

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Charles R. Gordon v. Thomas Horne and others, from the Supreme Court of Canada; delivered the 29th July 1910.*

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PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

LORD MERSEY.

[DELIVERED BY LORD MERSEY.]

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This is an Appeal from a Judgment of the Supreme Court of Canada, dated the 28th May 1909. That Judgment, by a majority of three Judges to two, reversed the Judgment of the Supreme Court of British Columbia, dated the 11th December 1908, whereby, by a majority of two Judges to one, that Court had reversed the Judgment of the Trial Judge, Mr. Justice Morrison, who had dismissed the action with costs.

There are two questions in the case. The first is whether, at the date of the writ, a partnership was subsisting between the Plaintiff Gordon (now the Appellant) and the three Defendants, Horne, W. S. Holland, and R. W. Holland (who are now the Respondents); and the second is whether, if so, circumstances had arisen which entitled the Plaintiff to a dissolution and consequent relief.

The contention of the Plaintiff is that he and the three Defendants became jointly interested in a speculation in land, and that subsequently the Defendant Horne fraudulently attempted to oust the Plaintiff from his interest in it and attempted to acquire the land for himself. The Defendants Horne and W. S. Holland deny that there was any partnership, and the Defendant Horne denies the alleged fraud. The Defendant R. W. Holland submits to the decision of the Court, and asks to be released from the payment of any costs.

The facts are as follows. In the year 1906 the Plaintiff Gordon and the two Defendants W. S. and R. W. Holland were carrying on business in partnership together at Vancouver under the style of the Holland Realty Company.

The business consisted of buying and selling land.

On the 15th May 1906 the firm bought of Dow and Fraser, who were acting for the vendors, three blocks of land and paid a deposit of \$10. The contracts were made subject to confirmation by the vendors. The land consisted of 43. 13 acres and was bought at a price of \$125 an acre amounting in all to \$5,391. 25. This price was to be paid by instalments, viz., \$1,800 on the confirmation of the contracts; \$906. 25 on the 15th November 1906; and the balance in three instalments of \$895 each payable on the 15th May 1907, the 15th November 1907, and the 15th May 1908 respectively. The vendors confirmed the contracts and on or about the 28th May 1906 it became necessary for the Holland Realty Company to provide the amount (\$1,800) of the first instalment. They were not able to do this, and in their difficulty they had recourse to the Defendant Horne, who was a personal friend of W. S. Holland's. There is a dispute between the Plaintiff on the one

hand and the two Defendants Horne and W. S. Holland on the other hand, as to the arrangement made with Horne on this occasion, but it is clear that the \$1,800 was found between them. The Holland Realty Company contributed \$294 and Horne \$1,506, and the amount was then paid to the vendors of the property. The arrangement with Horne is said by the Plaintiff to have been that Horne was to come in as a partner with the Holland Realty Company in the adventure, and was to provide 85 per cent of the purchase money leaving the Holland Realty Company to provide the remaining 15 per cent.; that the profits on a resale were to be divided equally between Horne and the Holland Realty Company, but that the latter was to guarantee Horne that his share of the profits should not be less than 15 per cent. on his outlay. On the other hand, Horne and W. S. Holland say that in consideration of Horne finding the balance (\$1,506) of the money required for the first instalment Horne was to become the out-and-out purchaser of the property as between himself and the Holland Realty Company; but that if and when he sold the property (a matter which was to be in his uncontrolled discretion) the profit, if any, arising from such sale was to go, first, as to 15 per cent., to Horne, and then, as to the remaining 85 per cent., in equal parts between Horne and the Holland Realty Company. Horne was also, according to this version, to pay all the future instalments. How, if at all, the Holland Realty Company was to get back the \$294 which it had contributed does not appear. Horne says that the matter was not mentioned, but that he would have returned the amount to the Realty Company out of the proceeds of the sale, if any. The substantial difference between these two stories is that, according to the Plaintiff, a

partnership was created which would give to all the members a voice in the resale of the property, whereas, according to the Defendants, Horne and W. S. Holland, no partnership was created, and Horne alone was to determine what should be done with the property. The contracts with the vendors had been taken by the Holland Realty Company in the name of one Garling, their book-keeper, and there is this much to be said for Horne's version of the arrangement, namely, that at this time (on the 29th May 1906) he took from Garling a formal assignment of the contracts, and covenanted with Garling to pay the balance of the purchase money, and generally to indemnify Garling in respect of the contracts. The Plaintiff's statement with reference to this matter is, however, that the assignment was to be held by the Holland Realty Company until such time as a trust deed could be prepared for Gordon's execution, setting out the interest of the Holland Realty Company in the property; and this statement is supported by the fact that the Company did not hand over the assignment to Horne but retained it.

