

1958

Rex Holland v. Arthur E. Moreton et al : Brief of Respondents

Utah Supreme Court

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E. R. Christensen; Harley W. Gustin; Attorneys for Defendants and Respondents;

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IN THE SUPREME COURT
of the
STATE OF UTAH

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REX HOLLAND
REX HOLLAND, Administrator with
the Will Annexed of the Estate of
JOHN G. HOLLAND, Deceased,
Plaintiffs and Appellants,

—vs.—

ARTHUR E. MORETON, ETHEL T.
MORETON, also known as E. T.
MORETON, JOHN R. MORETON,
also known as J. R. MORETON,
ROSE ANN P. MORETON, SUSAN
MORETON TEVIS,
Defendants and Respondents.

FILED

JUL 22 1958

Clerk, Supreme Court, Utah

RESPONDENTS' BRIEF

E. R. CHRISTENSEN
HARLEY W. GUSTIN
*Attorneys for Defendants
and Respondents*

CASE NO. 8740
IN THE SUPREME COURT
OF THE
STATE OF UTAH

REX HOLLAND, et al.,

**Plaintiffs and
Appellants**

vs.

**ARTHUR E. MORETON,
et al.,**

**Defendants and
Respondents.**

RESPONDENTS' ADDITIONAL AUTHORITIES

B. RAY CHRISTENSEN

**GUSTIN, RICHARDS & MATTHEWSON
Counsel for Respondents
Walker Bank Building
Salt Lake City, Utah**

ADDITIONAL AUTHORITIES ON POINTS RAISED AND ARGUED IN RESPONDENTS' BRIEF AT PAGES INDICATED BELOW:

THE LAW OF THE CASE AND RES ADJUDICATA, PAGES 91 and 101, OF RESPONDENTS' BRIEF, AND PARAGRAPH 13 OF RESPONDENTS' MOTION FOR DIRECTED VERDICT. (A. ~~292-2~~) 237

The plaintiff contends, as he did on his former appeal, that the total purchase price paid by Columbia was not made known to him. However, that was the identical issue (although now only one of the issues, in the instant case) heretofore squarely presented to this court and determined by this court, contrary to such contention, as the very basis of its decision dismissing the Columbia Iron Mining Company. Such determination is the law of the case on that issue, which alone should be decisive of this case regardless of whether the decision now be deemed right or wrong, and it cannot again be litigated. *State v. Erwin*, 101 Ut. 365, at p. 422, 120 Pac. (2d) 285; at 313; *East Mill Creek Water Co. v. Salt Lake City*, 108 Ut. 315, 159 Pac. (2d) 863, at p. 868; *McCarthy vs. State*, 1 Utah (2d) 205, 265 Pac. (2d) 387; *Pensinger vs. American Finance Co.*, (Sup. Ct. Cal.), 74 Pac. (2d) 253;

Todhunter vs. Smith, (Cal.), 18 Pac. (2d) 916,
at page 918; Farmers Fruit Growers Bank vs.
Davis, (Ore.), 184 Pac. (2d) 275, at page 279;
Johnson vs. Gillett, (Okla.), 168 Pac. 1031;
Wharton vs. Zenger, (Kan.), 180 Pac. (2d) 287;
Vangel vs. Vangel, (Cal.), 137 Pac. (2d) 136;
Caraway vs. Oversholser, (Okla.), 77 Pac. (2d)
688; Wilson vs. Lee Evans Drilling Co., (Okla.),
322 Pac. 330; King vs. Pauly, (Cal.), 115 Pac.
210; Greenwood vs. Greenwood, (Kan.), 152 Pac.
657; Tally vs. Ganahl, 90 Pac. 1049; 15 C.J. 940,
952 and 953; 30 Am. Jur. § 371, pages 411 and 415,
and § 375, page 423.

