[HIGH COURT OF AUSTRALIA.]

GEORGE . . . . . APPELLANT;
DEFENDANT,

AND

GREATER ADELAIDE LAND DEVELOPMENT COMPANY LIMITED . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 27; *Oct.* 1.

SYDNEY, *Dec.* 9.

Knox C.J., Isaacs and Starke JJ.

Vendor and Purchaser—Allotments—Contract for sale—Statutory prohibition of sale until Act complied with—Contract made subject to compliance with Act—Act not complied with at date of contract—Validity of contract—Recovery of money paid under illegal contract—Town Planning and Development Act 1920 (*S.A.*) (*No.* 1452), *secs.* 4, 23, 44*—*Regulations under Town Planning and Development Act* (*S.A.*), *regs.* 17-46—*Real Property Act* 1886 (*S.A.*) (*No.* 380), *sec.* 101*—*Real Property Act Amendment Act* 1919 (*S.A.*) (*No.* 1415), *sec.* 3*—*Land Agents Acts* 1925-1927 (*S.A.*) (*No.* 1723—*No.* 1807), *secs.* 25A, 25E.*

Sec. 23 of the *Town Planning and Development Act* 1920 (S.A.) makes it unlawful for any person to subdivide any land into allotments or to offer for sale or to sell, or to convey, transfer or otherwise dispose of any existing

* The *Town Planning and Development Act* 1920 (S.A.), by sec. 4, defines "subdivide" to mean and refer to "(*a*) dividing a parcel of land by sale, conveyance, transfer, lease, mortgage, agreement, partition, or other dealing or instrument, or by procuring the issue of a certificate of title under the *Real Property Act* 1886, in respect of any portion of any land; or (*b*) dividing a parcel of land by building thereon in such a manner that any part thereof becomes obviously adapted for building, or for occupation, separately from the remaining portion of such land." By sec. 23 it is provided that "it shall not be lawful . . . (*b*) for any person to subdivide any land into allotments or otherwise, or resubdivide any existing allotment or parcel of land for building or other purposes; or (*c*) for any person to offer for sale, or to sell, or to convey, transfer, or otherwise dispose of any existing allotment or parcel of land except in accordance with the provisions of this Act." By sec. 44 a penalty not exceeding £200 is imposed "on any authority or person who subdivides, resubdivides, disposes of, or deals with any land in contravention of the provisions of" Part III., Division II., of the Act, which includes sec. 23.

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allotment or parcel of land except in accordance with the provisions of the Act, and sec. 44 imposes a penalty on any person acting in contravention of this provision. A contract for the sale of certain allotments was entered into at a time when the provisions of the Act had not been complied with. The contract was expressed to be subject to the provisions of the Act having been complied with. Subsequently to the contract the Act was complied with.

Held, that the contract was illegal and invalid.

Held, further, that moneys paid by the purchaser under the contract could not be recovered.

Harse v. *Pearl Life Assurance Co. Ltd*, (1904) 1 K.B. 558, followed.

Sec. 25A and sec. 25E of the *Land Agents Acts* 1925 *and* 1927 (S.A.) provide that a contract to purchase subdivided land which has been induced by unreasonable persuasion shall be voidable and that subdivided land means one or more vacant allotments shown on a plan of subdivision deposited in the Lands Titles Office at Adelaide.

Held, that this provision has no application to allotments, a plan showing the subdivision of which has not been deposited at the time the contract is entered into.

Decision of the Supreme Court of South Australia (*Murray* C.J.): *Greater Adelaide Land Development Co. Ltd.* v. *George*, (1929) S.A.S.R. 199, in part reversed and in part affirmed.

APPEAL from the Supreme Court of South Australia.

