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秘書長龍漢標先生

龍先生：

〈土地業權條例草案〉

六月十八日來信已經收到，現倒序回應來信的問題。

時限

隨信夾附第 81A 條的修訂本，確認已達成共識的情況，即草案不會改變〈時效條例〉現時訂明的情況。

第 81 條的更正條文

來信提到 *Tai Hing Cotton Mill Limited v Liu Chong Hing Bank Limited* [1987] 一案，但正如我們於星期六所討論，以及在沒有審閱過案件的謄本的情況下，看來該案支持政府如下的立場：-

- (a) 法庭確有留意到被詐騙擁有人的作為；但
- (b) 他們對給予被詐騙一方的保護持堅定態度。

你或許會提及 *Li Tse Hi (Administrator) v Pong Tsoi Ching* [1934] HKLR 4 一案。法庭在該案拒絕在藉一份無效文書處置物業的情況下，把物業復歸前度擁有人。這宗案由香港合議庭裁決並得到樞密院批准。

我主要想提出的一點仍然如我於六月十七日的信所述，即據我們理解，就藉一份無效文書處置物業方面，我們應該把前度擁有人置於與他現時所處的情況一樣。以沒有保留的強制規定取代法庭現時具備的更正酌情權，會使前度擁有人處於較現時有利的處境。為保持情況不變，當局必須指示法庭考慮前度擁有人的作為。根據第 81(3)條的草擬方式及先例，我們認為法庭會繼續在這類情況下給予前度擁有人非常大的保障。

The Land RegistrySecuring your property, Supporting an open market.

在六月二十一日舉行的法案委員會會議上，委員要求我致函地產建設商會，請求貴會經我們互相交流意見後，表明是否贊成草案的工作繼續進行。謹請貴會考慮是否會致函表明這一點。

正如我星期六所說，如果草案於七月七日通過，在草案開始實施前仍有充裕時間及大量工作須要完成。我歡迎地產建設商會繼續參與有關的籌備工作。稍後我會與你聯絡，並邀請貴會派代表參與與其他關注團體舉行的會議，以便詳細制定接下來所需的工作。

土地註冊處處長蘇啟龍



連附件

副本送：房屋及規劃地政局局長(經辦人：Ms Olivia Nip)

《土地業權條例草案》委員會秘書(經辦人：陳美卿女士)

二零零四年六月二十三日

[d:\job 2004\6-2004\6-26-04 11b reda letter.doc]

摘自律政司日期為 2004 年 6 月 23 日載有標記的草案#26158 第 22 版本

81A. 根據第 81 條提起法律程序的時間

(1) 除第(2)款另有規定外，任何人不得在自取得、作出或遺漏(視屬何情況而定)業權註冊紀錄上的有關記項的日期起計的 12 年的期間屆滿後根據第 81 條提出申請，要求更正業權註冊紀錄。

(2) 《時效條例》(第 347 章)在經必需的變通後適用於根據本條例第 81 條提出的更正業權註冊紀錄的申請。

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LI TSE SHI ADMINISTRATRIX WITH THE WILL
ANNEXED OF LI WOON NAM, DECEASED,

Appellant
(Plaintiff)

AND

PONG TSOI CHING

Respondent
(Defendant)

APPEAL No. 11 OF 1933.

(O. J. ACTION No. 318 OF 1931).

1934
March
26, 27
& 28.

*Estoppel—impersonation of owner of leaseholds, plaintiff
consenting—fraudulent assignee—innocent mortgages—
innocent purchaser—plaintiff impugning purchaser's title.*

This is an appeal to the Full Court from the decision (previously unreported) of Wood, Acting C. J. before whom the case was tried in 1923.

The judgments appear below. Briefly the facts are as follows:—

On 19.4.25, one Li Woon Nam died possessed of certain leasehold premises in Hong Kong.

By his will he bequeathed the premises to his widow, the plaintiff, who, with the apparent object of evading estate duty did not obtain representation until 4.12.31, when she was advised to do so in order to institute these proceedings. In the meantime on 24.3.30, nearly five years after Li Woon Nam's death, someone impersonating him, assigned the premises to one Li Kai Loi. The assignment was duly registered in the Land Office.

By a mortgage dated 20.4.31, registered in the Land Office, Li Kai Loi in fraud of the plaintiff, mortgaged the premises to one Yan Pun.

On 23.7.31, interest being then in arrear, Yan Pun in exercise of his power of sale, sold the premises to the defendant.

On the completion of this sale Messrs. Wilkinson & Grist acted as solicitors for both vendor and purchaser. At a point of time after the execution of the assignment by both parties and whilst the purchase price still remained in the solicitors' custody the latter received notice from the plaintiff's solicitors stating that Li Woon Nam had died in 1925 and could not therefore have executed the assignment of 1930, and pointing out that all dealings with the property after his death must be fraudulent and void.

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In her statement of claim the plaintiff alleged that the assignment to Li Kai Loi was a forgery and that the subsequent mortgage to Yan Pun and the sale by him to the defendant were void.

The defendant pleaded estoppel and alleged that the plaintiff had contemporaneous knowledge of and consented to the impersonation of Li Woon Nam.

At the trial before Wood, Acting C. J., it was decided that the question of estoppel should remain in abeyance until an issue had been tried as to whether or not the plaintiff had such contemporaneous knowledge.

Judgment on this issue was delivered on 8.6.32.

Held: The plaintiff did in fact have such contemporaneous knowledge.

Leave was given for either party to move the Court for final judgment at a later date.

Accordingly on 13.8.33 the defendant moved for final judgment.

On the hearing of the motion the plaintiff, by leave of the Court, filed a reply to the defendant's plea of estoppel, in which she alleged that even if she had contemporaneous knowledge of the impersonation, nevertheless the defendant, through his solicitors, had received notice of the forgery before payment of the purchase price to the mortgagee.