"It is a fundamental principle of juris-
prudence that material facts or questions which
were in issue in a former action, and were there
admitted or judicially determined, are conclu-
sively settled by a judgment rendered therein,
and that such facts or questions become res judi-
cata and may not again be litigated in a subse-
quent action between the same parties or their
privies, regardless of the form the issue may
take in the subsequent action, whether the sub-
sequent action involves the same or a different
form of proceeding, or whether the second action
is upon the same or different cause of action,
subject matter, claim, or demand, as the earlier
action. In such cases, it is also immaterial
that the two actions are based on different
grounds, or tried on different theories, or in-
stituted for different purposes and seek dif-
ferent relief." 30 Am. Jur. § 371, pages 411

WHERE THE PARTIES HAVE REDUCED THEIR AGREEMENT TO WRITING, IT CANNOT BE CONTRADICTED, ALTERED, ADDED TO OR VARIED, BY PAROL OR EXTRINSIC EVIDENCE.
(Resp. Br. p. 33)

Sphraim Theater vs. Hawk, 7 Ut. (2d) 163, 321 Pac.
(2d) 221; McCornick vs. Levy, 37 Ut. 134, 106
Pac. 660.

In the case of Hudson vs. Texas Gulf Sulphur Co.
(Cir. Ct. of App. 2nd Cir.) 72 Fed (2d) 251, the
court said at page 254:

"The appellants were not in a fiduciary relationship with reference to the sale of the property after the delivery of the options on December 27, 1918, if indeed the fiduciary relations which did exist were not terminated on September 2, 1918. The options made no provisions for any sums to be paid other than those stated therein. No ambiguity exists as to the terms thereof, and parol evidence cannot vary them. Richardson v. Hardwick, 106 U.S. 252, 1 S. Ct. 213, 27 L. Ed. 145; Watkins Salt Co. v. Mulkey, 225 F. 739 (C.C. A. 2); Mitchell v. Lath, 247 N.Y. 377, 160 N.E. 646, 68 A. L. R. 239. The considerations named for the option on December 27, 1918, showed substantial profits for the appellants. By their terms, when accepted, obligations were created which were binding upon the appellants. Patrick v. Bowman, 149 U.S. 411, 13 S.Ct. 811, 37 L. Ed. 790.

"Whatever may have been the fiduciary obligation between Snyder and the appellants when the appellants knowingly gave these options to Snyder, the interests were sold only after negotiations with appellants and with their approval. They have binding force and effect upon the appellants."

APPELLANTS RECOGNIZED THE RELATIONSHIP ARISING FROM THE OPTION BY THEIR LETTERS TO COLUMBIA IRON MINING COMPANY, AND BY THEIR ACTS AND CONDUCT IN SO CONSTRUING THE SAME. (Resp. Br. pp 73 to 76 Incl.)

Roberts v. Tuttle, 36 Ut. 614, 185 Pac. 916; Copp v. Longstreet, (Colo.), 38 Pac. 601; Smith vs. Blodgett, (Cal.), 201 Pac. 584; Cooke vs. Lavina Land Co., Cal.), 39 Pac. (2d) 458.

THE DISTINCTION BETWEEN AN OPTION AND AN AGENCY. (Resp. Br. p. 26), IS WELL POINTED OUT IN THE FOLLOWING CASES:

Robison vs. Easton Eldredge & Co., (Cal.), 28 Pac. 796; Smith vs. Blodgett, 201 Pac. 584; Synott vs. Shaughnessy, (Ida.), 7 Pac. 82; Tufts vs. Mann, (Cal.), 2 Pac. (2d) 500; Landon vs. Moorehead, (Okla.), 126 Pac. 1027.

"AGENCY--Option contracts for purchase of land and contracts of agency are distinguishable, and while a particular contract may be difficult to classify, the distinction, in principle, is clear. An option to purchase certain real estate on given terms within a specified time does not make the holder of the option an agent of the owner, but rather creates the relationship of vendor and purchaser, but a contract authorizing one to sell land for the owner on prescribed terms for a commission, creates an agency rather than an option. The relation is to be determined by the contract between the parties expressing their intention, although their own designation of it is entitled to some weight." 2 C.J.S. page 1034.

