WILLIAM F. HARRIS (PLAINTIFF).....APPELLANT; 1930

*Oct. 9.
*Dec. 23.

AND

DANIEL LINDEBORG AND ANOTHER (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Mines and minerals—Group of claims—Oral agreement between free miner and two prospectors—Two miners to do assessment work and look after claims for a two-thirds' interest—Subsequent relocation of ground and new claims added to group—Trusteeship as to proceeds of sale—Statute of frauds—Laches—An Act for preventing Fraud and Perjuries (Statute of Frauds) R.S.B.C. (1924) c. 95—Mineral Act, R.S. B.C. (1924) c. 167, s. 19.

An oral agreement between a free miner and two prospectors whereby the latter were to do, on a certain mining claim, whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under Crown grant, handle, option and sell it, is no mere contract for work and labour, but makes the prospectors agents of the free miner in what they are to do and establishes a fiduciary relationship whereby the prospectors must in equity be held to have become trustees for the miner and they or their representatives must account to him for all sums of money received thereunder.

Under such arrangement, an action by the free miner for a share of the proceeds received and a declaration of trusteeship in respect to the moneys paid to the prospectors is not "asserting an interest in a mineral claim which has been located and recorded by another free miner" and sect. 19 of the Mineral Act (R.S.B.C. 1924, c. 167) does not apply.

Nor is the action barred by the *Statute of Frauds* (R.S.B.C., 1924, c. 95), the agreement, being one only for the division of the proceeds of the sale of land, does not come within the 4th section of the statute.

Discussion of the doctrine of *laches*. When the action is not barred by any statute of limitations, mere lapse of time is not sufficient to deprive one of his equitable rights. In order to decide whether the remedy should be granted or withheld, the courts must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties, and where lies the balance of justice and injustice.

Under an agreement for a division of the proceeds of a sale, the claimant can wait until the sale is completed by the payment of the price before starting his action for an account and for his share of the proceeds.

Judgment of the Court of Appeal (42 B.C. Rep. 276) reversed.

---

*PRESENT:—Duff, Rinfret, Lamont, Smith and Cannon JJ.

1930

HARRIS v. LINDEBORG.

APPEAL from the decision of the Court of Appeal for British Columbia (1), reversing the judgment of the trial judge, Morrison C.J. S.C. (2) which awarded the appellant $100,000 and reducing the amount to $15,789 as against the respondent Laura McEwan and dismissing the action as against the respondent Daniel Lindeborg.

The material facts of the case and the questions at issue are fully stated in the judgment now reported.

W. F. Chipman K.C. for the appellant.

J. A. Ritchie K.C. and *E. F. Newcombe K.C.* for the respondent Lindeborg.

R. M. Macdonald for the respondent McEwan.

The judgment of the court was delivered by

RINFRET J.—The appellant Harris is a retired prospector. On the 25th of July, 1904, being then a free miner according to the *Mineral Act* of the province of British Columbia, he discovered and located a certain mining claim situated on the Salmon River, in the Stewart mining division of that province. He described it as the "Jumbo" and had it recorded under that name on the 8th of August, 1904. He did on the ground and recorded, in compliance with the statute, sufficient assessment work to keep the claim in good standing until the 9th of August, 1909.

In his action, the appellant alleged that in or about the month of June, 1908, while at Queen Charlotte Islands, he entered into an oral agreement with one James Proudfoot and one Hiram Stevenson whereby the latter were to do whatever work was necessary to keep up all assessments, record the same, manage and look after the claim, place it under crown grant, handle, option and sell it. For that, they were to receive two-thirds of all the money and profits derived therefrom and the appellant was to get one-third, after deducting all expenses.

The appellant further alleged that, pursuant to the agreement, Proudfoot and Stevenson associated with one Andrew Lindeborg and one Dan. Lindeborg on the basis that they were to have each a quarter interest and, to-

(1) (1930) 42 B.C. Rep. 276; [1930] 1 W.W.R. 411.
(2) (1929) 41 B.C. Rep. 262.

gether with them, entered into possession of the Jumbo claim. They allowed the same to lapse, relocated and recorded it under the name of Big Missouri and grouped it along with certain other mining claims under the name of the Big Missouri group. Subsequently, they gave several options on this group of claims out of which they received various sums of money amounting to $300,000, but they have paid so far to the appellant only the sum of $364.20. He therefore prayed for an account of all sums of money received by the four associates from the options and from the final sale of the Big Missouri group of claims, and for the payment to him of $100,000, being the one-third share of moneys so received.