The final judgment of Wood, Acting C. J. was delivered on 22.6.33.

Held: (1) At the time when the defendant's solicitors received notice of the forgery, the assignment had been executed by both parties. The solicitors therefore held the purchase price as agents solely for the mortgagee who alone was entitled to claim it.

(2) That as the plaintiff had not been able to invalidate the mortgage she was estopped from invalidating the defendant's title.

Judgment for defendant with costs.

On appeal to the Full Court, MacGregor, C. J. and Lindsay, J., against both judgments in the Court below, the decision of the trial judge was affirmed and the appeal dismissed with costs.

Sheldon (*d'Almada* with him) instructed by *Lo & Lo* for plaintiff.

Potter, K.C. (*Jenkin*, K.C. with him) instructed by *Hastings & Co.* for defendant.

Note:—The plaintiff appealed to the Privy Council which dismissed the appeal with costs (10.10.35).

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CHEUNG

1933
June 8.

WOOD, ACTING C.J.

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The plaintiff Li Tse Shi, is a widow aged 61 years, resident in Toi Shan village in the Province of Kwangtung, China. Her late husband Li Woon Nam died in Toi Shan on or about 19th April, 1925. Presumably because they were without a son Li Woon Nam and his wife adopted many years ago, a son named after adopting, Li Kai Loi. This adoption was not of a blood relation, but was made by purchase from outside the family. During his lifetime Li Woon Nam, as also did his adopted son, spent some time in America and acquired there some wealth. Both father and son possessed passports. Li Woon Nam returned to this Colony from America in 1924. He was introduced by a relative to Ng Iu Hon who became thereupon a trusted friend of Li Woon Nam and of his family. Ng Iu Hon was at that time the owner of premises 73 Bonham Strand West. The premises were occupied by the Un Lung Shing firm in which firm Ng Iu Hon was a partner. Li Woon Nam was seeking an investment for his money. By an assignment dated 11th October, 1924, Ng Iu Hon sold the premises to Li Woon Nam. Ng Iu Hon (or the Un Lung Shing firm) then became the tenant of the purchaser. The title deeds held by Li Woon Nam were two in number, namely, the earlier assignment to Ng Iu Hon and the assignment by Ng Iu Hon to Li Woon Nam already mentioned. Li Woon Nam returned to Toi Shan with these two title deeds. The rent (subject to approved deductions) was remitted to him in Toi Shan by Ng Iu Hon, who was both his tenant and his agent to collect rent. Li Woon Nam kept his papers in an American trunk, locked by a padlock, for which he kept two keys, duplicate keys. In addition to the two title deeds of the premises in Hong Kong he had also Chinese deeds of title for property in China. In the same box also were deposited the two passports—his own and his son's; and two "chops" each bearing his name, one of which was used by him in connection with his Hong Kong affairs and the other in connection with his affairs in China. At Toi Shan, Li Woon Nam lived in his family house with his wife, his son and his son's family. At the present time his son has five children

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who are still living with their grandmother, the plaintiff. On the 13th April, 1925, Li Woon Nam in anticipation of his death made a Chinese will. He thereby bequeathed all his property to his wife "to administer and control and enjoy all "privileges thereof" with power to "deal with these properties "herself" without interference. Before his death, which occurred on or about 19th April he handed to his wife this will together with all the documents and things deposited in the American trunk and with five keys including both keys of the trunk padlock. The widow, the plaintiff, thereafter administered the property. Ng Iu Hon accounted to her for the rent of the premises in Hong Kong—remitting to her in the country. In January, 1929, Ng Iu Hon at the end of the Chinese year surrendered his tenancy in accordance with one of the terms of the lease. Ng Iu Hon as agent for the plaintiff, secured a new tenant so that there might be no break in the occupation of the premises. He also continued to collect the rent and to remit it to the plaintiff. Rent was remitted every month by Ng Iu Hon throughout the period of his agency. In correspondence with Ng Iu Hon about these premises the plaintiff used the "chop" for Hong Kong affairs, bearing her husband's name, which her husband had left to her. No representation either in Hong Kong or in China was taken out to her husband's estate. By all parties concerned action was taken as though no change in ownership had resulted from the death of Li Woon Nam.

On a day, a few days before the 24th March, 1930, the two title deeds of these premises were produced in Hong Kong to Hung Hing Kam, a solicitor, in the firm of Messrs. Deacons, by some person unknown who was impersonating Li Woon Nam. This person was introduced to Hung Hing Kam by Li Kai Loi, who himself had been introduced to Hung Hing Kam by Ng Iu Hon. Li Kai Loi purported to purchase the said premises from Li Woon Nam. On the instructions of both vendor and purchaser Hung Hing Kam prepared an assignment by Li Woon Nam to Li Kai Loi which on the 24th March, 1930, was executed and was later registered in the Land Office. On the 7th April, 1930, Hung Hing Kam returned the two earlier deeds with the new assignment to Li Kai Loi.

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The plaintiff has informed the Court that the only proper custody of these deeds was in herself, that she kept them under cover in a top tray of her trunk, that she put them in that place when she first received them from her husband before his death, that she habitually wore the keys of the box on her person, that she had not missed the deeds in March 1930 and that in fact she did not see the deeds from the date on which she received them until July, 1931.

The location of these deeds of title between the 7th April, 1930, and a date in April, 1931, remains undisclosed by evidence. On or before the 13th April, 1931, Li Kai Loi came again to Hung Hing Kam. He stated then that he had lost the deeds. On the 18th April, 1931, he executed two documents prepared on his instructions by Hung Hing Kam, firstly a statutory declaration setting out the circumstances in which he alleged the deeds to have been lost and secondly, a power of attorney to his cousin Li Hip Loi. Li Hip Loi is the son of Li Cheuk Nam, who is an elder brother of Li Woon Nam and resides in Hong Kong. Li Kai Loi asked Hung Hing Kam to find a mortgage for the property, but in the absence of the title deeds Hung Hing Kam refused to do this, unless with a guarantee. Incidentally Hung Hing Kam asked Ng Iu Hon, speaking on the telephone, to guarantee a mortgage by Li Kai Loi, which Ng Iu Hon declined to do.

