DC G2. 25, 1952

No. .... of 195......

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

21 JA 1953 ... OF ADVANCED ... STUDIES

BETWEEN

CIVIL AIR TRANSPORT INCORPORATED (Plaintiffs) - - *Appellants*

AND

CENTRAL AIR TRANSPORT CORPORATION (Defendants) - *Respondent*

RECORD OF PROCEEDINGS

MESSRS. MARKBY, STEWART & WADESONS,
5 Bishopsgate,
London, E.C.2,
Solicitors for the Appellants.

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

31497

No. ...15...... of 1952...

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

UNIVERSITY OF LONDON
W.C.1.
21 JUL 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

BETWEEN

CIVIL AIR TRANSPORT INCORPORATED (Plaintiffs) - *Appellants*

AND

CENTRAL AIR TRANSPORT CORPORATION (Defendants) *Respondent*

RECORD OF PROCEEDINGS

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No. .... of ....

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT IN HONG KONG.

BETWEEN

CIVIL AIR TRANSPORT INC. (Plaintiffs) *Appellants*

AND

CENTRAL AIR TRANSPORT CORPORATION (Defendants) - - - *Respondents.*

10

RECORD OF PROCEEDINGS

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 1. The Order in Council.

No. 1.

THE SUPREME COURT OF HONG KONG (JURISDICTION) ORDER IN COUNCIL 1950.

(Hereinafter sometimes referred to as The Order in Council).

WHEREAS evidence has been produced to the Governor of Hong Kong that 70 aircraft now on the Government airfield at Kai Tak in Hong Kong are registered both in the United States of America and in China and, the aircraft not being State aircraft within the meaning of the Chicago Convention on International Civil Aviation, 1944, such dual registration is contrary to Article 18 of that Convention,

20 AND WHEREAS ownership of the aircraft is in dispute and there are conflicting claims to their possession,

AND WHEREAS it is just and desirable that the question of ownership of the aircraft and of right to their possession should be decided by a Court of Law before they are permitted to leave HONG KONG,

NOW THEREFORE, His Majesty, in exercise of all powers enabling him in this behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows:—

1. (1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of 30 coming into operation of this Order, it shall not be a bar to jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State.

(2) If a Defendant in any such action or other proceedings fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire into the matter fully before giving judgment.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 1. The Order in Council, *continued.*

2. (1) If at any time after 21 days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which subsection (1) of Section 1 of this Order applies and in which, or as a result of which, the ownership of the aircraft or right to the possession thereof is likely to be finally determined, the Governor shall by Order published in the Gazette refer the question of ownership of the aircraft and right to the possession thereof to the Court for determination.

(2) On any such reference to the Court it shall enquire fully into and determine the questions notwithstanding reference may implead a foreign Sovereign State. 10

3. Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or other proceeding or reference may appeal therefrom to the Full Court and from thence to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken any part in previous proceedings.

4. (1) For the purpose of an action or other proceeding or reference or for the purpose of any appeal which may be brought in accordance with section 3 of this Order, a Court shall have power—

(a) to hear evidence, to summon witnesses, to take evidence on affidavit and to call for production of documents; 20

(b) to give such directions as it shall think fit to enable justice to be done, and, in particular, but without prejudice to the generality of the foregoing power, to give directions as to the conduct and hearing of the action or other proceedings or reference, or appeals as the case may be, as to the persons who may be parties thereto or may be heard therein, and as to the time within which any step therein is to be taken;

(c) to provide for the service of any documents whether inside or outside of Hong Kong.

(2) Subject to the provisions of this Order and to any directions of the Court under this section— 30

(a) the existing law and practice relating to civil proceedings in the Court shall apply as nearly as may be to an action or other proceeding or reference;

(b) the existing law and practice relating to appeals from a decision of the Court in a civil matter shall apply as nearly as may be to any appeal which may be brought in accordance with section 3 of this Order.

5. (1) Until the Governor is satisfied that ownership or right to possession of the aircraft have been finally determined the aircraft shall remain in Hong Kong and the Governor may give such directions and take such steps whether by way of detention of the aircraft or otherwise, as shall appear to 50 him necessary to prevent their removal and to ensure their maintenance and protection.

(2) When the Governor is satisfied that ownership or right to possession has been finally determined he may give such directions and take such steps as shall appear to him necessary to give effect to decision of the Court.

(3) If any person fails to comply with any direction given by the Governor under this section he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding H.K.$5,000 or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

10 **6.** (1) In this Order unless the context otherwise requires—

"action or other proceeding" means an action or other proceedings to which subsection (1) of Section 1 of this Order applies;

"Court" means the Supreme Court of Hong Kong;

"person" includes any body of persons whether incorporated or not, and any government;

"reference" means a reference to the Court by the Governor under section 1 of this Order.

(2) The aircraft referred to in this Order are the aircraft mentioned in the preamble to this Order together with any spare parts, machinery and 20 equipment for use in relation to any of the aircraft, and the Governor may in case of doubt give directions designating more particularly the aircraft spare parts machinery and equipment referred to.

(3) The Hong Kong Interpretation Ordinance, 1911, as amended, shall apply for interpretation of this Order as it applies for interpretation of an Ordinance.

7. This Order may be cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, and shall come into operation forthwith.

Notified by the Colonial Secretary Hong Kong on the 11th day of May, 30 1950.

No. 2.

DIRECTIONS BY HIS EXCELLENCY THE GOVERNOR OF HONG KONG.

(Under Section 5 of the Order in Council).

In exercise of the powers conferred upon him by Section 5 of the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950 the Governor hereby gives the following Directions—

Citation.

1. These Directions may be cited as the Aircraft (Detention, Maintenance and Protection) Directions, 1950.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 2. Directions by H.E. the Governor.

Interpretation.

2. In these Directions—

"aircraft" has the meaning assigned to it in section 6 (2) of the Order in Council;

"aircraft premises" means any land or building occupied in whole or part by the aircraft at the appointed time or at any time thereafter;

"appointed time" means midday of the 11th day of May, 1950;

"authorized person" means a person authorised by permit of the Director issued or approved by him for the purposes of these Directions; 10

"Director" means the Director, Civil Aviation Department;

"Order in Council" means the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950;

Detention of Aircraft.

3. The Director shall, with effect from the appointed time, cause the aircraft to be detained upon the aircraft premises.

Maintenance of aircraft.

4. The Director, with effect from the appointed time shall provide for the due maintenance of the aircraft.

Protection of aircraft.

5. The Director shall, with effect from the appointed time, 20 take and maintain all measures reasonably necessary and suitable for the protection of the aircraft upon the aircraft premises.

Prohibition against entry etc upon premises.

6. As from the appointed time, no person other than the Director, an authorised person, a police officer or a member of His Majesty's Forces shall be, or shall enter, upon any aircraft premises.

General enforcement of Directions.

7. The Director shall take all such steps as may be necessary to render effective the detention, maintenance and protection of the aircraft and for such purposes he shall be afforded the assistance of any public officer and, in particular, of any police officer detailed to such duty by or on behalf of the Commissioner of Police. 30

Given at Hong Kong this 11th day of May, 1950.

By His Excellency's Command,

R. R. TODD,

Acting Colonial Secretary

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 3. Writ of Summons.

No. 3.
WRIT OF SUMMONS.

Action No. 269 of 1950.
IN THE SUPREME COURT OF HONG KONG.
Original Jurisdiction

Between CIVIL AIR TRANSPORT INCORPORATED Plaintiffs,

and

CENTRAL AIR TRANSPORT CORPORATION Defendants,

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

To The Central Air Transport Corporation care of Messrs. A. S. K. Lau & Co., its Solicitors.

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 Civil Air Transport Incorporated a Corporation duly incorporated under the laws of the State of Delaware U.S.A. having its registered office at 317-325 South State Street, City of Dover, County of Kent, State of Delaware whose address for service is care of
20 Messrs. Wilkinson & Grist, 2 Queen's Road Central Victoria in the Colony of Hong Kong, and 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 Acting Chief Justice of our said Court, the 19th day of May, 1950.

(Sgd.) C. D'Almada e Castro,
Registrar.

(L.S.)

STATEMENT OF CLAIM.

The Plaintiffs' Claim is for a Declaration that the forty (40) aircraft now on the Government airfield at Kai Tak in the Colony of Hong Kong
30 formerly the property of the Defendants together with spare parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this Honourable Court are the property of the Plaintiffs and/or that the Plaintiffs have the sole right to possession thereof.

Dated the 18th day of May, 1950.

(Sgd.) Wilkinson & Grist,
Solicitors for the Plaintiffs.

This writ was issued by WILKINSON & GRIST, who carry on business at No. 2 Queen's Road Central, Victoria aforesaid, Solicitors for the Plaintiffs.

(Sgd.) Wilkinson & Grist.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 4. Alfred Sui Kay Lau Affidavit.

No. 4.

AFFIDAVIT OF ALFRED SUI KAY LAU DATED THE 30th DAY OF MAY 1950.

I, Alfred Sui Kay Lau, of No. 226 Wang Hing Building Victoria in the Colony of Hong Kong, Solicitor, do make oath and say as follows:—

1. I am the principal of Messrs. A.S.K. Lau & Co., Solicitors.

2. On the 19th day of May, 1950, the Writ of Summons herein was served on my firm and we accepted service on behalf of the Defendants on the strength of the retainer of Colonel C. L. Chen, Managing Director of the Central Air Transport Corporation, sent us by cable from Peking on the 4th day of December, 1949. 10

3. Since then, my firm has received a letter from the Central Air Transport Corporation which states inter alia that the previous instructions to us do not include any action commenced after the 11th day of May, 1950. A copy of this letter is hereto attached and marked "ASKL—1".

4. I, therefore, crave leave of this Honourable Court that the acceptance of service endorsed on the Writ of Summons in this Action be struck out of the Court records.

Sworn etc.

No. 5. Order vacating appearance.

No. 5.

ORDER BY HIS HONOUR MR. JUSTICE TREVOR JACK GOULD IN CHAMBERS. 20
The 3rd day of June 1950.

Upon the Application of the Applicants and upon reading the Affidavit of Alfred Sui Kay Lau filed herein on the 30th day of May, 1950 and upon hearing the respective solicitors for the Applicants and the Plaintiffs and by consent IT IS THIS DAY ORDERED THAT the acceptance of service endorsed by Messrs. A.S.K. Lau & Co. on the Writ of Summons in this Action be vacated and withdrawn and that such acceptance of service be struck out of the records herein of this Honourable Court.

(Sgd.) C. D'Almada e Castro,
Registrar. 30

(L.S.)

No. 6. Peter John Griffiths Affidavit.

No. 6.

AFFIDAVIT OF PETER JOHN GRIFFITHS DATED THE 2nd DAY OF JUNE 1950.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central Victoria in the Colony of Hong Kong hereby make oath and say as follows:—

1. I have the conduct of this cause on behalf of the Plaintiffs abovementioned.

2. The Writ herein was issued on the 19th day of May 1950 and since that date service has been attempted by delivering the original Writ together with the sealed copy thereof in the normal manner to Messrs. A.S.K. Lau & Co. Solicitors who have previously been acting for the above-named Defendants in actions in this Honourable Court. The Writ of Summons has been endorsed with an acceptance of service by the said Messrs. A.S.K. Lau & Co. I have since been informed and verily believe by Messrs. A.S.K. Lau & Co. that they had no authority to accept service on behalf of the Defendants. The said Messrs. A.S.K. Lau & Co. issued a Summons on the 31st day of May 1950 for an Order that their acceptance of service be vacated and struck out of the records in this Action.

3. I am informed by virtue of reading Affidavits filed in O.J. Action No. 518 of 1949 and in O.J. Action No. 6 of 1950 in this Honourable Court and verily believe that the above-named Defendants are a Department of State of the Government of China.

And lastly I say that the contents of this my Affidavit are true.

Sworn etc.

No. 7.

ORDER BY HIS HONOUR MR. JUSTICE ERNEST HILLAS WILLIAMS ACTING CHIEF JUSTICE IN CHAMBERS THE 16th DAY OF JUNE 1950.

(Under s4 (1) (b) (c) of the Order in Council).

No. 7. Order as to service of Writ.

UPON reading the Affidavit of Peter John Griffiths filed herein and Upon hearing the Solicitors for the Plaintiffs IT IS ORDERED as follows:—

(a) That the Central People's Government of the Republic of China be served with a notice of the Writ of Summons issued herein in accordance with Form "A" attached hereto together with a certified translation thereof into the Chinese language.

(b) That a request for service of notice abroad in accordance with Form "B" attached hereto be filed by the Solicitors for the Plaintiffs.

(c) That upon filing the said request for service of notice abroad a letter in accordance with Form "C" attached hereto shall issue from this Honourable Court to the Hon. the Colonial Secretary enclosing the Notice referred to in paragraph (a) hereof and its translation.

(d) That service of the notice referred to in paragraph (a) hereof in the manner prescribed in this Order shall be deemed to be valid service of the Writ of Summons upon the Defendants named therein The Central Air Transport Corporation.

(e) That in default of notice of intention to appear being given to this Court in accordance with Form "A" attached hereto and within the time specified therein the Central People's Government of the Republic of China and the Defendants named the Central Air Transport Corporation shall be bound by any judgment given in this Action.

(f) That there shall be liberty to apply generally.

Dated the 19th day of June 1950.

(Sgd.) C. D'Almada e Castro,
Registrar.

(L.S.)

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 7. Order as to service of Writ, *continued.*

FORM "A".

To the Central People's Government of the Republic of China.

TAKE NOTICE that Civil Air Transport Incorporated a Corporation duly incorporated under the laws of the State of Delaware, U.S.A. having its registered office at 317-325 South State Street, City of Dover, County of Kent, State of Delaware, U.S.A. has commenced an Action against the Central Air Transport Corporation in the Original Jurisdiction of the Supreme Court of Hong Kong by Writ of that Court dated the 19th day of May 1950 which Writ is endorsed as follows:—

"Statement of Claim: The Plaintiffs' claim is for a Declaration that the Forty aircraft now on the Government Airfield at Kai Tak in the Colony of Hong Kong formerly the property of the Defendants together with all spare parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this Honourable Court are the property of the Plaintiffs and/or that the Plaintiffs have the sole right to the possession thereof. 10

Dated the 16th day of May, 1950.

(Sgd.) Wilkinson & Grist,
Solicitors for the Plaintiffs."

and if you desire to be heard you are required within thirty (30) days after the receipt of this notice exclusive of the day of such receipt to give notice to this Court of your intention to appear in the said Action and in default of your so doing the said Civil Air Transport Incorporated may proceed therein and judgment may be given in your absence. Notice of intention to appear may be despatched to this Court through the channels whereby this notice was served upon you. 20

Solicitors for the Plaintiffs.

FORM "B".

We hereby request that a notice of a Writ of Summons in this Action be transmitted through the proper channels to the Central People's Government of the Republic of China. 30

And we personally undertake to be responsible for all expenses incurred by the Colonial Secretary in respect of the service hereby requested and on receiving due notification of the amount of such expense we undertake to pay the same to the Chief Clerk at the Colonial Secretary's Office and to produce the receipt of such payment to the proper officer of the Supreme Court.

Solicitors for the Plaintiffs.

FORM "C"

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 7. Order as to service of Writ, *continued.*

The Chief Justice of the Supreme Court of Hong Kong presents his compliments to the Colonial Secretary and begs to enclose a notice of Writ of Summons issued in an Action of Civil Air Transport Incorporated versus The Central Air Transport Corporation pursuant to order out of the Supreme Court of Hong Kong in order that the necessary steps may be taken to ensure its transmission to the proper authorities in China with the request that the same may be served upon the Central People's Government of the Republic of China who are entitled to give notice of intention to appear in this Action and with 10 the further request that the service of the same upon the Central People's Government of the Republic of China may be officially certified to the said Supreme Court.

The Chief Justice begs further to request that in the event of efforts to effect service of the said notice of Writ proving ineffectual the Colonial Secretary be requested to certify the same to the said Supreme Court.

No. 8.

COMMUNICATION FROM THE HON. COLONIAL SECRETARY TO HIS HON. THE CHIEF JUSTICE.

No. 8. Communication from Colonial Secretary to Chief Justice as to service.

Ref: 9/936/49

20 COLONIAL SECRETARIAT,
HONG KONG.
24th August, 1950.

Civil Air Transport Incorporated, Plaintiffs

and

Central Air Transport Corporation, Defendants

The Acting Colonial Secretary presents his compliments to His Honour the Acting Chief Justice of the Supreme Court of Hong Kong, and with reference to the Chief Justice's third person note dated the 21st day of June 1950 is directed to certify and hereby certifies that efforts to effect service of 30 the notice of a Writ of Summons issued in the action Civil Air Transport Incorporated versus the Central Air Transport Corporation (Action No. 269 of 1950) have proved ineffectual.

Sd. R. R. Todd,
Acting Colonial Secretary.

His Honour the Acting Chief Justice,
Supreme Court,
HONG KONG.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 9. Further Order as to service.

No. 9.

FURTHER ORDER AS TO SERVICE BY HIS HONOUR THE ACTING CHIEF JUSTICE IN CHAMBERS THE 9th DAY OF SEPTEMBER 1950.

Upon hearing the Solicitors for the Plaintiffs and Upon reading the communication dated the 24th day of August, 1950 from the Honourable the Colonial Secretary IT IS ORDERED as follows:—

1. That service of process upon the Defendants herein be effected by leaving a sealed copy of the notice of the Writ of Summons issued herein and referred to in the Order of this Court of the 16th day of June 1950 at the office of the Defendants at Shell House, Queen's Road Central, Victoria in the Colony of Hong Kong. 10

2. That in default of notice of intention to appear being given to this Court in accordance with the sealed copy so served as aforesaid and within the time specified therein the Central People's Government of the Republic of China and/or the Central Air Transport Corporation shall be bound by any judgment given in this Action.

3. That there shall be liberty to apply generally.

Dated the 11th day of September, 1950.

(Sgd.) C. D'Almada e Castro,

Registrar. 20

(L.S.)

No. 10. Order giving leave to proceed ex parte.

No. 10.

ORDER BY HIS HONOUR THE ACTING CHIEF JUSTICE THE 2nd DAY OF DECEMBER 1950 GIVING LEAVE TO PROCEED EX PARTE.

UPON hearing Counsel for the Plaintiffs and Upon reading the Affidavit of Peter John Griffiths dated the 27th day of November 1950 IT IS ORDERED that the Plaintiffs do have leave to proceed ex parte in this Action.

Dated the 4th day of December, 1950.

Sd. C. D'Almada e Castro,

Registrar. 30

(L.S.)

No. 11. Statement of Claim.

No. 11.

STATEMENT OF CLAIM.

1. The Plaintiffs are a Corporation incorporated under the laws of the States of Delaware, United States of America and registered as a Foreign Corporation under the laws of Hong Kong.

2. The Defendants at all material times were an unincorporated commercial enterprise operated and controlled by the National Government of the Republic of China. The said Government was the sole owner of the assets of the Defendants.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 11. Statement of Claim, *continued.*

3. By a Contract reduced into writing and concluded on the 12th day of December 1949 the National Government of the Republic of China for the consideration of U.S.$1,500,000.00 sold to the partnership firm of Chennault and Willauer all the assets of the Central Air Transport Corporation including forty aircraft situated on the airfield at Kai Tak in the said Colony of Hong Kong together with all spare parts, machinery and equipment for use in relation thereto situated in the said Colony.

4. By a Contract reduced into writing and dated the 19th day of December 1949 the said partnership sold the said assets together with the
10 assets of the China National Aviation Corporation to the Plaintiffs for the consideration of U.S.$3,900,000.00.

5. By reason of the foregoing the Plaintiffs are the sole owners and entitled to possession of the assets referred to in paragraph 3 above situated in the Colony of Hong Kong.

6. By virtue of the Supreme Court of Hong Kong (Jurisdiction) Order in Council 1950 and directions made by His Excellency the Governor thereunder the aircrafts, spare parts, machinery and equipment referred to in paragraph 3 above are detained by the Director, Civil Aviation Department pending the determination of ownership or right to possession thereof.

20 THE PLAINTIFFS' CLAIM:—

A Declaration that the Plaintiffs are the owners of the aircraft, spare parts, machinery and equipment mentioned in paragraph 3 hereof and/or that the Plaintiffs are entitled to possession thereof.

Dated the 1st day of February 1951.

(Sgd.) D. A. L. Wright,
Counsel for the Plaintiffs.

No. 12.

AFFIDAVIT OF PETER JOHN GRIFFITHS DATED 30th NOVEMBER 1950.

No. 12. Peter John Griffiths second Affidavit.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central Victoria
30 in the Colony of Hong Kong Solicitor hereby make oath and say as follows:—

1. I have had the conduct of this Action on behalf of the Plaintiffs and it is now apparent that certain evidence from outside the Colony of Hong Kong is required to support the case for the Plaintiffs. Such evidence is required from the following persons:—

(a) The ex Premier of the National Government of the Republic of China Yen Hsi-shan.

(b) George K. C. Yeh who is now the Foreign Minister of the Government in Taiwan.

(c) Nih Chun Sung who is now the Deputy Secretary General of the
40 Executive Yuan of the Government in Taiwan.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 12.
Peter John Griffiths second Affidavit, *continued.*

(d) Wong Kuang who is Director General of the Department of Navigation and Aviation in the Ministry of Communications of the Government in Taiwan.

(e) Liu Shao Ting who is an Aide to ex Premier Yen Hsi-shan and was Vice Minister of Communications.

(f) Ango Tai who was the Director of the Civil Aeronautics Administration, Ministry of Communications.

2. On the 6th day of October 1950 I went to Taipeh, Taiwan for the purpose of interviewing the witnesses and in order to obtain proofs of their evidence. During my visit I was informed on several occasions by the witnesses whose names appear above that having regard to the political situation and especially the emergency in Taiwan it would be quite impossible for those witnesses to appear in person in the Courts of Hong Kong. 10

3. In view of this position I eventually arranged for all the evidence to be taken down in the form of Affirmations (in the case of George K. C. Yeh Affidavit) and sworn before His Britannic Majesty's Consul at the Provincial Government Offices in Taipeh.

4. I verily believe that the evidence of these witnesses is essential to this case and it is not possible to procure personal attendance of the witnesses in Hong Kong. 20

AND lastly the contents of this my Affidavit are true.

Sworn etc.

No. 13.
Order giving leave to produce evidence in form of Affirmation and/or Affidavit.

No. 13.

ORDER BY HIS HONOUR MR. JUSTICE ERNEST HILLAS WILLIAMS ACTING CHIEF JUSTICE IN CHAMBERS THE 2nd DAY OF DECEMBER 1950.

UPON hearing Counsel for the Plaintiffs and Upon reading the Affidavit of Peter John Griffiths dated the 30th day of November, 1950 IT IS ORDERED as follows:—

That the Plaintiffs do have leave to produce at the trial of this Action evidence in the form of Affirmations and/or Affidavits affirmed and/or sworn in Taipeh on the 19th day of October 1950 in respect of the under mentioned witnesses for the Plaintiffs:— 30

1. Yen Hsi-shan
2. George K. C. Yeh
3. Nih Chun Sung
4. Wong Kuang
5. Liu Shao Ting
6. Ango Tai

Dated the 4th day of December, 1950.

(Sd.) C. D'Almada e Castro, 40
Registrar.

(L.S.)

No. 14. Peter John Griffiths third Affidavit.

No. 14.

AFFIDAVIT OF PETER JOHN GRIFFITHS DATED THE 11th DAY OF JANUARY 1951.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central Victoria in the Colony of Hong Kong Solicitor hereby make oath and say as follows:—

1. I have had the conduct of this Action on behalf of the Plaintiffs and it is now apparent that further evidence from outside the Colony of Hong Kong is required to support the case for the Plaintiffs. Such evidence is required from the undermentioned persons:—

(1). Joseph Keat Twanmoh a duly qualified Chinese legal practi-
10 tioner at the moment practising at No. 12 Shing Yang Street Taipeh Taiwan who has from time to time held important positions in the National Government of the Republic of China.

(2). Kenneth Fu also practising at No. 12 Shing Yang Street Taipeh Taiwan and who has also held important positions in the National Government of the Republic of China.

2. On the 7th day of December 1950 the said J. K. Twanmoh and Kenneth Fu attended before His Britannic Majesty's Vice Consul at Taipeh Taiwan and were duly affirmed to a joint Affirmation relating to the Chinese law applicable to the transactions referred to in the Writ of Summons herein.

20 3. I verily believe that the joint Affirmation so sworn is essential as evidence in this cause and that for political reasons it is not possible to procure personal attendance of the witnesses in Hong Kong.

AND lastly the contents of this my Affidavit are true.

Sworn etc.

No. 15. Second Order giving leave to produce evidence in form of Affirmation.

No. 15.

ORDER BY HIS HONOUR MR. JUSTICE ERNEST HILLAS WILLIAMS ACTING CHIEF JUSTICE IN CHAMBERS THE 31st DAY OF JANUARY 1951.

UPON hearing Solicitors for the Plaintiffs and Upon reading the Affidavit of Peter John Griffiths dated the 11th day of January 1951 IT IS
30 ORDERED that the Plaintiffs do have leave to produce at the trial of this Action evidence in the form of a joint Affirmation sworn in Taipeh on the 7th day of December 1950 by Joseph Keat Twanmoh and Kenneth Fu witnesses for the Plaintiffs.

Dated the 31st day of January, 1951.

(Sd.) C. D'Almada e Castro,
Registrar.

(L.S.)

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 16.
Peter John Griffiths fourth Affidavit.

No. 16.

AFFIDAVIT OF PETER JOHN GRIFFITHS DATED THE 8th DAY OF MARCH 1951.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central Victoria in the Colony of Hong Kong, Solicitor, hereby make oath and say as follows:—

1. I have had the conduct of this Action on behalf of the Plaintiffs and am advised that during the course of the trial it will be necessary to produce documentary evidence showing the sale of the assets the subject matter of this Action from General Claire Lee Chennault and Whiting Willauer to the Plaintiffs. The documents which evidence this sale are as follows:—

(a) Power of Attorney executed by Whiting Willauer and dated the 18th day of December 1949 in favour of Thomas G. Corcoran. 10

(b) Bill of Sale dated the 19th day of December 1949 and signed by the said Thomas G. Corcoran.

(c) Power of Attorney dated the 19th day of December 1949 and signed by Claire Lee Chennault and Whiting Willauer in favour of Thomas G. Corcoran.

(d) Bill of Sale dated the 19th day of December 1949 and signed by the said Thomas G. Corcoran.

2. I am advised that the originals of these documents are in the United States of America and are required there in connection with litigation 20 pending in San Francisco involving them. There is annexed hereto and marked Exhibit "PJG 1" a copy of a cable which has been received by the Solicitors for the Plaintiffs from S.G. Marias an American lawyer employed by the Plaintiff Corporation which reveals that the lawyers engaged by the Plaintiffs in the United States of America require the original documents.

3. Messrs. Wilkinson & Grist are in possession of copies of each of the documents specified above which have been notarially certified by Annetta M. Behan, Notary Public for the District of Columbia.

AND lastly the contents of this my Affidavit are true.

Sworn etc. 30

No. 17.
Order giving leave to produce copy documents.

No. 17.

ORDER BY HIS HONOUR MR. JUSTICE TREVOR JACK GOULD SENIOR PUISNE JUDGE IN CHAMBERS.

The 14th day of March 1951.

Upon hearing the Solicitors for the Plaintiffs and Upon reading the Affidavit of Peter John Griffiths dated the 8th day of March 1951 IT IS ORDERED that the Plaintiffs do have leave to produce at the trial of this Action notarially certified copies of the following documents in lieu of the originals thereof which said copy documents have been produced and initialled for identification purposes upon the hearing of this application. The docu- 40 ments are as follows:—

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 17. Order giving leave to produce copy documents, *continued.*

(a) Power of Attorney executed by Whiting Willauer and dated the 18th day of December 1949 in favour of Thomas G. Corcoran.

(b) Bill of Sale dated the 19th day of December 1949 and signed by the said Thomas G. Corcoran.

(c) Power of Attorney dated the 19th day of December 1949 and signed by Claire Lee Chennault and Whiting Willauer in favour of Thomas G. Corcoran.

(d) Bill of Sale dated the 19th day of December 1949 and signed by the said Thomas G. Corcoran.

10 Dated the 14th day of March, 1951.

(Sgd.) C. D'Almada e Castro,
Registrar.

(L.S.)

No. 18.

AFFIDAVIT OF PETER JOHN GRIFFITHS DATED THE 14th DAY OF MARCH 1951.

No. 18. Peter John Griffiths fifth Affidavit.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central, Victoria in the Colony of Hong Kong Solicitor hereby make oath and say as follows:—

1. I have had the conduct of this Action on behalf of the Plaintiffs.

20 2. During the course of the trial of this Action it will be necessary for evidence to be given by Whiting Willauer who was a partner of Major-General Claire Lee Chennault and who is Vice President and a Director of the Plaintiff Corporation.

3. The said Whiting Willauer is well known to me personally and I have on many occasions consulted him with reference to the case for the Plaintiffs and in particular I took a proof of evidence from the said Whiting Willauer which was to be given orally by him at the trial of this Action. I advised Mr. Willauer that it will be necessary for him to attend the trial in person and he indicated his consent to do so.

30 4. I last saw the said Whiting Willauer on the 13th day of February 1951 when he told me that he would be in Hong Kong not later than the 20th of March 1951 and would be present to give evidence at the trial of this Action. He informed me and I verily believe that on that day he was proceeding by air to London and the United States.

5. The evidence of the said Whiting Willauer consists mainly in identifying documents relating to the sale of the assets of the Central Air Transport Corporation.

6. I am informed by Alfred Thomas Cox a Vice President of the Plaintiff Corporation and verily believe that the said Whiting Willauer is
40 seriously ill and will be unable to leave hospital for at least four weeks from this date.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 18. Peter John Griffiths fifth Affidavit, *continued.*

7. I know that the said Whiting Willauer was both willing and anxious to appear in person at the trial of this Action. I also know personally that he had been severely overworked for many months past.

AND lastly the contents of this my Affidavit are true.

Sworn etc.

No. 19. Third Order giving leave to produce Affidavit.

No. 19.

ORDER BY HIS HONOUR MR. JUSTICE TREVOR JACK GOULD SENIOR PUISNE JUDGE IN CHAMBERS.

The 14th day of March 1951.

Upon hearing Counsel for the Plaintiffs and upon reading the Affidavits of Peter John Griffiths and Alfred Thomas Cox both dated the 14th day of March 1951 IT IS ORDERED that the Plaintiffs do have leave to produce at the trial of this Action evidence on Affidavit deposed to by Whiting Willauer a witness for the Plaintiffs. 10

Dated the 14th day of March, 1951.

(Sd.) C. D'Almada e Castro,
Registrar.

(L.S.)

The hearing in the first instance.

EVIDENCE ADDUCED

in the form of Affirmations and/or Affidavits produced at the Hearing before His Honour Sir Gerard Lewis Howe Kt. K.C. Chief Justice pursuant to the Orders hereinbefore referred to (pages 11, 12 and 15 of this Record). 20

No. 20. Evidence of Liu Shao Ting.

No. 20.

AFFIRMATION OF LIU SHAO TING DATED THE 9th DAY OF OCTOBER 1950.

(Affirmed before the British Consul in Formosa).

I, LIU SHAO TING of Chung Shan Road North Section 2 Taipeh Taiwan China do hereby solemnly sincerely and truly affirm and say as follows:—

1. In November 1949 I was appointed Vice Minister of Communications and on the 12th day of December 1949 I was appointed Chairman of the Board of Governors of Central Air Transport Corporation (CATC). There is annexed hereto and marked Exhibit LST-1 a copy of the original document whereby I was appointed Chairman of the Board of CATC. 30

2. Premier Yen Hsi Shan with the consent and approval of the Executive Yuan authorized me as Vice Minister of Communications and Chairman of the said Board to accept on behalf of my Government the offer of C.L. Chennault and Whiting Willauer contained in an original document a notarially certified photostatic copy whereof is annexed hereto and marked Exhibit LST-1A whereon I identify my signature appended in Taiwan.

3. The said acceptance by me on behalf of my Government was confirmed in a letter dated the 12th day of December 1949 a photostatic copy whereof is now produced to me and marked LST.-2. I am familiar with and recognize the chop of the Executive Yuan and the signature of Premier Yen Hsi Shan.

4. On the 11th day of December 1949 I was present at a meeting of the Executive Yuan in Taipeh when it was resolved that the said offer should be accepted. I was authorized at that meeting by resolution to sign accepting. Premier Yen Hsi Shan was Chairman of the meeting.

10 5. The Minister of Communications (at that time Tuanmo Chieh) ordered CATC to be moved from Canton to Taiwan. This order was given prior to the removal of the seat of Government from Canton and prior to the fall of that City.

6. It was my intention acting on behalf of and with the approval and consent of my Government that Chinese law should govern the whole transaction between my Government and Chennault and Willauer.

AND lastly the contents of this my Affirmation are true.

Affirmed etc.

No. 21. Evidence of Wong Kuang.

No. 21.

20 **AFFIRMATION OF WONG KUANG DATED THE 19th DAY OF OCTOBER 1950.**

I, WONG KUANG, Director General of the Department of Navigation and Aviation in the Ministry of Communications, Taipeh, Taiwan, China do hereby solemnly, sincerely and truly affirm and say as follows:—

1. C.A.T.C. was at all material times a Government-owned enterprise carrying on business according to Chinese civil law and directed by the Minister of Communicatious through a Board of Governors. It was not a Department of Government in the true sense as for example, the Bureau of Posts and Telegraphs, or the Civil Aeronautics Administration.

2. CATC was never incorporated but was under the control and direc-
30 tion of the Minister of Communications through the said Board. One of the two Vice Ministers in the Ministry of Communications was always Chairman of the said Board. There were no shareholders of the C.A.T.C. and its assets were owned solely by my Government.

3. In my official capacity I know that in or about early September 1949 orders were given by the Minister of Communications, Tuanmo Chieh to C.A.T.C. to remove their organisation from Canton to Taiwan.

4. In my official capacity I have access to and custody of the official records of the Ministry of Communications relating to aviation.

5. There are produced to me and marked Exhibits WK-1, WK-2,
40 WK-3, WK-4 and WK-5 photostatic copies of:—

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 21. Evidence of Wong Kuang, *continued.*

(1) An original letter dated 31st December 1949 from Chennault and Willauer, and

(2) Four original promissory notes received by and now in the possession of the Ministry of Communications.

The said promissory notes form the consideration for the sale of the assets of C.A.T.C. by my Government. The original documents above-referred to are among the official records of my department.

AND lastly the contents of this my Affirmation are true.

Affirmed etc.

No. 22. Evidence of Nih Chun Sung.

No. 22.

AFFIRMATION OF NIH CHUN SUNG DATED THE 19th DAY OF OCTOBER 1950.

(Affirmed before the British Consul in Formosa).

I, NIH CHUN SUNG alias C.S. NIBSON of Taipeh, Taiwan, China do hereby solemnly sincerely and truly affirm and say as follows:—

1. I was appointed Deputy Secretary General of the Executive Yuan in the month of December 1948 and have held that position ever since. I have custody of and access to the official records of the Executive Yuan.

