

Privy Council Appeal No. 93 of 1931.

Tsang Chuen - - - - - *Appellant*

v.

Li Po Kwai *alias* Li Kan - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH JULY, 1932.

Present at the Hearing:

LORD BLANESBURGH.

LORD TOMLIN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

The question at issue on this appeal is whether the respondent has shown a title in himself to the entirety of certain leasehold properties in Hong Kong, freed and discharged from a legal mortgage upon an undivided moiety thereof held by the appellant from Li Nga Ching, the second son of the respondent. In the Courts of Hong Kong, the respondent has established his claim. The appellant's title as mortgagee has, following deliverances of great elaboration, been set aside, and he has been ordered to reassign to the respondent freed from his mortgage the undivided

moiety in question. The order to that effect made on the 8th April, 1930, by the Supreme Court of Hong Kong in its original jurisdiction was, on appeal, affirmed in the Full Court by its judgment of the 28th August, 1930. This is the mortgagee's appeal therefrom.

The respondent is a Chinaman of position resident in Hong Kong. His dispute with the appellant concerns an undivided moiety of one of three separate parcels of leasehold properties, held under Crown leases for long terms of which in 1912 the respondent became possessed, on the division of his deceased father's estate.

The particular leaseholds the undivided moiety of which is now in question are described in terms both elaborate and identical in a deed of assignment of them of the 9th March, 1917, and in a memorial of that deed duly registered under the Land Registration Ordinance of 1844. For present purposes it will suffice compendiously to describe the properties as Nos. 18 and 20 Wing Kut Street, Victoria, Hong Kong, and it will be convenient hereafter to refer to them as the properties in question.

By the deed of the 9th March, 1917, these properties were assigned by the respondent to one Li Kan and to Li Nga Ching already mentioned as joint tenants for the residues of the terms granted by the Crown leases under which they are held at the apportioned rents adjusted with the Crown. The deed upon the terms of which much in this case will be found to depend is one of purchase and sale. The respondent party to it of the one part, and, as such, described throughout as "the vendor," is named as "Li Hung Cheung *alias* Li Po Kwai of Victoria in the Colony of Hong Kong, gentleman." The parties to it of the other part and as such described throughout as "the purchasers" are named and described as "Li Kan and Li Nga Ching, both of Victoria aforesaid, gentlemen." The deed contains a recital that "the vendor" has agreed with "the purchasers" for the sale to them of the properties in question at the price of \$16,000. The assignment is expressed to be made in pursuance of that agreement and in consideration of \$16,000 to the vendor then paid by the purchasers. The receipt of the \$16,000 is acknowledged by the respondent as vendor in the body of the deed. It is made also the subject of a separate endorsement signed by the respondent in his vendor name and witnessed by his solicitor. The assignment of the properties in terms extends to all the estate right title interest property claim and demand whatsoever of the vendor in or to the same and the deed contains the usual full covenants for title given on a sale by a vendor to purchasers as also a covenant by the purchasers with the vendor to pay the apportioned rents and perform the covenants in the leases under which the properties in question are held so far as relating to these properties, with a further covenant by them to indemnify the vendor against such rents and covenants.

The respondent in executing the deed signs his vendor name in Chinese characters: the execution signature of "Li Kan" is in English characters. The attesting witness to both executions is the respondent's solicitor.

Li Nga Ching was, as has already been stated, a son of the respondent, but there is nothing either in the deed or anywhere else to suggest the existence of that or of any other relationship between them: nor is there any hint of the fact, for the first time set up in this litigation, that Li Kan, the other "purchaser" is the same person as the vendor. On the contrary the deed is so framed as to represent that the vendor is a separate person from either of the purchasers: that the transaction is an out and out sale and that the vendor, as a result of it has parted with all estate and interest of every kind in the properties assigned. In entire accordance with its expressed effect the deed was stamped \$80 the *ad valorem* stamp on the stated purchase price.