When the next instalment fell due, namely, on the 15th November 1906, Horne found it inconvenient to provide any cash, and accommodation bills, bearing the names of Horne and the Holland Realty Company, were created and discounted. The proceeds of these bills were used, together with a sum of \$172 in cash, contributed by the Holland Realty Company for the purpose of making up the money required for the second instalment, and the instalment was then paid. It is to be observed that the \$294 in cash contributed by the Holland Realty Company towards the first payment, and the \$172 in cash contributed by that firm towards the second payment, are just about, though not

exactly, 15 per cent. of the two payments. Both Horne and W. S. Holland swear that they did not know of the contribution by the Holland Realty Company towards the second instalment until after the commencement of this Action. Their Lordships are unable to accept this statement. Both of them knew what the amount of the second instalment was; both of them must have known the sum obtained by discounting the bills; and both of them must therefore have known that a balance remained to be provided. And not only this, but Horne, as appears by a document (Exhibit 2) to which he put his signature later on, acknowledged that this sum of \$172 had been paid by the Holland Realty Company.

This payment is quite inconsistent with the contention of Horne that he alone was to make all the payments of the instalments of the purchase money remaining due after the payment of the first instalment. It is also inconsistent with his statement that he was to be the out-and-out purchaser of the property; for the payment would have the effect of giving to the Holland Realty Company an interest in the land even if they had not such an interest already by virtue of the payment of the \$294 in respect of the first instalment. The fact, which is undisputed, that the Holland Realty Company lent its name for the purpose of raising the money for the second instalment also appears to be inconsistent with the statement that Horne alone was to be the purchaser of the land. On this point Horne was cross-examined on the 18th December 1907. A note of this cross-examination appears on page 59 of the record. In the course of this cross-examination he swore that he had to "put up" the second instalment, and that he did not expect the Holland Realty Company to pay any part of

it. He was then confronted with statements which he had made on the subject on the 12th July 1907 in a previous action of *Gordon v. Horne*. He had then said: "Of course if there were any more payments coming due" (after the first instalment), "I looked to the Holland Realty Company to pay a proportion of them. If they were going to get a proportion of the profits they had to make a proportion of the payments." When asked to explain the apparent inconsistency of these two statements, he says that he had what he calls an "absolute guarantee" from the Holland Realty Company that there would be no second payment, so that when the second instalment became due "I went to the Holland Realty Company and told them that there were two or three talks with me in which they had agreed that there was no second payment, and I expected them to pay it." The meaning of this so-called explanation is that all parties had hoped that the land would be sold at a profit before the second instalment became payable, and that when that hope was disappointed Horne expected all to join in a scheme for providing the money wherewith to make the necessary payment. The facts relating to the payment of the second instalment, and the evidence of Horne in connection with it, appear to be far more consistent with the Plaintiff's contention that the adventure was a partnership adventure than with Horne's contention that it was not.

In the early part of 1907 disputes unconnected with this case arose between the Plaintiff and his partners W. S. Holland and R. W. Holland, with the result that by the 1st February the Holland Realty Company had ceased to do business. There was, however, no formal dissolution of the firm. In the meantime, the value of land had greatly increased, and there was a

prospect of a still further increase in value. In these circumstances it was to the interest of Horne and his friend W. S. Holland to get Gordon out of the speculation, and to secure it for themselves. It is now said by W. S. Holland that the Holland Realty Company had been trying up to this time to sell the property for Horne, and that Horne had threatened him (W. S. Holland) that if a sale were not made at once he (Horne) would sell the property himself. In answer to this threat Holland states that he told Horne that the Holland Realty Company was no longer in existence, but that if Horne was "talking to him as a private man" he had a friend in the East to whom he would submit the property if Horne would give him an option on the property until he heard from the friend. He says that thereupon Horne gave him a written option dated the 26th February 1907 on the property at \$300 an acre, the option to expire on the 12th March; and in support of his statement he produced on cross-examination a document addressed to himself and signed by Horne to that effect. It does not appear that anything was paid for the option. The Plaintiff knew nothing of it; indeed, W. S. Holland says that it was a document which did not concern the Plaintiff, and that any profit to arise from a sale at a price beyond the option limit was to be his alone. Holland says that he then opened negotiations with his friend, a man named Ewing, and succeeded, by a date in March which he is unable to fix but which appears to have been later than the 16th, in selling to him a half interest in the property at \$325 an acre. It was suggested to Holland in cross-examination that in the course of his correspondence with Ewing he had represented that the Holland Realty Company were interested in the property. His answers were evasive and unsatisfactory, and