2. There is annexed hereto and marked Exhibit NCS-1 a photostatic copy of a document among the official records of the Executive Yuan relating to the exercise by Premier Yen Hsi Shan of the powers of Minister of Communications.

3. The seat of my Government including its Ministries and Departments was moved as hereinafter appears. In each case the move was made by order of the President at the request of the Premier after resolution by the Executive Yuan. The said Orders were given and moves effected from the Cities concerned prior to entry thereof by the Communist forces. The dates of removal were as follows:—

(i)

(1)	Nanking to Canton	23rd April 1949
(2)	Canton to Chungking	12th October 1949
(3)	Chungking to Chengtu	29th November 1949
(4)	Chengtu to Taiwan	9th December 1949

4. The first removal to Canton was so ordered on the 26th day of January 1949 and directed to be effected on the 5th day of February 1949. Part of the Government however remained in Nanking for the continuation of peace negotiations with the Communists. There is annexed hereto and marked Exhibit NCS-2 a photostatic copy of a draft order from the said official records which I know was forwarded in final form to the Minister of Communications on the 26th day of January 1949. I approved the said draft and it

bears my signature which I recognise. I identify the official chop of the Executive Yuan and the signature of the then Premier Sun Fo on the said document. When the said peace negotiations broke down in April 1949 a further order was issued in like manner and signed by Premier Ho Ying Ching again directing a complete removal of all Government institutions and their subsidiary organisations from Nanking and Shanghai to Canton because the removals previously ordered had not been completed owing to the peace negotiations. The removals were effected by the 23rd day of April 1949 as indicated 10 in sub. para. (1) of para. 3 hereof. The said orders were given and removals effected before Nanking or Shanghai was occupied by Communist forces. The official records of the Executive Yuan containing the draft or copy order of Premier Ho Ying Ching were lost during the removal of the Executive Yuan but I clearly remember seeing the same.

AND lastly the contents of this my Affirmation are true.

Affirmed etc.

No. 23. Evidence of Yen Hsi Shan.

No. 23.

AFFIRMATION OF YEN HSI SHAN DATED THE 19th DAY OF OCTOBER 1950.

20 **(Affirmed before the British Consul in Formosa).**

I, YEN HSI SHAN of Ching Shan Taipeh Taiwan China do solemnly sincerely and truly affirm and say as follows:—

1. I was Premier of the National Government of the Republic of China from June 1949 to March 1950.

2. I have had read and explained to me paragraphs 1, 2, 3 and 4 of the Affirmation of Liu Shao Ting and I verify and confirm the facts therein contained. I identify my chop on Exhibit LST-1 and my signature on LST-2.

3. There is produced to me and marked YHS-1 a photostatic copy of 30 a letter dated the 12th day of December 1949 sent by me to Chennault and Willauer whereon I identify my chop and the chop of the Executive Yuan.

4. The letter of offer dated the 5th day of December 1949 from Chennault and Willauer referred to in paragraph 2 of the Affirmation of the said Liu Shao Ting was dealt with by me personally.

5. I have had read and explained to me paragraphs 2 and 3 of the Affirmation of Nih Chun Sung to be filed herein and I verify and confirm the facts therein contained. I identify my signature in Exhibit NCS-1 which was signed by me with the consent and approval of the Executive Yuan.

6. As Premier I ordered the then Minister of Communications Tuanmo 40 Chieh to direct CATC to move their organisation from Canton to Taiwan. This Order was given by me in Canton after consultation with the Minister of Economic Affairs Liu Hang Chen and the said Tuanmo Chieh prior to the

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 23. Evidence of Yen Hsi Shan, *continued.*

move of the National Government from Canton and prior to the occupation of that City by Communist forces. The reasons for my issuing the said order were to secure a safe and permanent domicile for the CATC in Taiwan and to secure safer operational facilities for the airline.

AND lastly the contents of this my Affirmation are true.

Affirmed etc.

No. 24. Evidence of George K. C. Yeh.

No. 24.

AFFIDAVIT OF GEORGE K.C. YEH DATED THE 19th DAY OF OCTOBER 1950.
(Affirmed before the British Consul in Formosa).

I, GEORGE K. C. YEH Minister of Foreign Affairs of the National Government of the Republic of China, Taipeh, Taiwan, China hereby make oath and say as follows:— 10

1. At all material dates hereinafter mentioned I was Minister of Foreign Affairs of the National Government of the Republic of China which was the only Government of China recognised by the United Kingdom Government up to midnight of the 5th/6th January 1950. I have held the post of the Minister of Foreign Affairs continuously since the first October 1949.

2. The seat of my Government was removed to Taipeh, Taiwan on the 9th December 1949. And from that date until midnight of the 5th/6th 20 January 1950 my Government was recognised de jure by the United Kingdom Government. Such removal was notified by my Government to the United Kingdom Government through the Chinese Ambassador in London on my direction given on the 15th December 1949. My Government with all its agencies and subsidiary organs, has been functioning in Taipeh from the said date of removal.

3. As to the status of Taiwan, I say that it forms part of the territory of China. The Joint Declaration of the U.S.A., the United Kingdom and China on the first December 1943 at Cairo provided that "all territories Japan has stolen from Chinese, such as Manchuria, Formosa (Taiwan) and the 30 Pescadores shall be restored to the Republic of China." The said provision was reaffirmed in the Potsdam Declaration of the 26th July 1945 to which the U.S.A., the United Kingdom, China and the USSR are parties. An extract of the said declaration is as follows:—

> "(8) The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine."

The arrangements mentioned above formed part of the terms accepted by Japan when she surrendered. The said declaration coupled with the acceptance 40 thereof in the terms of surrender clearly show and acknowledge the theft by Japan of Taiwan and subsequent illegal occupation thereof. Wherefore, I say that Taiwan which, since the surrender, has been under the control and administration of my Government, is a part of the national territory of China.

4. There are annexed hereto and marked Exhibits GY-1 and GY-2 respectively, photostatic copies of notification of the 28th day of December 1949 and the 4th day of January 1950 given by my Government to the United Kingdom Government. I say that such notifications are to my knowledge in accordance with normal diplomatic procedure.

AND lastly the contents of this my Affidavit are true.

Sworn etc.

No. 25. Evidence of Ango Tai.

No. 25.

AFFIRMATION OF ANGO TAI DATED THE 19th DAY OF OCTOBER 1950.

10 **(Affirmed before the British Consul in Formosa).**

I, ANGO TAI Dipl. Eng. (Berlin) of 33 Wuchang Street first Section, Taipeh, Taiwan, China do hereby solemnly, sincerely and truly affirm and say as follows:—

1. I was Director of the Civil Aeronautics Administration under the Ministry of Communications from December 1946 until May 1949, and in that capacity I remember clearly seeing instructions from the Minister of Communications in January and April 1949 for the removal of Central Air Transport Corporation from Shanghai to Canton issued in pursuance of the orders of the Executive Yuan referred to in paragraph 4 of the Affirmation of 20 Nih Chun Sung to be filed herein which I have read.

2. In June 1949 I joined CATC as Technical Adviser. By that time the whole organisation of CATC had been moved from Shanghai to Canton including all its Departments, namely:—

(a) The Secretariat.

(b) The Operations Department.

(c) The Business Department.

All the office records and the technical equipment of the Corporation including spare parts were then in Canton.

3. Canton was occupied by the Communist forces on or about the 14th 30 day of October 1949. At the end of July 1949 the Executive Vice-President Moon F. Chen verbally instructed me to move the technical equipment to Hong Kong as soon as possible. I personally supervised the move of the technical equipment to Hong Kong which move was completed by the 1st day of September 1949. I know that the other departments which were more easily moved than mine had completed their move to Hong Kong prior to the 1st day of September 1949. Towards the end of September 1949 and in early October 1949 I visited Canton to confirm that the entire move had been completed. While in Canton I visited the office premises and storage buildings formerly occupied by CATC and saw that the move had been completed by all depart-40 ments. I made these inspection trips before the fall of Canton. The said move of CATC to Hong Kong was intended to be a stage of the move of the whole organisation from Canton to Taiwan until suitable arrangements could be made to accommodate the organisation in, and to obtain adequate transport to Taiwan.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 25. Evidence of Ango Tai, *continued.*

4. On the 1st day of August 1949 the Operations Department of CATC had been split into two Departments, namely the Operations Department and the Engineering and Maintenance Department. I was appointed Manager of the Engineering and Maintenance Department on the said date.

5. In September 1949 in Hong Kong I was instructed by C.L. Chen the then President of CATC to prepare estimates of the expenditure necessary to move my Department to Taiwan. I know that the other Departments of CATC received similar instructions. The estimates were duly prepared and submitted to the said C.L. Chen.

AND lastly the contents of this my Affirmation are true. 10

Affirmed etc.

No. 26. Evidence of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu.

No. 26.

JOINT AFFIRMATION OF JOSEPH KEAT TWANMOH AND KENNETH KANG-HOU FU DATED THE 7th DAY OF DECEMBER 1950.

(Affirmed before the British Consul in Formosa).

We, JOSEPH KEAT TWANMOH (端木愷) & KENNETH KANG-HOU FU (富綱侯) of No. 12 Shinn Yang Street, Taipeh, Taiwan, China do hereby solemnly sincerely and truly affirm and say as follows:—

1. That our qualifications are as follows:—

(a) As to me the said JOSEPH KEAT TWANMOH, my qualifications are:— 20

B.A. (Fuh-tan University), LLB. (Soochow University), J.S.D. (New York University N.Y., U.S.A.), Legal Practitioner & Member of Nanking Bar Association (1930-1933), of Chung-King Bar Association (1945), of Shanghai Bar Association (1945-1947), of Taipeh Bar Association since 1949; and before and in between those dates, for some time Professor of Law of National Central University, of National Fuh-tan University and of Soochow University; also in Government Service as Councillor of the Executive Yuan, Civil Commissioner of Anhui Province, Secretary-General of the National Mobilization Council, Member of the Legislative Yuan, Secretary-General of the Judicial Yuan, Secretary-General of the Executive Yuan, and Advisor to the President of the Republic of China. 30

(b) As to me the said KENNETH FU, my qualifications are:— B.S. (Soochow University), LLB. (The Comparative Law School of China), J.D. (Doctor of Jurisprudence, North-western University, Chicago, U.S.A.), Legal Practitioner and Member of Shanghai Bar Association (1929-1949), Member of Soochow Bar Association (1929-1934), Member of Taipeh Bar Association since April 1950; and before and in between these dates, for some time Professor of Law of Soochow University and of National Chinan University; also in Government service as Director of Department of Labour, Codifier of Labour Legislation, Government Representative to the 12th International Labour Conference held in Geneva 1929, Director of Factory Inspectorate. 40

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 26. Evidence of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu, *continued.*

2. We have read and considered the affirmations to be filed in this action which are as follows:—

(1) The Affirmation of Premier Yen Hsi-shan.

(2) The Affirmation of George K. C. Yeh.

(3) The Affirmation of Nih Chun Sung.

(4) The Affirmation of Wong Kuang.

(5) The Affirmation of Liu Shao Ting.

(6) The Affirmation of Ango Tai.

3. As to the legal status of C.A.T.C. From the evidence before us
10 we say that:—

(a) C.A.T.C. was not a Corporation.

(b) It was not a Government Department in a strict sense but was a Government owned enterprise.

As to proposition (a):—

(i) It has never been registered under the provisions of Chinese Companies Law or under any special legislation.

(ii) By reason of paragraph 1 it is not a separate juristic person in Chinese law (see Articles 25 and 30 of the Civil Code and Articles 1 and 14 of the Chinese Company Law set out here-
20 under).

(iii) It is directed and controlled by the Minister of Communications through a Board of Governors. A corporate body in Chinese law is managed and controlled by a Board of Directors. The characters used to designate Governors are 理事會 whereas the characters used to designate Directors are 監事會 the latter character being invariably applied to Directors of bodies incorporated under Chinese law.

(iv) It has no shareholders.

The Article in the Civil Code and Chinese Company Law referred to are
30 as follows:—

CHINESE COMPANY LAW ARTICLE 1: "The term "Company" as used in this law denotes a juristic person organised and incorporated in accordance with this law for the purpose of profit making."

ARTICLE 14: "No Company may be formed until it shall have been incorporated at the office of the Central Competent Authority."

CIVIL CODE ARTICLE 25: "A Juristic person can exist only in accordance with the provisions of this Code or of any other law."

ARTICLE 30: "A Juristic person cannot come into existence unless registered with the Competent Authorities."

40 **As to proposition (b):**

(i) There is no provision of funds for C.A.T.C. in the National budget.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 26. Evidence of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu, *continued.*

(ii) It was run as a commercial enterprise without the status of a Government Department as stated by Wong Kuang in paragraph 1 of his Affirmation to be filed herein.

(iii) It was directed and controlled by the Minister of Communications through a Board of Governors of which one of the two Vice Ministers of Communications was always Chairman.

(iv) The Government was the sole owner of the assets.

(v) An instance of a similar enterprise was the China Merchants Steam Navigation Co. with which we are familiar as the result of our professional experience. For many years this organisation was not incorporated but run as a government owned enterprise without the status of a Government Department but directed and controlled by the Minister of Communications. The ships and other assets of this organisation belonged entirely to the Government.

It is clear, therefore, that the legal status of C.A.T.C. is unusual wherefore no express provisions in the Chinese Civil Code or Company Law can be found to deal with it. What is quite clear is that the assets thereof belonged solely to the Government who had full direction and control of the same and who possessed the powers of disposal of an absolute owner. In our opinion it carried on business as a carrier within the definition of that term contained in Article 622 of the Civil Code which reads as follows:—

> "A carrier is a person who undertakes as a business to transfer goods or passengers for freight."

4. (a) With reference to the Affirmation of Nih Chun Sung filed herein we consider that the taking over of the duties of Minister of Communications by the then Premier Yen Hsi-shan as evidenced in Exhibit NCS-1 was valid. By Article 56 of the Constitution it is the Premier who is empowered to nominate Ministers for appointment by the President. In this case the circumstances required a mere temporary taking over of the powers and duties of Tuanmo Chieh and therefore no substantive appointment was required. From our experience we can say that it is in accordance with normal Chinese constitutional and Governmental procedure and custom for the Premier to provide for temporary absences of Ministers in such a manner. Article 56 of the Constitution which deals with substantive appointments reads as follows:—

> "The Vice Premier of the Executive Yuan and Ministers with or without portfolio shall be appointed by the President after nomination by the Premier of the Executive Yuan."

(b) We have also considered the legality of the Order given in Canton by Premier Yen Hsi-shan to the then Minister of Communications Tuanmo Chieh to remove C.A.T.C. to Taiwan and are of opinion that such an Order was valid. Under Article 53 of the Constitution the Executive Yuan is stated to be the Supreme Executive Organ of the country. The Premier as head of the Supreme Executive Organ had power to give such instructions to the Minister of Communications. The only matters which the Premier or Minister has to refer to the Executive Yuan are laid down in Article 58 of the Constitution and it was obviously within the discretion of the Premier to decide whether to refer the matter of removal to the Executive Yuan Council or not.

In fact such removal does not fall within the matters which are required to be referred under the Constitution by Article 58 which is the relevant provision. Article 53 of the Constitution reads as follows:—

> "The Executive Yuan shall be the Supreme Executive Organ of the Country."

Article 58 reads as follows:—

> "The Executive Yuan shall have an Executive Yuan Council which shall be composed of the Premier and Vice Premier of the Executive Yuan and the Ministers with the Premier as Chairman. The Premier of the Executive Yuan and the Ministers shall lay before the Executive Yuan Council for adoption any Bill which is to be presented to the Legislative Yuan relating to statutes, budgets, martial law, amnesty, declaration of war, resumption of peace, treaties and other important affairs or affairs which have a common bearing upon more than one Ministry."

5. As to the legality of removal of the seat of Government from various places to Taiwan as shown in paragraphs 3 and 4 in NIH CHUN SUNG'S Affirmation and as to whether Government could legally function therefrom as the Government of China. It is our opinion that the seat of the National Government of the Republic of China could be moved and that it could legally function from Taiwan for the following reasons:—

(a) We refer to the Affidavit of George K.C. Yeh filed herein wherein he states that Taiwan is a part of the National territory of China. If this evidence is accepted and in view of the fact that the Chinese Constitution makes no provision for any particular location for the seat of the Central Government we say that the National Government can function from any part of the National territory selected by it to be the seat of the Central Government.

(b) If the said evidence is not accepted in the absence of any such provision as aforesaid as to the location of the seat of Government it was lawful for the National Government of the Republic of China to function in a territory in its possession and being governed, controlled and administered by it.

(c) We draw attention to the evidence that the removal of the seat of Government to Taiwan was notified to the United Kingdom Government which continued to recognise the National Government de jure whilst it was still functioning in Taiwan until the 5th/6th January 1950.

In support of our opinion on the above I the said J.K. Twanmoh do say that I was present at the National Convention held in Nanking in 1946 as a member when the Constitution was discussed and adopted. At that time after lengthy discussion and deliberation it was decided not to make any express provision as to the location of the Central Government.

Article 31 of the Constitution clearly contemplates that the Central Government may move its seat and provides that the National Convention shall follow it. Article 31 reads as follows:—

> "The National Convention shall be assembled at the locality in which the Central Government has its seat."

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 26. Evidence of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu, *continued.*

In view of Article 53 of the Constitution referred to in paragraph 4(b) hereof there is no doubt that the Executive Yuan as Supreme Executive Authority had powers to make orders for removal in the absence of any prohibition in the Constitution.

6. As to the legality of the sale we deal with this point under two heads:—

The right of Government to sell the assets.

The validity of the sale according to Chinese law.

AS TO THE RIGHT OF GOVERNMENT TO SELL: We say that the Government possessed this right for the following reasons:— 10

(a) It was sole owner of the assets.

(b) The Executive Yuan by Article 53 of the Constitution is the Supreme Executive Authority in the State.

(c) Even if C.A.T.C. is a Department of Government in the strict sense (which in our opinion it is not) for the reasons given in paragraphs 1 and 2 above we say that the Government had the right to sell the assets.

AS TO THE VALIDITY OF THE SALE: We say that the sale is valid in accordance with Chinese law for the following reasons:—

The normal requirements of a valid sale by Chinese law are:— 20

(i) that the person selling has the right and title to do so.

(ii) that there is agreement between the parties for a transfer and payment of a price.

In support of these contentions we cite Articles 153 and 345 of the Civil Code.

ARTICLE 153: "A Contract is concluded when the parties have reciprocally declared either expressly or tacitly their concording intention.

If the parties agree on all the essential elements of the contract but have expressed no intention as to the non-essential points the contract is deemed to be concluded. In respect of the above-mentioned non-essential 30 points in the absence of an agreement the Court shall decide them according to the nature of the affair."

ARTICLE 345: "A sale is a contract whereby the parties agree that one of them shall transfer to the other his rights over a property and the latter shall pay a price for it.

The contract of sale is completed when the parties have mutually agreed on the object to be sold and on the price to be paid."

We say that the evidence shows that all these requirements have been satisfied in this case. As to the acceptance endorsed by Liu Shao Ting on the offer of Chennault and Willauer we say that Government has to act in matters 40 of this nature through its duly appointed agent and the obvious choice in this case was Liu Shao Ting who was at that time Chairman of the Governors of C.A.T.C. His authority is clearly set out in paragraph 2 of his Affirmation

and confirmed in paragraph 2 of the Affirmation of Yen Hsi-shan. The contract of sale was therefore validly concluded by the acceptance of Liu Shao Ting on the 12th day of December 1949 duly authorised in that behalf as mentioned above and further there was a clearly expressed agreement between the parties within the meaning of Article 345 of the Civil Code.

As regards the consideration we say that it is clear from the evidence that there was valid consideration in Chinese law in the form of promissory notes. From our experience in Chinese law we say that it is self evident that promissory notes form good and valid consideration.

10 7. We are of the opinion that the property passed in this case to the purchasers when the offer was accepted on the 12th day of December 1949 by the said Liu Shao Ting which shows full agreement within the meaning of Article 345 of the Civil Code whereby the contract and the sale were completed by such signed acceptance.

8. We as practitioners in Taiwan say from our own knowledge that Chinese law has been administered there since 1945.

9. In our experience Courts in China have always treated any contract made in China as being governed by Chinese law unless otherwise expressly provided. And further it is our opinion that the same principle would apply 20 if the contract was made in any territory where Chinese law was being administered at the material time.

We say therefore that the whole of the transaction evidenced by the Affirmation should be governed by Chinese law. The contract was concluded in Taiwan where Chinese law has been administered since 1945 and moreover the parties clearly intended Chinese law to apply.

AND lastly we do solemnly sincerely and truly affirm and say that the contents of this our Affirmation are true.

Affirmed etc.

No. 27.

30 **AFFIDAVIT OF WHITING WILLAUER DATED THE 20th DAY OF MARCH 1951 LEGALISED BY THE BRITISH CONSULATE NEW YORK U.S.A.**

I, WHITING WILLAUER care of Civil Air Transport Incorporated of No. 75 Robinson Road Victoria in the Colony of Hong Kong Company Director hereby make oath and say as follows:—

1. I am duly qualified as an Attorney in the United States of America.

2. I have read and considered the Affirmations and Affidavit to be filed in this Action as follows:—

(1) the Affirmation of Premier Yen Hsi-shan
40 (2) the Affidavit of George K.C. Yeh
(3) the Affirmation of Nih Chun Sung
(4) the Affirmation of Wong Kuang
(5) the Affirmation of Liu Shao Ting
(6) the Affirmation of Ango Tai
(7) the Joint Affirmation of Drs. Twanmoh and Fu.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 27. Evidence of Whiting Willauer, *continued.*

I recognise the notarially certified photostatic copy of the letter of Offer by Claire Lee Chennault and myself addressed to His Excellency the Minister of Communications, National Government of the Republic of China which document is annexed to the Affirmation of the said Liu Shao Ting and marked Exhibit LST-1(a). I identify my signature appended to the said document and I also recognise and identify the signature of the said Claire Lee Chennault who signed in my presence.

3. I recognise and identify the photostatic copy of a letter dated the 12th day of December 1949 addressed to the said Claire Lee Chennault and myself which was received by us and there is a chop of the Executive Yuan and the signature of Premier Yen Hsi-Shan. The said letter is exhibited to the Affirmation of the said Premier Yen Hsi-shan and marked Exhibit YHS-1. 10

4. I recognise and identify the letter dated the 12th day of December 1949 addressed to the said Claire Lee Chennault and myself which was duly received by us and which appears as Exhibit LST-2 to the Affirmation of the said Liu Shao Ting.

5. There is produced to me a notarially certified copy of a Power of Attorney executed by me with the full authority of Major-General Claire Lee Chennault whereby we appointed Thomas G. Corcoran our Attorney in the United States with full power to sell the assets of C.A.T.C. to the Plaintiff Corporation. I signed the original document on behalf of the partnership on the 18th day of December 1949 in Hong Kong. The intention of this document was to enable our Attorney to sell the assets to the Plaintiff Corporation (this Power of Attorney is attached and marked "W W.1"). 20

6. There is produced to me a notarially certified copy of a Bill of Sale executed in Washington on the 19th day of December 1949 by our Attorney whereby he in pursuance of his powers sold all the assets of C.A.T.C. to the Plaintiff Corporation. This document was executed in Washington and I recognise the signature of Thomas G. Corcoran which is well known to me. It was the intention of the partnership to transfer the assets in accordance with the laws of the District of Columbia where the said Thomas G. Corcoran our Attorney is a practising lawyer who attends to the legal business of the partnership and where the Plaintiffs have a main office for the transaction of business. (This Bill of Sale is attached and marked "W W.2"). 30

7. There is also produced to me a notarially certified copy of a Power of Attorney dated the 19th day of December 1949 and signed by Major-General Claire Lee Chennault and myself on behalf of the partnership whereby we appointed the said Thomas G. Corcoran to do all things necessary to satisfy the requirements of the Civil Aviation Administration Department of the United States of America. I was personally present and saw Major-General Claire Lee Chennault who is well known to me signed this document at the same time as I appended my signature. (This Power of Attorney is attached hereto and marked "W.W.3"). 40

8. There is also produced to me an initial copy of a Bill of Sale executed by our said Attorney Thomas G. Corcoran in Washington on the 19th day of December 1949 in the normal form required by the Civil Aviation Administration. The aircraft formerly belonging to C.N.A.C. and C.A.T.C. were duly registered with the Civil Aviation Administration. (This photostatic copy of the Bill of Sale is attached hereto and marked "W.W.4" and a photostatic copy of the Civil Aviation Registration List is also attached and marked "W.W.5"). 50

9. With the full authority of Claire Lee Chennault I hereby acknowledge in the name of the partnership the sale of the assets of C.A.T.C. to the Plaintiffs and say that the property in those assets is now vested in the Plaintiffs. As President of the Plaintiff Corporation I acknowledge the said sale.

10. I recognise and identify the letter dated the 31st day of December 1949 and appearing as Exhibit WK-1 to the Affirmation of the said Wong Kuang which I signed and forwarded to the addressees named thereon. I also identify and recognise the four promissory notes which were enclosed with the said letter and signed by me and which appear as Exhibits WK-2, WK-3, WK-4 and WK-5 to the said Affirmation of Wong Kuang.

11. With regard to the said letter of offer of the 12th day of December 1949 as the assets belonging to the National Government of the Republic of China, the said Claire Lee Chennault and I as partners were dealing with that Government, and as it was our intention to operate the assets in territory under the administration of that Government I say that it was the intention that questions between the parties should be determined by Chinese Law.

12. Under the terms of the said Letter of Offer referred to it was provided that the consideration for the said sale should be three joint promissory notes signed by my partner and myself for the sum of US$500,000:00 each and further that we should cause a corporation to be organised under the laws of such country as we should select who should issue promissory notes in substitution for those issued by us for the same amounts and upon the same terms. By the time the said letter enclosing the promissory notes dated the 31st day of December 1949 and appearing as Exhibit WK-1 to the Affirmation of Wong Kuang was written by me my said partner and I had caused a Company to be incorporated in pursuance of the said letter of offer which is the Plaintiff Corporation herein.

13. By arrangement between myself acting on behalf of the said Corporation and the partnership with the National Government of the Republic of China it was agreed that four promissory notes each for US$375,000:00 should be made out to bearer directly by the Plaintiff Corporation. This was accordingly done and the four promissory notes in that form were accepted by the National Government of the Republic of China as consideration for the sale.

14. At the time the letter of offer of the 12th day of December was written it was not contemplated that I and my partner should buy the twenty per cent shareholding in the China National Aviation Corporation. Later we decided to do this and as our liability in buying the two airlines was thereby increased by an additional US$1,250,000:00 it was agreed between the National Government and the partnership that our liability should be discharged by promissory notes on a four year basis and not on three years as originally intended. Consequently four promissory notes for US$375,000:00 were made out and accepted by the Government in lieu of three of US$500,000:00 as laid down in the Agreement.

AND lastly the contents of this my Affidavit (sic) are true.

Sworn etc.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 28. Further evidence of Liu Shao Ting.

No. 28.

FURTHER AFFIRMATION OF LIU SHAO TING DATED THE 19th DAY OF MARCH 1951 (AFFIRMED BEFORE THE BRITISH CONSUL IN FORMOSA) PRODUCED AT THE HEARING AND ADMITTED AS EVIDENCE BY LEAVE OF HIS HONOUR THE CHIEF JUSTICE.

I, LIU SHAO TING of Chung Shan Road North Section 2, Taipeh, Taiwan, China, do solemnly sincerely and truly affirm and say as follows:—

1. In my Affirmation dated the 19th day of October, 1950, together with the exhibits contained therein, I have affirmed that in November 1949 I was appointed Vice Minister of Communications and on the 12th day of December 1949 I was appointed Chairman of the Board of Governors of Central Air Transport Corporation. In my such official capacity I came to know Central Air Transport Corporation and its relationship to my Government. 10

2. The assets of the Central Air Transport Corporation have never been vested in the Board of Governors but have always been vested in the National Government of the Republic of China.

AND lastly the contents of this my Affirmation are true.

Affirmed etc.

No. 29. Evidence of Camille Joseph Rosbert.

No. 29.

EVIDENCE OF CAMILLE JOSEPH ROSBERT GIVEN ORALLY AT THE HEARING BEFORE HIS HONOUR SIR GERARD LEWIS HOWE CHIEF JUSTICE AND EXTRACTED FROM THE TRANSCRIPT OF THE PROCEEDINGS. 20

Camille Joseph Rosbert (sworn)

Examination by Mr. D.A.L. Wright, Junior Counsel for the Plaintiffs:—

Q. At present, Mr. Rosbert, you are Director of Operations of Civil Air Transport?

A. That's right.

Q. And in December 1949 and January 1950, did you hold the same appointment in Civil Air Transport, namely Director of Operations? 30

A. Yes, I did.

Q. And in that capacity your main duty is to direct flight operations?

A. That's right.

Q. Now in December 1949 were the aircraft of Civil Air Transport flying from Hong Kong to the Mainland of China.

A. Yes, they were.

Q. Now in particular around the 12th of December, 1949, can you say that your aircraft were flying to any parts of the Mainland of China?

A. Yes, I can.

Q. To what parts of the mainland do they operate? 40

A. Mainly to Chengtu, Szechuen Province and Mongtse and Yunnan Province. Also we were flying into Hainan Island, two principal points being Hoihow and Samya.

Q. Now how long did your aircraft continue to operate to Chengtu, for example—up to what date?

A. Until approximately December 22nd.

Q. And to Mongtse?

A. The last flight was made on January 16th.

Q. And if those areas have been controlled by the Communists would you have been able to operate flights to Chengtu, Mongtse and Hainan Island?

A. No, it would not.

Q. Did you keep in touch with the Chinese Nationalist Militarist Commanders in those localities while you were inspecting these flight operations?

A. Yes, it was our practice to maintain such contact through our CAT representatives in those particular places and we had up-to-the-minute information through our own radio communication system.

Q. You, I take it, kept in touch with your own representatives in these areas by direct radio communications?

A. That's right.

Q. That's a system operated by CAT?

A. Yes.

Q. And the reason for your keeping in touch with these representatives was—?

A. Well, there were two principal purposes (1) at this time in China it was important to know the military situation so that it would be safer carrying out an operation and also to carry out that operation. In other words, we had had communications for normal air line operations plus the gathering of information, so that we could know just how well the area was from the safety stand-point.

Q. Now, you have already stated that you operated services in and out of Hoihow and Samya on Hainan Island throughout January 1950.

A. That's right.

Q. Did you yourself fly to Hainan Island during that period?

A. Yes, I made a couple of trips during that period both to Hoihow and Samya.

Q. And who was administering Hainan Island when you were there?

A. The Nationalist Government.

Q. And were Nationalist Government military forces in control?

A. Yes.

(Mr. Wright closes his examination of Mr. Rosbert).

No. 30.

EVIDENCE OF SAUL G. MARIAS GIVEN ORALLY AT THE HEARING AS AFORESAID AND EXTRACTED FROM THE TRANSCRIPT OF THE PROCEEDINGS.

No. 30. Evidence of Saul G. Marias.

Saul G. Marias (sworn)

Examination by Mr. D.A.L. Wright, Junior Counsel for the Plaintiffs:—

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 30. Evidence of Saul G. Marias, *continued,*

Q. You graduated from Harvard School with the degree of LL.D. in 1948? (1938?)

A. That's right.

Q. And in that year you were Beale prizeman in conflict of laws?

A. That's right.

Q. Immediately after your graduation in 1938, you were admitted to practise at the New York Bar?

A. That's correct.

Q. And you practised in New York in association with the law firm of Messrs. Dunnett &c.? 10

A. That's correct, of No. 2 Wall St., New York City.

Q. And you are familiar with the laws of the U.S.A.?

A. I am.

Q. I think you have before you certain bills of sale and powers of attorney? —My Lord, those are the particular documents which we put in by reason of the court order and which enables us to put in notarially certified copies of the originals—now Mr. Marias, you have already seen those bills of sale and powers of attorney which are in those bundles?

A. Yes, I am familiar with them.

Q. Please look at the first power of attorney; it is in favour of Thomas G. Corcoran and donors of that power of attorney are Chennault and Willauer? 20

A. That's correct.

Q. In your opinion, is that power of attorney valid according to American Law?

A. In my opinion, it is a valid Power of Attorney.

Q. And it is drawn up in the normal forms of Powers of Attorney according to American law?

A. Yes, this is a very usual form for a Power of Attorney.

Q. And is it drawn up with all the requirements of the American law regarding validity of Powers of Attorney? 30

A. It is.

Q. That particular Power of Attorney authorised Mr. Corcoran, inter alia, to sell and transfer to CAT Incorporated all their right, title and interest in all the property, assets, formerly owned by the Central Air Transport Corporation?

A. That's correct.

Q. And is that Power of Attorney effective to authorise Mr. Corcoran to do that?

A. It is effective to authorise him to transfer and sell the assets to Civil Air Transport Incorporated. 40

Q. Now, you have before you a bill of sale dated 19th day of December, 1949, and executed by Mr. Corcoran in pursuance of that Power of Attorney and you have examined that bill of sale?

A. I have.

Q. And in your opinion, is it effective to transfer the property in these assets from the partnership of Chennault and Willauer to Civil Air Transport Inc.?

A. It is absolutely effective to transfer the title of the property in the partnership.

Q. And is that bill of sale drawn up in common form according to the laws of U.S.A.?

A. Yes, this bill of sale is in the traditional form used in the U.S.A.

Q. And this bill of sale was executed according to the evidence and purports to be so executed on the face of it in Washington, D.C.?

A. That's correct.

Q. Now what is the relevant law which governs the validity of this bill of sale?

A. The laws of the District of Columbia govern the validity of the bill of sale.

Q. And why do you say that?

A. The basic rule of conflicts complies with the law of the District of Columbia being the law of the place of the making of the bill of sale would be the applicable law.

Q. And it is in evidence in this case that the intention of Chennault and Willauer was that the law of the District of Columbia should govern the validity of this bill of sale? Does that re-enforce your opinion that that particular law does govern the validity?

A. Yes, there would seem to be no question whatsoever in view of that intent that the laws of the District of Columbia would apply.

Q. Now this transaction is a sale of goods in your view?

A. That's correct.

Q. Have you got before you the law applicable to the sale of goods in the District of Columbia?

A. I do.

Q. Are you familiar with it?

A. I am.

Q. Would you refer the Court to the relevant provisions of the law relating to the sale of goods in the District of Columbia—what is it contained in —is it in a statute or—?

A. The applicable law is in the form of a statute contained in the United States Statute at Large Vol. 50 Chapter 43 Section 1-79 at pages 29 to 49.

Q. Now, in your opinion, what are the relevant provisions of this law governing the sale of goods?

A. Section 4 which is entitled "Formalities of the Contract" is the first section applicable. The sub-title of that section is "Statute of Frauds" and subsection (1) reads as follows: "A contract of sale or a sale of any goods or choses in action of the value of $500 or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold and actually received the same or gives something in ernest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

Q. Now in your opinion Mr. Marias does the bill of sale which is before you provide a sufficient memorandum within the provisions of Section 4?