The Greater Adelaide Land Development Co. Ltd. brought an action against Charles Edgar George to recover the balance of

The *Real Property Act* 1886 (S.A.) provides, by sec. 101, that "any registered proprietor subdividing land for the purpose of selling the same in allotments shall deposit with the Registrar-General a map or plan, in duplicate, of such subdivision. Such map or plan shall exhibit, distinctly delineated, all roads," &c., "and also all allotments into which the said land may be divided," &c. The *Real Property Act Amendment Act* 1919 (S.A.) provides, by sec. 3, that "sec. 101 of the" *Real Property Act* 1886 "is amended by adding at the end thereof the following sub-sections . . . :—(2) Any registered proprietor subdividing land for the purpose of selling the same in allotments who . . . sells or offers for sale, or conveys or transfers, such land, or any part thereof, in allotments, before such map or plan is deposited . . . shall be liable to a penalty of not more than one hundred pounds."

The *Land Agents Acts* 1925-1927 (S.A.) enact, by sec. 25E, that in any action which comes on for trial after the commencement of the Act of 1927, "if it is shown that any person was induced . . . to enter into any contract to purchase subdivided land . . . by any unreasonable persuasion on the part of any person acting or appearing to act on behalf of the vendor or the vendor's agent, then . . . such contract . . . shall be deemed to have been induced by undue influence and shall be voidable at the option of such first-mentioned person." By sec. 25A it is provided that in sec. 25E "subdivided land" means "any one or more vacant allotments of land shown on a plan of subdivision deposited in the Lands Titles Registration Office at Adelaide or any part of such an allotment."

purchase-money payable under a contract dated 15th November 1925 for the sale of certain vacant allotments of land. In his defence the defendant alleged (1) that he was induced to enter into the contract by fraudulent misrepresentations of the plaintiff's agents; (2) that he was so induced by unreasonable persuasion within the meaning of the *Land Agents Acts* 1925 *and* 1927 (S.A.); (3) that the contract contravened the provisions of sec. 101 of the *Real Property Act* 1886 (S.A.) and sec. 3 of the *Real Property Act Amendment Act* 1919 (S.A.), and was therefore invalid; (4) that the contract contravened the provisions of the *Town Planning and Development Act* 1920 (S.A.), and was therefore invalid. The defendant counterclaimed rescission of the contract and repayment of the sum of £156 paid by him thereunder.

By the contract the plaintiff sold the vacant allotments for £1,070 "subject to the conditions of sale and to the provisions of the *Town Planning and Development Act* 1920 being complied with." Par. 2 of the conditions was in these words: "Subject to the provisions of the *Town Planning and Development Act* 1920 in relation to subdivisions of the land hereinbefore described of which the said allotment is part, having been complied with, the purchaser may pay the balance of the unpaid purchase-money at any time before the same may be due and payable as hereinbefore provided." No plan of subdivision of the allotments in question was deposited in the Lands Titles Office until some months after the execution of the contract. At the time of the contract the plaintiff was not the registered proprietor of the allotments, although it became the registered proprietor eight days later. At the date of the contract, though certain of the steps provided for in the Act and the regulations thereunder had been taken, the Act and regulations were not fully complied with until some months later.

Further material facts sufficiently appear from the judgments hereunder.

In the Supreme Court *Murray* C.J. decided against the defendant on all the issues raised, and gave judgment for the plaintiff for the amount claimed: *Greater Adelaide Land Development Co. Ltd.* v. *George* (1).

(1) (1929) S.A.S.R. 199.

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From that judgment the defendant now appealed to the High Court.

Hicks, for the appellant. As regards the point under the *Land Agents Acts*, consideration of the Acts as a whole shows that the object of sec. 25E is to give relief in connection with a certain class of land—vacant land. The allotments in question were in actual fact subdivided land at the date of the contract, and sec. 25E applies. In any case it is sufficient if the land were subdivided land at the date of the writ or even at the date of trial. To adopt any other construction is to render the legislation futile. Apart from the argument based on the language of the Act, the appellant's contention should be adopted in order to prevent a person from benefiting by his own default. [Counsel referred to *Gowan* v. *Wright* (1); *Cory & Son Ltd.* v. *France, Fenwick &c. Co.* (2); *Metropolitan Water Board* v. *Colley's Patents Ltd.* (3); *Barlow* v. *Ross* (4).] As to the point under the *Town Planning and Development Act*, the question is whether the contract is legal. If not, it is not saved by being expressed to be subject to the provisions of the Act being complied with: the efficacy of such words depends on whether they constitute a condition precedent or a condition subsequent (*Roach* v. *Bickle* (5)). Here the words constitute a condition subsequent, and such a condition cannot save an illegal contract from its illegality (*Halsbury's Laws of England*, vol. VII., p. 432; *Roberts* v. *Brett* (6)). The contract is in direct contravention of secs. 23 and 44 of the Act (*Taylor* v. *Chichester and Midhurst Railway Co.* (7)). As to the counterclaim, if this is an illegal contract the parties are not *in pari delicto* and the appellant is entitled to recover the money paid by him (*Reynell* v. *Sprye* (8); *Hughes* v. *Liverpool Victoria Legal Friendly Society* (9); *Lodge* v. *National Union Investment Co.* (10); *O'Carroll* v. *Potter* (11)).