In addition to pleading laches, the *Mineral Act* and the *Statute of Frauds,* the defence raised was that the moneys paid to the appellant were voluntary gratuities and were not made in pursuance of any agreement whatever.

In the Supreme Court of British Columbia, the trial judge (Morrison C.J.) (1), found that the agreement as pleaded was entered into between the appellant and Stevenson and Proudfoot;

that the Lindeborgs were brought into the agreement or that they intruded themselves on the footing of the agreement and identified themselves with it and were fully aware all along of such agreement.

He gave judgment for the appellant in the terms of the statement of claim. The Court of Appeal (2) set aside this judgment taking the view that the evidence negatived the finding against the Lindeborgs and accordingly dismissed the action against them. As against Proudfoot and Stevenson, for reasons later to be discussed, it was adjudged that the appellant do recover $15,789, less the sum of $521.40 found to have been paid to him on account.

The appellant Harris now appeals to this court to have the first judgment restored. There is also a cross-appeal on behalf of Proudfoot and Stevenson asking that the decision of the Court of Appeal be varied in so far as any sum was awarded to the appellant as against these respondents.

Of the four associates who joined to form the Big Missouri group, three are now dead. Daniel Lindeborg (the only survivor) is now respondent, both personally and as

(1) (1929) 41 B.C. Rep. 262.
(2) (1930) 42 B.C. Rep. 276; [1930] 1 W.W.R. 411.

1930
HARRIS
v.
LINDEBORG.
Rinfret J.

the administrator of the estate of his late brother, Andrew Lindeborg. Laura McEwan, the other respondent, is the administratrix of the estate of Hiram Stevenson. For the purposes of the action, she represents both the latter and the estate of James Proudfoot.

The existence of an agreement entered into at Queen Charlotte Islands, in 1908, between Harris, on the one part, and Proudfoot and Stevenson, on the other, can hardly be disputed. It results from the evidence of Harris corroborated by several other miners and prospectors, from admissions by Proudfoot and Stevenson in conversations reported by witnesses heard at the trial and from letters addressed to Harris, written and signed by Proudfoot or Stevenson, each on behalf of the other. Two of these letters may be conveniently reproduced, because they have a particular bearing on the point we are now at, and also—as regards one of them—because it was made the basis of the judgment of the majority of the Court of Appeal and will have to be referred to later when we come to discuss the decision of that court.

The first letter was written by Stevenson, after the Jumbo claim had been re-located in his name and that of Dan. Lindeborg. They had then secured from one Edgecombe their first option on the group formed of the re-located claim and of other claims and they had received the first instalment on the option price:

Stewart, B.C.,
Sept. 27, 1909.

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 done some work on the mossouri after we staked it but count get much of a assay she pretty low grade ore you no that we don the best we could we give you five thousand dollars if that will be satictory 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 he dont see you he will leave it Sandlands when you get it i wish you would send me a receate Well Harris Portland Canal is better this Summer then ever we bonded Claims on fish Crick to the same outfit.

from Yours truly
Hiram Stevenson.

The second letter was written by Proudfoot for the purpose of sending to Harris part of the latter's share under the same option:

Stewart, B.C.,
Sept. 12th, 1910.

Mr. W. Harris,

Dear Sir,

As requested by you I have thiss day mailled a check to the Canadian Bank of Commerce Prince Rupert for $184 20/100 to be placed to your credet well frind they have not turned Salmon River down yet and if we get one or two of the big payments I will feel Safe.

Yours very truly

J. Proudfoot
Box 32, Stewart, B.C.

Both letters point to the fact that Stevenson and Proudfoot felt themselves under a binding obligation towards Harris. Indeed, certain passages of the first letter are incompatible with the contention of the respondents that the moneys paid to Harris were voluntary gratuities.

You no that we don the best we could we give you five thousand dollars if that will be satictory to you and you will get yours per cent as the payments comes do * * * I got fifty three dollars for you as near as I can figer it out.

are not words suggestive of the intention to make a gift. They are consistent only with the existence of a contract.

We agree with the trial judge who found that a contract existed. It should be noted that the Court of Appeal did not reverse that finding, and only decided that the letters brought about a modification in the agreement originally made.

Of course, the appellant is met *in limine* by the objection that the agreement on which he relies was only verbal, that it was in respect to an interest in land and that it is therefore barred by section 4 of the *Statute of Frauds* (R.S.B.C., 1924, c. 95) and by section 19 of the *Mineral Act* (R.S.B.C., c. 167). We will have to examine how far the appellant's case is affected by these sections. But we may start from the point that, subject to the objection, an oral agreement was proved to have existed and the applicability of these sections will depend, at least to a certain extent, upon the nature of that agreement.