Later in the same month Li Hip Loi produced the statutory declaration and the power of attorney to Messrs. Wilkinson & Grist, solicitors. He instructed them to prepare a mortgage of the premises and introduced an intended mortgagee, Yan Pun. This mortgage was executed on the 20th April, 1931, and was registered in the Land Office.

Further, a second mortgage was executed on the 1st May, 1931, with which the present proceedings are not concerned.

The interest on the first mortgage was not paid on due date. The mortgagee instructed Messrs. Wilkinson & Grist to exercise the power of sale under the mortgage. The premises were advertised to be sold by the mortgage at an auction to be held on the 23rd July, 1931, at 3 p.m.

Up to this date Ng Iu Hon had collected the rent without interruption and had remitted it to the plaintiff.

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On this date the plaintiff was away from home with a sick grandchild in Canton, arranging for medical treatment. Ng Iu Hon came down from Canton to Hong Kong by the morning train, arriving after 12 noon. He was at once informed of the advertised sale and took prompt action on behalf of his principal, the plaintiff.

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He called upon Maurice Murray Watson, a solicitor in the firm of Messrs. Johnson, Stokes and Master; asked him to stop the sale, if possible: paid him \$3,000.00 in cash so that he might have money to meet sums accrued due under the mortgage; and arranged for the production of the title deeds at the auction room. This solicitor attended at the auction room. The three deeds of title, including the assignment to Li Kai Loi, were produced to him by Wong Wa Kong, who is the father-in-law of Li Kai Loi. The solicitor inspected the deeds. The mortgage was represented at the sale by Messrs. Wilkinson and Grist. The request for the postponement of the sale was refused. I will refrain from comment upon the mortgagee's conduct.

The sale proceeded. The defendant became the purchaser. Subsequently to the auction Messrs. Wilkinson and Grist acted for both vendor and purchaser. The deed of assignment to the purchaser was executed on the 6th August, 1931.

The three deeds of title which on the 23rd July had been produced by Wong Wa Kong remained in his custody.

On the 23rd July after the auction sale Ng Iu Hon wrote a letter to Li Tsau Loi a nephew of the plaintiff in Toi Shan enclosing a further letter to the plaintiff in which he asked her to come to Hong Kong in connection with the matter. This letter reached Li Tsau Loi on the 25th July. The plaintiff was in Canton. She received her letter there on the 27th July. She at once came back to Toi Shan, arriving in the forenoon of the 28th July.

On her return she has stated (and on this point I believe her) that she found her son Li Kai Loi at home, had a conversation with him and beat him severely. Since that date she says that she has not seen him; and this statement too, I see no reason to doubt.

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She further says that on that day she opened her American trunk and became for the first time aware of the absence of her title deeds.

On the afternoon of the same day, the 28th July, a person named Wong Yui who had been sent by Wong Wa Kong, arrived from Hong Kong and handed to the plaintiff a bundle of documents, three or four, which she supposed to be her title deeds restored to her.

She came at once to Hong Kong bringing these documents with her and arriving on the 29th July. She stayed in a boarding house.

On the 30th July she interviewed Li Cheuk Nam.

On the 31st July she did so again; and on the afternoon of that day visited Ng Iu Hon in his shop in Wing Lok Street. Wong Wa Kong was there present.

While she was in this shop a solicitor from Messrs. Wilkinson and Grist, accompanied by his interpreter Wai Po Cheung, arrived. They demanded from Wong Wa Kong the deeds which he had produced at the auction room. In the hearing of the plaintiff Wong Wa Kong stated that these deeds had been sent to the country.

On the 6th August, 1931, the plaintiff consulted her present solicitor, Lo Man Kam. She has stated that she handed to him all documents received by her on the 28th July from Wong Yui. Lo Man Kam received from her four documents—the first two assignments of the premises and two other documents. He did not receive from her the assignment by Li Woon Nam to Li Kai Loi which was last seen, according to the evidence, in the custody of Wong Wa Kong in the auction room on the 23rd July.

From the plaintiff's interview with Lo Man Kam these proceedings originated. He obtained for her on the 4th December, 1931, letters of administration with will annexed to her late husband's estate. The present writ was issued on the 15th December, 1931.

The plaintiff here asks that the deed of assignment by Li Woon Nam to Li Kai Loi dated 24th March, 1930, be declared void; and consequently also all transactions with the said property deriving validity therefrom.

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The impersonation of Li Woon Nam by some person unknown is not in doubt.

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At this trial the defendant has relied wholly upon the plea that the plaintiff is estopped by her own conduct from questioning the validity of the assignment.

It is here alleged against the plaintiff that she had contemporaneous knowledge of and consented to the impersonation.

The onus of proving the allegation of knowledge rests upon the defendant and if that onus be not discharged the plaintiff must here succeed.

At this point I am in the place of a jury.

I have it in mind that impersonation in legal matters of one member of a family by another, where the interests of the family as a whole are not thereby damaged, is not regarded in the circle to which the plaintiff belongs as culpable. Still less is it so regarded when such impersonation is adopted to safeguard the family's interests.

In the course followed in this trial the plaintiff's evidence came first. She affirms that the deeds of title were abstracted from her custody without her knowledge. In the Spring of 1930, according to her evidence, Li Kai Loi (Li Hip Loi being with him) obtained from her on one occasion the keys to the American trunk and had access to the trunk in her absence in order to take out his passport.

