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25,1952

31498 No. 15 of 1952.

# In the Privy Council.

ON APPEAL  
FROM THE APPEAL COURT OF HONG KONG.

UNIVERSITY OF LONDON  
W.C.I.  
21 JUL 1953  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

BETWEEN  
CIVIL AIR TRANSPORT INCORPORATED . . . *Appellants*  
AND  
CENTRAL AIR TRANSPORT CORPORATION . . . *Respondents.*

## Case for the Appellants.

RECORD.

10 1. This is an appeal brought by the above-named Appellants by  
virtue of the provisions of Article 3 of the Supreme Court of Hong Kong  
(Jurisdiction) Order in Council, 1950, and by leave of the said Court, p. 2.  
against a judgment of the Appeal Court of Hong Kong (Gould and Scholes, JJ.), dated the 28th December, 1951, affirming a judgment of the p. 197.  
Supreme Court of Hong Kong Original Jurisdiction (Howe, C.J.), dated  
the 21st May, 1951, whereby the learned Chief Justice dismissed the  
Appellants' claim for a declaration that 40 aircraft on the Government  
airfield at Kai Tak in the Colony of Hong Kong, together with any spare  
parts, machinery and equipment for use in relation thereto were the  
20 property of the Appellants and/or that the Appellants had the sole right  
of possession thereto.

2. The aircraft and equipment with which this Appeal is concerned  
were formerly part of the assets of the Respondent Corporation (hereinafter  
called "C.A.T.C."), which was itself at all times an unincorporate  
commercial enterprise of the Government of the Republic of China. p. 17, ll. 24-30.  
C.A.T.C. was not a Government Department in the strict sense, but was p. 23, l. 12 et seq.  
administered by a Board of Governors under the control and direction  
of the Minister of Communications. One of the Vice-Ministers of  
Communications was Chairman of the Board of Governors. The assets  
30 of C.A.T.C. were not, however, vested in the Board of Governors but were p. 30, l. 14.  
vested in and owned solely by the Chinese Government which had over  
the assets the powers of disposal of an absolute owner. p. 24, l. 20.

3. At all material times until midnight 5th January/6th January,  
1950, His Majesty's Government recognised the Nationalist Government p. 35, l. 22.  
as the *de jure* Government of the Republic of China.

4. In the summer of 1949, the Prime Minister of the Nationalist Government of China, which then had its seat in Canton, ordered the removal of C.A.T.C. from Canton, where it was then located, to Taiwan (Formosa). By the 1st September, 1949, the whole organisation of C.A.T.C. had accordingly removed to Hong Kong as a stage in the journey to Taiwan, and was there awaiting arrangements to be made for accommodation in and transport to Taiwan. Some ninety per cent. of the assets of the C.A.T.C. had similarly been removed to Hong Kong.

p. 18, l. 30.  
p. 19, l. 39.  
p. 21, l. 32.  
p. 21, l. 40.  
p. 190, l. 24 et seq.

5. On the 9th November, 1949, before the further move to Taiwan could be undertaken, the then President of C.A.T.C. flew from Hong Kong to Peking and defected to the Central People's Government of China. At about the same time the majority of C.A.T.C.'s employees in Hong Kong also defected from the Nationalist Government, though they remained in Hong Kong. In consequence of these occurrences the Chinese Civil Aeronautics Administration on the 13th November suspended the registration certificates of all C.A.T.C.'s aircraft. On the same day one Ango Tai, an employee who had remained loyal to the Nationalist Government, was appointed acting President of C.A.T.C. with full power to deal with all its affairs. On the 16th November, in pursuance of his powers, Ango Tai dismissed the disloyal employees of C.A.T.C. and suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong. He also appointed one Parker as Chief of Security of C.A.T.C. with instructions to take possession of the property of C.A.T.C. and prevent it being injured or removed by unauthorised persons.

p. 105, l. 29.  
p. 105, l. 42.  
p. 106, l. 25.  
p. 253, l. 13.  
p. 248, l. 5.  
p. 249, l. 24.  
p. 248, l. 28.