The nature of the agreement made at Queen Charlotte Islands is therefore the first matter to be considered.

1930

HARRIS
v.
LINDEBORG.

Rinfret J.

In the appellant's testimony, the agreement is stated to have been as follows:

Q. Now go on and tell me about that.—A. Well, I had this Jumbo claim up at the Portland Canal, and I had located some claims on Hughes Inlet at Jedway, and I wanted to prospect them more and see if I couldn't realize on them quicker than I could on the other. And they said they were going over there to the Portland Canal——

Q. Going back to the Portland Canal?—A. Going back to the Portland Canal; and I says to them, I have some claims up there; and they said, well, we could do your work; I said, yes. And, boys, I said, I will tell you what I will do, you go up there and take care of those claims, and do the work on them, hold them, and we will just go in three and three on them; and hold them until they are sold; you can hold them anyway, and do the work until they are sold, and just divide up the money three and three. That is why I never undertook to bring suit or anything else, because I wanted to carry out my contract.

Q. Well, did they agree to that?—A. Yes, sir; that is what they agreed to do. They agreed to go up and keep—do the work on them claims. There was nothing said about re-locating, and nothing else; they were to do the work. I was very anxious about that claim because it was a mine.

Q. What claim?—A. The Jumbo.

Q. And any talk about any claims they would add?—A. No, there was no talk about any claims that they had; I don't really think they had any at that time.

Q. But any they would take afterwards?—A. I told them anyway we wanted to hold them, they could add on to them, and make a group, and have a crown grant of them and take care of them, and when they were sold I was to retain my share, and each of them get a share.

Q. Each get a share?—A. Each get a share, yes, sir, that was the agreement.

Q. And were they agreeable to that?—A. Yes, sir.

Mr. MACDONALD: Q. At the time of this conversation where you say this agreement was entered into on Queen Charlotte Islands, who were present?—A. Well, I can name a few of them, quite a few.

Q. There were a lot there, were there?—A. Yes, all the old-timers around, a good many of them. There was myself, Jack Peterson, Joe Davis, Tom Wilson, and Jimmy Lidden, I think, and McKay, quite a bunch of the boys there present.

Q. And you were just standing in a group on the beach?—A. Yes, talking to them, when we first commenced talking about it we were on the beach, you see, talking about it, and then we adjourned there and went up to this cabin of Jim Matthew's cabin, Shorty's cabin.

Q. Well, where was the bargain struck?—A. The bargain was wound up in this cabin. We wound it up there; and I called on the boys and said, Boys, you all understand this between us, and you witness this agreement, these men Shorty and Mr. Proudfoot goes over there and take care of them claims and works them, and holds them until they are sold, crown grant them or anything they like, and hold them until they are sold, and when they are sold we divide up the money even. That is why I never bothered the boys, because my contract was when this mine was sold I was to get my money, my third interest.

Q. And did all these men you have mentioned hear the contract entered into?—A. Yes.

Q. And you called on them to witness it?—A. Yes, sir.

* * * * *

They agreed to take charge of my property up there and keep it up and crown grant it if necessary, and hold it until the ground was sold, and then we were to divide even up, the money.

* * * * *

Mr. MACDONALD: What was said, if anything, about adding other claims to them?—A. That is what they could do, they could add on or—

Q. I am asking you what was said?—A. Well, that was what was said.

Q. Who said it?—A. We all said it, we agreed among ourselves, they agreed as well as I did, that they would take them and keep them up, and add on or handle them the same as—until they were sold, and take care of them.

Q. I want you to answer this question, who said anything about adding additional claims?—A. I said it.

Q. And what did you say with respect to that?—A. What did I say? I say, you boys will take these claims and keep them up, do the assessment work, and keep them in good standing, crown grant them if you like, or any way until they are sold, one year or two years or five years —them days we didn't know—and when they are sold we distribute out the moneys three and three, one for each.

Q. Now you haven't said a word there about adding other claims, was anything said by anybody about that?—A. I don't know as there was anything said about it.

Q. You don't know what?—A. I don't know just what was said about adding other claims.

THE COURT: Was there anything said?—A. There might have been said, I don't know. I couldn't say.

The appellant's version is substantially corroborated by several of the "old-timers," whom Harris mentioned as having been present when the agreement was made in Shorty's (Stevenson's) cabin, at Jedway. As already mentioned, the trial judge not only believed Harris, but he found that the contract existed as stated by him and he acted upon it. On that point, we find ourselves in complete accord with the court of first instance.

