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1951

In the Privy Council.

No. 27 of 1950. LAMGIED  
LEGAL STUDIES

ON APPEAL FROM THE SUPREME COURT  
OF HONGKONG  
(APPELLATE JURISDICTION).

BETWEEN

HANGKAM KWINGTONG WOO ... (Defendant) Appellant

AND

LIU LAN FONG alias LIU AH LAN ... (Plaintiff) Respondent.

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

No.	Description of Document.	Date.	Page.
IN THE SUPREME COURT OF HONG KONG— ORIGINAL JURISDICTION.			
1	Writ of Summons	24th May 1948	1
2	Statement of Claim	17th June 1948	2
3	Amended Statement of Defence	21st February 1949	4
4	Reply to Amended Statement of Defence	19th November 1948...	7
<i>The Plaintiff's Evidence as noted by the Chief Justice:—</i>			
5	Liu Lan Fong		
	Examination-in-Chief	9th February 1949	8
	Cross-Examination	9th February 1949	8

INSTITUTE OF ADVANCED  
LEGAL STUDIES,  
25, RUSSELL SQUARE,  
LONDON,  
W.C.1.

No.	Description of Document.	Date.	Page.
6	Francisco Xavier Soares Examination-in-Chief ... ..	9th February 1949 ...	9
	Cross-Examination ... ..	9th February 1949 ...	9
7	Koo Wan Ying Examination-in-Chief ... ..	9th February 1949 ...	10
	Cross-Examination ... ..	9th February 1949 ...	11
8	Cheuk Ming To Examination-in-Chief ... ..	9th February 1949 ...	12
	Cross-Examination ... ..	9th February 1949 ...	12
	Further Cross-Examination ... ..	11th February 1949 ...	12
9	Chan Hung Cheung Examination-in-Chief ... ..	9th February 1949 ...	13
	Cross-Examination ... ..	9th February 1949 ...	13
	Further Cross-Examination ... ..	10th February 1949 ...	13
10	<i>Defendant's Application :</i> Application for Leave to Amend Defence ...	10th February 1949 ...	14
11	<i>Defendant's Evidence as Noted by Chief Justice :</i> Chan Un Chau Examination-in-Chief ... ..	11th February 1949 ...	14
	Cross-Examination ... ..	11th February 1949 ...	15
	Re-Examination ... ..	11th February 1949 ...	16
	Further Examination ... ..	11th February 1949 ...	16
	Further Cross Examination ... ..	11th February 1949 ...	16
	Further Re-Examination ... ..	11th February 1949 ...	16
12	Woo Hang Kang Qwingtong Examination-in-Chief ... ..	11th February 1949 ...	16
	Cross-Examination ... ..	11th February 1949 ...	17
	Re-Examination ... ..	11th February 1949 ...	18
13	Yuen Lai Man Examination-in-Chief ... ..	11th February 1949 ...	19
14	Judgment of Chief Justice on Trial of Action ...	25th February 1949 ...	19
15	Letter, Hastings & Co. to Ko Ho Ning ...	25th February 1949 ...	25
16	Letter, Ko Ho Ning to Hastings & Co. ...	4th March 1949 ...	26
	IN THE SUPREME COURT OF HONG KONG— APPELLATE JURISDICTION.		
17	Notice of Appeal ... ..	12th March 1949 ...	27
18	Notes of Williams, J. on the Appeal to Full Court	30th May 1949 and 31st May 1949 ...	27
19	Notes of Scholes J. on the Appeal to Full Court ... ..	30th May 1949 and 31st May 1949 ...	44
20	Joint Judgment of Williams and Scholes, JJ. ...	10th June 1949 ...	54
21	Petition for Leave to Appeal to the Privy Council	18th June 1949 ...	60
22	Order granting Provisional Leave to Appeal to the Privy Council ... ..	15th August 1949 ...	62
23	Order granting Leave to Appeal to Privy Council	20th May 1950 ...	63

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT  
PRINTED.

No.	Description of Document.	Date.
		UNIVERSITY OF LONDON M.C. 1. 26 JUL 1953
1	Notes of Opening Speech of the Plaintiff's Counsel at Trial	10th February 1949
2	Notes of Opening Speech of the Defendant's Counsel at Trial	10th February 1949
3	Notes of the Closing Speech of the Defendant's Counsel at Trial	18th February 1949
4	Notes of the Closing Speech of the Plaintiff's Counsel at Trial	18th February 1949
5	Formal Judgment in Original Jurisdiction Action	25th February 1949
6	Letter, Woo & Woo to Hastings & Co.	28th February 1949
7	Letter, Hastings & Co. to Woo & Woo	1st March 1949
8	Letter, Woo & Woo to Hastings & Co.	2nd March 1949
9	Letter, Hastings & Co. to Woo & Woo	3rd March 1949
10	Letter, Woo & Woo to Hastings & Co.	4th March 1949
11	Letter, Hastings & Co. to Woo & Woo	4th March 1949
12	Letter, Woo & Woo to Hastings & Co.	5th March 1949
13	Letter, Hastings & Co. to Woo & Woo	7th March 1949
14	Letter, Woo & Woo to Hastings & Co.	14th March 1949
15	Letter, Hastings & Co. to Woo & Woo	15th March 1949
16	Motion for Leave to Appeal to the Privy Council	18th June 1949
17	Affirmation of Hangkam Qwingtong Woo in support of Petition	18th June 1949
18	Letter, Woo & Woo to Hastings & Co.	12th January 1950
19	Letter, Hastings & Co. to Woo & Woo	18th January, 1950
20	Letter, Hastings & Co. to Woo & Woo	26th January, 1950
21	Inter Partes Summons for final Leave to Appeal to Privy Council	16th May 1950

## EXHIBITS.

Exhibit Mark.	Description of Document.	Date.	Page.
A	Power of Attorney from Appellant to Chan Un Chau	15th September 1942...	64
A.2	Certified translation of Power of Attorney in Chinese from Appellant to Chan Un Chau	1943 ... ..	67
B	Certified translation of Agreement for Sale in Chinese	21st August 1943 ...	68
C	Assignment	Undated— Agreed 21st September 1943...	71

Exhibit Mark.	Description of Document.	Date.	Page.
D	Certified translation of Deed of Sale in Chinese...	Undated— Agreed 21st September 1943...	74
E	Reassignment ... ..	Undated— Agreed 30th September 1943...	76
F	Certified translation of Receipt in Chinese ...	1943 ... ..	78
G	Certified translation of Guarantee in Chinese ...	Undated ... ..	79
H	Certified translation of Receipt in Chinese ...	14th October 1943 ...	80
J	Certified translation of Letter in Chinese from Koo Wan Sing to Appellant ... ..	30th October 1943 ...	80
K.1	Power of Attorney from Appellant to Koo Wan Sing ... ..	1940 ... ..	81
K.2	Certified translation of Power of Attorney in Chinese from Appellant to Koo Wan Sing ...	Undated ... ..	83
L.1	Certified translation of Letter in Chinese from Appellant to Koo Wan Sing ... ..	Undated ... ..	85
L.2	Letter from Appellant to Koo Wan Sing ...	Undated ... ..	85
M	Certified translation of Letter in Chinese from Appellant to Koo Wan Sing ... ..	15th January 1944 ...	86
N	Certified translation of Letter in Chinese from Appellant to Koo Wan Sing ... ..	28th January 1944 ...	87
O	Certified translation of Letter in Chinese from Appellant to Koo Wan Sing ... ..	29th May 1944 ...	88
P.1	Consisting of Exhibits J, L.1, L.2, M, N and O ...		
P.2	Agreed bundle of correspondence :— No. 1.—Letter from Respondent's Solicitors to Kwong Sang Hong ... .. No. 2.—Letter from Lo & Lo to Respondent's Solicitors ... .. No. 3.—Letter from Respondent's Solicitors to Ko Ho Ning ... .. No. 4.—Letter from Ko Ho Ning to Respondent's Solicitors ... .. No. 5.—Letter from Respondent's Solicitors to Appellant ... .. No. 6.—Letter from Appellant's Solicitors to Respondent's Solicitors ... .. No. 7.—Letter from Respondent's Solicitors to Appellant's Solicitors ... ..	13th August 1947 ... 18th August 1947 ... 19th August 1947 ... 29th August 1947 ... 9th February 1948 ... 15th May 1948 ... 19th May 1948 ...	89 89 90 91 91 92 93

Exhibit Mark.	Description of Document.	Date.	Page.
	No. 8.—Letter from Appellant's Solicitors to Respondent's Solicitors ... ..	21st May 1948 ... ..	93
	No. 9.—Letter from Respondent's Solicitors to Appellant's Solicitors ... ..	22nd May 1948 ... ..	95
	No. 10.—Letter from Respondent's Solicitors to Appellant's Solicitors ... ..	26th July 1948 ... ..	95
	No. 11.—Letter from Appellant's Solicitors to Respondent's Solicitors ... ..	11th August 1948 ... ..	96
	No. 12.—Letter from Lo & Lo to Appellant	5th June 1946 ... ..	97
Q	Certified translation of Contract for Sale in Japanese ... ..	Undated ... ..	97
R	Certified translation of Certificate of Sale in Japanese ... ..	Undated ... ..	99
S	Certified translation of Agreement for Sale of Garago in Chinese ... ..	1943 ... ..	99
T	Certified translation of Envelope in Chinese in which Exhibits K.1, K.2, L.1 and L.2 were enclosed ... ..	Undated ... ..	101
U	Certified translation of Envelope in Chinese in which Exhibit M was enclosed ... ..	Undated ... ..	102
V	Certified translation of Application for Registration of Cancellation of Mortgage in Japanese...	Undated ... ..	102
W	Letter from P. Y. Woo to Koo Sui Ting ...	26th October 1943 ... ..	103
X	Agreed Extract from the Hongkong News of 10th May 1943 ... ..	10th May 1943 ... ..	104

In the Privy Council.

No. 27 of 1950.

ON APPEAL FROM THE SUPREME COURT  
OF HONGKONG  
(APPELLATE JURISDICTION).

BETWEEN

HANGKAM KWINGTONG WOO ... .. (Defendant) Appellant

AND

LIU LAN FONG alias LIU AH LAN ... (Plaintiff) Respondent.

RECORD OF PROCEEDINGS.

No. 1.

Writ of Summons.

No. 146 of 1948.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

Between

LIU LAN FONG alias LIU AH LAN ... .. Plaintiff

and

HANGKAM KWINGTONG WOO ... .. Defendant.

No. 1.  
Writ of  
Summons,  
24th May  
1948.

10 GEORGE VI by the Grace of God, of Great Britain, Ireland and of  
the British Dominions Beyond the Seas, King, Defender of the Faith.

To Hangkam Kwingtong Woo c/o Messrs. Woo & Woo, Prince's  
Building, Ice House Street Victoria in the Colony of Hongkong Solicitor.

We command you that within eight days after the service of this writ  
on you, exclusive of the day of such service, you cause an appearance to be  
entered for you in an action at the suit of Liu Lan Fong alias Liu Ah Lan  
of No. 187-195 Des Voeux Road Central Victoria aforesaid Widow and

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

—  
No. 1.  
Writ of  
Summons,  
24th May  
1948—  
*continued.*

take notice that in default of your so doing, the Court may give leave to the plaintiff to proceed ex parte.

Witness His Honour Mr. Justice Ernest Hillas Williams the Acting Chief Justice of our said Court, the 24th day of May 1948.

Sd. J. B. MAINGARD,  
*Deputy Registrar.*

Sealed by  
(L.S.)

STATEMENT OF CLAIM.

The Plaintiff's claim is as the sole executrix and beneficiary of the estate of the late Koo Shui Ting alias Koo Wan Sing deceased for 10 a declaration that the Plaintiff is the sole beneficial owner and entitled to the possession of the piece of land registered in the Land Office as Inland Lot No. 2153 together with the dwelling house thereon known as No. 48 Kennedy Road and the Garage appertaining thereto and that the Defendant has no right or title to the said property.

(Sd.) HASTINGS & CO.,  
*Solicitors for the Plaintiff.*

No. 2.  
Statement  
of Claim,  
17th June  
1948.

No. 2.

Statement of Claim.

1.—The Plaintiff is a widow and lives at 187 Des Voeux Road Central 20 Victoria in the Colony of Hongkong. She is the sole executrix and beneficiary of the Will of Koo Shiu Ting alias Koo Wan Sing deceased.

2.—The Defendant is a Solicitor and partner in the firm of Messrs. Woo and Woo, Prince's Building, Victoria aforesaid.

3.—On the 15th day of September 1942, the Defendant executed a Power of Attorney in favour of one Chan Un Chau.

4.—Under and by virtue of the said Power of Attorney by an Agreement in writing dated the 21st day of August 1943, the Defendant agreed to sell and the said Koo Wan Sing agreed to purchase the piece of land registered in the Land Office as Inland Lot No. 2153 together with the dwelling house and garage pertaining thereto, and known as No. 48 Kennedy Road, Hongkong for the price of 68,000 Military Yen. 30

50,000 Military Yen deposit was paid by the purchaser to the Vendor on the said date. The sum of 18,000 Military Yen, the balance of the said purchase price was paid to the said Chan Un Chau under the said agreement and as the attorney of the Defendant as aforesaid in the form of six promissory notes of 3,000 Military Yen each note payable during the period October to December 1943.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

5.—By an indenture, undated, but executed by the said Chan Un Chau as attorney for the Defendant on the 21st day of September 1943, the Defendant purported to assign the said property to the said Koo Wan Sing.

No. 2.  
Statement  
of Claim,  
17th June  
1948—  
*continued.*

In the said indenture the price is stated to be 272,000 Hongkong dollars which said sum was the equivalent of 68,000 Military Yen and was so treated and intended by the parties to the said agreement and said indenture to be such equivalent.

6.—By a document entitled “Deed of Sale and Purchase” undated but executed by the said Chan Un Chau as attorney aforesaid on the 21st day of September 1943 the Defendant purported to assign the said property in the same terms and conditions as are set out in paragraph 5 herein.

7.—Subsequent to the said agreement, indenture and document entitled “Deed of Sale and Purchase” the Defendant sent a letter to the said Koo Wan Sing in the following terms:—

“For the perusal of Mr. Koo Wan Sing.

“My attorney Mr. Chan Woon Chau has just told me that he has agreed to sell to you my house property No. 48 Kennedy Road for the price of 68,000 Yen in Military Notes. I hereby declare that my Attorney has agreed to sell the said house to you with my consent and that I have never revoked the Power of Attorney which was executed by me in favour of Mr. Chan and now lodged with you and which is good and effective in all respects. In confirmation thereof I specially make this document.”

“(Sd.) Woo HANG KAM.”

8.—The Defendant wrongfully refuses to convey the said property to the Plaintiff.

The Plaintiff claims:—

1. Specific performance of the said agreement and that the Defendant be ordered to execute a proper conveyance of the said property to the Plaintiff
2. Such further and other relief as to the Court may seem just.

Dated the 17th day of June 1948.

(Sd.) H. G. SHELDON,  
*Counsel for the Plaintiff.*



## No. 3.

## Amended Statement of Defence.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

No. 3.  
Amended  
Statement  
of Defence,  
21st  
February  
1949 (as  
amended  
by Orders  
made on  
30th  
October  
1948, 9th  
February  
1949 and  
10th  
February  
1949 re-  
spectively).

1.—Paragraphs 1, 2 and 3 of the Statement of Claim are admitted.

2.—Paragraphs 4, 5 and 6 are admitted save that the Defendant says—

- (a) The purchase price was intended to be HK\$272,000. The figure M.Y. 68,000 was inserted in certain of the Agreements for Sale to comply with the requirements of Japanese law.
- (b) The Defendant, at all material times living in Free China, was not aware that M.Y.68,000 was not, in fact, the equivalent of 10 HK\$272,000.
- (c) The Plaintiff is not entitled to the relief claimed in that the payments of the purchase price as pleaded in paragraph 4 of the Statement of Claim do not constitute the true value of the purchase price agreed.
- (d) The Plaintiff ought not to be admitted to say the garage was included in the sale in that it is not included in the deeds and/or agreements referred to in the Statement of Claim as the said Indenture and deed of sale and purchase, being executed later in time to the Agreement of 21st August 1943. 20

3.—In answer to paragraph 7 of the Statement of Claim the Defendant says—

- (a) There was certain correspondence between himself and Koo Wan Sing which must be read as a whole.
- (b) He does not admit the translation or genuineness of the letter pleaded in the said paragraph 7, but, will crave leave to plead further thereto after he has obtained inspection of the document.

4.—In further answer to paragraphs 4, 5 and 6 the Defendant says that at all times material to this action the Defendant and his alleged attorney the said Chan Un Chau were divided by line of War by reason 30 whereof the said Power of Attorney was cancelled and/or abrogated and the Defendant is not bound by the agreements, indentures, deeds and other documents signed by the said Chan Un Chau on his behalf.

5.—In further answer to paragraph 7 the Plaintiff ought not to be admitted to rely on the terms of the said letter in that it discloses an illegality to this Honourable Court. It is against Public Policy for unauthorised correspondence to pass across the line of War, and in addition, the particular correspondence constituted a Trading with the enemy. The Defendant will further rely on the Trading with the Enemy Ordinance 1914 and Regulations made thereunder, and on the Defence Regulations. 40

6.—Further to paragraph 3 (b) above and to paragraph 7 of the Statement of Claim, the document therein described as a letter sent by the Defendant to Koo Wan Sing was written by or on behalf of Koo Wan Sing and sent to the Defendant for signature. The said document was in two parts, namely one in the Chinese language and one in the English language which with two Powers of Attorney from the Defendant to the said Koo Wan Sing one in English and one in Chinese were four documents sent to the Defendant by the said Koo Wan Sing for signature, for the purpose of satisfying the Japanese Authorities.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

No. 3.  
Amended  
Statement  
of Defence,  
21st  
February  
1949 (as  
amended  
by Orders  
made on  
30th  
October  
1948, 9th  
February  
1949 and  
10th  
February  
1949 re-  
spectively)  
—continued.

10 7.—The said Koo Wan Sing further induced the Defendant to sign the said four documents by falsely, and with the intention of misleading the Defendant, representing to him, in writing, that M.Y.68,000 was the equivalent of HK\$272,000 by reason whereof the Plaintiff ought not to be admitted

- (a) To rely upon the Document pleaded in paragraph 7 of the Statement of Claim, or any of the said four documents
- (b) To say that M.Y.68,000 was the purchase price or alternatively,
- (c) To say that the purchase price has been fully paid.

20 8.—The Plaintiff with fraudulent intention, has made, or had made on her behalf, the following alterations to the documents in her possession.

- (a) To the document described as " Letter from Defendant to Koo Wan Sing undated " in her Affidavit of Documents
  - (i) the words " received in the morning of the 27th January " added
  - (ii) the said words subsequently obliterated.
- (b) To the document described as " Letter from Defendant to Koo Wan Sing dated 29th May 1944 " the words " received on the 7th day of June " added.
- (c) To the document described as " Letter from Defendant to Koo Wan Sing dated 15th January 1944 " the words " received in the morning of the 27th January " added.
- (d) To the document described as " Letter from Defendant to Koo Wan Sing dated 28th January 1944 " the words " received in the afternoon of the 7th of February " added.

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9.—The Defendant puts the Plaintiff to strict proof of the genuineness of the second sheet of the Document described as " Copy letter from Koo Wan Sing to Defendant dated 30th October 1943 " in her Affidavit of documents.

40 10.—In further answer to paragraphs 4, 5 and 6 of the Statement of Claim and to the Plaintiff's claim generally or in the alternative the Defendant says :—

- (1) At the date of the said Agreement for sale the property was subject to incumbrances that is two mortgages namely, a first

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

No. 3.  
Amended  
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of Defence,  
21st  
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1949 (as  
amended  
by Orders  
made on  
30th  
October  
1948, 9th  
February  
1949 and  
10th  
February  
1949 re-  
spectively)  
—continued.

mortgage on which the amount of principal and interest outstanding and due to the mortgagee was \$78,948 and a second mortgage on which the amount of principal and interest outstanding and due to the mortgagee was \$34,200.

- (2) It was an express condition of the said Agreement that the property should be conveyed to the purchaser free of the said incumbrances and it was an implied term thereof that the same should be satisfied and discharged out of the purchase money and in the same currency whereby both the Defendant and the said property should be fully discharged from any claim in 10 connection with the said mortgages.
- (3) The purchase money was paid in Military Yen.
- (4) On the 30th September 1943 the said first mortgagee was paid the sum of M.Y.19,737 in purported discharge of the first mortgage.  
On the 14th October 1943 the said second mortgagee was paid the sum of M.Y.8,550 in purported discharge of the second mortgage.
- (5) By Section 11 of Ordinance No. 24 of 1948 the said mortgages are undischarged except to the extent provided for by Section 3 20 of the said Ordinance.
- (6) By reason of the foregoing
  - (a) It has become impossible for the Defendant to perform the said Agreement for sale in accordance with its terms and the Defendant is discharged from the performance thereof; further or in the alternative
  - (b) The said Agreement has been frustrated and the Defendant is discharged from the performance thereof.

11.—Further or in the alternative by reason of the facts pleaded in paragraphs 2, 6, 7, 8 and 10 hereof the Defendant says that specific performance of the said Agreement would be unfair and would work great hardship upon him. 30

12.—The said Chan Un Chau as attorney for the Defendant was induced to enter into the agreements relied upon by the Plaintiff by the false representation of the said Koo Wan Sing that he would pay the purchase money in Hongkong dollars.

13.—In the alternative specific performance should not be granted by reason of the fact that the said Chan Un Chau entered into the said agreements in the mistaken belief that the purchase money would be paid in Hongkong dollars namely H.K.\$272,000. 40

14.—The acceptance of the purchase money in M.Y. was obtained by duress or undue influence.

Particulars :

- (1) Despite his assurance to pay in Hongkong dollars the said Koo Wan Sing insisted on paying in M.Y. well knowing that by insisting on Hongkong Dollars the said Chan Un Chau was liable to criminal prosecution even unto death by the Japanese.
- (2) One P. Y. Woo in the presence of the said Koo Wan Sing and at the time of the offer of the deposit in M.Y. said to Chan Un Chau words to the effect that he could not refuse payment in such a manner because if he did and it became known to the Japanese they would get into trouble.  
By his silence thereafter the said Koo Wan Sing—  
(a) confirmed the said statement of P.Y. Woo  
(b) indicated his intention to see that the Japanese authorities should know thereof.
- (3) The said Koo Wan Sing was influential with the Japanese.

Dated the 21st day of February 1949.

Sd. BROOK BERNACCHI,  
*Counsel for the Defendant.*

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.  
—  
No. 3.  
Amended  
Statement  
of Defence,  
21st  
February  
1949 (as  
amended  
by Orders  
made on  
30th  
October  
1948, 9th  
February  
1949 and  
10th  
February  
1949 re-  
spectively)  
—continued.

No. 4.

20                      Reply to Amended Statement of Defence.

- 1.—The Plaintiff joins issue with the Defendant on his Defence.
- 2.—And in further answer to paragraphs 4 and 5 thereof the Plaintiff says that even if the said Power of Attorney was abrogated as alleged (which is not admitted) the Defendant ratified the sale of the said premises by the letter signed by him and set out in paragraph 7 of Statement of Claim.
- 3.—In further answer to paragraph 6 of Statement of Defence the Plaintiff denies that the documents therein referred to were sent to the Defendant for signature to satisfy the Japanese Authorities. The said documents were sent to the Defendant to confirm the sale of the said premises at the agreed price of M.Y.68,000.
- 30 4.—In further answer to paragraph 7 of Statement of Defence the Plaintiff says that at the material time the rate of exchange as fixed by the Japanese Authorities was M.Y.1 = HK\$4.00. The said rate, as the Defendant well knew, had been fixed before he departed from Hongkong to Free China. If the said Koo Wan Sing stated that M.Y.68,000 was

No. 4.  
Reply to  
amended  
Statement  
of Defence,  
19th  
November  
1948.

In the Supreme Court of Hongkong Original Jurisdiction.

No. 4. Reply to amended Statement of Defence, 19th November 1948—*continued.*

the equivalent of HK\$272,000.00 that statement did not amount to any such false or misleading representation as alleged. The said Koo Wan Sing did not make the said statement, if at all, with the intention of misleading the Defendant, nor was the Defendant misled thereby.

5.—In further answer to paragraph 8 (a) of the Statement of Defence the Plaintiff says that no such alteration as alleged, or any alteration was made or ever has been made in the said letter by or on behalf of the Plaintiff, or at all.

6.—In further answer to sub-paragraphs (b) (c) and (d) of paragraph 8 of the Statement of Defence the Plaintiff says that the Defendant sent 10 the said letters to Koo Wan Ying, daughter of the said Koo Wan Sing, who was residing at the material time in Mei Hsien, Kwang Tung, which was in Free China. The said Koo Wan Ying wrote the words set out in the said sub-paragraphs, in pencil, to record the dates on which she received the said letters. The Plaintiff craves leave to refer to the markings on the envelopes in which the letters referred to in sub-paragraphs (b) and (c) were enclosed. The Plaintiff denies that the said words were written by her, or on her behalf, and denies that the said Koo Wan Ying wrote the said words with any fraudulent intention.

Dated the 19th day of November 1948.

20

(Sd.) D. A. L. WRIGHT,  
*Counsel for the Plaintiff.*

**PLAINTIFF'S EVIDENCE AS NOTED BY THE CHIEF JUSTICE.**

**No. 5.**

**Evidence of Liu Lan Fong.**

Plaintiff's Evidence.

No. 5. Liu Lan Fong, 9th February 1949. Examination.

LIU LAN FONG d.s. Xd. WRIGHT.

Widow of Koo Wan Sing alias Koo Shiu Ting. Executrix of his will. During Japanese occupation, I and husband remained in Hongkong—apart from a short visit to China for a few months. Husband died on 25.5.46. I was then in Hongkong. He died in H. K. After that I found documents 30 in his office safe—L.1, M, N. and O. I cannot read and cannot recognise writing.

I wrote nothing on these documents. I did not instruct anyone to write anything on them. I didn't instruct daughter to do so. I didn't rub out or erase anything on L.1.

Cross examination

**CROSS-EXAMINED**

XXd. (D'ALMADA):

During occupation my husband was in business in Hongkong. Shui Hing Co. was my husband's. Pre-war company did considerable business—

small amount with Japan. After Japanese occupation we bought no Japanese goods. We had no dealings with the Japanese during occupation. We had American and British goods in stock at date of occupation. In 1937-8 shop had slight damage in anti-Japanese riots. During occupation no relations worked for Japanese. No relative or clansman worked as interpreter for Japanese. All relatives and clansman had gone to the country. I don't know anyone known as "Vampin." I have not left H.K. since the re-occupation. My husband did not leave H.K. after re-occupation. He was in H.K. at the liberation. Safe where documents found was Shui Hing Co.'s safe and was in Company's office. I can't read. I put documents away because they were important. I didn't ask anyone to read them to me. After a short time I gave them to my solicitors—when application was made for probate. The documents have never been read to me. I handed to my solicitor all documents I found. Pencilling on N, M and O—I do not recall clearly whether they were on documents when I found them. I went to see Mr. Brooks (solicitor) alone. The man in court (Roy Lan) is the private secretary of my son—Koo Shing Cheong (identifies). I have two sons. Koo Shing Cheong is second son. Koo Kam Cheong—my eldest son—is in America. Went there before the war. Returned to H.K. at time of father's death but went back to America. Don't know who represented my husband's company in Japan before the war. There was no representative. Apart from these two sons I have no adult sons. One person with same surname but not a member of the company was educated in Japan. He was not in the company. I don't know if this person was in Hongkong during the occupation.

10  
20

Rxd. : Nil.

BERNACCHI : I give notice that I shall apply to-morrow to make further amendments to Statement of Defence.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.  
-----  
Plaintiff's  
Evidence.  
-----  
No. 5.  
Liu Lan  
Fong  
9th  
February  
1949—  
Cross-exam-  
ination—

No. 6.

30

Evidence of Francisco Xavier Soares.

FRANCISCO XAVIER SOARES ss. Xd. SHELDON.

H.K. Bank for 42 years. From 1941 to October I was so employed. In 1943 rate of exchange fixed by Japanese was 4 \$ H.K. to 1 Military Yen. In 1942-3 several mortgages of bank were paid off. Rate of exchange for repayment was the rate above. In 1943 I was Chief Clerk in Accounting Department.

CROSS-EXAMINED

XXd. : D'ALMADA. I was working in Bank under Japanese liquidators of Bank. Rate for repayment of mortgages was fixed by liquidators. In 1943 went to Macao—5 October, 1943. In January, 1942 rate fixed was 2 \$ H.K. to 1 Yen. Increase in rate to 4\$ H.K. to 1 Yen was about

No. 6.  
-----  
Francisco  
Xavier  
Soares,  
9th  
February  
1949.  
Examina-  
tion.  
  
Cross-exam-  
ination

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

Plaintiff's  
Evidence.

No. 6.  
Francisco  
Xavier  
Soares,  
9th  
February  
1949.

Cross-examination—  
*continued.*

June, 1942. About June, 1943 the H.K. bank ceased to accept H.K. dollars. Don't know that Japanese banned H.K. dollars. Bank paid for purchases in yen. At beginning of occupation—January or February, 1942 we could pay for purchases in Hongkong dollars or yen. I think this went on for whole of 1942. In bank we received instructions that as from June, 1943 we could only accept note payments in yen—instructions from Japanese liquidators the Yokohama Specie Bank. Rate for payment of H.K. Bank mortgages at \$4 H.K. to 1 Military Yen, continued until I left and, from bank records, it continued thereafter. Before I left for Macao there was a Black Market for H.K. dollars—rate varied. Value of military yen gradually declined as war progressed. In September 1943 rate for H.K. dollars was 3 to 3½ for 1 military yen. It was a criminal offence to deal in H.K. dollars—don't know penalty. My transactions at 3 to 3½ rate were to oblige friends. I had H.K. dollars in Macao and needed money in Hongkong. 10

Rxd. : Nil.

#### No. 7.

#### Evidence of Koo Wan Ying.

No. 7. KOO WAN YING d.s. Xd. WRIGHT.

Koo Wan  
Ying,  
9th  
February  
1949.

Examination.

Daughter of plaintiff and Koo Wan Sing. I was in Hongkong for 20  
1st year after Japanese occupied Hongkong. Left in 1942 and went to  
Mui-Yuen. Tung Woo Lo is a road. I resided at 42 Tung Woo Lo Road,  
Mui Yuen, Kwantung Province. While there I received letters from my  
father.

In 1943 I received K.1, K.2, L.1 and L.2. When I received them  
there was a letter from my father with these four. My father asked me  
to send K.1, K.2, L.1 and L.2 to H. K. Woo. Those were the only four  
I was asked to send as far as I remember. I have seen J before. I cannot  
recognise handwriting. I recognise the copy letter by letter heading.  
From documents referred to in J are K.1, K.2, L.1, L.2. I cannot remember 30  
if they came with J. I sent the 4 documents to Mr. Woo. I don't remember  
sending original of J. to Mr. Woo. I may have sent J. as well but can't  
be sure. I remember sending the four because I remember the Chinese  
numbers and my father's chop on the back. Handwriting of numbers is  
of Chan Hung Cheung. I cannot remember Mr. Woo's address—it was in  
Kwongsi. The four documents were returned to me by post—envelope (T).  
I point to post-mark "Kwongtung 7th day 6th month." I see O.

(D'ALMADA admits a letter in terms somewhat like J. from the  
purchaser was received but has been lost.)