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 30. Evidence of Saul G. Marias, *continued,*

A. Yes, the bill of sale before me definitely is in full compliance with that section.

Q. That is to say it's sufficient memorandum within the provisions of that Section 4?

A. That's correct.

Q. I want to direct your opinion now to the passing of the property of these assets to CAT Inc. Well, what are the relevant sections?

A. The relevant sections are: Section 18 entitled property in specific words (goods) passes when the parties so intend. Subsection (1) of that section reads as follows: "Whether it is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Section 19 entitled "Rules for Ascertaining Intentions" reads as follows:—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1 thereunder reads as follows: Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery or both be postponed.

Q. Have you got the definition of the specific goods in that law?

A. Yes, I do. Section 76 of the Statute entitled "Definition" contains a definition of specific goods which is as follows: "Specific goods mean goods identified and agreed upon at the time when the contract to sell or a sale is made".

Q. And in your opinion are the goods which is the subject of this bill of sale specific goods within the meaning of that definition?

A. In my opinion they are specific goods within the meaning of that definition.

Q. And in your opinion is that bill of sale an unconditional contract to sell those specific goods?

A. It is unconditional. In fact I would say there is definitely an express intention to pass an immediate title to the goods and the matter is not open to the influence of presumption.

Q. Then in your opinion according to that law, did the property in these goods pass on the execution of this bill of sale on the 19th December, 1949, the date of this execution?

A. In my opinion, the property in the goods passed on that date.

Q. There is before you in that bundle of documents Mr. Marias another bill of sale which appears to be drawn up in a different form. Do you know what the purpose of this particular type of document is?

A. Yes, that bill of sale is a formal bill. You will notice it is on a printed form, which was used in connection with the registration of the aircraft the numbers of which are listed on the attachment with the United States Civil Aeronautics Administration.

Q. It's executed in order to comply with the formalities of the Civil Aeronautics Administration relating to registration?

A. That's very correct.

(Those are the questions which I wish to put to Mr. Marias on these aspects in the case, my Lord)—Mr. Wright.

No. 31.

QUESTIONNAIRE AND ANSWERS THERETO SUBMITTED TO THE FOREIGN OFFICE REFERRED TO IN AND EXTRACTED FROM THE TRANSCRIPT OF PROCEEDINGS.

"1. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the de jure Government of China?

2. If not when did His Majesty's Government cease so to recognise that Government?

3. Is the Central People's Government or any other Government recognised as the de jure Government and, if so, from what date?

4. Has the Republican Government ceased to be the de facto Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?

5. Is any other Government recognised as the de facto Government and, if so, from what date?

6. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-a-vis China?"

The replies to the questionnaire are as follows:—

"1. H.M. Government in the U.K. does not recognise Nationalist Government (Republican Government) as de jure Government of Republic of China.

2. Up to and including midnight January 5th/January 6th 1950 H.M. Government recognised Nationalist Government as being de jure Government of the Republic of China and as from midnight January 5th/January 6th 1950 H.M. Government ceased to recognise former Nationalist Government as being de jure Government of the Republic of China.

3. As from midnight of January 5th/6th 1950 H.M. Government recognised Central People's Government as de jure Government of the Republic of China.

4. H.M. Government recognise Nationalist Government has ceased to be de facto Government of the Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from date on which it ceased to be in effective control of those parts.

5. H.M. Government does not recognise any governments other than Central People's Government of the People's Republic of China as de facto Government of the Republic of China. Attention, however, is invited to the 2nd sentence in answer to question 4.

6. In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory.

On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to the Republic of China. On July 26th 1945 at Potsdam, the heads of the Government of United States of America, the United Kingdom and the Republic of China reaffirmed "The terms of Cairo Declaration shall be carried out." On

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 31. Questionnaire to Foreign Office, *continued.*

October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied powers concerned Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of the Republic of China. At present, actual administration of the island is by Wu Kou Cheng, who has not, so far as H.M. Government are aware repudiated superior authority of Nationalist Government.

I am advised that the effect of recognition by H.M. Government as stated in answer to questions 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of evidence before it. Ends. Copy of letter follows by air." 10

No. 32. Transcript of Proceedings.

No. 32.

TRANSCRIPT BY THE COURT STENOGRAPHERS OF THE PROCEEDINGS RECORDED IN THE ABOVE ACTION.

(The proceedings having been recorded by mechanical process namely by Wire Recorder).

Mr. D'Almada:

My Lord, I appear in this case together with my learned friends Mr. McNeill, Sir Walter Monckton, Mr. Wright, Mr. Threlfall. Sir Walter Monckton has come to Hong Kong specially to assist in this case and by arrangement among us and with the indulgence of Your Lordship, he will 20 address the Court. I trust Your Lordship will have no objection to this course.

Court: Proceed Sir Walter Monckton.

Sir Walter Monckton:

May it please your Lordship, I am greatly indebted to the Court and also to my learned friends who lead me here for the opportunity of addressing you in opening this case and I should like my first words to be words of gratitude to them and to the Court for the courtesy with which I have been permitted to take my part. Your Lordship will appreciate from the pleadings that this is a case in which the plaintiff incorporated company is claiming 40 aircraft which are now in Hong Kong and which were formerly part of the 30 assets of the Central Air Transport Corporation, which your Lordship will see referred to throughout as CATC; and the other assets which were the property of that Corporation. My Lord, I have anxiously considered how best I could serve the Court in laying before you the submissions of the plaintiffs and that I came to the conclusion that it will probably be most convenient to your Lordship if I should say first of all in general terms what the nature of the claim is, and then explain to your Lordship how we have prepared the documents for your convenience and give you, after showing you how the documents are prepared, a short history of the case in chronological order so that we have both the documents and the facts before you; then make the 40 submissions and then present you with the affirmations, affidavits and the evidence. My Lord, in that case, the first step is to say in what way this claim to the 40 aircraft and the other assets of the defendant Corporation are claimed here. The claim is made through the American partnership of General Chennault and Mr. Willauer. Those two gentlemen in partnership, by a transaction of the 12th December, 1949, the Chinese National Government

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No. 32. Transcript of Proceedings, *continued.*

sold the CATC and its assets; and one of the matters which your Lordship will have to consider will no doubt be the documents by which that sale to the American partnership was effected on the 12th December, 1949. I said that the claim of the plaintiff Corporation was made through that partnership because, after that sale on the 12th December, 1949, the plaintiff Corporation acquired the rights of the American partnership again on the 19th December, 1949. What I have to do my best to assist your Lordship upon is tracing the ownership of the assets of which the bulk is those 40 airplanes from the National Government to the partnership and from the partnership to the plain-
10 tiff Incorporated Company. I ought to say, first of all, that the CATC itself—the Central Air Transport Corporation—is an unincorporate commercial enterprise, wholly owned at the time of these transactions by the National Government of China. Your Lordship may take the view when you see the evidence that that body, the CATC, is not strictly a department of the Government of China and was not but it is, at any rate, wholly owned and was wholly controlled by the Government and was, as it were, what in the law is sometimes called an emanation of the Government. On the 12th December, 1949, when the first of the two steps was taken, namely, the sale by the National Government of China to the partnership, that Government—the
20 National Government—was recognised by His Majesty's Government as the de jure Government of the Republic of China. At that date, it still had some territory on the mainland under its control, and it was maintaining itself as the Government in Taiwan which island it had administered since 1945 with the approval of His Majesty's Government. At that date, the 40 aircraft now in question before your Lordship were in Hong Kong and the contract of sale to Chennault and Willauer of the American partnership was completed in Taiwan and the purchase price of these assets was $1,500,000:00. As from midnight of the 5/6th January, 1950, His Majesty's Government withdrew de jure recognition from the National Government and granted it to the Central
30 Peoples Government. I shall show your Lordship in chronological order as we go through the documents the instrument by which that decision was conveyed to this Court in earlier proceedings. The importance for the moment is that I, in showing how the case is established, should draw your attention to the fact that it is perfectly plain from the document that the change of recognition involved two things; first in terms, it involved that the de jure recognition of the National or old Government persisted until midnight of the 5/6th January, 1950; and secondly, that the new Government—the Peoples Government—was from that moment recognised in substitution. Your Lordship will appreciate the importance of the first limb of that argument because all
40 the transactions, about which I have to address your Lordship, took place in December, 1949, in a period where, upon the document, it will be claimed that the National Government was recognised as the de jure government by His Majesty's Government and our case will be, when you have seen the document, that by the 5/6th January, 1950, the property in the assets here in question, the airplanes, the spare parts and the apparatus and so forth had passed to the partnership and by them had been transferred to the plaintiff Corporation on the 19th December. The advent of the People's Government to recognition cannot, in our submission, divest the plaintiffs of property thus acquired. The principle of international law for which we contend in such
50 circumstances is, that recognition of the new Government does not divest property in the hands of those who have acquired it from the old Government for value. The whole point of the fact in law and in fact of the recognition of

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No. 32. Transcript of Proceedings, *continued.*

the old government up to the 5/6th January, 1950, is that up to then, third persons, third parties outside the jurisdiction of that Government could safely deal with it. It is laid down, not once but many times in the authorities, that it is an essential feature of the international system that that should be so and that persons who deal with the Government, which is a recognised Government when they deal with it, can deal with it safely and not fear that any subsequent recognition of a new Government will defeat their rights already acquired. It is sometimes put by lawyers in the form that the new Government succeeds, not by title paramount which might divest property in the hands of others, but by succession and representation. The essence of it is 10 that the rights acquired when the old Government is recognised are rights which remain and subject to which the new Government succeeds by representation. The new Government cannot get a better claim than that which, at the relevant date, the 5/6th January, 1950, the old Government possessed. Your Lordship may think that it is as well that I should deal with that point as I have thus earlier because once it is appreciated how vital is the date of the change of de jure recognition, the case assumes much simpler proportions; it doesn't become necessary to examine in detail a great deal of authorities about international law and the effect of recognition. What one really has to do is to see how the matter stood on the 5th of January, 1950, as between 20 the parties who at one time or another had property of these assets and our case is simple, it is this: that by the effect of the agreements made in December, 1949, there was no property in these assets left in the National Government but that it had passed wholly to the partnership and from them to the plaintiff company. There is, however, before I come to the documents and the history, one other matter I ought to deal with. I have described the CATC as an emanation of the Government and there is de jure recognition of the People's Government now and therefore, as your Lordship will understand, there were difficulties at different stages of litigation in respect of these assets because of the fact that the defendants were an emanation of the recognised sovereign 30 power and that that sovereign power could not be impleaded in our Courts. Therefore, I think it is essential that I should at an early stage, though not of course argue it fully at an early stage, show your Lordship the Order-in-Council under which these proceedings can take place in spite of the fact that they might be held to implead a sovereign power. And, my Lord, I have that as a separate document—the Order-in-Council—your Lordship hasn't a copy or has your Lordship got one?

Court: I have one.

Monckton: I am taking it out of date as your Lordship will appreciate the foundation of jurisdiction. It is, as your Lordship sees, dated the 11th May, 40 1950, and entitled "The Supreme Court of Hong Kong Jurisdiction, Order-in-Council, 1950." Whereas evidence has been produced to the Governor of Hong Kong that 70 aircraft—my lord, I pause to say that there were other assets of a different corporation—the CNAC—with which your Lordship is not concerned in this action. I understand that litigation pends in relation to that but I am not engaged in it. But the 40 with which your Lordship is concerned are included in the 70. "Whereas evidence has been produced to the Governor of Hong Kong that 70 aircraft now on the Government airfield at Kai Tak, Hong Kong, are registered both in the United States of America and in China, and the aircraft not being State aircraft within the meaning 50 of the Chicago Convention on International Civil Aviation, 1944, such dual

registration is contrary to Article 18 of that Convention." I stop there to say that by the Chicago Convention on International Civil Aviation, it is provided in Article 18 "an aircraft cannot be validly registered in more than one State but its registration may be changed from one State to another and those who signed that Convention included the United Kingdom, the United States and China." I understand that since that date, the Convention has been denounced by China but not with effect at any moment relevant for your Lordship's consideration. I pass on to the second recital "And whereas the ownership of the aircraft is in dispute and there are conflicting claims to their possession and whereas it is just and desirable that the question of ownership of the aircraft and a right to their possession should be decided by a Court of Law before they are permitted to leave Hong Kong, now therefore His Majesty, in exercise of all powers enabling him in this behalf, is pleased by and with the advice of his Privy Council to order and it is hereby ordered as follows (1) in any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of coming into operation of this Order........." That indicates to your Lordship that this action began a few days after the Order-in-Council "it shall not be a bar to jurisdiction of the Court that the action or other proceeding impleads a foreign sovereign state." Now those words of course are not susceptible of any construction but that they confer jurisdiction upon your Lordship to determine ownership notwithstanding the normal immunity of a sovereign power from jurisdiction. The second subsection "If a defendant in any such action or other proceeding fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case enquire into the matter fully before giving judgment." Now your Lordship, I am of course not as familiar as I ought to be with the practice and procedure in your Lordship's Court but, no doubt, as in England, so here there may be methods of proceeding to judgment by default if a pleading or appearance is not taken or put in, then judgment might go. But as I read this subsection, what it is saying, even though there might be a case for proceeding in default, your Lordship must have evidence to enable you to determine that a case is made out. It is the distinction between a judgment by default without evidence and a judgment in a case where your Lordship has evidence before you.

Court: Sir Walter Monckton, what do you think the words "which he ought properly to take" mean?

Sir Walter: Well I should read them as this; it is in a connotation of a failure to appear or a failure to put a defence. What it is really saying, is ejusdem generis with those two expressions, is saying or any other step which he would take in order to enable the matter to be dealt with on the merits. If you don't appear, then the matter might not be dealt with on the merits; if you don't put in a defence, well then there is nothing for the plaintiffs to do, except to proceed to judgment bv motion, it may be. There may be some other sort of step which he could take of that kind but, when you see any other step in a connotation including a failure to appear or to put in a defence. It must be something of the kind.

Court: What proper steps, Sir Walter Monckton, could independent foreign sovereign power take as a defendant in an action?

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No. 32. Transcript of Proceedings, *continued.*

Sir Walter: My Lord, the only steps he could take is to appear or to put in a defence if he desires to submit to the jurisdiction of the Court.

Court: He can't be compelled to appear?

Sir Walter: Oh no! Nor indeed to put in a defence because the other thing ...... or ...... illustration of the sort of word ...... sort of meaning that might be attached to the words about which my Lord asked me is that after appearance and after a defence, there might be an order for discovery of documents and he might fail to take that step and thereby subject himself to the possibility of a judgment by default. With submission, that is really what is in the mind of this order—those who drafted this order. If some 10 one doesn't take the steps to enable him to challenge the case upon the merits, nevertheless, you must not have a judgment by default; you must see the material upon which the plaintiff says "I make out a prima facie case." It isn't of course someone neither appearing or defending nor doing anything else can have facts assumed before him; it is that I must give you the facts upon which your Lordship can act. That then, is the first section of the Order-in-Council.

Court: I am not very happy, Sir Walter Monckton, about "impleads a foreign sovereign state."

Sir Walter: In subsection 20

Court: Subsection 1.

Sir Walter: Yes. It shall not be a bar to jurisdiction of the Court that the action or other proceedings impleads a foreign sovereign state. Well, my Lord, I suppose in the ordinary use of language that means that it makes a party to the litigation a foreign sovereign state which normally, if one did, one would put it into it because the sovereign state would say "I choose not to appear" and your Lordship will do nothing about it.

Court: Quite. But it doesn't mean any whittling down of the rights, the legal rights of foreign sovereign states?

Sir Walter: My Lord, I submit it only means this and one will be anxious, 30 your Lordship will be anxious, to treat it as limited to the subject matter of the Order-in-Council, the well-established immunity which a sovereign power entertains. It is not, as it were, touched except in relation to the ownership of the chattels here. It cannot, of course, compel a sovereign power to appear or defend or take any other steps in the proceedings. Indeed, sub-paragraph 2 of this section implicitly assumes that, it postulates a case in which the sovereign power does not appear before your Lordship. What it is saying is you shall still have jurisdiction even though the sovereign power prefers to take its stand upon its immunity. It is really, if I may put it to your Lordship in this way, what I submit the Order-in-Council is doing is 40 putting upon the Court the duty of deciding this ownership whether or not that immunity is claimed whereas your Lordship would be very likely to say, as I understand was said in this Court before, that while that immunity remained and covered the subject-matter of such a claim as this, you couldn't entertain an action. In other words, it enables your Lordship to determine ownership notwithstanding the absence of the other party which is in effect a sovereign power. But, of course, it doesn't seek to compel the sovereign power to take any part in the proceedings. As I understood your Lordship's question

to me, it really was this, that it doesn't. I am not seeking to say to your Lordship that the immunity save in respect of a determination of the ownership of these assets is in any way impaired; and the Order-in-Council continues, paragraph 2. "If at any time after 21 days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which sub-section 1 of section 1 of this Order applies, and in which or as a result of which the ownership of the aircraft or right to the possession thereof is likely to be finally determined, the Governor shall by order published in the Gazette refer the questions of ownership of the air-
10 craft and right to the possession thereof to the Court for determination. On any such reference, the Court should enquire fully into and determine the question notwithstanding reference may implead a foreign sovereign state."

The importance of that section is simply this, that the obligation is being put upon the Court to determine whether or not an action is brought. It is only for that purpose I read it because here the action was brought on the 19th May, 1950, that is, within the 21 days. And that, I submit, assists one in reaching the conclusion, if I may say so—I respectfully submit was in your Lordship's mind—about the necessity of limiting any departures from immunity. It is obvious that the authors of this Order-in-Council had in
20 mind two things: (1) that immunity in general must remain but in the other it was necessary to determine the ownership of these assets, whether or not an action was brought for reasons of policy into which we don't, of course, enquire.

Then section 3. "Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or other proceeding or reference may appeal therefrom to the Full Court and from thence to His Majesty-in-Council, and such an appeal shall lie notwithstanding such person has not taken any part in previous proceedings." Your Lordship will see that is a very unusual provision and it would enable, if
30 they so desired, those who stand behind the defendants in this suit, to refrain from appearing in your Lordship's Court, refrain from appearing in the Supreme Court on Appeal and yet appear in the Privy Council on the final appeal before this matter is ultimately determined, if an appeal is lodged. But what it really is doing, if I may say so, carrying out what is in your Lordship's mind, that you will only depart from the strictness of immunity to the least possible extent essential to give this ownership to them. It is saying, well, even if you don't, as an ordinary litigant would, appear in the first or the second Court, you would even then be entitled to appear in the final Court of Appeal and that shows the limits to which they will go while main-
40 taining the necessity of determining ownership to avoid impinging upon the old doctrine of immunity. Well then Section 4 describes ....

Court: One minute, Sir Walter Monckton, what is the purpose of the difference "claiming the ownership or right to possession"?

Sir Walter: Well one can imagine a case, my Lord, in which, without having acquired under a contract the ownership of goods, one had acquired a right to possession and a right to immediate possession. But in this case, I don't think your Lordship will be troubled by any such distinction because I am seeking to show to your Lordship when I come to the documents that their effect, by whatever law may turn out to be relevant, was to pass the property
50 and therefore the right to possession as well.

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Court: How would you suggest Sir Walter Monckton to this Court to regard the decision of the Full Court receiver action. Is that going to be binding upon me?

Monckton: Well my Lord, it won't, I submit now the cause your Lordship is bound to determine is the question which the Full Court desisted in determining that is namely the ownership that the one thing the Order-in-Council compels or seeks to compel your Lordship to do is to determine the very question which the Full Court said on that material and in the circumstances which I must deal with later, they would ....

Court: Does it go that far, Sir Walter Monckton? Surely it empowers me to find out if this particular applicant has proved a right to ownership. I take it that it would require proof?

Monckton: That will require proof.

Court: If I find that this particular applicant has not proved his case the matter still remains in the air to be dealt with under Section 2.

Monckton: Yes, my Lord. I submit that in the result if your Lordship determine this action against me, reference will be necessary under 2, references not altogether easy to conduct. I assume though I shall no doubt not be concerned with those difficulties, it is because one would have to seek someone else who claims ownership and if the other party (if there could be another party) to these proceedings still desires not to come to your Lordship, your Lordship would not have very much assistance.

Court: That is so Sir Walter Monckton. I cannot see that in those circumstances that anything at all could be conclusive in this Order-in-Council.

Monckton: I see that difficulty my Lord and I hope to enable your Lordship to resolve the case without being left it. I had better perhaps draw your attention to Section 4 because it refers to jurisdiction ...... the powers your Lordship has. The purpose of an action and other proceedings or references or for the purpose of appeal which may be in accordance with section 3 of this Order. A court shall have powers to hear evidence, summon witnesses, to take evidence on affidavit and to call for the production of documents to give such directions as it shall think fit to enable justice to be done and in particular without prejudice to the generality of the foregoing power to give directions as to the conduct of hearing of the action or other proceedings or reference or appeal as the case may be as to persons who may be parties thereto may be heard therein and as to the time within which any step therein is to be taken to provide for the service of any document whether inside or outside of Hong Kong (Your Lordship will see that power was used by the judges of this Court) subject to the provisions of this Order and to the directions of the Court under the section (a) the existing law and practice relating to civil proceedings in Court to apply as nearly as may be to an action or other proceeding or reference (b) the existing law and practice relating to appeals from the decision of Court in a civil matter shall apply as nearly as may be to any appeal which may be brought to the Court under Section 3 of this Order. Then Section 5—This is what lays the duty upon the Governor dealing with the matter, until the decision of the Court. Until the Governor is satisfied that ownership or right to possession of the aircraft have been finally determined (that looks forward to possibilities of appeal when the time for appeal

passes). The aircraft shall remain in Hong Kong and the Governor may give such directions and take such steps whether by way of detention of the aircraft or otherwise as shall appear to him necessary to prevent their removal and to ensure their maintenance and protection. When the Governor is satisfied that ownership or right to possession has been finally determined he may give such directions take such steps as appear to him to be necessary to give effect to the decision of the Court. (My Lord, I pause there—that rather illustrates that something Your Lordship put to me about the distinction between ownership and the right to possession. What, of course, politically 10 no doubt the Order-in-Council was most concerned with was that someone should be decided to have the right to take these aircraft now whether by right of ultimate ownership or some other immediate right to possession. No doubt that is why both are put here). Section 3—If any person fails to comply with any of the directions given by the Governor under this section he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five thousand Hong Kong dollars or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment. (I don't think I need trouble your Lordship with the interpretation of the provision). Your Lordship will see that under the powers of section 5 of that Order His 20 Excellency the Governor made directions entitled "The Aircraft, Detention, Maintenance and Protection Directions of 1950". I look down to paragraph 3 of those directions:—The director i.e. the Director of Civil Aviation Department—shall with effect from the appointed time cause the aircraft to be detained upon the aircraft premises and the Director (see paragraph 4) with effect from the appointed time shall provide for the due maintenance of the aircraft and see 5, shall from and with effect from the appointed time take and maintain all measures reasonably necessary and suitable for the protection of the aircraft upon the aircraft premises. (That is the provision preventing any one from entering). I only mention that because under the Order which founds the 30 jurisdiction that obligation had been carried out by His Excellency the Governor. Now my Lord I thought it right at the outset to show Your Lordship the foundation of this jurisdiction that I would like to turn aside now to deal with the matter in chronological order I wanted to tell your Lordship—I beg your Lordship's pardon?

Court: This is a remarkable document.

Sir Walter: My Lord that is certainly an unusual document, but fortunately for me my Lord it is a plain document and in its essential directions inescapable and with its policy I am not concerned. My Lord when I come to deal with the facts and proceedings in the case I wanted to tell your Lordship how I 40 have tried to get it into compartments. There are a number of affidavits with a number of exhibits and subject to Your Lordship's judgment and experience, I have always found that rather a tiresome thing unless the documents are in bundles in chronological order and numbered. Your Lordship will find we have done this, we have got a bundle A which is the proceedings in order of dates; A bundle B. which is a copy of all the affidavits shorn of their exhibits which will be read in due course to Your Lordship. A bundle C also numbered and in order of date which includes the agreement which I rely upon which is called a Bill of Sale which transferred the assets from the partnership to the corporation in America and then a bundle D also in order of date and 50 numbered which is the correspondence and parts of agreements and powers of attorney and so forth. And I think it will be found convenient if I deal in

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opening the matter with the documents pertaining from bundle to bundle in order of date. I can start at the 9th November, 1949. By that date the CATC which was, as I have described it, a Chinese state-owned commercial enterprise was already and had been for some time operating commercial air transport in the Republic of China and elsewhere and already maintained an air base in Hong Kong. The affidavits will show your Lordship that by this date the 9th of November 1949 the National Government of the Republic had moved its seat of government to Chungking and that in pursuance of Orders of Government authorities that is the Chinese Government authorities, the CATC had moved its whole organisation to Hong Kong. The Proceedings 10 which have taken place in the Court and which I shall refer to shortly will also satisfy your Lordship that at or about this time a number of employees on the executive and technical staff of the Corporation were taking orders from what has become the People's Government and not from the organs of the National Government with the result that the authorities put in by the National Government were unable to get in touch with or control the aircraft, or the use of them. So on the 24th of November, 1949, (all this of course being in the year when the National Government was recognised) the Corporation—the CATC ......

Court: That is the government recognised de jure and the People's Government 20 de facto.

Monckton: There was no recognition of course of the People's Government at that time.

Court: No recognition?

Monckton: No. The Corporation through the Minister of Communications of the National Government started proceedings which are on the file of this Court No. 518 of 1949. I am not going to ask your Lordship to look at them now, it is only a matter of history—we may have to look at them at a later stage. Those proceedings were for an injunction against what I might describe as the defecting employees. A named number of them were treated 30 as defendants for the purpose—an injunction to restrain them from entering on the property of the Corporation, and from interfering with the control of the corporation by its duly constituted officers. That injunction was granted ex parte. On the following day the 25th of November, 1949, the defendants in that action No. 518 of 1949 issued a summons for the detention and preservation of the property of the Corporation pending the hearing. And an order was made accordingly. I mentioned those in order of date, I have not dealt with the details for the moment. Now I come to the first of the contractual documents as between the National Government and the partnership. That is the 5th of December, 1949, and it is the first page of bundle C. That is an 40 important document in this case and so if I may I shall read it, it is dated 5th December 1949 and addressed to the Minister of Communications in the National Government and, as Your Lordship will find on page 4, signed by and on behalf of Chennault and Whiting Willauer, by both of the partners and it is in these terms:—

"Your Excellency, This letter is written to confirm our mutual agreement that whereas (a) the National Government of the Republic of China (hereinafter referred to as the Government) is the legal and beneficial owner of all the outstanding shares of stock of the Central Air Transport Corporation

(hereinafter referred to as CATC) and 80% of the outstanding shares of stock of the China National Aviation Corporation (hereinafter referred to as CNAC) —

Court: I don't want to interrupt but was it not a fact that there was no stock in the CATC?

Moncklon: No that really must be an ownership of the assets because Your Lordship will find in the affidavits that although there was no stock at all the Government in fact owned the enterprise that is why I described it rather not as a department but as an emanation. It is the Government—the pro-
10 perty of the Government directly.

Court: The purchasers didn't appear to know that?

Monckton: They didn't appear to have appreciated that there weren't necessarily any such shares. Anyhow they wouldn't get anything under that. They could get all the assets.

Court: Yes, quite.

Monckton: And (b) whereas we the undersigned Chennault and Willauer (hereinafter so referred to) desire to purchase and operate the physical assets of the said CATC and CNAC and to acquire the shares of stock (Well, in their desire to frustrate it in respect of the CATC and CNAC held by the Govern-
20 ment). (c) these physical assets a major part of which are now located in the Colony of Hong Kong are now subject to various injunctions issued by the Supreme Court of the said Colony of Hong Kong with the result that the said CATC, CNAC have been forced to cease their operation; and the said physical assets have materially decreased in value (one of the disadvantages of the aircraft is that when they are on the ground they may not eat their heads off but they cost a lot and get no better).

Court: They do.

Monckton: And (d) the Government is unwilling to sell or otherwise dispose of the said physical assets or stock except for the most binding assurances
30 that after such sale or disposition they will not be used in anyway for the benefit of or the carriage of passengers or goods within or to or from the Communist areas of China.—Your Lordship sees that at this stage not the whole of the mainland had been under the control of the Communists and as Your Lordship appreciates throughout December we are treating of a time when the National Government was recognised de jure and no other Government recognised and there was nothing improper in this.

Court: At this time, Sir Walter Monckton, where was CATC situate—Shanghai?

Monckton: CATC was in Hong Kong.

40 Court: Hong Kong by this time?

Monckton: By the 9th of November they had been moved here. (e) The Government is concerned and anxious to secure the future of the loyal staff members of the said CATC and CNAC. The Government is particularly anxious to sell the physical assets at the start of the said CATC and CNAC to Chennault and Willauer, because of the trust and confidence it imposes in them by virtue of their loyal and devoted service during the war of liberation to China and the cause of the United Nations because the Government recognised that Chennault and Willauer have amply demonstrated their ability to operate efficiently air transport services because the Government is confident

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No. 32. Transcript of Proceedings, *continued.*

that Chennault and Willauer will always use their best efforts to ensure that the assets will never be used for the benefit directly or indirectly for the Communist areas of China rather for the usage and furtherance of the anti-Communist cause. Now therefore it is agreed as follows. (Now your Lordship may find a misprint in the next paragraph, it is a slip of typography). The Government agrees to cause the said CATC and the said CNAC to sell and Chennault and Willauer agree to buy all the physical assets and such stock as is owned by the Government of the said CATC and the said CNAC free and clear of encumbrances for the sum of United States currency 1,500,000 dollars in the case of the CATC assets and the sum of United States currency 2,000,000 10 dollars in the case of the CNAC assets and for further consideration referred to herein. (2) Chennault and Willauer agreed to pay the said purchase price as follows: By issuing to the said CATC three joint promissory notes numbered serially each in the sum of United States currency 500,000 dollars payable to bearer without interest subject to the terms and conditions set forth in the form of note attached to the letter (Your Lordship sees, pausing there what was contemplated at that stage was three joint promissory notes. In fact that was changed in the end to four joint promissory notes of 350,000 dollars each amounting to the same sum but spread over a longer period and the reason why that was suggested and accepted is that if Your Lordship looks 20 back to paragraph (a) on page 1 that the National Government was dealing with two lots of assets, interests in CATC—100% and 80% interest in the CNAC. Well, the other 20% was being held by Pan American Airways Corporation. In the end, these purchasers were to buy the whole of it which meant a larger sum in total and it was arranged that this should be spread, instead of by three promissory notes over three years by four over four years. Then 2(b) by issuing CNAC—(I want to tell your Lordship that that of course is covered by the affidavits which Your Lordship will read). By issuing CNAC three joint promissory notes (I don't think I need trouble your Lordship with the details of that as that is not in this action but (c) I'll 30 read—5th line on page (3) by causing to be organised a corporation or corporations or other legal entities under the law of such country or countries or place or places Chennault and Willauer shall they select to which corporation or corporations or legal entities Chennault and Willauer shall transfer the said physical assets shares of stock of the CATC and the CNAC in consideration of which the corporation or corporations shall issue its or their promissory notes payable to bearer without interest in substitution for the aforesaid notes jointly issued by Chennault and Willauer. The said substitute notes shall be in the same amount and substantially subject to the same terms and conditions as the notes of Chennault and Willauer for which they are substituted excepting 40 only that such corporation notes shall not be limited to payment out of the said physical assets of the CATC and the CNAC and which shall be fully payable out of the assets of any nature belonging to the new corporation or corporations or legal entities. (Well now what your Lordship sees that what was contemplated was—promissory notes to be drawn but payable only out of the assets by the partnership." But later a substitution of a promissory note with the incorporated body behind it in their place. In truth, what happened was that the corporation was formed immediately and by the 19th of December was in a position to give the promissory note direct—and did so, so that the substitution never had to take place, the promissory notes were 50 issued by the corporation direct. Your Lordship will see that, don't you?

Court: Well did the corporation issue promissory notes purporting to buy the assets of CNAC?