The appellant recognized the existence of the option by his letters to respondent of as late a date as September 16, 1948, (Resp. Br. p. 15), and by his letter to Dr. Mathesius of September 14, 1948, Ex. P-14, Resp. Br. Appendix, p. A 23)

THE INTERPRETATION OF THE INSTRUMENTS WAS A MATTER OF LAW FOR DETERMINATION BY THE COURT AND NOT A QUESTION OF FACT FOR THE JURY. THIS WAS CONCEDED BY APPELLANTS' COUNSEL, MR. ROBERTS. (R. 215; Resp. Br. p. 91)

Nanti City Savings Bank v. Peterson, 33 Ut. 209, 93 Pac. 566; 53 Am. Jur. pp. 214-15, § 250, and pp 226-227, § 268; Cummings v. Nielson, 42 Ut. 157, 129 Pac. 519; Sachs vs. Blawett, 185 N.E. 856; Greening vs. Gazette Printing Co., (Mont.), 88 Pac. (2d) 862, at 864.

APPELLANTS HAVING FAILED TO PROVE AGENCY, THE TRIAL COURT RULED CORRECTLY IN DIRECTING A VERDICT. (Resp. Br. pp. 26, 90-91).

Hinton vs. Keefe, (Cal.), 275 Pac. 503; Lewis B. Wood Realty vs. Greer, (Okla.), 229 Pac. 236; Elliott v. Mutual Life Ins. Co., (Okla.), 91 Pac. (2d) 746; 53 Am. Jur. § 297, p. 250.

THE RELATIONSHIP OF THE PARTIES WAS THAT OF TENANTS IN COMMON. NO TRUST RELATIONSHIP WAS CREATED THEREBY, AND EACH HAD THE RIGHT TO SELL HIS OWN INTEREST. (Resp. Br. p. 42)

Garner vs. Anderson, 67 Ut. 553, 248 Pac. 496;
Phillips vs. Homestake Cons. Placer Mining Co.
(Nev.), 273 Pac. 657.

In **Lichtenberger vs. Newhouse**, 41 Ut. 22, 123
Pac. 624, this court, at page 627, established the
applicable rule of law under the circumstances ex-
isting in this case in the following language:

"The rule is elementary that tenants in common
may contract with each other regarding the
management or the disposition that shall be made
of the common property. One tenant may make a
valid contract with his co-tenants for the ex-
clusive right to sell and dispose of the common
property. 12 A. & E. Ency. L. (2d Ed.) 672.
The general rule in this regard is tersely illus-
trated in 38 Cyc. 72, in the following language:
'Tenants in common may contract with each other
concerning the use of the common property, and
agreements between them, their heirs, personal
representatives, and assigns, are as binding as
if between strangers, if they do not otherwise
conflict with the relationship of tenancy in
common, and the rights of the respective parties
are held to be enforceable either at law or in
equity, for purposes of offense or defense.'"

RATIFICATION OF ACT OF ALLEGED AGENT. (Resp. Br.
p. 63)

Depot Realty Syndicate vs. Enterprise Brewing Co.,
(Ore.), 171 Pac. 223; **U. S. Bond & Finance Co. vs.**
Mutual Building & Loan, 80 Ut. 62, 12 Pac. (2d)
758, at 761.

THE TIME OF THE ALLEGED DISCOVERY WAS CORRECTLY DECIDED ADVERSELY TO THE APPELLANTS AS A MATTER OF LAW. (Resp. Br. pp. 77 to 79 incl.)

Gibson vs. Jenson, 48 Ut. 248, 158 Pac. 426; 37 C.J. 1257; State of Montana vs. Heeser, (Mont.), 227 Pac. p. 819; Lasby, et al., vs. Burgess, (Mont.), 289 Pac. 1025, at page 1033; Lady Washington Cons. Co. v. Wood, 113 Cal. 428, 45 Pac. 809, at page 810; Ray, et ux vs. Divers, et ux, (Mont.), 264 Pac. 673; Montgomery vs. Gilbert, (Mont.), 108 Pac. (2d) 616; Consolidated Reservoir & Power vs. Seaborough, (Cal.), 16 Pac. (2d) 268; Watson v. Carmelita 137 Pac. (2d) 757; Highbert vs. First National Bank, (Cal.), 79 Pac.(2d) 1105; Bainbridge vs. Stoner, (Cal.), 106 Pac.(2d) 423; Phelps vs. Gray, (Cal.), 141 Pac.926; Easton vs. Geller, (Cal.), 3 Pac.(2d) 74; Douglas vs. Douglas, (Cal.), 228 P. (2d) 603, at 605; Henried v. Henried, (Wash.), 89 Pac. (2d) 222; Smith vs. Rector, (Kan.), 10 Pac. (2d) 1077; Frisbee vs. Coburn, (Mont.), 52 Pac. (2d) 882; Kelly vs. Longan, (Cal.), 53 Pac. (2d) 971, at 973.

