BOULEVARD HEIGHTS, LIMITED (DEFENDANT) ..... APPELLANT;

AND

CHARLES B. VEILLEUX (PLAINTIFF) ..... RESPONDENT.

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*Oct. 25, 26.
*Nov. 2.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Construction of statute—Sales of subdivided lands—Registration of plans—Prohibitive sanction—"Land Titles Act," 6 Edw. VII., c. 24, s.-s. 7 (Alta.); 4 Geo. V., c. 2, s. 9; 5 Geo. V., c. 2, s. 25 (Alta.)—Retrospective legislation—Illegality of contract—Rescission—Recovery of money paid—Right of action—Practice—Pleading—Appeal.

The effect of the amendment to the Alberta "Land Titles Act," 6 Edw. VII., ch. 24, by 1 Geo. V., ch. 4, sec. 15(25), adding the seventh sub-section to section 124 of that Act, is to prohibit sales of lands subdivided into lots according to plans of subdivision until after the registration of the plans in the proper land titles office and also to render any sales made in contravention of the prohibition inoperative.

The vindicatory sanction imposed by the statute is directed against the vendor and where there is no presumption of knowledge of the invalidity on the part of the purchaser he cannot be deemed *in pari delicto* with the vendor and is not deprived of the right of action to set aside the agreement and recover back moneys paid thereunder.

After the judgment appealed from had been rendered the statute was further amended (5 Geo. V., ch. 2, sec. 25) by the addition of sub-section 8(*a*) providing that the seventh sub-section could not be pleaded or relied upon in any civil action or proceeding by a party to any such agreement when the plan in question had been registered before the action or proceeding was instituted or where it was the duty of the party pleading to make such registration.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Idington, Duff, Anglin and Brodeur JJ.

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Held, that, as the last amending Act was not a statute declaratory of the law as it stood at the time when the judgment appealed from was rendered, and as appeals to the Supreme Court of Canada are not of the nature of re-hearings to which the principle of the decision in *Quilter* v. *Mapleson* (9 Q.B.D. 672) applies, the restricting provisions can have no effect upon the decision of the present appeal.

Judgment appealed from (8 West. W.R. 440) affirmed.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta(1), affirming the judgment of Walsh J., at the trial(2), by which the plaintiff's action was maintained with costs.

The circumstances of the case and the questions in issue on the present appeal are stated in the judgments now reported.

A. H. Clarke K.C. for the appellants.

M. B. Peacock for the respondent.

THE CHIEF JUSTICE.—This is an appeal from the Supreme Court of Alberta. The action was brought for return of moneys paid on account of a contract for the purchase of lands and for a declaration that the contract was rescinded. The judgment at the trial was in favour of the plaintiff. This judgment was affirmed by the full court and I can see no reason to interfere with the conclusion reached below.

The appeal is dismissed with costs.

IDINGTON J.—This is an action to rescind an agreement for the sale of lots in a subdivision, and the appeal must turn upon the meaning to be given to the section of an Alberta Act, which reads as follows:—

(1) 8 West. W.R. 440. (2) 7 West. W.R. 616.

No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the land titles office for the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister.

This was in force at the time when the agreement in question was entered into. It seems, therefore, to be the very thing which the Act prohibits, for, admittedly, there was no plan registered when it was entered into.

The respondent was ignorant of that fact and brought this action for rescission the next day after his discovery thereof.

The purpose of the Act may primarily have been the convenience of those having to deal with registrations, but the court of appeal suggests another purpose had in view by the legislature was to protect intending purchasers from possible fraud by manipulation of unregistered plans. I think we must feel bound to give due weight to that view resting upon knowledge of local conditions which we may not as clearly apprehend as the local courts.

It is by accepting that view that the respondent is entitled to succeed herein.

He comes, thus, within a class of whom each person is entitled, when acting in ignorance of an illegality tainting a contract he has entered upon, to recover from the other party to the contract, notwithstanding the illegality.

Had he known the fact when entering into the contract, or possibly when acting under the contract in a way to ratify it, he could hardly claim to recover.