6. From the 16th until the 21st or 22nd November, 1949, C.A.T.C.'s property at Kai Tak airfield, Hong Kong, was under the control of guards stationed there by the said Parker. These guards were then withdrawn on the instructions of the Commissioner of Police, Hong Kong, with the consequence that the defecting employees were able to obtain control of C.A.T.C.'s property at the airfield. On the 24th November, 1949, Ango Tai therefore commenced an action in the Supreme Court of Hong Kong in the name of C.A.T.C. against the principal defecting employees, and obtained an injunction restraining them (*inter alia*) from entering or remaining upon C.A.T.C.'s premises or interfering with C.A.T.C.'s enjoyment thereof, and from removing or interfering or tampering with C.A.T.C.'s property. On the 25th November, 1949, the Defendants in the action obtained an injunction until the 21st December, 1949, restraining C.A.T.C. from removing from the same premises the property affected by the previous injunction. As a result, Ango Tai made no effort to regain physical possession of C.A.T.C.'s assets at Kai Tak airfield. On the other hand, the injunction obtained at his instance on the 24th November, 1949, was not obeyed by the defecting employees, who remained in physical control of the assets.

p. 110, l. 35.  
p. 107, l. 12.  
p. 250.  
p. 251.  
p. 108, l. 26.  
p. 108, l. 33.

7. Such was the situation of C.A.T.C.'s assets in Hong Kong when on the 5th December, 1949, an American partnership, consisting of General C. L. Chennault and Mr. Whiting Willauer, offered, *inter alia*, to purchase from the Nationalist Government all the physical assets of C.A.T.C. for the sum of U.S. \$1,500,000, payable by means of bearer promissory notes. On the 11th December, 1949, a meeting of the Executive

p. 232 et seq.  
p. 17, l. 6.

Yuan was held at Taipeh, Taiwan, where the Nationalist Government had then established itself, and the offer of the American partnership was considered. It was resolved that the offer should be accepted and Liu Shao-Ting, the Vice Minister of Communications, was authorised to sign an acceptance of the offer in so far as it concerned the assets of C.A.T.C. On the 12th December, 1949, Liu Shao-Ting was appointed Chairman of the Board of Governors of C.A.T.C., and on the same day he duly signed an acceptance of the terms of the offer made by the American partnership. The acceptance of the offer and the sale and transfer of the assets of C.A.T.C. to the partnership was confirmed by a letter from the Prime Minister of the Nationalist Government dated the 12th December, 1949, on which date the Nationalist Government also cancelled permanently the certificates of registration of C.A.T.C.'s aircraft.

8. It was a term of the agreement so entered into between the Nationalist Government and the American partnership that a corporate body should be formed to which the partnership should transfer the assets of C.A.T.C. in consideration of the issue of promissory notes to bearer for the agreed purchase price ; and that these notes should be accepted by the Nationalist Government in substitution for the promissory notes of the partnership. In accordance with this term of the agreement the partnership, by a Bill of Sale executed on the 19th December, 1949, by their duly authorised attorney, sold the former assets of C.A.T.C. to the Appellants. The Appellants in consideration of this sale made promissory notes to bearer for the purchase price of U.S. \$1,500,000 and these notes were issued to the Nationalist Government on the 31st December, 1949.

9. As from midnight 5th/6th January, 1950, His Majesty's Government withdrew *de jure* recognition from the Nationalist Government and recognised the Central People's Government as the *de jure* Government of China.

10. In January, 1950, the Appellants commenced proceedings in the Supreme Court of Hong Kong against the partnership of General Chennault and Mr. Willauer for delivery up of the former assets of C.A.T.C. To these proceedings C.A.T.C. and the defecting employees against whom the injunction had been obtained on the 24th November, 1949, were added as third parties. The Appellants applied in these proceedings for an Order for the appointment of a receiver of the assets. To this course the partnership consented but the application was opposed by the third parties who claimed to hold the assets on behalf of the Central People's Government. The then Chief Justice of Hong Kong held that the application impleaded a foreign sovereign and accordingly refused it on the principle of sovereign immunity. His decision on this question was upheld by the Appeal Court of Hong Kong.

11. Meanwhile, the aircraft which had formed part of the assets of C.A.T.C. had been registered in the United States of America by the Appellants on the 19th December, 1949, and despite the prior United States registration, were purportedly registered in China by the Central People's Government on the 1st February, 1950. In this state of affairs, the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950,

was made and came into force on the 11th May, 1950. This Order provided (*inter alia*) that the aircraft should remain in Hong Kong until the Governor was satisfied that the ownership and right to possession of them had been finally determined; and further provided that it should not be a bar to any proceeding concerning the aircraft instituted in the Supreme Court of Hong Kong after the coming into force of the Order that a foreign sovereign state was thereby impleaded.

p. 5. 12. The Writ of Summons in the present action was issued on the 19th May, 1950. After service of the Writ by a sealed copy delivered to the office in Hong Kong of C.A.T.C. as ordered by the Supreme Court 10 of Hong Kong, service was accepted on behalf of the Respondents by solicitors in Hong Kong. This acceptance was subsequently struck out on it appearing that the Respondents' instructions to those solicitors did not include any action commenced after the coming into force of the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950. Attempts were subsequently made to effect service of notice of the Writ of Summons on the Central People's Government of China, but these attempts proved ineffectual and on the 2nd December, 1950, the Appellants obtained leave to proceed in the action *ex parte*.

p. 6, l. 20.

p. 7, l. 19.

p. 9, l. 20.

p. 10, l. 22.