The question of fact to be decided is whether having regard to all the evidence before the Court her story is discredited.

That it is probable that she had knowledge of the actual events as they happened is shown by the following facts. According to her own statement the plaintiff herself from April 1925 to July 1931 kept carefully in her custody the duplicate keys of the trunk in which the deeds were deposited. With the one exception already referred to by her in her evidence no one but herself opened the trunk. The trunk was kept on the first floor in a living room. It was in use by the plaintiff—she kept clothes in it of her own (according to her evidence these were clothes which she did not wear). Quite apart from any business relating to

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property in China she went to the box regularly each month to take out the "chop" employed to issue acknowledgments for rent received from the property in Hong Kong. In these circumstances it seems *prima facie* unlikely that the abstraction of these deeds could have taken place without her consent or that the absence of the deeds could have remained undiscovered by her.

Further, the assignment here questioned, though it is apparent that among its purposes was to avoid the intricacies of the Probate Jurisdiction of the Court and the payment of estate duty, is not otherwise characterised by fraud. The assignment itself involved legal costs amounting to \$850.00. The assignee, if he is to be suspected of fraud, at this time notably after this expenditure postponed attempting to make any profit for himself for 13 months. Also the *bona fides* of the assignee at this time is evidenced by the fact that the deeds of title did not remain in his custody and that when 13 months later he designed the fraudulent mortgage the deeds were not available to him. On the day of the auction sale of the property by the mortgagee the deeds were still in the hands of persons who were holding them for the family of Li Woon Nam and not for his fraudulent son. On the occasion when instructions were given to Messrs. Deacons with reference to the assignment itself, Li Kai Loi was introduced to the solicitor by Ng Iu Hon himself, the trusted, and in my opinion, trustworthy friend of the family. I notice also that the date of this assignment comes shortly after the property was brought to the attention of the family by the first change in tenancy since the death of Li Woon Nam. For these reasons it seems more likely that the assignment was, so far as the internal administration of family property is concerned, executed in good faith. Such a decision would be usually reached after a conference of all the elder members of the family.

I am not impressed by the plaintiff's statement that she kept the "chops" concealed in the trunk under her clothing and not in the tray with the documents.

The defendant claims to have shown not merely that the plaintiff is likely to have known of the impersonation but that she did in fact know.

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The plaintiff would establish her ignorance of the assignment to the Court by reference to her castigation of her son on the 28th July, 1931, but her violence may be more probably attributed to her discovery of her son's subsequent dealings with the property in fraud of his family.

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It is suggested that her knowledge is shown by her own actions in Hong Kong after her discovery of the auction sale of the property.

So far as the story told in court goes, she on her own initiative visited Li Cheuk Nam in Hong Kong on the 30th and 31st July 1931. Li Cheuk Nam was her husband's elder brother and the father of Li Hip Loi who was the donee of the power of attorney given by Li Kai Loi. Later in the second day she was taken to a police station. Her intention both in the house and in the police station was to lay a complaint against Li Hip Loi. She herself has stated that she complained that Li Hip Loi had induced her son to steal her title deeds and sell her property fraudulently. On the other hand, the two police officers who have given evidence for her say that her complaint was merely that Li Hip Loi had induced her son to come to Hong Kong and to sign a document by means of which her property had been sold. It is clear to me in spite of her own statement to the contrary that she was not then alleging a theft of title deeds by her son, and it is a reasonable inference that she must have known throughout that her son had not stolen the deeds otherwise she would have included the theft in her report.

Again, later in the same afternoon, she was in Ng Iu Hon's shop. I may say here that I do not found any conclusion upon evidence give for the defendant to prove that on this occasion she made a certain request to a solicitor's interpreter; but there is one matter of interest in the evidence about the interview between the interpreter to Messrs. Wilkinson and Grist and Ng Iu Hon. In the hearing of the plaintiff Ng Iu Hon is reported to have said "This is a matter between uncle "and nephew." In fact, this meant that Li Kai Loi as representative of his family must settle accounts with his uncle Li Cheuk Nam whose son was the originator of the fraud.

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If the thoughts of those concerned had on this occasion been directed back to a theft 16 months earlier of the family deeds by Li Kai Loi, the problem could not have been so described. Both the plaintiff and incidentally Ng Iu Hon would seem to have been well aware that the deeds had not been stolen.

In addition to these consideration I noted as a curious fact that the actual assignment in question was last admitted by any witness to have been seen in the auction room on the 23rd July, 1931. It was then not in the possession of a person concerned in the fraud but of a person who was intervening to prevent further consequences flowing from the fraud. Other title deeds then in the same possession reached Lo Man Kam, her solicitor, through the plaintiff on the 5th August. The assignment to Li Kai Loi itself has not been forthcoming. These circumstances suggest that it has been suppressed and suppressed in the interest of the plaintiff in these proceedings who is attacking its validity.

For these reasons I find that the contemporaneous knowledge of the impersonation has been brought home by the evidence the plaintiff.

This issue of fact was the only issue submitted for trial by the plaintiff's counsel when he opened his case. That the conduct of the plaintiff, if this issue were decided against her, formed a basis of estoppel as pleaded by the defendant, was not then questioned. The evidence was allowed to cover a somewhat ample field, so that the Court might have before it a complete story; but witnesses were called and examined on this issue of fact only. It was not until his final address that the plaintiff's counsel raised any argument upon the law of estoppel. I want this position to be placed here clearly upon record.

If the parties had addressed themselves to the law of estoppel no doubt evidence would have been tendered to bring the defendant's case within the precedent of *Tsang Chuen v. Li Po Kwai* (1). Evidence might have followed to establish an estoppel upon an estoppel.

(1) (1932) A.C. 715.

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I have decided in these circumstances to place on record here my decision of fact already set out, leaving it to either party to move the Court for final judgment after further consideration of the matter.

