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*May 17, 18.
*June 20.

GEORGE McKEAN AND COMPANY, LIMITED AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

EUNICE A. BLACK AND OTHERS (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Evidence—Admissibility—Corroboration—Conveyance—Security for advances—Continuing agreement.

A contract made in Jan. 1914 recited that McK. had agreed to guarantee repayment of advances made and to be made to B., that he had agreed to buy from B. lumber to be cut and manufactured during the year and as security for the guarantee he was to receive title to the property from which the lumber was to be cut. The contract then provided that B. would completely lumber the property and deliver all the lumber to McK. at a price to be settled or, in default of agreement, on consignment for sale on the customary commissions. B. eventually paid all the advances and demanded a reconveyance from appellant (McK. having died) which was refused on the ground that all the lumber had not been cut and delivered. In an action for an order directing the appellants to reconvey and for damages B. tendered evidence of a representation made by McK. when the agreement was presented and he objected to the requirement to cut all the lumber that the meaning of it was that McK. would hold the lumber until paid all the advances with interest; that B. could not sell any until enough was cut to pay him off. The evidence was admitted and the trial judge, accepting it as true, gave judgment for a reconveyance and damages to be assessed. On appeal from the Court *en banc* affirming his decision.

Held, per Davies C. J. and Idington J., that the evidence was admissible and sufficiently corroborated by the provisions of the document.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

Per Idington J. The document was a mortgage with the usual right of redemption and respondents were entitled to succeed without this evidence.

Per Duff J. Parol evidence is always admissible when its object is to show that the transaction is one of loan and that the conveyance though absolute in form is intended to be security only.

Per Anglin J. The contract was not ambiguous and the evidence not admissible for the reason that it needed explanation. But it could be received to support a claim for reformation or a plea of estoppel based on misrepresentation innocent or fraudulent. The corroboration relied on below was too slight to satisfy the provision of the Nova Scotia Evidence Act but the admission by the appellants that for the purposes of the action they should be deemed to be in the same position as if McK. was alive and was the defendant obviated the necessity for any corroboration.

Per Mignault J. Two courts having received and believed the evidence of B. and held that there was sufficient corroboration of it, the decision appealed against should stand.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the respondents.

The material facts are set out in the above head-note.

F. R. Taylor K.C. and *Jenks K.C.* for the appellants. The plaintiffs cannot rely on fraudulent misrepresentation which must be specifically pleaded; *Lawrance* v. *Norreys* (2); and as recission is not asked for innocent misrepresentation cannot help him. *Newbigging* v. *Adam* (3), at page 590.

The evidence does not justify an order for rectification. *May* v. *Platt* (4), at page 623. And there is no sufficient corroboration. *McDonald* v. *McDonald* (5).

Henry K.C. for the respondents referred to *Burkinshaw* v. *Nicolls* (6); *Redgrave* v. *Hurd* (7).

(1) 54 N.S. Rep. 245.
(2) 15 App. Cas. 210.
(3) 34 Ch. D. 582.
(4) [1900] 1 Ch. D. 616.
(5) 33 Can. S.C.R. 145.
(6) 3 App. Cas. 1004 at p. 1026.
(7) 20 Ch. D. 1. at pages 12, 14 and 20.

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THE CHIEF JUSTICE.—I think this appeal fails and should be dismissed. The action was one brought by Black against the heirs and representatives of the late George McKean in which the plaintiff claimed a reconveyance to him of a certain lumber property which he had conveyed and assigned to McKean as security, as he contended, for certain advances then and afterwards to be made to him and certain guarantees to be given on his behalf to enable him to complete his purchase of the property and to enable him further to carry on his lumbering operations, and which advances had all been repaid. The defence was practically a denial that the plaintiff had carried out the obligations imposed upon him by the agreement in other respects than the repayment of the moneys advanced or guaranteed and which it was essential he should carry out before he was entitled to the reconveyance claimed. The repayment of all advances and interest which McKean had made to Black or guaranteed for him, was not challenged or denied, but it was claimed that it was a condition and a term of the agreement that before Black could claim a reconveyance of the property he was obliged completely to lumber the property and to cut, saw and manufacture and deliver to McKean all the lumber on said property at a price to be agreed upon, or that said lumber should be shipped on terms in paragraph one (1) of the agreement stated. It was agreed that this had not been done and Black's contention was that it was not obligatory on him to do this, once he had paid McKean all advances made by him with interest and discharged him from all guarantees and liabilities he had incurred in this respect by the agreement.