In our view the contract disclosed establishes a fiduciary relation between Proudfoot and Stevenson on the one hand, and Harris on the other. It is not necessary to decide whether or not a partnership was constituted. It is sufficient that Proudfoot and Stevenson undertook to act as the agents of Harris to perform the necessary assessment work, and to record the same in his name. It was no mere contract for work and labour, because Proudfoot and Stevenson were to represent Harris in what they were to do. Harris was the owner of the claim; they were to do the assessment work for him, and for him and in his name they were to record it. The Court of Appeal appears to

1930
HARRIS
v.
LINDEBORG.
Rinfret J.

have taken the view that the existence of this fiduciary relationship was established. The powers of Proudfoot and Stevenson were very wide, and Harris was satisfied to leave it to them to take all the steps necessary to make it possible for them to dispose of the claim. It is true that full authority to obtain a Crown grant or to make a binding sale might have required a writing, but the parties had, no doubt, full confidence in one another. To repeat Harris's words, however, "There was nothing said about relocating, and nothing else; they were to do the work," and if there was anything clearly expressed in the contract, it was that Proudfoot and Stevenson were to keep the Jumbo claim alive until it was sold. This they did not do. They allowed the claim to lapse, and they re-staked the ground under the name of the Big Missouri. We do not think they intended thereby to deprive Harris of what rightfully belonged to him. On the contrary, their subsequent declarations and their letters rather show that they followed the course they did as a matter of policy and as the means best adapted to bring about satisfactory results. Under any view, however, they must in equity be held to have become trustees for the appellant and they or their representatives must account to him for all sums of money they received through the options and the sale of the claim contributed by him under the original agreement,—unless the defences under the Mineral Act and the Statute of Frauds should prevail.

Section 19 of the *Mineral Act* (R.S.B.C., 1924, c. 167) reads as follows:

> No free miner shall be entitled to any interest in any mineral claim which has been located and recorded by any other free miner, unless such interest is specified and set forth in some writing signed by the party so locating such claim.

On behalf of the respondents, it is submitted that that section was expressly intended to put a stop to the practice of free miners asserting interests in each others' properties founded upon alleged verbal contracts. In the present case, however, we do not think the section has any application. Harris is not asserting an

> interest in a mineral claim which has been located and recorded by another free miner.

He had a claim; he held the Jumbo claim and he says he went into an arrangement with Proudfoot and Stevenson

to develop that claim. The agreement he invokes is not one concerning an interest in the claim itself, it relates to an interest in the proceeds of the sale. Harris now asks for his share of the price received and a declaration of trusteeship in respect to the moneys paid therefor. In that view of the case, the courts below rightly decided that the *Mineral Act* did not stand in the way of the appellant.

Nor do we think his action is barred by the *Statute of Frauds* (R.S.B.C., 1924, c. 95). There is authority in this court to the effect that a partnership may be formed by a parol agreement notwithstanding it is to deal in land, and that the *Statute of Frauds* does not apply to such a case. (*Archibald* v. *McNerhanie* (1), a British Columbia case).

Whether, however, there was or was not a partnership, Proudfoot and Stevenson, having, by making use of the opportunity afforded them by their fiduciary position, got into their own names a half-interest in the mineral lands covered by the Jumbo, and in other mineral lands as well, could not escape the obligations of the original contract, by which the proceeds of the sale of the Jumbo were to be divided among the three interested persons equally. They were in a position in which, on these interests being converted into money, they were accountable, by virtue of their fiduciary relation, for one-third of those proceeds. An agreement for the division of the proceeds of the sale of land is not an agreement within the fourth section of the *Statute of Frauds*. *Stuart* v. *Mott* (2).

It is not even necessary to go that length in the present instance, for, in our opinion, the documentary evidence and particularly the letters are sufficient to satisfy the statute, which, under the circumstances, affords the respondents no protection.

Yet another defence is raised against the appellant's action. This defence is based upon the doctrine of laches, and it cannot be denied that the case presented on that ground by the respondents is worthy of serious consideration.

Where a person is obliged to apply for the peculiar relief afforded by equity to declare a trust or to enforce a contract, the principle is that he must come promptly. Now the respondents point to the following facts:

(1) (1899) 29 Can. S.C.R. 564. (2) (1893) 23 Can. S.C.R. 384.

1930

HARRIS v. LINDEBORG.

Rinfret J.

