Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Charles Robertson Gordon v. *William Sowden Holland; and of William Sowden Holland* v. *Charles Robertson Gordon, from the Court of Appeal for British Columbia (P.C. Appeals Nos.* 49 *and* 50 *of* 1912); *delivered the* 19*th February* 1913.

PRESENT AT THE HEARING:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD ATKINSON.
LORD MOULTON.

[DELIVERED BY LORD ATKINSON.]

These are consolidated Appeals brought by Charles Robertson Gordon and William Sowden Holland, respectively, from a judgment of the Court of Appeal of British Columbia, dated the 2nd of April 1912, whereby the judgment of the learned Trial Judge, Mr. Justice Gregory, in favour of the Plaintiff Charles Robertson Gordon, dated the 19th of September 1911, was varied in some respects.

There has been much litigation between the parties interested in the several transactions out of which these Appeals arise, and the facts of the case are, in consequence, somewhat complicated.

So far as material for the purposes of this judgment, they are as follows:—

The Appellant, the Respondent, and one Richard W. Holland carried on in partnership in

the year 1906 the business of real estate agents at Vancouver, in the Province of British Columbia, under the style of The Holland Realty Company.

On the 15th of May in that year they entered into agreements with two separate vendors to purchase (with a view to re-sale) two separate plots or blocks of land in Vancouver at the price of 125 dollars per acre. Of these, the block called lot 2, purchased from the Grandview Trust Company, comprised 18·13 acres, and the block called lots 10 and 11, purchased from the Messrs. Nelson, comprised 25 acres, making 43·13 acres in all. The purchase money of the first block was therefore 2,266·25 dollars, and that of the second 3,125 dollars—5,391·25 dollars in all. The name of the book-keeper of this firm, one Garling, was inserted in these contracts as purchaser, but his was a mere *prête nom*, and of course he contracted on behalf of his employers. According to the terms of the contracts, a sum of $1,800 was to be paid on their execution, and the balance of the purchase money by four instalments of named amounts, at intervals of six months. The firm being unable to pay this sum of $1,800, applied to a friend of William Sowden Holland, one Thomas Horne by name, to come to their assistance. He did so, and advanced $1,506 in part discharge of the first payment, the firm providing the balance of $294. By two several Indentures bearing date the 29th of May 1906, Garling purported to assign to Horne both contracts of purchase, and the lands the subject of them. These instruments, however, do not appear to have ever been delivered to Horne, but he was subsequently registered in the Land Registry as the legal owner of the lands. A dispute soon arose between the Appellant on the one side, and the

Respondent and Horne on the other, as to the precise terms of the arrangement on the faith of which he, Horne, had provided the sum of $1,506. The present Appellant contended that the terms were that Horne was to come into the adventure as a partner with the three members of the firm, or so-called Company, that he was to provide 85 per cent. of the purchase money, the Company providing the remaining 15 per cent., that any profits made upon the resale of the land were to be divided between Horne and the Company in equal shares, the Company guaranteeing, however, that Horne's share of the profits should not be less than 15 per cent upon his outlay, that the land was to be conveyed to and vested in Horne as trustee for himself and his three co-adventurers, and lastly, that none of the lands were to be sold without the consent of all the parties concerned. According to this contention, Gordon substantially became beneficially entitled to one-sixth of the property. The Respondent and Horne, on the other hand, contended that the terms were that Horne was to pay all the accruing instalments of the purchase money when due, that in consideration of this the lands were to be conveyed to and be held by him as absolute beneficial owner with power to sell and alienate them at his own discretion, subject only to this, that if they should be sold at a profit, 15 per cent. of this profit should be retained by him, Horne, as his own, and the remaining 85 per cent. of it divided between him and the Company in equal shares. These were the respective positions taken up by the parties from the first, and through all the vicissitudes of the litigation in the Canadian Courts resolutely maintained by them, until the controversy was set at rest by the judgment of this Board of the 29th of July 1910, upholding Gordon's contention.

The partnership styled the Holland Realty Company was subsequently dissolved.