Apart from the legal construction of the agreement itself, a question arose as to the statement said to have been made by McKean to Black as to the meaning of the agreement, which statement Black swore was what induced him to sign the agreement. This evidence is as follows:—

(Charles O. Black, Direct Examination).

After we had bargained, Mr. McKean, the young man, went out and got that agreement drawn up by a lawyer; I had no lawyer, and I am not one myself, and have a limited education; there was a clause where it said we hold all the lumber on this property estimated at thirty million; I said there might not be thirty million on the property, in fact, I know there is not; it is only an estimate, and I might not be able to cut all that lumber, and it is a bad thing for me to sign things like that. He said, "the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest; that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have security, and that is what the agreement means." I said, "if that is what it means, all right." That is what I thought it was, but now it seems it is interpreted they hold it all after it is paid off; he said the meaning and intention of the agreement was that.

Q. You then signed the agreement? A. Yes, with young McKean.

Q. On the understanding you had with Mr. George McKean, as you have just told us about? A. Yes.

The learned trial judge accepted this statement of fact as proved, and also held that there was sufficient corroboration of it and the question for our consideration is whether the statement was admissible as evidence, and if so, whether McKean being then dead there was sufficient corroboration under the statute and what effect, if any, was to be given to it.

I am of the opinion that the learned trial judge was right in holding that the agreement in question was an ambiguous one the real meaning of which, considering the apparently conflicting clauses of it, was most difficult to determine. I must say I myself have

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found it so and agree fully with the learned trial judge as to its ambiguity. I think the evidence was properly admitted and that there was sufficient corroboration of it under the statute.

In my judgment the agreement in question was in reality a mortgage intended to secure to McKean all moneys advanced or guaranteed by him together with interest and charges and as these were conceded to have been fully repaid to McKean when the action was commenced and he was discharged from all liability in respect of them, the equity of redemption of Black in the property was complete and entitled Black to the reconveyance claimed.

Once the evidence of McKean's statement, as to the meaning and intent of the agreement before set out, is accepted, and that such meaning and intent were indeed the inducements which led Black to sign it, the controversy would be at an end and Black's claim to a reconveyance would, in my opinion, be complete.

I accept fully the findings of the trial judge confirmed by the majority of the court on appeal on this point, and think that it is a reasonable construction of the agreement that all its other provisions relating to the cutting of the lumber on the land were at an end when McKean's advances and guarantees were fully paid and discharged. In other words, I hold that the statement of McKean as to the intent and meaning of the agreement and which formed the inducement on which Black signed it, was a correct statement and was accepted by the parties as such. If and when Black paid off all advances and interest and discharged McKean from his guarantees, he became at once entitled to a reconveyance.

The other provisions of the contract as to the cutting of the lumber by Black and handing it over to McKean for sale on a commission were, in my judgment, intended to be in force only while McKean's advances to Black, or his guarantees to the bank for Black, or some part of them, were still outstanding, and were intended as securities to McKean as against such liability and guarantees.

Section six (6) of the agreement provides for a condition which never arose, namely: Black "desiring to sell the property free from the agreement," and need not now be considered.

For these reasons I would dismiss the appeal with costs.