On the 11th October, 1927, a lease of 20 Wing Kut Street, parcel of the properties in question was granted by "the purchasers" to a tenant for a term of five Chinese years from the 26th September, 1927, subject to the rent therein mentioned. The lease is expressed to be executed by Li Kan in Chinese characters and by Li Nga Ching in English characters. The deed of assignment had not been executed by Li Nga Ching. The execution by him of this sub-lease of the 11th October, 1927, to anyone perusing the two deeds, manifests his acceptance, if any such manifestation were necessary, of the deed of assignment from which was derived his only sub-lessor's interest in the properties in question. The respondent now states, it will be seen, that it was he who executed the lease in Li Nga Ching's name and on his behalf.

As already indicated there has been in force in Hong Kong since 1844, a system of registration of deeds under the Land Registration Ordinance, 1844, and memorials, both of the deed of assignment and of the lease just referred to, were duly registered by the respondent in the register at the Land Office. It will be convenient before considering in detail the terms of these memorials—and more particularly those of the memorial of the assignment—to refer to some of the immediately relevant provisions of the ordinance under which both were registered.

First of all its preamble, in striking contrast with that of the Yorkshire Registry Act of 6 Anne c. 20, from which many of the procedure and other clauses of it have clearly been taken, is in its concluding terms very significant:—

"Whereas it is expedient to prevent secret and fraudulent conveyances and to provide means whereby the title to real and immoveable property may be easily traced and ascertained."

Section 2 declares that the Land Office shall be a public office for the registration of deeds, conveyances and other

instruments in writing, and wills and judgments, and provides for the entry and registration in that office of any of these documents by which any parcels of ground tenements or premises in the colony may be affected. Section (3) (2) provides that any such instruments which are not registered shall (as against any subsequent *bona fide* purchaser or mortgagee for valuable consideration of the same premises), with a proviso not presently material, be null and void to all intents and purposes.

Section 4 has no counterpart in the Yorkshire Act of Anne, and is very material:—

“No notice whatever, either actual or constructive, of any prior unregistered deed, conveyance or other instrument in writing or will or judgment shall affect the priority of any such instrument as aforesaid as is duly registered.”

The particulars required to be stated in every memorial are set forth in the 1st schedule to the ordinance, and in striking contrast to what Lindley, M.R., in *Kettlewell v. Watson*, 26 Ch. Div. 501 described as the “very little information given” by the memorials required by the Yorkshire Act, are so complete as to be really exhaustive.

They are in these terms:—

1. Date of instrument or will.
2. Nature and object thereof.
3. Names and additions of the parties or of the devisors or devisees.
4. Names and additions of the witnesses thereto.
5. Description of the land or premises conveyed in or affected by the instrument or will.
6. Name and description of the place where situate.
7. Consideration and to whom and how paid.
8. Any other particulars which the case may require.

Section 7 requires that every memorial shall be verified by the oath of some competent person that the same contains a just and true account of the several particulars therein set forth, which oath shall be taken before a Justice of the Peace.

The memorial of the deed of assignment was registered by the respondent on the 14th March, 1917. As required by the ordinance, the memorial is in effect a complete statement of the deed of assignment. That deed is therein described as being one made between “Li Hung Cheung alias Li Po Kwai (who and whose executors and administrators were thereafter called the vendor of the one part) and Li Kan and Li Nga Chin (who and the survivor of them and the executors and administrators of such survivor their or his assigns were therein called the purchasers) of the other part.” The assignment is stated to have been made in consideration of \$16,000 “to the vendor then paid by the purchasers.” The premises in question described in the identical terms of the assignment with “all the estate right title interest property claim and demand whatsoever of the vendor therein or thereto,” are expressed to have been assigned by the vendor to the purchasers as joint tenants for

the residue of the terms of years stated in detail and subject to the apportioned rents specified and to the covenants in the Crown leases affecting the properties in question. It may be said as definitely of the memorial as it has already been said of the deed itself, that there is nothing in its terms to suggest even remotely the existence of any relationship between the respondent and Li Nga Ching, nor is there any hint that the respondent, the "vendor" is the same person as Li Kan, the other of "the purchasers."