Towards the latter end of February 1907, Horne and his friend and adherent in the dispute, William Holland, joined in an enterprise to sell the entire 43·13 acres to one R. S. Ewing, of St. John, New Brunswick, for a sum which worked out at 325 dollars per acre. The device adopted to attain this end was this. Horne gave to the Respondent an option ending on the 12th of March 1907 to purchase the lands, and the Respondent, who was the active mover in the business, in the exercise, or pretended exercise, of the power he thus acquired, opened negotiations with Ewing by letter dated the 26th of February 1907. In this letter he dwelt in glowing terms upon the value of the property, and the vast profits likely to be realized upon its sub-division and resale, but did not then mention that he had himself any interest in it, or in the profits to be realized upon its resale other than what the option gave him. Ewing replied by telegram on the 9th of March offering to buy half the property. To this telegram the Respondent on the 14th of March wired in reply: "Land deal closed as per "your wire. Will pass draft with agreement "attached. Writing fully." The letter alluded to in this latter telegram duly arrived. It was dated the 18th of March 1907, and contained the two passages following:—

"This appeared to me to be such a good proposition "that I induced the original holder, Mr. Horne, to retain "one-quarter interest, myself taking the other quarter, "giving you that half as suggested in your wire. You "can see by this that we have absolute confidence in the "transaction. The papers are being drawn out now, "putting the property in the name of R. S. Ewing and "Thos. Horne, on exactly the basis laid down in your "letter of the 26th ult. Now to clean up this proportion "up and to do it quickly, we are sub-dividing lots 10 and "11, and No. 2 in 320, in parcels comprising practically "half acres, and we are putting them on the market at a

"given date, which date you will be advised of, and which "will be sometime about the middle of April I imagine, at "prices which will average $600 an acre over the entire "43 acres."

* * * *

"The other party interested in this proposition with us "is a personal friend of mine, I therefore can vouch for him "as an interested party. We have, however, between you "and myself, controlling interest in this property. Although "my name does not appear in the agreement of sale, I hold "a letter from Mr. Horne assigning to me one-quarter "interest in his half with all the privileges as an owner, so "that you can therefore see exactly the position in which "this deal lies. I am going, as you may depend, to make a "special effort in connection with this particular deal, as I "realise if I can make Mr. Ewing clear $1,000·00 in a "month or six weeks on a small investment like $1,500, and "should I have another good proposition to put up will "be able to induce him with more capital, and his friends "to swing a deal of this kind in this territory. I feel that "we will be able to pull this off in a hurry."

The statements contained in these extracts as to the alleged assignment by Horne to the Respondent of a quarter of interest in this land are now admitted to be false. They were obviously made to win Ewing's confidence, and induce him to buy. They were successful, not to the extent designed, but to the extent of the sale of an undivided moiety of the lands, at a profit of $200 per acre.

It was held by this Board that it was one of the express terms of the partnership agreement entered into between Horne and the partners in the Holland Realty Company that, as Gordon asserted, none of this land should be sold without the consent of each of the four partners.

It is now admitted that he, Gordon, never consented to this sale to Ewing.

The contention put forward in argument before their Lordships on the Respondent's behalf that Gordon, though not giving any antecedent consent to this transaction, acquiesced in it or adopted it, and is now bound by it, cannot,

having regard to the latter's attitude from the first, be, in their opinion, sustained.

The sale, therefore, being a violation of the express terms of the partnership agreement was illegal and wrongful from the first, and Horne the trustee for himself and his co-partners, and William Holland one of those co-partners, were in truth co-adventurers in a transaction amounting to a clear breach of trust. William Holland was not examined as a witness at the trial of the present action. Having regard to the deliberate falsehoods which he resorted to he naturally recoiled from a cross-examination.

The sale was entirely contrived and carried out by him, and was effected, or at least attempted to be effected, by his false representations. Ewing knew nothing of the true state of affairs. He obviously trusted William Holland, and stood towards the transaction, no doubt, in the position of a *bonâ fide* purchaser for value without notice. In this state of things the Appellant Gordon, on the 9th of November 1907, instituted an action in the Supreme Court of British Columbia against Horne and the two Hollands claiming (1) a dissolution of the partnership; (2) a partition of the lands, or a sale of them and a distribution of the proceeds amongst the parties interested according to their respective rights; (3) that all necessary inquiries should be made and accounts be taken; and (4) further relief.