I recognise O because I wrote date of receipt of letter in pencil 40  
"7th June." Letter O accompanied the 4 documents. I wrote "7 June"  
on day I received letter—the date on the postmark. I see M. I wrote  
date of receipt "27th January forenoon received" on it. I wrote this

on date I received the letter. I recognise envelope (U). It bears note "3rd day of 3rd year of Republic January 27th forenoon received" in pencil. It was written by Wong Chi Sheung. He was then private secretary to my father. He is dead. Envelope has postmark. I cannot read first two characters but date is 25th January. U contained M. I see N. I wrote date of receipt of it "7th February afternoon received." I wrote this at the time. I cannot remember whether I have the envelope which contained the letter. I see L.1. I did not write date of receipt on any part of it. I didn't write words at the bottom. I never wrote "received in morning of 27th January" in top right hand corner. I never wrote anything on L.1. I did not write "Received in morning of 27th January" on L.2 or anything else.

I see L.1. I know nothing about any words being written on it and obliterated. As regards M, N and O I made the notes—adopting my father's method as to recording dates of receipt. I had no fraudulent intention. I recorded dates so that my father would know. I put the letters away to show to my father. Later I handed them all to my father.

In the Supreme Court of Hongkong Original Jurisdiction.

Plaintiff's Evidence.

No. 7.

Koo Wan Ying,

9th February 1949—

Examination—  
*continued.*

CROSS-EXAMINED.

XXd. (BERNACCHI): I have distant cousins—nephews and nieces of father. My father was not made guardian of one of the nephews—I never heard of it. I don't know if nephews helped in business. I am 22—European reckoning. During war I never counted how long a letter took from one province to another. Postmark on T bears same date as date of receipt. Postmark is that of Mui Yuen. Usually postmark is date of receipt in Mui Yuen. I see U and M. Date of receipt was two days after postmark. I don't know why father's secretary wrote note on envelope. It was written on the date stated. Private secretary was in village with us. I don't remember whether I actually saw him write the note. I made notes because my father asked me. Secretary helped to look after affairs.

Cross-examination.

(Witness writes on paper (Ex.1) the words endorsed on M and N.) Endorsements on back of L.1, L.2, K.1, K.2 and "filed as Number —" followed by signature Wan Sing and father's chop. I don't know why endorsements are there.

Put: When you saw letters they had no endorsements.

Answer: They were there.

I kept T and U because I kept the letters inside. I don't remember whether I kept N in its envelope. I don't remember whether I saw L.1 after receiving it. I did not send the four documents straight to my father. He asked me to keep the documents in a safe place. I gave them to my father in the country—on his return to Mui Yuen towards end of war before liberation. He remained in country until close to time of liberation when he returned to Hong Kong.

Put: M and N endorsements in pencil were made in last few months.

Answer: Not so.

Rxd.: Nil.



In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

No. 8.

Evidence of Cheuk Ming To.

CHEUK MING TO ss. Xd. WRIGHT.

Plaintiff's  
Evidence.

No. 8.  
Cheuk  
Ming To,  
9th  
February  
1949.

I am with a friend in import and export business. In 1943 I was working with P. Y. Woo in firm of Woo and Woo. In 1943—August—P. Y. Woo gave me instructions re 48 Kennedy Road. I tried to sell the house for him and contacted Koo Wan Sing of Shui Hing Company. He agreed to buy house at 68,000 military yen and to pay deposit of 50,000 military yen. After completion I received 1% from Mr. Koo—the purchaser.

10

CROSS-EXAMINED.

Examina-  
tion.

XXd. (BERNACCHI).

Cross-exam-  
ination.

P. Y. Woo had been arrested by Japanese about May or June, 1943. I don't know whether it was in August he was released. He asked me to find purchaser before his arrest. At that time there was exchange at \$4 H.K. to 1 Yen. In June 1943 the use of the H.K. dollar was made illegal. To deal in H.K. dollars punishable with maximum punishment of death. Considerable dealings on black market. After June 1943 black market rate very much less than \$4 H.K. to 1 Yen. I had nothing to do with the matter after P. Y. Woo's arrest. Mr. Koo agreed to price of 68,000 yen. I asked for more, P. Y. Woo mentioned the dollar equivalent to me. I don't think Mr. Koo mentioned it. I don't know what took place after I ceased to be concerned in transaction. Mr. Koo not P. Y. Woo paid brokerage. Vendor promised me brokerage but never paid me.

Put : The \$2,000 in H.K. \$272,000 was your brokerage fee.

Answer : No.

P. Y. Woo was in 1943 practising on his own and not in Woo and Woo.

Rxd. : Nil.

Further  
Cross-exam-  
ination  
11th  
February,  
1949.

CHEUK MING TO recalled on former declaration further XXd. BERNACCHI.

I remember 68,000 Yen was figure because I negotiated sale. I am sure about the figure. Possibly I shouldn't have remembered the figure if I had not been paid brokerage on 68,000 yen. Only offer was in military yen—no figure in H.K. dollars. The figure H.K. \$272,000 was the equivalent. No one mentioned that figure.

30



## No. 9.

## Evidence of Chan Hung Cheung

CHAN HUNG CHEUNG d.s. Xd. WRIGHT.

10 Manager of Perfumery Dept. of Shui Hing Co. Late Koo Wan Sing was owner of company. In October 1943 I was in Company's employ. I see J. I wrote J. on instructions of Koo Wan Sing. J. is a copy-carbon. Mr. Koo signed the original sent out. The second page was written by me at same time as first page. I see K.1, K.2, L.1, L.2. Endorsements at back were written by me as dictated by Koo Wan Sing. He put his chop after I had written. They are four documents referred to in J. After J. written Koo asked me to put down on each of four documents date of filing, etc.

## CROSS-EXAMINED.

20 XXd. (BERNACCHI): Documents were numbered in a bundle. I don't know why Koo asked me to write "filed." This was only time I made such an endorsement for Koo. I cannot remember whether I had written other letters for Koo. Whoever Koo asked to write wrote his letters. I don't know whether Koo was illiterate. As to J. I used pencil on top and carbon underneath. I now say I used pencil to write all the time. I now say J is a pencil copy. A carbon was put under J and a carbon copy was made from J. One carbon paper was used. Only one carbon copy was made. Double-faced carbon was used. It was the carbon copy that was signed and sent. On the second page of J is a faint impression of writing on first page. Pages kept together and pressing on first page would cause this impression. During war business of Shui Hing firm was certainly bad—i.e. visible business. Don't know how many houses Koo bought. He had a safe in Sui Hing. I didn't see inside of safe. I don't know whether he used to store H.K. dollars.

Rxd. : Nil.

30 CHAN HUNG CHEUNG recalled on former declaration further XXd.

BERNACCHI.

Have been with Shui Hing Co. 10 odd years. Joined in 1937 or 1938. I don't know anyone called "Joseph Vampin." Firm had no representatives in other countries as far as I know. I only know local affairs. Before war, I don't know if firm had business with Japan.

Rxd. : Nil.

*Close of Case for Plaintiff.*

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

Plaintiff's  
Evidence.

No. 9.  
Chan Hung  
Cheung,  
9th  
February  
1949.

Examina-  
tion.

Cross-exam-  
ination.

10th  
February  
1949—  
Further  
cross-exam-  
ination

No. 10.

In the Supreme Court of Hongkong Original Jurisdiction.

Application for Amendment of Defence.

10.2.49.

Appearances as before.

D'ALMADA : We abandon defences in paragraphs 2 (d) of Defence— also paragraph 8.

No. 10. Application for Amendment of Defence, 10th February, 1949.

BERNACCHI : I apply to amend Defence in terms of draft (Y). New paragraphs anticipated but no evidence unless attorney Chan Un Chau gave evidence. We understood rightly or wrongly that he was being called by plaintiff. Request to interview attorney refused by Hastings & Co. 10 We interviewed attorney yesterday.

SHELDON : This is third amendment. Some at least of new matters must have been known to defendant.

I allow the amendments.

BERNACCHI : I apply to recall witnesses 4 and 5 for further cross-examination.

SHELDON : No objection. (See Pages 12 and 13).

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DEFENDANTS EVIDENCE AS NOTED BY CHIEF JUSTICE

No. 11.

Defendant's Evidence.

Evidence of Chan Un Chau.

20

No. 11. Chan Un Chau, 11th February 1949. Examination.

BERNACCHI calls :—

CHAN UN CHAU d.s. Xd. BERNACCHI.

Employed by Hastings & Co. as clerk-interpreter. Prior to December 1941 I was with Woo and Woo. H. K. Woo went to Free China shortly after occupation. Shortly before departure he gave me two powers of attorney A.1, A.2. Re 48 Kennedy Rd. a prospective purchaser was obtained in early part of 1943. Plaintiff witness 4 found him. He was asked to find purchaser by P. Y. Woo. P. Y. Woo arrested about June or July, 1943. Before the arrest the offer was \$240,000 or \$250,000. No agreement reached at that time. After arrest no further steps taken to further sale until he was released in August 1943. During P. Y. Woo's detention—about June 1943 the Japanese prohibited circular of H.K. dollars. That was before P. Y. Woo's arrest. After Woo's release negotiations with same prospective purchaser, Mr. Koo, were renewed. Negotiations were directly between P. Y. Woo and Mr. Koo. I was seldom 30

present but was present on one or two occasions. Offer increased to \$270,000. I was present when this offer was made. (Sheldon objects to last two answers but I allow them.) Although H.K. dollars prohibited. It was agreed price should be paid in H.K. dollars nevertheless. Brokerage to us \$2000 was added. Koo agreed to pay. P. Y. Woo asked for it. I was present. I see B, C and D. B was drawn by P. Y. Woo. We could not put in writing that price was to be paid in H.K. dollars. C and D were executed at request of Mr. Koo. C and D name price in H.K. dollars. B was agreement to be shown to Japanese authorities. Others were not.

10 Mr. Koo first paid me \$50,000 military yen. I had to accept yen because refusal to accept yen involved an offence—may be involving hanging. I, P. Y. Woo and Mr. Koo were present at Shui Hing's premises when money paid.

(SHELDON: I object to evidence of conversations. Statements of deceased persons not admissible except as in 13 Hailsham 585, para. 655. BERNACCHI: There was a parol agreement subsequent. Evidence also admissible as to duress. SHELDON: I still object. I admit evidence as affecting duress and undue influence.)

Mr. Koo said "I have no H.K. dollars—only military yen." He asked if I would accept. I asked P. Y. Woo if I had to accept and P. Y. Woo advised me to accept. He said "You must accept otherwise you will get into trouble." Mr. Koo said nothing. I took the money. Balance of purchase price later paid in promissory notes in military yen. This was also at Shui Hing premises. Nothing said about currency. We knew balance would be paid in yen because we had been paid yen before. I knew Koo was owner and manager of Shui Hing. I had heard of an incident involving Shui Hing in the anti-Japanese riots. First mortgagee was paid in yen. P. Y. Woo paid second mortgage. Mortgagees didn't ask for their money—they were just paid. I wouldn't have entered into the agreement if I had known the purchase price would have been insufficient to pay off the mortgages. I wouldn't have executed C and D if I had known mortgages still existent.

20

30

## CROSS-EXAMINED.

XXd.: (SHELDON). P. Y. Woo drafted B in his office and executed at Shui Hing. After it was drafted and signed the conversation occurred about taking the 50,000 military yen.

Put: P. Y. Woo never said "You must accept or you will get into trouble."

Answer: Yes—he did.

40 C and D executed at purchaser's request. C executed so to be effective after the war. I assume this. I did what P. Y. Woo told me and asked

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

Defendant's  
Evidence.

No. 11.  
Chan Un  
Chau,  
11th  
February  
1949.

Examina-  
tion—  
*continued.*

Cross-exam-  
ination

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

him what to do. I think H.K. Woo appointed me attorney because he thought I would not leave H.K. whereas P. Y. Woo might do so. K.1. K.2 I never saw before—nor L.1 or L.2. I knew Shui Hing long before war. They had a large number of employees before the war—over 50 perhaps. During the war I don't know if business contracted. I don't know how many shops they had before or during war.

Defendant's  
Evidence.

RE-EXAMINED.

No. 11.  
Chan Un  
Chau,  
11th  
February  
1949.

Rxd. : I don't know whether before the war Shui Hing were wholesalers as well as retailers.

Re-exam-  
ination.

CHAN UN CHAU (recalled on former declaration). Xd. by BERNACCHI. 10

I should not have executed B if I had thought real agreement was not for payment in H.K. dollars.

Further  
Examina-  
tion.

CROSS-EXAMINED.

Further  
Cross-exam-  
ination.

XXd. : (SHELDON). After I was paid in yen I never wrote or suggested to anyone that I should be paid in dollars. I and P. Y. Woo alone knew the agreement.

RE-EXAMINED.

Further  
Re-exam-  
nation.

Rxd. : When Mr. Woo returned, I told him about it.  
To Court : I understood Japanese law required me to accept payment in yen and that payment in yen would be a good discharge. 20

## No. 12.

### Evidence of Woo Hang Kang Qwingtong.

No. 12.  
Woo Hang  
Kang  
Qwingtong,  
11th  
February  
1949.  
Examina-  
tion.

WOO HANG KANG QWINGTONG d.s. Xd. BERNACCHI.

I am sole proprietor of Woo & Woo, solicitors. In October, 1942 I left H.K. to avoid being arrested by Japanese. I had to serve Japanese on a committee. I wanted to avoid further service. I left with 4 children of mine. Before leaving I gave A.1 and A.2 to last witness. Son P. Y. Woo stayed behind in Colony. I gave P. Y. Woo no authority to sell property in this case. Before I left H.K. official rate of exchange was 1 military yen to 4 \$ H.K. H.K. dollar was legal tender. I took money to Free China. It turned out not to be enough. In China I had no knowledge of sale of house until I received certain information. I knew of proposal to sell house. I believed house was to be sold for \$270,000. I was content with that price. I hoped that payment of mortgages would take 120,000 30

leaving 150,000 for my use. I got remittances from Hongkong in Chinese national currency.

(SHELDON : I don't rely on L.1 for my substantive pleading.)

I expected 450,000 Chinese dollars over for the 150,000 H.K. In latter part of 1943 I received 47,000 \$ Chinese. Later I received J—in January 1944 I think. It says 68,000 yen is equivalent of \$272,000 H.K. I thought 68,000 yen was of same value as \$272,000 H.K. I received K.1, K.2, L.1, L.2 with J. I don't know whether endorsements were on the back. I wrote M because on receiving 47,000 \$ Chinese I thought my house was sold and expected a remittance for the balance and I asked purchaser to ask my son P. Y. Woo to send me money. I wrote N shortly afterwards. I wrote O also. With O I enclosed K.1, K.2, L.1 and L.2. In L.1, L.2, only 68,000 military yen is mentioned. I signed L.1, L.2 because I thought they had to be shown to Japanese authorities in which case only yen could be mentioned. I thought K.1, K.2 were required to satisfy Japanese authorities because I had already given A.1, A.2. J was only letter from Mr. Koo. I stayed in Kanshien in Kiansi Province on 30 January 1945. In 1944 appointed honorary military adviser to the British military mission in Kiansi. On 31.1.45 mission evacuated me and family by reason of advance of Japanese. Took only small amount of property with me. Left a lot of papers behind including original of J. Returned to Hongkong in February 1946. P. Y. Woo had been killed, I heard on my return. My attorney was with Hastings & Co.

(Counsel agree that practice in solicitors' offices is to deduct from purchase price amount required to pay off any mortgage and pay balance to vendor.)

Pre-war value of property was \$150,000 to \$200,000 H.K. If I have to convey property to purchaser free of mortgages I may have to file my bankruptcy proceedings.

30

CROSS-EXAMINED.

XXd. : (SHELDON). I thought value of property in H.K. went up during the war—i.e. value in H.K. dollars. Before I left for China I gave A.2—irrevocable, specifically for dealing with 48 Kennedy Rd. Agreement was subject to special circumstances. I see M. I see K.1, K.2. I didn't understand why they were required and could only assume they were required by Japanese. L.1, L.2 were with K.1, K.2. When I wrote M, I had K.1, K.2 L.1 and L.2 before me but unsigned. In fact I had not heard from my attorney as stated in L.1. I wrote N—a request to send balance of purchase price. When I wrote O, I thought I had received the balance of the 272,000 \$ H.K. I had received 90,000 \$ Chinese and expected to receive more. I had already signed K.1, K.2, L.1, L.2. I never thought whether I was satisfied to receive military yen. I wanted balance of my money. I signed documents because I thought whole thing was completed and I didn't want to make trouble for the purchaser. I see document 30 in P.1.

In the Supreme Court of Hongkong Original Jurisdiction.

Defendant's Evidence.

No. 12.

Woo Hang Kang Qwingtong, 11th February 1949.

Examination—  
continued.

Cross-examination.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

Defendant's  
Evidence.

No. 12  
Woo Hang  
Kang  
Qwingtong,  
11th  
February  
1949.

Cross-exam-  
ination—  
*continued.*

Fourth paragraph refers to a letter I wrote to Mr. Koo. It was my first letter to purchaser—sometime in January 1944—i.e. M. When I wrote letter of 21 May, 1948 I was referring to M only from recollection. I only saw M again when we got discovery. We have made an agreement about putting up a retaining wall. If plaintiff gets house she will have to pay. Estimates for repair of property are 150,000 to 190,000 which will have to be expended unless place altered.

(17 in P.1 and letter of 1 February, 1949 on P.2.)

I see letter 32 in P.1. I wasn't there when assignment referred to in second paragraph was executed. 10

I see 28 in P.1. Second mortgage was not paid in H.K. dollars. My wife said this but later I went to Macao and checked. Payment in fact in yen. I saw 2nd mortgagee. Rich man and a friend of mine. He said he did not wish it to be known that he had refused to accept yen. I see 43 in P.1. Ko Ho Ning is son of mortgagee. Mortgagee might still sue me. P. Y. Woo was on his own when I left H.K. My attorney was free to consult P. Y. Woo. I valued house immediately before war at \$150,000—\$200,000. I don't remember whether prices dropped until immediately before war. I bought house for \$74,000 in 1926. Legal estate is not now in plaintiff. Mortgage is not discharged. Assignment 20 only purports to discharge mortgage. C purports to assign legal estate. It could be registered if we had the memorial and land officer agreed to register. He would not register if there was a dispute. I am the instructing solicitor in this case. I understand Shui Hing had influence with the Japanese authorities and that if anyone refused to accept yen he might be arrested and punished. I do not know Koo and wife were arrested by Japanese. I heard from Mr. Bernacchi that a nephew from the shop worked for Japanese. I said I might have to go into bankruptcy. Interest alone comes to \$30,000. On first mortgage I might have to pay \$80,000. That might put me in bankruptcy. I haven't a large practice. I have 30 had expenses in rehabilitating office. I had no other house and sold no other house during occupation. Wife had a house and sold to Japanese. She bought back from Custodian for \$5000 and sold it for \$200,000. There was a mortgage on house. She lives at 48 Kennedy Road. I hold no mortgages. When I came back to H.K. I never wrote to Mr. Koo and Mrs. Koo asking for more money.

Re  
Examina-  
tion.

RE-EXAMINED.

Rxd. : I was negotiating verbally with Koo family from shortly after I came back to H.K. I heard from you (Mr. Bernacchi) the fact I have stated and also heard you got it from court records. At time of anti- 40 Japanese riots there were three large stores near Shui Hing. I don't know whether they were damaged. No. 48 Kennedy Road is not subject of green ink entry in Land Registry.

## No. 13.

## Evidence of Yuen Lai Man

YUEN LAI MAN d.s. Xd. BERNACCHI.

Member of Cheung Yu Bank of 88 Queen's Road, Central. During occupation I was manager of a firm dealing in currency—banking business generally. Official Japanese Regulations as to currency were put in paper. I saw them. At beginning of 1943 official rate was \$4 H.K. to 1 yen. Hongkong dollars then legal tender. Banned in June, 1943. Regulations published in Wah Kiu, Heung To and Hongkong Chinese newspapers. After 10 dollars banned, dollars found on any person were confiscated and person punished.

I did in fact continue to deal in H.K. dollars after ban. Rate (black market) towards end of 1943 had risen higher and higher—to 2\$ H.K. to 1 yen. After ban there was only a black market rate. Although Hong Kong currency banned, business people who wanted H.K. dollars could buy in black market.

XXd. : Nil.

Signed L. B. GIBSON.

*Close of Case for Defendants.*

## No. 14.

20 The Judgment delivered by the Chief Justice in the first instance.

In this action the plaintiff Liu Lan Fong alias Liu Ah Lan, as administratrix of the estate of her late husband Koo Shiu Ting alias Koo Wan Sing, claims specific performance of an agreement dated 18 August 1943 and made between her late husband and the defendant Mr. H. K. Woo for the sale by the defendant of a house No. 48 Kennedy Road. The agreement was executed on behalf of the defendant by his attorney Chan Un Chau, the defendant himself being at the time in Free China whither he had gone by reason of circumstances created by the Japanese invasion of Hongkong. The agreement specifies the purchase price as 68,000 Japanese 30 military yen and provides for the payment on the date of the agreement of 50,000 yen on account of the purchase price. This payment was duly made and is acknowledged by endorsement on the agreement. The purchase was to be completed within a month, but time was not of essence of the agreement. The defendant undertook to give a title free from encumbrances—a clause of some importance because pre-occupation mortgages

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.Defendants  
Evidence.No. 13.  
Yuen Lai  
Man,  
11th  
February  
1949.  
Examina-  
tion.No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—



In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

were outstanding to the tune of H.K. \$103,000. The balance of the purchase price was in due course paid in military yen, the amounts outstanding in respect of the mortgages were paid in military yen, the first mortgagee executed a reassignment in English form and assignments of the property in favour of the purchaser were executed in English, Chinese and Japanese forms. For some reason the transaction was not carried to completion by registration, either with the Japanese authorities or under the British law of Hongkong, and the difficulty now is that by reason of sections 3 and 11 of the Debtor and Creditor (Occupation Period) Ordinance 1948 the mortgage debts on the property have not been discharged. 10

It was pleaded on behalf of the plaintiff that by a letter (written on 30 October 1943) the defendant ratified the sale of the property, but Mr. Sheldon (for the plaintiff) abandoned this plea in the course of the hearing.

The defendant has sought to meet the plaintiff's claim by a number of defences with which I must now deal. The pleadings on behalf of the defendant were amended no less than three times—once before the hearing and twice during the hearing. I cannot commend this system of pleading but the amendments were allowed and must be considered accordingly.

Among the amendments was an allegation that endorsements had been made on certain correspondence "with fraudulent intention." The nature of the fraudulent intention was neither pleaded nor apparent. There was no evidence to support the allegation and Mr. D'Almada, who led for the defendant, properly and wisely abandoned this line of defence. Allegations of fraud are not lightly to be made. 20

The first broad basis on which the plaintiff's claim is challenged is that the real agreement between the parties was that the purchase price should be H.K. \$272,000—the figure 68,000 yen being inserted to comply with Japanese law. An order dated 10 May 1943, and effective from 1 June 1943 made military yen the only permissible currency and forbade the use of Hongkong dollars under heavy penalties—the maximum being 15 years or a fine of 50,000 yen. The official rate of conversion was 4 Hongkong dollars to 1 yen—so that the 272,000 dollars was in fact the equivalent of 68,000 yen at the official rate. 30

Coupled with this defence, a number of other matters are pleaded—that the defendant was not aware that 68,000 yen was the equivalent of 272,000 dollars, that the payments made by the purchaser did not constitute the true value of the purchase price, that Chan Un Chau was induced to enter into the agreement by the false representation of Koo Wan Sing that he would pay the purchase price in Hongkong dollars and that the payments of the purchase price were accepted under duress or undue influence. 40

It seems that the persons directly concerned in the negotiation of the agreement for sale were the purchaser, the late Mr. P. Y. Woo (a solicitor who represented both sides and was incidentally the defendant's son), Cheuk Ming To (an employee of Mr. P. Y. Woo and the broker in the transaction), and Chan Un Chau (the defendant's attorney). Cheuk Ming

- To was concerned only in the early negotiations before Mr. P. Y. Woo's arrest by the Japanese—the date of which was variously described as May, June or July 1943 and gave evidence that the price offered by the purchaser was 68,000 yen with an advance of 50,000 yen. He said P. Y. Woo, but not (he thought) the purchaser mentioned the dollar equivalent. Chan Un Chau gave evidence that the offer, prior to Mr. P. Y. Woo's arrest, was \$240,000 to \$250,000, that after Mr. P. Y. Woo's release in August 1943 the negotiations were continued by the purchaser and Mr. P. Y. Woo, he (Chan Un Chau) being present at some of the talks, that
- 10 the price was increased to \$270,000 with brokerage of \$2,000, that it was agreed that the price should be paid in dollars although this was prohibited by Japanese law, and that he would not have signed the agreement if he had not thought the price was to be paid in dollars, or if he had thought that the purchase price was insufficient to discharge the mortgages. Dealing with the payment of the advance of 50,000 yen on the day the agreement was signed, he explained that Koo Wan Sing said he had no dollars and asked him (Chan Un Chau) if he would accept yen, that he (Chan Un Chau) asked Mr. P. Y. Woo if he had to accept and Mr. P. Y. Woo advised him to do so saying "You must accept, otherwise you will get
- 20 into trouble" and that Koo Wan Sing said nothing. Chan Un Chau apparently regarded Koo Wan Sing's silence as sinister because he had heard that Koo Wan Sing's firm had been involved in an incident in the anti-Japanese riots of 1937-1938, and, by implication, thought Koo Wan Sing had influence with the Japanese. Chan Un Chau said he accepted the balance of the purchase price in yen without anything being said—the implication being that he continued under the duress alleged in connection with the first payment.
- I allowed the evidence of the alleged secret agreement or representation that the purchase price would be paid in dollars to be given solely on the
- 30 basis that I thought it might disclose some ground on which the defendant might be able to resist the equitable remedy of specific performance. Having carefully considered the evidence, however, I am of the clear opinion that the written agreement was the only agreement between the parties and that, even if any question of payment in dollars had arisen prior to the signing of the agreement, it had been abandoned when the agreement was signed. There was no evidence whatever to support the allegation that the purchaser was influential with the Japanese and I am surprised that this allegation (like the allegation of fraud) was not withdrawn. This being so, why should the purchaser, any more than the vendor, be willing to defy the Japanese
- 40 law at the risk of long imprisonment or heavy fine? And if the parties were prepared to run the risk, why did they not show the purchase price in dollars in the agreement since it was not claimed that the agreement itself, as opposed to the Japanese assignment, would have to be shown to the Japanese? The assignment in English form was for use after the Japanese occupation and the purchaser would have an interest to have the purchase price expressed in dollars, but, since this document par excellence was not for Japanese eyes, why was the vendor prepared to acknowledge

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdic-  
tion.

—  
No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

—  
No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

payment in full? Why was the payment of the purchase price accepted in yen—50,000 yen being paid the very day the agreement was signed? Duress and undue influence are alleged but even Chan Un Chau's own evidence (and, as I have indicated, I am not prepared to accept him as completely truthful) is not evidence of duress or undue influence. Mr. P. Y. Woo gave the parties legal advice as to their position under Japanese law (which they clearly knew before they signed the agreement for sale) and Koo said nothing. Then again, if the purchaser had been guilty of the dishonourable tactics alleged, why is it that the defendant, himself a very experienced solicitor, was willing to pass unchallenged a statement in Koo Wan Sing's letter of October 1943 that the price was "68,000 yen in military notes equivalent to \$272,000 in Hongkong currency" and why is it that neither defendant nor his attorney (a solicitor's clerk) ever put in writing the allegation that the purchase price should have been paid in dollars until May 1948? The suggestion is that the matter was being discussed verbally and had been referred to counsel. Perhaps it is so, but that is not enough to explain the absence of some formal written protest. I have no doubt that the reason why the agreement provided for payment in yen and payment was in fact made in yen (as were the purported repayments of the Mortgages) was simply that the parties contracted on the basis of the Japanese law.

Since this case is before me in first instance, I have thought it right to make findings of fact in respect of matters which constitute the defendant's first line of defence, but actually it seems to me to be extremely doubtful whether that line of defence could succeed even if I had been prepared to find that the real agreement between the parties was that the purchase price should be paid in Hongkong dollars. I say this because of the terms of section 4 (b) of the Debtor and Creditor (Occupation Period) Ordinance 1948. The effect of that section is that where an obligation has been incurred during the occupation period to pay a debt in Hongkong currency and payment is made which is the equivalent in occupation currency calculated at the official rate of exchange prescribed by the occupying power, then the payment in occupation currency is a valid discharge. It will further be noted that while in some sections provision is made for payments under "duress or coercion" as defined in section 2 of the Ordinance, no such provision is made in section 4.

I turn now to the second line of defence which is that Chan Un Chau and the purchaser on the one hand and the defendant on the other were divided by the line of war and that therefore Chan Un Chau's power of attorney and the things done under it were invalid and the correspondence between the parties was an illegality. It was conceded on the part of the defendant that this argument was already answered adversely to the defendant by the decision of the Full Court in Appeal No. 12 of 1948 and the point was therefore only made formally. I am bound of course by the Full Court's decision.

This brings me to two arguments put forward by Mr. D'Almada for the defendant which may conveniently be considered together. They are that

by reason of the operation of sections 3 and 11 of the Debtor and Creditor (Occupation Period) Ordinance 1948, considered in the light of the other circumstances of the case, either the agreement was frustrated or the enforcement of it would be unfair and would work great hardship on the defendant.

As regards the question of frustration the defendant has pleaded (and Mr. D'Almada argued) that it was an implied term of the agreement for sale that the encumbrances should be paid off out of the purchase money and in the same currency. Mr. Sheldon (for the Plaintiff) readily agreed that it was the ordinary practice in solicitors' offices for mortgagees to be paid off there and then out of the purchase money, but terms are only to be implied in agreements where necessity so demands, and I am unable to agree that there was an implied term as alleged in this case.

Given that there was no implied term Mr. D'Almada's carefully reasoned argument on frustration is weakened, but I must still consider his second line of approach which is that sections 3 and 11 are provisions operating retrospectively to alter the law in such a way as to strike at the very root of the agreement. His first preliminary point was that the agreement was not severable and that if the agreement that the title should be free from encumbrances was frustrated by the Ordinance, the whole agreement would be at an end. He referred to *Denny, Mott and Dickson Ltd. v. James B. Fraser & Co. Ltd.* 1944 A.C. 265. I agree on this point. His second preliminary point was that sections 3 and 11 are retrospective to cover the mortgage debts in this case, and I agree also on this point. The way is thus clear for Mr. D'Almada's main contention and I have to consider whether sections 3 and 11 do in fact strike at the root of the agreement and so frustrate it.

I did not understand Mr. D'Almada to contend that performance of the agreement became impossible (given that there was no implied term as alleged) and I do not think that there was in fact any impossibility in performance. There is clearly nothing in the Ordinance to prevent a title free from encumbrances from being given now if the mortgage debts are discharged at the rate of exchange provided for in the Ordinance. No reason has been given why the agreement could not have been specifically performed before the Ordinance on the basis of the discharge of the mortgages by the payments in yen in fact made. Once the legal estate had (under the then existing law) been got in from the mortgagees and the property assigned to the purchaser, I do not think section 11 would have operated to divest the legal estate. No doubt the mortgagor would have remained liable on his personal covenants to comply with section 3, but as regards the legal estates of the mortgagees section 11(1) merely provides that the mortgages shall be *deemed* not to have been extinguished, i.e. it creates a legal fiction and the consequences of this legal fiction are set out in section 11(2). There is nothing in section 11(2) to suggest that where, under the law existing before the Ordinance, a mortgagee has lost the legal estate in favour of a

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

- -  
No. 14.

