

1922  
 \*Feb. 7, 8.  
 \*March 29.

H. D. TWIGG AND OTHERS..... } APPELLANTS;  
 (DEFENDANTS)..... }

AND

ISAAC GREENIZEN..... } RESPONDENT.  
 (PLAINTIFF)..... }

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

*Contract—Sale of land—Fraud—Collusion between vendor and one of several purchasers—Claim by purchasers for rescission—Restoration of property—Sufficiency of restitution—Damages for deceit.*

APPEAL from the judgment of the Court of Appeal for British Columbia (1), varying the judgment of Clement J. at the trial and maintaining in part the respondent's action.

The respondent sold a tract of land to a syndicate of five who formed a joint stock company to which their trustee conveyed the land subject to a mortgage to the respondent, payment of which was guaranteed by the members of the syndicate. The company subdivided the land into townsite lots and registered a plan thereof. Thereupon the Crown, under the "Land Act" R.S.B.C. (1911) c. 129, became entitled to a conveyance of one-quarter of the lots in the subdivision, which was duly made. In a suit by the

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

(1) [1921] 3 W.W. R. 493.

respondent for payment under the mortgage and guarantee, an allegation in defence, sustained on the facts by the trial judge and the Court of Appeal, was that in his conveyance the respondent fraudulently misstated the price to be \$75 an acre whereas the amount to be actually received by him was \$50 an acre, the balance being payable by him to a member of the syndicate, a fact unknown to his co-purchasers. The respondent, having settled with two of the other members of the syndicate, the two remaining members defended the action, and, by counter claim, sought rescission of the contract of sale. The principal answer made to this claim was that restitution of the land was impracticable. The legislature of British Columbia passed an Act, retrospective in its application ("Land Act Amendment Act" [B.C.] 1921—2nd session, c. 24), enabling the provincial government, on cancellation of the subdivision plan, to reconvey lands transferred to it, as stated above, to the persons in whom the remainder of the lands covered by the plan of subdivision are vested.

The trial judge dismissed the action unconditionally and held the appellants entitled to rescission conditionally upon their being able to re-convey the lands as they stood before the sale to the syndicate; but he put upon the respondent the burden of procuring cancellation of the plan of subdivision of the lands and reconveyance by the provincial government of the lots transferred to it. The Court of Appeal held that, restitution of the land being impracticable, rescission could not be had; but that the appellants were entitled to recover damages for deceit, based on the difference between the real and fictitious price, viz. \$25 per acre, which damages should be set off against the mortgage moneys due respondent.

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On appeal the Supreme Court of Canada (Idington J. dissenting), held that the judgment of the trial judge for conditional rescission should be restored with the modification that the burden of procuring cancellation of the plan of subdivision and reconveyance of the lots transferred to the provincial government should rest on the appellants, the respondent, however, being required to deposit with the Registrar of the Supreme Court of British Columbia his consent as mortgagee to such cancellation and reconveyance: *Lindsay Petroleum Co. v. Hurd* (1) followed.

Should restitution, without any default of the respondent, be found impracticable, the judgment of the Court of Appeal, awarding damages for deceit, should not be disturbed.

*Appeal allowed with costs.*

*Eug. Lafleur K.C. and G. Barclay* for the appellants.

*W. N. Tilley K.C.* for the respondent.