THE THREE YEAR STATUTE OF LIMITATIONS APPLIES TO A CONSTRUCTIVE TRUST. (Resp. Br. p. 83)

Jones vs. Cardiff Mining & Milling Co., 56 Ut. 499,

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1911 Pac. 1257; State of Montana vs. Heeser, 227 Pac. p. 819; Lasby, et al., vs. Burgess, (Mont.), 289 Pac. 1025, at page 1033; Lady Washington Cons. Co. v. Wood, 113 Cal. 428, 45 Pac. 809, at page 810; Ray, et ux vs. Divers, et ux, (Mont.), 264 Pac. 673; Montgomery vs. Gilbert, (Mont.), 108 Pac. (2d) 616; Consolidated Reservoir & Power vs. Seaborough, (Cal.), 16 Pac. (2d) 268; Watson v. Carmelita 137 Pac. (2d) 757; Highbert vs. First National Bank, (Cal.), 79 Pac.(2d) 1105; Bainbridge vs. Stoner, (Cal.), 106 Pac.(2d) 423; Phelps vs. Gray, (Cal.), 141 Pac.926; Easton vs. Geller, (Cal.), 3 Pac.(2d) 74; Douglas vs. Douglas, (Cal.), 228 Pac. (2d)

Scarborough, (S. Ct. Cal.), 16 Pac. (2d) 268; Haley, et al., vs. Santa Fe Land Improvement Co., (Cal.), 42 Pac. (2d) 1078; Bell vs. Bayley Bros. of Cal. (Cal.), 127 Pac. (2d) 662, at 666; Tognassini v. Tognassini, (Cal.), 271 Pac. (2d) 77; Redpath v. Aagaard, (Cal.), 16 Pac. (2d) 998; Foy vs. Greenwide (Kan.), 206 Pac. 332.

THE FACTS PRESENTED A CLEAR CASE OF WAIVER AS A MATTER OF LAW, AND LEFT NOTHING FOR THE JURY TO DETERMINE. (Resp. Br. p. 80).

Holland vs. Columbia Iron Mining Co., 4 Ut. (2d) 303, 393 Pac. (2d) 700; Lavine vs. Whitehouse, 37 Ut. 260, 109 Pac. 2; Loftis vs. Pacific Mutual Life Ins. Co., 38 Ut. 523, 114 Pac. 134; Taylor vs. Moore, 87 Ut. 493, 51 Pac. (2d) 222; U. S. Bond & Finance Corp. vs. National Bldg & Loan, 80 Ut. 62, 12 Pac. (2d) 758; 761; 54 Am. Jur. 358, § 463; 54 Am. Jur. pp. 477-8, § 578, also pp. 446-7; Leon vs. Zunigas, 84 Ut. 417, 34 Pac. (2d) 699, at p. 704; Beebe vs. James, (Mont.), 8 Pac. (2d) 803; Tindell vs. Central Savings Bk & Tr. Co., (Colo.), 6 Pac. (2d) 312; Cooper vs. Hillsboro Garden Tract., (Ore.), 162 Pac. 488, 21 C.J. p. 1216, § 221, 1 C.J. 971;