(1) (1886) 18 Q.B.D. 201, at p. 207.
(2) (1911) 1 K.B. 114, at p. 135.
(3) (1911) 2 K.B. 38, at p. 50.
(4) (1890) 24 Q.B.D. 381, at p. 392.
(5) (1915) 20 C.L.R. 663.
(6) (1865) 11 H.L.C. 337, at p. 354; 11 E.R. 1363.
(7) (1867) L.R. 2 Ex. 356; (1870) L.R. 4 H.L. 628.
(8) (1852) 1 DeG. M. & G. 660; 42 E.R. 710.
(9) (1916) 2 K.B. 482, at p. 492.
(10) (1907) 1 Ch. 300, at p. 311.
(11) (1929) 46 N.S.W.W.N. 96.

[Counsel for the respondent were called on only as regards the questions on the *Town Planning and Development Act* and the counterclaim.]

Thomson (with him *Kriewaldt*), for the respondent. The essential purpose of the *Town Planning and Development Act* is to provide for proper width of roads, proper reserves and proper service. A second and subsidiary purpose is a prohibition of dealings contrary to the main purpose. Consideration of the whole of Division II. shows that a clear distinction is drawn between existing and future subdivisions. The part of sec. 23 prohibiting sale relates to existing allotments, that is, to allotments existing when the Act was passed. Accordingly that part of the section does not apply. Even if this contention is wrong, what happened here is neither a sale nor an offer to sell. There was no sale, because a sale connotes the immediate passing of property (*Benjamin* on *Sale*, 5th ed., p. 310). There was only an agreement to sell (*Lang* v. *Castle* (1)). If the parties to an agreement contemplate a condition, no estate or interest passes and there is no sale. Under this contract there could be no sale until the Act was complied with. Nor is there any offer for sale. There is a contract. The Act aims at an offer to sell contrary to the Act (*Norton* v. *Angus* (2)). If this contention is correct, the respondent must still show that the land has not been subdivided contrary to the earlier words of sec. 23. The emphatic word in the definition of " subdivide " is " divide." The word " agreement " in that definition must be read *ejusdem generis* with what has gone before. To come within the definition the agreement must pass an interest. In any event, whatever the proper interpretation of the Act, there is nothing to say that the Act must be complied with before the contract is entered into. The purpose of the Act cannot be frustrated by a document which expressly provides that the Act shall be observed. The regulations carry the matter no further : they merely sketch in detail what has been laid down in the Act (*Egan* v. *Ross* (3) ; *Roseville Extended Ltd.* v. *Lucas* (4)). As to the counterclaim, if a contract is illegal the rule is that neither side can recover anything paid under it. The only qualifications to this

(1) (1924) S.A.S.R. 255.
(2) (1926) 38 C.L.R. 523.
(3) (1929) 46 N.S.W.W.N. 90.
(4) (1926) S.R. (N.S.W.) 402.

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rule are if a fiduciary relationship exists or if an Act is passed for the benefit of a class and recovery of money is claimed by a member of that class (*Kearley* v. *Thompson* (1); *Harse* v. *Pearl Life Assurance Co.* (2)).

[ISAACS J. referred to *Petherpermal Chetty* v. *Muniandi Servai* (3).

[STARKE J. referred to *Hermann* v. *Charlesworth* (4).]

