57, 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*

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*

RECORD OF PROCEEDINGS

Messrs. Farris, Farris, Stultz & Bull,
Solicitors for Plaintiff (Appellant).

J. W. deB. Farris, Esq., K.C.,
Counsel.

Messrs. MacNeill & Pratt,
Solicitors for Defendants (Respondents).

A. H. MacNeill, Esq., K.C.,
Counsel.

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57, 1934

In the Supreme Court of British Columbia

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,

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.

No. 1

ENDORSEMENT ON WRIT

Writ dated August 5th, 1931.

The Plaintiff's claim is for the recovery from the Defendants of one-half the amount paid by the Plaintiff for Judgment and costs in an action in the Supreme Court of British Columbia between

WILLIAM F. HARRIS,

Plaintiff,

AND:

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased, Laura McEwan representing for the purpose of this action the Estate of James Proudfoot, deceased, Laura McEwan Administratrix of the Estate of Hiram Stevenson, deceased, and Daniel Lindeborg,

Defendants.

AND for the payment out of Court to the Plaintiff, to be applied in connection with the said claim, of the sum of money now in Court to the credit of the Defendants in the said action.

In the Supreme Court of British Columbia

No. 2
Statement of Claim, 17th August, 1931.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

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.

No. 2

STATEMENT OF CLAIM

Writ issued August 5th, 1931.

1. The Plaintiff is a married woman and is the Administratrix of the Estate of Hiram Stevenson, deceased, and is suing as such, and also on behalf of all others the heirs of James Proudfoot, deceased.

2. The Defendants are the Executors of the Estate of Daniel Lindeborg, deceased, and Administrators of the Estate of Andrew Lindeborg, deceased.

3. An action was brought in the Supreme Court of British Columbia by one William F. Harris against Daniel Lindeborg as administrator of the Estate of Andrew Lindeborg deceased, Laura McEwan administratrix of the Estate of Hiram Stevenson deceased Daniel Lindeborg and Duncan C. Barbrick as administrator of the Estate of James Proudfoot deceased. During the course of the said action the said Duncan C. Barbrick died and the said Laura McEwan was appointed by the Court to represent the Estate of the said James Proudfoot, deceased, for the purposes of the said action. Daniel Lindeborg was the Executor and sole beneficiary of the Estate of Andrew Lindeborg.

4. The action was brought by the said Harris upon an alleged

verbal agreement which the said Harris alleged was made by him in 1908 with the said James Proudfoot and the said Hiram Stevenson concerning certain mineral claims which the said Harris claimed to own and which he called the "Jumbo" Group. James Proudfoot died in 1910 and Hiram Stevenson in 1917.

5. The said Harris in his pleadings set up that the said Proudfoot and Stevenson agreed in 1908 to return to Portland Canal and do all necessary assessment work on the "Jumbo" Group; to manage, group and look after the said claims, and the handling, selling, optioning and Crown Granting thereof; and that they were to have two-thirds of the net proceeds as their reward, and the said Harris was to receive one-third.

6. It appears that the said Stevenson and Proudfoot did go back to Portland Canal but that they did not do any assessment work on the "Jumbo" and that more than a year afterwards it lapsed and the ground was then taken up jointly by the said Stevenson and the said Daniel Lindeborg, who also had other claims in the neighborhood. The new location was called the "Big Missouri."

7. Shortly after the location of the "Big Missouri" the said Proudfoot, Stevenson, Daniel Lindeborg and Andrew Lindeborg joined all their contiguous claims, ten in number, in an option to one Edgcomb for $95,000.00 and received $1,000.00 as a first payment thereon. The arrangement between the vendors being that the proceeds from the group were to be divided equally between them, viz., one-fourth part to each. Subsequent thereto the said Edgcomb option was abandoned and other efforts were made by the parties to dispose of the group of claims and other options were given, the parties at all times proceeding on the basis that all moneys disbursed and all moneys received would be borne or shared equally between them.

8. The group of claims was finally bonded to the Standard Mines Company for $250,000.00, which option went through and the final payment of $100,000.00 was paid to the Canadian Bank of Commerce for the defendants, whereupon the said action was started by the said Harris on the 18th of July, 1928, and the said $100,000.00 was garnisheed in the hands of the bank as being one-third of the total moneys received out of the property by the Defendants and their predecessors.

9. The said action was tried before the Honourable Chief Justice Morrison, who found the Plaintiff entitled to one-third of all moneys which were received from the whole group, including the claims owned by Proudfoot and Stevenson and the two Linde-

borgs and accordingly gave Judgment for the said Harris for $100,000.00.

10. The Court of Appeal found that there was an agreement but that the Lindeborgs were not parties to it and their interest was not affected by it, and that the proper proportion payable to the said Harris was the sum of approximately $15,000.00.

11. The Supreme Court of Canada dismissed the action as against the two Lindeborgs, or their estates, and gave Judgment against the plaintiff in this action as administratrix of the estate of Hiram Stevenson and as representing the estate of James Proudfoot, for the sum of $50,000.00 and costs.

12. Of the said sum of $100,000.00 paid into Court, the sum of $50,000.00 has been paid to the said Harris on account of his said Judgment and of the remainder the sum of $28,000.00 has been paid out to the Defendants in the present action, but without prejudice to the rights of the plaintiff in the present action. The balance of the said $100,000.00 with interest thereon, is still in Court.

13. At the time of the Edgcomb option referred to in paragraph 7 herein it was agreed between the said Stevenson, Proudfoot and the said Lindeborgs that the said Lindeborgs would pay to the said Stevenson and Proudfoot one-half of any money that the said Stevenson and Proudfoot should pay to the said Harris in connection with the said claims. The said Lindeborg was, or regarded himself, as a partner with his said associates.

14. When the said action was brought by the said Harris, the said Daniel Lindeborg consulted his solicitor, Mr. R. M. Macdonald, and as a result the defence of the said action was undertaken by the said R. M. Macdonald on behalf of all the defendants. The said R. M. Macdonald appeared on behalf of all the said defendants and subsequently entered a Statement of Defence on their behalf. Two Statements of Defence were delivered, one on behalf of the Proudfoot and Stevenson Estates, and the other on behalf of Daniel Lindeborg acting on behalf of himself and as administrator of the estate of Andrew Lindeborg. The Lindeborg defence raised the same defences that the other defendants raised, but added the further defence that if the plaintiff had any agreement with the late James Proudfoot and Hiram Stevenson the Lindeborgs were not parties to the same and were not bound thereby.

15. On the occasion of the said Macdonald receiving the Statement of Claim in the action and receiving instructions for the defence it was explained to the said Daniel Lindeborg by the

said Macdonald that the Lindeborgs had a separate and inconsistent defence to that of the Defendants Laura McEwan, administratrix of the Estate of Hiram Stevenson deceased and Duncan C. Barbrick, Administrator of the Estate of James Proudfoot deceased, and the said Macdonald found it necessary as the solicitor for all parties to consider if he was free to continue to act as solicitor for all the defendants, or whether he should advise Mrs. McEwan and Duncan C. Barbrick to engage a separate solicitor because of the separate and independent defence available to the Lindeborgs. This position was explained to the said Daniel Lindeborg by the said Macdonald and the said Lindeborg represented and agreed with the said Macdonald as solicitor for all the parties that he, on behalf of himself and his brother, would share equally with the said Laura McEwan and Duncan C. Barbrick, as to principal and costs in any judgment which might be given against them jointly, or against Mrs. McEwan and Duncan C. Barbrick separately. On this distinct understanding the said Macdonald agreed to act for all the parties and that Mrs. McEwan and Proudfoot interests could be represented by him, and continued to do so throughout the trial, and the appeals until after final judgment as aforesaid in the Supreme Court of Canada.

16. In addition to the representations and agreement with the said Macdonald the said Daniel Lindeborg also, on the occasion of the said suit being brought against them, agreed with the said Laura McEwan and Duncan C. Barbrick personally that they would fight the action together and that he, on behalf of himself and the estate of Andrew Lindeborg, would share equally with her as to principal and interest in any judgment which might be given against them, and the said action was continued and fought by the parties in consideration of an on such understanding and the Plaintiff herein at all times has relied on the said agreement.

17. The plaintiff says that the said sum of $100,000.00 paid into Court as aforesaid was partnership money and asks for a declaration that the said money was liable for the payment of the Harris Judgment and that the plaintiff as representative of the Stevenson and Proudfoot estates is entitled to one-half of the surplus of the said $100,000.00 after the payment of the said Harris Judgment.

18. The plaintiff further says that she succeeded in settling the Harris Judgment for the sum of $50,000.00 without costs on her undertaking to pay to the said Harris one-half of the amount paid by the said Harris to the Lindeborgs for their costs of the aforesaid action in excess of $1,000,00; that the said sum payable by the plaintiff amounts to $608.10. This sum is less than the costs for which the plaintiff was liable to the said Harris in the aforesaid action.

WHEREFORE the plaintiff claims against the defendants:

(a) The sum of $27,724.52, such sum being made up as follows:

"25,000.00 principal on the Judgment
2,116.42 interest on the said sum
608.10 one-half the costs as aforesaid.

$27,724.52"

Place of Trial, Vancouver, B. C.

DATED at Vancouver, B. C., the 17th day of August, 1931.

To the Defendants;

And to their Solicitors,

MacNeill, Pratt, MacDougall & Morrison.

FILED AND DELIVERED by Farris, Farris, Stultz & Sloan, Solicitors for the Plaintiff, whose place of business and address for service is Suite 1508 Standard Bank Building, 510 Hastings Street West, Vancouver, B. C.

No. 1216/1931

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

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.

No. 3

STATEMENT OF DEFENCE

1. The defendants admit the allegations of fact contained in paragraph 1 of the Statement of Claim herein save and except that the plaintiff is suing on behalf of all others, the heirs of James Proudfoot, deceased.

2. The defendants admit the allegations of fact contained in paragraph 2 of the Statement of Claim herein.

3. The defendants admit the allegations of fact contained in paragraph 3 of the Statement of Claim herein.

4. The defendants admit the allegations of fact contained in paragraph 4 of the Statement of Claim herein.

5. The defendants admit the allegations of fact contained in paragraph 5 of the Statement of Claim herein.

6. The defendants deny the allegations of fact contained in paragraph 6 of the Statement of Claim herein.

7. The defendants deny the allegations of fact contained in paragraph 7 of the Statement of Claim herein.

8. The defendants admit the allegations of fact contained in paragraph 8 of the Statement of Claim herein.

In the Supreme Court of British Columbia

No. 3
Statement of Defence, 17th August, 1932.
—*Continued.*

9. The defendants admit the allegations of fact contained in paragraph 9 of the Statement of Claim herein.

10. The defendants admit the allegations of fact contained in paragraph 10 of the Statement of Claim herein.

11. The defendants admit the allegations of fact contained in paragraph 11 of the Statement of Claim herein.

12. The defendants admit the allegations of fact contained in paragraph 12 of the Statement of Claim herein.

13. The defendants deny the alegations of fact contained in paragraph 13 of the Statement of Claim herein.

14. The defendants deny the allegations of fact contained in paragraph 14 of the Statement of Claim herein.

15. The defendants deny the allegations of fact contained in paragraph 15 of the Statement of Claim herein.

16. The defendants deny the allegations of fact contained in paragraph 16 of the Statement of Claim herein.

17. The defendants deny the allegations of fact contained in paragraph 17 of the Statement of Claim herein.

18. The defendants deny the allegations of fact contained in paragraph 18 of the Statement of Claim herein.

19. In further answer to paragraph 7 of the Statement of Claim herein the defendants say that of Daniel Lindeborg and Andrew Lindeborg joined their mineral claims with those of the said Proudfoot and Stevenson in option to one Edgcomb as therein alleged, which the Defendants do not admit but deny, then the same was done for the purpose of selling the said mineral claims only.

20. In further answer to paragraph 8 of the Statement of Claim herein the defendants say that the group of mineral claims therein referred to were not the same group of claims referred to in paragraph 7 of the Statement of Claim.

21. In answer to the whole Statement of Claim herein the defendants deny that there was any agreement or undertaking between the said Daniel Lindeborg, Andrew Lindeborg and the said Hiram Stevenson and James Proudfoot referred to in the Statement of Claim herein whereby the said Lindeborg should

share or contribute in or to any expenses or costs incurred by the said Stevenson and Proudfoot, and the defendants specifically deny that the said Daniel Lindeborg and Andrew Lindeborg or either of them agreed at any time to pay one-half of any money that the said Stevenson and Proudfoot should pay to William F. Harris or any person in connection with the mineral claims referred to in the Statement of Claim herein or in any connection.

22. The defendants say that the only agreement between the said Lindeborg and the said Stevenson and Proudfoot was that their respective mineral claims were to be grouped together for the purpose of sale only and that each should receive his share of the proceeds of such sale and for that purpose arrangements were made with the Canadian Bank of Commerce at Vancouver, B.C., whereby the purchase price as set forth in paragraph 8 of the Statement of Claim herein was paid into the said bank and to be disbursed one-quarter each to the said Stevenson, Proudfoot, Daniel Lindeborg and Andrew Lindeborg.

23. In further answer to paragraph 18 of the Statement of Clain herein the defendants say that if a settlement was made as therein alleged, then such settlement was made without the knowledge or consent of the defendants and the defendants were not parties thereto.

24. The defendants deny that there was at any time a partnership between Daniel Lindeborg, Andrew Lindeborg, or either of them and Hiram Stevenson and James Proudfoot or either of them.

25. The defendants will on the trial of this action rely on Section 19 of the "Mineral Act" being Chapter 167 of the Revised Statutes of British Columbia, 1924.

26. The defendants further say that there is no memorandum in writing of the alleged agreement more particularly referred to in the Statement of Claim herein to satisfy the Statute of Frauds being Chapter 95 of Revised Statutes of British Columbia, 1924.

27. The defendants further say that the Statement of Claim herein discloses no cause of action herein. Wherefore the defendants ask that this action be dismissed with costs.

28. That there was no consideration for the representation and agreement that the parties would share equally with the said Laura McEwan referred to in paragraph 15 of the Statement of Claim and to the agreement referred to in paragraph 16 of the Statement of Claim.

In the Supreme Court of British Columbia

No. 3
Statement of Defence, 17th August, 1932.
—*Continued.*

DATED at Vancouver, B. C., this 17th day of August A.D. 1932.

"F. D. PRATT,"
Solicitor for the Defendants

FILED AND DELIVERED by F. D. Pratt, Esq., of the firm of MacNeill, Pratt, MacDougall & Morrison, Solicitor for the Defendants, whose place of business and address for service is at Room 313 Bank of Nova Scotia Building, 602 Hastings Street West, Vancouver, B. C.

To the Plaintiff, 10

And to Messrs. Farris, Farris, Stultz & Sloan,

Her Solicitor.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

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.

No. 5

DEMAND FOR FURTHER AND BETTER PARTICULARS OF THE STATEMENT OF CLAIM

The defendants hereby require the plaintiff to furnish them with further and better particulars in writing of the Statement of Claim as follows:—

1. Particulars of paragraph 13 of the Statement of Claim setting forth fully the agreement between the said Stevenson, Proudfoot and Lindeborgs therein referred to and stating whether the said agreement was in writing or verbal and also the date upon which the said agreement was made and when and who was present at the making thereof.

2. Also further and better particulars of the last sentence in the said paragraph 13 of the Statement of Claim reading as follows: "The said Lindeborg was or regarded himself as a partner with the said associates," and setting forth what the partnership was, between whom and the full terms of the same and if in writing a copy thereof, and the names of the associates therein referred to and also the date when the Lindeborgs agreed to pay to Stevenson and Proudfoot any money as therein stated.

In the Supreme Court of British Columbia

No. 5
Demand for Particulars of Statement of Claim, 12th September, 1932.
—*Continued.*

3. And also further and better particulars of paragraph 13 of the Statement of Claim showing how, when and where the said Daniel Lindeborg regarded himself to be a partner with his associates, and who the said associates are referred to in the said sentence and where and when the said Daniel Lindeborg expressed the same.

4. And also further and better particulars of paragraph 15 of the Statement of Claim showing how the said Lindeborg represented and agreed with the said Macdonald, and if any representation or agreement or either of them are in writing a copy of the same and the names and addresses of any persons present when the representation was made by the said Lindeborg and the agreement therein referred to.

5. And also further and better particulars in writing of paragraph 16 of the Statement of Claim setting forth the agreement made by the said Daniel Lindeborg with the plaintiff and when and where the said agreement was entered into and if in writing a copy thereof.

6. And also further and better particulars of paragraph 17 of the Statement of Claim, setting forth the partnership therein referred to, the names, addresses and occupations of all the partners, the date of the same and where entered into, and if in writing a copy thereof.

DATED at Vancouver, B. C., this 12th day of September, A.D. 1932.

MacNeill, Pratt, MacDougall & Morrison
Per A. H. MacNEILL,
Solicitors for Defendants.

DELIVERED by MacNeill, Pratt, MacDougall & Morrison, Solicitors for the Defendants, whose place of business and address for service is Room 313 Bank of Nova Scotia Building, 602 Hastings Street West, Vancouver, B.C.

To the Plaintiff,

And to her Solicitors,

Messrs. Farris, Farris, Stultz & Sloan.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

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.

No. 6

ANSWER TO DEMAND FOR PARTICULARS

1. In answer to paragraph 1 of the Demand for Particulars herein, the plaintiff says that the "Big Missouri" was located in or about the year 1909 as set out in paragraphs 5, 6 and 7 of the Statement of Claim herein. Shortly thereafter, that is within a few weeks (the exact period the plaintiff cannot state) an option was given to Edgcomb as set out in paragraph 7 of the Statement of Claim. The agreement referred to in paragraph 13 was at the time of the Edgcomb option. The said agreement was verbal and was made by and in the presence of the parties mentioned in the said paragraph.

2. In answer to paragraph 2 of the Demand for Particulars herein, the plaintiff says that the said partnership arrangement was verbal. The parties thereto were Proudfoot, Stevenson and the two Lindeborgs. The terms of the said partnership were as set out in paragraphs 6, 7 and 13 of the Statement of Claim.

3. In answer to paragraph 3 of the Demand for Particulars herein, the plaintiff abandons the words "or regarded himself"

In the Supreme Court of British Columbia

No. 6
Answer to Demand for Particulars, 14th September, 1932.
—*Continued.*

as alleged in the said paragraph and says that the associates referred to in the said paragraph were the aforesaid Proudfoot, Stevenson and the other of the said Lindeborgs.

4. In answer to paragraph 4 of the Demand for Particulars herein, the plaintiff says that the said Lindeborg represented and agreed with the said Macdonald by verbally stating to him that he, Lindeborg, would, on behalf of himself and his brother, share equally with the said Laura McEwan as to principal and costs in any judgment which might be given against them jointly, or against Mrs. McEwan separately. There were no other persons present at the said interview.

5. In answer to paragraph 5 of the Demand for Particulars herein, the Plaintiff says that the said Daniel Lindeborg, at the time that the Harris action was commenced, agreed verbally with the said Laura McEwan by stating to her words to the effect that they would fight the action together and that he, on behalf of himself and the estate of Andrew Lindeborg, would share equally with her as to principal and costs in any judgment which might be given against them. The said agreement was entered into at the home of the said Mrs. McEwan.

6. In answer to paragraph 6 of the Demand for Particulars herein, the plaintiff says that the partnership referred to in parapraph 17 is the partnership heretofore referred to in paragraph 13 of the Statement of Claim herein.

Dated at Vancouver, B. C., this 14th day of September A.D. 1932.

FARRIS, FARRIS, STULTZ & SLOAN
Solicitors for Plaintiff.

To the Defendants,

And to their Solicitors,

Messrs. MacNeill, Pratt, McDougall & Morrison.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

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.

No. 4

REPLY TO PARAGRAPH 28 OF THE STATEMENT OF DEFENCE AS AMENDED

The plaintiff repeats paragraph 15 of the Statement of Claim and says that the plaintiff and the said Barbrick through their said solicitor R. M. Macdonald in consideration of the said promise of the said Lindeborg abandoned any question of obtaining independent advice or of taking any position in opposition to that taken by the said Lindeborg that he was not a party to or bound by the alleged Harris agreement.

DATED at Vancouver, B. C., the 22nd day of November A.D. 1932.

To the Defendants;
And to their Solicitors,
MacNeill, Pratt, MacDougall & Morrison.

FILED AND DELIVERED by Farris, Farris, Stultz & Sloan, Solicitors for the Plaintiff, whose place of business and address for service is Suite 1508 Standard Bank Building, 510 Hastings Street West, Vancouver, B.C.

In the Supreme Court of British Columbia

Proceedings at Trial.
22nd November, 1932.

IN THE SUPREME COURT OF BRITISH COLUMBIA

(Before the Honourable Mr. Justice Fisher)

1216/31 Vancouver, B. C., November 22, 1932

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,

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.

PROCEEDINGS AT TRIAL

J. W. deB. FARRIS, ESQ., K.C.,
appearing for the Plaintiff.

A. H. MacNEILL, ESQ., K.C., and 20
F. D. PRATT, ESQ.,
appearing for the Defendants.

Mr. Farris: I am appearing for the Plaintiff.

Mr. MacNeill: I am appearing for the defendant, my lord, with Mr. Pratt.

Mr. Farris: There are some amendments; both myself and my learned friend have reciprocal notice. I presume there is no objection?

Mr. MacNeill: No.

Mr. Farris: But in reply to his amendment I wish to file the 30 following—

The Court: The plaintiff is applying for an amendment to which there is no objection.

Mr. MacNeill: Not to the amendment itself of which I have had notice.

Mr. Farris: My friend is asking to amend his defence.

The Court: Dealing with the Statement of Claim?

Mr. Farris: My amendment is allowed, my lord.

The Court: Yes. That will be part of the record.

Mr. Farris: My friend is asking to amend his defence. I have no objection except to reply, which I wish to file today. I will read it now.

"The plaintiff repeats paragraph 15 of the statement of "claim and says that the plaintiff and the said Barbrick "through their said solicitor R. M. Macdonald, in considera- "tion of the said promise of the said Lindeborg abandoned "any question of obtaining independent advice or of taking "any position in opposition to that taken by the said Linde- "borg, that he was not a party to or bound by the alleged "Harris agreement."

The Court: Amended defence and amended reply is part of the record.

Mr. MacNeill: I would like to get a copy of what my learned friend read.

Mr. Farris: That is not an amendment, my lord, it is a reply to his amendment. I will have a copy made.

The Court: The reply as it stood was left a joinder of issue, was it?

Mr. Farris: I do not think there was one. I think it was just an automatic joinder of issue.

The Court: There is a joinder of issue in the record apparently. The reply now is part of the record.

Mr. Farris: Could I assist your lordship if I stated briefly the subject matter?

The Court: Yes, I have read the pleadings.

Mr. Farris: It is a little complicated. Perhaps I could be of assistance in setting out further. There were four miners or prospectors in the beginning of this narrative, all of whom are now dead. Proudfoot and Stevenson are the two who Mrs. McEwan represents in this action. Stevenson was her brother.

The Court: She is not suing on behalf of herself at all. The words in the statement of claim—it says the plaintiff is a married woman and is administratrix and is suing as such and also on behalf of all others. Now, is she suing on behalf of herself personally?

Mr. Farris: Only in this sense that she is heir of her brother, but as far as her status in this action is concerned, it must be in her representative capacity, because the issue arose out of the estate of her brother Stevenson and also of his associate Proudfoot. Now, with that preliminary explanation—this lawsuit is an aftermath of another lawsuit. The original lawsuit was brought by one Harris against four men; the two that Mrs. McEwan represents and the two that my friends represent; the two I represent being Stevenson and Proudfoot and the two that my friends represent are the two Lindeborgs, Daniel and Andrew. Harris

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was also a miner. These four men were miners. Harris had a claim up north called the Premier Gold Mine.

The Court: As I remember in the original action, it was finally held that the Lindeborgs were not liable to Harris.

Mr. Farris: Yes, my lord. That is one of the things that makes this present suit. Here is briefly what happened, as the narrative goes, and it is more for the purpose of outlining what happened. It appears that Harris claimed that he had the Jumbo mine, that Stevenson and Proudfoot came and he turned it over to them on some quite verbal arrangement that they were to carry on and if they sold it, that from the group of which this was to be the nucleus, that he would get one-third of what they sold it for. Now, that agreement verbal away back in 1899 was only with Proudfoot and Stevenson. It seems that Proudfoot and Stevenson instead of carrying on under the name of Jumbo allowed it to lapse and restaked and the reclamation took place in collaboration with the two Lindeborgs. The four of them, they converted it into what they call the Big Missouri, and those four men had each a quarter interest in the Big Missouri group; the two Lindeborgs, Stevenson and Proudfoot. The gave options from time to time and finally they got about $25,000, I think, out of the option.

The Court: Well, Mr. Farris, I might anticipate a situation where there would be evidence led before me on an issue that was dealt with in the other action. What would you say; that I would be bound by the findings.

Mr. Farris: Quite. This is merely the narrative. There is no controversy on what I am telling your lordship now. Finally this group of four sold the Big Missouri for $300,000. Then Harris sued the four of them, and his position—he recited this contract verbally as to Proudfoot and Stevenson, and then he said that the Lindeborgs went in and they adopted that. So he says the four of them owned a one-third interest in the $300,000.

The Court: I don't just follow the $250,000.

Mr. Farris: The reason for that is they got some moneys out of their options, so that the total which they got was $300,000, and then Harris sued for one-third of that and before the Chief Justice he got judgment for that. That was appealed. In the Court of Appeal the Lindeborgs were allowed to go free on the ground that they were not parties to this agreement and the other judgment was reduced $15,000 on the theory that there had been an adjustment afterward. Then it was taken to the Supreme Court of Canada and the Supreme Court of Canada took this position. They agreed with the Court of Appeal. First, they agreed with the Chief Justice that a contract had been made. Secondly, they agreed with the Court of Appeal that the Lindeborgs were not liable, but they said Proudfoot and Stevenson are liable on the basis of their original contract for one-third of what they got.

The Court: For one-third of what Proudfoot and Stevenson got.

Mr. Farris: Proudfoot and Stevenson got originally $150,000, so they got one-third of that: $50,000, and judgment was given for that amount against Mrs. McEwan who at that time—in the meantime Stevenson, her brother, had died and she is in the action as administratrix of her brother's estate. And then later, or some time in the history of the transaction, Proudfoot died and Barbrick was his administrator or executor; and then by an order, I take it under order 16, rule 9, Mrs. McEwan by order of the court was made the representative of the Proudfoot estate as well. So in the end a judgment goes against her in her representative capacities for $50,000 and costs, which money is paid out of the—

The Court: Representing both Proudfoot and Stevenson?

Mr. Farris: Yes. Then that money is paid on the judgment by Mrs. McEwan out of her share of this $150,000. She pays the $50,000 and costs.

The Court: The judgment was paid?

Mr. Farris: By these two estates through Mrs. McEwan.

The Court: In one-third of what Proudfoot and Stevenson apparently got.

Mr. Farris: Yes, my lord. Now, that completes the narrative about which I take it there is no dispute. I have made it sketchy—

Mr. MacNeill: My friend says there is no dispute. The only dispute I say is this: That Mrs. McEwan the plaintiff—that there is no one here representing the Proudfoot estate. It is not before your lordship.

Mr. Farris: That my lord, is another matter that I will ask leave at the end to argue.

Mr. MacNeill: I do not want to let it go by.

Mr. Farris: I was not trying to slip that over.

Mr. MacNeill: Well, I wanted to get that on the record.

The Court: You had better give me time to get it. That is not admitted.

Mr. MacNeill: No, we do not admit — of course, I do not make any admissions as to the matter. But as to Proudfoot it is my duty now to point out clearly that Proudfoot, the plaintiff in her capacity of representative, if she is at all, which is denied, is not before your lordship here in this action.

Mr. Farris: Well, I think you had better leave that to the argument.

Mr. MacNeill: Well, I am merely stating—

The Court: As far as representing Proudfoot?

Mr. MacNeill: Proudfoot.

Mr. Farris: Now, I suggest until argument at the end, that having recorded Mr. MacNeill's objection, that we eliminate that, because it is simpler. All that could happen if my friend is

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right, as he may be—it is a close question—if he is right it means that we only get judgment for Mrs. McEwan's part of it; that is the Stevenson part. Subject to that, I prefer to discuss it as if she is properly before the court, because it only means cutting it in half in the end if she is not.

Now, the controversy is this:—There is one further preliminary I should state. In the series of eventualities in this case, Andrew Lindeborg died and in the litigation Daniel Lindeborg appeared, half of it for himself and half for the representative of his brother, so that it is all Daniel Lindeborg. The two Lindeborgs were entitled to half of this $300,000; $150,000 between them. But there was only one Lindeborg alive and he appeared in his representative capacity and also in his personal capacity. He is now dead as well. So that my friend is representing the heirs of the Lindeborgs. Now, the claim that we set up in this action is this: We say at the inception—

The Court: The time the action was begun?

Mr. Farris: Yes. At that time Mrs. McEwan represented her brother and Barbrick represented Proudfoot. We say at that time all parties, all four defendants, placed the defence of this action in the hands of one solicitor, Mr. R. M. Macdonald. That Mr. Macdonald had to consider his position as solicitor and the position of his clients in this way. He was not able to say exactly how this suit was going to eventuate, assuming that they were liable at all. There was one possibility, as found by the Chief Justice that everybody was liable. There was another possibility as found by the Court of Appeal, and there was a possibility as finally fixed by the Supreme Court of Canada. There was still another serious possibility that did not eventuate at all, but it had to be faced, and it was this: In the statement of claim filed by Harris, he sets up these allegations. I am going to ask my friend to let me put these in from the appeal book; not to prove the facts, but prove that they were allegations made. In paragraph 4:

> "In, of or about the month of June, 1909, the plaintiff "at Queen Charlotte Islands in the Province of British Col- "umbia, being then the owner of said mining claims, entered "into an oral agreement with one James Proudfoot and one "Hiram Stevenson, whereby the said James Proudfoot and "Hiram Stevenson were to do whatever work was necessary "to and keep up all assessments and record the same on all "the ground within the boundary of said group, manage, "group and look after said claims, and the handling, selling, "optioning and Crown granting of said claims, for which the "said James Proudfoot and Hiram Stevenson and their "associates were to receive two-thirds of all the money and "profits derived therefrom, and the plaintiff was to receive a "one-third share of all moneys received in respect to the said

"claims and all other claims grouped therewith by selling or "otherwise, after deducting all amounts expended in keeping "up the assessments, grouping, optioning and selling the same "as aforesaid."

And then paragraph 5:

"Pursuant to and under said agreement, the said James "Proudfoot, Hiram Stevenson, Andrew Lindeborg and Dan. "Lindeborg entered into the possession of the said group of "Jumbo mineral claims and thereafter allowed the same to "lapse at midnight on the 8th day of August, 1909, and on "the 9th day of August, 1909, had the said Hiram Stevenson "and the said Daniel Lindeborg relocate the said Jumbo "group of mining ground and claims as the Big Missouri and "recorded said claims and mining ground on the 10th day of "August, 1909, in the Mining Recorder's Office at Stewart, "B.C., in the names of said Hiram Stevenson and Daniel "Lindeborg, the above-named defendants, which said group "of mining claims were thereafter known under the name "of the Big Missouri group."

Now, here was the fourth possibility that was concerning Mr. Macdonald as solicitor. The Lindeborgs to him were taking the position "we know nothing about this." And there was the possibility of Harris succeeding on this claim. "You, Proudfoot, and Stevenson, had no right to bring any others in as part owners of this group except subject to the agreement with me. Now, if you have done that and you have brought them in and they are innocent parties, we cannot collect from them, but we can collect from you as if you had done your duty to us." There was always that danger in the case. Now, see what that would have led to. It would have led to Harris getting the whole $300,000. There was always that possibility in the suit. In other words, if Proudfoot and Stevenson brought the two Lindeborgs in and advised them of the situation, then Harris could have collected a third of the $300,000. There was the danger of it being said—

The Court: In accordance with the judgment of the Chief Justice, Harris would get one-third of the $300,000.

Mr. Farris: They did get one-third. There was always the danger that the amount might have to be reduced. There was always this possible danger in this suit. It did not happen. The final court might have said Harris is entitled to this third because this is the group he was to get the one-third out of. If you fail to notify them and allow them to escape, I still am entitled to my third. And if that had happened, Proudfoot and Stevenson would have had to pay out of the $300,000 the whole $100,000. Now, Mr. Macdonald was confronted with that problem.

The Court: One might say there were three different judgments, but that judgment never happened.

Mr. Farris: That one never happened. That never did

happen but it was one of the potentialities of the case. Now, Mr. Rex Macdonald was receiving instructions from Mr. Lindeborg and I think possibly Mr. Barbrick; but anyway Lindeborg. He called Lindeborg in and pointed this out to him; he pointed out the situation and suggested that inasmuch as he had a separate defence—now, his separate defence in his defence was the same as—

The Court: Well, the record in the Harris case will be put in, I suppose?

Mr. Farris: Yes. I do not think my friend will object to that. This is his last paragraph of the defence and it was not open to Stevenson and Proudfoot.

"This defendant says that if the late James Proudfoot "and the late Hiram Stevenson, or either of them, ever "assumed to make any agreement whatsoever with the plain- "tiff, this defendant was never informed of the fact and "neither James Proudfoot nor Hiram Stevenson ever had "any authority to enter into any contract on behalf of this "defendant, nor had either of them any authority at any time "to enter into any contract on behalf of the late Andrew "Lindeborg, deceased."

Mr. Macdonald, as the joint solicitor for all, in accordance with his obvious duties as a solicitor, had to consider whether he would conduct this case as a joint defence acting as solicitor for them all, or whether his clients Proudfoot and Stevenson should not entirely diassociate themselves from that defence and if necessary challenge it. Because it might result in the eventuality which I have pointed out—it might result by allowing the Lindeborgs to get clear and that an extra burden would be put on them. He called in Mr. Daniel Lindeborg and pointed the situation out to him and the allegation that we are making in the pleadings and on which we are substantially basing this claim is that Lindeborg said to him, 'that does not make any difference because I am going to take care of the situation, so that we are all in this fifty-fifty whatever happens."

Mr. MacNeill: I think my learned friend should not trespass putting in to your lordship statements that are—

The Court: That is a matter of evidence.

Mr. MacNeill: It is a matter of evidence, and it is this, that that was a privileged communication and my friend should not do that.

Mr. Farris: Of course, if there was a jury, that might be objectionable, my lord.

The Court: It is wise for Mr. MacNeill to point that out. I was assuming for a moment that it would be admissable evidence.

Mr. Farris: If that is a privileged communication, then, of course—but that is the basis of our action. I am going to call

further evidence to support that by corroborative evidence; not in detail, but in a general way to corroborate it. And also there is a suggestion in the case that these people were partners. This evidence is allowed to go in that probably won't have to be gone into if I can establish my case on the other. The other is simpler, but, however, there are the two factors.

My lord, if my friend will be good enough to allow it—I assume that he would not raise any technical objection; he never does—I would like to put in the pleadings and file the appeal book for that purpose.

Mr. MacNeill: Well, can you take out the pleadings from the book? It is only the pleadings? Give the page numbers.

Mr. Farris: The pages are from page 1 to page 18 inclusive. Then I am going to submit that I am entitled to put in Lindeborg's discovery as admissions made by him. If my friend objects to the admissability of that—

Mr. MacNeill: I do.

Mr. Farris: As to the proof of it. I take it you do not object if they are admissable.

Mr. MacNeill: Well, it is an examination for discovery. There were some questions picked out here and there in the other action.

The Court: That is by Harris?

Mr. MacNeill: By Harris, yes. Now, what there is in addition to that, I have never seen it.

Mr. Farris: I am willing to put in the entire examination.

Mr. MacNeill: Well, I would like to see it before it goes in.

The Court: Well, that had better stand.

Mr. Farris: I will call Mr. Macdonald.

REGINALD MURRAY MACDONALD, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

Q. Mr. Macdonald, you are a barrister and solicitor residing and practising in this city? A. Yes.

Q. And have been for a great many years? A. Yes.

Q. You are familiar with this case that I have just mentioned, of Harris vs. Daniel Lindeborg, et al? A. Yes.

Q. And you were throughout this case the solicitor on the record for the defendants? A. Yes.

Q. For all the defendants? A. Yes.

Q. You had instructions to put in a defence for those defendants? A. Yes.

Q. And before doing so—

Mr. MacNeill: Q. Well, have you the consent of the executors named as defendants; that is, Arthur Cosens, Verena Cosens and Hemsworth; have you their consent to your giving evidence

as to your conversations and dealings with the Lindeborgs? A. No.

Mr. MacNeil: I object then to Mr. Macdonald giving any evidence of that, as they are privileged communications. He was their solicitor and has admitted now he is without the consent of the executors of the Lindeborgs, for whom Mr. Macdonald was solicitor. My submission is that they are privileged and cannot be put in evidence by Mr. Macdonald. If your lordship wishes the authorities on the subject, I can—

The Court: Well, Mr. MacNeill, just there, to start with, what may bother me—assuming for a moment that Mr. Macdonald's future conduct is going to be based or guided by what was said there and then to him, do you submit—

Mr. MacNeill: I object to that, yes. Any communication from his client is a privileged communication.

The Court: Would there by any principle of estoppel there that might estop the Lindeborgs or anyone representing them from raising the point of privilege? I was just thinking that from that moment all Mr. Macdonald's conduct might be guided or based upon what had been said and in that way the interests of other people might be affected by what was said. Would it then lie in the mouths of the Lindeborgs or anyone representing them later to say that the conversation could not be put in?

Mr. MacNeill: Could not be put in as evidence without their consent and they refuse consent.

The Court: Well, will you give me the authorities?

Mr. MacNeill: I am citing from McRae on Evidence, page 659.

(Reading).

The Court: Would that be limited to conversation as to what the facts of the case were? But if while they were discussing the facts of a case anything there and then said I can follow might be privileged. But supposing in the discussion of the case they make a bargain between themselves in the presence of another person, do you still submit that that is privileged?

Mr. MacNeill: The bargain will have to be proved in some other manner. They can prove any contract they want to by any other witness with the exception of Mr. Macdonald who was the solicitor. That is the position.

The Court: As the solicitor, he being then solicitor for them all. And he may be sitting there and his talk may be guided by what they say to each other, but that he cannot be heard afterwards to give evidence—

Mr. MacNeill: As against the Lindeborgs, that is, he is their solicitor and they are the ones—

The Court: And the fact that he is solicitor for them all does not affect it?

Mr. MacNeill: I don't see how it does.

The Court: Well, I do not know.

Mr. MacNeill: Well, I am taking that position, my lord, that if these present plaintiffs wish to set up such a matter out of Mr. Macdonald's conversation with a deceased client, they must prove it in some other way, but not by Mr. Macdonald.

The Court: You hardly go so far then as to say that the communication is privileged because evidence may be given, but not out of the mouth of this witness, his solicitor.

Mr. MacNeill: That is it. They can prove it in any other way. But Mr. Macdonald in his capacity as solicitor is not in a position to give this evidence. He has conversations with his client whom he was advising at the time. The communications, that is what I object to.

The Court: I might just look at the authorities for the moment.

Mr. MacNeill: There is a good deal more in this McRae on Evidence. (Reading).

The Court: That is what I was calling attention to; about the case; anything being said about the case. But if they, while they are talking about the case, make a bargain between themselves—well, of course, it would be as to the conduct of the case. However, is there any distinction there that might be drawn? If they were telling him the facts of the case, I could follow you more easily.

Mr. MacNeill: My friend's question was as to some interview which Mr. Lindeborg had with Mr. Macdonald and in his previous capacity. He pointed out certain things and my friend says that Mr. Lindeborg said certain things.

The Court: And the other people were there?

Mr. MacNeill:

The Court: Well, that is not before me yet. Really, who were there is not before me.

Mr. Farris: They were all there in the person of Mr. Macdonald.

The Court: Well, I think I will let the evidence proceed until we find out just who were there in person.

Mr. Farris: There is no doubt about that; there was no one there but Lindeborg.

Mr. MacNeill: So then the matter stands?

Mr. Farris: Your lordship has not heard my argument yet.

Mr. MacNeill: Now, there is a case in 6 Ontario Law Reports, page 495; that is in the Court of Appeal. I will read the head note, my lord. *Stewart* vs. *Walker.* (Reading). In *Bullivant* vs. *Attorney-General for Victoria,* 1901 Appeal Cases, 196, at page 191, the circumstances are set forth. (Reading). And at page 206 a judgment of the court says: "When the witnesses were called, they were asked . . . it remains."

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There is something else in Bray on Discovery, but the book is out of the library at the present moment. I can hand it to your lordship later on. Phipson on Evidence, I have got the 6th Edition here at page 204. (Reading). Now, those are the principles, my lord, on which I rely.

Mr. Farris: If it pleases your lordship, I do not challenge any of the principles which my learned friend has offered. I think your lordship has already put a finger exactly on the situation. You will notice that in the House of Lords case my friend cited, it refers to confidential communications. Confidential communications do not arise when a client is making a communication to his associates through the medium of their common solicitor.

The Court: The other parties are not there.

Mr. Farris: They are not there, but their solicitor is there.

The Court: Well, he is solicitor for them all?

Mr. MacNeill: Was he solicitor at that time?

Mr. Farris: Oh, yes.

The Court: That was what I understood.

Q. You were solicitor for them all? A. Oh, yes, my lord. I had entered an appearance for every person before the discussion that Mr. Farris is referring to.

Mr. Farris: The authorities are gathered together in 22 English and Empire Digest, beginning at page 417. The first case is not quite as directly in point as the others, but it involves a principle. Heading 8. When client not within protection of privilege. These are numbered. No. 4263 is the number of the paragraph. (Reading). Now, it is clear to me that the late Mr. Lindeborg did make a bargain, that if he were here himself he would have to tell us what that bargain was. If this is an actual contract entered into by these different associates through the medium of their solicitor, it is a contract, and Lindeborg would have to tell his part in the contract so that applying this case alone if I had no others I would be far enough advanced, because the rule is if the client is compellable to answer, of course, there is no privilege on the part of the solicitor. But we find the matter has gone much farther than that in paragraph 4266. (Reading). That is a case which I have not for the moment here. 1 M & R, 182 and '3, *Ball* vs. *Craddock,* 1 Moody & Robertson, 182 and '3, (Reading head note.)

The Court: The distinction is drawn. A case where if Mr. Macdonald had not been acting for the other defendants as well, your submission would not be so strong.

Mr. Farris: No, possibly not. It would be distinguishable, although there may be cases arise that—supposing I had been solicitor for Mrs. McEwan and Mr. Macdonald had been solicitor for Lindeborg and the same bargain had been made, but he had called his client in and got instructions and then he had come to

me and told me that there was a bargain made. He would have to disclose what his client told him.

The Court: What he told you may be admissable in evidence, and so far as he told you what the other party told him, that might be admissable. But for him to give evidence as to what was said might be a different matter.

Mr. Farris: The only distinction in the two cases is that he combines in himself a capacity of both solicitors. All these cases make it very clear. The next case is *Cleve* vs. *Orwell*, 1 M & R, 228. (Reading headnote).

Now, in this case, Mrs. McEwan, although she was not present in person, was present there in Mr. Macdonald who was her solicitor, and therefore she has a right to the disclosure of what Lindeborg said to Mr. Macdonald in their common capacity.

Now, the next case that I cite is *Perry* vs. *Smith*, 152 English Reports at page 288. The headnote there is this. (Reading headnote). Now, here is what Baron Parke says: "I have not the least doubt in this case . . . properly received."

And Baron Alderson: "I am of the same opinion . . . against one of them."

I have one further authority here that I had not seen before. Re Elliott, 14 Law Times at page 508. A very short statement. "A solicitor under examination is questioned . . . effects."

So I think all those cases make it clear, my lord.

The Court: Give me the Perry and Smith case, if you please.

Mr. MacNeill: I would like to call your lordship's attention—I think these cases my friend cites are not applicable. Take this *Evans* vs. *Craddock*. The marginal note is where two parties in dispute have one attorney, a communication by one to him in his common capacity is not privileged, but may be used by the other. But there was no dispute between these parties then at all. It was with another person entirely.

The Court: What are they deciding at the time? Something might be troubling the solicitor as to whether or not he could act for all of them. Now, there may be some apparent difficulty between the parties with which Harris has nothing to do for the time being. I am not thinking of that. The solicitor is pressed, as one may say, anxious about him acting for them all, having put in an appearance for all of them; and one of them is talking to him and says something. Then this Perry and Smith case, just reading the head note—

> "Where, upon the sale of an estate, the same attorney "was employed by the vendor and by the purchaser, a com- "munication from the purchaser to the attorney, asking for "time to pay the purchase money, was held not to be privi- "leged."

And Baron Parke says:

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"If the party employs an attorney who is also employed "on the other side, the privilege is confined to such communi- "cations as are clearly made to him in the character of his "own attorney."

Now, Mr. Macdonald was not being spoken to there and then by Lindeborg just as his own solicitor—at least it would seem to me, subject to what you have to say, that Mr. Macdonald's future conduct with reference to the other parties defendant, is going to be guided by what is said to him by Lindeborg there and then.

Mr. MacNeill: The distinction is this. There are two opposite parties there. Here they were all grouped together, which is a different situation. If Harris wanted to find something out like that—

The Court: I do not think I am confusing the matter. With regard to the issue that is troubling Mr. Macdonald there are two sides to the matter. The four defendants—their interests may conflict, and is speaking to Lindeborg about the possible conflicts, I suppose.

Mr. MacNeill: Well, we have not got that yet, my lord.

The Court: No, we have not come to what the conversation is, yet.

Mr. MacNeill: But this is the position: There were not two parties in that. There was just a group. Now, later on when this dispute has arisen and this claim was made against Mr. Macdonald's client Lindeborg, this is a different situation. You must take it at the time. There were no two opposite parties in that action.

The Court: But the future conduct of the solicitor is going to be guided perhaps by what is said, and it is going to perhaps affect the interests of the other parties who were not present. He is discussing it with Lindeborg, and it may be suggested that Lindeborg is talking to Mr. Macdonald as solicitor for himself and the others.

Mr. MacNeill: The situation of these opposite parties I submit is not applicable here at all. Here is a man who is acting for one person, Lindeborg; he speaks to him. Because Mr. Macdonald has entered an appearance for other people, why should these other people be entitled to claim the right to put themselves then as being hostile parties? That is the position. If there were two distinct groups those cases—the bankruptcy case, that is a case of fraud—both those I submit, my lord, do not come in this case.

The Court: Well now, do you think Mr. MacNeill that there is anything in "Bray" that I should see before I come to a conclusion? If there is any further authority that I could see?

Mr. Farris: May I make an observation on what my friend said. If they were hostile—hostile in that sense—Mr. Macdonald would not have the right to act at all. That is not the sense in

which these defendant parties were potentially hostile if Mr. Macdonald was reconciling their different interests; and he was then reconciling I suppose the interests which made the contract between them. They were no longer opposite.

Mr. MacNeill: That is assuming a great deal. That is not before your lordship.

The Court: This Craddock case, 1 Moody & Robertson, 182. What do you think the nature of the authority is?

Mr. MacNeill: Well, it is following the same line that I have submitted, my lord. My recollection of it—that these people, assuming that there was a contract, your lordship has not got the evidence on that point at all. However, I do not think I could add anything to the authorities that you have before you, my lord. I do not think that goes any further than the authorities I have given your lordship already.

The Court: In this matter it seems to me that the communication which it is sought to put in evidence, is not one made to Mr. Macdonald in the same character of attorney for Mr. Lindeborg. He is commo n attorney for Lindeborg and the other defendants in the Harris action. I would not say that is was a communication made to Mr. Macdonald in his adverse character of attorney for those other than the Lindeborgs, as it might be suggested Parke, B. had in mind in this *Perry* vs. *Smith case,* 152 English Reports, 288. But as Alderson, B. says in that case—he speaks along these lines:

> "If Mr. Alexander's argument were right, the effect "would be, that wherever an attorney is employed by both "parties, no communications made to him could be admitted "in evidence, because they must all be made through the com- "mon attorney. The point was expressly ruled in *Baugh* vs. "*Craddock* 1 M & Rob. 182, that where one attorney only is "employed, a communication made to him in his character "of attorney for both parties, may be used against one of "them."

That would be my view. In this matter it seems to me that what was there and then said to Mr. Macdonald by Lindeborg as I understand it, at a time when he must have had some anxiety as to what course should be pursued—it seems to me that the communication made to him in his character as attorney for both parties may be used against one of them and I so rule and admit the evidence.

Mr. Farris: Q. Mr. Macdonald, I think you had got as far as having entered an appearance for all parties. You were about to or had instructions to put in your statement of defence. You had received the statement of claim? A. I had received the statement of claim.

Q. And at that stage you had to call Mr. Lindeborg in, Mr. Daniel Lindeborg? A. Yes.

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Q. To your office. And will you state—

The Court: Q. Well, might I have the date? A. I could not give the exact date, my lord, but it was after the delivery of the statement of claim and before the delivery of the statement of defence.

Mr. Farris: The statement of claim is dated 11th September, 1928; statement of defence is the 18th October, same year.

Q. Go on, Mr. Macdonald; tell us what transpired. A. As soon as I received the statement of claim, that presented to me for the first time what the nature of the plaintiff's claim was, and on perusing it I saw at once that, on the allegations alleged in the statement of claim, there was a defence open to the Lindeborgs which was not open to the Proudfoot and Stevenson estates.

The Court: Q. The statement of claim is going to be before me, is it not?

Mr. Farris: Yes.

The Court: Perhaps I could see the statement of claim, or the particular paragraph that Mr. Macdonald has in mind.

Mr. Farris: Well, I suppose it appears best in the defence which Mr. Macdonald put in for Mr. Lindeborg, which is paragraph 20.

The Court: Q. There was a separate defence put in on behalf of each one, was there? A. No. There were two statements of defence put in, one on behalf of the Lindeborg interests and one on behalf of the Proudfoot and Stevenson interests.

Mr. Farris: Q. That paragraph 20 which you heard me read earlier in the opening is not in the Proudfoot and Stevenson? A. That is not in the defence of the Proudfoot and Stevenson estates.

Mr. Farris: Paragraph 20 in the Lindeborg defence is not in, either.

Q. Are you clear in what that paragraph 20 is—? A. No, I am sufficiently clear.

Q. And it was, I understand it, what ultimately became paragraph 20? A. Well, if it is paragraph 20—I don't remember.

The Court: Q. The defendant says, "If the late James Proudfoot or the late Hiram Stevenson, or either of them . . ." (reading paragraph). A. That is a special defence of the Lindeborg interests as it seemed to me. I think perhaps, my lord, I could make this plain with a very short statement. Until I got the statement of claim I did not know what the Harris claim was founded upon. When I saw his statement of claim I saw, as it sets out, an allegation of an agreement alleged to have been entered into by Harris with Proudfoot and Stevenson, and a further allegation that that agreement was entered into by Proudfoot and Stevenson on their own behalf and on behalf of their

associates. I filed and delivered a demand for particulars as to who the associates were, and the reply to that was that the associates were the Lindeborgs. Well, it at once appeared to me that a question arose there, if Proudfoot and Stevenson did enter into the agreement that Harris alleged, how could they bind the Lindeborgs, unless they could show that the Lindeborgs had authorised Proudfoot and Stevenson to enter into it on their behalf, and it raised an issue of the agency between Proudfoot and Stevenson and the Lindeborgs; consequently it raised the defence which I have set out there in paragraph 20, that if there was any such agreement entered into by Proudfoot and Stevenson, it was not on behalf of the Lindeborgs, nor was there any authority to enter into it on behalf of the Lindeborgs. Now, I had to call in Mr. Lindeborg and also Mr. Barbrick, with whom I was in constant communication at that time, and explain this position.

Mr. Farris: Q. Were they both present together? A. Well now, I have tried to search my memory. They were both together constantly, but they came in individually at times, and whether they were both together at this very moment—whether or not there is anything which I can search my memory to help me—they were in and out, both together at times, individually at times, and I don't know how I can—

Q. Well, tell us what you told Mr. Lindeborg. A. I pointed this situation out expressly to Mr. Lindeborg and told him that at first sight it seemed to me that it became necessary to sever his defence.

Q. Why did you tell him? A. Well, the situation on the statement of claim.

The Court: Q. Just what you told him, Mr. Macdonald. A. Yes. Rendered this situation as a possible outcome, that Harris might recover judgment for the amount that he is suing for against Proudfoot and Stevenson estates, and fail to show any agreement by the Lindeborgs with them. That was the situation the possible situation that presented itself to me, and which I explained to Mr. Lindeborg.

Mr. MacNeill: I presume, my lord, that all this is subject to the objection.

The Court: Your objection has been noted, Mr. MacNeill, and if you wish to, I do not see any reason for renewing it from time to time.

Mr. MacNeill: Yes, that is satisfactory, my lord. It is understood that my objection applies to all this.

Mr. Farris: Q. Go on, Mr. Macdonald. A. 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—"

Mr. MacNeill: You say that is in the statement of claim. I do not think it is.

Mr. Farris: I think it is all here. To clear up a little ambiguity, I will read paragraph 15. (Reading paragraph 15 of statement of claim).

Mr. MacNeill: My friend is aiding very greatly the objection to giving evidence in this case. If my friend puts a question then I have an opportunity of making my objection. But Mr. Macdonald is going on to give his evidence—

The Court: Of course, he is giving the conversation, as I understand it.

Mr. MacNeill: Yes, but he has gone away past that.

The Court: But still, he is still on the conversation that took place, as I understand, between himself and Mr. Lindeborg. Of course, his attention might be directed to a particular topic, if you think that you should have an opportunity of raising some other objection on some other basis such as, that it was not set out in the statement of claim.

Mr. MacNeill: Well, I take that exception. And it is pretty hard to get my objection in, because I do not know anything of what he is going to say until he has said it.

Mr. Farris: I do not think in the statement of claim I have to give the whole ins and outs of all the conversation. I give the substance of it, of what the contract was.

Mr. MacNeill: Well, he has made the statement there of "stand and fall."

Mr. Farris: I know, but that is the method.

The Court: It seems to me paragraph 15 is broad enough to cover that. You may go on, Mr. Farris.

Mr. Farris: Q. Very well, Mr. Macdonald. A. 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—

The Court: No, just a moment.

Mr. Farris: Q. Well, you could put it this way: As the result of that conversation what position did you take? A. Well,

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.

Q. At a later date—let me show now the history of the case. As I understand it Chief Justice Morrison who tried the case, gave judgment against all parties for $100,000? A. Yes.

Q. You appealed from that? A. Yes.

Q. On behalf of the parties? A. Yes.

Q. And the Court of Appeal reduced the judgment to $15,000, and confined it to Proudfoot and Stevenson interest only? A. Roughly $15,000. It was not exactly that but it was about that.

Q. Then was there any further question about appealing to the Supreme Court of Canada? A. Yes.

Mr. MacNeill: That is objected to. Here is another conversation I suppose. Do I have to take any objection to it.

Mr. Farris: This is merely corroborative of the original understanding.

The Court: Well, another conversation—then Mr. MacNeill's objection is made. Now, are you insisting Mr. Farris, to lead evidence as to another conversation?

Mr. Farris: Between Mr. Lindeborg and his solicitor?

The Court: Q. Under what circumstances were they—at what time? A. That was after the judgment of the Court of Appeal was given. I—

The Court: Just a minute.

Mr. Farris: By this time Lindeborg was free. The action against him was dismissed.

The Court: I want to be clear now as to what the circumstances were. The judgment of the Court of Appeal is referred to in paragraph 10.

Mr. Farris: I would suggest to my learned friend that the judgments below be put in again. Not as proof of any facts in that, but as merely proof of what happened.

Mr. MacNeill: I do not see any objection to that.

Mr. Farris: They are also in this book.

Mr. MacNeill: We are just putting in the formal judgments.

Mr. Farris: Not all the reasons.

Mr. MacNeill: Well, I don't know. There is a dissenting judgment, and we only get into the position—I say if my friend puts the judgments in the Supreme Court and in the Court of Appeal and in the Supreme Court of Canada—

Mr. Pratt: Those can be put in separately.

The Court: Will you give me the pages please?

Mr. Farris: (Referring to appeal book, Exhibit 1). Formal

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judgment of the trial court at page 179. Formal judgment of the Court of Appeal page 195. The formal judgment of the Supreme Court of Canada, I will have to put in separately, because it is not in this book.

The Court: I think probably the book now being referred to may be marked as an Exhibit on the understanding that certain pages marked are admitted.

Mr. Pratt: The pages referred to should go in, only. Pages 1 to 18; page 179 and page 195.

The Court: Yes, only those pages are in. All the rest of the book will be sealed up. That had better be marked.

(APPEAL BOOK MARKED EXHIBIT No. 1, AND PAGES 1 to 18; 179 and 195 MARKED BY THE REGISTRAR)

The Court: And then the Supreme Court of Canada formal judgment, that would be another exhibit.

Mr. Farris: I have not that in my hand. Perhaps Mr. Pratt has got one right here and we will file that and get it off our minds.

Mr. Pratt: (Producing document).

Q. It can be identified that that is a copy? A. Well, I can't say it is not.

Mr. Pratt: We got it from you, anyway.

(COPY OF JUDGMENT PRODUCED MARKED EXHIBIT No. 2).

The Court: Of course, the Lindeborgs have been let out, if we may use that expression, by the Court of Appeal, but still there may have been the possibility of the other side appealing to the Supreme Court of Canada.

Q. You were still acting as solicitor, you say, for Lindeborg? A. Yes.

Q. And the circumstances of the conversation—which would be about what time? A. Well, I could only say after the judgment of the Court of Appeal was given, but very shortly after.

Q. And before any other steps had been taken by either side? A. Yes, my lord.

The Court: And you seek to adduce evidence now, Mr. Farris, as to what happened?

Mr. Farris: I think so, my lord. It shows the consistent conduct based on this original conversation. I suppose it would be no harm to tell what the substance is, and then your lordship can rule on it.

Mr. MacNeill: What is that?

Mr. Farris: I am merely outlining the substance of what I wish to extract from Mr. Macdonald. If my friend states it is not admissible—

Mr. MacNeill: My client is dead.

The Court: It is rather tendered along the lines of confirmatory evidence, rather than anything that would affect the conduct of Mr. Macdonald, I think.

Mr. Farris: I think I had better state what it is. It is harmless. There would be no other way of arguing it unless I state—the question of this $15,000.

Mr. MacNeill: There is no such allegation in the statement of claim.

Mr. Farris: I do not have to plead evidence. I am just merely showing the attitude Mr. Lindeborg took, to confirm what had happened before.

Mr. MacNeill: Well, that is a matter that should be especially pleaded. It is not here in the statement of claim. We know nothing of it. My friend refers now to something that happened in the case of the appeal to the Supreme Court, my lord.

The Court: I have paragraph 15 of the statement of claim, setting out—

Mr. Farris: I do not have to say as further proof that such a contract was made; that Mr. Lindeborg had said something at a later time.

The Court: The action of Mr. Macdonald, it seems to me, might be affected by the first conversation which I have admitted; and he is talking to Mr. Lindeborg, and as I have held at that time and place, is a common attorney.

Mr. MacNeill: This is a different position.

The Court: This is a different time and place. This is after the Court of Appeal judgment, and no further move has been made by either party. This is sought to introduce conversation between Mr. Lindeborg and Mr. Macdonald, and you are seeking by his conversation Mr. Farris, to establsih a certain arrangement or contract.

Mr. Farris: Yes.

The Court: As having been made. That is when you allege it was made. Now then, it is not alleged by you that it was made after the Court of Appeal judgment. The first conversation I have admitted. But later on, after the Court of Appeal judgment is given—it might not seem to me that Mr. Macdonald's action is going to be affected from what you suggest, Mr. Farris, but simply you seek to adduce it as to confirm it. You see, Mr. Macdonald has acted in the matter, if I follow him carefully, by virtue of the first conversation, and he is going right through acting for them all. Then I can visualize a situation where perhaps he might have some conversation with Lindeborg after the Court of Appeal, a casual conversation, something where his action is not going to be affected. It might

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seem to me different then. He may have met him on the street sometime and in a casual conversation he may have said something to Mr. Lindeborg, and then there might be some reply to that. You submit that I should admit that?

Mr. Farris: Oh, yes. Supposing this happened—supposing Lindeborg came over and said, "Here is my cheque for half that amount." That would be absolutely admissible; that would be a talk in recognition of the contract already made. Now, I say that is not what happened, but something else happened which I say equally illuminates the position of the parties and its never has to be pleaded, because we are not relying on a succession of contracts; I am only relying on the one contract. But it makes it that much easier for the Court to appreciate the whole course of what the real mind of the parties was, and the real harm was done in allowing in the main contract. Now, that is in. Now, it seems that things that go to fill it in should not be shut out. Possibly my friend may appeal this case if it should be against him.

Mr. MacNeill: I will hope I won't have to.

Mr. Farris: Well, I hope you will see—

The Court: Of course, I think perhaps there might be distinction between whether Mr. Macdonald's conduct is going to be affected and based upon the conversation and something that might happen in a casual way between them.

Mr. Farris: This was more than casual. It was a serious discussion as to what was about to be done.

The Court: Well, I will hear Mr. MacNeill:

Mr. MacNeill: My lord, this is a very different situation. In the first place my friend has alleged a contract made in the earlier stages, and your lordship has admitted that. Now my friend says "Here is something else."

The Court: Not a contract; but if I follow Mr. Farris it may confirm.

Mr. MacNeill: My friend must go further than that. If it is confirmation it must mean a new interview, which I claim is privileged, and your lordship will have to rule on that. The position of solicitor and client still existed.

The Court: But if he were not setting up another contract there?

Mr. MacNeill: That is what he says.

The Court: I do not understand Mr. Farris to be leading evidence as to another contract.

Mr. MacNeill: At this time Lindeborg was out of the matter. He had a judgment in his favor.

The Court: But nothing had been done.

Mr. MacNeill: There could not be any common interest between these people at all, because the Lindeborgs were discharged;

they had the judgment dismissing the action against them. Surely that is a different position. My friend now wishes to show, as I understood from him, that a further conversation with Lindeborg put Lindeborg in it.

The Court: It might tend to show that the contract or agreement had been made in the first conversation.

Mr. MacNeill: That was dead and gone, my lord.

Mr. Farris: No, it is live and living.

Mr. MacNeill: Mr. Macdonald was acting for all these parties; they wanted to know what policy to take. But now we are at a stage where the Lindeborgs were not in the matter at all. That is a different position. And furthermore it is not pleaded. Your lordship will see the terrible position we are in.

The Court: I would not say it was necessary to plead it, unless it were a different contract.

Mr. MacNeill: It is a different contract; it is a different day. Everybody knew what the case was about and there was no need for getting information that would affect all of them, because they were different parties in the matter. My friend was then only acting for Barbrick, Proudfoot and Stevenson. So the situation is a very different one, my lord.

Mr. Farris: No, Mr. Macdonald was still acting for everybody.

Mr. MacNeill: But Lindeborgs were out of the matter.

The Court: I asked about that. It seems to me that Mr. Macdonald will still be acting for them all, but it is possible that the plaintiff may appeal further.

Mr. MacNeill: But at the time of this conversation the Lindeborgs were out of the matter entirely. They had a judgment in their favor. Now then, what ever the situation may have been at the start when the first conversation admitted by your lordship took place, there is something, and it isn't pleaded.

The Court: Well, if they are out entirely then it might be said that the conversation is not between solicitor and client.

Mr. MacNeill: On what basis is he appearing then? He says he is solicitor for these others. He is still on the record. The situation is different.

The Court: Of course, I would like to make myself clear on this phase of the matter, that I would not think on my casual reading of the proceedings, that it would be open to Mr. Farris to set up another contract or agreement made in the conversation that he seeks to lead in evidence now.

Mr. Farris: Quite, my lord.

The Court: But as I understand, it is intended to now lead evidence which might tend to confirm the truth of what Mac-

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donald has said as to what was stated before and some agreement made at that time. I will admit the evidence.

Mr. Farris: Q. What took place at that time Mr. Macdonald, between you and Mr. Lindeborg? A. After the judgment of the Court of Appeal I had an interview with Mr. Lindeborg, informed him of the outcome in the Court of Appeal, and discussed with him the question of whether the defendants in that case should appeal from the $15,000 judgment to the Supreme Court of Canada, and Mr. Lindeborg instructed me not to bring any such appeal, and I accordingly did not do so. But when it subsequently transpired that the plaintiff Harris was appealing to the Supreme Court of Canada, I again took up the question with Mr. Lindeborg.

Mr. MacNeill: My objection goes to all this.

The Court: There is objection raised by Mr. MacNeill, and the objection is over-ruled.

A. I again took up the question with Mr. Lindeborg, of the attitude that should be taken in the Supreme Court of Canada, and I was instructed—

The Court: Q. That was after the notice of appeal had been served by Harris? A. After the launching.

Q. Had been served by Harris? A. By Harris. And Mr. Lindeborg then instructed me to take the necessary steps to oppose that appeal, and in doing so then would cross-appeal from the Court of Appeal judgment, which I did.

Mr. Farris: Q. You continued to act for Mr. Lindeborg up to his death? A. Yes.

Q. Do you recall about when he died? A. He died very shortly after the handing down of the judgment of the Supreme Court of Canada. The exact date I could not tell you; it would be found in the probate of his will.

The Court: We might adjourn now to 2:15.

(COURT ADJOURNED AT 12:55 UNTIL 2:15 P.M.).

(PROCEEDINGS RESUMED AT 2:15 P.M.).

Mr. Farris: My lord, before my learned friend starts, I would like to put in the order appointing Mrs. McEwan as administratrix representing the Proudfoot estate. It is an order by the Chief Justice of British Columbia; pages 197 and 198 of Exhibit 1, dated the 21st of January, 1930. (Reading order). I do not think my friend will object to that.

Mr. MacNeill: Well, I do object to it. This is an order made in the action of Harris against various parties you have referred to. This order worked itself out when the action of

Harris vs. *Lindeborg* et al was disposed of. It is not relevant on this action. It is for the purpose of carrying on, for the purposes of this action. This is the order. (Reading order).

The Court: It might be relevant to know whether or not Mrs. McEwan did, in the Harris action, represent the Proudfoot estate. But that may be admitted.

Mr. MacNeill: But what is the value of that to us, my lord? I do not want to get this on the record at all. It is embarrassing and it is not relevant. What she was in the other action is one thing—

The Court: Your submission is that that would not be relevant even if it be just to prove that.

Mr. MacNeill: Yes, it is not relevant to this action that is now at bar. It is a question of carrying on the appeal and the proceedings. An affidavit is filed. It says "Upon the reading of the affidavit of Reginald Murray Macdonald . . ." (Reading). Now, that is all over. I submit it is not relevant here and I object to this being put in.

Mr. Farris: My lord, the reason for putting it in will appear if there is any reason in my judgment. I cannot see how it can do any harm. It does not add or take away from the original point that is in issue on this trial. Neither is it an authority alone to justify Mrs. McEwan carrying on the present action. If my friend feels that I am trying to work it in on that basis, I say alone it is not sufficient. But when I come to argue the question—Here is my position: That under order 1, rule 9, a defendant may be joined, a party may be named to carry on for certain purposes.

The Court: That was done I assume in the Harris action.

Mr. Farris: Yes. Now, in the case of the plaintiff, a plaintiff may appear under the same rule without an order, to represent other parties, provided certain conditions are fulfilled. Now, I merely want to lay down a foundation as to what the previous facts were. If they are before me, all right. If they are not before me—

The Court: You wish to establish the fact in the Harris action Mrs. McEwan was appointed. But what Mr. MacNeill is submitting is it is not relevant at all in this action.

Mr. Farris: Your lordship may ultimately rule on my submission. It should be allowed in subject to objection and subject to further consideration. I do not think your lordship will find in the end it is immaterial, but I do not want to argue that question at this time.