The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

purchaser, the purchaser must provide security. The vendor could not revive the mortgage once a purchaser had acquired the legal estate and all he could do, or be ordered by the Court to do, would be to replace the mortgage with equivalent security.

But an agreement may be frustrated in certain circumstances even though there is no absolute impossibility of performance. Lord Simon, in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd.* 1945 A.C. 221 at p. 228 put forward one of many definitions of the doctrine of frustration in the following terms:—

“ Frustration may be defined as the premature determination 10  
“ of an agreement between parties, lawfully entered into and in  
“ course of operation at the time of its premature determination,  
“ owing to the occurrence of an intervening event or change of  
“ circumstances so fundamental as to be regarded by the law  
“ both as striking at the root of the agreement, and as entirely  
“ beyond what was contemplated by the parties when they  
“ entered into the agreement.”

Now, of course, neither side could in fact have contemplated the enactment of the Ordinance. As far as the purchaser was concerned, it would not have mattered even if he had contemplated it. It was a matter of indifference 20  
to him how the mortgages were discharged so long as he got a good title. As far as the vendor was concerned, he could not have avoided the effect of the Ordinance on his liability to the mortgagees whether he made the agreement or not. In so far as the sale of his property is involved, apart from the question of the mortgages, nothing has happened to change his position. No doubt he hoped, when he made the agreement, to pay off the mortgages out of the purchase price and possibly he would not have made the agreement if he could have foreseen the enactment of the Ordinance, but I cannot regard these mental reservations on matters not dealt with in the agreement as going to the root of the agreement and I am therefore 30  
of opinion that there was no frustration.

There remain the questions of unfairness and hardship—matters which arise when an equitable remedy is sought. Now there is no evidence that the purchase price of the property fixed by the agreement was unfair or inadequate. The “ black market ” exchange for yen was falling in the latter part of 1943, but there is no evidence as to the extent that the “ black market ” rate had diverged from the Japanese official rate by the date of the agreement. There is certainly no evidence that the agreed price was so grossly inadequate as to be evidence of fraud. See *Hailsham Vol. 31*, page 371, paragraph 425 and the cases there cited. All that has happened 40  
is that it will now be much more expensive for the vendor to carry out the agreement than he had expected, but, as I have pointed out, the vendor would have to meet this extra expense whether the agreement is specifically performed or not. He is merely losing the chance of setting off against this extra expense the profits he could, but for the agreement, have made by

selling in the more favourable market of to-day. If it had so happened that the value of the property had dropped below the price paid, the vendor would certainly suffer no hardship if he was now asked to complete. In fact the price of the property has soared, and this being so the vendor has made a bad bargain. A bad bargain in itself cannot amount to unfairness or hardship, and there is no doctrine of equity to deprive a purchaser of a good bargain if it has been fairly made.

It follows that the plaintiff is entitled to specific performance of the agreement and to the costs of the action.

10

(Sd.) L. B. GIBSON,  
*Chief Justice.*

25/2/49.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

No. 14.  
The  
Judgment  
delivered  
by the  
Chief  
Justice in  
the first  
instance,  
25th  
February  
1949—  
*continued.*

No. 15.

Letter from Respondent's Solicitors to Ko Ho Ning.

Ko Ho Ning Esq.,  
c/o Tak Shing Investment Co. Ltd.,  
122 Queen's Road Central.

Dear Sir,

Re Estate of Koo Shiu Ting deceased.

I.L.2153 and No. 48 Kennedy Road.

20

Referring to your letter to us of 29th August 1947 our client the Executrix of the late Mr. Koo Shiu Ting has now obtained judgment for specific performance of the Agreement for Sale of the above property by Mr. H. K. Woo to the late Mr. Koo.

We have prepared a Certificate of Satisfaction of the Second Mortgage on the above mentioned property and shall be obliged if you will attend at our office to sign the same.

Yours faithfully,  
(Sd.) HASTINGS & CO.

No. 15.  
Letter  
from Re-  
spondent's  
Solicitors  
to Ko Ho  
Ning,  
25th  
February  
1949.

No. 16.

Letter from Ko Ho Ning to Respondent's Solicitors.

In the  
Supreme  
Court of  
Hongkong  
Original  
Jurisdiction.

Messrs. Hastings & Co.,  
Hongkong.

Dear Sirs,

Re Estate of Koo Shiu Ting deceased.  
I.L. No. 2153 (No. 48 Kennedy Road).

No. 16.  
Letter and  
enclosure  
from Ko  
Ho Ning  
to Re-  
spondent's  
Solicitors,  
4th March  
1949.

I am in receipt of your letter of the 25th ultimo requesting me to call at your office to execute a Certificate of Satisfaction of Second Mortgage of the above property. 10

As the repayment of the said Mortgage was made in Yen and as I was forced to accept such payment, and in view of the Debtor and Creditor Ordinance, I regret that I cannot agree to the execution of the Certificate of Satisfaction unless I am paid the sum of \$39,034.92 made up in accordance with the account annexed herewith.

When I wrote you the letter of the 29th August 1947 the Debtor and Creditor Ordinance had not been passed and I was under the impression that payment in Yen would be a good discharge.

Yours faithfully,  
For KO HO NING. 20  
(Sd.) F. S. Ko.

Enclosure of letter Ko Ho Ning to Respondents Solicitors, dated  
4th March, 1949.

MORTGAGE DATED 2ND DECEMBER 1936 TO SECURE \$30,000 AT 7 PER  
CENT. PER ANNUM INTEREST PAID UP TO 6TH OCTOBER 1941.

To Principal ... ..	\$30,000.00	
Less payment on 16/10/43 M.Y. 7,500 @ \$280 to M.Y. 1,000 ... ..	2,100.00	
	<hr/>	\$27,900.00
To interest for one month and 2 days @ 7 per cent. (7/10/41—8/12/41) ... ..	186.66	30
To interest for 1 year 10 months and 28 days @ 4 per cent. (9/12/41—16/10/43) ... ..	2,293.33	
To interest for 1 year 10 months and 6 days @ 4 per cent. on \$27,900 (17/10/43—31/8/45) ... ..	2,064.60	
To interest for 3 years 6 months and 9 days (at \$27,900) @ 7 per cent. (1/9/45—2/3/49) ... ..	6,884.33	
	<hr/>	\$11,428.92
Less payment on 16/10/43 M.Y. 1,050 @ \$280 to M.Y. 1,000 ... ..	294.00	40
	<hr/>	11,134.92
	<hr/>	<u>\$39,034.92</u>

No. 17.  
Notice of Appeal.

Motion to the Full Court for the rescission of the Judgment of the Chief Justice in the first instance.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

NOTICE OF MOTION.

TAKE NOTICE that the Full Court will be moved on the 30th day of May 1949 at 10 a.m. or so soon thereafter as Counsel can be heard by Mr. Eldon Potter K.C., Mr. Leo D'Almada K.C., and Mr. Brook Bernacchi Counsel for the abovenamed Appellant for an order that the judgment of His Honour the Chief Justice Sir Leslie Bertram Gibson Kt., K.C., dated the 25th day of February 1949 in Original Jurisdiction Action No. 146 of 1948 whereby it was adjudged that the Respondent was entitled to specific performance of the Agreement in the said Judgment mentioned and costs to be taxed may be rescinded and that it may be ordered that specific performance of the said Agreement be refused and that the costs of that Action and of this Appeal should be paid by the Respondent to the Appellant.

No. 17.  
Notice of  
Appeal.  
Motion to  
the Full  
Court for  
the  
rescission  
of the  
Judgment  
of the  
Chief  
Justice in  
the first  
instance,  
12th  
March,  
1949

AND FURTHER TAKE NOTICE that the grounds of the motion are :—

- (1) That the trial Judge was wrong in law,  
(2) That the trial Judge was wrong in his application of the principles of equity to the facts,

further particulars whereof will be supplied.

Dated the 12th day of March, 1949.

(Sd.) WOO & WOO,  
*Solicitors for the abovenamed Appellant.*

To the abovenamed Respondent and to  
Messrs. Hastings & Co. her solicitors and to  
the Registrar of the Supreme Court.

No. 18.

Notes of Williams J. on the Appeal to the Full Court.

30 30.5.49. 10 a.m.

Coram : WILLIAMS AND SCHOLES J.J.

Appeal 6/49 (O.J. 146/48).

HANGKAM KWINGTONG WOO ... .. *Appellant (Defendant)*

v.

LIU LAN FONG alias LIU AH LAN ... .. *Respondent (Plaintiff).*

POTTER K.C., LEO D'ALMADA K.C. and BERNACCHI (H. K. Woo) for  
*Appellant.*

SHELDON K.C., MCNEILL and WRIGHT (Hastings) for *Respondent.*

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court



In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

POTTER : Preliminary point—D'ALMADA :

D'ALMADA :—Point arises out of notice—intention to call further evidence. Paral. p. 35. Further to that we have received letter from 1st mortgagees letting us know amount due.

SHELDON : No objection to the calling of the fresh evidence.

As Respondents don't object we admit the fresh evidence (though unlikely it comes within terms of paragraph " the new evidence is admissible if it would have formed a determining factor "—p. 1320 of 1948 W. B.).

HANGKAM KWINGTONG WOO affirmed : X'd by BERNACCHI.

Sometime after judgment delivered I had visit from Mr. Ko. Fook San 10  
he is son and attorney of the 2nd mortgagee. Reference made to mortgagee by Mr. Ko—he made first reference to matter. He gave me a copy of a letter addressed to Messrs. Hastings (Copy of letter—marked A—Mr. Sheldon produces original). He also gave me a copy of a letter from Messrs. Hastings. (Copy of letter marked B). (original with Mr. Ko—B. put in by consent). I also produce a letter from Messrs. Lo. & Lo. solicitors for 1st mortgagee—enclosing statement of outstanding account up to 1st March (C).

XX'd by SHELDON :

Correct that up to judgment no claim made by either mortgagee. 20  
Mr. Ko. Ho Ning is 2nd mortgagee—he lives in Macao, old friend rich man—true up to judgment no claim made by him. True he wrote on 19th August to Hastings no further claim. (Attention drawn to 3rd paragraph.) Agree words occur ' our clients do not suggest they were forced'. 1st reading of Debtor & Creditor Bill was in June 1948. Between passing of Debtor & Creditor Ordinance 18th June, 1948, and March 1949, no claim of any kind made by either mortgagee. Writer of A. (F. S. Ko) is writer of 44. F. S. Ko (attention of witness drawn to 2nd paragraph—words ' as I was forced to accept such payment '). F. S. Ko is, I think, in Hongkong.

2nd mortgagee was forced—not the writer (attention of witness drawn 30  
to 95 of R.). Koo Sui Ting was purchaser. P. Y. Woo was my deceased son. Circumstances in which he was forced to accept payment were as follows :—

My son P. Y. Woo went to Macao in 1943 and endeavoured to prevail on 2nd mortgagee to accept payment in Military Yen at rate 1—\$4 H.K. ; He pointed out to 2nd mortgagee that he (2nd mortgagee) was under obligation to accept as otherwise consequences would be serious. Under these circumstances payment accepted. Agree payment made in Macao—dangerous to refuse in Macao as 2nd mortgagee had numerous property and businesses in Hongkong and the Japanese authorities could get at him 40  
if he refused. Agree that you put it to me in lower Court more or less to effect that he was an old friend and would not therefore make claim on me. Reason I did not tell judge below of this was I had no occasion to do so—in fact I gave statement to my counsel in regard to my visit to Macao 2 or 3 days after my visit i.e. 22nd of January 1949.

I do not agree that it is wholly untrue 2nd mortgagee not forced to accept.

re-Xn. My statement to counsel contained Mr. Ko's account as given me in Macao. (Counsel draws attention of Court to last two paragraphs of p. 42).

POTTER: Appeal against decision of Chief Justice. I am only concerned in my argument with para. 10 of Statement of Defence—frustration.

D'Almada will deal with para. 11 of Statement of Defence. Case of great importance. As to A.—agreement for sale—terms of which he was to receive 68,000 M.Y.—& mortgages and interest of \$113,000 H.K. were to be discharged.

Now by virtue of judgment position of A is as follows. He received M.Y. 68,000. He is now compelled to pay mortgages—which were discharged then—amounting to \$113,000 less credit for M.Y. approximately \$100,000 under Debtor & Creditor Ordinance and he also loses his property.

Refer to p. 1 of judgment—facts set out—see last 6 lines of it. [See p. 19, line 37.]

p. 2—last 4 lines—An order dated 10th May 1943 etc. [See p. 20, line 29.]

p. 5—4 lines from bottom. I have no doubt etc.—obviously correct. [See p. 22, line 18.]

For points emerge from judgment.

1. M.Y. only recognised currency at that time—criminal offence to pay in Hongkong dollars.

2. Creditor bound to accept payment in M.Y. of even pre-war H.K. \$ debt.

3. 1st mortgagee was in fact so paid off at the time—he executed a reassignment of the mortgagee. 2nd mortgagee was in Macao, paid off at later date but for protection and at request of purchaser a guarantee G. (p. 107) given by Vendor. [See p. 79.]

(POTTER refers to contents of G.—p. 107). [See p. 79.]

4. Of great importance—according to then existing law mortgagee debts then in fact completely discharged in September 1943, and were regarded by all parties—vendor, purchaser and mortgagee (1st mortgagee as he had received in yen at the time) as being paid off.

See p. 9 of judgment: 'No doubt he hoped, when he made the agreement etc.' [See p. 24, line 26.] Decisions was there no frustration; not a question of what he hoped at time—as positive fact he had paid off—not question of mental reservation as, debt in fact paid off. Reservation, hopes, etc., have nothing to do with case. Vital to realise basis on which Judge rejects 2nd limb of frustration is wholly unsupported. Next point I ask you to note—supported by judge and is in our favour. This was sale of 48 Kennedy Road free from encumbrances—one and indivisible—Manifest in 1943 purchaser would not have bought unless mortgages discharged—equally as to vendor. Agreement for sale not severable: p. 7 of judgment therefore at 3rd paragraph 'His first preliminary point etc. . . . I agree

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
continued.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdic-  
tion.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

on this point' [see p. 23, line 18] vital finding in our favour. p. 5—bottom  
—' I have no doubt that . . . partner contracted on the basis of Japanese  
law' [see p. 22, line 18]—see 27 Hails. p. 218, para. 297.

Position therefore mortgages paid off in September 1943—no reserva-  
tion—everyone satisfied—It must be assumed all contracted on basis of  
law existing at time—law not only enabled but compelled you to pay off  
and accept in Yen.

2 Ordinances—24/48

34/48—

Sec. 3(2) (ii) Ordinance 24/48 applies here—scale of payment. 10

Sec. 11(1) : Language clear therefore effect is expressly to say mortgage  
under these circumstances shall be deemed not to be extinguished or  
diminished.

We shall submit inevitably that when you consider language of section,  
mortgage again attached itself to the property freed in 1943.

Judge says nothing remains but personal covenant—if so then mortgage  
is extinguished. Whole object of mortgage is to charge property.  
(5 H.K.L.R. p.1.) Personal covenant is always present in mortgage, whether  
expressed or not :

If all that is left is personal covenant, then you may draw your pencil 20  
through section 11.

If mortgage not extinguished or diminished then it must inevitably  
affect the land. In our Ordinance—no protection afforded to bona fide  
purchaser—say deliberately done—left to Common law remedy. This  
Ordinance to protect the creditor. See Ordinance 34/48—section 8(2) :  
refer to section 2—definition 'green ink entry' : By section 8(2)—L.O.  
powers : effect is here if parties here had chosen to enter up sale and dis-  
charge in Japanese Register, they could have done so and in due course our  
Registrar would have copied that entry into our Register. By section 8(2)  
the green ink entry would have been struck out as any payment which 30  
comes within D. & C. Ordinance would be deemed unpaid. Section 11(1)  
of 24/48 : 'deemed not to have been extinguished'. Position therefore is  
this as result of Ordinances : whereas in September, 1943, mortgage debts  
of \$103,000 plus interest were discharged and property freed from all  
encumbrances retrospective Debtor & Creditor Ordinance throws back to  
September 1943 and says 'mortgages shall not be discharged except as to  
value of M.Y.—here roughly \$10,000'—Ordinance also says 'mortgage  
shall be deemed not to be extinguished or diminished.' That Ordinance is  
coupled with fact that no protection for vendor and purchaser. Ordinance 40  
protects only the creditor. Effect of judgment is to protect the purchaser  
—but in our submission in law position of purchaser deliberately passed  
over. Impossible to imagine our legislature.

quite forgot to deal with bona fide purchaser. Page 6 of judgment—  
at bottom—'This brings me etc.'—over to page 7 [see p. 22, line 46] :  
object of this plea was to emphasize that payment off of mortgage was part  
of the one transaction—see p. 230 of record . . . . (Counsel agree to that  
practice, etc.). I accept that. Object of it is that it was ordinary way of  
paying off—and was done here. It would have been better to have pleaded

that it was in contemplation of all that debt would be paid in this way. Our plea 'express terms of our agreement that sale was to be free from encumbrances'—I cannot follow 'given that there was no implied term, etc.' on p. 7 of judgment. [See p. 23, line 15.]

p. 227 of Record. 'First mortgagee was paid in Yen . . .' 'I would not have executed C. & D. if I had known mortgages still existent.'

P. 7—judgment in our favour on the second point—retrospective aspect of Ordinance. 'The way is thus clear, etc.' [See p. 23, line 25.]

Our argument missed entirely—see p. 219 where D'Almada's argument  
 10 —p. 220 'Implied term theory'—not our implied term of agreement. Impossibility in sense of *Bailey v. de Crespigny* L.R. 46 Q.B. 180. You made agreement in 1943—mortgages paid off—now Ordinance 24/48—mortgages exist. Our argument is you cannot carry out now contract made in 1943. Nothing to make it impossible for us to pay off now—\$103,000. Note that it would be a new contract if we paid off in H.K. \$—Constantine (1943) A.C. 188 (top). We stand on 1943 contract—you cannot do that now—pay in M.Y.—but only to extent as provided in Ordinance. (Sheldon here interrupts and says—referring to p. 7 [see p. 23]—judge was referring to 'impossibility' in this sense that Mr. Woo could execute assignment now).

20 POTTER continues :—a contract can be carried out now—pay \$103,000—but not the contract.

p. 8—Once the legal estate, etc. [see p. 23, line 36] . . . to divest the legal estate. Under Japanese law you could not get legal estate—under our law we have to have declaratory judgments. Legal estate has not passed: I say mortgage still attaches to the property. 'No doubt, etc. . . . equivalent security.'

Adj. 5 minutes and resumes.

POTTER continues : Purchaser has not legal estate.

- 30 1. could not get it under Japanese law.  
 2. loses it under Debtor & Creditor Ordinance.

Mortgagor always liable to pay his debt—whether or no personal covenant. 9th edition Coote on p. 10. "Every mortgage implies a loan, etc." Covenant not required.

40 Submit that—if judgment correct—you could not say mortgage deemed not to have been extinguished. Judge does not refer to words 'or diminished.' Words of judge—page 8—'it creates a legal fiction [see p. 23, line 42]—but in case of R—he must pay \$113,000. Judge lightly thrusts aside word 'deemed': Legal fiction imposes legal obligation on person. As to meaning of 'deemed' Stroud J.—Dict. 'Deemed'—to be treated as something else 'with the attendant consequences.'

R. v. County Council of Norfolk 60 L.J.Q.B. 379—at 380—both of 2nd column. Applying that to our Ordinance—although we know in fact debts extinguished in 1943 by payment of M.Y. yet Ordinance says debts not assumed to be paid off. Consequence the same as if the debts had not been repaid.

Words 'Security shall be deemed not to have been extinguished or

In the  
 Supreme  
 Court of  
 Hongkong  
 Appellate  
 Jurisdic-  
 tion.

—  
 No. 18.  
 Notes of  
 Williams, J.  
 on the  
 Appeal to  
 the Full  
 Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdic-  
tion.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

diminished'—in other words mortgage is intact. Judge say mortgage qua mortgage is gone.

R. v. Westminster Assessment Committee (1917) 1. K.B. at 838 (middle) 'The intention is to treat as a fact something which has not been established.'

Here facts shows debt paid off yet new statute says 'not paid off'—deemed to have been revived again.

R. v. 30th Battalion Middlesex Regiment, Commanding Officer, *ex parte* Freybege (1917) 2. K.B. 129 at 139. 'But there is a further ground . . . construction of word 'deemed.' Submit judge not attached sufficient importance to words 'deemed not to have been extinguished, etc.' Conse- 10  
quences of legal fiction are not set out in 11(2) but in 11(1). Sec. 11(2) provides machinery merely.

Effect of judgment here is: if purchaser has acquired legal estate (I say he has not) he is free from original mortgage—that is effect of passage—'there is nothing in section 11(2) . . . to end of paragraph.

Vendor never attempts to revive anything nor purchaser—the Ordinance does.

Judge decides that if purchaser acquired legal estate he is free from original mortgage—where is the proviso in the Ordinance—refer to 11(2)—'the rights of the creditor . . . discharge'—no word to exempt bona fide 20  
purchase.

I say the judge read into Ordinance at end of 11(1) words such as 'provided that where property affected by such mortgage has, after a purported discharge thereof, been transferred to a bona fide purchaser the title of such bona fide purchaser shall prevail against the title of the original mortgagee.'

Unless you read that proviso you cannot get rid of words at conclusion of 11(1).

The judge has legislated—cannot do so. This is not a '*casus omissus*'—legislature left position of vendor and purchaser entirely untouched by 30  
the Ordinance—left them to their rights in equity or at Common Law. Legislature could not have failed to visualise position of bona fide purchaser as here. If Woo no other property what is position of creditor under 11(2)—under judgment none—by our construction he has. I submit judge cannot read into act proviso of this sort—I say omission obvious—clearer also from subsequent argument: deliberate intention of legislature to maintain original mortgage absolutely intact. Court cannot make good *casus omissus*—31 Hail p. 497 para. 635—*ex parte* Vicar & Church Wardens, etc. 33 L.J. 372 at 375 (1st column) 'The Vice-Chancellor, etc.—if Court feels just that purchaser should be protected still not in its power to supply 40  
a proviso such as judge did.' Bristol Guardians v. Bristol W.W. Co. (1914) A.C. 379 at 388. 'Now it is we then . . . etc.' (31 Hail. p. 497 quotes this case in note (a)).

That portion of the judgment which says bona fide purchaser is outside terms of the Ordinance cannot be maintained. As to 11(2)—clear provisions nothing to do with case we are dealing with. It is passed expressly for protection of creditor and no one else. 'Creditor may give notice'—look at Land Registration entries: no need here for mortgagee to give any

notice or make any application. Here legal estate is in 1st mortgagee. Neither mortgagee need do anything—if there was green entry here it would have been struck out. Legal estate is in Kwong Sang Hong. If Bank had deposit of title deeds or deposit of shares (c.m.)—no register in which charge signed up—Bank would bring debtor along and would apply to Court and ask for shares to be replaced or deposit replaced. Therefore 11(2) nothing to do with case and judge is wrong when he says ‘consequences of legal fiction are set out in 11(2)—11(2) sets out machinery for creditors.

Counsel came to new point therefore Court adjourns until 2.30 p.m.

10 2.30 p.m. Court resumes.

Appearances as before.

POTTER continues :—

Page 8 ‘But an agreement, etc.’ [See p. 24, line 5.]

Page 9 ‘As far as the purchaser etc.’ [See p. 24, line 19.]

I gave issue on this finding.

Purchaser would have said ‘I want it free from mortgage.’

We say contract in 1943 entirely different from position created by passing of Debtor & Creditor Ordinance. When you read the 2 Ordinances, position is this : by reason of Debtor and Creditor Ordinance, 1948, these  
20 mortgages are again attached to the land—48 Kennedy Road—they have not been discharged—they can now only be paid in H.K. \$ in contradistinction to actual discharge in Military Yen in 1943—they must be deemed not to be discharged—though discharged in September, 1943.

Can frustration afford defence? I say clear case—actual law directly affecting the contract—unlike most cases : here piece of legislation avowedly affects the contract itself : agreement for sale as the contract provided the existing mortgage debts should be discharged and in contemplation of the parties could only be discharged by payment of Military Yen and in accordance with the existing law of Hongkong.

30 New Ordinance changes whole position—says you cannot discharge in manner contemplated.

Mortgages in fact are to be deemed not be discharged : note defence  
10(2). Subsequent legislation reopens whole transaction. Assume agreement for sale came to on 1st August 1943, completion to be on 31st August : on 15th August law passed—Debtor & Creditor Ordinance—would any British Court enforce it on 31st in view of change. Suppose contract for sale on 1st August 1945—completion at end of August—Japanese surrender in meantime—then we pass law : plaintiff asks for specific performance—no Court would enforce it. No difference that period from September 1943  
40 to present period has lapsed. Even if legal estate had passed to purchaser—I say same result. If Court agrees with Chief Justice that bona fide purchaser takes title superior to mortgage then I lose : But I say where legal estate is outstanding in mortgagee he does not need to use 11(2) (a)—he has got legal estate reattached.

11(2) (a) is machinery for protection of creditor if he chooses to avail himself of it—he will, if he has no security. I say reattachment of legal estate

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

—if it reverts—is by 11(1) : If mortgagee can get any additional benefit by applying under 11(2) (a) he can.

Does the Ordinance reattach the former mortgage to the property in spite of the reassignment in 1943—only section that does so is 11(1). I say 11(2) is additional machinery enabling mortgagee to make any application he likes if he thinks it will assist his title. Under L.R.O. 1/44 position of 1st mortgagee is impregnable—no worse position than if he lost his title deeds—no notice actual or constructive would defeat the mortgagee— if you agree with my submission.

11(1) is crucial section.

10

11(2) is merely machinery : in certain cases he must make application.

In 11(1)—‘lien’—then person entitled would have to protect himself—11(2) (a)—but no need for mortgagee.

11(2)(a) does not come into the picture until rights of creditor are deemed not to have been extinguished or diminished.

In frustration—nothing to do with point whether either purchaser or vendor would have made profit.

I submit that cases cited below in regard to implied term have nothing to do with the case : we rely on express term of contract—Cases like *Harbler v. Wood*, etc., have nothing to do with the case—we say this contract destroyed by effect of subsequent legislation. 20

If it is decided effect of C. & D. is to protect purchaser—(though it says nothing about it) then no more to say : it is not to be got from 11(1).

Q.—Can frustration apply to contract for sale of land ? Definition of frustration set out on p. 8 of judgment. [See p. 24, line 10.] Applying that test : was it fundamental part of contract that mortgage debts could be paid off—and in Yen ? We are concerned with way they had decided to pay off mortgage debts—here in Yen—in ordinary course as law then existed.

Frustration is automatic : *Cricklewood* case p. 228. ‘But where it does arise, etc. . . . volition.’ *Jirji Mulji v. Cheng Yue S.S.* (1926) A.C. 30 at 509. ‘Evidently . . . etc.’

I define ‘impossible’—contract cannot be carried out by the parties now in accordance with terms contemplated by the parties in 1943.

Contract not completed as R. asking Court to enforce it. Refer to *Pollock*—p. 224 ‘Occurrence, etc.’—impossibility. You cannot pay off mortgage in Yen now.

Agreement for sale of land carries with it certain rights—nevertheless a contract—29 *Hail*. p. 337, p. 338—failure of contract. Contract for sale of land can be frustrated like any other contract. Interesting that Chief Justice has held that doctrine of frustration can apply to agreement of sale of land—I agree. 40

O.J. 159/47 at p. 5 & 6—only a dictum but view borne out by 2 English decisions.

1. *London & Northern Estates Co.* (1916) 1 K.B. 20—judgment of *Lush*—in anything short of actual lease no reason why doctrine should not apply.

2. Whitehall Court v. Ellinger (1920) 1 K.B. 680. Argument p. 684 —frustration pleaded—a lease. 685—5 lines from top: ‘If I were dealing, etc.’—there Chief Justice implies no difficulty in applying doctrine of frustration in case of agreement for a lease: also p. 686. If actual demise doctrine of frustration does not apply—if only agreement then doctrine can apply.
3. Macara v. Barelay (1945) 1 K.B. 149. Agreement to give vacant possession. Vendor could not give vacant possession. If in 1943 vendor had said to purchaser ‘for certain reasons I cannot sell free from encumbrances’—then would any Court enforce agreement: ‘cannot’ do it—mean cannot do it in terms contemplated by the parties at the time they entered into it.

In the Supreme Court of Hongkong Appellate Jurisdiction.

No. 18. Notes of Williams, J. on the Appeal to the Full Court—*continued.*

10

Of course we can now pay \$113,000, etc., but that is not contract contemplated—Here purchaser so anxious to get property free from mortgage that he obtained writing—guarantee from 2nd mortgagee in Macao—see 20 Hailsham p. 177 note (s).

- 20 29 Hail. p. 364, para. 498—shows nothing sacred about agreement for sale of land. Completed Cricklewood case—that was case of lease: Russell p. 233: lease much more than a contract—R. contrasting lease with contract for a lease—but does not suggest that contract for a lease as distinct from a lease may not be frustrated.

Page 245 Goddard J. Judgment based throughout on fact that there was completed lease.

- 30 Bailey v. de Crespigny IV L.R. Q.B. 180, 181—reasons on p. 180 & 186. ‘There can be no doubt . . . to end of para. p. 185. No one can suggest we could have anticipated change in the law—over to p. 186. ‘To hold a man, etc. . . .’ in other words to hold was liable to convey land on terms not contemplated by parties in 1943 is to hold him to contract he never made. There Court of Appeal held vendor discharged from his covenant.

- 40 Crave in aid Cricklewood case—Judgment of Wright at 240. Last 5 lines ‘This comes very near . . .’ If covenant fundamental in that case—even though 20 years after he would have applied doctrine of frustration. In 1943 they contemplated that mortgagee discharged by payment of M.Y.—and were so discharged—now we are told they are deemed not to be discharged—fundamental. Constantine’s case (1942) A.C. 154 at 172 ‘Other consideration, etc.’—or words in paragraph before ‘My Lords, if the, etc. . . .’ See words ‘Thirdly, where circumstances arise . . . impossible in the manner and at the time contemplated.’ Here change in the law which prevented contract being carried out in the manner contemplated. Apart altogether from inability to pay in Yen.

Assuming we are correct in saying mortgage reattaches—can any one say this was in contemplation of parties. It is uncontradicted evidence that in contemplation of all parties mortgage debts paid.

p. 182: (7 lines from bottom) ‘In more recent days, etc.’—in middle of p. 183 ‘there has been so vital a change in the circumstances as to defeat



In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

the contract'—Also, 'The same is true where there has been a vital change of the law, etc.'

p. 187: 'There is another aspect, etc.'

p. 188: 'But in the case of frustration the contract is ended and dead, etc.' If the parties choose to go on with it, that is in truth entering into a new contract. Even if Court said 'purchaser might have specific performance provided he paid off mortgage debts' that would be making new contract.

Mott v. Fraser (1944) A.C. p. 265—at 274 'What happens (line 4), etc. . . .'

Also last paragraph on p. 274 'It is now I think, etc.'—p. 275 'I find the theory of the basis of the rule in . . .'. Does justice demand Woo is to pay \$103,000 though all parties agree that mortgage debts were to be discharged.

p. 281—Lord Porter:—quoting from (1916) A.C. 397—here presupposed in 1943 clear title could be given.

Note again Bailey v. de Crespigny—in support of 7 Hail. para. 297. Newington L.B. v. Cottingham L.B. (1879) 12 Ch. 725 at 731 'Now it was said, etc., to end of para.'—continue.