The present judgment must be regarded as a judgment on an issue of fact and the plaintiff must pay the defendant's costs of the trial of this issue.

WOOD, Acting C.J.

Following upon my judgment delivered herein on the 8th June last, the defendant has here moved the Court for final judgment.

On the hearing of the motion the defendant has called evidence with reference to the search in the Register of Deeds in the Hong Kong Land Office conducted by Messrs. Wilkinson and Grist. They used the record of this search in the preparation both of the mortgage from Li Kai Loi to Yan Pun dated 24th April, 1931, and of the assignment by Yan Pun to the defendant dated 6th August, 1931.

This evidence coupled with that previously given establishes the estoppel pleaded in paragraph 2 of the statement of defence (see *Tsang Chuen v. Li Po Kwai, supra*).

In order to meet this position the plaintiff has in the course of the hearing of the motion been allowed to file a reply. By her reply she has contended that this estoppel is defeated by certain circumstances.

In paragraph 1 of the reply it is pleaded that even if the plaintiff in fact had such knowledge and had consented, as she is alleged to have done, nevertheless, the defendant through his agents, Messrs. Wilkinson and Grist, had received "before payment of the purchase price to the vendor Yan Pun" full notice and information of facts contained in a letter dated the 6th August, 1931, written by Messrs. Lo and Lo, the solicitors on behalf of the plaintiff.

With reference to this first portion of the copy I find that the notice contained in this letter did not in fact reach Messrs. Wilkinson and Grist "before the payment of the purchase price to the vendor Yan Pun." The letter arrived

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at the office of Messrs. Wilkinson and Grist at a point of time when the purchase money was still in their custody: but the deed having been executed by both parties they were then custodians of the money as agents solely for the vendor. The vendor alone could claim the money from them. They were agents for both parties in the transaction: and after execution of the assignment by both parties, the solicitors held the deeds for the purchaser and the consideration for the vendor. For this reason the first portion of the reply, in my opinion, fails.

A further answer to the same portion of the reply is that whatever notice may have reached the purchaser on the 6th August, 1931, such notice will not operate to disentitle him as purchaser from the mortgagee unless it can be shown also that the mortgagee was affected by like notice. The reply does not allege that the mortgagee was affected by any notice contained in this letter.

The remainder of the reply amounts to this, that Messrs. Wilkinson and Grist, the solicitors for the defendant, during the period from the 23rd July, 1931, to the 6th August, 1931, obtained knowledge which should have put them on enquiry for flaws in the title to the property, that they omitted the proper enquiries, and that their knowledge and their omission became, in the circumstances which arose, the knowledge and the omission of the defendant himself, thereby affecting the defendant with notice of all flaws existing in the title that might on due enquiry have been revealed.

For the defendant it has been submitted that this argument is unsound.

It will be agreed that the knowledge of an agent will only become notice to his principal where a legal duty lies upon the agent to communicate such knowledge to his principal: and basing his position upon the case of *Taylor v. Blacklow* (1) the defendant's counsel has here contended that so far from there being a duty on Messrs. Wilkinson and Grist to inform their client, the purchaser, of the flaws in the title, it would have been a breach of their own duty

(1) (1836) 3 Bing. N.C. 235.

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to the vendor, who was also their client, so to inform the purchaser. The case cited is, however, not an authority for the proposition that a solicitor acting simultaneously for two parties and finding himself under conflicting duties becomes relieved from the performance of one duty by the fact that he is, by performing it, in breach of his other duty. The solicitor's course in these circumstances is clearly laid down for him in the case cited in the judgment of Tindal, C.J. (see p. 248)—The solicitor must retire in silence from both duties. It seems to me that Messrs. Wilkinson and Grist were under the duty to disclose to the purchaser all material information in their possession however derived and whether acquired before they became his agents or afterwards (see judgment of Vaughan Williams, L.J. in *Young v. David Payne & Co., Limited*) (1).

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Other submissions made for the defendant, which are in my view effective are these. Firstly, that this information did not operate to invalidate the mortgage to Yan Pun and, until the mortgage is invalidated, the title of the purchaser from the mortgagee remains unaffected by notice to the purchaser and absolutely good. Secondly, that the knowledge in question could not have initiated an inquiry which would have led to the discovery of the impersonation of Li Woon Nam, and is therefore not notice of that impersonation — which is here the only material mis-conduct, and further, even if it might have so led, yet it is not open to the present plaintiff to rely upon such notice, because she has been found already by the Court to have been as lately as 31st July, 1931—indeed, until the 5th August, 1931—actively co-operating in concealing this very impersonation from persons concerned in this sale.

Thirdly, that there was no omission of enquiry on the part of Messrs. Wilkinson and Grist, who were on the 31st July still endeavouring to trace the documents of title which had been shown to them at the auction sale of the property.

For these reasons it seems to me that the estoppel which rests upon the plaintiff is not defeated by any counter-estoppel.

I give final judgment for defendant with costs.

(1) (1904) L.R. 2 Ch. 816.

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ON APPEAL TO THE FULL COURT.

1934
April 14. MACGREGOR, Chief Justice.

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In this case the plaintiff, appellant, Li Tse Shi, sued as administratrix of the estate of Li Woon Nam who died in 1925, having among the property premises situate at 73 Bonham Strand West in the city of Victoria. On the 24th March, 1930, an indenture of assignment was registered in the Land Office whereby Li Woon Nam purported to assign these premises to Li Kai Loi, who was the adopted son of the deceased Li Woon Nam and his widow the plaintiff.

On 20th April, 1931, the premises were mortgaged by Li Kai Loi to Yan Pun and on 23rd July the mortgagee Yan Pun in exercise of his power of sale sold the premises to the defendant, respondent, Pong Tsoi Ching.