IDINGTON J.—The late Charles O. Black, engaged in the lumber business and, as the learned trial judge finds, in course thereof bought from the Nova Scotia Lumber Company a large property for $40,000, of which all had been paid but $5,000. Having met with some business reverses he needed help in order to pay that and raise $18,000 to carry on his lumbering business on said property.

The late George McKean agreed to go his surety to the Bank of Montreal for such amount as thus needed.

The Nova Scotia Lumber Company had given Black a bond to convey the said land upon the payment of the price and that was indorsed over, as Black expresses it, to the late George McKean at the time of entering into the agreement presently to be referred to. By virtue thereof the said company, three months later, conveyed the land to said McKean. Under the circumstances an ordinary form of mortgage

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might have easily been framed to express all that the parties intended, but, instead thereof, an agreement was entered into between said Black and said McKean (whom I shall hereinafter call the mortgagor and mortgagee respectively) drawn up by the latter's solicitor, dated 29th January, 1914, which recited the facts that the mortgagee had agreed to guarantee

> a certain advance to be made by the Bank of Montreal to the said party of the first part, and has also agreed to arrange for further advances to the said party of the first part during the lumbering season of 1914,

and also had entered into an agreement to purchase certain lumber from the said mortgagor, and, as security, said mortgagor had agreed to assign the said agreement for purchase of the said land to said mortgagee.

Then the operative part of the agreement contained a half dozen covenants such as might have been inserted in an ordinary mortgage had the parties taken that method of carrying out their arrangement.

If we have regard to what the parties were about these several instruments must be read together, and so read, the transaction was nothing more nor less than a mortgage accompanied by these covenants to secure the mortgagee against loss and incidentally get the profits to be derived from handling the mortgagor's entire lumber from timber on said land, until the advances and six per cent per annum thereon had been repaid.

That product for a year would seem to have been likely to be about three million feet of lumber.

From the expressions in the agreement the term of the year 1914 would seem to be all that was in the minds of the parties.

The first paragraph provided for the said mortgagor completely lumbering the property and selling the lumber to the mortgagee at such prices as they might agree on, or commission named.

The second provided that no other lumber should be cut on the premises nor should any cut there be sold to any one else than the mortgagee, his assigns or representatives.

These provisions the appellants contend entitle them as the successors in title of the mortgagee (who died in 1915) to hold the property free from the redemption by the said mortgagor who instituted this suit for the redemption of said mortgage.

This contention I will presently consider, after stating the substance of the other paragraphs.

The third paragraph was for quiet enjoyment and will be set forth later in full.

The fourth paragraph provided for the payment by the said mortgagor to the mortgagee of

> all loss or damage which may be caused to the said timber lands, lumber or property by fire or other casualty, and will hold the said party of the second part, his executors, administrators and assigns, harmless and indemnified therefrom.

The fifth bound the mortgagor to pay all rates and assessments on the property.

The sixth provided for the case of the mortgagor wishing to sell the property doing so on the terms of paying fifty cents a thousand on a basis of there being thiry million feet thereon.

These were followed by the following power of sale given McKean:—

> Provided always and it is hereby agreed, that on default in the repayment of the sums so guaranteed by the said party of the second part and all other sums that hereafter may be guaranteed by the said