The Act was amended after judgment was given

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herein by the court of appeal, and the amendment, it is urged, does away with his right therein.

Whatever might be said in the case of such an amendment as appears, enacted before the hearing in appeal, cannot, I think, help the appellant now.

That judgment was right when given. We can only give the judgment which the court below appealed from should have given. To go further would be to exceed our jurisdiction.

I think, therefore, the appeal must be dismissed with costs.

DUFF J.—I have no difficulty in reaching the conclusion that, apart from the enactments discussed below, the respondent is entitled to rescind the agreement in question on the ground of misrepresentation, on the principle of *Redgrave* v. *Hurd*(1); and this, of course, would entail the consequence that he is entitled to recover back the moneys paid under the agreement.

It is necessary, however, to notice the points upon which the argument chiefly proceeded (touching certain legislation), and which are dealt with in the judgments of the other members of the court. I entertain no doubt that sub-section 7 of section 124 of the "Land Titles Act," which is in the following words:—

> No lots shall be sold under agreement for sale or otherwise according to any townsite or subdivision plan until after the same has been duly registered in the land titles office of the registration district in which the land shewn on said plan is situate; providing that this section shall not apply to any plan now in existence and approved by the Minister,

(1) 20 Ch. D. 1.

does prohibit any agreement for the sale of "lots"—"according to any townsite or subdivision plan until after the same has been duly registered"; and that, consequently any such agreement, made in the circumstances mentioned, though *de facto* complete, is by reason of this enactment legally inoperative.

It does not, however, necessarily follow, where moneys have been paid under such a transaction in professed and intended performance of the obligations supposed to be thereby created, that such moneys can be recovered back by the party paying them on discovering that the transaction was illegal. The law of England as touching the right to recover back moneys paid or property delivered under an unlawful agreement or the right to set such an agreement aside was fully discussed in the case of *Lapointe* v. *Messier* (1), and, for convenience, I quote from my own judgment, at pages 287, 288 and 289:—

> The general rule of the English law is stated in the judgment of Lord Mansfield, in *Holman* v. *Johnson*(2).
>
> "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of the country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and the defendant were to change sides, and the defendant was to bring his action against

(1) 49 Can. S.C.R. 271. (2) Cowp. 341, at p. 343.

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the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*"

There are, however, apparent exceptions to this rule and the question is whether or not the present case comes within any of those exceptions. These exceptions have been stated in two text books of high repute and in two comparatively recent judgments. And, before considering the scope of them in their application to this case, it will be convenient to reproduce the passages: 1st Pollock on Contracts, pages 404, 405:—

"Money paid or property delivered under an unlawful agreement cannot be recovered back, nor the agreement set aside at the suit of either party—unless nothing has been done in the execution of the unlawful purpose beyond the payment or delivery itself (and the agreement is not positively criminal or immoral);

"Or unless the agreement was made under such circumstances as between the parties that, if otherwise lawful, it would be voidable at the option of the party seeking relief.—Note (*b*).—This form of expression seems justified by *Harse* v. *Pearl Life Assurance Co.*(1).

"Or in the case of an action to set aside the agreement, unless in the judgment of the court the interests of the third persons require that it should be set aside."

Secondly, Anson on Contracts, pp. 253-4:—

"But there are exceptional cases in which a man may be relieved of an illegal contract into which he has entered; cases to which the maxim just quoted does not apply. They fall into three classes: (1) The contract may be of a kind made illegal by statute in the interests of a particular class of persons of whom the plaintiff is one; (2) the plaintiff may have been induced to enter into the contract by fraud or strong pressure; (3) no part of the illegal purpose may have been carried into effect before it is sought to recover the money paid or goods delivered in furtherance of it."