The location by Harris of the Jumbo claim having lapsed, the ground was re-staked jointly by Stevenson and Dan. Lindeborg and was called "Big Missouri." Shortly afterwards, Proudfoot, Stevenson, Dan. Lindeborg and Andrew Lindeborg grouped all their contiguous claims, ten in number, and gave the option to Edgecombe to which reference has already been made. It was then that Stevenson wrote to Harris the letter of the 27th of September, 1909 (above recited) and offered him $5,000 for his share, at the same time sending him the sum of $53 as the first payment. Harris immediately wrote and told Stevenson he was not satisfied and that he and Proudfoot had not done what they agreed to do.

> They agreed to do the work instead of relocating it, and I am not satisfied.

It does not appear that this letter of protest was received by Stevenson, who wrote again on the 31st January, 1910:

> Prince Rupert, B.C., Jan. 31, 1910.
>
> Mr. William Harris Dear frend I got a letter from you about a month ago I rote you in September from hear and I gess it must have gon a strae you no the claim you had on Salmon river me and Dan Lenderborg staked it and we Bonded all of ower Claims on Salmon River as near as I can figer it out you will get about five thousand Dollars out of it and as we get the Payments we Put your Share in the Canadian Bank of Comers hear.
>
> from Yours H Stevenson.

Then, on April 7, 1910, a further sum of $100 was sent to Harris in a letter written by Andrew Lindeborg. On July 25, 1910, a cheque signed by James Proudfoot to the order of Harris and for the sum of $184.20 was deposited for the appellant in the Canadian Bank of Commerce, Prince Rupert Branch. On September 12, Proudfoot wrote the letter already reproduced and containing another cheque of $184.20 to Harris' order, always on account of his share of the Edgecombe option. Another letter dated October 3, 1910, emanating from the Manager of the bank at Prince Rupert, advised Harris that yet another sum of $80 was being sent to him under separate cover. The Court of Appeal found that Harris had received these various sums, and this was not disputed at bar.

In the meantime, around September, 1910, Harris went to Stewart, at the head of the Portland canal. There he met all four associates. His evidence is that he then re-

newed his protest, told them that he was "not satisfied the way they "did with the mine, and (he) still retained his interest in that group of claims." The evidence goes on:

Q. What did they say?—A. They said, certainly you will get your interest in them claims the same as if we did the work, you will get it just the same by us re-locating it as you would if we done the work. Put it that way.

Q. What interest: did you tell them?—A. I told them I still retained my one-third interest, according to my first contract, my first contract with them.

Q. With Stevenson and Proudfoot?—A. Yes; I never recognized Lindeborg, never seen him in the contract.

Q. But they came in and said you could have the one-third interest? —A. Yes.

Q. And that was all agreed to?—A. Yes.

Q. And you were all there?—A. Yes.

We have quoted the above verbatim on account of its bearing upon other points of the case, to which we will turn our attention later.

The next development was that Harris wrote to Dan. Lindeborg on the 7th of May, 1911. The letter was not found but was acknowledged by Lindeborg on the 15th of June, 1911. Harris swears to the contents of his letter and says he was inquiring about the options,

how they were getting along with them, and trying to keep in touch with (his) interest.

This is consistent with the terms of the reply by Lindeborg.

Nothing is shown to have passed between the parties from June, 1911, until April 30, 1919.

During that period, no less than six options were executed concerning the Big Missouri group, although comparatively little money was paid on them, and they were all allowed to lapse. Harris was not advised of any one of them. Apparently he was kept in absolute ignorance of what was going on and he does not pretend having made any attempt to find out.

Proudfoot had died about Christmas, 1910, and Stevenson had been killed in action, in France, some time in 1917.

It was not until April 30, 1919, that Arthur J. Harris, the son of the appellant, broke this long silence by writing to Dan. Lindeborg. His letter begins in this way:

1930

HARRIS v. LINDEBORG.

Rinfret J.

It has been such a long time since we have been in communication with you boys that you are doubtless thinking that we have passed out. We have been talking quite often about the Big Missouri and other properties on Salmon River and have kept in touch with developments there. We are sure delighted to hear of the bright prospects for the Salmon River district.

He goes on rather lengthily to give a lot of family news, he inquires about the death of Stevenson (whom he calls Stevens) and says:

You are of course aware of the agreement that father and Mr. Stevens had in regards the Big Missouri, and father desires to know if that matter was fixed up before Mr. Stevens left.

He winds up by asking Lindeborg to write and let them know "how everything is going." Lindeborg answered he had "not heard if (Stevenson) made any provision for any agreement with (Harris)" but he was forwarding the letter to Stevenson's sister. Almost a year elapsed before Harris' son wrote again to Dan. Lindeborg and got the reply (May 15, 1920) that the administrator of Proudfoot's estate "had not been able to find anything among Jim's papers regarding any agreement of the sort mentioned." Lindeborg added:

so far we have not got anything near out of the property what it has cost us to hang on to it this many years.