Reilly v. The King (1934) A.C. 176 at p. 180: 'But the present case, etc. to end of para.'

I submit that on the facts clearest case of frustration—assuming correct in my submission that mortgage has revived.

Ask yourselves this: Why was our legislature in case of Debtor & Creditor Ordinance completely silent about case of bona fide purchaser for value—is it possible to protect him in spite of fact that Ordinance is silent—also on viewing Ordinance 34 that mortgage was revived.

Sale—green ink entry—entry could be deleted if it affected a mortgage. Performance of contract now of terms of contract in 1943 is impossible.

Adj. to 10.30 a.m.

(Sd.) E. H. WILLIAMS.

30

30.5.49.

31 May, 1949, at 10.30 a.m.

Continued from above.

Court resumes. Parties as before.

POTTER continues—Had dealt with 'impossibility'—only means if fundamental part is gone whole is gone, unless contract severable. See p. 7 [see p. 23, line 22]—judge agrees contract not severable. That is case of Denny v. Mott (1944) A.C. 265.—Sale of wood and option to have lease of property: House of Lords held contract was purchase of wood and contract went, including that for lease. Also Cricklewood case—if fundamental portion goes whole goes—we say fundamental that property should be sold free from encumbrances—if that not possible then whole contract goes.

We say mortgage attaches to property:

40

Section 11(1)—‘deemed’—some mortgages discharged during occupation—like this—others not. This completed. ‘Rights of creditor in relation to such mortgage’—

1. Rights of mortgagee embraces number of things—right to enter into possession—had such right in 1943.
2. Had right to foreclose.

Under section 11(1) they now have all the rights mortgagee ever had.

Right of mortgagee is to register under 1/44 thereby obtains priority over every subsequent dealings: if he does not his rights are entirely  
10 defeated. Short of registration—no notice even actual is effectual.

Assume an actual sale—on 21/9/43.

There would be on sub-assignment sheet—agreement for sale entered up 21.9.43—it would be subject to the 2 mortgages.

When completion took place entry in register would be—against K.S.H. & Ko Ho Ning—21.9.43—satisfied. With reference to Koo Wan Sing you would have on reverse side Koo Wan Sing purchaser.

That is position until Debtor & Creditor Ordinance passed: at once mortgages are revived—11(1)—and whereas register shows mortgages are satisfied now it shows mortgages not satisfied. If not so then 11(1) meaning-  
20 less. If no rectification of register Mr. Koo has complete and perfect title—he can sell free from encumbrances. Mortgagor could under 11(2) (a) ask Court to rectify.

I go as far as this—if you find in my favour Woo discharged from contract and mortgagees put back in their position—mortgagees have charge against land—purchaser gets back purchase price—Woo is freed—if that is not meaning of section 11—then section 11 is waste paper.

Land transactions Ordinance 34/48: Complete acceptance in our law of voluntary transactions put through in occupation period.

See Definitions:

30 Section 3(1)—green ink entries are proper entries—lawfully made. Section 3(2)—Actual ‘notice’—section 4 of Land Registration Ordinance—in other words legislature provides green ink entries shall have all force and validity as entry made at time of transactions and will bind with notice every purchaser—for 2 years.

Section 4—Again complete recognition and protection of operations in occupation period.

Section 5(1)—Japanese assignments—Under it you get the full legal estate.

40 Section 5(2)—‘house’ includes ‘land.’ Here therefore complete recognition of ‘assignment’ in full term—any dealing with land during Japanese regime is recognised by us.

If our deal entered in Japanese Register, you would have in our Register mortgagees entered in green ink as discharged, etc., and in front Mr. Koo Wan Sing entered in green ink as purchaser of property.

Now we come to section 8(2): Deletion of green ink entry—Look at Register now the entry ‘mortgages discharged’ must be deleted. Result of 8(2) is that Registrar is bound to strike out as ‘satisfied’ the mortgages

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

therefore Koo Wan Sing has only got the property subject to the mortgages. That is only way to read Register—that is all result of 11(1)—section 8(2) of Land Transactions Ordinance can only refer to section 3(2)(ii) and 11(1) of Debtor & Creditor Ordinance. Immaterial no green ink entries made in our Register—it is *a fortiori* in present case : under our own Ordinance any knowledge of the 1943 transaction immaterial—no notice actual or constructive affects.

If I am right as to green ink entries I am right as to section 11(1). If that is position what are rights of parties : mortgagees can do what they are entitled to do under mortgage. Koo can bring action against Woo—effect 10 of it would be to compel him to pay off encumbrances—this would give rise to ‘frustration’ action. Supposing mortgagees said to Woo ‘We want our title deeds back—as our debts are not discharged.’ Woo would reply ‘with Mr. Koo.’ Mortgagee could issue O.S. and Court might order Koo to be brought in as another defendant. I say

11(1) revives mortgages against property—then you come to point ‘was there frustration’—we say ‘Yes.’

I can contend that parties may say ‘Foundation of contract gone—payment in Yen.’ Tamplin’s case (1916) 2 A.C. 402 at 406.

(2) —another theory—Bank Line case (1919) A.C. 442—as result of 20 Debtor & Creditor Ordinance—only contract that can be carried through.

(3) Implied term—Cricklewood case—impossible to carry out contract in terms agreed on in 1943.

(4) Denny, Mott & Dickson case (1944) A.C. 260.

(5) Impossibility.

Assuming you are in our favour what order could be made.

Chief Justice found intention was to pay M.Y. 68,000.

Vendor’s agent had valued at \$272,000 : Court cannot order payment of M.Y. 68,000 nor \$272,000 as you could be recognising fictitious rate of 30 Japanese—rate which Debtor & Creditor Ordinance refuses. We suggest true order—Y.68,000 at 400 H.K.=Y.1,000—means Y.68,000=\$27,000 (approx.) in addition purchaser should get interest up to date of judgment : by such an order you would bring parties back to correct position. Woo would get property—subject to payment of about \$140,000. You would not make order that purchaser should take subject to mortgages. Not material—in frustration—that parties did or did not make profit out of it.

For these reasons I say clear case of frustration—if you accept my construction of 11(1)—mortgages revived. If parties in September, 1943, had for moment thought what they were doing would not discharge mortgages, 40 then never entered in it.

To Court : Even if 11(1) does not revive mortgage I still say impossible now to order specific performance because by change of law what every one regarded as discharged is now re-opened—bottom of p. 8—i.e. second limb of argument. [See p. 23, line 23.]

In 1943 all contemplated (1) discharge of mortgage as from September 1943 (2) paid in Yen.

If my construction of 11(1) right hardly open to argument that there was frustration. Even if there was a completed demise frustration would still apply—refer to Criklewood case—if Debtor & Creditor Ordinance is retrospective as we say it is.

D'ALMADA—Alternative defence of 'hardship':

10 1st mortgage—Total amount due on 1st mortgage in September, 1943, was \$80,000—discharged on 30th September by payment of M.Y.20,000—revalued now under Schedule 24/48 at \$6,400 therefore amount outstanding is \$73,600.

2nd mortgage—amount due (p & i) in October, 1943—\$34,200—paid off with M.Y. 8,550 revalued at \$2,400 therefore outstanding amount—\$32,000. Position therefore is that by reason of Debtor & Creditor Ordinance Woo liable to pay total of \$104,000 to discharge the mortgages. If no Debtor & Creditor Ordinance—position is this :—Woo would have got Y. 40,000—after payment.

(Sheldon interrupts—evidence at trial was this at the time 1 Yen = \$3-4).

20 In equity I say specific performance should not be decreed.

Common Law way of dealing with injustice arising out of contract—frustration. Equity also : Specific performance is discretionary remedy—if exercise would work hardship then plaintiff left to remedy at law. Fundamental basis—to do what is fair between parties. In actions for specific performance Court will refuse if order will work hardship—whether purchaser or vendor—see *Regler v. White* 33 L.J. Ch. 569.

30 There allegations by plaintiff—see 569 in 2nd column—defence also of defendant. Finding of facts of M.R. on p. 570—column 1. 571—column 1—end of 1st paragraph 'If he knew, etc.' Refusal against vendor. *Barendale v. Seale* 24 L.J. Ch. p. 385. p. 385—2nd column—last paragraph. 'The boundary of the manor, etc.'

See judgment of the M.R., p. 387—Specific performance refused. If Court here order specific performance you compel Woo to perform a contract into which he has not entered. 2 cases—in which no case of unfair dealing arose—but from facts it was decided decree would effect hardship on vendor in one case and purchaser on other. We relied originally for our equitable defence on facts in it—paragraphs 2, 6, 7, 8 & 10—hardship in para. 11 of our defence. In Court below we relied on para. 10—hardship caused by Debtor & Creditor Ordinance.

40 Whether or not contract is frustrated or whether or not hardship we know Woo has to pay something like \$140,000. See p. 9. [See p. 25.] I never suggested that purchaser driving hard bargain : I based defence on broad ground that Court of Equity should not decree specific performance because of hardship it would work, irrespective of conduct. Accepting that legal estate is not in mortgagees—Chief Justice missed the point that if specific performance is decreed Woo loses house : if not decreed he does not lose house : not a question merely 'setting off against extra expense, etc.'

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

Chief Justice based his decision on finding that price of property has increased : In *Barendale v. Seale* agreement fairly made also : no suggestion there of hard bargaining yet Court refused to decree specific performance because it would have worked hardship on vendor. To decree specific performance here would mean Court is enforcing new contract between parties and a new one which would work hardship on A.

Alternatively—if it be not enforcing now contract, the on ground of hardship should be refused. Hardship—retrospective Ordinance whereby mortgages are still alive or mortgage debts undischarged. This case analogous to case where relief for mistake of law is given. 10

*Allcard v. Walker* (1896) 2 Ch. 381. Judgment of Sterling J. ‘These terms were entered into, etc.’

*Stone v. Godfrey* 23 L.J. Ch. 769—at p. 774—1st column ‘the ground . . . may be done.’ Here, in sense, mistake—parties thought payment finished—now retrospective Debtor & Creditor Ordinance never contemplated by parties. A. here sold because he thought he was going to discharge the encumbrances—now retrospective Ordinance changes it. Purchaser bought in same belief—his obtaining of guarantee. Chief Justice confined his attention to points like gross inadequacy. First see principles 31 Hail. p. 366 and 367 paras. 414, 415 p. 367’ and if the contingency is outside . . . the Court refuses specific performance.’ Unfairness at a subsequent date may be material—we say Debtor & Creditor Ordinance is unfairness at a subsequent date. p. 369 para. 419, 420—note h. on p. 370—hardship arising subsequent to contract. 20

Chief Justice dealt with matter under para. 425—inadequacy of consideration. *Buttock v. Buller* 10 Vaisey 292.

p. 214 :—Argument of Solicitor General.

p. 297 :—Argument of Remily.

p. 301 :—reference to *Buxton v. Lester*.

p. 305 :—judgment of Chancellor : (interposition only here). 30

p. 307 :

Note p. 310—‘There is evidence, etc.’ Distinction between agreement to sell contract and conveyance.

Here specific performance refused—vendor’s agent negligent. *Wedgwood v. Adams* 40 E.R. 958 : headnote. Here Trustees joined with *cestui que* trust in contract for sale to exonerate the estate from encumbrances. No difference, I submit that case deals with trustees—see facts at top of 959. See bottom (8 lines) at 959 ‘This being the situation of the parties, etc. . . . over to 960, where occurs passage : ‘That being so, the question, etc.’ note words ‘The Court must therefore have regard to, etc.’ 40

Order for specific performance refused. No distinction between this and our case—even though trustees concerned—there in spite of inconvenience. *G. N. Railway v. Sanderson* 25 Ch. D. 788—see headnote. Argument of Lunn—p. 791—based on equitable principles, p. 792—order refused—

p. 793—‘I am asked, etc.’

Considered it irrelevant that the Co. might have been wealthy. Irrelevant whether property in our case has depreciated. If you decree

specific performance liability to pay off mortgage debt is in Woo—he also loses house.

At time of sale all thought mortgages paid off—hardship here is that A. will be deprived of house. Submit here proper course is for Court to refuse specific performance on ground of hardship.

There is another defence—divided by line of war—concluded by judgment of Full Court in Appeal 19/48.—this point reserved should case go to higher Court.

Adjourned to 2.15 p.m.

10 2.15 p.m.

Court resumes. Parties as before.

SHELDON: First deal with hardship. Don't think it was pressed strongly. A. involving equity therefore must look at surrounding circumstances. In 1943 he entered into fair bargain. He returned to H. K. later. Action then brought against him for specific performance. In answer to claim every conceivable form of defence raised—fraud, forgery, undue influence by Japanese. Take it that that influence has been withdrawn not scintilla of evidence to support them. At time of trial position was 1st mortgagee had, through their solicitors guarded their rights: 2nd mortgagee had unequivocally withdrawn any claim he had. If letter of 4th March straightforward then F. S. Ko would have come and told us so: Secondly, in light of previous letter, impossible to accept as true 'I was forced to accept.' If forced to accept then must be Woo's agent who did so.

20 Come now to p. 9 [see p. 24, line 32]—last question of hardship. This part of judgment—correct: Last paragraph wholly unattacked—facts not traversed. Pegler v. White cited—specific performance refused because if not one party would have been involved in litigation with a third party. Muttock v. Buller—breach of trust. Wedgwood v. Adams—encumbrances exceeded by 5 times purchase price. In not one case cited had purchase price been paid. In this case purchase price paid—moreover Woo still living in house. Authorities, I submit, insufficient to enable Court to upset judgment.

Part complained of is from bottom of p. 30. [See p. 23, line 28.] If correct you will rule agreement for sale of land is capable of frustration—no Court has held that agreement for sale is capable of frustration. Secondly, —if A. right—in all the transactions in which mortgages, purchases completed before passing of Debtor & Creditor Ordinance—are null and void. Mortgages paid off are void and legal estate vests in mortgagee. Admire ingenuity of Potter's answers.

40 Question was put by Court: what is position when transaction been completed before Debtor & Creditor Ordinance.

Did not answer.

In all those cases in which transactions are completed—they will be null and void—if he is correct.

I suggest not difficult case. What was agreement in 1943—to convey 48 Kennedy Road free from encumbrances—no agreement to pay off in M.Y. What was position between 1945 & Debtor & Creditor Ordinance—

In the Supreme Court of Hongkong Appellate Jurisdiction.

No. 18. Notes of Williams, J. on the Appeal to the Full Court—continued.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

binding agreement to sell property for Y. 68,000. Ordinance :—section 3 : marginal note.

Then section 11(1) : note rights of creditor shall be deemed, etc.—pass to (2)—Creditor gives notice to debtor of sum owed. Mortgagee gives notice to Woo—if not paid off he asks for issue of Originating Summons. Assume the mortgage has been repaid then what would Court do—plainly it would not reinstate the security as it is no more in the debtor—it would replace it with others. If Woo has no other security then mortgagee would proceed to get execution in ordinary way.

Whole edifice built on fallacy—see X on p. 145.

I say the mortgages have been discharged—they do not attach to the land.

No one will contend that before Debtor & Creditor Ordinance mortgages not discharged.

Reassignments are made. What happens on passing—11(1)—they shall be deemed not to be discharged with consequences set out on 11(2). Where on 11(1) does it say ‘mortgages attach’—why bring in word ‘deemed’ ? ‘deemed’—legal fiction with consequences set out in 11(2). See p. 8. ‘the then existing law’ [see p. 23, line 36]—refers to British law as it was before Debtor & Creditor Ordinance. Under 11 (1) mortgagees have certain rights—result of Ordinance is mortgages have lost estate in land—  
is given certain rights against mortgagor. It was suggested by Potter that entry in Register means person on it has legal estate—(Potter says ‘Look at Register’).

SHELDON :—If you do not register you look to prior encumbrances—you still are owner. This is not a green ink entry case. Potter says—Look at section 8(1)—how does it affect this case ? For these reasons I say judgment of Chief Justice on p. 7 & 8 beyond serious dispute. [See p. 23.] 11 (1) not difficult if you look at it—no need to supply any proviso.

Frustration :—Assume it can apply to agreement for sale of land—though never such a case. I think you will agree with Lord Porter—that difficulty arises in application of facts to legal propositions. Notice first about all the cases cited—contract has literally come to an end—e.g. lease of property requisitioned by Government, vessels captured by enemy, etc.—you find contract literally at an end. Case of Morgan v. Manser (1948) 1 K.B. 184—he considers all the cases cited—Case of music hall singer—again complete ending of his contract. How do they apply here ? If Woo wished—he could fulfil his contract to-morrow. Admits it—by signing. In none of cases cited could it be said either party could have fulfilled his contract. Invite Potter to deal with this point in Denny Mott v. Fraser (1944) A.C. 265—at bottom of 281 ‘Whether this result follows, etc.’ . . . Further it is to be observed that the . . . cause . . . Interference leaving a considerable part capable of performance will not be an excuse.’ Pollock—12th edn.—p. 246 contains the passage. Can it be said applicable here—that this contract cannot be substantially performed. Only part left here is that Woo will have to pay part or whole of \$104,000. Not disputed he can complete to-morrow. Suppose Woo did change and convey premises. What rights would mortgagees have to interfere—none—their rights are

under 11(2): can take Originating Summons against Woo. Authority on 'deemed' Conley v. I.R.C. (1899) A.C. at 211—last para. 'exceptional case in which property is deemed to pass, though there is no passing of property in fact': stress these words. Section 11(1): apply same words. 'Implied terms' Potter brushed aside Humber v. Wood—implied terms argument now gone. (Potter says 'Quite content to rely not on implied term but on admission made by Counsel as to practice').

23 Hailsham p. 228—legal and equitable mortgages. Bradley & Munton 15 Beavan's 460—not noted by C.J.—that was case where vendor attempted to except to his own title. I cannot find any case in books where vendor has come and said 'defect in my title'—only parallel case is that and the V.C. refused to hear him. I suggest judgment of C.J. has done is right—he has considered every argument and given his view on it.

To Court: 'Deemed'—difficult word. If Potter right why put in word 'deemed'?

Stress words 'rights of creditor' and legal estate shall be deemed, etc. He may have right to call for legal estate—section cannot vest its legal estate in him. Potter says result of section is to vest legal estate in mortgagor. 23 Hail. p. 228. p. 354—rights and liabilities of the mortgagee—section 530. Section 11 (1) does not vest legal estate in mortgagee. Section 11 (1) does not in itself vest in mortgagee the legal estate. Under section 11 (2) he can ask for his rights—no power given to Court to revest legal estate in him.

D'ALMADA in reply: 2nd limb—hardship—I say seriously argued. We raised defences—but they have no hearing when Court considers whether specific performance should be granted. 1st mortgagee reserved his rights. Since judgment he has been presented with letter of 1st mortgagee therefore no question but he will have to meet it. As to 2nd mortgagee—letter written before Debtor & Creditor Ordinance—now we have it he stands on his rights. Up to Debtor & Creditor Ordinance we treated this as case where mortgages paid off. Writer of letter is attached—under Debtor & Creditor Ordinance 2nd mortgagee is still entitled to be paid. Not necessary for me to challenge every statement in p. 9 & 10; [see pp. 24 and 25] I say to deprive Woo of house should induce Court to act so as to refuse specific performance. Coming to second part—true no Court has yet laid down proposition that agreement for sale of land can be frustrated—but facts in other cases different. In peculiar circumstances of Hongkong, frustration must apply to this and numerous other cases. Sheldon has said 'if we are correct all transactions prior to this are null and void.' They have been a few cases before Court. In none were circumstances similar—contract was 'to convey free from encumbrances' but 'in manner contemplated by parties.' Sheldon says 'Stress words *rights of creditor*'—rights of mortgagor—does not say same rights reserved to him—his rights not diminished. 'Deemed'—words of Lord Reading—Westminster case. No other word could have been used—the mortgages had been discharged. In 1943 legal estate gone back to vendor: this Ordinance says 'though legal estate had gone to vendor: now the mortgagee has it revested in him. Every

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*



In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 18.  
Notes of  
Williams, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

right—no question but 1st mortgagee had legal right—he need not invoke 11(2) (a). 11(2) (a) begins ‘the creditor may do’—i.e. if circumstances make it necessary he must do certain things—but we say circumstances make it unnecessary for him to do anything. Sheldon asks ‘What can Court do if vendor (mortgagor has sold’: proceed against vendor. Legislature has envisaged that mortgagor might have no property—so put mortgagee back into position. Sheldon asks where in 11(1) words that mortgage reverts. Legislature not content with word ‘extinguished’—goes on to use ‘diminished.’ Read 11(1) with section 8(2) of Land Transactions Ordinance. Mandatory on L.O. to delete green ink entries. No Japanese assignment—no green ink entry—immaterial. Morgan v. Manser (1948) 1 K.B. 184—Read headnote:—principle set out here. Sheldon says ‘Nothing to prevent Woo fulfilling contract’—paying off mortgages but would that be fulfilling contract in manner contemplated by the parties? Frustration is doctrine which has developed in recent years: Pollock 224—from top. Denny Mott—p. 281, 282. Constantine’s case (1942) A.C. 154—judgment of Maugham p. 172 at 2nd para. Early Cowley case as to meaning of ‘deemed’ does not carry us far. We are not ‘excepting our title’—Bradley case—15 Beavan. 31 Hail. p. 424 para. 509. Here we are not attempting to do that—we say that by reason of change in law there has been frustration of contract—to sell property—but by reason of law alteration of circumstances not in contemplation of parties.

Therefore contract at an end.

C.A.V.

(Sd.) E. H. WILLIAMS.

31.5.49.

10 June, 1949. App. 6/49.  
at 9.45 a.m.

Coram: WILLIAMS & SCHOLLES JJ.

D’ALMADA, BERNACCHI (H. K. Woo) Appellant.  
MCNEILL & WRIGHT (Hastings) Respondent.

Judgment read.

Appeal dismissed with costs.

Judgment in Court below confirmed.

(Sd.) E. H. WILLIAMS.

10.6.49.

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court.

No. 19.

Notes of Scholes J. on the Appeal to the Full Court.

30.5.49.

Coram: WILLIAMS J.  
SCHOLLES J.

Appeal 6/49 (O.J. 146/48).

POTTER K.C., LEO D’ALMADA K.C. BERNACCHI (H. K. Woo) for Appellant.  
SHELDON K.C., MCNEILL and WRIGHT (Hastings & Co.) for Respondent.

D'ALMADA : Notice at p. 35 Notice to call further evidence. Evidence not available at trial, also since judgment received letter re 1st mortgagee.  
 SHELDON : No objection to calling fresh evidence on either point.  
 As Respondents do not object, Court prepared to hear new evidence.

In the  
 Supreme  
 Court of  
 Hongkong  
 Appellate  
 Jurisdic-  
 tion.

HANGKAM KWINGTONG WOO AFFIRMED.

Xn. (BERNACCHI). Since judgment in action 146/48, I had a visit from Ko Fuk San, he is son and attorney of 2nd mortgagee. Ko first made reference to mortgage. Ko gave me a copy of a letter purporting to have been sent to Hastings & Co.

- 10 (Copy of letter admitted by consent and marked Ex.A.) (Sheldon states he will produce original.) He also gave me copy of a letter to which A was a reply ; (letter put in by consent ; marked Ex.B.) I also put in a third letter with Accounts (put in by consent and marked Ex.C.).

No. 19.  
 Notes of  
 Scholes, J.  
 on the  
 Appeal to  
 the Full  
 Court—  
*continued.*

XXn. (SHELDON). Up to time of judgment no claim had been made by 1st mortgagee or by 2nd mortgagee. 2nd mortgagee is an old friend of mine and very rich—up to time of judgment he had made no claim.

- 20 2nd mortgagee went to Hastings & Co. on 29th August 1947, saying he had no claim (witness shown letter at p. 44). No claim made by either mortgagee up to judgment. I see 2nd paragraph of letter of 4th March. The 2nd mortgagee was forced (witness sees letter 26.10.43) (p. 95). Koo Sui Ting was the purchaser (shown letter at p. 44).

Circumstances in which he was forced to accept payment were as follows :—

My late son P. Y. Woo went to Macao in 1943 and endeavoured to prevail upon the 2nd Mortgagee to accept military yen at rate of 1 to 4.

My late son pointed out to 2nd mortgagee that he is under obligation to accept as otherwise the consequences would be serious. 2nd mortgagee was under obligation. Under these circumstances payment was accepted. Payment was made in Macao.

- 30 2nd mortgagee had various property in Hongkong and did business in Hongkong, and it was easy enough for Japanese authority to get at him if he refused.

I agree that it was put to me in Court below that he was an old friend and would not make a claim. I had no reason to tell Chief Justice this, and I gave it to my counsel in respect to my visit on 22nd January, in my statement to counsel two or three days after 22nd January. I do not agree that statement forced to accept payment is untrue.

Re-Xn. (BERNACCHI). Statement I gave counsel is what I have said to-day. (Sheldon states why should he not tell C.J.—that is the point.)

- 40 (BERNACCHI, claim all rights reserved, letter p. 42).

POTTER : Appeal from C.J. sets out judicial facts. Concerned only with para. 10 of Statement of Defence—frustration. This case of great importance, not only to Woo, but others in Colony.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

Term of Agreement of 18th August, for 68,000 Military Yen, discharged in Military Yen—roughly about \$27,000 at 2 : 1.

Defendant called upon to pay mortgages again, about \$10,000. Facts set out at p. 1 of judgment. [See p. 19.] Refer bottom page 1 [see p. 19, line 37] and bottom page 2 [see p. 20, line 29] of judgment, bottom page 5. [See p. 22, line 18.]

Four points from judgment.

1. Military Yen, only recognised currency then, and criminal offence to make payment in dollars.
2. Creditor bound to accept payment in Yen, even of preoccupation 10 debt.
3. First mortgagee was in fact paid off at the time ; and first mortgagee executed reassignment. 2nd mortgagee in Macao and paid off at later date; at request of purchaser guarantee given (Ex.G) (p. 107) [see p. 79] ; that property sold free from encumbrances. Reads 3rd paragraph.
4. According to then existing occupation law, the mortgagee debts were completely then discharged in September, 1943, and were regarded by all parties, vendor, purchaser and mortgagee, were so regarded and well as in fact then paid off. 20

p. 9 judgment (top). [See p. 24.]

Submits that last sentence of 1st paragraph p. 9 judgment is incorrect. [See p. 24, line 30.]

That statement of frustration in September, 1943, cannot be supported. Submitted that what stated in this passage unsupportable, this was a sale of No. 48 Kennedy Road, free from incumbrances. Not a severable agreement.

Purchaser would not have touched property at time if mortgages not paid off, and vendor would not have either. P. 7 of judgment 3rd para. [See p. 23, line 18.] Judge agrees that agreement not severable.

Bottom page 5 judgment. [See p. 22, line 18.] Hailsham Vol. VII, 30 p. 218. Debts in fact paid off in September, 1943. Law then compelled debts to be paid in Military Yen, heavy penalties.

Ordinance 24 of 1948 and Ordinance 32 of 1948. Section 3(2) (32 of 1948). Mortgagee did not demand payment, payment was tendered. Section 11. Section 11 expressly says that mortgage under those circumstances shall be deemed not to be extinguished or diminished.

Submitted that whole object of mortgage is to create charge on land.

Result of this Ordinance is that mortgage attaches to land.

Judge said only personal covenant stands—submits that cannot be so. Mortgage attaches to land. Personal covenant always present even if 40 not in mortgage. If mortgage not extinguished, and say it is not, it must affect land. No frustration to bona fide purchaser. No provision in Ordinance to protect bona fide purchaser.

Ordinance 34 of 1948, Section 2(4). Section 8(2).

If parties had chosen to interrupt their agreement for sale, they could have registered it in due course our own Registrar would have copied the green ink entries on the register.

By section 8(2) the mortgages would have been struck out. Means that mortgages would still be attached to land.

Mortgage debts were paid and property was discharged from all incumbrances and ordinance 24 of 1948 throws back to 1943 and says mortgages not to be discharged.

'Deemed not to have been extinguished.' No protection to purchaser.

Judgment gives protection to purchaser, whereas submitted that legislature passed over bona fide purchaser—legislature under blink and forgot about bona fide purchaser.

10 Top page 6 judgment, [See p. 22, line 22.]  
and top of page 7. [See p. 23.]

Attaches no importance to implied term. P. 230 Record—counsel agreed practice. This may be adopted in this case. Understood by all that it would be paid off in this way, and in fact it was.

Frustration not based on implied term, but express agreement that mortgages were to be paid off.

Page 227 Record.

Judgment p. 7, 2nd para. [See p. 23, line 6.]

Dissent from last paragraph. [See p. 23, line 14.]

20 Ordinance makes contract impossible. Top p. 8. [See p. 23, line 28.]  
P. 219 Record, p. 220.

Contract destroyed by Ordinance throwing back to 1943.

One could pay off all the mortgages again, but that would be making new contract. If paid now it would mean paying \$103,000. Constantine's case.

(Sheldon; Woo could have passed property if he wished by going to Registrar and passing property, and so not impossible).

Oh, yes, it could have been done now by paying all this extra \$103,000. Judgment p. 31. [See p. 23, line 28.]

30 Under Japanese law could not get legal estate.  
Mortgage not extinguished.

Adjourned 5 minutes at 11.45 p.m.

Resumed at 12.00 noon.

Appearances as before. Woo could and matter now, but have to pay \$103,000. Debtor & Creditor Ordinance takes legal estate from purchaser. 9th Edition Coote on Mortgages, page 10.

Page 8 of judgment say only personal covenant left. If that so mortgage is extinguished. Judgment does not say 'diminished.' No legal fiction. [See p. 23, line 28.]

40 Stroud Judicial Dictionary—'Deemed,' p. 487 'With the attendant consequences.' 60 L.J. Q.B. 379, at p. 380—'Deemed.'

Ordinance states debts deemed not to be extinguished.

'Security shall be deemed not to have been extinguished or diminished.' R. v. Westminster Assessment Committee 1917 1 K.B. at p. 832 at p. 838. 'The intention is to treat as a fact.'

1917 2 K.B. 129 at 139. Judgment not given sufficient attention to word 'deemed.'

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

P. 31 judgment. [See p. 23, line 28.]

Consequences of legal fiction not set out in 11(2) but 11(1). Judgment states that if purchaser buys legal estate he is freed from mortgages—cannot be so.

Bona fide purchaser is not freed. Chief Justice read into Ordinance at conclusion of section 11(1) 'provided that where property affected by such mortgage has, after a purported discharge thereof, been transferred to a bona fide purchaser, the title of such bona fide purchaser shall prevail against original mortgagee.'

Cannot read that into Ordinance. Ordinance left purchaser to common law rights—deliberate omission from Ordinance. Judgment states bona fide purchaser's title better than mortgagee, but Ordinance does not state so.

Bona fide purchaser cannot be relieved or Ordinance will say so. Ordinance states creditor is to be protected. States Ordinance 34 of 1948 supports this.

Only Legislature can *casus omissus*. 31 Hailsham 497–8. Para. 635 *ex parte* St. Sepulchres Church 33 L.J. Ch. 372 at 375 Guardians of the Poor, Bristol v. W. W. Co., Bristol 379 at 380 (1914) App. Cases 1914. Bona fide purchaser's claim cannot be maintained under section 21 and authority. Section 11(2) passed for protection of creditor—entirely for protection of creditor. Legal estate in register in mortgagees. Mortgagees have a perfect title. Section 11(2) has nothing to do with this case. Consequences of legal fiction set out in 11(1) not 11(2).

Adjourned to 2.30 p.m. at 12.50 p.m.

2.30 p.m. Court resumes.

Parties as before.