13. The action was heard before Howe, C.J., on the 27th and 20 28th March, 1951. It was submitted for the Appellants that on the 12th December, 1949, the assets in question were the property of the Chinese Government; that as on that date the assets were within the British jurisdiction and the Nationalist Government was then recognised as the *de jure* Government of China, the Nationalist Government only was entitled, in the view of our Courts, to deal with the assets at that date; that the proceedings of the Nationalist Government in disposing of the assets were *intra vires* and regular by Chinese law; that the agreement of the 12th December, 1949, was valid by Chinese law and the law of Hong Kong to pass the property in the assets forthwith to the American partner- 30 ship; that the Bill of Sale of the 19th December, 1949, was valid by the law of the District of Columbia and the law of Hong Kong to pass the property in the assets forthwith to the Appellants; and that the subsequent change of *de jure* recognition as from midnight 5th/6th January, 1950, did not operate to divest the Appellants of rights and property which they had acquired, through the partnership, from the Nationalist Government for value.

p. 84. 14. On the 21st May, 1951, Howe, C.J., delivered a reserved judgment in which he held that the transaction between the Nationalist Government and the American partnership was not valid or enforceable in our Courts 40 and that the Appellants had failed to establish their claim to ownership or right to possession of the assets, ownership and the right to possession being in the Central People's Government. The learned Chief Justice based his conclusion on three grounds. He held, first, that the agreement of the 12th December, 1949, was invalid as being an act of members of the Nationalist Government done not in good faith as trustees but for an alien and improper purpose. Secondly, he held that the effect of the subsequent recognition of the Central People's Government as the *de jure* Government of China had the retroactive effect of conferring on that

p. 96.

p. 04, l. 28.

p. 95, l. 32.

Government as from the 1st October, 1949, the ownership of the assets. Thirdly, he held that the agreement of the 12th December, 1949, was an executory agreement which had been reprobated by the Central People's Government. p. 93, l. 18 et seq.

15. As to the first ground, the learned Chief Justice was of opinion that, although upon a change of recognition the newly recognised Government succeeds by representation and succession and not by title paramount, there must be a limit to the scope of the acts to which this doctrine applied, and a limit to the transactions into which a Government p. 93, l. 18 et seq.  
 10 knowing that recognition would shortly be withdrawn from it might enter. The learned Chief Justice considered that this limitation on the principle of succession was expressed in a passage in the judgment of Denning, L.J., in *Boguslawski v. Gdynia Ameryka Linie* (1951) 1 K.B., where he said at page 182 :—

“ But the principle of continuity is of paramount importance. It requires that the new Government should stand in the shoes of the old Government in all respects, except in respect of acts of members of the old Government which were *ultra vires*, or acts which were done by them, not in good faith as trustees for the State, but for p. 94, l. 18.  
 20 an alien and improper purpose.”

16. The learned Chief Justice sought to apply this test in the present case and continued :—

“ In the transaction now before the Court, I have no hesitation in reaching the conclusion that not only was it one designed to embarrass the Central People's Government, but it was against the interests of the Chinese people and that it was a transaction incompatible with the trusteeship which every Government must assume. The loss of these aircraft in a country so large as China and with poor communications would be severe. The majority p. 94, l. 18.  
 30 of the staff and employees had already attorned to the Central People's Government, and the aircraft were only at any time owned by the Nationalist Government solely in its capacity as trustee. I cannot hold that at the time of the transaction the Nationalist Government may properly be said to have sold these aircraft for the purposes of fighting to retain (*sic*) its former territory. In my opinion, this was an act of members of the Nationalist Government done not in good faith as trustees but for an alien and improper purpose.”