Harris was now living in Tacoma, State of Washington, U.S. At his request, on February 12, 1921, his son wrote again to Lindeborg complaining that the letters so far received from the latter were "evasive and did not contain the information (they) wished." He asked for the address of the heirs of Stevenson and said that if they could not find out how they stood with respect to the agreement, Harris would

either come up there himself or send a suitable representative to represent his interest, and would place the necessary papers in the hands of proper authorities for collection.

This brought the following reply:

June 22, 1921.

Mr. Arthur J. Harris,
627 N. State Street,
Tacoma, Washington.

Dear Sir,

Your letter of February 12th last was received by me on my return home and in answer will say that if you think my former letters have been evasive will try to make this plain as possible.

First, you state you have not received the information desired, as near as I can remember you have never stated the nature of information wanted.

Further you refer to an agreement between your father and myself. Of this I can inform you that there never has been any agreement, verbal or in writing, between your father and myself. If he has any agreement with other parties I have no knowledge of same.

The address of Administrator of the Proudfoot Estate is D. C. Barbrick, 6039 Sherbrooke St., Vancouver, B.C. For Stevenson Estate, address Mrs. Laura McEwan, Koch Siding, B.C.

Trusting you will find this plain enough, I remain,

Yours truly,

DL-I Dan Lindeborg.

The correspondence then shifted from Lindeborg to Barbrick and Mrs. McEwan. Letters were exchanged between them and Harris' son, Harris seeking to find out if Proudfoot or Stevenson "had made any provision for the agreement," (being told that there was none), insisting that he could "make proof" of his rights and asking that they should be recognized. The last letters were addressed to the administrators by A. J. Harris on April 4, 1922, and remain unanswered.

The present writ was issued only on July 18, 1928.

The respondents contend that Stevenson's letter of September 27, 1909, was a repudiation of the agreement, that the administrators challenged the appellant's claim as far back as 1922. They point to the long delay that ensued and to the change of circumstances: the introduction of the Lindeborgs as co-owners invoking a change of parties, the deaths of Proudfoot and Stevenson eliminating all possible evidence on their behalf, and the fact that the "new parties were allowed to go on and spend money on the property and go to all the trouble, expense and risk for years." And they submit that it is impossible, under the circumstances, to avoid the effect of laches.

In *Lindsay Petroleum Co.* v. *Hurd* (1), it is said:

> The doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, if founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important

(1) (1874) L.R. 5 P.C. 221, at 239.

1930

HARRIS v. LINDEBERG.

Rinfret J.

in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

Lord Blackburn, in *Erlanger* v. *New Sombrero Phosphate Co.* (1), quotes the above passage and then adds the following comment:

> I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

This suit, as we have seen, was not instituted until the 18th of July, 1928, more than six years after the date of the last letter sent on behalf of Harris and to which he got no reply; but the action is not barred by any statute of limitations, and mere lapse of time is not sufficient to deprive the appellant of his equitable rights against the respondents. In order to decide whether the remedy should be granted or withheld, we must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties and where lies the balance of justice and injustice.

We may now apply this test to the several grounds just enumerated and put forward by the respondents as to why the defence of laches should be given effect to in the present case.

1. We have already stated our reasons for construing the letter written by Stevenson on September 27, 1909, not as a repudiation, but, on the contrary, as an acknowledgment of the existence of an agreement between himself, Proudfoot and the appellant. True, it does not contain the whole tenor of the agreement, but if Harris is telling the truth about what took place upon receipt of that letter, he protested against anything in it not in conformity with the original agreement, he told the respondents he "still retained (his) one-third interest according to (his) first contract" and, he says, it was all agreed to at the interview at Stewart, in 1910. This evidence was accepted by the

(1) (1878) 3 App. Cas. 1218.

trial judge, and we see no reason why it should be disbelieved.

2. The letters written by the administrators in 1921 and 1922 are not and could not be a denial of the agreement. The administrators did not know. Their letters are no more than answers to the demand for information coming from Harris, and advising him that, amongst the documents of the respective estates of Proudfoot and Stevenson, nothing was found to indicate the existence of an agreement concerning the Big Missouri.

3. If the Lindeborgs ever became co-owners of the Jumbo or Big Missouri claim, it was in the month of August, 1909, before Harris went to Stewart and before he had with Proudfoot and Stevenson the understanding there arrived at whereby they agreed that, notwithstanding any re-staking, he still retained his one-third interest "according to his first contract." At that time, if ever, the Lindeborgs had already been introduced as new parties.