when called upon to produce his correspondence with Ewing (notice to produce having been served upon him) he declined to do so. The inference which their Lordships draw from this conduct is that in the course of his negotiations with Ewing Mr. Holland had made statements with reference to the nature of the Holland Realty Company's interest in the property inconsistent with the case put forward by him in this action that there was no partnership with Horne. The Plaintiff doubts whether any sale was in fact made to Ewing. Ewing was not called as a witness, and Holland, as already stated, is unable to fix the date of the sale. It is true, however, that at the end of his examination-in-chief Horne produced a document (Exhibit 8), dated the 16th March 1907, purporting to be an agreement for a sale by him to Ewing of an undivided half interest in the property for \$7,008. 50, but when asked to fix the date on which he signed this document he professes to be quite unable to remember. While these negotiations are alleged to have been going on between W. S. Holland and Ewing a remarkable conversation took place between Horne and the Plaintiff. On the 12th March, according to the Plaintiff's evidence, Horne informed the Plaintiff that he had sold the whole property to a man named Ford at \$300 an acre, and had taken a deposit in connection with the transaction, adding "now Gordon I want your consent to the sale." The Plaintiff refused to give his consent until he had seen his two partners. The Plaintiff says that he then saw W. S. Holland and told him of the alleged sale to Ford, and asked him whether he would consent to it, and that Holland very willingly did consent, saying that he did not see what else could be done. Holland at the trial denied that he knew anything about the supposed sale to Ford. Horne, on the other



hand, says he told Holland of it, but that it was not a real sale but only a negotiation which never "materialised." A careful consideration of the evidence with reference to the supposed sale to Ford leads their Lordships to the conclusion that the story about Ford was a mere fiction invented by Horne (probably with the knowledge and assent of W. S. Holland) for the purpose of inducing the Plaintiff to accept a settlement of his claim in respect of the property on the basis of a sale at \$300 an acre. Ford was not called as a witness. On the day after the conversation, namely, on the 13th March, an account was drawn up by the Plaintiff and Horne (Exhibit 1) purporting to show how the money which was supposed to be coming from Ford was to be divided. After payment to Horne and to the Holland Realty Company of their respective disbursements, and after providing for the still unpaid instalments of the original purchase money, the remainder (representing the profit) was by this account to go as to one-half to Horne, and as to the other half in thirds to the partners in the Holland Realty Company. In this account there appears to the credit of the Holland Realty Company a sum of \$466, being the amount of their two contributions to the payment of the first and the second instalments. In connection with this account Horne on the next day (the 14th March) entered into a deed in which he covenanted to pay to Gordon his share of the profit shown in it. This deed contained a recital that the Plaintiff was part owner with Horne in the property, and that they (Gordon and Horne) had agreed to sell the property for the price of \$12,000. The deed also contained an undertaking on the part of Horne to give to the Holland Realty Company a note for \$466. 15. This \$466. 15 was the total of the two sums of \$294 and \$172 before mentioned. This deed

appears to their Lordships to be quite inconsistent with the story now set up by Horne and W. S. Holland, that there was no partnership between the Holland Realty Company and Horne and that Horne was to have an uncontrolled right to dispose of the property. If the story as to the sale to Ewing is true, then within two days of the execution of this deed an undivided half of the property was sold by W. S. Holland to Ewing at a price of \$7,008. 50.

Their Lordships are satisfied on the evidence that there was at the date of the writ a subsisting partnership between the Holland Realty Company and Horne in respect of the property in question, and that Horne fraudulently attempted to obtain exclusive control of the property by pretending to the Plaintiff that a sale of it had been made to Ford at the price of \$300 an acre.

In these circumstances their Lordships will humbly advise His Majesty that the Judgment of the Court below should be set aside and the Judgment of the Full Court of the Supreme Court of British Columbia restored, with costs against the defendants Horne and W. S. Holland here and below.

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In the Privy Council.

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CHARLES R. GORDON

*v.*

THOMAS HORNE AND OTHERS.

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