Monckton: They gave promissory notes binding anything they'd got, ordinary promissory notes payable on demand on dates of course spread over the four years as the original ones would have been. They didn't in any way exclude recourse to the end. Now my Lord I don't trouble you with (3) except just to describe it. It gives an option after the organisation of the new corporation the holder of the promissory note is to take interests of a different kind but that never was operated and so we needn't trouble. If you look at page 4
10 however, paragraph 4, Chennault and Willauer agree to use their best efforts and to do everything within their power to reduce the said assets to their possession and absolute control. Section 5 the Government agrees to use its best efforts to do everything within its power to assist Chennault and Willauer to reduce the assets to their possession and absolute control. Chennault and Willauer agree that the assets shall not be used directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China. Chennault and Willauer agree to use their best efforts to continue in their employment as many of the local employees and staff members of the said CATC and CNAC as is reasonably possible and to
20 dispose of the rightful claims of Pan American Airways if any approved in the case of CNAC (They had none in relation to these assets). And then this letter and promissory notes and bills of sale issued to hereunder contain the whole and entire agreement between the parties. If this letter meets with your approval and agreement, will you kindly sign and return to us, enclosed duplicate copies. Then your Lordship sees on the left-hand side of the letter at the bottom "The above terms accepted and approved." (sd.) Nih Chun Sung the Deputy Secretary General of the Executive Yuan concurrently Chairman of the Board of Directors of the CNAC on the 30th and Liu Shao Ting, Vice Minister of Communications, and concurrently Chairman of the Board of
30 Directors of the CATC on the 12th December, 1949, and one of the deponents to affirmations will be the signatory to that letter on behalf of the CATC. So, my Lord, there's the letter of offer and the acceptance at the foot, the letter of offer of the 5th December and the acceptance of the 12th of December. My Lord there is another letter of the 12th of December which is the next document in order of date which is in bundle D. It isn't a document, which constitutes the agreement—it confirms it. Your Lordship has bundle D at page 7—that's a letter from the Premier Yen Hsi Shan to General Chennault and Mr. Willauer of the 12th of December written from Taiwan. It says "Dear Sir, we take pleasure in notifying you that your offer to purchase
40 CNAC and CATC has been accepted by the highest authority of the Government of the Republic of China. The Government of the Republic of China has sold and transferred to you, you are now the sole owners of, all the assets, airplanes, spare parts, machinery, tools, and other property of whatsoever nature of CNAC and CATC including also all the shares of stock or other evidences of ownership in CNAC and CATC held by the Government. This sale and transfer has been made to you in consideration of promises and undertakings heretofore made by you. It is hereby certified to you that the foregoing action is final and complete. We have instructed the Minister of Foreign Affairs to make all necessary certification of this sale and transfer
50 to any foreign governments upon your request. We have further instructed all officials of the government to execute any necessary documents required by

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you as evidence of your ownership and title (then there is a note to say that this English letter is legal and true and any Chinese version is but a translation of it.) That is not in itself a contractual document—it is the confirmation of it. The first two documents which I have dealt with, the 5th of December and the acceptance of it on the 12th—that is the first contract, thus confirmed. I am giving your Lordship in opening the substance, that's the first check. Now my Lord we turn to consider how from the partnership —I am not making my submissions right here, how from the partnership it went on to the plaintiff corporation. My Lord in the bundle C at pages 5 to 8 we get (I am not going to trouble you with the authentication of it) a power 10 of attorney from the two partners Chennault and Willauer to Mr. Corcoran giving him authority as agent to sell to the plaintiff corporation. The document on page 5 is merely a notarial certificate of what follows on page 6 and the material document is page 6, that is, "Know all men by these presents that the undersigned Chennault and Willauer a partnership (then it describes it) do hereby make constitute and appoint Thomas G. Corcoran (the address was in Washington) their true and lawful attorney in fact for and on their behalf to bargain, sell and transfer unto Civil Air Transport Incorporated (a Delaware Corporation) its successors and assigns all their right, title and interest in and to the following described properties: (I pass over No. 1 20 because that is dealing with the CNAC). I now go to No. 2 "All the property and assets, real personal or fixed, tangible or intangible of whatsoever kind and wheresoever situated including without limiting the generality of the foregoing all airplanes, spare parts, tools, machinery, real estate, leases, contracts (I needn't read the rest) formerly owned by the CATC as of the 12th December 1949 all the aforesaid property and assets having on that day been sold and transferred to Chennault and Willauer, sole owners, by deed of the Government of the Republic of China. The undersigned hereby authorise their said attorney to execute and to deliver for and on their behalf any or all bills of sale and so forth. My Lord they do it in America by a bill of sale 30 instead of an agreement or by a deed. In the same bundle pages 9-12 we give the Bill of Sale. The effective document is at page 10; again the Certification precedent. And "Know all men by these presents, that on this 19th day of December, 1949, Chennault and Willauer, a partnership for and in consideration of unconditional bearer notes in the sum of $3,900,000 United States currency, to be issued by Civil Air Transport Inc., a corporation organised and existing under the laws of Delaware, and for other good and valuable consideration, do hereby grant, bargain, convey, assign, transfer and set over, unto Civil Air Transport Inc., its successors and assigns, all their right, title, and interest, in and to the following described property." Again I leave 40 over (1) which is CNAC to (2). "All the property and assets......" and then the various kinds of property are described including the airplanes and spare parts and I drop four lines "formerly owned by Central Air Transport Corporation, as of December 12th, 1949; all the aforesaid property and assets having on that day been sold and transferred to Chennault and Willauer as sole owners by deed of the Government of the Republic of China." Now that following the language of the Power of Attorney, that is the instrument called the Bill of Sale by which the partnership transferred to the incorporated plaintiffs, their interest in these assets. My Lord I go to keeping to the chronological story and I am going through it now. Page 14 of the same 50 bundle, the Power of Attorney under which Chennault and Willauer authorised Corcoran again as their agent to do all that is necessary to satisfy the require-

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No. 32. Transcript of Proceedings, *continued.*

ments of the Civil Aviation Administration Department of the United States as towards getting registration. On page 14 "We" that is, these two, "appoint as our true and lawful attorney, Thomas G. Corcoran of Washington, to act for us and in our stead in all matters involving any property or assets of any nature whatsoever and more particularly involving aviation, aircraft, aircraft equipment etc. ......" and one sees three lines lower "and we hereby order our said Attorney to do and perform all acts of any kind whatsoever in connection with said property or assets including conveying, mortgaging or otherwise encumbering, obtaining registration or airworthiness certificates and
10 so on." That is a Power of Attorney to him under which he acts on the pages 15 and 16. The effective page really is 16 by getting under the Department of Commerce, Civil Aeronautics Administration a Bill of Sale through. This is really only history. Your Lordship sees about four lines down "this 19th day of December, 1949 does hereby sell, grant, transfer and deliver all of his right, title and interest to the Civil Air Transport Incorporated ......" and if one drops down about seven more lines the name of the seller is given as these two gentlemen. This is simply the document called the Bill of Sale executed in order to obtain registration. It doesn't affect the contract which already had been made on that date. The next matter of importance is in the
20 bundle D at page 9. This is dated the 28th of December, 1949, and is a letter from the Chinese Ambassador then to Mr. Bevin of the Foreign Office, Secretary of State, notifying him of the transfer to the partnership. In these terms "Your Excellency, Referring to my note of 25th December, I have the honour, under instructions from my Government, to inform your Excellency that after all the shares and assets owned by the Chinese Government in the CNAC and the CATC have been sold to the American citizens Mr. Chennault and Mr. Willauer, Mr. Ne Kwing Sing, Assistant Secretary General of the Executive Yuan, have been authorised by the Executive Yuan to take charge in Hong Kong of all legal proceedings in which the two corporations are
30 involved as well as all other matters relating to the two corporations, and that Mr. Ne Kwing Sing has been duly authorised to sign all relevant documents required to be signed by the concurrent Minister of Communications, General Yen Hsi Shan, as well as to exercise all powers in dealing with all matters relating to the two corporations." The importance of the document is only this, it is an official notification by the Chinese Ambassador to the Foreign Secretary in England of the transfer of the assets owned by the Chinese Government in CATC to the American partnership which had taken place some sixteen days before. My Lord, on the next page, on the 31st December, 1949, we get a letter from the plaintiffs partnership to the Premier and Vice
40 Minister of Communications with the four promissory notes which I have explained to you totalled $1,500,000. "Your Excellency, (to the Premier and Vice Minister). We enclose herewith four promissory notes dated 18th December 1949 of Civil Air Transport, Inc., a Delaware Corporation, payable yearly over a period of four years totalling $1,500,000, the same being full settlement of all our obligations in connection with the purchase of the stock and all assets of whatsoever nature of CATC as per our offer of 5th December 1949 which was accepted and upon which transfer deed of 12th December 1949 was based. It is our understanding that with the delivery of these promissory notes to you we now have taken all steps required as to payment." and then
50 your Lordship sees ......

Court: What do they mean by the "transfer deed of 12th December, 1949?"

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No. 32. Transcript of Proceedings, *continued.*

Monckton: Well I think it is merely a description of the agreement constituted by the acceptance by the endorsement on the original document. On the succeeding pages, my Lord, you will find the promissory notes drawn the first year after date—payable year after date—and so forth spread over the four years and they are promissory notes payable to bearer and no restriction as to the assets from which they would come. They my Lord in the same bundle at page 15 on the 4th January, 1950, the Ambassador—the Chinese Ambassador in London—again writes the Foreign Secretary. He said this "Your Excellency, Referring to and supplementing my note to Your Excellency dated 28th December, 1949, I have the honour under cable instructions from my Government, to certify as follows:— 10

1. The 20% share interest in China (Chinese) National Aviation Corporation (CNAC) formerly owned by Pan American Airways Corporation has been purchased and transferred to Civil Air Transport, Inc., a United States Corporation.

2. The formal corporate name of the Chennault and Willauer corporation referred to in my note dated 28th December, 1949, is "Civil Air Transport, Inc.", and you are requested to be good enough to take note of the same.

3. The Government of the Republic of China has, for good and valid consideration heretofore given to and received by it, sold and transferred to Civil Air Transport, Inc., and Civil Air Transport, Inc. is the sole and complete owner of, all the assets, including airplanes, spare parts etc. of CNAC and CATC including also all of the shares of the stock or other evidences of ownership in CATC formerly held by the Government of the Republic of China and all of the shares of the stock etc., of the CNAC similarly so held. 20

4. The foregoing action is final and complete.

As the Court in Hong Kong before which litigation is pending will, we are informed, recognise the validity of the above transfer and ownership 30

Court: A somewhat startling statement, Sir Walter, before the Court has considered it?

Monckton: Yes, my Lord, it will want some certification which no doubt my Lord in some of these cases one does have to ask the civil power to note it by facts which they recognise ......

Court: Indeed, yes?

Monckton: ......but as the Court in Hong Kong before which litigation is pending will, we are informed, recognise the validity of the above transfer and ownership only when it has received evidence in the form of a certification thereof made by the Chinese Ambassador in London to His Majesty's Foreign Office and certified by His Majesty's Foreign Office, it is urgently requested that His Majesty's Government will be good enough to make full certification to the Colonial Secretary and the Court in Hong Kong as soon as possible of the foregoing and also of my note to you dated 28th December 40

1949. The authority to Mr. Ne Kwing Sing referred to in my note became effective after the above transfer, and is in full force and effect."

My Lord, however accurate or inaccurate that was, he was only saying 'We understand we have to give you notification'. Well at any rate my Lord that gets us to the 4th January, 1950 and on the 5th January, 1950 an action No. 6 of 1950 was brought by the present plaintiffs—their first action—against Chennault and Willauer for delivery up of the assets sold on the 19th December. I need only to summarise this. An application was made in that action, the first of two applications for a receiver—this was for one receiver
10 —and that application was made in circumstances, as your Lordship sees, when the defecting employees, as I have called them, who had been defendants in the other action were not before the Court. The only people before the Court were Chennault and Willauer and the application failed. That was an application heard by Mr. Justice Williams. Then, my Lord, on midnight of the 5/6th January 1950 His Majesty's Government recognised the Central People's Government of China as the de jure Government of China as from that time. Now I come in a moment to show your Lordship what was certified by the Colonial Secretary here in relation to this ......

Court: Yes ......

20 Monckton: On the 20th January 1950, in action No. 6 of 1950 the one which the plaintiffs had just begun, the plaintiffs applied to join defecting employees as third parties so as to get them before the Court. That application was granted. And a second application was made in respect of the appointment of two receivers, the third parties now being present and opposing.

The application dealt with assets of CNAC as well as CATC. I am not troubling you with the judgment in full at the moment, but I can actually summarise it as follows: It first dealt and separately dealt with CNAC and in respect of that the Court refused a receiver upon three grounds. First, they said, the appointment of a receiver would, in effect, implead a foreign
30 sovereign state. That was because the third parties then said that they were in possession on instructions of the Central People's Government. Secondly, the Court said that in respect of the CNAC assets, the plaintiffs had not at that time made out a sufficiently strong title; and thirdly, they said that the real parties behind the third parties, that is, the Central People's Government, were not before the Court. If and when it becomes necessary to look at the judgment, it might be convenient to your Lordship to know that the first of those three points is dealt with at p.6 and the following pages and the second and third points at page 15. Then that is the CNAC parties. In respect of the CATC, which is much more likely to your Lordship, all that they
40 said in a very short judgment referring to what they said in CNAC was, that it was enough to say that it would implead the foreign government.

Court: Did the Court make any finding of fact in coming to that conclusion?

Monckton: About the pleading? I think they just said that it would in the light of the circumstances involved. My Lord, in the course of the judgment, there is set out a questionnaire which the Court put to the Government of the Colony and of replies which were made. I had them taken out and put in a separate document. It might be convenient for your Lordship. As that is going to be obviously material, it might be convenient that I might read it now that I have come to it. The first question to the Government was:

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No. 32. Transcript of Proceedings, *continued.*

Q. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the de jure Government of China? And the answer was:

A. H.M. Government in the United Kingdom does not recognise Nationalist Government (Republican Government) as de jure Government of Republic of China.

And the second question was:

Q. If not, when did His Majesty's Government cease so to recognise that Government?

A. Up to and including midnight January 5th/January 6th 1950 H.M. Government recognised Nationalist Government as being de jure Government of the Republic of China and as from midnight January 5th/January 6th 1950 H.M. Government ceased to recognise former Nationalist Government as being de jure Government of the Republic of China. 10

Then 3:

Q. Is the Central People's Government or any other Government recognised as the de jure Government and, if so, from what date?

A. As from midnight of January 5/6th 1950 H.M. Government recognised Central People's Government as de jure Government of the Republic of China. 20

My Lord I draw attention, before I pass on, to the answers to 2 and 3 from which it is perfectly plain that up to that midnight that is, all through the material period in December, the Nationalist Government was de jure recognised. That helps one when if any problem ever arose about retroactive de jure recognition, it wouldn't arise on those facts. The fourth question:

Q. Has the Republican Government ceased to be the de facto Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?

A. H.M. Government recognise Nationalist Government has ceased to be de facto Government of the Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from date on which it ceased to be in effective control of those parts. 30

Court: Who is going to determine that point, Sir Walter?

Monckton: I trust it is not going to arise for your Lordship in this case because de jure recognition is good enough for me. It will be a very hard thing if you made a bargain with a de jure government and someone else says that that is to be removed by a subsequent recognition of someone else.

Fifth question:

Q. Is any other Government recognised as the de facto Government and, if so, from what date? 40

A. H.M. Government does not recognise any governments other than Central People's Government of the Peoples Republic of China as de facto Government of the Republic of China. Attention, however, is invited to the 2nd sentence in answer to question 4.

It was the one your Lordship drew attention to involving some difficulties to ascertain.

Then sixth:

Q. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-a-vis China?

A. In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory.

On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to the Republic of China. On July 26th 1945 at Potsdam, the heads of the Govern-
10 ments of United States of America, the United Kingdom and the Republic of China reaffirmed "The terms of Cairo Declaration shall be carried out." On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied powers concerned, Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Powers Administration, Formosa was undertaken by the Government of the Republic of China. At present, actual administration of the island is by Wu Kou Cheng, who has not, so far as H.M. Government are aware repudiated superior authority of Nationalist Government.

I am advised that the effect of recognition by H.M. Government as
20 stated in answer to question 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of evidence before it." Well that is the information which has been given. Certain matters are left over no doubt for your Lordship's consideration. Then on the 24th May...... I am sorry, I have gone too fast. On the 23rd February 1950, which is the same date as the receiver application had been refused, the solicitors for the defecting employees who were now parties to the action applied for the dissolution of the injunction which had been granted in the first action, that is, No. 518 of 1949. My Lord, you will remember that is an action which had been brought by CATC, the old National Government action, and
30 what then happened was when that application for the dissolution of the injunction was made, the solicitors who had been acting for the plaintiffs not unnaturally declined to do anything further, there being no effective plaintiff, but if they had, they might have been liable for costs and the injunctions were dissolved, recognition having been withdrawn. And now my Lord we have got to the 11th May, 1950, in our chronological history and the Order-in-Council was made and the directions issued by His Excellency thereunder. On the 19th May 1950, the present action was begun, No. 269 of 1950, and the service of the writ was accepted by solicitors who had been retained by the defendants in December 1949. Now my Lord, one goes really to bundle A to
40 get the sequence of events in the action—proceedings bundle. Look at page 9 of the bundle my Lord. We get a letter from a Mr. Lau who is the Chief Secretary of the Central Air Transport Corporation. It is exhibited to an affidavit on the previous page. He is saying to the solicitors who had then accepted service under a misapprehension, "We understand that a writ ...... (here counsel reads the whole of this letter) ......" Then my lord, on the next page, as a result of that, on page 10 an order is made after reading the affidavit to which that letter had been exhibited, that the acceptance of service endorsed by Messrs. Lau and Company on a writ of summons in this action be vacated and withdrawn and that such acceptance of service be struck out
50 of the records herein in this Honourable Court. Will your Lordship now turn

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No. 32. Transcript of Proceedings, *continued.*

to page 14 of the same bundle. It shows how the matters proceeded; it is an order of the Court by Mr. Justice Williams upon reading the affidavits of Mr. Griffiths (on page 12 of the same bundle), and upon hearing the solicitors for the plaintiffs, it is ordered (a) that the Central People's Government of the Republic of China be served with a notice of the Writ of Summons issued herein in accordance with Form "A" attached hereto together with a certified translation thereof into the Chinese language; and (b) that a request for service of notice abroad in accordance with Form "B" attached hereto be filed by the solicitors for the plaintiffs. (c), which is the only other material paragraph; that in default of notice of intention to appear being given to this Court in accordance with Form "A" and within the time specified therein the Central People's Government of the Republic of China and the Defendants named the Central Air Transport Corporation shall be bound by any judgment given in this action and liberty to apply. In Form A, I need not trouble you to read it, no doubt you are familiar with it, telling them what the claim is about set out and giving them an opportunity of giving notice of intention to appear. I go on to page 20. The next order, I am going to trouble you with the order. The 11th September, 1950—it is ordered that service of process upon the defendants herein be effected by leaving a sealed copy of the notice of the Writ of Summons at the office of the defendants at Shell House, in the Colony. Again that in default—it gives the default position, I need not read it. We go to page 26 of this bundle. It is an affidavit of search by the solicitors instructing me. Page 26 my Lord. The first paragraph refers to the order...... and paragraph 2 "I have caused a search to be made in the official records of this Action and am informed and verily believe that no appearance nor notice of intention to appear has been filed in this Action." And thereupon an application was made to proceed ex parte and on page 27 there is an order of the 4th December, 1950, under which the plaintiffs get leave to proceed ex parte. And on the same date at page 31, on the 4th December, 1950, an order was made giving us power to adduce evidence by affirmation or affidavit by six named persons. And the fifth of the six named persons is Liu Shao Ting. I only mention it because there is a short further affidavit on one matter which I shall ask leave at a later stage to read in addition to the one we got leave—affirmation I should have said. Then my Lord on page 32 we applied to call two more witnesses on Chinese law. And on page 34, on the 31st January 1951 an order is made accordingly that we may put in affirmations by those persons; and I will just give you the order of dates, the Statement of Claim which is at page 5 is dated the 1st February, 1951, it might be convenient, your Lordship, to see it now. (Here counsel reads the whole of the Statement of Claim). I go to page 35 of this bundle; 21st February 1951, where the solicitors instructing me applied to set the case down for trial. And on page 26 an order was made accordingly.

Court: Sir Walter Monckton, this might be a convenient time to rise? What are your feelings about the time of sitting?

Monckton: My Lord, I feel that I ought to consult my leaders......

Court: Mr. D'Almada might have something to say on that. Well, I am quite prepared to sit, if it suits counsel, to sit at nine and go through till half-past one or two rather than have the break at the middle of the day and come back again.

D'Almada: We have no objection to this, my Lord.

Court: Well, if we take our adjournment now of 20 minutes, we can go on till half past-one or two as counsel may think proper at that time.

(11.45 a.m. Court adjourns for a 20 minute break).

(12.05 p.m. Court resumes. Appearances as before).

Monckton: If your Lordship pleases, I have almost completed the summary of the chronological dates. I come to page 37 in bundle A. which is dated the 8th of March, 1951, the application by the plaintiffs to produce at the trial notarially certified copies of documents dealing with sales by the partner-
10 ship to the plaintiffs. We want to introduce notarially certified copies instead of the originals. At page 41 on the 14th March of this year, an order was made accordingly. And on page 42, we ask leave to produce at the trial affidavit evidence by Mr. Willauer who is ill and an order was made accordingly by Mr. Justice Gould on page 46. That really completes the history of the proceedings. As I indicated a little earlier I shall have to ask your Lordship for leave, when my learned friends help me to take Your Lordship through the affidavits, to read one more supplementary one. It really is to show that the assets of CATC were vested not in the Board of Governors but in the National Government. My Lord at this stage, what I propose to
20 do is to tell your Lordship how I would put the case to deal with the few authorities that I feel I ought to place before your Lordship for consideration on the international law question, and then call the evidence—read the evidence—and then sum it up when your Lordship has heard the evidence. Your Lordship sees that in the end, this case comes up to two transactions of sale. What we first need to establish, in order to prove that the plaintiff corporation are the owners of these assets, is a valid contract of sale between the National Government of China and the partnership; and to show that under that contract of sale, the property and the goods passed. That, my Lord, is the transaction of the 12th December, 1949. And the second stage of the
30 journey is to show that the property passed under the so-called bill of sale of the 19th December, 1949, from the partnership to the Plaintiffs. Now, my Lord, before I look at the contract of sale, in order to be able to establish that, I should like quite shortly to get out of the way any problem in international law which may arise, and the first proposition which I submit to the Court is that there is no question of retroactive effects here of recognition because of the date to which effect could be carried back is the 5/6th January 1950 and the transactions with which I am concerned are all transactions in December, 1949. Your Lordship sees that the very language of the communication from the representative of His Majesty's Government here to the
40 Court shows that up to the 5th January, the Government with which the partnership contracted on the 12th December was recognised de jure. When the Court asks His Majesty's Government what the position is about recognition, if the civil power is decisive as to the effect of recognition, it follows as a necessary corollary if it chooses to show to what date it recognised the old Government, and from what date it recognises the new; it must be decisive on that too. It alone can tell what Government it recognises; if it chooses to put a date to it, it must be decisive as to that also. But I am anxious because this is obviously a case of great importance too. Add to that submission

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the second submission that, even if recognition had been retroactive so as to cover December, 1949, the new Government as successor Government succeeds to the rights of its predecessor on the same terms as bound the predecessor. That is sometimes quoted in the cases that every presumption should be made in favour of continuity. My Lord, if I might, I am sure your Lordship would bear with me in a case of this importance if I should refer you to a few and only a few authorities. I will not, my Lord, if I may put it this way, impose upon you with a great number of authorities because I rely upon the first point; but I should just like to show you how the authorities go. And the first case I should like to cite would be the United States of America against McRae, decided in 1869 reported in Law Reports, 8 Equity page 69. My Lord, I will, before I cite it, tell your Lordship why I cite it. I am taking it in order of dates as I think it is more convenient. I am citing it in order to show that succession by a new Government to public property is succession by representation and not by title paramount. If you had succession by title paramount, you might oust people, third parties who had rights of their rights; but that is not how it is done, it is done by representation. Well if I may read the headnote of that case—(here counsel read the headnote in McRae's case supra in full)—Your Lordship sees, before I turn to the judgment, that the effect of it is this, if contrary to the judgment, of the Court, the new Government— the restored new Government—had been entitled by title paramount, it could have an account from this agent of the Confederate Government without giving credit for anything which the Government to which they succeeded was subjected to; but it was held that it was not so, and you can only get the rights which the old Government would have had. The matter is dealt with by Sir William James and I think it would be most convenient to look at the top of page 74. (Here counsel reads from top of page 74 "I have considered this case...... etc." up to 2/3rds of page 75...... "and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it.") He then draws an analogy with which I need not trouble your Lordship. The passage I rely upon is this, a passage which your Lordship noticed at once. "It is the right of succession, is the right of representation, a right not paramount but derived through the suppressed authority and can only be enforced in the same way and to the same extent ...... etc." That really is the principle which necessarily run through the law of nations because otherwise it would be quite impossible for persons, not subjects of the usurping or usurped Government, to trade with them with any security; and it is a principle of international law that that safety of promise should remain so that anyone dealing with a recognised Government, when that Government is displaced, is in no worse position. In replacing the new Government, then it would have been under the ...... (unintelligible).

The next case is the Republic of Peru against Dreyfus, that was reported in 1888, 38 Ch.D. at page 348 upon which I was last insisting, namely that it asserts that it ought to be safe to contract with a de facto recognised government. The headnote of that case (Counsel reads from headnote beginning "Where the revolutionary or de facto government of a country ......" down to "cannot be recovered from it in violation of the contract"). Counsel continues with address to Court: I needn't deal with the 7th because that doesn't arise here, but your Lordship will remember in the first case that the learned Judge, Sir William James, treated restored government and new

government as in pari materia and no doubt for this reason that it is always acknowledged in the law of nations that you get new governments displacing old sometimes the old ones restored again but the fact is always recognised when the government is established, then whether it be an old government restored or a new government to usurp it then this principle will still apply. The judgment in this case is given by Mr. Justice Kay and I don't want to trouble your Lordship with much of it. It deals......(look at page 359 at the bottom)...... he has been citing a number of cases to establish the proposition which the headnote deals with and at bottom of page 359 and top of page 360
10 he is dealing with the United States of America v. McRae which I have just cited to your Lordship with approval. He sets out a passage which I have read half way down the page and then cites the passage as it is put in Wheaton's International Law (it saves turning to that) at the break of the page (Counsel reads from page 360 of report) as follows: "If, on the other hand" ...... down to "...... from an enemy in war on the principle of the jus postliminii".

Monckton: Then he goes on to deal with private property confiscated by an intervening act of the state, and says that question is more difficult to establish.

Counsel quotes again: "Even the lawful sovereign of a country may, or may
20 not, by the particular municipal constitution of the State have the power of alienating the public domain." The general presumption is that he is not so authorised. I don't think I need trouble your Lordship with more of it, but it is, eh......the important thing from my point of view is this: If one looks at the foot of page 361, one gets it where the break comes. (Counsel quotes passage beginning "Another objection was urged" down to the 6th line on page 362 "......all public property belonging to the rebellious States.")

Monckton: Now this is the passage "But where these States......" down to "...... if Senor Pierola's government could have done so. That government certainly could not have recovered them ......"

30 Monckton continues: "And so the Republic of Peru can't. That is a very good case in my submission of succession. My Lord, there is one case in the United States Reports which I should like to cite. It is the Guaranty Trust Company v. United States. It was decided in 1937 and reported in Volume 304 United States Reports at page 126.

Court: We have no copy of that.

Monckton: The only passage which I really want to trouble your Lordship about is this: It is the 4th item in the headnote beginning "What government is to be regarded"...... (counsel reads 4th item in full).

Monckton continues: This was a case which depended upon the provisional
40 government in Russia in 1917 displaced by the Soviet Government later on and I might just shortly tell your Lordship that passage, it is number 5 (Counsel quotes item 5 "After the overthrow......" down to "......it had given due notice of such repudiation."

Monckton continues: It was held that the later recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the provisional government and its representatives, which attached to

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action taken here prior to the later recognition. I hand your Lordship my copy so that your Lordship understands the passage upon which I rely. A further passage to which I refer in the judgment, I have put a marker at page 140. It is stating the argument for the government in this case in these words. (Counsel quotes passage beginning "The government argues......" down to 4th line on page 141 ending "to our own nationals in carrying them on.").

Monckton: My Lord that was the very short passage in the opinion of the Court delivered by Mr. Justice Stone as he then was—I now hand the report to your Lordship. I now want to cite two more cases and quite short passages, but in the two one of them is in the court of appeal in England and in the course of it Lord Justice Cohen delivering the leading judgment referred with approval to the passage in Mr. Justice Stone's judgment. I take it that your Lordship knew the authority. I want you just to look at Haille Selassie v. Cable & Wireless Ltd. (No. 2) 1939, Chancery, page 182, and I am looking at that for the purpose of saying that de facto recognition doesn't necessarily divest title. It is an interesting case as Your Lordship remembers, the distinction between de facto and de jure when events changed on the way to the Court of Appeal. (Monckton quotes from head note) as follows:—

"The Director General of Posts, Telegraphs and Telephones in Ethiopia, a sovereign power, entered into a contract......" down to "...... and to recover it was vested in him."

Monckton adds: de jure in spite of the de facto control of the foreign power. While it was going to the Court of Appeal the King of Italy became recognised de jure so that the situation was altered but it did not detract from the value of Mr. Justice Bennett's judgment. If your Lordship will note it, in the course of that judgment, at page 189, the learned judge dealt with the case of the United States of America v. McRae to which I draw your attention. I don't think I need trouble your Lordship at this stage by asking you to read passages in the judgment. It sufficiently appears I think from the headnote. My Lord, the last case I will refer to is the recent case of Boguslawski and Another v. Gdynia-Ameryka Linie which is reported in 1951 L.R., 1 K.B. at page 162. This is the case where passages occur about the presumption of continuity which I mentioned earlier.

(Monckton reads from headnote beginning "By a certificate of recognition......" down to "......until midnight on July 5-6, 1945". Counsel here remarks: It is that short time which became very important on these contracts).

(Monckton continues reading from handnote down to "The new Polish Government exercised effective control").

Monckton continues: I don't think I need read these further passages in the headnote and turn at once to the judgment of Lord Justice Cohen which begins at page 172. (Monckton quotes as follows beginning "Mr. Pritt put in the forefront of his argument......" down to "......has retroactive effect").

Court: That is the point which seemed to be accepted in Haille Selassie's case without argument. It wasn't argued that it was accepted by the House of Lords?

Monckton: In general of course there is retroactive effect but what one really has to see is in respect of what territory, and what persons, and what manner of country —

Court: It is stated very baldly here for the respondent said that in view of the retrospective effect of the de jure recognition, he could no longer contend that the claim had been forced. That statement of the law, however general, seems to have been accepted.

Monckton: Yes, certainly by Greene, M.R.

Court: In the earlier case?

Monckton: Yes, in the Haille Selassie case. If I may, before I conclude, I will come back to that. Of course, what one is anxious—I am much obliged to your Lordship for raising it now—because what one is so anxious to do is
10 to see in what respect retroactivity takes place. It depends a good deal upon territory where the goods are. It depends a good deal upon the persons. Are they persons who are subjects of the Crown of the sovereign power or not? Are they third parties? If I may just read this passage while I am on it. I will certainly come back to the other. (Monckton quotes again from judgment of Cohen, L.J. from top of page 173 down to end of paragraph "...... relevant to the present case is concerned").

Monckton continues: My Lord that passage, with respect, is very material when one is looking at the form of the certificate in this case because it is one which is only impatient of the Interpretation but His Majesty's Govern-
20 ment said: I recognise the old Government up to January and thereafter I recognise the new (following this language) as successor of the old and certainly not intending to divest of interest people of acquired interests under the old. I think I had better read it in view of the obligation which your Lordship told me.

(Monckton continues quoting from judgment in Boguslawski's case from 2nd paragraph on p.173 beginning "As I have reached......" to paragraph on p.176 ending with "......fully agree with every word that the Chief Justice said").

Monckton: Very important to me to establish that because it is all this about
30 safely doing business with the old government and not being put in a bad position when the new succeeds that gives the imprimatur in the English Court of Appeal. (Monckton continues reading from judgment up to "......by leaving their ship" at end of 2nd paragraph on p.177).

Monckton: Your Lordship is no doubt familiar with this case and remembers the facts.

Sir Walter Monckton continues reading the judgment beginning from the 3rd paragraph at p.177......" Mr. Pritt objected that this conclusion involved the infraction...... same time in respect of the same area" (Of course this act which your Lordship no doubt knows was in Taiwan). Counsel carries on
40 reading "Comity seems to us to be satisfied by a recognition...... and we are considering......" Therefore he agrees with Mr. Justice Finnermore in the Court below but the judgment of Lord Justice Denning is an important judgment. It is a little long but I am happy to see that Lord Justice Bucknill took a short course at the end of it. Obviously this is a very recent case and your Lordship will wish to see it?

Court: I will indeed. Yes, please do.

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Monckton: I think it is better I should read his judgment (at p.178): "At the beginning of July 1945...... should receive suitable compensation." Then it goes into a discussion of the facts by which that happened and how the men acted upon it, left the ship and said that the claim is for three months wages by two of the men brought in England and it goes on at the middle of the page, just below the middle (at p.179) "The outstanding fact in the case is...... ceased to be a minister." That is what Lord Justice Cohen looked at when he was saying that even if the case were not heard, it remained open unless withdrawn. (Counsel carries on at p.179) "Assuming that the men are right ...... (about top of p.180) but the means were supplied by us." Then he deals with In re Amand which I need not trouble you with, and the Norwegian Government in the same situation. And they are saying "We must give them the power otherwise they can't carry on their functions." It continues further on, on the page 180 (Counsel reads) "This all shows......in respect of acts done here." Once again your Lordship sees the importance of that. (Counsel continues) "It could not......(up to middle of p.181)......which is involved in recognition." My Lord sees how far all that is from suggestions that if a third person not within the territory has acquired rights from the first Government, the effect of recognising the second government is retroactively to interfere with those rights. (Counsel continues at middle of p.181) "The retroactive effect must......and ships were concerned." Now, my Lord, applying that reasoning to the present, these assets, these aircraft in Hong Kong outside the jurisdiction of any ruler, persons with whom the bargain was made being persons not subjects of that state, there is no room for retroactivity in the recognition. Quite apart from that, that at the time the bargains were made, recognition was in someone else.

Court: You couldn't suggest, Sir Walter Monckton, there that the Nationalist Government of China had effective control of the property in Hong Kong?

Monckton: Oh no, no! I am saying that no Government of China had.

Court: Yes, quite.

Monckton: That is what I am on. The only way I could be heard by retroactivity would be if it could be said that the new Government had effective control over assets in Hong Kong at the crucial date. My case is that retroactivity has no effect in respect to a bargain made as to property outside the jurisdiction of either the first or the second Government. If a bargain has been made in respect of that property by the old Government, the new Government seeks to claim it, it will claim not by title paramount but by succession, and only subject to the rights which the old Government could have had.

Court: Supposing the Chinese Nationalist Government had purported to sell the Legation Buildings in London, what would be the effect of that contract?

Monckton: Purported to sell the Legation Buildings? Well, my Lord, one would have to say, of course, that one would have great difficulties about that because the Legation Buildings are probably not within the jurisdiction of the English Courts. I suppose there is extra-territoriality there.

Court: Quite, but I was seeking to see if there were any distinction between the public property of the State and private property of an individual on contract.

Monckton: Yes, I will try and examine incidences on one side or the other.

Court: Yes, I am sorry I interrupted you, Sir Walter...... will you go on?

Monckton: No, my Lord, I am much obliged because one does not want to deal with what you have agreed already but deal with points which might be troubling you. The learned Lord Justice continues (here counsel quotes from last paragraph of page 181). "The result of all this discussion is therefore that...... But (at p.182) the principle of continuity is of paramount importance." My Lord sees how important this passage is to my argument. It is a principle of continuity and the rights of people safely dealing with one Government not to be divested on succession of a new. (here counsel con-
10 tinues just below middle of p.182). "It requires that the new government should stand ...... was it ultra vires?" Then he goes on to deal with that and says that it wasn't. He says, was it made in good faith? And he says it wasn't merely to embarrass the new Government on its taking over the ships, it was to protect the old. Here, of course, it is very important for me to remind your Lordship, following the Colonial Secretary's answer, that at the relevant time the National Government was de jure recognised; that there was nothing improper in doing what it could to protect the State which it represented in every way which is open to them. He says at the foot of the page, after dealing with those two points, he says at the foot of page 183 (here
20 counsel reads): "Therefore, applying the principles which......(up to p.184) ...... declaration was made." Then he didn't go into the Polish law, they didn't arise. Lord Justice Bucknill only said this, he agreed (at p.184) "On either...... repudiated them."

Court: Couldn't one add "or knew of them"?

Monckton: Well, my Lord, they would have to act, of course, because your Lordship sees the principle behind this is, that a person dealing with a recognised government can safely deal with them because it is of importance in its national affairs if a Government is recognised, its acts should be treated thereafter as valid. Therefore, whether known or not, unless something was
30 done to put the third party in a different position, its rights continue once they did some good. That is why it is so important in my submission to appreciate here that what was done on the 12th December was a bargain made with an established and recognised Government that its successor in January was a successor, not taking over in any other form, but as a successor by representation to all these rights. It is really on that branch of the case that I am citing these authorities to your Lordship. I am sorry I have cited several but, having done it, I want to return to my argument to-day; if I may, when I address your Lordship after the evidence, deal with the case your Lordship wishes me to say all about—Haille Selassie.