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party of the second part, his executors, administrators or assigns, and all expenses, charges, costs, rates, taxes and assessments with interest at six per cent as aforesaid on the said property or any portion thereof, or the said lumber thereon, or any portion thereof, or in case of the loss or destruction of said property or any portion thereof or the lumber thereon or any portion thereof, by fire or other casualty, or in case of the breach by the party of the first part, his heirs, executors or administrators of any of the covenants or agreements herein contained it shall be lawful for the said party of the second part, his heirs, executors, administrators or assigns, either by public auction or private sale to sell and convey the said property hereinbefore referred to or any portion thereof and either in one block or in separate parcels as he or they may deem fit, and upon such terms as he or they in their discretion may deem advisable after giving notice to the said party of the first part of such sale by mailing at least seven days prior thereto at some post office in the province of New Brunswick by registered mail addressed "C. O. Black, Oxford, N.S." written notice of the time and place of such sale and no other or further notice or demand shall be necessary, and such notice shall be effectual whether the said Charles O. Black be living or dead; and the proceeds of such sale or sales the said party of the second part, his heirs, executors, administrators or assigns, shall apply in the first place to the expenses of such sale or sales and necessary conveyances, and, secondly, so far as they will go to or towards the repayment to the said party of the second part, his heirs, executors, administrators or assigns, of any sums that he may have paid or be liable for under said guarantee or may have advanced hereunder, together with interest, expenses, costs, charges, rates, assessments, moneys paid on account of rates, taxes and impositions or such portion thereof as may remain unpaid; and thirdly, to or towards any sums otherwise accruing due by the said party of the first part or his aforesaid to the said party of the second part, and shall pay the balance, if any, to the party of the first part, his heirs, executors, administrators or assigns, and that all contracts which shall be entered into, and all conveyances which shall be executed by the said party of the second part, his heirs, executors, administrators or assigns, for the purpose of effecting any such sale or sales shall be valid and effectual notwithstanding that the party of the first part, his heirs, executors, administrators or assigns, shall not join therein or assent thereto, and that it shall not be incumbent on the respective purchasers of said lands, property or premises or any part thereof, to ascertain or inquire whether such notice of sale shall have been given or to see to the application of the proceeds thereof.

This certainly (in the third part regarding the application of such proceeds of sale) does not countenance anything like the contentions of the present appellants.

It should have provided expressly for that fifty cents a thousand or for the commissions provided for in foregoing or something like thereunto, if the contentions set up are sound.

In the argument much was said by counsel for appellants about this agreement being unambiguous and not ambiguous as suggested by some of those dealing with it in the courts below.

It is contended that the language is plain and express.

So I answer is the third paragraph of the agreement, which reads as follows:—

> 3. That the said party of the second part, his heirs, executors, administrators and assigns, shall quietly and peaceably enjoy the said property and the said timber and lumber, and that the same are free from incumbrances.

If the sort of argument applied to paragraphs 1 and 2 is valid, why not rely on this one and simplify the whole business by setting up that least ambiguous of all.

Thereby the appellants are entitled to enjoy forever, as there is no limit of time named, the land in question.

Of course the answer thereto is that such was not within the contemplation of the parties.

The question thus raised as to the first and second paragraphs is whether the remarkable contentions set up by the appellants can be imagined as within the like contemplation of the parties when due regard is had to the surrounding circumstances and the conduct of the mortgagor and much more so of the appellants in later years.

I think the intention was made quite clear by the first part of the recital as quoted above that the mortgage was simply to indemnify the mortgagee for his suretyship for the contemplated advances by the bank.

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No doubt the parties intended that the mortgagee, as part of the inducement to him to become surety, was to get the benefit to be derived from handling the lumber produced so long as the advances made within the scope of said recital or interest thereon remained unpaid.

But I cannot imagine such a proposition as appellants contended for, that the advantages so implied during that period were to extend for ten years or more, being the length of time probably required to complete the lumbering.

It is not only inconsistent with the recital but also with the terms of the power of sale, and with the correlative right of redemption which the mortgagor would have the moment the condition came into existence, which would render the power of sale capable of operation.

The curiosities presented in the document shewing others like to the first two giving rise to these contentions of the appellants, do not end there or in the covenant number three, above quoted, for the pith of the fourth covenant, above quoted in part, provides, not for the protection of the mortgagee against his loss by reason of any fire, but for the payment to him

of the damage which may be caused to the said timber lands.

In as plain, unambiguous language as appellants claim for these other covenants in question the mortgagee would hereunder be entitled to claim the whole value of the timber destroyed by fire.

Of course no one ever imagined that such was the intention of the parties, but such is its literal meaning and we are left to guess what could be claimed under this covenant.