The fourth paragraph of the Statement of Claim set forth in detail what Gordon alleged to be, it must now be assumed truthfully, the more important terms of the partnership agreement, and in the fifth paragraph it was averred that—

"Defendant Thomas Horne has attempted and is "still attempting to make a disadvantageous sale of the "said property against the will and without the consent of "the said Plaintiff."

The sale here alluded to was apparently an abortive sale to one Ford which came to nothing. Gordon was kept altogether in the dark as to the sale to Ewing. Both Horne and William Holland filed separate defences. In paragraph 19 of the former's defence he admitted that Ewing had paid him directly $1,500, half the purchase money, and had applied the other half towards the discharge *pro tanto* of the original purchase money of the land. The action came on for trial before Mr. Justice Morrison in the month of December 1907. That learned Judge held that the alleged verbal partnership agreement had not been proved and dismissed the action. On Appeal to Supreme Court of British Columbia, this Judgment was reversed, and it was on the 11th December 1908 declared that a partnership had since the 29th May 1906 existed between the said Thomas Horne, the Appellant, the Respondent, and the said Richard William Holland in respect of the said 43·13 acres of land; that the Appellant was entitled to a one-sixth share of the same; that it was a term of the partnership that no sale or dealing with the lands should take place without the consent of all the four partners, and that the said Thomas Horne held the land as trustee for the partnership. It was accordingly ordered that the partnership should be dissolved as from the said 11th December 1908 and that the following accounts should be taken:—

(1.) An account of all dealings and transactions by and between the Plaintiff and the Defendants or any of them as co-partners, including all dealings with the partnership property and assets.

(2.) An account of the credits, property, and effects then belonging to the partnership.

(3.) An account of the one-sixth interest of the Plaintiff in the partnership business and estate.

A sale, however, of the partnership lands was not directed. It now appears the partnership did not owe any debts. On appeal to the Supreme Court of Canada this judgment and decree was on the 28th of May 1909 reversed, and on Appeal to His Majesty in Council this last mentioned judgment was by Order in Council of 2nd of August 1910 reversed, and the judgment of the Supreme Court of British Columbia restored. Immediately on the reversal of the judgment of the Supreme Court of British Columbia, namely, on the 8th of June 1909, William Holland recommenced trafficking in these lands. He entered into an agreement with Ewing to re-purchase from him the undivided half interest in the lands which Ewing had himself shortly before acquired, and on the 21st of the same month he assigned to one Joseph Victor Norman Spencer this undivided half interest which he had purchased from Ewing only 13 days before. The assignment to Spencer was duly registered in the Land Registry on the same day. By this sale Spencer, a stranger to the previous litigation, became interested in the partnership assets, to the extent apparently of one undivided half. It has been urged on grounds to be presently considered that owing to the intervention of Ewing, a *bonâ fide* purchase for value without notice, the undivided half interest in the lands purchased from him which subsequently vested in Spencer stands in a position different from that of the other undivided half interest remaining in Horne, and dealt with by him almost concurrently. On the 21st of September, this same Mr. Spencer, with the aid of the Respondent, entered into an agreement with Horne to purchase from him direct the remaining undivided half interest claimed to be vested in him, for the sum of $25,872. A conveyance of this land to Spencer was accordingly duly

executed and registered on the 22nd of September in the Land Registry. Though Horne has paid almost the entire of the original purchase money, he has realised vast profits by his breach of trust. Spencer, aided and assisted by William Holland, has divided lot 2 into small building lots and sold them, at what appear to be almost fabulous prices, to *bonâ fide* purchasers for value without notice, in whom they have been vested by several conveyances duly registered. It is now admitted on both sides that the lands comprised in lot 2 cannot, as against these purchasers, be recovered in specie. Spencer remains, however, the registered owner in fee of lots 10 and 11, subject to a mortgage for $10,000 in favour of one A. C. Flummerfelt.