40 Court: Yes.

Monckton: Well your Lordship sees I have really been seeking at the outset of the case to put before you the international legal proposition—2 propositions—and have really advanced my argument on the two; the first, as your Lordship recollects, was that the de jure recognition cannot be retroactive behind the 5th January in this case, having regard to the terms of the Colonial Secretary's reply. And the second was, that even if on the facts hereon, the successor government could only succeed by representation and not by title

paramount and every possible presumption, from the nature of the principles of international law, ought to be made in favour of continuity and therefore rights, if they were vested in December, ought not to be treated as retroactive.

Court: It would be difficult to suggest, Sir Walter Monckton, that the present Chinese Government should be bound by the terms of the contract which explicitly states that none of the property passing under the contract could be used for the purpose of the present Government?

Monckton: I am not suggesting that they would wish to adopt the contractual rights of the previous Government. All that I am saying is that they can't escape from contractual obligations. 10

Court: What was in my mind, Sir Walter, was this—that as this case, the Polish case, talks about acquiescence or rescinding, surely one must know the terms of the contract before one rescinds or acquiesces. It would be difficult to ask the Government to acquiesce to a contract which is to its own disadvantage—in fact even against it?

Monckton: If my proposition depended on acquiescence I could cadit quaestio there is no more to be said. Really the proposition I am contending for is no more than this that if, during a period when the old Government was recognised, it made a bargain which could have been enforced against it and 20 under which property passed, the mere succession of a new Government doesn't divest that property. It is for that, my Lord, that I was reading these principles.

Court: I quite agree with you, Sir Walter.

Monckton: I am sure your Lordship knows what is in my mind. I say quite frankly, my Lord, that when I come back to the Haille Selassie Case, I shall try and lead the point which your Lordship has been putting to me in a succinct way. I don't want continually to repeat the argument, but I would respectfully say that in the ordinary way I would, had you not been put upon full enquiry—to use the language of the Order-in-Council—I shouldn't have 30 thought it necessary to trouble you at this stage with any authorities at all on this aspect.

Court: Quite, quite, but I do feel 'fully enquire' means fully enquire.

Monckton: Yes, I so assumed, my Lord, and so I turned to these cases. Because one would normally assume that, in the absence of argument to the contrary, any rights that had been validly given to a third party in relation to assets outside the territory of China would remain unimpaired by the change of Government or recognition of Government. As I have looked at its retroactivity and will look again as it is a matter which your Lordship will be interested in; and I suggest, when you do look into it, there is nothing and, 40 indeed, it would be contrary to principle to seek for anything which would displace the position one would assume to exist in fellowship of nations and where the bargain was valid and complete. Under the old contract, the new Government on succession could get rid of it.

Court: Even when the contract is aimed at the interests of the succeeding Government?

Monckton: Yes, my Lord, for this reason, that you have got to postulate a period during which, if I may put it in this way, the struggle was still on during which the recognition was still, as an element in that, with the National Government, and therefore there was nothing wrong in that Government, there being a struggle on; it is trying to protect itself and help itself as far as it could to recovery and security. Nothing improper to that, otherwise one says that something improper in a recognised Government endeavouring to keep going......

Court: How would the plaintiff company feel about the terms of the contracts 10 with the partnership. Do they still feel themselves bound not to fly these planes if they get them in Communist China?

Monckton: Oh, yes. Certainly, my Lord, they can only take subject to the terms of the contract. They are certainly under that contractual obligation.

Court: And if they break that contract who can sue them?

Monckton: That raises great problems as to the degree of continuity. Anyone could sue them if they are prepared to come into Court.

Court: I am only groping, Sir Walter, these things occur to me and I say them.

Monckton: I will go as far as I can to assist your Lordship in the search 20 but with this very much in my mind. There are some fundamental principles of international law which are things to cling to. One is continuity of commercial life that one do not really assume. That a new Government might be recognised can disregard the contracts which have been properly made by its predecessor. I submit in the last resort, as I said I would come back to, much, much better I should after your Lordship has seen the evidence, I submit that in the last resort your Lordship will find this, the question before you, is not so much whether the plaintiffs' rights persist, survives the change because on the authorities I submit your Lordship will be satisfied with that. What you need to be satisfied of further, as I apprehend it, what those rights 30 are. What is it to which we still can claim, if I am right on this principle of no retroactivity? That, of course, depends on the contract itself, the terms of it and the application of the general law to it. This is a sale so far as the CATC assets are concerned of specific goods in a deliverable state. So far as our law goes, and I speak not only of course the law in England but the Hong Kong Ordinance which gave the same effect in the sale of goods the property passes when the contract is made unless a contrary intention is shown. I refer to the Ordinance No. 4 of 1896 relating to the sale of goods. Look at Section 18, page 386: It reproduces the same section as the 1893 English Act. Section 18 Rule 1 (here counsel reads Section 18, Rule 1 in full). It 40 is just as well now to look at the definition section page 401 Section 62(1) (n): "Specific goods" means goods identified and agreed upon at the time a contract of sale is made. So, there can be no doubt that these goods were that. And then Subsection 4 on page 402: "Goods are in a 'deliverable state' when they are in such a state that the buyer would, under the contract, be bound to take delivery of them." And there will be no doubt about that, so we are driven back to section 18 Rule 1—we have an unconditional contract for the sale of

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specific goods in a deliverable state so that unless a different intention appears that is the problem we have to examine. Unless a different intention appears the property and goods will pass when the contract is made. As to the different intention appearing, it is quite manifest from the documents I read to your Lordship that it was intended that the property should pass. In a document of the 12th December, the confirming document from the Prime Minister, he said that this is final and complete. He used that language. By the two documents in D9, D15, to D16 of 28th December and 4th January, they are the documents in which the Foreign Secretary was notified by the Chinese Ambassador in London that the thing had happened...... So I start with this proposition, that it is plain here there is no contrary intention—one doesn't need to go into it—and we got specific goods in a deliverable state and the property passes on the 12th December. There might be some questions as to what is the proper law of the contract in order to determine the question when the property passes—I have only this to say about it, in relation to proprietary rights I submit that it will be the lex situs that is here and if one other contractual rights were in question, it is said that some of the affirmations will show you that the parties intended Chinese law to apply; it is a question of fact whether Chinese law is different; it must be established so far from any evidence of that sort, such evidences that will be before your Lordship is to the same effect, that the property would have passed by Chinese law as it would under English. Just for convenience now, I would like to refer to the standard work Dicey's Conflict, 6th edition at page 560—Rule 130 at the foot of the page (here counsel reads Rule 130). There are all sorts of difficulties which arise. I always used to submit that Dicey's rules were about the equivalent to the exception—there is about as much weight of either one or the other—but the exception here is immaterial for our purpose, I looked into it and discovered that it is only about goods in transit. And as your Lordship sees in the passage of "Comment", second sentence: "The tendency of Anglo-American courts in such circumstances......(here counsel reads from the passage)...... and its proprietary effects." Your Lordship sees here by force of circumstances you have got to deal with proprietary effects. (here counsel continues reading the passage). "The contractual effects of the transfer...... whether delivery is necessary." I needn't read on.

Court: No.

Monckton: It explains why the rule is there and whether that be right or wrong, as I say, it is a question of fact to prove something different applies in Chinese law which is no doubt proper law of the contract and such evidence as there is, is to the contrary.

Court: What would the law of Formosa be Sir Walter?

Monckton: Well I suppose the Chinese Code would be applied there and I shall be able to say that that is right.

Court: Well what about the 40 years of occupation by Japan?

Monckton: Well at the moment, His Majesty's Government seems to be recognising the administration there......

Court: That is so.

Monckton: And for me that is enough. I am not going to trespass from the law into politics but one is constantly in danger of doing that in these times.

Court: This seems to be a convenient time to adjourn and with your agreement, gentlemen, we can make it 9 o'clock to-morrow morning.

(The Court therefore adjourns at 1.30 p.m. to 9 a.m. to-morrow, (28.3.51).)

(28th March, 1951.)

(Hearing resumed at 9 a.m.—Appearances as before).

Monckton: If your Lordship pleases, when your Lordship adjourned yesterday, I had almost completed what I had to say on the main issues. I had said what I wanted to say about the contract of the 12th of December and as to the contract of the 19th December it is, as I submit, plain and valid and 10 does what it purports to do—you will see the evidence about it and I shouldn't help you by going into that unless some point at a later stage arises. I shall in due course with the assistance of Mr. Wright have the affidavits before your Lordship—Your Lordship will probably welcome a change of bowling—and give me liberty is call two short witnesses—one will be a Mr. Rosbert who will be able to show your Lordship (in case it should be necessary here or elsewhere) that there were areas still under the control of the de jure old government in December 1949 and then there will be a Mr. Marias who will be called to show the validity of the American contract by American law which will apply. But before we come to the evidence there were two or three points 20 which were really left over from yesterday, matters which my Lord raised during the hearing. The first was about impleading. Your Lordship, if I may say so, naturally stopped me on the word "impleading" and asked me to devote a little time to defining it. My Lord I suppose the locus classicus for that matter is the case of the Christina (1938) A.C. but before I turn to it, one remembers from that case that in effect the general principle of international law applied by the Municipal Law of England is that there is immunity from process in the case of a sovereign government and what was there said was that there could be no impleading of the government there concerned in relation to the Spanish ship which was the subject of the litigation and it was 30 made clear in the opinion of Lord Wright (which I suppose was the leading speech in the case) that impleading would be covered whether it was direct or indirect. In the case of the Christina as in the case of the Arantzazu in the following year 1939 A.C. what had been done was to start proceedings in respect of a ship and, as your Lordship knows, that is done by a writ in rem attached, as it were, to the ship herself. But it was said in both cases that though we wanted in terms impleading a foreign power if it is a ship which is claimed by a foreign power you are in effect inviting the foreign power to take part in the proceedings. And whether that be called direct or indirect impleading (and their Lordships took one view or the other and not all of 40 them the same) that whether it was direct or indirect, it is impleading. That is what your Lordship will want? First thing I will say therefore is impleading means when you say that there shall be no bar to jurisdiction because you implead a foreign sovereign, that covers a case in which you do not in terms call upon him as a defendant but you do indirectly in impleading. There is a second matter also within this immunity problem and that is as it was said in the Christina, there is not only the question of inviting a foreign sovereign directly or indirectly to come before the court but there is the problem of challenging a possession claimed by that foreign sovereign. The removal of

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the bar to jurisdiction in this case must clearly remove the bar in respect of both those points. First of all, as to the impleading, there is no longer a bar to jurisdiction, that you are in effect inviting a foreign sovereign to come before the court. That is covered by the plain words of the Order-in-Council. And secondly, the whole purpose of the Order-in-Council as shown in the recitals and in the operative part is to call upon the court either in an action brought by a party asserting a claim, or in a reference which in default of such an action, H.E. the Governor has to start to determine that ownership or the right to possession. So that this case is one in which it is not only open to the court, but it is incumbent upon the court to determine the right to ownership and/or, as it said, the right to possession of these assets despite the fact that a foreign sovereign power may be interested therein. That is the whole purpose obviously of the Order-in-Council and if I may put it with respect to your Lordship, not unnaturally in the circumstances, your Lordship said to me "This is an unusual and exceptional and a singular document." And indeed it is, because in the law of England as applied here borrowed from international law this immunity in both respects has hitherto stood for reasons which I am not permitted to enquire into, and with respect, are outside the province of any court. It has been decided here that this immunity is gone, and all I need to do is just to remind your Lordship of the Order-in-Council before I come to the case in two respects. It is a separate document. Your Lordship sees the second recital (Counsel quotes second recital). So that the very thing which the recital shows to be the purpose of the Order-in-Council is to enable and compel a determination about the quality of title to possession. Then having dealt with in 1(1) in the paragraph which I have read, the removal of the bar because it impleads a foreign sovereign and called upon the court to enquire fully, arrange for appeal and give directions. And one observes in Sec. 5, His Excellency the Governor is satisfied that ownership or right to possession of the aircraft has been finally determined. So that until then he is to hold, which once more points to the thing which has to be determined, ownership or right to possession. And that I think sufficiently illustrates the point I am on in order to assist Your Lordship as far as I can about what is meant by the removal of the bar to jurisdiction and the object of this enquiry. My Lord, to make good what I was saying, may I invite your Lordship's attention to the Christina which was reported in 1938 A.C. at page 485." The opinions of the learned law Lords go on for some 28 pages but there is only one passage, my Lord, the headnote is in these terms. (Counsel reads headnote and invites court's attention to the words "Directly or indirectly" in the paragraph beginning "Held, that the court......").

Monckton: The passage which deals with it in terms is to be found in the opinion of Lord Wright, page 503. He had dealt with the two rules which I have discussed before your Lordship—this rule about impleading and the rule about possession of the foreign State—he says (Counsel here quotes from judgment at page 503 beginning "The first of the two rules......" down to sixth line below "......an action in personam".)

Monckton: Then it goes on to give other cases and applies the same reasoning to an indirect impleading and an action in rem. That is sufficient authority for apparently the proposition I am putting before your Lordship that impleading can be direct or indirect and the main proposition which I am here to assert that you are relieved of that immunity in this case. My Lord, that is

the first point upon which your Lordship invited my assistance. There were two more—one really is on the problem of retroactivity in relation to Haille Selassie. It is the case I cited but didn't deal with it in detail and the second is as to the effect of the Full Court's decision on the receiver action. If I may, I will take them in turn. First of all, I would like to deal with the problem of retroactivity of recognition, bearing particularly in mind the Haille Selassie case. Now my Lord, the first thing I would say apart from the Haille Selassie case is that so far as my knowledge and researches have gone, there is no English authority for the proposition that recognition de jure confers on the new government a title to public property of the State from any time prior to the grant of recognition. And side by side with that is this: that there is no case (and again I am excepting Haille Selassie for the moment) where it can be suggested that the doctrine of retroactivity has effect except in relation to governmental acts whether legislative or executive. I don't want to labour this but if one looks at what is the origin and basis of the doctrine of retroactivity, it is, I think, the distinction between title and the governmental acts, emerges because after all what is it that has caused this doctrine of retroactivity to arise? Recognition de facto and indeed de jure is something which owes its origin to the necessity imposed when the time comes of recognising the facts of control; you will find that a government has become established over a certain area of territory indisputably and that it is no longer any use asserting the contrary and thereupon you say "We will recognise that country as either being de facto or it may be at a later stage de jure the government of that territory where undoubtedly by now its control has become effective." And that when you do that as a matter of convenience and necessity in relation to governmental acts, you are driven to say, "Having now decided that I must recognise the fact, I will recognise it with retroactive effect because otherwise what absurd result would follow?" The Government now recognised as having established its control over the territory, would have to re-enact all its decrees and statutes since the period when in fact it was established up to date of recognition, if it wished i.e. His Majesty's Government either in the United Kingdom or here to give effect to those decrees. If it were otherwise what would happen would be this: you will find that the new government thus de jure recognised when it came to having its disputes dealt with in the courts of Hong Kong, or of the United Kingdom would find that its decrees passed in the interval since it established control before it was recognised were not taken to be valid. Therefore this retroactivity in respect of governmental acts is imposed by the necessity and reason of the case and the basis of recognition itself. There is no better instance of that and I needn't ask your Lordship to look at Luther v. Sagor but in the Soviet case, as your Lordship remembers as in November 1917 the Karenski Government fell and the Soviet government came into power it wasn't until 1921 that His Majesty's Government recognised the Soviet Government de facto it wasn't until 1924 that it was recognised de jure, and if so the argument which I am advancing is not correct and there was no retroactivity in respect of governmental acts, all the decrees of the Soviet from 1917 to 1921 or 1924 would be invalid, that is, in the courts of this country and that of course would be an impossible position. And that is how Luther v. Sagor and the various acts which determine whether old banks and private companies remain existent raised its points and had it decided this way but it has nothing to do with title independent of the validity of governmental acts. Well now, I am desirous of putting before you the basis upon which retroactivity is effective and then I would say as I come

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to Haille Selassie that if that case is an authority for saying that subsequent de jure recognition divests a right acquired by a third party (although in that case it was the emperor—it makes no difference) to divest the title to property by title paramount and not by succession, then it is quite inconsistent with the principles laid down in the series of cases which were deeply summarised in the United States case which I cited yesterday in 304 United States Reports and which in this very year received the approval of Lord Justice Cohen in the Boguslawski case in the passage which I read, because that really is saying what I am saying here that it is the principle of international law recognised by the law of our country that in such a new de jure government comes into 10 power and is recognised by succession representatives and not by title paramount, so that if Haille Selassie were deciding that, it would stand in isolation and contrary to the general principle. If I may remind your Lordship of the case—the first court where the matter was argued out and fully determined. Mr. Justice Bennett held that de facto control of the whole country did not divest title. This is what the learned judge decided in his judgment and he say this at the foot of page 192 (Counsel reads passage beginning "The present case is not concerned......" down to "......is now ruled by the Italian Government.").

Monckton: Then he decides that it is not so. He is deciding in terms—the 20 title is not divested by that de facto control having been recognised by H.M. Government. Then my Lord the case goes to the Court of Appeal and Sir Wilfred Greene, as he then was, Master of the Rolls, dealt with the matter. Of course, as Your Lordship sees, it was not necessary for him to deal with the principle of retroactivity at all because, on any view, as he says in his opening passage and in his final passage, the title of the emperor of Ethiopia had been extinguished by succession. It wasn't a case in which property in some goods was alleged to have passed; there was an outstanding debt due to some one and to whom was it due? And upon any view the effect of the change in de jure recognition must be that the emperor who had had the right 30 to recover, lost it and then it was passed over by succession or representation to the succeeding de jure government. It was a right which they as successors—not by title paramount (which didn't come into question) had the right to receive. That is one of the effects of succession and if I may just remind you not only of that which is fully supported by the cases. Secondly, of course, it was a case in which there was no argument. What the learned judge said in relation to retroactivity. It was quite unnecessary to determine the case. I think it was a loosely used term with regard to retroactivity. It wasn't necessary for either the learned counsel or for the Court of Appeal in that case to distinguish between rights of succession and rights of title para- 40 mount because they were in a position, whichever view you took, the right must have gone to the new government and that is how it goes. If your Lordship would be kind enough to look for a moment at page 195 (1939) 1 Chancery, at the top of the page the argument is being dealt with, the matter came again before the Court of Appeal on December 6th when Mr. Andrew Clarke for the respondent said that in view of the retroactive effect of the de jure recognition, he could no longer contend that the claim could be enforced. Then Sir Wilfred said (Counsel read from the words "This is an appeal......" down to "from that judgment this appeal is brought.").

Monckton: Now my Lord I stop there to say that he is actually showing that 50 de facto recognition doesn't divest title. (Counsel continues reading from

report: "The appeal stood in the list for hearing on the 3rd of November last.")

Monckton: Now the learned Master of the Rolls is going to say "Well, I did the right thing in procedure" (Counsel continues reading: "It was called to our attention......" down to "......the other possible claimant to this money was a foreign sovereign State.")

Monckton: My Lord I stop there for this reason that that is an interesting reflection in relation to the present case. Supposing that the truth will be that the new government succeeded to the rights in this contract by repre-
10 sentation—supposing that they approbated the contract—I agree it may be difficult to suppose, having regard to some of its terms, but supposing they did, it might be that having succeeded to the right to receive the money—the proceeds of the promissory note—they could proceed against us. I say "us" meaning the plaintiffs here or at any rate the partnership, it doesn't matter for this purpose which. Then we should be in peril because if they are right in saying: "Having approbated and not approbated we claim the money," we couldn't do this interpleader which between private persons would be fair enough to say: "Well we owe one of you and we are content to pay, here's the money in Court." That embarrassment was present in this case too.

20 (Counsel continues reading from p.196—"In those circumstances, had we heard the appeal......" down to "That decision was a right and just one." at the top of page 197).

Monckton: Well, that's obviously plainly right. I only pause to say it's rather the length of space that's given to it is the illustration of the fact that this was not a considered judgment. It was given on the date when the matter came up for hearing and ex parte, ex tempore, and so that's what the Master of the Rolls did. (Counsel continues at top of page 197 "What has happened in this......" down to "late emperor cf Abyssinia's title thereto is no longer recognised as existent.")

30 Monckton: Now, just pausing there, that was quite enough to dispose of the case, at least asserting that for which I am contending for in principle succession—and not title paramount. (Counsel quotes further from report: "Further, it is not disputed that......" down to "the de facto sovereign of Abyssinia, took place.")

Monckton: Well, of course, it has no effect once you have decided by succession the title has gone to some one else the emperor of Ethiopia is no longer entitled to sue for the money. That decides the case. This talk about relation back is ineffective in the circumstances if the title is indistinct. It goes on to say (counsel continues reading on page 197 "accordingly the appeal comes
40 ......" down to "his decision would have been the other way" at the top of page 198).

Monckton: Then they say they must therefore deal with the matter by allowing the appeal and then at the foot of that page (page 198) 8 lines from the foot, there appears this: (counsel reads "Mr. Andrew Clark appearing for the plaintiff......" down to "of his title to sue.").

Monckton: Now that of course is quite unexceptional. Nobody can possibly complain of that but the only submission I made about it is that it is no authority for retroactive effect in relation to title to sue, not argued—not necessary—not a considered judgment—a mere admission by counsel who quite rightly ought to say "On whatever view you approach this case my

client has no title to sue." It had gone in fact on the authorities because the new de jure government succeeded by representation. My Lord I pause to say this about the case. It is of course in one most important respect entirely distinguishable from the present. In the present case our whole submission before your Lordship—I have sufficiently put it before you—is that the property passed and the title vested in the partnership or the present plaintiff company during the time when the old government was de jure recognised. In Haille Selassie case there was something outstanding there was money admittedly due to some one but the problem there was: that money outstanding at the date of the change of recognition from the old government 10 to the new was to be paid to one or other of them. When the crucial moment came, the date of the recognition of the new government, it was something which the defendants had to pay some one. When you say, well, on the submissions, we have made to you when this change came the new government succeeded to the right of the old, then quite plainly they succeeded to this right. But how different it is when you are considering not some continuing liability but what was the effect upon the property of a contract made in what was called in one of the cases "The twilight period." Here you have got the contract in December, recognition in January. I have been submitting to your Lordship on reference to the Ordinance about sale of goods that this 20 being a contract for the sale of specific goods in a deliverable state property passed at once. Now the effect of that is this:—

Court: Sir Walter, Do you mean in a deliverable state, do you mean physically deliverable or legally deliverable?

Monckton: In a condition in which the buyer would have been bound to accept delivery. My Lord, that I think is the definition. I refer you to sub-section 4 of section 52 of the Sale of Goods Ordinance (counsel reads sub-section). Of course, your Lordship knows that's really in contrast to the cases in which, though the goods are specific, before they are deliverable under the contract, they have got to be in some way altered or stamps or marks put upon them 30 or something of that kind. But what's really said of the section is (the old section of the Sale of Goods Act of 1893) is that if you have got specific goods i.e. goods identified and agreed upon (as you plainly had here) if they are in a condition in which nothing more remains to be done to them then they must be accepted by the buyer, unless he wishes to breach the contract, then the property passes in them at once, unless the contrary intention appears. And when you look at this contract, as I had indicated to your Lordship yesterday, so far from the contrary intention appearing, the intention that the property shall pass is emphasized in the contractual document and in the letter of confirmation itself. It doesn't mean of course in a deliverable state—it has 40 nothing to do with the possibility of the buyer removing them, or the seller giving them, it is—are they in the state in which between you as the buyer and the seller are bound to accept them? And they are in that state—there is nothing more that remains to be done. That's why I was anxious to put before your Lordship the transaction which gives rise to the present claim i.e. the transaction which took place in December. If I may illustrate it to your Lordship in this way. Supposing we were dealing with outstanding claims to money—and that's plain enough. But if you are dealing with two transactions under which the two governments had purported to sell these goods. Supposing that, as has happened on the 12th December, the old government 50

sold these goods to the partnership, then, between 12th December and the 5th January, the new hitherto unrecognised government chose to purport to sell the same goods not to the partnership but to X; and then the change of recognition follows in January and a problem arises between the two purchasers: Which of them is entitled to the right to possession of these goods. My submission: there can be no doubt on the authorities and principles I have been advancing that the partnership in that case would say: Well at the time when the old government was de jure recognised, we bought and the right to the property in the goods passed to us. There was no doubt that at that time the de jure 10 government could sell. They did sell. The property passed. Thereafter the government later recognised purported to sell the same goods. What title have they got? What title could they pass? I submit that it is plain in those circumstances that the first purchaser had a good title and there was nothing left to sell to any one else. It all depends, of course, upon the right of the old government at the time it was de jure recognised to enter into a contract of sale of these goods. If it had that right, then as I submit, by succession it passed. Take the sort of case we are dealing with here in a simpler illustration, if I may, because it is a quite simple case. If my friend Mr. Threlfall has a motor car (and I have reason to believe that he does) and he makes 20 me the executor of his Will, his personal legal representative, when I survive him. But before his death he sells his car for £100 (it wouldn't be worth it) to my friend Mr. Wright. Then, he comes in due course to die. I, as his legal representative, say at the time when this Will was made, and I was his legal personal representative, he had a motor car. Well, I shouldn't have had the smallest claim to the motor car by succession as his legal personal representative because his whole title in it had passed to Mr. Wright. But if Mr. Wright, as I am sure could not happen, having purchased the motor car and failed to pay for it and therefore an outstanding claim in Mr. Threlfall's purchase price when he dies. I, as the legal personal representa-30 tive, would most certainly claim for his estate that outstanding purchase price. That's the distinction between this case and Haille Selassie.

Court: I quite agree, Sir Walter. But supposing your learned Junior had no title to sell the car at all?

Monckton: Ah, of course, that's why I preface what I said about the old government by saying "de jure at the time when that sale took place." The old government was the government of China recognised as such and was dealing with property of China which was not situated in any territory which was within the control of any one else, or indeed, in their own control. They were dealing, as in the Haille Selassie case, with something in a foreign juris-40 diction, foreign to China and therefore if it were the de jure government, if it were public property then the de jure government were entitled to deal with it by a contract, it not being in a territory which was covered or controlled by the de facto government of some part of China.

Court: How far could you put that, Sir Walter Monckton? As I said yesterday, could they sell all Legation Buildings all over the world? Could they sell islands which were not inhabited round the China coast?

Monckton: But my Lord, let us begin by taking these things in stages. Take the Embassy in England. If that is part of the public property of China, and if, and I must assume it for this purpose, it is something outside China, 50 (as you see, your Lordship, problems of extra-territoriality at once arise)

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then I submit the only people entitled to dispose of that property by sale, mortgage, or lease, are the authorised agents of the Chinese de jure government. So that apart from any questions of whether de facto control of the whole of China had passed from them and that embraced an extra-territorial Embassy in England, apart from the question, I submit, certainly they could sell. Who else? But the authorised Government of China. And your Lordship sees that the pinch that may be said to lie here, and it is dealt with in Lauterpach's book about recognition, and it is dealt with in other authorities. When you have got such a state as existed in December 1949, between the de jure government and the de facto government of parts of China, and the 10 matter was still in conflict, at that time, however, the scales of probable victory are weighted one way or the other, however such, so long as this struggle is maintained, the old government still is de jure government and even now the de jure government, as this court must hold throughout December, 1949, was entitled to do what it could to maintain the State which was the State of which it was the government even against the de facto government until the struggle was manifestly over. And there is nothing improper. If you are thus entitled, in protecting yourself and your state against what, in that view, is the insurgent power. If I may just remind your Lordship of a passage in Lauterpach's book on "Recognition in International Law" page 93 20 section 38 (counsel reads "Although International law......" down to "as an act of intervention contrary to international law"). Well now, I only want to say this about this passage: in the present case, we are relieved from any necessity of considering what the position was by the fact that, as the matter stands, recognition de jure of the old government persisted throughout December and is still said to persist until the 5th of January 1950. Consequently, it is beyond controversy in this Court that up to and throughout December, the old government was entitled to maintain itself as the government of China. In so doing, it had to resist an alternative government. There is nothing improper or wrong in taking such steps as seemed to it necessary by the sale 30 of assets or otherwise in order to maintain its position even if thereby it damages the position of the alternative government, which eventually, but at a later stage, succeeds it. The importance of that won't escape your Lordship. It means this that in December 1949 the old government was entitled to take such steps. It was then that it took them and it had a right to take them, unless that theory is wholly wrong. My Lord, having said so much for that case, I would like to conclude that part of my argument by drawing a distinction between the de facto controlled territory and the de facto control of assets for the present purpose. Your Lordship sees at once how important that distinction is from the facts of this case because the assets which you 40 have to consider were not at material times within China at all. They were situated within the boundaries of this Colony. Well, now the de facto control of territory, no doubt, in December, 1949, the new government was in de facto control of the greater part of the mainland. Some of it, as you will gather from the evidence we shall provide—some of the mainland—was still in the hands of the Nationalist Government and that Government was carrying on, and was entitled to carry on from Taiwan. But the assets are not in any way connected with, or adherent to, the territory in respect of which the claim to the de facto control is made. And when you are considering retroactivity, in respect of recognition, it is only the control of territory which is relevant. 50 The control of assets outside the territory has nothing to do with the matter at all. Next, as to the control of the assets, no doubt, at the relevant time

in December, 1949, persons asserting the instructions of the new government, had seized the assets in Hong Kong. Once again, this has nothing to do with de facto recognition, or its retroactive effect. What we are now considering, and what, with all respects, is the duty and province of this court to decide is the question of title to property in Hong Kong. In December 1949, before the sale took place, these assets were vested in the de jure, the old government. In that view, those who seized them were trespassers and had no shadow of right to possession. It is therefore the quality of title to possession which is here in issue, not any problem of international law about recognition. When one looks at such a problem, I expect your Lordship, as I do, starts by thinking: "Well, but this is property in respect of which a sovereign government now makes claim." The case of the Christina comes into one's mind and one says: You've impleaded but once more, contrary to the ordinary immunity, you are challenging a possession which they claim. But, of course, as I have indicated earlier, and don't repeat, the effect of this Order-in-Council is to take away those considerations from your Lordship's court. It is imperatively necessary that your Lordship should determine in whom the right to possession rests and the right to property. It is the quality of title which is here in question and shortly put, it really is this: in the crucial month, there was a contract of sale by the then de jure government which had the right to dispose of these assets. The effect of that sale was that the property passed through the American Partnership to the plaintiff company immediately and irrevocably, and when in January 1950 the new Government succeeded by representation to the rights of the old, there was no property left in the old in these assets. My Lord, I put the argument upon that point, I won't embroider it; it doesn't assist. I have left over, however, the point about the Full Court. My Lord, the decision of the Full Court on the receiver, the application to appoint two receivers, what I have to say about it—three matters. The first is this, that you will find upon re-reading it that it was largely concerned with difficulties which were special to the CNAC in which there were shares, if your Lordship recollect, and which wasn't in the same sense as the CATC, an emanation of government. Secondly, their Lordships of the Full Bench were careful to refrain from prejudging the issue in terms they avoided it. If I may respectfully say so, they very properly declined to bind the judge who would hear the case. Moreover, it is only on this point—the same second point—their Lordships took the view that to go on with the matter would be to implead a foreign sovereign; that was quite enough for their purpose, they only indicated this doubt as to the prima facie case then established on the evidence then available by the plaintiffs; they indicated a doubt as to whether it was enough to make a prima facie case; but the case turned, and your Lordship may think naturally turned in the circumstances, then upon impleading. Thirdly, and this is the last point about it, in any event the Order-in-Council would compel your Lordship to deal with the matter upon evidence now put before your Lordship whatever their Lordships below had done; but they have not embarrassed your Lordship. My Lord, it is clear to me, I hope I may say that your Lordship had seen these judgments and therefore you won't want me to go through them in detail.

Court: No, I don't, I have read them actually.

Monckton: My Lord, what I am now saying, I dealt yesterday with the judgment of the learned judge who first dealt with the matter I am now only thinking of the Full Court and the passages in which they dealt with immunity

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begin at page 9 of their judgment in the copy I have and continues up to page 14. I need not do more than say that, having fully considered that as the first point which took the bulk of their judgment, they say "we are unable to find in any of these submissions any ground for holding that the learned Chief Justice was wrong in deciding that the doctrine of sovereign immunity precluded the Court from entertaining an application to appoint receivers." That is the first and sufficient ground. Then on page 15, they say this and I can only indicate the passage, "In his decision, the learned Chief Justice indicated that apart from any question of sovereign immunity he would have refused the appointment of a receiver on the ground that in his opinion the 10 plaintiff corporation had not established a sufficient prima facie case. In order to succeed, a plaintiff must show that there is a reasonable likelihood of his winning the case when the action comes on for trial." I don't know what exact material there was then, but at any rate it did not satisfy the Chief Justice.

Court: Sir Walter Monckton, I, on the hearing of an action, even without this Order-in-Council, I would not feel myself bound by any such decision.

Monckton: No, as your Lordship pleases. Then I will only just continue two sentences and stop; I don't want to leave an open door. "It was argued before us, that in the present proceedings they need not, to quote counsel's 20 words, dot every "i" and cross every "t". In our opinion, the learned Chief Justice was correct in his view also of this aspect of the case. We do not wish, at this stage, to say anything which might be prejudicial at the trial of any issue and will do no more than indicate some of the difficulties which in our opinion the plaintiff corporation must surmount.

But as your Lordship sees that language is very carefully shown. We are not attempting to say "What when the matter comes to trial and full evidence is presented to the court, the court will determine on this title issue?" and I am content to put it before your Lordship that your Lordship is required, in spite of anything said in the Full Court, to examine the material which we 30 shall now put before you and see whether on the submission I have made that material is sufficient to establish (1) the validity of the contract whereby the partnership acquired their ownership and right to possession of these assets on the 12th December, 1949, and (2) the validity, which I don't suspect is open to much challenge, of the transactions whereby the partnership made over the same assets on the 19th December to the present plaintiffs. My Lord, those are the arguments I desire to advance and I ask my learned friend if he would be kind enough to call the evidence for me.

Court: Very well, Sir Walter.

Wright: May it please the Court, in addition to the oral evidence of Mr. 40 Marias and Mr. Rosbert in this case, the evidence which I now propose to read consists of 7 affirmations and 2 affidavits and, to these affirmations and affidavits, are exhibited various documents of importance in this case. The original documents are, as sworn in Formosa and America, actually before your Lordship on the file and you may, if you desire, refer to those but, from the point of view of convenience, all those documents have been made up into three bundles, bundles B, C & D. And, from the point of view of convenience, my Lord, I propose to read from the copy documents.

Court: Yes, you may.

Wright: The first affirmation my Lord is that of Liu Shao Ting and that is contained in pages 1 and 2 of bundle B. It reads as follows: "I, Liu Shao Ting of Chung Shan Road, North Section 2 Taipeh Taiwan China do hereby...... (here counsel reads the affirmation of the said affirmant which was sworn to on the 19th October, 1950 before His Britannic Majesty's Consul, Tamsui, Formosa)......Chairman of the Board of CATC." Now that document is contained in pages 5 & 6 of file D. 5 is the original document in Chinese and 6 is the translation. Pages 5 & 6 of file D, and I will read
10 you the English translation on page 6. "The Executive Yuan—Appointment Order...... Order is hereby given......(counsel reads on)...... Dated the 12th day of December in the 38th year of the Republic of China 1949" and the document bears the seal of the Executive Yuan. Now this particular paragraph 1 of the affirmation of Liu Shao Ting is confirmed in the later affidavit which I shall read from the Premier himself, my Lord, and the Premier also identifies and recognises that chop on the document—the Appointment Order—on page 6 of file D. The next paragraph of Liu Shao Ting's Affidavit "Premier Yen Hsi Shan with the ......(here counsel reads para. 2 of Liu Shao Ting's affidavit)......"appended in Taiwan". That particular document, my Lord,
20 is in file C.—bundle C.—page 1. Perhaps your Lordship will absolve me from the task of reading this particular document because it has already been read by Sir Walter Monckton.

