1932

*May 9, 10.
*June 15.

CORSON *v.* MORGAN

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Appeal—Evidence—Action for rectification of description of land in deed —Conflicting evidence as to real agreement for division of lands— Judgment at trial for rectification reversed on appeal but restored by Supreme Court of Canada.

APPEAL by the plaintiff (by leave granted by the Supreme Court of Nova Scotia *in banco*) from the judgment of the Supreme Court of Nova Scotia *in banco* (1) reversing (Carroll J. dissenting) the judgment of Graham J. (2) in favour of the plaintiff in an action for rectification of the description of the land in a certain deed of land at Middlehead, Ingonish, in the county of Victoria, Nova Scotia.

The question in dispute was one of fact, namely, whether a certain deed to the respondent executed in 1905 by the appellant's husband (since deceased) and the appellant, through their attorney, one Blanchard, and including the land now in question, was according to the agreement and intention of the parties (in dividing certain lands between them), or whether the land now in question should have been excluded from the said deed and included in a deed of the same date from the respondent and his wife to the appellant's husband.

On the appeal to this Court, after hearing argument of counsel, the Court reserved judgment, and on a subsequent day delivered judgment allowing the appeal with costs, and restoring the judgment of the trial judge. Anglin C.J.C., and Cannon J. dissented.

Written reasons were delivered by Smith J., with whom Rinfret and Lamont JJ. concurred, and by Anglin, C.J.C. (dissenting), and by Cannon J. (dissenting). All the reasons discussed the evidence at some length.

Smith J. (Rinfret and Lamont JJ. concurring), after discussing the evidence, stated that "it was for the trial judge to determine the credibility of the witnesses appear-

*PRESENT:—Anglin C.J.C. and Rinfret, Lamont, Smith and Cannon JJ.

(1) (1932) 4 M.P.R. 409.
(2) (1931) 4 M.P.R. 409, at 410 *et seq.*

ing before him in the box, and he has believed the evidence of the appellant and Blanchard and concludes that the respondent, after a severe illness and the long lapse of years, has forgotten the real terms of the agreement" between him and the appellant's husband. He stated his opinion, not only that the trial judge should not be reversed where the whole matter turns on the credibility of witnesses, but also, on examination of the evidence, that the trial judge arrived at the correct conclusion.

Anglin, C.J.C. (dissenting), held that the circumstances were such that it was impossible to grant the relief prayed for; it is well established law that rectification of a deed, such as was here sought, can be granted only where there has been mutual mistake, and an agreement between the parties contrary to the tenor of the deed is established beyond question by irrefragable evidence (*Clarke* v. *Joselin* (1)), which should be such as to produce on all minds alike the conviction that the deed is wrong and should have been made to conform to the substance of the agreement (*McNeill* v. *Haines* (2); *Howland* v. *McDonald* (3)). After discussing the evidence, he stated that, on the whole record, he was satisfied that no case whatever had been made for rectification, either because the deed had been shown to be false, or because an agreement as to the division as alleged by appellant had been shown to have had pre-existence; if it should come down to a question of preference, as to their credibility, of witnesses, he would certainly prefer to believe the respondent rather than the witness Blanchard. He approved of the reasons of Mellish J. in the court below.

Cannon J. (dissenting) was of opinion, after a careful perusal of the evidence (which he discusses in his reasons), that it was impossible to say that there was a mutual mistake with respect to the boundaries of the land conveyed; the court cannot make a new contract unless it is absolutely certain that in so doing it is rectifying a mistake and giving effect to the clearly proved intention of the parties; they have chosen to make a solemn contract in writing and the court must not substitute another for it after the death of

(1) (1888) 16 Ont. R. 68, at 78. (2) (1889) 17 Ont. R. 479, at 484-5.
(3) (1907) 14 Ont. L.R. 110, at 115.

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one of the parties and the lapse of 25 years, except upon evidence which is reasonably free from doubt; rectification can be granted only if the mistake is mutual and the evidence of the mutual mistake is clear and unambiguous; moreover (a point also referred to by Anglin, C.J.C.), the evidence on appellant's behalf as to where the division line should be drawn lacked certainty and would not enable the court to prepare an unchallengeable description for a new deed. He approved of the reasons of Mellish J. in the court below.

Appeal allowed with costs.

G. F. Henderson K.C. and *D. K. MacTavish* for the appellant.

W. C. Macdonald K.C. for the respondent.