On the 15th of November 1910 Gordon took out a summons against Thomas Horne, William Holland, and Richard W. Holland to take directions as to the accounts to be lodged and the inquiries to be instituted in the suit, in accordance with the decree so restored, and he obtained thereon an order that Horne and William Holland, the Respondent, should file, and verify by affidavit, the accounts therein specified. The accounts, duly verified, were, accordingly, filed on the 2nd of December 1910.

The Appellant Gordon, thereupon, took the necessary steps to have Horne and William Holland cross-examined on their affidavits. On the 14th of January 1911 Horne and William Holland obtained an Order postponing their cross-examination, on the terms that they should pay into Court the sum of $4,275. 25, same being the amount to which, as shown in their accounts, the Plaintiff Gordon would be entitled in respect of his one-sixth share of the partnership assets, with liberty to him to accept this sum on or before the 4th of February 1911 in full satisfaction of his claim. This the Plaintiff

declined to do, and on the 22nd of February 1911 instituted against W. S. Holland, Horne and Spencer the action out of which the present Appeals have arisen.

His statement of claim is very voluminous, and in it he claims relief on many different grounds. In its sixth paragraph the Plaintiff charges that William Holland has always been joint owner with Spencer, both of the undivided moiety of the lands purchased from Ewing, and also of that purchased by Spencer from Horne. Both the Defendants, Horne and Holland, filed lengthy and elaborate defences, but both avoided dealing specifically with this charge. In the statement of defence filed by Spencer, however, he, like an honest man, admits that both sales were made to him for the use and on the account of William S. Holland and himself in equal shares. The truth of this admission was not questioned on argument before their Lordships.

The case came on for trial before Mr. Justice Gregory in the month of December 1911. It lasted for many days. Spencer was examined as a witness. He repeated his admission but positively denied that he had any notice or knowledge of Gordon's claim to an interest in the lands till after the service of the writs in this, the second action. His evidence is not contradicted, and if it be true he was in the position of a *bonâ fide* purchaser for value of these lands without notice.

The view taken by Mr. Justice Gregory of the result of these dealings with the partnership assets is set forth in the following passage from his judgment :—

" He (Holland) stayed out of the box because he was " afraid if he submitted himself to cross-examination it " would become apparent to everybody that he was, as " expressed by counsel—practically trying to do everybody " with whom he came in contact, in connection with this " whole transaction. Now, he is the man who actually has " the property, which at one time, according to the decision

" of the Privy Council, was the partnership property of " Gordon, Horne, and the two Hollands. He has that " property in his possession to-day. At least, as to one half " of it. It would seem to me to be unjust if he were allowed " to retain that, when he has been guilty of fraud and " deception throughout the whole transaction, from " beginning to end, with almost everybody with whom he " came in contact. It would be wrong to allow him to " profit by his own wrong-doing.

" The Privy Council say unquestionably that the property " was the partnership property, and should not have been " sold without Gordon's consent. Now, it has been sold by " Horne. Horne thought he had the right, but he had not " the right. It was bought by Holland really. He induced " Horne to sell it to him, and seeks to retain it under the " protection of the Judgment of the Supreme Court of " Canada, which has since been reversed. That might " possibly protect him if a *bonâ fide* sale had been made to a " stranger, but it is still in his hands, and to allow him to " retain it would be to deprive the Plaintiff of the fruits of " the judgment of the Privy Council, and permit Holland " to profit by his own wrongful act."

During the cross-examination of Spencer, the learned Judge (page 169) asked him the question if he, Spencer, considered an injury would be done to him if the land should be fairly divided; and what was equivalent to the Plaintiff's one-sixth of it should be awarded to him (the Plaintiff) out of the portion of lots 10 and 11 to which William Holland was still entitled? To this question Spencer answered "No." The learned Judge apparently embodied this idea in the Decree he made on the 19th of September 1911, by which it is declared that Gordon is entitled to an undivided interest in blocks 10 and 11, equal to seven acres and decimal 7926 of an acre free from all charges and incumbrances; that Spencer is a trustee of this interest for him, and should convey it to him; that the remainder of lots 10 and 11 should be divided between Spencer and William Holland in certain proportions which are named, and the interest awarded to W. S. Holland is charged with the Plaintiff's costs.