Court: Yes.

Wright: I need only draw your attention to the fact that this affirmant Liu Shao Ting, his signature appears at the foot of that document. In connection with that paragraph 2, my Lord, a later affidavit from Yen Hsi Shan confirms that he gave this authorisation to Liu Shao Ting and the validity of this authorisation was dealt with in the affirmation of Chinese lawyers. Paragraph 3 "The said acceptance by me......(counsel reads the said paragraph)
30 ...... and the signature of Premier Yen Hsi Shan". Now that particular document is on page 7 of file D. Again, my Lord, that document has already been read by Sir Walter and perhaps there is no necessity for me to read it. I will draw your Lordship's attention to the fact that it is signed by Premier Yen Hsi Shan and in his affirmation later on you will find that he identifies it as his signature. "On the 11th day of December 1949......(counsel reads para. 4 of Liu Shao Ting's affidavit)...... of the meeting." Premier Yen Hsi Shan's affirmation, he confirms those facts, my Lord, and perhaps I may mention here that it is later in evidence that the Executive Yuan is the supreme executive organ under the Chinese Constitution. (Counsel reads para. 5). In
40 order thoroughly to understand that paragraph, my Lord, it will appear in later affirmations that the Minister of Communications ordered CATC to be removed from Canton to Taiwan in early September 1949—I shall draw your Lordship's attention to that evidence later on. That order was in early September, 1949, and the order to move CATC was given prior to the removal of the seat of Government from Canton. Later evidence will show that the seat of Government was removed from Canton on the 12th October, 1949; and this was prior to the fall of the city and later evidence will show that Canton fell two days later, the 14th of October. The final paragraph of this affirmation "It was my intention......(counsel reads

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paragraph 6)...... and Willauer". This affirmation was sworn at Taiwan. The next affirmation is that of Wong Kuang and that is contained on pages 3 & 4 of the same bundle, file B. "Wong Kuang, Director General...... (counsel reads the affidavit paragraphs 1, 2, 3, 4 and 5(1)...... an original letter dated 31st December, 1949 from Chennault and Willauer." That document is in file D, page 10 my Lord. If your Lordship will recall, that letter was read by Sir Walter Monckton and it is a covering letter to which were attached four promissory notes to which Sir Walter Monckton has already referred. Pages 10, 11, 12, 13 and 14 of file D. The original covering letter from Chennault and Willauer and the four original promissory notes. (Counsel continues to read the rest of the affirmation of Wong Kuang). That is the affirmation of Wong Kuang.

Monckton: My Lord, we now come to the affidavit—the affirmation—in respect of which I have to ask for leave. It is on page 5 here, it is only a short addition—page 5 in bundle B, my Lord—If I may read it de bene esse and then tell your Lordship why we ask for it, your Lordship sees that the affirmant has already been permitted by the Court to make one affirmation; it is desired to supplement it in one particular. He says this, paragraph 1 "In my affirmation dated the 19th October, 1950...... (here counsel reads the second affirmation of Liu Shao Ting)...... to my Government." That paragraph of course is only qualifying him to give what is in the second paragraph and that is "The assets of the Central Air Transport Corporation have never been vested in the National Government of the Republic of China." My Lord, I would have assumed that from the affidavit already sworn because he said they were not shareholders and that it was owned by the Government of China—the Republic of China—but it seemed better to have it made abundantly plain. Therefore, my Lord, I ask leave that that may be treated as part of the evidence in the case before your Lordship.

Court: Certainly.

Monckton: I am very much obliged.

Wright: And the next affirmation, my Lord, is that of Nih Chun Sung, page 6, file B. (Counsel reads the affirmation and the exhibits referred to therein). The next affirmation is that of Yen Hsi Shan, page 8, file B. (Counsel reads the Affirmation up to the end of paragraph 2). LST-1 was the Executive Yuan order appointing Liu the Chairman of the Board of Governors as I have indicated to you, Premier Yen Hsi Shan's chop was on that document and he also identifies his signature on LST-2, that is, page 7 of file D. That is the confirmation of the Government's acceptance of the offer of Chennault and Willauer. (Counsel continues reading the affirmation starting with para. 3). (After reading para. 3 counsel read the exhibit referred to in that paragraph). (Counsel then says: "That confirms the authorisation given to Liu Shao Ting to sign acceptance on behalf of CATC"). (Counsel continues to read para. 4 and up to the 3rd line of para. 5 including the words "therein contained" and says as follows:—"If your Lordship would refer back to the affirmation of Nih Chun Sung, you will find that that relates to the exercise of Premier Yen of the powers of Minister of Communications while the actual Minister of Communications was absent in Hong Kong and it relates to the various moves of the seat of Government"). (Counsel continues reading the rest of para. 5 and then read the exhibit referred to in that paragraph; Counsel read

para. 6 of the affirmation). The validity, my Lord, of this particular order referred to in para. 6 of Yen's affirmation is also dealt with in the affirmation of the Chinese lawyers. The next affidavit is that of George K.C. Yeh, p.10 of file B (Counsel reads the whole affidavit). My Lord, those 2 documents referred to in para. 4 of this affidavit are in file D, p.9 and p.15; p.9 is the first one and which has already been read to your Lordship.

Court: Yes, I remember that.

Wright: You will recall the date, 28th December; from the Chinese Ambassador to the Foreign Office. Now the 2nd document referred to is on page 15
10 —this has also been read by Sir Walter Monckton and you will recall that that again was a letter from the Chinese Ambassador to the Foreign Office. Next affirmation is that of Ango Tai on page 12 file B (Counsel reads the whole affidavit)—the next affirmation is on page 14 of this file and this is the affirmation of the Chinese lawyers Joseph Keat Twanmoh sell...... etc. ...... sub-paras. (a), (b) & (c)" and says as follows: My Lord, line 3 in (c)—I think that is a mistake, the words "in paragraphs 1 & 2" should be in paragraphs (a) & (b)").

(Counsel then continued reading the affirmation from that point up to the end thereof).

Wright: My Lord, that concludes the affirmation of the 2 Chinese lawyers.
20 The last of these documents is the affidavit of Whiting Willauer and I don't know whether that affidavit has as yet been incorporated in file B. I think it was perhaps handed in rather late. It is on page 21 of file B (counsel reads affidavit. Having reached paragraphs 8 of the said affidavit, Sir Walter Monckton interposed here as follows: If your Lordship will allow me to intervene for a moment on that because I don't want your Lordship to be troubled with documents which really are not very material for the purposes of this case. The documents to which my learned Junior has just referred are documents which are not really the documents of title in this case. It is the earlier bill of sale which does the transfer. This was only a step to be taken
30 in order to achieve registration in a formal manner. Therefore, I don't think your Lordship need worry about them).

Mr. Wright continues to read from affidavit.

Then Sir Walter Monckton:—

I don't know if that is convenient to your Lordship, that concludes the affidavit and affirmation evidence; there will be two short witnesses to be orally examined. Your Lordship may like to adjourn for a short moment.

Court: Yes, we will adjourn for 20 minutes.

(Court adjourned for 20 minutes at 11.25 a.m.)

(Court resumed at 11.45 a.m. Appearances as before).

40 Wright: May it please the Court, my Lord, I desire to call Mr. Rosbert to give evidence.

(Here follows the evidence of Camille Joseph Rosbert and Saul G. Marias already extracted and appearing at pages .... of this record.)

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No. 32. Transcript of Proceedings, *continued.*

Monckton: Your Lordship, you will not expect me at the end of this case, with the evidence before you, to detain you very long but there are just a few points which have arisen and I should like to address you upon them. Now as far as the evidence goes itself as your Lordship will appreciate it, apart from the evidences to the relevant clause, everything turns upon the documents which I had addressed you upon earlier and the facts which had been proved are only facts which I had opened. So far as the relevant law is concerned I only remind your Lordship in relation to the first of the transactions the sale to the partnership that on the passage in Dicey's Conflict to which I had referred whatever be the proper law of the contract in relation to the con- 10 struction of the contractual rights, it would be the lex situs of this place where the goods are which would determine the proprietary rights with which your Lordship is concerned. But, of course, it doesn't matter in the light of the evidence; even if your Lordship adopted the proper law of contract the evidence is that the Chinese law in relation to this contract would have the same effect and the part property would pass on the completion of the contract on 12th December. And the question about which I shall ask at a little later stage is "Is it not therefore the effect of the whatever law is the appropriate law is part of this bargain?" Because that is now beyond challenge. But upon the proprietary on the one hand and the legal possibility on the other of the sale 20 of such property by the de jure government—But that is a matter from the illustration which your Lordship put to me is of interest to me. My Lord, I turn therefore in order to get rid of the matters of evidence to the second transaction, to the American transaction, my Lord, there again it is interesting to see, and Your Lordship was observing it I noticed, how closely the American Statute about the sale of goods, having been born of the same common law, is analogous to our own. Not only the note and memorandum which was wanted and forthcoming but also the rule of intention about passing of property is substantially the same. So that if I am right in what I have submitted as to the first transaction, it is as clear that the second is a transaction under 30 which the property in that cases passed to the plaintiff corporation. And it is a happy reflection that we aren't troubled here with when there is a not only a conflict of laws in the technical sense but a conflict of laws in their effect and operation. That simplifies the matter. My Lord, the first thing I would like to say a word about to your Lordship is Boguslawski's case which I mentioned yesterday. To draw a distinction between it in one respect and the present. Your Lordship remembers in the present case how I have been saying it is most important to observe that at a critical moment in December 1949 de jure recognition by our Government was with the what I call the old Government of China—very important as determining the matter whether with 40 whom resided the title to sell subject to the constitutional point we put aside. Of course, in the Boguslawski's case the situation was very different; that was not the case as this is in which the de jure government was on the evidence still fighting back. In this case you will see that evidence of Mr. Rosbert really illustrates it that there were areas not only Hainan Island but areas in the mainland which were still in the effective occupation and under the control of the de jure government to which he was able to cause these aircraft to be flown in December and to some extent even in January so that there is no question this is a case in which the de jure government was there and was de facto in control of some parts of the mainland. My Lord, I addressed 50 your Lordship to-day with a citation from Professor Lauterpacht's book. It didn't matter if an accurate judge from outside would say "It is very unlikely

that the Nationalist Government would again retain their foothold"—that doesn't matter. However, the balance has become tipped if the struggle is still maintained then it is legitimate for the de jure government to take the appropriate steps in their judgment to protect the assets of the State which they lawfully claim to represent. That was the position here all the time citing Professor Lauterpacht makes good the proposition that it is not ultra vires or improper that the de jure government to do what was here done. In Boguslawski's case on the other hand the essential difference was that everybody knew indeed (in the only judgment which I would like to look at for a moment
10 again—that of Lord Justice Denning) it is said at the outset that the Government in London was about to be extinguished—there was no question of fighting back—that government was to go. If I may refer once to the passage in 1941, I K.B. at page 178—we needn't go back to anything else—there in the opening passage of his judgment, the learned Lord Justice says this: (Counsel reads from beginning of Lord Justice Denning's judgment down to the 12th line ending "London Government"). Counsel continues: I don't go on from that, what I was upon there was to point the difference which is existed in a case in which there was no question of fighting back—the British Government had already said: "We are going to recognise the Lublin
20 Government. We have since also decided to abandon our recognition of the London Government at some time and that we proposed to do." Now for the purpose for which I am now addressing the Court, that, of course, is a very important distinction. Had what is called of London Government been a government which had been de jure recognised and in Poland controlling a part—however small a part—of Poland itself and fighting back. Then the problems which can occur in the case as reported, would not arise. Problems as to vires, was it ultra vires the London Government to do what they did, were their motives questionable, were their motives to embarrass the Lublin Government which was about to be recognised. All these problems arise in a
30 case where there isn't what Lauterpacht dealt with in the passages I have cited a propriety in the established government maintaining itself even if that does involve the embarrassment of that government which in the end is recognised on a later date. As my friend Mr. D'Almada reminded me in the case of the London Government of Poland, it was extinguished in the most literal sense—it wasn't existent in control of any area; it was just gone.

Court: At this time there was, however, no de facto government in Poland recognised by the United Kingdom.

Monckton: I don't think the Lublin Government—I don't think there was recognition at all.

40 Court: It went straight to a de jure recognition?

Monckton: I am not sure but I am sure my friends will correct me if I am wrong. That is my recollection.

Court: The point I had in mind, there could have been at that time no internal act of a de facto government be placed in opposition to the act of the government de jure existing in England?

Monckton: I follow your Lordship's mind. I was, of course, upon a narrower point that, when the Lord Justice is dealing with the specific facts of this case, rather hedges what he says on page 182 by reflections about the

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No. 32. Transcript of Proceedings, *continued.*

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No. 32. Transcript of Proceedings, *continued.*

alien and improper purpose—if you will turn to page 182 which reads "There may be a difficulty in enforcing etc. etc., applying this principle." He goes on to apply to the facts of that case. What I was anxious to make plain to your Lordship was the material distinction between the two cases, the one here in which the de jure government was fighting back and there was nothing either alien or improper so long as that was the government recognised by this country. So long as it was fighting back, so long as it was still established in parts of the mainland in its doing its duty as it conceived that duty to be in resisting the power which ultimately overcame it. Your Lordship will follow it in this connection that without my repeating it, it is there that the 10 passage of Lauterpacht which I have referred to earlier to-day becomes of material value. And one can't help bearing in mind in this connection the passage from the judgment of Mr. Justice Bennett which we have several times referred to—a very short passage—in which he gives a warning when he was dealing with authorities which one always, I submit, must bear in mind that whereas principles are great and shall prevail authorities must be related to their own actual facts. He cites Lord Halsbury's speech in Quinn v. Leathem on page 189 of 1939 (1) Chancery and Lord Halsbury had a habit of putting it pungently "There are two observations of a general character which I wish to make...... The other is that a case is only an authority for what it actually 20 decides." The principle of continuity is a principle not depending upon any individual authority, it is a principle which runs through the international law which in English law had been adopted. It is a principle of succession by representation; the principle of maintaining the security of commercial relation as distinguished from any violent interruption by assuming that a newly recognised de jure government succeeds by title paramount so as to divest the interests already acquired by third parties. The last thing I want to cite in relation to this part of the case because it rather bears on what your Lordship put to me about a de facto and a de jure government is a passage in Lauterpacht on Recognition at page 286—the top of the page line 8—"The 30 circumstances that international law permits recognition......" down to "in any of His Majesty's courts."

Monckton: That passage frequently has been criticised and is about to be. (Monckton continues reading from "It would have been sufficient for the purposes" down to "the bank of Ethiopia in Liquidation").

Monckton: There is a governmental act—a legislative one, that is (Monckton continues reading: "But there was no warrant for suggesting" down to "......for the enforcement of the property rights of the Emperor outside Abyssinia."

Monckton: Now, my Lord, before I read on may I pause to correct something 40 which I said in my proposition this morning. I said, in unguarded terms, that there was no English authority which decided recognition de jure conferred on a new government a title to public property of the State from any time prior to the grant of recognition. That was an accurate statement, if I had added "property of the State outside the State." I prefer to guard it that way—the Professor does, in this passage. That, of course, is very material—it had decisive consequence for the enforcement of the property rights of the Emperor outside the empire. In this case, there being both sorts of recognition; this case, if instead of an outstanding right to the payment of

money, one was dealing with a sale by the emperor de jure recognised of something to Cable & Wireless of specific goods in a deliverable state, in which case there would be an enforceable right in them no longer challengeable because there the de jure government had done so.

Monckton goes on quoting: "The Court refused to consider......" down to end of quotation from Mr. Justice Bennett's judgment.

Monckton: He goes on to say how Mr. Justice Bennett endeavoured to distinguish Mr. Justice Clauson's judgment, and I don't think I need trouble you with the rest of that. It only sets out and approves Mr. Justice Bennett's
10 conclusion in the Haille Selassie case. All that, as it humbly appears to me, goes to show that the second proposition which I was contending for, about the right of a de jure government to deal properly with the assets of that government is well established. Indeed, it isn't for nothing and it isn't for something wholly unenforceable that a government is de jure recognised even when there is a de facto government in control of the territory of the State. The presence of the de facto government in control of the State is effective in relation to executive and legislative acts of the State which will be recognised within its territory. But the position of the de jure government in relation to property outside, stands, as Mr. Justice Bennett correctly decided in that case.
20 And at the end of the day, as I suggest, we come to this: That the one matter which remains for me to address your Lordship upon is the propriety and right of the de jure government to deal with assets which, upon the evidence, were undoubtedly there. I draw a firm distinction between propriety and right. What your Lordship is concerned with here is the legal right of ownership or possession as it passed. My Lord, if I may take an extravagant illustration: If one were dealing with the British fleet and H.M. Government through a properly and duly recognised agent, sold that fleet to a foreign power, there would be, so far as I am aware, no legal impediment to the passage of a good title but there would be a very doubtful chance of that government
30 remaining in power. On the first matter we are dealing with law, we find no constitutional impediment. In the second, we are dealing with politics which I am not permitted here to discuss but it is a political disaster which such a government would incur and those who bought could buy with as good a title as if they bought a single ship which has often been sold by a legally recognised government, or two ships or more—or a number of aeroplanes, however valuable they are. The question is, from the legal point of view: In whom does the title rest? And what impediment is there which prevents government through its proper agent, from disposing of that property in what, it conceives to be, in the best interest of the State. If it falls into error in
40 reaching its conclusion upon what are the best interests of the State it remains open to political sanctions but the party which has bought from it property which it chose to sell having a valid title (under what I am assuming to be a mistaken view of what is most expedient), that third party acquires an indefeasible title and it is at the root of all the principles which I have been contending. That title should be, and should be regarded as, indefeasible. Those who deal with a de jure recognised government, with property admittedly the property of that government should be safe, so far as international law applies by us is concerned. From any suggestion afterwards that that government exhypothesi de jure recognised up to 5th January 1950 was some-
50 how deprived of the power of granting a title to a third party. And if the

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new government, not hitherto recognised by merely succeeding is entitled to defeat that title.

My Lord, those are the matters which, on behalf of the plaintiffs in this action, I desire to lay before the Court and I respectfully submit that we have established on the evidence a valid sale which passed the property to the partnership on the 12th December 1949 and a valid resale on the 19th December to the plaintiff corporation. And it is the duty of the Court under the Order-in-Council to pronounce that the ownership and the right to possession in these aircraft and the apparatus that goes with it lies securely in the plaintiffs in this action. 10

Court: There is one point on the question of these old judgments of the Full Court. I quote from the first three lines of the first paragraph of page 13 beginning "it is necessary to bear in mind......" down to "Republic of China." Court continues: That apparently was an admission on the part of the plaintiff in a different suit, it is true, but is it any part of your case that they are public assets and CATC is a government department.

Monckton: No, my Lord, my case is, that the CATC, on the evidence, is not a public department but that its assets are the property of the government. Your Lordship has seen how it was put and, whether it was put in a different form below, upon the evidence I must and do so—that it is not a public department but these were assets of the government—no doubt as such. 20

Court: You are not going to suggest that you might be bound by an admission by the plaintiff in the former case?

Monckton: I am sure your Lordship will not put that upon me in this case, an admission I know nothing about. I am much obliged to your Lordship for drawing my attention to it but your Lordship will recollect the evidence.

Court: You admit not public assets but the property of the government?

Monckton: Property of the government. Your Lordship will recollect the questions about public property and so forth are questions which are concerned with these various immunity problems of which we are really excused. I don't think it can be, at least, I submit, it can't be said here that there is any difficulty in there being the right of sale in the de jure government and the question whether the court can go into the matter is another. 30

Court: We have an uncompleted contract, as it were, here, if we might put it that way.

Monckton: True, I think one can say this that, save and in respect of the passage of property upon which there is really no conflict between the various ......(unintelligible)......save in respect to the passage of property the contract remains in part executory because it so far remains the payment had not been made—it hasn't fallen fue. 40

Court: If in Haille Selassie's case, he had obtained his judgment and on appeal possibly for the recognition, he might, as you say, have got away with it.

Monckton: He might have.

Court: Now here is a case which is not a frustrated contract but a contract in which delivery has not passed. Is it your contention that the present de jure government of China, in whose control at the moment those assets are must recognise a contract inimical to itself.

Monckton: Let me put it this way—In whose possession those assets were for a time (because they are now in medio in possession of H.E. the Governor under his directions). But let me assume that against myself. At a crucial moment, they were, as I have said, no doubt, physically controlled by a man who said they were accepting the instructions of the new government as we have called it. What I submit here is this: In respect of contractual rights, however they arise, the parties to a contract cannot approbate and re-approbate. What he can say (and I think it may involve some interesting and may be difficult questions), he can say, "I approbate this contract and I desire to take it over. I get it by succession—my rights" and then it may be, he put me or my clients into the difficulty of uncertainty to whom, in truth, the payment might be made. But there is one payment due under the contract. I may make a mistake or my clients may and pay it to the wrong people and would have to pay again because interpleader may be difficult. But the fact remains that that executory part of the contract remains over and it may well be that the new government could say "By succession inasmuch as those payments remain over as in Haille Selassie's case, we are entitled to recover." But they can only do that upon the footing of approbating the contract. Your Lordship points out—any one looking at the reality of things would say "It is not perhaps likely that they would approbate a contract in these terms where the consideration on both sides included a desire made effective not to operate into, what is now, the territory of the new government, and might not desire to approbate." But I am not saying in force of this argument that they could not approbate but if they did, then all these arguments about succession would enable them to stand. Really, the distinction can be put in this way: Part of that contract, the passage of the property is that in which you are principally concerned. Very difficult questions may arise as to the executory part but the passage of the property in the assets is plain from the evidence and from the law, I submit, your Lordship, it was property passed by the de jure recognised government at that time and the difficulties which might have supervened if the goods had not passed—property of goods not passed, are not here. And one is not fortunately put into this embarrassing situation of deciding how to implead. For an interpleader, my Lord, it might well be that by other means one would have to ask for right to implead even more. I do not desire to do that now and I am not embarrassed in my argument by that as Your Lordship sees because when I was dealing with Haille Selassie I pointed what a great distinction there was between that case in which there was an outstanding right of payment as there is here and the successor government could say "Without violating all these principles about not taking by title paramount, I claim it is a de jure government now." Very difficult then for me to resist—no doubt. It will only do that upon the footing of claiming it under the contract. As your Lordship points out to me that may not be a contract likely to be approved.

Court: We have the situation, Sir Walter, in which your clients were forced to sue the partnership. What remedy would the partnership have? It has no legal remedy—it cannot go against the original vendor, the other party to the contract, for specific performance because he has ceased to exist. Is it to be suggested that this piece of paper is creating a legal remedy?

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No. 32. Transcript of Proceedings, *continued.*

Monckton: No, my Lord, the remedy was there save for one thing which that paper has done to it, namely, that I wasn't able to bring into court the party against whom the remedy was to be sought. I have the right to the property against whomever claims it. If this person who claims it is a foreign sovereign government, I won't be allowed to bring him to court, but for that piece of paper, that's what your Lordship said that it is a remarkable document. But there it is, it is the source of orders and under it I seek to say that your Lordship has to determine ownership in spite of a foreign government being interested. Upon the evidence, I submit there is no alternative but to say that the ownership is in me. If there is anything else I can assist your Lordship upon I shall only be too glad to endeavour so to do. But I think I have covered all that I have to say—I hope not too often. 10

Court: What is the best procedure now, Sir Walter?

Monckton: My Lord, I do not know if it would be convenient for your Lordship to deal with this matter now—we are in your Lordship's hands. I imagine this is a case in which your Lordship might desire to be advised—curia advasari—if that is so my friends are with me if you are, my Lord, going to give judgment at a later date.

Court: I think I will have to do that.

Monckton: I apprehended that. 20

Court: Stand over for judgment to be listed.

To the best of my knowledge and belief, the foregoing is a true transcript of the recorded proceedings in the afore-mentioned action.

(Sgd.) F. Gutierrez,
Court Stenographer.
31.3.51.

No. 33. The Judgement of the Court of first instance.

No. 33.

THE JUDGMENT OF THE CHIEF JUSTICE ON THE TRIAL OF THE ACTION. 30

(As amended in red ink pursuant to Order of the Courts)

This is an action brought by Civil Air Transport Incorporated, a Corporation duly incorporated under the laws of the State of Delaware, United States of America, against the Central Air Transport Corporation, in which a declaration is sought "that the forty aircraft now on the Government airfield at Kai Tak in the Colony of Hong Kong formerly the property of the defendants together with all spare parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this Honourable Court are the property of the plaintiffs and/or that the plaintiffs have the sole right to possession thereof."

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33. The Judgement of the Court of first instance, *continued.*

The Central Air Transport Corporation, it is agreed, is unincorporated and a department of the Government of China, inasmuch as from its organisation in 1942 it has been administered and controlled first as a department of the Ministry of Communications and now as a department of the Central Peoples Government controlled and administered by the Civil Aeronautical Administration.

Service of the writ of summons herein was attempted upon the Central People's Government of the Republic of China by the usual channels and subsequently an Order was made for service by leaving a sealed copy of the writ 10 of summons at the office of the defendant in the Colony of Hong Kong. In the event, no appearance nor notice of intention to appear was filed and, under the procedure in these Courts, an Order giving leave to proceed ex-parte in this action was made on the 4th December, 1950.

It is necessary to go briefly into the events leading up to the institution of this action. The Central Air Transport Corporation operated an air service within China with services to Hong Kong and other outside territories.

A corporate body, incorporated in China and known as the China National Aviation Corporation, of which 80% of the shares were held by the Chinese Government and 20% by an American company, was also operating both within 20 and without China.

During the struggle between the former Nationalist Government of China and the present Central People's Government, a number of aircraft and certain equipment of the Central Air Transport Corporation and of the China National Aviation Corporation were moved to Hong Kong where they still remain. The Nationalist Government, then situated in Formosa, a fact to which further reference will be made, eventually grounded all these aircraft by suspending their certificates of registration, and here in Hong Kong the aircraft have remained.

In October 1949, it became evident that the effective majority of the members of the staff and employees of the Central Air Transport Corporation 30 had attorned to the Central People's Government and refused to recognise the Nationalist Government then in Formosa and, as a consequence, several actions were commenced in these Courts of which only those in which the present plaintiff Corporation were concerned are of relevance in this action and it is well here to set out very briefly the facts upon which the plaintiff Corporation claims title.

Sgd. C. D'Almada e Castro.

On the 5th December, 1949, an American partnership of General Chennault and a Mr. Willauer approached the Nationalist Government in Formosa with an offer to purchase the physical assets (including those in Hong Kong) of the Central Air Transport Corporation and the China National Aviation 40 Corporation upon the terms and conditions set out in a letter which offer was accepted by the then Nationalist Government on the 12th December, 1949.

Sgd. C. D'Almada e Castro.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33. The Judgement of the Court of first instance, *continued.*

In consequence of this transaction, the partnership of General Chennault and Mr. Willauer sold and transferred to the Civil Air Transport Incorporated, all their right, title and interest in the assets acquired by the partnership under its transaction of the 12th December, 1949, with the then Nationalist Government.

Sgd. C. D'Almada e Castro.

As a result of these dealings, two actions (O.J. Nos. 5 and 6 of 1950) were instituted in these Courts by the present plaintiff Corporation. O.J. Action No. 5 was brought against General Chennault and Mr. Willauer as defendants and H. C. Wang and others and the China National Aviation Corporation as third parties; and O.J. Action No. 6 was against the same defendants with S. Y. Ho and others and the Central Air Transport Corporation as third parties. In each case the claim, arising from the transactions I have mentioned, was for delivery up of the aircraft, equipment etc., and for damages for wrongful detention : the third parties, other than the China National Aviation Corporation and the Central Air Transport Corporation, were some, if not all, of the members of the staff and employees of each Corporation who had attorned to the Central Peoples Government. The plaintiff Corporation then issued summonses for the appointment of receivers in both these actions, and, the defendants General Chennault and Mr. Willauer consenting, the issue was fought between the plaintiff and the third parties in each case. The then learned Chief Justice refused each application holding, that the Central People's Government was in possession and control of the assets in question and that the doctrine of sovereign immunity operated.

The plaintiff Corporation appealed and the Full Court upheld the decisions of the learned Chief Justice (Appeals Nos. 5 & 6 of 1950).

By consenting, only one judgment was delivered by the Chief Justice and both appeals were heard together and one judgment delivered by the Full Court.

The reserved judgment of the Full Court was given on the 13th May, 1950, and a deadlock appeared to have been reached for neither action could have proceeded in face of these judgments but, on the 10th day of May, 1950, the Supreme Court of Hong Kong (Jurisdiction) Order-in-Council, 1950, came into operation, the essential purpose of the Order being to confer jurisdiction upon the Supreme Court of Hong Kong in any action or proceeding concerning these aircraft notwithstanding that any such action or proceeding impleads a foreign Sovereign State. On the 19th day of May, 1950, the plaintiff Corporation instituted these proceedings in respect of the aircraft of the Central Air Transport Corporation.

The Order-in-Council is expressed to apply to any action or proceeding instituted in the Supreme Court after the coming into operation of the Order and it therefore applies to this action.

This Order-in-Council therefore has to be construed; it is an incursion into established law and as such, in my opinion, must bear as narrow an interpretation as the wording will permit.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33. The Judgement of the Court of first instance, *continued.*

Section 1 of the Order, which confers jurisdiction upon this Court, reads :—

"1(1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of coming into operation of this Order, it shall not be a bar to the jurisdiction of the Court that the action or other proceeding impleads a foreign sovereign State.

(2) If a defendant in any such action or other proceeding fails to appear or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire fully into the matter before giving judgment."

From the judgments of this Court and of the Full Court in the cases and in the appeal to which I have referred, it is quite clear that any claim in respect of the aircraft must "implead a foreign sovereign State" and it is sub-section 1 of this section of the Order which creates the jurisdiction under which these proceedings have been taken, and I interpret this sub-section as giving this Court jurisdiction to proceed even though the Sovereign Foreign Power stands upon its immunity: it is nothing wider than that and entails no further whittling down of the rights granted in our law to such foreign sovereign States and no wider incursion into that law.

No appearance has been entered by the defendant to these proceedings and it is therefore sub-section (2) that determines the duty of this Court in such circumstances.

This Court is directed that judgment in such an event shall not go by default and that this Court shall "enquire into the matter fully before giving judgment."

These words are difficult to interpret. It is not possible for this Court to consider what defences the defendant might have raised, whether in fact or in law, had the foreign sovereign State appeared that would be a matter of speculation but in my opinion it must mean more than hearing the case for the plaintiff in full. I have interpreted this sub-section as requiring this Court, in the circumstances of this particular proceeding, to go outside an examination of the plaintiff's case and to consider the other suits and applications which have been decided in these Courts relating to the subject matter of these proceedings to which the present plaintiff Corporation was a party, and the proceedings on appeal in the Full Court. As I have said, the judgment in the application for the appointment of receivers and the judgment of the Full Court on appeal were, by consent, related to aircraft, the property of the China National Aviation Corporation which is not a defendant to the present proceedings, as well as to the aircraft of the Central Air Transport Corporation the present defendant, but in the proceedings in these suits the cases for and against these Corporations were separately put and I am of opinion that regard may properly be had to them.

The construction of sub-section (2) of section 1 of the Order requires examination of the phrase "which he ought properly to take," used in relation to a defendant who "fails to appear, or to put in a defence, or to take any other step in the action or other proceeding."

As I have interpreted section 1 to do nothing other than to confer jurisdiction upon this Court to proceed in this action even though so to proceed impleads a foreign sovereign State, it is difficult to appreciate what steps the defendant "ought properly to take" as being a foreign sovereign State his normal rights and privileges remain otherwise unchanged.

I am of opinion that this phrase means no more than this; that even though the foreign sovereign State has stood upon its immunity, the matter must fully be enquired into by this Court and that the phrase "ought properly to take" is related to what an ordinary defendant ought to do, and does not imply any further incursion into the recognised rights and privileges of a foreign sovereign State. It would cover also the case in which, if the foreign Sovereign State had entered an appearance but failed to enter a defence or to comply with an order made arising out of the proceedings.

In these proceedings, as in the others which were brought before these Courts, the question of the recognition by His Majesty's Government, de facto and de jure, of the Central People's Government and of the Nationalist Government was an essential factor and steps were taken in the proper manner to obtain this information and, although these steps were taken and the information received in another suit, the statement of His Majesty's Government were put in by the plaintiff in these proceedings, whose case to some extent was based upon this statement. It is convenient therefore to set out the questions and answers here :—

Questions.

"1. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the de jure Government of China?

2. If not, when did His Majesty's Government cease so to recognise that Government?

3. Is the Central Peoples Government or any other Government recognised as the de jure Government and, if so, from what date?

4. Has the Republican Government ceased to be the de facto Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?

5. Is any other Government recognised as the de facto Government and, if so, from what date?

6. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-a-vis China?

The replies to the questionnaire are as follows :—

"1. H.M. Government in the U.K. does not recognise Nationalist Government (Republican Government) as de jure Government of Republic of China.

2. Up to and including midnight January 5th/January 6th, 1950 H.M. Government recognised Nationalist Government as being de jure Government of the Republic of China and as from midnight January 5th/January 6th, 1950 H.M. Government ceased to recognise former Nationalist Government as being de jure Government of the Republic of China.

3. As from midnight of January 5th/6th, 1950 H.M. Government recognised Central People's Government as de jure Government of the Republic of China.

4. H.M. Government recognise Nationalist Government has ceased to be de facto Government of the Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from date on which it ceased to be in effective control of those parts.

5. H.M. Government does not recognise any governments other than Central People's Government of the Peoples Republic of China as de facto Government of the Republic of China. Attention, however, is invited to the 2nd sentence in answer to question 4.

6. In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory.

On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to the Republic of China. On July 26th, 1945 at Potsdam, the heads of the Government of United States of America, the United Kingdom and the Republic of China reaffirmed "The terms of Cairo Declaration shall be carried out." On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied Powers concerned, Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of the Republic of China. At present, actual administration of the island is by Wu Kou Cheng, who has not, so far as H.M. Government are aware repudiated superior authority of Nationalist Government.

I am advised that the effect of recognition by H.M. Government as stated in answer to question 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of evidence before it. Ends. Copy of letter follows by air."