Hicks, in reply, referred to *Central Trust and Safe Deposit Co.* v. *Snider* (5).

Cur. adv. vult.

Dec. 9.

The following written judgments were delivered :—

KNOX C.J. An action was brought by the respondent against the appellant to recover the purchase-money payable under a contract dated 15th November 1925 for the sale of certain allotments of land. The appellant set up (1) that he was induced to enter into the contract by fraudulent misrepresentations of the respondent's agents, (2) that he was so induced by unreasonable persuasion within the meaning of the *Land Agents Act* 1927, (3) that the contract contravened the provisions of sec. 101 of the *Real Property Act* 1886 and sec. 3 of the *Real Property Act Amendment Act* 1919 and was therefore invalid, (4) that the contract contravened the provisions of the *Town Planning and Development Act* 1920 and was therefore invalid. The appellant also counterclaimed for £156 paid by him under the alleged contract. The action was tried before *Murray* C.J., who decided against the appellant on all the issues raised and gave judgment for the respondent for the amount claimed. From this judgment the present appeal is brought. The appellant does not challenge the finding on the issue of misrepresentation.

With regard to the defence founded on the *Land Agents Act* the learned Chief Justice held that the land in question was not "subdivided land" within the meaning of the Act and therefore the provision as to unreasonable persuasion did not apply. In my opinion he was clearly right in so deciding, and I have nothing to add to the reasons which he gave for his decision.

(1) (1890) 24 Q.B.D. 742, at p. 746.
(2) (1904) 1 K.B. 558, at p. 563.
(3) (1908) L.R. 35 Ind. App. 98.
(4) (1905) 2 K.B. 123.
(5) (1916) 1 A.C. 266.

As to the defence based on the provisions of the *Real Property Acts* it was proved that the respondent was not at the relevant time either the registered proprietor or the agent of the registered proprietor of the land in question; and on these facts the Chief Justice decided, in my opinion correctly, that the respondent in making the contract in question committed no offence against the provisions of these Acts.

The next question is whether the contract was forbidden by the *Town Planning and Development Act* 1920. Sec. 23 of that Act provides that it shall not be lawful for any person to offer for sale or to sell or to convey, transfer or otherwise dispose of any existing allotment or parcel of land except in accordance with the provisions of that Act, and by sec. 44 a penalty is imposed on any person who subdivides, resubdivides, disposes of or deals with any land in contravention of the provisions of Part III., Division II., of the Act, which includes sec. 23. The *Acts Interpretation Act* 1915 of South Australia (No. 1215), by sec. 4, provides that in every Act whenever passed, unless the contrary intention appears, the expression, "this Act" includes regulations, rules and by-laws made under the Act wherein the expression occurs. Reg. 17 of the Regulations made under the *Town Planning and Development Act* 1920 provides that after the coming into operation of the Act any owner who desires to offer for sale, sell, convey, transfer or otherwise dispose of any existing allotment or parcel of land shall cause a plan to be prepared which shall comply with the provisions of secs. 28, 33 and 34 of the Act. The regulations following prescribe the steps to be taken to obtain approval of such plan, the final steps being the issue by the Government Town Planner of a certificate of approval (reg. 44) and the deposit by the owner of the certificate and copies of the plan under sec. 35 of the Act (reg. 46). On 15th November 1925, when the contract sued on in this action was made, the certificate of approval had not been issued, and the provisions of sec. 35 of the Act were not complied with until 25th February 1926. There can, I think, be no doubt that, leaving aside any question of illegality, the contract was and was intended to be a binding agreement for sale of the land the performance of which was not to be completed until the provisions of the Act had been complied with, and it is clear that the subject