Two further facts of real significance in relation to the memorial, and very relevant in the present dispute, are that its correctness is verified by the oath of the clerk to the respondent's solicitors and that it is actually signed by the respondent himself in his "vendor" name.

The memorial of the lease of the 11th October, 1927, also registered at the Land Office, took the form of a full copy of the original. It was registered on the 16th October, 1927, and was like the other memorial verified by the oath of the clerk of the respondent's solicitors.

Some facts relating to the dealings by the respondent with the two other long leaseholds to which he became entitled in the division of his father's estate may, at this point, be collected. The respondent has four sons. In 1917 his three younger sons, the first of whom was Li Nga Ching, were aged, respectively, 21, 19, and 14 (Chinese reckoning). Evidence was given to show that on the same 9th March, 1917, on which the respondent executed the assignment already stated he executed another relating to the second of the leasehold properties to the same "Li Kan" and his third son as joint tenants, and an assignment of the third leasehold property to "Li Kan" and his fourth son as joint tenants. The form of each of these assignments was the same as that of the assignment of the properties in question, but with different sums expressed as the purchase consideration.

These two assignments are relied upon by the respondent as confirmatory of the case he makes with reference to the deed now in question. But it is not suggested that the existence of these deeds or of either of them was known to the appellant or his solicitors prior to the institution of these proceedings. It would appear, indeed, that had these deeds been known to the appellant before he took his mortgage, they would have tended to confirm rather than otherwise the complete regularity of the assignment now in question. For it was stated on behalf of the respondent in the Trial Court as a reason for the non-production of the first of the two deeds that the properties comprised therein had since been sold, presumably under the title thereby conferred.

The association of the appellant with the properties in question came about in the following way. He is a banker, a partner in, and in the transaction of mortgage now to be stated

the nominee of the Han Chuen Bank of Victoria, Hong Kong. In March, 1929, he was approached in the ordinary course of business by a mortgage broker with a proposal that he should lend \$25,000 for six months to Li Nga Ching on the security of his half-interest in the properties in question. Li Nga Ching may now be conveniently referred to as the mortgagor. The appellant did not know him, nor had he previously heard of the respondent. He himself inspected the properties, was satisfied with the sufficiency of the security offered; was prepared favourably to consider the loan proposal, and he instructed his solicitor to proceed leaving it to him to make all enquiries.

It is matter of admission that, prior to the mortgage which followed, the appellant's solicitor searched the register at the Land Office in reference to the properties in question and that he inspected the registered memorial of the assignment and that he proceeded with the preparation of the mortgage deed and the completion of the transaction of loan as a result of that inspection. He did not see the assignment itself. That he asked for it and was informed that it was in the possession of Li Kan joint tenant with the mortgagor is not improbable in view of his letter later to be mentioned asking Li Kan for a loan of the deeds in order to make copies of them to keep with the mortgage deed. But it is not proved that any such inquiry was made. The solicitor did not give evidence. The fact that he did not do so was a source of real embarrassment to the learned Counsel for the appellant in their argument before the Board. In the view which their Lordships take of the case his non-appearance as a witness is less serious than it might well have been, and it may have seemed to him that his activities being to a large extent matters of admission the desirability of a full account from him of what he did was unimportant. It is right to add that no suggestion is made that either the appellant or he had actual notice or any suspicion, when the mortgage was accepted and the advance made, of any defect in the mortgagor's title to an undivided moiety of the properties in question.

The advance of \$25,000 was made by the appellant to the mortgagor on the 7th March, 1929. By the mortgage deed of that date, after a recital that the properties in question were vested in Li Kan and the mortgagor for the residues of the terms of years under the said Crown leases, the mortgagor in consideration of the loan assigned the undivided moiety of the property in question to the appellant for the unexpired residues of the terms of years subject to the usual proviso for redemption. A memorial of the mortgage deed was, on its execution, duly registered pursuant to the ordinance.