The Court: Well, I am inclined to prefer ruling definitely as I go on in this matter. I will admit it subject to the objection, in this way.

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Mr. MacNeill: Well, my lord, that won't do me any good at all. Let us see this position: My learned friend said he does not want to say now, but he is going to base some argument on it. Should not we have all the facts, and what are the reasons—

Mr. Farris: I said that here are the reasons, that under the authorities as I read them—let us get the originals. I did not think my friend would check me at this stage.

Mr. MacNeill: My friend asked me by correspondence and I refused. I think you will find some correspondence on that.

Mr. Farris: No, I wrote to my friend Mr. MacNeill and suggested that the question of her authority be not disputed. I have not brought the originals here— 10

The Court: Perhaps you can go on with Mr. Macdonald's evidence and come back with that, it being understood that I have made no ruling on the admissibility of that.

Reginald Murray Macdonald, Cross-Examination, 22nd November, 1932,

REGINALD MURRAY MACDONALD resumes the stand.

CROSS-EXAMINATION BY MR. MacNEILL:

Q. Mr. Macdonald, you lived in the mining district up in the West Kootenays for a great many years? A. Thirteen years.

Q. And down here, in Vancouver, you have encountered these mining men? A. Yes. 20

Q. You are familair with the words they use in connection with their properties? A. Tolerably so, I think.

Q. Now, as to the word "partner"—prospectors and miners, you have heard them use the word "partner"? A. Yes, frequently.

Q. And they use it in a manner that is not the legal sense of the word partner? A. Very often. I think that two men working on a drill together speak of themselves as partners.

Q. And many illustrations of that sort? A. Yes. 30

Q. In other words, when a man uses the word "partner" he does not necessarily mean partner in the legal sense of the word? A. Not necessarily; and very often not at all, I should say.

Q. Now, what has been your attitude in connection with this action since it was commenced?

The Court: This action, means—?

Mr. MacNeill: Q. This action at bar? A. In what respect?

Q. In respect of—Have you been assisting the plaintiffs in this action? A. Yes, to the extent of telling them what I knew. 40

Q. You revised the statement of claim for them? A. No, I don't think I have seen the statement of claim, if I remember rightly.

Q. Well, are you quite clear on that now? A. Well, perhaps I may be wrong on that. Perhaps he did show me the draft statement of claim. I cannot recall.

Q. No, he sent it to you, asked for your approval, and advice on it? A. Well, really, I do not recall, but it may be so. Because I do not know that Mr. Farris consulted me a good deal about what the facts were.

Q. And the conduct, the carrying on of this action then being brought? A. Well, you will have to direct my attention to something.

Q. For instance, I will give you this: Did you give to the executors a copy or statement of the evidence you have given here this morning? A. When the executors came into my office after Dan. Lindeborg's death, in order to get his will which had been left with me, I told them then what the arrangement was, substantially as I have told it today.

Q. Who were the ones who were there? A. I think they were all there. Mr. Cosens, Mr. Hemsworth, and I think Mrs. Cosens but I would not be absolutely sure about that, but I think she was there too.

Q. And did you give a written statement to my friend of your evidence? A. Not that I remember.

Q. Well, did you give it orally? A. As I told you, Mr. Farris has asked me a number of times what I knew about it; I have told him as much as I can.

Q. You gave all the evidence you gave here today? A. Substantially so.

Q. You did not give me the same privilege, did you. A. I have never refused you anything. You have called at my office to examine my files and I have put them entirely at your disposal, and answered every question that was asked.

Q. Those were not in the files. This evidence you gave today is not in your files? A. I suppose part of what I have stated is to be found on the files. I don't know.

Q. Oh, yes, maybe some documents. I show you what purports to be a letter of Farris & Company to yourself dated August 10th, 1931. Now that may refresh your memory? A. Oh, yes, I recall that now. He did send me a draft statement of claim and asked me to consider it from the point of view of the facts that I had told him. That is what I understood the purport of that letter to be.

Q. I had better read that letter. This letter is dated August 10th, 1931. (Reading letter). That was the letter you received? A. Yes, I presume so. I have no doubt I did receive it.

Q. Have you been taking an active part in helping the plaintiff in this action? A. Nothing beyond telling them the

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—*Continued.*

facts as I knew them. Well, perhaps I should not say that too, because now it does come to my mind that Mr. Farris and I had discussed some purely legal questions; I think we discussed together at one time the question of whether my evidence was privileged or not, but I had not any advice or opinion to give him on that point.

Q. Is that all? A. That is all I can think of at the moment.

Q. I show you copy of another letter, letter of R. M. Macdonald to Mr. Farris. I wish to have the original of that put in as an Exhibit.

(LETTER AUGUST 10th MARKED EXHIBIT No. 3).

The Court: That letter is what?

Mr. MacNeill: The letter which I just read, my lord.

The Court: Letter to witness from Farris & Company?

Mr. MacNeill: Yes, my lord.

Q. And the one now is dated the 3rd of August 1931. That is the original? (Showing letter). A. That is my signature.

Mr. MacNeill: (Reading letter 3rd August, 1931).

(LETTER AUGUST 3rd MARKED EXHIBIT No. 4).

Q. Will you let me have the letter of the 26th June, 1931, Macdonald to Farris. Is that your letter, Mr. Macdonald? A. Yes.

Mr. MacNeill: This will be Exhibit 5. (Reading letter).

(LETTER MARKED EXHIBIT No. 5).

Mr. Farris: That is in the old action, my lord.

Mr. MacNeill: That is the old action, yes.

Q. Letter July 2nd. My friend produces a copy. Do you remember that, Mr. Macdonald? A. I cannot say I remember it but I have no doubt it is correct.

Mr. Pratt: It is your friend's production. A. Well, I don't question it. My memory does not connect—is not connected with it.

Mr. MacNeill: (Reads letter of July 2nd, 1931).

(LETTER MARKED EXHIBIT No. 6).

Q. This is dated the 3rd of July, 1931. Is that your letter, Mr. Macdonald? A. Yes, that is my letter.

Mr. MacNeill: (Reads letter of July 3rd, 1931).

(LETTER MARKED EXHIBIT No. 7).

Q. Here is a letter to MacNeill & Company.

Mr. Farris: How is that admissible?

Mr. MacNeill: Well, I will show you now.

Q. Is that your letter?

Mr. Farris: That is from him to you?

Mr. MacNeill: Yes, A. This appears to be in connection with another lawsuit altogether. Yes, that is my letter.

(LETTER MARKED EXHIBIT No. 8).

Mr. MacNeill: Letter dated September 17th, 1932—

The Court: That is this year.

Mr. MacNeill: Yes, my lord. (Reading letter Exhibit 8).

Q. Now, I call your attention here Mr. Macdonald, I had asked you to hand over "all files and documents pertaining in any way to these two estates," and you say "since I believe there may be such documents and files in which my client Mrs. McEwan and the Proudfoot estate are as much interested as the Lindeborg estate," for that reason your declined? A. Declined to hand them over to you?

Q. Yes. A. Yes, but I showed you everything I had, as I did also to Mr. Farris. What I thought about that, was this: I was in a very difficult position in consequence of this present litigation. I had been a solicitor for the Lindeborgs and solicitor for Mrs. McEwan. I did not in those circumstances feel that when a dispute arose between Mrs. McEwan and the Lindeborg estate, that I was justified in handing my files over to either side. But I was under obligation to give both sides the fullest information, which I did.

Q. But you have told us, have you not, that you did not give us the information about your statements today? A. I told you expressly that when the executors for the Lindeborg estate came into my office after Dan. Lindeborg's death I told them as plainly as I possibly could that Mr. Lindeborg's arrangement with the Proudfoot and Stevenson estates was that they all stood or fell together and that whatever was made or lost in that litigation was to be divided equally between them. And in response to that one of them—I think it was Mr. Cosens, but one of them said that that might be all very well as regards Mr. Lindeborg if he was alive, but that they as executors were in a different position.

Q. Yes, that was a different position. You were asking for costs for carrying on the estate? A. Not at all. That was directly in connection with the matter of the present claim. It was in connection with that entirely.

Q. Can you produce the original of that letter, Mr. Macdonald? (Showing letter). A. Yes, I got that letter.

The Court: That is from whom?

Mr. MacNeill: This is from MacNeill, Pratt, McDougall & Morrison.

(LETTER MARKED EXHIBIT No. 9).

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Q. Is that your letter, Mr. Macdonald? (Showing letter).
A. Yes.

Mr. MacNeill: (Reading letter 21st September, 1932).

(LETTER MARKED EXHIBIT No. 10).

Q. Now you say here Mr. Macdonald, "On the other hand you have had my whole file in your custody for a considerable time." Now, what do you mean by that? A. When the executors of the Lindeborg estate took the will away from my office to your office and it became your duty to take proceedings for the administration of that estate, my whole file was taken over to your office and left there for the—it was on Mr. Pratt's desk for quite a long time. I eventually took it back again.

Q. When was that? A. That was just after Mr. Lindeborg's death.

Q. After Mr. Lindeborg's death? A. Yes.

Q. That would be sometime before this action was begun? A. Oh, yes.

Q. I show you a copy of a letter dated January 13th, 1930. It is addressed to the Departmental Solicitor, Victoria? A. That is my letter.

Q. That is your letter? A. Yes.

Q. (Reading letter). And the statements made therein are true? A. To the best of my belief they are. Some of them are matters of opinion, but they are still my opinion.

Mr. Farris: Now, my lord, I object to that letter going in. A matter of opinion. If my friend is putting it in for credibility or anything of that kind—

The Court: The witness can be confronted with anything he may have said at any other time, to contradict him.

Mr. Farris: Oh, yes. If my friend is doing it on the ground of credibility, I have nothing to say.

Mr. MacNeill: It is as to the whole thing. I understand you agree.

Mr. Farris: I am not objecting to the formal proof. I am just questioning as to its relevancy.

Mr. MacNeill: Well, it is revelant as to the issue brought up here. The statement of claim, or at least the examination for discovery as I have seen, has a direct bearing upon that.

The Court: I will admit that.

(LETTER MARKED EXHIBIT No. 11).

Mr. MacNeill: (Reading Exhibit 11). The said position as to that would apply to Daniel Lindeborg wouldn't it, on your knowledge of him? A. That is that Daniel Lindeborg's claims were his own claims?

Q. Yes? A. I think so.

Q. That is the claims under an option, in the option notice? A. Oh, no, not at all. You see—

Q. Well, I didn't ask you anything further. A. All right it doesn't matter.

Q. You did give me an opportunity Mr. Macdonald, to look at one of your files in your office. I have asked you to bring here your documents. A. Yes, they are over there on that table. The whole file is there. There may be certain letters taken out of this file by Mr. Farris' partner, Mr. Stultz, a day or so ago, I understood by arrangement with you. You required production of certain specific letters and he came over and got them. They are not now in the file. I segregated those out because I understood that they were the ones that you both wanted produced.

Q. Well, what have you got there? Have you got the letter dated 11th of August, 1928? A. You have got these in order, have you?

Q. Can I take them? A. Yes.

Q. I will pass that just for one moment. You can leave them there and we can come back to them in a minute. Mr. Macdonald, where did this interview with Mr. Daniel Lindeborg, that you referred to this morning take place? A. In my office.

Q. At your office in— A. Vancouver.

Q. That is the Pender Block is it? A. Yes.

Q. And who was present? A. Well, as I said this morning I cannot be quite sure whether Mr. Barbrick was present or not.

The Court: Mr——? A. Mr. Barbrick.

Mr. MacNeill: Q. And on what date did it take place? A. That I cannot tell you any closer than I have done. It was shortly after the delivery of the statement of claim in the action of Harris and Lindeborg.

Q. What was the date of the delivery of the statement of claim? A. 11th September, 1928.

Q. And the defence was delivered when? A. 18th of October, 1928.

Q. And that is as closely as you can come to the precise date of that interview? A. I think so.

Q. You apparently did not make any entry in your books of that interview, or you would be able to give the date? A. Well, I did not make any entry of the fact. I may have made an entry of the interview but I did not connect it with those particular instructions.

Q. Did you write a letter to Lindeborg confirming it? A. I don't think I did. If I did you would have seen it in my file, and if it isn't there, I did not.

Q. Did you write a letter to Barbrick confirming it? A. I am pretty sure I did not.

Q. Did you write to Mrs. McEwan confirming it, or telling her of it? A. Not that I remember. If I did it would have been in the file. If you find it there, I did, and if you don't find it there, I presume I did not.

Q. Well, I don't find it, I can assure you of that. But you had better satisfy yourself. Now then, have you found this letter of the 11th of August, 1928?

Mr. Farris: Was that in the list you gave us? 10

Mr. Pratt: I gave you a list on Saturday.

Mr. Farris: Here it is.

Mr. MacNeill: Q. You produce a copy of a letter, Macdonald & Peplar to Mrs. Laura McEwan dated August 11th, 1928? A. That is correct.

Q. This is the letter. (Reading letter). So Mr. Lindeborg was not in the country when you wrote that letter? A. No, when the action was started he was in Sweden.

Q. Yes. I am just pointing this out, that when you wrote to Mrs. Laura McEwan as you did, you had not seen Mr. Daniel 20 Lindeborg? A. No.

Q. He was out of the country? A. Yes.

(LETTER MARKED EXHIBIT No. 12).

Q. I show you a copy of another letter. (Showing). A. Correct.

Q. Letter dated 11th August, 1928, to Bass and Bullock-Webster, Barristers, Victoria. Mr. Peplar was your partner? A. He was my partner at that time.

Q. This is the same date as the other letter. Mr. Lindeborg was still on his way from Sweden? A. Well, I don't know 30 whether he had started back or not.

Q. Well, at any rate, he was not in the country. That is right? A. Yes.

Q. So that at any rate you put in the appearance for Barbrick long before Lindeborg got back here? A. Oh, yes. You see, Barbrick was the first person who came to my office with the appearance entered by him. I entered an appearance.

Q. So that what you did there was done without any instructions from Lindeborg? A. No, I hadn't spoken to Mr. Lindeborg in connection with the action.

Q. No, and he was not in the country? A. No. 40

(LETTER MARKED EXHIBIT No. 13).

Q. Here is a letter, Laura McEwan to Macdonald & Peplar? A. Yes, that is correct.

Q. Nelson, B. C., September 6th, 1928. (Reading letter).

(LETTER MARKED EXHIBIT No. 14).

Q. Here is one that should have preceded the last one, but it doesn't make any difference. I show you another letter, Mr. Macdonald? A. Yes, I got that.

Q. This is dated Nelson, B. C., August 18th, 1928. (Reading letter). A. Perhaps I should say I have not had any instruction from Mrs. McEwan to disclose these documents. I suppose your lordship's ruling covers that.

Mr. Farris: Well, I can waive the privilege. A. I only mention it because I feel there is a privilege. It is not for me to waive it.

(LETTER MARKED EXHIBIT No. 15).

Mr. MacNeill: Q. You see, you made some statements this morning about what Mr. Lindeborg told you which I think are inconsistent with this correspondence.

Mr. Farris: I do not see how.

Mr. MacNeill: Well, we hope you will see the light before I have done.

The Court: As long as the Court does, I suppose.

Mr. MacNeill: I will be satisfied, my lord.

Q. Letter 10th September, 1928. (Showing). A. That is correct.

Q. That is a letter, Macdonald & Peplar to Bullock-Webster. (Reading letter).

(LETTER MARKED EXHIBIT No. 16).

Q. Bullock-Webster were your agents there? A. They were our agents in Victoria.

Q. Had Mrs. McEwan been served with writ at that time? A. I think that——My recollection is that acting on instructions to accept service for her I entered an appearance before she was served, and after that I think she was served. That is my memory.

Q. Well, the instructions you received were from Mrs. McEwan? A. Oh, yes.

Q. Not from Mr. Lindeborg at all? A. Oh, no.

Q. I want to get that clear. A. Oh, no.

Q. 11th September, 1928, the Bullock-Webster letter. Have you seen this letter Mr. Macdonald? (Showing). A. I have no doubt that is correct.

Mr. MacNeill: (Reading letter).

(LETTER MARKED EXHIBIT No. 17).

The Court: Well now, am I to understand that the state-

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ment of claim was being delivered before any service or appearance by Daniel Lindeborg?

Mr. MacNeill: Yes, my lord. We can give the exact dates when Daniel Lindeborg's appearance did come forward.

Q. Is this a copy of your letter Mr. Macdonald? A. That is correct.

Q. Is this Macdonald & Peplar, or Mr. Macdonald? Can you say what it is? A. Well, I could not tell you without looking at the original whether I signed it with my own name or Macdonald & Peplar.

Q. Well, it came from your office? A. It came from our office, yes.

Mr. MacNeill: (Reading letter 21st September, 1928).

(LETTER MARKED EXHIBIT No. 18).

Q. Now, up to that time certainly you had not seen Lindeborg? A. Oh, I am pretty sure I had seen him before then.

Q. No.—I mean after his return from Sweden? A. I saw him after his return from Sweden, got instructions from him to appear for him.

Q. How long after he returned? A. I don't know. I think very shortly. I would not say. I don't know how long. I don't think I know exactly when he did get back, but when he got back he came to see me.

The Court: Q. Well then, you put in an appearance for him, did you? A. Yes, my lord.

Q. Would that date help you? A. It might, yes.

Mr. MacNeill: Q. This is the letter, Macdonald & Peplar to Bullock-Webster? A. Yes, that would seem to show that it was shortly before the 5th of September that I got instructions from Dan Lindeborg.

Q. You don't say anything about getting instructions in this letter, do you? You don't say anything in this letter about having had instructions, do you? A. I think it is implicit in the letter.

Q. Well, I just want to get it. That is Exhibit 19. 5th September, 1928, Macdonald & Peplar to Bullock-Webster. (Reading letter).

(LETTER MARKED EXHIBIT No. 19).

The Court: Q. Just a moment, please. Referring to Exhibit 18, letter dated 21st of September, it says "Sorry to hear of Dan's illness." That is Dan Lindeborg?

Mr. MacNeill: Q. I show you copy of a letter to Bullock-Webster 6th of October, 1928. (Showing). A. That is correct.

Mr. MacNeill: (Reading letter).

(LETTER MARKED EXHIBIT No. 20).

Q. Now letter 8th of October? A. Yes, that is my letter.

Q. Letter Macdonald & Peplar to Mrs. McEwan, Nelson, B. C. (Reading).

(LETTER MARKED EXHIBIT No. 21).

Q. Have you got that letter that is referred to there? A. That is a letter from Mrs. McEwan to Dan Lindeborg?

Q. Yes? A. No, I don't think I ever had that, as far as I remember.

Q. Letter 12th of October. That is your letter, or letter received by you? A. I presume so.

Q. This is a letter unsigned, on the letterhead of Bullock-Webster, October the 12th, 1928, to Macdonald & Peplar. (Reading).

(LETTER MARKED EXHIBIT No. 22).

Q. Another one, 12th of October from McEwan to Macdonald. This is the letter, Mr. Macdonald? A. It looks so. I presume that was sent by Mrs. McEwan and received by me. (Letter read).

(LETTER MARKED EXHIBIT No. 23).

Q. October 15th, Macdonald to McEwan. (Showing). A. Yes.

Q. This is copy of letter 15th October, 1928, Macdonald & Peplar to Mrs. Laura McEwan. (Reading letter).

(LETTER MARKED EXHIBIT No. 24).

Q. 23rd of October—do you recognize that letter, Mr. Macdonald? A. I presume that that was received.

Q. Letter dated Nelson, B. C., October 23rd, 1928, addressed to Macdonald & Peplar. (Reading letter).

(LETTER MARKED EXHIBIT No. 25).

Q. 25th of October, Macdonald to McEwan. Did you see this, Mr. Macdonald? (Showing). A. Yes.

Q. 25th of October, copy letter Macdonald & Peplar to Mrs. Laura McEwan. (Reading letter).

(LETTER MARKED EXHIBIT No. 26).

Q. Here is a letter. I do not think it is of any importance, but look at it Mr. Macdonald. A. Yes, that is correct.

Q. Copy of letter Macdonald & Peplar to P. G. Sinnott. Mr. Sinnott was solicitor for Harris? A. Harris, yes.

Q. Dated 2nd November, 1928. (Reading letter).

(LETTER MARKED EXHIBIT No. 27).

Q. November the 26th, McEwan to Macdonald. You recognize that Mr. Macdonald? A. Yes, that is Mrs. McEwan's letter.

(LETTER READ AND MARKED EXHIBIT No. 28).

Q. Will you look at that Mr. Macdonald? (Showing letter). A. Yes.

Q. 28th November, 1928, Mrs. Laura McEwan; letter from Macdonald & Peplar. (Reading letter).

(LETTER MARKED EXHIBIT No. 29).

The Court: It has occurred to me Mr. MacNeill, it may be of some assistance to know the exact date when Dan Lindeborg went to the hospital.

Mr. Pratt: We can prove that. If your lordship pleases we can call that witness right now.

The Court: Very well.

Mr. Pratt: If you will stand down Mr. Macdonald. (Witness stands aside).

Defendants' Case.

Frederick J. Fish, Direct Examination, 22nd November, 1932.

FREDERICK J. FISH, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PRATT:

Q. You have been called here on behalf of the defendants to give evidence. You are the clerk of the records are you not? A. Yes.

Q. At the Vancouver General Hospital? A. Yes.

Q. You have the record here covering the period from September 19th, 1928, to November 7th, 1928? A. Yes.

Q. Can you tell me when the late Daniel Lindeborg entered the hospital, and when he left? A. September 19th he was admitted.

Q. What year? A. 1928. And discharged on the 7th of November, 1928.

Q. That is the official record? A. That is the hospital admitting card.

Q. Does that show the date of his discharge? A. Yes.

Q. I suppose you want to keep your record? A. I would prefer to if I may. It is very important that we do.

Mr. Pratt: (Reading card). Vancouver General Hospital, case C7186, ward "G," semi rate. Date admitted September 19th, 1928, 2:30 p.m. Mr. Daniel Lindeborg, age 63, Swedish, Lutheran religion, residence 3308-37th Avenue West. Occupation, retired. Name and address of friend, Mr. A. Cosens, Bay-

view 5140-L. Attending physician, Brodie. Diagnosis, phlebitis. Inflammation of lungs—

The Witness: Infarction.

Mr. Pratt: Hour of discharge, 7th of November, 1928; 49 days in hospital.

The Court: The hour on which he was discharged November 7th. Complete it. A. He was discharged at 2 p.m., my lord. (Witness aside).

REGINALD MURRAY MACDONALD resumes the stand.

CROSS-EXAMINATION BY MR. MacNEILL:

Q. Here is a letter Mr. Macdonald, July 8th, 1929, R. M. Macdonald to D. Lindeborg? A. That is my signature. I don't remember the letter.

Q. You say you have not got it. I had better produce this.

Mr. Farris: What is this supposed to be?

Mr. MacNeill: I will put this in, my lord; July 8th, 1929. There is no way of identifying. This is a letter signed by you Mr. Macdonald dated July 8th, 1929., R. M. Macdonald to D. Lindeborg. (Reading letter).

(LETTER MARKED EXHIBIT No. 30).

Q. You have read that letter. Can you produce the letter referred to there? A. I haven't any recollection of it at all Mr. MacNeill. I don't know what the letter was.

Q. You cannot produce it then? A. If you did not find it amongst my file I cannot.

Q. Well, we have done our best. Have you got the probate of the will of Stevenson, Mr. Macdonald? A. Of Stevenson?

Q. Yes. A. No. I never had that, I think. Mrs. McEwan was appointed executor of the Stevenson estate.

Q. I want to prove the date? A. I had nothing to do with that.

Q. Tell me then—he was killed at Vimy Ridge— A. So it was stated in evidence. I don't know.

Q. What was the date of Vimy Ridge? I am told it was Easter Sunday, wasn't it, April 9th, 1917? That was the date then of the death of Stevenson? A. Well, if that was so; I know nothing about that. I know nothing about Stevenson's death. I think the probate of his will would show.

Q. Can you state the date of the death of Proudfoot? A. Proudfoot died in 1910 or 1911 as I remember it.

Q. Cannot you get any closer than that? A. Let me think now. I have no doubt I have got that in my office, but I cannot tell it closer just at the present moment. It is a long time ago now, but I believe that I took out the letters of administration—

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perhaps I did not though—no, I could not tell you at any rate now. I would have to look it up, but I am pretty sure that the evidence that was given in the case showed that Proudfoot died either in 1910 or 1911. Was his letters of administration put in at the trial?

Q. Not that I am aware of? A. No. I don't seem to have that here at all, but I am nearly sure I am right in saying it was 1910 or 1911. Just towards the end of 1910 or early in 1911, that Proudfoot died.

Q. And Barbrick, when did he die? A. I have got the letters probate of Barbrick's will. He died on the 28th of October, 1929.

Q. And Daniel Lindeborg? A. Well, just after the decision in the Supreme Court of Canada.

Mr. Pratt: January 6th, 1931, wasn't it?

Mr. MacNeill: Q. The decision was on the 23rd of December? A. It was very shortly after that.

Mr. MacNeill: Q. January 6th, 1931, would that be it?

Mr. Pratt: That is the date I have got.

Mr. MacNeill: Q. You prepared Mr. Lindeborg's will, did you not? A. Yes.

Q. And the date of it was what? A. I would have to refer to it to tell you that.

Q. (Showing document). A. The date of the will was the 14th of May, 1930.

Q. And he died? A. According to this probate he died on the 6th of January, 1931.

Q. What were the dates of the judgments in the Lindeborg litigation? A. Well, they appear in the Appeal Book that has been filed.

The Registrar: 22nd December, 1930, the Supreme Court of Canada.

Mr. Farris: Those are the reasons.

Mr. MacNeill: I do not want the reasons. I want the formal judgment.

Mr. Farris: That may be any time afterwards.

Mr. MacNeill: Q. Well, the judgment is dated in the Supreme Court of Canada, Tuesday, 23rd of December, 1930. A. Well, I don't know whether Mr. Lindeborg died before or after that.

Q. Oh, he died after that. A. He died after that, did he.

The Court: The 23rd of December, 1930, is the Supreme Court of Canada judgment?

Mr. MacNeill: Yes, my lord.

Mr. Farris: That is the formal judgment. The reasons possibly came down and were known before that.

Mr. Pratt: No, that is the date of that. They came down and dated that after.

Mr. MacNeill: Q. And the Court of Appeal judgment was the 7th of January, 1930? A. Whatever the date is.

Q. Well, that is in this exhibit. The will which you prepared was at a time when it was known that the Lindeborgs were out of the matter. They were exonerated by the Court of Appeal of British Columbia? A. The dates will speak for themselves Mr. MacNeill. I cannot help you out.

Q. Yes, but I am calling your attention to this: that in this will he makes no provision whatever—

The Court: Is the will being placed before me?

Mr. MacNeill: I had better put in a copy.

Q. Read the will that you prepared. Can you find any reference at all to this arrangement which you spoke of this morning? A. I am quite sure there is none there.

Q. I agree with you. And you were the person who drew the will and who knew the circumstances as to Lindeborg and these others? A. Yes.

Q. And there was no trace of any such beneficial arrangement as my friend spoke of this morning. He did not provide for that at all in his will; although the draughtsman of the will knew the situation and was a witness to the signing of the will.

(WILL PRODUCED MARKED EXHIBIT No. 31).

Q. After the death of Daniel Lindeborg did the executors call upon you with Mr. Pratt, to ask as to the liabilities of the estate, for the purpose of probate, to get out Form X or Inventory X? A. Did they call upon me? Mr. Pratt— to get that information?

Q. Yes? A. They may have done, but I have no recollection of it. I would not deny it if they say they did.

Q. It would be a matter of interest to the executors who were about to file their Inventory X, to show the liabilities of the estate, would it not? A. Yes.

Q. And did you tell them of this contingent liability? A. Mr. MacNeill, I have told you—I have already told you—

The Court: Q. No, just a moment. Did you? A. —that when the executors called in my office for the purpose of getting that will, I told them all about Dan Lindeborg's arrangement to participate in losses and profits in that litigation, and we had quite a talk about it.

Mr. MacNeill: Q. We need not repeat that. This is at a different stage. A. I thought that was what you were asking.

Q. No. What I am asking is this: These executors had to file this Form X in order that the succession duties should be

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ascertained and paid. Now then, when they applied to you, as I am instructed they did, you made no reference whatever to this contingent liability which is claimed in this action? A. That is highly probable, that I did not do so at that time, because I had already told them all about it.

Q. Well, it was a different stage then wasn't it? They were then making, proceeding formally to have the necessary information for this Inventory X? A. They knew all about it from me.

Q. And Mr. Pratt was with them wasn't he? A. Well, I don't remember that. You have asked me that, and I don't remember.

Q. At any rate, you did not give them the information of this contingent liability? A. I had already given it to them, I have stated.

Q. I show you Exhibit X—Inventory X. This is a certified copy of Inventory X.

Mr. Farris: Who was the original prepared by?

Mr. Pratt: That is the original. That is a certified copy.

Mr. Farris: Was Mr. Macdonald the solicitor?

Mr. Pratt: No.

Mr. Farris: Well then, it is not admissible.

The Witness: I did not prepare that.

Mr. Farris: I am not obecting to my friend's formal proof. I am objecting to its admissibility.

Mr. MacNeill: Well, at any rate, we will prove it for ourselves.

Q. I show you a letter from yourself to Mr. Cosens. (Showing). A. That is correct.

Q. January 3rd, 1931. (Reading letter).

(LETTER MARKED EXHIBIT No. 32).

Q. I show you here a copy of a letter February 6th, 1931, from yourself to Cosens and Hemsworth, and ask you if you remember that? A. Well, this is not a copy off my file, is it?

Mr. Pratt: Yes. A. I don't know. That may be a copy off my file. It does not look as though it was made by my office.

Mr. Pratt: It is taken from a copy on your file. A. It is a copy made from a copy found in my file?

Q. Yes. A. If Mr. Farris does not object to it, I don't. It is stated to be a copy of something that was a copy in my file. I have no means of checking it, my lord.

Mr. Pratt: We can prove this letter through Mr. Cozens later.

The Witness: Mr. MacNeill is asking me about it. I cannot say about it, that is all.

The Court: You cannot produce the original now?

Mr. Pratt: Not just now, my lord, no.

Mr. MacNeill: Q. The executors called upon you for information, as you have already stated? A. Yes, they did. I helped them all I could.

The Court: Q. What is that? A. They called upon me for information from time to time, and I gave them all the information I could.

Mr. MacNeill: Q. Letter of February 16th, 1931. Assuming this to be a correct letter—otherwise it would come out— (Showing letter). A. That is so full of familiar matter that I feel I must have written it.

The Court: It might be marked for identification in the meantime.

Mr. Farris: Well, don't let us put it in if there is any question about it. Where did you get the information?

Mr. MacNeill: Mr. Cosens. Letter addressed to him.

Mr. Farris: Why hasn't he got the original.

Mr. Pratt: It was Mr. Macdonald's in response to inquiries of Mr. Cosens.

The Court: How was the copy obtained?

Mr. Pratt: A copy was in Mr. Macdonald's files.

Mr. Farris: You say that is a correct copy from Mr. Macdonald's files?

Mr. Pratt: So far as I recollect, yes. We will prove it by Mr. Cosens later.

Mr. Farris: I am satisfied.

Mr. MacNeill: Q. This is dated February 16th, 1931. Now, the date of the death of Lindeborg was apparently the 6th of January, 1931.

The Court: Yes, I have that.

Mr. MacNeill: This is addressed to Messrs. Cosens and Hemsworth. (Reading letter).

(LETTER MARKED EXHIBIT No. 33).

Q. Was that the occasion of the interview referred to before? He says "In answer to your inquiry of today." Was that the interview you had in view? A. Well, as I told you, I do not remember that. I rather should have inferred from reading that letter, that it was in reply to a letter, but I cannot remember any such letter.

Q. Here is a letter from yourself to myself. (Showing). A. Yes, that is my letter.

Mr. MacNeill: (Reading letter).

(LETTER MARKED EXHIBIT No. 34).

Q. Here is a letter yourself to myself February 18th, 1931. (Showing). A. Yes, that is correct.

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M. MacNeill: (Reading letter).

(LETTER MARKED EXHIBIT No. 35).

The Court: At that time, if you please Mr. MacNeill, your firm was—

Mr. MacNeill: Acting for the executors of the Daniel Lindeborg will.

Mr. Farris: I think it would be fair to have it on the record that on the 25th of February I had written a formal letter to Mr. MacNeill setting up the claim that we are now making. On the 25th of February I find my first letter to you was written.

Mr. MacNeill: I should not doubt that at all.

The Court: Do you wish that put in the record?

Mr. Farris: Not to prove any of the facts, but to show the position we were taking at the time.

The Court: Well then, that is common ground between you.

Mr. MacNeill: Yes.

Q. Letter of March 7th. (Showing). A. Those are my letters.

Mr. MacNeill: (Reading letter).

(LETTER MARKED EXHIBIT No. 36).

Q. This is another letter Mr. Macdonald has identified, March 20th, 1931. (Reading letter).

(LETTER MARKED EXHIBIT No. 37).

Q. There is another letter Mr. Macdonald. (Showing). A. That is correct.

Q. And annexed thereto—is that your bill of costs? A. I have no doubt it is, yes.

Q. It looks like a bill of costs? A. It looks like it.

Mr. MacNeill: (Reading letter March 12th, 1931).

The Court: From whom to whom?

Mr. MacNeill: Letter from Mr. Macdonald to Mr. Pratt.

(LETTER MARKED EXHIBIT No. 38).

Mr. MacNeill: This Cole matter has nothing whatever to do with this transaction? A. Oh, no, that is another matter altogether.

The Court: Well, Mr. MacNeill, I think it was stated the witness wished to go at 4:30.

Mr. MacNeill: Yes, my lord. I am quite prepared to go on tomorrow morning.

(COURT ADJOURNED AT 4:30 P.M. UNTIL 11 A.M. THE FOLLOWING DAY).

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(COURT RESUMED PURSUANT TO ADJOURNMENT).

Mr. MacNeill: I would ask, my lord, that any witnesses that my learned friend has should be excluded from the court room.

Mr. Farris: That is all right. I suppose that applies to both sides. Do you want Mr. Ralston excluded?

Mr. MacNeill: No, I will not ask Mr. Ralston to be excluded. (Witnesses excluded).

Mr. Pratt: My lord, yesterday there was an Exhibit No. 33 filed—a copy and we now find the original this morning and will substitute it for the copy. I just want to put that on the record.

The Court: Very well—might I speak a moment, please—with regard to the order that Mr. Farris wanted to put in—Mr. Farris, if you please, was that with a view to proving that Laura McEwan was appointed by the court to represent the estate of James Proudfoot, deceased, for the purpose of the Harris action?

Mr. Farris: Yes, my lord.

The Court: Well, that is alleged in paragraph 3 of the statement of claim and is admitted in paragraph 3 of the statement of defence.

Mr. Farris: That ought to be sufficient.

Mr. MacNeill: Yes, that there was such an order, but my position is that that is not an order applicable in this case. That is quite true.

The Court: I am just referring to the matter of the order—

Mr. MacNeill: Oh, yes, my lord.

The Court:—being tendered. Very well.

R. M. MACDONALD resumed stand.

CROSS-EXAMINATION CONTINUED BY MR. MacNEILL:

Q. There are a few letters here, Mr. Macdonald, I just want to—that is a letter to Mr. Hemsworth. That is right, is it? A. That is my letter. I don't know whether it has any bearing on this case.

Q. It may be only for fixing dates. I think that is the only value it may have.

(LETTER MARKED EXHIBIT No. 39).

Q. And this one.

The Court: Might I have the date of the letter? You might read it.

Mr. MacNeill: It is November 12th, 1931, my lord.

The Court: From the witness to—

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Mr. MacNeill: From the witness to Mr. Hemsworth. He is one of the defendants.

Q. And that is another letter? A. That is my letter.

Mr. Farris: My lord, I don't know what in the world these letters have to do with it. He is only loading up the record with matters of this kind.

Mr. MacNeill: It is only to get assistance on certain dates. That is all. This is one of January 20th, 1931, from Mr. Macdonald to Mr. Cosens.

The Court: That is this year.

Mr. MacNeill: '31, my lord.

(LETTER MARKED EXHIBIT No. 40).

Mr. MacNeill: And here is another one of the same character. Is that your letter, Mr. Macdonald? A. That is my signature.

(LETTER MARKED EXHIBIT No. 41).

Q. This is a letter, Mr. Macdonald, to Mr. Cosens, another one of the defendants. The only value it may have is in connection with the—it is dated January 16th, 1931. I shall read it. (Reading same).

(LETTER MARKED EXHIBIT No. 41).

Q. Now, your bill of costs, Mr. Macdonald. This has been sent up from the Registry as being the original.

The Court: Is that part of exhibit 38? Is it the same bill of costs?

Mr . Pratt: Yes, it was put in last night.

The Court: Well, it is part of 38.

The Registrar: 38 is a letter, my lord.

Mr. MacNeill: I don't think we put it in, my lord.

The Court: Well, however, it is put in now. I was concluding it was attached to this letter.

Mr. MacNeill: Is is put in now.

Q. This is your bill of costs, Mr. Macdonald. I have the original from the Registrar which was filed? A. That looks like it.

Q. This covers from what period? A. It appears to cover from June 19th, 1929, to the conclusion.

Q. That is from the beginning of this action—of the Harris action? A. No, no, I think this only applies to the appeal.

Q. Look at that. It appears to be in sections. I believe you did not have any docket entries. I think that was proven, wasn't it, Mr. Macdonald? A. Well, they were very imperfect, so much so I had to make a charge.

Q. Just a lump charge. But that covers the whole of the trial of Harris' action? A. No, I don't think so. It starts off here in June, "services re appeal from judgment of $100,000 to the Court of Appeal." That evidently was not the trial. And then, "Services re appeal to Supreme Court of Canada," and the rest is all disbursements I think except some—

The Court: Let me see exhibit 38, please.

The Witness: Well, then, there is a bill regarding the Andrew Lindeborg estate—no, that does not include the trial.

Mr. MacNeill: Well, where is your letter. You were not overlooking all of the costs in the Harris estate? A. Well, now, I am bound to depend on a somewhat indefinite memory on this point, but my recollection is this—

The Court: Well, there is the letter, Mr. Macdonald, that accompanied it, number 38. A. That does not help me, my lord, because that does not refer to the cost of the trial, but my recollection now is, looking at that, that my bill in respect of the cost of the trial had been paid.

Mr. MacNeill: Q. Before that? A. Yes.

Q. I see. A. But perhaps you can find something which will help me. Certainly that bill does not include the costs of the trial, but it included everything which I was asking the executors for at that time.

Q. Yes? A. And my recollection is that my services in connection with the trial had been paid.

Q. I show you a copy of a letter from myself to you dated February 11th, 1931. Have you got the original? If you will look at that it will refresh you? A. That would rather seem to bear out what I have been saying.

Q. Well, you had better read this. You remember this letter? A. No, I cannot say I do. I don't remember it, Mr. MacNeill, but I have no doubt it is correct.

Q. All right.

(LETTER MARKED EXHIBIT No. 42).

The Court: What is that, if you please?

The Registrar: Exhibit 42.

The Court: That is the bill of costs.

Mr. MacNeill: I will put that in, but I will make the bill of costs exhibit 42 and the letter exhibit 43.

(BILL OF COSTS MARKED EXHIBIT No. 42).

(LETTER MARKED EXHIBIT No. 43).

Mr. MacNeill: I had better read this letter. It is a letter from our firm to you, Mr. Macdonald, dated February 12th, 1931. Your bill of costs has been marked.

Q. So that bill was the outcome of it? A. That is what I gather from that and my memory together.

Q. I note in this bill, exhibit 42, you mention a number of charges. You have on page 1 a total sum of $1200? A. Yes.

Q. And then half chargeable to Lindeborg? A. Yes, that would be all—that would be right.

Q. I see. And on page 2 there are a number of items which you lump at $1400. Do you see? A. Total $2800—one-half chargeable to Lindeborg—$1400.

Q. Yes, that is right. And these disbursements shown on page 3 and page 4, they amount to $1086.25, and you have "one-half disbursements chargeable to Lindeborg $543.12 — total $3,143.12." A. Yes.

Q. All right. That is all. Well, just a moment. I show you a document dated 26th of February, 1931. Do you recognize that document? A. I recognize the document. I would have to read it all over to recall the facts.

Q. Well that is just sufficient for my purposes. That is your signature? A. Yes, that is my signature to it.

Q. You signed this document on behalf of Laura McEwan? A. Yes, that is right, yes.

Q. And the executors of Daniel Lindeborg are not parties to that? A. The executors of Daniel Lindeborg are not parties to it—no, apparently not. I see Mr. Farris approved it. He was acting—

Mr. Farris: What is it?

Mr. MacNeill: That is the agreement.

The Witness: The settlement with Harris.

Mr. Farris: We tried to get you to agree to it and you wouldn't.

Mr. MacNeill: That will be exhibit No. 44.

(DOCUMENT MARKED EXHIBIT No. 44).

Q. I show you a document—

The Court: Is that being read—or perhaps I might look at it. I can just look at it.

Mr. MacNeill: I will read it. (Reading document).

The Witness: And there is Mr. Farris' signature on it.

Mr. MacNeill: Q. Yes, Mr. Farris approves of it. A. As a matter of fact, I think Mr. Farris, if I remember rightly, negotiated that and fixed that up, and I had to sign it, because I was the solicitor on the record; and that is why my memory on it is not clear as it should be.

Q. Well, at any rate, we just want to prove the document at the present time? A. Yes.

Q. I show you a letter—yes, it is a letter—addressed to

yourself by Daniel Lindeborg and witnessed by yourself dated May 14th, 1930? A. I remember that letter. It was rather a curious transaction.

Q. What exhibit will this be?

The Registrar: Exhibit 45.

Mr. MacNeill: You had better mark it then.

(LETTER MARKED EXHIBIT No. 45).

Q. This is dated May 14th, 1930, from Daniel Lindeborg to Mr. Macdonald. (Reads same). A. That was a peculiar idea, it semed to me in Mr. Lindeborg's mind. He had told me he was appointing—in fact I knew he was appointing those parties, Mr. Hemsworth and Mr. and Mrs. Cosens, as executors under his will, but he had an idea that he might get into a condition, without dying, where he would not be able to look after his own affairs; and he wanted to know if there was any way in which he could have somebody appointed under those conditions; and I explained to him the possibility of curatorship and so on, but I could not understand—

Q. Well, it just shows the close relationship of Cosens and these people to Lindeborg? A. Oh, yes, I think there was a very close relationship.

Q. That is what I want to get. Your bill of costs of $3,074 —that was paid by cheque by the executors of the Lindeborg estate. They paid it? A. That is my recollection.

Q. That is all, Mr. Macdonald.

Mr. Farris: That is all Mr. Macdonald. (Witness aside).

Mr. Farris: Some of these letters my learned friend has filed of recent date, I think, should be put in—not to prove the facts therein, but to prove the attitude that has been taken. It is my letter of February 25th, 1931.

Mr. MacNeill: Just a moment, to see if I have them.

Mr. Pratt: Yes, February 25th, 1931.

The Court: That is from yourself to—

Mr. Farris: To Mr. MacNeill.

Mr. Pratt: What date is the other one?

Mr. Farris: April the 11—it is on the same subject matter and you have no objection to this going in, too.

Mr. MacNeill: I have no objection to its going in. I was just wondering if I have a copy of it in my brief, to know what was in it, but I have no objection to that going in.

The Court: Will you read them now or will you pass them up?

(LETTER MARKED EXHIBIT No. 46).

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M. Farris: Mr. MacNeill wants to hear what is in it so I will read it.

Mr. MacNeill: No, I have read it.

Mr. Farris: Give it to his lordship then. The other is April the 11th.

Mr. MacNeill: April 11th.

(LETTER MARKED EXHIBIT No. 47).

M. Farris: By the way, there is a clerical error in that letter in the third paragraph—in the fourth line—it says: "The principal sum or costs." It should be "principal sum and costs."

The Court: The word "or" should be "and"?

Mr. Farris: Yes, my lord.

Mr. MacNeill: In the third paragraph, is it?

Mr. Farris: Yes, in the fourth line. It sounds as if I were only talking of costs, but it means the principal sum and costs.

Mr. MacNeill: All right.

Mr. Farris: I will call Mr. Ralston.

James Chisholm Ralston, Direct Examination, 23rd November, 1932.

JAMES CHISHOLM RALSTON, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

The Court: Very well, Mr. Farris.

Mr. Farris: Q. You are a barrister and solicitor residing and practising in the city? A. Yes.

Q. You are a member of the firm of—I don't know all the names connected with it—but of Mr. E. P. Davis' firm, I will call it? A. That is correct.

Q. You were acquainted, I believe with the late Daniel Lindeborg? A. Yes, I was from about 1924.

Q. Yes. Do you recall about the time that this action of Harris v. Lindeborg was started and subsequent thereto? A. Yes, I discussed the matter with Mr. Lindeborg.

Mr. MacNeill: Well, now have you the consent of the executors?

Mr. Farris: Mr. Ralston wasn't his solicitor.

Mr. MacNeill: Q. Well, what do you say as to that? A. Well, I was in this position, Mr. MacNeill. I acted for the people who purchased the Big Missouri mine and I handled the various transfers from a man named Henton, with an option for the Standard Mines Corporation, and from the Standard Mines Corporation to the Big Missouri Company and I acted for these people, including the payment of approximately $2,000,000 and consequently I was closely in touch with Mr. Lindeborg.

Mr. Farris: Q. But these people had nothing whatever to do with this affair? A. No, nothing whatever.

Q. Well you were acquainted with him? A. Yes, I was acquainted with him and after he had this judgment of $100,000 against him he came to me and asked if I would arrange for Mr. E. P. Davis to take the appeal for him and I so arranged. And I had conversations with Mr. Lindeborg before he engaged me to handle this work for him, or to get Mr. Davis to handle it for him, dealing with this matter and I never considered at any time that I was acting as solicitor for Mr. Lindeborg.

Mr. MacNeill: Now, Davis & Company were certainly his solicitors and Mr. Davis was acting as counsel for him? A. No, I don't think that is right, Mr. MacNeill.

Q. Well, you sent in your bill to him, did you not? A. I have copies of the only two bills—

The Court: Now, if you please, gentlemen, I would like to get the date of the conversation to begin with.

Mr. MacNeill: Yes, my lord.

The Court: I understand some evidence is now sought to be introduced as to some conversation, Mr. Farris?

Mr. Farris: Yes, my lord.

The Court: And what is the date of it approximately? A. It is very hard for me to actually fix the date—

Q. Well, about? A. —because I had no interest in it at the time, except in a friendly way talking to Mr. Lindeborg about it. It would probably be about the end of 1927—

Q. And where? A. —and again in 1928. As a matter of fact, I saw him quite frequently during that period.

Q. And where would the conversations be according to your recollection? A. Well, I remember discussing the matter with him in the Hotel Georgia.

Mr. MacNeill: Q. Which matter was that, Mr. Ralston—this appeal? A. This Harris case. And I remember discussing it with him standing on the corner of Pender and Seymour Streets.

Mr. MacNeill: Yes.

Mr. Farris: Q. And who were these communications with?

Mr. MacNeill: Pardon me?

The Witness: And these discussions were with Mr. Lindeborg prior to the trial.

The Court: Prior to what? A. Prior to the trial and the judgment for $100,000.

Q. Prior to the Supreme Court of British Columbia's judgment? A. Yes. At one of those interviews, I had one interview in the presence of a party by the name of Sloan.

Mr. Farris: Well, then, it was before the time that you mentioned to me, and about him speaking to you about retaining Mr. Davis in connection with the appeal? A. Yes, the case was discussed because it was a notable case among the miners and I was

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doing a lot of mining work at the time and I was following it more or less closely.

Q. Well, this is what you say: The conservations were before the trial? A. Well, they were before the trial; but there was a general discussion about the Harris case before the trial and he was trying to explain to me that he was not responsible for it.

Q. Well, I don't wish to go into that for the moment—just the time of the conversation? A. Well, I am sure that I discussed the matter with him before he approached me to have Mr. Davis act for him as counsel in that appeal.

The Court: You are objecting to that evidence, Mr. Mac Neill?

Mr. MacNeill: Yes, my lord.

The Court: Well, subject to your objection as to the admissibility and I suppose there will be no objection to Mr. MacNeill cross-examining on it.

Mr. Farris: Oh, no.

The Court: Very well. You might cross-examine on it now, Mr. MacNeill.

Mr. MacNeill: Q. And Mr. Lindeborg was up in your office at the time? A. The way the thing came up—

Q. Well, was he? Was Mr. Lindeborg up in your office discussing this Harris case with you at the time? A. At what time are you questioning me on? With regard to getting Mr. Davis to act for him?

Q. Well, before you got Mr. Davis to act for him, Mr. Lindeborg was talking to you about this Harris case and he was stating that he wasn't liable in the matter? A. Well, that was the general discussion.

Q. And you were a solicitor and you had known him for a long time and he asked you your opinion about the matter? A. No, he didn't ask me my opinion.

Q. Did you give an opinion? A. I don't think I did. I didn't know enough about it at the time.

Q. Well, on his statement—on his statement of the facts to you— A. No, I didn't give him any opinion.

Q. Well, I don't mean a formal opinion? A. No, I didn't even express an opinion, Mr. MacNeill. It was just a matter of conversation and the way it came out was this: As I say, I had had frequent interviews with Mr. Lindeborg on behalf of the people in Tacoma about getting extensions of time and these conversations very often occurred in the Hotel Vancouver and the Hotel Georgia and at those meetings, or after them, this conversation would come up about this Harris case and I didn't express any opinion on it.

Q. Was that before the Harris case was tried? A. That was before the Supreme Court judgment.

Q. Well, now, isn't this the fact, that Mr. Lindeborg mentioned to you that he was dissatisfied with Mr. Macdonald acting for him in this matter and that he wanted to get Mr. Davis? A. There is no question that he mentioned that after the result of the Supreme Court judgment.

Q. Well, didn't he do it before that time—before the trial? A. No, I cannot recall that he did, Mr. MacNeill.

Q. You wouldn't say that he didn't—he was asking—or wishing to enlist the services of Mr. Davis? A. No, he never approached the matter with that idea in his mind at all, not prior to the Supreme Court judgment.

Q. Well, after the Supreme Court judgment he did then ask you to act for him? A. The way it came about was that he had been making his deposits—or I had been making a deposit to a man by the name of Baird who was escrow manager for the Bank of Commerce and who had been a great friend of Dan Lindeborg for years and he had been in the bank at Stewart. And Baird 'phoned him about this judgment and said it was a terrible thing for Dan to get that judgment against him and he said to Dan that he had better get Mr. E. P. Davis to act for him; and the result was the next day Mr. Lindeborg came over to me and asked me if I would get Mr. Davis to conduct his appeal for him and I said I would do the best I could. And I went and saw Mr. Davis and he took the appeal; but at no time were we the solicitors for Mr. Lindeborg. I never acted as solicitor for him, but I acted as a go-between to get Mr. Davis to take his case for him.

Q. And you were at that time a member of Davis & Company? A. Yes.

Q. And you firm rendered their accounts for all Mr. Davis' services and for all yours in that matter, did it not? A. Well, I didn't make any charge.

Q. Well, your firm did? A. Mr. Davis made a charge for his counsel fees.

Q. And Lindeborg left with you a considerable sum of money in connection with this litigation, didn't he? A. No. He went up to Nelson. I thought it was after the Supreme Court judgment—but Mr. Lindeborg was away for some time—about a month or six weeks probably and he was up in Nelson so he arranged with the bank that I should have—I think it was a drawing allowance of $3500 if I needed it for the purpose of this litigation—

Q. Yes? A. —The idea being, that I hoped on the appeal we might get a new trial and I had heard of several witnesses who could have been called at the trial, who would have had a considerable effect, I thought, on the whole matter; and one of them, I

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understood, was at that time in California and it might take some money to get him up here in case of a new trial, so that was the arrangement Mr. Lindeborg made with me. I was acting more as a friend than a solicitor and Mr. Davis at that time never had anything to do with that matter. It was my own personal dealing with him.

Q. Well, at any rate, as a result of certain legal matters he asked you to arrange this for him and you had this money? A. Yes.

Q. Which you held at your discretion? A. Yes.

Q. I see. Didn't you write letters to him also advising him as to the progress of the appeal, and the result? A. Well, I am not sure if we did not write letters to him telling him what happened, but if Mr. Davis took the appeal he certainly would have done so.

Q. Well, didn't you personally write letters to him? A. I probably did. I cannot recollect it, but I probably did. I would have been very happy to write to him under the circumstances.

Q. In connection with this—I show you a letter dated April 11th. Is that your letter? A. Yes. It isn't my signature but it is my letter and it was signed in the office.

Q. It is dated October 11th, 1930, and addressed to Daniel Lindeborg, Esq., 3308-37th Avenue West, Vancouver, B.C. (Reading same). I had better put that in. Have you any objection?

(LETTER MARKED EXHIBIT No. 48).

Mr. Farris: Do you suggest that that has a retroactive effect?

Mr. Pratt: It shows the relationship.

Mr. MacNeill: And there is a telegram attached from your agent Mr. Newcombe? A. I don't know anything about that.

Mr. MacNeill: We had better put it in at any rate. It can be attached to this letter.

The Witness: I think I recollect that, but I cannot prove it.

Mr. MacNeill: This is a telegram dated October 10th, 1930, to E. P. Davis, K.C., (Reading same).

Mr. Farris: You will be getting those Ottawa lawyers in wrong.

Mr. MacNeill: All right. Let them take the effect of it.

Mr. MacNeil: Q. Were you not familiar with Harris' claim as to his interest in the Big Missouri, and didn't you discuss the same frequently with Mr. Lindeborg? A. At what time, Mr. MacNeill?

Q. Both before and after the accident? A. Well, as I tell you. I had so many meetings with Mr. Lindeborg I naturally was interested in the title to those mining claims, and I went to a great deal of care in seeing that the title was protected for the people for whom I was acting.

Q. This is in regard to the Harris claim? A. I didn't know about the Harris claim in connection with that property. All I knew about the Harris claim was some old man who claimed to have some interest with the Lindeborgs in those properties and it never became in any way definite in my mind as to what the claim was until after the litigation started. In fact I think I talked to Mr. Rex Macdonald about it, because he was the man who was acting for Mr. Lindeborg, and I was acting for the Big Missouri Company, but I cannot give you any definite time when I first heard of it.

Q. There is no question about all these bills. I show you a bill to D. Lindeborg from Davis & Company? A. That is correct.

Q. This is an account to D. Lindeborg, in account with E. P. Davis & Company: "October 9th, 1929, re Harris v. Lindeborg, et al. Counsel fee to Mr. Davis on argument of appeal on 7th, 8th and 9th of October, when action dismissed as against you and judgment reserved as against Stevenson and Proudfoot estates, including all interviews with you and Mr. R. M. Macdonald and advising in connection with matter: $1500." And there is a credit on that of $750. And the balance, I suppose, was ultimately paid? A. It was all paid.

Q. It was all paid by Mr. Lindeborg.

(STATEMENT MARKED EXHIBIT No. 49)

Q. Now, I show you another statement of March 12th, 1931? A. Yes, that is correct. That followed—at Mr. Pratt's request I prepared a copy of our account that was sent out and that is the account.

Mr. Pratt: Of professional services. A. Yes.

Mr. MacNeill: Q. This is an account for professional services: "Estate of Dan Lindeborg in account with E. P. Davis & Company, from January 17th, 1930 to December 31st, totalling $128.44."

The Court: Let me see that?

(STATEMENT MARKED EXHIBIT No. 50).

Mr. MacNeill: And have you any more of them? A. Mr. MacNeill, I haven't any interest in giving evidence one way or another in this case—

Q. I haven't asked you that? A. I am here under subpoena and I don't care if I give evidence or not, but I do know certain things and that is why I have been called and I told your Mr. Pratt all that I knew about the matter.

Q. This isn't responsive to any question I have asked you, Mr. Ralston, and you know that isn't proper on your part? A. But you know that Mr. Rex Macdonald was his solicitor all the way through and when he went to California the question of

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digging up the security that Harris put up came to my notice from Mr. Macdonald's office. And he was away at the time and he had no assistant there, so I took charge of it for him and I sent him the particulars of it.

Mr. Pratt: And you acted as his solicitor? A. No, I did not. It was as Mr. Macdonald's agent—and I sent the matter over to Mr. Bullock-Webster in Victoria.

Mr. MacNeill: That was his agent? A. Yes, but we never paid Mr. Bullock-Webster anything for his services because they were all charged up to Mr. Macdonald.

Q. But still you were really acting in Mr. Lindeborg's interest in connection with that and you had a free hand to utilize that $3500 that he left on deposit with you as you liked, in Mr. Lindeborg's interest? A. Absolutely.

The Court: And about when did you get that? A. I will tell your lordship—it was after the Supreme Court judgment and I never got that money as solicitor at all. I got it as a friend of Dan Lindeborg's. There is no question about that.

The Court: That is in connection with the Supreme Court judgment — now, if you please, Mr. Farris, I want to know the dates of the conversations that you wish to adduce evidence on.

Mr. Farris: I suggest, my lord, that we take it piece meal and I will first ask the question about the time that there seems to be no doubt about, that he was solicitor.

The Court: And Mr. MacNeill can be taken to be objecting each time and then I will consider the matter later.

Mr. MacNeill: Yes, well, has your lordship ruled on my objection?

The Court: No, I am trying first to get the time of each conversation and will then rule on each one, and if there seems to me to be any difference—

Mr. Farris: Q. Did you have any conversation with Mr. Daniel Lindeborg relative to the subject matter under consideration prior to the time that he asked you to secure Mr. E. P. Davis' services? A. I cannot say that I had any definite conversation with Mr. Dan Lindeborg as to the question as to whether or not they were going to take the gains and losses proportionately prior to the time of that Supreme Court judgment. I cannot say that positively.

Q. I see. A. But I don't think it was ever really pertinent in my mind prior to that.

Q. Did you have any conversation with him about that after the date of the Supreme Court judgment?

Mr. MacNeill: I object to that.

Mr. Farris: I am not asking what the conversation was—I am not asking that, you understand.

The Witness: I beg your pardon? I didn't get your question. Will you read the question?

The Court: And do not give any answer until I have ruled on it.

The Witness: I am not going to, my lord.

Mr. Farris: Q. I asked you if you had any conversations with him on that subject matter after the date of the Supreme Court judgment? A. Yes.

Q. Were those conversations in relation to any information he was giving to you in connection with your duties of acting for him in the case? A. Well, that is a matter of opinion, but I did not think at the time that I was solicitor for Lindeborg.

Q. But that isn't what I am asking you, Mr. Ralston. I am asking you if for instance—don't answer the question until his lordship rules on it—but I ask you this question again definitely: Did he discuss with you at any time after the date of the Supreme Court judgment the arrangement he had as to—the arrangement he had with his associates about how the judgment and the costs were to be borne.

Mr. MacNeill: Well, now, this is the time for my objection.

Mr. Farris: I am not asking what that conversation is.

The Witness: I most certainly had several conversations with Mr. Lindeborg on that subject.

Mr. Farris: All right.

Q. Don't answer what they were. Were those conversations, or were those statements made by him as part of what material you were getting from him to assist in your acting for him or rather Mr. Davis acting for him in the case. A. Now, there are two positions to be considered there—at the time of the Supreme Court judgment of $100,000 against Lindeborg and his associates, it was discussed then; and after Mr. Davis succeeded in having the appeal—or at least in having the judgment set aside as to a proportion of the $100,000 against Mr. Lindeborg, the matter became pertinent again and it was discussed then and at that time I raised the question myself.

Q. All right. Now, let us take the first occasion. When do you say the first occasion was? A. The first occasion would be after we were—after the Supreme Court judgment.

Q. And under what circumstances did it come up? Be careful, of course, to refrain from stating what was said? A. Oh, I met him outside the office on Pender Street, near Seymour, and I am sure that this particular interview was right after the judgment and Mr. William Sloan was present.

Q. Yes? A. And we went into a Pender Street beer parlor which was right next door and had a glass of beer in the evening about 5:30, and at that time that point was raised.

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Q. Now, were you seeking instructions for acting for him at that time? A. No, not at all. He came to me—

Mr. MacNeill: There you are—

Mr. Farris: Q. Was he giving you instructions about the case? A. He wanted me to get Mr. Davis to act for him.

Q. Well, did this question that you were talking about have any relation to this question we are discussing now? A. No, I don't consider it did. It was an outside matter altogether.

Mr. Farris: I consider I am entitled to an answer, my lord, to the question I am asking. I submit I am entitled to answer from Mr. Ralston and that the question of privilege does not apply to that occasion.

Mr. MacNeill: I submit that the very last answer of Mr. Ralston—

The Court: Just a moment—have you any thing further to say, Mr. Farris?

Mr. Farris: Yes, my lord. Do you want my authorities on the question? My submission is—

The Court: This was after the deceased had asked the witness about getting Mr. E. P. Davis to act for him.

Mr. Farris: Yes, my lord. My submission is this: It is twofold: First, that that did not constitute Mr. Ralston as his solicitor. That is my first submission: That all he was doing was seeing if his firm would act in that capacity, and until that time was agreed to, the relationship did not arise at all.

The Court: Yes, but someone might come to a member of the firm and discuss the matter with him and he was talking to a solicitor who was a member of the firm of E. P. Davis & Company; and it might probably be said that he was discussing the matter as solicitor before Mr. E. P. Davis was retained as counsel. But, however, I will hear you.

Mr. Farris: My further submission is in any event this statement was not something that had any relationship to what he was obtaining Mr. E. P. Davis for—Mr. E. P. Davis was to carry on the appeal and this was just some casual conversation in a beer parlor with Mr. Lindeborg who was on even terms in the case with his associates.

The Court: If you draw a fine distinction there it might leave a client in an awkward position—if you say at one time he was talking to him as solicitor and another time he was not talking to him as solicitor.

Mr. Farris: At all events, if he was giving him the information about those things that were necessary for a solicitor to know—there are cases on that.

The Court: There might be a point of distinction there and I will hear you on it.

Mr. Farris: I am referring your lordship to 22 English Empire Digest at page 410. Now, this is the first—page 410 paragraph 4189. (Reading same.) And that is an old case—I have it here —17 State Trials.

The Court: Well, might it not be suggested that that would be entirely on another matter, where he could draw a clear distinction. I assume he is talking something about the Harris, Lindeborg matter.

Mr. Farris: Yes, but not about that phase of the matter about which he was to get Mr. Davis to act.

The Court: I am trying to follow the distinction.

Mr. Farris: I will go this far and say that I think the court would scrutinize the distinction a little more carefully when it happened to be the same subject matter than if it were about an entirely different subject, but as long as there is a distinction that appears after a careful scrutiny, it seems to me the principle to be applied is no different here. Now, there is a case—I have only seen it from the digest, because it wasn't in the library and it seems to be a very long case. And it is too long to endeavor to extract a point out of it for the moment. I didn't realize it was so long.

The Court: Assuming for the moment that I might anticipate the nature of the evidence and that he begins to talk about the subject matter of retaining Mr. E. P. Davis and I assume from what the witness says that something was said about the matter—some matter that might affect the issue here for instance—

Mr. Farris: If it would appear that there was something disclosed incidental to the engagement of Mr. Davis, yes.

The Court: Well, it might—one might suggest it might be.

Mr. Farris: Very well, but I think one would have to hear the conversation to suggest that.

The Court: I am anticipating something—

Mr. Farris: I do not see any reason why the court should not take that statement because if there were a jury here the jury would be excluded from any argument on it, but in the absence of a jury I see no reason why such a statement should not be given and if it has no deleterious effect on the client other than the fact—

The Court: If I were to make a ruling anticipating in a general way the conversation—

Mr. Farris: But if it should turn out in the last analysis it had no bearing on it there is no reason why it should not be given.

The Court: I think your question that you put to Mr. Ralston gives me a good idea or a sufficient idea.

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Mr. Farris: The next case I have in my hands is the case of *Williams vs. Moody,* and I think that is in the Empire Digest, too, and the Digest says this at paragraph 4193. (Reading same.)

The Court: You didn't give me the citation there.

Mr. Farris: Well, this is 20 Law Times, Old Series, page 258 and I would cite to your lordship an anterior case—*Rudd* vs. *Frank.* The year is 1889, volume 17 O. R., at page 758, and the head note is this. (Reading same.) And the judgment of Mr. Justice Street at page 761. (Reading.)

And so I say if this evidence was a preliminary to the engagement or part of the engagement of Mr. Davis to act as counsel in this case, then, of course it would be privileged.

And that is all that it says on that. And then Falconbridge, J., says. (Reading same.) I think that is a much stronger case there as far as the solicitor knew the man was actually instructing on this question.

Mr. MacNeill: Let me see that case, please?

Mr. Farris: Now, Mr. Hall has marked for me some parts indicating where I should read—the Annersley case—

Mr. Pratt: Did I get that citation?

Mr. Farris: It is paragraph 4139, I am reading from page 1205. It is 1206—State Trials. I will just let it stand at that on the notes, because I do not think that adds anything to what I have already said on it.

Mr. MacNeill: I submit, my lord, that these cases that my learned friend refers to are not applicable to the present situation. Here is a man who undoubtedly was desirous of having the benefit of Mr. Ralston's partner, Davis & Company, advice and he speaks to one—and in that way he speaks to them all, and when my friend says nothing arose from it, I submit something did because they went on and Mr. Davis undertook the brief for Mr. Lindeborg and business did arise from that and that was manifestly what Lindeborg had in mind. He was in terrible trouble there at that time. He had just come through an unsuccessful lawsuit and he was naturally looking for counsel's advice and he would tell him his professional secret and whether there was another man there or not at the time, I don't know. We can deal with that when it comes up. But I submit, as Mr. Ralston has put it here, "He came to me wanting Mr. Davis to act for him—" now, that is the matter we are dealing with—and he did act for him and that, I submit, is the controlling situation here on which your lordship should exclude the evidence.

The Court: In my view, I do not think the evidence should be given, having been made to him under the circumstances as Mr. Lindeborg had come to him apparently to get him to get a member of his firm to act for him. (Witness aside.)

Mr. Farris: I will call Mr. Sloan.

WILLIAM SLOAN, a witness called on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

Q. Mr. Sloan, what is your occupation? A., I am a Provincial Assayer.

Q. Yes. Did you know the late Daniel Lindeborg. A. Yes.

Q. How long did you know him? A. Since 1910.

Q. Yes. Do you recollect him starting the Harris action when Lindeborg came back from Sweden? A. Yes.

Q. And did you have occasion, or did you see him from time to time at that time? A. I saw him on or about the 14th of September, 1928.

Q. Yes. Where did you see him then? A. I saw him down on Pender Street.

Q. Yes. Did you see him—were you ever at his house? A. Yes.

Q. Did you see him there when he was sick before he went to the hospital? A. I saw him the morning that he took sick in 1928—that was about the 15th of September.

Q. When he took sick? A. Yes.

Q. I see.

Mr. MacNeill: What date was it? A. About the 15th of September.

The Court: Do you mean the date he went to the hospital? A. No, he didn't go to the hospital.

Mr. Farris: Q. Do you know Mr. Ralston, Mr. James Ralston? A. Yes.

Q. Did you ever have any conversations with Lindeborg in the presence of Ralston? A. Yes.

Q. Anything about the Harris action? A. Yes.

Q. Have you any recollection of when that would be? A. Some time about the end of June or the beginning of July in 1929.

Q. Yes, where was that conversation? A. That was in a Pender Street beer parlor.

Mr. MacNeill: Well, now, I object to this conversation. Here was a man who was having an interview with his solicitor—Mr. Sloan—

Mr. Farris: Drinking beer in a beer parlor.