See note: 106 A.L.R. 172; Slann v. Goodyear Metallic

179 Pac. (2d) 380, at p. 385; Cameron vs. Cameron, (Cal.), 199 Pac. (2d) 443; Tudor v. American Inv. Co., (Okla.), 21 Pac. (2d) 1056; Nelson v. Hoff, (Ida.), 218 Pac. (2d) 345; Cameron v. Egmont Inv. Co., (Ore.), 299 Pac. 698; 19 Am. Jur. pp. 636, 666, 678; Conzelmann v. Northwest Poultry & Dairy Prod. Co., (Ore.), 225 Pac. (2d) 757; Haffner v. First National Bank of Seiling, (Okla.), 5 Pac. (2d) 351; 24 Am. Jur. pp. 33, 34, 36, 45-46; Keylon vs. Inch (Wash.), 35 P. (2d) 73; Malinow v. Dorenbaum, (Cal.), 125 Pac. (2d) 554; Robison v. Hanley, (Cal.), 289 Pac. (2d) 560.

Appellants cannot ratify that part of the option providing for the patenting of the claims and repudiate that portion relating to the option. Appellants' counsel at the pretrial stated that he was not attacking the documents, but was relying wholly on the theory of agency. (R. 211, 626, 665; Resp. Br. pp. 99-91); Hoffitt-West Drug Co. vs. Lyneman, (Colo.), 50 Pac. 736, at p. 737; Restatement of Law of Agency, Vol. 1, pp. 224, 230, 236; Restatement of the law of Torts, Vol. 4, pp 488.

THE TRUST RELATIONSHIP, IF ANY, WAS REPUDIATED LONG PRIOR TO DECEMBER 20, 1948, AND THE STATUTE OF LIMITATIONS THEREON. (Resp. Br. 81)

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as the trustee openly repudiates the trust and asserts an adverse claim to the trust property: 54 C.J.S. 169; Jack Waite Mining Co. v. West, (Ariz.) 101 Pac. (2d) 202.

Such is the rule of law as established and determined by this court. In Wood vs. Fox, 8 Ut. 380, 32 Pac. 48, judgment affd 166 US 648, 41 L ed 1149, 17 S Ct 1003, this court held unequivocally and in accordance with the rule established by the Supreme Court of U.S. in the cases cited in its opinion, that "the law is, that the statute of limitations begins to run against a claim growing out of a trust from the time the trustee repudiates the trust, and the cestu que trust has notice", and in the more recent case of Ruthrauff vs. Silver King Western Mining. & Mill. Co., 95 Ut. 279, 80 Pac. (2d) 338, involving a controversy of an alleged trust in mining claims, this court said:

"One method of repudiation is by publicly or notoriously setting up a claim inconsistent with the existence of the trust. * * * The fraud and wrong by him, (plaintiff,), is in itself a repudiation. * * * He cannot in turn perpetrate a fraud on others by waiting to see if the mine will prosper as a result of their contributions, not his. Limitations and laches begin to run from the time he knew or by reasonable inquiry might have known the relevant facts."

In the instant case, the appellant by his letter to Dr. Mathiasius of September 14, 1948, (Ex. P-14, Appendix to Appel. Br. A. 23), recognized the fact that respondent was repudiating the alleged constructive trust, if any such existed. Further, undeniable repudiation was the telegram from the defendant Moreton to the co-owners of date Oct. 8, 1948, the receipt of which was admitted by appellant (R. 238, 505; Resp. Br. p. 73) reading as follows:

"Have talked on phone to president of company twice today bargaining with him for sale of your interest for your fixed amount in cash and for as much more as I can get for mine as agreed and as set forth in our written agreements I will keep you advised."

against enforcement of constructive trust was also determined by this court

in *Jones Min. Co. v. Cardiff Min. & Mill. Co.* (1920) 56 Utah 449, 191 P 426, an action to have the defendants declared trustees of a certain mining claim for the benefit of the plaintiff corporation, wherein plaintiff alleged collusion between the defendants and the only director of the company, to deprive the company of its interest in the claim, the court stated that in all such cases the statute of limitations commences to run from the time when the complaining party discovered the wrong complained of or from the time when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry.

THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT BECAUSE APPELLANT FAILED TO ESTABLISH EACH AND ALL OF THE FOLLOWING PROPOSITIONS NECESSARY TO HIS RECOVERY: (1) EXISTENCE OF A CONSTRUCTIVE TRUST; (2) THE ALLEGED FRAUD, AND (3) THAT PLAINTIFF DID NOT DISCOVER THE SAME WITHIN THE THREE YEAR PERIOD PRIOR TO THE COMMENCEMENT OF THIS ACTION. (Resp. Br. p. 45)

Halloway v. Wetzel, 86 Ut. 387, 45 Pac. (2d) 565;
Jewell v. Allen, (Okla.), 109 Pac. (2d) 235; *Shapiro v. Equitable Life*, (Cal.), 172 Pac. (2d) 725; 65 C. J. 493; 37 C.J. 1257; *Adams v. Sage*, 38 N.Y. 103;
Tiepel v. Southern Nevada Vending Co., (Cal.), 268 Pac. (2d) 1081; *Turman vs. Holmes*, (Cal.), 84 Pac. (2d) 225; 34 Am. Jur. page 353, § 451; 2 Am. Jur. p. 349; 34 Am. Jur. p. 100, § 122; *Seafaldi vs. Western Loan & Bldg. Co.*, (Wash.), 165 Pac. (2d) 260;
Hoyes v. Parsons, (Wash.) - 177 P. 691; *Campbell v.*

Dick, (Cal.), 157 Pac. 1062; New vs. Smith, (Kan.), 119 Pac. 380; Carpenter v. Hamilton, (Cal.), 62 Pac. (2d) 1397 at 1400; Neet vs. Holmes, (Cal.), 154 Pac. (2d) 854.

In the case of Adrian v. Guyette, (Cal.), 58 Pac. (2d) 988, the court said at p. 993:

"The question was solely one of law addressed to the trial judge and to be decided by him. In cases of this kind where there is no conflict in the evidence upon which the determination of a question of law rests, the decision is for the court and it should not be submitted to the jury."

In re Bundy's Estate, 121 Utah 299, 241 P. 2d 462, this court said:

"It is true that respondent was a fiduciary and as such she should have made full disclosure to the court in regard to her personal wealth. Appellants, however, were given notice of the petition. They had the right and the opportunity to inquire as to the amount requested for family allowance. Further, they had the means to discover the approximate value of respondent's possessions and the full ability to inquire and investigate. No statements or actions were made or taken by respondent to stop or arrest inquiry on the part of appellants. In view of these facts, it is evident that no extrinsic fraud was practiced by respondent in regard to family allowance."

THE OPTION WAS MERGED INTO THE CONTRACT OF SALE.
(Resp. Br. 46)

American Mines & Smelter Co., (Colo.), 278 Pac. 800,
&
at p. 803; Fairview Mining Corp. vs. American Smelt-
ing & Ref. Co., 287 Pac. 800, at p. 802.

**THE ALLEGED INADEQUACY OF THE CONSIDERATION CANNOT
BE DETERMINED BY SUBSEQUENT EVENTS. (Resp. Br. pp.
80-81)**

**Holland vs. Columbia Iron Mining Co., 4 Ut. (2d)
303; 293 Pac. (2d) 700; Peck vs. Judd, 7 Ut. (2d)
420, 326 Pac.(2d) 712; Jones vs. Re-mine Oil Co.,
119 Pac. (2d) 219, at p. 223; Turman v. Holmes,
(Cal.), 84 Pac. (2d) 225, at p. 230; Gorneth vs.
Lloyd, (Cal.), 10 Pac. (2d) 1045; Bell vs. Spain ,
(Ore.), 222 Pac. 322, at p. 328.**

**APPELLANTS HAVING AUTHORIZED A SALE FOR A FIXED
PRICE NET TO THEM, THE RESPONDENTS ARE ENTITLED TO
THE EXCESS.**

**Allen v. Dailey, (Cal.), 268 Pac. 404, at p. 406;
Wolverton vs. Tuttle, (Ore.), 94 Pac. 961, at p. 963;
Cook vs. Lavina Land Co., (Cal.), 39 Pac. (2d) 458
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Respectfully submitted,

E. RAY CHRISTENSEN

GUSTIN, RICHARDS & MATTESSON

**By E. RAY CHRISTENSEN
Attorneys for Respondents.**

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