At the date of its registration there was no entry in the register of any estate or interest in the properties in question being possessed or retained by the respondent: no memorial,

indeed, of any subsisting interest therein other than that of "the purchasers" under the deed of assignment and of their tenant under the registered lease.

It appears, however, that shortly before this date information had reached the respondent that his sons, or one of them, were attempting to deal with properties standing in their names. The respondent's reaction was to insert in a newspaper what one of the learned Judges describes as a perfectly futile advertisement: he made no warning entry on the register.

On the 11th March, 1929, four days after the advance was made the appellant's solicitors in a letter addressed to "Mr. Li Kan" at the address of the respondent gave him notice of the mortgage by the mortgagor. The letter proceeded:

"As our client is informed the title deeds are in your possession we are instructed to request you to lend us the title deeds to enable us to make attested copies thereof to accompany the mortgage to our client.

We shall be glad if you will lend us the title deeds upon the usual understanding."

The reply of the respondent's solicitor of the 14th March is, it must be agreed, a somewhat inapt description of his case as finally made in Court.

"We are instructed by our client, Mr. Li Po Kwai, who in the names of Li Kan and Pi Lo respectively is the co-owner of the above properties to reply to your letter of the 11th inst. Mr. Li Nga Ching, the mortgagor, had no beneficial interest in any of these properties the funds for which were provided by our client and he had no right to mortgage them."

Fourteen days later, on the 28th March, 1929, the respondent commenced the action out of which this appeal emerges. The defendants were the appellant and the mortgagor. The mortgagor did not appear: indeed he was never served with the writ. His whereabouts were said to be unknown to the respondent.

The respondent gave evidence at the trial. He gave the account already set forth of his connection with the properties in question and with his other inherited leasehold properties. He proceeded to say that "Li Kan," the joint purchaser, was himself. The name was his milk name—a name given to him when a baby by his mother. Other persons knew it. "Li Po Kwai" was an alias and he was mostly known to the public by it. He admitted that except in the three assignments to which reference has been made he had never taken any transfer of property in the name of "Li Kan." His only object in putting the leasehold properties into the joint names of himself and his three younger sons respectively was, he asserted, to mark them out so that in case of his death the properties might be handed to his sons later on. In cross-examination he said, with reference to the properties in question:

"The sum of \$16,000 was mentioned as the purchase price. I gave instructions that the sum should appear as purchase price. When making deed I knew I would have to pay Solicitors' costs and stamp duty. I intended to mark out the property so that it might go to my son at my death if he behaved properly. But not automatically. If he did not behave

properly I thought I had a right to cancel the assignment. If he behaved properly I would not have allowed the assignment to operate. I would have left my property by will."

The respondent went on to say that it was a Chinese custom to mark out property in this way: that in fact no money had passed and that he retained the assignments and earlier deeds in his possession and collected the rents and paid the outgoings. The mortgagor's signature to the lease of the 11th October, 1927, was attached by himself, he said. He had authority so to sign as the mortgagor was his son. He denied that the assignments were executed to escape or save death duty. None of his sons knew of them at the time they were made. The respondent did not explain how or when the mortgagor heard of the assignment in his favour, nor did he suggest that he had ever told the mortgagor that the assignment was not intended to confer any beneficial interest on him or that he was to hold any estate of his thereunder in trust for himself. Indeed, no evidence of any kind was adduced by the respondent to show that the mortgagor was ever aware that any trust was intended by himself, much less that one had ever been assumed by the mortgagor. Nor was any explanation offered why, if the assignment in question was to have no other function than that averred by the respondent it was appropriate that it should have been registered at all, to say nothing of the circumstance with which registration was in fact made.