The Court of Appeal of British Columbia by its Decree bearing date the 2nd of April 1912 varied the Decree of Mr. Justice Gregory, substantially only to this extent, however, that it declared that the Plaintiff was only entitled to an undivided interest in 3·8963 (half of the 7·7926 acres awarded by the former) but was also in addition entitled to one-sixth of the profits on the sale made to Ewing. Both Gordon and W. S. Holland have appealed against this decree.

Two objections to the Decree were urged before their Lordships on behalf of William Holland in addition to that against the division of the lands in specie, the first to the effect that Horne, though now admittedly an express trustee of these lands, was not made answerable for any of the purchase money received by him on the occasions of the sales in breach of his trust of the partnership assets. The second was to the effect that inasmuch as William Holland had, through Spencer, purchased jointly an undivided moiety of the lands from Ewing, a *bonâ fide* purchaser for value, without notice, he was, on the principle laid down by Lord Hardwick in *Lowther* v. *Carlton*, 2 Atkyns 242, entitled as to this moiety to shelter himself under Ewing's title, was not, therefore, accountable to the Plaintiff in respect of it, and that accordingly the Plaintiff's remedy as against him was confined to the half of the undivided moiety purchased direct from Horne.

The market value of the lands comprised in lots 10 and 11 has been, and now is, rapidly rising. A very large profit was realised on the re-sale in building plots on lot 2, and the Plaintiff accordingly refuses to be contented with a one-sixth share of the purchase money received by Horne, less all due credits, and insists that he is entitled to receive one-sixth of the profit realised on the re-sale of lot 2, together with one-sixth of the value of lots 10 and 11 at the date of the

taking of the account, less, of course, all proper deductions. Subject to the second of the above-mentioned points their Lordships are of opinion that the Plaintiff is right in this contention. The principle laid down in *Lowther* v. *Carlton*, though undoubted, has long been held inapplicable to two classes of cases, namely, first to the case of trustees re-purchasing the trust property which they had previously sold, and secondly to the case of fraudulent and dishonest persons who seek by means of it to take advantage of their own wrong.

The law upon this point is succinctly stated by Sir G. Jessel in his judgment in *Barrow's* Case, 14 Ch. D. 432, 445. He said :—

> "The only exception and the well known exception to "the rule which protects a purchaser with notice taking "from a purchaser without notice is that which prevents a "trustee buying back trust property which he has sold, or "a fraudulent man who has acquired property by fraud "saying he sold it to a *bonâ fide* purchaser without notice "and has got it back again. Those are cases to show that "a person shall not take advantage of his own wrong. But "the present Appellant had not done wrong."

(See also *Lewin on Trusts* (12 Ed.) 1102–1103 and *West London Commercial Bank* v. *Reliance Permanent Building Society*, 29 Ch. D. 954, 962–3).

The question for decision in the present case is whether William Holland comes within both or either of these classes. He was a partner in this venture. At his suggestion, and by his procurement the express trustee, Horne, sold the partnership property in violation of the express terms of the partnership agreement. He, Holland, resorted deliberately to false representations in order to induce Ewing to buy. He concealed from his co-purchaser Spencer the existence of the Plaintiff's claim. He has shrunk from entering the witness-box to justify or excuse his action. The legal estate in lots 10 and 11 is vested in

Spencer, but William Holland seeks to retain to his own gain, and therefore to the Plaintiff's loss, the equitable interest he has, by these discreditable means acquired in the undivided moiety sold by Ewing. It is difficult to see how that action falls short of seeking to take advantage of his own wrong. Then as to his fiduciary position. In *Knox* v. *Gye*, L.R. 5, E. and I. Appeals 656, it was decided that in an action for an account of the partnership assets brought by the representatives of a deceased partner against a surviving partner after the lapse of six years from the dissolution of the partnership by the death of the deceased, the Defendant could rely upon the provision of Section 9 of 19 & 20 Vict., c. 97, as a complete defence to the action, and that if during this time the latter should be paid a debt due to the partnership, the statutory period would not re-commence to run from the date of the payment. Lord Westbury, at pages 675 and 676 of the report, laid it down broadly that to describe the surviving partner as a trustee for the representative of a deceased partner was a misapplication of language, that there was no fiduciary relation between them, and that the right of the deceased partner's representative--

> "consists in having an account of the property, of its "collection and application, and in receiving that portion "of the clear balance that accrues to the deceased's share "and interest in the partnership."