There is much to be said in favour of all these covenants presenting curiosities demonstrating such an inconsistency with the right of redemption as to render them null and void within many cases to be found when mortgagees had attempted to bar or render impossible the right of redemption.

I mean, of course, on the assumption that the results appellants claim are the true meaning thereof, interpreting and construing, in light of all the surrounding circumstances, as I do, that these first two covenants were only to be operative during the existence of the indebtedness for or in respect of the advances contemplated and then to cease. Though they are no models of accurate draftmanship, they are consistent with the creation of a mortgage and only a mortgage as being all that was intended by those concerned.

In the sense contended for by appellants they might be such as might be found in a partnership agreement but are hardly consistent with being part of a mortgage.

Evidently the explanation given the mortgagor, (who never met the solicitor who drew this document) who asked the mortgagee its meaning before its execution, and was told by him what he swore to and the learned trial judge believed, did not need much corroboration, if any needed in such a case.

Moreover the maxim relied upon in respondents' factum—*Verba chartarum fortius accipiuntur contra proferentem*—may, under such circumstances, be borne in mind.

The chances are, I suspect, that if the mortgagee had survived no one would have heard him set up such contention as appellants make.

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The unfortunate slips so evidently the result of haste in preparation of the document are cogent warnings against taking those now in question as literally correct.

Parts of any document, and especially one so prepared, may have in it sentences and covenants clear and unambiguous if taken alone, yet be most ambiguous when read in light of surrounding circumstances clearly demonstrating its real purpose.

Then as to the appellants, and relative thereto, it is to be borne in mind that their own conduct, as set forth in correspondence and accounts against them, is quite inconsistent with such claims as they set up.

In regard thereto I think the following passage in Fisher on Mortgages (Can. Ed.) relative to the analogous subject of mortgage or no mortgage, to be found in the 14th paragraph of that work, is worth quoting as a guide herein as against appellants' contention for what, I submit, is a claim for partnership.

> 14. And while the courts protect a *bona fide* purchaser, and will not lightly infer an intention to make a mere security, if none be expressed they will give effect to an intention, if proved, to create a security, and will also take care that a borrower shall not suffer from the omission by fraud, mistake, or accident, of the usual requisites of a mortgage.
>
> An instrument which purports to be an absolute conveyance, may therefore be construed as a mortgage, where, according to the true intention of the parties, it was intended to be regarded as a mortgage.

In conclusion I take the conduct of the mortgagor and mortgagee, the nature of the business they had in hand and the fact that by the hypothecation of the product of the lumber to the bank by the mortgagor, with the knowledge and assent of the mortgagee to secure payment of the advances by the bank, to be cogent evidence of the transaction being a redeemable mortgage and not a partnership, or something akin thereto.

And the conduct of appellants in relation thereto after the death of the mortgagor, renders it clear that respondents are entitled to succeed quite independently of the evidence of the mortgagor of what the mortgagee told him.

But I do not doubt that such evidence may well be received on the basis of what transpired being used in regard to the right of redemption denied by the appellants on the strength of a most ambiguous provision, if room for the contentions set up, and that there is abundant corroboration in the other provisions of the document.

Suppose the case of a mortgagor bound by the terms of his mortgage to insure, having assigned his policy to the mortgagee by an instrument that was absolute in orm and expressed as made for due consideration, but nothing else disclosing the actual consideration, and the insurers saw fit to pay what became due thereon, as result of fire, to such assignee next day after all the money due on the mortgage had been paid, and he died immediately after the receipt of such insurance money, how much and what kind of corroboration would be needed for the mortgagor to establish his rights to recover same from the representatives if the innocent mortgagee's representatives chose to insist as appellants do that the mortgagor's version of his rights must be corroborated?

I submit the surrounding facts and circumstances might suffice as they ought to do herein.

I think the appeal should be dismissed with costs.