Consequently, we fail to see how, because of the appellant's delay in coming to court, the respondents can be prejudicially affected through a change which had occurred before the contract was re-affirmed at Stewart and before the period in respect of which laches is now charged.

4. The fact that Stevenson and Proudfoot are both dead no doubt compels the court to sift thoroughly and with great care the evidence rendered on behalf of the appellant; but, in addition to the fact that the latter was amply corroborated, it is not disputed that the learned Chief Justice, who tried the case, and who believed the evidence for the plaintiff, was fully aware of the extent of his duty in the premises, and that he decided to act upon such evidence only because the truthfulness of the witnesses was made to him perfectly clear and apparent (*In re Garnett* (1)).

5. As for the trouble and expense to which the respondents allege they went "for years" and the risk they incurred, suffice it to say that largely, if not entirely, through the Jumbo claim, which the appellant contributed to the common adventure, and which was, as the evidence shows, the "big value" in that group of claims, the respondents made profits admitted to have reached $300,000. It thus becomes an easy matter to decide

(1) (1885) 31 Ch. D. 1, at 9.

1930
HARRIS
v.
LINDEBORG.
Rinfret J.

whether the balance of justice or injustice is in favour of granting the remedy or withholding it.

We have now examined, in the order they were presented by the respondents, each of the reasons they urge in support of their plea of laches and we have found that none of them calls for the application of the doctrine. On the part of Harris, there never was conduct from which an intention to abandon his interests can be gathered, and all the evidence shows, on the contrary, "a settled determination to hold to his rights" (*Clarke* v. *Hart* (1)). Those rights, under the agreement, entitled him to divide the money only after the claim was sold. "That is why I never bothered the boys," says Harris in his evidence, "because my contract was when this mine was sold I was to get my money, my third interest." The Big Missouri group was sold to the Standard Mining Corporation for $275,000, the first payments under the option were made shortly before this action was commenced and, in fact, the last instalment of $100,000 was garnisheed and is now paid into court. The appellant could wait, if he so wished, until the sale was completed by the payment of the price before starting his action for an account and for his share of the profits.

We therefore agree with both courts that the defence based on laches, on the *Statute of Frauds* and on the *Mineral Act*, raised by all the respondents must fail. As a result, the conclusion already reached against Proudfoot and Stevenson must stand, and their representatives must account to the appellant.

In the case of the Lindeborgs, however, the story is different. They were not parties to the original agreement. There is no evidence that, at the time of relocating the Jumbo claim, the agreement was disclosed to them or that they knew of it. Fraud on their part is neither alleged, nor proven. Even if they became subsequently aware of the agreement existing between Harris, Proudfoot and Stevenson, that would not make the Lindeborgs partners. They could not become partners without the consent of all the other parties.

Consent on the part of Harris could result perhaps from his *acceptance* of the proposition contained in the letter of

(1) (1858) 6 H. of L.C. 633, at 648.

the 29th of September, 1909, provided it was shown that Stevenson, when making the proposition, was acting for the four associates; but there is no evidence that the Lindeborgs ever bound themselves towards Harris or linked themselves with any bargain towards him. As for Harris, he does not pretend but denies having accepted Stevenson's offer. His conduct and testimony preclude the introduction of the Lindeborgs in any agreement. He stated most positively he "never recognized Lindeborg, never seen him in the contract." His action, far from invoking the letter of the 29th of September, is the very negation of the existence of a modified bargain into which the Lindeborgs could be brought. Whatever part the Lindeborgs took in the whole matter is perfectly consistent with their understanding that Stevenson and Proudfoot were entitled to act as they did. Assuming that, at any time before September, 1910, they were put upon inquiry as to whether Harris had an interest and as to the nature and the extent of that interest, this was made clear as a result of the interview held at Stewart at that date, and where Harris, being fully conversant with all that Stevenson and Proudfoot had done, knowing that they had joined hands with the Lindeborgs, declared (to use his own words):

> It don't make any difference if you located it, if you can handle it better in your name it is alright,

as long as he kept his interest with Stevenson and Proudfoot. This meant, if anything, that he was to look to Proudfoot and Stevenson alone for whatever share he was to get out of the sale of the Jumbo claim; it was a recognition on his part that the Lindeborg interests remained unaffected. Harris himself puts that interpretation upon the interview when he says: "I never recognized Lindeborg, never seen him in the contract."

Fraud having been eliminated and there being with the Lindeborgs neither partnership, nor agency, they could not be declared trustees and, as far as they are concerned, the action against them was rightly dismissed by the Court of Appeal.