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matter of the contract consisted of "allotments." Nor do I entertain any doubt that the transaction amounted to a "sale" within the meaning of sec. 23 of the Act, in which the word "sell" is used to describe a transaction different from a transfer, conveyance or disposition of the lands. Such a transaction is forbidden by the Act, and is therefore unlawful, unless the provisions of the Act—i.e., the Act and Regulations—are complied with. Apparently the parties recognized that on 15th November the provisions of the Act had not been complied with, but took the view that compliance was possible after sale and before conveyance. It is true that neither in the Act nor in the Regulations is there any express prohibition against selling before the issue by the Government Town Planner of a certificate of approval and the deposit of the certificate and plan, but it seems to me that such a prohibition must be implied from the terms of regs. 17-46, which prescribe the steps to be taken by any person *desiring to sell* an allotment. The plain object of the Act and Regulations is to require the owner of any land which it is desired to sell in allotments to obtain the approval of the Government Town Planner to the proposed plan of subdivision, and this object can only be obtained by reading the regulations as imposing an obligation to obtain such approval before any allotment is sold, for the words "who desires to" govern not only the word "sell" but also the words "offer for sale, convey, transfer or otherwise dispose of," and a regulation which prescribes a course of conduct for an "owner" who "desires to transfer" would be wholly ineffective if the owner could lawfully transfer without first complying with the regulations prescribed. If the true meaning of the regulations be, as I think it is, that the steps prescribed must be taken before any sale or offer to sell an allotment is made, the provision in the contract that it was "subject to the provisions of the Act being complied with" can have no effect, for the requirement of the Act and Regulations that the certificate of approval should be obtained and deposited with the plan before any sale of the land could lawfully be made could never be complied with in respect of this contract. For these reasons I am of opinion that the contract of 15th November 1925 contravened the provisions of the *Town Planning and Development Act* and was therefore illegal and invalid.

The remaining question is whether the appellant is entitled to recover the money paid by him under the alleged contract. It appears that the amount which the appellant now seeks to recover was paid in respect of instalments of purchase-money payable under the contract during the period between 19th November 1925 and 17th August 1927. Apparently nothing beyond the payment of these instalments was done by either party towards performance of the contract. It is said in *Halsbury's Laws of England* (vol. VII., par. 846) that money paid in pursuance of an illegal contract can be recovered from the other party so long as the contract remains executory, but that if a substantial part of the contract has been performed money paid under the contract can no longer be recovered except where it appears that the parties were not *in pari delicto*. It appears to me difficult to reconcile this statement of the law with the decision of the Court of Appeal in *Harse* v. *Pearl Life Assurance Co.* (1), unless payment of money in pursuance of the contract be regarded as performance of a substantial part of it. In that case the plaintiff sought to recover the amount paid by him as premiums on illegal contracts of insurance into which he had been induced to enter by the innocent misrepresentation of defendant's agent. The County Court Judge held that even if both policies were void for want of insurable interest—i.e., were illegal contracts and therefore void, and not merely voidable at the option of one of the parties—the representations having been innocently made, the premiums could not be recovered back. The decision was affirmed by the Court of Appeal (*Collins* M.R. and *Romer* and *Mathew* L.JJ.). In delivering judgment *Collins* M.R. said (2) :—" It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back. . . . Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss." And

(1) (1904) 1 K.B. 558.

(2) (1904) 1 K.B., at p. 563.

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Romer L.J. said (1): "Assuming that the two policies are void because they were illegal, it is clear that the plaintiff cannot recover the premiums that he has paid unless he can make out that he is not *in pari delicto* with the defendant company." I can find no sufficient ground on which that case can be distinguished from the case now under consideration. In each the contract was void because it was illegal, in each both parties apparently believed the contract to be valid, in each there was no fraud proved, and no fiduciary relationship between the parties, nor was anything proved in the nature of oppression or duress. In *Harse's Case* (2), the contract being wholly void, neither party could have insisted on its performance, and therefore it could not be said that the company had been at risk under the policies, or that anything had been done in performance of the contract except the payment of premiums in pursuance of it. In *Harse's Case* it could not be said that the illegal purpose had been carried out or a substantial part of the contract had been performed, unless the payment of premiums were regarded as such performance; and, if so, in the present case there is no reason for treating the payment of instalments of purchase-money as having a different result. The decisions relied on by counsel for the appellant appear to me to be distinguishable. In *Kettlewell* v. *Refuge Assurance Co.* (3) fraud was proved. In *Hughes's Case* (4) the contracts were obtained by fraudulent misrepresentation, and therefore the parties were not *in pari delicto*. In *Hermann* v. *Charlesworth* (5) *Collins* M.R. based his decision on the position of the defendant as a stakeholder and on the attitude of Courts of equity to the particular mischief arising on marriage brokage contracts. *Taylor* v. *Bowers* (6) was a case of stakeholder; so, in substance, was the case of *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Wright* (7) and the case before the Judicial Committee (8) referred to in the reasons of *Isaacs*, *Gavan Duffy* and *Rich* JJ. (9). Where the action is to recover money deposited with a stakeholder to abide the event of an illegal contract the money can be recovered, if notice be given