In these circumstances the plaintiff claimed a declaration that no interest in the premises passed to Li Kai Loi by virtue of the assignment of 24th March, 1930, that the mortgage to Yan Pun and a second mortgage dated 1st May, were null and void and of no legal effect, and that the purchase by the defendant respondent from the first mortgagee was also null and void.

By his defence the respondent claimed that the appellant was estopped from denying his title to the premises in that she consented to the impersonation of Li Woon Nam in connection with the assignment of 24th March, 1930.

The case came before Wood, J., sitting without a jury on 29th May, 1933 and after a five days' hearing the learned trial judge on 8th June, 1933, delivered a judgment on fact in which he found that the plaintiff's contemporaneous knowledge of the assignment had been established to his satisfaction.

On 13th June the defendant moved for final judgment. In the course of the argument the plaintiff obtained leave to file a reply in which she pleaded that if she knew of and consented to the impersonation and assignment the defendant through his agents Messrs. Wilkinson & Grist before payment of the purchase price to the vendor Yan Pun had full notice of the infirmity in the title to the premises, such notice being contained

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in a letter dated 6th August, 1931, from Messrs. Lo and Lo to Messrs. Wilkinson and Grist, which after relating the death of Li Woon Nam in 1925 continued thus:—

“It is obvious that since Li Woon Nam died in 1925 he “could not possibly have executed any assignment in 1930, and “all dealings with the property thereafter must be fraudulent “and void.”

On 22nd June, 1933, Wood, J., gave final judgment for the defendant. From both these judgments appellant appeals, on the grounds that in the former the learned trial judge has drawn erroneous and unwarranted deductions on issues of fact, and that in the latter he has come to a wrong conclusion in law.

This Court, before hearing argument on the appeal, took the evidence of Mr. Hugh Jones a material witness whose evidence was not available at the trial in the Court below.

The plaintiff's case was that after her husband's death, she, being illiterate and inexperienced in European business matters, kept the title deeds relating to her late husband's property, in a covered tray on top of a large American trunk. In the same trunk, underneath the tray, she kept the chops of her husband, which she had occasion to use every month. The trunk was locked and she kept the keys safely. Though, as I have said, she opened the trunk every month she states that she never had occasion to lift the lid of the tray in which she had placed the title deeds, she was, she says, unaware of the disappearance of the title deeds of the Bonham Strand property until 28th July, 1931, when in consequence of information which she then received she opened the tray of the trunk and found that the deeds were missing. On the afternoon of the same day the deeds were handed to her by a messenger from Wong Wa Kong, the father-in-law of Li Kai Loi.

On one occasion, and on one occasion only, in the Spring of 1930, she parted with the keys of the trunk. She then handed them to Li Kai Loi, who was accompanied by his cousin Li Hip Loi. When they went to open the trunk she left the room.

In March, 1930, Li Kai Loi in Hong Kong asked Ng Iu Hon, who collected the rents of this property and remitted them

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monthly to the plaintiff, to introduce him to a solicitor. Ng Iu Hon thereupon took Li Kai Loi to Hung Hing Kam a solicitor in the firm of Messrs. Deacons, and later Li Kai Loi returned to Hung Hing Kam accompanied by an unknown man who posed as Li Woon Nam, who had then been dead for years. An assignment was prepared by which Li Woon Nam purported to sell the premises to Li Kai Loi. This assignment was executed on 24th March, 1930, and was duly registered in the Land Office. On 7th April, 1930, Hung Hing Kam gave the new assignment and the two old title deeds to Li Kai Loi. Thirteen months later in April, 1931, Li Kai Loi again called on Hung Hing Kam. He stated he was anxious to mortgage the property but he had lost the title deeds. He then executed two documents, a statutory declaration explaining the circumstances in which he had lost the deeds, and a power of attorney in favour of his cousin Li Hip Loi. He then asked Hung Hing Kam to endeavour to find a mortgagee, but Hung Hing Kam declined to do anything in the matter without a guarantee. Hung Hing Kam actually telephoned to Ng Iu Hon and asked him if he would guarantee a mortgage by Li Kai Loi, but Ng Iu Hon declined to do so.

Later that month Li Hip Loi called upon Messrs. Wilkinson and Grist. He introduced Yan Pun as an intending mortgagee, produced the statutory declaration and power of attorney and instructed that firm to prepare a deed of mortgage. This mortgage was executed on 20th April, 1931, and registered in the Land Office.

On 1st May, 1931, a second mortgage was executed, the mortgagee being Ho So Ching who appears to be the wife of the first mortgagee Yan Pun.

Interest on the first mortgage in respect of the first two months of its currency was not paid, and the mortgagee in exercise of his power of sale, acting through Messrs. Wilkinson and Grist, had the premises advertised for sale at an auction to be held on 23rd July, 1931, at 3 p.m.

About noon on that day Ng Iu Hon arrived in Hong Kong from Canton. He was shown an advertisement of the intended sale and took immediate steps to postpone the sale. He went

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first to Messrs. Wilkinson and Grist and saw Mr. Hugh Jones who has sworn that Ng told him that Li Kai Loi was owner of the property. He called upon Messrs. Johnson Stokes and Master and asked Mr. Watson to accompany him to the sales room and endeavour to stop the sale.

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The events of that afternoon in the auction room are to me of great interest and of the utmost importance. Mr. Watson was assisted by his interpreter Wong Chak Nam, and Ng Iu Hon, and one Li Sik Tso were also present. \$3,000 were produced and handed to Mr. Watson who offered that sum to the mortgagee in payment of interest due and the costs of the sale. The mortgagee was willing and ready to take that sum and call the sale off, but he was advised by Mr. Hugh Jones not to postpone the sale unless he got a substantial sum in reduction of the principal debt.