Chief Justice Kemp observes in his judgment on appeal:—

"When Li Nga Ching discovered the fact of the assignment he may have believed that his father had intended to transfer a beneficial interest to him, as he may well, and not unreasonably, have thought that his father's object as suggested on behalf of the [Appellant] was either to avoid the payment of estate duty or to obviate the necessity of legal representation.

Their Lordships agree. But, as will be seen later, they do not so readily accept the learned Chief Justice's observation which immediately follows:—

"This point, however, appears to be irrelevant for the purposes of this judgment."

The evidence of the respondent to the effect just stated was given subject to objection taken to its admissibility. It was also contended on the appellant's behalf that it was in essentials entirely unreliable. In this regard, the evidence was, in the result, although with some hesitation, believed by the learned Trial Judge. He accepted, but not without some reserve, the respondent's assertion that the transaction had not been put through by him to escape death duty or for some other ulterior purpose. The complete futility of registration, from the respondent's alleged point of view, does not seem to have struck the learned Judge. Upon the point of its admissibility he held the evidence to be receivable in order to rebut the presumption of advancement and to show that there was a resulting trust of the properties in question in favour of the respondent. There was in his

view no estoppel, while the omission of the appellant to demand production of the deed of assignment from the mortgagor before making the advance to him constituted such gross negligence on his part as to deprive him as against the respondent of the protection of his legal estate. Accordingly, to adopt the language of another jurisdiction, he decreed the respondent's suit.

On appeal by the appellant to the Full Court the trial judgment was affirmed. The learned Judges there, as the learned Trial Judge had done, accepted the respondent's evidence as reliable, but, it would seem, mainly if not exclusively because of their reluctance to interfere, on a pure question of fact, with the finding of a Trial Judge who had seen and heard the witness concerned.

They agreed with the learned Trial Judge's view that the reception of the evidence was permissible to rebut the presumption of advancement while its effect was to disclose the existence of a resulting trust for the respondent. True it might be that neither the appellant nor his solicitor had either notice or suspicion of the existence of such a trust, but their ignorance was the result of gross negligence on the part of the solicitor in not insisting upon the production of the deed of assignment before any advance to the mortgagor was made. The fact that the respondent had always retained that deed in his possession entitled him, as they thought, notwithstanding his registration of the memorial, to assume that no dealings with any property comprised in it would take place without reference to himself. *Kettlewell v. Watson*, 26 Ch. Div. 501, 508, showed that even a system of registration did not dispense an intending purchaser or mortgagee from the duty of inquiring for or examining deeds, memorials of which were registered. Had the application of the 11th March, 1929, for inspection of the deed been addressed to the respondent when the loan was only in prospect and not after it had been made, the appellant would have ascertained that the mortgagor had no interest in the properties in question and was not in a position to offer any security whatever over them. *Oliver v. Hinton*, [1899], 2 Ch. 264, was the authority in point. The appellant had been guilty of negligence in the transaction so gross that it would be unjust to deprive the respondent's resulting trust of its priority over his subsequently registered mortgage.

The above is a compendious summary of the ruling considerations which led the learned Judges in the Courts below to their conclusions in favour of the respondent. Their Lordships must say at once that they are not prepared to accept the correctness of these conclusions nor the soundness of the elaborate reasoning on which they depend. If regard be had, as it must be, to the admitted or accepted facts of the case and to the well recognised principles of law and equity applicable thereto, the respondent's action must, their Lordships think, necessarily fail. It was because so much depended thereon that they have been at pains in the earlier part of this judgment to examine these facts in

their appropriate setting. That examination has satisfied them that the conclusions of the learned Judges can only be reached by ignoring essential principle and by refusing to attribute their proper consequences to the conduct and actions of the respondent, even as avowed in his own evidence which, with a reluctance no less than that of any learned Judge below, their Lordships also accept at its face value.

The outstanding fact disclosed by the examination is that the evidence of the respondent, admitted by both Courts, and essential to support the judgment in each, was evidence which directly contradicted the terms of his own deed. It ought not to have been received at all.