DUFF J.—This appeal, in my opinion, should be dismissed. Parol evidence is, I think, admissible in all cases where the question arises whether a covenant

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absolute in form is intended as security and whether the real transaction is or is not a transaction of loan, that is to say, whether the property was to stand as security for the repayment of money advanced. The trial judge had held that such was the nature of this transaction and that according to the true intent of the parties the provisions of the agreement notwithstanding their form were intended to stand as security for the repayment of money advanced or to be advanced. I have discovered no satisfactory ground upon which that finding could be reversed.

ANGLIN J.—Not, I confess, without some lingering doubt, I concur in the conclusion of the learned trial judge affirmed by the majority of the learned judges of the Nova Scotia Appellate Court as to the nature and scope of the agreement between the late Charles Black and the late George McKean; but the award of damages to the plaintiff for the defendants' refusal to reconvey the land in question I think cannot be upheld.

This is not the comparatively familiar case of a defendant maintaining that a deed of conveyance in form absolute truly represents the transaction it purports to evidence against the plaintiff's assertion that it was intended to be held merely as security and is therefore in reality a mortgage. That the transfer to the late George McKean of the property in question was merely as security is common ground. The controversy between the parties is rather as to what it was given to secure—whether merely repayment of advances made by McKean with interest, as the plaintiffs assert, or also performance of an agreement, which the defendants maintain that the plaintiffs' testator, the late Charles Black, made, to lumber the property completely and either to sell and deliver the

entire product to McKean at prices to be agreed upon, or, if such agreement should not be reached, to ship such product to him on consignment and commission at stated rates. The parties also differ as to the extent and duration of the right conferred on McKean to handle the lumber produced by Black from the property. The plaintiffs maintain that that right was given merely as security for the repayment of McKean's advances and interest and was to terminate upon such repayment being completed. The defendants insist that it was absolute, that it formed the inducement for making the advances, and that it was to subsist after they were repaid and until all the lumber on the land had been cut by Black and delivered to McKean either as its purchaser or as commission agent, even though Black should sooner become entitled to a reconveyance of the land.

While the omissions from the recital in the contract under consideration of any reference to the cutting of lumber subsequent to the year 1914, and from its concluding clause of all provision for compensation to McKean for loss of profit on the sale of lumber still uncut should his power of sale for default be exercised, may be open to observation, as is pointed out by the learned Chief Justice of Nova Scotia, I am disposed to agree with Mr. Justice Russell that they scarcely created an ambiguity sufficient to justify a refusal to give effect to the plain and unambiguous covenant of Black to cut, manufacture and deliver to McKean all the lumber on the land, etc. The evidence of W. K. McKean, if accepted, would make it reasonably clear that the obtaining of this business advantage was the chief, if not the sole, consideration which moved his father to enter into the agreement and at least one passage in the cross-examination of Black would

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support that view. The provision of the agreement for the payment by Black to McKean, in the event of the former selling the property, of 50 cents per M for 30,000,000 feet of lumber, estimated to be standing on the property, less what might have been already shipped to or handled by McKean, also tends to indicate that the defendants' contention as to the real intent of the parties in making the arrangement is sound.

While the recital declares that the property is to stand as security for advances, it also states that it is to serve as security "for the performance of this * * agreement," the first operative provision of which, immediately following the recital, is the covenant of Black "to completely lumber the said property" and to "saw, manufacture and deliver all the lumber on the said property" to McKean, at prices to be agreed upon, or, in default, of such agreement, "on consignment and commission" at stated rates. But for the findings of the learned trial judge based on the oral evidence of Black, and accepted by the appellate court, that it had been represented to him by the late George McKean immediately before the execution of the agreement that this was not its purport or intent, but, on the contrary, that the meaning and scope of the agreement was that McKean should hold the lumber on the property only until he should be repaid all advances with interest and that Black executed the document under the belief, so induced, that this was its effect, I should probably have felt constrained to uphold the contention, ably and forcefully presented by Mr. Taylor and Mr. Jenks on behalf of the appellants, that the covenant for cutting and delivering all the lumber on the premises must be given effect according to its tenor and that Black's

property had been pledged as security for its performance. But I am inclined to think we should not interfere with the findings made by the learned trial judge and affirmed on appeal unless the evidence on which they are based was inadmissible, or s. 35 of the Nova Scotia Evidence Act (R.S.N.S., 1900, c. 165) prevents effect being given to it.