POTTER: P. 8 of Judgment. [See p. 23, line 28.] P. 9. [See p. 24, line 18.] Parties thought they were discharging mortgages once and for all. Contract of 1943 different after Ordinance 24 of 1948. Defendants paid off in September, 1943. By reason of 24 of 1948, mortgages are again attached to land, and can now only be discharged in Hongkong dollars, while they were actually discharged in September 1943.

Law of frustration.

This clear case of frustration.

Legislation affects contract as agreement for sale, because the contract provided expressly that mortgage debts shall be discharged and in contemplation of parties could only be discharged by payment of military yen and in accordance with the then existing law of Hongkong.

New Ordinance affects whole position, and in fact mortgages deemed not to have been discharged. If agreement for sale had been in 1st August 1943 to take place on 31st August 1943, British Court would not enforce.

If contract on 1st August, 1945, to take place at end of September 1945 and if this law comes into force in September 1945 no British Court would enforce contract.

Law alters basis of contract. Section 11(2) (a) gives back the security of the legally entitled. Question whether mortgages reattach to property.

Section 11(1) crucial title, section 11(2) (a) procedure. Position of 1st mortgagee impregnable. Section 11(2) additional machinery where required. Mortgagee has to take no steps under 11(2) as he is fully protected.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

Section 11(2) only comes into effect where right of creditor have been deemed not to have been extinguished. Frustration same to both parties, if bomb had fallen on property, there still would be frustration. The agreement is one indivisible agreement.

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

10 Contract of September 1943 has been destroyed by effect of subsequent legislation. If legislature had set bona fide purchaser had title he would, but Ordinance does not say so. Can frustration apply to sale of land. Cricklewood case (1945) A.C. 221 at 228. Fundamental part of contract that mortgages be paid off. Agreed mortgages paid off in *Military Yen-Hirji Mulji v. Cheong* (1926) A.C. at 509. By impossible—means that it cannot be effected by the parties now in the terms contemplated when it was made. Pollock on Contract p. 224—impossibility. Vendor would not have agreed to pay \$103,000 now. 29 Hailsham p. 337-38. Agreement for sale of land.

20 Contract for sale of land can be frustrated like any other contract. Held though dictum in this Court that can have frustration in agreement for sale of land O.J. 159/1947 pages 5 & 6. Two cases supporting this in England. *London, etc. v. Schlesinger* (1916) 1 K.B. p. 20 at p. 23-4.

*Whitehall Court v. Ellinger* 1920 1 K.B. 680, p. 685-7.

*Macra v. Barclay* 1945 1 K.B. 148. Other side may say can be performed now. Impossible means cannot do it in the terms agreed upon by parties at time of contract.

20 Hailsham 177. 29 Hailsham 364 para. 498. Cricklewood case 1945 A.C. 233. p. 245.

30 *Bailey v. De Crespigny* L.R. 4 Q.B. 180 at 185, 186. Impossibility 'To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made.' Cricklewood case p. 240 at bottom.

Agreed to discharge by Military Yen, now that not so.

*Constantine's case*, 1942 A.C. 154, at p. 172. 'Where circumstances arise which make the performance of the contract impossible in the manner and at the time contemplated.'

If land re-attached, can it be said that parties contemplated that p. 182.

40 p. 133 half way down 'there has been so vital a change in the circumstances as to defeat the contract.' P. 187, p. 188, top if parties go on with frustrated contract, it is a new contract. Contract now not as parties contemplated at all. *Denny, etc. v. Fraser & Co.* 1944 A.C. 265 at p. 274, bottom and top p. 275—date for making decision—doctrine of frustration.

P. 281 3rd para. 7 Hailsham 218. *Bailey v. De Crespigny* (1869). *Newington v. Cottingham* 1879, 12 Ch. D. 725 at 731 1924 A.C. 176 *Reilly v. the King* at p. 180. Submits this clear case of frustration if under section 11(1) the mortgage reattaches to land.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

In Ordinance 24 of 1948 why legislature completely silent about bona fide purchaser. Can such a purchaser be protected now? Clear that Ordinance 34 of 1948 revives mortgages.

Adj. till 10.30 to-morrow.

(Sd.) A. D. SCHOLES,  
*Acting Puisne Judge.*

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

31.5.49 at 10.30 a.m.

Court resumes. Parties as before.

POTTER continues: Possibility not mean that whole contract gone, but the fundamentals have gone. Denny Mott's case. 1944 A.C. 465. 10  
Contract not severable here. Cricklewood case. If any fundamental portion goes and contract not severable, whole contract goes. Ordinance No. 34 of 1948. Reads section 11(1) Ordinance 24 of 1948. 'Deemed.' In this case mortgages voluntarily originally paid off and so 'deemed.' In 1943 mortgagees had right to enter into property and right to foreclosure.

Short of Registration, notice not sufficient Land Registration Ordinance. Entries of mortgages in land Registry. Mortgages revived by section 11(1) of 24 of 1948. Ordinance shows that mortgages not satisfied, otherwise section 11(1) useless. If Woo gets specific performance he can deal with land. In absence of mortgagees in this case, Court cannot give order. 20

Ordinance 34 of 1948. Affects voluntary transaction put through during occupation. Section 3. Green ink entry shall have all force of entry made at time of transaction, and to last for two years.

Section 4, section 5, section 6, section 7, Any assignment in Japanese occupation made as green ink entry and binding on everybody. If green ink entries had been made with this property the mortgages would be discharged and Woo would have purchase, but no green ink entries. Section 8(2). Discharge in green ink deleted. Then result of 8(2) is that registrar is bound to strike out re mortgages and Woo only gets title subject to mortgage. Would any purchaser take property encumbered. Mortgagee have legal 30  
title can obtain legal titles. Section 11(1) revives mortgages, frustration.

Frustration.

Can contract that basis of contract has gone—that mortgages shall be discharged in 1943. Tamplin, etc. v. Anglo, etc. 1916 2 A.C. 407. Bank Line v. Epel (1919) A.C. 443. If Court in favour of Appellant, could not order payment in yen, or in dollars at 4 to 1, but suggest Order would be \$400=1,000 Yen, interest for purchaser—purchaser get equivalent of 68,000 Yen, and interest, and parties back in original position. Profit does not apply in frustration cases—site might have been bombed—frustration just the same. For these reasons clear frustration if construction of 40  
Ordinance accepted. If parties in 1943 had imagined that they were not discharging property from mortgages neither party would have entered into contract. If mortgage does not attach to property, still frustration as law changed and not what parties contemplated, that mortgages should still

subsist, agreed that mortgages should be discharged in 1943. If section 11(1) attaches to property does not matter if transaction completed or not. In this case transaction never was completed.

D'ALMADA : Will give figures worked out. Amount due 1st mortgage in September 1943 in round figuring \$80,000 interest plus capital—discharged. September 1943—20,000 Yen, there 20,000 Yen, now revalued at \$6,400 amount outstanding now is the difference, i.e. \$73,000. 2nd mortgage in September 1943 34,200 paid off with 8,550 Yen—\$2,400 by  
10 Schedule—amount outstanding on 2nd mortgage \$32,000.

Woo liable to pay 104,000 to two mortgages on account of Ordinance. If not for Ordinance mortgages would be redeemed and Woo in pocket of 42,000.

(SHELDON, at time of transaction ; Yen 1 to \$4 Hongkong, evidence on that). Black market rate not taken in sale.

In Equity the specific performance of this agreement should not be made. Basis on which equity gives specific performance is to do justice to parties. Discretionary remedy exercised with great caution. If not exercised party left to his rights at law. Basis is to do justice to parties.

20 Regler v. White 33 L.J. Ch. 569. P. 570, 571 Col, 1 end of 1st para. Barendale v. Seale 24 L.J. Ch. 385, 386, 387, bottom page 1st column—top 2nd column.

Specific performance not given there. No question of fraud or unfair dealing in those cases. In present case para. 11 of Defence sets out hardship. Relied in this case on para. 10 of Defence, Hardship on account of Ordinance 24 of 1948.

P. 9, judgment. [See p. 24, line 32.]

30 Defence based on broad ground that in this case Court of Equity would not give specific performance on account of hardship. Hardship that if specific performance Woo loses house and has to pay mortgagees. Bargain—in Barendale v. Seale—Fairly made. Court refused specific performance because hardship to vendor. To decree specific performance would enforce new contract between parties, and new contract work hardship. If no new contract, specific performance should be refused for hardship. Hardship brought about by retrospective Ordinance which neither party dreamt of at time, whereby mortgage debt undischarged. All card v. Walker 1896 2 Ch. 381. If parties contract on mistaken view of rights, relief may be given. Stone v. Godfrey 23 L.J. Ch. 769 at column 1 bottom 774, and starting next column.

40 Mistake—though mortgages discharged, not so.

Retrospective legislation never thought of by parties in 1943.

Question of guarantee. 31 Hailsham pages 366, 367 paras. 414, 415, 369, paras. 419, 420. Mortock v. Buller (1804) 10 Vaisey 292, 295, 296, 301, 305, 307, 310, 312, 313.

Wedgewood v. Adams 49 E.R. 958, 959 top, 859 bottom, 960. Great N. Railway v. Sanderson 25 Ch. D. 788, 793, 794.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdic-  
tion.

—  
No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
continued.



In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

Submits that hardship that would arise in this case if specific performance has nothing to do with wealth of parties, but that Woo loses house and has to pay mortgagees, value of house irrelevant. There should be no decree of specific performance.

Defence also that parties divided by line of war, but in Full Court Appeal No. 19/1948, but reserves right if goes to Higher Court.

Adj. to 2.15 p.m.

(Sd.) A. D. SCHOLLES.

2.15. Court resumes.

Appearances as before.

10

SHELDON : *Hardship*. Does not think this argument pressed. Certain facts in case. Appellant invoking equitable jurisdiction, surrounding circumstances. In 1943, Woo entered into what D'Almada said to be fair bargain. Fraud, forgery, undue influence by Japs, all argued in other Court. No doubt undue influence withdrawn by implication.

At time of trial 1st mortgagee through solicitors Lo & Lo, reserved right. 2nd mortgagee had unequivocally withdrawn right of claim. Letter of Woo not straightforward. P. 9 of judgment. [See P. 24, line 32.] Last para.—Cannot be disputed—facts correct and not disputed. Pegler v. White refused specific performance for if not one party would be involved in expensive litigation with third parties. In none of cases cited by D'Almada had purchase money been paid. Judgment bottom page 30 to middle page 32. [See p. 23, line 14.] If this Court does so, it will rule that agreement for sale of land.

Can be frustrated for the first time in any Court. Many mortgages completed before Ordinance will have been wrongly completed if Potter right. If Potter right, all cases where there have been specific performance will not have passed legal estate. Agreed to convey 48 Kennedy Road, free of encumbrances—not stated that encumbrances are to be paid off in Military Yen. It was a binding agreement. Ordinance 24 of 1948. Section 3. Discharge during occupation period of preoccupation debts. Section 11(1), not mortgage, but right of creditor. Section 11(2). If mortgagee applies, Court would replace with other security; if no other security, cannot get blood out of stone.

Mortgages have been discharged and do not attach to the land. No one will contend that before passing Ordinance the mortgages were not discharged. On passing of Ordinance, they shall 'deemed' not to be discharged with consequences following in section 11(2). Why use word 'deem'? It is legal fiction.

Page 8 of judgment. [See p. 23, line 36.]—'Under the existing law' refers to occupation law. Mortgagee having lost right in land is given certain rights. Land Transactions Ordinance.

Suggested that entry on register means person entered has legal estate (Potter states he does not say so). Section 8(2). Not a Japanese assignment under Ordinance. Under section 8(2).

Frustration—difficulty of applying facts to the propositions.

In cases cited the contract has literally come to an end.

40

Morgan v. Manser 1948 1 K.B. 184 (goes through cases fully). Woo could fulfil contract to-morrow by signing, without first paying plaintiff money. Denny's case 1944 A.C. 265, 281, 282. 12th edition Pollock on Contract, p. 247. Woo can complete contract to-morrow. Mortgagees rights are clear. Conley v. I.R.C. 1899 A.C. 211 "Deemed"—  
23 Hailsham 228.

Bradley v. Munton 15 Beavan 460—Vendor stating his title is bad. Suggests 23 Hailsham 228, 354, section 11(1) does not revest the legal estate.

- 10 D'ALMADA : His agreement is taken seriously. 1st mortgagee reserved rights from beginning. 2nd mortgagee has now made claim. Mortgagees originally paid off. Writer of the letter attached here he did not come and give evidence. No demand made for payment by either mortgagee when mortgages paid off. Hardship resulting from specific performance as stated this morning. Section 11, Ordinance 24 of 1948. No Court has dealt with case like this, in respect of sale of land, under this section. No case that cannot be frustrated in case like this. Section 11 does not say mortgage not extinguished, but right of creditor. 'The rights' of creditor. Meaning of word 'deemed.' Rights not divested. After payment of legal estate  
20 went to vendor, but legal estate under Ordinance goes back to mortgagee. There was a legal mortgage in 1st Mortgage. Section 11(2) (a) results from 'Deeming.' Beginning of Section 11(2). Sheldon states that mortgagee left out in cold.

Mortgages were discharged before Ordinance, and so had to use word 'Deem.' Legislature said rights not only not extinguished but not diminished. Ordinance 34 of 1948. Mandatory on Land Officer to delete green ink entries.

Frustration.

- 30 Morgan v. Manser 1948 1 K.B. 284. Nothing to prevent Woo paying off mortgages—but would that be same contract entered into in 1943, and would that be the terms contemplated at time in 1943. Pollock p. 224.

Constantine's case p. 172. 31 Hailsham p. 424, para. 509.

Here say by reason of change of law there has been a frustration, altering the contract from what parties contemplated and therefore contract at an end.

C.A.V.

(Sd.) A. D. SCHOLES.

10.6.1949.

WILLIAMS J. & SCHOLES J.

9.45 a.m. in Court.

- 40 6/1949 Full Court Appeal.

D'ALMADA and BERNACCHI (Woo) for Appellant.

MCNEILL and WRIGHT (Hastings) for Respondent.

Appeal dismissed with costs. Judgment of Court below confirmed.

(Sd.) A. D. SCHOLES,  
*Acting Puisne Judge.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 19.  
Notes of  
Scholes, J.  
on the  
Appeal to  
the Full  
Court—  
*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

**Joint Judgment of Williams and Scholes JJ. on the Appeal to the Full Court.**

Coram : WILLIAMS J.  
SCHOLES J.

No. 20.  
Joint  
Judgment  
of Williams  
and  
Scholes JJ.  
on the  
Appeal to  
the Full  
Court,  
10th June  
1949.

This is an appeal from a decision of the learned Chief Justice in which he ordered specific performance of an agreement dated the 18th August 1943, made between the Respondent's late husband, Koo Shiu Ting, alias Koo Wan Sing, and the Appellant, Hangkam Kwingtong Woo, for the sale of property known as No. 48 Kennedy Road, Hongkong.

The facts are not in dispute and are fully set out in the judgment. 10

Additional evidence was called before this Court, mainly in respect of a claim made by Ko Ho-ning, formerly 2nd mortgagee of the property, some time after judgment had been pronounced. In view of the fact that he had previously declared in writing that he had no further claim under the mortgage, his present statement contained in a letter of the 4th March 1949 that he now desired to claim the sum of \$39,034.92 because the previous money was accepted by him under duress, carried little if any weight with us.

The grounds of the appeal are (1) that the trial judge was wrong in law, and (2) that he was wrong in his application of the principle of equity to the facts. 20

Before considering the arguments in detail, we may summarise them briefly. Mr. Potter for the Appellant contended that the effect of the Debtor & Creditor (Occupation Period) Ordinance, No. 24 of 1948, was that the mortgages re-attached to the property and in consequence the agreement had been frustrated.

Mr. D'Almada submitted that specific performance of the agreement ought not to be ordered because of the equitable doctrine of hardship, the Appellant being now required by the provisions of the Debtor & Creditor Ordinance to pay a considerable sum to discharge the mortgages, though they were discharged to the satisfaction of both mortgagees in September, 30 1943.

Mr. Sheldon contended for the Respondent that the effect of the Debtor & Creditor Ordinance was to give the mortgagees only a personal covenant enforceable against the Appellant: that there had never been any decision of a Court that an agreement for a lease could be frustrated. He also submitted that the correct principles of equity had been rightly applied by the trial judge in coming to his decision.

It is first necessary to consider the effect of the Debtor & Creditor Ordinance on the relations between the mortgagees and the Appellant.

Both mortgages were pre-occupation mortgages and were completely 40 discharged by payment in Military Yen at about the time of the agreement but without repayment having been demanded. The 1st mortgagee, in fact, executed a reassignment of the mortgage. As assignment of the property was executed in favour of the purchaser in English, Chinese, and Japanese,

but the transaction was never carried to completion by registration either with the Japanese or later after the occupation.

Under the agreement for sale the Appellant undertook to give a title free from encumbrances and the mortgages were paid off to the satisfaction of both mortgagees. By reason of section 3(2) (ii) of the Debtor & Creditor Ordinance, the payments made in Military Yen are subject to a re-valuation, the result of which is to make the Appellant now liable to pay considerable sums to each mortgagee before there is a valid discharge of the mortgage debts.

10 We come then to the interpretation of section 11 of the Debtor & Creditor Ordinance. Mr. Potter contends that the effect of section 11(1) is that the mortgages reattach to the property which is therefore not free from encumbrances. Mr. Sheldon, on the other hand, contends that the mortgagees have only a personal covenant against the Appellant which he can discharge by payment or by replacement with equivalent securities.

Section 11 of the Debtor & Creditor Ordinance reads :

“ Reinstatement of securities.

20

11.—(1) In any case where a debt purporting to have been discharged in whole or in part by payment in occupation currency is by virtue of the provisions of this Ordinance deemed to be wholly or partly undischarged at the commencement of this Ordinance and where the payment of such debt before such purported discharge as aforesaid was secured by any mortgage charge lien guarantee indemnity or other form of security the rights of the creditor in relation to such mortgage charge lien guarantee indemnity or other form of security shall be deemed not to have been extinguished or diminished by such purported discharge.

30

“ (2) Where the rights of a creditor in respect of a security have been deemed by virtue of sub-section (1) of this section not to have been extinguished or diminished—

40

“ (a) the creditor may give notice in writing of not less than one month calling upon the debtor and any third party who furnished the security to reinstate or replace such security and to execute all documents and do all acts necessary for that purpose ; and in default of compliance therewith the Supreme Court may, on application by the creditor on an originating summons, make such order as to the Court shall seem fit to reinstate the security or replace it with other equivalent security and to execute all documents and do all acts necessary for that purpose.

“ (b) where any person neglects or refuses to comply with an order under paragraph (a) of this sub-section directing him to execute any such documents or to do any such acts the Court may on such terms and conditions if any as may be just nominate any person to execute such documents and to do such acts and any document so executed or act so done shall operate for all

In the Supreme Court of Hongkong Appellate Jurisdiction.

No. 20.

Joint Judgment of Williams and Scholes JJ. on the Appeal to the Full Court, 10th June 1949—

*continued.*

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 20.  
Joint  
Judgment  
of Williams  
and  
Scholes JJ.  
on the  
Appeal to  
the Full  
Court,  
10th June  
1949—  
*continued.*

“ purposes as if it had been executed or done by the person  
“ originally directed to execute or do the same.

“ (c) the creditor may give notice in writing to any company  
“ the stock share bonds or debenture of which were subject to any  
“ charge to such creditor by way of a security as aforesaid and  
“ upon the receipt of such notice such company shall not permit  
“ or record any transfer of such security until the debtor or any  
“ third party who has furnished the security has reinstated or  
“ replaced such security or in default thereof the Supreme Court  
“ has made an order under paragraph (a) of this subsection.” 10

The important part of section 11(1) so far as this case is concerned is :

“ where the payment of such debt before such purported discharge  
“ as aforesaid was secured by any mortgage . . . the rights of the  
“ creditor in relation to such mortgage . . . shall be deemed not  
“ to have been extinguished or diminished by such purported  
“ discharge.”

It is considered that the legislature used the word “deemed” because the section deals with debts which at the time of repayment had in fact been discharged in whole or in part. In respect of the meaning of the word “deemed,” Reading C. J. said in *The King v. The Westminster Assessment Committee* (1917) 1 K.B. 832 at 838 referring to the word ‘deemed’ in section 65 of the Valuation (Metropolis) Act, 1869, that the intention is to treat as a fact something which has not been established as a fact—even something which can be shown not to be a fact. In *The Queen v. The County Council of Norfolk* 60 L.J.Q.B. 379 Cave J. said :

“ When you talk of a thing being deemed to be something, you  
“ do not mean to say that it is that which it is deemed to be. It  
“ is rather an admission that it is not what it is to be deemed to  
“ be, and that, notwithstanding it is not that particular thing,  
“ nevertheless for the purposes of the Act, it is to be deemed to be 30  
“ that thing.”

In *ex parte* Walton 50 L.J. Ch. 662 James L.J. said :

“ When a statute enacts that something should be ‘deemed’  
“ to have been done, which, in fact and truth, was not done, the  
“ Court is entitled and bound to ascertain for what purposes and  
“ between what persons the statutory fiction is to be resorted to.”

Mr. Potter submitted that the object of section 11(1) was to protect the creditor (the mortgagee), the vendor and the purchaser being left to their rights at common law or equity. The construction put on section 11 by the trial judge is contained in the following passage on page 8 of his judgment :— 40

“ Once the legal estate had (under the then existing law) been  
“ got in from the mortgagees and the property assigned to the  
“ purchaser, I do not think section 11 would have operated to  
“ divest the legal estate. No doubt the mortgagor would have

10 “remained liable on his personal covenants to comply with section 3, but as regards the legal estates of the mortgagees section 11(1) merely provides that the mortgages shall be *deemed* not to have been extinguished, i.e. it creates a legal fiction, and the consequences of this legal fiction are set out in section 11(2). There is nothing in section 11(2) to suggest that where, under the law existing before the Ordinance, a mortgagee has lost the legal estate in favour of a purchaser, the purchaser must provide security. The vendor could not revive the mortgage once a purchaser had acquired the legal estate and all he could do, or be ordered by the Court to do, would be to replace the mortgage with equivalent security.”

In the Supreme Court of Hongkong Appellate Jurisdiction.

—  
No. 20.  
Joint Judgment of Williams and Scholes J.J. on the Appeal to the Full Court. 10th June 1949—  
*continued.*

Mr. Potter contended that section 11(2) was machinery which a creditor could use if he considered it of assistance but that it was unnecessary for the 1st mortgagee to do so, as by section 11(1), the legal estate again vested in him.

Are the consequences of the legal fiction set out in section 11(1) as Mr. Potter contends or in section 11(2) as was found by the learned judge?

20 It is therefore necessary to consider the purposes of the Ordinance. Its short title is “the Debtor and Creditor (Occupation Period) Ordinance.” The important sections are 3, 4 and 5: they fix the basis for payment of debts contracted before and during the occupation period. They are operative between a debtor and his creditor or, as in the present case, between a mortgagor and the mortgagee. We come then to section 11. By section 11(2), where the legal fiction set out in section 11(1) exists, the mortgagee may call on the mortgagor to reinstate the mortgage or replace it. If the mortgage by section 11(1) attached itself to the property, what is the object of stating in section 11(2) that a creditor may call on his debtor to replace the security as an alternative to reinstating it? Only in one case 30 may any creditor call on any other person but the debtor to reinstate or replace the security—namely, where a third party has furnished the security, which is not applicable here.

Should the mortgagor not reinstate or replace the security, the mortgagee may apply to the Court and the Court may order the mortgagor to do so. If the mortgagor, having got in the legal estate from the mortgagee, assigned it to a purchaser during the occupation period, then in our opinion the mortgagor cannot now reinstate it, nor will the Court order him to do so. Mr. Potter argues that the legislature under the Ordinance deliberately afforded no protection to a bona fide purchaser. In our opinion 40 this is not so, because the rights of the creditor under section 11(1) are limited under the provisions of section 11(2). There must be many cases where the mortgagor has, during the occupation period, paid off the mortgage and then assigned to a purchaser—in fact the property may have subsequently passed through many hands.

There is no reason why the mortgagee should be put in the very privileged position vis-a-vis a bona fide purchaser for which Mr. Potter contends. We hold that, on the reading of the Ordinance as a whole, the

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 20.  
Joint  
Judgment  
of Williams  
and  
Scholes JJ.  
on the  
Appeal to  
the Full  
Court,  
10th June  
1949—  
*continued.*

mortgagee in this case under the legal fiction contained in section 11(1) retains his rights to the legal estate as between himself and the mortgagor only and that once the mortgagor had assigned to a bona fide purchaser, the only remedy for the mortgagee is to call on the mortgagor to provide equivalent security. The word "deemed" is operative here only between the mortgagor and mortgagee, and without prejudice to the rights of a bona fide purchaser. We therefore agree with the construction put on section 11 by the trial judge.

We come next to deal with the question of frustration. The agreement in 1943 was for the sale of No. 48 Kennedy Road free from encumbrances: 10  
it was not a severable but a complete agreement. Mr. Potter argued that as the mortgage by section 11(1) of the Debtor & Creditor Ordinance now attached to the property freed in 1943, the property could not be sold free from encumbrances and, therefore, performance of the contract was impossible in the manner contemplated in 1943. It was on this construction of section 11(1) that he mainly argued the question of frustration. In reply to a question put by the Court he submitted that, even if the learned judge was correct that the mortgagee had only a remedy on the personal covenant, the doctrine of frustration would still apply.

Applying the definition of frustration given by Viscount Simon in 20  
Cricklewood Property & Investment Trust Ltd. v. Leighton's Investment Trust Ltd., 1945 A.C. 221 at 228, can it be said that the effect of the passing of the Debtor & Creditor Ordinance is so fundamental as to be regarded both as striking at the root of the agreement and as entirely beyond what was contemplated by the parties when they entered into the agreement. The passing of the Ordinance was clearly beyond what either vendor or purchaser contemplated. Its effect is that the mortgagor is now liable to pay additional sums to the mortgagees. Is that so fundamental that it strikes at the root of the agreement? The foundation of the contract was that the vendor would assign the lease to the purchaser free from encumbrances and the 30  
purchaser would pay the agreed purchase price. The latter has fulfilled his portion of the agreement: there is nothing to prevent the vendor now fulfilling his part of the agreement. Lord Goddard at p. 245 of the Cricklewood case when considering frustration has also emphasised that frustration applies only where the foundation of the contract is destroyed so that performance is no longer possible. Obviously in this case performance is now possible and we consider the judgment of the trial judge correct that there was no frustration.

We come finally to the question of whether the Court should order specific performance of the 1943 agreement. The trial judge has set out 40  
very lucidly his decision and his grounds for it at pages 9 and 10 of the judgment. [See p. 24, line 32 to end.] The relevant portion reads:

"There remain the questions of unfairness and hardship—matters which arise when an equitable remedy is sought. Now there is no evidence that the purchase price of the property fixed by the agreement was unfair or inadequate. 'The black market' exchange for yen was falling in the latter part of 1943 but there is no evidence as to the extent that the 'black market'

rate had diverged from the Japanese official rate by the date of the agreement. There is certainly no evidence that the agreed price was so grossly inadequate as to be evidence of fraud. See Hailsham, Vol. 31, page 371, paragraph 425, and the cases there cited. All that has happened is that it will now be much more expensive for the vendor to carry out the agreement than he had expected, but, as I have pointed out, the vendor would have to meet this extra expense whether the agreement is specifically performed or not. He is merely losing the chance of setting off against this extra expense the profits he could, but for the agreement, have made by selling in the more favourable market of to-day. If it had so happened that the value of the property had dropped below the price paid, the vendor would certainly suffer no hardship if he was now asked to complete. In fact the price of the property has soared, and this being so the vendor has made a bad bargain. A bad bargain in itself cannot amount to unfairness or hardship and there is no doctrine of equity to deprive a purchaser of a good bargain if it has been fairly made."

Mr. D'Almada for the Appellant based his defence in equity solely on the broad ground that to decree specific performance would work hardship on the Appellant. At the trial, allegations of fraud on the part of the Respondent's late husband raised in the pleadings were abandoned by the Appellant. Allegations of duress or undue influence (e.g. that the purchaser was influential with the Japanese) were made at the trial, but there was no evidence whatever to support them and the learned judge expressed his surprise that these allegations were not withdrawn. Before us, Mr. D'Almada did not contend that there was anything whatsoever in the conduct of the purchaser to merit censure.

Mr. D'Almada cited a number of cases on the doctrine of hardship with respect to a decree of specific performance but none are, in our opinion, of great relevance in connection with the present case. We must consider the general principles applicable. The discretion of the Court to grant specific performance is not exercised if the contract is not "equal and fair." The unfairness, as a rule, must be determined at the time the contract was made. That a contingency turns out adversely to one party does not render the contract unfair (paragraphs 414 and 415 of 31 Hailsham, p. 366). As a general rule hardship, to operate as a ground of defence, must be such as existed at the time of the contract, and not such as has arisen subsequently from a change of circumstances (paragraph 420 of 31 Hailsham, p. 369). We can find no reason to differ from both the reasoning and conclusion of the trial judge in the exercise of his discretion to decree specific performance.

The result is, therefore, that the appeal is dismissed with costs and the judgment in the Court below confirmed.

(Sd.) E. H. WILLIAMS,  
*President.*  
10.6.49.

(Sd.) A. D. SCHOLES,  
*Appeal Judge.*  
10.6.49.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

—  
No. 20.  
Joint  
Judgment  
of Williams  
and  
Scholes J.J.  
on the  
Appeal to  
the Full  
Court,  
10th June  
1949—  
*continued.*



## No. 21.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

Petition for Leave to Appeal to the Privy Council.

TO THEIR HONOURS THE JUDGES OF THE SUPREME COURT OF HONGKONG.

THE HUMBLE PETITION OF HANGKAM KWINGTONG WOO, of  
No. 48 Kennedy Road, Victoria, in the Colony of Hongkong, Solicitor.

No. 21.  
Petition  
for leave  
to appeal  
to the  
Privy  
Council,  
18th June  
1949.

RESPECTFULLY SHEWETH :

1.—That on the 24th day of May 1948 a Writ of Summons was issued out of the Supreme Court of Hongkong in Original Jurisdiction Action No. 146 of 1948 at the suit of Liu Lan Fong, alias Liu Ah Lan (Plaintiff) against Hangkam Kwingtong Woo (Defendant) for a declaration that the said Liu Lan Fong, alias Liu Ah Lan as the sole executrix and beneficiary of the late Koo Shui Ting, alias Koo Wan Sing deceased was the sole beneficial owner and entitled to the possession of the piece of land registered in the Land Office as Inland Lot No. 2153, together with the dwelling house thereon known as No. 48 Kennedy Road and the garage appertaining thereto and that the said Hangkam Kwingtong Woo had no right or title to the said property. 10

2.—That on the 2nd day of June 1948 the said Hangkam Kwingtong Woo entered an Appearance to such Writ of Summons. 20

3.—That the said Action came on for hearing before His Honour the Chief Justice Sir Leslie Bertram Gibson Kt. K.C. on the 9th, 10th, 11th and 18th of February 1949.