Mr. MacNeill: Yes, that is all right. You can discuss lawsuits in a beer parlor as well as anywhere else and the relation of solicitor and client is existent there and at any time—

The Court: I understood you to say, for example, when you were discussing the question of the admissibility of Mr. Mac-

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donald's evidence—I may have misunderstood you—but you said it might be proved otherwise what was said. Now, to what extent, for example, might it be said that a solicitor—in this case, Mr. Ralston—could give evidence—say with the consent of the deceased.

Mr. MacNeill: Or the executors in this case.

The Court: Yes, I meant the executors—but if he were not deceased—

Mr. MacNeill: Well, here is the position. If the man was present and heard the conversation between Lindeborg and Ralston—

The Court: Of course, Mr. Sloan has just said—he said the conversation was between himself and Mr. Lindeborg—that is the way this witness puts it—in the presence of Mr. Ralston.

Mr. MacNeill: Well, that seems unlikely. I submit here that this man was evidently consulting his solicitor there—a man who was his legal adviser and this witness is not a legal adviser. He is an assayer and because he happened to overhear some conversation there in which he had no interest at all but in which the solicitor would be interested, I submit that is barred.

The Court: Well, what authority have you along that line? Now, supposing the solicitor is being called—

Mr. MacNeill: No, but this was a man who was present when the solicitor and client were consulted and he was not a party to it, but because he happened to be present there—and they may have gone in together—they may have gone into the beer parlor together—that does not matter—there is the situation. It is still a private and confidential conversation between Mr. Lindeborg and Mr. Ralston and because this man happens to be there joining him in a drink of beer, I submit he should not be privileged to give that conversation because this man overhears it.

The Court: Have you any authority showing where a man overhears a conversation he cannot give it?

Mr. MacNeill: I never heard a word of this until this morning so we are all in the dark. Not a single idea came to us about this for us to look up any authorities or anything else.

The Court: Well, I was thinking of what you said with the other witness—the conversation might be proved otherwise but not through a solicitor.

Mr. MacNeill: There might be some communication concerning it—for instance, he might write a letter, but anyway your lordship overruled me in my objection there in the case yesterday.

The Court: That is, you would not concede the principle—it is just a matter of whether a solicitor cannot be heard to give

the evidence and your submission goes further—that any person overhearing it cannot give it.

Mr. MacNeill: Any person overhearing the conversation cannot give it. And of course your lordship asked me for authorities and I heard about this just when your lordship did. That was the very first and it would hardly be possible for me to be prepared to argue it. I never heard or saw this witness before or heard his name, and had no communication or interview with him of any kind. He is a complete stranger to me.

Mr. Farris: Why should you have?

Mr. MacNeill: His lordship asked me for my authority.

Mr. Farris: I have just been looking for some authority and I find this note on the question which seems to settle the principle very well. It is at page 414 of Volume 22.

The Court: That is of the Empire Digest?

Mr. Farris: Yes, and it is a note I should have given you—page 415—under 2425 I—at the foot note. (Reading.)

The Court: What about the other part, is there any difference at all? Perhaps I may be entirely wrong in thinking there would be any difference.

Mr. Farris: This goes far enough to allow Mr. Ralston's evidence on it if I had had it when he was giving evidence. Now, I could understand that if the late Mr. Lindeborg had gone up into Mr. Ralston's private office and Mr. Sloan or anyone else had listened in at the keyhole or in some way overheard what was a private conversation, then the court would not allow the evidence because it would be violating the secrecy that the party himself intended to preserve, but when he goes into an open place —a meeting place like a beer parlor with these two men—who were there in a friendly way, without any suggestion of secrecy—

The Court: That is just what I wish to discuss with you. I am firmly of the opinion still that Mr. Ralston cannot be heard to say what took place there without the consent of his client or the representatives of his client. But is there a distinction, for example? A solicitor is sometimes asked—has he the consent of his client. Well, now, is it permitted, in the case of Mr. Sloan, that he would have to have the consent also of the client—or does it apply to him at all?

Mr. Farris: I cannot see how it applies to him at all except in the way I have illustrated. I think the court will exclude it—

The Court: If it were behind closed doors?

Mr. Farris: Yes, and if it were a matter of eavesdropping evidence the court would say, "No, we won't admit it, it is against public policy—" but if the man himself has seen fit to say this to all the world because all the world is privileged to be there—everyone goes there and it could be heard by others other than

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the solicitor, how can he say, "You cannot say that, because my solicitor was listening to it as well as you."

The Court: I may be completely wrong on the principle that is applicable here, but one might visualize a position where the late Mr. Lindeborg, or Mr. Sloan or whoever was there who might be old and familiar friends and he would say anything in front of that friend and the other man who was his solicitor might be an entire stranger to him except as solicitor and the solicitor perhaps should not be heard to give the conversation—as I have ruled—but it may be that there would be no privilege attached so far as the admissibility of the evidence is concerned from the other party, but I may be wrong in applying that principle.

Mr. Farris: I cannot put my mind to any principle by which Mr. Sloan's mouth is tied, for instance.

The Court: Unless as you say he heard it when it was being held by the client as it might be said to be behind closed doors.

Mr. Farris: And that would be on the ground of privilege, that we would not violate a privilege, but this is not violating a privilege.

The Court: It might be something he said in the presence of friends. Can it be then said that the friend cannot give that evidence without the consent of that man—who is not his client, but who is his friend?

Mr. Farris: But what fiduciary relationship is there shown here to close Mr. Sloan's mouth. The thing is entirely different.

The Court: It might be that the principle applies to the conversation and not to the individual.

Mr. Farris: It is the parties whose mouths are closed and not the conversation.

The Court: According to my ruling, the solicitor cannot said to be heard and neither can the other man.

Mr. Farris: Now, we are jumping ahead, because Mr. Lindeborg talked to Mr. Sloan. I would like to ask Mr. Sloan that question.

The Court: I can point out that the witness did say that—I have that already.

The Witness: I was called into the beer parlor.

Mr. Farris: Conversations with Mr. Sloan—

The Court: I notice the witness said, "I had a conversation with Mr. Lindeborg in the presence of Mr. Ralston." That is the way I have it.

Mr. Farris: Q. Did you have a conversation there at any other time without the presence of Mr. Ralston, with Mr. Lindeborg? A. Yes.

Q. And what were the conversations when Mr. Ralston was not present? A. A conversation took place about the 14th or

15th of September, 1928, with respect to a commission that was payable.

Mr. MacNeill: The 14th or 15th of what?

The Witness: Of September, 1928—with respect to a commission that was payable from the sale of the Big Missouri property to the Big Missouri Company by Lindeborg and his partners. I was acting for a man named Jamieson who had died on the 2nd of September, and I went to Lindeborg and asked him if he would protect the widow Mrs. Jamieson with respect to this commission which was due on the sale—or from the sale of the property. He said, "Yes, I will protect her in every way I can." He said, "I am acting for the whole bunch of us and you can depend upon it I will take care of Mrs. Jamieson."

Mr. Farris: Yes. A. And I had several other conversations with him at different times every time I would meet Dan—any time I would discuss that part of the business as well as the Harris case. I discussed the Harris case with him several times.

Q. Now, with relation to the Harris case particularly, did you have any conversation with him about his relationship to his associates about it? A. Yes, I had a conversation some time in the spring of 1929—I would say it was in April.

Q. Yes? A. About April—I had been called in by Billy Martin and Pat Sinnott who was acting for Harris and they showed me—

Mr. MacNeill: Just a moment, I object to that.

Mr. Farris: Q. Well, you cannot tell what Harris and Martin and Sinnott said.

Mr. MacNeill: I know but he cannot say—in the presence of these men what they were doing—

Mr. Farris: I am not asking him about that conversation.

Mr. MacNeill: You are not asking for that conversation?

Mr. Farris: No, not any conversation in the presence of Sinnott—

Mr. MacNeill: If Sinnott and Martin were only there for the purpose of discussing the settlement—that is why I object to this—and this man was—

The Witness: It was not a discussion.

Mr. Farris: Apparently my learned friend's position is anyone who talks to a lawyer, his mouth is sealed thereafter. It would be a good rule probably if it were so held.

Mr. MacNeill: I hope it will be a good rule in this.

Q. Martin was what? A. He was handling the case for Mr. Lindeborg.

Q. And Sinnott was what? A. He was acting for Harris.

Q. And what were Harris and Sinnott doing there—or Martin, rather? A. Martin?

Q. Martin? A. He had a transcript of the examination for discovery in this action against Lindeborg.

Q. But this was after the judgment had been given against Lindeborg? A. No, this was before.

Q. Well—

Mr. Farris: Now, after you had this conversation—you say you had a conversation with Lindeborg? A. Yes.

Q. What was it? A. I told him when I read this transcript of the evidence—of the examination for discovery that I thought he was going to lose the case—and I asked him that in that case what would happen to this commission that I was interested in on behalf of Mrs. Jamieson and he said, "We are going to fight this—"

Mr. MacNeill: I object to this talk about the Jamieson commission. There is nothing about that here.

The Court: He is giving the circumstances of how he came to talk to him about it. Very well, you can go on.

The Witness: He said, "If we lose this case we are going to fight it and will go to the Appeal Court and we are all in this together. I am acting for my partners and have always acted for them, and anything I do will be all right with them." And that referred to both this case, and the commission, because the two things were tied up together.

Mr. Farris: Q. Did you have any other conversation with him? A. That conversation that took place in the Pender beer parlor.

Q. Now, who was he talking to at that time—or was he talking to you—I will put it that way—at any time? A. Yes.

Mr. MacNeill: What was the question?

Mr. Farris: Don't answer this question—I will ask you to state—what conversation transpired between you and Lindeborg and the statement that he made to you?

Mr. MacNeill: Now, was this at the interview when Mr. Ralston was present?

The Court: Witness, just wait a moment.

Mr. MacNeill: Q. Was Mr. Ralston there? A. Yes.

Mr. MacNeill: Well, now, that just comes back to the same question.

Mr. Farris: I don't see it.

The Court: Well, I think counsel will appreciate the difficulty which I am either making for myself or that I have. Is there any distinction as to what the solicitor can be heard to say and between what the witness under these circumstances, Mr. Sloan, can be heard to say, when Mr. Sloan says that Mr. Lindeborg was talking to him in the presence of the solicitor. I cannot see—

Mr. MacNeill: Well, it is pretty hard to believe that this man would go there and talk to a layman about his case when he had his own solicitor there.

Mr. Farris: He wasn't his own solicitor and they were just down in the beer parlor drinking beer.

Mr. MacNeill: If that was all they were doing, there would be no harm done, but you say he was talking to this man about his case—my learned friend says it was not a case of eavesdropping, but there cannot be two different rules—if the man was listening in at a key hole he says it would be different—but there cannot be two rules.

The Court: I thought the distinction might be along this line as I have suggested before: Mr. Lindeborg might have been quite willing to say anything as in this case before Mr. Sloan who was his friend, and he might have the idea that so far as Mr. Ralston is concerned—or his solicitor, that that would be confidential or privileged so far as Ralston was concerned and that he could not be heard to give evidence about it.

Mr. MacNeill: Yes, and now then we are faced with this matter.

The Court: You see I tried to follow you in the other discussion—although you say, Mr. MacNeill, I have disposed of that; but I understood you to say although Mr. Macdonald might not be permitted to testify about it, it might be proved in another way, but you do not concede that a person present at the conversation can tell about it.

Mr. MacNeill: We cannot ourselves from this phase of it—that this conversation was in the presence of Mr. Ralston, the solicitor. There may be other ways of proving it, but my friend has not found that one yet. The other way is Mr. Lindeborg might have written a letter to these different people and told them about it, but he didn't. There is nothing of that at all. That is one of the ways it could be admissible, but the present circumstances, I submit, are not applicable.

Mr. Farris: I would suggest that I call Mrs. McEwan now and let this witness stand down. I am like Mr. MacNeill—I did not know this witness was available until I saw him here in court, but he was brought here at my request and I did not have an opportunity to see him before he was called.

The Court: I understood it was from the solicitor's mouth when it was offered—

Mr. Farris: I don't want the evidence in if it is going to imperil my case and on the other hand I wish it to go in if it cannot be objected to. I will call Mrs. McEwan now.

Mr. MacNeill: If you will exclude him—

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The Court: Yes, Mr. Sloan will be good enough to remain outside.

(Witness aside.)

LAURA McEWAN, the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

Q. Mrs. McEwan, you are the plaintiff in this action? A. Yes.

Q. Your home is in Nelson? A. Yes.

Q. And has been for a good many years? A. Yes—ten— well, more than ten years steadily now.

Q. How long have you known Daniel Lindeborg? A. Well, through correspondence, I had known him ever since my brother was killed and had heard from him—well, since 1910.

Q. Your brother was killed at Vimy Ridge? A. Yes.

Q. That was in 1917? A. Yes, April 9th.

Q. Did you have any conversations with him in regard to this Harris case and about the general subject matter of costs and who would pay the judgment.

Mr. MacNeill: Well, I must object to that.

Mr. Farris: I am merely directing the topic to her.

Mr. MacNeill: I must object to that statement, as to conversations she had with her deceased brother.

Mr. Farris: No, with Lindeborg.

Mr. MacNeill: I thought you said her brother. All right.

Mr. Farris: Q. Yes? A. Well, it was more like a mutual understanding.

Q. Well, when was the conversation? A. Well, it was at the Hume Hotel—you mean after the action had started?

Q. Yes? A. After the Supreme Court action?

Q. Yes? A. It was in the Hume Hotel.

Q. That is in Nelson? A. Yes.

Q. And about when was it? A. About July, 1929.

Mr. Farris: Q. What was the substance of what was said there? A. It was about—

Mr. MacNeill: Give the exact words.

Mr. Farris: Q. Give it as near as possible—as you can—you don't have to give it if you can't? A. Well, it is a long time ago and a lot was said, but the substance of it was that we stood together—no matter which way it went we were all together in it, right through to the end of it, and I wasn't to worry.

Mr. Farris: These are a group of letters, Mr. MacNeill, that I have extracted from my files, I think I will let Mrs. McEwan see them.

Mr. MacNeill: Will you take them one by one?

Mr. Farris: I thought I could go through them and identify the names. It takes so long the other way, but I will read them one by one when I put them in.

Mr. MacNeill: That is all right.

Mr. Farris: Q. These letters you are producing are all the letters you received from Mr. Lindeborg, are they? A. Yes.

Q. You know his signature? A. Yes.

Q. They are his letters? A. Yes.

Q. This is a different letter. The first letter is—Dan Lindeborg to Mrs. McEwan—August 1st, 1918. These are all letters Lindeborg to Mrs. McEwan.

Mr. MacNeill: What is the date of that one, please?

Mr. Farris: August 1st, 1918.

(LETTER MARKED EXHIBIT No. 51.)

The next is August 12th, 1920.

(LETTER MARKED EXHIBIT No. 52.)

The next is May 14th, 1920.

(LETTER MARKED EXHIBIT No. 53.)

August 16th, 1924.

(LETTER MARKED EXHIBIT No. 54.)

October 28th, 1924.

(LETTER MARKED EXHIBIT No. 55.)

July 6th, 1929.

(LETTER MARKED EXHIBIT No. 56.)

This one is out of order, because we had it wrongly in our brief. It is dated July 12th, 1919.

(LETTER MARKED EXHIBIT No. 57.)

Mr. MacNeill: I thought you said the others were 1929?

Mr. Farris: This is out of order. January 25th, 1930.

(LETTER MARKED EXHIBIT No. 58.)

April 7th, 1930.

(LETTER MARKED EXHIBIT No. 59.)

Mr. Farris: And I suppose you will admit this, will you?

Mr. MacNeill: Oh, yes, yes, certainly. It wasn't really written by Mr. Lindeborg, but we will let it go at that.

Mr. Farris: December 25th, 1930—a telegram. This is the receiver's copy.

"Decision fifty against us not many details more later."

That would be after the Supreme Court judgment.

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(TELEGRAM MARKED EXHIBIT No. 60.)

Q. Now, those letters—I have marked them, and there is only an extract in each letter I think is material. I don't know whether my learned friend wants to wade through them or not.

Mr. MacNeill: Where will you start from?

Mr. Farris: You can take the original letter and I will read from my brief.

Mr. MacNeill: All right, but give us time to turn them up.

Mr. Farris: The first letter is August 1st, 1918. There is the third paragraph—as regards the assessment work.

Mr. Pratt: I don't think we have that letter.

Mr. MacNeill: Let me see that.

Mr. Farris: Give me the original. Here it is.

Mr. Pratt: We have it. I am sorry.

Mr. MacNeill: What exhibit number is that?

The Registrar: Exhibit 51.

The Court: Very well.

Mr. Farris: "As regards the assessment work . . . it would "be an endless job without results."

That is all I want to refer to there. And the next letter is August 12th.

The Court: The next one will be 57, if you are taking it in sequence.

Mr. Farris: August 12th.

Mr. MacNeill: We haven't got that one at all. Have you put in your affidavit of documents?

Mr. Farris: I suppose so. They are all in our file together. It is the last paragraph—a long paragraph. This was written from Hyder, Alaska, to Mrs. McEwan (referring to Exhibit 52). "In regard to the letter from Harris—"

Mr. MacNeill: Will you wait a moment until I run down this. That is all right.

Mr. Farris: "In regard to the letter from Harris . . . from all angles."

The Registrar: That is Exhibit 52. And it is the wrong date, August 12th, 1920.

The Court: Yes, that is what I have.

Mr. Farris: That is what I said.

The Court: Now, Mr. Farris, if you don't mind, would you be good enough to read the letter of July 12th, 1919, which is Exhibit 57.

Mr. Farris: What date?

The Court: July 12th, 1919—Exhibit 57—that is the next letter, is it not?

Mr. Farris: I cannot find it in my brief in that way. But

it is in typewriting—it is all right. I will read it all. It isn't very long. (Reads Exhibit 57.)

"Your letter of June 5th . . . Things look very promis-
"ing for the future."

And then he goes on and I do not think there is anything else I need read in that letter.

Mr. Pratt: Just that last paragraph, where he encloses a statement showing work was done to pay his share. "Am enclosing a statement as requested."

Mr. Farris: "As far as I can now recollect you only owe
"me for your share of the assessment work on five fractions
"and one claim—six in all—$600, your share of this is one
"quarter or $150, those claims will be Crown granted this
"season."

Mr. Pratt: Thanks.

Mr. Farris: The next letter is July 6th, 1929, from Hyder, Alaska.

Mr. MacNeill: What year?

Mr. Farris: 1921.

The Court: Well, I have several before that. May 14th, 1920, Exhibit 53—let me see Exhibit 53—yes, May 14th, 1920.

Mr. Farris: What exhibit is that?

The Court: Exhibit 53.

Mr. Farris: (Reading same.) I don't know why this letter should go in. It wasn't on that list. But it is harmless, but I do not think it has any materiality.

Mr. MacNeill: What exhibit is that?

Mr. Farris: Exhibit 53.

The Court: Now, Mr. Farris, you spoke of something in 1921, did you not?

Mr. Farris: Yes, my lord.

The Court: I have none in 1921. What number is that?

Mr. MacNeill: There were none at that date in my learned friend's list as far as I know.

Mr. Pratt: No, there was none in 1921.

Mr. Farris: Let me see that list.

The Court: Well, perhaps we might adjourn now and the matter can be looked up.

(COURT ADJOURNED AT 1 P.M. UNTIL 2.15 P.M.)

2.15 P.M. COURT RESUMED PURSUANT TO ADJOURNMENT.)

LAURA McEWAN resumes the stand.

Mr. Farris: This is a letter I thought was read. It has not

been put in. It is another letter from Lindeborg dated July 6th, 1921.

(LETTER REFERRED TO MARKED EXHIBIT No. 61.)

All I want to do is to read the second paragraph.

"In regard to the work and worry . . . at the same time outspoken."

The next letter is August 16th, 1924. That is Exhibit 54. This is from Vancouver. Mr. Lindeborg is now in Vancouver. "Enclosed you will find copy of . . . often times bad feelings." That is as far as I read.

The next is a letter of October 28th, 1924, Exhibit No. 55. I have just the last paragraph marked for reading. It is the next letter in my brief. I have just marked the last paragraph:

"Well, Mrs. McEwan, I wish to thank you for your letter "and I aim to do business so that you will find me worthy of "your confidence. Will write again as soon as something "definite turns up."

The next letter is the letter of July 6th, 1929, Exhibit No. 56. I will read all of that letter. This is written from Vancouver to Mrs. McEwan. (Reads Exhibit 56.) I do not read the last paragraph.

Mr. MacNeill: That is all right.

Mr. Farris: Well, I will read it. (Reads last paragraph of Exhibit 56.)

The next letter on my brief is dated July 12th, 1929. That is wrong, it is July 12th, 1919. That is Exhibit No. 57. I have read that in.

The next letter is January 25th, 1930.

Mr. MacNeill: That is Exhibit No. 58. It is not in your discovery.

Mr. Farris: I don't know, Mr. MacNeill. You had access to it anyway.

Mr. MacNeill: We have not got that at all.

Mr. Farris: I will read the whole letter. (Reads Exhibit 58.)

Mr. Farris: Next is the letter of April the 7th, 1930, Exhibit 59. I am reading the whole letter. (Reads Exhibit No. 59.) You recollect at that time, my lord, that Lindeborg was out of it.

The Court: That is after the Court of Appeal judgment?

Mr. Farris: Yes. That is all.

Laura McEwan, Cross-Examination, 23rd November, 1932.

CROSS-EXAMINATION BY MR. MacNEILL:

Q. Mrs. McEwan, there are some other letters which I wish to put in and it is a little bit hard to follow. There is a letter from McEwan to Lindeborg, February 5th, 1919.

The Court: Are they all from the witness?

Mr. MacNeill: I think they are, my lord. There may be one or two exceptions.

The Court: Then, you can tell me.

Mr. MacNeill: Q. Is that your writing, Mrs. McEwan? A. Yes.

Mr. MacNeill: That is a letter from Laura McEwan to Mr. D. Lindeborg, from Koch Siding.

(LETTER REFERRED TO MARKED EXHIBIT No. 62)

Mr. MacNeill: It is addressed to Mr. D. Lindeborg. (Reads Exhibit No. 62.)

The next one is dated April 17th, 1919. This is a copy furnished by my friend Mr. Farris. My friend has handed me the letter of April 17th, 1919.

(LETTER READ AND MARKED EXHIBIT No. 63.)

Q. Did you get that letter, Mrs. McEwan, that I read? A. I must have. I cannot recall it right now, but I must have.

Q. The next is April 29th 1919. I show you this letter dated April 29th, 1919, from yourself to Mr. Lindeborg. Just see if that is your signature? A. Yes.

(LETTER REFERRED TO MARKED EXHIBIT No. 64.)

Mr. MacNeill: (Reads.) "I received the letter from Mr. Barbrick . . . until they had their accounts made out." Those were your lawyers? A. Yes, Williams & Manson at Prince Rupert.

Mr. MacNeill: (Reading.) "I am leaving in the bank in Prince Rupert . . . yours very sincerely, L. McEwan."

Q. Here is another letter, June 5th, 1919. You might see if that is your signature, Mrs. McEwan? A. Yes.

(LETTER READ AND MARKED EXHIBIT No. 65.)

Q. Now, here is a letter. I ask you if you recognize this. What I have before me is a copy. You recognized it on your examination for discovery. Just have a look at this, Mrs. McEwan? A. Yes.

Mr. Pratt: That is a copy of letter July 12th, 1919?

Mr. MacNeill: What number will that be?

The Registrar: No. 66.

(COPY OF LETTER DATED JULY 12th, 1919, READ AND MARKED EXHIBIT No. 66.)

The Court: Haven't I heard that read before? That is 57, is it not?

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Mr. Pratt: Yes, my lord, it is.

Mr. MacNeill: There is a document annexed to it which may go in. It was produced on the discovery. It is a statement from Lindeborg to you.

The Court: Any objection to it being attached to Exhibit 57?

Mr. MacNeill: No, my lord.

The Court: Very well, make it part of Exhibit 57.

Mr. MacNeill: It is a statement that will be attached to the exhibit.

(STATEMENT ATTACHED TO EXHIBIT 57.)

Q. Here is another copy of a letter to yourself dated May 29th, 1920. Do you recognize that? A. Yes.

(LETTER OF MAY 29th, 1920, NOW MARKED EXHIBIT 66)

Mr. MacNeill: Q. Yes. There is a further letter of June 3rd, 1920. Well, possibly this isn't from this lady. It is from Barbrick and, of course, I cannot prove it by her. Here is a letter of June 14th, 1920—a letter dated April 15th, 1921. Is that yours, Mrs. McEwan? A. Yes.

Q. April 15th, 1921, to Mr. D. Lindeborg, Vancouver, B. C. (Reading same.) "Dear Mr. Lindeborg . . . I received the club bag—"

The Court: Perhaps you could pass over some of the matters in this.

Mr. MacNeill: Well, I think it is essential, my lord, that I should give this.

The Court: Very well, but I mean not read the whole of the letter.

Mr. MacNeill: It is pretty hard to say which is important.

The Court: Well, that is what I mean—if there is any part of the letter you can leave out.

Mr. MacNeill: Well, I need not go into the club bag at all.

Mr. Farris: Is it a golf club bag?

Mr. MacNeill: I don't know, it may be.

The Court: You might read it all then, Mr. MacNeill.

Mr. MacNeill: It is all written by pen.

The Court: Perhaps we would save as much time.

Mr. MacNeill: "I received the club bag which you sent at Christmas time . . . apart from the value of the club bag." I can drop some of this perhaps and get down to business. "The lawyers (Williams & Manson) never sent in their account until last January— and get their share, don't they?"

Mr. Farris: Would you expect them to do it for nothing?

Mr. MacNeill: No, certainly not. "Yes, Mr. Lindeborg, I also settled up all accounts . . . with best wishes, Sincerely yours, L. McEwan." You had some other property up there in the Yellowstone, hadn't you? A. Yes.

(LETTER MARKED EXHIBIT No. 67.)

Q. I show you another letter dated October 19th, 1921, addressed to Mr. Lindeborg, is that yours? A. Yes.

(LETTER MARKED EXHIBIT No. 68.)

Q. (Reading.) "Dear Mr. Lindeborg—

Mr. Farris: What date?

Mr. MacNeill: October 19th, 1921. "Must write to you today . . . your advice in the matter." I think that is enough of that. And then there is a letter of May 1st, 1922. Will you look at that Mrs. McEwan? A. Yes.

Q. "Nelson, B.C.,—to Mr. D. Lindeborg, Vancouver, B.C."

(LETTER READ AND MARKED EXHIBIT No. 69.)

The Court: Just a moment. Am I right in assuming, Mrs. McEwan, you are interested in the Estate of Hiram Stevenson—not only as administratrix but personally? A. Yes, your honour.

Q. And your living brother, that you speak of? A. Yes.

Q. He was interested? A. Yes.

Q. And any other people? A. No.

Mr. MacNeill: Here are copies of three letters. I don't think they have been put in yet, Mr. Farris. You furnished them to us.

Mr. Farris: If they were from our files they are all right.

Mr. MacNeill: Q. Do you remember that letter—a letter from Dan Lindeborg to yourself?

Mr. Farris: Well, I admit them. That is the best way. She cannot remember them.

Mr. MacNeill: Well, I had better read it.

Mr. Pratt: It was taken from your original.

Mr. Farris: What date?

Mr. Pratt: May 25th, 1921.

(LETTER READ AND MARKED EXHIBIT No. 70.)

Mr. MacNeill: Here is another letter which my learned friend is also admitting dated December 12th, 1921, Lindeborg, to Laura McEwan. Well, I don't think there is anything in that that I need. We will withdraw it. It is only loading up the record. And here is one that can substitute that number, for it. This is another letter which was received from our friend, dated April 6th, 1922, Lindeborg to Mrs. Laura McEwan.

(LETTER MARKED EXHIBIT No. 71.)

Q. Here is the original letter, Mrs. McEwan. That is your signature? A. Yes, Mr. MacNeill.

Q. This is, "Nelson, B. C., May 24th, 1922, to Mr. D. Lindeborg, Vancouver, B. C."

(LETTER MARKED EXHIBIT No. 72.)

And here is a letter of June 2nd, 1922. Have you got a copy of that? It has a statement enclosed.

Mr. Farris: We have the statement, but we haven't got the letter, though.

Mr. MacNeill: Well, that was enclosed.

Mr. Farris: Where did you get the enclosure from?

Mr. MacNeill: That is referred to in this letter. He refers in his letter to a statement.

Mr. Pratt: It is the same as the copy of the letter, Mr. Farris. It came from the same place and Mrs. McEwan acknowledged it on her examination for discovery.

Mr. MacNeill: Yes, this was produced on discovery. Here is a letter of June 2nd, 1922, to Mrs. Laura McEwan from D. Lindeborg.

(LETTER MARKED EXHIBIT No. 73.)

And annexed thereto is a statement from D. C. Barbrick to Dan Lindeborg, showing the details of the settlement arrived at.

(STATEMENT INCLUDED IN EXHIBIT No. 73.)

And here is a letter, a carbon copy of a letter, Dan Lindeborg to Mrs. Fred McEwan. You saw this carbon copy before, Mrs. McEwan, if you will remember.

The Court: Well, unless there is any objection, you might go on.

Mr. MacNeill: All right, thanks.

Q. It is dated July 3rd, 1924. (Reads same.)

(LETTER MARKED EXHIBIT No. 74.)

And this is the reply—a letter dated July 7th, yourself to Mr. Lindeborg, that was in reply to the last letter. A. Yes.

Q. Is that your handwriting? A. Yes, Mr. MacNeill.

(LETTER MARKED EXHIBIT No. 75.)

Q. Nelson, B. C., July 20th, 1925.

Mr. MacNeill: Have you given this an exhibit number yet.

The Registrar: It will be Exhibit No. 76.

(LETTER READ AND MARKED EXHIBIT No. 76.)

The Court: Let me see Exhibit 75, please.

Mr. MacNeill: And there is another letter, Mrs. McEwan? A. Yes, that is mine.

Q. This one is dated September 22nd, 1925, written from Nelson, B. C. That was written by you, witness? A. Yes.

Q. You might mark that.

(LETTER MARKED EXHIBIT No. 77.)

Q. I am going to the second page: "Am enclosing money order . . . found everything O. K."

The Court: What was the date when the group of claims was finally bonded to the Standard Mining Company?

Mr. Pratt: The Standard Mines, my lord?

The Court: Yes.

Mr. MacNeill: I think we have got it here—the Standard Mines—they change the name frequently.

The Court: It is referred to in paragraph 8 of the statement of claim. Well, you might go on.

Mr. Pratt: I will get it in the meantime.

The Court: You can give me that some time later.

Mr. MacNeill: Yes. I do not think there is much in that particular one.

Q. Will you look at this letter, Mrs. McEwan? A. Yes.

Mr. MacNeill: What exhibit number will that be?

The Registrar: Exhibit 78.

(LETTER MARKED EXHIBIT No. 78.)

Mr. Pratt: My lord, that date is in the month of July, 1925—paragraph 13 of the Statement of Claim in the Harris action.

Mr. MacNeill: This is Exhibit 78. "Dear Mr. Lindeborg—he doesn't seem to want him to have it." I don't think there is anything more in that I want. And here is March 1st, 1927. Is this your signature, Mrs. McEwan? A. Yes.

(LETTER MARKED EXHIBIT No. 79.)

Mr. MacNeill: Q. "Dear Mr. Lindeborg: In replying to your letter of February 25th—each one of us concerned."

The Court: What is the date of that?

Mr. MacNeill: March 1st, 1927. Yes, here is the carbon copy of the letter which was used on discovery—a letter dated June 29th, 1927, from Mrs. McEwan to—oh, this is from Lindeborg to Mrs. McEwan. "Dear Mrs. McEwan . . . and things are looking fine."

(LETTER MARKED EXHIBIT No. 80.)

And the letter of July 25th, 1927—I suppose you saw that one before, Mrs. McEwan? A. Yes.

Q. July 25th, 1927.

(LETTER MARKED EXHIBIT No. 81.)

Q. And there is another letter, Mrs. McEwan, Lindeborg to yourself? A. Yes.

(LETTER MARKED EXHIBIT No. 82.)

Q. This is dated December 23rd, 1927. You might mark that, will you (referring to Exhibit 82). And here is a letter from yourself to Mr. Lindeborg? A. Yes.

(LETTER MARKED EXHIBIT No. 83.)

Q. And this is dated April 2nd, 1930. Can you tell me what that is? "Dear Mr. Lindeborg . . . "

Mr. Farris: "Without a doubt," they mean without a doubt.

The Witness: Yes. They mean to—

Mr. MacNeill: Reading.) Oh, yes—"they mean to"—and then there is a period. "—without a doubt . . . will be glad to hear from you soon again." I think I had better put in some of these tax notices. There are a number of tax notices I want to put in here. February 27, 1918—I might not have these in their order. It is issued from the Prince Rupert Assessment District to Hiram Stevenson, c/o Daniel Lindeborg, Stewart, B. C. It is taxes for a number of mineral claims. There is a number of these —Andrew Lindeborg, Stewart, B.C., February 27th—for the Buena Vista, Cassiar District, and then it gives the description. And tax notice from Prince Rupert Assessment District, February 27th, 1918—is that to Duncan C. Barbrick, administratrix of Estate of James Proudfoot, deceased, care of Daniel Lindeborg, Stewart, B. C.—and that is for the mineral claim, Jain, Winer, Epluribus—and another tax notice for 1918 to Daniel Lindeborg and Hiram Stevenson for the Big Missouri and Kansas, and one on February 27th to Daniel Lindeborg for the Rambler, Province, Dauntless and Terminus. It might be out of place putting them in by myself at this time.

(TAX NOTICES MARKED EXHIBIT No. 84.)

And there is another bunch, if my learned friend will permit me to put these in now—a number of tax notices—some in 1918 and some in 1923 and some in 1921—assessment notices. They are all on the same terms. Have you any obection to them all going in as an exhibit?

Mr. Farris: No, the only objection I have is in littering up the files.

Mr. MacNeill: Well, it may be necessary to have them .

(TAX NOTICES MARKED EXHIBIT No. 85.)

Q. You know the signature—the handwriting of Mr. Daniel Lindeborg? A. Well, I should.

Q. Well, I think so. I am showing you a document—

Mr. Farris: What is this, Mr. MacNeill?

Mr. MacNeill: Well, it is something which I am instructed is in the handwriting of Lindeborg.

The Court: Well, perhaps Mr. Farris can admit it.

Mr. Farris: This has nothing to do with his signature.

Mr. MacNeill: Yes, it refers to all of the claims.

Mr. Farris: I object to it. I cannot see the materiality of it. It has not been written to Mrs. McEwan, but it has some heading on it.

Mr. MacNeill: It is something that was found among the effects of Lindeborg and is in the handwriting of Lindeborg.

Mr. Farris: I cannot see that it can be evidence in this case.

Mr. MacNeill: I am just asking you if you are prepared to admit this statement?

Mr. Farris: No, I don't agree to it.

Mr. MacNeill: All right, I cannot put it in.

Mr. Farris: I will let everything in if you will let Mr. Ralston's evidence in.

Mr. MacNeill: I cannot do anything like that.

Q. When did you realize or come to the belief that you could make a claim against the Lindeborg Estate? A. Well, when? I don't know just how to answer that.

Q. Well, it is a plain answer—a plain question? A. When the time came that we had to do it.

Mr. Pratt: Who are we?

Mr. MacNeill: Q. Who are we? A. Well it would be the two estates.

Q. Well, that isn't very clear. Who was it who told you that? A. Well, our legal adviser.

Q. Who was that? A. Mr. Macdonald.

Q. Oh, Mr. Macdonald told you that? A. And Mr. Farris.

Q. Well, first, I will ask you—when did Mr. Macdonald tell you that? A. Well, it was after Mr. Lindeborg's death, I don't know just when it was.

Q. All right.

Mr. Farris: Thank you.

(Witness aside).

Mr. Farris: I considered the question with regard to Mr.

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Proceedings at Trial.

Plaintiff's Case.

Laura McEwan, Cross-Examination, 23rd November, 1932. —*Continued.*

Sloan's evidence, and I feel this way—do not misunderstand me—I am not trying to argue the case—I am merely stating what my position is—I have already pressed for Mr. Ralston's evidence—that it is admissible—and I am not asking you to allow it although I have a right to my own belief that that evidence is admissible—but it seems to me both Mr. Ralston's and Mr. Sloan's evidence is either admissible or it is not admissible.

The Court: That is that privity applies to the conversation.

Mr. Farris: I take that position. It does not prejudice my rights to object in any other case if the occasion should arise— because my objection is that they are both admissible, but in the face of your lordship's ruling as to Mr. Ralston's evidence, I do not propose to press it in Mr. Sloan's evidence and I merey wish now to ask him about another occasion.

WILLIAM SLOAN, resumes stand.

William Sloan, Direct Examination, 23rd November, 1932.

DIRECT EXAMINATION CONTINUED BY MR. FARRIS:

Q. After the hearing by the Court of Appeal when judgment was given for $19,000 or $20,000 against the McEwans—the Lindeborgs were then no longer legally liable—did you have any conversation with Mr. Lindeborg about this Harris case? A. Yes, I had several conversations.

Q. Had you any in particular? A. I had one particular conversation right after the judgment was handed down.

Q. And what did he say about any matter of further appeal or anything of that kind? A. He said he was going to fight the case to a finish, no matter what it would cost. They were all in together and they were going through with it win or lose.

Q. I want to go back to something you told us this morning. You stated you had a conversation with Mr. Lindeborg on the 14th of September, 1928? A. Yes.

Q. How do you fix that date? A. A friend of mine Jamieson died on the 2nd of September. He died in Stewart. The boat came down here on the 9th of September, and he was cremated on the 10th and Mr. Lindeborg was at the funeral; and this Harris case was coming up then. I knew from Martin that he was going to sue Lindeborg on behalf of Harris and I mentioned the case to Mr. Lindeborg at the funeral and said I wanted to see him during the week and I saw him on the Friday after the funeral; and the funeral took place on the 10th and it was the 14th I saw him.

Q. Where did you see him? A. I saw him at the entrance to the London Building on Pender Street.

Q. Did he say where he had been? A. He had been to some lawyer's office.

Q. Mr. Macdonald's office was in that building. Your witness.

CROSS-EXAMINED BY MR. MacNEILL:

Q. Just a moment. What was the date of the interview you had with Mr. Lindeborg that you referred to? You had some conversation and he said that he was going to fight it through—that was it—was it? You made some statement to that effect? A. What was the date?

Q. I want to know—about this statement you told my learned friend Mr. Farris—that he had a conversation with you, and that Lindeborg said he was going to fight it out? A. Yes.

Q. I see. Now, when was that conversation? A. Some time early in 1930.

Q. Is that as near as you can come to it? A. Well, it was very shortly after the decision was handed down on the judgment of 1/19th of the amount that was being sued for.

Q. Have you any means of fixing the time at all? A. No, only this much, that probably it was within ten days of that judgment being handed down.

Q. And where was it you met him? A. In the Pender Street beer parlor—on Pender Street.

Q. Is that your regular headquarters? A. No, it was his.

Q. Oh, it was his? A. Yes, not mine.

Q. Well, how did you happen to be in there? A. Well, I happened to be passing there and saw him going in.

Q. You could see him from the street? A. I saw him go in.

Q. And then you followed him in? A. Yes.

Q. And then you had some beer, I suppose? A. Yes.

Q. All right. Very good.

(Witness aside).

NELSON McEWAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

Q. Mr. McEwan, you are the husband of the plaintiff, Mrs. McEwan, in this action? A. Yes.

Q. And you knew the late Dan Lindeborg? A. Yes.

Q. Did you have a conversation with him relative to this matter we are discussing? A. Yes.

Q. When would that be in relation to what was happening? A. That was after the Court of Appeal judgment.

Q. In which they decided for a similar amount against your wife and it freed Lindeborg? A. Yes.

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Proceedings at Trial.

Plaintiff's Case.

Nelson McEwan, Direct Examination, 23rd November, 1932. —*Continued.*

Q. Where was that conversation? A. In the Dunsmuir Hotel.

Q. You were down here from Nelson? A. Yes.

Q. What did he say to you at that time? A. Mr. Barbrick and I were in there and we had taken a room for the purpose of having a little conversation and Mr. Barbrick said, "It looks as if Stevenson—"

Mr. MacNeill: Never mind what Mr. Barbrick said.

Mr. Farris: He is the president of the mine.

The Witness: Mr. Barbrick and Mr. Lindeborg and I were present and we had got a room there to hold a meeting and have a little conference, and Mr. Barbrick said it looked as if the Stevenson Estate were going to be hooked for $15,000 and Mr. Lindeborg said, "There is no one estate in this—it is 50/50 with the four estates."

Mr. Farris: Your witness.

Nelson McEwan, Cross-Examination, 23rd November, 1932.

CROSS-EXAMINED BY MR. MacNEILL:

Q. Can you fix the date of that? A. That was some time in August, some time after the Court of Appeal judgment—before I went home—I was here about two weeks.

Q. Did you contribute anything towards fighting the case yourself? A. Contribute in what way do you mean?

Q. Any money? A. No, sir.

Q. To Mr. Macdonald, for instance? A. No, sir.

Q. Did your wife? A. My wife? I don't know—she knows her own business—I could not swear to that.

(Witness aside). . . . .

Mr. Farris: My lord, I wish now to tender—where is that discovery—the examination for discovery of Lindeborg in the Harris action as an admission or a statement of fact made by him.

Mr. MacNeill: I object to that. I didn't have an opportunity of looking over that. Is it the whole examination you are putting in?

Mr. Farris: I don't need the whole of it for my purposes, but for your convenience I was putting it all in and I was going to put in extracts from the Supreme Court—

Mr. MacNeill: I never saw a word of it up to the present time. Someone picked it up—and I haven't seen it—but if you will leave it until later on this morning—

Mr. Farris: Well, this completes my case. I am willing to tender it and have it disposed of at a later stage of the trial.

The Court: Very well.

Mr. Farris: That is the case for the plaintiff.

Mr. MacNeill: I will call Mr. Cosens.

ARTHUR COSENS, one of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MacNEILL:

Q. What is your occupation, Mr. Cosens? A. Merchant.

Q. In the City of Vancouver? A. In the City of Vancouver.

Q. And you have been for what length of time? A. Some twenty odd years.

Q. And you were one of the executors of the will of the late Daniel Lindeborg? A. Yes.

Q. And your wife is another? A. Yes.

Q. And are you personally a beneficiary under that will? A. Yes.

Q. And is your wife? A. Yes.

Q. And Mr. Hemsworth is your uncle? A. Yes, he is an associate.

Q. Now, what terms were you with Mr. Daniel Lindeborg? A. Very great friend for many years.

Q. And just—very great friends. And did you see him frequently and often? A. Very frequently.

Q. Yes. And where did he live? A. Of late years at Kitsilano—or Kerrisdale, rather.

Q. And did you have occasion to visit him at his house? A. Very frequently.

Q. Then during his last illness just state what you had to do with him then. Possibly I might withdraw that question and we will get the history of matter. Reference has been made here to a visit that Mr. Lindeborg made with you up to Nelson and vicinity? A. Yes.

Q. Will you just state in your own words how you happened to be up there with Mr. Lindeborg, and the time and so forth? A. We were up there on two occasions, Mr. MacNeill. I had to take a business trip through there. Mr. Lindeborg was more or less at loose ends and he used to visit the Kootenays quite frequently; and I proposed to him that he should join me; and we proposed to meet there. The first time was in 1926.

Q. Yes. State now what took place there. Did you see the plaintiff on that occasion? A. We did.

Q. Just proceed. A. We called on Mrs. McEwan. That was the first time Mr. Lindeborg had met her. We paid her a social visit; and had lunch with her; and it was a comparatively short visit. It was just a social visit. They were meeting for the first time. They were strangers.

Q. And where did you have your luncheon? A. We had it on that occasion at Mrs. McEwan's house.

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Arthur Cosens, Direct Examination, 23rd November, 1932.
—*Continued.*

Q. And was there anything said about these matters of mining—as raised in the particulars.

Mr. Farris: You did not raise any issue about this with Mrs. McEwan. I understand nothing was said about it at that time.

The Court: It would have been better practice to confront Mrs. McEwan with it at the time; but if that was not done it might be a case where one could grant leave to recall Mrs. McEwan.

Mr. MacNeill: I am referring, my lord, to my learned friend's particulars in this action.

Mr. Farris: Well, I might state they are wrong. I did not ask Mrs. McEwan about that at all and I gave those particulars from my own memory of the matter and she was not here at the time. And on that point they are inaccurate, which was entirely my own fault. But Mrs. McEwan was only asked about a later date—her interview with Lindeborg in the Hume Hotel.

The Court: But Mr. MacNeill could have asked her about any conversation with Mr. Lindeborg in the presence of Mr. Cosens.

Mr. Farris: My lord, he examined her for discovery—and there is no use putting up sticks only to knock them down.

Mr. MacNeill: I was relying on my learned friend's particulars.

Mr. Farris: My learned friend is trying to knock down those sticks—

The Court: It is something that apparently was said between the witness and the deceased and Mrs. McEwan.

Mr. Farris: Proving nothing was said.

Mr. MacNeill: My learned friend's pleadings said there was.

Mr. Farris: My learned friend is trying to make capital out of something in the particulars which I gave without consultation with Mrs. McEwan and they are incorrect and if my learned friend can get any consolation out of that, all right.

Mr. MacNeill: Mr. Macdonald revised your particulars—your statement of claim.

Mr. Farris: This is not in the statement of claim.

The Court: What do you want to ask him?

Mr. MacNeill: I want to ask him what took place on these two visits.

The Court: I will allow you to ask that.

Mr. MacNeill: Then we will go on and I will follow on to the other visit.

Q. Now, you might proceed, Mr. Cosens, and state what happened? A. In 1926?

Q. Yes? A. In 1926 we paid a social visit to Mrs. McEwan.

Mr. Farris: That is the second visit?

The Witness: No, that is the first visit—both becoming acquainted with her.

The Court: Well, I have that.

The Witness: Do you wish to know what took place?

Mr. MacNeill: Yes, you might tell what took place? A. Well, on that occasion we were naturally talking about the northern country.

The Court: What was said? A. It is very hard to say, your lordship, what was really actually said. I think we were describing the northern country to her in a general way on that occasion and I don't remember anything specific at all. It was just simply a description of the northern country and of the Portland Canal in particular.

Mr. MacNeill: Now, you made another trip up there with Mr. Lindeborg? A. In 1929.

Q. Yes, just state what time you were up there and what happened? A. It was the middle of the summer, I think it was in August, 1929.

Q. Yes? A. And we visited Mr. and Mrs. McEwan jointly, and invited Mrs. McEwan down to the Hume Hotel for dinner and Mr. Lindeborg had quite a lot of conversation with Mrs. McEwan on that occasion at which I was not always present. I believe on the first occasion, I think I was present during the whole of the time, but on the second occasion, Mr. Lindeborg was with Mrs. McEwan mostly.

Q. You had asked her around to the Hume Hotel for luncheon? A. Yes—no, for dinner, I believe, Mr. MacNeill to be correct.

Q. That was just the one occasion, was it? Well, at any rate, you had dinner—you had invited her for dinner with you? A. Yes.

Q. And was anything said in your presence or hearing in connection with this action? A. No, nothing.

Q. And you were on intimate terms with Mr. Lindeborg at all times? A. At all times.

Q. Had you discussed the question of the Harris action—?

Mr. Farris: I object to that. My friend cannot make evidence from his own client in that way. My learned friend smiles. I am perfectly willing to let all the bars down and have all the evidence go in on both sides, but if my learned friend is going to stand on technicalities, I must object to this.

The Court: This is a conversation between whom?

Mr. MacNeill: Q. This was with Lindeborg, yourself and Mrs. McEwan? A. Yes.

Mr. Farris: No, he has gone further than that. I don't object to any conversation under those circumstances.

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Arthur Cosens, Direct Examination, 23rd November, 1932.
—*Continued.*

Mr. MacNeill: Q. Well, had you—did Mr. Lindeborg keep you in touch with any dealings?

Mr. Farris: I object to that.

The Court: No, you cannot give that conversation.

Mr. MacNeill: Your lordship would rule out any conversation which Lindeborg had told you in connection with his—

The Court: If you will put the question, I will rule on it. Mr. Cosens, please, don't answer for a moment or two until I make my ruling.

The Witness: All right, your lordship.

Mr. MacNeill: Q. Did Lindeborg tell you what his conversation with Mrs. McEwan was on that occasion?

Mr. Farris: I object to that.

The Court: There were just the two of you present, were there? A. I had my family with me on that occasion.

Q. Mrs. McEwan was not present? A. Oh, do I understand you mean during the conversation?

The Court: You had better direct his attention to the time and place and ask him if Mrs. McEwan was present, but do not lead him with regard to the conversation.

Mr. MacNeill: Q. Was there any conversation you had in connection with this matter in the presence of Mrs. McEwan and Mr. Lindeborg? A. Is that all right to answer that?

The Court: Well, you have just been asked if you did have a conversation? A. No.

Mr. MacNeill: All right.

Q. Exhibit 60 in this action is a telegram from Vancouver signed by D. Lindeborg.

The Court: Yes, I have it in my notes.

Mr. MacNeill: Q. What do you know about that telegram?

The Court: If you please—

Mr. Farris: I feel obligated to permit this because my learned friend has been good enough to allow him when I could not have proven it otherwise.

The Court: Very well.

Mr. MacNeill: Q. State what you know about that particular telegram and the time and so forth? A. On the 23rd of December, 1930, there was a notice in the Province respecting the decision of the Supreme Court of Canada.

Q. Where were you at the time? A. I was with Dan Lindeborg at his house when the Province came.

Q. The Province newspaper? A. The Province newspaper yes, and it was on the front page of the Province—of December 23rd, 1930. Mr. Lindeborg at that time was very ill. He was in very very poor health and he asked me to notify Mrs. Mc-

Ewan of the information that was contained in the Province. I did so. I sent this telegram.

Q. Now, have you a copy of the article that was in the Province about which you sent this telegram? A. I have.

Q. This is copied from— A. From the Province.

Q. Have you any objection to that?

Mr. Farris: No.

Mr. MacNeill: Q. Will you read what is in there? A. This is dated, "Daily Province, December 23rd, 1930." It is also dated "Ottawa, December 23rd. On appeal—"

Q. Did you read the heading that was there? A. That was the heading, Mr. MacNeill. (Reading). On appeal of Wm. F. Harris, pioneer prospector of Port Angeles, the Supreme Court of Canada awarded him judgment of $50,000 in connection with sale of the Big Missouri Mine in the Salmon River District.

"At the trial in Victoria before Chief Justice Morrison, Harris was allowed $100,000 but the Court of Appeal reduced this to $16,000.

"The Plaintiff claimed a third interest in money received from the sale of Big Missouri and Kansas Mineral Claims on Salmon River twelve miles from the head of Portland Canal. He alleged that the claims were located by him twenty-five years ago and that subsequently, in return for assessment work, James Proudfoot and Hiram Stevenson were given third interests in the properties. The new partners brought into the business Andrew Lindeborg and Daniel Lindeborg, Proudfoot, Stevenson and Andrew Lindeborg have since died.

"Mr. Knox Walkem was solicitor for the successful appellant."

Q. And it was on that information that you sent this telegram? A. Yes.

The Court: That might be marked exhibit 86.

(DOCUMENT MARKED EXHIBIT No. 86).

Mr. MacNeill: Q. Did you have any particulars of that action other than what you saw there? A. Oh, none whatever. I might say while it was on the 23rd, I saw that in the newspaper, I sent that wire on the evening of the 25th in order not to interfere with Mrs. McEwan's Christmas Day.

Q. That is all the information you have? A. That is all the information I had.

Q. In your close connection with Mr. Lindeborg, did you ever realize that Mrs. McEwan had any claim against him?

Mr. Farris: My learned friend cannot put that question.

Mr. MacNeill: He can answer that subject to whatever his lordship rules.

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The Court: Have you anything further to say about it?

Mr. MacNeill: No, nothing further than that.

The Court: Question disallowed.

Mr. Farris: But my bargain is still open to my friend—or at least my offer.

Mr. MacNeill: Well, you were appointed one of the executors, Mr. Cosens? A. Yes.

Q. And what did you do in connection with carrying out your duties as an executor? A. First of all, knowing that Mr. Macdonald was the solicitor for Mr. Lindeborg we called upon him.

Q. Who is "we"? A. Mr. Hemsworth and I.

Q. Yes? A. And Mr. Bunting was with us at that time, too. He is no longer in the country; but I think on the first occasion the three of us went down—and Mr. Hemsworth might have gone there first to make a preliminary call, but Mr. Hemsworth was with me on each and every occasion—I never called on Mr. Macdonald alone.

Q. Well, you might proceed with your conversations there? A. We were going to do Mr. Lindeborg's affairs—

The Court: Has this been called to the attention of Mr. Macdonald?

Mr. MacNeill: Oh, yes. Mr. Macdonald gave his evidence yesterday, as I understand it, as to what took place.

Mr. Farris: But I am not aware that my learned friend confronted him with the time and place and circumstances of the conversation.

Mr. MacNeill: Certainly I did, and Mr. Macdonald has over and over again said, "I have produced everything and I have sent you all the files," and I put it to him very squarely.

The Court: If I may be permitted to say so, I prefer, for example, when Mr. Macdonald was in the witness box, and you knew Mr. Cosens was going to be called—if he were going to give any testimony which was different to what Mr. Macdonald has said—that he should have been confronted with it when he was in the witness box. However, I am in the habit of allowing a witness to be recalled if counsel wishes.

Mr. MacNeill: My recollection is this: I asked Mr. Macdonald the question and I put it to him squarely, "When did you make this claim, when did you tell these executors about this claim"? And he said, "You have got all my files." And I showed him the form that the executors had to use and I interrogated him —I think I am right in saying it—as to the necessity of the executors knowing that there was such a contingent claim as this. I am satisfied on that, your lordship.

The Court: That you have done that.

Mr. MacNeill: Yes. That is what I am doing—

The Court: Yes, and if anything turns on it, that Mr. Macdonald's attention was not drawn to the time and place about which Mr. Cosens may speak, I will be inclined then to consider an application for the recalling of Mr. Macdonald, but it may be you have covered the ground.

Mr. MacNeill: It was certainly mentioned—the place was in Mr. Macdonald's office and the time was immediately after his death when the executors were seen about getting the probate of the will and so forth.

The Court: I think I will allow it.

Mr. MacNeill: My recollection may be wrong—but that is what I think I put to Mr. Macdonald.

The Court: You can go on.

Mr. MacNeill: Q. All right, proceed. A. We called on Mr. Macdonald with a view to being appointed executors to get the particulars and to get the will read to us which was done.

Mr. Farris: What date was that?

The Witness: Wouldn't that be in January—shortly after the 6th of January?

Mr. MacNeill: I see.

The Witness: I don't remember the date.

Q. The 6th was the date of his death? A. Yes, it would be after the funeral. It would be after the funeral.

Q. It would be within a few days— A. Yes, within a few days.

Q. Well, what happened then, Mr. Cosens? A. And the will was read and also the paper which was—which I notice was put in this morning and Mr. Macdonald proceeded to give us some particulars as to the estate.

Q. Well, proceed, Mr. Cosens? A. Do you wish me to state the particulars?

Q. I think you had better give a full account of all that took place there? A. Well, the different cases we discussed. Some might have been on that occasion and some on a later occasion, because we made various visits to Mr. Macdonald before we were finally in a position to be appointed executors. I know the Daley case was discussed.

Q. The Daley case, what was that? A. That was a claim for commission.

Q. Which Daley was making? A. Which was coming up —the pail business, in which Lindeborg had an interest in connection with the Barbrick Estate—it was discussed very extensively. Mr. Macdonald happened to be an executor for Mr. Barbrick,

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so that was discussed at considerable length.

Q. Well, now, was this claim of Mrs. McEwan's discussed? A. It wasn't discussed.

Q. Was it mentioned? A. It wasn't mentioned.

Q. Where is the form—who prepared this form for the succession duty?

The Court: Now, if you please, Mr. MacNeill—this is subject to correction if I may be wrong, but it seems to me that Mr. Macdonald did say something about having told the executors—and Mr. Cosens about the matter.

Mr. MacNeill: I don't think so. He may have gone that far, but I don't remember it.

The Court: That is, at one time.

Mr. MacNeill: Mr. Pratt says Mr. Macdonald's evidence was he explained fully to the executors—he explained fully to the executors.

Mr. Pratt: My recollection of his evidence is that Mr. Macdonald said he explained fully to the executors. That is my recollection of his evidence yesterday—at the time they called after the death of Lindeborg.

The Court: Well, has the attention of Mr. Cosens been directed to that time and place?

Mr. MacNeill: Well, you might proceed then, Mr. Cosens? A. You wish to know if any reference was made to the McEwan claim?

Q. Yes? A. There was no reference made whatsoever to the McEwan claim during that conversation.

Q. Did you know that there was such a claim? A. Not at that time, absolutely not.

Q. Then on how many occasions were you at Mr. Macdonald's office? A. Quite a number, Mr. MacNeill. As I stated before, I was never there alone. I was always with Mr. Hemsworth and I was also there with Mr. Pratt.

Q. And when did you first hear of this claim of McEwans? A. The McEwan claim?

Q. Yes? A. We were first notified of it by your firm.

Q. Yes? A. Of the McEwan claim.

Q. And when would that be? A. That would be the end of January.

Q. Yes. Of 1932? A. Of 1931.

Q. Was it 1931—yes, that is right? A. Yes.

Mr. MacNeill: Would this be a convenient time to adjourn, my lord. I wanted to get some matters arranged.

The Court: Very well. In order to refresh my own memory about the matter, and to be corrected if I am wrong—my recollection is that while being examined, Mr. Macdonald said

that he told, in substance, to Mr. Cosens, and possibly at a time when Mrs. Cosens was present, what he told here in court. And then he was asked—Mr. Macdonald was asked later on in cross-examination if after the death of Dan Lindeborg, did he at that time, when the executors called with Mr. Pratt, make any reference to the contingent liability and he again said—he told the court that he had already told the executors what agreement was made and he probably didn't tell them at that time, as he had already told them. Now, that is my recollection.

Mr. MacNeill: I think that is pretty accurate.

Mr. Pratt: Yes.

The Court: So that Mr. Cosens' attention might be called to it. Perhaps you have already done so, Mr. MacNeill, but you might call his attention to the time and place when Mr. Macdonald said he did tell Mr. Cosens something along the lines which he has told me in court.

Mr. MacNeill: Mr. Cosens has said that he got that directly through my firm.

The Court: Mr. Cosens, were you in court all the time when Mr. Macdonald was giving his testimony? A. I was.

Q. And do you remember him saying something along the lines that he told you? A. Yes, he did say that, yes.

Q. Well, is that according to your recollection? A. No, it isn't, your lordship. I figured that Mr. Macdonald got a little mixed over the matters we were discussing, because that case—

Q. Well, your recollection is that he didn't? A. He didn't, no. No, he didn't.

The Court: Very well. Will counsel give me some idea how long they are likely to be and when they will finish?

Mr. MacNeill: Well, I have several witnesses, but I will try to finish tomorrow.

The Court: You anticipate we may take all day?

Mr. MacNeill: I think so.

The Court: We will adjourn until eleven o'clock.

(COURT ADJOURNED AT 4:35 P.M. UNTIL 11 A.M., NOVEMBER 24, 1932).

Thursday, November 24th, 1932. 11:00 a.m.

(COURT MET PURSUANT TO ADJOURNMENT).

ARTHUR COSENS, resumed the stand.

DIRECT EXAMINATION CONTINUED BY MR. MacNEILL:

In the Supreme Court of British Columbia

Proceedings at Trial.

Defendants' Case.

Arthur Cosens, Direct Examination, 24th November, 1932, —*Continued.*

Q. You were speaking yesterday afternoon, Mr. Cosens, in connection with your first visit to Mr. Macdonald, and that a Mr. Bunting was with you? A. Yes.

Q. Will you explain to his lordship, please, just when Bunting was there and what was said then? A. Yes. That first interview was taken with an object to see if Mr. Lindeborg had left any instructions with regard to his funeral. Bunting was a great friend of his, and Mr. Bunting and Mr. Hemsworth and myself called on Mr. Macdonald with that object in view.

Q. That was then before the funeral? A. That was before the funeral, yes.

Q. Yes? A. To see if he had left any instructions with regards to the burial, whether it was as to be under any lodge, or anything of that kind. We wanted to be sure on that.

Q. Where is Mr. Bunting now? A. Mr. Bunting is in Europe.

Q. After the funeral you had your interview? A. That was the first business interview after the funeral.

Q. Yes. Now, when did you first get from Mr. Macdonald an intimation as to this claim which is now put forward and under what circumstances? A. I didn't get any intimation of this claim from Mr. Macdonald—

Mr. Farris: Q. What is that? A. I didn't get any intimation from Mr. Macdonald of this claim.

Mr. MacNeill: Q. Well, just state when you first got it.

The Court: Well, I have that.

Q. What you said, Mr. Cosens, was it not, that you were first notified of the McEwan claim by Mr. MacNeill's firm? A. Yes—yes, your lordship.

Mr. MacNeill: Q. Well, can you fix the date of this when —did you meet Mr. Macdonald at my office? A. Yes.

Q. You might tell the circumstances of that.

The Court: Q. When was that, please? A. It would be the end of January.

Mr. MacNeill: Q. Yes? A. As far as I remember.

Q. Well, what occurred at that time and place with Mr. Macdonald.

The Court: Q. That would be 1931? A. It was on the occasion when there was a doubt existing in our mind whether we should—when we asked that information with regards to our being a party to carry on the—

Mr. MacNeill: Q. There was a suggestion? A. There was a suggestion.

Mr. Farris: Surely this witness ought to remember all these things.

Mr. MacNeill: Just go on and tell, Mr. Cosens, your own recollection?

The Court: Q. Yes, Mr. Cosens? A. Yes, there was a suggestion about the case being carried to the Privy Council, and—

Mr. MacNeill: Q. Who made the suggestion? A. About it being carried?

Q. Yes? A. About it being carried?

Q. About taking this to the Judicial Committee of the Privy Council. Who was that put forward by? A. Mr. MacNeill. We all knew, and I knew in particular that it was Mr. Lindeborg's intention to support the McEwans in going to the Privy Council, morally and I presume financially.

Q. Yes.

Mr. Farris: Q. I didn't hear that—it was the intention of Mr. Lindeborg? A. To support the McEwans.

Mr. MacNeill: Q. Yes? A. Knowing that we would be desirous of doing—carrying out his wishes. The executors consulted your firm, Mr. MacNeill, for a ruling on that matter, and your ruling was that there was—being no judgment against Lindeborg—

Mr. Farris: Of course that is not evidence, Mr. MacNeill.

Mr. MacNeill: Well, I think it was—

The Court: Q. Now, just what was said between yourself and Mr. Macdonald, or in his presence, if you please, Mr. Cosens?

A. On that occasion?

Mr. MacNeill: Q. Well, lead up to it. Was there an occasion when all parties met together when that matter was discussed including Mr. Farris? A. Oh, yes.

Q. Well, that is— A. Yes, on that occasion I think that was probably—

Q. Well, that was without prejudice, I suppose? A. Yes.

Q. There had been an agreement—there had been a discussion as to proceeding? A. As to proceedings.

Q. Did Mr. Macdonald express any wish to you in connection with that, ever make a request upon you in connection with that matter? A. Absolutely not.

Q. Well, just proceed and tell us? A. No, absolutely not. Now, at that meeting which you refer to, at which Mr. Farris was also present—

Q. Well, we can't go into that? A. No.

Q. But after that meeting or before it did you have a conversation with Mr. Macdonald in connection with taking an appeal? A. Not with Mr. Macdonald.

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Proceedings at Trial.

Defendants' Case.

Arthur Cosens, Direct Examination, 24th November, 1932. —*Continued.*

Q. I beg your pardon? A. No, I had no conversation with Mr. Macdonald.

Q. Do you remember a meeting with Mr. Pratt? A. Yes.

Q. Yes, when the matter of appeal to the Privy Council was discussed with Mr. Macdonald? A. Yes.

Q. What was the discussion there? A. On that occasion Mr. Macdonald said a claim might arise from the McEwans on a partnership basis.

Q. What is that? A. Mr. Macdonald said a claim might arise from the McEwans of a partnership basis.

Q. Yes, how was Macdonald interested in this matter?

The Court: Well, what was said.

Mr. MacNeill: Q. Can you go on and state. There was a suggestion that you should go on to the Privy Council? A. Yes.

Q. And did you take it? A. We consulted our legal advisers with regard to—

Q. Well, tell what your legal adviser told you?

Mr. Farris: Oh, no.

Mr. MacNeill: That gives the reason, what we did, you see.

The Witness: Yes.

Mr. Farris: No, surely we are not bound by that.

Mr. MacNeill: He is telling why.

The Court: He says they consulted and then they did not.

Mr. MacNeill: Q. As the result of that advice, what did you do?

The Court: Q. You consulted your solicitors, then you decided not to go on? A. Yes.

Q. Very well? A. We understood as executors—

Mr. Farris: I object.

The Court: Just a moment, please. A. That—

The Court: No, please, Mr. Cosens, just wait.

Mr. MacNeill: Q. What was Macdonald doing at that interview? A. At your office?

Q. Yes? A. Mr. Macdonald on that occasion came up in connection with an entirely different case to my recollection.

Q. Well, Mr. McEwan was in the witness stand yesterday and mentioned having a meeting with you? A. Yes.

Q. What took place at that meeting, according to your recollection? A. Well—

Mr. Farris: That is not evidence, my lord, because my friend has not asked Mr. McEwan about that.

Mr. MacNeill: Well, we got Mr. McEwan's statement.

Mr. Farris: Yes, but you did not challenge him.

The Court: It would be much better, Mr. MacNeill to confront him with anything that was said in his presence.

Mr. MacNeill: Well, I submit—

The Court: While he is in the witness box, otherwise it makes it necessary for me to consider giving leave to recall. In the same way, if I may be permitted to say so, with regard to any interview Mr. Macdonald had with Mr. Cosens in your own office, that Mr. Macdonald might have been confronted with that interview or asked about it. However, now you wish to ask—

Mr. Farris: My lord, might I put it this way that this situation is a little different, my friend did ask Mr. Macdonald what was said, and he gave his version of it. He has not asked Mr. MacEwan as far as I recall but I presume that Mr. Cosens and Mr. McEwan gave no evidence of such conversation, and Mr. McEwan is not a party to this action. I do not see how this is admissible at all. The only ground on which he can give that evidence is by laying a foundation under the Evidence Act which has not been done.

Mr. MacNeill: Well, if my friend wishes to recall Mr. McEwan as to that—

Mr. Farris: No, I repeat my suggestion, if my friend wants to get all the evidence in in this case I will lead him half way on it, I will put it in, but as long as he stands to shutting it down—

Mr. MacNeill: All right, I won't bother about that.

Mr. Farris: I didn't think you would agree to that.

Mr. MacNeill: Well, I don't want anything of that sort—

Mr. Farris: My friend has it in his power to allow all the evidence in this case to come out.

The Court: Well, go on now.

Mr. MacNeill: All right, your witness.

CROSS-EXAMINATION BY MR. FARRIS:

Arthur Cosens, Cross-Examination, 24th November, 1932.

Q. When you went to Mr. Macdonald's office after the funeral, how many of you went? A. Mr. Hemsworth and myself.

Q. Where was his office at that time, do you remember? A. In the London Building.

Q. Yes, and who did you see when you first went in? A. Mr. Macdonald.

Q. Was there anybody else there besides Mr. Macdonald? A. No, not in—in the outer office the stenographer, and the inner office, Mr. Macdonald.

Q. How many times after the funeral were you in Mr. Macdonald's office? A. Quite a number of times Mr. Farris.

Q. Quite a number of times? A. Yes.

Q. And who was with you the other times? A. Mr. Hemsworth.

Q. Only Mr. Hemsworth? A. On each occasion.

Q. On each occasion, and no one else? A. Not at that time.

Q. What do you mean by at that time? A. Well, I mean after the—I believe on two occasions, my wife was there on two occasions later, after things had progressed considerably.