Where the \$3,000 came from we do not know. Mr. Watson's recollection is that the money was given to him by Ng Iu Hon: Ng Iu Hon states that the money was produced by Li Sik Tso: and Li Sik Tso does not disclose the source from which the money was derived. He states that he telephoned to Wong Wa Kong and asked him for the money. Wong Ka Kong stated that the title deeds were with him, but he did not supply the money nor had Li Sik Tso enough money himself.

The sale proceeded and the property was purchased by Pong Tsoi Ching, the defendant respondent, for the sum of \$77,000.

The missing title deeds were produced by Wong Wa Kong, the father-in-law of Li Kai Loi.

After the sale Ng Iu Hon went to the plaintiff and asked her to come and discuss the matter with him. She came at once to Hong Kong bringing with her the title deeds which she had received from Wong Wa Kong on 28th July.

On 30th July and again on the morning of 31st July, she visited Li Cheuk Nam, the brother of Li Woon Nam deceased, and apparently made such a nuisance of herself that Li Cheuk Nam sent for the police and had her removed. She herself has stated that both to Li Cheuk Nam in his house and to the police she complained of the theft of her title deeds: the two police officers who were called, on the other hand, testify that

LI TSE SHE, her complaint was against Li Hip Loi, who, she said, had induced her son to come to Hong Kong and execute a document in consequence of which the property had been sold.

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That afternoon she visited Ng Iu Hon in his shop in Wing Lok Street, Wong Wa Kong being also present. The shop was visited by Mr. Hugh Jones and his interpreter. Mr. Hugh Jones has sworn that while he was in the shop the plaintiff came up to him, bowed, and said to him "Please get back my son's property." The plaintiff entirely denies this story, and is supported in her denial by Ng Iu Hon. It is true that Mr. Hugh Jones was dependent for his knowledge of what was said to him on an interpreter, but he cannot have been innocently mistaken as to the plaintiff coming up to him and bowing to him, and in a letter dated 6th August, 1931, addressed to Messrs. Lo and Lo and written when Mr. Hugh Jones' recollection of the incident was quite fresh, reference is made to plaintiff being present in Ng Iu Hon's shop and there making a statement.

Let us pause at this point and consider what deductions and inferences can properly be drawn from the conduct of the parties, always bearing in mind that it is for the defendant to satisfy the Court that plaintiff was aware of the assignment.

As the learned trial judge sat without a jury the hearing in this Court is of the nature of a rehearing (*Coughlan v. Cumberland*) (1) but that broad statement is subject to certain qualifications. The Court will ever lean in favour of a finding of fact by a judge who has had the advantage of seeing and hearing the witnesses and forming an impression of their credibility from their demeanour and conduct in the witness box. The position is put thus by Lord Sumner in *S.S. Hontestroom v. S.S. Sagaporack* and *S.S. Hontestroom v. S.S. Durham Castle* (2).

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has somewhat been lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing

(1) (1898) 1 Ch. 704.

(2) L.R. 1927 A.C. 47.

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"by rules which have the force of statute: Order LXVIII, r.1. It is not, however, a mere matter of discretion to "remember and take account of this facts; it is a matter of "justice and judicial obligation. None the less, not to have "seen the witnesses puts appellate judges in a permanent "position of disadvantage as against the trial judge, and unless "it can be shown that he has failed to use, or has palpably "misused his advantage, the higher court ought not to take "the responsibility of reversing conclusions so arrived at, merely "on the result of their own comparisons and criticisms of the "witnesses and of their own view of the probabilities of the "case. The course of the trial and the whole substance of "the judgment must be looked at, and the matter does not "depend on the question whether a witness has been cross- "examined to credit or has been pronounced by the judge in "terms to be unworthy of it. If his estimate of the man "forms any substantial part of his reasons for his judgment "the trial judge's conclusions of fact should, as I understand "the decisions, be let alone. In the *Julia* (1) Lord Kingsdown "says: "They, who require this Board, under such circumstances, "to reverse a decision of the Court, below on a point of this "description, undertake a task of great and almost insuperable "difficulty We must, in order to reverse, not merely "entertain doubts whether the decision below is right, but be "convinced that it is wrong'. Wood, L.J., in *The Alice*, (2) "says: 'The principle established by the decision in *The Julia* "(*supra*) is most singularly applicable We should require "evidence that would be overpowering in its effect on our "judgment with reference to the incredibility of the statement "made'. James, L.J., thus laid down the practice in *The Sir "Robert Peel*. (3) 'The Court will not depart from the rule "it has laid down that it will not overrule the decision of the "Court below on a question of fact in which the judge has had "the advantage of seeing the witnesses and observing their "demeanour, unless they find some governing fact which in "relation to others has created a wrong impression'."

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(1) (1860) 14 Moo. P.C. 210, 235.
 (2) (1868) L.R. 2 P.C. 245, 248.
 (3) (1880) 4 Asp. M.L.C. 321, 322.

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Applying these principles I was satisfied that the learned trial judge came to a proper and justifiable conclusion on the evidence before him. Having regard to the fact that this Court has had the advantage of the evidence of Mr. Hugh Jones I go further and say that any other conclusion would have meant straining the evidence unduly in favour of the plaintiff. If her story is true we have not only to imagine a gigantic conspiracy in which not only Li Kai Loi and Li Hip Loi are involved but also Ng Iu Hon and Wong Wa Kong and a collusive mortgage put through with the aid of Yan Pun and his wife Ho So Ching. We must go further and accept that the prime mover in this wicked plot, Li Kai Loi, having succeeded in getting the property assigned to him was so overcome with fear or shame that he was incapable of doing anything in furtherance of his wicked fraud on the plaintiff for thirteen months, during which period plaintiff made thirteen visits to her trunk, any one of which might have led to his detection and have put a summary end to his money-making schemes. We must go further and find a reason for the sudden repentance of Ng Iu Hon who as soon as he heard of it tried to stop the sale. True, he was the plaintiff's rent collector, and he would have to explain why no more rents were coming in, but if he was a party to the conspiracy why not wait a day or two longer and then report the unfortunate sale of the property by the prodigal son as a *fait accompli*?