The case for the plaintiff, put with great ability by Sir Walter Monckton, K.C. was based on three propositions :—

(a) That the Central Air Transport Corporation was wholly owned and controlled by the Nationalist Government (then in Formosa) and that on the 12th December, 1949, there was a valid sale by that Government to the partnership, General Chennault and Mr. Willauer, a condition being that the partnership was to organise a Corporation to which the physical assets were to be transferred;

(b) that the partnership duly transferred the assets by a sale valid in American law to the plaintiff Corporation; and

(c) that a change of Government is by succession and not by title paramount and accordingly the Nationalist Government was empowered to enter into this transaction, still being recognised de jure by His Majesty's Government, and that the doctrine of retroactivity did not apply to this transaction.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33.
The Judgement of the Court of first instance, *continued.*

The purchase price was to be paid by bearer promissory notes, without interest, the first promissory notes to be given by the partnership later to be replaced by promissory notes given by the Company to be formed. In the event the promissory notes were given directly by the plaintiff Corporation and not in substitution for those to be given temporarily by the partnership.

The document comprising the contract is a letter from the partnership, dated the 5th December, 1949, and addressed to the Minister of Communications of the Nationalist Government at Taipeh in Formosa and bears the acceptance of a person styled "the Vice-Minister of Communications and concurrently Chairman of the Board of Directors of Central Air Transport Corporation" which is dated 12th December, 1949. There is another acceptance signed by a person styled the Deputy Secretary-General of Executive Yuan and concurrently Chairman of the Board of Directors of China National Aviation Corporation and dated the 13th December, 1949. 10

There is also a document dated the 12th December, 1949, signed by Yen Hsi Shan "Premier concurrently as Minister of Communications" ordering one Liu Shao Ting to take over the duties of Chairman of the Board of Governors of Central Air Transport Corporation in conjunction with his other duties : it is this Liu Shao Ting who signed the endorsement on the partnership offer of the 5th December, 1949, on behalf of the Central Air Transport Corporation. 20

A further letter dated December 12th, 1949, addressed to the partnership signed by Premier Yen Hsi Shan for the Nationalist Government notifies the acceptance of the partnership offer, but the plaintiff Corporation bases the sale on the letter of the 5th December, 1949, as endorsed on the 12th December of that year. Finally, the representative of the Nationalist Government in London, on the 28th December, 1949, notified the then Foreign Secretary of the transaction. It was stated for the plaintiff Corporation that Chinese law was to govern this transaction while it was agreed that the Municipal law of Hong Kong governed any legal proceedings relating to the aircraft grounded there.

The Nationalist Government had moved during the year from Nanking to Canton in April, thence to Chungking in October, thence to Chengtu in November and finally to Formosa on the 9th December : it purported to bring its Departments and Ministries with it on its travels and in any event the aircraft and technical equipment of Central Air Corporation were brought to Hong Kong before September, 1949, while the organisation itself appears to have been moved to Formosa on the 9th of December, 1949. 30

At the date of this transaction, it is evident that the Nationalist Government had no effective control over the mainland of China save possibly in respect of those few areas of which evidence was given in these proceedings, but it is equally evident that no possibility existed of that Government being able to defend these areas which awaited occupation by the Central People's Government. 40

While the Nationalist Government was taking the steps it did to evacuate to Formosa, the Central People's Government was not idle, and on the 1st October, 1949, issued a decree dismissing the Ministers of the Nationalist Government and appointing new ones. Further by November, the members of the staff and employees of Central Air Transport had attorned to the Central People's Government, and from the 15th November, 1949, the staff and employees have been paid by that Government.

An affirmation by Chen Cheuk Lin in O.J. Action No. 6 of 1950 contains the following :—

"I say that from its organisation in 1942 the Corporation had been administered and controlled as a department of the Ministry of Communications and I say that the Corporation is still a Department of the Central People's Government now controlled and administered by the Civil Aeronautical Administration. I say that the possession, control and management on behalf of the Central People's Government of all the assets, properties, equipment machinery belonging to the Central Air Transport Corporation has been at all material times in myself as Managing Director and in the members of the staff of the Corporation appointed by me and acting under my instructions and orders to retain and maintain possession, control and management of this property as State Property."

"I further say that on the 9th November, 1949, I accepted the orders of the Central People's Government of the People's Republic of China and went to Peking with the intention of continuing to carry out the objects for which the State Property was to be used under the laws and constitution of the Republic of China, namely to fly the routes linking the cities of Peking-Shanghai-Tientsin-Hankow-Chungking-Kunming-Mukden-Lanchow and other cities as well as to connect the said cities of China with Hong Kong and Bangkok."

"Prior to my departure for Peking as stated in Paragraph 8 of this Affirmation I authorised the Directors of the Business, Finance, Operations Departments and other senior officials of the Corporation to set up an Emergency Committee for the purpose of consultation on measures to prevent the officials of the deposed Nationalist Government from getting control of, sabotaging, damaging, or tampering with the assets and properties of the Corporation or from removing such assets and properties from the jurisdiction of this Honourable Court to Formosa. Among such senior officials were some of the persons joined as third parties in this Action. Other senior officials of the Corporation are not Third Parties and were not defendants in any other suits before this Honourable Court. Acting under my instructions and in continuous communication with me these senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and absolute possession and control in every respect of all the assets, properties, aircraft and real estate belonging to the Corporation. I say that I gave the said instructions and orders for and on behalf of the Central People's Government. I further say that the wages of all of the employees and staff from the 15th November, 1949 have been paid by the Central People's Government."

On the 12th November, Mr. Chen Cheuk Lin was appointed by the Premier of the Central People's Government General Manager in a communication in the following terms :—

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"To

General Manager Chi Yi Liu,

General Manager Cheuk Lin Chen, and

All Officers and Workmen of

China National Aviation Corporation and

Central Air Transport Corporation.

My hearty welcome to you who rise gloriously to uphold the cause under the guidance of the two General Managers Liu and Chen.

I hereby accept in the name of the Cabinet of the People's Central Government of the Chinese People's Republic the telegraphic request made by you on 9.11.1949, declare the China National Aviation Corporation and the Central Air Transport Corporation to be the property of the Chinese People's Republic and exercise (the right of) control of the said China National Aviation Corporation and the said Central Air Transport Corporation on behalf of the People's Central Government. 10

I hereby appoint Chi Yi Liu to be General Manager of the China National Aviation Corporation and Cheuk Lin Chen, General Manager of the Central Air Transport Corporation.

I hope all officers and workmen of the said two Corporations remaining in Hong Kong and Specially Liberated Areas will hereafter unite in a body under the guidance of the two General Managers Liu and Chen, heighten their precautions, shatter the secret plots of the reactionaries, bear the responsibility of protecting the assets and wait for further instructions (from me). The (cost of) living for all the officers and workmen shall be borne by the People's Central Government. I again hope that you will stick to the position of patriots, strive to make progress and exert yourselves in the cause of establishing the civil aviation enterprise of New China. 20

Dated the 12th day of November, 1949.

(Sgd. & Chopped) Chow En-loi." 30

The position then on the 12th December, 1949, when this contract was made, was that the Nationalist Government no longer exercised any effective control over the mainland of China; that Government was established outside Chinese territory; the aircraft were in Hong Kong and the members of the staff and employees having attorned to the Central People's Government. Subsequently the Courts of Hong Kong held, and, with respect, in my opinion rightly held, that these aircraft, were and had been in the possession and control of the Central People's Government. I will refer here to certain extracts from the document of sale :—

"(D) The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China"; and 40

(6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China."

By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's Government in the near future and in fact this took place as from midnight 5/6th January, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition de jure for the references to "Communist Areas of China" must relate to the areas controlled by that Government, recognised as the de facto Government of those areas.

It is a transaction inimical to the Central People's Government and indeed, as the aircraft were used for a public purpose within and without China, inimical to the interests of the Chinese people.

This then is the transaction to which the plaintiff Corporation submits the Central People's Government succeeded after midnight on the 5/6th January, 1950, basing this argument on the doctrine of succession.

The doctrine of succession of one Government to another rather than by title paramount has been recognised by judicial decision (United States of America vs. McRae, Law Reports 8 Equity; Republic of Peru vs. Dreyfus, (1888) 38 Ch. D.; and the American case of the Guaranty Trust Company v. United States, Volume 304 United States Reports) and most recently in Boguslawski and another vs. Gdynia Ameryka Linie 2 A.E.R. 1950, and the purposes of and the reasons for that doctrine are well established. There must surely be, in my opinion, a limit to the scope of the acts to which this doctrine applies; a limit to the transactions into which a Government, knowing that recognition will shortly be withdrawn from it, may enter.

This transaction was clearly hostile to the present de jure Government of China and I consider hostile to the interests of the Chinese people. Counsel for the plaintiff Corporation did not suggest that the Central People's Government would wish to adopt these contractual rights but submitted that it could not escape from them and that if his proposition depended on its acquiescence then —cadit quaestio. Counsel further stated that the plaintiff Corporation would consider itself bound by the terms of the contract and would not directly or indirectly permit the aircraft to be operated in China under the present Government.

In Boguslawski v. Gdynia Ameryka Linie, Denning L. J., lays down the following principles :—

"On such a succession it is obviously desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old Government will remain effective except in so far as the new Government decides to repeal them. . . So also, it seems to me that the offers made by the old Government may be lawfully accepted unless they

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33. The Judgement of the Court of first instance, *continued.*

have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts because the new Government cannot be impleaded in our Courts. 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 are ultra vires, or acts which were done by them not in good faith as trustees for the State but for an alien and improper purpose. . . ."

"Secondly did Mr. Kwapinski make the declaration in good faith or did he do it for an alien or improper purpose? It was argued before us that it was most detrimental to the shipping companies for the men to leave the ships and thus immobilise them; that the payment of three months wages if they left would have the effect of inducing them to leave and was, therefore, unjustifiable; and it was to be inferred that the purpose of the declaration was to embarrass the new Government on its taking over the ships. If that were the purpose of the declaration, I do not think it would be valid."

In the transaction now before this 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 that 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 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 of 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 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.

To turn to the question of retroactivity, I would again quote Denning L.J. (Boguslawski vs. Gdynia Ameryka Linie).

"The retroactive effect must, however, be confined to the acts of the Government within its proper sphere, i.e. acts with regard to persons and property in the territory over which it exercises effective control; (See Banco de Bilbao v. Sancha) or acts with regard to ships which are registered there and whose masters attorn to them; see The Arantzazu Mendi. Just as the new Government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its control.

The relevant period in this case is from June 28th, 1945, to midnight of July 5/6th, 1945. During that week the Polish Government of National Unity had control only over the territory of Poland itself. It had no control over the men and ships who were subject to the Polish Government in London. During that time, no master of any of those ships attorned to the new Polish Government. It follows therefore that our recognition had no retroactive effect whatever so far as those men and ships were concerned."

It was argued for the plaintiff Corporation that since the transaction was one which the Nationalist Government, then recognised de jure, had authority to enter into, then on the principle of succession it was one to which retroactivity, by recognition of the new Government as the de jure Government, could not affect.

To my mind, it appears that it is to the acts of the new Government to which the principle would apply and it is necessary to consider those acts.

The Nationalist Government ceased to be de facto Government of different parts of China as from the date on which it ceased to be in effective control of 10 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 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 20 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, 30 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, these aircraft were owned by the Central People's Government.

With respect to the actual contract itself, it is to be noticed that it purports to sell all the physical assets of Central Air Transport, a department of the Government of China, possessing in addition to the aircraft in Hong Kong property to the value of Hong Kong $6,000,000 in China and a radio station in Formosa. It is idle to suppose that the assets in China would be affected by this transaction. Further, although the property in the aircraft in Hong Kong 40 might legally pass on the execution of the contract, delivery could not be effected for under the municipal law of Hong Kong, goods which at the time of sale are in the possession of a third party an acknowledgment by that third party is required. The contract was also executory as the promissory notes have not fallen due. It is probable that the Order-in-Council would cure the former and time the latter, but no more effective reprobation of the contract, of which it had knowledge, could have been made by the Central People's Government than by acquiring possession and control of the aircraft in Hong Kong.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 33. The Judgement of the Court of first instance, *continued.*

Holding therefore as I do that this transaction between the then Nationalist Government of China and the partnership General Chennault and Mr. Willauer is not valid or enforceable in these Courts, it follows that the plaintiff Corporation may stand in no better position and I find accordingly that the plaintiff Corporation has failed to establish ownership or right to possession of these aircraft in Hong Kong, the subject matter of this action. It follows further that I must hold that the ownership and the right to possession of these aircraft is in the Central People's Government.

One point remains on which I must give directions. By section 606 of the Code of Civil Procedure, a period of six months is laid down within which an appeal from this decision may be brought. I consider that there must be finality in this matter and that so soon as possible and accordingly under the powers vested in this Court by section 4(1) (b) of the Order-in-Council, I direct that any appeal shall be brought within two months of the date of this judgment and that section 606 of the Civil Procedure Code be construed accordingly. 10

This action is accordingly dismissed.

CHIEF JUSTICE,
21.5.51.

No. 34. Affirmation of Chen Cheuk Lin referred to in the Judgment.

No. 34.

AFFIRMATION OF CHEN CHEUK LIN DATED THE 27th DAY OF JANUARY 1950 FILED IN THE COURSE OF INTERLOCUTORY PROCEEDINGS IN ORIGINAL JURISDICTION ACTION No. 6 OF 1950 AND REFERRED TO BY THE CHIEF JUSTICE IN THE COURSE OF HIS JUDGMENT. 20

This Affidavit is hereunder printed with its exhibits attached.

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION No. 6 OF 1950

BETWEEN

CIVIL AIR TRANSPORT INCORPORATED *Plaintiffs.*

and

CLAIRE LEE CHENNAULT and WHITING WILLAUER - - *Defendants.* 30

and

S. Y. Ho, W. M. Lau, C. S. Liao, V. L. Zee, H. T. Hang, T. M. Hung, Kwan Wing, Y. T. Chow, C. W. Chen, Ben Fong, L. T. Loh, Robin Lou, C. K. Su, L. T. Wen, M. B. Tang, S. H. Lee, P. C. Cheng, K. S. Chen, S. I. Cheng and S. K. Chang - *Third Parties.*

I, CHEN CHEUK LIN (   ) of Central Air Transport Corporation, Shell House, ground floor, Queen's Road Central, Victoria in the Colony of Hong Kong, do solemnly, sincerely and truly affirm and say as follows:— 40

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 34. Affirmation of Chen Cheuk Lin referred to in the Judgment, *continued.*

1. I am and have been at all material times to this Action the Managing Director of the Central Air Transport Corporation.

2. I have read the affidavit of James J. Brennan made on the 6th day of January, 1949 and the affidavit of Denis Henry Blake made on the 21st day of January, 1950.

3. In reference to paragraph 2 of the affidavit of James J. Brennan I say that the Central Air Transport Corporation is a department of the Central People's Government of the People's Republic of China. I say that from its organisation in 1942 the Corporation had been administered and controlled as a
10 Department of the Ministry of Communications and I say that the Corporation is still a Department of the Central People's Government now controlled and administered by the Civil Aeronautical Administration. I say that the possession, control and management on behalf of the Central People's Government of all the assets, properties, equipment machinery belonging to the Central Air Transport Corporation has been at all material times in myself as Managing Director and in the members of the staff of the Corporation appointed by me and acting under my instructions and orders to retain and maintain possession, control and management of this property as State Property.

4. In reply generally to the affidavits of James J. Brennan and Denis
20 Henry Blake I say that the People's Republic of China is being impleaded before this Honourable Court in respect of its rights to the assets, aircraft, equipment, machinery, funds, bank accounts and other properties or to its use thereof which are State Property of the said People's Republic of China. I respectfully say that I have the right and duty to bring these facts before this Honourable Court in my capacity of Managing Director of the Central Air Transport Corporation and on behalf of the present Third Parties and I further respectfully say that the Central People's Government of the People's Republic of China does not submit in any way to the jurisdiction of this Honourable Court.

5. With reference to the affidavits generally of James J. Brennan and
30 Denis Henry Blake I say in reply as follows :—

(a) I have been the Managing Director of the Corporation from the time of its organisation in 1942 and at all times have appointed staff members, allocated work, and generally directed the affairs of the organisation.

(b) Some time in April 1949 the Administrative Offices of the Corporation were removed to Canton from Shanghai, and for convenience of operation the workshops and equipment were moved to Hong Kong. I gave orders to the members of the staff located in Liberated China to remain at their posts, to maintain installations belonging to the
40 Corporation. Particularly I ordered the maintenance of 42 radio weather stations throughout the territory of China.

(c) On the 1st October, 1949 by process of revolutionary change the Central People's Government was announced to have taken office by proclamation of Mr. Mao Tze Tung, Chairman of the Central People's Government of the People's Republic of China.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 34. Affirmation of Chen Cheuk Lin referred to in the Judgment, *continued.*

(d) The Ministers of State of the erstwhile Nationalist Government and particularly Yen Hsi Shan, who had removed themselves outside the territorial limits of the Republic, were dismissed. New Ministers of State were appointed in their place. These facts were widely published in the English and Chinese press. I say that as a result of these events the authority of the dismissed Ministers had in fact been terminated within the territory of the Republic of China, and I verily believe that any acts of theirs were not recognised thereafter in any Court of the Republic.

6. I say that on the 9th November, 1949 by exercising my right of self 10 determination as a citizen of the Republic and as the Managing Director of the Central Air Transport Corporation I decided that the State Property under my control should continue to be used for the benefit of the people of China. I say that at or about this time attempts were made by officials of the deposed Nationalist Government to force me as Managing Director of the Corporation to transfer the assets and properties of the Corporation to Formosa, to abandon the routes flown in China, discontinue the operation of the air lines and in general to commit such acts as to deprive the people of the Republic of China of public property and the means of air transportation within China and between China and the outside world. 20

7. I was advised and verily believe that by obeying the orders of Tuanmo Chieh, deposed Minister of Communications, and other high officials of the deposed Nationalist Government I would be guilty of criminal offences punishable under the criminal and constitutional laws of the Republic of China with life imprisonment or death. I knew that by so doing I would be depriving thousands of employees of the Corporation in China of their livelihood and that I would be depriving the Republic of China of the public property comprising aircraft, machinery, equipment, weather directional and climate forecasting facilities and an important means of national deferce if I had followed the orders of the deposed Nationalist Government since it had been superseded by the Central 30 People's Government as from the 1st October, 1949.

8. I say that I have and had a duty to protect the State proprietary interests in Public and State Property within the confine of the Republic of China or within the jurisdiction of this Honourable Court against all those whose title is in conflict with the Republic of China through the duly appointed Ministers of State. I further say that on the 9th November, 1949 I accepted the orders of the Central People's Government of the People's Republic of China and went to Peking with the intention of continuing to carry out the objects for which the State Property was to be used under the laws and constitution of the Republic of China, namely, to fly the routes linking the cities of Peking- 40 Shanghai-Tientsin-Hankow-Chungking-Kunming-Mukden-Lanchow and other cities as well as to connect the said cities of China with Hong Kong and Bangkok.

9. I say that on the 12th November, 1949 I received the authorisation from Premier Chou En Lai and assumed the control of all properties and assets of the Corporation throughout China to use and employ such assets and properties for the transport of passengers, mail and cargo by air. A copy of the translation of this authorisation is attached hereto and marked "A".

10. I say on the 6th January, 1950 His Britannic Majesty's Government severed diplomatic relations with the erstwhile Nationalist Government and recognised the Central People's Government as the de jure Government of the Republic of China.

11. I say that on the 13th January, 1950 I received further instructions from the Director of the Civil Aeronautical Administration, Mr. Chung Chik Ping, to take over on behalf of his Administration the assets and properties of the Central Air Transport Corporation and to report to him at the earliest opportunity. I have here a copy of a translation and it is hereto attached and
10 marked "B". By these orders the aircraft, equipment, machinery, and other assets of the Central Air Transport Corporation are requisitioned by the Central People's Government for public purposes.

12. Confirmation of these instructions were also sent from Peking by Cable and Wireless. The cable was sent in ordinary code in which messages in Chinese are sent. I am shown a copy of a translation and it is hereto attached and marked "C".

13. Prior to my departure for Peking as stated in Paragraph 8 of this Affirmation I authorised the Directors of the Business, Finance, Operations Departments and other senior officials of the Corporation to set up an Emergency
20 Committee for the purpose of consultation on measures to prevent the officials of the deposed Nationalist Government from getting control of, sabotaging, damaging, or tampering with the assets and properties of the Corporation or from removing such assets and properties from the jurisdiction of this Honourable Court to Formosa. Among such senior officials were some of the persons joined as third parties in this Action. Other senior officials of the Corporation are not third parties and were not defendants in any other suits before this Honourable Court. Acting under my instructions and in continuous communication with me these senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and
30 absolute possession and control in every respect of all the assets, properties, aircraft and real estate belonging to the Corporation. I say that I gave the said instructions and orders for and on behalf of the Central People's Government. I further say that the wages of all of the employees and staff from the 15th November, 1949 have been paid by the Central People's Government.

14. I am informed and verily believe that the grounding of the aircraft belonging to the Corporation was caused by the acceptance as valid a communication purporting to come from China wherein one Tso Chih Chuen, deposed Director of Civil Aeronautical Administration of the deposed Nationalist Government some time about the 15th November, 1949 temporarily suspended the
40 registration certificates of the said aircraft. I am informed and verily believe that this suspension is invalid since the supersession of the deposed Nationalist Government dates from the 1st October, 1949. I say that I have been informed by Mr. Chung Chik Ping of the Central People's Government that the suspension is annulled and the registration certificates have been restored to efficacy. I say that this fact has been conveyed to the Director of Civil Aviation of the Hong Kong Government who rightly refused to accept registration certificates issued by the Civil Aeronautics Administration of the United States in conflict with existing and valid registration certificates issued by the Sovereign State owning the aircraft as Public Property.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 34. Affirmation of Chen Cheuk Lin referred to in the Judgment, *continued.*

15. I say that whatever rights of ownership there are in the aircraft and properties of the Central Air Transport Corporation within the jurisdiction of this Honourable Court are vested in the Central People's Government of the People's Republic of China as Public Property to be employed solely and exclusively for the use and benefit of the people of the People's Republic of China. I further respectfully submit that this Honourable Court has no jurisdiction over such property which has at all times been in the possession and control of persons holding for and on behalf of the Republic of China.

And lastly, I, the said Chen Cheuk Lin, solemnly, sincerely and truly affirm and say that the contents of this my Affirmation are true. 10

Affirmed etc.

This is the exhibit marked "A" referred to in the Affirmation of Chen Cheuk Lin dated the 27th day of January, 1950.

Before me,

(Sgd.) C. D'Almada e Castro,
A Commissioner &c.

To

General Manager Chi Yi Liu,

General Manager Cheuk Lin Chen, and 20

All Officers and Workmen of

China National Aviation Corporation and

Central Air Transport Corporation.

My hearty welcome to you who rise gloriously to uphold the cause under the guidance of the two General Managers Liu and Chen.

I hereby accept in the name of the Cabinet of the People's Central Government of the Chinese People's Republic the telegraphic request made by you on 9.11.1949, declare the China National Aviation Corporation and the Central Air Transport Corporation to be the property of the Chinese People's Republic and exercise (the right of) control of the said China National Aviation 30 Corporation and the said Central Air Transport Corporation on behalf of the People's Central Government.

I hereby appoint Chi Yi Liu to be General Manager of the China National Aviation Corporation and Cheuk Lin Chen, General Manager of the Central Air Transport Corporation.

I hope all officers and workmen of the said two Corporations remaining in Hong Kong and Specially Liberated Areas will hereafter unite in a body under the guidance of the two General Managers Liu and Chen, heighten their precautions, shatter the secret plots of the reactionaries, bear the responsibility of protecting the assets and wait for further instructions (from me). The (cost of) living for all the officers and workmen shall be borne by the People's Central Government. I again hope that you will stick to the position of patriots, strive to make progress and exert yourselves in the cause of establishing the civil aviation enterprise of New China.

10 Dated the 12th day of November, 1949.

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

(Sgd.) & (Chopped) Chow En-loi.

(Sgd.) Chan Kwok Ying,
Court Translator.
27.1.1950.

This is the exhibit marked "B" referred to in the Affirmation of Chen Cheuk Lin
20 dated the 27th day of January, 1950.

Before me,

(Sgd.) C. D'Almada e Castro,
A Commissioner &c.

For the perusal of
Chi Yi Liu,
General Manager,
China National Aviation Corporation,
Des Voeux Road, Central, and
Cheuk Lin Chen,
30 General Manager,
Central Air Transport Corporation,
Queen's Road Central.

Hereby appoint Chi Yi Liu, General Manager of China National Aviation Corporation, to undertake the responsibility of taking over all assets of China National Aviation Corporation in Hong Kong (and) appoint Cheuk Lin Chen, General Manager of Central Air Transport Corporation, to undertake the responsibility of taking over all assets of the Central Air Transport Corporation in Hong Kong. Apart from sending order by mail (the said Officers concerned) are requested to act in accordance herewith and report as soon as possible.
40 Chung Chik Ping, Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. 13th January 1950. "San"

Initialled KYC

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

(Sgd.) Chan Kwok Ying,
Court Translator.
27.1.1950.

In the Supreme Court of Hong Kong Original Jurisdiction.

No. 34. Affirmation of Chen Cheuk Lin referred to in the Judgment, *continued.*

This is the exhibit marked "C" referred to in the Affirmation of Chen Cheuk Lin dated the 27th day of January, 1950.

Before me,

(Sgd.) C. D'Almada e Castro,
A Commissioner &c.

For the perusal of
Cheuk Lin Chen,
General Manager,
Central Air Transport Corporation,
Queen's Road Central.

10

Hereby appoint Chi Yi Liu, General Manager of China National Aviation Corporation, to undertake the responsibility of taking over all assets of China National Aviation Corporation in Hong Kong (and) appoint Cheuk Lin Chen, General Manager of Central Air Transport Corporation, to undertake the responsibility of taking over all assets of the Central Air Transport Corporation in Hong Kong. Apart from sending order by mail (the said Officers concerned) are requested to act in accordance herewith and report as soon as possible. Chung Chik Ping, Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. 13th January 1950. "San"

Initialled KYC

20

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

(Sgd.) Chan Kwok Ying,
Court Translator.
27.1.1950.

No. 35 Notice of Motion on Appeal.

No. 35.

NOTICE OF APPEAL.

Motion to the Full Court to set aside the Judgment of the Chief Justice on the Trial of the Action in the First Instance.

30

TAKE NOTICE that the Full Court will be moved at 10.00 o'clock a.m. on Tuesday the 21st day of August, 1951 or so soon thereafter as Counsel can be heard, by Hon. Leo D'Almada, K.C., Mr. John McNeill, K.C. and Mr. D. A. L. Wright Counsel for the above-named Appellants for an Order that the Judgment herein of His Honour the Chief Justice given on the trial of this Action on the 21st day of May, 1951 whereby it was adjudged that the Plaintiffs had failed to establish ownership or right to possession of certain aircraft, spare parts, machinery and equipment in Hong Kong and whereby the Plaintiffs' claim was dismissed may be reversed and that Judgment may be entered for the Plaintiffs in the said action.

40

Dated the 20th day of July, 1951.

Wilkinson & Grist,
Solicitors for the Appellants.

N.B.—The 22nd of August is also reserved for the hearing of the appeal.

To The Registrar of the Supreme Court,
and to the Respondents.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 36. Order by the full Court as to service of Motion.

No. 36.

ORDER BY HIS HONOUR MR. JUSTICE TREVOR JACK GOULD AND HIS HONOUR MR. JUSTICE ALWYN DENTON SCHOLES.

(Full Court in Chambers the 11th day of August 1951).

On hearing the Solicitors for the Appellants and upon reading the Affidavit of Basil Norman Cooper sworn herein on the 10th day of August, 1951 IT IS ORDERED as follows :—

1. That the Appellants do have leave to amend the Notice of Motion herein by adding the words "and to the Respondents" at the foot
10 thereof after the word "Court."

2. That service of the Notice of Motion herein be effected by leaving a copy of the said notice at the office of the Respondents at Shell House, Queen's Road Central, Victoria in the Colony of Hong Kong.

3. That the time specified in Section 609 of the Code of Civil Procedure be reduced to 7 days.

Dated the 11th day of August, 1951.

(Sgd.) C. D'Almada e Castro,
Registrar.

(L.S.)

20

No. 37. Affirmation as to servic of Notice of Motion.

No. 37.

AFFIRMATION AS TO SERVICE OF NOTICE OF MOTION AFFIRMED THE 14th DAY OF AUGUST 1951.

I, WONG HOI SHING of 2 Queen's Road Central, Victoria in the Colony of Hong Kong, Clerk to Messrs. Wilkinson & Grist, Solicitors, do solemnly sincerely and truly affirm and say as follows :—

1. On the 13th day of August, 1951 at 3.00 p.m. I attended at Shell House, Queen's Road Central, Victoria aforesaid, the office of the Central Air Transport Corporation within this Colony and served a sealed copy of the Notice of Motion herein dated the 20th day of July, 1951, as amended on the 13th
30 day of August, 1951, by leaving the said sealed copy at the said office. At the same time I left with the said sealed copy Notice of Motion a copy of the Order of Mr. Justice Gould and Mr. Justice Scholes dated the 11th day of August, 1951. Copies of the said amended Notice of Motion and the said Order are annexed hereto and marked "A" and "B" respectively.

And lastly I do solemnly sincerely and truly affirm and say that the contents of this my Affirmation are true.

Affirmed etc.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 38. Affidavit of Basil Norman Cooper in support of Motion to adduce further evidence on Appeal.

No. 38.

AFFIDAVIT OF BASIL NORMAN COOPER SWORN THE 18th DAY OF AUGUST 1951.

I, BASIL NORMAN COOPER of 2 Queen's Road Central Victoria in the Colony of Hong Kong, Solicitor, make oath and say as follows :—

1. I have the conduct of this Appeal on behalf of the Appellants herein.

2. I am advised by Counsel that it will be necessary to adduce fresh evidence at the Appeal by reason of the fact that in the judgment of His Honour the Chief Justice of this Court given on the 21st day of May, 1951 he referred to and relied on a certain Affirmation filed on behalf of the Defendants in interlocutory proceedings which took place in previous Actions, namely O.J. Actions Nos. 5 and 6 of 1950. 10

3. It was not foreseen or contemplated that such Affirmation or such previous proceedings would be referred to or relied on by the learned Trial Judge and therefore on the hearing of this Action no evidence was produced by the Plaintiffs to deal with the material matters referred to in the Defendants' said Affirmation or in such previous proceedings.

4. The fresh evidence it is proposed to adduce viva voce will be furnished inter alios by Ango Tai and Moon Chen and the leave of the Full Court is sought that their evidence be given at the hearing of this Appeal.

Sworn etc. 20

No. 39. Notice of Motion for leave to adduce further evidence.

No. 39.

NOTICE OF MOTION FOR AN ORDER FOR LEAVE TO ADDUCE FRESH EVIDENCE BY WITNESSES ON THE HEARING OF THE APPEAL.

TAKE NOTICE that the Full Court will be moved at 10.00 o'clock a.m. on Tuesday the 21st day of August, 1951 or so soon thereafter as Counsel can be heard, by Hon. Leo D'Almada, K.C., Mr. John McNeill, K.C. and Mr. D. A. L. Wright Counsel for the above-named Appellants for an Order that leave be given to the Appellants to adduce fresh evidence by witnesses on the hearing of this Appeal.

Dated this 17th day of August, 1951. 30

(Sd.) Wilkinson & Grist,
Solicitors for the Appellants.

To the Registrar of the Supreme Court
and to the Respondents.

No. 40.

FURTHER QUESTION TO AND ANSWER FROM FOREIGN OFFICE REFERRED TO IN THE HEARING ON APPEAL BEFORE THE FULL COURT.

No. 40. Further Question to and Answer from the Foreign Office.

(NOT PRODUCED PRIOR TO AUGUST 22ND 1951)

Subsidiary question and answer

Question : Chief Justice would be grateful if he could be further informed whether H.M.G. recognises the People's Government as having become the *de facto* sovereign government or the government exercising effective control on first October, 1949 when it was proclaimed, or any other date between that date and fifth January, 1950, of the parts of China of which the Nationalist Government had ceased to be the *de facto* government.

Answer : H.M.'s Government in the United Kingdom recognised in period between October 1st, 1949 and 5th/6th January, 1950 the Central People's Government was *de facto* Government of those parts of territory of Republic of China over which it had established effective control and if control was established after October 1st, 1949 as from dates when it so established control.

No. 41.

FURTHER EVIDENCE ADDUCED AT THE HEARING BEFORE THE FULL COURT BY LEAVE OF THE COURT ON THE HEARING OF THE NOTICE OF MOTION TO ADDUCE FURTHER EVIDENCE.

(Such evidence being extracted from the transcript of the Proceedings and from the notes of President of the Full Court).

No. 41. Further evidence of Ango Tai adduced at the hearing on Appeal.

EVIDENCE OF ANGO TAI (d)

At present of Taipeh, Taiwan. Have already sworn affidavit in Taipeh in this action. In June 1949 I joined CATC as technical adviser. I came to Hong Kong end May 1949. I remained to end of year. Was in H.K. on 9.11.1949. Chen Cheuk Lin was up to then the President of CATC. On that day he left for Peking taking 2 of the Corporation's aircraft. I was then Manager of Maintenance and Engineering Departments. Prior to his departure Mr. Chen had not given me any indication of his intentions. Were then Secretarial, Operations and Business Department in CATC. 3 departments. My Maintenance and Engineering Department was under Chen and Moon Chen who was Vice President. He was mainly concerned with operations. Up to 9th November I did not hear of any political trouble in the organisation. As far as I know up to 9th November no employee of Central People's Government had stated openly that swore loyalty to Central People's Government. Nor up to then had any one stated to me that he claimed to hold any part of property for Central People's Government. I considered myself as employee of the Company and understood it to be solely controlled by Nationalist Government. A day or two after Chen's departure I understood an Emergency Committee had been formed—11-13 members. I understood it was trying to take over assets of

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 41. Further evidence of Ango Tai adduced at the hearing on Appeal, *continued.*

Company illegally. After Chen C. L. departed I was appointed by Minister of Communications of Nationalist Government on 11/11, as acting President of CATC, replacing Chen C. L. who had been appointed by same Ministry. He was dismissed. I received order from Minister of Communications who had come to Hong Kong from Taiwan about 11th November. I recognise these 2 documents. 1st is order of appointment of self. 2nd also issued by Minister of Communications naming me a member of the Board of Governors replacing C. L. Chen. They have been in my possession since handed to me in Hong Kong. Put in marked Appeal 1 & 2. The chops are the official seal of the Ministry of Communications. The President is the Highest official in the organisation. After my appointment I appointed a Mr. Parker as security Chief of CATC. About 16th November. Object was to prevent the Company's assets being damaged—stolen or otherwise illegally taken by persons not in the Company's employment. This letter is one I issued to Mr. Parker 16/11/1949 appointing him as Chief of Security. I identify my signature. Marked Appeal 3. Parker reported to me regularly. He employed 75 guards. I paid them out of special funds appropriated by the Government for the purpose. About same time I was responsible for putting notices in H.K. papers. About mid-November. About 6 or 7 papers. Included *S.C.M. Post*. Also Chinese newspapers for 3 days. I produce a copy of *S.C.M. Post* of Saturday 19/11/1949 containing the notice I had inserted. *Put in* Appeal 4. It was a notification to employees. All staff conspiring with Chen dismissed etc. About 80-100 came forward. I continued paying them until January 1950. End of January. 80-100 of CATC only. The instruction to keep off the premises was not obeyed by those persons who did not register i.e. the balance of the employees. Whole staff of CATC was about 300-400.