Q. Would that be after the conference at Mr. Macdonald's office at which I was present? A. It would be after that, yes.

Q. Are you suggesting that the day that you and your wife and Mr. Hemsworth came to Mr. Macdonald's office—Mr. McEwan, I believe, was there? A. Yes.

Q. And myself. A. Yes.

Q. I am not going into what has happened there. Are you suggesting that prior to that day you didn't know of the suggestion that Lindeborg had agreed to go shares on this judgment? A. I never knew that at any time, Mr. Farris.

Q. You never knew that at any time? A. No.

Q. Not even on that day? A. Not on that day.

Q. What? A. No.

Q. Not even on that day? A. Absolutely not.

Mr. Pratt: That meeting was had without prejudice.

The Court: Well, if he knew before that.

Mr. Farris: Q. Did you know why I was taking part in this, apart from this conversation altogether, did you know—

The Court: Just a moment, please.

Mr. Pratt: My lord this meeting was held without prejudice, and I submit my friend has no right to refer to it.

The Court: No, he is just asking him if before that time he knew.

Mr. Farris: Q. Did you know I was coming to that meeting? A. If I remember rightly you called up on the telephone, if I remember rightly. I think so.

Q. Apart from that meeting was there any occasion for the parties meeting at that time. I don't want you to say what took place in that meeting, but what was the controversy that occasioned the meeting at that time? A. Well, I presume at that time that Mr. McEwan—I only discussed whether we could take—

The Court: No, not what you discussed at that meeting.

Mr. Farris: Q. What was it that was in controversy amongst the parties that required, or that there was an occasion of us getting together? A. Whether we were in a position to go to the Privy Council in conjunction with the McEwans.

Q. You say that was the only thing in dispute? A. That was the main issue.

Q. The only thing at that time? A. That was the main issue.

Q. Do you say that was the only issue? A. That was the issue.

Q. Do you say that was the only issue? A. Yes, I say that was the issue at that time. That is what I said.

Q. You say on your oath that was the only issue at that time, do you, sir? A. That is the only issue that I remember.

Q. The only one you remember? A. Yes.

Q. All right. Now, when did you first hear that there was any suggestion that Lindeborg had agreed to share in the result and losses of this action? A. I never heard that on any—on any occasion.

Q. The Harris action? A. I never heard of any agreement to that effect.

Q. Never heard about it. When did you hear there was any suggestion about it? A. Will you repeat that question?

Q. I say, when did you hear there was any suggestion coming from me or Mr. Macdonald or Mr. McEwan that Lindeborg had intimated that he would share in the results of this judgment against the McEwans? A. Not at any time.

Q. Not at any time. You don't know it now—never heard it yet, do I understand? A. Oh, yes.

Q. Oh, yes. Well, then, you have heard it at some time? A. I heard it here.

Q. The first you ever heard of it is here in court? A. Oh, no.

Q. Oh, no. Well, when did you first hear of it? A. When this action was started.

Q. When this action was started? A. Surely.

Q. And you never heard of it prior to the action being started? A. I never heard of it prior to the action being started, that is to say, you are saying we would be participating in the whole thing, if I understand you rightly.

Q. Did you get no letters from Mr. MacNeill saying that he heard from me? A. Yes.

Q. Yes, and were you not informed of the facts then? A. Yes.

Q. Yes, you knew the claim was being made? A. At that time, yes.

Q. And that was some time before the action started, was it not? A. Well, that was starting the action, I presume.

Q. And you call my writing a letter starting the action, do you? A. I certainly do.

Q. I see. I suggest that when you were in Mr. Macdonald's

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—*Continued.*

office that not only did he tell you of the position Mr. Lindeborg had taken, but that you replied to him, that might be all right if Mr. Lindeborg was alive, but his executors couldn't take that position? A. With regard to what.

Q. The thing we are talking about here, sir. You know what we are in litigation about here? A. You mean with regard to McEwan? I have already said yesterday in the evidence that the McEwans were not discussed—

Q. I am not talking about the McEwans at all, I am talking about the information that Macdonald had given you in regard to the position he said Lindeborg had been taking. You are surely not talking about the claim—certainly the McEwans hadn't made a claim, that is quite right, the McEwans hadn't been down here then? A. I have had no conversation with Mr. Macdonald with regard to McEwan, I have already stated that.

Q. Let us get behind that, you know surely this— A. All right, go ahead.

Q. Did you have any conversation with Mr. Macdonald about what Lindeborg had said. Never mind the McEwans? A. I have no recollection of any.

Q. No recollection of it? A. Absolutely not.

Q. And I suggest to you that at that conversation Mr. Macdonald had told you what Lindeborg's position was, that you said that might be all right if Lindeborg had been alive, but that as executors you could not take that position? A. I have no recollection.

Q. No recollection; and you have no recollection when McEwan did come to Vancouver and when you knew that I was acting for him that there was any such position being taken? A. As I stated before, I knew it when you wrote to Mr. MacNeill.

Q. That letter was not written for some time after the conference in Mr. MacNeill's office, was it? A. No.

Q. You knew it then all right. Now, do you say not only have you no recollection of Mr. Macdonald telling you, but that you have no recollection that that was why I was in the case, and for no other reason? A. I stated before that our meeting was with reference to our status—

Q. I didn't ask you that at all, sir, I asked you if you say you have no recollection of that situation? A. Well, I knew that you were there on behalf of McEwan, naturally.

Q. All right, if you are satisfied with that answer, I am. And I suggest to you further that when Mr. Macdonald had discussed this matter with you at one of the interviews, he then went so far as to say that if it became necessary he would have to go into court and tell the facts.

Mr. Pratt: Now, which interview is this?

Mr. Farris: Oh, that is not the one in Mr. MacNeill's office. I am not talking about that at all.

Mr. Pratt: Well, let us get the date.

Mr. Farris: I said at one of them.

Mr. Pratt: Well—

Mr. Farris: Q. Prior to my writing the letter? A. No.

Q. Did you get that advice from Mr. MacNeill in writing or verbally as to the fact that a claim was being made by McEwan through me, or is that something more you don't remember? A. I wouldn't be absolutely sure on that.

Q. You said something about being desirous of carrying out Mr. Lindeborg's wishes. I suppose you are still desirous of carrying them out? A. Exactly.

Q. Yes. You are aware that Mr. E. P. Davis acted as counsel for Mr. Lindeborg? A. I am.

Q. And you are aware that Mr. James Ralston was a partner of Mr. Davis? A. Yes.

Q. He had had many intimate conversations with Mr. Lindeborg? A. Yes.

Q. That he acted for him both as solicitor and in a friendly way?

Mr. Pratt: Well—

Mr. Farris: Q. Aren't you? A. I couldn't tell you, I am sure.

Q. And you are aware that Mr. Lindeborg made some statement about this matter to Mr. Ralston.

Mr. MacNeill: About what matter?

Mr. Farris: This matter that is in controversy. A. I can't have any knowledge of that, Mr. Farris.

Q. And you are taking the position that you will not renew the privilege of allowing those facts so you can carry out Mr. Lindeborg's wishes—

Mr. MacNeill: I am taking that position, never mind about the—

Mr. Farris: Q. You are taking it under instructions of your counsel. Is Mr. MacNeill taking it against your wish.

Mr. MacNeill: Well, now, surely there is a limit to that—any advice I gave to this gentleman, and so forth.

The Court: That is the responsibility of counsel.

Mr. Farris: I have got to take the responsibility of counsel as to the question in this suit, but when it comes to the question of this witness's wishes, as to what he said he wants to carry out, the responsibility of counsel does not enter into it.

The Court: Well, are you objecting to the question Mr. MacNeill?

Mr. MacNeill: Yes, my lord.

The Court: I disallow the question.

Mr. Farris: Q. If you knew that Mr. Ralston had been informed by Lindeborg—

Mr. MacNeill: I object to what he knew about—

The Court: I have not heard the question yet.

Mr. Farris: Q. Don't answer it, Mr. Cosens. If you knew as a fact that Mr. Lindeborg had told Mr. Ralston that it was his intention— 10

Mr. MacNeill: I submit that is an improper question.

Mr. Farris: Let me finish the question.

Mr. MacNeill: I thought you had finished it.

Mr. Farris: Oh, no, I haven't half finished it. I have started a few times now. I will tell you when I am through with it so I can get it down for once.

Q. And don't answer it, Mr. Cosens, until the stage is set: I say if you had known from Mr. Ralston as a fact that Lindeborg had told him that he proposed to share in the losses, or the liability 20 on the judgment and costs, wouldn't you want that to come out in this court?

Mr. MacNeill: Now, I object to that question, my lord, because he is an executor, he has to be guided by his professional adviser. His personal views would be of no value and the question, I submit, should not be asked, what this witness—what he would like to do, or what he would not like to do, any matters of that sort, executors, he knows what he has to do, he has to carry out the terms of the will, nothing else, and his personal views or inclinations are irrelevant. 30

The Court: Have you anything further to say, Mr. Farris?

Mr. Farris: I submit that is proper cross-examination. This witness professes that he would like to carry out Mr. Lindeborg's wishes, then I contend that the fact that he has special knowledge, that he is shutting out—

The Court: I disallow the question.

Mr. Farris: All right.

The Court: Q. Mr. Cosens, I would like to ask you, if you please, about a statement made by you in which you said, if I understood you correctly, that you knew it was Mr. Lindeborg's 40 intention to support Mrs. McEwan in going to the Privy Council? A. I made that statement, your lordship.

Q. You knew that from what Mr. Lindeborg had told you, or not? A. Yes. Mr. Lindeborg felt an injustice had been

done them in the amount that was awarded against them, and he was willing to support them to that extent.

Q. And when did you have any such conversation with him? A. With Mr. Lindeborg?

Q. Yes? A. Oh, a good many times, your lordship.

Q. No, but how long before the time—before the Supreme Court of Canada judgment was given—or was it before that? A. It was at that time anyway, and it may have been before.

The Court: Very well.

Mr. Farris: That is all.

RE-DIRECT EXAMINATION BY MR. MacNEILL:

Q. My friend referred to using the word "support," what was the support that you were referring to?

Mr. Farris: Surely, my lord, that is not proper?

Mr. MacNeill: Why surely on re-examination.

The Court: Q. Mr. Cosens, you were telling me that that was your conversation— A. Yes, your lordship.

Q. —you had with the late Mr. Dan Lindeborg? A. Yes.

Q. What did he say to you at the time. Now, I think that was all.

Mr. MacNeill: That would automatically clear it up, my lord.

Mr. Farris: Of course, my lord—your lordship wishes it, but it is not admissible evidence.

Mr. MacNeill: Well, he is explaining what he said about the word support. Surely he ought to clarify that? A. He intended to support—

The Court: No, not what intended? A. No, well, it is pretty hard to repeat the exact conversation, but my understanding—

Q. Well, of course you have used the expression, intention to support, that was your own— A. Interpretation.

Q. —Words? A. Yes. Morally and financially, I took it to be, for the purpose of fighting that action successfully.

Mr. MacNeill: All right.

The Witness: For the purpose of fighting that action.

The Court: Very well.

(Witness aside).

Mr. Pratt: Mr. Hemsworth.

JOHN HUBERT HEMSWORTH, one of the Defendants herein, called as a witness on behalf of the Defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. PRATT:

Q. Mr. Hemsworth, what is your occupation? A. I am a mining broker.

Q. You are a mining broker. Were you acquainted with the late Daniel Lindeborg? A. Yes.

Q. For how long? A. Oh, about 19 or 20 years.

Q. 19 or 20 years? A. Yes.

Q. Did you act for Mr. Lindeborg in any capacity? A. Yes, I used to look after a good deal of his business here in the City.

Q. You looked after a good deal of his business here in the city? A. Yes.

Q. You are one of the executors of his estate, are you? A. Yes.

Q. Tell me when you first received an intimation of the claim that has been brought here in this action today? A. I can't tell you the exact date, Mr. Pratt, but it was through your office. You ought to be able to tell that.

Q. Well, I am asking you; his lordship doesn't know—approximately what date, can you give us? A. It was about—sometime around the 1st of February.

Q. Around the 1st of February? A. Somewhere, I would say, between the 28th of January and the 2nd of February, some where.

Q. And do you remember the nature of the claim then. What was the claim based on? A. It was a claim that a partnership existed.

Q. A partnership existed? A. Yes.

Q. Was there any mention of any agreement spoken of here today, between the parties? A. No.

Q. What is your answer? A. No.

Q. Did you have any interviews with Mr. MacNeill regarding this claim? A. Not—not prior to that time.

Q. Well, after that time? A. Well, we met at different occasions in your office.

Q. Mr. Macdonald was there? A. Mr. Macdonald was there.

Q. And why was Mr. Macdonald there, for what purpose? A. Well, as I remember, the reason Mr. Macdonald was there was for—in connection with whether we proceeded with this action, to support them in appeal.

Q. Mr. Macdonald was acting for whom at that time? A. Mrs. McEwan.

Q. For Mrs. McEwan, and he was interviewing you for the purpose of enlisting your aid in carrying this appeal to the Privy Council? A. That was my understanding.

Q. That was your understanding, and did he formally make

any claim in your presence on behalf of Mrs. McEwan to be indemnified in the Harris judgment? A. No, I don't remember any.

Q. Never. That was after January 31, 1931? A. You are speaking now of the McEwan claim, you mean prior to January?

Q. No, after.

Mr. Farris: We didn't even suggest that Mr. Macdonald made a claim on behalf of Mrs. McEwan.

Mr. Pratt: Q. However, he did—I got your answer, didn't I, that he did endeavour to enlist your aid as executor?

Mr. Farris: Please don't lead.

The Court: Better not lead him.

Mr. Pratt: I am sorry, my lord. A. Well, I did state that a moment ago in another question.

Q. When did you first visit Mr. Macdonald's office in connection with this estate? A. It was before the funeral, I went there with Mr. Cosens and Mr. Bunting.

Q. Yes, that was for the purpose of what? A. Seeing the will.

Q. Seeing the will. A. Yes.

Q. When did you again visit Mr. Macdonald's office? A. Well it was shortly after the funeral—a few days I would say.

Q. For what purpose? A. Well, going into Mr. Lindeborg's affairs.

Q. And did you get a list from Mr. Macdonald of his assets and liabilities? A. Of his assets and liabilities?

Q. Yes, any liabilities or claims against the estate? A. Well, we went thoroughly into it. I am not sure at the moment whether he listed them in a paper or a list.

Q. Did you get that information from him? A. Yes, we got the information.

Q. To put in the inventory of the estate? A. Yes.

Q. You got all the information? A. Well, we didn't get all of the information, there were details got later I think through your office.

Q. Yes, yes? A. But the most of the information I think we got at that time.

Q. You asked him for any contingent claims, did you, against the estate? A. Well, we advertised for claims later, is that what you mean?

Q. Yes, but I mean from Mr. Macdonald did you get any— A. Oh, yes, yes, anything that was—

Q. Anything that there was? A. Any information that Mr. Macdonald had we asked him for, and he gave it to us at that time, as far as we knew.

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Q. And you told him the purpose you needed them for? A. Yes.

Q. And as a result of that information, Mr. Hemsworth, your solicitors prepared the inventory act of this estate? A. Yes.

Q. And I produce to you certified copy of the inventory acts of the Lindeborg estate. (Handing document to witness). A. Yes.

The Court: That is in already, is it?

Mr. Pratt: No, my lord, it is not in.

Mr. Farris: Is that prepared by Mr. Macdonald? 10

Mr. Pratt: No, prepared by my firm, and from information received from this witness.

Mr. Farris: It is not admissible in this action, my lord.

Mr. Pratt: Well, I submit it is, my lord.

The Court: This is what occurred between himself and Mr. Macdonald, if he wishes to refresh his memory.

Mr. Pratt: Q. Look that document over, Mr. Hemsworth. My friend says he doesn't want it in?

Mr. Farris: Says what?

The Court: Just as to what occurred between this witness 20 and Mr. Macdonald. Well, he says he got a list from Mr. Macdonald of the assets and liabilities.

Q. A list—do you mean in writing? A. No, we may have had notes in writing, but this list was later compiled in full by our solicitors, as I remember, but we got information and possibly we got—

Q. Well, you can tell me the information you got from Mr. Macdonald? A. Well, the information, my lord, that we got from Mr. Macdonald was when I went to find out how the estate stood, naturally, and what were the assets and liabilities, and I 30 think Mr. Macdonald gave us that information at the time. Whether he listed it, and whether that is a correct copy of his list I wouldn't say. I think there was other information gotten later, you see, but as far as I know we got the main points at that time.

Mr. Pratt: Q. And no mention was made by Mr. Macdonald at that time—

Mr. Farris: Well, please.

Mr. Pratt: Q. Was there any mention made by Mr. Macdonald of a claim by Mrs. McEwan?

The Court: Of course Mr. Macdonald was asked that also. 40

Mr. Pratt: Yes, he certainly was.

Mr. Farris: No, I am objecting to my friend's leading question.

The Court: Well, in rebuttal, if it were direct—in rebuttal. Of course, Mr. Pratt, if you please, Mr. Macdonald did not say that he gave—in that conversation.

Mr. Pratt: My recollection, my lord, is that Mr. Macdonald said he did at the first interviews with the executors.

The Court: Did he not say what I permitted to go in yesterday, that he had already told Mr. Cosens about the agrement, and saying he was not sure—he probably did not tell the executors when he saw them again. However, if you think it was otherwise, I would like to put it direct.

Mr. Farris: I am objecting to the question in that form.

The Court: If Mr. Macdonald did say that he gave it to Mr. Hemsworth, then I think you would be entitled, Mr. Pratt, to go right at it direct.

Mr. Pratt: That is what I propose to do, my lord. I want to ask this witness.

Q. Did Mr. Macdonald at any of these interviews when you obtained this information to prepare this estate for probate, did he inform you of this claim on behalf of Mrs. McEwan? A. Not on the first—in the first interviews that we had with him.

Q. At any time up to the date of applying for probate? A. Well, now, Mr. Macdonald—we had a meeting in your office—in Mr. MacNeill's office, in which Mr. Macdonald was present, not the occasion when Mr. Farris was there. On that occasion I think the question came up.

Q. In what way. How did it come up? A. Well, as to whether we would—it arose from the point of whether we would support the appeal.

Q. The appeal to the Privy Council? A. Yes.

Q. And what followed after the argument about supporting? A. Well, we—just what do you mean, conversation that followed, do you mean?

Q. Yes, what did Mr. Macdonald say when you told him that you could not support him. You gave him your reasons why you could not support him, did you? A. Well, that was discussed, that was discussed among all of them. I didn't personally give him my reasons. I couldn't, because I wouldn't be able to do that, but I think under the advice, that was what was arrived at, we could not support him.

Q. And that was the time Mr. Macdonald informed you of this claim?

Mr. Farris: That is very objectionable in form, that question? A. I am not certain whether that was—if you could tell me the date of that meeting, I would be able to tell you whether it was the first time I heard of it or not. I don't remember—possibly that meeting was after the time you had informed me, I am not quite certain of that. What was the date we met them in your office?

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Mr. Pratt: Of course if my friend is objecting to the question I can't very well tell you.

Mr. Farris: I am objecting to the form of it. I wasn't objecting to the subject matter at all.

The Court: No, you identify the time and place for Mr. Hemsworth. It is quite a long time ago.

Mr. Pratt: Q. Around about the 10th February, 1931, prior to the formal claim that Mr. Farris has made in his letter? A. Well, we heard it through you first, as I have already said, sometime around the end of January.

Q. Mr. Macdonald, at the meeting that you have referred to when he wanted to take this case to the Privy Council, did he—

The Court: Well, it is better to say what did he say, unless you have in mind a straight contradiction of what Mr. Macdonald has said that he said, Mr. Pratt.

Mr. Pratt: Q. What did Mr. Macdonald say at that meeting with reference to this claim? A. He said that—as I remember, he said that a partnership—he claimed that there was a partnership existed.

Q. Yes? A. Whereby the Lindeborg estate would be responsible for 50 percent. of the loss on the $50,000.00 that was lost by McEwan.

Q. He said there was a partnership. Was there any reference made to an agreement? A. No, there was no reference made.

Q. No reference made to an agreement? A. No.

Q. All right, that is all, thank you. By the way, you have used the word "partner" here, what is your understanding and conception of the meaning of "partner?"

Mr. Farris: Your lordship will have to say—

The Court: I think I will disallow that question.

Mr. Pratt: I think we have got very definite evidence anyhow. That is all.

John Hubert Hemsworth, Cross-Examination, 24th November, 1932.

CROSS-EXAMINATION BY MR. FARRIS:

Q. I understand from you, Hemsworth, that sometime about the end of January you did understand and you did hear at the conference at which Mr. Macdonald was present that he was taking the position that there was some form of partnership arrangement by which he was liable for half the judgment? A. His client was liable for half the judgment?

Q. Yes? A. Yes.

Q. And you had already heard that, you say, from Mr. MacNeill's office? A. I heard that—you see, Mr. Farris, I am not certain of the date of this meeting, but if it was round Feb-

ruary 10th or so, I had already heard it, because we heard it around the first—

Q. Around the end of January? A. Around the end of January or the first of February.

Q. So that at the time—it was not until later, was it, the conference took place in Mr. MacNeill's office, at which I was present? A. Well, I am not quite certain of that date, Mr. Farris, you will have to remind me of the date.

Q. Well, I mean it was subsequent to the time that you knew what Mr. Macdonald had said? A. And they met in Farris' office subsequently.

Q. In MacNeill's office where Farris was present? A. I am not certain about that.

Q. That is your recollection? A. I am not quite certain of the dates.

Q. Now, the meeting at which Mr. Macdonald was present and I was not present, Mr. Cosens was there, was he? A. Yes.

Q. Of course he would hear what was said, just as plainly as you would? A. I suppose so.

Q. Did you ever see the letter I wrote to Mr. MacNeill on the 25th February—I mean at that time? A. At that time, we are speaking now of a date prior to the 25th February.

Q. Of course you didn't see this letter before I wrote it, but after I wrote it. I say about that time did you see it? A. I saw it shortly after you wrote it, because I was submitted a copy of it from our solicitors.

Q. So that you were advised—this letter I point out to you says this: "My instructions are that this action has been conducted by Mr. R. M. Macdonald as Solicitor for all the Defendants and that these Defendants have throughout had an understanding and arrangement that any liability for principal sum or costs"—it says "or," it is obviously "and costs"—"found against the defendants, or any of them, would be borne in equal proportions by all the Defendants as between themselves. It would follow from this arrangement that while as against Harris Mr. McEwan only is liable on the Judgment, that as between the party Defendants she, as the four is liable only for half the amount. The position taken by Mrs. McEwan has already been placed before you verbally and before your clients, the executors of the Lindeborg Estate, and I understand that you have advised your clients against acceding to our claim."

Mr. Pratt: You might read that next paragraph, please, Mr. Farris.

Mr. Farris: The next paragraph—well, I will read it in a minute.

Q. When you saw that, that was in accordance with the

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position you understood was being taken at the time was it not? A. Yes.

Q. "The purpose of this letter at this juncture is two-fold: "First: To advise you that Mrs. McEwan is not in a posi- "tion single handed to continue the proceedings by way of "appeal to the Privy Council, and therefore is about to "abandon these proceedings and to effect the best settlement "possible with Harris. In making this settlement you will "please be advised therefore that formal claim is now made "upon your clients to provide half the amount necessary to "settle this claim."

You quite understood what that meant, didn't you, Mr. Hemsworth? A. Yes.

Q. You knew it meant that it was being put up to you that if you wanted the appeal to go on you came in fifty-fifty, and if you didn't it was going to be dropped? A. No, I would read from that—if I remember, Mr. Farris, I think your letter states more clearly that we are expected to pay 50 percent. of the loss, does it not, isn't that the immediate point in the letter.

Q. Well, possibly so, but you quite understand this, that it was proposed to drop the appeal? A. Yes, and then if we couldn't go on with the appeal it wasn't their intention, but we didn't know what their intention was. We can't say what they intended to do.

Q. "It is the desire of all parties to have this question of "liability settled as expediously as possible." Is that correct. Did I have the right understanding of the situation? A. Yes.

Q. "I therefore suggest that we bring a new action" and so on. Unless Mr. Pratt wishes I won't bother reading it over.

Mr. Farris: And the terms mentioned, my lord, in this last paragraph—I am afraid I will have to ask the indulgence of the court to get in, unless my friend—I have not formally put in the settlement—

Mr. Pratt: It is in, the settlement is in.

Mr. Farris: Oh, yes, that is in. That is all right, then.

Q. Was your first intimation from Mr. MacNeill's office in writing about the position? A. No, I think not. I think it was a telephone call from Mr. Pratt.

Mr. Farris: That is all, thank you.

(Witness aside).

Frances Drew Pratt, Direct Examination, 24th November, 1932.

FRANCES DREW PRATT, a witness called on behalf of the Defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. MacNEILL:

Q. Mr. Pratt, you are a barrister and solicitor? A. I am.

Q. And you are acting with my firm representing the executors of the estate of Lindeborg? A. Yes.

Mr. Farris: My lord, I don't know just where this is going to lead to. It seems to me we had better adjourn and get new counsel if all the counsel are going in the box. I have never known, in controversial matters, that counsel who conducts the examination should then go in the box. If that is going to be done I want to get in on this.

The Court: Well, I do not think they should do that.

Mr. MacNeill: Well, I want to put Mr. Pratt in. He is here if my friend wants anything.

Mr. Farris: I say if my friend wants all the particulars in, I am willing to call Mr. Ralston and let him give evidence too.

Mr. MacNeill: Never mind now, Mr. Pratt.

(Witness aside).

Mr. MacNeill: I want to put in some discovery of Mrs. McEwan. I am reading some portions of the examination for discovery of Mrs. McEwan: Questions 1 to 3; 12 to 35; 34 to 43; 46 to 68; 89 to 92; 94 to 97; 102 to 107; 118 to 127; 131 to 146; 147 to 163.

* * *

Defendants' Case. Extracts Examination for Discovery, L. McEwan.

1. Q. You are Mrs. McEwan? A. Yes.
2. Q. You are the Plaintiff in this action? A. Yes.
3. Q. You live at Nelson? A. Yes.

* * *

12. Q. Do you know Mr. Rex Macdonald, barrister and solicitor? A. Yes.

13. Q. How long have you known him? A. Do you mean personally or in business.

14. Q. In any way. When did you first meet him, and where? A. I met him at Nelson.

15. Q. How long ago? A. That is two years ago last summer.

16. Q. That was the first time you met him in person? A. Yes, the first time I met him in person.

17. Q. But you had correspondence with him? A. Oh, yes.

18. Q. Commencing about how long ago? A. Well, you know, I had had papers to sign.

19. Q. That is what I want to know, when you first had any correspondence with him and knew who he was? A. I can't say exactly how many years ago, not to be certain, you know.

20. Q. What was the occasion when you first met him? A. You know, documents in connection with the Big Missouri.

21. Q. Possibly we can get at it this way. Your brother was Hiram Stevenson? A. Yes.

22. Q. And he was an associate of Mr. Lindeborg? A. Yes.

23. Q. And he went over to the war? A. Yes.

24. Q. And was killed at Vimy Ridge? A. Yes.

25. Q. And you had had no occasion to have any dealings with Mr. Macdonald prior to that? A. No.

26. Q. So then you met him in connection with signing the documents pertaining to the Big Missouri Group of properties, that is right, is it? A. Yes.

27. Q. Had your brother left a will? A. Yes.

28. Q. And you proceeded to have the same probated, I suppose? A. Yes.

29. Q. That is, when you got the news of your brother's death? A. Yes.

30. Q. And you had occasion to write to Mr. Macdonald, or he to you, is that it? A. Well, not, you mean on account of the probate?

31. Q. In connection with the Big Missouri? A. Yes, the Big Missouri but not the will, because the will was probated in Prince Rupert.

32. Q. What was the class of documents generally you were discussing with Mr. Macdonald? A. The bonding of the claims.

33. Q. And what did you have to do in connection with that? A. I had to sign all the papers.

34. Q. How many of these options had you anything to do with? A. Well, I would be safe in saying five.

35. Q. Five, yes and in connection with each of these options what did you do? A. Well, I signed on behalf of myself, and my brother, Joseph Stevenson.

* * *

36 Q. Your brother Joseph was a legatee of your brother's will? A. Yes.

37. Q. And you had to get the papers signed by your brother— A. Sometimes the papers went back to New Brunswick and he signed them, and sometimes I signed them with his power of attorney.

38. Q. Yes, you got a power of attorney from your brother in connection with this Big Missouri matter? A. Yes.

39. Q. Prior to your brother's death you had had no connection at all or any knowledge of the Big Missouri property? A. Oh, yes, I had heard of it.

40. Q. Yes, but not in the way of having business dealings at all? A. No. no.

41. Q. Now, the procedure in connection with these various documents, which you say were five, you would sign an option agreement? A. Yes.

42. Q. Then you would sign a deed to be placed in the bank in favour of the proposed purchaser. That was it, was it not. The documents which you signed were put in the Bank of Commerce? A. Yes.

43. Q. That was it. So you would sign a deed in each instance on your own behalf? A. That was necessary, I did what ever was necessary to do.

* * *

46. Q. Then Mr. Macdonald—you had a lot of correspondence with him I suppose? A. Oh, yes.

47. Q. He was the lawyer for the Big Missouri owners? A. Yes.

48. Q. That was it; and you first met him about two years ago? A. Yes, it was two years this last summer.

49. Q. Where did you meet him? A. In my home in Nelson.

50. Q. And have you seen him frequently since that time? A. No, never.

51. Q. You never saw him at all. What was the particular date two days ago when you met him? A. July.

52. Q. Of what year? A. 1930.

53. Q. 1930 you saw him? A. Yes.

54. Q. And what was the occasion of meeting him then? A. His sister lives up the lake and he was there on a holiday and he was passing through Nelson and he came to—

55. Q. To call on you? A. Yes.

56. Q. It was not a business call at all then? A. Not particularly.

57. Q. Was there any business? What was it? A. We were discussing, of course, the Big Missouri lawsuit at the time, but you know there was no particular reason that he had to come on that occasion.

58. Q. There was no business transacted between you at that time? A. No, no; you mean paper signed?

59. Q. Yes. A. No.

60. Q. Or agreements of any kind? A. No.

61. Q. It was just a general gossip about the affairs. I have got it right, have I? A. Yes. Mr. Macdonald had been to Nelson before that too. Didn't he have a case in Cranbrook?

62. Q. I can tell you he lived at Nelson for many years.

Mr. Sloan: Just answer the questions. A. It seems to me he was there once before, he just passed through.

Mr. MacNeill: 63. Q. Just passed through? A. Yes.

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64. Q. Did you have any business dealings then? A. No, He came to the house.

65. Q. Just came to the house and said good-day to you and went on? A. Yes.

66. Q. No business dealings or any discussions? A. No, no papers signed.

67. Q. Or business discussed? A. I can't remember.

68. Q. And you have never seen him since two years ago? A. No.

* * *

89. Q. When money was paid in on any of the options given on these claims, on these five options, the moneys were to be paid in by the purchaser, into the Bank of Commerce was it, at Prince Rupert? A. Yes, the last.

90. Q. Well, the intervening ones, they had all been? A. Yes.

91. Q. And that was paid in each case to the Bank of Commerce? A. Yes.

92. Q. What did the Bank of Commerce do with the money they received? A. I was notified.

* * *

94. Q. That is, the Bank would send you a cheque? A. Yes.

95. Q. In your own name? A. Yes.

96. Q. A cheque drawn on the Bank of Commerce? A. Yes.

97. Q. And that was the way all the way through while you had anything to do with it? A. All the way through.

* * *

102. Q. They were sent back by the Bank of Commerce. You wouldn't have a deed outstanding signed and sealed and so on? A. Oh, no.

103. Q. So you got them back. That is all I want to make clear. Did you have any other mineral claims outside of the Big Missouri Camp? A. Yes, the Yellowstone group.

104. Q. How much is that? A. It is three claims.

105. Q. And you hold those yet, do you? A. Yes, unfortunately.

106. Q. And any others? A. No.

107. Q. That is all you ever had? A. Yes.

* * *

118. Q. We can come back to that if necessary. Do you know anything of an option called the Edgcomb option? A. I heard of it.

119. Q. Did you have anything to do with it yourself? A. No.

120. Q. Your statement of claim—you have read the statement of claim delivered by your solicitors in this matter? A. Yes.

121. Q. And you say there—

Mr. Sloan: Paragraph—?

Mr. MacNeill: Paragraph 13. You can read it for yourself.

122. Q. You have read over that paragraph 13? A. Yes.

123. Q. Do you know anything about the statements made there? A. Meaning what?

10 124. Q. Were you present when anything was signed? A. Oh, no.

125. Q. Then how do you say what is contained in that paragraph? A. You know talking to Mr. Lindeborg and reading over my brother's papers, you know, I read about it.

126. Q. Have you produced your brother's papers here? A. Well, I wouldn't be sure whether there is some of those there or not. I know we have the option.

127. Q. Personally you know nothing about it? A. No, not personally, no. It was done when my brother was alive.

20 * * *

131. Q. But you mentioned a little while ago about Mr. Lindeborg? A. What do you mean?

132. Q. I will keep calling your attention to this paragraph 13; you say there it was agreed between the said Stevenson, Proudfoot, and the said Lindeborgs, that the Lindeborgs would pay to the said Stevenson and Proudfoot one-half of any money that the said Stevenson and Proudfoot should pay to the said Harris. What do you know about that? A. Well, it was in the agreement.

30 133. Q. It was in the agreement? A. As far as I know.

134. Q. What agreement was that? A. The agreement that was made at this time.

135. Q. Made at what time, which agreement? A. I mean the Edgecomb.

136. Q. The Edgecomb option. A. Yes, the Edgecomb option.

137. Q. It is in that, is it? A. As far as I know.

138. Q. Well, you said something about Mr. Lindeborg. What was that? A. Well, what do you mean, about Mr. Linde-

40 borg?

139. Q. Did you, or did you not say—I may have got you wrong—that Mr. Lindeborg had said something to you about repayment of this money? A. You mean in connection with talking about this?

140. Q. In connection with agreeing to pay you? A. This was made, you know, when my brother was still alive.

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141. Q. I know. You see all these people are dead? A. Yes, sure.

142. Q. That is the difficulty we are in. But did you say Mr. Lindeborg told you that they were to pay that money? A. Well, in a letter.

143. Q. Where is the letter? A. Mr. Sloan.

Mr. Sloan: Is this the letter you refer to Mrs. McEwan? A. Yes.

Mr. MacNeill: Q. Is it in the productions?

Mr. Sloan: This is the letter Mrs. McEwan refers to, August 12th, 1930, from Lindeborg to Mrs. McEwan.

Mr. MacNeill: Is it in the productions?

Mr. Sloan: Yes, it is in our affidavit.

Mr. MacNeill: To which she refers. All right, then. Better have that marked for identification.

(LETTER REFERRED TO MARKED No. 1 FOR IDENTIFICATION).

* * *

Mr. Farris: It is hard to say what that refers to.

Mr. MacNeill: Paragraph 18 of the statement of claim, it says.

The Court: Well, you are carrying on from 145-6-7, and the question, Mr. MacNeill, is "Was there any reason why Mr. Lindeborg would want to make that payment." Now, what payment is referred to?

Mr. MacNeill: I am going back to 132. (Reading).

* * *

132. Q. I will keep calling your attention to this paragraph 13; you say there it was agreed between the said Stevenson, Proudfoot, and the said Lindeborgs, that the Lindeborgs would pay to the said Stevenson and Proudfoot one-half of any money that the said Stevenson and Proudfoot should pay to the said Harris. What do you know about that? A. Well, it was in the agreement.

133. Q. It was in the agreement? A. As far as I know.

134. Q. What agreement was that. A. The agreement that was made at this time.

135. Q. Made at what time, which agreement? A. I mean the Edbecomb.

136. Q. The Edgecomb option? A. Yes, the Edgecomb option.

137. Q. It is in that, is it? A. As far as I know.

138. Q. Well, you said something about Mr. Lindeborg.

What was that? A. Well, what do you mean, about Mr. Lindeborg?

139. Q. Did you, or did you not say—I may have got you wrong—that Mr. Lindeborg had said something to you about repayment of this money? A. You mean in connection with talking about this?

140. Q. In connection with agreeing to pay you? A. This was made, you know, when my brother was still alive.

141. Q. I know. You see all these people are dead? A. Yes, sure.

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145. Q. There is nothing else besides that, is there? A. No.

146. Q. All right. Your brother got his share of the Edgecomb option while he was alive? A. I presume so; as far as I know.

147. Q. Was there any reason why Mr. Lindeborg would want to make that payment?

Mr. Sloan: Of course, it is rather unfair to ask her what Mr. Lindeborg's reasons were. She doesn't know.

* * *

That is what she said before. From 148 on. (Reading).

Mr. MacNeill: 148. Q. Do you know of any reason? A Why he would want to?

149. Q. Yes? A. The agreement betwen them.

150. Q. Between whom? A. Well, between my brother and Mr. Proudfoot, and he was living then, you know.

151. Q. I know; but I am asking you if you know of any reason why Mr. Lindeborg should agree to pay that money which you refer to? A. Well, I don't know of any reason.

152. Q. That is all I wanted to know. Now, did you know

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the Proudfoot family at all? A. No, just have written one or two letters, that is all.

153. Q. To them? A. Yes.

154. Q. But you are not acquaintances at all? A. No.

155. Q. And have no interests with them? A. Well, yes, they have the quarter.

156. Q. I know they have some interest, but— A. No.

157. Q. —you have no business connection or anything at all? A. Well, to represent the estate.

158. Q. Just whatever the Court may have said, but you, individually— A. No.

159. Q. —have no connection with them at all, or do not represent them? A. Well, in this action, Mr. Sloan—

Mr. Sloan: Mr. MacNeill is asking you, apart from the action. He knows you are appointed to represent the estate by virtue of the Court order; but apart from that.

Mr. MacNeill: 160. Q. Do you know of any? A. Pardon?

161. Q. Have you any connection or dealings with them at all? A. No.

162. Q. None at all. And in connection with this action what have you to do for the Proudfoot group? A. Well, representing them.

163. Q. Only so far as this Court order goes? A. Yes. Is that it, Mr. Sloan.

* * *

Mr. Farris: That clearly indicates something about her property.

Mr. MacNeill: No, that clearly refers to paragraph 13 of the statement of claim.

The Court: Well, all right, carry right on, if you will, to 163, if I follow you correctly.

Mr. MacNeill: Yes. (Reading). 165 to 167. 173 to 203.

* * *

Mr. MacNeill: 165. Q. You have always had confidence in Mr. Macdonald, your lawyer? A. Well, Mr. Lindeborg's word, what he said, went with us always.

166. Q. I just asked you, you at all times had ample confidence in Mr. Macdonald? A. Yes.

167. Q. You didn't want to change your lawyer at any time? A. Well, we didn't.

173. Q. And when did you meet Mr. Lindeborg first? A. I met Mr. Lindeborg first in—what year was that, Mr. Cosens?

174. Q. Just answer for yourself? A. Mr. Cosens can probably remember better than I can. It was in 1926, I think.

175. Q. 1926, and Mr. Cosens— A. Or 1925, I wouldn't be sure—1926.

176. Q. At any rate, it was an occasion when Mr. Cosens was with him? A. Yes.

177. Q. And what was the next time? A. 1929.

178. Q. 1929? A. Yes.

Mr. Sloan: That is Daniel you are talking about.

Mr. MacNeill: Yes.

179. Q. Did you ever meet Andrew at all? A. No.

180. Q. Or the Proudfoots? A. No.

181. Or Barbrick? A. No.

182. Q. In the particulars your solicitor has handed to us, you say this—

Mr. Sloan: I don't think Mrs. McEwan has seen that.

Mr. MacNeill: I will read this to you and then you can see:

"In answer to paragraph 5 of the demand for particu-
"lars herein—"

—that is further and better particulars of the statement of claim, being paragraph 16, setting forth the agreement made by the said Daniel Lindeborg with the plaintiff, and where and when the said agreement was entered into, and if in writing, a copy thereof. Then I will read the particulars given pursuant to that demand:

"The Plaintiff says that the said Daniel Lindeborg, at
"the time that the Harris action was commenced, agreed
"verbally with the said Laura McEwan by stating to her
"words to the effect that they would fight the action together."

and so forth. When did you see Mr. Lindeborg about that? A. You mean that I talk to him?

183. Q. I am not dealing with letters just now. A. No.

184. Q. But they say here the said agreement was entered into at the home of the said Mrs. McEwan. What do you say about that? A. Well, that was before the action was started.

185. Q. That is not what this says at all. I will read it to you again. The Plaintiff, that is you—

Mr. Sloan: Pardon me, Mr. MacNeill, why not read paragraph 16 to her and give the running account.

Mr. MacNeill: I will read that— A. Oh, I understand.

186. Q. You understand it? A. Yes.

Mr. Sloan: Paragraph 16 sets out the alleged contract, and then they wanted particulars and we gave them particulars as set out there, which Mr. MacNeill is now referring to.

The Witness: Yes, I understand.

Mr. MacNeill: 187. Q. Tell me what you know about it? A. At the Hume Hotel in Nelson in 1929.

188. Q. Mr. Lindeborg was there? A. Yes.

189. Q. Who were present? A. Just Mr. Lindeborg and I talking together.

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190. Q. Was any person else with him on that trip? A. Mr. Cosens.

191. Q. He was there? A. Yes.

192. Q. That took place then in 1929? A. Yes.

193. Q. What date in 1929, if you can recollect? A. It would be in July. I wouldn't be sure of the date.

194. Q. And what did Mr. Lindeborg say to you? A. Just as it is stated there.

195. Q. I want your own recollection, Mrs. McEwan. A That we agreed, you know, whatever the agreement called for we would all stand together.

196. Q. Those were the whole of his words? A. Yes.

197. Q. That was a long time after this action was on? A. It was before the Court of Appeal.

198. Q. Yes. A. The judgment had been given, the first judgment had been given.

199. Q. And this matter was before the Court of Appeal? A. Yes, coming up before the Court of Appeal that fall.

200. Q. And was that the only interview you had with him? A. Well, then, I saw him again.

201. Q. Where? A. He came up to the house.

202. Q. That was your house in Nelson, was it? A. Yes.

203. Q. And what took place there? A. Well, I don't remember, but you know we were just talking then. I don't remember what was said.

* * *

Mr. Farris: My lord, I think in connection with that part that my friend read, I would think that it was rather meaningless, the same matter has come back again at 207, and I think that should go in.

Mr. MacNeill: No, that is not responsive.

The Court: Mr. MacNeill has not passed 203 yet. Are you putting in 207?

Mr. MacNeill: No my lord.

The Court: That may be with regard to some other matters. I have not looked it over sufficiently to ascertain, that is, 207, would appear to go back to 205. Does that refer to the same matter, according to your submission, Mr. Farris?

Mr. Farris: Well, I understand from Mr. MacNeill that he claims this was a missing letter—

The Court: 147 and so on.

Mr. Farris: Yes.

The Court: "I am asking you if you know of any reason" (Reading). Mr. MacNeill says apparently that refers to the matter set out in paragraph 13 of the statement of claim, or re-

ferred to in question 132. Now, then, apparently 207 is about something else.

Mr. Farris: I submit 205-6 and '7 is clearly about the statement of claim. It is rather ambiguous.

The Court: Yes, but is it about the same particular matter?

Mr. MacNeill: It is very vague. I had finished that branch of the matter.

Mr. Farris: No, you have endeavored to come back to it. This couldn't mean anything else. The other is ambiguous.

The Court: You see, if you please, Mr. Farris, if 132, going right along to 147 and so on, refers to paragraph 13 of the statement of claim, that is with reference to—at the time of the Edgecomb option.

Mr. Farris: Yes, but the Edgcomb option is away back when our property was alive.

Mr. MacNeill: That is what is referred to in the statement of claim specifically, you will find it there, that is why it was brought up.

Mr. Farris: All right, I misunderstood what you were talking about.

Mr. Pratt: Then paragraph 13 of the statement of claim, my lord, refers to the Edgecomb option.

The Court: Very well, Mr. MacNeill can go on.

Mr. Farris: I misunderstood, I thought my friend was claiming that referred to 13. I am sorry.

Mr. MacNeill: 355 to 366. I stopped at 364.

* * *

355. Q. Did you pay Mr. Rex Macdonald your share of his taxed costs in the Harris action? A. We paid him, but we have not had any settlement really yet.

356. Q. What is the trouble? A. No trouble at all, only, you know, he has not asked for a settlement.

357. Q. He sent you a bill, though, did he? A. No.

358. Q. You are quite sure you didn't pay your share? A. I won't say I didn't pay my share, but we have not had a settlement yet.

359. Q. What do you mean by a settlement? A. Oh, you know, a statement.

360. Q. He didn't send you a statement at all? A. No.

361. Q. Well, did you send him money? A. Yes.

Mr. Sloan: Subject to my objection that it is not relevant.

Mr. MacNeill: I think it has a bearing.

362. Q. Can you answer, Mrs. McEwan?

Mr. MacNeill: What is the last question.

(Reporter reads: 361).

363. Q. You owe him money still, do you? A. I don't know.

364. Q. How much did you pay?

Mr. Sloan: Subject to objection you can answer the question, if my friend wants to inquire into your relations with Mr. Macdonald.

Mr. MacNeill: It has a bearing.

The Witness: Is it all right to answer?

Mr. Sloan: Subject to my objection. It is a matter of comment later on.

Mr. MacNeill: It is not mere curiosity at all? A. No.

Mr. Sloan: I take it my learned friend has some real purpose in asking the question, if it has a real bearing on the case, as I say, it is subject to my objection. You can answer.

The Witness: I can answer?

Mr. Sloan: Yes. A. You know, as executrix of the Stevenson estate, we sent $1000.00, what was asked for, and then we sent $500.00.

* * *

The Court: Well, now, do you wish 365 read?

Mr. MacNeill: (Reading).

* * *

Mr. Pratt: 365. Q. There has never been an account or statement sent? A. No.

366. Q. Showing how those moneys were applied? A. No.

* * *

The Court: Then I have to 366.

Mr. MacNeill: Then we go on, 367 to 373.

The Court: You are really putting in from 355 to 373, are you?

Mr. MacNeill: Yes, my lord, that is where we began (Reading).

* * *

Mr. MacNeill: 367. Q. Mrs. McEwan, I have a large bundle here, of tax bills, and assessment notices sent out from the Government, and receipts for payment. Is this not the fact that each person paid the taxes on the acreage of his own pro-property, the property of which he was the owner? A. Well, you mean some would pay a certain amount?

368. Q. Yes? A. And that the others would pay an equal amount?

369. Q. No, each one would pay according to the acreage they own? A. No, they never paid that way since I had anything to do with it.

370. Q. When was that? A. We each paid a quarter, that is since 1918 or possibly 1917.

371. Q. Well, just look at these, Mrs. McEwan. I don't think they bear you out. Just look at them. Now, you see a statement there, a receipt dated the 29th of June, 1921, Daniel Lindeborg, based on acreage, is it not? A. Yes.

372. Q. $9.50. Here is another D. Lindeborg, and Hiram Stevenson, $7.75, another one Andrew Lindeborg $13.00? A. This was in 1921.

373. Q. Yes, 1921. You see for yourself? A. Yes, I see.

* * *

377—I had better read right down to the end (Reading).

The Court: I did not follow you there. Did you complete 373 or did you stop before?

Mr. Pratt: Stopped at 373, my lord, and then there is a discussion by Mr. Sloan.

The Court: Well, the witness says something there, is that put in or not? You put in the answer to 373.

Mr. MacNeill: I had better read down, 373, my lord.

The Court: Then there is some discussion between counsel. Then the witness says something. Are you putting that in?

Mr. MacNeill: No, my lord, I am not.

Mr. Farris: What is that that is being left out. Is it important?

Mr. MacNeill: I don't think that it is.

Mr. Farris: Why not put it all in and get the continuity of it?

Mr. MacNeill: Well, I don't object to doing that—go back to 374.

The Court: It is just 373 I am asking about.

Mr. MacNeill: (Reading).

* * *

Mr. Sloan: But what relation have these to the particular property you are discussing.

Mr. Pratt: These are the Government statements.

Mr. Sloan: Apparently something to do with something called Dauntless.

Mr. Pratt: That is one of the claims.

The Witness: We never paid the taxes like that. I never paid exactly the quarter.

* * *

The Court: Very well, that is what I want to know, whether that is in or not. Now, you go to 377, do you?

Mr. MacNeill: 375 I think clears up some matters that are vague. 375 to the end (Reading).

* * *

375. Q. In the final transaction 16 and a fraction claims

sold, were there not, in the Big Missouri? A. No, supposed to be 20 claims, 20 different names, anyway.

Mr. MacNeill: 376. Q. These are based on acreage, are they not. Here I show you one Laura McEwan, administratrix of the estate of Hiram Stevenson deceased, $9.75? A. Mr. Lindeborg never sent that to me.

Mr. Sloan: I would point out to my learned friend that in one of the letters Mr. Lindeborg states he has received some 17 tax notices, and I think Mrs. McEwan may have got three, and she sent them on to him for payment. It is quite apparent he got all the tax notices, and the ones which were sent to her, she sent to him to deal with, and then the amount was divided later.

Mr. Pratt: According to the acreage held. A. No, never once.

Mr. MacNeill: 377. Q. Let us clear this up. Did you not receive tax notices addressed to yourself. The assessor used to send the notices to you? A. No, I may have got a notice once, but I can't even be sure of that, but I never paid the taxes, a certain share, I paid one quarter, and then when they were Crown granted I paid a quarter.

Mr. Sloan: I refer my learned friend to Exhibit 59. It sets out in detail how they did those things. The form of the tax notice is not the test of payment. The two things are entirely different.

Mr. Pratt: 378. Q. Are you alleging a partnership, then, Mrs. McEwan? A. Yes, a partnership, certainly.

379. Q. And you could not withdraw from it any time you wanted to?

Mr. Sloan: That is a matter of law.

Mr. Pratt: Just a moment. I want to get her conception? A. I couldn't withdraw from it?

Mr. Sloan: He is asking you that. A. I wouldn't say I couldn't withdraw from it.

Mr. Pratt: 380. Q. In fact, Mr. Lindeborg could not do anything with your property unless with your consent? A. No.

Mr. MacNeill: That will do, thanks.

* * *

My friend stated yesterday that he desired to have some of the examination for discovery of Lindeborg in the Harris action.

Mr. Farris: Yes, I suggested—I haven't read the whole of the examination, and I read from the examination that is in in the Harris action, which is enough for my purpose, and I suggested putting that in, and my friend objected, and I said as far as I am concerned, put the whole thing in.

Mr. MacNeill: Well, there is a tremendous amount of it.

There is some of it which I wish to have in, if my friend can go on and read what he wants, I will supplement that with such portions as I desire, and I do desire some of it.

Mr. Farris: I think we would save time if your lordship would adjourn a little earlier and we could sit down and mark it up.

The Court: Yes.

Mr. Farris: Because I didn't think of this when I prepared my brief, I only had extracts.

The Court: Very well. Now, could not counsel just agree on that? Is there anything else?

Mr. Farris: Are you finished, Mr. McNeill?

Mr. MacNeill: Well, I want to finish and then we would dispose of that other.

Mr. Farris: Well, have you finished your evidence?

Mr. MacNeill: Well, I haven't closed my case.

Mr. Farris: We are both in the same position on this thing here. I want to call Mr. Macdonald in rebuttal; and that other witness will not be here, my lord, until after lunch.

Mr. MacNeill: There is some evidence in rebuttal that you wish to put in.

Mr. Farris: Yes.

The Court: Very well.

REBUTTAL

REGINALD M. MACDONALD, recalled in Rebuttal on behalf of the Plaintiff, testified as follows:

DIRECT EXAMINATION BY MR. FARRIS:

Q. You were not here this morning to hear Mr. Cosens' evidence? A. No.

Q. I asked Mr. Cosens if he didn't state to you in your office at the time he was visiting you prior to—well I will put it this way, prior to the time when we all met in Mr. MacNeill's office over the appeal of Mr. Lindeborg. In discussing what you stated that you had told Mr. Cosens about Mr. Lindeborg's arrangement to share in the liability of any judgment and costs, I asked Mr. Cosens if he didn't make a statement to you, that statement I won't read, I don't want to suggest it unduly to the witness, but I want to identify it.

The Court: We have had it already.

Mr. Farris: Not from this witness, because he had not been instructed on this at the time, and it was not material at that time anyway.

Q. Did Mr. Cosens make any statement to you pointing out

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the difference between the position that Lindeborg had taken and what he would take as an executor? A. Well, as I said before, I think—

The Court: Yes, I heard something about that.

Mr. Farris: Not from Mr. Cosens.

The Court: No, but Mr. Macdonald said something.

Mr. Farris: I am sorry, I don't recall it.

The Court: No, I think I had that. Well, no objection to him being asked again. Perhaps that would save time.

Mr. Farris: Q. What was said, Mr. Macdonald? A. Well, now, Mr. Farris, I am not prepared to say that it was Mr. Cosens that said that. I think it was; but it was either Mr. Cosens or Mr. Hemsworth. They were both there at the same time. I had told them about this arrangement of Mr. Lindeborg's, anyway, I think, and I think it was Mr. Cosens said, "Mr. Lindeborg, if he were living, could do anything he liked, but we are executors, and we must protect the estate."

The Court: Was Mr. Hemsworth asked about that then?

Mr. Farris: I don't think he was, because—

The Witness: I ought to say, perhaps, that I replied to that and said, "Well, I can only tell you frankly that if the matter ever goes into court, I shall have to go into the witness box and tell the facts. I did hear a portion of Mr. Cosens' evidence, and I remember his saying that no claim had been made on Mrs. McEwan's behalf by me, and that is correct. I wasn't making a claim on Mrs. McEwan's behalf, I was telling the executors what I knew about the matter as affecting the Lindeborg estate.

Q. You never did make a claim? A. I never made a claim. I had no instructions to.

Q. You know that Mr. McEwan came from Nelson early in February? A. Well, I don't remember the date. I know that Mr. McEwan came into my office and told me that he had been in to see you.

Q. Yes, and after that I got in touch with you and got a statement from you? A. Yes.

Mr. Pratt: There is a letter, Mr. Harris, that I would like to be put in? (Handing document to counsel).

Mr. Farris: All right.

CROSS-EXAMINATION BY MR. PRATT:

Q. By the way, Mr. Macdonald, I produce to you a letter dated January 7th, 1930. Is that your signature? (Handing document to witness). A. Yes, that is my signature.

Mr. Pratt: I will have that marked, Mr. Registrar.

(DOCUMENT MARKED EXHIBIT No. 87).

Mr. Pratt: The letter reads, my lord—it is addressed by Mr. Macdonald to Daniel Lindeborg (Reading letter).

Q. On that date, Mr. Macdonald, you took the trouble to tell Mr. Lindeborg that you didn't know what his interest was in that judgment, did you? A. The letter speaks for itself, Mr. Pratt.

Q. Yes, it speaks for itself. We will have it at that. Now, going back to this question of the interview that you claim you had with Mr. Cosens and Mr. Hemsworth, what date was that approximately? Can you give the date? A. Approximately I can, but only approximately. It was after Mr. Lindeborg's death.

Q. That was January 6th, 1931? A. Well, it was after that, but Cosens called at my office a number of times. Sometimes Mr. Hemsworth and Mr. Cosens came by themselves, and once or twice—once anyway, and I think probably twice, Mrs. Cosens came with them. During those interviews I was telling them all I knew that would help them in the matter.

Q. You don't know whether you have got the right date anyhow? A. I can't give you it any better than that.

Q. How long was it approximately—was it a week or— A. You can't tie me down to that, because I can't tell you, Mr. Pratt. We had, as I say, a number of interviews extending over several weeks, I suppose

Q. Over several weeks, in fact there were several interviews and it was about the estate, was it not? A. Yes, my memory would be that it was likely at the first interview that we had—one of the early ones.

Q. And Mr. Macdonald, the object of those interviews was to get the particulars from you in order to prepare the application or petition for probate, was that not so? A. That was the first interview.

Q. No, but at a number of interviews they had with you? A. I have had a number of interviews asking me for information that would aid you in preparing the affidavit for the succession duties.

Q. Yes? A. But that was later on, I think.

Q. That was later on, and did you at any of these interviews tell me or Mr. Cosens of this claim that has now been made here? A. I can't remember such, but I think it was commonly talked about amongst us.

Q. You think it was commonly talked about amongst us, but you can't remember, can you? A. No.

Q. There was a meeting in my office on or about January 31st, at which you were present with Mr. and Mrs. Cosens, as I recollect. Do you remember that? A. A meeting in your office?

Q. Yes, you came over—perhaps I can refresh your memory.

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You were very much concerned over carrying the appeal to the Privy Council? A. Yes, we had had advice to take an appeal to the Privy Council.

Q. For Mrs. McEwan? A. Oh, no, no. The question of taking an appeal to the Privy Council—In fact I think the appeal was launched, if I remember rightly, wasn't it?

Q. I don't know; you were solicitor? A. I think that notice of appeal to the Privy Council was actually given. Now, then, the reason why that was abandoned was that the Lindeborg interests refused to co-operate, and Mrs. McEwan felt that it was too big a burden for her to handle alone.

Q. So she went to work to settle the action? A. Yes, that was—

Q. You signed it, the settlement is there? A. What ever that document says. It speaks for itself.

Q. Now, Mr. Macdonald, the first recollection—my friend may object to this question—the first intimation you ever gave me of this claim was that there might be, if we didn't go ahead with the appeal, there might be a claim for a partnership—

Mr. Farris: Well—

Mr. Pratt: My friend may object.

Mr. Farris: I know, but my friend should not put the thing in this position. I say my friend is telling your lordship this is his recollection about it. Now, I can't cross-examine on that.

Mr. Pratt: Well, if my friend wouldn't allow me to go in the box to give my version—

Mr. Farris: I say if everybody wants to go in the box I would go too.

Mr. Pratt: Q. Well, did you, Mr. Macdonald, on or about January 31st, advise me that there might be a claim based on a partnership? A. Might be a claim by Mrs. McEwan?

Q. Yes? A. I don't remember, Mr. Pratt.

Q. You don't remember that? A. I don't remember it.

Q. Do you remember subsequently, after Mr. Farris had written this letter, that I had an interview with you and I asked you about this claim based on a partnership and then you said—

The Court: I cannot quite follow, Mr. Pratt, why Mr. Macdonald would not be asked about that matter when he was in the witness box before. However, there may be something—

Mr. Pratt: Mr. Macdonald was acting for Mrs. McEwan.

The Court: Well, you did ask Mr. Macdonald, as I recollect, some questions about whether he told you and Cosens certain things.

Mr. Pratt: Very well, I will leave that.

Q. You made the statement just now that you told Mr. Cosens or Mr. Hemsworth that if the matter came up you would

have to go into court to tell the facts? A. Yes, I did. I told them that.

Q. Now, at one time when Mr. Lindeborg had died, you had been his solicitor, you prepared his will? A. Yes.

Q. And you intimated, did you not, that you expected you would carry through the probate. That was your understanding? A. That I would carry through the probate of the Lindeborg will?

Q. Yes? A. I never made such a suggestion at all. It was entirely out of my hands. It was in Cosens' hands.

Q. It was taken out of your hands by the executors? A. They came to my office to get the will, yes, I had the will there, they decided to take it away, asked me whether there would be any objection to it, I said of course not, and they took it away.

Q. Did you not intimate at one time that you expected you should have had the work of carrying out the probate? A. Never, there was never any suggestion of that kind made to me. If Mr. Lindeborg had wanted that, I presume he would have left some word to that effect; and he did not.

Mr. Pratt: All right.

The Court: We will adjourn now until 2:15.

(COURT ADJOURNED AT 12:50 P.M. UNTIL 2:15 P.M.)

(2:15 P.M. COURT MET PURSUANT TO ADJOURNMENT)

Mr. Farris: I will call one short witness. At lunch time my friend spoke about suggesting an adjournment of the argument of this case, that would be until Tuesday, and that we might be in better shape to present the argument, and your lordship won't lose any time.

The Court: Well, subject to how the list stands, it will be Tuesday, provided it does not conflict with anything next week.

Mr. MacNeill: Well, it is Tuesday next week unless something extraordinary interposes.

The Court: Yes, I will set it for eleven o'clock on Tuesday, next week, of course it being understood if I have a trial the day before and it carries on it will stand over.

Mr. Farris: I will call the next witness. Miss Fugler.

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MARY ETHEL FUGLER, a witness called in rebuttal on behalf the Plaintiffs, being, first duly sworn, testified as follows:

Mr. MacNeill: This is in rebuttal, I think my friend should tell your lordship what it is to rebutt.

Mr. Farris: Yes, my lord, I will do that. It is as to the conversations, or lack of conversations that took place between Mr.

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Macdonald and Mr. Cosens. I could not have called this evidence in chief, because it is not part of our affirmative case.

Mr. MacNeill: It is confined then to—

Mr. Farris: Just those—this lady was Mr. Macdonald's stenographer.

Mr. MacNeill: This is between certain dates after the death—

Mr. Farris: Yes, it is between that date of the death—well, it is conversations that were had after that, that is all.

Mr. MacNeill: All right.

DIRECT EXAMINATION BY MR. FARRIS:

Q. You are in the employ of Mr. R. M. Macdonald as stenographer? A. Yes.

Q. And have been for how long? A. About four years.

Q. About four years. Have you been in the same premises all that time? A. We were on the 9th floor of the same building, but we have been in the present office for about two and a half years.

Q. Well, at the time in question, in 1929 you were in the same office? A. Yes.

Q. This office was on what floor? A. The 8th floor.

Mr. Farris: My friend won't mind if I lead—I was just there a few minutes ago.

Q. It is one room with a glass partition put in? A. Yes.

Q. And Mr. Macdonald's is — the private part is into the window? A. The inner office, yes.

Q. And there is a door between? A. Yes.

Q. Which is in the middle of the partition? A. Yes.

Q. Now, where is your location? A. Well, there are two desks in the outer office, one on each side of the door.

Q. On each side of the door, yes. And where in relation to the partition? A. Right beside the partition.

Q. Right beside the partition, so that the door is in the centre, Mr. Macdonald's desk is in the centre, inside the door. A. Yes.

Q. And then on either side of the door—there is a desk on either side of the door outside? A. Yes.

Q. And you sat on the inside place, that is closest to the door? A. Yes.

Q. On either one of these seats? A. Yes.

Q. That would only be a very few feet. Could you form a guess as to how far you would sit to where Mr. Macdonald was sitting? A. Oh, not more than four or five feet I would think.

Q. Do you recall the date of the death of Mr. Daniel Lindeborg? A. Yes.

Q. Mr. Cosens—the executors of the Lindeborg will came to the office? A. Yes.

Q. Yes. Do you remember who it was that came? A. I remember that Mr. Hemsworth and Mr. Cosens came, and on one or two occasions Mrs. Cosens came with them.

Q. Are you able to separate in your mind one visit from the other? A. No, not very clearly.

Q. Now at any of these visits at that time, that is while they were coming up and asking—seeing Mr. Macdonald shortly after Mr. Lindeborg's death, do you recall hearing any of the conversations? A. Well, on one or two occasions the discussion became rather heated and my attention was attracted to them for that reason.

Q. Yes? A. And I heard something of what was said.

Q. Yes, do you recall whether the door was open or not? A. I am not sure about that. Sometimes it was open, and sometimes not.

Q. Are you able to hear when the door is shut? A. Yes, if the voices are raised at all.

Q. I saw you just before lunch today down at that office? A. Yes.

Q. That is the first time I saw you? A. Yes.

Q. Yes, you sat in your seat there, and listened to Mr. Macdonald and I talking? A. Yes.

Q. Mr. Macdonald being in his seat—

Mr. MacNeill: I don't know why this should be brought in, as to what my friend and Mr. Macdonald did, because I don't think that is relevant. We are dealing with certain matters—

Mr. Farris: It is mainly a question of fixing what she could hear.

Mr. MacNeill: Well, of course the circumstances are different. I don't think my friend should put that.

Mr. Farris: It is open to my friend, if he wishes to cross-examine.

Q. Can you recall any discussions on the subject of Mr. Lindeborg, and his relations with the others in the Harris action? A. Well, I remember one or two occasions when the discussion became quite heated, the subject of Mr. Lindeborg's estate sharing the cost in the Harris action with Mrs. McEwan and the Proudfoot estate coming up, and on those occasions I think the Lindeborg executors were—

Mr. MacNeill: Q. Speak up, please? A. I beg your pardon. On these occasions—

Q. I think what?

Mr. Farris: Q. Yes, go on? A. I think the Lindeborg executors were objecting to Mr. Macdonald saying that Mr. Lindeborg had repeatedly assured him, Mr. Macdonald, that he intended—

Mr. MacNeill: Now, here is another conversation between—

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The Court: Just what was said.

Mr. Farris: Q. You had better tell what was said as you can recall it?

The Court: Just what was said. A. Mr. Macdonald told the Lindeborg executors that he had repeatedly heard Mr. Lindeborg telling him that he intended to share the gains or losses of that Harris action with the other parties to the action.

Mr. MacNeill: Well, this is entirely new. This should have been brought out in the plaintiff's case, my lord.

Mr. Farris: No, this would not be admissable in the original case.

Mr. MacNeill: Well, if it is not admissable in the case it is not admissable now.

Mr. Farris: My friend has made this an issue.

The Court: If you please, I was trying to look up when Mr. Macdonald was asked about the conversation with the executors and I found, subject to correction, and you correct me, Mr. MacNeill, if you think otherwise, that he had asked Mr. Macdonald about the conversations with Mr. Cosens or Mr. Hemsworth.

Mr. MacNeill: Some conversations they had, yes.

The Court: Yes, in your cross-examination. I just have it—you apparently, Mr. MacNeill, asked Mr. Macdonald re conversation with Mr. Cosens or with the Cosens.

Mr. MacNeill: Yes, my lord, I did.

Mr. Farris: Now, if that had dropped there I couldn't have gone any further, but my friend wishes to have that, taking advantage of that cross-examination of Mr. Cosens and Mr. Hemsworth, he for some reason of his own seems to make that a material issue and this is the only time I can meet that.

Mr. MacNeill: But here my friend is going much further than that, some conversation with Mr. Macdonald—

The Court: And you asked Mr. Macdonald about the conversations, Mr. MacNeill, and then you led evidence with regard to the conversations and asked Mr. Cosens and Mr. Hemsworth about them, and now Mr. Farris submits that he can call a witness.

Mr. MacNeill: Well, to give evidence that was in dispute —this witness should have been in the first instance—

The Court: If you please, if it is suggested that Mr. Macdonald told the executors something or the executors told him something, do you submit Mr. Farris should call that evidence as part of this case?

Mr. MacNeill: Well, what he told Cosens, as long as it was not—if it is confined to the executors, but here as I understand this witness wishes—

The Court: Telling what was said between Mr. Macdonald and the executors as I understand it—

Mr. Farris: Yes, my lord.

Mr. MacNeill: No, these are statements that Mr. Macdonald to make these people.

The Court: You mean the executors?

Mr. MacNeill: Made to the executors, yes, and detailed matters in that way and he is getting before the court evidence that wouldn't—which should be put in his case in chief, because this witness could have been called, "Yes, I heard on a certain day this conversation." That would have been part of his evidence in chief. Now, he is supplementing that as I understand by some statement, as he puts it, in rebuttal, and I submit, my lord, that that is hardly a matter for rebuttal. It is a nice question, my lord, I admit.

The Court: Well, you may go on, Mr. Farris.

Mr. Farris: Can you give me the last question. (Last question read as follows: "Q. You had better tell what was said as you can recall it."

"The Court: Just what was said. A. Mr. Macdonald told the Lindeborg executors that he had repeatedly heard Mr. Lindeborg tell him that he intended to share the gains or losses of that Harris action with the other parties to the action."