Chief Justice Tindal's statement of the law on this subject in *Shore v. Wilson*, 9 Cl. and Fin. 355, 565, has never been departed from. It may be useful to recall his words :—

"The general rule," he says, "I take to be, that where words of any written instrument are free from ambiguity in themselves and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject matter to which the instrument relates, such instrument is always to be construed according to the strict plain common meaning of the words themselves and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise no lawyer would be safe in advising upon the construction of a written instrument nor any party in taking under it for the ablest advice would be controlled and the clearest title undermined if, at some future period, parol evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself."

These observations apply with peculiar force here. Perhaps the evidence of the respondent tendered and accepted may euphemistically be termed evidence to rebut the presumption of advancement and incidentally establish a resulting trust, but it was in fact tendered to show that the deed of assignment, followed by its attested registration, was an elaborate make-believe with, so far as the operative provisions of the deed were concerned, no word of truth in it from beginning to end. There were no "purchasers ; there had been no sale to anyone ; no purchase money had either been paid or received ; it was a mere assignment by the respondent to himself. It is unnecessary, however, to dwell on more than one of these contradictions—that which sought to deny the payment and receipt of purchase price acknowledged in the deed by the respondent and attested by his solicitor.

As Sir George Farwell says in *Rimmer v. Webster*, [1902], 2 Ch. 163, 173 :—

"If a man acknowledges that he has received the whole of the purchase money from the person to whom he transfers property 'he voluntarily arms the purchaser with the means of dealing with the estate as the absolute legal and equitable owner free from every shadow of encumbrance or adverse equity,' and he cannot be heard to say that he has not received such purchase money."

It is not, Sir George Farwell goes on to say, as if the purchase money had been paid out of money found by the vendor himself or by some third person, and that fact was being deposed to. The distinction between the two cases is obvious :—

“There is no contradiction of the deed in saying ‘True the purchase money was paid by him but out of some third person’s money.’ There is a direct contradiction in saying that it was never paid at all.”

Evidence to that effect was accordingly under Chief Justice Tindal’s rule here inadmissible “to establish either a lien for unpaid purchase money or that there was a resulting trust for the” vendor. Indeed it appears from the authorities examined before their Lordships that the cases in which parol evidence when objected to is, apart from fraud or mistake, receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; where the provisions of the deed leave the question doubtful whether merely a mortgage and not an out and out sale was intended, or where the language sought to be explained in evidence is language in an ordinary conveyancing form not exhaustively accurate but without an actual misstatement of fact. Instances of each of these will be found in *Haigh v. Kaye*, 7 Ch. 469, *re Duke of Marlborough*, [1894], 2 Ch. 133, *Barton v. Bank of New South Wales* 15 App. Cas. 379, *Carritt v. Real & Personal Advance Company*, 42 Ch. D. 263. But the present position is that correctly described by Farwell, J., in the recent case of *re King’s Settlement*, [1931], 2 Ch. 294, 299, where he says :—

“If a grantor conveys property in a form actually and actively misleading, so that any persons reading the conveyance necessarily conclude that the grantees are the absolute owners, the grantor cannot subsequently be heard to say that this is not the real transaction but that the grantees take on a secret trust not disclosed in the conveyance.”

And this statement brings into clear relief the respondent’s position in these proceedings. If he fails to establish a resulting trust which requires no writing to support it, his claim must fail. He cannot set up an effective express trust against the appellant for at least four reasons. First, no agreement by the mortgagor to be a trustee for him has been established, and the respondent’s own evidence negatives the possibility of the existence of such an agreement. Secondly, to be valid, that agreement must have been in writing. Thirdly, if it were in writing it would, even if known to the appellant, have been of no avail against his registered mortgage unless it had been first registered. (See Ordinance, section 4.) Fourthly, such a trust has never been registered. The truth, indeed, is that after the execution of his deed of assignment, the respondent’s claim had to be rested on an express declaration of trust by the mortgagor. But such a trust unregistered would have been useless to him as against the appellant. His essential task, accordingly, was to establish a resulting trust, which, in the circumstances, alone

could help him. This he has sought to do by evidence inadmissible for its purpose. On this ground alone, therefore, as it seems to their Lordships, the respondent's case must fail. He proves no resulting trust whatever.