4.—That on the 25th day of February 1949 His Honour the Chief Justice delivered Judgment in the said Action in favour of the Plaintiff the said Liu Lan Fong, alias Liu Ah Lan wherein it was adjudged that the Plaintiff the said Liu Lan Fong, alias Liu Ah Lan, was entitled to specific performance of the Agreement in the said Judgment mentioned dated the 18th day of August 1943 made between the said Koo Sui Ting alias Koo Wan Sing and the said Hangkam Kwingtong Woo for the sale of the said property for the price of 68,000 Military Yen by the said Hangkam Kwingtong Woo to the said Koo Sui Ting alias Koo Wan Sing free from encumbrances consisting of two several mortgages whereby the total principal monies secured amounted to \$103,000 Hongkong Currency and to the costs of the said Action. 30

5.—On the 12th day of March 1949 the said Hangkam Kwingtong Woo filed a Notice of Motion that the Full Court should be moved on the 30th day of May 1949 or so soon thereafter as Counsel for the Appellant might be heard for an Order that the said Judgment of His Honour The Chief Justice dated the 25th day of February 1949 in the said Original 40

Jurisdiction Action No. 116 of 1948 whereby it was adjudged that the Respondent was entitled to specific performance of the Agreement in the said Judgment mentioned and costs to be taxed might be rescinded and that it might be ordered that specific performance of the said Agreement be refused and that the costs of that Action and of the Appeal should be paid by the Respondent to the Appellant.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

6.—That the said Motion was heard before this Honourable Court by His Honour the Puisne Judge and His Honour Mr. Justice Scholes on the 30th and 31st of May 1949.

No. 21.  
Petition  
for leave  
to appeal  
to the  
Privy  
Council,  
18th June  
1949—  
*continued*

10 7.—That on the 10th day of June 1949 His Honour the Puisne Judge and His Honour Mr. Justice Scholes gave Judgment dismissing the Appeal with costs.

8.—Your Petitioner the abovenamed Appellant feels himself aggrieved by the said Judgment of this Honourable Court dated the 10th day of June 1949 confirming the Judgment of His Honour the Chief Justice dated the 25th day of February, 1949 and desires to appeal therefrom.

20 9.—The Appeal involves directly some claim or question amounting to the value of upwards of H.K. \$5,000.00 as the present value of the property is at least H.K. \$250,000—and as one of the matters to be decided is whether the Appellant is liable to pay to the said mortgagees the said sum of \$103,000 plus interest. The question involved in the Appeal is also one of great general and public importance and which ought to be submitted to His Majesty in Council for decision. It concerns *inter alia* the applicability or otherwise of the doctrine of frustration to the said Agreement and the construction of certain sections in the Debtor and Creditor (Occupation Period) Ordinance No. 24 of 1948 and in the Land Transfer Ordinance No. 34 of 1948.

YOUR PETITIONER THEREFORE PRAYS :—

30 (1) That this Honourable Court will be pleased to grant your Petitioner, the abovenamed Appellant, leave to Appeal from the said Judgment of this Honourable Court to His Majesty the King in Council.

(2) That this Honourable Court may make such further or other order in the said premises as may seem just.

And your Petitioner the abovenamed Appellant will ever pray, etc.

Dated at Hongkong the 18th day of June 1949.

(Sd.) WOO & WOO,  
*Solicitors for the abovenamed Petitioner.*

(Sd.) LEO D'ALMADA

(Sd.) BROOK BERNACCHI

40 *Counsel for the abovenamed Petitioner.*

This Petition is filed by Messrs. Woo & Woo, Solicitors, of Prince's Building, Victoria, in the Colony of Hongkong, Solicitors for the abovenamed Appellant.

In the  
Supreme  
Court of  
Hongkong  
Appellate  
Jurisdiction.

No. 22.

Order Granting Provisional Leave to Appeal to Privy Council.

BEFORE THE FULL COURT THE 15TH DAY OF AUGUST 1949.

No. 22.  
Order  
granting  
provisional  
leave to  
appeal to  
Privy  
Council,  
15th  
August  
1949.

Upon the Petition of Hangkam Kwingtong Woo, the abovenamed Appellant, filed on the 18th day of June 1949, praying for leave to appeal to His Majesty in His Privy Council from the Judgment of the Full Court dated the 10th day of June 1949, affirming the Judgment of His Honour the Chief Justice dated the 25th day of February 1949 AND UPON reading the said Petition, the Notice of Motion, filed herein on the 18th day of June 1949 and the Affirmation of Hangkam Kwingtong Woo filed herein on the 18th day of June 1949 AND UPON hearing what was alleged by the Honourable Mr. Leo D'Almada e Castro K.C. and Mr. B. A. Bernacchi of Counsel for the Appellant, and by Mr. John McNeill and Mr. D. A. L. Wright of Counsel for the Respondent, and it appearing to this Honourable Court that this is a proper case in which to allow such appeal and the Respondent undertaking by her Counsel not to part with or otherwise deal with the premises No. 48 Kennedy Road until Judgment in the Appeal to His Majesty in His Privy Council shall be delivered or the said Appeal shall be withdrawn THIS COURT DOTH ORDER that subject to the performance by the Appellant of the Order of this Court by him to be performed hereinafter contained or hereinafter made and subject to the final Order of this Court to be made upon the due performance thereof Leave to appeal to His Majesty in His Privy Council against the said Judgment of this Honourable Court affirming the said Judgment of His Honour the Chief Justice be granted to the Appellant AND THIS COURT DOTH FURTHER ORDER that the Appellant will within three months from the date hereof obtain a Certificate of Satisfaction from Ko Ho Ning of the second mortgage of the premises No. 48 Kennedy Road and will sign a Memorial for the registration at the Land Office of the reassignment already executed by Kwong Sang Hong Limited the first mortgagees of the said premises and will execute a conveyance of the said premises to the Respondent free from all encumbrances and sign any other documents that may be necessary for that purpose AND that the Appellant do within three months from the date hereof enter into good and sufficient securities to the satisfaction of the Registrar of this Court in the sum of \$5,000 for the due prosecution of the appeal and for the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an Order granting him final leave to appeal or of the appeal being dismissed for non-prosecution or of His Majesty in Council ordering the Appellant to pay the Respondent the costs of the Appeal AND THIS COURT DOTH FURTHER ORDER that the Appellant do within the said period of three months pay the taxed costs of the Respondent directed to be paid to her by the said Judgment of the

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said Full Court AND THIS COURT DOth FURTHER ORDER that the record of this Appeal for His Majesty in His Privy Council be prepared and despatched from Hongkong within three months from the date of the hearing of the said Petition.

In the Supreme Court of Hongkong Appellate Jurisdiction.

Dated the 15th day of August 1949.

(L.S.)

(Sd.) C. D'ALMADA E CASTRO,  
*Registrar.*

No. 22.  
Order granting provisional leave to appeal to Privy Council, 15th August 1949—  
*continued.*

No. 23.

Order Granting Leave to Appeal to Privy Council.

No. 23.  
Order granting leave to appeal to Privy Council, 20th May 1950.

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Between

HANGKAM KWINGTONG WOO ... .. *Appellant (Defendant)*

v.

LIU LAN FONG alias LIU AH LAN ... .. *Respondent (Plaintiff)*

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Upon reading the Petition of the Appellant filed herein on the 18th day of June 1949 for leave to appeal to His Majesty in His Privy Council from the Judgment of this Honourable Court dated the 10th day of June 1949 affirming the Judgment of His Honour the Chief Justice dated the 25th day of February 1949 and upon reading the Order herein dated the 15th day of August 1949 made on the said Petition and the Certificate of the Registrar of this Court dated the 18th day of May 1950 of due compliance with the said Order and upon hearing the Solicitors for the Appellant and the Respondents THIS COURT DOth ORDER that the final leave to appeal prayed for be granted.

Dated the 20th day of May 1950.

(L.S.)

(Sd.) C. D'ALMADA E CASTRO,  
*Registrar.*

Exhibits.

A

Power of  
Attorney,  
from  
Appellant  
to Chan  
Un Chau.  
15th  
September  
1942.

## EXHIBITS.

## Exhibit A.—Power of Attorney from Appellant to Chan Un Chau.

TO ALL WHOM these presents shall come I HANGKAM KWINGTONG WOO of No. 48 Higashi Taisho Dori (formerly known as No. 48 Kennedy Road) Hongkong Gentleman SEND GREETING :

WHEREAS I am desirous of appointing an attorney to act for me in manner hereinafter appearing NOW KNOW YE that I the said Hangkam Kwingtong Woo do hereby nominate constitute and appoint CHAN UN CHAU (*Chinese characters*) of No. 56 Mongkok Road Kowloon Hongkong aforesaid Gentleman to be my true and lawful attorney in Hongkong aforesaid for me in my own individual and private capacity and also for me (so far as lawfully may be) in the capacity of Executor or Administrator or Trustee of or for any person or persons of or for whom I now am or hereafter shall be Executor or Administrator or Trustee in my name or in the name of my said Attorney or otherwise as occasion shall be or require from time to time and at any time or times during the continuance of these presents to do perform transact and effectuate all or any or either of the following acts deeds matters and things that is to say :—

1.—To ask for demand and receive all monies for the time being payable to me and all securities deeds and writings for the time being deliverable or transferable to me. 20

2.—To pay all monies for the time being payable by me and to deliver or transfer all securities deeds and writings and all real and personal property estate interests chattels and effects for the time being deliverable or transferable by or from me.

3.—To compromise settle and adjust any claim by or against me or any difference or dispute upon such terms as to my said attorney shall appear desirable.

4.—To prove in any bankruptcy or insolvency and to represent me in the matter of any composition or trust deed or any assignment for the benefit of creditors. 30

5.—To commence and prosecute or to compromise and determine upon such terms as to my said Attorney shall appear desirable any action suit or other proceedings that my said Attorney shall consider necessary or desirable in my behalf.

6.—To appear to and defend or to compromise upon such terms as to my said Attorney shall appear desirable any action suit or other proceedings instituted against me.

7.—To buy to sell to assign and transfer and to mortgage or hypothecate for such price or other consideration (whether a pecuniary consideration or not) or sum of money and upon such terms and conditions as my said Attorney shall think fit any debentures stocks scrip shares or interests in any corporation or other public company now or hereafter to be established at any place in which these presents may be lawfully exercised and to vote at any meeting of any such corporation or public company.

Exhibits.

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A

Power of  
Attorney,  
from  
Appellant  
to Chan  
Un Chau,  
15th  
September  
1942—  
*continued.*

8.—To enter upon and take possession of all the real and personal property estates interests chattels and effects now belonging or in mortgage or charge to or any time or times hereafter to belong or be in mortgage or charge to me or in or to which I now or hereafter shall have any estate interest or claim of whatsoever nature or description and to manage and demise or let for such rent and upon such terms and conditions as my said attorney shall think fit to accept surrenders of to mortgage or charge for such amount at such interest and upon such terms and conditions as my said Attorney shall think fit to sell by public auction or private contract for such price or other consideration (whether a pecuniary consideration or not) as my said Attorney shall think fit to transfer any mortgage or charge over to reassign to release any claim over to make partition of to exchange to grant rights of way over to convey or assign by way of gift or otherwise either with or without any consideration (whether a pecuniary consideration or not) or otherwise howsoever to effect dispose of or deal with upon such terms and conditions as my said Attorney shall think fit the said real and personal property estates interests chattels and effects or any or either of them or any part or parts thereof respectively.

9.—To repair and rebuild houses or other erections and fences and walls and to drain or otherwise improve the said real and personal property estates and interests or any or either of them or any part or parts thereof respectively and for all or any or either of the purposes of these presents to employ architects surveyors agents servants workmen and others and to pay to every person so employed such salaries wages or other remuneration as my said Attorney shall think fit.

10.—To invest any money of or belonging to me in or upon mortgage or equitable deposit or charge or in or upon any bill of sale or document of hypothecation whatsoever or in or upon such other security investment mode manner or way as my said Attorney shall think fit.

11.—Upon receipt of any monies for the time being payable to me or any securities deeds writings real or personal property estate interest chattels or effects for the time being deliverable or transferable to me full and sufficient receipts releases and acquittances to give sign and execute which receipts releases and acquittances shall exonerate the person or persons or company or corporation paying or delivering or transferring the monies therein expressed to be received and the securities deeds writings real or personal property estate interest chattels or effects therein expressed

Exhibits.  
 —  
 A  
 Power of  
 Attorney,  
 from  
 Appellant  
 to Chan  
 Un Chau,  
 15th  
 September  
 1942—  
*continued.*

to be delivered or transferred therefrom and from being concerned to see to the application thereof or from being liable for the loss misapplication or nonapplication thereof.

12.—To sell (either by public auction or privately) or exchange any part of my leasehold messuages lands tenements or hereditaments personal property or chattels or other effects for such consideration and subject to such covenants as he may think fit and to give receipts for all or any part of the purchase or other consideration money and the same or any of them with like powers to mortgage charge or pledge and also to deal with my real or personal property or any part thereof as he may think fit for the purpose of 10  
 paying off reducing consolidating or making substitution for any existing or future mortgage charge or pledge thereon or thereof or any part thereof and to make or concur in any transfer of or alteration in the terms of any existing or future mortgage charge or pledge of the same or any part thereof as he shall think fit and in general to sanction any scheme for dealing with mortgages charges or pledges of any real or personal property or any part thereof as fully and effectually as I myself could have done.

And for all any or either of the purposes of these presents I hereby authorise my said Attorney for me in all any or either of the capacities aforesaid (as far as lawfully may be) to sign seal and as my act and deed 20  
 deliver or (as the case may require) to sign all and all manner of leases or counterparts or duplicates thereof mortgages charges conveyances assignments transfers of mortgages or charge reassignments releases deeds of partition or exchange surrenders deeds of grant or gift or any other deeds instruments documents or writings whatsoever whether under seal or not.

And I hereby agree to allow and confirm unto all and whatsoever my said Attorney shall lawfully do in the premises by virtue of these presents.

And I declare that every act deed matter and thing whatsoever done and performed by my said Attorney shall be legal binding and conclusive notwithstanding the revocation of these presents before the doing and 30  
 performing of any such act deed matter or thing.

As witness my hand and seal this Fifteenth day of September One thousand nine hundred and forty-two.

Signed Sealed and Delivered by the said  
 Hangkam Kwingtong Woo in the presence } (Sd.) H. K. Woo (L.S.)  
 of

(Sd.) P. Y. Woo.

Exhibit A.2.—Certified translation of Power of Attorney in Chinese from Appellant to Chan Un Chau.

Exhibits.

A.2

Certified translation of Power of Attorney in Chinese, from Appellant to Chan Un Chau, 1943.

*Translation.*

I, WOO HANG KAM, am the maker of this Power of Attorney.

WHEREAS I the said Woo Hang Kam am possessed of a piece of ground situate in Hongkong and registered in the former Government of Hongkong as Inland Lot No. 2153 together with the buildings thereon now known as No. 48 Kennedy Road, hereinafter referred to as "the said premises."

AND WHEREAS I the said Woo Hang Kam am desirous of appointing  
10 an Attorney to act for me in manner hereinafter appearing in respect of the said premises.

I the said Woo Hang Kam do hereby make this Power of Attorney and appoint Chan Kim Cho alias Chan Un Chau to be my Attorney who will with full power perform the matters relating to the said premises as set out hereunder.

I hereby also declare that this appointment shall not be revocable.

1.—To let the said premises or any part thereof at such rent for such period and on such terms agreed with the tenant as my Attorney shall determine.

20 2.—To receive on my behalf rent and other moneys payable in respect of the said premises and to sign and give receipts therefor.

3.—In the event of any rent being due from tenants my Attorney shall be at liberty to demand sue for in any Court or to refer to arbitration the same as my Attorney shall think expedient.

4.—To pay all duties rates and other taxes payable in respect of the said premises to the local Government.

5.—To apply for registration of ownership of the said premises and to carry out the procedure of such application for registration of ownership.

6.—Should the said premises require repairs my Attorney shall be at  
30 liberty to cause proper repairs to be effected and to pay the cost of the repairs.

7.—To carry out all the matters as ordered or directed by the local Government.

8.—To sell the said premises for such price and upon such terms and conditions agreed with the Purchaser as my Attorney shall at his absolute discretion think fit.

9.—To give and sign the receipt for and to receive the sale price of the said premises.



Exhibits.  
 —  
 A.2  
 Certified  
 translation  
 of Power of  
 Attorney  
 in Chinese,  
 from  
 Appellant  
 to Chan  
 Un Chau,  
 1943—  
*continued.*

10.—For the purpose of carrying out the matters set out above my Attorney shall have power to sign for and on my behalf any deed and other necessary documents the effect of which shall be the same as if they were signed and executed by me personally.

I hereby sign my name and affix my seal hereto as proof.

Maker of Power of Attorney :—

(Sd.) WOO HANG KAM.

H. K. WOO.

Witness :—

(Sd.) WOO Tsz YING.

10

Made on the                    day of                    in the 18th Year of Showa (1943).

I hereby certify the foregoing to be the true translation of the Chinese document marked " L."

(Sd.) CHAN KWOK YING,

*Court Translator.*

19.8.1948.

B  
 Certified  
 translation  
 of Agree-  
 ment for  
 Sale in  
 Chinese,  
 21st  
 August,  
 1943.

**Exhibit B.—Certified translation of Agreement for Sale in Chinese**

*Translation.*

Makers of this Agreement are : WOO HANG KAM of No. 48 Higashi-Taisho-Dori (Kennedy Road)-floor Hongkong, hereinafter called as " the Vendor " and KOO WAN SANG of No.                    Higashi-Showa-Dori (Des Vœux Road Central)-floor Hongkong, hereinafter called as " the Purchaser." 20

Both parties have entered into the following agreement :—

1.—The Vendor hereby agrees to sell a parcel of ground possessed by him in Hongkong and registered with the Hongkong Government of the former regime as Inland Lot No. 2153 together with all buildings thereon known as No. 48 Higashi-Taisho-Dori (Kennedy Road) hereinafter called " the said property " to the Purchaser and the Purchaser agrees to buy and hold the said property in accordance with the law as proclaimed in Hongkong.

The said property shall include the garage on the opposite side and all appurtenant buildings. Exhibits.

“ Chop of Koo Wan Sang ” “ Chan Un Chau ” “ Chop of Tsok En Kau ”

B  
Certified  
translation  
of Agree-  
ment for  
Sale in  
Chinese,  
21st  
August,  
1943—  
*continued.*

2.—The sale price as agreed shall be 68,000 yen in Military Notes of which a sum of 50,000 yen is on the date hereof paid to and received by the Vendor as deposit money.

3.—It is agreed that both parties shall put through the transaction in lawyer Woo Pak Yung's office within one month from to-day's date when the Purchaser shall pay the balance of the price in full to the Vendor who shall hand over to the Purchaser all title deeds of the predecessors and execute a formal deed of sale in favour of the purchaser. It is (also) agreed that the title of the said property is unimpeachable and that the said property is free of any mortgages pledges or any other encumbrances. From to-day's date the Purchaser shall be entitled to enjoy the rents and other income of the said property and all other rights and privileges. All duties and taxes payable in respect of the said property shall be borne and fully settled by the Vendor up to the date hereof.

4.—Should the title to the said property be defective in any respect the Purchaser may reject and decline to put through the transaction and demand the deposit money to be refunded but shall not be entitled to claim interest thereon or any other charges or compensation.

5.—Except for the reason as referred to in the preceding clause No. 4 should the Purchaser fail to pay in full to the Vendor the balance of the purchase price namely 18,000 Yen in Military Notes on the due date as prescribed under Clause No. 3 hereof the deposit money paid on to-day's date shall be wholly forfeited to the Vendor and all expenses payable in respect of the transaction shall be borne and paid by the Purchaser. In addition if the Vendor sustains any losses or damages through the failure on the part of the Purchaser to observe Clause No. 3 hereof the Purchaser shall pay compensation for all such losses and damages.

6.—Should the Vendor fail to put through the transaction on the due date the Vendor shall in addition to the refund of the deposit money to the Purchaser pay compensation for all losses and damages sustained by the Purchaser through the failure of the Vendor to put through the transaction on the due date. All expenses payable in respect of the transaction shall be entirely borne and paid by the Vendor. The Purchaser shall be entitled to petition the local authority compelling the Vendor to comply with this Agreement by executing a deed for putting through the transaction. This clause does not apply in the case where the Vendor fails to put through the transaction through the title to the said property being defective.

7.—Prior to the transaction being put through the Purchaser may assign all the rights and privileges derived from this Agreement to any other party

Exhibits.  
 —  
 B  
 Certified  
 translation  
 of Agree-  
 ment for  
 Sale in  
 Chinese,  
 21st  
 August,  
 1943—  
*continued.*

provided the Purchaser continue to bear the responsibility of fulfilling all stipulations contained in this Agreement. At the time of putting through the transaction the Vendor shall at the request of the Purchaser execute a formal deed of perpetual sale in favour of the Purchaser or any person designated by the Purchaser. The deed of perpetual sale shall be made out in such form and the amount of sale price shall be filled in in such sum as the Purchaser may direct and the Vendor shall not be allowed to raise objection thereto.

8.—The expenses for making this Agreement shall be equally borne by both parties. As to the expenses for drawing up the deed for perpetual sale in the office of Lawyer Woo Pak Yung and all other expenses in connection with the transaction shall be paid by the Purchaser. 10

9.—From to-day's date should the said property be damaged or blasted by a bomb or meet with any other accident (all such losses or damages) shall be borne by the Purchaser.

10.—After the receipt of the deposit money by the Vendor should there be any irregularity thereby causing a delay in putting through the transaction on the due date the Vendor shall undertake to settle the matter in a proper manner and shall not be allowed to cause a delay under any pretext otherwise the Purchaser may hold the Vendor and the Guarantor responsible for any losses or damages as the Purchaser may have claimed and charge 20 them to pay full compensation therefor.

“ Chop of Koo Wan Sang ” “ Chan Un Chau ” “ Chop of Tsok En Kau ”

Dated the 21st day of August in the 18th year of Showa (1943)

Vendor : H. K. Woo by his Attorney Chan Un Chau.

(Sd.) CHAN UN CHAU.

(Chopped) “ Chan Un Chau.”

Purchaser : KOO WAN SANG.

(Sd.) KOO WAN SANG.

(Chopped) “ Chop of Koo Wan Sing.”

Witness : TSOK EN KAU.

30

(Sd.) TSOK EN KAU.

(Chopped) “ Chop of Tsok En Kau.”

Identifier of the Vendor : TSOK EN KAU.

(Sd.) TSOK EN KAU.

(Chopped) “ Chop of Tsok En Kau.”

Received payment from the Purchaser on the date hereof of the sum of 50,000 Yen in Military Notes being amount of deposit money. Exhibits.

Recipient of money : H. K. Woo by his Attorney  
CHAN UN CHAU.

(Sd.) CHAN UN CHAU.

(Chopped) " Chan Un Chau."

Witness : TSOK EN KAU.

(Sd.) TSOK EN KAU.

(Chopped) " Chop of Tsok En Kau."

B  
Certified  
translation  
of Agree-  
ment for  
Sale in  
Chinese,  
21st  
August,  
1943—  
*continued.*

10

Guarantor : P. Y. Woo.

(Sd.) WOO PAK YUNG.

(Chopped in two places) " Woo Pak Yung."

I hereby certify the foregoing to be the true translation of the Chinese document marked " H."

(Sd.) CHAN KWOK YING,  
*Court Translator.*

18.8.1948.

**Exhibit C.—Assignment—Undated—Agreed 21st September 1943.**

THIS INDENTURE made the \_\_\_\_\_ day of \_\_\_\_\_  
20 One thousand nine hundred and forty BETWEEN HANGKAM  
KWINGTONG WOO of 48 Kennedy Road Victoria in the Colony of Hong-  
kong Solicitor (who and whose executors and administrators are where not  
inapplicable hereinafter included under the designation " the Vendor ")  
of the one part and KOO WAN SING (*Chinese characters*) of No.  
Des Vœux Road Central Victoria aforesaid Merchant (who and whose  
executors administrators and assigns are where not inapplicable hereinafter  
included under the designation " the Purchaser ") of the other part  
WHEREAS by a Crown Lease dated the 11th day of September 1922 and  
made between His Majesty King George the Fifth of the one part and  
30 Cheung Kam Ming of the other part His said Majesty demised unto the said  
Cheung Kam Ming his executors administrators and assigns ALL that piece  
or parcel of ground situate lying and being at Victoria therein more  
particularly described and registered at the Land Office as Inland Lot No.  
2153 except and reserved as was therein excepted and reserved from the  
3rd day of January 1916 for the term of 75 years at the rent and subject to  
the Lessee's covenants and conditions therein reserved and contained

C  
Assignment  
Undated.  
Agreed,  
21st  
September  
1943.

Exhibits. AND WHEREAS the said premises are now vested for the residue of the said term of 75 years with such right of renewal as aforesaid in the Vendor who hath agreed with the Purchaser for the sale thereof to him for the price of \$272,000.00 Hongkong Currency NOW THIS INDENTURE WITNESSETH that in pursuance of such agreement and in consideration of TWO HUNDRED AND SEVENTY TWO THOUSAND DOLLARS Hongkong currency to the Vendor paid by the Purchaser on or before the execution of these presents (the receipt whereof the Vendor doth hereby acknowledge) He the Vendor doth hereby assign unto the Purchaser ALL THAT the said piece or parcel of ground registered at the Land Office as INLAND LOT No. 2153 Together with all messuages or tenements and other erections and buildings thereon known at the date hereof as No. 48 Kennedy Road And all rights of way (if any) and other rights and all privileges easements and appurtenances thereto belonging or appertaining or therewith at any time used held occupied or enjoyed and particularly with a right of way over that piece or parcel of ground registered at the Land Office as Inland Lot No. 2218 as is mentioned in a Grant of a Right of Way dated the 10th day of June 1919 and registered at the Land Office by Memorial No. 68,546 and all the estate right title interest property claim and demand of the Vendor in and to the said premises hereby assigned and every part thereof except and reserved as in the said Crown Lease is excepted and reserved To HOLD the said premises hereby assigned or expressed so to be unto the Purchaser for all the residue now to come and unexpired of the said term of 75 years with such right of renewal as aforesaid subject nevertheless to the existing lettings and tenancies (if any) thereof and to the payment of the rent and the performance of the Lessee's covenants and conditions in the said Crown Lease reserved and contained And the Vendor hereby covenants with the Purchaser that notwithstanding any act deed or thing by the Vendor done or executed or knowingly suffered to the contrary the said Crown Lease is now valid and subsisting and not in anywise forfeited surrendered or become void or voidable and that the rent reserved by and covenants by the Lessee and conditions contained in the said Crown Lease have been paid observed and performed up to the date of these presents AND that the Vendor now hath good right to assign the said premises hereby assigned or expressed so to be in manner aforesaid free from incumbrances AND that all the said premises may be quietly entered into and during the residue of the said term of 75 years held and enjoyed without any interruption by the Vendor or any person or persons claiming through or in trust for the Vendor AND that the Vendor and all other persons lawfully or equitably claiming any estate or interest in the said premises or any part thereof from under or in trust for him the Vendor shall and will from time to time and at all times hereafter during the residue of the said term of 75 years at the request and cost of the Purchaser do and execute or cause to be done and executed all such acts deeds and things whatsoever for further and more perfectly assuring the said premises and every part thereof unto the Purchaser for the unexpired residue of the said term of 75 years with such right of renewal as aforesaid as shall or may be reasonably required AND the Purchaser

C  
Assignment  
Undated.  
Agreed,  
21st  
September  
1943—  
continued.

hereby covenants with the Vendor that He the Purchaser will at all times hereafter during the residue of the said term of 75 years pay the rent reserved by the said Crown Lease and observe and perform the covenants and conditions in the said Crown Lease contained and will at all times hereafter keep indemnified the Vendor his executors and administrators and his estates and effects from and against the non-payment of the rent and the non-observance and non-performance of the said covenants and conditions and from and against all actions claims and demands whatsoever for or on account of the same or in anywise relating thereto IN WITNESS  
 10 whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

Exhibits.  
 C  
 Assignment  
 Undated.  
 Agreed  
 21st  
 September  
 1943—  
*continued.*

Signed Sealed and Delivered by the Vendor }  
 by his Attorney Chan Un Chau (he having } (Sd.) (*Chinese characters*)  
 been previously identified by P. Y. Woo in } (L.S.)  
 the presence of :—

(Sd.) P. Y. Woo,  
 Solicitor,  
 Hongkong.

Signed Sealed and Delivered by the Pur- }  
 20 chaser in the presence of :— } (Sd.) KOO WAN SING (L.S.)

(Sd.) P. Y. Woo,  
 Solicitor,  
 Hongkong.

Interpreted by :—

RECEIVED the day and year first above written of and }  
 from the above named Purchaser the sum of TWO HUNDRED }  
 AND SEVENTY-TWO THOUSAND DOLLARS Hongkong Currency } \$272,000.00  
 being the consideration money above expressed to be paid }  
 by him to me

30 Witness :—

(Sd.) P. Y. Woo.

(Sgd.) (*Chinese characters*)

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Exhibits. **Exhibit D.—Certified translation of Deed of Sale in Chinese—Undated—  
Agreed 21st September 1943.**

D  
Certified  
translation  
of Deed of  
Sale in  
Chinese.  
Undated.  
Agreed,  
21st  
September  
1943.

*Translation.*

**DEED OF SALE AND PURCHASE OF PROPERTY.**

Makers of Deed are :—

Vendor : WOO HANG KAM of No. 48 Kennedy Road Hongkong,  
hereinafter referred to as " A."

Purchaser : KOO WAN SANG of No. 191 Des Vœux Road Central  
Hongkong, hereinafter referred to as " B."

Both parties have made a deed of sale and purchase as follows :— 10

1.—A agrees to sell one parcel of ground possessed under his name at Kennedy Road Hongkong and duly registered in the Land Office of Hongkong as Inland Lot No. 2153 together with all buildings thereon known as No. 48 Kennedy Road, hereinafter referred to as " the said property " to B at the agreed price of \$272,000 in Hongkong Currency for the perpetual sale thereof.

2.—This deed of sale and purchase of property is made by both parties to testify that B has on to-day's date paid the price of \$272,000 in Hongkong Currency to A and that A has duly received it and perpetually sold the said property to B together with the rights of way in front and on 20  
the rear the drainage and all other legal rights pertaining to the house and the land.

3.—After the transaction is put through B shall be entitled to enjoy all rights and privileges of the said property according to the terms and conditions contained in the title deeds of the predecessors, shall bear the responsibility of paying duties and taxes and shall hold the said property according to law.

4.—Should B discover in the future that A had not paid up any duties or taxes in connection with the said property or had committed a breach of the conditions contained in the deeds of the predecessors thereby causing 30  
B to suffer any losses or damages A shall be required to pay full compensation therefor.

5.—A hereby declares that the title to the said property is unimpeachable and that the said property is free of any mortgage pledge or any other incumbrances. Should there be any complications or disputes concerning Chinese or foreigners in the future A shall settle same in a proper manner and they shall have nothing to do with B. If there be anything required to be done by A to enable B to have full enjoyment of his rights and privileges in connection with the said property A shall do the same whenever he is so requested provided all expenses therefor shall be borne by B. 40

It is clearly endorsed that should the title to the said property be found to be defective in the future or should there be any complications or disputes concerning Chinese or foreigners taking place A shall settle same in a proper manner according to the provisions laid down in Clause No. 5 hereof.

Should A be unable to settle same A's Guarantor shall bear responsibility to settle same to entirety and shall not be allowed to cause delay or put off under any excuse otherwise the Purchaser may hold the Guarantor responsible for any losses or damages as he may have claimed and charge him to pay full compensation therefor. Words to the contrary shall not be allowed.

10 It is further endorsed that should the Government in the future regard this deed as being improper and require a new deed to be made both the Vendor and the Guarantor shall undertake to make one in a proper manner so as to enable the Purchaser to have complete enjoyment of his rights and privileges. The Vendor and the Guarantor shall do this whenever he is so requested and shall not be allowed to evade their responsibility or to put up any excuse. All the expenses therefor shall be borne by the Purchaser.