(1) (1904) 1 K.B., at p. 564.
(2) (1904) 1 K.B. 558.
(3) (1908) 1 K.B. 545.
(4) (1916) 2 K.B. 482.
(5) (1905) 2 K.B. 123.
(6) (1876) 1 Q.B.D. 291.
(7) (1917) 23 C.L.R. 185.
(8) (1908) L.R. 35 Ind. App. 98.
(9) (1917) 23 C.L.R., at p. 197.

to the stakeholder at any time before he has actually paid it over in pursuance of the contract. But the decision in *Harse's Case* (1) seems to show that, where money is paid in pursuance of an illegal contract by one of the parties to the other, it is not recoverable unless there be present some element of fraud, duress or oppression or some circumstances creating a fiduciary relationship between the parties so that the parties may be regarded as not *in pari delicto*. In the present case nothing of that kind is shown to exist; and, on the authority of the decision in *Harse's Case*, I am of opinion that the appellant is not entitled to recover the amount paid by him in pursuance of the contract.

I think that both the action and the counterclaim should be dismissed.

ISAACS J. Three questions were argued. The first was as to whether the land was "subdivided land" within the *Land Agents Act* 1925 as amended in 1927. Whatever it was intended to enact is conjectural; the controlling circumstance is that the definition "subdivided land" for this purpose includes the word "deposited." That is what the Legislature has said, and no Court can amend the statute by omitting the word. The second turns on the *Town Planning and Development Act* 1920. *Murray* C.J. thought that the words "subject to . . . the provisions of the *Town Planning and Development Act* 1920 being complied with" saved the bargain, and on completion of all that the Act and the Regulations under it require, the contract was binding and enforceable. That depends on whether, before the Act is complied with, the law prohibits the making of the contract, or only the transfer of the land. In my opinion the effect of secs. 23 and 44 is to prohibit the making of the contract, either absolutely or conditionally. The purpose of the legislation is disclosed in sec. 19, and extends to the promotion of public interests, convenience and safety. To this end, traffic in land commencing with the offer to sell and continuing to the transfer and including all disposal, is forbidden, except in accordance with the provisions of the Act. Reg. 17, made in pursuance of sec. 50, prescribes the duty of the owner who wishes,

(1) (1904) 1 K.B. 558.

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inter alia, to offer for sale or sell any land. That duty begins with the deposit of a plan, and includes an application for approval, and the regulation read in connection with the Act itself connotes the obligation to await approval before even offering the land for sale. The attempted sale, having taken place before approval, is invalid, and the appellant defendant is entitled to succeed on the claim. The third question is whether the defendant is, on the counter-claim, entitled to recover £156 instalments paid in pursuance of the contract. The primary test in such a case is: Has the illegal purpose been carried out in whole or in part? (*Taylor* v. *Bowers* (1); *Petherpermal Chetty* v. *Muniandi Servai* (2); *Perpetual Executors &c. Ltd.* v. *Wright* (3).) In the last mentioned case the question is stated to be "whether the illegal purpose from which the plaintiff insists on retiring still rests in intention only. If either he is seeking to carry out the illegal purpose, or has already carried it out in whole or in part, then he fails." In applying this principle a distinction must be observed between a contract to do an unlawful act, and therefore affected only by common law, and a contract itself made illegal by statute. *Taylor* v. *Bowers* (4) is an instance of the first kind; *Harse* v. *Pearl Life Assurance Co.* (5), of the second. In *Evanson* v. *Crooks* (6) *Hamilton* J. says: "A defendant is not under any obligation to repay the money *ex æquo et bono* where an Act of Parliament has said that the transaction shall be void, and the Courts, particularly the Court of Appeal in the case of *Harse* v. *Pearl Life Assurance Co.*, have said that the effect of that statute is to disentitle the plaintiff to recover the money." The statute in the present case strikes directly, not only at the subsequent transfer of the land, but also at the contract itself. Both parties in entering into that bargain carried out an illegal purpose. The concluding words do not save the contract, because the mere fact of entering into it made it impossible to give those words the necessary effect. The Act was already contravened. But those words have the effect of establishing that the purchaser, who must be assumed to know the law, knew also that it was not