If, on the other hand, one assumes plaintiff's knowledge of, and consent to, the assignment, everything is capable of a simple and logical explanation, and except for Li Kai Loi and his cousin Li Hip Loi our faith in human nature need not be shattered. The assignment passed the property from deceased father to living adopted son. The title deeds are safe with Wong Wa Kong and plaintiff continues to receive the rents each month. Everyone is satisfied until suddenly to their horror they learn that by means of a false statutory declaration the property has been mortgaged and by the mortgagee's exercise of his power of sale is in danger of being lost. Such a risk had never been contemplated by anyone, and the reaction of the various interested parties on hearing the news are

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instinctive and natural. Ng Iu Hon when asked if he would guarantee a mortgage of the property by Li Kai Loi had declined to do so, but he did not at once state that as the property was not Li Kai Loi's he could not possibly mortgage it. When he heard of the intended sale and went to the office of Messrs. Wilkinson and Grist Ng Iu Hon claimed that the power of attorney must be a forgery, and further said, according to the evidence of Wai Po Cheung. "No mortgage "is possible, because the owner Li Kai Loi has told me nothing "about it," and further referred to the situation as a matter between uncle and nephew.

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Wong Wa Kong when told of the sale said "Strange, the "title deeds are with me," and most significant of all are the words of the plaintiff herself to Mr. Hugh Jones "Get me "back my son's property."

There remains for consideration the points of law raised by the plaintiff appellant in her reply dated the 13th day of June 1983.

With that aspect of the appeal I propose to deal very shortly. Two undisputed facts, that the deed of sale had been executed by both parties and the purchase price paid by the purchaser before the receipt by Messrs. Wilkinson and Grist of Messrs. Lo and Lo's letter, and that notice of any invalidity in the title had ever been given to the mortgagee Yan Fun, seem to me to dispose of the appellant's contentions in her reply.

For the reasons given at length by the learned trial judge in his judgment of 22nd June, 1983, I hold that the appeal on ground of law fails.

The judgment of the Court below is affirmed and the appeal is dismissed with costs.

LINDSELL, J.

I concur. Although it may be that certain facts relied upon by the learned trial judge were not sufficiently established by the evidence, yet in my opinion there was ample material on which he was entitled to found his main conclusion, i.e., that the plaintiff (the present appellant) must have had contemporaneous knowledge of the purported assignment by

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Li Woon Nam to Li Kai Loi in 1930 and must have acquiesced therein.

In my view of the evidence the actual villain of this drama may well have been Li Hip Loi against whom the appellant's real fury was directed on her arrival here.

Having allowed her nephew to vest himself with what must appear to the world, and what was in fact intended to be, the legal estate in the property now in dispute, it seems to me that the appellant is clearly estopped from setting up her own title against a *bona fide* purchaser of that property.

It has indeed been suggested that the mortgage to Yan Pun must have been fraudulent and collusive. It may have been fraudulent in the sense that it was effected either by Li Hip Loi acting under his power of attorney, without the knowledge or consent of either Li Kai Loi or the appellant, or by the two cousins acting in concert in fraud of the appellant, though in the latter case it is hard to understand why, if he intended to defraud his mother by mortgaging the property and appropriating the proceeds, Li Kai Loi should have brought his cousin into the transaction. Of fraud or collusion on the part of the mortgagee there is not, however, a scintilla of evidence, or can it be shown that he had any notice at the time of taking the mortgage of any defect in Li Kai Loi's title. That title may have been sketchy as being derived from Li Kai Loi's statutory declaration of the loss of his deeds, but it was supported by the registration in the Land Office of the assignment of 1930 in his name.

Nor again did the mortgagee have any notice of appellant's claim to the legal estate at the time of the completion of the assignment to the respondent; and even if Messrs. Lo and Lo's letter of August 6th, 1931, had saddled him and the respondent through their solicitors with such notice before the transaction was completed, I cannot see how that notice could operate to defeat the title of either or to validate an adverse claim which the Court has held not to be maintainable.

It is true that the solicitors, Messrs. Wilkinson and Grist were informed on July 23rd, 1931, that the validity of the

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power of attorney and consequently of the mortgage effected thereunder was challenged, but as the event has proved their clients were justified in disregarding this challenge. Nor can it be said that the information given was such as to necessitate enquiry which if pursued would have revealed the existence of any bar to the mortgagee's right to transfer the legal estate in the property to the respondent.

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I agree that the appeal must be dismissed with costs.

RICKMERS RHEDERAI A—G.
(OWNERS OF THE S.S. "CLAUS RICKMERS")
Appellants
(Defendants)

AND

THE BANK OF TAIWAN LTD. AND
H.S.M.R. KAZEROONI & SONS
Respondents
(Plaintiffs)

APPEAL No. 1 OF 1934.

(O. J. ACTION No. 261 OF 1931).

*Amendment of statement of defence—admissions made by mistake—
part of defence struck out for failure to supply particulars
—restoring defence on proving inability to supply required
particulars.*

1934
May 15.

The defendants appellants appealed against the refusal of Wood, Acting C.J., sitting in Chambers, to allow them to file an amended statement of defence.

The amendments consisted of (a) the withdrawal of certain admissions which the defendants stated they had admitted by mistake; and (b) the restoration of that part of their defence which had been struck out because they could supply no particulars.

On appeal to the Full Court, MacGregor, C. J. and Lindsell, J.

Held: With regard to the first point: Before the Court will allow an admission to be withdrawn it must be satisfied that the admission is a mistake; and the reason for making that