The Court: Well, go on, will you, please, and tell me.

Mr. Farris: Q. Do you remember what they said? A. Well, now, I don't know, I didn't hear what they said.

Q. Did you hear Mr. Macdonald say anything more? A. Yes, I heard him say on two or three occasions that if the action—

The Court: Q. This is to the executors. A. Yes, that if this action—if there should be a trial of this question, he would have to go into the witness box and say that Mr. Lindeborg had given him that assurance on several occasions.

Mr. Farris: Your witness.

CROSS-EXAMINATION BY MR. MacNEILL:

Q. Have you made any notes of these conversations at the time? A. No.

Q. You did not? Have you discussed it with any person—this matter? A. Well, I have, in the office, discussed these subjects with Mr. Macdonald—I—

Q. I haven't that in view. I want to know, had you any interviews today? A. No.

Q. Not with any person? A. No.

Q. When did you last have it up with Mr. Macdonald? A. He asked me this morning if I remembered anything of this.

Q. Well, I say you did have a talk with Mr. Macdonald this morning about it then? A. He merely asked me that question.

Q. Well, he asked you the question, and you replied? A. Yes.

In the Supreme Court of British Columbia

Proceedings at Trial.

Plaintiff's Case.

Mary Ethel Fugler, Rebuttal. 24th November, 1932. —*Continued.*

Q. All right. Can you fix any date at all when this took place? A. No, it was shortly after Mr. Lindeborg's death.

Q. And who were the people who were in Mr. Macdonald's room? A. Mr. Cosens and Mr. Hemsworth; perhaps Mrs. Cosens.

Q. Oh, it is perhaps, I see. And your recollection is not very clear as to the whole matter? A. It is only clear on the subject of these heated discussions, that was what drew my attion to them.

Q. Whose were the heated voices? A. Well, I think Mr. Macdonald's chiefly.

Q. Well, why. What was that for? A. Well, I don't know.

Q. But Mr. Macdonald got very excited, did he? A. He was rather vexed, yes.

Q. Yes, why was he vexed? A. I don't know.

Q. You don't know. You didn't hear that part of the conversation? A. Well, I think he was only trying to emphasize his point of view.

Q. But he was very excited about it? A. He was rather excited, yes.

Q. Yes. Was there any reason for his being vexed at all? A. I don't know.

Mr. Farris: Does your lordship wish anything?

The Court: No.

Mr. Farris: Thank you.

(Witness aside).

Mr. Farris: It is also suggested that we take advantage of the adjournment to pick out what evidence we wish to put in of that discovery, and put that in, if your lordship is agreeable to allow that.

The Court: Very well. The case is adjourned now until eleven o'clock on Tuesday next.

(2:35 P.M. CASE ADJOURNED TO NOVEMBER 29th, 1932, AT 11:00 A.M.)

Plaintiff's Case.

Extracts Examination for Discovery, D. Lindeborg.

November 29, 1932, 11 a.m.

(COURT MET PURSUANT TO ADJOURNMENT)

Mr. Farris: My lord, we were to put in some evidence given by Mr. Lindeborg on the Harris trial, but what I suggested doing is reading what is in the old appeal book, that is exhibit 1, and my friend can supplement that with any further questions and answers out of the original. Is that satisfactory?

Mr. MacNeill: That is quite all right.

Mr. Farris: This begins at page 105 of the appeal book.

which is exhibit 1, and goes to page 124. There is a lot of this that I might cut out, but it is easier to read it than to pick it out. It begins at page 105 of the appeal book at question 1 and it runs to 124. I will tell you when there are any questions skipped and you can follow it. (Reading).

1. Q. Mr. Lindeborg, you are one of the Defendants in this action? A. Yes.

2. Q. And the other Defendants are: Duncan C. Barbrick, administrator of the Estate of James Proudfoot, and Laura McEwan administratrix of Hiram Stevenson, and yourself as administrator of the Estate of your late brother Andrew Lindeborg? A. Yes.

3. Q. Do you know Mr. Harris, the Plaintiff? A. Yes.

4. Q. How long have you known Mr. Harris? A. I have known him since 1904.

5. Q. Where did you first meet Mr. Harris? A. Stewart, B. C.

6. Q. That was on the Salmon River, was it? A. No, in the Bear River flats I first met him.

7. Q. What were you doing at that time? A. Prospecting.

8. Q. What was Mr. Harris doing? A. I met him on the beach and afterwards he was prospecting.

9. Q. You knew he was prospecting? A. Not at that time.

10. Q. But within a short time afterwards you did? A. Yes, a few days.

11. Q. Did you ever visit certain mineral claims that he had in that neighborhood? A. Well, I visited the ground.

12. Q. You visited the ground? A. Yes.

13. Q. What ground was that? A. I couldn't tell you. The only one I could tell you the actual ground was the Jumbo.

14. Q. You visited the Jumbo? A. Yes.

15. Q. And you saw certain work done on that Jumbo claim, certain tunnelling? A. No.

16. Q. You didn't see any? A. Yes, I did, too. There was a tunnel in the surface dirt.

17. Q. And who was doing the work on this claim? A. At the time I was there there was nobody working there.

18. Q. Who had done it to your knowledge? A. Harris and his partner.

19. Q. Harris and his partner. Who was his partner? A. Dave Rarick.

20. Q. Did you have any talk with Mr. Harris at that time about that particular claim? A. No.

21. Q. Did you have any talk with Mr. Harris at that time about any claim? A. No, just the country in general.

In the Supreme Court of British Columbia.

Proceedings at Trial.

Plaintiff's Case.

Extracts Examination for Discovery, D. Lindeborg. —*Continued.*

22. Q. And did you decide to stake a claim yourself? A. Yes.

23. Q. And did you stake a claim yourself? A. Yes.

24. Q. Where was the claim you staked in reference to the Jumbo? A. In a northwesterly direction from the Jumbo.

25. Q. Far from it or close to it? A. It would be I guess —I have no measured distance you know but it would be approximately 3,000 feet or more.

26. Q. How much? A. 3,000 feet or more.

27. Q. Was it contiguous to that group, was it adjoining the Jumbo group? A. No.

28. Q. What was this claim you located? A. I located two claims in 1904. The Buena Vista and the Rambler.

29. Q. Do you know if Mr. Harris at any time owned these claims before you located them? A. Not so far as I know.

30. Q. Did Mr. Harris discuss the Buena Vista or the Rambler with you before you staked them? A. No, he didn't discuss them with me because I hadn't been over the country at that time, the first time I was over and he told me there was a mineral showing on the heights.

31. Q. He said there was a wonderful showing on the heights? A. A mineral showing.

32. Q. And by the heights he referred to the Buena Vista and the Rambler? A. There was no Buena Vista then.

33. Q. But that is a part of it now? A. Yes.

34. Q. Did he tell you that he had staked off part of it? A. No, there were no stakes I saw.

35. Q. You didn't see any post or stake there? A. No.

36. Q. So then you staked the Buena Vista and the Rambler? A. Yes.

37. Q. Did you stake any other claims within the next few years immediately adjoining? A. Yes, any number of claims.

38. Q. I mean to say in the immediate neighborhood of the Jumbo group? A. Yes.

39. Q. What were they? A. I staked the Terminus and Falls View, another party and myself.

40. Q. Who was your partner? A. My brother Andy Lindeborg.

41. Q. He was there at that time, was he? A. Not in 1904, but afterwards.

42. Q. When did Andy Lindeborg arrive on the scene? A. 1905.

43. Q. And he was your partner? A. Yes.

44. Q. Did you know Proudfoot at that time? A. Yes.

45. Q. He was there at that time? A. No, not in 1904.

46. Q. When did Proudfoot come on the scene. A. As near as I can remember, 1905.

47. Q. And Stevenson, when did he arrive? A. The same time.

48. Q. What were Proudfoot and Stevenson doing up there? A. Prospecting.

49. Q. Were they in partnership with anybody? A. No.

50. Q. Were they in partnership with you? A. No.

51. Q. Were they in partnership with Mr. Harris? A. Not that I know of.

52. Q. Then the Jumbo group of claims were re-located by you and recorded in August, 1909? A. Yes, that Jumbo claim?

53. Q. The Jumbo claim, yes. A. Yes.

54. Q. What date in August was that, do you recollect? A. I couldn't tell the date, but about the middle of August.

55. Q. About the middle of August? A. Yes.

* * *

We skip to 65 here. Do you want these in?

Mr. Pratt: No.

Mr. Farris: Then this skips to 65. (Reading).

* * *

65. Q. You located in your joint names? A. Yes.

66. Q. Why did you not locate it in your own name? A. I couldn't locate it in my own name when he was there. He would have done the same thing and there would have been a dispute about it.

* * *

Then it skips to 70.

Mr. Pratt: You want—

Mr. Farris: 65 and 66, then skip to 70 and 71. (Reading).

* * *

70. Q. You did not have anything in writing? A. No.

71. Q. It was not necessary? A. No, certainly not.

* * *

—85 next. (Reading).

* * *

85. Q. Nobody had any interest in the Dauntless except yourself? A. My brother and myself. We had been partners at that time for twenty odd years, anything I staked or what he staked it was equal shares.

86. Q. Did you have any agreement to that effect? A. No.

87. Q. Nothing in writing? A. No.

88. Q. So that your brother was a partner then in this Dauntless claim? A. Anything I staked he was a partner.

89. Q. In all the claims he was a partner? A. Yes.

90. Q. But Stevenson was not a partner in the Dauntless? A. No, not at that time.

91. Q. What about the Winer claim? Who staked that? A. I think Jimmie Proudfoot staked it.

* * *

110. Q. Well, had you when it was staked in 1909? A. No.

111. Q. Have you any interest in it now or have you had recently? A. We were in together in everything we had the last few years.

112. Q. Who is we? A. Proudfoot, Stevenson, my brother and myself.

113. Q. And your brother and yourself? What was this arrangement? Was this a written agreement you had? A. No.

114. Q. Nothing in writing? A. No.

115. Q. What was the basis of the agreement? A. The basis of the agreement was this that we in dealing, in making a deal on the property we would put all our claims, all the adjoining claims together—not all the claims we had—but the adjoining claims together and make one deal on it.

116. Q. How were you going to share the expenses of that, of the assessment work and so on? A. We done our share of the assessment work all of us. If one man happened to be away the others done it and at another time if another one happened to be away the others done it.

117. Q. And the monetary expense, any money you had to expend in the maintaining of these claims, how was that paid? A. Equally.

118. Q. That is four equal shares? A. Yes.

119. Q. Yourself, your brother, Proudfoot and Stevenson? A. Yes.

120. Q. That is correct? A. Yes.

* * *

Mr. Pratt: You skipped there?

Mr. Farris: Yes, from 120 to 149. (Reading).

* * *

149. Q. Well, then, when you located these claims you gave them the name of the Big Misouri, did you not? A. Yes. No. Didn't give it the name of the Big Misosuri group. We gave that individual claim that name.

150. Q. But since then it has become known as the Big Missouri group? A. That is the group of all those claims?

151. Q. Yes? A. Yes.

152. Q. And that name was given because of the fact Mr. Harris was known as Missouri Bill? A. No, never heard of that.

153. Q. Why did you locate it in that name then? A. Because it was his home State.

154. Q. Whose home State? A. Harris'.

155. Q. That is what I say. You gave it that name because it was Mr. Harris' home State? A. Yes.

156. Q. He came from Missouri? A. Yes, came from Missouri.

157. Q. So you gave the claims that name? A. Because he was an old timer in the country.

158. Q. Now, in the early part of 1909 you were negotiating with a man called John W. Edgecombe? A. Yes.

159. Q. To option certain claims to him? A. Yes.

160. Q. And you did option certain claims to him? A. Yes.

161. Q. What date did you option them? A. I think the 1st of September.

162. Q. Will you produce that option, please. When did you start negotiations with Mr. Edgecombe, in the early part of 1909, was it not? A. No.

163. Q. What time then, the spring? A. It was in the latter part of the summer, I presume.

164. Q. What were you going to option to Mr. Edgecombe? A. I was going to option the claims that we had up there.

165. Q. The claims that you had up there? A. Yes.

166. Q. Did you intend to option the Jumbo? A. No, we never intended to option the Jumbo, because we never owned the Jumbo.

167. Q. But you did option the Jumbo? A. We optioned the claim Big Missouri, the balance of them, yes.

168. Q. Finally you optioned the Jumbo?

Mr. Macdonald: The Jumbo was not optioned? A. The Jumbo did not exist.

Mr. Sinnott: 169. Q. You called it the Big Missouri. That is the same thing? A. It is part of the same ground.

170. Q. You do not dispute the Jumbo is in this option? A. The ground the Jumbo occupied is in that option.

171. Q. So you did finally option the Jumbo to Mr. Edgecombe? A. No, we never did option the Jumbo because we never owned the claim by that name.

172. Q. But what was originally the Jumbo became the Big Missouri by change of name and relocation and you optioned that Big Missouri to Mr. Edgecombe? A. Yes.

173. Q. How long were you discussing this option with Mr. Edgecombe before he took it up? A. I couldn't tell you. That is a long time ago.

174. Q. Yes and the Big Missouri claim, was that discuss-

ed at the time when negotiations were proceeding? Did you discuss the Big Missouri Group? A. We discussed the claims that we had up there.

175. Q. But did you tell him you were going to give him the Big Missouri claim? A. Naturally it came in. We had so many claims and you have the names there.

176. Q. So you entered into this option on the 1st of September, 1909, and a few days previously you became the owner of the Big Missouri claim? A. Well, whatever time it was between the time of the locating and that option.

177. Q. Now, what did you arrange to get from Mr. Edgecombe for this option, what was the amount? A. $95,000.

178. Q. And how much did you receive in cash? A. The first payment.

179. Q. The first payment? A. As I recollect it was $1,000.

180. Q. When did you get that payment? A. I think it was the 15th of September.

181. Q. Did you get any further payments? A. Yes.

182. Q. What did you get? What other payments? A. I am not sure of that. We got either two or three more.

183. Q. Two or three more? A. Yes.

184. Q. Of $1,000 each? A. Some of them were more.

185. Q. Beg pardon? A. Some of them were more.

186. Q. Did you get one of $3500? A. What time?

187. Q. That was on the 15th of March, 1910? A. I am not sure of that.

188. Q. You aren't sure? A. No.

189. Q. How much money do you think you got altogether? A. I am reasonably certain that we got four payments, the first four payments.

190. Q. That is $4,000? A. No, more than that. You have the option there. You can easily see.

191. Q. The first payment was $1,000, the next payment was $1,000, that was on the 15th of December, $1,000 on the 15th of March and $3500 on the 15th of June, 1910? A. Probably so.

192. Q. Well, what money did you get? A. I wouldn't say about the last one there, but the other three.

193. Q. Do you know how much money you got out of this thing? A. No, I am not sure.

194. Q. Did you keep any record? A. No.

195. Q. Why didn't you keep a record? A. I don't know how to keep books.

196. Q. Do you know how to write letters? A. Yes.

* * *

Mr. Pratt: You skip again, do you?

Mr. Farris: Yes, 196 to 213. (Reading).

* * *

213. Q. Then you had another option after this, did you not? A. Yes.

214. Q. The next option you had was on August the 10th, 1911, you entered into an option with W. J. Bowen, did you not? A. I can't recollect the date, but I remember Bowen had an option with us.

Mr. Macdonald: 215 Q: Look at this? A. Yes.

Mr. Sinnott: 216 Q: That option was executed by you, was it, Mr. Lindeborg. That was the 10th of August, 1911, an option from D. Lindeborg, A. Lindeborg, Hiram Stevenson and Barbrick, administrator for James Proudfoot, to William J. Bowen of Seattle? A. Yes, sir.

217. Q. How much were you to get out of this? A. I don't remember.

218. Q. Did you get any money out of it? A. No.

219. Q. Didn't you get a cent? A. No.

OPTION ABOVE REFERRED TO MARKED No. 2 FOR IDENTIFICATION).

220. Q. The next is an option dated August the 28th, 1911, from Daniel Lindeborg to Tonkin.

Mr. Macdonald: This appears only to be a copy. It is not executed.

221. Q. Was there an agreement of that kind entered into, Mr. Lindeborg?

Mr. Sinnott: 222 Q: Was that document executed? A. I think so, yes.

223. Q. Did you get any money as a result of this option? A. No.

224. Q. You swear positively you got no money? A. I don't recollect that option, whether we ever got any money of it. I didn't read it fully. If it says any money is paid down when we signed the option all right, otherwise we didn't get it.

225. Q. Did you or did you not get any money out of it? A. It says in the option if we did.

226. Q. Do you recollect yourself? A. No.

227. Q. If it says in the option you got any money then you did get it? A. Certainly, if it says there was money paid at the signing of the option then we got it.

* * *

254 (Reading).

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254. Q. Now, the next thing is November the 18th, 1912, an option from Daniel Lindeborg to E. F. Cassels? A. Yes.

255. Q. This option was executed by yourself and your brother Andrew, Hiram Stevenson and Mr. Barbrick, to E. F.

Cassels on the 18th of November, 1912. Did you get any money out of this? A. No.

256. Q. You got no money? A. No.

257. Q. You swear positively? A. Yes.

258. Q. Was there any work done under his option? A. No.

(OPTION ABOVE REFERRED TO MARKED No. 4 FOR IDENTIFICATION).

259. Q. Was there any work done under the option to Tonkin? A. No.

260. Q. Or under the option to Bowen? A. No.

261. Q. Rogers? A. No.

262. Q. Here is another of August the 10th, 1914, from Daniel Lindeborg to E. C. Howard. Do you recollect that option? A. Yes.

263. Q. Was there any work done under that option? A. Yes.

264. Q. What work?

Mr. Macdonald: Howard, Thayne and Shackleford? A. Yes, we got some work done on that.

Mr. Sinnott: 265. Q. What work? A. That I couldn't describe. They done various work.

266. Q. What money did you get out of this? A. $1,000.

267. Q. No more? A. No, I don't think so.

268. Q. That is all you got? A. To the best of my recollection we got $1,000, that is the first payment.

269. Q. How did you get that money? Who paid you that, Thayne, or Shackleford or Howard? A. I couldn't say that.

270. Q. How did you get it, in cash or cheque? A. It was paid into the bank.

271. Q. Did you get your share of it? A. Naturally.

272. Q. How much did you get, do you recollect? A. Out of $1,000 I would get $250.

273. Q. $250? A. Yes.

274. Q. And your partners Andrew Lindeborg and Hiram Stevenson and Mr. Barbrick got $250? A. Yes.

* * *

274 to 280 skipped. (Reading).

* * *

280. Q. Now, we will have the next, Herbert N. Witt, August the 29th, 1916 and option from Daniel Lindeborg to Herbert N. Witt. Do you recollect that option? A. Yes, sir.

281. Q. And did you receive any money yourself or your associates from Herbert N. Witt? A. Yes, $350.

282. Q. What did you do with that money, pay it into the bank? A. We paid for a Crown grant.

283. Q. That was just about the time of the Crown grant? A. Yes.

284. Q. And all these options up to this time that I have referred to were options covering this Big Missouri claim? A. It was some of the claims and we needed the money to complete the Crown grant, needed the $350, and we had a hard time getting that from them.

10 285. Q. Well, that concluded that? A. Yes.

(OPTION ABOVE REFERRED TO MARKED No. 6 FOR IDENTIFICATION).

286. Q. The next is an option from Daniel Lindeborg to M. F. Hendrickson of August 23rd, 1917? A. Yes.

287. Q. Was that option executed by you? A. Yes. Here is my name on it.

288. Q. And did you receive any money as a result of that? A. Yes. I don't remember when we got it, but we got some money out of it.

20 289. Q. How much money did you get out of that? A. I don't remember.

290. Q. Did you keep any record of that? A. No.

291. Q. You have no record of any of these payments? A. No.

292. Q. How much money do you think approximately you would have got out of that? A. I couldn't say how much we got out of it.

(OPTION ABOVE REFERRED TO MARKED No. 7 FOR IDENTIFICATION).

30 293. Q. How much money did you get out of that? A. I don't know how much money we got out of that.

294. Q. Have you any idea approximately? A. We got the first payment.

295. Q. What was that? A. $5,000.

296. Q. You got $5,000? A. If we got any more I don't know.

297. Q. What did you do with that $5,000? Did you get your share of it? A. Yes.

298. Q. And Mr. Barbrick got his share of it, did he? A.

40 Yes.

299. Q. How did he get that? Paid into his account in the bank? A. Yes.

300. Q. You are swearing to this. This is all absolutely correct? A. I swear this, that whenever we got any money it was paid into the bank. It was not paid to any one partner, and the bank paid it out to the different partners.

301. Q. There is no doubt about Mr. Barbrick having been paid his share of that $5,000 under this Handrickson option? A. No, there is no doubt but what it was paid into the bank.

302. Q. And he got it? A. He would have got it, otherwise, I would have known of it.

303. Q. And Mr. Stevenson and Andy Lindeborg got their shares, did they? A. Yes.

304. Q. The next is June the 12th, 1919, to M. F. Handrickson? A. That is an amendment.

Mr. Macdonald: It appears to be an extension or amendment of the previous one.

Mr. Sinnott: 305. Q. What about any moneys payable under this option? A. I don't know if there was any money paid under that.

306. Q. You got no more money from Handrickson, did you, than the $5,000 you mentioned? A. I couldn't say exactly. You will find there will be another option there, Handrickson turned over his option to Sir Donald Mann and I don't know how much was in on that and how much was paid on the other.

307. Q. How much did you get from Handrickson altogether, $5,000, was it? A. We got the first payment.

308. Q. Did you get any more than that? A. I couldn't say.

309. Q. You kept no record at all? A. No.

(OPTION ABOVE REFERRED TO MARKED No. 8 FOR IDENTIFICATION).

310. Q. The next one is August the 5th, 1920, Lindeborg, to Sir Donald Mann.

Mr. Macdonald: This appears to be a continuation of the Handrickson agreement. A. Yes. Handrickson transferred his option to Sir Donald Mann.

Mr. Sinnott: 311. Q. That is the option to Sir Donald Mann, is it not?

Mr. Macdonald: Yes.

Mr. Sinnott: 312. Q. Now, this option dated the 5th of August, 1920, between yourself, Mrs. McEwan, Andrew Lindeborg and Barbrick of the one part and Donald C. Mann covered this Missouri group of claims. How much money did you receive in respect of this? A. It is a continuation of that other option.

313. Q. How much money did you receive from Sir Donald Mann or Handrickson from all sources? A. I don't know.

314. Q. Can you tell approximately? A. I couldn't tell. There were amendments and amendments.

315. Q. I am not talking about the amendments. I am talking about how much money you received from all sources from Handrickson and Mann? A. I couldn't tell you.

316. Q. Was it $10,000? A. I think it would probably be that.

317. Q. Would it be $20,000? A. I don't think it would be that.

318. Q. Would it be $15,000? A. I can't give the exact figures, not having kept track of them.

319. Q. You didn't keep any track of them? A. No.

320. Q. Was a share of that money paid to Mrs. McEwan? Did she get her share of it? A. Yes, I presume she did. It was paid into the bank.

321. Q. It was paid into the bank and divided up by the bank? A. Yes.

322. Q. Was there any money to be deducted from that for expenses or anything? A. No.

323. Q. No expenses deducted? A. Not that I know of, not that I can recollect.

324. Q. Did Mr. Barbrick get his share of that? A. I presume he did.

325. Q. You don't know if he did or not? A. I never asked him. I know the money was paid into the bank.

326. Q. And if he has not got it it would be there still? Would it, at Stewart? A. No, Prince Rupert.

* * *

Mr. Pratt: Do you skip there?

Mr. Farris: Yes, from 326 to 331. (Reading).

* * *

331. Q. Now, there is another option dated May, 1921 to B. L. Thayne?

Mr. Macdonald: This is a blank copy. I don't know if it was executed or not. A. It was never executed.

Mr. Sinnott: 332. Q. It was never executed. It has no significance at all.

Mr. Macdonald: No, I didn't know that. I found it among the papers and put it in.

Mr. Sinnott: 333. Q. You were going to option it again to Mr. Thayne, were you? A. There were Thayne, Shackleford and Howard in the first place and this one is to B. L. Thayne.

334. Q. But this did not come to anything? A. No.

335. Q. Now, you had another one on June 6th, 1921, an option from you to Patrick Daly. Did you get any money under that? A. $5,000.

336. Q. And how did Mr. Daly pay that? A. He paid it by telegram. It came to the Bank of Montreal.

337. Q. Where at? A. From New York to the Bank of Montreal at Vancouver.

338. Q. What happened to the money after it got here? A. The money was sent to me at that time.

339. Q. What did you do with it when you got it? A. I took it down to the Bank of Commerce and put it in there to the credit of Barbrick, Mrs. McEwan and myself.

340. Q. To the credit of Barbrick, Mrs. McEwan and yourself? A. Yes.

341. Q. How much of that did you credit Mrs. McEwan with? A. A quarter.

342. Q. A quarter to Mrs. McEwan? A. Yes.

343. Q. That was $1250, was it? A. Yes, that would be a quarter of $5,000.

344. Q. She got that, did she? A. I presume so. It was in the bank to her order.

345. Q. And Mr. Barbrick he got the same amount, did he? A. Yes.

346. Q. Did you issue cheques to them? A. No. I took the draft to the bank and deposited the money there to—

347. Q. To their credit? A. Yes.

348. Q. Have you your bank book for that transaction? A. That was in what year?

349. Q. 1921? A. I may have. I couldn't say.

(OPTION ABOVE REFERRED TO MARKED No. 10 FOR IDENTIFICATION).

350. Q. Was there any work done by Patrick Daly under that option? A. If there was it was very little.

* * *

Mr. Pratt: Do you skip there?

Mr. Farris: From 350 to 353. Yes. (Reading).

* * *

353. Q. Then there is another option of the 14th of March, 1922, to Hattie Houston? A. Yes.

354. Q. Do you recollect that transaction? A. Yes.

355. Q. Did you get any money out of that? A. No.

356. Q. You didn't get a cent out of it? A. No.

Mr. Macdonald: This is only a copy. A. It was only a thirty-day option.

Mr. Sinnott: 357. Q. Nothing to this? A. No.

Mr. Macdonald: It ran a short time and nothing was paid on it and it expired.

(OPTION ABOVE REFERRED TO MARKED No. 11 FOR IDENTIFICATION).

A. It was turned over to E. B. Trites.

Mr. Sinnott: 358. Q. What is that? A. A new option was made.

359. Q. Where is that option? A. I haven't got it.

360. Q. How much was it for? A. It was in the neighbourhood of $30,000.

361. Q. Was it $32,000? A. It might have been.

362. Q. How did you get the money from Mr. Trites? A. Paid into the bank.

363. Q. Which bank? A. The Bank of Commerce.

364. Q. Where? A. Here.

365. Q. In Vancouver? A. Yes.

366. Q. At the head office? A. No, the branch at Robson Street.

367. Q. How was this paid, into your account? A. No.

368. Divided up? A. Yes.

369. Q. So you got $8,000 of that, did you? A. One-quarter each of whatever was paid in.

370. Q. And Mrs. McEwan and Barbrick each got their share, each got $8,000? A. I assume so.

371. Q. That is assuming $32 was paid? A. I never kept track of the money. It was paid into the bank and put to the credit of the holders and I don't know what became of it.

372. Q. But you got $8,000, you know that? A. I got what was coming to me.

373. Q. And what is the next option you have got there?

Mr. Macdonald: I think the next is the option to the Standard Mines. A. Well, there was an option between that.

Mr. Sinnott: 374. Q. What was that option? A. To Collins.

375. Q. Did he pay any money over to you? A. No.

Mr. Macdonald: 376. Q. You have not got a copy of that? A. No, I haven't a copy.

Mr. Sinnott: 377. Q. You are sure he didn't pay any money? A. No.

378. Q. Did he do any work up there? A. No.

379. Q. Did Trites do any work there? A. Yes.

380. Q. How much work did he do? A. I don't know, but he did a lot of work.

* * *

Mr. Pratt: You skip again.

Mr. Farris: From 380 to 385. (Reading).

* * *

385. Q. Now, we come to the Standard option.

Mr. Macdonald: I might say the original option underwent many modifications. They are all here.

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Mr. Sinnott: Yes. It says under options dated respectively the

386. Q. 21st of July, 1925, the 29th of March, 1926, and the 20th of January, 1926, and another one dated the 20th of January, 1926, and another one dated—it is not dated—yes, it is dated March, 1927. These are options of this Big Missouri group to the Standard Mining Corporation and the Big Missouri Mining Company. What did you get out of this transaction, how much money? A. Well, we have received $150,000.

387. Q. You have actually received that? A. Yes.

388. Q. When did you receive the $150,000? A. Oh, well, I couldn't tell the dates. The option will state the dates of the payments and the payments were made on the dates specified in the option.

389. Q. What year? A. It was 1925.

390. Q. You got some money in 1925, did you? A. Yes.

391. Q. How much did you get? A. We got $25,000.

392. Q. $25,000? A. $5,000.

393. Q. Then in 1926 what did you get? A. I couldn't tell you.

Mr. Macdonald: You could tell by referring to the document.

394. Q. Could you? A. Yes.

* * *

Mr. Pratt: You skip again there some place.

Mr. Farris: No. I am reading 399 now. (Reading).

* * *

398. Q. They each got a quarter share, but you got a half for your brother and yourself? A. Yes.

399. But the others got a quarter? A. Then there would be another $100,000 which we have not got yet.

400. Q. I know. That is the money which is garnisheed now, attached? A. Yes.

(FIVE DOCUMENTS MARKED 12, 12-A, 12-B, 12-C, 12-D RESPECTIVELY FOR IDENTIFICATION).

* * *

I skip from 400 to 403. (Reading).

* * *

403. Q. Did you have any written agreement so far as these different parties were concerned? A. No.

404. Q. You had nothing in writing? A. No, sir.

405. Q. Nothing between yourself and Mr. Proudfoot? A. No.

406. Q. Nothing between yourself and Mr. Stevenson? A. No.

407. Q. Or between yourself and your brother? A. No.

408. Q. There was not a vestige of writing of any kind to show what interest you had respectively? A. No.

* * *

That is from 408 to 421.

(Continuing reading).

* * *

421. Q. In 1916 you applied for a Crown grant and got it, the 25th of October, 1916, you got a Crown grant to the Big Missouri mineral claim being record 3217 Cassiar. In whose name did you take the Crown grant? A. The Crown grant would naturally come in the name of the locator.

422. Q. That is in the name of Hiram Stevenson and Daniel Lindeborg ? A. I presume so, yes.

423. Q. Why did you not then arrange to have Proudfoot and your brother Andrew Lindeborg included? A. Why it never was considered.

424. Q. They trusted you? A. It was something I never even thought of until you mentioned it.

425. Q. They relied upon you, did they, and trusted you? A. They didn't trust me any more than I trusted them.

426. Q. It was a mutual trust and they had nothing to evidence their title to that property at all in writing? A. No. We worked together all the time up there and if one was not there the others done the work and vice versa. It was evident to every one that we were partners; that is, at that time.

427. Q. By reason of your working there? A. Yes.

428. Q. But there was nothing else to show? A. And dealing together.

429. Q. Yes, but there was nothing else to show that you were partners? A. No.

430. Q. Not a vestige of writing of any kind? A. No.

* * *

Mr. Pratt: What question is that?

Mr. Farris: It skips from 430 to 473 (Reading).

* * *

473. Q. Now, Mr. Lindeborg I am going to show you a letter dated the 15th of June, 1911. Whose writing is that? A. That looks like my writing.

474. Q. That is your writing, is it? A. Yes.

475. Q. And you wrote that letter to whom? A. To Bill Harris.

476. Q. And you wrote it in reply to a letter you had received from Mr. Harris? A. Yes.

* * *

Mr. Pratt: Is there a break there?

Mr. Farris: 476—it skips to 509. That letter is in this book. I suppose if the examination goes in, the letter ought to go in too. The letter is found at page 161. Beginning at 509 (Reading).

* * *

509. Q. Didn't you send him some money? A. Not after the option expired.

510. Q. Did you send him money before this letter? A. I did not.

511. Q. Do you know that he did receive money? A. Yes.

512. Q. And he received it from whom? A. He received it from Proudfoot, Stevenson, and my brother, and, of course, I was a party to that, that is, I was a quarter in that money.

513. Q. You were a quarter in that money? A. Yes.

514. Q. That is, you put up your share of it, a quarter? A. Yes.

515. Q. For Mr. Harris the Plaintiff? A. Yes.

516. Q. And that was the money or part of the money that came out of this option, this bond to which you referred in this letter of June the 15th? A. June the 15th?

517. Q. June the 15th, 1911. You are referring in this letter of June the 15th, 1911, to a bond which they had not gone ahead with.

Mr. Macdonald: That was not the date of the bond.

Mr. Sinnott: No, this is the letter, June the 15th. A. That would be the end of the option.

518. Q. That is the end of it, but this money that you and your associates paid to Mr. Harris was money coming out of this option agreement or this bond to which you refer in your letter of June the 15th? A. Yes.

* * *

I think we should read that letter, my lord.

Mr. MacNeill: I was just going to take this exception to a line of evidence my friend is referring to just now. My friend has already put in the judgment of the Supreme Court, the Court of Appeal, and the Supreme Court of Canada. Now, according to those judgments it has been held that Lindeborg had nothing whatever to do with this claim of Harris. He was entirely exonerated, but the other men were left in, so in view of that is that evidence admissible? If my friend is taking the judgments there,

the appeal judgment of the Supreme Court of Canada, it shows that Lindeborg was not bound by anything to Harris, found not to be a partner, he was no party to that Harris transaction. My friend has read evidence bearing on that transaction.

Mr. Farris: I am reading it for two reasons—

The Court: Well, if you wish to put it in, my ruling would be that you may do so.

Mr. Farris: All right, I won't argue it now.

The Court: What about the letter?

Mr. Farris: Well, the letter must go in to give the context of what I am reading. The letter is found at page 161 of exhibit 1.

The Court: Very well.

Mr. Farris: (Reading letter).

Mr. Pratt: You are at question 519.

Mr. Farris: Yes, I stopped at 518 and then it skips to 533. (Reading).

* * *

533. Q. Now, I am going to produce a letter to you of the 7th of April, 1910, addressed to the Plaintiff. Whose writing is that? A. That looks like my brother's.

534. Q. That is your brother's signature, is it not? A. Yes.

535. Q. Your brother wrote the letter, did he? A. Yes.

536. Q. And he sent the sum of $100 to Mr. Harris? A. Yes, sir.

537. Q. And was that part of this option money? A. Yes.

(LETTER MARKED No. 14 FOR IDENTIFICATION).

538. Q. Well, what was his reason for sending this? What was the reason? Did he act for you? Did your brother Andrew Lindeborg act for yourself and your partners in doing this? A. Yes.

539. Q. You contributed your share of this $100? A. I naturally paid my share of it, yes.

* * *

Mr. MacNeill: Of course, my objection goes to all of this bearing on that.

The Court: Very well.

Mr. Pratt: You skip there some place.

Mr. Farris: I am sorry. 539 to 546 (Reading).

* * *

546. Q. Now, on the 27th of September, 1909, here is another letter. Do you recognize that letter? A. It looks like Stevenson's.

547. Q. Is it Stevenson's writing or is it not? A. Yes, it is Stevenson's.

548. Q. You knew his writing well? A. Yes.

(LETTER MARKED No. 15 FOR IDENTIFICATION).

549. Q. Mr. Stevenson in this letter dated September 27th, 1909, says, "Mr. Harris. Dear Friend: We have made a deal on them claims on Salmon River. Me and Dan Lindeborg staked the Jumbo in Ower names and turned it in with the others we called it the big Mossourie we bonded ten Claims between Lenderborg and Jim Proudfoot and we don some work on the Mossouri after we taked it but count get much of a assay she pretty loe grade ore you no that we don the best we Could we give you five thousand dollars if that will be satisforey to you and you will get yours per cent as the payments— Comes do we got the first payment of one thousand dollars on the 15th Sep we bonded for ninty five thousand and payments comes every ninty dayes I got fifty three dollars for you as near as i Can figer it out on the first Payment and if we never get any more you wount i am sending it over with tom McRostie and if—" Now, the sum of $53 you contributed part of that, did you? A. Yes.

550. Q. And Mr. Hiram Stevenson acted upon your instructions in sending that money? A. No, he had no instructions from me.

551. Q. You gave him the money to send, your share of the $53? A. I can't say whether I gave him the money to send or not, but I know I paid—

552. Q. You paid your share? A. Yes, but of course whether at that time or later on I couldn't say.

553. Q. His statements are quite correct about these claims in this letter, are they, about the assay and about the bonding of these ten claims? A. Yes, I think so. I couldn't say exactly the details of that without looking into it.

554. Q. And the statement that you bonded them for $95,000, payments due every ninety days, that is also correct, is it not? A. That is correct.

555. Q. And that you were going to get the first payment of $1,000 on the 15th of September, that is correct? A. Yes.

* * *

Mr. Pratt: Did you skip there?

Mr. Farris: Yes, from 555 to 559 ((Continuing reading).

* * *

559. Q. He got $53 on the 27th of September in this letter? A. Yes.

560. Q. And you contributed part of that? A. Yes.

561. Q. Then is the statement true that the Plaintiff was

going to get $5,000. Is that statement correct? A. He was going to get the $5,000 out of the $95,000.

562. Q. Who was? A. Harris.

563. Q. He was to get $5,000? A. Out of the $95,000 option.

564. Q. He was going to get $5,000 out of the $95,000 option? A. Yes.

* * *

Mr. Pratt: Is there a skip there, Mr. Farris?

Mr. Farris: Yes, from 564 to 584. Then I put in 586, and skip to 590 (Reading).

* * *

584. Q. Now, I am going to produce a letter of the 31st of January, 1910. Who wrote that letter?

Mr. Macdonald: Do you know? A. I think Stevenson wrote it.

Mr. Sinnott: 585. Q. Do you know his signature? A. It varies quite a bit.

586. Q. But you are satisfied that is his? A. Yes.

* * *

590. Q. Was there any money paid at any time into the Canadian Bank of Commerce for Mr. Harris? A. I couldn't say.

591. Q. Would you be surprised if there was any paid? A. No.

592. Q. You would take it as a matter of course it was quite all right? A. Yes.

593. Q. And was the statement in this letter that Mr. Harris is entitled to $5,000 correct? A. If the option went through.

594. Q. Out of this particular option? A. Yes.

(LETTER MARKED No. 16 FOR IDENTIFICATION).

595. Q. Was this statement correct that Dan Lenderborg staked the claim on Salmon River and bonded them. That was correct.

Mr. Macdonald: "Me and Dan Lenderborg."

Mr. Sinnott: "Me and Dan Lenderborg staked the claims on Salmon

596. Q. River and bonded all of ower claims." That was correct? A. Yes.

597. Q. So this man was telling the truth when he wrote that letter evidently? A. Yes, as far as I know.

* * *

Mr. Pratt: You skip there.

Mr. Farris: From 597 to 600.

* * *

600. Q. Here is a letter; do you recognize the writing of that? A. It is a long time since I saw Jim's writing.

Mr. MacNeill: There is nothing that I can recollect in the pleadings in this action on which this class of evidence my friend has been reading—I can't see that there is anything accounting for what these people really got between themselves.

Mr. Farris: It supports two positions, my lord: The first one, which is not my primary position, is that if there is anything in the contention that there is a partnership, this supports it. It is the strongest kind of corroboration of Mr. Macdonald's statement of the contract that was made, because it shows that throughout Lindeborg's conduct was consistent with the attitude which Mr. Macdonald says he took.

The Court: Can I treat anything as corroboration if I have before me a judgment of the Supreme Court of Canada in the same matter. To what extent am I bound by that? I think I referred to that in the opening of the case somewhere.

Mr. Farris: On the partnership, my lord, you are one way or the other to the extent of the law, not on the facts; but on the other branch of the case, in which Mr. Macdonald says, "I on behalf of all the defendants made a contract with Lindeborg," that has nothing to do with the other trial, there is no binding in that at all. All I am reading now on that phase of it is Lindeborg's attitude all the way through, that he would share in everything.

Mr. MacNeill: That is years before.

Mr. Farris: I know it was years before, but it was with regard to the same transaction, at the time "that me and the other associates"—as he calls them—partners—were putting in money with Harris, he took the position that he was in it and paid his share. Now, that is confirmed, and strengthens the suggestion, if there is going to be any question about the truthfulness of Mr. Macdonald's statements, that shows that that is the very thing one would expect Lindeborg would do. There is no question about that part of it.

The Court: I will allow you to go on.

Mr. Pratt: 600 it is?

Mr. Farris: 601 (Reading).

* * *

601. Q. That is Jim Proudfoot's writing, is it not? A. Yes.

602. Q. The Defendant Proudfoot, your late partner? A. Yes, I think so.

(LETTER MARKED No. 17 FOR IDENTIFICATION).

603. Q. And are these statements in this letter that they have not turned down the Salmon River option yet, was that correct? A. It doesn't say that.

604. Q. Eh? A. It doesn't say they have not turned down the Salmon River option.

605. Q. He says, "Well, Friend, they have not turned down Salmon River yet and if we get one or two of the big payments I will feel safe." Was that a correct statement of facts? A. That is a question whether they have not turned it down, because it had been turned down by one party and recommended by another.

606. Q. But at that time they had not turned it down? A. The thing in general was not turned down.

607. Q. But he refers to an option on the Salmon River? A. No, not an option, but to the Salmon River.

608. Q. The Salmon River, yes? A. He doesn't refer to an option.

609. Q. He says, "Well, friend, they have not turned Salmon River down yet and if we get one or two of the big payments I will feel safe." He meant payments on the option, did he not? A. Yes.

610. Q. What option? A. Edgcomb's.

611. Q. So at that time this statement he made was substantially correct they had not turned it down and he expected to get some payments? A. He expected to get some more payments, yes.

612. Q. And when he says he mailed a cheque to the Canadian Bank of Commerce at Prince Rupert for $184.20 to be placed to the credit of William Harris that would be correct? A. I don't know. I didn't see it.

613. Q. You paid your share of that $184? A. I paid my share of everything that was paid, but I couldn't say that it was paid before it was sent to Harris.

614. Q. And Mr. Proudfoot when he says that he was requested by Mr. Harris to pay this money into the bank that would be correct? A. I presume so.

* * *

Mr. Pratt: You skipped there some place.

Mr. Farris: From 614 to 643 (Continuing reading).

* * *

643. Q. And Stevenson was overseas. Stevenson went to France? A. Yes.

644. Q. And was killed in action in France? A. Yes, killed in action.

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645. Q. And during that period there was very little activity in mining in the Stewart District? A. No, there was very little.

* * *

Mr. Pratt: You are reading—

Mr. Farris: I skipped again, yes, from 645 to 781 (Reading).

Mr. Macdonald: Yes. I admit those came from Mr. Barbrick who found them among Mr. Proudfoot's papers. He gave them to me and I mislaid them then and have only just found them again.

Mr. Sinnott: 781. Q. Were these moneys sent to Mr. Harris with your share included? A. If he had not got my money at that time he knew where to get it.

782. Q. You were quite agreeable to paying your share of this and probably did? A. I did agree to it.

783. Q. And you did pay it? A. Yes.

* * *

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That is all.

Mr. Pratt: There are a few questions, my lord, I would like to put in on this examination—

The Court: Now, I have not that examination for discovery.

Mr. Pratt: It is in the file here. Mr. Farris put in 114, I would like to put in question 113 (Reading). 158 to 165. I think Mr. Farris put that other in—

The Court: Well, perhaps you can go on, and if there is duplication—go on to 165.

Mr. Pratt: But 165 I put in.

The Court: Would you read it?

Mr. Pratt: I think that is duplication. Then I want to put in 198 to 212—I don't think Mr. Farris put these in (Reading).

* * *

198. Q. You had the responsibility on your shoulders to keep track of this money so that you could divide up with your partners? A. No. The bank did that.

199. Q. The bank did all this? A. Yes.

200. Q. What bank was this? A. The Canadian Bank of Commerce at Prince Rupert.

201. Q. Did they pay out the different amounts of money to the different partners? A. Yes.

202. Q. How did they pay it out? A. A quarter to each.

203. Q. So you had at least $4,000, had you? A. Oh, yes, I think so.

204. Q. So that you got $1,000? A. Yes.

205. Q. And Andrew Lindeborg got $1,000? A. Well, as

I said, I don't know exactly what we got out of it, but whatever we got each one received a quarter.

206. Q. You each received a quarter? A. Yes.

207. Q. You got a quarter, did you? A. Naturally.

208. Q. That would be over $1,000 would it? A. I presume it would be.

209. Q. And did Andrew Lindeborg get the same amount you got? A. Yes, sir.

210. Q. And did Stevenson get that money, too? A. Yes, I presume he got it. I never asked him if he drew the money out of the bank.

211. Q. Do you think it is still in the bank up there? A. No.

212. Q. No balance up there by any chance? A. I don't think so.

(OPTION ABOVE REFERRED TO MARKED No. 1 FOR IDENTIFICATION).

* * *

236 to 242.

* * *

236. Q. How would that money be withdrawn from the bank? A. By cheque.

237. Q. Who would sign that cheque? A. The man who draws the money signs the cheque.

238. Q. So they could all draw money out of that account? A. Draw money out of his own account.

239. Q. Could Stevenson draw money out of that account? A. We had no account together. The money was paid over to the different parties in the bank.

240. Q. How were these moneys paid, by cheque or cash? A. I couldn't say.

241. Q. Who would take it to the bank? A. The man that takes the option deposits the money in the bank.

242. Q. To whose credit? A. To the owners.

* * *

275 to 276.

* * *

275. Q. Will you swear positively Mr. Barbrick got $250 out of that? A. I swear positively Barbrick got his share whatever it was.

276. Q. How did you send in his share? A. I didn't send in his share. It was paid into the bank and the bank paid over to the different parties their share of the money. That is, they

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paid over to their accounts in the bank which was according to their instructions.

* * *

293—that is in, my lord—Mr. Farris has read that, 293 to 299. The next is 312 to 321.

* * *

Mr. Farris: That is all in.

Mr. Pratt: Is that in?

Mr. Farris: Yes.

Mr. Pratt: I haven't got a note of that. Yes, I beg your pardon, that is in. Now, 385 to 401—401 is not in. 400 I will read—or 399 (Reading).

* * *

401. Q. Now, at the outset, Mr. Lindeborg, in describing these different claims and discussing the ownership you pointed out that Mr. Stevenson and yourself and Mr. Proudfoot owned certain claims in that group of which they had the sole ownership? A. If a person locates a claim he is the owner of it. If he locates it and records it naturally he is the owner of it.

* * *

Mr. Farris: The rest are in.

Mr. Pratt: I had better read 402, then the rest are in.

Mr. Farris: Yes.

Mr. Pratt: (Reading).

* * *

402. Q. But since that time things have changed and there were four parties subsequently interested in these claims in the whole group? A. Yes.

* * *

447 to 454, I don't think those are in.

Mr. Farris: No.

Mr. Pratt: (Reading).

* * *

447. Q. When did your brother die? A. He died in 1925.

448. Q. 19 what? A. '25.

449. Q. Did he leave a will? A. Yes.

450. Q. He left a will? A. Yes.

451. Q. It was probated then? A. Yes.

452. Q. Where was that will probated? A. Vancouver.

453. Q. In what court?

Mr. Macdonald: Excuse me, but my recollection, Mr. Lindeborg, is that he did not leave a will, but I don't think it is relevant. I will have to refresh my memory whether he left a will or not.

Mr. Sinnott: 454. Q. What date in 1925 did he die, do you? A. The 15th of February, I think.

* * *

Now, 641 and 642, that is not in. (Reading).

* * *

641. Q. And did Proudfoot go overseas? A. No.

Mr. Macdonald: Proudfoot died in 1910, did he not, or 1911?

Mr. Sinnott: Oh, yes, Proudfoot died before that.

642. Q. So Proudfoot was dead and your brother Andrew and Stevenson were the two survivors? A. Yes.

* * *

That is all the examination, my lord.

Mr. MacNeill: That is the case for the defence, my lord.

Mr. Farris: No further evidence, my lord.

(Argument by Mr. MacNeill).

(1 P.M. COURT ADJOURNED UNTIL 2:30 P.M.).

(2:30 P.M. COURT RESUMED PURSUANT TO ADJOURNMENT).

(Argument continued by Mr. MacNeill).

(Argument by Mr. Farris).

(COURT ADJOURNED AT 4:55 P.M. UNTIL 11 A.M., NOVEMBER 30th, 1932).

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

"WILLIAM R. HILL,"
Deputy Official Stenographer.

NOVEMBER 30th, 1932, 11 A.M.

(COURT RESUMED PURSUANT TO ADJOURNMENT).

(Argument resumed by Mr. Farris).

The Court: Judgment reserved. I thank counsel for their assistance in this matter.

(C. A. V.)

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

"F. SAUNDERS,"
Deputy Official Stenographer.

IN THE SUPREME COURT OF BRITISH COLUMBIA

McEWAN
v.
COSENS ET AL

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE FISHER

From the evidence before me it would appear that on the 18th day of July, 1928, an action was brought in the Supreme Court of British Columbia by one William F. Harris against Daniel Lindeborg, as administrator of the Estate of Andrew Lindeborg deceased, Laura McEwan administratrix of the estate of Hiram Stevenson, deceased, Daniel Lindeborg and Duncan C. Barbrick as administrator of the estate of James Proudfoot deceased. During the course of the said action the said Duncan C. Barbrick died and the said Laura McEwan was appointed by the Court to represent the Estate of the said James Proudfoot, deceased, for the purposes of the said action. Daniel Lindeborg was the Executor and sole beneficiary of the estate of Andrew Lindeborg. The action was brought by the said Harris upon an alleged verbal agreement which the said Harris alleged was made by him in 1908 with the said James Proudfoot and the said Hiram Stevenson concerning certain mineral claims which the said Harris claimed to own and which he called the "Jumbo" Group. James Proudfoot died in 1910 and Hiram Stevenson in 1917. The said action was tried before Chief Justice Morrison, who found the Plaintiff entitled to one-third of all moneys which were received from the whole group, including the claim owned by Proudfoot and Stevenson and the two Lindeborgs and accordingly gave judgment for the said Harris for $100,000.00. The Court of Appeal found that there was an agreement but that the Lindeborgs were not parties to it and their interest was not affected by it, and that the proper proportion payable to the said Harris was the sum of approximately $15,000. The Supreme Court of Canada dismissed the action as against the two Lindeborgs or their estates and gave judgment against the plaintiff in this action as administratrix of the estate of Hiram Stevenson and as repersenting the estate of James Proudfoot for the sum of $50,000.00 and costs.

When the action was brought by William F. Harris as aforesaid, the said Duncan C. Barbrick and later the said Daniel Lindeborg consulted the same solicitor, Mr. R. M. Macdonald, who also communicated by letter with the said Laura McEwan and as a result the defense of the said action was undertaken by the said

R. M. Macdonald on behalf of all the defendants. The said R. M. Macdonald appeared on behalf of all the said defendants and subsequently entered Defences on their behalf. Two statements of Defence were delivered, one on behalf of the Proudfoot and Stevenson Estates, and the other on behalf of Daniel Lindeborg acting on behalf of himself and as administrator of the estate of Andrew Lindeborg. The Lindeborg defence raised the same defences that the other defendants raised, but added a further defence (see paragraph 20) which was in effcet that if the plaintiff had any agreement with the late James Proudfoot and Hiram Stevenson, the Lindeborgs were not parties to the same and were not bound thereby.

In the present action the Plaintiff alleges that an agreement was made between the said Daniel Lindeborg since deceased on behalf of himself and the estate of Andrew Lindeborg with the said Mr. R. M. Macdonald as solicitor for all the parties who were defendants in the Harris action as aforesaid to the effect that he, the said Daniel Lindeborg, and the estate of his said brother Andrew Lindeborg would share equally with the said Laura McEwan administratrix of the estate of Hiram Stevenson deceased, and Duncan C. Barbrick, administrator of the estate of James Proudfoot deceased, as to principal and costs in any judgment which might be given against them jointly or against Mrs. McEwan and Duncan C. Barbrick separately and that on this understanding the said Macdonald agreed to act for all the parties and that Mrs. McEwan and Proudfoot interests could be represented by him, and continued to do so throughout the trial and the appeals until after final judgment in the Supreme Court of Canada.

Mr. R. M. Macdonald was called at the trial herein and testified in part, in answer to questions, as follows:—

"As soon as I received the statement of claim, that pre-
"sented to me for the first time what the nature of the plain-
"tiff's claim was, and on perusing it I saw at once that, on
"the allegations alleged in the statement of claim, there was a
"defence open to the Lindeborgs which was not open to the
"Proudfoot and Stevenson estates."

* * *

"Until I got the statement of claim I did not know what
"the Harris claim was founded upon. When I saw his state-
"ment of claim I saw, as it sets out, an allegation of an agree-
"ment alleged to have been entered into by Harris and Proud-
"foot and Stevenson, and a further allegation that that agree-
"ment was entered into by Proudfoot and Stevenson on their

"own behalf and no behalf of their associates. I filed and "delivered a demand for particulars as to who the associates "were, and the reply to that was that the associates were the "Lindeborgs. Well, it at once appeared to me that a ques- "tion arose there, if Proudfoot and Stevenson did enter nito "the agreement that Harris alleged, how could they bind the "Lindeborgs, unless they could show that the Lindeborgs had "authorized Proudfoot and Stevenson to enter into it on their "behalf, and it raised an issue of the agency between Proud- "foot and Stevenson and the Lindeborgs; consequently it "raised the defence which I have set out there in paragraph "20, that if there was any such agreement entered into by "Proudfoot and Stevenson, it was not on behalf of the Linde- "borgs nor was there any authority to enter into it on behalf "of the Lindeborgs. Now I had to call in Mr. Lindeborg and "also Mr. Barbrick, with whom I was in constant communi- "cation at that time, and explain this position . . .

"Q. Well, tell us what you told Mr. Lindeborg. A. I "pointed this situation out expressly to Mr. Lindeborg and "told him that at first sight it seemed to me that it became "necessary to sever his defence.

"Q. Why did you tell him? A. Well, the situation on "the statement of claim.

"The Court): Q. Just what you told him, Mr. Mac- "donald. A. Yes. Rendered this situation as a possible "outcome, that Harris might recover judgment for the amount "that he is suing for against Proudfoot and Stevenson estates, "and fail to show any agreement by the Lindeborgs with them. "That was the situation, the possible situation that presented "itself to me, and which I explained to Mr. Lindeborg . . . "A. Well, having explained the situation as it appeared to "me to Mr. Lindeborg, I asked him whether under the cir- "cumstances it might not be necessary, in his opinion, for "either solicitors to be engaged; either I represent the Linde- "borgs and somebody else represent the Proudfoot and Ste- "venson estates, or I represent the Proudfoot and Stevenson "estates and somebody else represent the "Lindeborg inter- "ests. And Mr. Lindeborg's answer was, 'There is no neces- " 'sity 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 us all and take " 'any point of defence that you . . . '

* * *

"A. He further told me at that time to take any defence "I could on behalf of any one of the defendants, that was "available, as any such if successful would endure to the "benefit of them all. Now, that is the substance of that con- "versation as well as I can recollect it. It satisfied me at the "time that I was justified . . .

"The Court: No, just a moment.

"Mr. Farris: Well, you could put it this way: as the "result of that conversation what position did you take? A. "Well, I did exactly what Mr. Lindeborg told me to do, and "continued to act for all parties by delivering a separate "defence raising this particular issue on their behalf."

As stated the said Daniel Lindeborg has since died as has also Mr. Barbrick and the only direct evidence I have as to what occurred is that of the witness Macdonald. Though his evidence is uncontradicted it is contended on behalf of the defendants that his statements are in themselves improbable or unreasonable on the ground that his evidence means that he had a conversation with Mr. Daniel Lindeborg after the delivery of the particulars by the plaintiff in the Harris action and before Mr. Lindeborg went to the hospital which would be impossible as Mr. Lindeborg went to the hospital on the 19th September 1928, and the particulars were not delivered until the 5th day of November following. Though it might be inferred from what Macdonald says in one part of his evidence as set out above that he intended to convey the impression that the conversation took place after the delivery of the particulars his attention would not appear to have been called at the trial specifically to that phase of the matter and in any event I think it might fairly be said that he might be mistaken in his recollection as to whether the exact time was shortly after he received the statement of claim which was on September 12th or after the reception of the particulars. It seems to me that what I have really to consider is the fact that he testifies to such a conversation having taken place at his office with Mr. Lindeborg before he went to the hospital and there is some corroboration of this testimony as to some conversation from another witness Sloan who says that on the 14th of September, 1928 (which would be shortly before Mr. Lindeborg went to the hospital) he (Sloan) saw him in the London Building where Mr. Macdonald's office was and that he told him he had been to some lawyer's office. Considering the whole evidence of Mr. Macdonald on the matter I cannot find that it is impossible or improbable that the conversation actually took place though he may have been mistaken or expressed himself as though he were mistaken as to the exact

In the Supreme Court of British Columbia.

Reasons for Judgment, Fisher, J., 10th December, —*Continued.*

time when it took place. I cannot see that there was anything in the demeanour of Macdonald while in Court during the trial or anything in the evidence of any of the witnesses before me that would discredit his testimony in connection with the matter in question herein. I accept his testimony and would say that I did not find it necessary to decide whether such evidence must be corroborated by some other material evidence pursuant to Section 11 of the Evidence Act as I think it is so corroborated by the evidence of the witnesses Mr. McEwan, Mrs. McEwan, and Mr. Sloan, which I also accept and which would lead me to infer that some such agreement had been made.

Counsel on behalf of the defendants, however, submits that in any event there was no real consideration for the promise, if any, made by the said Daniel Lindeborg and that, therefore, there was no binding agreement since it is consideration which gives to the promise a binding force. It is also argued that Macdonald had no authority to act on behalf of the McEwan or Proudfoot interests in respect of such an agreement and that it would therefore not bind them and consequently would not bind the estates of the said Lindeborgs. Though the points thus raised might be dealt with separately it seems to me that they both have to be answered after considering and having in mind the circumstances which existed at the time. It has already been pointed out that, when the said action was brought by Harris, the said Barbrick and the said Daniel Lindeborg personally consulted the said solicitor R. M. Macdonald, who also communicated with the said Mrs. McEwan by letter and as a result the defence of the said action was undertaken by the said Macdonald on behalf of all the defendants. I find that after the statement of claim was delivered and before delivery of the defence it became apparent to the said Macdonald that the said Daniel Lindeborg could raise not only the same defence that could be raised on behalf of the Stevenson and Proudfoot estates but the separate and independent defence that, if plaintiff Harris had an agreement with the late James Proudfoot and Hiram Stevenson, the Lindeborgs were not parties to the same and were not bound thereby. I find that the said Macdonald then explained the situation as it appeared to him to the said Daniel Lindeborg and asked him in effect whether in view of the fact that the Lindeborgs had such a separate and independent defence he the said Macdonald should continue to act as solicitor for all the defendants or whether he should advise the said Mrs. McEwan and Duncan C. Barbrick to engage a separate solicitor because of such defence being available to the Lindeborgs.

I also find that thereupon the said Daniel Lindeborg requested the said Macdonald as solicitor for all parties that he (Macdonald) should continue to act for all parties and deliver the required separate defence as aforesaid and promised that in such event he (Lindeborg) and the estate of his brother would share equally with the said Laura McEwan and Barbrick as to principal and costs in any judgment which might be given against them jointly or against Mrs. McEwan and Duncan C. Barbrick separately. I also find that upon this understanding with the said Daniel Lindeborg the said Macdonald did continue to act for all the parties delivering separate defences and that the said Mrs. McEwan and the said Barbrick, through their said solicitor, R. M. Macdonald, abandoned any question of obtaining independent advice or of taking any position in opposition to that taken by or on behalf of the Lindeborgs that they were not parties to or bound by the alleged Harris agreement. Under these circumstances it is submitted on behalf of the plaintiff that this was not a case of the offer of a promise for a promise but the case of the offer of a promise for an act, the promise of the said Daniel Lindeborg being the inducement to the transaction and in this connection reference is made to the case of *Alliance Bank v. Brown* 62 E. R. 631, where the Court says at pp. 632-3:—

> "The Defendant demurs to the Plaintiff's bill in this "case, on the ground that the promise to give security, which "the Plaintiff seeks to enforce, was without any consideration "—that it is in fact a nudum pactum, which the Court will "not enforce; and in support of this proposition, it is argued "that the Plaintiffs, so far from giving any consideration "for the promise, could at any time have brought an action "for the payment of the debt; and that they could have done "so is perfectly true.
>
> "Now, according to the facts stated in the bill, a demand "was made by the creditor for security; and upon that de- "mand a promise and agreement was made by the debtor "that he would give such security; and that, although it might "take some time to get the warrants, he would hand them over "to the creditor when he obtained them.
>
> "It appears to me, that, when the plaintiffs demanded "payment of their debt, and, in consequence of that applica- "tion the Defendant agreed to give certain security, although "there was no promise on the part of the plaintiffs to abstain "for any certain time from suing for the debt, the effect was, "that the Plaintiffs did in effect give, and the Defendant

In the Supreme Court of British Columbia

Reasons for Judgment, Fisher, J., 10th December, —*Continued.*

"received, the benefit of some degree of forbearance; not, in "deed, for any definite time but, at all events, some extent "of forbearance. If, on the application for security being "made, the Defendant had refused to give any security at "all, the consequence certainly would have been that the "creditor would have demanded payment of the debt, and "have taken steps to enforce it. It is very true that, at any "time after the promise the creditor might have insisted on "payment of his debt, and have brought an action; but the "circumstances necessarily involve the benefit to the debtor "of a certain amount of forbearance, which he would not "have derived if he had not made the agreement.

"On this ground the demurrer must be over-ruled."

On the other hand Counsel on behalf of the defendants contends that the circumstances of the alleged transaction did not necessarily involve any benefit to the said Daniel Lindeborg as he was entitled to have such a defence entered by Macdonald in performance of his duty as his solicitor. A fair answer to this contention would appear to be that Macdonald could not do his duty nor could the said Lindeborg obtain performance of such duty unless and until the question raised, as I have found, by Macdonald had been settled. I am satisfied that both of them would and did realize the possibility of a conflict of interest or of some opposition arising on the part of Mrs. McEwan and Mr. Barbrick to the alternative defence of the Lindeborgs unless some agreement was arrived at forthwith. As already indicated I am also satisfied that the apparent difficulty was overcome by the promise and agreement on the part of the said Lindeborg as aforesaid.

As I have already indicated it is further contended, however, on behalf of the defendants that the said Macdonald could not bind the said Mrs. McEwan or Mr. Barbrick to abandon any question of obtaining independent advice or of taking any position in opposition to that taken by the said Lindeborg. In this connection reference might be made again to the case of *Alliance Bank* v. *Brown* 62 E. R. 631, supra, where it was argued and admitted that the plaintiff Bank could have brought an action at any time but nevertheless it was held by the Court that the forbearance of the Bank to enforce payment of the existing debt in consequence of the agreement was a sufficient consideration to support it and that the circumstances necessarily involved the benefit to the debtor of a certain amount of forbearance which he would not have derived if he had not made the agreement. In the present case it would appear to me that the plaintiff, Mrs. McEwan and

perhaps Mr. Barbrick did not know personally for some time at least that such an agreement had been made, and they were not bound by any promise, but nevertheless, it is also apparent that they did not obtain independent advice or take any position in opposition to that taken by the said Lindeborg but that their solicitor Macdonald continued to act for them as well as the Lindeborgs and neither was obliged to obtain independent advice, and Daniel Lindeborg had the benefit of the said solicitor acting for all the defendants in the Harris action without any opposition from his co-defendants to the position taken on behalf of the Lindeborgs in paragraph 20 of the defence filed for them.

It seems to me that the argument by counsel on behalf of the plaintiff is sound that this is a case of a contract arising upon executed consideration as Anson in his Law of Contract, 17th edition, says at p. 112:—

> "A contract arises upon executed consideration when "one of the two parties has, either in the act which consti- "tutes an offer or the act which constitutes an acceptance, "done all that he is bound to do under the contract leaving "an outstanding liability on one side only."

In my view whether Macdonald had or had not the authority to bind the plaintiff to abandon any question of obtaining independent advice or of taking any position in opposition to that taken by the said Lindeborg the fact is as I find that the said plaintiff Mrs. McEwan and the said Barbrick through their said solicitor Macdonald in consideration of the said promise of the said Lindeborg did abandon any question of obtaining independent advice or of taking any position in opposition to that taken by the said Lindeborg that he was not a party to or bound by the alleged Harris agreement. My view also would be that under all the circumstances the said Macdonald having had the conversation with the said Lindeborg as aforesaid was not exceeding the authority which he then had as solicitor for the said Laura McEwan and Barbrick in continuing to carry on as he did on behalf of all parties who were defendants in the Harris action.

My conclusion therefore, is that a contract arose here upon an executed consideration where the plaintiff did all that she was bound to do under the contract leaving an outstanding and enforceable liability on the part of the said Lindeborgs. The consideration was undoubtedly of some value and "its adequacy is for the parties to consider at the time of making the agreement not for the Court when it is sought to be enforced"—see Anson, supra, pp. 92-3.

In the Supreme Court of British Columbia

Reasons for Judgment. Fisher, J., 10th December, —*Continued.*

The only remaining question is as to whether or not the plaintiff is entitled to sue as she purports to do on behalf of the heirs of James Proudfoot deceased. Although it is admitted that during the course of the Harris action the said Duncan C. Barbrick died and the said Laura McEwan was appointed by the Court to represent the estate of Proudfoot for the purpose of such action, no order appointing her to represent the said estate for the purposes of the present action has been made. The provisions of Order XVI, r. 32 x (b) would not appear to have been invoked, but Order XVI, r 9 is now relied on reading as follows:—

"9. Where there are numerous persons having the same "interest in one cause or matter, one or more of such per- "sons may sue or be sued, or may be authorized by the Court "or a Judge to defend in such cause or matter, on behalf or "for the benefit of all persons so interested.

The following cases are also cited *Bedford v. Ellis* 70 L. J. Chancery 102; *Market v. Knight* (1910) 2 K. B. 1021; and *Jansen v. Prop. Insurance Co.* (1913) 30 T. L. R. 49. In the *Bedford* case supra, at page 105, Lord Macnaghten says in part as follows:

"The old rule in the Court of Chancery was very simple "and perfectly well understood. Under the old practice the "Court required the presence of all parties interested in the "matter in suit in order that a final end might be made of the "controversy. But when the parties were so numerous that "you never could 'come at justice,' to use an expression in "one of the older cases, if everybody interested was made a "party, the rule was not allowed to stand in the way. It was "originally a rule of convenience; for the sake of convenience "it was relaxed. Given a common interest and a common "grievance, a representative suit was in order if the relief "sought was in its nature beneficial to all whom the Plaintiff "proposed to represent."

In the same case Lord Shand at p. 108 says in part as follows:—

"The rule has been framed and adopted for a useful and "important object—the saving of the multiplication of ac- "tions, with the attendant costs, in cases where one action "would serve to determine the rights of a number of persons "in a question with another party called as defendant. A "series of different actions one after another by different "plaintiffs is to be no longer necessary in cases where numer- "ous persons have 'the same interest in one cause or matter,' "for in such cases 'one or more of such persons may sue on "behalf or for the benefit of all persons so interested,' the

"rule is obviously one of advantage not only to plaintiffs but "to defendants also, in the way of saving multiplication of "suits, and it is of much importance to note, as observed by "Lord Macnaghten, that it only applies to the practice of the "Court of Chancery, of which he gives many instances, to "all divisions of the High Court."