The then Lord Chancellor, Lord Hatherley, dissented strongly from this doctrine, and at pages 678 and 679 seems to lay it down, that as all the property of a partnership vests by survivorship in a surviving partner, he, as to the share of that property to which the deceased partner would have been entitled, stands to the representative of the deceased in the relation of a trustee.

The point was not dealt with by the other noble Lords who took part in the hearing, and

it was not necessary to rule it for the purposes of the decision of the case, which turned entirely on the section of the statute. In *Piddocke* v. *Burt*, 1894, 1 Ch. 343, Chitty, J., decided that a partner who receives assets of the partnership on behalf of himself and his co-partners, does not in respect of those assets come within words of the Section 4, sub-section 3 of the Debtors Act, 1869, "as a trustee or person acting in a "fiduciary capacity." From the observation of the learned Judge at page 346 of the report it would appear, their Lordships think, that he based his decision on the legal right of one partner—as a joint creditor with his fellow partners—to receive the whole of any debt due to the partnership, though no doubt liable to account for the sums received, and on this ground to have distinguished the case from that of *Harris* v. *Ingram*, 13 Ch. D. 338, where a manager of a farm who sold part of the stock and retained the proceeds was held by Sir G. Jessel to come within the words of the sub-section as a person in "a fiduciary relation, the object of the section "being to render liable to imprisonment persons "in that position who acted dishonestly."

The facts of the present case, in their Lordships' view, distinguish it fundamentally from both *Knox* v. *Gye* and *Piddocke* v. *Burt*. Here the sales of these lands without Gordon's consent were from the first illegal and wrongful, and were obviously designed and resorted to in order to enable certainly Holland, and possibly Horne, to realise, and as against Gordon, keep for themselves all the profits which could be gained by sales in a rapidly rising market. Their Lordships are therefore of opinion that William Holland cannot be permitted to avail himself of the purchase from Ewing to secure for his own benefit what may be not inaptly described as his ill-gotten gains. The decree appealed from, however just in its results it may be towards the Plaintiff and Spencer, cannot be allowed to stand in its present shape.

The Plaintiff is quite willing to accept his share of the value of the partnership assets in money, not land. To that relief he is entitled. The decree appealed from, as well as that of Mr. Justice Gregory, dated the 19th of September 1911, must accordingly in their Lordships' opinion be reversed, the accounts directed by the decree of the Supreme Court of British Columbia, dated the 11th December 1908, must be taken, and the Plaintiff declared entitled to have an enquiry instituted forthwith to ascertain the profits realised by the resale of Lot 2, and also to ascertain the market value of the lots 10 and 11 at the date of the commencement of the enquiry, and further entitled to recover from the said Thomas Horne and William S. Holland one-sixth of the said profits so realised on the re-sale of lot 2, and one-sixth in money of the value of the said lots 10 and 11 so ascertained as aforesaid subject, in both cases, to all just credits and allowances (which however, shall not include any part of the sums paid by W. S. Holland or Spencer for the re-purchase of the said lands) together with costs in the present action, including those of the Appeal to the Supreme Court of British Columbia and also the costs of this Appeal. And further, that the interest of the said William Holland in the said lots 10 and 11 shall stand charged, in priority to the mortgage to A. C. Flummerfelt, as a security for the aforesaid sums, to which the Appellant is declared to be entitled in respect of his share of the partnership assets, and also in respect of the amount of the above-mentioned costs when taxed and ascertained.

The Judgment and decree appealed against by William S. Holland having been reversed, his Appeal must be allowed, but he is not in their Lordships' view entitled to any costs.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

CHARLES ROBERTSON GORDON

v.

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AND OF

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v.

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DELIVERED BY LORD ATKINSON.

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