(1) (1876) 1 Q.B.D., at p. 300.
(2) (1908) L.R. 35 Ind. App., at p. 103.
(3) (1917) 23 C.L.R., at p. 196.
(4) (1876) 1 Q.B.D. 291.
(5) (1904) 1 K.B. 558.
(6) (1911) 106 L.T. 264, at p. 269.

being observed, and he was *in pari delicto*. His counterclaim therefore fails.

STARKE J. The contract in this case was expressly made "subject to the conditions of sale, and to the provisions of the *Town Planning and Development Act* 1920 being complied with." It is a question of construction whether these words are a condition of agreement, or a condition or term of the bargain. In the former case, no agreement exists between the parties; in the latter case, an agreement exists but the promises of the parties are conditioned upon compliance with the conditions of sale and the provisions of the *Town Planning and Development Act* 1920. *Roach* v. *Bickle* (1), upon which the learned Chief Justice in the Court below relied, belongs, on the construction put upon the particular agreement or instrument there involved, to the former class of case. But the present contract falls, in my opinion, within the latter class. The provisions of the *Town Planning and Development Act* 1920 are put on precisely the same basis as the conditions of sale, and they are clearly made mere terms of an existing agreement. (Cf. *Von Hatzfeldt-Wildenberg* v. *Alexander* (2); *Niesmann* v. *Collingridge* (3).) The *Town Planning and Development Act* 1920, sec. 23, provides that "it shall not be lawful . . . for any person to subdivide any land into allotments . . . or . . . to offer for sale or to sell, or to convey, transfer, or otherwise dispose of any existing allotment or parcel of land except in accordance with the provisions of" the Act, and sec. 44 imposes a penalty on any person acting in contravention of this provision.

The question, therefore, is whether a sale subject to the terms of the Act being complied with is in contravention of the Act. *Murray* C.J. in the Court below held that it was not, but consideration has led me to the conclusion that this decision cannot be supported.

The principle is undoubted that a transaction expressly or impliedly forbidden by statute is unlawful. The *Town Planning and Development Act* 1920 renders unlawful not only conveyances and transfers of allotments, but also the acts of offering for sale or

(1) (1915) 20 C.L.R. 663.
(2) (1912) 1 Ch. 284, at pp. 288-289.
(3) (1921) 29 C.L.R. 177, at pp. 184-185.

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Starke J.

selling such allotments. Selling, in the case of land, includes the making of agreements for its conveyance in consideration of a price in money: and this is so whether the agreement be absolute or conditional, for a conditional agreement for the sale of land is none the less a sale of land, and therefore a selling of it. Once this point is reached, the case becomes clear, for the Act prohibits the mere making of the agreement, and making the agreement "subject to the provisions" of the Act "being complied with" cannot save it.

On the question arising under the *Land Agents Act* 1927, I adopt the judgment of *Murray* C.J., and have nothing to add.

I agree that the appellant cannot recover the money paid by him under the agreement for sale (*Harse* v. *Pearl Life Assurance Co.* (1)).

Appeal allowed. Judgment of the Supreme Court set aside and judgment in the action entered for the appellant and on the counterclaim for the respondent. The appellant to pay the costs of the issues raised by par. 3 of the defence and of the counterclaim, the respondent to pay the costs of the other issues in the action and the costs of this appeal. Set-off of costs.

Solicitors for the appellant, *Badger & Hicks.*

Solicitors for the respondent, *Alderman, Reid & Brazel.*

C. C. B.

(1) (1904) 1 K.B. 558.