Counsel on behalf of the plaintiff contends that "given a common interest and a common grievance" a representative suit is in order. On the other hand counsel on behalf of the defendants contends that Order XVI, r. 9, does not apply to the present case, and cites *Braybrook v. Wright* (1916) Weekly Notes 74, where Sargant J. said in part as follows:—

"No doubt in many cases the other parties might be con- "tent for one of them to argue on their behalf but speaking "generally a representation order should not be made or a "decision be given in the presence of one only of a few parties "with similar interests. Such a practice really went beyond "Order XVI, r. 9, which authorized the Court to make a "representation Order where the parties were numerous. "Five parties were not numerous enough, unless the amount "in question was very small or unless the Court was satis- "fied that all the other parties wished the question to be "determined in the presence of the one."

It may be noted that in the *Jansen* case, supra, it was argued on behalf of defendants that one person could not recover on a contract made by himself jointly with another and the Court held that the plaintiff was driven back on the rule in question, namely Order XVI, r. 9, and that as there were eighteen others involved the word "numerous" was complied with.

In the present case it does not seem to me that it has been established how many others are involved or that the word "numerous" is complied with. As to the rights of the plaintiff Laura McEwan, my view would be that on the agreement, which I have found was made, she could recover as administratrix of the estate of Hiram Stevenson without joining the heirs of James Proudfoot, deceased, as she alone might have had to pay the whole of the judgment in favour of Harris, so that I do not think that she "was driven back on the rule," Order XVI, r. 9. I have not overlooked the argument that it would be advisable to avoid the necessity of another action, but I am faced with the objection of Counsel on behalf of the defendants that the plaintiff has not been appointed to represent the heirs of the said James Proudfoot for the purposes of the present action and that the plaintiff

In the Supreme Court of British Columbia

Reasons for Judgment. Fisher, J., 10th December, —*Continued.*

cannot sue on their behalf or for their benefit herein. Under the circumstances my view would be that this objection must be sustained.

As to the amount which the plaintiff is entitled to recover as administratrix of the estate of Hiram Stevenson I have noted that under both the judgment of the Supreme Court of Canada (Exhibit 2) and the settlement (Exhibit 44) it might be argued that Laura McEwan as such administratrix was liable for the whole amount of the judgment or settlement, but it would appear that as such administratrix she had only a half interest in the money in Court that was paid out pursuant to the judgment or settlement. In any event, however, it was conceded by Counsel on behalf of the plaintiff that she should have judgment for only half the amount claimed if the said objection of counsel on behalf of the defendants should be sustained.

There will be judgment therefore in favour of the plaintiff as administratrix of the estate of Hiram Stevenson, deceased, against the defendants for one half of the amount claimed herein.

"A. I. FISHER, J."

Vancouver, B. C.
Dec. 10th, 1932.

No. 1216/1931

B.C.L.S.
$1.10

Checked S.V.L.

Seal Supreme Court
of British Columbia
Vancouver
Registry
Dec. 24, 1932.

Entered
Dec. 24th, 1932
Order Book, vol. 29
Fol. 197.
Per "A.L.R."

IN THE SUPREME COURT OF BRITISH COLUMBIA

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,

—and—

ARTHUR COSENS, VERENA MABLE COSENS and JOHN HUBERT HEMSWORTH, Executors of the Estate of Daniel Lindeborg, deceased, and Administrators of the Estate of Andrew Lindeborg, deceased, Defendants,

BEFORE THE HONOURABLE MR. JUSTICE FISHER } Saturday, the 10th day of December, A. D. 1932.

THIS ACTION having come on for trial at the City of Vancouver, B. C., on the 22nd, 23rd, 24th, 29th and 30th days of November, A. D. 1932, in the presence of J. W. deB. Farris, Esq., K.C., of Counsel for the Plaintiff, and A. H. MacNeill, Esq., K.C., and F. D. Pratt, Esq., of Counsel for the Defendants AND UPON hearing the evidence adduced and what was alleged by Counsel aforesaid and Judgment having been reserved and coming on this day for Judgment AND UPON it appearing that the Plaintiff Laura McEwan was not entitled to sue on behalf of the heirs of James Proudfoot deceased,

THIS COURT DOTH AND ADJUDGE that the said Plaintiff Laura McEwan as Administratrix of the Estate of Hiram Stevenson, deceased do recover from the Defendants the sum of $13,862.26, and three-quarters of her costs of this action to be taxed.

BY THE COURT.

"H. BROWN"
Dep. District Registrar.

Minutes filed "A.I.F." J.

In the Supreme Court of British Columbia

No. Mc 1216/31

Notice of Appeal, 27th December, 1932.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

LAURA McEWAN, Administratir of the Estate of Hiram Stevenson, deceased, suing as such and also on behalf of all others the heirs of James Proudfoot, deceased,

Plaintiff, (Respondent)

—and—

ARTHUR COSENS, VERENA MABLE COSENS and JOHN HUBERT HEMSWORTH, Executors of the Estate of Daniel Lindeborg, deceased, and Administrators of the Estate of Andrew Lindeborg, deceased,

Defendants, (Appellants)

TAKE NOTICE that the above-named Defendants intend to appeal and hereby appeal from the Judgment of the Honourable Mr. Justice A. I. Fisher rendered herein on the 10th day of December, A. D. 1932;

AND FURTHER TAKE NOTICE that the Court of Appeal will be moved at its sittings in Victoria on Tuesday the 10th day of January, A. D. 1933, at the hour of 11 o'clock in the forenoon, or so soon thereafter as Counsel may be heard on behalf of the Defendants (Appellants) for an Order that the Judgment herein be set aside and Judgment entered herein for the Defendants (Appellants) upon the following grounds:

1. That the Judgment of the Honourable Mr. Justice Fisher is against the evidence, or in the alternative is contrary to the weight of evidence.

2. That the claim against the Executors of Daniel Lindeborg Deceased was not treated by the learned Judge as he should have in view of the claim being against the estate of a deceased person.

3. There was no corroboration of the evidence which it was alleged constituted a contract between the said Daniel Lindeborg, the Testator, and the Plaintiff (Respondent) on which the said Judgment was based.

4. The words said to have been used by the said Daniel Lindeborg do not constiute a contract between the Plaintiff and

the said Lindeborg. Such words if used only constitute an offer to make a contract, and were never accepted by the Plaintiff or any one on her behalf and never became binding upon the deceased Daniel Lindeborg or any or all of the defendants in the action of Harris referred to.

5. If there was any contract between the said Lindeborg and the Plaintiff (Respondent) there was no consideration for the same.

6. The learned Judge wrongfully admitted the evidence of Mr. R. M. Macdonald, who was then solicitor for the said Daniel Lindeborg, and on an occasion which was privileged.

7. That according to the evidence at the trial of this action the words used at the time when it is claimed by the Plaintiff the contract was made did not constitute any contract between the said Daniel Lindeborg and the Respondent.

8. If the words alleged to have been used by the said Daniel Lindeborg were used, such words are only an offer to make a contract.

9. If such words were used by the said Daniel Lindeborg such offer was never communicated to the other defendants in the said action of Harris vs. Lindeborg et al. The other persons interested with the said Daniel Lindeborg were not parties to such agreement.

10. That if the offer to make a contract referred to was made (which the Appellants do not admit but deny) the same was never accepted.

11. That Mr. R. M. Macdonald who it is alleged made the contract referred to was not authorized by the Respondent to make the same.

DATED at Vancouver, B. C., this 27th day of December, A. D. 1932.

F. D. PRATT
Solicitor for the Defendants (Appellants) whose place of business and address for service is at the office of MacNeill, Pratt, MacDougall & Morrison, Room 310, Bank of Nova Scotia Building, 602 Hastings Street West, Vancouver, B. C.

To the Plaintiff (Respondent)
And to Messrs. Farris, Farris, Stultz & Sloan,
Her Solicitors.

In the Court of Appeal for British Columbia.

Reasons for Judgment of the Honourable the Chief Justice, 7th March, 1933.

COURT OF APPEAL

McEWAN v. COSENS } JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE

The Plaintiff's contention in this case is that in the case of *Harris* v. *Lindeborg* the four parties interested being the two Lindeborgs and Stevenson and Proudfoot, the latter two of whom are represented by the Plaintiff, the Lindeborgs agreed with Mr. R. M. Macdonald, who was then acting as solicitor for all parties, to bear the gains or losses of all parties in equal proportions. The suit was eventually lost and the Plaintiff herein now seeks to recover from the Executors of the two Lindeborgs her proportion, namely, one-half of the expenses to which she was put in defending the action. Mr. Macdonald who was acting for the Defendants as solicitor stated the agreement as follows. But before setting it out I wish to say that upon seeing the pleadings of his clients the Lindeborgs, he discovered that these clients had a defence separate and distinct from that of the others represented by the Plaintiff. He called in Mr. D. Lindeborg who in addition to his own interest in the suit was executor for his deceased brother. Mr. Macdonald submitted the difficulty as to his acting in the premises for all the parties, to him. Lindeborg then said "We are in this together; we will share the gains and losses equally. Further there is no reason why you should not act for us all." I shall now quote the words of Mr. Macdonald as to what happened at that time:

> "Mr. Daniel Lindeborg said on this occasion, they agreed "with the said Laura McEwan and Duncan C. Barbrick, "now represented by her personally, that they would fight "the action together and that he on behalf of himself and "the estate of Andrew Lindeborg would share equally with "her, as to principal and interest, in any judgment which "might be given against them, and the said action was con- "tinued and fought by the parties in consideration of and on "such understanding and the Plaintiff herein at all times has "relied upon the said agreement."

The principal contest before us, if not in reality the whole contest, was as to whether there was corroboration of this agreement. The proceedings were carried to a conclusion and the Plaintiff now sues for specific performance of it to recover from the Defendant a sum equal to one-half of the share of the judg-

ment recovered against her with interest, and one-half of the costs which Harris secured against her and which she has paid, she having settled also for her own one-half of the costs with Harris. With regard to corroboration Mr. Farris contended that no corroboration was necessary; that the corroboration required by our statute is required only when the contract was made between deceased contractors and the one who is claiming against them; and as this contract was made by Mr. Macdonald on behalf of Mrs. McEwan and those represented by her the statute has no application, he contended.

It is unnecessary to decide whether or not this is so, and I do not propose to decide it in this case since there is quite sufficient corroboration of the contract by the said Daniel Lindeborg and the Plaintiff herself in her conversation with him at Nelson in which he told her what he had agreed to do, and also corroboration from a telegram of his to her on the 25th of December, 1930, in which he said, speaking of the decision of the Supreme Court of Canada: "Decision fifty (thousand) against us. Not many details. More later." Signed "D. Lindeborg."

There is also some corroboration from witness Sloan, but I do not need to depend upon that. The words in the telegram "against us" show that he was interested in the judgment against the Plaintiff notwithstanding that he and his brother's estate were free from liability. The judgment was against the Plaintiff and those whom she represented and not in any respect against the Defendants. Daniel Lindeborg further shouldered himself, by that telegram, with the loss sustained by the Plaintiff and himself and his brother under the agreement aforesaid.

Another point argued was that the Plaintiff was not advised of the agreement by her solicitor until after the judgment was delivered. It is sufficient to say that the agreement was made on her behalf by her solicitor and agent, and has been taken advantage of and ratified by her, which ratification renders the agreement binding from the time it was made. I also think there was consideration for the agreement since the parties co-operated, and acquiesced in it throughout the whole legal proceedings.

I would, therefore, dismiss the appeal, with costs.

"J. A. MACDONALD,"
C. J.

Vancouver, B. C.
7th March, 1933.

In the Court of Appeal for British Columbia.

Reasons for Judgment of the Honourable Mr. Justice Martin, 21st March, 1933.

COURT OF APPEAL

McEWAN v. COSENS } JUDGMENT OF THE HONOURABLE MR. JUSTICE MARTIN

Vancouver, B. C., 21st March, 1933.

It had been my intention to hand down reasons herein, as the case is one of much interest, but the long protracted pressure upon my available time, caused by the greatly increased business of this Court during the last two years, has prevented me from doing so, particularly at present in the face of the necessity of preparing reasons in more urgent cases, and therefore I must perforce content myself by saying that on the whole case, I am of opinion, though not without some doubt, that the learned judge below should not be held to have reached a wrong conclusion and therefore this appeal should be dismissed.

(Sgd.) "ARCHER MARTIN,"
J. A.

Reasons for Judgment of the Honourable Mr. Justice McPhillips, 21st March, 1933.

COURT OF APPEAL

McEWAN v. COSENS } JUDGMENT OF THE HONOURABLE MR. JUSTICE A. E. McPHILLIPS

McPhillips, J. A.

I am agreeing with the C. J.

Sgd. "A. E. McP."

March 21, 1933.

COURT OF APPEAL

McEWAN
v.
COSENS

JUDGMENT OF THE HONOURABLE MR. JUSTICE M. A. MACDONALD

Reasons for Judgment of the Honourable Mr. Justice M. A. Macdonald, 7th March, 1933.

The facts disclosing the nature of the action and the interests involved are stated in the judgment under review. In this appeal we are only concerned with Respondent as administratrix of the estate of Hiram Stevenson deceased. The trial judge outlined the evidence supporting the contract sued upon but it may be convenient to refer to it again briefly to make comment intelligible. It is contained in the evidence of Mr. R. M. Macdonald, a solicitor, and his testimony was accepted by the trial judge.

The judgment is attacked on three grounds (1) no contract (2) if so, no corroboration, the claim being against the estate of a deceased person and (3) if a contract, so-called, was entered into or if the conversation between the alleged contracting parties took place as testified it cannot be given the legal effect contended for.

Dealing first with the second point, assuming a contract, is corroboration necessary? Section 11 of the Evidence Act, Chap. 82, R. S. B. C. 1924 reads as follows:

> "In any action or proceeding by or against the heirs, "executors, administrators, or assigns of a deceased person, "an opposite or interested party to the action shall not obtain "a verdict, judgment, or decision therein, on his own evidence, "in respect of any matter occurring before the death of the "deceased person, unless such evidence is corroborated by "some other material evidence."

The "opposite or interested party" is the plaintiff (respondent). But the contract, if it may be so called, was made by Mr. Macdonald with the deceased Daniel Lindeborg, now represented by his executors (the appellants), not by the "opposite party." We are not concerned therefore with the evidence of the respondent. If we were corroboration would be required. She gave evidence of a conversation with the deceased Lindeborg in which he told her after the first action started "that they all stood together" but it is too vague, standing by itself, to establish a contract and was only treated by the trial judge as corroboration. The point therefore is—must the evidence of Macdonald be corroborated? Do the words "on his own evidence" include evidence

In the Court of Appeal for British Columbia.

Reasons for Judgment of the Honourable Mr. Justice M. A. Macdonald, 7th March, 1933. —*Continued.*

produced by the "opposite party?" In England where there is no statute it is a rule of prudence, rather than of law, for a judge (at least some judges) to recommend the jury to disregard the unsupported evidence of a claimant against the estate of a deceased person to protect it from unfounded claims (In re *Finch* (1882) 23 C. D. 267) and judges sitting without a jury, applying the rule to themselves, sought corroboration. But it never appeared to be more than a rule of caution: nor yet an absolute requirement. As Irving J. A. stated in *Ledingham vs Skinner* (1915) 21 B. C. R. 41 at 45—

> "For the protection from unfounded claims it has always "been a rule of the courts that claims against the estate of "a deceased person should be examined with jealous sus- "picion."

The cases he refers to show that it was not a rule of law; it is now by section 11 of the Evidence Act. It was submitted that in principle corroboration should not be required of the evidence of an independent witness. That does not follow, bearing in mind the object of the rule. My view is that the statute does not apply to the facts before us but the common law rule of prudence should be applied although I know of no case in which the point arose in this way. Any judge would naturally scrutinize with extreme care evidence that might have been controverted if the deceased were living and thoroughly satisfy himself of its reliability. That however is all that is necessary. Brett M. R. in *re Garnett* (1885) 31 C. D. 1 at p. 9, referring to the alleged need of corroboration, said:—

> "Are we to be told that a person whom everybody on "earth would believe, who is produced as a witness before the "Judge, who gives his evidence in such a way that anybody "would be perfectly senseless who did not believe him, whose "evidence the Judge in fact, believes to be absolutely true, is "according to a doctrine of the Court of Equity, not to be "believed by the Judge because he is not corroborated. The "proposition seems unreasonable the moment it is stated. "There is no such law. The law is that when an attempt is "made to charge a dead person in a matter, in which if he "were alive he might have answered the charge, the evidence "ought to be looked at with great care; the evidence ought "to be thoroughly sifted, and the mind of any Judge who "hears it ought to be, first of all, in a state of suspicion; but "if in the end the truthfulness of the witnesses is made per- "fectly clear and apparent, and the tribunal which has to act

"on their evidence believes them, the suggested doctrine be- "comes absurd."

In the case at bar I am satisfied that the trial judge exercised due caution and accepted Mr. Macdonald's evidence unreservedly. I will not therefore discuss the alleged corroborative evidence as I feel satisfied from the language used, even although supporting evidence is referred to, that without it, the same conclusion would have been reached.

Mr. McNeill raised the point that statements made by the deceased Daniel Lindeborg to Mr. Macdonald, his solicitor, were privileged and evidence relating thereto inadmissible. If this is so the case fails for want of evidence. A solicitor may be compelled to divulge the fact that his client executed a deed though the result of the disclosure is that the document may be impeached (*Crawcour vs. Salter* (1891) 18 C. D. 30). If Lindeborg before his death gave a document to his solicitor executed by all parties interested setting out the manner in which the judgment should be adjusted the solicitor could not be prevented from producing it in an action carried on by representatives. Why otherwise if an oral agreement, or an offer made for later acceptance? The rule is based on the inability to conduct legal business without the attorney's expert assistance and as a *sequitur* the necessity—in order to make such assistance effectual—of securing full and free intercourse between the two. It would be a breach of duty in this case not to convey the offer to the party intended to receive a benefit. Lindeborg was speaking to his associates through their common solicitor. This objection therefore is not tenable. (*Perry v. Smith* (1842) 152 E. R. 288).

What was the contract, if any? On receipt of the statement of claim in the first action, Mr. Macdonald noticed that a defence open to the Lindeborgs was not available to the parties represented by the respondent. The Lindeborgs might not be held liable at all. Obviously a conflict of interests arose requiring ordinarily separate solicitors. In this dilemma Mr. Macdonald explained the position to Daniel Lindeborg, viz., that

"Harris (the plaintiff) might recover judgment for the "amount that he is suing for against Proudfoot and Steven- "son estates, and fail to show any agreement by the Linde- "borgs with them."

He asked Lindeborg

"Whether it might not be necessary in his opinion for "other solicitors to be engaged."

In the Court of Appeal for British Columbia.

Reasons for Judgment of the Honourable Mr. Justice M. A. Macdonald, 7th March, 1933. —*Continued.*

Lindeborg said:—

"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."

He also told him to take any defence he could on behalf of the other defendants. That was done. Mr. Macdonald filed separate defences. If the plaintiff Harris succeeded in the action it might only be as against this respondent (as the event proved) while the Lindeborgs or their estates would be free from liability. What is the effect of this conversation? It was at this stage simply (speaking also as executor of the estate of Andrew Lindeborg) an offer by Lindeborg, to share equally with respondent the burden of any judgment against her whatever the result of the action might be. The words are not as explicit as they might be but that I think is the fair interpretation. I speak of it as an offer because Mr. Macdonald had no authority to make a contract of this sort. As to motive Lindeborg may have thought that for some reason it was important to have Mr. Macdonald act for all parties. It was possibly a generous gesture on his part; or he may have made the offer simply because they were associates. It is I think characteristic of men, who follow out-of-door occupations, to be generous to a fault and to take a broad view of obligations, erring, if at all, on the side of liberality, particularly where associates are concerned. It was the offer of a promise to assume a possible liability. The occasion to implement it might not arise but in any event he offered the promise for the consideration of an act on the part of the respondent through her solicitor to forebear from withdrawing his services. The solicitor in effect said in answer to the offer "if you promise to do that I promise to act for respondent and for you." The reciprocal promises provide the consideration. The consideration for a contract may be, and often is, beneficial in respect to one party and onerous in respect to the other. It may be good therefore although unilateral, so to speak, in respect to benefits.

"A contract may be binding as based on good considera- "tion although the promise is purely gratuitous in the sense "that the promisor obtains in return for it no consideration "or profit to himself."
(*Salmond on Contracts 79*).

The foregoing consideration would be conclusive if the solicitor had authority to act for the respondent in respect to this matter. The respondent however never heard of it until over two years later. Mr. Macdonald had no authority to accept the

offer on her behalf because it was made, not in a matter relating to the usual conduct of an action but in respect to a collateral matter. (*Swinfen v. Lord Chelmsford* (1860) 6 Jurist N. S. 1035). It was not part of the solicitor's duty, nor within the ambit of his usual authority as such in the ordinary conduct of an action (unless authorized) to place an onerous liability on one client or to relieve the other from a legal liability. He was not acting as agent for Lindeborg (except to the limited extent, that he was selected by him to communicate the offer) because Lindeborg was there to speak for himself: Neither *qua* this matter was he the agent of respondent, to bind her to any contract however beneficial. Mr. Macdonald, as a messenger, might convey the promise to respondent and she in turn might instruct him to proceed with the action in the terms of the promise; if so, the contract would have been complete. The consideration by an act would then move from the promisee. That however was not done. He (Mr. Macdonald) assumed to act without communicating with respondent. It follows that we have as yet no completed contract simply because, after the solicitor received this communication, he proceeded to act on behalf of all parties. The offer might have been revoked by Lindeborg at any time before his death as it had not been accepted by respondent in express terms or by contract or by anyone authorized to do so on her behalf.

We have therefore a promise to assume a burden made to the solicitor to convey to the respondent. It is the respondent, who must furnish the consideration. That consideration would be furnished (moving from the promisee) if and when she instructed the solicitor to proceed with the cause in the terms of the offer.

This difficulty therefore arises. The respondent did not hear of the offer during the course of the trial or before final judgment was given in the Supreme Court of Canada. The solicitor proceeded to act for all parties, assuming to accept an offer in respect to a collateral matter without authority from the only one competent to give it, viz., the respondent. It is the case of an unauthorized agent, acting *ultra vires*, presumptively on behalf of principals (the respondent) and Lindeborg, as if the contract had been concluded. That position could be made legally binding only by ratification. The offer of a promise must be communicated to the respondent within a reasonable time before performance was possible. Performance could only take place after judgment was given by the Court of Appeal affirmed by the Supreme Court of Canada, relieving the Lindeborgs of liability. The offer was never withdrawn. If, therefore, it came to respondent's notice

In the Court of Appeal for British Columbia.

Reasons for Judgment of the Honourable Mr. Justice M. A. Macdonald, 7th March, 1933. —*Continued.*

in a reasonable time she might still accept it. The question might be asked—what consideration for the promise could pass from the promisee at this stage? No act could then be performed by her acting alone or through her solicitor. The act of forbearance on the part of her solicitor was spent. The answer is that ratification on her part at this late date would relate back to the receipt of the offer by the unauthorized agent and the consideration then given would enure in her favor. Respondent could before the time for performance arrive (assuming that it is a reasonable time) by letter or by action claiming payment pursuant to the agreement (and she did so) ratify her solicitor's attempt to not only accept the offer but also his conduct in assuming to act on her behalf in accepting it and in furnishing the consideration by proceeding with the action. While Mr. Macdonald had no authority to act upon the offer he in fact did so and it is this unauthorized act that may be ratified by the party on whose behalf he professed to proceed. (*Bolton Partners vs. Lamber* (1888) 41 C. D. 295; *Simpson vs. Eggington* (1855) 10 Exch. R. 44). The ratification relates back to the assumed acceptance of the offer by the solicitor and we must treat it as if the agreement had been closed at that time. In *Salmond's Law of Contract* the author at p. 349-50 says:—

> "When any person professing to act as the agent of "another makes on his behalf a contract which is *ultra vires*, "either because the person who so made it was not an agent "at all or because he exceeded the authority committed to "him, the contract is wholly invalid as between the principal "and the third party, and neither confers rights nor imposes "obligations on either of them. Nevertheless, the principal "may, if he chooses, subsequently adopt and confirm the un- "authorized act of him who purported to act as his agent. "In so doing he is said to ratify the contract. The effect of "such ratification is to validate it *ab initio*, just as if it had "originally been made with due authority. Ratification takes "effect not, prospectively from its date, but retrospectively as "from the date of the ratified contract. The legal maxim is, "*Omnis ratihabitio retrotrahitur et mandato priori aequi- "paratur.*"

If ratification did not so relate back the offer of a promise would die with the party making it and a later attempt to accept it would be valueless. It is not material therefore that Lindeborg died before ratification. Ratification must take place within a reasonable time dependent on the circumstances of the case and the nature of the contract. Lapse of time is not material here in view of intervening events delaying the date of performance and the

absence of embarrassment to the opposite party. True Lindeborg had he lived might have withdrawn the offer before ratification but that is not material on this point. He indicated his willingness to be bound by having the solicitor proceed. I think therefore we have a binding enforceable contract and the appeal should be dismissed.

"M. A. MACDONALD," J.A.

Victoria, B. C.,
7th March, 1933.

In the Court of Appeal for British Columbia.

Formal Judgment, 7th March, 1933.

Entered Vol. 5 Fol. 33 Victoria B.C.L.S.
Date March 18th, 1933 Mar. 18, 1933 $1.10
By "J. S. G." Registry

COURT OF APPEAL

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) Respondent,

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) Appellants.

CORAM: JUDGMENT

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA
THE HONOURABLE MR. JUSTICE MARTIN
THE HONOURABLE MR. JUSTICE McPHILLIPS
THE HONOURABLE MR. JUSTICE M. A. MACDONALD

VANCOUVER, B. C. the 7th day of March, 1933, THIS APPEAL from the judgment of The Honourable Mr. Justice Fisher, pronounced on the 10th day of December, 1932, coming on for hearing at the City of Victoria, Province of British Columbia, on the 2nd, 3rd and 6th days of February, 1933, and UPON HEARING Mr. A. H. MacNeill, K. C. and Mr. F. D. Pratt, of Counsel for the Appellants and Mr. J. W. deB. Farris, K. C., of Counsel for the Respondent and UPON READING the Appeal Book herein, and judgment being reserved thereupon;

THIS COURT DOTH ORDER AND ADJUDGE that the said appeal be and the same is hereby dismissed with costs to be paid by the Appellants to the Respondents after taxation thereof.

THE COURT:

"B. H. TYRWHITT DRAKE,"
Registrar.

Approved
A H MacN
J. W. deB. F.
O. B.
D. R.

J. A. M.
C. J

Seal
Court of Appeal
British Columbia

B.C.L.S.
10c.

Victoria,
March 16, 1933
Registry.

COURT OF APPEAL

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) Respondent,

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) Appellants.

NOTICE OF APPEAL

TAKE NOTICE that Arthur Cosens, Verena Mabel Cosens and John Hubert Hemsworth, the above-named Defendants, hereby appeal to the Supreme Court of Canada from the Judgment pronounced in this cause by this Court on the 7th day of March, A. D. 1933, whereby the appeal from the judgment of the Honourable Mr. Justice Fisher pronounced on the 10th day of December, 1932, in the Supreme Court of British Columbia, wherein it was adjudged that the Respondent as Administratrix of the Estate of Hiram Stevenson, Deceased, recover from the Appellants the sum of $13,862.26 and three-quarters of her costs of that action to be taxed was dismissed.

DATED this 15th day of March, A. D. 1933.

"F. D. PRATT,"

Solicitors for the above-named Appellants

To the Respondent

And to Messrs. Farris, Farris, Stultz & Sloan,
Solicitors for the Respondent.

In the Supreme Court of Canada.

Appellant's Factum

APPELLANTS' FACTUM

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,

vs.

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.

PART I

STATEMENT OF FACTS

1. The Appellants are the Executors of the Estate of Daniel Lindeborg, deceased, who died at Vancouver, B.C., on the 6th day of January, 1931.

2. On the 18th day of July, 1928, William F. Harris began an action in the Supreme Court of British Columbia against the said Daniel Lindeborg as Administrator of the Estate of Andrew Lindeborg, deceased, Duncan C. Barbrick, Administrator of the Estate of James Proudfoot, deceased, Laura McEwan, Administratrix of the Estate of Hiram Stevenson, deceased, and the said Daniel Lindeborg.

3. The said Daniel Lindeborg left Vancouver, where he was then living, in the month of April, 1928, on a trip to his people in Sweden, where he was born, and did not return to British Columbia until the early part of September, 1928.

4. For a number of years prior the said Daniel Lindeborg, his brother Andrew, James Proudfoot and Hiram Stevenson having acquired certain mineral claims in the Stewart Mining Division of British Columbia, had arranged between themselves to sell the mineral claims which they had each acquired and owned in a group which was called the Big Missouri Group.

5. There was no partnership between the parties. When a prospective purchaser was found formal option agreements were prepared on the terms then agreed upon by all, and provision was made in the agreements for the payment of the instalments of the agreed purchase price into a bank for distribution by the bank among the four persons, each person receiving 1/4 of the payment.

6. Harris in his Statement of Claim alleged that in 1909 he

owned some mineral claims and that he made an oral agreement with the said Proudfoot and Stevenson providing for his retaining a one-third interest in some mineral claims which the said Harris had located at the site of some of the mineral claims afterwards embraced in the Big Missouri Group.

7. It was not alleged by Harris that either of the Lindeborgs were parties to the Harris Agreement, but claimed that Proudfoot and Stevenson were to have two-thirds of all profits of the mineral claims which Harris owned.

8. Proudfoot died in 1910, and the said Barbrick was his Administrator. Barbrick died on the 28th October, 1929.

9. The said Stevenson was killed in France on April 9th, 1917, and the said Laura McEwan (the Respondent) is his Administratrix.

10. In 1925 an option was given by the Respondent, Barbrick, Daniel Lindeborg for himself and also as Administrator of Andrew Lindeborg Estate to certain persons who entered into possession of the Big Missouri Group and carried on mining operations and paid over to the parties in the option named various instalments amounting in all to $200,000, and on which a further sum of $100,000 was about to be paid over by the Bank of Commerce for distribution among the vendors.

11. Harris claimed one-third of the total sum of $300,000, and on issuing his writ attached the sum of $100,000 which was then held by the bank.

12. Mr. R. M. Macdonald, barrister and solicitor, had been the solicitor for Lindeborg for some years and had corresponded with Barbrick and the Respondent in connection with matters pertaining to various Big Missouri contracts.

13. The Writ of Summons in the Harris action was served on Barbrick on 4th August, 1928, and an appearance entered for him by Mr. Macdonald on the 11th August. Ex. No. 13, Case. P. 204.

14. On 11th August, 1928, Mr. Macdonald wrote to the Respondent referring to the Harris action, and asking her to send to him any papers which might be served on her and that he would enter an appearance for her. Ex. 12, Case P. 203, and had several letters in connection with such action.

15. On August 14th the Respondent acknowledged receipt of Mr. Macdonald's letter of 11th August, and stated that she would send to him any papers served on her.

16. On 5th September Mr. Macdonald wrote his Victoria Agent (the Harris Writ having been issued at the Victoria

Registry of the Supreme Court) enclosing an appearance for the Defendant Lindeborg.

17. On September 6th the Respondent wrote to Mr. Macdonald instructing him to accept service of the writ on her behalf, Ex. 14, Case P. 207.

18. The Statement of Claim was served on Mr. Macdonald's Agent in Victoria on September 11th and by him forwarded to Mr. Macdonald.

19. Mr. Macdonald had an interview at his office with Daniel Lindeborg on a date that cannot be stated. No one else was present.

20. What occurred at this interview is the basis of this action.

21. On 8th October Mr. Macdonald served a Demand for Particulars of Statement of Claim in Harris action. Ex. 1, Case P. 216.

22. Macdonald prepared and filed Statements of Defense, one for Lindeborg and one for Respondent, both dated 18th October. The only difference between the two defences was the addition to the Lindeborg Defence of Clause 20, which stated that neither Proudfoot nor Stevenson were his agents.

23. Lindeborg went to a hospital in Vancouver on September 19th and remained there until 7th November, 1928—Case P. 51.

24. Reply of Plaintiff was delivered 18th October.

25. The answer of the Plaintiff's Solicitor to the Demand for Particulars was delivered on 5th November, 1928.

26. The trial of action Harris v. Lindeborg came on before Chief Justice Morrison on the 13th and 14th days of May, 1929. Judgment against all defendants for $100,000 was delivered on 18th June, 1929.

27. All of the defendants appealed to the Court of Appeal on June , 1929, and same was heard on the 7th, 8th and 9th days of October, 1929, Mr. E. P. Davis, K.C., appearing for Daniel Lindeborg and Mr. R. M. Macdonald for the other Appellants.

28. On 7th January, 1930, judgment was delivered by the Court of Appeal, dismissing the action as against Lindeborg and reducing the judgment against Barbrick and Respondent to $15,-789.00.

29. On 31st January, 1930, an order was made appointing the Respondent to represent the Proudfoot Estate in the Harris action on account of the death of Barbrick on 28th October, 1929,

between the time when the appeal was argued and the delivery of judgment in Court of Appeal.

30. An appeal was taken by Harris to the Supreme Court of Canada against all the parties appellant in the Court of Appeal; Mr. J. A. Ritchie, K.C. and Mr. E. F. Newcomb, K.C. for Respondent Lindeborg and Mr. Macdonald for Respondent McEwan. There was also a cross appeal to the Supreme Court of Canada by the Respondent on behalf of Proudfoot and Stevenson Estates on 29th March, 1930. Mr. Macdonald appeared for the Respondent in such cross appeal. In the Supreme Court of Canada the appeal was dismissed as against Lindeborg and the judgment against the Respondent was increased.

31. Lindeborg died 6th January, 1931. By his will he appointed the Appellants his Executors and Executrix.

32. On the 5th day of August, 1932, Respondent began this action in the Supreme Court of British Columbia to recover from the Appellants one-half the amount paid by the Respondent for judgment and costs in the said Harris action.

This action was tried before His Lordship Mr. Justice Fisher on the 22nd, 23rd, 24th, 29th and 30th days of November, 1932, and on the 10th day of December, 1932, judgment was given against the Appellants for the sum of $13,862.26 and three-quarters of her costs of the said action to be taxed.

On the 27th day of December, 1932, the Appellants gave notice of appeal to the Court of Appeal of British Columbia, and the same was heard at Victoria on the 2nd, 3rd and 6th days of February, A.D. 1933, and on the 7th day of March, 1933, the Court of Appeal dismissed the appeal with costs.

PART II

QUESTIONS INVOLVED IN APPEAL

(1) Did the arrangement made between Lindeborg and Macdonald involve an agreement by Lindeborg to pay the Respondent one-half or any part of the Judgment which Harris might recover against her in the action referred to?

(2) Had Macdonald power to make the oral agreement referred to for the Respondent or Barbrick?

(3) Was there sufficient consideration moving from the Respondent to Lindeborg for such agreement to make such promise valid?

(4) Is the corroboration of the contract sufficient under section 11 of the Evidence Act?

(5) If there was such an agreement did Lindeborg revoke the same?

(6) Did the Respondent ratify what Macdonald had done?

(7) Was the interview between Lindeborg and his solicitor, Macdonald, privileged, and was it admissible as evidence against the Appellants?

(8) Was it necessary that Barbrick should assent to the arrangement between Macdonald and Lindeborg, and is there any evidence of such assent?

(9) Was the learned Trial Judge right in stating as he did at Case page 296, lines 33-35 that what he had really to consider is the fact that Macdonald testified to the conversation referred to?

PART III—ARGUMENT

Mr. R. M. Macdonald, barrister and solicitor, who was solicitor for the Lindeborgs, the Respondent and Proudfoot Estate (Barbrick) in the action of Harris against the same parties, was the witness called to prove the oral agreement on which Respondent's claim was based.

Exception was taken to Mr. Macdonald giving evidence of the alleged contract on the ground that his conversation with the deceased Daniel Lindeborg was privileged. This contention of the Appellants was overruled by Mr. Justice Fisher and the Court of Appeal.

The evidence which Mr. Macdonald gave is found in Case page 32, lines 18 to 38 and page 33, lines 23 to 27.

By section 11 of The Evidence Act of the Province of British Columbia, R.S.B.C. 1924, Vol. 1, Chap. 82, P. 1084, it is provided as follows:

> "11. In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person an opposite or interested party to the action shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence. R.S. 1911, c. 78, s. 11."

The Appellants claim that Section 11 of the Evidence Act, R.S.B.C. 1924, Vol. 1, Chap. 82, is imperative, and that there

must be corroborative evidence of the claim that Lindeborg agreed to pay any portion of the sum which was paid to Harris.

The Appellants rely on authorities as follows:

Finch v. Finch, 23 Chancery Division, 267, at pp. 274, 277.

Vavaseour v. Vavaseour, 25 Times Law Reports, 50.

Thompson vs. Coulter, 34 Supreme Court Reports, 261, at p. 263.

The evidence required to be corroborated is as to agreement to pay any part of the judgment against McEwan.

No witness gives that.

The Appellants claim that the corroboration referred to in the judgments in the Courts below does not refer to the claim that Lindeborg agreed to pay any portion of the judgment against McEwan or Barbrick, and state that it consists only of statements by Lindeborg that he would fight the action through to the end, which was never in dispute.

The Appellants also claim that the conversation with Macdonald referred to as a contract was only an offer, that Macdonald had no authority to make a contract for the Respondent or for Barbrick. The authority for this is, among others—

Swinfen v. Lord Chelmsford (1860), 29 L. J. Ex. 382.

Macdonald did not communicate his arrangement with Lindeborg to either the Respondent or to Barbrick, and she knew nothing whatever about it until she was told by her legal advisers in Vancouver after the death of Lindeborg. See Evidence of McEwan, Case p. 92, lines 33 to 46 and p. 93, lines 1 to 5.

Barbrick was not aware of the agreement. Macdonald, Case p. 46, lines 29-44.

The Respondent claims that the Respondent ratified Macdonald's action in making this arrangement and claims that her issuing of the writ in this action was in itself the ratification of the action. But this was too late.

The Appellants claim that it being a portion of the contract that Macdonald was to act for all of the parties, that Mr. Lindeborg, having engaged Mr. E. P. Davis, K.C., of Davis & Company, is inconsistent with the arrangement, and constituted a revocation of the same.

They also claim that the offer, if any, having not been accepted was cancelled by the death of Lindeborg, which took place on the 6th day of January, 1931, prior to the date of the writ in the action at bar.

The Appellants claim that if there was any agreement as claimed by the Respondent, there was no consideration for the same.

His Lordship, Mr. Justice Fisher, relied on *Alliance Bank v. Broom,* 2 Drewry & Smale, 289.

It is now settled law when such an arrangement as is claimed by the Respondent has not been communicated to a person in the position of the Respondent, there is no consideration as the party has not changed his position and lost nothing thereby.

The Appellants further contend that inasmuch as the contract was with all of the defendants in the Harris case, which includes Barbrick, who died on the 28th October, 1929, after the argument of the appeal to the Court of Appeal in British Columbia in the Harris case and without obtaining the concurrence of Barbrick to the proposed arrangement, the contract was never a completed one. Both the Respondent and Barbrick would have found themselves subject to heavy liabilities to Lindeborg should the judgment in the Harris case have finally gone against Lindeborg and Barbrick and the Respondent exonerated.

EVIDENCE AS TO MATTERS BEARING ON THE MAKING OF THE CONTRACT

One of the reasons for requiring corroboration is due to the possibility of inaccuracy of the recollection of persons speaking as to a claim against the Estate of a deceased.

See Mr. Justice Channell in *Vavaseour v. Vavaseour* (1909), 25 T.L.R. 250 at page 252.

> "The first thing to be said was that it was a claim against the Estate of a deceased person, as to which there was no corroboration of the Plaintiff's story. That was a very serious difficulty because the rule with regard to corroboration was very clear, and when two people made a joint claim it was necessary to have independent corroboration in addition to what was supplied by each telling the same story as the other. The meaning of the rule was that the Court could not place reliance on the recollection of people in such circumstances without corroboration, not that the Court thought that the witnesses were saying anything untrue."

As to Macdonald's memory, Case page 32 Macdonald says, after giving his account of the conversation with Lindeborg—

> "That is the substance of that conversation, as far as I can recall."

Case page 60, lines 12 to 17—

> "I am bound to depend on a somewhat indefinite memory."

Case page 31, line 34—referring to the question as to whether

[redacted]

Barbrick was present at the interview—

"Q. Were they both present together? A. Well now I have tried to search my memory. They were both together constantly."

As a matter of fact Barbrick was not there. See Particulars, Case page 15; and also the difficulty as to the time of the conversation, see Justice Fisher, Case page 296, lines 10 to 33. Fisher, J., at Case page 296, line 34, says—

"It seems to me that what I have really to consider is the fact that he testifies to such a conversation having taken place." &c. Quote it.

In the Reasons for Judgment of Mr. Justice Fisher, Case p. 297, line 25, he says—

"It has already been pointed out that when the said action was brought by Harris the said Barbrick and the said Daniel Lindeborg personally consulted the said solicitor, R. M. Macdonald, who also communicated with the said Mrs. McEwan by letter, and as a result the defence of the said action was undertaken by the said Macdonald on behalf of all the defendants."

The statement as to Mr. Macdonald communicating with McEwan, etc., is not accurate.

The letter which Mr. Justice Fisher had in mind appears to be a letter, Exhibit 12, Case page 203, dated 11th August, 1928, Macdonald to McEwan, which date was prior to Lindeborg's return from Sweden.

Mr. Justice Fisher, Case page 296, says that Macdonald testified to saying that he had his conversation before Lindeborg went to hospital. There is no such evidence.

Lindeborg, during the summer of 1928, made a visit to his home in Sweden. He left British Columbia in the month of April, 1928, and did not return to British Columbia until early in September, 1928.

Correspondence between Macdonald and McEwan took place prior to Lindeborg's return.

See Exhibit 12, Case p. 203, dated 11th August, Macdonald to McEwan.

Exhibit 15, Case page 205, letter McEwan to Macdonald & Pepler, dated August 14th, 1928.

Both McEwan and Barbrick had therefore made their arrangements for defence in the action before Lindeborg returned from Sweden.

Macdonald in his examination in chief, Case page 26, line 38—

"Q. You are solicitor for them all? A. Oh, yes, my lord, I had entered an appearance for every person before

the discussion that Mr. Farris is referring to. (i.e., the discussion on which Respondent's claim is based).

Macdonald's evidence, Case page 31, he states—

"Until I got the Statement of Claim I did not know what the Harris claim was," etc.

(Mr. Farris, Case page 36, line 44—

"I am relying on the one contract").

And line 32—

"I filed and delivered a Demand for Particulars as to who the associates were, and the reply to that was that the associates were the Lindeborgs. Well, it at once appeared to me that a question arose there, if Proudfoot and Stevenson did not enter into the agreement that Harris alleged, how could they bind the Lindeborgs unless they could show that the Lindeborgs had authorized, etc."

Mr. Justice Fisher, in his Reasons for Judgment, Case p. 296, deals with Macdonald's evidence, Case page 296, lines 14-34, at Case page 38 says that Macdonald testified that this was before he went to hospital, but there is no such evidence. The conversation may have taken place at a much later date than is suggested, as will appear from the following statement of dates:

September 15th—Lindeborg was in hospital and remained there until 7th November—See Case p. 51.

8th October —Demand for Particulars in Harris action—See Case, Vol. 2, p. 216.

8th October —Macdonald wrote to McEwan—(Read this) Case page 217, Exhibit 21.

12th October —Exhibit 23—Case p. 219.

18th October —Defence for Lindeborg put in—Case page 224.
Defence for McEwan—Case page 228.

18th October —Joinder of Issue.

5th November —Particulars in Harris action—Case p. 232.

It will be noted from the foregoing that the action was at issue prior to Lindeborg's return from the hospital.

AS TO CONSIDERATION

The Appellants claim that if there was any contract between Lindeborg and Mr. Macdonald, there was no consideration for the same, and that Macdonald had no authority to make such a contract.

Mr. Justice Fisher refers to Alliance Bank vs. Broom, 2

Drewry & Smale, 289. There doesn't appear to be anything in the facts in this case similar to the Alliance Bank vs. Broom. In the Alliance Bank case the defendant was a debtor to the Alliance Bank. The Bank asked for security which Broom promised to give but failed to do so, and the Bank sued Broom for specific performance of his promise to deliver the securities. Broom received the benefit of some degree of forbearance, not, indeed, for any definite time, but at all events some degree of forbearance, by reason of his promise to deliver securities.

It was held that Broom received good consideration for his contract to deliver the securities, inasmuch as the Bank, in pursuance of the promise of Broom to give them the securities, did not exercise their powers to sue on the contract. There therefore was good consideration.

It has been held that *Alliance Bank vs. Broom* does not apply under circumstances such as exist here.

Wigan v. English & Scottish Co. (1909) 1 Chancery, 208-209. Parker, J., in holding as he did, that the fact that the contract in that case was never communicated to the person who was to benefit by it, held that the contract was purely voluntary. Justice Parker first refers to a decision of Sir Geo. Jessel in re Barker, 44 Law Journal, Chancery, pages 489-490, as follows:

> "If you have an express contract cedit questio then there is nothing to argue. In the case of further security the lender gives time and forbearance, or he gives some other advantage to the person giving the further security, and that is valuable consideration, but if instead after the voluntary instrument has been executed its contents are communicated to the person taking the benefit of it, and acting on the faith of it he does substantially alter his position, that is, he does communicate to the donor his acceptance of the further security, and by so doing gives value to the donor, being the value which the donor expected to give, he has in fact accepted the voluntary instrument as a consideration for the action he takes upon the faith of it. In that way it comes back again really to contract, and upon that ground it is that the Courts have refused to disturb voluntary deeds where consideration has been given for them, so to say, ex post facto; but where the lender has no knowledge it is impossible that he can give consideration in that way, and therefore I hold that mere constructive notice would not be sufficient."

The foregoing is an extract from the judgment of Sir Geo. Jessel—44 Law Journal, Chancery 489-490.

Re Barker—Mr. Justice Parker goes on:

> "Now it appears to me that this is a clear decision that when a deed giving further security is executed, but the person executing it holds it back and does not communicate it in any way to the person in whose favor it is executed, there being no express agreement to give further time or to forbear to sue, there being no circumstances upon which such an agreement can be implied, and the fact that no notice was given being absolutely inconsistent with any such ex post facto consideration as is mentioned by Sir Geo. Jessel, in such a case the deed is purely voluntary and would be so held by the Courts."

There does not appear in the evidence in the case at bar that there was any reason at all why Lindeborg should agree to make such a contract as is alleged with either McEwan or Barbrick.

These cases show that where the agreement was not known it could not have influenced Mrs. McEwan.

The next authority is *Clegg vs. Bromley* (1912) 3 Kings Bench, 434, at pages 442, 443, 481, 487 and 491.

Parker J., referring to *Wigan vs. English & Scottish Co.*, said:

> "The ratio decendi of that case was clearly that there could have been no forbearance or alteration of position on the part of the mortgagee on the strength of the new security because he had no notice of it, and it is precisely on that ground that the Master distinguished the case of Wigan vs. English & Scottish Co. from the case before him. In other words, in my opinion the Master came to the conclusion because the mortgagee was aware of the mortgage and acted on it."

In the present case it is clear that neither the Respondent nor Barbrick was informed of the agreement made by Mr. Macdonald. He admits this himself. See Case page 46, lines 29 to 44.

All of the Defendants in the Harris case had received the money which they had from the same source, each getting an equal share. It would therefore be that Lindeborg would be in no better position than any one of the others to meet the payment of a judgment.

It should be noted that inasmuch as the consideration must go from the promisee, namely the Respondent and Barbrick, how could the promisees claim to have a contract of which they knew nothing?

Macdonald in his evidence, Case page 46, lines 39-43, says that

he never advised either Barbrick or McEwan of his arrangement with Lindeborg.

Mr. Justice M. A. Macdonald says, Case page 313, lines 23 to 27.

"It was possibly a generous gesture on his part or he may have made the offer simply because they were associates," etc.

None of these constructions would amount to any consideration. They would be matters that Lindeborg could provide for in his Will.

The Appellants quite agree with the first portion of the extract made by Mr. Justice Macdonald from Salmond's Law of Contract, page 349-50—

"The whole contract is invalid as between the principal and the third party, and neither confers rights nor imposes obligations on either of them."

At Case page 300, Mr. Justice Fisher's judgment, he quotes from Anson on Contracts at page 112—

"I find that the said Plaintiff McEwan and the said Barbrick through their said solicitor, Macdonald, in consideration of the said promise of the said Lindeborg did abandon any question of obtaining independent advice," etc.

There is no evidence to support this.

How could it be contended that Macdonald could prevent the Respondent from taking independent advice that she may have desired?

At Case page 300, lines 28-30—

"Mrs. McEwan and the said Barbrick through the said solicitor, Macdonald, in consideration of the said promise of the said Lindeborg did abandon any question," etc.

Inasmuch as it appears that Macdonald was not authorized any further than such authorization as goes with entering an appearance for his client, it would be an extraordinary thing if the solicitor could enter into a contract binding the client from getting independent advice.

The Respondent claims as representing the estate of Stevenson. The Harris action was based on the contract between Stevenson and Barbrick, representing Proudfoot. It was due to an arrangement between Harris, on one hand, and Stevenson and Proudfoot on the other, that the Harris action was based. The Respondent's title to some of the mineral claims included in the sale was affected. There would therefore be no moral or legal claim that Lindeborg should agree to pay this judgment which Harris had obtained against her as such, but on the contrary, Lindeborg should be indemnified by the Respondent from the

expense to which Lindeborg was put in connection with the Harris action.

AS TO CORROBORATION

See *Finch v. Finch*—(1883) 33 Chancery Division, page 267. Jessel, M. R., page 272—

"As I understand, corroboration is some testimony proving a material point in the testimony which is *to be* corroborated. It must not be testimony corroborating something not material."

Baggalay, J.—page 274.

Lindley, L. J.—pages 276-7—

"It has been said in this case that the learned judge in the Court below appeared to have taken the view that there was corroborative evidence. Even though it becomes important to look into that, we must see what it corroborates. It is undoubtedly consistent with the lady's story, and it seems to be equally consistent with another view, and evidence which is consistent with two views does not seem to corroborate either. It is not consistent with the view taken by the residuary legatee, although it is consistent with the view taken by the lady."

Re Garnet—31 Chancery Division 1—

Mr. Justice M. A. Macdonald quotes a portion of the judgment. The evidence herein makes the earlier portion of the quotation inapplicable.

Mr. Justice Fisher does not appear to have adopted the safeguards referred to in the Reasons in the Garnet case. See Justice Fisher, Case page 296, line 36, and page 297,—Refers to witnesses who do not corroborate the matter in issue here.

In the judgment in the Court of Appeal reference is made to statements which it is alleged are corroboration of the matter in issue now.

First, as to Sloan, Case p. 74, line 34; p. 78, line 11; page 93, line 31 to 37; statements of Sloan lines 30 to 35, Case p. 79.

These all deal with the question of fighting the case through, and have no reference at all to a promise to pay any judgment, as now claimed.

Mrs. McEwan, Case p. 81, line 39 to end; Case p. 82, lines 1 to 8—

This applies to carrying on the litigation right through to the end and makes no reference to a contract to pay a judgment.

Next is as to Nelson McEwan. Nelson McEwan, Case page 95 lines 30 to 35, says he does not know his wife's business.

Case page 95, line 20—

"Barbrick and Lindeborg and I were present (the Barbrick referred to is not the man involved in the litigation) and Barbrick said 'It looks as if the Stevenson Estate were going to be hooked for $15,000.00' Mr. Lindeborg said 'There is one estate in this. It is 50-50 with the four estates.' "

There is no suggestion that four estates were to pay McEwan, but there was an arrangement for four estates to join in fighting the case. It follows that Lindeborg had the continuance of the litigation in view when he made the reference to four estates.

The Conversation was in August, when the parties were preparing the case for an appeal to the Supreme Court of Canada, and for that appeal Lindeborg had retained Counsel (Mr. E. P. Davis, K.C.) and Mr. Macdonald was preparing for the same appeal for McEwan and Barbrick estates. The conversation was alleged to have taken place some time in August, some time after the Court of Appeal Judgment.

See lines 20 to 30, Case page 95—At that time an appeal and cross appeal to the Supreme Court of Canada had been taken. See Exhibit 2, case, p. 251-52-53, and all four estates were represented in the Supreme Court of Canada.

Finally as to the telegram sent by Cosens in the name of Lindeborg to McEwan.

See evidence of Cosens at Case p. 99, line 39 to end; Case p. 100, line 1 to 43 and Exhibit 96.

The only evidence that is stated to be corroboration applies to the defence of the action, and does not purport to be a contract to pay, or contribute to pay any judgment against McEwan or Barbrick.

As to the meaning of the words "material evidence" mentioned in the Evidence Act, Section 11, see definition given by Lord Blackburn in *Smith v. Chadwick,* L.R. 9 Appeal Cases at page 196. He says:

"It must be of such a nature as would be likely to induce a person to enter into a contract."

It is submitted that such evidence as the Respondents have relied on, namely, the references hereinbefore quoted, would not induce a person to believe that Lindeborg had contracted to repay to the Respondent a judgment against her in the Harris case.

AS TO RATIFICATION OF CONTRACT BY McEWAN

It is claimed by the Respondent that while she was unaware of the existence of the agreement yet she had the right to ratify it.

In this connection note that Lindeborg died on the 6th of January, 1931.

Mrs. McEwan was not aware of the agreement until after Lindeborg's death.

See Mrs. McEwan, Case p. 92, lines 34 to end, Case p. 93, lines 1 and 2.

The case of the Respondent is that the issuance of the writ in this action was the ratification of the offer.

Such a ratification is too late. It is after the death of Lindeborg; and after the litigation.

1. Halsbury, page 234, Section 403—

> "As to the time within which ratification may take place, the rule is that it must be either within a time fixed by the nature of the particular case or within a reasonable time after which an act cannot be ratified to the prejudice of third persons, giving several illustrations.

See also *Jardine v. Leathlay*—(1803) 3 Best & Smith, 700 at p. 708.

See *Bird v. Brown*—4 Exchequer, 786.

Also 154 English Reports, 1434.

Also *Portugese Company vs. Bradman*—45 Chancery Div., p. 16, at pp. 34 and 35.

Ex parte Bailey—Law Reports, 3 Chancery, 592.

In the House of Lords *Lyall vs. Kennedy*—14 Appeal Cases, at p. 462—

Earl Selbourne says:

> "*Bird vs. Brown* is good law," and that the doctrine of ratification must be taken with this qualification, that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies.

In addition to the foregoing, Lindeborg revoked the alleged contract when he retained Mr. E. P. Davis to act for him, a portion of the contract being that Mr. Macdonald should represent all of the defendants in the Harris action, and he accordingly acted in a way which was inconsistent with keeping any agreement open.

REVOCATION OF ALLEGED CONTRACT BY LINDEBORG

One of the terms was that Mr. Macdonald should act for all the parties.

Lindeborg changed his mind and engaged Davis & Company.

See Ralston, Case page 66, line 6 to 47.

Exhibit 49—Case page 240, 1st October, bill for $1500.

Exhibit 50—Case page 257, Respondent was aware that Mr. Davis was acting for Lindeborg.

See letter McEwan to Lindeborg, Exhibit 83, Case page 246, line 21.

Judgment of Court of Appeal, 7th January, 1930, Case page 241, Davis appears for Lindeborg and Macdonald for McEwan and Barbrick.

The alleged contract is in fact an offer which could be revoked at any time before acceptance.

See 7 Halsbury, page 66, Section 119—

"The offer is determined by the lapse of the time during which it is to remain open by the death or insanity of the person by whom it was made, if the fact of his death or insanity comes to the knowledge of the person to whom the offer was made before he has accepted it."

In this case the offer was not accepted until after the death of Lindeborg, 6th January, 1932.

See also Halsbury, page 87, Section 120—

"The revocation need not be made in the form of an express withdrawal of the offer. Any act done by the person making the offer which is inconsistent with his keeping the offer open amounts to a revocation of the offer as soon as it comes to the knowledge of the person to whom the offer is made."

See *Dickinson vs. Dodds*—(1876) 2 Chancery Division, 463. See particularly James, L. J. at page 472.

Mellish, L. J. at page 473 and 474; also *Gilkes vs. Tronina*—(1858) 4 Common Bench, New Series, page 485.

See also E. & I. Digest, Vol. 12, 60.

Lindeborg revoked the offer when he retained Mr. E. P. Davis, K.C., to act for him, a portion of the contract being that Mr. Macdonald should represent all of the defendants in the Harris action.

It should also be noted that the agreement provided that Macdonald "can go on and act for all," That proviso was only carried out until the trial. After the trial Davis & Company acted for Lindeborg. This change is a revocation of the agreement by Lindeborg.

WAS THE CONTRACT PRIVILEGED?

The evidence of Macdonald as to his conversation with Lindeborg was privileged and should not have been admitted.

The rule is that where two or more litigants have the same solicitor and a conversation takes place between the solicitor and

one of the litigants, if at the time of the conversation the solicitor was acting in the character of solicitor for the litigant with whom he was having the conversation, then the conversation is privileged.

In this case it is clear from Macdonald's statement that he was acting at the time of the interview in question as solicitor for Lindeborg, and not for Barbrick or McEwan.

The evidence is that Macdonald, after he had received the statement of claim, recognized that Lindeborg had a defence not open to the other Defendants.

Case page 31, line 44, he says—

"Now I had to call in Mr. Lindeborg."

Case page 32 line 8-9—

"I pointed the situation out expressly to Mr. Lindeborg and told him that at first sight it seemed to me that it became necessary to sever his defence."

At Case page 32, lines 28-31—

"I asked him whether under the circumstances it might not be necessary in his opinion for other solicitors to be engaged, ... and Mr. Lindeborg's *answer,* was . . . . " etc.

It is submitted that the evidence of Mr. Macdonald shows that he was acting in his character of solicitor for Lindeborg.

It was a matter of no value to the defence of the other defendants that Lindeborg had a defence distinct from theirs.

Under these circumstances, it is submitted that the learned Trial Judge was wrong in admitting the evidence.

Baugh vs. Craddock—1 Moody & Robinson, 182.

Perry vs. Smith—9 Meeson & Welsby, 681.

Rochfoucauld v. Bowstead—65 L. J., Chancery 794, at page 796.

Reynalt v. Sprye—Taylor on Evidence, 9th Ed. Sec. 923. 10 Beav. 51.

REASONS FOR JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE

In his Reasons for Judgment the Honourable the Chief Justice says, Case, page 307—

"I shall now quote the words of Mr. Macdonald as to what happened at that time: ' . . . . . Lindeborg then said "We are in this together; we will share the gains and losses equally. Further there is no reason why you should not act for us all." '

And at lines 30 to 39—

'Mr. Daniel Lindeborg said on this occasion, they agreed

with the said Laura McEwan and Duncan C. Barbrick, now represented by her personally, that they would fight the action together and that he on behalf of himself and the estate of Andrew Lindeborg would share equally with her, as to principal and interest in any judgment which might be given against them, and the said action was continued and fought by the parties in consideration of and on such understanding and the Plaintiff herein at all times has relied upon the said agreement.' "

This is in error. There is no such statement in Mr. Macdonald's evidence or in any other evidence.

What Mr. Macdonald actually did say is found in Case, page 31, lines 23 to 46 and page 32, lines 28 to 44 and page 33, lines 23 to 34.

At Case page 32, line 42, Mr. Farris says:

"I think it is all here. To clear up a little ambiguity I will read paragraph 15," whereupon he read paragraph 15 of Statement of Claim. An objection was taken to that evidence, but on Case page 33, line 33, the learned Judge overruled the objection and said: "You may go on, Mr. Farris."

The ambiguity he referred to is not stated. It, however, was designed to give Mr. Macdonald a further opportunity to add anything to his evidence which he had in mind.

The words which the Honourable the Chief Justice quotes as being a portion of Mr. Macdonald's evidence are taken from the Particulars of the Plaintiff's Statement of Claim, case, page 15, (page 4 of the Particulars).

Mr. Justice Fisher, in the Supreme Court deals with the matter at Case page 297, lines 24-36 and page 298, lines 1-4, wherein he refers to Lindeborg. He says:

"It has been pointed out that when the said action was brought by Harris the said Barbrick and the said Daniel Lindeborg personally consulted the said solicitor, R. M. Macdonald, who also communicated with the said Mrs. McEwan by letter, and as a result the defence of the said action was undertaken by the said Macdonald on behalf of all the Defendants."

This statement is not accurate. When the writ was issued it was first served on Barbrick.

Lindeborg was then on his way from Sweden. There is no evidence as to any interview Barbrick may have had with Macdonald.

Macdonald had written to the respondent advising her of the fact that Harris had issued a writ and had some correspondence with her, which is found in—

[redacted]

In the Supreme Court of Canada.

Appellant's Factum —*Continued.*

Exhibit 12—at Case page 203—Letter Macdonald & Pepler to McEwan, dated 11th August.

Exhibit 15, at Case page 205—Letter McEwan to Macdonald & Pepler, dated August 14th.

Exhibit 14, at Case page 207—Letter McEwan to Macdonald & Pepler, dated September 6th. This instructed Macdonald to accept service of the writ on her behalf.

There were no letters between Lindeborg and Mrs. McEwan from the time he returned from Sweden until after the trial before Chief Justice Morrison. 10

The above exhibits give the entire authority McEwan had given to Macdonald.

Respectfully submitted,

A. H. McNEILL,
Of Counsel for Appellants.

RESPONDENT'S FACTUM

PART I

STATEMENT OF FACTS

This action is brought by the (Plaintiff) Respondent against the (Defendants) Appellants under the circumstances following:

In 1909 one William F. Harris, a mining prospector, made a verbal agreement with James Proudfoot and Hiram Stevenson concerning certain Mineral Claims situate in British Columbia which were known as the "Jumbo" Group. Harris alleged that Proudfoot and Stevenson agreed to do necessary assessment work on the said claims; to manage, group and look after the claims and the handling, selling, optioning and Crown Granting thereof, for which Proudfoot and Stevenson were to receive two thirds of all money and profit to be derived therefrom and Harris one third after deducting all expenses.

It appears that Stevenson and Proudfoot went to Portland Canal where the claims were situate but they did not do any assessment work and the claims lapsed. After the claims had lapsed the ground was taken up by Stevenson and Daniel Lindeborg who joined with Proudfoot and Andrew Lindeborg in a consolidation of contiguous claims. This new group was known as the "Big Missouri" and each of the four men had an equal or one-quarter interest in the group as consolidated.

Several options were given to various interests and various sums received for such options.

In 1910 Proudfoot died and Duncan C. Barbrick was appointed administrator of his estate.

In 1917 Stevenson was killed in action and Laura McEwan was appointed administratrix of his estate.

Andrew Lindeborg died in 1925 and Daniel Lindeborg was appointed administrator of his estate.

In 1925 Daniel Lindeborg on his own behalf and as administrator for his brother Andrew, Duncan Barbrick for the estate of Proudfoot and Laura McEwan for the estate of Stevenson, executed an option on the "Big Missouri" claims to Standard Mine Company for the sum of $275,000 which option went through and the final payment of $100,000 paid to the Canadian Bank of Commerce. Harris then started action in July of 1928 and attached the said funds in the Bank as representing one-third of the total moneys received and out of the property by reason of this and preceding options.

Harris' action came to trial before the Honourable Chief Justice Morrison on the 18th day of June, 1929, when judgment

was given in favor of Harris for $100,000 against the owners of the group including the Lindeborgs.

The Court of Appeal for British Columbia found that Stevenson and Proudfoot had made an agreement with Harris, but that the Lindeborgs were not parties to it; that in consequence their interests were not affected and that the proper proportion payable to Harris was $15,789.00.

The Supreme Court of Canada dismissed the action as against the Lindeborgs and gave judgment against the Respondent in this appeal as administratrix of the Estates of Stevenson and Proudfoot (Barbrick had died during the action and Laura McEwan had been appointed in his place) for the sum of $50,000.-00 and costs.

Daniel Lindeborg died on January 6th, 1931.

In February, 1931, a settlement was arranged of the Harris Judgment between Laura McEwan as administratrix and Harris under which Laura McEwan paid to Harris the sum of $50,000 and certain costs.

Laura McEwan as administratrix then started this present action against the present Appellants who represent the estates of both Daniel and Andrew Lindeborg. She claimed that Daniel Lindeborg during his life for himself and his brother Andrew agreed to pay one-half of whatever judgment and costs Harris might recover in his action.

At the trial Fisher J. held that Mrs. McEwan was not representing the Proudfoot Estate but gave Judgment in her favor as administratrix of the Stevenson Estate against the Appellants for the sum of $13,862.26, finding as a fact that the contract was made as she had claimed.

The Court of Appeal affirmed the finding of the learned trial Judge and dismissed the appeal.

From this finding of fact the Appellant now appeals to the Supreme Court of Canada.

The Respondent has not entered a cross-appeal.

PART II

GROUNDS FOR DISMISSING THE APPEAL.

It is submitted the appeal should be dismissed on the following grounds:

I: That there has been a concurrent finding of fact of two courts that Daniel Lindeborg in his personal capacity and as administrator of the Estate of Andrew Lindeborg

agreed to pay one-half of whatever Judgment Harris might obtain against the owners of the Big Missouri or any of them.

II: That no corroboration of the evidence of R. M. Macdonald is required.

III: If such evidence requires corroboration it is fully corroborated by other material evidence.

IV: That the said contract was supported by a good consideration.

PART III

ARGUMENT

I. It is proposed to deal with each subject following the headings set out in Part II:

The contract set up by the Respondent is pleaded in paragraphs 14, 15 and 16 of the Statement of Claim. In support of this pleading the Respondent called Mr. R. M. Macdonald. He is a Barrister and Solicitor and has practiced as such in Vancouver for a great many years. Throughout the Harris action he was Solicitor on the record for all the Defendants. As Solicitor for all the Defendants in common his evidence is not privileged—see

Baugh v. Cradocke 1 Moody and Robertson p. 182, 174 E.R. 62
Cleve v. Powel 1 M & Rob. 228, 174 E. R. 78.
Perry v. Smith 152 E. R. p. 288.
In re Elliott 14 L. T. O. S., p. 508.
Crawcour v. Salter (1880) 18 C. D. 30.
M. A. Macdonald, J.A., at p. 312 of Record.

When Macdonald received the Statement of Claim in the Harris action (Exhibit No. 1 p. 208) and before delivering a Statement of Defence he called Daniel Lindeborg in to his office for a conference. The Statement of Claim presented to Macdonald for the first time the nature of the claim Harris was making and he saw at once that on the allegations therein contained a defence was open to the Lindeborgs not open to Stevenson and Proudfoot Estates.

Macdonald's version of that conversation is as follows:

"I think perhaps, my lord, I could make this plain with a very short statement. Until I got the statement of claim I did not know what the Harris claim was founded upon. When I saw his statement of claim I saw, as it sets out, an allegation of an agreement alleged to have been entered into by Harris with Proudfoot and Stevenson, and a further

allegation that that agreement was entered into by Proudfoot and Stevenson on their own behalf and on behalf of their associates. I filed and delivered a demand for particulars as to who the associates were, and the reply to that was that the associates were the Lindeborgs. Well, it at once appeared to me that a question arose there, if Proudfoot and Stevenson did enter into the agreement that Harris alleged, how could they bind the Lindeborgs, unless they could show that the Lindeborgs had authorized Proudfoot and Stevenson to enter into it on their behalf, and it raised an issue of the agency between Proudfoot and Stevenson and the Lindeborgs; consequently it raised the defence which I have set out there in paragraph 20, that if there was any such agreement entered into by Proudfoot and Stevenson, it was not on behalf of the Lindeborgs, nor was there any authority to enter into it on behalf of the Lindeborgs. Now, I had to call in Mr. Lindeborg and also Mr. Barbrick, with whom I was in constant communication at that time, and explain this position.