But not only on this ground does his case disappear. It fails also because of estoppel. To their Lordships it seems clear that by his registration of the memorial of his deed of assignment the respondent is estopped as against the appellant who took his registered mortgage in reliance on that memorial from denying its correctness in any essential particular. The memorial is a complete statement of the deed of assignment, including therein a statement as to receipt of the purchase price. Its correctness, as required by the ordinance, is duly attested. Its registration is, in terms of the ordinance, a means whereby the title to this immovable property may be easily traced and ascertained. The respondent has been acquitted of any fraudulent intent or ulterior purpose in registering it, but his avowed purpose in executing the deed would have been fully attained without any registration at all, and the respondent by the registration of the memorials both of the deed and the lease must be taken, in the absence of any other explanation, to have intended "to produce faith" by such registrations—to adopt a phrase of Fry L.J. in *Bickerton v. Walker*, 31 Ch. Div. 151, 159. It is not to be disputed—*Rimmer v. Webster*, *ubi supra*, would be authority for the proposition if it were—that if the actual deed of assignment had been produced by the mortgagor to the appellant before he took his mortgage, the respondent would have been estopped from disputing its correctness and the appellant have been relieved of any imputation of negligence had he refrained from inquiry of the respondent as to any rights or claims of his. (See *Bickerton v. Walker*, *ubi supra*, p. 158.) Their Lordships can see no reason why the respondent should not have put the appellant in precisely the same position towards himself, so soon as it is proved or admitted that on the faith of the memorials the appellant advanced his money to the mortgagor. Their Lordships have some difficulty in appreciating the real relevance of the decision in *Kettlewell v. Watson*, 21 Ch. D. 685; 26 Ch. Div. 501 on this point. That was a Yorkshire Registry case, under the statute of Anne and before "the law on the subject of registration as regards land in Yorkshire was revolutionised by the Yorkshire Registries Acts, 1884, and 1885. (See Dart, Vendors and Purchasers, 7th ed., vol. 1, p. 607.) Lindley L.J. there said that the registered memorials under the earlier Act gave very little information. He added that the object of the statute of Anne seemed rather to be to let people know what they were to inquire about than to dispense with inquiry respecting deeds and documents, memorials of which are registered—a passage from his judgment already referred to. All of which is, of course, true with reference to that statute. But the statute contained no preamble corresponding to that in the Hong Kong ordinance; it required

no memorial in any sense complete. There was, for instance, no obligation to disclose the purchase consideration, and in the memorial in question in *Kettlewell v. Watson* there was no such disclosure. (See 21, Ch. D. at p. 699) nor did the subsequent purchasers or mortgagees there ever inspect the register. The memorial accordingly in that case could have worked no estoppel. But Fry J. in the course of his judgment (21 Ch. D., p. 703) indicates how much the facts of the present case would have influenced him:—

“The registration of the deed is not notice to all the world of the receipt of the purchase money, because the memorandum does not state the receipt for the purchase money and therefore it appears to me that it cannot interfere with the right of the vendors to the lien which was created by the mere fact of the non-payment of the money.”

The learned Judge indicates in that passage not obscurely what his view would have been had he been dealing with a memorial like that in the present case and, in fact, relied upon by the subsequent mortgagee.

On this ground also, in their Lordships' judgment, the respondent's case fails.