The admissibility of the evidence cannot, I think, be rested on ambiguity in the agreement. In the first place, as already stated, I do not find any such ambiguity. But if, as held by the learned trial judge and the learned Chief Justice of Nova Scotia, there is inconsistency between the recital and the final proviso on the one hand and the covenant invoked by the defendants on the other which renders the whole instrument equivocal, that, with respect, would seem to be a patent ambiguity and as such, in the quaint language of Lord Bacon, not to be "holpen by averment." *Saunderson* v. *Piper* (1).

But in support of a claim for reformation or of a plea of estoppel grounded on misrepresentation, whether fraudulent or innocent, the evidence under consideration was, I think, admissible. Its sufficiency is of course another question.

Fraud, it is true, is not alleged, and there may therefore be a difficulty in the way of the plaintiffs recovering on that ground without amendment. But the defendants seem to me to be in this dilemma. Accepting the finding that the representation deposed to by Black was made to and acted upon by him, it was either honestly and innocently, or dishonestly and fraudulently made. If the latter, the defendants would scarcely be heard to allege the turpitude of the party through whom they claim. If the former,

(1) 5 Bing. N.C. 425.

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there was mutual mistake such as would afford a ground for reformation. Moreover, for a party who had made such a misrepresentation or for those claiming under him to insist upon holding the other party to the terms of a contract his execution of which was so induced, however innocently, would be the *ex post facto* fraud dealt with by Jessel M. R., in *Redgrave* v. *Hurd* (1), at page 12. We had to consider the admissibility of somewhat similar evidence and the effect of such a misrepresentation as raising an equitable estoppel in the recent case of *Bathurst Lumber Co.* v. *Harris* (23rd of Nov. 1920).

The learned trial judge found in the circumstances and in the terms of the agreement itself corroboration sufficient to satisfy s. 35 of the Nova Scotia Evidence Act. The learned Chief Justice of Nova Scotia, and Longley and Ritchie JJ. and also (with some doubt) Chisholm J. concurred in that view, and I do not understand Russell J. to express any dissent from it. I am not convinced that the conclusion reached on this point was wrong. Yet the corroboration relied on, if any, is very slight and while, as was held in *Radford* v. *Macdonald* (2), all that the statute requires is that the evidence to be corrorobated shall be

> strengthened by some evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to,

and, as was said in *Green* v. *McLeod* (3),

> the "material evidence" in corroboration may consist of inferences or probabilities arising from other facts and circumstances,

I share Mr. Justice Chisholm's doubt as to the value as corroboration of an agreement alleged by the plaintiffs to be ambiguous and were it not for the aid on

(1) 20 Ch. D. 1. (2) 18 Ont. App. R. 167.
(3) 23 Ont. App. R. 676.

this branch of the case afforded to them by the letter of the defendants' agent, C. H. Read, of the 28th of December, 1918, I should doubt whether the statute had been satisfied. But I find in the record that at the close of the trial

> it was agreed between the parties that for the purpose of this action the defendants are to be taken to be in the same position as if the defendant were George McKean and he was still alive.

If that were the situation no question of corroboration would arise and I am disposed to think that this agreement, although that may possibly be a result which the parties did not contemplate, wholly excludes the application of s. 35 of the Nova Scotia Evidence Act.