Mr. Farris: Q. Were they both present together? A. Well, now, I have tried to search my memory. They were both together constantly, but they came in individually at times, and whether they were both together at this very moment—whether or not there is anything which I can search my memory to help me—they were in and out, both together at times, individually at times, and I don't know how I can—

Q. Well, tell us what you told Mr. Lindeborg. A. I pointed this situation out expressly to Mr. Lindeborg and told him that at first sight it seemed to me that it became necessary to sever his defence.

Q. Why did you tell him? A. Well, the situation on the statement of claim.

The Court: Q. Just what you told him, Mr. Macdonald. A. Yes. Rendered this situation as a possible outcome, that Harris might recover judgment for the amount that he is suing for against Proudfoot and Stevenson estates, and fail to show any agreement by the Lindeborgs with them. That was the situation the possible situation that presented itself to me, and which I explained to Mr. Lindeborg."

"Mr. Farris: Q. Go on Mr. Macdonald. A. 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 re-

present 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—"

"Mr. Farris: Q. Very well, Mr. Macdonald. A. He further told me at that time to take any defence I could on behalf of any one of the Defendants, that was available, as any such, if successful, would enure 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—

The Court: No, just a moment.

Mr. Farris: Q. Well, you could put it this way: As the result of that conversation what position did you take? A. Well, I did exactly what Mr. Lindeborg told me to do, and continued to act for all parties by delivering a separate defence raising this particular issue on their behalf."

Following this conversation Macdonald filed two separate defences. The defence filed on behalf of the Lindeborgs contained an added paragraph not included in the defence of the other Defendants (See Exhibit 1 at p. 224). This paragraph is as follows:

"20. This Defendant says that if the late James Proudfoot and the late Hiram Stevenson, or either of them, ever assumed to make any agreement whatsoever with the Plaintiff, this Defendant was never informed of the fact and neither James Proudfoot nor Hiram Stevenson ever had any authority to enter into any contract on behalf of this Defendant, nor had either of them any authority at any time to enter into any contract on behalf of the late Andrew Lindeborg. Deceased."

He continued to act for both sets of Defendants and after the Court of Appeal had delivered Judgment freeing the Lindeborgs from responsibility Macdonald had a further conversation with Lindeborg which could only be consistent with the bargain already made. Macdonald says:—

"Mr. Farris: Q. What took place at that time Mr. Macdonald, between you and Mr. Lindeborg? A. After the judgment of the Court of Appeal I had an interview with Mr. Lindeborg, informed him of the outcome in the Court of Appeal, and discussed with him the question of whether the Defendants in that case should appeal from the $15,000 judgment to the Supreme Court of Canada, and Mr. Lindeborg

instructed me not to bring any such appeal, and I accordingly did not do so. But when it subsequently transpired that the Plaintiff Harris was appealing to the Supreme Court of Canada, I again took up the question with Mr. Lindeborg.

A. I again took up the question with Mr. Lindeborg, of the attitude that should be taken in the Supreme Court of Canada, and I was instructed—

The Court: Q. That was after the notice of appeal had been served by Harris? A. After the launching.

Q. Had been served by Harris? A. By Harris. And Mr. Lindeborg then instructed me to take the necessary steps to oppose that appeal, and in doing so then would cross-appeal from the Court of Appeal judgment, which I did.

Mr. Farris: Q. You continued to act for Mr. Lindeborg up to his death? A. Yes."

It is to be noted that none of this evidence given by Macdonald has been denied. Some evidence of a completely negative character is introduced by the Appellants to endeavor to displace the testimony of Macdonald, but a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative:

Lefeunteum v. Beaudoin 28 S. C. R. 89.

Rex v. Stewart 32 S. C. R. 483.

Union Bank of Halifax v. The Indian & General Investment Trust 40 S. C. R. 510 at p. 519.

There is ample evidence, it is submitted, upon which the learned trial Judge could have come to the decision he did. As was said by Sir Arthur Channel:

"It is unnecessary to go so far as Mr. Justice Middleton did in the Court below and say that the jury have come to the right conclusion. It is enough that they have come to a conclusion which on the evidence is not unreasonable."

Toronto Power Co. Ltd. vs. Paskwan (1915) 84 L. J. P. C. p. 148 at p. 152.

and by Mr. Justice Newcombe:

"It is not the view of the judges of the Court of Appeal upon the merits involved in the issue of fact which should govern the disposition of the case. It is for the Court of Appeal to ascertain whether there is evidence upon which the trial Judge could find as he did, and if there be evidence of the facts found to which he could reasonably give effect having due regard to the weight of evidence it is for the Court to consider further whether his finding is based upon any misdirection occasioning a substantial miscarriage of justice,

or the judgment, in light of the evidence, and having regard to the course of the trial discloses any error of law. If there be no error in these particulars the judgment should be permitted to stand."

Murray v. Delta Copper Co. Ltd. (1925) 4 D. L. R. 1061 at p. 1064.

The next point then to consider is the extent which Macdonald's evidence was corroborated at the trial:

CORROBORATIVE EVIDENCE AND CIRCUMSTANCE

10 It is submitted that as a matter of law corroboration of Macdonald's evidence is not essential. II.

By Section 11 of the Evidence Act. R. S. B. C. 1924, Chapter 82, in actions in British Columbia against representatives of a deceased person evidence of an opposite or interested party must be corroborated by some other material evidence before such party can obtain a judgment against the estate.

Macdonald is not an interested or opposite party, nor is he seeking a judgment against an estate of a deceased person, therefore, it is submitted, the section does not apply.

20 See Macdonald J. A. at pp. 310-311.

Corroboration is only a reason why his evidence should be believed and affords further grounds upon which the learned trial Judge could rely in coming to his decision.

Two corroborative circumstances have been mentioned above. i. e. he continued to act for all Defendants, and his second conversation with Lindeborg after the decision of the Appeal Court.

There is, however, it is submitted, abundant other material evidence to support his testimony. III.

(A) Lindeborg had taken a consistent position that the

30 four interests stood together.

This can be read from his discovery in the Harris action which became part of the record in this case. Dealing with one of the options he states that $1000 was put up and this was divided four ways:

271. Q. "Did you get your share of it? A. Naturally.

272. Q. How much did you get, do you recollect? A. Out of the $1000 I would get $250.

273. Q. $250? A. Yes.

274. Q. And your partner Andrew Lindeborg and

40 Hiram Stevenson and Mr. Barbrick got $250? A. Yes."

On the Hendrickson option $5000 was divided four ways.

Q. 300— A. "I swear this, that whenever we got any money it was paid into the bank. It was not paid to any one partner and the bank paid it out to the different partners."

The same situation existed with regard to $5000 received from the Thayne option and $32,000 received from the Trites option. Lindeborg had no agreement in writing between himself and Proudfoot and Stevenson. He was accustomed to verbal arrangements and he says it was evident they were partners. Lindeborg contributed one-quarter toward money received by Harris from two options referred to in letter of June 15, 1911 and in letter of 7th April, 1910.

He further says:

781. Q. "Were these moneys sent to Harris with your share included? A. If he had not got any money at that time he knew where to get it.

782. Q. You were quite agreeable to paying your share of this and probably did. A. I did agree to it.

783. Q. And you did pay it? A. Yes."

By virtue of the foregoing it is submitted that it is clear that Lindeborg considered the interests of the four men identical. He considered himself as a partner with all the obligations and responsibilities which that term connotes to a prospector and miner.

(B) In addition to this Lindeborg wrote a series of letters which contain expressions similar in purport.

Exhibit 51. Date Aug. 1st, 1918 to Mrs McEwan:

"What is to the interest of one is to the interest of all."

Exhibit 57. Date July 12, 1919 to Mrs. McEwan:

"Your last letter (and all your letters for that matter) are very kind and I appreciate it very much, it a pleasure to be associated with people who will help things along instead of holding back as so very often happens, in my case I have been very fortunate and with one single exception have always had agreeable partners or associates, it is no particular credit due me in this case as I have had to look out for my own interest anyway and what is to the interest of one is to the interest of all and if we had not stuck together perhaps we would have got something out of it and perhaps not, in this connection a great deal of credit is due to Mr. Barbrick for the unfaltering way he has stood by me, and ever since your first letter I have felt the same way about you, which has enabled me to tell people just what we would do, knowing that I could depend on all parties interested. Some time ago while Hiram was alive it was a strong effort made to split us apart but without success, and now it looks as if it is only a matter of time when payments come due that they will be made, however, I never count my chickens until they are hatched and it has saved me many a disappointment."

[redacted]

Exhibit 66. Date May 29 1920 to Mrs. McEwan:

"We will work together as our interests are in the same pot."

Exhibit 52. Date Aug. 12, 1920 to Mrs. McEwan:

"In regard to the letter from Harris, can say that I do not think he has any agreement but I do think that he was promised something by your brother at the time they were together on Queen Charlotte Islands because he told Hiram that he would not do the work on a certain claim now in the Missouri group and that he could locate it. Then when we had it bonded in 1910 we got some small payments out of it, it was agreed among us that we would give Harris something and as near as I can remember he got about $600.00 out of it at that time. I do not consider that Harris has or ever had any legal claim to anything and also that he will have to wait until we get our final payment before we will even consider his claim, as we have spent years of work and thousands of dollars in money to hold this ground and to which he has not contributed one penny, but when we get everything cleared up we will talk the matter over and whatever we agree on then we will doo. It is impossible to go into all the details in a letter but perhaps we will meet sometime and then we can discuss the matter from all angles."

Exhibit 61. Date July 6, 1921 to Mrs. McEwan:

"In regard to the work and worry in making deals I can assure you it is a pleasure to do it when you have associates like I have got, no haggling, no kicking from anybody, the last deal I was fortunate enough to have Mr. Barbrick near at hand and I consulted him before making any move one way or another and I will say this he is a Prince to do business with, allways reasonable and at the same time outspoken."

Exhibit 74. Date July 3rd, 1924 to Mrs. McEwan:

"In discussing the matter with Mr. Barbrick assured me that his interest would under no consideration be for sale separately. The same applies to my brother and myself and as far as you are concerned you can be absolutely sure of a fair deal with us."

Exhibit 75. Date July 7, 1924 to Lindeborg from Mrs. McEwan:

"I am very glad you and Mr. Barbrick decided not to grant any extension of time, and rest assured Mr. Lindeborg I would never dream of doing anything in connection with the property without your full consent and approval. I

should feel I was absolutely crazy to even think of such a thing—and where Pat got his reasons for telling them, is sure a puzzle to me."

Exhibit 54. Date Aug. 16, 1924 to Mrs. McEwan:

"On several occasions in the past, people that I have talked deal to have expressed doubt about me being able to deliver the goods on accounts of me not having power of Attorney, but I have been able at all times to convince them that my partners would back me up, (and they have never failed me yet), you can redily see how very difficult it would be if every little detail had to be submitted to each one, oftentimes by mail, the delay and annoyance would spoil allmost any deal, as it is I can pretty near tell what my partners will agree to. Allmost everybody says it is an unusual partnership, no doubt it is, but it is successful, which most partnerships are not for the simple reason that they cannot agree when there is a chance to make a deal and when the chance has vanished they put the blame onto one another. Results, dissappointments and oftentimes bad feelings."

Exhibit 55. Date Oct. 28, 1924 to Mrs. McEwan:

"I aim to do business so that you will find me worthy of your confidence."

Exhibit 79. Date March 1, 1927 to Lindeborg from Mrs. McEwan:

"However, I must say once more that I'm exceedingly thankful to be able to leave this matter entirely in your hands, Mr. Lindeborg. Would be only too glad if I can give you an opinion that might be a help, but I feel your judgment in this matter is so superior to mine."

Note Lindeborg's telegram sent to Mrs. McEwan after the Judgment of the Supreme Court of Canada, Dec. 25, 1930.

"Decision fifty against *us* not many details more later."

(C) Macdonald's evidence is further corroborated by other witnesses called, including the Respondent.

Mrs. McEwan, the Respondent, testified that she had a conversation with Daniel Lindeborg at the Hume Hotel at Nelson about July of 1929—concerning that conversation she stated as follows:

A. "Well it is a long time ago and a lot was said but the substance of it was that we stood together—No matter which way it went we were all together in it, right through to the end of it and I wasn't to worry."

Mr. McEwan, husband of the Respondent, had a conversation with Lindeborg at the Dunsmuir Hotel in Vancouver after

the judgment of the Court of Appeal released Lindeborg from liability. McEwan stated:—

> "Mr. Barbrick and Mr. Lindeborg and I were present and we had got a room there to hold a meeting and have a little conference and Mr. Barbrick said it looked as if the Stevenson estate were going to be hooked for $15,000 and Mr. Lindeborg said 'There is no one estate in this—it is 50-50 with the four estates'."

William Sloan, Provincial Assayer, further corroborates Macdonald. On the 14th September 1928 Sloan talked with Lindeborg at the entrance to the London Building on Pender Street in Vancouver. Lindeborg stated he had been to some lawyer's office. Macdonald's office was in the London Building, and this incident, small in itself, serves to strengthen Macdonald's evidence concerning the visit Lindeborg made to him. Sloan also had two conversations with Lindeborg wherein the Harris action was discussed. The first occasion was on the 14th or 15th of September 1928—Sloan testifies as to that occasion as follows:

> "He said 'If we lose this case we are going to fight it and will go to the appeal court and we are all in this together. I am acting for my partners and have always acted for them and anything I do will be all right with them'."

The second convention took place after the Court of Appeal Judgment. Sloan stated as follows:

> Q. "After the hearing by the Court of Appeal when Judgment was given for $19,000 or $20,000 against the McEwans—the Lindeborgs were then no longer legally liable—did you have any conversation with Mr. Lindeborg about this Harris case? A. Yes, I had several conversations.
>
> Q. Had you any in particular? A. I had one particular conversation right after the judgment was handed down.
>
> Q. And what did he say about any matter of further appeal or anything of that kind? A. He said he was going to fight the case to a finish, no matter what it would cost. They were all in together and they were going through with it win or lose."

The witness Cosens called by the Appellants is helpful to the Respondent. He states that they all knew and he knew in particular that it was Mr. Lindeborg's intention to support the McEwans in going to the Privy Council and presumably financially. Mr. Lindeborg, he says, felt an injustice had been done them in the amount awarded against them and he was willing to support them to that extent.

It is submitted that the foregoing facts clearly corroborate

Macdonald's testimony and that there is ample material upon which the learned trial judge could base his judgment.

CONSIDERATION FOR CONTRACT

IV: Assuming the agreement proven is it supported by consideration? It is submitted that it is.

The Respondent relies upon the reasoning of the learned trial Judge and that of the Honourable Mr. Justice Macdonald on appeal and the authorities cited by them.

Mr. Justice M. A. Macdonald dealing with Lindeborg's conversation with Macdonald, the Solicitor, finds such conversation to be an offer by Lindeborg to assume a possible liability. "He offered the promise for the consideration of an act on the part of the Respondent through her solicitor to forbear from withdrawing his services."

The learned trial Judge after finding that the contract pleaded had been proven states:

> "I also find that upon this understanding with the said Daniel Lindeborg the said Macdonald did continue to act for all the Defendants delivering separate defences and that the said Mrs. McEwan and the said Barbrick, through their Solicitor R. M. Macdonald, abandoned any question of obtaining independent advice, or taking any position in opposition to that taken by or on behalf of the Lindeborgs that they were not parties to or bound by that agreement."

And again to the same effect at p. 300, line 23 to 33 and at p. 300, line 38 to p. 301, line 3.

The Appellants took the position that Macdonald could not bind Mrs. McEwan; that Lindeborg's offer had never been communicated to Mrs. McEwan by Macdonald and therefore the offer had never been accepted.

The trial Judge found that Macdonald was not exceeding his authority as solicitor in carrying on as he did on behalf of all parties without direct notification to Mrs. McEwan.

The Chief Justice of British Columbia holds that Macdonald made the agreement on her behalf as solicitor and agent; that she took advantage of its terms and subsequently ratified it, which ratification rendered the agreement binding from the time it was made.

Mr. Justice McPhillips agrees with this view.

Mr. Justice M. A. Macdonald deals with this aspect of the case at length and finds ratification relating back to the receipt of the offer.

[redacted]

Mrs. McEwan stated that Macdonald advised her of her rights after the judgment of the Supreme Court of Canada. In consequence Mrs. McEwan ratified the arrangement made by Macdonald on her behalf by bringing this present action.

By reason of the foregoing it is submitted:

(A) The contract was established at the trial upon good and sufficient evidence to support such finding;

(B) That the evidence of Macdonald is fully corroborated;

10 (C) That the contract is supported by consideration good in law;

(D) That Macdonald had authority to bind Mrs. McEwan or alternately, that she ratified and confirmed his arrangement with Lindeborg.

and that this appeal should be dismissed.

Respectfully submitted,

J. W. deB. FARRIS,
Of Counsel for Respondent.

In the Supreme Court of Canada.

Reasons for Judgment,

SUPREME COURT OF CANADA

ARTHUR COSENS, et al

v.

LAURA McEWAN.

(Concurred in by the Chief Justice, Rinfret, Lamont and Crocket, JJ.)

Smith, J.—

The Appellants are executors of the estate of Daniel Lindeborg, deceased, who died at Victoria, B. C., on the 6th day of January, 1931.

In 1909, one William F. Harris, a mining prospector, having located and recorded certain mining claims in British Columbia described as the "Jumbo Group", made a verbal agreement with James Proudfoot and Hiram Stevenson by which, as he alleged, they agreed to do necessary assessment work on the said claims; to manage, group and look after the claims and the handling, selling, optioning and Crown Granting thereof; for which Proudfoot and Stevenson and their associates were to receive two-thirds of all money and profit to be derived therefrom, and by which Harris was to receive one-third share of all moneys received in respect of the said claims and all other claims grouped therewith, by selling or otherwise, after deducting expenses.

Stevenson and Proudfoot went to the locality where the claims were situate, but the claims were allowed to lapse on 9th August, 1909, and on the following day they were relocated and recorded by Stevenson and Daniel Lindeborg, who joined with Proudfoot and Andrew Lindeborg in a consolidation of this Jumbo Group with contiguous claims. This new group was known as the "Big Missouri", in which the four parties just mentioned had, as among themselves, each an equal or one-quarter interest.

In 1910 Proudfoot died, and Duncan C. Barbrick was appointed administrator of his estate; in 1917 Stevenson was killed in action, and Laura McEwan, the respondent, became administratrix of his estate; and in 1925 Andrew Lindeborg died, and Daniel Lindeborg became administrator of his estate.

In 1925, Daniel Lindeborg, on his own behalf and as administrator for his brother Andrew, Duncan Barbrick for the estate of Proudfoot, and Laura McEwan for the estate of Stevenson, executed an option on the Big Missouri claims, on which they

received $275,000.00, the last instalment of which, $100,000.00, was paid in to the Canadian Bank of Commerce.

Harris then started an action, in July, 1928, against Daniel Lindeborg personally and as administrator of the estate of Andrew Lindeborg, Duncan C. Barbrick, as administrator of the estate of James Proudfoot, and Laura McEwan as administratrix of the estate of Hiram Stevenson, claiming $100,000.00 as the one-third of moneys received on this and other options on these claims, to which he was entitled under the agreement that he had made with Stevenson and Proudfoot.

The learned trial judge gave Harris judgment for the $100,000.00, but on appeal it was held that Stevenson and Proudfoot had made an agreement with Harris, as the latter alleged, but that the Lindeborgs were not parties to it, and not affected by it; and Harris was awarded $15,789.00. The Supreme Court of Canada, on appeal, dismissed the action as against the Lindeborgs, and gave judgment for $50,000.00 and costs against the respondent in this appeal as administratrix of the estates of Stevenson and Proudfoot (Barbrick having died during the action, and respondent Laura McEwan having been appointed in his place. The respondent paid to Harris the amount of the judgment.

Mr. R. M. Macdonald, barrister and solicitor, was retained by all the defendants to defend the Harris action, and entered appearances for all. Mr. Macdonald had an interview at his office with Daniel Lindeborg in reference to filing defences in answer to the statement of claim served on him, at which Macdonald explained to Lindeborg that the Lindeborgs had a separate and inconsistent defence to that of the defendant Laura McEwan, as administratrix of the estate of Stevenson, and Duncan C. Barbrick, as administrator of the estate of Proudfoot, inasmuch as they could plead that neither Stevenson nor Proudfoot was agent for them in making the alleged agreement with Harris; and that he had to consider whether he should advise Mrs. McEwan and Duncan C. Barbrick to engage a separate solicitor because of this separate and independent defence available to the Lindeborgs.

The present action is based on an alleged agreement entered into at this interview, by which, as set out in Clause 15 of the statement of claim, Daniel Lindeborg

> " . . . represented and agreed with the said Macdonald as "solicitor for all the parties that he, on behalf of himself and "his brother, would share equally with the said Laura Mc-"Ewan and Duncan C. Barbrick, as to principal and costs in "any judgment which might be given against them jointly,

"or against Mrs. McEwan and Duncan C. Barbrick separ-
"ately. On this distinct understanding the said Macdonald
"agreed to act for all the parties and that Mrs. McEwan and
"Proudfoot interests could be represented by him, and con-
"tinued to do so throughout the trial, and the appeals, until
"after final judgment as aforesaid in the Supreme Court of
"Canada."

Clause 16 of the statement of claim alleges an agreement made by Daniel Lindeborg with the respondent and Duncan C. Barbrick personally, but there was no evidence offered to establish this agreement.

By virtue of the alleged agreement between Daniel Lindeborg and Macdonald, the respondent claimed from the appellants $27,724.52, being one-half the amount paid by respondent in satisfaction of the Harris judgment, with interest added.

The only evidence in support of this alleged agreement between Daniel Lindeborg and Mr. Macdonald, acting on behalf of the respondent, is that of Mr. Macdonald. This evidence begins at page 32. Mr. Macdonald states that he explained the conflict of interest already referred to, and asked Mr. Lindeborg whether, under the circumstances, it might not be necessary in his opinion for other solicitors to be engaged; either that he represent the Lindeborgs and somebody else represent the Proudfoot and Stevenson estates, or that he represent the Proudfoot and Stevenson estates and somebody else represent the Lindeborg interests. Mr. Lindeborg's answer was:

"There is no necessity for that at all; all the defendants in
"this action 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—"

At this point there is an objection, followed by argument, and then Mr. Macdonald goes on:

"He further told me at that time to take any defence I could
"on behalf of any one of the defendants that was available,
"as any such, if successful, would ensure to the benefit of
"them all. Now that is the substance of that conversation as
"well as I can recollect it."

Then, being asked:

"Q. As the result of that conversation, what position did
"you take?"

he answered:

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

The action can succeed only on a finding that Mr. Macdonald, in the conversation quoted, entered into an agreement on behalf of the respondent and Barbrick with Daniel Lindeborg, acting for himself and Andrew Lindeborg, to the effect set out in the clause quoted above from the statement of claim. Mr. Macdonald does not state in this evidence that he was entering into any agreement whatever on behalf of the respondent and Barbrick. The only point that he was discussing with Lindeborg was the question of whether or not he should continue to act for all parties; and the only agreement arrived at, according to this evidence, was that he should go on and act for all parties. There was no undertaking by Mr. Macdonald on behalf of the respondents and Barbrick that they should do anything at all. Mr. Macdonald's position as solicitor to conduct the defence gave him no authority to enter into any agreement such as alleged with the Lindeborgs on behalf of the respondent and Barbrick. The latter knew nothing of any such agreement until after the litigation with Harris was all over, so that up to that time they were not bound by the alleged agreement, even if it could be said that there was such an agreement actually entered into by Macdonald.

Mr. Farris contended that the alleged agreement was acted upon and its terms carried out by the respondent and Barbrick or, on their behalf, by Mr. Macdonald.

So far as the respondent and Barbrick are concerned, there was no carrying out of such agreement, because they had no personal knowledge of its existence; and so far as Mr. Macdonald is concerned, he did nothing but file defences and continue to act for all parties. The respondent and Barbrick would have had a right to separate from the Lindeborgs, in view of their separate and special defence, and to take the position that the Lindeborgs knew all about the agreement with Harris, and were assenting parties to it. Mr. Farris urges that Mr. Macdonald, on their behalf, refrained from doing so, and that this constituted a consideration from them to the Lindeborgs. Mr. Macdonald does not say that he made any agreement that the respondent and Barbrick should not separate in their defence and should refrain from contesting Lindeborg's separate defence. As already stated, there is not a word in Mr. Macdonald's evidence to suggest that he undertook to do or refrain from doing anything on behalf of the respondent and Barbrick, or that he actually did anything beyond continuing to act for all parties.

In the Supreme Court of Canada.

Reasons for Judgment. —*Continued.*

It is argued, however, that the respondent ratified the alleged agreement by bringing this action upon it, thus declaring her assent to it which would mean that there was simply an outstanding offer by the Lindeborgs to enter into the alleged agreement, never accepted by the respondent and Barbrick during the course of the litigation that it had reference to, and which was still outstanding for acceptance after the litigation was all over. I think this contention is untenable.

In any case, as already intimated, I am of opinion that the evidence of Mr. Macdonald does not establish that an agreement of any kind was entered into by him with Daniel Lindeborg on behalf of the respondent and Barbrick, as alleged.

The appeal should be allowed, with costs, and the action dismissed, with costs throughout.

FORMAL JUDGMENT

IN THE SUPREME COURT OF CANADA

Thursday, the 8th day of June, A. D. 1933.

PRESENT:

THE RIGHT HONOURABLE LYMAN POORE DUFF, P.C., C.J.C.
THE HONOURABLE MR. JUSTICE RINFRET
THE HONOURABLE MR. JUSTICE LAMONT
THE HONOURABLE MR. JUSTICE SMITH
THE HONOURABLE MR. JUSTICE CROCKET.

Between:

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) Appellants,

—and—

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) Respondent.

The appeal of the above-named Appellants from the judgment of the Court of Appeal for British Columbia pronounced in the above cause on the seventh day of March in the year of Our Lord one thousand nine hundred and thirty-three, affirming the judgment of the Honourable Mr. Justice Fisher of the Supreme Court of British Columbia rendered in the said cause on the tenth day of December in the year of Our Lord one thousand nine hundred and thirty-two, having come on to be heard before this Court on the twenty-fifth and twenty-sixth days of April in the year of Our Lord one thousand nine hundred and thirty-three, in the presence of Counsel as well for the Appellants as for the Respondent, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment and the same coming on this day for judgment;

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed, that the said

In the Supreme Court of Canada.

Formal Judgment, June 8th, 1933. —*Continued.*

judgment of the Court of Appeal for British Columbia should be and the same was reversed and set aside and that the said judgment of the Honourable Mr. Justice Fisher of the Supreme Court of British Columbia should be and the same was also reversed and set aside and the action dismissed.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellants for costs incurred by the said Appellants as well in the said Court of Appeal for British Columbia and in the said Supreme Court of British Columbia as in this Court. 10

Settled
June 24th, 1933.

(Sgd) J. F. Smellie,
Registrar.

L.S.

AT THE COURT AT BUCKINGHAM PALACE

The 21st day of December, 1933.

Order in Council Granting Leave to Appeal, 21st December, 1933.

PRESENT,

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
EARL STANHOPE
EARL OF PLYMOUTH
MR. ORMSBY-GORE
SIR PERCY LORAINE.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 30th day of November 1933 in the words following viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Laura McEwan admininstratrix of the estate of Hiram Stevenson deceased suing as such and also on behalf of all others the heirs of James Proudfoot deceased in the matter of an Appeal from the Supreme Court of Canada between the Petitioner-Appellant and Arthur Cosens Verena Mable Cosens and John Hubert Hemsworth executors of the estate of Daniel Lindeborg deceased and administrators of the estate of Andrew Lindeborg deceased Respondents setting forth that the Petitioner craves leave to appeal from a Judgment of the Supreme Court of Canada (Duff C. J. Rinfret J. Lamont J. Smith J. and Crocket J.) delivered on the 8th June 1933 unanimously reversing the unanimous decision in the Petitioner's favour of the Court of Appeal of British Columbia) Macdonald C.J. Martin J.A. McPhillips J.A. and Macdonald J.A.) rendered on the 17th March 1933 dismissing an Appeal from a Judgment for $13,862.26 rendered in the Petitioner's favour against the Respondents by the Supreme Court of British Columbia (Fisher J.) on the 10th December 1932: that the Action arises out of an alleged contract made between the parties who were the Defendants in a previous Action brought against them by one Harris: that the parties to the present Action are the legal representatives of these various former Defendants: that in July of 1928 Harris commenced an Action against Daniel Lindeborg personally and as administrator of the estate of Andrew Lindeborg Duncan Barbrick as administrator of the estate of James Proudfoot

and the Petitioner as administratrix of the estate of Hiram Stevenson claiming the sum of $100,000.00 representing a one-third interest in moneys received by the Defendants in that Action from the sale of certain mineral claims in British Columbia: that Duncan Barbrick died during the Action and the Petitioner was appointed to represent the estate of Proudfoot in the Action: that the Supreme Court of Canada on Appeal dismissed the Action against the Lindeborgs and gave Harris judgment against the Petitioner as administratrix of the estates of Proudfoot and Stevenson for the sum of $50,000.00 which Judgment was paid by the Petitioner: that Daniel Lindeborg died in 1931 and the present Respondents represent the estates of both Daniel and Andrew Lindeborg: that the Petitioner after payment of the Harris Judgment commenced this Action against the Respondents claiming that Daniel Lindeborg for himself and his brother Andrew agreed to pay and contribute one-half of whatever judgment and costs Harris might recover in his Action and for judgment accordingly with the result as already set forth: that it is submitted that the Supreme Court failed to understand the legal effect of the arrangement entered into and that the Judgment of that Court deprived the Petitioner of her contractual right to contribution from the present Respondents and was contrary to justice: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court of the 8th June 1933 or that Your Majesty may be pleased to make such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Supreme Court of Canada dated the 8th day of June 1933 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on

In The Privy Council.

Order in Council Granting Leave to Appeal, 21st December, 1933. —*Continued.*

the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

EXHIBIT No. 51

DAN LINDEBORG

SC1216/31

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 51
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

Stewart, B.C., August 1st, 1918.

Mrs. Fred McEwan,
Koch Siding, B.C.
Dear Madam:

Your two letters of June 21st and 25th received, was glad to hear from you.

Since writing you last I have been in Prince Rupert, I had a talk with your Lawyers, Williams and Manson and they told me that the power of attorney from your brother was a point brought up by the Vancouver lawyer and as he was working for the other parties it had to be done, I have had my brothers power of attorney since 1906, made out by one of the best lawyers in B. C. and I had to get another made out at the request of the same man, for this deal, now, I have signed dozence of papers before and it has never been questioned, so you see it may be only a notion, one thing, it will give them a chance to collect more money, a fact which they never overlook.

As regards the assessment work, I do not think there is the least chance to get anything back from the Government, and if you are willing to pay us for the work when you get the first payment it is O. K. with us. I may tell you that we have looked after the work for the Proudfoot Estate ever since he died in 1912, but as I know Mr. Barbrick to be strictly on the square we will get it as soon as he gets the money to pay it, furthermore it is a pleasure to be associated with people who will stand by you and back you up when it comes to making a deal, in our case for instance, what is to the interest of one is to the interest of all, I have often wished that we were located closer together so we could meet and talk things over. In the past I have on different occasions arranged deals same as if I owned the whole works, knowing full well that I would be backed up by my associates, and if the same occasion should arise in the future intend to do the same thing, subject of course to the approval of yourself and Barbrick. I have not done those things because I liked to, but because it

Exhibit No. 51, Letter, Dan Lindeborg to Mrs. Fred McEwan, 1st August, 1918. —*Continued.*

was necessary under the circumstances, if we were to arrange all the details by correspondence it would be an endless job without results.

Glad to hear that you have bonded the Yellowstone, I had heard of it before I got your letter, was surpriced about the price as I was told Tonkin was offering it at just twice that figure, we have the adjoining property to the Yellowstone and Tonkin wants an option on it but as he is not willing to entertain a business proposition he has not got it. The Yellowstone group is located about 2½ miles from the Big Missouri.

I never heard before how Hiram was killed and am glad you told me, am sorry to hear that your mother also is dead.

Sincerely yours,

DAN LINDEBORG.

P.S.—They are now erecting camps on the Big Missouri and soon will be at work, will keep you informed on anything of importance.

EXHIBIT No. 62

Exhibit No. 62, Letter, Laura McEwan to D. Lindeborg, 5th February, 1919.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 62
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

13 9/22/32, J.

Mr. D. Lindeborg,
Vancouver, B. C.

Koch Siding, B.C., Feb. 5/19.

Dear Sir:

The business is in shape now, so I am drawing the money from the Bank of Commerce, Prince Rupert. If I send you a cheque for $200 on the Imperial Bank of Canada in Nelson will that be satisfactory? I suppose I might have left it to your credit in the Bank in Prince Rupert. You can please make out a statement, as I will have to have something to show for all expenses. I am sending this letter to Vancouver in care of Mr. Barbrick and I trust you'll get it safely.

Williams and Manson informed me that Mr. Hendrickson is

In the Supreme Court of British Columbia

Exhibit No. 62, Letter, Laura McEwan to D. Lindeborg, 5th February, 1919. —*Continued.*

dead. They also said they are making out new Deeds and Bills of Sale.

Hoping you are spending a very pleasant winter and have good health.

Yours very truly,

LAURA McEWAN.

Exhibit No. 63, Letter, Dan Lindeborg to Laura McEwan, 17th April, 1919.

EXHIBIT No. 63

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 63
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

April 17, 1919.

Letter Dan Lindeborg to Mrs. Laura McEwan.

Prince Rupert, B. C., April 17, 1919.

Mrs. Laura McEwan,
Koch Siding, B. C.

Dear Madam:

As promised am writing you and am glad to say that the only trouble in the Bank here was that they did not know how the money was to be divided between the parties to the deal. The Bank intended to make out a check for the whole amount and have all the parties sign it, but as that operation would have to be repeated for every payment I suggested a letter signed by us that would apply to all following payments as well so it would not cause any delay in the future. I am sending this banks letter to Mr. Barbrick for his signature requesting him to forward to you and you can forward to the Bank here, when you can request the Bank to forward your money to your bank at any place you designate.

I am exceedingly sorry that through my fault you have been prevented from using this money, but I hope that it has not caused you any loss either financially or otherwise.

From what I have learned here the outlook for mining in our district are very promising for the coming season and after fourteen years of waiting and boosting it is very wellcome indeed.

Hoping this will find you and yours in the best of health.

I remain, Yours sincerely,

DAN LINDEBORG.

EXHIBIT No. 64

SC1216/31

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 64
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

14 9/22/32, J.

Koch Siding, B.C., April 29/19.

Mr. D. Lindeborg,
Prince Rupert, B.C.,

Dear Sir:

I received the letter from Mr. Barbrick containing the letter from the Bank, last Friday, and forwarded it same day with instructions where to transfer my share of the money as executrix of Stevenson Estate. The $200 owing to you and $250 the lawyers asked me to retain, until they had their accounts made out, I am leaving in the Bank in Prince Rupert. If you will please send me a statement or something to show, when the business of the Estate is finally wound up, I will send you cheque for amount— Have asked the Bank to send me some cheques but in case they neglect please put a few in your next letter.

I would be very sorry to think you felt badly because we have not been able to get the money sooner—for myself and I'm very sure for my brother also, we couldn't get it in a better time than now. He will be able to use it to such good advantage starting in his Spring work on the farm. He has seven of a family ranging from fourteen to two months, so in these days of high prices, you may well believe the money will be a great help to him. I feel, we owe you a world of gratitude for getting any of the money now, for it's doubtful if it wasn't for your untiring efforts if the "Big Missouri" would be even bonded now. It is certainly splendid the out look in Stewart district is so promising and I trust it will continue so. After fourteen long years of waiting I surely hope you'll be well rewarded.

My husband met Mr. Pat Daly in Nelson. It was quite a surprise for him to learn my husband was Hiram Stevenson's brother-in-law. He has great faith in the mineral wealth of the Stewart district, and will soon be retiring.

Hoping this letter finds you real well, I am,

Yours very sincerely,

L. McEWAN.

EXHIBIT No. 57

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 57
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar

DAN LINDEBORG

Hyder, Alaska, July 12th, 1919.

Mrs. Laura McEwan,
Koch Siding, B. C.

Dear Madam:

Your letter of June 5th. also letter April 29th. received some time ago and I owe you an apology for not answering sooner, I have been on the go all the time of late so have had very little time, today it is raining so have a day off.

Your last letter (and all your letters for that matter) are very kind and I appreciate it very much, it is a pleasure to be associated with people who will help things along instead of holding back as so very often happens, in my case I have been very fortunate and with one single exception have allways had agreeable partners or associates, it is no particular credit due me in this case as I have had to look out for my own interest anyway and what is to the interest of one is to the interest of all and if we had not stuck together perhaps we wold have got something out of it and perhaps not, in this connection a great deal of credit is due to Mr. Barbrick for the unfaltering way he has stood by me, and ever since your first letter I have felt the same way about you, which has enabled me to tell people just what we would do, knowing that I could depend on all parties interested. Some time ago while Hiram was alive it was a strong effort made to split us apart but without success, and now it looks as if it is only a matter of time when payments come due that they will be made, however, I never count my chickens until they are hatched and it has saved me many a dissappointment.

Things look very promising for the future, Sir Donald Mann has just left here, I was with him over the property and while he does not say much it is easy to see that he is pleased with it so far, he now has an Engineer on the ground and they expect to do a good deal of work this season and I am not worrying about the results.

Exhibit No. 57, Letter, Dan Lindeborg to Laura McEwan, 12th July, 1919. —*Continued.*

The season has been very cold and backward and it is still a good deal of snow on the property.

Am inclosing a statement as requested, as far as I can now recollect you only owe me for your share of the assessment work on five fractions and one claim, six in all $600.00 your share if this is one quarter or $150.00, those claims will be Crown Granted this season.

Am very glad that delay in receiving the money did not couse you any great inconvenience, no doubt your brother unless otherwise well fixed will need the money as it cost money now a days to raise a large family, and if everything goes all right we should have a new years present of a few dollars the first of January next.

Wishing you every success, I remain

Yours sincerely

DAN LINDEBORG.

If this statement is not in proper form return it and will send you another. D. L.

16B—9/22/32, J.

STATEMENT.

To Mrs. Laura McEwan, Executrix, Hiram Stevenson Estate.
To assessment work on five fractions and one full claim of the Big Missouri group, ...$600.00
The share of the Stevenson estate holding one quarter interest is, ...$150.00

EXHIBIT No. 65

Exhibit No. 65, Letter L. McEwan to Dan Lindeborg 5th June, 1919.

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Exhibit No. 65
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

15 9/22/32, J.

Koch Siding, B.C., June 5, '19.

Dear Mr. Lindeborg:

This letter dated Apr. 29 which I sent to you to Prince Rupert was returned to me this week—I presume you have gone to Stewart so am sending mail there. Also had a letter from the Lawyers —Williams & Manson asking me if I had received the Deed to

In the Supreme Court of British Columbia

Exhibit No. 65, Letter L. McEwan to to D. Lindeborg, 5th June, 1919. —*Continued.*

sign—I wrote them by return mail stating I had returned Deed to you by registered mail on Apr. 22nd. No doubt they have it before this.

Very glad to tell you my share of the money as Executrix of the Estate has been transferred some time ago, and my brother received his share. Let me take this opportunity of thanking you very very much for all your trouble on our behalf.

The Bank of Commerce sent me some cheques, so will send you cheque for amount owing you any time you state.

Wishing you every success.

Yours very truly,

L. McEWAN.

Exhibit No. 53, Letter, Dan Lindeborg to Laura McEwan, 14th May, 1920.

EXHIBIT No. 53

DAN LINDEBORG

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 53.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

Hyder, Alaska, May 14th, 1920.

Mrs. Laura McEwan,
Koch Siding, B. C.

Dear Mrs. McEwan:

Your letters of Jan. 19, and Feb. 23 I found waiting for me on my arrival home after spending a few months in the south where we had a very enjoyable time but I can honestly say that I am glad to be back home again, I would rather spend my summers here than any place that I know of.

Very sorry to hear that you have had the Flu, and at the same time glad that you all have recovered, some parts of Alaska it has been very bad this winter, eaven worse than last year, many deaths being reported from different camps, so far my brother and myself have escaped it, it seams to attack the young people and leave old plugs like myself go free.

The prospect in the mining line this season is very good, Sir Donald Mann has let a contract for 15,000 ft. of dimond drilling on the Big Missouri, (it has been hinted to me that perhaps he

will want an extension of time for the next payment, just mentioning this so you can think it over, time enough to take it up when we are officially notified,) a lot of other Companies are also planning extensive work but I don't think we are going to have the big boom that been predicted and that some people are hoping and waiting for, Glad to hear that you got the payment on the Yellowstone as it is some considerable time since you bonded it.

The winter here has been mild with only an average fall of snow but the spring is very late and cold and the result is that work will be delaid some time.

Regarding that $150.00 check, it seems to me that I got that cashed, however, will look it up and let you know later, some people are now living in my cabin but will move in about a week and then I can go through my old junk.

Regarding Caldwill's Rail Road you may take that with a grain of salt, he has been talking about that now ever since he been here and not a shovel full of earth has been moved yet, we will have a Rail Road here within the next two or three years but it is very doubtful if Coldwell will build it as it will take a lot of money for a job of that kind of work.

Sincerely yours,

DAN LINDEBORG.

EXHIBIT No. 66

Exhibit No. 66, Letter to Laura McEwan, 29th May, 1920.

SC1216/31

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Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

17—9/22/32, J.

Mrs. Laura McEwan,
Koch Siding, B.C.

May 29, 1920.

Dear Mrs. McEwan:

Last night I was approached by Col. Hime Sir Donalds representative here about getting an extension on the Big Missouri option, I told him that it was impossible for me to grant his request until I heard from you and Mr. Barbrick, and I want you to state frankly what you think about it, the extension they want is for sixty days, which will make the last payment come the first of Nov. instead of Sept. 1st. I told him that it was no use trying

In the Supreme Court of British Columbia

Exhibit No. 66, Letter to Laura McEwan, 29th May, 1920. —*Continued.*

for an extention of time without making some payment sept. 1st. but I did not set any amount as can be done later after all parties have been consulted, I have written Mr. Barbrick on this same mail, I wish you would give this your early consideration and let me know as soon as possible.

In asking for option the Col. used all the old stock arguments such as late season, short time to do any work and that if Sir Donald throws up the option that we would have a hard time getting anybody to take hold again, the least season you can ignore entirely as it is parties wishing that he would quit so they wold get a chance, and I also know that he can turn his option over any time but that he wants to much for it, the only thing we have to take into consideration is that if we have to give a new option it will take two or three years more before we get our money out of it, here also the extension of time comes in, if we grant it and he quits then it will be to late to interest other parties while if he quits Sept 1st. we might get other parties interested so as to get work going this winter.

Col. Hime suggested that I advise you to grant the extention, this I refused to do as I want yout to use your own judgment in the matter and which ever way it goes we will work together as all our interest are in the same pot.

I have went into this quite fully and I want your candid opinion on what you think.

Yours sincerely,

Exhibit No. 52, Letter, Dan Lindeborg to Laura McEwan, 12th August, 1920.

EXHIBIT No. 52

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 52
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Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

1—Sept. 22/32, J.

Hyder, Alaska, Aug. 12th, 1920.

Mrs. Laura McEwan,
Koch Siding, B. C.

Dear Mrs. McEwan:

Inclosed find Agreements for extention of time Missouri

option, I got same on the last mail from Mr. Barbrick who had his Lawyer make them out so as to be sure everything is all right, I will ask you after your approval and signature to send one copy to Sir Donald Mann 43 Victoria Street, Toronto, keep one for yorself, send one to Mr. Barbrick, and one back to me. As you see the agreement calls for $25,000.00, Sept. 1st. and we are giving them to the first of the year for the balance, if they dont come up with the money the first of September we are free to go ahead as their option expires then and we can do business with whoever we have in sight, if they should pay this money and not the balance then we have the consolation that we have been paid for the time we have lost. It would not surprice me if they drop the option as they have quit working, and I am getting other people to examine the property and if they like it we can do business as soon as option expires.

I have your letters of June 5th. and 14th. you ask if it would be necessary for you to consult your Lawyers, as this is not a legal question I dont see any need of you doing so and if you did they would not know anything more about it than you do, as I see it, it is simply a matter of giving the other party more time to dig up the money.

In regard to the letter from Harris, can say that I do not think he has any agreement but I do think that he was promised something by your brother at the time they were together on Queen Charlotte Islands because he told Hiram that he would not do the work on a certain claim now in the Missouri group and that he could locate it. Then when we had it bonded in 1910 we got some small payments out of it, it was agreed among us that we would give Harris something and as near as I can remember he got about $600.00 out of it at that time. I do not consider that Harris has or ever had any legal claim to anything and also that he will have to wait until we get our final payment before we will eaven consider his claim, as we have spent years of work and thousands of dollars in money to hold this ground and to which he has not contributed one penny, but when we get everything cleared up we will talk the matter over and whatever we agree on then we will doo. It is impossible to go into all the details in a letter but perhaps we will meet sometime and then we can discuss the matter from all angles.

The month of July was the finest ever here but the last week it has rained like the dickens.

Hoping this will find you well and prosperus I remain,

DAN LINDEBORG.

EXHIBIT No. 67

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Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

19—1/22/32, J.

Koch Siding, B. C., Apr. 15, '21.

Mr. D. Lindeborg,
Vancouver, B. C.

Dear Mr. Lindeborg:—

Was so glad to receive your letter yesterday also enclosed option. Hope you spent a very pleasant winter and enjoyed good health as usual.

As regards the option I heartily agree to it, and only hope the deal may be put through—as it certainly looks good. I was quite surprised when I read your letter for I had no idea you'd be able to do anything bonding the "Big Missouri" this year, for every thing seems to dull in this part of B. C. and mining especially. Use your own judgment in any changes that may have to be made and of course it will be agreeable to me.

I received the Club bag which you sent at Xmas time, and I want to thank you so much for sending it. I'm sure it was very very kind of you to think of doing it and apart from the value of the club bag, which is a lovely one, we appreciate it so much because it belonged to Hiram.

The Lawyers (Williams & Manson) never sent in their account till last Jan. It was a little over $300. Tonkin threw over the deal on Yellowstone so there was a little more business the Lawyers had to attend to and they've sent in their account for $12.50. They look out and get their share, don't they?

Yes Mr. Lindeborg I also settled up all accounts with the Canadian Bank of Commerce, Prince Rupert and they sent me all the cheques so I know now for sure you never got yours cashed, and let me know when you write if it will be all right for me to send you the money from the Bank in Nelson so you'll get it while you are still in Vancouver. You will understand I mean the $150, which was due you for assessment work. There is no money now in the Bank in Prince Rupert so I'll have to send it to you from Nelson.

Exhibit No. 67, Letter, L. McEwan to D. Lindeborg, 15th April, 1921. —*Continued.*

We have had a very mild but stormy winter here, Am thankful to say though we have all been well,

Give my best regards to Mr. Barbrick.

Must close my letter now and hope to hear from you soon. With best wishes.

Sincerely yours,

L. McEWAN.

EXHIBIT No. 70

Exhibit No. 70, Letter, Dan Lindeborg to Laura McEwan, 25th May, 1921.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 70.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

May 25, 1921.

Letter Dan Lindeborg to Mrs. Laura McEwan

Vancouver, B. C., May 25, 1921.

Mrs. Laura McEwan
Koch Siding, B. C.

Dear Mrs. McEwan:

Just a few lines to let you know that we are now negotiating with a New York outfit for the Big Missouri, at this time it looks as if it will go all right though you never can tell until you get the money in your hands. We are dealing on the same general terms as in the draft of option I sent you except that we are asking $5,000.00 cash instead of $2,500.00 the details are not yet worked out but I dont expect any trouble about that.

I have been waiting here so that if possible to get this deal through before going north as it takes so much time where the mails only arrive twice per month and as it is getting toward the time when they have to get in to do something and we want them to get started as soon as possible.

I will let you know as soon as it is settled and when papers are made out will send same to you for your approval and signature.

If this deal with New York dont come off we can still accept the proposition from B. L. Thane San Francisco, there are one or two others also that want to get in but their propositions are not so attractive from the cash point of view.

That $150.00 you can send to Hyder, Alaska at your convenience. I expect to be back there before two or three weeks.

Yours sincerely,

DAN LINDEBORG.

EXHIBIT No. 61

DAN LINDEBORG

SC1216/31

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 61.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

Hyder, Alaska, July 6 1921

Mrs. Laura McEwan
Koch Siding B.C.

Dear Mrs. McEwan:

Your letter of June 22nd to hand last mail and glad to hear from you, I feel the same as you about the deal and hope it is the last papers we will have to sign to get our money, however, if we have to do it all over again we will do it, I am firmly convinced we have a good property and sooner or later we will find the man that will make it a great mine, no, Patrick Daly has not got his two millions yet and in my opinion has has a very slim chance of getting it, though it is possible he might get something. He wired me that he had some of the best mining and financial people in New York, but perhaps you know Daly, in that case enough said.

I have not heard from the Bank but if you wrote them that will be good enough as I can get the papers to put in the new escrow when time comes.

In regard to the work and worry in making deals I can assure you it is a pleasure to do it when you have associates like I have got, no haggling, no kicking from anybody, the last deal I was fortunate enough to have Mr. Barbrick near at hand and I consulted him before making any move one way or another and I will say this he is a Prince to do business with, allways reasonable and at the same time outspoken.

Speaking about Strawberries glad to hear that they are at a price that people can afford to eat them, we have to import them here as they dont seem to do very well, but other berries

such as Huckelberries, Salmon Berries and tall bush Cranberries as well as others grow here in abundance, no fruit of any kind grows in the neighborhood, but we have a Canadian boat once a week to Stewart and we have a boat every four days from Ketchikan to Hyder so we are well fixed as far as transportation is concerned.

I am inclosing a copy of letter I sent to Mr. Harris, he wanted to know your and Mr. Barbricks address, he seems to think, that he has an interest in the property, no doubt he will write you about it, as you will see by copy enclosed I am making it plain to him that to my knowledge there is no agreement of any kind.

We been having fine weather until about a week ago since when it been raining a little and pretty cold for this time of year.

My brother and myself are both well and he joins me in best wishes for yourself and yours.

Sincerely yours,

DAN LINDEBORG.

Got enclosed check all O. K. many thanks. D. L.

Exhibit No. 72, Letter, L. McEwan to D. Lindeborg, 24th May, 1922.

EXHIBIT No. 72

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 72
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

24—9/22/32, J.

Nelson, B. C.,
May 24, 22

Mr. D. Lindeborg,
Vancouver, B. C.

Dear Mr. Lindeborg:—

Your letter of May 21st received to day and was so glad to hear the deal was closed, and I know you must be very glad too. Just as soon as you let me know how much my share will be (as executrix of the estate) to pay Lawyers for this deal also deal last year I will leave that amount in the Bank in Vancouver, when I am having the money transferred. It must have been hard for you with Mr. Trites lawyer so unfair in every way, but let us hope they really mean business, and the deal will go through this time. I do feel so grateful to you for taking all the burden, for

In the Supreme Court of British Columbia

Exhibit No. 72, Letter, L. McEwan to D. Lindeborg, 24th May, 1922. —*Continued.*

I know it's all so safe when you are handling it, and I should be so very helpless without you to depend on for everything in this mining business—

Well, since I last wrote you we've had a girl added to our family—Having three boys, of course, this is some girl.

We are having weather here very much like you are getting at the Coast—very warm some days, and then cold and rainy.

Suppose you will soon be leaving for the North Country—Haven't heard from Mr. Murphy since last fall, but I guess there's no deal on "Yellowstone" or I'd be getting word before this.

Wishing you best success

Yours sincerely
L. McEWAN.

Exhibit No. 73, Letter to Laura McEwan, 2nd June, 1922.

EXHIBIT No. 73

SC1216/31
67 A, J.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 73.
McEwan vs Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

June 2nd, '22.

Mrs. Laura McEwan,
Nelson, B. C.

Dear Mrs. McEwan:

After many delays and difficulties we finally got the deal finished, and as Mr. Barbrick and myself have had no settlement for a long time we got together and squared up everything, we found that our total expences amounted to $241.00 part of this is for the deal a year ago with Pat Daly, and as Mr. Barbrick had paid more than his share I paid over to him my brothers and my own share and you can at your convenience pay over to him your share which amounts to $60.25 and everything will be squared up to date.

Well I hope that this time we will get our money out of it but if we dont we will make a few more deals and sooner or later we will get it.

The spring here has been very late at least a month later than usual though, since I came home it has been warm and beutiful.

With very best wishes I remain

Yours sincerely,

EXHIBIT No. 73

Exhibit No. 73, Expenses Big Missouri for years 1921-1922.

SC1216/31
67 B, J.

DAN LINDEBORG

Vancouver, B. C., May 23, 1922.

To expenses Big Missouri deals for the years 1921-1922.

Pat Daly Agreement and Lawyers fees (1921)	$ 50.00
For typewriting reports, etc	14.00
Telegrams	10.00
	74.00
Other expenses in connection with Missouri deals paid by Barbrick	167.00
Total	$241.00

To be paid equally by the parties mentioned Dan Lindeborg Andrew Lindeborg D. C. Barbrick and Laura McEwan.

The share of each individual	60.25
Paid Barbrick for D. and A. L. by check today balance of	$ 46.50
Recvd from D Lindeborg the sum of	$120.50

Amount in full on Big Missouri deals up to date.

D. C. BARBRICK.

Exhibit No. 75, Letter, L. McEwan Dan Lindeborg 7th July, 1924.

EXHIBIT No. 75

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 75.
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

28—9/22/32, J.

Nelson, B. C.
July 7, '24.

Mr. D. Lindeborg,
Vancouver, B. C.

Dear Mr. Lindeborg:—

Your letter of July 3rd received this morning, so I'll answer at once.

I surely wonder where Pat Daly got the idea that I'd sell my

In the Supreme Court of British Columbia

Exhibit No. 75, Letter, L. McEwan to D. Lindeborg, 7th July, 1924. —*Continued.*

interest in the B. M. for a few thousand dollars—I've never even hinted such a thing, and any time we spoke about the property he always assured me that the party who have it bonded now would never give it up, and was so emphatic in his statements, that it would never be back in our hands again.

I am very glad you and Mr. Barbrick decided not to grant any extension of time, and rest assured Mr. Lindeborg I would never dream of doing anything in connection with the property without your full consent and approval. I should feel I was absolutely crazy to even think of such a thing—and where Pat got his reasons for telling them, is sure a puzzle to me.

It is just one week till the payment is due so we haven't long to wait to know our fate—I'm hoping, of course, they make the payment, but am very very glad you gave them to understand you were independent—even if a new deal has to be made. Very glad to hear Mrs. Barbrick is improving—give them my best regards—Glad to hear from you again any time.

With best wishes to yourself and brother

Yours sincerely

L. McEWAN.

Exhibit No. 77, Letter, L. McEwan to D. Lindeborg, 22nd September, 1925.

EXHIBIT No. 77

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 77.
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

35 9/22/32, J.

Nelson, B. C.,
Sept. 22, '25

Mr. D. Lindeborg,
Vancouver, B. C.

Dear Mr. Lindeborg:—

Very glad to receive your letter of Sept. 8th and to hear such good news concerning the Big Missouri and I fully share with you the wish that these people may be the ones to make the property into a big mine—They say an Irishman for luck, and it looks as if it may really be the case with "Pat." Yes, I can just

imagine how uplifted he'll feel if it should turn out to be as good as we hope it may, and it's lucky for us that Trites Woods and Wilson overlooked or at least gave up the work there too soon. I suppose even if they are so rich they hate to miss anything, and will hate to hear that the property is better than they thought it was. Woods will have to take all the blame for the others, no doubt wouldn't have given it up—

Am enclosing money order for $50.19 to pay our share of taxes—and want to thank you again very much for paying our share and waiting so long for your money.

Sincerely hope if you've already gone North you've found everything O.K. and "Pat" gracious enough to let you, at least, have a look at the B. M. Glad to hear from you again anytime.

With our best wishes

Very sincerely yours

L. McEWAN

EXHIBIT No. 80

Exhibit No. 80, Letter to L. McEwan, 29th June, 1927.

Supreme Court of B. C. SC1216/31
Vancouver Registry
Exhibit No. 80.
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

60 9/22/32, J.

3308 - 37th Ave. West,
Vancouver, B. C., June 29th, 1927.

Mrs. L. McEwan,
Nelson, B. C.

Dear Mrs. McEwan:—

The other day some of the big men of the Big Missouri Co. were over here from Tacoma, they came to prepare for an extension of time for the next payment due July 21st next.

I could not of course promise them anything until after consulting with you and Mr. Barbrick, but I told them that it was entirely useless to try and get the whole payment extended. I have talked with Mr. Barbrick about this and he like yourself and me would like to have them make the full payment on time but if necessary he will agree to them making half the payment when due and then $10,000 by Aug. 21st $10,000 by Sept. 21st and $5.000 by Oct. 21st.

The Co. I was told intend this year to spend $175,000 in building wagon road from Premier to property, install a hydroelectric plant and work on the mine.

In view of the Co. plans and expenditures we may I think be

In the Supreme Court of British Columbia

Exhibit No. 80, Letter to L. McEwan, 29th June, 1927. —*Continued.*

reasonably sure that they intend to go through with option and I dont think it is any doubt about them paying this payment in full if we insist on it.

You think this over and let me know your opinion as soon as convenient as I promised to let the Co. know as soon as possible.

May add that the property is looking fine.

We have had some fine summerweather here lately and things are looking fine.

Best regards to Mr. McEwan as well as the boys and girl.

Sincerely,

Exhibit No. 1, Endorsement on Writ, 18th July, 1928.

EXHIBIT No. 1

1

Endorsement on Writ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff;

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

Writ issued the 18th day of July, 1928.

ENDORSEMENT ON WRIT.

The Plaintiff's claim is as the owner of an undivided one-third interest of, in and to those certain mineral claims known as the Big Missouri Group situate on Salmon River in the Portland Canal Mining Division in the Province of British Columbia, more particularly known and located and recorded as the Tip Top, Rambler, Buena Vista, Province, Jane, Golden Crown, Winner, Big Missouri, Kansas, Dauntless, as against the Defendant for (1) judgment for the sum of $100,000.00 due by the Defendants to the Plaintiff, being the amount realized by the Defendants for the Plaintiff from the sale of the said undivided one-third interest of the Plaintiff in the said mineral claims; (2) a declaration that there is a subsisting mining partnership between the Plaintiff and the Defendants; (3) an account of all monies due by the Defendants to the Plaintiff pursuant to the said mining partnership; (4) a Receiver; (5) other relief; (6) costs of this action.

EXHIBIT No. 12

SC1216/31

Exhibit No. 12, Letter, Macdonald & Pepler to Laura McEwan, 11th August, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 12.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

11 August, 1928.

Mrs. Laura McEwan,
Nelson, B. C.

Dear Madam:

re Harris v. Lindeborg et al

A man named Harris has started action against Mr. Lindeborg, Mr. Barbrick and yourself, claiming some of the Big Missouri purchase money. I am entering an appearance for Mr. Barbrick who has been served with a Summons. If you should be served with any papers in this matter, would you please send them down to us immediately you get them and we will enter an appearance for you also. This must be done without delay after the papers have been served.

We expect Mr. Lindeborg will be back in Vancouver very shortly now and we will then actively take the matter up.

Yours very truly,

MACDONALD & PEPLER,

Per.....

RMM:M

EXHIBIT No. 13

SC1216/31

Exhibit No. 13, Macdonald & Pepler to Bass & Bullock-Webster, 11th August, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 13.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

11 August, 1928.

Messrs. Bass & Bullock-Webster,
Barristers, etc.,
Law Chambers,
Bastion Street,
Victoria, B. C.

Dear Sirs:

re Harris v. Lindeborg et al

Enclosed please find Appearance for Barbrick which please enter the first thing on Monday morning and serve Notice of Appearance by yourselves as our agents and naming your office as an address for service.

The Writ was served a week ago to-day, so it is very important to get this entered at the first possible moment.

Yours truly,

MACDONALD & PEPLER,

Per.....

RMM:M
Enc.

EXHIBIT No. 15

SC1216/31

Exhibit No. 15, Letter, Laura McEwan to Macdonald & Pepler, 14th August, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 15.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

Harris v. Lindeborg

Nelson, B. C., Aug. 14, '28.

Macdonald & Pepler,
Barristers, etc.
Vancouver, B. C.

Dear Sirs:—

Your letter of Aug. 11th to hand to day, and as yet I have not been served with any papers in this matter that you have stated in your letter.

If I should be served with any papers will immediately send them down to you.

Glad to hear you expect Mr. Lindeborg back in Vancouver soon.

Very truly yours,
LAURA McEWAN

EXHIBIT No. 19

Exhibit No. 19, Letter, Macdonald & Pepler to Bass & Bullock-Webster, 5th September, 1928.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 19.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

5 September, 1928.

Messrs. Bass & Bullock-Webster,
Barristers, etc.
Law Chambers,
Bastion Street,
Victoria, B. C.

Dear Sirs:

re Harris v Lindeborg

Enclosed please find Appearance for the Defendant Lindeborg, which please enter, and serve the Notice of Appearance enclosed. We also enclose a letter and copy addressed to the Plaintiff's solicitor demanding security for costs, and would be pleased if you would deliver the letter and note the fact of delivery upon the copy at the time of serving the Notice of Appearance.

Yours very truly,
MACDONALD & PEPLER,
Per.....

RMM:M
Enc. 4.

EXHIBIT No. 14

Exhibit No. 14, Letter, Laura McEwan to Macdonald & Pepler, 6th September, 1928.

Supreme Court of B. C. SC1216/31
Vancouver Registry
Exhibit No. 14.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

Nelson, B. C., Sept. 6, '28.

Macdonald & Pepler,
Barristers & Solicitors,
Vancouver, B. C.

Dear Sirs:—

Your letter of Sept. 4th re Harris and Lindeborg et al to hand to day, and I am replying at once to instruct you to accept service of the writ on my behalf.

Very glad to hear that Mr. Lindeborg has returned home.

Yours truly,
LAURA McEWAN

EXHIBIT No. 16

Exhibit No. 16, Letter, Macdonald & Pepler to Bass & Bullock-Webster, 10th September, 1928.

Supreme Court of B. C. SC1216/31
Vancouver Registry
Exhibit No. 16.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

10 September, 1928.

Messrs. Bass & Bullock-Webster,
Barristers, etc.,
Law Chambers,
Bastion Street,
Victoria, B. C.

Dear Sirs:

re Harris v Lindeborg

We now enclose Appearance and Notice of Appearance on behalf of the Defendant, Mrs. McEwan. Will you kindly enter Appearance and serve notice.

Yours truly,

MACDONALD & PEPLER,
Per.....

RMM:M
Enc. 2.

Exhibit No. 1, Statement of Claim, William F. Harris, 11th September, 1928.

EXHIBIT No. 1

2

Statement of Claim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff:

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

STATEMENT OF CLAIM

1. The Plaintiff is a retired Mining Prospector and resides at 137 West Thirteenth Street in the City of Port Angeles, in the State of Washington, one of the United States of America.

2. The Defendant, Daniel Lindeborg, resides at the City of Vancouver, in the Province of British, Columbia, and is the Administrator of the Estate of Andrew Lindeborg, deceased; the said Duncan C. Barbrick resides at 6039 Sherbrooke Street in the said City of Vancouver and is the Administrator of the Estate of James Proudfoot, deceased; and the said Laura McEwan resides at Koch Siding in the said Province of British Columbia and is the Administratrix of the Estate of Hiram Stevenson, deceased.

3. On or about the 25th day of July, 1904, the Plaintiff being then, and at all times herein mentioned, a free miner, discovered, located and recorded those certain mining claims situated on the Salmon River in the Stewart Mining Division of the Province of British Columbia about twelve (12) miles from the head of Portland Canal, known and described as the "Jumbo Group," consisting of three (3) mineral claims, and kept said claims in good standing by doing and recording the assessment work thereon until the 9th day of August, 1909.

4. In, of or about the month of June, A.D. 1909, the Plaintiff at Queen Charlotte Islands in the Province of British Columbia. being then the owner of said mining claims, entered into an oral agreement with one James Proudfoot and one Hiram Stevenson whereby the said James Proudfoot and Hiram Stevenson were

to do whatever work was necessary to and keep up all assessments and record the same on all the ground within the boundary of said group, manage, group and look after said claims, and the handling, selling, optioning and crown granting of said claims, for which the said James Proudfoot and Hiram Stevenson and their associates were to receive two-thirds (2/3) of all the money and profits derived therefrom, and the Plaintiff was to receive a one-third (1/3) share of all moneys received in respect to the said claims and all other claims grouped therewith by selling or otherwise, after deducting all amounts expended in keeping up the assessments, grouping, optioning and selling the same as aforesaid.

5. Pursuant to and under said agreement, the said James Proudfoot, Hiram Stevenson, Andrew Lindeborg and Dan Lindeborg entered into the possession of the said group of Jumbo Mineral claims and thereafter allowed the same to lapse at midnight on the 8th day of August, 1909, and on the 9th day of August, 1909, had the said Hiram Stevenson and the said Daniel Lindeborg relocate the said Jumbo group of Mining ground and claims as the Big Missouri and Kansas Mining Claims and recorded said claims and mining ground on the 10th day of August, 1909, in the Mining Recorder's Office at Stewart, B. C., in the names of said Hiram Stevenson and Daniel Lindeborg, the above named defendants, which said group of mining claims were thereafter known under the name of the Big Missouri group.

6. On or before the said 9th day of August, 1909, the said James Proudfoot, Hiram Stevenson, Daniel Lindeborg and one Andrew Lindeborg entered into an agreement with each other to group and consolidate with the said Kansas and Big Missouri Mineral Claims certain other adjoining mineral claims owned by them and known as Tip Top, Rambler, Buena Vista, Province, Jain, Golden Crown, Winner and Dauntless and called the same the "Big Missouri Group" for the purpose of selling the same in block in accordance with the agreement made as aforesaid.

7. The principal value of the said group of mineral claims designated as the Big Missouri group consisted in the values and showings of minerals and precious metals upon the grounds and within the boundaries of said Jumbo Group of claims; and on or about the 8th day of December, 1909, the defendant Daniel Lindeborg and the said James Proudfoot, Hiram Stevenson and Andrew Lindeborg gave an option on the said Big Missouri group of claims referred to in the preceding paragraph to one John Edg-

comb which option was subsequently assigned by the said John Edgcomb to one Donald D. Mann and in respect of which certain sums of money were received by the said Defendant Daniel Lindeborg and the said James Proudfoot, Hiram Stevenson and Andrew Lindeborg, the amount of which is unknown to the plaintiff, out of which they paid to the plaintiff the sum of $100.00.

8. On or about the 12th day of September, 1910, the defendant Daniel Lindeborg and the said James Proudfoot, Hiram Stevenson and Andrew Lindeborg paid to the plaintiff a further sum of $184.20 and on or about the 3rd day of October, 1910, the plaintiff received from them a further sum of $80.00 being payments on account of moneys due to the plaintiff pursuant to the said agreement made in June, 1909, between the plaintiff and the said James Proudfoot and Hiram Stevenson as aforesaid.

9. Subsequent to the matters referred to in the preceding paragraph the said James Proudfoot died in the Province of British Columbia and the defendant Duncan C. Barbrick was granted administration of his estate.

10. On or about the 10th August, 1914, the defendants Daniel Lindeborg, Duncan C. Barbrick as administrator aforesaid, and Andrew Lindeborg, and Hiram Stevenson granted an option of the said Big Missouri Mineral Claims unto one E. C. Howard, B. C. Thane and L. P. Shackleford without the knowledge of the plaintiff.