But lastly it fails also on a comparison of the conduct of the respondent and the appellant in this matter, the ground selected by the Courts below for their decision in favour of the respondent. How first of all may the respondent's conduct in relation to the transaction be described? He placed upon the register an assignment which he now asserts was no assignment at all. He thereby made a representation which induced the appellant to advance money to his son; he misinformed as to his position all persons searching his title in a public record; and when he heard of attempts by his son to raise money he published a futile advertisement and entered no warning notice on the register. In the face of that catalogue their Lordships have difficulty in following Kemp C.J. when in his judgment he says that of “the respondent it cannot be said that he did anything which he was under a duty not to do, or that he omitted anything which he was under any duty to do.”

And where was the “gross negligence” of the appellant's solicitor? It consisted, so it is said, in not demanding from the mortgagor production of the deed of assignment, a deed quite naturally in the possession of his co-tenant. Now, that the solicitor by refraining from demanding production of the deed exposed his client the appellant to the grave risk of being postponed to some mortgage by deposit made by “the purchasers” after the date of the assignment to them is not after the decision in *Oliver v. Hinton ubi supra* to be gainsaid. But that is not the equity which is now being set up by the respondent against the appellant. That was an equity of which the custody of the deeds was a concomitant. The equity here sought to be set up by the respondent is one in no way dependant upon the whereabouts of the deeds: it is an equity upon the existence of which the production of the deed of assignment would cast no light at all.

For the protection of the appellant against such a concealed equity as this production of the deed, when a memorial of it had been already considered, would have been of no assistance. The appropriate question for the appellant's solicitor to have asked would have been, not where is the deed of assignment, but whether the respondent had thereby reserved to himself any interest in the properties in question. And why should the solicitor have troubled himself to ask any such question when the possibility of the existence of any such interest was negatived by the terms of the registered memorial of the deed vouched by the respondent himself?

The inquiry as it seems to their Lordships would have been impertinent, and the solicitor cannot be said to have been guilty of any negligence for not having made it. The respondent having put his hand to and registered his deed of assignment was not entitled to suppose that any inquiry with regard to that or any other reserved equity would ever be addressed to him. And the appellant with no notice of that equity has now had assigned to himself for value the legal estate. Between the respondent and the appellant in this matter, so far as the conduct of either is questionable, there is in their Lordships' judgment no room even for comparison.

The judgments in favour of the respondent on this point in the Courts below have been based on what their Lordships cannot help thinking is a misunderstanding of the decision of the Court of Appeal in *Oliver v. Hinton, ubi supra*. There the contest in a non register County was between a person in the position of the appellant and one, not in the position of the respondent, but of a mortgagee from him by deposit made subsequent to the date of his purchase deed. "The defendant has been cheated by Hill, but she has not been in any way cheated by the plaintiff," says Lindley L.J. In that passage Hill corresponds roughly to the respondent, and the plaintiff to his subsequent mortgagee by deposit. No production of the deeds was required by the purchasing defendant. The plaintiff was entirely blameless in the matter. On these facts the Court held that the defendant had been guilty of such gross negligence in not asking for the deeds as would render it unjust to deprive the plaintiff who held them of his priority. Their Lordships can see no analogy between that case properly understood and the present. It is not necessary to say that the respondent here was as bad as Hill was there. But it is through the respondent's representations that the appellant has been led to part with his money. That which then was gross negligence in relation to the possibility of a prior equitable charge, is not necessarily any negligence at all in relation to the possibility of a resulting trust. It is only of the latter negligence, if any there be, that the respondent can claim the benefit. There is nothing in Lord Lindley's judgment to indicate that the protection which he extended to the entirely

blamless mortgagee by deposit he would have thought of extending to the respondent in the present case.

For all these reasons their Lordships are of opinion that this appeal should be allowed : that the judgment of the Full Court of the Supreme Court of Hong Kong of the 28th August, 1930, and the judgment of that Court in its original jurisdiction of the 8th of April, 1930, should both be discharged : and that the respondent's action should be dismissed and with costs in both Courts.

And Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay to the appellant his costs of this appeal.

In the Privy Council.

TSANG CHUEN

vs.

LI PO KWAI *alias* LI KAN.

DELIVERED BY LORD BLANESBURGH.

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