It remains to establish the amount Harris is entitled to recover against Proudfoot and Stevenson. Strictly speaking, the action could have been disposed of merely by ordering an account; but, owing to a lack of definite records,

1930
HARRIS
v.
LINDEBORG.
Rinfret J.

the profits on the sale of the group of claims have been accepted by both sides as being $300,000.

The trial judge gave judgment in favour of Harris for one-third of that sum. The majority of the Court of Appeal thought the appellant should receive only five ninety-fifths of the $300,000, less the amounts already paid to him. This computation was made on the strength of the letter of the 29th of September, 1909, wherein Stevenson offered Harris $5,000 as his share of the $95,000. This, however, could serve as a basis of computation only if the proposition contained in the letter had been accepted by Harris and a new contract was thereby formed. We have already indicated that, in our view, that was not the case. Express acceptance by Harris was not established. Acceptance, whether express or by conduct, was neither invoked nor relied on by Proudfoot or Stevenson, who took the stand all through the case that no agreement of any kind was ever made. True, the appellant received and kept some moneys. The first sum of $53 enclosed in Stevenson's letter was approximately five ninety-fifths or one-nineteenth of the first Edgecombe payment. But if Harris told the truth about what followed—and his evidence was believed by the trial judge—his acceptance of that sum was of no consequence. The subsequent remittances made to him rather lend colour to his contention, for they show that the alleged one nineteenth proportion was not adhered to. None of the individual payments made to Harris after the first payment of $53 amounts to one-nineteenth, neither does the total received by him correspond with that proportion of the moneys which the respondents got under the options. We must therefore look for another basis and we think it should be found in the following way:

The Big Missouri group was formed of ten claims. Of these, the claim formerly known as the Jumbo was the only one covered by the agreement. On Harris' evidence, we agree with the Court of Appeal that the contract did not cover the adding of other claims. Proudfoot and Stevenson were to hold the Jumbo claim until it was sold. They were not to re-locate it, nor to admit others as partners in the working out of the contract. Harris was right in telling them, at Stewart in September, 1910: "You boys haven't

lived up to your agreement." Yet, being informed of what they had done, he added:

> I says, it don't make any difference if you located it, if you can handle it better in your name it is alright, as long as you keep my interest. And they agreed to it.

We have already referred to other parts of his evidence to the same effect. Harris

> still retained (his) one-third interest, according to (his) first contract * * * with them.

Now the interest in question was an interest in the Jumbo claim (re-named the Big Missouri) and the one-third of the proceeds of that interest meant one-third of the proceeds of the sale of the Jumbo or Big Missouri claim. The respective values of that claim and of the other claims added to it for the purpose of forming the Big Missouri group are not in evidence, although it is abundantly clear that the Jumbo was the dominant claim and the trial judge so found. The amount of Harris' share is not to be calculated according to the principle which governs when a man intermingles his property with that of another without the approbation or knowledge of the latter. Here, Harris, after having acquired knowledge of the situation, approved of it and was willing to accept what his original contract would give him in full satisfaction of his interests. He approved of the method adopted by Proudfoot and Stevenson to bring about the sale of his claim and, as a consequence, in our view, his share is limited to one-third of the amount which, through the means so adopted and so approved, the latter got out of that sale, including the moneys paid on previous options.

As between the four associates: Proudfoot, Stevenson, Andrew and Dan. Lindeborg, we know that they were to divide in four equal shares. On that basis, out of the $300,000, the amount coming to Proudfoot and Stevenson was $150,000. It can hardly be contended by them that this sum of $150,000 does not stand wholly and exclusively for the value of the Big Missouri or Jumbo claim. The only other claim which they are known to have contributed to the group was a claim called " Winner," staked and recorded by Proudfoot in August, 1909. This claim does not appear to have had any bearing on the price paid for the group.

The sale of the Jumbo claim having brought $150,000, Harris, Proudfoot and Stevenson must now, according to their agreement, " divide up the money three and three."

1930

HARRIS v. LINDEBORG.

Rinfret J.

Proudfoot and Stevenson have received the money and they or their representatives must account to Harris who is entitled to recover from them $50,000 for his share. This was the conclusion of Galliher J.A., with whom we agree.

The appeal should therefore be allowed to the extent indicated, with costs to the appellant before this court against the respondents Proudfoot and Stevenson. The cross-appeal of the latter is dismissed with costs and the appeal of Harris, so far as Andrew and Dan. Lindeborg are concerned, is also dismissed with costs.

Appeal allowed with costs.

Solicitors for the appellant: *Burns, Walker & Thomson.*

Solicitor for the respondents: *R. M. Macdonald.*