10a. On or about the 25th day of October, 1916, a Crown Grant of the said Big Missouri Mineral Claim being Lot 3217 Cassiar District in the Province of British Columbia was issued to the said defendants Daniel Lindeborg and Hiram Stevenson by the Government of the Province of British Columbia and on or about the same date Crown Grants were issued to the defendants in respect of the other Mineral Claims referred to herein and known as Tip Top, Rambler, Buena Vista, Province, Jain, Golden Crown, Winner and Dauntless.

11. On or about the 3rd day of August, 1917, the defendant Daniel Lindeborg executed an option to one M. F. Hendrickson of the said Big Missouri Group of Claims at a purchase price of $165,000.00, and on or about the 25th day of October, 1918, the said M. F. Hendrickson assigned the said option to Sir Donald Mann and in respect of the said option the said Daniel Lindeborg received the sum of $12,000.00 without the knowledge of and without having paid any part thereof to the plaintiff.

12. Subsequent to the matters referred to in the preceding paragraph the said Hiram Stevenson was killed in action in France and the defendant Laura McEwan was appointed the administratrix of his estate and the said Andrew Lindeborg also died and administration of his estate was granted to his brother the defendant Daniel Lindeborg.

13. In or about the month of July, 1925, the defendant Daniel Lindeborg in his own behalf and as administrator for his brother Andrew Lindeborg and the defendant Duncan C. Barbrick as administrator of the estate of the said James Proudfoot and Laura McEwan as administrator of the estate of Hiram Stevenson executed an option on the said Big Missouri Mineral Claims to the Standard Mines company, a corporation organized under the laws of the State of Washington, United States of America and having its principal office at the City of Tacoma in the said State of Washington for the sum of $275,000.00, which said option was assigned by the said Standard Mines Company to the Big Missouri Company, a corporation organized under the laws of the State of Washington and having its principal office at Tacoma aforesaid, and which said option was further assigned by the said Big Missouri Mining Company to the Buena Vista Mining Company, Limited, a company incorporated under the laws of the Province of British Columbia and having its registered office at the City of Vancouver in said Province, and the sum of $275,000.00 was paid thereon to the defendants.

14. Pursuant to the options and assignments thereof referred to in the preceding paragraphs the defendants have received various sums of money amounting to about $300,000.00, but the plaintiff has only received from the defendants to the date hereof the sum of $364.20 and the defendants although asked by the plaintiff to give an accounting of and to pay over to the plaintiff the undivided one-third share of the said moneys received by the defendants in respect of the said Big Missouri Group of Mineral Claims pursuant to the said agreement made in June, A.D. 1909, have refused and neglected to do so.

WHEREFORE, the plaintiff claims as against the defendants:

1. Judgment for the sum of $100,000.00, being one-third share of moneys received from the sale of the Big Missouri claims,

2. An account of all sums of money received by the defen-

dants and paid to the defendants as trustees for the plaintiff from all options and sales of said Big Missouri Group of claims.

3. Payment of the amount found due to the plaintiff pursuant to said agreement.

4. Costs.

5. Other relief.

DATED at Victoria, B. C., this 11th day of September, A.D. 1928. 10

"P. J. SINNOTT,"
Solicitor for the Plaintiff.

The place of business and address for service of the said P. J. Sinnott is at the Bank of Nova Scotia Building, 1305 Douglas Street, Victoria, B. C.

Filed and Delivered this 11th day of September, A.D. 1928.

EXHIBIT No. 17

SC1216/31

Exhibit No. 17, Letter, W. H. Bullock-Webster to Macdonald & Pepler, 11th September, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 17
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

P. O. Box 56

10 W. H. BULLOCK-WEBSTER
Barrister, Solicitor and Notary
Solicitor for
The Bank of Toronto

Law Chambers,
Victoria, British Columbia,
September 11th, 1928

Messrs. Macdonald & Pepler,
Barristers & Solicitors,
Vancouver, B. C.

20 Dear Sirs:

Harris v Lindeborg

Referring to your letter of 10th instant.
I have entered appearance for Laura McEwan, and served notice of entry.

I have been served with the statement of claim, which is enclosed herewith.

Yours truly,

W. H. BULLOCK-WEBSTER

W.H.BW.
30 Encl.

EXHIBIT No. 18

Exhibit No. 18, Letter to D. C. Barbrick, 21st September, 1928.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 18.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

21 September, 1928.

D. C. Barbrick, Esq.,
6039 Sherbrooke St.,
Vancouver, B. C.

My Dear Dunc:

I was sorry not to have seen you yesterday when you called and particularly sorry to hear of Dan's illness. I hope you will keep me informed as to how he is progressing. I am afraid from our report that he is in for a bad time but as soon as he is allowed to see strangers I should like to go up to the hospital and see him even for a few minutes. Of course he will not be able to talk business for a long time to come. Please keep me advised as to how he is getting on.

Yours faithfully,

EXHIBIT No. 20

SC1216/31

Exhibit No. 20, Letter, Macdonald & Pepler to W. H. Bullock-Webster, 6th October, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 20.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

6 October, 1928.

W. H. Bullock-Webster, Esq.,
Barristers, etc.,
Law Chambers,
Victoria, B. C.

Dear sir:

re Harris v Lindeborg

We are in receipt of your letter of 5th instant advising us that the Plaintiff's solicitor has filed the required bond for security for costs and, no doubt, you will be served with notice at once.

We are drafting the Statement of Defence and also Demand for Particulars which we will forward to you sometime next week, to be filed and served.

Yours turly,

MACDONALD & PEPLER,

Per.....

RMM:M

EXHIBIT No. 1

7

Demand for Particulars

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff;

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

DEMAND FOR PARTICULARS

The Defendants require the Plaintiff to deliver forthwith further and better particulars of the following matters referred to in the Statement of Claim:

1. Particulars of the names and dates of location and record of the three mineral claims alleged to constitute the "Jumbo Group" as alleged in Paragraph 3 of the Statement of Claim.

2. The names of the associates of James Proudfoot and Hiram Stevenson referred to in Paragraphs 4 of the Statement of Claim.

3. The names and dates of location and record of all the other claims grouped with the plaintiff's claims as alleged in Paragraph 4 of the Statement of Claim.

DATED at Vancouver, B. C., this 8th day of October, 1928.

"MACDONALD & PEPLER,"
Defendants' Solicitors.

To: The above named Plaintiff
and to P. J. Sinnott, his solicitor.

EXHIBIT No. 21

SC1216/31 Exhibit No. 21, Letter, Macdonald & Pepler to Mrs. McEwan, 8th October, 1928.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 21.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

8 October, 1928

Mrs. McEwan,
Nelson, B. C.

Dear Madam:

re Harris v Lindeborg

Our friend Mr. Lindeborg has had to go to hospital with something resembling pneumonia or pleurisy and for some little time the doctor would not allow him to see visitors. I got the doctor's consent, however, to-day to call upon him for a short visit. I did not talk much in the way of business to him as the doctor warned me not to introduce any topic that would excite him. I gathered, however, that he is on the mend and with time and careful nursing will be around again all right but it will take some little while before he is his own self again.

He told me of a letter that he had had from you asking about Harris' case and generally as to the Big Missouri. I may say that I am delaying the progress in this case as much as I can at the present time on account of Mr. Lindeborg's condition. We cannot go to trial wthout calling him as a witness and I want him to have all the time possible to get on his feet again. For this reason I hope to be able to stall the case off for a few months. When it does come to trial it will be tried most probably in Victoria. At any rate, it will be somewhere in British Columbia and not in the States. So far as the prospect of our success is concerned, I have no hesitation in saying that I do not think that Harris has got a leg to stand upon and I am not in the least degree anxious as to the outcome of the case.

Have you any documents in your possession that have any bearing on the case? You may have had some letters from Harris or from somebody on his behalf claiming an interest and you may perhaps have written to him or to some member of his family or perhaps to his lawyer. Possibly also amongst Mr. Stevenson's

In the Supreme Court of British Columbia

Exhibit No. 21, Letter, Macdonald & Pepler to Mrs. McEwan, 8th October, 1928. —*Continued.*

papers that came to your hands there might have been some letters or documents of some kind relating to the matter. If you have any such papers at all would you please let me know what they are and if they are of any importance I will get you to send them down to me.

Mr. Lindeborg asked me to write to you and to explain that he was not at present able to answer your letter himself but he would write as soon as his health was sufficiently restored to enable him to do so.

Yours truly,

MACDONALD & PEPLER,

Per.....

RMM:M

EXHIBIT No. 24

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 24.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

44 B

15 October, 1928

Mrs. Laura McEwan,
Nelson, B. C.

Dear Madam:

re Harris v Lindeborg

Thanks for your letter of 12th instant with the two letters from Arthur J. Harris to you enclosed. These will, I think, be of use to us.

I have been up to the hospital this afternoon to see Mr. Lindeborg and had quite a good chat with him. He seemed to me better than when I saw him there before and I hope he will keep on steadily improving. He was very pleased at receiving your messages of good wishes for his restoration to health. He asked me to tell you that as soon as he was fit for it he would write to you himself. Of course, at the present time the important thing is to do nothing but sleep and get well. After I had been with him about 15 or 20 minutes Mr. Barbrick arrived to pay him a visit so I decided that one at a time was enough and came away. I shall try to see the Doctor soon and try to learn from him when we may hope to have Mr. Lindeborg around again and enjoying his former health.

Yours truly,

MACDONALD & PEPLER,

Per.....

RMM:M

EXHIBIT No. 1

8

Statement of Defence of Daniel Lindeborg.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff,

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

STATEMENT OF DEFENCE OF DANIEL LINDEBORG

1. This Defendant admits the allegations in Paragraph 1 of the Statement of Claim.

2. This Defendant admits the allegations in Paragraph 2 of the Statement of Claim.

3. As to Paragraph 3 of the Statement of Claim, this Defendant denies that the Plaintiff was at any time a free miner of the Province of British Columbia and further says that if the Plaintiff was at any time a free miner he was not a free miner continuously after the 25th day of July, 1904, up to the time when crown grants were issued in respect to the properties in question in this action; and this defendant says that upon the Plaintiff ceasing to have a free miner's certificate unexpired he was incapable of holding any interest in any mining property. This Defendant pleads the provisions of Sections 12, 13 and 95 of the "Mineral Act."

4. This Defendant denies each and every allegation set forth in Paragraph 3 of the Statement of Claim.

5. This Defandant denies that any agreement as alleged in Paragraph 4 of the Statement of Claim was ever entered into with the Plaintiff and in respect of any such alleged agreement this Defendant pleads the provisions of Section 4, 7 and 9 of the "Statute of Frauds" and Sections 18, 19, 75, 91 and 92 of the "Mineral Act."

Statement of Defence of Daniel Lindeborg

Exhibit No. 1, Statement of Defence of Daniel Lindeborg, 18th October, 1928. —*Continued.*

6. This Defendant denies each and every other allegation set forth in Paragraph 4 of the Statement of Claim.

7. This Defendant denies each and every allegation set forth in Paragraph 5 of the Statement of Claim.

8. As to Paragraph 6 of the Statement of Claim, this Defendant admits that James Proudfoot, Hiram Stevenson, Daniel Lindeborg and Andrew Lindeborg agreed together to group and consolidate a number of claims held by them into a group to be known as the Big Missouri Group, but denies that such grouping agreement was in accordance with any agreement whatsoever with the Plaintiff, and save as aforesaid this Defendant denies each and every allegation set forth in Paragraph 6 of the Statement of Claim.

9. This Defendant admits that on or about the 8th day of December, 1909, James Proudfoot, Hiram Stevenson, Andrew Lindeborg and Daniel Lindeborg gave an option on the Big Missouri Group as alleged in Paragraph 7 of the Statement of Claim, and further admits that the plaintiff was paid the sum of $100.00 as alleged in Paragraph 7 of the Statement of Claim but states that this and all other moneys paid to the Plaintiff were voluntary gratuities and were not made in pursuance of any agreement whatsoever and except as aforesaid this Defendant denies each and every allegation set forth in Paragraph 7 of the Statement of Claim.

10. This Defendant denies each and every allegation set forth in Paragraph 8 of the Statement of Claim and further says that any moneys that were paid to the Plaintiff were voluntary gratuities and were not made in pursuance of any agreement.

11. As to Paragraph 9 of the Statement of Claim, this Defendant says that James Proudfoot died as alleged on or about the 22nd day of December, 1910, and that the defendant Duncan C. Barbrick was appointed administrator of his estate.

12. This Defendant admits the granting of the option referred to in Paragraph 10 of the Statement of Claim, but denies that the Plaintiff had no knowledge thereof.

13. As to Paragraph 10(a) of the Statement of Claim, this Defendant says that the mineral claims composing the Big Missouri Group varied from time to time as claims were from time to time added thereto and the same have now been all crown granted;

otherwise, this Defendant denies each and every allegation set forth in Paragraph 10(a) of the Statement of Claim.

14. This Defendant denies that the Plaintiff did not have knowledge of the option to Hendrickson but, otherwise, admits the allegations in Paragraph 11 of the Statement of Claim.

15. This Defendant admits that Hiram Stevenson was killed in action in France and that the Defendant Laura McEwan has been appointed administratrix of his estate; and also admits that Andrew Lindeborg has died and the Defendant, Daniel Lindeborg, has been granted administration of his estate.

16. This Defendant denies that the sum of $275,000.00 was in the option to Standard Mines Company and further denies that the sum of $275,000.00 has been paid to the Defendants as alleged in Paragraph 13 of the Statement of Claim, or at all, but, otherwise, admits the allegations set forth in Paragraph 13 of the Statement of Claim.

17. This Defendant admits that the Defendants have refused to pay over to the Plaintiff one-third share of moneys received in payment for the Big Missouri Group of mineral claims and admits that they have from time to time paid the Plaintiff various sums to a total of $364.20 but alleges that all such last mentioned payments were voluntary gratuities and he denies each and every other allegation set forth in Paragraph 14 of the Statement of Claim.

18. This Defendant says that the fact is that in or about 1909 James Proudfoot and Hiram Stevenson in conversation with the Plaintiff at Queen Charlotte Islands informed the Plaintiff that they, the said Proudfoot and Stevenson, intended to prospect for mineral in the neighborhood of Stewart, whereupon the Plaintiff informed them that he had a mineral claim there by the name of the "Big Jumbo" but that he did not intend to return to that district and was not going to keep up the assessment work on such claim and intended to abandon it, so they were at liberty to locate it for themselves if they so desired; and the plaintiff did abandon the said mineral claim by failing to do or record assessment work thereon whereby the ground became open for location and was subsequently located and recorded by Hiram Stevenson and Daniel Lindeborg under the name of the "Big Missouri Mineral Claim" and the Plaintiff was informed thereof and never pro-

tested or objected or made any claim in respect to any alleged agreement until shortly before the commencement of this action.

19. The Plaintiff was at all times, at and after the year 1909, fully aware that the owners of the Big Missouri Group were dealing with the same and assuming to dispose of same without regard to any claim of the Plaintiff and without consulting him as to any disposition of the property and were assuming to dispose of the moneys received in respect thereto without regard to any such agreement as alleged in Paragraph 4 of the Statement of Claim, and the Plaintiff was further aware of the death of James Proudfoot and Hiram Stevenson yet at no time until shortly before the commencement of this action did the Plaintiff make any claim that there was any such oral agreement as set forth in Paragraph 4 of the Statement of Claim, nor did he ever present any claim for an accounting against the administrators of any of the estates of such deceased persons, nor did he ever offer or submit to pay any of the costs, charges and expenses of and incidental to the development of the said property; and this Defendant says that by reason of the laches acquiescence and delay of the Plaintiff in asserting any such claim in respect to the oral agreement alleged in Paargraph 4 of the Statement of Claim he should not now be heard to claim any interest in the Big Missouri Group of mineral claims nor the profits derived therefrom.

20. This Defendant says that if the late James Proudfoot and the late Hiram Stevenson, or either of them, ever assumed to make any agreement whatsoever with the Plaintiff, this Defendant was never informed of the fact and neither James Proudfoot nor Hiram Stevenson ever had any authority to enter into any contract on behalf of this Defendant, nor had either of them any authority at any time to enter into any contract on behalf of the late Andrew Lindeborg, deceased.

DATED at Vancouver, B. C., this 18th day of October, A.D. 1928.

"MACDONALD & PEPLER,"
Solicitors for the Defendant,
Daniel Lindeborg.

To: The above named Plaintiff
and to P. J. Sinnott, his solicitor.

Exhibit No. 1, Statement of Defence of D. C. Barbrick and Laura McEwan, 18th October, 1928.

EXHIBIT No. 1

Statement of Defence of D. C. Barbrick and L. McEwan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff;

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

The same as the Statement of Defence of Daniel Lindeborg (Exhibit 1) save that Paragraph 20 of said Exhibit 1 is omitted.

EXHIBIT No. 25

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 25.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

Nelson, B. C., Oct. 23, '28.

Macdonald & Pepler
Barristers & Solicitors
Vancouver, B. C.

Dear Sirs:—

Your letter of Oct. 15th safely to hand and I was so glad and thankful to learn that Mr. Lindeborg was steadily improving, and sincerely hope by now he is very much better.

Only today I was served with these papers which I am enclosing to you in this letter. They haven't been in any hurry, or perhaps the papers have been delayed for they were sent to our old address at Koch Siding, B. C. As you have already entered an appearance for me perhaps the delay in serving these papers is not important, but thought best to forward them to you as soon as possible.

Kindly convey again to Mr. Lindeborg our sincerest wish for his continued steady improvement and hope to hear by next letter he is ever so much better.

Very sincerely yours,

L. McEWAN.

EXHIBIT No. 26

Exhibit No. 26, Letter, Macdonald & Pepler to Laura McEwan, 25th October, 1928.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 26
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

25 October, 1928

Mrs. Laura McEwan,
Nelson ,B. C.

Dear Madam: re Harris v Lindeborg

Your letter of 23rd instant received enclosing Writ of Summons and Garnishee Orders served upon you herein. As we had already entered an appearance for you the serving of these upon you was unnecessary and of no importance.

The writer paid a visit to Mr. Lindeborg in hospital yesterday and found him much improved but it will be some weeks yet in all probability before he is really able to properly attend to business. In the meantime I have written the Plaintiff's solicitor in Victoria advising him of Mr. Lindeborg's illness and the matter is not being pressed in consequence. I gather that the doctor expects him to remain in hospital for a week or two yet and then will consent to his going home but will require that he lives very carefully for a further period.

Yours faithfully,
MACDONALD & PEPLER,
Per.....

RMM:M

EXHIBIT No. 1

17

Exhibit No. 1, Particulars of Statement of Claim of William F. Harris, 5th November, 1928.

Particulars of Statement of Claim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff;

—and—

DANIEL LINDEBORG, Administrator of the Estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, Administrator of the Estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the Estate of Hiram Stevenson, deceased; and DANIEL LINDEBORG,

Defendants.

PARTICULARS PURSUANT TO DEMAND

The Plaintiff, pursuant to the demand for Particulars of the Defendants, dated 8th October, A.D. 1928, says as follows:

1. The mineral claims referred to in paragraph 1 of the Demand for Particulars with their dates of location and record as constituting the Jumbo Group referred to in Paragraph 3 of the Statement of Claim, are as follows: Jumbo mineral claim, No. 669, located 25th July, 1904, recorded 8th August, 1904; Silver Lake mining claim No. 668, located 4th July, 1904, recorded 8th August, 1904; Ivanhoe mineral claim No. 670, located 29th July, 1904, recorded 8th August, 1904; St. Louis mineral claim No. 671, located 1st August 1904 recorded 8th August 1904.

2. The names of the associates of James Proudfoot and Hiram Stevenson referred to in Paragraph 2 of the Demand for Particulars and in Paragraph 4 of the Statement of Claim, are Daniel Lindeborg and Andrew Lindeborg.

3. The names and dates of location and record of the other claims grouped with the plaintiff's claim as alleged in Paragraph 4 of the Statement of Claim, are as follows: Tip Top No. 443-3, located 23rd July, 1907, recorded 5th August, 1907; Rambler No. 158-1, located 23rd August, 1904, recorded 7th September, 1904; Buena Vista No. 157-1, located 23rd August, 1904, recorded 7th December, 1904; Province No. 652-4, located 24th August, 1909, recorded August 28th, 1909; Jain No. 651-4, located 12th August, 1909, recorded 27th August, 1909; Golden Crown No. 442-3, located

In the Supreme Court of British Columbia

Exhibit No. 1, Particulars of Statement of Claim of William F. Harris, 5th November, 1928. —*Continued.*

23rd July, 1907, recorded 5th August, 1907; Winner No. 632-4, located 1st August, 1909, recorded 16th August, 1909; Kansas No. 621-4, located 9th August ,1909, recorded 10th August, 1909; Dauntless No. 656-4, located 16th August, 1909, recorded 30th August, 1909.

DATED at Victoria, British Columbia, this 5th day of November, A.D. 1928.

"P. J. SINNOTT,"

Solicitor for Plaintiff.

To: The above-named Defendants
and to their Solicitors, Messrs. Macdonald & Pepler,
and to W. H. Bullock-Webster, Esq.

10

EXHIBIT No. 1

179

Exhibit No. 1, Formal Judgment, 18th June, 1929.

Judgment

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

WILLIAM F. HARRIS,

Plaintiff,

—and—

DANIEL LINDEBORG, administrator of the estate of Andrew Lindeborg, deceased; DUNCAN C. BARBRICK, administrator of the estate of James Proudfoot, deceased; LAURA McEWAN, administratrix of the estate of Hiram Stevenson, deceased, and DANIEL LINDEBORG,

Defendants.

(Victoria
July 6, 1929
Registry.)
B. C.
L. S.
$1.10

Tuesday the 18th day of June, 1929.

JUDGMENT

THIS CAUSE having on the 13th and 14th days of May, A.D., 1929, been tried before the Honourable the Chief Justice without a jury, in the City of Victoria in the Province of British Columbia, in the presence of Mr. A. H. Maclean, K.C., and Mr. P. J. Sinnott of counsel for the plaintiff, and Mr. R. M. Macdonald and Mr. W. H. Bullock-Webster of counsel for the defendants; AND UPON HEARING the evidence adduced on behalf of the plaintiff and the defendants respectively AND UPON HEARING counsel aforesaid;

THIS COURT DOTH DECLARE that the defendants are trustees for the plaintiff of an undivided one-third of all moneys received from the sales, options, or otherwise of those certain mineral claims known as the Big Missouri Group situated at Portland Canal in the Province of British Columbia.

THIS COURT DOTH ORDER AND ADJUDGE that the plaintiff in respect of his claim is entitled to and doth hereby recover judgment against the defendants for the sum of $100,000.00

In the Supreme Court of British Columbia

Exhibit No. 1, Formal Judgment, 18th June, 1929. —*Continued.*

and costs to be taxed, such sum and costs, so far as regards the Defendant Daniel Lindeborg as Executor of the estate of Andrew L. Lindeborg, deceased; the defendant Duncan C. Barbrick as Administrator of the estate of James Proudfoot, deceased; and the defendant Laura McEwan as Executrix of the estate of Hiram Stevenson, deceased, to be levied of the goods and chattels which were of the above-named Andrew Lindeborg, James Proudfoot, and Hiram Stevenson, all deceased, at the times of their respective deaths and which shall thereafter have come and hereafter come in the hands of the respective defendants as their executors or administrators if they have so much thereof in their hands to be administered and if they have not so much thereof in their hands to be administered then the costs to be levied of the proper goods and chattels of the defendants.

BY THE COURT,

"B. H. Tyrwhitt Drake,"
Registrar.

(Seal)

Checked
By "H.C.S."

Appd.
"R.M.M."

A.M.C.J.
Entered
Vol. 6, Fol. 205
By "H.C.S."

EXHIBIT No. 49

SC1216/31 Exhibit No. 49, Account E. P. Davis & Co. with D. Lindeborg, 5th November, 1929.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 49
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar

601 Royal Trust Building

Vancouver, B. C., Novr. 5th 1929.

D. Lindeborg, Esq.,
3308, 37th Ave. West,

In account with

E. P. DAVIS & CO.

Barristers & Solicitors

1929
Octr. 9, re Harris v Lindeborg et al.

Counsel fee to Mr. Davis on argument of appeal on 7th, 8th and 9th October, when action dismissed as against you and judgment reserved as against Stevenson and Proudfoot estates, including all interviews with you and Mr. R. M. Macdonald, and advising in connection with matter: $1500.00

Cr.

By cheque on account	750.00
To balance due:	750.00

Received Payment
With thanks
Nov. 6, 1929
E. P. Davis & Co.
Per G.J.E.

Exhibit No. 1, Judgment of the Court of Appeal, 7th January, 1930.

EXHIBIT No. 1

195

Court of Appeal Judgment

COURT OF APPEAL

Between:

WILLIAM F. HARRIS,
Plaintiff (Respondent),

—and—

DANIEL LINDEBORG, Administrator of the estate of Andrew Lindeborg, deceased; LAURA McEWAN, representing for the purposes of this action the estate of James Proudfoot, deceased; LAURA McEWAN, Administratrix of the estate of Hiram Stevenson, deceased, and DANIEL LINDEBORG,
Defendants (Appellants).

B.C.L.S.
$1.10
(Vancouver
Mar. 12, 1930
Registry)

CORAM:

THE HONOURABLE THE CHIEF JUSTICE OF BRITISH COLUMBIA
THE HONOURABLE MR. JUSTICE MARTIN
THE HONOURABLE MR. JUSTICE GALLIHER
THE HONOURABLE MR. JUSTICE McPHILLIPS
THE HONOURABLE MR. JUSTICE M. A. MACDONALD

TUESDAY, the 7th day of January, 1930.

THIS APPEAL coming on for hearing at Vancouver on the 7th, 8th and 9th days of October, 1929, in the presence of Mr. E. P. Davis, K.C., of counsel for the Appellant Daniel Lindeborg and Mr. R. M. Macdonald of counsel for the other Appellants and Mr. P. J. Sinnott of counsel for the Respondent, and UPON READING the Appeal Book and UPON HEARING what was alleged by counsel aforesaid, this Court was pleased to order that the same should stand over for judgment and the same coming on for judgment this day;

Court of Appeal Judgment

Exhibit No. 1, Judgment of the Court of Appeal, 7th January, 1930. —*Continued.*

THIS COURT DOTH ORDER AND ADJUDGE that this Appeal be and the same is hereby allowed, and the judgment appealed from be set aside.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that as against the Defendant Daniel Lindeborg, Administrator of the Estate of Andrew Lindeborg, deceased, and Daniel Lindeborg, this action be and the same is hereby dismissed with costs.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that as against the Defendant Laura McEwan, representing for the purpose of this action the Estate of James Proudfoot, deceased and Laura McEwan Administratrix of the Estate, of Hiram Stevenson, deceased, the Plaintiff recover the sum of $15,789.00, being five ninety-fifths (5/95's) of $300,000.00 less the sum of $521.40 heretofore paid to the Plaintiff on account thereof.

AND THIS COURT DOTH FURTHER ORDER that the Garnishee orders issued herein by the Plaintiff be and same are hereby discharged.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the Respondent do pay to the Appellants their costs of this Appeal and do further pay to the Appellant Daniel Lindeborg his costs of the Trial and that the Appellant Laura McEwan do pay to the Respondent his costs of the Trial on the scale appropriate to a judgment hereby awarded to him.

BY THE COURT.

"J. F. Mather,"
Registrar.

"Settled
J.F.M.R.
Court of Appeal
British Columbia
J.A.M., C.J."

Entered
Mar. 12, 1930
Order Book, Vol. 8, Fol. 96
Per "A.L.R."

EXHIBIT No. 11

Exhibit No. 11, Letter to Departmental Solicitor, Victoria, 13th January, 1930.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 11.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar

January 13th, 1930

Departmental Solicitor, 10
Parliament Buildings,
Victoria, B. C.

Dear Sir:— Re Estate of Andrew Lindeborg

Your letter of 10th inst. addressed to Daniel Lindeborg has been handed by him to me with a request that I reply thereto explaining this matter.

Mr. Andrew Lindeborg in his lifetime was not the owner of any interest whatsoever in the Big Missouri. The Big Missouri was one claim owned by Daniel Lindeborg and the estate of Hiram Stevenson, deceased. From time to time this claim was bonded 20 with other claims owned by Proudfoot, Hiram Stevenson, Andy Lindeborg and Dan Lindeborg but there was not community of ownership amongst these various parties in one another's claims. The last bond given was after Andrew Lindeborg's death and his claims were included in that bond by Daniel Lindeborg who was the sole beneficiary under the Will of Andrew Lindeborg. At the time of Andrew Lindeborg's death the claims standing in his name were set forth and valued and the owners of other claims which were ultimately combined in the group bonded to the Big Missouri Mining Co. had no interest in his claims, nor had he any 30 interest in theirs.

I trust the above sufficiently explains the matter, but if there is any further information desired please let me know.

Yours very truly,
etc.

EXHIBIT No. 58

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 58.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

SC1216/31

Exhibit No. 58
Letter,
Dan Lindeborg
to Mrs. Mc-
Ewan, 25th
January, 1930.

Vancouver, B. C., Jan. 25, 1930.

Dear Mrs. McEwan:—

Been going to write you for some time but have delayed thinking that the decission of the Court of Appeal would be settled, of which Mr. Macdonald no doubt have wrote you. It seems that in giving Judgment did not set out cost as well as some other points that not clear so as Macdonald said when I talked to him a few days ago they will have to go before the Court again and get those thing set out clear, it seems that this is not an unusual proceeding tho it seems rather odd to me.

You perhaps know that Mr. Martin from Seattle seen Mr. Macdonald day after Judgment was rendered and offered to settle for $50,000.00 and if he could not get that they would appeal to the Supreme Court of Canada, Macdonald told him (so he told me) that he would not get a cent more than the Judgment called for, so now we will have to wait and see. I told Macdonald to keep you fully posted on everything going on. As soon as judgment is cleared up we will have to get together and see if the terms are satisfactory or not, this we probably can do by correspondence, of course if they appeal then of course we have to defend and it wont surprice me a very big lot if the whole action is dismissed with cost, however, they will have to put up the cost for the appeal if they take it and it will amount to quite a lot, good many people think they will not appeal but you can never tell—until afterward.

We have had a very cold three weeks here and its still going strong, an ideal winter for coal dealers and plumbers but rather hard on the pocket book, it is thousands of idle men in town and a great deal of suffering.

I should think that Fred McEwan during this cold spell is unable to carry on with the road work and is taking it easy at home stoking the furnace etc.

Hoping this will find you all in good health and a bright outlook for the year 1930.

Sincerely,
DANIEL LINDEBORG.

If anything important will let you know at once. D. L.

Exhibit No. 83, Letter, L. McEwan to D. Lindeborg, 2nd April, 1930.

EXHIBIT No. 83

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 83.
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

49—9/22/32, J.

Nelson, B. C., Apr. 2, '30.

Mr. D. Lindeborg,
Vancouver, B. C.

Dear Mr. Lindeborg:—

Have intended writing ever since I received your letter—was so hopeful then the case was sure to be settled for I had no idea myself that Harris would think of taking the suit to Ottawa. Looks now, though as if they mean to, without a doubt, since they have put up bonds to cover the costs of Appeal.

I sincerely try to look on the bright side, but get terribly worried sometimes though, and how I wish we lived near you and we could get together and talk it over— What does Mr. Davis think about it now? I'll be so glad to get any word of encouragement Mr. Lindeborg and if you've heard from the Proudfoot family since Mr. Barbrick's death—or any word from them since they've heard the case is to be carried to Ottawa—

Fred has been out on the road working about two weeks now. Kept so cold at night until then, they couldn't do anything— He is working on the new Kuskanook highway and they hope to complete it this year.

Was home Monday night, but had to go back early Tuesday morning—

We were glad to hear when the details of the decision of the Court of Appeal last Fall were given out, most of the costs fell on Harris, and to know they did not hold you for anything— Do you think after Harris' share of costs were paid he would have had much left?

How is your health now Mr. Lindeborg? Do hope you are enjoying fine weather at the Coast—the days are nice and warm here, but nights—very cool.

Will be so glad to hear from you soon again. Kindest regards from all.

Yours very sincerely,

L. McEWAN

EXHIBIT No. 59

SC1216/31 Exhibit No. 59, Letter, Dan Lindeborg to Mrs. McEwan, 7th April, 1930.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 59.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

3308 - W. 37th
Vancouver, B. C., April 7, 1930

Dear Mrs. McEwan:—

Your letter of April 2nd rec. and was glad to hear from you, I was going to write to you in any case when I got the news of the last effort in the court was up a few days ago, it was about the the money. As you know the Court of Appeal ordered the garanshee discharged and Mcdonald applied for the money this they objected to of course and succeeded, I don't think they would have put up bonds for Cost of Appeal to Supreme Court of Canada so soon only for that they had to show good faith, however it does not neccessarly mean that they will go ahead as these bonds can be withdrawn any time and it only cost $500.00 if they had been in any hurry about their appeal they would have put up their bond and given notice of appeal as soon as they knew what the Judgment was and then they could have had it come up before the higher court at the May sitting but as it is it cant come up until the October sitting, it looks to me as if they are playing for time hoping that we may loosen up and offer a settlement or something and my idea of that is not a cent more than Judgment calls for.

The real expence will commence when they get out the Appeal books that will cost near $1000 as near as I can find out then they have cost for lawyer etc and so they have a bigger chance to loose than to win so they wont have nothing much to go on.

I have not spoken to Mr. Davis since the Appeal was started only so far that I have said I wanted him to go to Ottawa and represent me, I expect to see him and make arrangement soon. Mr. Davis said after Judgment was rendered in the Appeal Court that he did not think they would appeal the case and that would indicate to me that he did not think they could better themselves any, however, you cant tell what a court will doo or the outcome until afterwards. It is one great thing in our favor and that is, We are right and we know it and they know it and that

In the Supreme Court of British Columbia.

Exhibit No. 59, Letter, Dan Lindeborg to Mrs. McEwan, 7th April, 1930. —*Continued.*

being the case they cant have the same confidence in the final outcome as we have. Blackmailers as a rule dont have much moral courage.

As regards Harris getting much out of it after Martin takes his fifty per cent or more and Harris pay all the cost it wont be a fortune left for him.

I have not heard from the Proudfoots since Barbricks death but Mcdonald has been tuch with them but I dont think he has heard from them since they entered appeal so I dont know what their opinion is about the case.

Now Mrs. McEwan dont worry over this case at all it will cost something to go to Supreme Court of Canada but I dont think we can lose anything by it especially as they have to pay all initial expenses.

The spring here has been very late much more so than last year only a few of the early flowers out so far, we have had heavy rain the last 3 days and the nights have been cold for a long time but it will no doubt turn for the better soon.

My health has been very good for some time and if it was not for old age I think I would get as good as ever again.

Give my best regards to Fred and boys and girls.

Sincerely,

DAN LINDEBORG

Its to bad we are so far apart or I would run up and see you ocasionally but if anything important happens will let you know at once and I have told Mcdonald to keep you posted on the case as it goes along.

D. L.

EXHIBIT No. 48

SC1216/31

Exhibit No. 48, Letter, Jas. Ralston to Daniel Lindeborg, 11th October, 1930.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 48.
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

DAVIS, PUGH, DAVIS, HOSSIE, RALSTON & LETT
E. P. Davis, K.C., J. S. W. Pugh
D. N. Hossie, J. C. Ralston
Sherwood Lett, D. G. Marshall
Address all Communications
to "E. P. Davis & Co."
Barristers, Solicitors &c.

Telephone
Seymour 5990
Cable Address
"Damarell"
Codes
A 1 Telegraphic
Western Union
Bentley's

Royal Trust Building
626 Pender Street W.
Vancouver, B. C.

Daniel Lindeborg, Esq.,
3308 - 37th Ave., West.
Vancouver, B. C.

October 11th, 1930.

Dear Dan:

Re: Harris vs Lindeborg

Enclosed herewith please find copy of wire we have received from our Agents in Ottawa. We expect a letter explaining the position in the course of a few days and I will then communicate with you further.

It seems to us that the worst that can happen will be that the Judgment of the British Columbia Appeal Court will be sustained.

JCR/M
Encl.

Yours truly,
JAS. RALSTON

I COPY

Ottawa Ont 10 Oct 10 1930.
E. P. DAVIS, K.C. 10 PM.
626 Pender St West, Vancouver B.C.
Harris and Lindeborg reserved stop everyone got a hostile reception stop Court finally heard us on our liability to Harris on basis one nineteenth payable to him stop probable outcome appeal dismissed cross appeal dismissed without costs if we are lucky or one third of one half if we are not stop best regards.

E. F. NEWCOMBE.

EXHIBIT No. 2

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 2.
McEwan vs. Cosens et al
Put in by Pft. Date 23/11/32.
A. A. C., Registrar.

IN THE SUPREME COURT OF CANADA

Tuesday the 23rd day of December, A.D. 1930

PRESENT:

THE RIGHT HONOURABLE MR. JUSTICE DUFF, P.C.
THE HONOURABLE MR. JUSTICE RINFRET
THE HONOURABLE MR. JUSTICE LAMONT
THE HONOURABLE MR. JUSTICE SMITH
THE HONOURABLE MR. JUSTICE CANNON

BETWEEN:

WILLIAM F. HARRIS,
(Plaintiff) Appellant

AND:

DANIEL LINDEBORG, Administrator of the estate of Andrew Lindeborg, deceased;
LAURA McEWAN, representing for the purposes of this action the Estate of James Proudfoot, deceased;
LAURA McEWAN, administratrix of the estate of Hiram Stevenson, deceased and
DANIEL LINDEBORG,
(Defendant) Respondents.

The appeal of the above named Appellant and the cross appeal of the Respondent, Laura McEwan, representing for the purposes of this action the Estate of James Proudfoot, deceased, and Laura McEwan, administratrix of the estate of Hiram Stevenson, deceased, from the judgment of the Court of Appeal for the Province of British Columbia pronounced in the above cause on the Seventh day of January in the year of our Lord One thousand nine hundred and thirty, setting aside the judgment of the Honourable Chief Justice Morrison of the Supreme Court of the Prov-

ince of British Columbia, rendered in the said cause on the Eighteenth day of June, in the year of Our Lord One thousand nine hundred and twenty-nine, having come on to be heard before this Court on the Ninth and Tenth days of October in the year of Our Lord One thousand nine hundred and thirty in the presence of Counsel as well for the Appellant as for the Respondents and Cross-Appellants, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the appeal should stand over for Judgment and the same coming on this day for Judgment.

THIS COURT DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed as against the Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proudfoot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased; that the Judgment of the Court of Appeal for the Province of British Columbia should be and the same was reversed and set aside as against the said Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proudfoot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased, and that Judgment should be entered in the said Supreme Court of British Columbia in favour of the Appellant against the Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proudfoot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased, for the sum of Fifty thousand ($50,000.00) dollars, such amount to be paid to the said Appellant out of the monies paid into the Supreme Court of British Columbia, pursuant to an Order of the Honourable Mr. Justice Murphy made herein, bearing date the 4th day of July, A.D. 1929; that the Judgment of the Court of Appeal for the Province of British Columbia dismissing with costs the action of the Appellant as against the Respondent, Daniel Lindeborg, personally and as Administrator of the Estate of Andrew Lindeborg, deceased, should be and the same was affirmed and that the said Appeal as against the said Respondent, Daniel Lindeborg, personally and as Administrator of the Estate of Andrew Lindeborg, deceased, should be and the same was dismissed with costs; and that the cross-appeal of the said Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proudfoot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased, should be and the same was dismissed with costs, to be paid by the said Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proud-

In the Supreme Court of Canada.

Judgment, 23rd December, 1930. —*Continued.*

foot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased, to the said Appellant.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the said Respondent, Laura McEwan, representing for the purposes of this action the estate of James Proudfoot, deceased, and Laura McEwan, Administratrix of the estate of Hiram Stevenson, deceased, should and do pay to the said Appellant, the costs incurred by the said Appellant as well in the Supreme Court of British Columbia and in the Court of Appeal for the Province of British Columbia as in this Court. 10

Exhibit No. 86, Extract from Daily Province, 23rd December, 1930.

EXHIBIT No. 86

SC1216/31

Supreme Court of B. C.
Vancouver Registry.
Exhibit No. 86.
McEwan vs. Cosens et all
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

Daily Province, Dec. 23rd, 1930 20

Ottawa, Dec. 23.

On appeal of Wm. F. Harris, pioneer prospector of Port Angeles, the Supreme Court of Canada awarded him Judgment of $50,000 in connection with sale of the Big Missouri Mine in the Salmon River District.

At the trial in Victoria before Chief Justice Morrison, Harris was allowed $100,000 but the Court of Appeal reduced this to $16,000.

Plaintiff claimed a third interest in money received from the sale of Big Missouri and Kansas Mineral Claims on Salmon River 30 twelve miles from the head of Portland Canal. He alleged that the claims were located by him twenty-five years ago and that subsequently, in return for assessment work, James Proudfoot and Hiram Stevenson were given third interests in the properties. The new partners brought in the business Andrew Lindeborg and Daniel Lindeborg. Proudfoot, Stevenson and Andrew Lindeborg have since died.

Mr. Knox Walkem was Solicitor for the successful Appellant.

RECORD

In the Supreme Court of British Columbia

SC1216/31 Exhibit No. 46, Letter, J. W. deB. Farris to A. H. MacNeill, 25th February, 1931.

EXHIBIT No. 46

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 46.
McEwan vs. Cosens et all
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

FARRIS, FARRIS, STULTZ & SLOAN
Barristers & Solicitors
J. W. deB. Farris K.C.
W. B. Farris, K.C.
R. S. Stultz
Gordon McG. Sloan

Telephone Seymour 3701-3702
Cable Address "Farem"
Code Western Union
Five Letter Edition
Suite 1508 Standard Bank Bldg.
Vancouver, B.C.

February 25th, 1931.

A. H. MacNeill, Esq., K.C.,
602 West Hastings Street,
Vancouver, B. C.

Dear Sir:—

I am acting for Mrs. Laura McEwan, who is the representative of the Estates of James Proudfoot and Hiram Stevenson.

Mrs. McEwan was, in these capacities, a defendant, along with Daniel Lindeborg personally and as administrator of the Estate of Andrew Lindeborg, in an action brought in the Supreme Court by William F. Harris. This action was tried before Chief Justice Morrison, who awarded $100,000.00 to the Plaintiff as against all Defendants. On appeal to the Court of Appeal of this Province the amount was reduced to $10,000.00. A further appeal was taken to the Supreme Court of Canada. Judgment has been given against Mrs. McEwan for $50,000.00, and by that Judgment the action stands dismissed against the Lindeborgs. We understand that under a Garnishee $100,000.00 was paid into Court, and this money, or so much of it as belongs to Mrs. McEwan, is liable for the Judgment.

My instructions are that this action has been conducted by Mr. R. M. Macdonald as Solicitor for all the Defendants and that these Defendants have throughout had an understanding and arrangement that any liability for principal sum or costs found against the Defendants, or any of them, would be borne in equal proportions by all the Defendants as between themselves. It would follow from this arrangement that while as against Harris Mrs. McEwan only is liable on the Judgment, that as between the party

In the Supreme Court of British Columbia

Exhibit No. 46, Letter, J. W. deB. Farris to A. H. MacNeill, 25th February, 1931. —*Continued.*

Defendants she, as the representative of the two former partners, of whom there were four, is liable only for half the amount. The position taken by Mrs. McEwan has already been placed before you verbally and before your clients, the executors of the Lineborg Estate, and I understand that you have advised your clients against acceding to our claim.

The purpose of this leter at this juncture is two-fold:

FIRST: To advise you that Mrs. McEwan is not in a position single handed to continue the proceedings by way of appeal to the Privy Council and therefore is about to abandon these proceedings and to effect the best settlement possible with Harris. In making this settlement you will please be advised therefore that formal claim is now made upon your clients to provide half the amount necessary to settle this claim.

SECOND: I understand it is the desire of all parties to have this question of liability settled as expeditiously as possible. I therefore suggest that we bring a new action, making claim for the above mentioned amount; that you accept service; and that we have the matter tried at an early date. In the meantime there is $50,000.00 remaining in Court after Harris has been paid the face value of his Judgment. If the Lindeborg Estate is not responsible for any portion of the Judgment you will be entitled to payment out of the full amount. If, however, our contention is right, half of this money should be paid out to Mrs. McEwan. I would suggest therefore that no attempt be made to withdraw more than half of the amount.

The settlement being arrived at between Harris and Mrs. McEwan is that the Privy Council proceedings will be dropped; Harris will be entitled to an order for payment out of Court of the sum of $50,000.00, together with accumulated interest thereon. Mr. Walkem, as Solicitor for Harris, will pay $1,000.00 towards the Lindeborg costs and give his personal undertaking to pay the balance after taxation (I understand from you verbally that on this undertaking there will be no objection on behalf of the Lindeborgs to the payment of the $50,000.00 to Harris). In order to effect this settlement Mrs. McEwan is agreeing with Harris to pay half of the balance of the costs he will have to pay to the Lindeborgs. You will understand that this is done as the only method of bringing about a settlement which has secured for Mrs. McEwan a reduction in interest and the release of her costs owing to Lindeborg.

Yours truly,

JWdeBF/EA.

J. W. deB. FARRIS

EXHIBIT No. 44

SC1216/31
H152/1928.

Exhibit No. 44, Terms of Settlement, 26th February, 1931.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 44
McEwan vs. Cosens et al
Put in by Deft. Date 23/11/32.
A. A. C., Registrar.

British Columbia
Law Stamp
10 cents

Victoria
Feb. 27, 1931
Registry

IN THE SUPREME COURT OF CANADA

Between:

WILLIAM F. HARRIS,
(Plaintiff) Appellant.

—and—

DANIEL LINDEBORG, administrator of the estate of Andrew Lindeborg, deceased; LAURA McEWAN, repreresenting for the purposes of this action the estate of James Proudfoot, deceased; LAURA McEWAN, administratrix of the estate of Hiram Stevenson, deceased, and DANIEL LINDEBORG,
(Defendants) Respondents.

The above entituled action having been determined by a decision filed in the Supreme Court of Canada, the Plaintiff (Appellant) and the Defendant (Respondent) Laura McEwan hereto hereby agree to a settlement with respect thereto as follows:

1. That said decision be accepted as final and conclusive.

2. That said parties abandon and disavow the taking of any appeal therefrom.

3. That each of the respective parties hereto waive, cancel and discharge all rights to recover costs in either the Supreme Court of British Columbia, the Court of Appeal or the Supreme Court of Canada, it being understood that each party will pay his or her own costs of and all proceedings in all of the said Courts.

In the Supreme Court of British Columbia

Exhibit No. 44, Terms of Settlement, 26th February, 1931. —*Continued.*

4. That the plaintiff pay to R. M. Macdonald for the account of the Daniel Lindeborg Estate costs the sum of One Thousand dollars ($1,000.00) and that the Defendant Laura McEwan will pay to the plaintiff one-half the balance (if any) of the costs found payable by the plaintiff to the defendant Lindeborg on taxation.

5. That the plaintiff shall withdraw fifty thousand dollars ($50,000.00) of the money paid into Court in the above entituled action, together with all accumulated interest on the said sum of Fifty thousand dollars ($50,000.00), and the plaintiff shall further be entitled to any interest on the said Fifty thousand dollars ($50,000.00) which accumulated in the Canadian Bank of Commerce prior to payment into Court of the said money.

6. That an order be made in the Supreme Court of British Columbia directing payment out as aforesaid.

7. That the Canadian Bank of Commerce be also directed to pay out to the Plaintiff the amount payable hereunder of the accumulated interest on deposit in the said Bank on the said sum of Fifty thousand dollars ($50,000.00).

8. The parties hereby agree to consent to and approve of all orders necessary for the carrying out of the provisions of this settlement.

9. It is further stipulated that all moneys deposited by either party as security for costs shall be returned to the party depositing the same, and all bonds furnished by either party to secure the payment of costs shall be released and discharged.

DATED this 26th day of February, A.D. 1931.

KNOX WALKEM,
Solicitor for the plaintiff.

R. M. MACDONALD,
Solicitor for the defendants.
LAURA McEWAN.

Approved:
J. W. deB. Farris

EXHIBIT No. 31

SC1216/31
16039

Exhibit No. 31, Letters Probate and Will of Daniel Lindeborg, 14th May, 1930.

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 31.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

British Columbia
Law Stamp
$2.50

IN THE SUPREME COURT OF BRITISH COLUMBIA
IN PROBATE

Vancouver Registry.

Be it known that on the ninth day of February, in the year of our Lord one thousand nine hundred and thirty one, the last Will and Testament (a copy whereof is hereunto annexed) of.....
Daniel Lindeborg .....
late of the City of Vancouver, Province of British Columbia, deceased, who died at the said City of Vancouver on or about the 6th day of January, 1931, was exhibited, read, and proved, before a Judge of the Supreme Court of British Columbia, and administration of all the estate which by law devolves to and vests in the personal representative of the said deceased was granted to Arthur Cosens, Verena Mabel Cosens and John Hubert Hemsworth, all of the said City of Vancouver, the Executors in the said Will named,.....
.....
.....
.....

The Supreme Court of British Columbia
Vancouver Registry

GIVEN under the Seal of the said Court this 31st day of March, A.D. 1931.

Vancouver Registry
Mar. 31, 1931.

H. BROWN,
Deputy District Registrar.

Estate sworn under $188,117.49
Probate Duty 6,756.97
Succession Duty 18,369.91

Extracted by Messrs. MacNeill, Pratt, MacDougall & Morrison
Solicitors.

THIS IS THE LAST WILL AND TESTAMENT of me, DANIEL LINDEBORG of 3308—37th Avenue West in the City of Vancouver in the Province of British Columbia. Prospector.

1. I HEREBY REVOKE all former Wills and Codicils by me at any time heretobefore made and declare this to be my last Will and Testament.

2. I APPOINT Arthur Cosens, his wife, Mrs. Cosens, and J. H. Hemsworth, now of the firm of Beaton and Hemsworth all of the City of Vancouver in the Province of British Columbia, to be the Executors and Trustees of this my Will.

3. I DECLARE that in the interpretation of this my Will the expression my "Trustees" shall (where the context permits) mean and include the trustee or trustees for the time being hereof, whether original or substituted.

4. I DIRECT my Executors to pay all my just debts, funeral and testamentary expenses as soon after my death as may be convenient.

5. I BEQUEATH to E. L. Dale, Esquire, of Hyder, Alaska, and Mrs. Dale, his wife, share and share a like or to the survivor or survivors of them one-half of my stock or shares in the Hyder Townsite Company together with all dividends due or accruing due at the date of my demise.

6. I BEQUEATH to my Trustees one-half of my stock or shares in the Hyder Townsite Company together with all dividends due or accruing due at the date of my demise, in trust, to be used in building and equipping or assisting to be built and equipped, a hospital in the Town of Hyder, Alaska, for the care of sick persons.

7. I DEVISE all my real estate which may be situate in the City of Vancouver to the said Arthur Cosens, his wife and children, share and share alike, and bequeath to them share and share alike all my personal effects such as household furniture, automobile, clothing, jewelry, and books.

8. I DEVISE all the residue of my real estate, and I BEQUEATH all the residue of my personal estate, as to the real estate, to the use of my trustees in fee simple, and as to my personal estate, unto my trustees absolutely, and I DIRECT my trustees to sell, call in and convert into money all such part of my real and personal estate as shall not consist of money.

9. I DIRECT that my trustees shall set apart out of the

proceeds of my estate the sum of Ten thousand dollars ($10,000.00) to the used in paying my funeral and testamentary expenses, Probate duties and Succession duties assessed at the time of proving this my Will and any unused portion of the said sum of Ten thousand dollars ($10,000.00) shall form part of my residuary estate.

10. I GIVE AND BEQUEATH to Mrs. Mary Scott, formerly of 2221 Guelph Street, Vancouver, British Columbia, and now of Tonkawa, Oklahoma, in the United States of America, the sum of Five hundred dollars ($500.00) free of Probate and Succession Duty.

11. I GIVE AND BEQUEATH to my housekeeper, Mrs. J. Dennis of the City of Vancouver in the Province of British Columbia, the sum of Three hundred and sixty dollars ($360.00) free of Probate and Succession Duty.

12. In the event of the residue of my estate realizing enough to pay all legacies of every kind hereinbefore provided for and leaving a surplus I DIRECT that my Trustees shall divide and pay the same as follows:

(a) To the said Arthur Cosens, his wife and children, share and share alike, one-third part of said surplus for their own use absolutely;

(b) As to the remaining two-thirds of the said surplus the same shall be divided into two equal parts. One such part I GIVE AND BEQUEATH to my brother, Eric Lindeborg, of Nornas, Sweden, and his lawful issue living at my death, to be divided amongst them share and share alike and such other part I GIVE AND BEQUEATH to the lawful issue of my sister, Anna Dahl of Krokom, Sweden, who shall be living at my death, to be divided amongst them share and share alike.

13. AND I DIRECT that any bequest made or moneys payable to any married woman under the terms of this my will, whether married before or after the receipt of such bequest or the payment of such moneys shall be the separate property of such married woman, and shall be entirely free from the control of her husband.

14. I DECLARE that my Trustees may postpone the sale, calling in and conversion of any part of my real or personal estate for such period of they may in their absolute discretion deem fit notwithstanding that it may be of a wasting speculative or reversionary nature.

In the Supreme Court of British Columbia

Exhibit No. 31, Letters Probate and Will of Daniel Lindeborg, 14th May, 1930. —*Continued.*

15. I DIRECT that any moneys liable to be invested by my Trustees may be invested in their names in any investments for the time being allowed by law for the investment of trust funds with liberty to vary and transpose the same from time to time.

16. My Trustees shall further have power at their uncontrolled discretion instead of acting personally to employ and pay any other person or persons to transact any business or to do any act, of whatever nature in relation to the trusts hereof including the receipt and payment of money without being liable for loss incurred thereby; and any Trustee being a person engaged in any profession or business may be so employed to act and shall be entitled to charge and be paid all professional or other charges for any act done by him or his firm in connection with the trusts hereof, including acts which a trustee could have done personally.

IN WITNESS WHEREOF I have hereunto set my hand this 14th day of May, A.D. 1930.

SIGNED, PUBLISHED AND DECLARED by the above-named testator as and for his last Will and Testament in the presence of us both being present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses.

"DANIEL LINDEBORG"

"R. M. Macdonald
807 Royal Trust Building,
626 Pender St. W.,
Vancouver
Solicitor."

"Ethel Fugler,
2618—8th Ave. West,
Vancouver, B. C.
Stenographer."

Vancouver
Mar. 31, 1931
B
Registry

The Supreme Court
of British Columbia
Vancouver Registry

EXHIBIT No. 47

SC1216/31 Exhibit No. 47, Letter, J. W. deB. Farris to A. H. MacNeill, 11th April, 1931.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 47.
McEwan vs. Cosens et al
Put in by Ptf. Date 23/11/32.
A. A. C., Registrar.

FARRIS, FARRIS, STULTZ & SLOAN
Barristers and Solicitors
J. W. deB. Farris, K.C.
W. B. Farris, K.C.
R. S. Stultz
Gordon McG. Sloan

Telephone Seymour 3701-3702
Cable Address "Farem"
Code Western Union
Five Letter Edition

Suite 1508 Standard Bank Bldg.
Vancouver, B.C.

April 11th, 1931.

A. H. MacNeill, Esq., K.C.,
Barrister, Solicitor,
602 West Hastings Street,
Vancouver, B.C.

Dear Sir:

re Lindeborg and McEwan

With reference to our letter of February 25th: We are now advised by you that the executors of the Lindeborg Estate have been appointed. In considering a test action to determine the rights of the parties, we are confronted with the difficulty that while Mrs. McEwan is the Administratrix of the Estate of Hiram Stevenson, she is only the representative of the Proudfoot Estate for the purpose of the Harris action.

We have one of two courses: One is to apply to the Judge in the Harris action for a reference to determine to whom the moneys now in Court should be paid. The other course is to bring an independent action. I think all parties would prefer the matter to be disposed of in an independent action, but we are confronted with the difficulty as to Mrs. McEwan's status to sue on behalf of the Proudfoot Estate. Mrs. McEwan has undertaken to act on behalf of the Proudfoot Estate in the Harris action. It is possible for her in the Harris action to raise the issue on behalf of the Proudfoot Estate, as well as for herself. I think therefore she is bound to do this, unless it can be equally raised in an independent action.

In the Supreme Court of British Columbia

Exhibit No. 47, Letter, J. W. deB. Farris to A. H. MacNeill, 11th April, 1931. —*Continued.*

If you will undertake to raise no objection as to Mrs. McEwan's status in an independent action in suing on behalf of the Proudfoot Estate, we will proceed in that manner. Otherwise we must adopt the alternative course.

We have approved of the order for the payment out to your clients of some $28,000.00. It is understood that this is without prejudice to our full claim on behalf of the Proudfoot and Stevenson Estates, and further that if it is necessary for us to proceed in the Harris action our rights will be as if the full $25,000.00 were still in Court.

Yours truly,

FARRIS, FARRIS, STULTZ & SLOAN

JWdeBF/EA

by J. W. deB. Farris.

Exhibit No. 5, Letter, R. M. Macdonald to J. W. deB. Farris, 26th June, 1931.

EXHIBIT No. 5

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 5
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

REGINALD M. MACDONALD
Barrister and Solicitor

Telephone Seymour 8669

Cable Address: "Macler"

Codes: Bentley's
Western Union,
A.B.C. Fifth

Suite 807, Royal Trust Building
626 Pender Street West
Vancouver, B. C.

26 June, 1931.

J. W. deB. Farris, Esq., K.C.
Messrs. Farris, Farris & Co.,
Barristers, Etc.
510 Hastings Street West,
Vancouver, B. C.

Dear Sir:

re Harris v Lindeborg

Mr. Pratt of MacNeill, Pratt & Co. called on me today and said that he was launching an application returnable in Victoria on Tuesday next for payment out to the Lindeborg executors of

the remaining moneys in Court. He explained that these moneys had merely remained in Court to give you an opportunity for starting some proceedings on behalf of Mrs. McEwan if you wish to do so, but that as you had not started anything he now wanted on behalf of the Lindeborg executors to get this money.

Although I am solicitor on the record for Mrs. McEwan, in this particular matter they are consulting you and I accordingly deem it right that you should be prepared to take whatever action you have decided upon without delay.

Yours faithfully,

R. M. MACDONALD.

RMM:F

Exhibit No. 6, Letter to R. M. Macdonald, 2nd July, 1931.

EXHIBIT No. 6

SC1216/31

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 6.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

July 2nd, 1931.

R. M. Macdonald, Esq.,
Barrister, Solicitor,
626 Pender Street West,
Vancouver, B.C.

Dear Sir:—

re Harris and Lindeborg Estate

Enclosed please find copy of a letter I have sent to Mrs. McEwan.

It will be necessary for you to get in touch with the Proudfoot heirs at once, as I have undertaken, as a condition of the money remaining in Court, to proceed without further delay. You mentioned that possibly a representative could be appointed without administration. You might let me know right away what you think can be done, as I will probably have to issue a Writ for Mrs. McEwan, on behalf of the Stevenson Estate, before the Proudfoot matter is ready for action. Their rights could be brought in at a later date.

Yours truly,

JWdeBF/EA.

In the Supreme Court of British Columbia

Exhibit No. 7, Letter, R. M. Macdonald to J. W. deB. Farris, 3rd July, 1931.

EXHIBIT No. 7

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 7
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar

REGINALD M. MACDONALD
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A.B.C. Fifth

Suite 807, Royal Trust Building
626 Pender Street West
Vancouver, B. C.

3 July, 1931.

J. W. deB. Farris, Esq., K.C.,
Barrister, Etc.,
1508 Standard Bank Building,
Vancouver, B. C.

Dear Sir:

re Harris & Lindeborg Estate

Your letter of 2nd instant received enclosing copy of letter you have written to Mrs. McEwan.

With regard to the representation of the Proudfoot heirs I beg to refer you to Supreme Court Rule (marginal rule 154) Order 16, Rule 32 (b). In view of the fact that the Court had already ordered Mrs. McEwan to represent the Lindeborg Estate for the purpose of the Harris action I think the Court would readily order that she be appointed under the above rule to represent the Proudfoot next-of-kin in your proposed proceedings. If you approve of this I shall be pleased to write Proudfoot in Nova Scotia, tell him what is proposed and get his direct sanction.

Yours truly,

RMM:F

R. M. MACDONALD

EXHIBIT No. 4

SC1216/31 Exhibit No. 4, Letter, R. M. Macdonald to J. W. deB. Farris, 3rd August, 1931.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 4.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar

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Telephone Seymour 8669

Suite 807, Royal Trust Building
626 Pender Street West
Vancouver, B. C.

3rd August, 1931.

J. W. deB. Farris, Esq., K.C.,
Messrs. Farris, Farris, Stultz & Sloan,
Standard Bank Building,
Vancouver, B. C.

Dear Sir:

re Big Missouri Purchase Money

I am now in receipt of a letter from Mr. W. C. Proudfoot of Nova Scotia who is one of the next-of-kin of the late James Proudfoot and the one with whom I have myself been in communication on behalf of the Proudfoot heirs generally. He advises me that the Proudfoot heirs are prepared to join Mrs. McEwan in making the claim against the Lindeborg estate and approving the suggestion that she represent for the purpose of that claim the Proudfoot estate as well as the Stevenson estate. This will enable you to make the necessary application to have Mrs. McEwan appointed for that purpose.

Yours truly,

RMM:F

R. M. MACDONALD.

In the Supreme Court of British Columbia

Exhibit No. 3, Letter, Farris & Co. to R. M. Macdonald, 10th August, 1931.

EXHIBIT No. 3

SC1216/31

Supreme Court of B.C.
Vancouver Registry
Exhibit No. 3.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

August 10th, 1931.

R. M. Macdonald, Esq.,
Barrister, Solicitor,
626 West Pender Street,
Vancouver, B.C.

Dear Sir:—

re McEwan vs. Lindeborg

Enclosed please find copy of Statement of Claim which I have drafted in this matter. I would be glad if you would check up to see if my facts are correctly stated. I would also be glad of any suggestions about the structure of the Statement of Claim.

Yours truly,

FARRIS, FARRIS, STULTZ & SLOAN

By

Enc.
JWdeBF/EA.

EXHIBIT No. 8

SC1216/31 Exhibit No. 8, Letter, R. M. Macdonald to MacNeill & Co., 17th September, 1932.

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 8.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

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Suite 807, Royal Trust Building
626 Pender Street West
Vancouver, B. C.

17th September, 1932.

Messrs. MacNeill, Pratt, MacDougall & Morrison,
Barristers, Etc.,
602 Hastings Street West,
Vancouver, B. C.

Dear Sirs:

Attention Mr. Pratt

re Tolin v McEwan and Lindeborg Estate.

I am in receipt of two letters from your firm of yesterday's date.

With regard to the request for documents belonging to these estates which you allege are in my possession, I would be glad if you would particularize the documents you refer to as I have no knowledge of such. You will remember that when you first took in hand the business of these estates I submitted to you every file that I had and we culled out at that time all the documents which were exclusively the property of the Lindeborgs and these were handed over to you. I did not intend to hand over "all files and documents pertaining in any way to these two estates" since I believe there may be such documents and files in which my client, Mrs. McEwan, and the Proudfoot Estate are as much interested as the Lindeborg Estate.

If you will please let me know what documents you have in mind I shall be better able to meet your wishes.

In the Supreme Court of British Columbia.

Exhibit No. 8, Letter, R. M. Macdonald to MacNeill & Co., 17th February, 1932. —*Continued.*

With regard to the Tolin action I may say that I was more than surprised at being told that I had declined to join in the settlement referred to, more particularly in view of the fact that I in the first place suggested that an effort should be made to obtain a proposal of settlement along the lines indicated. No such proposal has been yet made to me. However, if such a proposal should be now made it is my wish that the question of the obligations as between the Lindeborg Estate on the one hand and the Proudfoot and Stevenson Estates on the other, which I understand is now in issue in the action brought by Farris & Co. on behalf of Mrs. McEwan, should be determined before Mrs. McEwan is required to join your clients in the proposed settlement. I have already discussed this situation with your Mr. Pratt. Mrs. McEwan's understanding of the relationship between the Estates is that they were all involved in proportion to their interests in the obligations incurred by any one of them. This position I understand is denied by your clients. If Mrs. McEwan's position is established as correct she would of course then be in a position to co-operate with you freely in settling the Tolin action. If your client's contention, however, should be held to be correct, then it would seem that Mrs. McEwan is not under obligation to contribute to obligations incurred by Mr. Lindeborg.

Mr. Farris informs me that his action is now set for trial this month and it would surely be only the part of wisdom in the interest of all parties that that action should be allowed to come to judgment in order that the relationship of the parties may be determined before anything further is done as between them in regard to the Tolin action.

Yours truly,

RMM:F

R. M. MACDONALD

EXHIBIT No. 9

Supreme Court of B. C. SC1216/31
Vancouver Registry
Exhibit No. 9
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

R. M. Macdonald, Esq., Sept. 20th, 1932.
Barrister & Solicitor,
807 Royal Trust Bldg.,
Vancouver, B. C.

Re: McEwan v Lindeborg Estate

Dear Sir:

We have your favour of the 17th instant and note its contents.

You ask if we can particularize the documents referred to of which we desire inspection. You must realize that such information as would enable us to particularize the documents is impossible. You state that you submitted to us every file that you had at that time which were the exclusive property of the Lindeborgs. We have no recollection of receiving any such documents from you. It is impossible to draw the line at those exclusively the property of the Lindeborgs and those of Lindeborgs and other Defendants. Whatever nature they are we wish you to produce all of the documents in your possession that deal with or bear on the action of Harris against Lindeborg et al. You also state in your letter as follows: "If you will please let me know what documents you have in mind I shall be better able to meet your wishes." Inasmuch as we were not connected in any way with the conduct of this action, it would be quite impossible for us to indicate to you particulars of documents we have in mind. What we have in mind are all of the documents, letters, proceedings, notes and memoranda under your possession or control or which should be under your possession or control bearing on the action of Harris vs. Lindeborg and McEwan vs. Lindeborg. Kindly advise this afternoon whether you intend to comply with this request.

There is an examination of Mrs. McEwan for discovery on the 22nd instant. You will, we think, appreciate that we should have access to all of the documents in order to prepare for the examination. They may be of no value whatever in your mind but we trust you will see that the request we have made so many times without avail is reasonable.

We are, Yours truly,
MacNEILL PRATT MACDOUGALL & MORRISON
AHM:PF Per

EXHIBIT No. 10

Exhibit No. 10, Letter, R. M. Macdonald to MacNeill & Co., 21st September, 1932.

SC1216/31

Supreme Court of B. C.
Vancouver Registry
Exhibit No. 10.
McEwan vs. Cosens et al
Put in by Deft. Date 22/11/32.
A. A. C., Registrar.

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A.B.C. Fifth

Suite 807, Royal Trust Building
626 Pender Street West
Vancouver, B. C.

21st September, 1932.

Messrs, MacNeill, Pratt, MacDougall & Morrison,
Barristers, Etc.,
602 Hastings Street West,
Vancouver, B. C.

Dear Sirs:

McEwan v Lindeborg Estate

Replying to your letter of 20th inst. your demand for production by me of all documents referred to puts me in a very difficult position. I have had a similar demand made upon me by Messrs. Farris & Co. on behalf of Mrs. McEwan and as I see the matter, both parties are entitled to inspect everything that I have bearing upon the matter. I cannot part with these documents to one apparently without offending my obligations to the other. In point of fact I have up to the present not given Mr. Farris any access whatever to them. On the other hand, you have had my whole files in your own custody for a considerable time when the Lindeborg Executors were first informing themselves about the Estate.

May I suggest that under the circumstances the best course would be for you and Mr. Farris to arrange to inspect all the documents in my office together. This seems to me to be the only way in which your request can be met and at the same time meet the equally urgent request of Mr. Farris.

Yours truly,

RMM:F

R. M. MACDONALD