It is further endorsed that the iron gate shall be permanently managed and enjoyed by the Purchaser.

Both parties have with mutual consent subscribed their names and affixed their chops hereto as proof.

Made this                    day of                    month                    year                    of the Chinese Republic.

20 Vendor by his Attorney :  
(Sd.) CHAN UN CHAU.  
(Chopped) " Chan Un Chau."

Purchaser :  
(Sd.) KOO WAN SANG.  
(Chopped) " Chop of Koo Wan Sang."

Witness :  
(Sd.) TSOK EN KAU.  
(Chopped) " Chop of Tsok En Kau."

Received payment on to-day's date from the Purchaser of the price money of \$272,000 in Hongkong Currency.

30 Vendor by his Attorney :  
(Sd.) CHAN UN CHAU.  
(Chopped) " Chan Un Chau."

Witness :  
(Sd.) TSOK EN KAU.  
(Chopped) " Chop of Tsok En Kau."

Guarantor :  
(Sd.) WOO PAK YUNG.  
(Chopped) Woo Pak Yung.

40 I hereby certify the foregoing to be the true translation of the Chinese document marked G.

(Sd.) CHAN KWOK YING,  
*Court Translator.*

18.8.1948.

Exhibits.  
D  
Certified translation of Deed of Sale in Chinese. Undated. Agreed, 21st September 1943—*continued.*



Exhibits.

**Exhibit E.—Reassignment—Undated—Agreed 30th September 1943.**

E  
 Reassign-  
 ment.  
 Undated.  
 Agreed,  
 30th  
 September  
 1943.

THIS INDENTURE made the \_\_\_\_\_ day of \_\_\_\_\_  
 One thousand nine hundred and forty-three BETWEEN KWONG SANG HONG  
 LIMITED whose registered office is situate at Nos. 250 and 252 Des Vœux  
 Road Central Victoria in the Colony of Hongkong (hereinafter called "the  
 Reassignors") of the one part and HANGKAM KWINGTONG Woo of No. 48  
 Kennedy Road Victoria aforesaid Solicitor (hereinafter called "the  
 Reassignee") of the other part WHEREAS by an Indenture of Mortgage  
 dated the 6th day of February 1926 and made between Cheung Kam Ming  
 of the one part and His Excellency the Governor of the Colony of Hongkong 10  
 of the other part and registered at the Land Office by Memorial No. 99,906  
 the said Cheung Kam Ming in consideration of the sum of \$50,000.00  
 Hongkong Currency paid to him by His Excellency the Governor assigned  
 unto His Excellency the Governor of the said Colony the premises hereinafter  
 more particularly described and intended to be hereby assigned and  
 released for the residue of the term of 75 years with a right of renewal for  
 one further term of 75 years created therein by a Crown Lease dated the 11th  
 day of September 1922 and made between His Majesty King George V of  
 the one part and the said Cheung Kam Ming of the other part subject to  
 a proviso in the said Indenture of Mortgage contained for the redemption 20  
 of the said premises upon payment by the said Cheung Kam Ming his  
 Executors Administrators or Assigns of the sum of \$50,000.00 with interest  
 thereon after the rates therein mentioned AND WHEREAS by an Indenture  
 of Assignment dated the 16th day of August 1926 made between the said  
 Cheung Kam Ming of the one part and the Reassignee of the other part and  
 registered at the Land Office by Memorial No. 102,046 for the consideration  
 therein mentioned the said premises with their appurtenances were assigned  
 unto the Reassignee for the residue of the said term of 75 years with such  
 right of renewal as aforesaid subject to the payment of the rent and the 30  
 performance and observance of the Lessee's covenants and conditions in  
 the said Crown Lease reserved and contained AND subject also to the  
 hereinbefore recited Indenture of Mortgage and to the payment of the said  
 principal sum of \$50,000.00 thereby secured and all interest thenceforth  
 to become due in respect of the same AND WHEREAS by an Indenture of  
 Transfer of Mortgage dated the 9th day of November 1927 and made between  
 His Excellency the Governor of the said Colony of the first part the  
 Reassignee of the second part and the Reassignors of the third part and  
 registered at the Land Office by Memorial No. 107,587 His Excellency the  
 Governor of the said Colony at the request of the Reassignee and for the  
 consideration therein mentioned assigned unto the Reassignors the said sum 40  
 of \$50,000.00 secured by the hereinbefore recited Indenture of Mortgage  
 and all interest thenceforth to become due on the said sum and the full  
 benefit of all powers rights remedies and securities in the said Indenture of  
 Mortgage contained absolutely AND WHEREAS by an Indenture of Further  
 Charge dated the 11th day of August 1930 and made between the  
 Reassignee of the one part and the Reassignors of the other part and

registered at the Land Office by Memorial No. 120,444 the said premises were charged with the payment to the Reassignors of the further sum of \$23,000.00 with interest as therein mentioned AND WHEREAS the said principal sums of \$50,000.00 and \$23,000.00 making together the total principal sum of \$73,000.00 still remains due and owing to the Reassignors on the security of the said Indentures of Mortgage and Further Charge but all interest for the same respectively has been paid up to the date of these presents AND WHEREAS the Reassignee is desirous of paying off the said principal sums of \$50,000.00 and \$23,000.00 and of having such

10 Reassignment as is hereafter contained NOW THIS INDENTURE WITNESSETH that in consideration of the sum of \$73,000.00 at or before the execution hereof paid by the Reassignee to the Reassignors (the receipt whereof and that all interest due thereon has been paid they the Reassignors do hereby acknowledge) They the Reassignors do hereby assign and release unto the Reassignee his executors administrators and assigns ALL THAT piece or parcel of ground registered in the Land Office as INLAND LOT NO. 2153 Together with all messuages or tenements and other erections and buildings thereon known at the date hereof as No. 48 Kennedy Road and the rights

20 rights of way (if any) easements and appurtenances thereto belonging AND all the estate and interest of the Reassignors therein and thereto To HOLD the said premises unto the Reassignee his executors administrators and assigns for the residue now to come of the said term of 75 years (with such right of renewal as aforesaid) Freed and absolutely discharged of and from the said Indentures of Mortgage and Further Charge and of and from all principal moneys interest and other monies thereby respectively secured AND the Reassignors do hereby for themselves and their successors covenant with the Reassignee his executors administrators and assigns that they the Reassignors have not done omitted or knowingly suffered any act deed matter or thing whereby or by means whereof the said premises

30 hereinbefore assigned and released or any part thereof now are or is or can or shall or may be impeached charged affected or incumbered in title estate or otherwise howsoever IN WITNESS whereof the Reassignors have caused their Common Seal to be hereto affixed and one of their directors and their secretary have hereunto set their hands and the Reassignee hath hereunto set his hand and seal the day and year first above written.

Exhibits.  
E  
Reassignment.  
Undated.  
Agreed,  
30th  
September  
1943—  
*continued.*

Sealed with the Common seal of  
the Reassignors and Signed by  
Funꝝ Fook Tien one of their  
Directors and Leung Ying Kun  
40 their Secretary in the presence  
of :—

(Sd.) FUNG FOOK TIEN	Seal of Kwong Sang Hong Limited Hongkong
(Sd.) LEUNG YING KUN	

(Sd.) P. Y. Woo,  
*Solicitor,*  
Hongkong.

Exhibits.            Interpreted to the Reassignors in the Chinese language by :—

      
E  
Reassign-  
ment.  
Undated.  
Agreed,  
30th  
September  
1943—  
*continued.*

(Sd.) P. Y. Woo.

RECEIVED the day and year first above written of and from }  
the above-named Reassignee the sum of SEVENTY-THREE } \$73,000.00  
THOUSAND DOLLARS Hongkong Currency being the considera- }  
tion money above expressed to be paid by him to us }

Witness :—

(Sd.) FUNG FOOK TIEN.

Seal of  
Kwong Sang  
Hong Limited 10  
Hongkong.

(Sd.) P. Y. Woo.

(Sd.) LEUNG YING KUN.

Exhibit F.—Certified translation of Receipt in Chinese (*sic* Japanese).

F  
Certified  
translation  
of Receipt  
in Chinese  
(*sic*  
Japanese),  
1943.

*Translation.*

RECEIPT.

The sum of Military Yen Twenty thousand nine hundred and eighty-seven only, as for refund of H.K. \$73,000 and \$10,948 interest for mortgage arranged on land and house located at No. 48 Kennedy Road, Hongkong.

Inland Lot No. 2153 of the former Hongkong Government. Dated 9th November Showa 2nd year, and 11th August Showa 5th year.

This is to acknowledge the above.

20

day,                    month, Showa 18th year (1943).

Mortgagor : FUNG FOOK TIN  
(Signed and Chopped)

Seal of  
Kwong Sang  
Hong Co. Ltd.

LEUNG YING KUEN  
(Signed and Chopped)

To Mr. Woo Hang Kam.

Revenue  
Stamp.

30

Chopped :

Fung Fook Tin.

I hereby certify the foregoing to be the true translation of the Japanese document marked "D."

(Sd.) G. TONG.

18.Viii.48.

*Court Translator.*

## Exhibit G.—Certified translation of Guarantee in Chinese.

Exhibits.

*Translation.*

G

Certified  
translation  
of  
Guarantee  
in Chinese.  
Undated.

Makers of this Guarantee are: Woo Pak Yung of No. 60 Kennedy Road Hongkong, and Tsok En Kau of No. 121 Argyle Street Kowloon.

In the matter of house No. 48 Kennedy Road Hongkong, namely the parcel of ground duly registered in the Land Office of Hongkong as Inland Lot No. 2153 together with the building thereon, which has been perpetually sold by Chan Un Chau, the attorney of Woo Hang Kam, who signed the agreement and the deed in favour of Koo Wan Sang to hold for ever. The price stated in the deed has also been fully received. In the deed it was clearly stipulated that the title to the said property was unimpeachable and that the said property was free of any mortgage pledge or other incumbrances.

It is ascertained that the said property was mortgaged to Mr. Ko Ho Ning for the principal sum of \$30,000 in Hongkong Currency plus interest. Because Ko Ho Ning is being absent from the Colony of Hongkong it is impossible to make payment of the principal and interest and so (the mortgage) could not be paid off.

Now after consulting with the Purchaser Koo Wan Sang and obtaining his consent the Vendor Woo Hang Kam by his Attorney Chan Un Chau and the Guarantor Woo Pak Yung are required to take up joint responsibility of paying in full with due despatch the principal and interest of the said mortgage to Mr. Ko Ho Ning and to obtain from him a receipt and discharge for handing them over to the Purchaser Koo Wan Sang to keep so as to settle the matter and to prevent the Purchaser Koo Wan Sang from suffering any losses. The principal of the said mortgage and the interest accrued thereon and all expenses in connection therewith which the Guarantor Woo Pak Yung hereby undertakes to fully settle in the future shall not concern the Purchaser. This is proof.

Made this            day of            month Thirty            year of the Chinese Republic.

Vendor by his Attorney :

(Sd.) CHAN UN CHAU.

(Chopped) " Chan Un Chau."

Guarantor :

(Sd.) WOO PAK YUNG.

(Chopped) " Woo Pak Yung."

Witness :

(Sd.) TSOK EN KAU.

(Chopped) " Chop of Tsok En Kau."

I hereby certify the foregoing to be the true translation of the Chinese document marked " I."

(Sd.) CHAN KWOK YING,

*Court Translator,*

18.8.1948.

Exhibits.

**Exhibit H.—Certified translation of Receipt in Chinese.**

H  
Certified  
translation  
of Receipt  
in Chinese,  
14th  
October  
1943.

*Translation.*

“ Wong ” No. 25 (Chopped).

Hereby received from Mr. Woo Hang Kam through Mr. Woo Pak Yung the sum of 8,550 Yen in Military Notes being amount of principal and interest of a mortgage. This is proof.

(Chopped) “ Foo Hang received on behalf and forthwith paid to the Firm concerned.”

This is a memo for recording account and there is no need to surrender this for cancellation. The holder is not allowed to produce this for obtaining back the money. This is a special endorsement. This is for reference. 10

Dated the 16th day of the 9th moon Kwai Mi Year (14.10.1943).

(Chopped) “ Foo Hang received on behalf and forthwith paid to the Firm concerned.”

Receipt issued by : Cheuk Mau Up.

(Chopped) “ Foo Hang received on behalf and forthwith paid to the Firm concerned.”

I hereby certify the foregoing to be the true translation of the Chinese document marked “ J.” 20

(Sd.) CHAN KWOK YING,  
*Court Translator.*

18.8.1948.

**Exhibit J.—Certified translation of letter in Chinese from Koo Wan Sing to Appellant.**

J  
Certified  
translation  
of letter in  
Chinese,  
Koo Wan  
Sing to  
Appellant.  
30th  
October,  
1943.

*Translation.*

For the perusal of Mr. Hang Kam.

I have known of your esteemed name and am regretted to say that I have never been able to have an interview with you. Of late I am happy to learn that you have devoted your energy to the cause of education for the purpose of training up some talents. 30

Now I beg you to do me a favour. I have recently associated with your son Mr. Pak Yung and a Mr. Chan Woon Chau. In the course of our conversation we talked about the property which is possessed by you namely house No. 48 Kennedy Road registered in the Land Office as Lot No. 2153 including all buildings thereon and a garage on the opposite side which you

have authorised Chan Woon Chau and your son Mr. Pak Yung to sell. As a result of negotiations (the property) was sold absolutely for me to hold for the sum of 68,000 yen in Military Notes being the equivalent of \$272,000 in Hongkong Currency. The transaction was completed on the 21st day of September in the 32nd year of the Chinese Republic (1943) by both parties upon the signing of (the necessary document); and all deeds of title of the predecessors and other documents relative to the said property were handed by your Attorney Mr. Chan Woon Chau, your son Mr. Pak Yung and the guarantor to me to keep. But as you were not in Hongkong (at the time) there are four documents requiring your signature and a letter from your son. Now I enclose them in the same envelope and send them to you by post. After examining same please sign such documents and affix your chop thereto using both the Chinese and the English language. After that send them to Koo Wan Ying care of Yuen Loo, No. 42 Tung Woo Road, Mui Yuen County by registered post with an acknowledgment receipt. This is my prayer.

Having thus troubled you I hope you will allow me to tender my thanks (in person) later on.

Meanwhile I beg to enquire after your general welfare.

Sent on the 30th day of October in the 32nd year (1943).

Respectfully written by  
Yours humbly,  
(Sd.) KOO WAN SING.

I hereby certify the foregoing to be the true translation of the Chinese document marked "A."

(Sd.) CHAN KWOK YING,  
Court Translator,

18.8.48.

**Exhibit K.1—Power of Attorney from Appellant to Koo Wan Sing.**

TO ALL TO WHOM these presents shall come I HANGKAM KWINGTONG Woo (*Chinese characters*) of No. 48 Kennedy Road Victoria in the Colony of Hongkong, Solicitor, SEND GREETING : WHEREAS I am the registered owner of All that piece or parcel of ground situate at Victoria in the said Colony and registered in the Land Office as INLAND LOT No. 2153 (hereinafter referred to as "the said premises") AND WHEREAS I am desirous of appointing an Attorney to act for me in manner hereinafter appearing NOW KNOW YE that I the said Hangkam Kwingtong Woo do hereby nominate constitute and appoint KOO WAN SING (*Chinese characters*) of No. Des Vœux Road Central Victoria aforesaid Merchant to be my true and lawful Attorney in the said Colony of Hongkong for me and in my name or in the

Exhibits.  
—  
J  
Certified translation of letter in Chinese.  
Koo Wan Sing to Appellant  
30th October, 1943  
—continued.

K.1  
Power of Attorney from Appellant to Koo Wan Sing, 1940.

Exhibits.  
 K.1  
 Power of  
 Attorney  
 from  
 Appellant  
 to Koo  
 Wan Sing,  
 1940—  
*continued.*

name of my said Attorney or otherwise as occasion shall require from time to time and at any time or times during the continuance of these presents to do perform transact and effectuate all or any or either of the following acts deeds matters and things (so far as relating to the said premises) that is to say :—

1.—To pay all taxes rates charges expenses and other outgoings whatsoever to be from time to time payable by me in respect of the said premises and to insure the said building against loss or injury by fire and pay the necessary insurance premium.

2.—To demise let and lease all of the said premises or any part or parts thereof for such period and on such terms as my said Attorney shall think proper and also to sign and give lawful notices to quit to any tenant thereof or to accept surrender of leases. 10

3.—To demand and recover from the present or any future tenant or occupier of the said premises or any part thereof the rents or sums of money to be from time to time payable to me by the said tenant or occupier and on payment thereof to make and assent to all just and reasonable abatements payments and allowances for or in respect of any Crown rent rates repairs and other outgoings paid or done by any such tenant or occupier.

4.—On non-payment of any such rent or sum to enter and distrain for the same and the distress or distresses there found to detain and keep or otherwise deal with according to law and on receipt of any such rent or sum or any part thereof to sign and deliver proper and effectuate receipts or other discharges or acknowledgments of the same respectively. 20

5.—To discontinue any action or proceedings that my said Attorney may institute or commence or become non-suit therein or adjust and compromise same as my said Attorney shall think proper.

6.—To sell assign convey part with or otherwise dispose of the said premises for such consideration (whether a pecuniary consideration or not) and on such terms as my said Attorney shall think fit. 30

7.—To do and perform all acts deeds matters and things which may be at any time requisite or necessary for the proper conduct and management of any of the said premises and to act for me fully and effectually to all intents and purposes whatsoever.

8.—And I agree to ratify allow and confirm whatsoever my said Attorney shall do, or cause to be done or purport to do in and about the premises by virtue of these presents.

9.—In general to perform every other act whatsoever in or about the said premises belonging to me as amply and effectually to all intents and purposes as I could do or have done in my own proper person if these presents had not been made. 40

And generally for me and on my behalf to carry out and effectuate all or any of the purposes of these presents and to exercise all or any of the purposes of these presents and to exercise all or any of the powers hereby conferred as fully and effectually to all intents and purposes whatsoever as I could do were I personally present and I desire and direct that these presents shall be understood and construed in the fullest and most comprehensive sense.

Exhibits.  
K.1.  
Power of Attorney from Appellant to Koo Wan Sing. 1940  
*continued.*

10 And for all any or either of the purposes of these presents I hereby authorise my said Attorney to sign and seal and as my acts and deeds deliver or (as the case may require) to sign all and all manner of agreements leases or counterparts or duplicates thereof and assignments and deeds of gift and also memorials for the registration thereof.

And I declare that every act deed matter or thing whatsoever done and performed by my said Attorney previously to his receiving notice of the revocation of these presents shall be legal binding and conclusive notwithstanding the revocation of these presents before the doing and performing of any such act deed matter or thing.

IN WITNESS whereof I have hereunto set my hand and seal this day of One thousand nine hundred and forty.

20 Signed sealed and delivered by the said }  
Hangkam Kwingtong Woo in the presence } (Sd.) H. K. Woo (L.S.)  
of }  
(Sd.) T. Y. CHANG.

Exhibit K.2—Certified translation of Power of Attorney in Chinese from Appellant to Koo Wan Sing.

K.2  
Certified translation of Power of Attorney in Chinese from Appellant to Koo Wan Sing. Undated.

*Translation.*

I WOO HANG KAM of No. 48 Kennedy Road, am the maker of this Power of Attorney.

30 WHEREAS I the said Woo Hang Kam am possessed of a piece of ground situate in Hongkong and registered in the former Government of Hongkong as Inland Lot No. 2153 together with the buildings thereon known as No. 48 Kennedy Road hereinafter referred to as the said premises.

AND WHEREAS I am desirous of appointing an attorney to act for me in manner hereinafter appearing in respect of the said premises.

I the said Woo Hang Kam do hereby make this Power of Attorney and appoint Koo Wan Sang of No. Des Vœux Road Central Hongkong hereinafter referred to as " the said Attorney " to be my Attorney with full power to perform the following acts relating to the said premises. And I declare that this appointment shall not be revocable.



Exhibits.  
K.2  
Certified  
translation  
of Power of  
Attorney  
in Chinese  
from  
Appellant  
to Koo  
Wan Sing.  
Undated—  
continued.

1.—To let the said premises or any part thereof at such rent for such period and on such terms agreed with the tenant or tenants as the said Attorney shall at his absolute discretion think fit.

2.—To receive on my behalf the rent or rents and other moneys payable in respect of the said premises and to sign and give receipts therefor.

3.—In the event of any rent being due from the tenant the said Attorney shall have power to demand, sue for in any Court or to refer to arbitration the same as the said Attorney shall think expedient.

4.—To pay all duties rates and other taxes payable in respect of the said premises to the local government. 10

5.—To apply for registration of ownership of the said premises and to carry out the requisite procedure of such application for registration of ownership.

6.—Should the said premises require repairs the said attorney shall be at liberty to cause proper repairs to be effected and to pay the cost of the repairs.

7.—To carry out all the matters as ordered or directed by the local Government.

8.—To sell the said premises for such price and upon such terms and conditions agreed with the purchaser as the said Attorney shall at his absolute discretion think fit. 20

9.—To give and sign the receipt for and to receive the proceeds of sale of the said premises.

10.—For the purpose of carrying out the matters set out above the said Attorney shall have power to sign for and on my behalf any deed and other necessary documents the effect of which shall be the same as if they were signed and executed by me personally.

I hereby sign my name and affix my seal hereto as proof.

Maker of this Power of Attorney :—  
(Sd.) WOO HANG KAM.

30

Attorney :—

Witness :—

(Sd.) CHENG TUN YAN.  
(Chopped) "The Chop of Cheng Tun Yan."

Made on the                      day of                      month in                      year.

I hereby certify the foregoing to be the true translation of the Chinese document marked "K."

(Sd.) CHAN KWOK YING,  
Court Translator.

19.8.1948. 40

Exhibit L.1.—Certified translation of letter in Chinese from Appellant to Koo Wan Sing. Exhibits.

*Translation.*

For the perusal of Mr. Koo Wan Sing.

My Attorney Mr. Chan Woon Chau has just told me that he has agreed to sell to you my house property No. 48 Kennedy Road for the price of 68,000 yen in military notes. I hereby declare that my Attorney has agreed to sell the said house to you with my consent and that I have never revoked the Power of Attorney which was executed by me in favour of Mr. Chan and now lodged with you and which is good and effective in all respects. In confirmation thereof I specially make this (document).

(Sgd.) Woo HANG KAM.

I hereby certify the foregoing to be the true translation of the Chinese document marked "E."

(Sgd.) CHAN KWOK YING,  
*Court Translator.*

18.8.1948.

Exhibit L.2.—Letter from Appellant to Koo Wan Sing.

Koo Wan Sing Esq.

20 Dear Sir,

I have just heard from my Attorney Mr. Chan Woon Chau that he has agreed to sell you my house No. 48 Kennedy Road at the price of Yen 68,000.00.

I wish to confirm that the sale has my full approval and that the Power of Attorney which I executed in favour of Mr. Chan and which I understand is now with you has never been revoked and continues of full force and effect.

Yours faithfully,

(Sd.) H. K. Woo.

L.1  
Certified  
translation  
of letter in  
Chinese  
from  
Appellant  
to Koo  
Wan Sing.  
Undated.

L.2  
Letter  
from  
Appellant  
to Koo  
Wan Sing.  
Undated.

Exhibits. Exhibit M.—Certified translation of letter in Chinese from Appellant to Koo Wan Sing.

M  
Certified  
translation  
of letter in  
Chinese  
from  
Appellant  
to Koo  
Wan Sing,  
15th  
January  
1944.

*Translation.*

For the perusal of Mr. Wan Sing :

Two days ago I received from you a letter dated the 30th day of October in the 32nd year (1943) together with a letter from my son Pak Yung dated the 13th day of October in the same year and four documents in Chinese and English languages which were enclosed therein.

I have learnt all particulars in (such letters and documents) and noted that you wished me to sign all such documents affix my chop thereto and send them by post to Miss Koo of Mui Yuen. I will do as requested. But with regard to this particular transaction there is something requiring your assistance without which it is impossible to put through the matter properly. I now propose to avail myself of this opportunity to settle the matter first. I therefore specially write you this letter requesting you to do your best in the matter on my behalf and hoping that you will not refuse my request for which I shall be obliged. 10

I recall to mind that in the month of October the year before last six of my children and I came here on divers dates. At that time I was told that the cost of living in the interior was comparatively low and that there was a subsidy for all pupils of a primary or middle school and for all undergraduates of a university. So I calculated that the money brought with me though not much would however be sufficient to carry on for a certain period. After my arrival at this place I began to realise that the facts were totally different from the reports as spread (by the people). 20

It so happened that the value of landed property in Hongkong was increasing and I directed my family to sell my house for the sole purpose of remitting to me a portion of the sale price to meet requirement. Subsequently in the first decade of September last year I received from Wai Yeung a sum of approximately \$47,000—remitted by telegraph. At that time I supposed that further remittance would thereafter be made to me from time to time little knowing that it was the only remittance so far. On account of the fact that the prices for commodities were ever daily increasing the said sum of \$47,000 was entirely expended in two or three months. It was impossible to write to Hongkong requesting (people there) continuously to remit money for any letter of the kind when discovered by the censors would cause the recipient in Hongkong to suffer torture. Besides Pak Yung repeatedly wrote to warn me against writing to him. At present, owing to financial difficulties, not only my children had to give up study one after the other but seven of us while staying abroad are almost subject to starvation. 30 40

Under such circumstances I cannot but entreat you to ask my son to remit at once to me by telegraph as before at least a sum of \$200,000 in Chinese national currency through the Kwangtung Provincial Bank at Wai

Yeung or through the Bank of China or the Farmers' Bank so as to meet my urgent requirement which is very important. Exhibits.

For the trouble given you allow me to thank you in person. This is stated in reply. Meanwhile I beg to enquire after your welfare. M

Dated the 15th day of January in the 33rd year (1944).

Written by yours humbly,

(Sd.) WOO HANG KAM.

Postscript: The sum of \$47,000 (remitted) on the last occasion was directed to be paid to Woo Kong Tong. The sender of the telegram might have mistaken the character "Kwing" of Woo Kwing Tong for "Kong." For any further remittance by telegraph through the same Bank the name Woo Kong Tong may continue to be used. For any money remitted by telegraph through the Bank of China or the Farmers' Bank my name "Woo Hang Kam" may be used. This note is added (by me).

I hereby certify the foregoing to be the true translation of the Chinese document marked "B."

(Sgd.) CHAN KWOK YING,

*Court Translator,*

18.8.1948.

20 Exhibit N.—Certified translation of letter in Chinese from Appellant to Koo Wan Sing.

*Translation.*

For the perusal of Mr. Wan Sing:

On the 15th inst. I have written a letter in reply to your letter dated the 30th day of October last year. In that letter I entreated you to ask my son Pak Yung to remit to me by telegraph as before at least a sum of \$200,000.— in Chinese national currency through the Kwangtung Provincial Bank at Wai Yeung and I trust that you have noted its contents.

I suddenly recall to mind that the sum of \$272,000.— in Hongkong currency as mentioned in your letter of which a portion might still be kept by you. Of course I have noted in your letter such words "The transaction was completed by both parties" but as there was something remaining to be done, namely several documents requiring my signature and in the usual practice of sale and purchase the purchaser would invariably under such circumstances retain a portion of the purchase price until all such documents were properly signed when the balance would be paid in full. In view of this I therefore write you again. Should there still be any money with you in connection with this particular transaction please remit

Certified translation of letter in Chinese from Appellant to Koo Wan Sing, 15th January 1944—  
*continued.*

N  
Certified translation of letter in Chinese from Appellant to Koo Wan Sing, 28th January 1944.

Exhibits. the whole amount by telegraph to Kam Yuen for me to receive for which I shall be obliged.

—  
N  
Certified  
translation  
of letter in  
Chinese  
from  
Appellant  
to Koo  
Wan Sing  
28th  
January  
1944—  
*continued.*

Meanwhile I beg to enquire after your welfare.

Dated the 28th day of January in the 33rd year of the Chinese Republic (1944).

Written by yours humbly,

(Sd.) WOO HANG KAM.

I hereby certify the foregoing to be the true translation of the Chinese document marked "C."

(Sgd.) CHAN KWOK YING, 10  
*Court Translator,*  
18.8.1948.

O  
Certified  
translation  
of letter in  
Chinese  
from  
Appellant  
to Koo  
Wan Sing,  
29th May  
1944.

Exhibit O.—Certified translation of letter in Chinese from Appellant to Koo Wan Sing.

*Translation.*

For the perusal of Mr. Wang Sing.

I trust you have duly noted the two letters from me dated respectively the 15th and the 28th January this year requesting you to ask my son Pak Yung to remit money by telegraph to me at Kam (Yuen) to meet urgent requirement. He has however as early as some time in the month 20 of November last year entrusted (the money) with some person for its remittance to me. The delay of its coming was due to a certain cause and I only quite recently learned of all particulars upon the receipt of a letter from him (my son). So there is no need to trouble you again. As you may like to know it I specially write this for your information.

I have also signed the four documents you sent to me on the 30th day of October last year. Please find them enclosed herein and favour me with a reply upon the receipt thereof.

Meanwhile I beg to enquire after your general welfare.

Dated the 29th day of May in the 33rd year (1944). 30

Yours humbly,

(Sd.) WOO HANG KAM.

I hereby certify the foregoing to be the true translation of the Chinese document marked "D."

(Sd.) CHAN KWOK YING,  
*Court Translator,*  
18.8.1948.

**Exhibit P.2.****No. 1. Letter from Respondent's Solicitors to Kwong Sang Hong.**

Messrs. Kwong Sang Hong,  
250, Des Vœux Road Central.

Dear Sirs,

re Estate of Koo Shui Ting deceased.  
I.L. No. 2153—No. 48 Kennedy Road.

We are acting for the executrix of Mr. Koo Shui Ting, who was the sole proprietor of the Shui Hing Co. of No. 187-195 Des Vœux Road  
10 Central and who died on the 25th May 1946. During the Japanese occupation of Hongkong the deceased purchased the above property from Mr. H. K. Woo. The property at that time was subject to the mortgage and further charge in your favour amounting to \$73,000 which were paid off and the title deeds handed to our client.

We should be glad if you will confirm that you now have no further claim under the mortgage and further charge and that the same have been discharged. If you allege that the mortgage and further charge have not been discharged please inform us what is the amount of principal and interest which you alleged is due up to the date of the death of the  
20 deceased.

This information is required for the purpose of preparing the Account of the estate for the Estate Duty Commissioner.

Yours faithfully,

(Sd.) HASTINGS & CO.

**No. 2. Letter from Lo & Lo to Respondent's Solicitors.**

Messrs. Hastings & Co.

Dear Sirs,

Inland Lot No. 2153—No. 48 Kennedy Road.  
Koo Shui Ting deceased.

Your letter dated the 13th instant to our clients, Messrs. Kwong Sang  
30 Hong Limited, has been handed to us with instructions to reply thereto.

We are instructed to inform you that of the principal sum of \$73,000.00 secured by the Mortgage of the above property, \$5,000.- was repaid in Hongkong Currency by Mr. H. K. Woo on the 16th December 1940 and two sums of M.Y.17,000.- and M.Y.2,737.- respectively were paid by Mr. P. Y. Woo as agent for his father, Mr. H. K. Woo, to our

Exhibits.

P.2  
No. 1.

Letter  
from Re-  
spondent's  
Solicitors  
to Kwong  
Sang Hong,  
13th  
August  
1947.

P.2.  
No. 2.

Letter  
from Lo &  
Lo to Re-  
spondent's  
Solicitors,  
18th  
August  
1947.