17. In the Appellant's respectful submission, comity requires that p. 94, l. 18.  
 40 our Courts should recognise the validity of all *intra vires* acts of a Government at the relevant time recognised as the *de jure* Government of a foreign state and acting within its proper sphere ; and that there is no principle which entitles our Courts to inquire into or pass judgment upon the propriety of such acts. The Appellants further submit that if in *Boguslawski's Case* Denning, L.J., was entitled to inquire into the propriety of the old Government's acts, a course which was not attempted by the other members of the Court, this was permissible only in the exceptional state of facts in that case and is no authority for such a proceeding where

those facts are not present. In *Boguslawski's Case* the act in question was done at a time when the old Government knew that recognition was to be withdrawn. Moreover, as the old Government was not in control of any territory and existed only by virtue of the acquiescence of His Majesty's Government it would cease wholly to exist on the withdrawal of recognition. In the present case there is no evidence that at the 12th December, 1949, the Nationalist Government knew that recognition was to be withdrawn, nor in the circumstances would the withdrawal of recognition have the effect of preventing it from continuing the struggle to maintain itself as the Government of China. Indeed the majority of the 10 United Nations including the United States of America continue to recognise the Nationalist Government as the *de jure* Government of China. Further, there was evidence in the present case that the Nationalist Government was in control of territory on the mainland of China at the time of the sale of the said assets to the Partnership.

18. Even if contrary to the Appellants' submissions there is any general principle which entitled the Chief Justice to inquire into the propriety of the agreement of the 12th December, 1949, it is respectfully submitted that there was no evidence upon which the Chief Justice could find that the transaction was entered into for an alien or improper purpose. 20 The transaction was compatible with the purpose of the Nationalist Government to provide itself with funds to continue the struggle and with the purpose of preventing the assets forming an accretion to the strength of the rebellious Government. Either and both of these purposes was in the circumstances at the relevant time a legitimate Government purpose, and the statement of the Chief Justice that the transaction was inimical to the interests of the Chinese people is, it is submitted, even if correct, a mere political pronouncement made in the light of subsequent events.

19. On the question of retroactivity, the learned Chief Justice said :—

p. 95, l. 8.

“ The Nationalist Government ceased to be *de facto* Government 30 of different parts of China as from the date at which it ceased to be in effective control of those parts and it is to be assumed that the Central People's Government became correspondingly *de facto* Government of those areas. In October, 1949, the Central People's Government dismissed the Ministers of the Nationalist Government and new Ministers were appointed in their place. In November, 1949, the majority of the members of the staff and employees of Central Air Transport Corporation in Hong Kong had attorned to the new Government and these Courts have held that the control and possession of the aircraft in Hong Kong was in the Central 40 People's Government. On the 12th November, 1949, the Premier of the Central People's Government appointed Cheuk Lin Chen, General Manager of Central Air Transport Corporation (he had been General Manager since the inception of the Corporation) and from the 15th November, 1949, wages and salaries were paid by the Central People's Government.

Even though the aircraft were in Hong Kong, there is no doubt that the Central People's Government were in possession and in effective control. If an analogy may be drawn between ships abroad,

the masters of which have attorned, and aircraft in similar circumstances, then clearly here is a situation in which recognition *de jure* will have a retroactive effect and, in my opinion, that retroactive effect will go back at least as far as the dismissal of the Ministers of the Nationalist Government in October, 1949. Further it must be remembered that the aircraft in this case were owned and managed and controlled by the Government of China and that the Central Air Transport Corporation is a department of that Government. I hold therefore that as from the 1st October, 1949,  
10 these aircraft were owned by the Central People's Government."

20. There was no evidence before the learned Chief Justice as to a number of the matters referred to in the passage cited above and he derived them from statements made by one C. L. Chen, the erstwhile President of C.A.T.C. who had gone over to the Central People's Government in November, 1949, in an affidavit affirmed in the course of the proceedings referred to in paragraph 10 hereof. It is respectfully submitted  
20 that there was no warrant for such a course. The Appellants had at no time an opportunity of cross-examining the said Chen and as they were unaware that the Chief Justice proposed to take his affidavit into consideration had not called evidence to rebut the statements contained in it. p. 96.