During the course of the argument the suggestion was made from the Bench that if the contract should be held to give to the defendants the right for which they contend it would be unenforceable as obnoxious to the rule of equity prohibiting the clogging or fettering of the mortgagor's equity of redemption. Counsel, however, did not discuss this aspect of the case, and, in the absence of argument, I should not be disposed to express a concluded opinion upon it. It might be a very nice question whether the right asserted by the defendants that after repayment of all advances and interest they should still control the output of the mortgaged property either as purchasers at a price to be agreed upon, or as commission agents at fixed rates, was inconsistent with Black's contractual and equitable rights to have his property restored unfettered upon such repayment, as was held to be the case in *Bradley* v. *Carritt* (1), or was merely a stipulation for

(1) [1903] A.C. 253.

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an independent collateral advantage not in itself unfair or unconscionable, not in the nature of a penalty clogging the equity of redemption, and not inconsistent with or repugnant to the contractual and equitable right to redeem as, in *Kreglinger* v. *New Patagonia Meat & Cold Storage Co.* (1), at page 61, a provision for an option of pre-emption was deemed to be under the circumstances of that case.

As at present advised I should be disposed to regard the transaction as evidenced by the written instrument as fair and businesslike and not within the mischief aimed at by any equitable rule or maxim relating to the clogging or fettering of the equity to redeem a mortgage. If the evidence of Black, on the strength of which the contrary view has prevailed, were not in the record I should have said the intention of the parties as shewn by their contract was that Black should not by repaying the McKean advances and interest be entitled to put an end to McKean's stipulated right to handle the entire output of the mortgaged property either as purchaser or as commission agent. As put by Lord Parker in the *Kreglinger Case* (1), at p. 61:

> I doubt whether even before the repeal of the usury laws, this perfectly fair and businesslike transaction would have been considered a mortgage within any equitable rule or maxim relating to mortgages. The only possible way of deciding whether a transaction is a mortgage within any such rule or maxim is by reference to the intention of the parties. It never was intended by the parties that if the defendant company exercised their right to pay off the loan they should get rid of the option. The option was not in the nature of a penalty nor was it nor could it ever become inconsistent with or repugnant to any part of the real bargain within any such rule or maxim. The same is true of the commission payable on the sale of skins as to which the option was not exercised.

(1) [1914] A.C. 25.

Mutatis mutandis this language seems to fit the case at bar. But it is unnecessary to pass upon this aspect of the case and, as I have said, I prefer not to do so without the assistance of argument upon it.

Subject to modifying it by striking out the clauses awarding damages and providing for a reference to assess them the judgment in appeal should be affirmed.

MIGNAULT J.—In my opinion, clause one of the agreement signed by the parties, obliging the plaintiff, Charles O. Black, to completely lumber the property and sell the timber to the appellants, is not ambiguous nor should it be construed as being merely a guarantee to secure the repayment of the advances made to Black, and as ceasing to produce effect when these advances are repaid. It is, in my opinion, an independent covenant. See *Kreglinger* v. *New Patagonia Meat & Cold Storage Co., Ltd.* (1), where a somewhat similar covenant was made.

The case of the plaintiff, now represented by the respondents, is however that he was induced to sign this agreement by the representations of the late George McKean that

> the meaning and intention of this agreement is that we hold all the lumber on this property until we are paid off all our advances with interest, that means to say, you can't sell any lumber off this property until you cut enough to pay us all off, because if you did we would not have enough security, and that is what the agreement means.

The learned trial judge believed Black's evidence that this representation was made to him. It is contended that the matter could not be proved by parol evidence. The learned trial judge decided otherwise and under all the circumstances of the case I do not think he was in error in allowing this evidence.

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He also considered that there was sufficient corroboration under the statute requiring corroboration as to statements alleged to have been made by deceased persons. This is the only point on which I entertain any doubt, but this doubt is not sufficient in my judgment to justify me in reversing the finding of the trial judge. The question of corroboration has already been passed upon by two courts and I am satisfied to abide by their decision.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *L. A. Lovett.*

Solicitor for the respondents: *W. A. Henry.*