The first of the judgments is in *Kearley* v. *Thomson*(2), where Lord Justice Fry says (pp. 745-6):—

"To that general rule there are undoubtedly several exceptions, or apparent exceptions. One of these is the case of oppressor and oppressed, in which case usually the oppressed party may recover the money back from the oppressor. In that class of cases the delictum is not par, and, therefore, the maxim does not apply. Again, there are other illegalities which arise where a statute has been intended to protect a class of persons, and the person seeking to recover is a member of the protected class. Instances of that description are familiar in the case of contracts void for usury under the old statutes, and other instances are to be found in the books under other statutes, which are, I believe, now repealed, such as those

(1) [1904] 1 K.B. 558. (2) 24 Q.B.D. 742.

directed against lottery keepers. In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

In the present case it may be suggested that the respondent brings himself within either one of two of the exceptions mentioned. First (and as I have intimated this is sufficient for disposing of the appeal), that the agreement was made under such circumstances that if otherwise lawful it would have been voidable at the option of the respondent. Secondly, that the enactment was intended to afford protection to a particular class of persons of whom the respondent is one. It is open to doubt, I think, whether the respondent does in truth bring himself within this last mentioned exception. I am disposed to think the better view to be that this enactment is intended to serve the general public interest in the security and certainty of title which is one of the main objects of the "Land Titles Act."

Assuming, however, as some of my learned brothers think, that the respondent has a status to set aside the agreement on the ground of illegality alone, then it become necessary to consider the contention of Mr. Clarke that the rights of the parties are governed by sub-sections 8(*a*) and 8(*b*) of section 124, which sub-sections were enacted on the 17th of April, 1915, after the judgment of the Appellate Division of Alberta now appealed from was delivered; (5 Geo. V., ch. 2, sec. 25). If we are governed by these amendments in the decision of this appeal, then the respondent must fail in so far as his case rests upon the illegality of the agreement of sale.

There can be no doubt, I think, that if these amend-

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ments had been enacted before the hearing of the appeal by the Appellate Division of Alberta, that court would have been governed by them in the disposition of the appeal. *Quilter* v. *Mapleson*(1). The question we have to consider is another question. The Legislature of Alberta has no authority to prescribe rules governing this court in the disposition of appeals from Alberta; and the enactments invoked by Mr. Clarke, which do not profess to declare the state of the law at the time the action was brought, or at the time the judgment of the Appellate Division was given, can only affect the rights of the parties on this appeal to the extent to which the statutes and rules by which this court is governed permit them so to operate.

In my judgment, the appeal to this court is an appeal strictly so called, not an appeal by way of rehearing. The "Supreme Court Act" (sec. 51), expressly declares that this court should give the judgment which ought to have been given by the court below, and there are no words corresponding to those of Order 58, Rule 2, of the Judicature Rules, which enable the court of appeal to

> make any further or other order as the case may require.

Speaking generally, subject to some special provisions of the Act which have no present application, and to some exceptions established for the purpose of preventing the abuse of the right of appeal, it is the duty of this court to give the judgment which the court below ought to have given according to the state of the law on which it was the duty of that court to base its judgment.

(1) 9 Q.B.D. 672.

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ANGLIN J.—The contract under which the payments that the plaintiff claims to recover back were made was, in my opinion, unquestionably in contravention of sub-section 7 of section 124 of the "Land Titles Act" of Alberta (2 Geo. V., ch. 4, sec. 15, sub-sec. 25). I cannot assent to Mr. Clarke's contention that what this statute forbids is not the making of an agreement for the sale of lots on an unregistered plan, but the conveyance or transfer of lots sold under such an agreement. It is the sale under an agreement (or otherwise) which is prohibited and that is effectuated by the agreement itself which vests in the purchaser the equitable title to the lots agreed to be sold. The agreement was, therefore, illegal and void.

The amending statue of 1915, although made applicable to pending litigation, is not declaratory of the law as it stood at the time of the contract in question or at any subsequent period anterior to its enactment. It became law only after the judgment of the Appellate Division in this case had been delivered. This court is bound by statute to render the judgment which the court appealed from should have given —of course upon the law as it was when that court delivered judgment. The appeal to this court is upon a case stated and it is not a re-hearing such as would render applicable the principle of the decision in *Quilter* v. *Mapleson*(1). It is impossible to say that the provincial appellate court should have given effect to an amendment of the statute law which was not in force when it rendered judgment. Nor can an amendment not declaratory in its nature, such as was that dealt with in *Corporation of Quebec* v. *Dunbar*(2),

(1) 9 Q.B.D. 672. (2) 17 L.C.R. 6.