21. Apart from this consideration the Appellants respectfully submit that the learned Chief Justice erred in holding that the subsequent *de jure* recognition had the effect of conferring retrospectively upon the Central People's Government any title to the assets of C.A.T.C. in Hong Kong. In the first place the Appellants submit that the Foreign Office certificate that up to and including midnight 5th/6th January, 1950, His Majesty's Government recognised the Nationalist Government as being the *de jure* Government of the Republic of China and thereafter recognised the Central  
30 People's Government in that character, is conclusive against any retroactive effect of the change of recognition in respect of assets of the Chinese Government within the British jurisdiction. Secondly, the Appellants submit that the doctrine of retroactivity of *de jure* recognition is confined to governmental and executive acts of the newly recognised government in relation to the territory previously controlled by it *de facto* and to persons and things having a local situation therein, and does not extend to affect the title to assets locally situate within the British jurisdiction. The Appellants submit, thirdly, that even if the control of the assets by  
40 the defecting employees was relevant to the question of retroactivity, the learned Chief Justice erred in failing to examine the quality of that control. In the Appellants' submission the position of the defecting employees was merely that of trespassers to the assets and their control, being a breach of municipal law and a violation of the injunctions of the Hong Kong Court, could not in any circumstances be the foundation of a retrospective title. In this connection it is also submitted that the Chief Justice erred in thinking that there was any analogy between the situation arising from the defection of certain of C.A.T.C.'s employees and that which may arise on the attornment of a ship's master, or that there is any analogy between ships which have a local port of registry and  
50 aircraft, which do not.

22. As for the third ground of the learned Chief Justice's judgment, it is submitted that he was wrong in regarding the agreement of the 12th December, 1949, as executory, since the obligations of the partnership thereunder, except in so far as they were continuing obligations, had been wholly performed before the date of the change of recognition. It is further submitted that the matters to which the Chief Justice referred in this part of his judgment are in any case irrelevant to the question of the Appellants' ownership and right to possession of the assets of C.A.T.C. in Hong Kong, the property in which passed on the signing of the agreement. 10

23. The Appellants' appeal from the judgment of Howe, C.J., was heard by the Appeal Court of Hong Kong (Gould and Scholes, JJ.), on the 21st and 22nd August, 1951. At the hearing of the appeal the Appellants, while objecting to the course taken by the learned Chief Justice in considering the affidavit of C. L. Chen, sought and obtained leave to adduce evidence in rebuttal. On the 2nd November, 1951, the Appeal Court asked for further evidence and this evidence was made available by the Appellants on the 26th November, 1951.

p. 189, l. 14.  
p. 194 et seq.

24. On the 28th December, 1951, the Appeal Court dismissed the Appellants' appeal. The leading judgment was delivered by Gould, J. 20 He held, for reasons which the Appellants submit are clearly right, that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that the Nationalist Government was entitled to possession of and had jurisdiction over the aircraft of C.A.T.C. at the relevant date. However, he agreed with the Chief Justice's finding that the Agreement of the 12th December, 1949, was hostile to the Central People's Government and to the interests of the Chinese people; a breach of trusteeship and done for an alien and improper purpose. On this ground he dismissed the Appeal. The Appellants respectfully submit that his reasoning on this part of the case is open to the same objection 30 as the similar reasoning of Howe, C.J.

p. 197.  
p. 216, l. 8.

p. 222, l. 44.

25. Scholes, J., delivered a judgment dismissing the appeal on the same ground, but he was doubtful whether the appeal should not also be dismissed on the ground that the Central People's Government had, by retroactive effect of the subsequent change of *de jure* recognition, acquired title to the aircraft prior to the 12th December, 1949.

p. 225.

26. From the judgment of the Appeal Court this appeal is now preferred to Her Majesty in Council.

The Appellants humbly submit that the judgments appealed from are wrong and should be set aside and that judgment should be directed to 40 be entered for the Appellants for the following among other

## REASONS.

- (1) BECAUSE the sale of the assets of C.A.T.C. by the Nationalist Government on the 12th December, 1949, was a valid sale and passed the property in the assets to the partnership of General Chennault and Mr. Willauer.



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- (2) BECAUSE the property in the said assets was passed by the said partnership to the Appellants by the Bill of Sale dated the 19th December, 1949.
- (3) BECAUSE the subsequent recognition of the Central People's Government as the *de jure* Government of the Republic of China did not divest the Appellants of their property in the said assets.
- (4) BECAUSE the Nationalist Government in selling the said assets was acting *intra vires* and was recognised by His Majesty's Government as the *de jure* Government of the Republic of China, and the Courts of Hong Kong were not entitled to inquire into the validity or propriety of the said sale.
- (5) BECAUSE the sale by the Nationalist Government was not a transaction entered into for an alien or improper purpose.
- (6) BECAUSE the Judgment of Howe, C.J., was wrong.
- (7) BECAUSE the Judgment of the Appeal Court of Hong Kong was wrong.

HARTLEY SHAWCROSS.

R. I. THRELFALL.

In the Privy Council.

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ON APPEAL

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**Case for the Appellants.**

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