Exhibits.  
 P.2  
 No. 2.  
 Letter  
 from Lo &  
 Lo to Re-  
 spondent's  
 Solicitors,  
 18th  
 August  
 1947.—  
*continued.*

clients on the 30th September 1943, purporting to be in discharge of the balance of principal moneys and interest due under the Mortgage.

While our clients do not suggest that they were forced by Mr. P. Y. Woo to accept payment in Military Yen, it was a well known fact that at the time of such payment, our clients had to face the situation where if they had refused to accept Yen, the consequences would have been extremely serious. It was under those circumstances that our clients accepted the purported repayment of the mortgage in Military Yen.

Until the law is clear regarding the repayment in Yen of loans contracted in Hongkong currency before the war, our clients do not 10 consider such repayment as a valid discharge of the mortgage. Until such time as the law is settled either by legislation or a judicial decision, our clients reserve all their rights under the mortgage.

Yours faithfully,  
 (Sd.) LO & LO.

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**No. 3. Letter from Respondent's Solicitors to Ko Ho Ning.**

P.2  
 No. 3.  
 Letter  
 from Re-  
 spondent's  
 Solicitors  
 to Ko Ho  
 Ning,  
 19th  
 August  
 1947.

Ko Ho Ning, Esq.  
 No. 122 Queen's Road Central.

Dear Sir,

Re Estate of Koo Shui Ting deceased.  
 I.L. No. 2153—No. 48 Kennedy Road.

20

We are acting for the Executrix of Mr. Koo Shui Ting, who was the sole proprietor of the Sui Hing Co. of No. 187-195 Des Vœux Road Central and who died on the 25th May, 1946. During the Japanese occupation of Hongkong the deceased purchased the above property from Mr. H. K. Woo. The property at that time was subject to the second mortgage in your favour amounting to \$30,000.00 which were paid off and the title deeds handed to our client.

We should be glad if you will confirm that you now have no further claim under the 2nd mortgage and that the same has been discharged. 30 If you allege that the 2nd mortgage has not been discharged please inform us what is the amount of principal and interest which you alleged is due up to the date of the death of the deceased.

This information is required for the purpose of preparing the Account of the Estate for the Estate Duty Commissioner.

Yours faithfully,  
 (Sd.) HASTINGS & CO.

**No. 4. Letter from Ko Ho Ning to Respondent's Solicitors.**

Hastings & Co.,  
Marina House,  
Hongkong.

Dear Sirs,

Re Estate of Koo Shui Ting deceased.  
I.L. No. 2153—No. 48 Kennedy Road.

In reply to your letter dated 19th instant, on the above subject, I wish to confirm that I have no further claim under the 2nd mortgage on the  
10 above property and that the same was discharged on 16th October 1943 by payment by the deceased of M. Y. 8,500 which at the official rate then prevailing was equivalent to HK \$34,200, \$30,000 being capital and \$4,200 being interest accrued from 6th October 1941 to date of payment for 24 lunar months at the rate of 7% per month.

Yours faithfully,

(Sd.) J. S. KO.

For Ko Ho NING.

Exhibits.

P.2  
No. 4.  
Letter  
from Ko  
Ho Ning  
to Re-  
spondent's  
Solicitors,  
29th  
August  
1947.

**No. 5. Letter from Respondent's Solicitors to Appellant.**

20 H. K. Woo, Esq.

Dear Sir,

Re I.L. No. 2153—No. 48 Kennedy Road.

We are instructed by our client Mrs. Liu Lan Fong, the widow and sole Executrix of the late Mr. Koo Shiu Ting, that in September 1943 the above property including the garage appertaining thereto was sold by your Attorney Mr. Chan Un Chau, with your approval to Mr. Koo for M. Y. 68,000 (HK\$272,000).

On 14th ulto., Probate was granted to our client and she has now instructed us to request you to execute a confirmatory assignment.

We shall be glad to hear from you at an early date that you are willing  
30 to execute the assignment.

Yours faithfully,

(Sd.) HASTINGS & CO.

P.2  
No. 5.  
Letter  
from Re-  
spondent's  
Solicitors to  
Appellant,  
9th  
February  
1948



Exhibits. No. 6. Letter from Appellant's Solicitors to Respondent's Solicitors.

P.2  
No. 6.  
Letter  
from  
Appellant's  
Solicitors  
to Re-  
spondent's  
Solicitors,  
15th May  
1948.

Messrs. Hastings & Co.

Dear Sirs,

Re Inland Lot No. 2153—No. 48 Kennedy Road.

With reference to your letter of the 9th February last we have now taken Counsel's Opinion in this case. You will note that in both the purported "Deeds" of assignment in English and in Chinese respectively i.e. the documents that were not to be shown to the Japanese Authorities, the consideration was stated as HK \$272,000. It is obvious that these "secret Deeds" were intended by the parties to represent the real agreement between them; in fact we believe that their secrecy was because the execution of an English Deed constituted a criminal offence during the Japanese occupation. Payment of course had to be made in Military Yen, at that time, and we understand that the following amounts were paid to Mr. Woo's purported Attorney. 10

<i>Date.</i>	<i>Sum.</i>
21st August 1943 ... ..	M. Y. 50,000.-
In October, November and December 1943 by 6 instalments of M. Y. 3,000 each ... ..	18,000.-
Total ... ..	M. Y. 68,000.-

20

Mr. Woo is prepared to execute a confirmatory deed for both house and garage provided he is paid the balance of the money owing to him on the contract price of HK \$272,000.—calculating the payments already made in M Y on the rates of exchange M Y to HK\$ shortly to be fixed by statute.

This offer is made without prejudice to Mr. Woo's right otherwise to repudiate the sale entirely, on the ground that all the Agreements and Deeds were entered into by Mr. Woo's alleged Attorney at a time when he himself, being in Free China, was divided from his Attorney by the line of War, which fact operates to cancel or abrogate the Power of Attorney. It is further without prejudice to his right to maintain that the garage is not now included in the sale in that it does not appear as part of the premises in either the Chinese or English Deeds. 30

Without taking advantage of the legal position with regard to the Power of Attorney, Mr. Woo feels that the settlement proposed is both morally reasonable and legally correct and it constitutes the minimum conditions on which he is prepared to execute the Confirmatory Deed.

Yours faithfully, 40  
(Sd.) WOO & WOO.

**No. 7. Letter from Respondent's Solicitors to Appellant's Solicitors.**

Messrs. Woo &amp; Woo.

Dear Sirs,

Re I.L. No. 2153—No. 48 Kennedy Road.

We are in receipt of your letter of 15th inst. upon which we have seen our client. With regard to the 1st paragraph in the Agreement for Sale of the property the consideration is shown as M. Y. 68,000 of which M. Y. 50,000 was paid as a deposit and it would appear that this document represents the real Agreement between the parties.

10 Your Attorney Mr. Chan Un Chau informs us that all documents were drawn up by the late Mr. P. Y. Woo and it is therefore not now possible to ascertain as to why the consideration is shown in the Assignment as HK\$272,000. We would also point out that in the Agreement for Sale the garage is mentioned and is stated to be included in the sale.

20 With regard to your suggestion that the Power of Attorney from you to Mr. Chan had been cancelled we would point out that in your letter to the late Mr. Koo you confirmed that Mr. Chan had agreed to sell the house with your consent and stated that the Power of Attorney had not been revoked. Apart from this we are unable to agree that legally there is any question of the Power of Attorney having been cancelled.

In these circumstances we are instructed to state that our client does not admit that there is any balance owing to you for the sale of the house and garage and that unless we hear from you in the course of the next 3 days that Mr. Woo is prepared to execute a Confirmatory Deed for both the house and garage legal proceedings will become necessary.

Yours faithfully,

(Sd.) HASTINGS &amp; CO.

**No. 8. Letter from Appellant's Solicitors to Respondent's Solicitors.**30 Messrs. Hastings & Co.,  
Hongkong.

Dear Sirs,

re Inland Lot No. 2153  
(No. 48 Kennedy Road).

We are in receipt of your letter of the 19th inst. It would appear that the matter will have to be decided by legal process.

Mr. Woo cannot now recall exactly the contents of any letter to Mr. Koo sent across the line of war but doubts the accuracy of your statements. It is true that Mr. Woo was aware that arrangements were being

Exhibits.

P.2  
No. 7.Letter  
from Re-  
spondent's  
Solicitors to  
Appellant's  
Solicitors,  
19th May  
1948.P.2  
No. 8.Letter  
from  
Appellant's  
Solicitors  
to Re-  
spondent's  
Solicitors,  
21st May  
1948.

Exhibits.  
 P.2  
 No. 8.  
 Letter  
 from  
 Appellant's  
 Solicitors  
 to Re-  
 spondent's  
 Solicitors,  
 21st May  
 1948—  
*continued.*

made to sell the house but not that the purchase price was to be in Military Yen regardless of the rate of exchange. When Mr. Woo left Hongkong in October 1942 Hongkong banknotes were in normal circulation and he had no reason to think the purchase price would not be paid in Hongkong Currency.

In or about April 1943 Mr. Woo received a letter from his son the late Mr. P. Y. Woo telling him that an offer had been received to purchase the property for \$270,000. Hongkong currency. Mr. Woo authorised his son to accept this offer. Mr. Woo considered that after the mortgages and interest were paid off at least \$150,000. Hongkong Currency would be 10 paid to him.

Mr. Woo recalls that sometime in the first half of 1944 after having previously received one small remittance in Chinese National Currency as part of the purchase money that he once wrote to Mr. Koo and pointed out in no uncertain terms that he was still waiting for a remittance of at the very least \$300,000. Chinese National Currency and in fact considered that it should be much more than this which sum at the then rate of exchange amounted to about Hongkong Dollars One hundred thousand but which if purchased in the Black Market with M.Y. would have cost more than M.Y. 68,000, yet this sum plus the remittance already received plus what had to be paid 20 to the Mortgagees was still considered by him to be less than the purchase price payable by Mr. Koo.

Mr. Woo now understands further that the Promissory Notes tendered at a time when the value of the M.Y. was falling rapidly were only accepted by Mr. Chan Un Chau under protest since he was in a dangerous position owing to the illegality of the transaction which if disclosed to the Japanese Authorities would render himself and Mr. P. Y. Woo liable to criminal prosecution.

The first mortgagee was paid in M.Y. because being in Hongkong he could only be paid off in M.Y. if the payment was to be recognised by the Japanese. Does your client suggest that Mr. Woo will have to make good the 30 balance as computed under the new statute to this mortgagee and yet have to accept the position that he has himself been paid up in full? This is contrary to the whole essence of the Agreement as Mr. Woo understands it. It is interesting to note that the 2nd mortgagee living in Macau was paid in Hongkong Dollars.

Without prejudice to any defence Mr. Woo may raise his offer of the 15th inst. is still open.

Yours faithfully,

(Sd.) WOO & WOO.

**No. 9. Letter from Respondent's Solicitors to Appellant's Solicitors.**

Exhibits.

Messrs. Woo &amp; Woo.

Dear Sirs,

re F.L. No. 2153 (No. 48 Kennedy Road).

We are in receipt of your letter of 21st inst. The statement therein that you were unaware that the purchase price was to be in Military Yen is incorrect as in his letter to you of 30th October 1943 the late Mr. Koo informed you that the property had been sold on 29th September 1943 for M.Y. 68,000 being the equivalent of H.K. \$272,000 and that the deeds of the property had been handed to Mr. Koo by your attorney and the late Mr. P. Y. Woo. This letter was acknowledged by you in your letter to Mr. Koo of 15th January 1944 which contains no suggestion that you were not aware that the purchase price had been paid in Military Yen. In your letter mentioned in the 3rd paragraph of our letter of 19th inst. you also state that you had heard from your Attorney that the property had been sold for M.Y. 68,000.

10 With regard to the 2nd mortgage we may inform you that we have letter from the 2nd mortgagee to the effect that the 2nd mortgage was paid off in Military Yen and that he has no further claim under this mortgage. The other statements in your letter are not necessarily admitted.

Our client is not prepared to reconsider her decision in the matter and the Writ will be issued next week.

Yours faithfully,

(Sd.) HASTINGS &amp; CO.

P.2  
No. 9.  
Letter  
from Re-  
spondent's  
Solicitors to  
Appellant's  
Solicitors,  
22nd May  
1948.

**No. 10. Letter from Respondent's Solicitors to Appellant's Solicitors.**

P.2

Messrs. Woo &amp; Woo.

No. 10.

Dear Sirs,

re O. J. Action No. 146 of 1948.

Liu Lan Fong vs. H. K. Woo.

30 We are instructed to require you to supply us with further and better particulars of the matters pleaded in Para. 5 of the Statement of Defence namely :—

1. Particulars of the " illegality " alleged.
2. Particulars of the " unauthorised correspondence " referred to.
3. Particulars of the regulations made under the Trading with the Enemy Ordinance 1914 and the Defence Regulations on which the Defendant relies.

Yours faithfully,

(Sd.) HASTINGS &amp; CO.

Letter  
from Re-  
spondent's  
Solicitors to  
Appellant's  
Solicitors,  
26th July  
1948.

Exhibits.

## No. 11. Letter from Appellant's Solicitors to Respondent's Solicitors.

P.2

No. 11.  
Letter  
from  
Appellant's  
Solicitors  
to Re-  
spondent's  
Solicitors,  
11th  
August  
1948.

Messrs. Hastings &amp; Co.

Dear Sirs,

re O. J. Action No. 146 of 1948.

Liu Lan Fong vs. H. K. Woo.

We give below the particulars asked for in your letter of the  
28th ultimo :—

- (1) Particulars of "illegality" are set out in the following passages  
in Paragraph 5 of the Statement of Defence :

"It is against Public Policy for unauthorised corres- 10  
pondence to pass across the line of War, and in addition,  
the particular correspondence constituted a Trading with  
the enemy. The Defendant will further rely on the Trading  
with the Enemy Ordinance 1914 and Regulations made  
thereunder, and on the Defence Regulations."

That is,

- (a) Against Public Policy as crossing the line of war,  
(b) Against Public Policy as constituting a Trading with the Enemy,  
and  
(c) Contrary to the Trading with the Enemy Ordinance 1914 and 20  
Regulations made thereunder and to the Defence Regulations.

The enactments under (c) will also be relied upon as supporting the  
general propositions under (a) and (b).

- (2) The unauthorised correspondence does not refer to any particular  
correspondence but is quoted as a general proposition in  
particularising the "illegality" and in further particularising what  
general point of public policy is relied upon.  
(3) The Defendant will rely on the whole of Trading with the Enemy  
Ordinance 1914 and Regulations made thereunder. The Defendant  
will rely on the Defence Regulations as a whole for the purpose 30  
of ascertaining their object, but, will in particular rely on  
Regulations 12 and 27 of the Defence Regulations of Hongkong  
and Regulations 2 (a), 4 and 4 (a) of the Defence Regulations of  
Great Britain.

Yours faithfully,

(Sd.) WOO &amp; WOO.

## No. 12. Letter from Lo &amp; Lo to Appellant.

Mr. H. K. Woo.

Dear Sir,

Re : Mortgage I.L. 2153  
(No. 48 Kennedy Road)

We are instructed by Messrs. Kwong Sang Hong to write to you with regard to the above mortgage.

Inasmuch as the principal and interest secured by the above mortgage was repaid in Yen to the prejudice of our clients, we are instructed to inform you that our clients reserve their right under the mortgage pending the official clarification of the position with regard to payment off in Yen, of mortgages which were contracted in Hongkong dollars.

Yours faithfully,

(Sd.) LO &amp; LO.

Exhibits.

P.2

No. 12.

Letter  
from Lo &  
Lo to  
Appellant,  
5th June  
1916.

## Exhibit Q.—Certified translation of Contract for Sale in Japanese.

*Translation.*

## Contract for Sale and Purchase of House.

Vendor : Name : WOO HANG KAM.

Address : No. 48 Kennedy Road, Hongkong.

20 (hereinafter briefly referred to as A.)

Purchaser : Name : KOO WUN SING.

Address : No. 191 Des Vœux Road Central, Hongkong.

(hereinafter briefly referred to as B.)

The above parties make Contract for sale and Purchase as follows :—

- 30 1. A sells the below-mentioned house which he owns to B at the price of Military Yen Sixty-eight only, and B buys it. Location of House—No. 48 Kennedy Road, Hongkong. Registered Number at the House Registry of the Government of the Occupied Territory of Hongkong : H. No. 7144. Lot number at the former Hongkong Government : I.L. No. 2143. Kind of House : European Style : Structure : Reinforced concrete. Number of storeys : 3. Covering area : 85756 tsubo. Area of each floor : ground floor : 110.8 tsubo, 1st and 2nd floors : 95.00 tsubo.
2. As soon as both parties conclude this contract 13 (*sic* B) shall pay to A the sum of Military Yen Sixty-eight thousand only and received

Q  
Certified  
translation  
of Contract  
for Sale in  
Japanese.  
Undated.

Exhibits.

Q  
Certified translation of Contract for Sale in Japanese. Undated—continued.

from A the aforementioned House, land drainage, passages in the front and at the rear and all legal rights and benefits en bloc.

- 3. After his sale and purchase is concluded B shall succeed all rights in respect of the period and terms specified in the deed of the house and thereafter B shall be responsible in paying all Government taxes in respect thereof.
- 4. Hereafter if B fails to pay Government taxes commits and breach against the terms specified in the deed of the house and A suffers any damage or loss, B shall be responsible in making good the same. 10
- 5. The abovementioned house is doubtlessly the property of A, and A shall declare that neither mortgage nor security rights in existence. Should any dispute arise in the future as to the ownership of the house A shall take all responsibilities. If A is required to subscribe his signature and affix his chop in connection with registration of transfer of ownership and other procedures he shall do all this when requested from time to time, and B shall bear the expenses thereof.

The above terms are made upon agreement by both parties, and this Contract is made to meet any future (requirements). 20

Date :

Vendor : CHAN WUN CHOW, Representative for Woo Hong Kam.  
(Signed and chopped.)

Purchaser : KOO WAN SING.  
(Signed and chopped.)

Witness : CHOK YAM KO.  
(Signed and chopped.)

I hereby certify the foregoing to be the true translation of the Japanese document marked "A." 30

(Sd.) G. TONG,  
18.VIII.48,  
Court Translator.

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Exhibit R.—Certified translation of Certificate of Sale in Japanese.

Exhibits.

*Translation.*

R  
Certified translation of Certificate of Sale in Japanese. Undated.

*Certificate of the Sale of House.*

I. Designation of House :—  
 Registered No. at the House Registry of the Government of the Occupied Territory of Hongkong : H. No. 7144.  
 Lot No. under former Hongkong Government I.L. No. 2153.  
 Location of House : No. 48 Kennedy Road Hongkong.  
 Kind of House : European style : Structures : Reinforced concrete :  
 10 Number of storeys : 3 : Area of each floor : ground floor : 110.83 tsubo  
 1st and 2nd floors 95.00 tsubo.  
 Price of the Sale : Military Yen Sixty-eight thousand only.  
 The above-mentioned house is my property and I sell the same to you at the above price, and I have received the amount in full. I shall be wholly responsible should any other person, or myself make claim and will not cause any trouble to you. This is the Certificate of Sale for any future (requirements).

Date :

Address : No. 18 Kennedy Road, Hongkong.

20 Vendor : CHAN WUN CHOW, representative of Woo Hong Kam.  
 (Signed and chopped.)

To

Address : No. 191 Des Vœux Road Central Hongkong.  
 Purchaser Mr. KOO WAN SING.

I hereby certify the foregoing to be the true translation of the Japanese document marked B.

(Sd.) G. TONG,

18.VIII.48.

Court Translator.

30

Exhibit S.—Certified translation of Agreement for Sale of Garage in Chinese

S  
Certified translation of Agreement for Sale of Garage in Chinese, 1943.

*Translation.*

Makers of Deed are : Woo Hang Kam of No. 48 Kennedy Road Hongkong Vendor and Koo Wan Sang of No. 191 Des Vœux Road Central Hongkong Purchaser.

In the matter of house No. 48 Kennedy Road, that is, the parcel of ground duly registered in the Land Office of Hongkong as Inland Lot No. 2153 together with all buildings thereon.



Exhibits.  
 S  
 Certified  
 translation  
 of Agree-  
 ment for  
 Sale of  
 Garage in  
 Chinese,  
 1943—  
*continued.*

The abovementioned property is perpetually sold on to-day's date to the Purchaser and this transaction is duly completed. The building of the garage opposite the said house is also perpetually sold to the Purchaser for his enjoyment but the ground on which the garage stands is rented from the Government on a yearly basis for which a lease was granted by the British Government some time ago. This lease is lost and could not be produced for making a transfer. Should there be anything to be done in the future to enable the Purchaser to enjoy the benefits of the said garage the Vendor shall undertake to do as requested until the whole matter is properly dealt with. All expenses therefor shall however be borne by the Purchaser. This Agreement is specially made as proof. 10

Dated the            day of            month 32nd Year of the  
 Chinese Republic (1943).

Vendor by his attorney :

(Sd.) CHAN UN CHAU.

(Chopped) " Chan Un Chau "

Purchaser :

(Sd.) KOO WAN SANG.

(Chopped) " Chop of Koo Wan Sang."

Witness :

20

(Sd.) TSOK EN KAU.

(Chopped) " Chop of Tsok En Kau."

Guarantor :

(Sd.) WOO PAK YUNG.

(Chopped) " Woo Pak Yung."

I hereby certify the foregoing to be the true translation of the Chinese document marked F.

(Sd.) CHAN KWOK YING,

*Court Translator.*

18.8.1948. 30

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Exhibit T.—Certified translation of Envelope in Chinese in which Exhibits K 1, K.2, L.1 and L.2 were enclosed.

Exhibits.

T

Certified translation of Envelope in Chinese in which Exhibits K.1, K.2, L.1, L.2 were enclosed. Undated.

Translation

(Envelope)

Registered

Miss Koo Wan Ying,  
Yun Loo  
No. 42 Tung Woo Road,  
Mei Hsien,  
Kwangtung.

Sent by :

Woo Kwing Tong,  
Protestant Union Middle School,  
Kam Hsien.

(Back of Envelope)

20

\$3.00  
Postal Service  
of the Chinese  
Republic.

\$3.00  
Postal Service  
of the Chinese  
Republic.

\$3.00  
Postal Service  
of the Chinese  
Republic.

30

Kiangsi,  
29th day 5th month  
33rd year (of the  
Chinese Republic)  
(29.5.44)  
Kam Hsien.

Kiangsi,  
29th day 5th month  
33rd year (of the  
Chinese Republic)  
(29.5.44)  
Kam Hsien.

Kiangsi,  
29th day 5th month  
33rd year (of the  
Chinese Republic)  
(29.5.44)  
Kam Hsien.

Kwang Tung  
7th day 6th month  
illegible  
Mei Hsien.

051170.

40

I hereby certify the foregoing to be the true translation of the Chinese document marked B.

(Sd.) CHAN KWOK YING,  
Court Translator.  
21.X.1948.

Exhibits. **Exhibit U.—Certified translation of Envelope in Chinese in which Exhibit M was enclosed.**

U  
Certified  
translation  
of Envelope  
in Chinese  
in which  
Exhibit M  
was  
enclosed.  
Undated.

(Envelope)

*Translation.*

*Express.*

Miss Koo Wan Ying,  
c/o Yun Loo  
No. 42 Tung Woo Road,  
Mei Hsien,  
Kwangtung.

10

Sent by :

Woo Hang Kam,  
Protestant Union Middle School,  
Kam Hsien.

(Back of Envelope)

(Post Mark)—Kwangtung,  
25th day 1st month, 33rd year (of the Chinese Republic)  
(25.1.1944)  
Mei Hsien.  
007628.

20

(Pencil Mark)—Received on 27th day 1st month 33rd year (of the Chinese Republic) (27.1.1944) in the forenoon.

I hereby certify the foregoing to be the true  
translation of the Chinese document  
marked A.

(Sd.) CHAN KWOK YING,  
*Court Translator*  
21.x.1948.

V  
Certified  
translation  
of Applica-  
tion for  
Registra-  
tion of  
Cancellation  
of Mortgage  
in Japanese.  
Undated.

**Exhibit V.—Certified translation of Application for Registration of Cancellation of Mortgage in Japanese.**

30

*Translation.*

*Application for Registration of Cancellation of Mortgage of House.*

1. Location of House : No. 48 Kennedy Road, Hongkong.
2. Lot No. under former Hongkong Government : I.L. No. 2153.
3. Registered No. at the House Registry of the Government of the Occupied Territory of Hongkong H. No. 7144.
4. Mortgager : Kwong Sang Hong Co. Ltd.

5. Amounts of Mortgage: H.K. \$50,000 on 9th November Showa 2nd year.  
 H.K. \$23,000 on 11th August Showa 5th year.  
 Total amount of H.K. \$73,000 only.

The above sum of Mortgage has been refunded as in the receipt attached  
 on \_\_\_\_\_ day, \_\_\_\_\_ year of Showa, and this is to apply  
 for the registration of cancellation of Mortgage.

Date

Address: Des Vœux Road, Central, Hongkong.

Mortgager: FUNG FOOK TIN.  
 (Signed & chopped)  
 LEUNG YING KUEN  
 (Signed & chopped)

10

Seal of Kwong Sang Hong Co. Ltd.
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Address: No. 48 Kennedy Road Hongkong

Mortgagee: CHAN WUN CHOW, representative of Woo Hang Kam.  
 (Signed and chopped)

To: Mr. Yoshii Sada, Head of the House Registry of the Government of  
 the Occupied Territory of Hongkong.

I hereby certify the foregoing to be the true  
 translation of the Japanese document  
 marked C.

20

(Sd.) G. TONG,  
 18.VIII.48  
 Court Translator.

**Exhibit W.—Letter from P. Y. Woo to Koo Sui Ting.**

Koo Sui Ting Esq.

26th October 1943

Dear Mr. Koo,

Enclosed please find a receipt from the Foo Hang Bank of Macao for  
 M. Y. 8,550 equivalent to HK \$34,200 the amount of principal and interest  
 30 due to them on the Second Mortgage of No. 48 Kennedy Road.

Mr. Ko Ho Ning personally undertook to procure from his son Mr.  
 Ko Fook San who figures as the nominal mortgagee on behalf of the Bank  
 on his return from abroad a proper reassignment of the mortgage and hand  
 the same to me with the original Deed of 2nd Mortgage.

I trust that the matter is now satisfactorily completed the above  
 arrangement being the best that can be effected under the existing  
 circumstances.

Yours sincerely,

Encl.

(Sd.) P. Y. WOO.

Exhibits.  
 V  
 Certified translation of Application for Registration of Cancellation of Mortgage in Japanese. Undated—continued.

W  
 Letter, P.Y. Woo to Koo Sui Ting, 26th October 1943.

Exhibits. **Exhibit X.—Agreed Extract from the Hongkong News of 10th May 1943.**

X  
Agreed  
Extract  
from  
Hongkong  
News,  
10th May  
1943.

HONG KONG NEWS.

Monday, May 10, 1943.

GOVERNOR'S ORDERS CLARIFIED.

The following regulations governing the circulation of currency in the occupied Territory of Hong Kong are contained in Governor's Order No. 26 just issued. 10

Military Yen will be the currency for use in the Occupied Territory of Hongkong. They will be classified as under (1) "B" class notes (2) "C" class notes (3) 50 sen "D" and "E" class notes. Besides these notes to be called Hongkong Military notes no other currency can be circulated.

Unless special permission has been obtained from the Governor, currency other than Hongkong Military notes will not be allowed to be used for buying or selling transactions.

Unless special permission has first been obtained Hongkong Military Yen cannot be taken out or brought into Hongkong. Other currency will also not be allowed to enter Hongkong. 20

Violators of any of the above regulations will be liable to a term of imprisonment of not more than 15 years or a fine not exceeding 50,000 Yen. The circumstances of the case will be taken into consideration and the violator is liable to a term of imprisonment and fine. This order will come into effect as from June 1st Showa 18th Year and there will be no further exchange of Hongkong currency for Military Yen on and after that date.

Until this order comes into effect all previous orders governing currency in Hongkong will remain effective.

PLACES FOR EXCHANGE OF HONGKONG NOTES.

Hongkong notes may be changed into Military Yen at the following 30 banks according to Public Notification No. 28 just issued to-day :

Bank of China, Shanghai Commercial & Savings Bank, National Commercial & Savings Bank, China Industrial Banking Corporation, Kwangsi Provincial Bank, Kwok Wah Bank, Hongkong Swatow Industrial & Commercial Bank and Fukien Provincial Bank.

CHANGING OF CURRENCY AND ACCOUNTS.

In connection with Governor's Order No. 26 containing the regulations governing Hongkong currency, which is to come into effect on June 1, Showa 18th year, Public Notice No. 14 states :

(1) Those in possession of Hongkong currency should have it changed into Hongkong Military Yen at the banks named in the annexed list on or before May 31.

(2) Those who have current banking accounts in Hongkong currency should have them changed into Hongkong Military Yen accounts on or before May 31.

(3) All loans, transactions, etc., should be carried out in Hongkong Military Yen on and after June 1.

(4) The above regulations will be based on the prevailing ratio of four  
10 Hongkong dollars to one Military Yen.

Exhibits.

X

Agreed  
Extract  
from  
Hongkong  
News,  
10th May  
1943—  
*continued.*

#### MILITARY YEN AND CHINESE BANK NOTES.

Places for exchange of currency are :

Hongkong : Yokohama Specie Bank, Military Yen depot at the site of the former Nederlandsch Indische Handelsbank, N.V. 5 Higashushawer Dori Bank of Taiwan Bank of Communications Bank of East Asia Overseas Chinese Banking Corporation Wing on Bank Bank of China Shanghai Commercial & Savings Bank Hong Nin Savings Bank National Commercial & Savings Bank Kwok Wah Bank Yien Yieh Bank Kwangtung Provincial Bank Kwangsi Provincial Bank Hong Kong & Swatow Commercial Bank  
20 China Industrial & Commercial Bank Fukien Provincial Bank.

These banks will be opened for exchange purposes every day excepting Sundays and holidays.

At the Motohonkon District Bureau on May 15, 21 and 25.

At Stanley District Bureau on May 20.

At Cheung Chau Gendarmerie Office on May 20, 25.

At Ping Chau Government Officials' quarters on May 20.

Kowloon.—Yokohama Specie Bank, Bank of East Asia, 475 Katori Dori (former Yaumati School), every day excepting Sundays and holidays.

At Kowloon Castle Peak District Bureau, May 15, 21, 27 ; Tsuen Wan  
30 District Bureau, May 18, 19, 26 ; Sheung Shui District Bureau, May 18, 24, 26 ; Stataukok District Bureau, May 19, 24 ; Shatin District Bureau, May 17, 22 ; Suntin District Bureau, May 17, 22 ; Saikung District Bureau, May 17, 22 ; Tai-O Government Officials' quarters, May 21, 25.

The above places and dates are likely to be changed at any time.

In the Privy Council.

No. 27 of 1950.

ON APPEAL FROM THE SUPREME COURT OF  
HONGKONG (APPELLATE JURISDICTION).

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BETWEEN  
HANGKAM KWINGTONG WOO  
*(Defendant) Appellant*  
AND  
LIU LAN FONG alias LIU AH LAN  
*(Plaintiff) Respondent.*

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RECORD OF PROCEEDINGS

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REID SHARMAN & CO.,  
36 Bedford Row, W.C.1,  
*Solicitors for the Appellant.*

SHARPE PRITCHARD & CO.,  
12 New Court,  
Carey Street, W.C.2,  
*Solicitors for the Respondent.s*