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cited by Mr. Clarke, enable us to say that the law was at the date of the judgment appealed from what the subsequent amendment has made it. I express no opinion as to how far such a declaratory amendment enacted by a provincial legislature after a right of appeal to this court had arisen would be binding on us.

Ordinarily, a party to an illegal contract cannot recover back moneys paid under it. But to this rule the law admits of an exception in favour of a plaintiff whom it does not regard as *in pari delicto* with the defendant. In the present case it is the sale, not the purchase, of land according to an unregistered plan which is forbidden. The penalty provided by sub-section 8 of section 124 of the "Land Titles Act" (4 Geo. V. (2nd Sess.), ch. 2, sec. 9, sub-sec. 4), is, as I read it, imposed on the vendor. He is the "offender" who sells. The seller may be presumed to know whether the plan according to which he is selling is or is not registered. There is no ground for a presumption of like knowledge on the part of the purchaser. Moreover, there is reason to believe that the statute was passed for the protection of purchasers. These are circumstances which, upon the authorities, suffice to relieve the present plaintiff, as a party not *in pari delicto*, from the operation of the rule which would, otherwise, disentitle him to sue for the recovery back of money paid under an illegal agreement.

It is unnecessary to consider the other grounds on which the respondent claimed to be entitled to rescission.

The appeal, in my opinion, fails and must be dismissed with costs.

BRODEUR J.—This is an action in rescission of an agreement for sale based upon three grounds:—

1. Illegality of the contract;
2. Defendant's inability to make title;
3. Misrepresentation of the vendors.

The illegality of the contract is invoked by the purchaser who claims that it was made in contravention of a statute passed in 1912 (sub-sec. 7, of sec. 124, "Land Titles Act"), declaring that

> no lots shall be sold under agreement for sale, or otherwise, according to any townsite or subdivision plan until after the same has been duly registered in the land titles office.

The lots of land in question in this case were shewn on a subdivision plan that was not registered as required by that statute.

The trial judge and the Appellate Division of the Supreme Court came to the conclusion that the agreement for sale should be rescinded in view of that prohibitory law. I concur in the reasons given by the trial judge, Mr. Justice Walsh.

But, since the judgment of the court of appeal was rendered, on the 12th of March, 1915, the Legislature of Alberta has amended the "Land Titles Act," on the 17th of April, 1915 (5 Geo. V., ch. 2, sec. 25), and has enacted sub-sections 8(*a*) and 8(*b*) of section 124, which provide as follows:—

> 8(*a*). No party to any sale or agreement for sale shall be entitled in any civil action or proceeding to rely upon or plead the provisions of sub-section 7 of this section, if the plan of subdivision by reference to which such sale or agreement for sale was made was registered when such action or proceeding was commenced, or if, pursuant to the arrangement between the parties, it was the duty of the party who seeks to rely upon or plead the provisions of such sub-section to himself register such plan of subdivision or cause the same to be registered.

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8(*b*). The costs of pending proceedings to which sub-section 8(*a*) applies shall be disposed of as if the said sub-section had not been passed.

The question which is raised as a result of that new legislation is whether we should give effect to it or not in this case.

By the "Supreme Court Act," section 51, this court may dismiss an appeal or give the judgment which the court whose decision is appealed against should have given.

At the time the court below was considering this case, the statute now invoked had not been passed. It could not be then acted upon by that court. Our duty is to render the judgment which the court below should have rendered.

The Legislature of Alberta could not pass any legislation that could interfere with the powers vested in and restrictions imposed on this court by the Federal Parliament.

If it was a declaratory law that had been passed by the provincial legislature, of course we would be bound by it.

I am of opinion that the judgment of the Supreme Court of Alberta should be confirmed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Savary, Fenerty & De-Roussy.*

Solicitors for the respondent: *Peacock, Skene & Skene.*