Q. Of those 80 or 100 who remained loyal, were there any in fairly high positions in the Corporation?

A. Yes, there were.

Q. Could you name one or two of them?

A. Mr. Moon Chien.

Q. What was he at that moment?

A. He was then a former executive Vice-President. He was then appointed as the adviser of the new management. Then Mr. Harvey Toy.

Q. What was he?

A. He was Secretary of the Operations.

Q. He was Secretary of the Operations department and that was one of the three divisions of CATC?

A. Yes. And then Mr. Henry Hsu.

Q. Who was . . . . ?

A. Chief of General Affairs.

Q. And anybody else?

A. And the legal adviser of the Company, Mr. Norman Chien.

Q. Now Mr. Parker, during this time, was carrying out his duties, carrying out the instructions you issued to him?

A. Yes.

Q. Was he able to continue carrying out your instructions in regard to the control of the aircraft?

A. He was able. He had been able to take possession of the aircraft of the company up to a time as reported by him that he was no longer able to maintain them and he had to withdraw.

Q. That would be from what date?

A. As I recall it, that was around the 5th and 10th of December.

Wright: He will be giving evidence about this himself, my Lords.

10 Q. I think as a result of his having to relinquish control, the other employees took over, is that right, on Kai Tak?

A. That is what I understood.

Q. Now as a result of the other employees taking control, I think that you, in consultation with Mr. Chen and the minister, instructed your solicitors to obtain an injunction. Is that right?

A. That is so.

Q. Do you recall the date of that?

A. A few days—round the 24th of November.

Wright: My Lords, I want to put in now the injunction obtained in O.J. 20 Action No. 518 of 1949. The Court file is before your Lordships but I have copies of the injunction here.

Q. Mr. Tai, would you just formally identify this as the injunction that was obtained on the 24th November?

A. Yes.

Wright: My Lords, that is a copy of the injunction appearing on the official file. Perhaps you could put that in as an exhibit now?

Q. Now Mr. Tai, did you try to put this injunction into effect?

A. Yes, I did.

Q. What did you do, whom did you give it to, or whom did you instruct to 30 try and enforce this injunction?

A. I was then informed or told to appoint someone of the company to deliver the injunction. . . .

Q. Whom did you appoint?

A. Mr. King.

Q. You appointed him to serve the injunction?

A. Yes.

Q. On the persons?

A. Yes.

Q. Was he able to do that?

40 A. He did finally, at a second time, serve.

Q. Did you know whether the Court Bailiff attempted to enforce the injunction?

A. The Court bailiff refused the first time to go and actually served on the second time as I have mentioned because of lack of police support as promised.

Q. He tried to serve it first? At least you tried to get him to serve it first, is that it? And he was unable to do it?

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 41. Further evidence of Ango Tai adduced at the hearing on Appeal, *continued.*

A. He accompanied Mr. King.

Q. He accompanied Mr. King the first time?

A. Yes. . . . He did not go.

Q. He did not go the first time. Why was that?

A. We were promised police support. . . .

Q. But as that was not forthcoming the bailiff did not serve the injunction?

A. Yes.

Q. So you got Mr. King to serve it the second time?

A. That is so. I understand, also, accompanied by the bailiff then the second time. 10

Q. Now the following day, that is the 25th, I think that the persons named as defendants got what I call a counter-injunction, a preservation order, do you recall that?

A. Yes.

Q. (That is on the same file, my Lords). I want you to identify that as the counter-injunction obtained by the defendants. That was served on you, wasn't it?

A. Yes.

Q. It ordered you not to remove from the premises the property affected by your injunction. You see that in para. 2: that the plaintiffs (that is your Corporation) do not remove from the premises concerned the property affected by the injunction obtained by you. Now when that injunction was obtained, I think that on the advice of your solicitors you did not make any other active effort to regain physical possession and control of the assets at Kai Tak? 20

A. That is right.

Q. You awaited the outcome of the legal proceedings?

A. Yes, we were told to await the legal procedure.

Q. By your solicitors?

A. Yes. 30

Q. Actually I think the position is quite clear. Your own, the injunction obtained by you, by your Corporation, was never obeyed?

A. That is correct.

No. 42. Evidence of William Robert Parker adduced at the hearing on Appeal.

No. 42.

EVIDENCE OF WILLIAM ROBERT PARKER.

Witness: WILLIAM ROBERT PARKER (from the witness-box).

(Witness sworn in the witness-box. Examination by Wright:)

Q. By whom were you employed at the moment, Mr. Parker?

A. Civil Air Transport Incorporated.

Q. Civil Air Transport Incorporated, and your appointment in that Company? 40

A. Chief of Security.

Q. You know Mr. Ango Tai—the first witness?

A. Yes.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 42. Evidence of William Robert Parker adduced at the hearing on Appeal, *continued.*

Q. Do you remember whether, during the month of November, he appointed you—in November 1949—to any position or issued you any instructions?

A. Yes, I have full recollections of such.

Q. What date was it please?

A. November the 16th.

Q. Do you identify that letter? (Exh. No. Appeal 3).

A. I identify this as a letter given to me. Covered my appointment by Mr. Ango Tai.

Q. Did you give anybody a copy of your letter of appointment?

10 A. Copy of the letter of appointment or rather a letter covering that letter of appointment was given to Mr. Mackintosh, Commissioner of Police.

Q. Who gave it to him?

A. I gave it to him personally.

Q. I see. Was that the same day or the next?

A. The following day.

Q. And what were your instructions from Mr. Ango Tai?

A. My instructions from Mr. Ango Tai were given to me on the afternoon of the 16th November after I had accepted the appointment and were to the effect that I shall get together a number of men to be used at Kai Tak 20 Airport as guards from a security point of view.

Q. Over what property?

A. They were to take over the guarding of aircrafts which were parked at Kai Tak Aerodrome.

Q. And belonging to whom?

A. Formerly the property of CATC and also CNAC.

Q. And any other property, any other assets?

A. Assets which were contained in the workshops at Kai Tak and also assets which were stored in various buildings in Kowloon.

Q. I think your appointment was, although you haven't stated it yet, it 30 appears in the letter as security officer—that is your appointment?

A. That is correct.

Q. Well now, this is on the 16th November. Did you get to work straight away?

A. The first number of men were posted by me personally at Kai Tak between 11 p.m. and 12 midnight on the 16th.

Q. How many men?

A. As near as I can recollect at present, 14 men. Definitely not less than 12.

Q. And where did you post them, what were the instructions you gave them?

A. Those men were posted on patrol duty covering the complete area of Kai 40 Tak Airpórt whereon the planes in question were parked.

Q. And what about the. . . . That particular night had you anyone looking after the machinery etc.?

A. From the night of the 16th onwards, we have men posted for observation purposes and with the knowledge of the police at various points such as Diamond Hill or Canton Road.

Q. Yes, but I am really concerned with the aerodrome.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 42. Evidence of William Robert Parker adduced at the hearing on Appeal, *continued.*

A. Yes, there were 11 points altogether and they were all covered.

Q. Did you meet with any opposition posting these guards?

A. None whatsoever.

Q. Did any of the other employees, any of the employees of the CATC, interfere with you?

A. Never on any occasion.

Q. The following day did you employ more men, that is, on the 17th?

A. On the 17th, with the assistance of the police, I was able to obtain on their recommendation a number of men which brought the total to 75.

Q. And what did you do with them? 10

A. 70 of those men were used to cover the airport in three shifts for 24 hours. The other 5, specially picked men, were put at the airport for supervision purposes.

Q. How were they able to get in and out of the airport. Did they get the relevant passes?

A. They were put on the airport by me with the approval of the Commissioner of Police and also Mr. Hamilton who was then in charge of Kai Tak Airport.

Q. Did they have any passes?

A. They had a temporary pass. 20

Q. To what extent had they control or possession of these aircraft and spare parts?

A. Well, from my point of view, I posted the men at each end of the parking lot and we had patrols moving amongst the aircraft—between the aircraft I should say—from point to point. These men were checked continually during the day and night.

Q. How long had you these men on Kai Tak. How many days?

A. As I said before, we posted the first number of men during 11 p.m. and 12 midnight on the 16th and I maintained them there approximately 4 days. 30

Q. Was there any interference by the employees of CATC on the airport?

A. During that period, no opposition whatsoever.

Q. When eventually did you take them away and why did you have to take them away?

A. It was either between the forenoon of the 21st November or the forenoon of the 22nd—I am not definitely certain which day, I was called by the Commissioner of Police who informed me that he decided the guards posted by me at Kai Tak must be withdrawn. The Commissioner of Police at the same time instructed me to call on Mr. Todd, Secretary of Chinese Affairs. 40

Q. Did you have any interview with him?

A. I had an interview with Mr. Todd early in the afternoon.

Q. And as a result of that interview. . . . ?

A. As a result of that interview, all the guards, special guards rather, were withdrawn, from Kai Tak by my instructions, the last leaving Kai Tak not later than 10 p.m. the same day.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 42. Evidence of William Robert Parker, *continued.*

Q. And after that what happened to the aircraft and these spare parts on Kai Tak, do you know?

A. After that, they were placed under the control of people appointed by the other parties.

Q. Who were placed not by you?

A. I beg your pardon?

Q. Placed under the control of persons appointed by the other party?

A. Not by me. My people were then withdrawn.

Q. Not with your approval?

10 A. Not with my approval.

No. 43.

EVIDENCE OF MOON-FON CHIEN.

No. 43. Evidence of Moon-Fon Chien.

MOON-FON CHIEN : Sworn : Xn by Mr. Wright.

Q. I think your present residence is in Taipeh, Taiwan?

A. Yes.

Q. And you joined the CATC, Central Air Transport Corporation, in December 1945?

A. Yes.

Q. As Operations Manager?

20 A. Yes.

Q. And in May 1949, you were appointed executive Vice-President of CATC?

A. Yes.

Q. And you were appointed to that position by the Ministry of Communications?

A. Yes.

Q. You came to Hong Kong when in 1949, Mr. Chien?

A. In May, 1949.

Q. How long did you stay in Hong Kong?

A. I stayed up to December 6th, 1950.

Q. So that's well over a year and a half after you arrived here?

30 A. Yes.

Q. I think that it was on your instructions, issued towards the end of July, 1949, that Mr. Ango Tai removed the technical equipment of the Corporation to Hong Kong.

A. That is correct.

Q. It appears to me, there is evidence already given by Mr. Ango Tai on his Affidavit that it was this gentleman Mr. Chien who instructed Mr. Ango Tai in July 1949 to remove the technical equipment of the Corporation to Hong Kong and that move was completed by the 1st September, 1949?

A. Yes.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 43. Evidence of Moon-Fon Chien, *continued.*

Q. You knew the then President of the CATC, Mr. C. L. Chen? You know him and you knew him?

A. Oh yes.

Q. You were in Hong Kong in October, 1949?

A. Yes.

Q. Do you remember having a conversation with Mr. C. L. Chen towards the end of October?

A. Yes.

Q. And did it relate to the changing political scene in China?

A. It related to that. 10

Q. Yes, well what was said between you?

A. He wanted to know what were my reactions to what we were going to do when the United Kingdom recognised the People's Government.

Q. Was he settled or fixed in his own mind as to what his course was going to be then?

A. He didn't give me any indication then.

Q. He gave you no indication. What date was that approximately?

A. Towards the end of October approximately around the 24th.

Q. Did you give him any indication of what your intentions were?

A. Well at that time I didn't give him any indication but I certainly told him that it wasn't my idea—things like that. 20

Q. What was not your idea?

A. My idea was that we couldn't turn over since the Ministry of Communications appointed and trusted us in such a position.

Q. Did you say that he didn't give you any indication of what he intended to do?

A. Yes.

Q. Did you gather from what he said to you that he had made up his mind or not what to do?

A. No. 30

Q. He gave no indications of his intentions one way or the other, is that right?

A. He didn't gave me an indication from my conversation whether he was taking orders from them or he was going to, all he wanted to know is what we were going to do if recognition did come.

Q. You know that he went to Peking on the 9th November?

A. After he left.

Q. Had he discussed the matter with you before he left? Did he tell you that he was going to go?

A. Well . . er . . I had no assurance that he was going.

Q. Did you know of anybody in the organisation who had come out into the open before the 9th November and said that they were going to side with the Central People's Government? 40

A. No.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 43. Evidence of Moon-Fou Chien, *continued.*

Q. In your appointment you control the Operations side of the CATC?

A. Yes.

Q. And you dealt specially with the pilots of the Corporation?

A. Yes.

Q. How many pilots were there approximately?

A. We had over 30 first pilots, what we call "captains."

Q. Did any of them go over and side with the Central People's Government side?

A. Only 2 of them who flew the two aircraft out of Kai Tak.

10 Q. Those were the only two that went over.

A. They were the only two that had left.

Q. Mr. Ango Tai had said that between 80 or 100 of the then employees of the CATC did not go over—between 80 and 100.

A. That's right.

Q. Are the pilots that you mentioned in addition to those figures?

A. Yes, they are additions to the 80.

Q. They are additions to the . . .

A. They are over 20, additional to the 80.

Q. Now you recall that the CATC obtained an injunction against certain em-
20 ployees of the Corporation in November. Do you recall that?

A. Yes, I recall that.

Q. Now from the time that C. L. Chen went to Peking up to the time that this injunction is obtained, were you in constant touch with Mr. Ango Tai?

A. Yes, I was.

Q. And Mr. Tuanmoh Chieh?

A. Yes.

Q. He was the then Minister of Communications of the National Government here in Hong Kong.

A. Yes.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

Q. And you recall Mr. Ango Tai inserting notices in the newspapers in Hong Kong?

A. Yes.

Q. Issuing instructions to the employees of the Corporation?

A. Yes, I recall that.

Q. Were those instructions obeyed?

A. No.

No. 44. Transcript of Proceedings on Appeal.

No. 44.

TRANSCRIPT FROM THE WIRE-RECORDER OF THE RECORDED PROCEEDINGS ON THE HEARING OF THE ABOVE APPEAL, ON 21st & 22nd AUGUST, 1951. 10

Coram: Gould, S.P.J.
& Scholes, J.

Mr. D'Almada:

My Lords, I appear with my learned friends Mr. McNeill and Mr. Wright on the instructions of Mr. Cooper of Messrs. Wilkinson & Grist on behalf of the appellant in this case. It is an appeal from a judgment of my Lord the Chief Justice, Sir Gerard Howe, dismissing the claim of the Plaintiff, appellant, in this case and, as your Lordships would have noticed in your file, there is to be heard before the appeal proper a notice of motion for leave to adduce further evidence. I take it your Lordships will want me to deal 20 with that now before I go any further with my main argument.

Gould J.: Yes.

D'Almada:

As your Lordships know, previous to the bringing of this action an Order-in-Council was made and this application for leave to adduce further evidence at the hearing of the appeal arises by reason of the interpretation placed upon a certain section of that Order by my Lord the Chief Justice. If your Lordships have the order before you, I would ask you to look, for the purposes of this application, at Section 1, subsection (2) of the Order. Your Lordships will find that in File D at pages 17 and following. His Majesty, 30 your Lordships see by this Order, directed that (and here I read Section 1, subsection 2) "if a defendant in any such action or other proceedings fails to appear or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall notwithstanding any rule enabling it to give judgment in default in such case enquire into the matter fully before giving judgment." That section, my Lords, fell to be interpreted by my Lord the Chief Justice and he came to the conclusion, as is evidenced from his judgment, that by reason of that section he was entitled to look at all the previous proceedings in connection with this and other kindred matters. That your Lordships will find in his judgment at p.102 of the 40 records prepared for your Lordships. File A, my Lords, page 102 and the paragraphs to which I refer your Lordships are the penultimate and the last paragraph on that page and then we go on overpage. He says, my Lords, in the second last paragraph on that page:

" This Court is directed that judgment in such an event shall not go by default and that this Court shall 'enquire into the matter fully before giving judgment.'

These words are difficult to interpret. It is not possible for this Court to consider what defences the defendant might have raised, whether in fact or in law, had the foreign sovereign State appeared that would be a matter of speculation but in my opinion it must mean more than hearing the case for the plaintiff in full. I have interpreted this subsection as requiring this Court, in the circumstances of this particular proceeding, to go outside an examination of the plaintiff's case and to consider the other suits and applications which have been decided in these Courts relating to the subject matter of these proceedings to which the present plaintiff Corporation was a party, and the proceedings on appeal in the Full Court. As I have said, the judgment in the application for the appointment of receivers and the judgment of the Full Court on appeal were, by consent, related to aircraft, the property of the China National Aviation Corporation which is not a defendant to the present proceedings......"

In pursuance of that decision, my Lords, you will see on page 107 of the record that Sir Gerard Howe looked at an affidavit filed by Mr. Chen Cheuk Lin in O.J. Action No. 6 of 1950 from which he sets out in his judgment three long paragraphs. Those paragraphs read as follows:

" I say that from its organisation in 1942 the Corporation had been administered and controlled as a department of the Ministry of Communications and I say that the Corporation is still a Department of the Central People's Government now controlled and administered by the Civil Aeronautical Administration. I say that the possession, control and management on behalf of the Central People's Government of all the assets, properties, equipment machinery belonging to the Central Air Transport Corporation has been at all material times in myself as Managing Director and in the members of the staff of the Corporation appointed by me and acting under my instructions and orders to retain and maintain possession, control and management of this property as State Property."

" I further say that on the 9th November, 1949, I accepted the orders of the Central People's Government of the People's Republic of China and went to Peking with the intention of continuing to carry out the objects for which the State Property was to be used under the laws and constitution of the Republic of China, namely to fly the routes linking the cities of Peking-Shanghai-Tientsin-Hankow-Chungking-Kunming-Mukden-Lanchow and other cities as well as to connect the said cities of China with Hong Kong and Bangkok."

" Prior to my departure for Peking as stated in Paragraph 8 of this Affirmation I authorised the Directors of the Business, Finance, Operations Departments and other senior officials of the Corporation to set up an Emergency Committee for the purpose of consultation on measures to prevent the officials of the deposed Nationalist Government from get-

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

ting control of, sabotaging, damaging, or tampering with the assets and properties of the Corporation or from removing such assets and properties from the jurisdiction of this Honourable Court to Formosa. Among such senior officials were some of the persons joined as third parties in this Action. Other senior officials of the Corporation are not Third Parties and were not defendants in any other suits before this Honourable Court. Acting under my instructions and in continuous communication with me these senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and absolute possession and control in every respect of all the assets, properties, aircraft and real estate belonging to the Corporation. I say that I have the said instructions and orders for and on behalf of the Central People's Government. I further say that the wages of all of the employees and staff from the 15th November, 1949 have been paid by the Central People's Government."

And following on that, my Lords, there is set out the letter of appointment by which the Premier of the Central People's Government appointed Mr. Chen Cheuk Lin General Manager. My Lords, it will be our submission in the course of the hearing of this appeal proper that my Lord the Chief Justice was wrong in concluding that those words in Section 1, subsection 2 of the Order-in-Council enabled or authorised him to go outside the evidence adduced in this case and to consider such matters as he did in fact consider. The point at the moment, my Lords, is this, that at the hearing of the action the plaintiffs were not informed by my Lord the Chief Justice that he was going to do so. Had he so told us either at the hearing or by summoning counsel before him before any question of delivering judgment in this case, then an opportunity would have been given to the plaintiffs to meet this evidence. As it is, the first we heard of it, my Lords, was when judgment was handed down. It is our submission therefore, my Lords, that this is really akin to a matter arising ex improviso, so to speak, in the course of the hearing and to which leave would be given to call rebutting evidence had the matter been brought to the attention of counsel before the conclusion of the case. That not being so, it is our submission that it is within the discretion of this Court and the only proper exercise of that discretion to allow this evidence to be given now, not only on general principles as to what evidence is admissible in the Court of Appeal, but also by virtue of Section 4, subsection 1(a) and (b) of the Order-in-Council.

Section 4 (1), my Lords, reads thus:

"4. (1) For the purpose of an action or other proceeding or reference or for the purpose of any appeal which may be brought in accordance with section 3 of this Order, a Court shall have power—

(a) to hear evidence, to summon witnesses, to take evidence on affidavit and to call for production of documents;

(b) (this is not really as important as (a)) to give such directions as it shall think fit to enable justice to be done, and, in particular, but without prejudice to the generality of the foregoing power, to give directions...... "

Now, my Lords, I deem it convenient that this matter should be dealt with here and now on the basis that your Lordships will not decide until you have heard further argument on the point whether or not the Chief Justice was right in coming to his conclusion with regard to the ambit of the section under which he did in fact consider evidence which was not adduced before him. I respectfully submit that is really the more convenient method of dealing with the case so that what your Lordships should do now, I submit, is this, admit our evidence as against the evidence looked at by my Lord the Chief Justice and later the question will fall to be argued whether or not he was right in
10 admitting that evidence. If he was right, then you would have the evidence in rebuttal before your Lordships. If he were wrong then of course you would strike out that evidence upon which he relied as well as the evidence we called in rebuttal perhaps. I may mention to your Lordships at this stage, that the point that my Lord the Chief Justice was wrong in coming to the conclusion at which he arrived in connection with the words "shall enquire fully" will be argued in the course of the appeal proper by my learned friend Mr. McNeill together with other points of what I, for want of a better term, call the points of municipal or civil law while I deal with the international law applicable to this case. I submit, my Lords, there is no question whatsoever that in the
20 circumstances of the case, unprecedented circumstances indeed, because I have never heard of a case, and you would not in the absence of the Order-in-Council such as we have in this case heard of it, a case in which a judge had gone outside the evidence, come to a certain conclusion and then presented his judgment upon that evidence plus such evidence as was led before him. In these circumstances, quite clearly my Lords on the broadest general principles as well as on this section 4 of the Order-in-Council, I submit that this evidence should now be admitted.

Gould J.: Mr. D'Almada, it is your submission that no notices at all was given by the learned Chief Justice of his intention to rely on any parts of
30 the records of earlier cases?

D'Almada: So far as I can see from the records, my Lord, and from my own recollections.

Gould J.: I understood that there was at least one passage in which he asked learned counsel whether he would be considered justified in referring to admissions made in the previous cases?

D'Almada: That may be so, my Lord. But then, of course, the difficulty there is this, Counsel in reply to that said "No." In addition, of course, there is this point to be considered, how we shall know what his Lordship is going to look at? You see, he only had a roving commission over the whole
40 of the previous proceedings and it is very difficult my Lord......

Gould J.: He was referring to the judgments and of course the judgments of both courts contain this particular affidavit set out.

D'Almada: Yes. Judgments, my Lord, in connection with the particular proceedings before the Court at the time. This is an entirely different proceedings. And, my Lord, not only on the judgments but also on the evidence led in those proceedings.

Gould J.: But was it not agreed in the Court of Appeal or in the Full Court previously that those were the facts on which the Court could rest its decision? It may have been agreed, for the purposes of the argument—I don't
50 know.

D'Almada: For the purposes of the argument in the receivership proceedings certain facts were agreed. Subsequently when this action was started, my Lord, further evidence became available and therefore the position is different. And I would have no quarrel with what your Lordship said if in fact my Lord the Chief Justice had said, "Now Sir Walter Monckton—he was then addressing the Court in this case, my Lord—I propose to look at this, that and the other" in which event of course we would have been utterly wrong in those circumstances to ignore the evidence and merely rest our case on a submission that the Chief Justice was wrong in proposing so to do. That is not the position, my Lord, and it would have been impossible, my Lord, physically to forestall any possible looking at the evidence by my Lord the Chief Justice. I didn't know what he was going to look at. You couldn't produce evidence in rebuttal by anticipation, so to speak, without knowing what that evidence is going to be. Apart altogether, as I am reminded by my learned friend Mr. Wright, is the fact that all these statements set out for the purposes of one proceeding are not necessarily binding upon the parties in another proceeding.

Gould J.: Those proceedings were between, in essence, the same parties?

D'Almada: That is so, my Lord.

Gould J.: One of the parties did not appear before the Chief Justice in this case. I would imagine that you would regard any intimation from the Chief Justice to go outside to include all of the evidence given by the other side......

D'Almada: My Lord, with respect, that would have made the case almost interminable because we would have had to meet every possible point which might be looked at by the learned Chief Justice.

Gould J.: I agree.

D'Almada: I think in the circumstances, my Lord, by reason of the fact that he didn't state definitely that he was going to look at that evidence, there is no question but that in the proper exercise of his discretion and under the powers conferred upon this Court by the Order-in-Council this evidence should now be admitted.

Gould J.: Well I think that you should at this stage state what portion or portions of the affidavit you take exception to and indicate what the nature of the evidence you propose to call.

D'Almada: As your Lordships please. Would it suit your Lordships if my learned friend Mr. Wright dealt with that aspect of the matter? He is handling the evidence on this part of the case.

Gould J.: Yes.

Wright: My Lord, we take particular exception to what Mr. C. L. Chen stated in the last paragraph of his affirmation as set out in the judgment of my Lord the Chief Justice. That appears on the top of p.108 of File A. He says there, Mr. Chen, that:

> "Acting under my instructions and in continuous communication with me these senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and absolute possession and control in every respect of all the assets, etc."

My Lord, that is not the case, and we have evidence here which we propose to call if your Lordships grant permission to show that far from Mr. Chen and those persons who were taking instructions from him effecting complete and absolute possession and control of the aircraft and spare parts which are, after all, the subject matter of these proceedings right up to and including 22nd November which was quite some time after Mr. Chen departed for Peking, we were in control of the aircraft and the assets out on Kai Tak Airfield. We also take particular exception to the statement contained in the first paragraph of that affidavit as set out in the judgment. That is contained on
10 p.107 of File A. "I say that from its organisation etc." If your Lordships will glance at the second sentence in that paragraph it says "I say that the possession, control and management on behalf of the Central People's Government of all the assets, properties, equipment, machinery belonging to the Central Air Transport Corporation has been at all material times in myself as Managing Director." Now, my Lords, there Mr. Chen is saying that at all material times, which no doubt includes the period starting on the 1st of October, he held possession, control and management on behalf of the Central People's Government. We will lead evidence to show that nothing of the sort occurred at all; that up to the 9th November, the date that he departed for
20 Peking, there was never a breath from him or from anybody else that he was holding, managing and controlling these assets on behalf of the Central People's Government. Now, my Lords, when that affidavit was filed, we take exception to the whole of the affidavit but I am pointing out the two portions to which we take particular exception and two portions which were incorrect. That particular affidavit was directed in interlocutory proceedings to the actual possession and control and the wrongfulness or the rightfulness of that particular possession and control, that is, the quality of the possession and control was really immaterial because the main point at issue was that of impleading and once possession and control was shown, it didn't matter whether that
30 possession and control was wrongful or otherwise. But in this particular case before your Lordship it is a very important issue indeed as to whether the possession and control was rightful or wrongful because impleading has been eradicated by the Order-in-Council. Now the purpose of the additional evidence which we intend to adduce before your Lordships is this, that from the material period, the first of October, up to the date of recognition, the National Government of the Republic of China was the de jure recognised Government and, in the eyes of the Courts here at the time, the only persons entitled to possess and control these assets legally were those people who were taking their instructions and orders from the de jure recognised Government
40 and our evidence will show that the properly appointed officers of the Corporation and so properly appointed by the de jure recognised Government who were here in Hong Kong during that period and that their instructions properly given were ignored by the persons who, at a certain point during this period, proclaimed that they were holding for and on behalf of the Central People's Government as yet unrecognised. It is important to bring that aspect of the case before the Court in these proceedings, my Lords, because whether the possession held by those people holding for and on behalf of the People's Government was right or wrong is the important issue. It didn't matter from the point of view of the interlocutory proceedings because the impleading could
50 be availed of.

Gould J.: Was that so put before the Chief Justice in the lower Court?

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

Wright: No, it was not because we didn't realise that he was going to avail himself of this evidence and that point was not raised at all, my Lords. He has availed himself, my Lords, of a finding as regards possession which did not take into account and did not require to take into account the wrongfulness or rightfulness, the quality of the possession. That is an important point now and the reason it is important is because the Chief Justice, by availing himself of this particular evidence, has put it in issue and it is only right from the point of view of justice, my Lords, that there should be evidence on the record to meet this to show that those who were properly appointed by the then de jure recognised Government issued instructions which should have been obeyed but were ignored. The three witnesses whom we propose to call, my Lords, if your Lordships grant us leave, are Ango Tai, who was the principal officer of the Corporation here in Hong Kong at the material time and also Mr. Moon Chien who was also a high official in the organisation and a governor on the Board of Governors of the CATC at the time, and also on the point as to whether we had effective control and possession right up to the 22nd November, we intend to call a Mr. William Parker, who was responsible for the men out in Kai Tak who did hold possession and control for us on the airfield.

Gould J.: Up to the 22nd November?

Wright: Yes, up to the 22nd November. That shows that Mr. C. L. Chen's affidavit is utterly wrong when he says that they had complete and absolute possession and control in every respect at all material times.

(N.B. From this point and for the next 23 minutes, owing to a mechanical defect, no verbatim recording of the proceedings is available. The Court of Appeal orders this lacuna to be filled by a transcript of the notes of the Appeal Judges. See latter at end of this record).

(Here follows the evidence of Ango Tai already extracted and appearing at pp. ... of this record and the evidence of William Robert Parker appearing at pp. ... of this Record).

D'Almada: May it please your Lordships. My Lords, this appeal arises out of the learned Trial Judge's dismissal of the claim of the Plaintiffs, appellants, which you will find set out in the document No. 5 of File A prepared for your Lordships in this matter. That, my Lords, is the Statement of Claim which sets out:

> "1. The Plaintiffs are a Corporation incorporated under the laws of the State of Delaware, United States of America and registered as a Foreign Corporation under the laws of Hong Kong.
>
> 2. The Defendants at all material times were an unincorporated commercial enterprise operated and controlled by the National Government of the Republic of China. The said Government was the sole owner of the assets of the Defendants.
>
> 3. By a Contract reduced into writing and concluded on the 12th day of December 1949 the National Government of the Republic of China for the consideration of U.S.$1,500,000:00 sold to the partnership firm of Chennault and Willauer all the assets of the Central Air Transport Corporation including forty aircraft situated on the airfield at Kai Tak in the said Colony of Hong Kong together with all spare parts, machinery and equipment for use in relation thereto situated in the said Colony."

The Statement of Claim then goes on to deal with the contract whereby the partnership sold the assets together with the assets of the China National Aviation Corporation to the Plaintiffs, that is, the CATC, for the consideration of U.S.$3,900,000:00. Paragraph 5:

> "5. By reason of the foregoing the Plaintiffs are the sold owners and entitled to possession of the assets referred to in paragraph 3 above situated in the Colony of Hong Kong."

It then refers to the Order-in-Council in these terms:

> "6. By virtue of the Supreme Court of Hong Kong (Jurisdiction) Order in Council 1950 and directions made by His Excellency the Governor thereunder the aircraft, spare parts, machinery and equipment referred to in paragraph 3 above are detained by the Director, Civil Aviation Department pending the determination of ownership or right to possession thereof."

> " The Plaintiffs' Claim:—
>
> A declaration that the plaintiffs are the owners of the aircraft, spare parts, machinery and equipment mentioned in paragraph 3 hereof and/or that the plaintiffs are entitled to possession thereof."

I am not going to trouble your Lordships with any reference to the interlocutory proceedings before the trial of this action nor do I think it necessary, subject to anything which may fall from your Lordships, to refer to any of the evidence; suffice it for my purpose, my Lords, in this appeal to refer to you the various passages in the judgment of the learned Trial Judge, after which I shall deal with the law and endeavour to convince your Lordships that the learned Trial Judge was wrong in the conclusion at which he arrived and which resulted in the dismissal of the claim. Before going on to the judgment itself, however, I think it necessary to draw to your Lordships' attention the Order-in-Council and, in particular, section 1(1) of that Order which reads:—

> "1(1). In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of coming into operation of this Order, it shall not be a bar to jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State."

In connection with that, my Lords, your Lordships know the cardinal principle of sovereign immunity which may be summarised thus; Once a foreign sovereign State claims the possession of certain property either of itself or through somebody else then, however that possession was obtained, even though it might be in breach of our criminal law—and I am dealing of course with property within our jurisdiction—the Courts will not enquire into the matter. And, if I may use a colloquialism, my Lords, the attitude of the Court is "Hands off." That, my Lords, is the ordinary rule. Thus by Section 1(1) of this Ordinance, impleading is expressly excluded from any consideration in this action and in this appeal and the Court is thereby enabled to examine into the nature of the possession and control, if any, of persons who purport

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

to hold, or purported to hold, the property on behalf—in this case—of the Central People's Government. Another document to which I think I should refer your Lordships before dealing with the case more particularly is the questionnaire which your Lordships will find set out in extenso in the judgment of the learned Trial Judge at pages 103-105. On those pages of the judgment which set out the questions put to, and the answers given by, the Secretary of State and the questions being:

Q. "1. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the de jure Government of China?"

And it may be more convenient, my Lords, instead of reading all the questions and then the answers to refer after each question to the answer. The answer to this question (1) my Lords, is overpage:

A. "1. H.M. Government in the U.K. Does not recognise Nationalist Government (Republican Government) as de jure Government of Republic of China."

Q. "2. If not, when did His Majesty's Government cease so to recognise that Government?"

A. "2. Up to and including midnight January 5th/January 6th 1950 H.M. Government recognised Nationalist Government as being de jure Government of the Republic of China and as from midnight January 5th/January 6th 1950 H.M. Government ceased to recognise former Nationalist Government as being de jure Government of the Republic of China."

Q. "3. Is the Central People's Government or any other Government recognised as the de jure Government and, if so, from what date?"

A. "3. As from midnight of January 5th/6th 1950 H.M. Government recognised Central People's Government as de jure Government of the Republic of China."

Q. "4. Has the Republican Government ceased to be the de facto Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?"

A. "4. H.M. Government recognise Nationalist Government has ceased to be de facto Government of the Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from date on which it ceased to be in effective control of those parts."

Q. "5. Is any other Government recognised as the de facto Government and, if so, from what date?"

A. "5. H.M. Government does not recognise any governments other than Central People's Government of the People's Republic of China as de facto Government of the Republic of China. Attention, however, is invited to the 2nd sentence in answer to question 4."

Having just read that sentence I don't propose to read it again, my Lords.

Q. "6. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-a-vis China?"

A. "6. In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory.

On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to the Republic of China. On July 26th 1945 at Potsdam, the heads of the Government of United States of America, the United Kingdom and the Republic of China reaffirmed "The terms of Cairo Declaration shall be carried out.' On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied Powers concerned, Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of the Republic of China. At present, actual administration of the island is by Wu Kou Cheng, who has not, so far as H.M. Government are aware repudiated superior authority of Nationalist Government.

I am advised that the effect of recognition by H.M. Government as stated in answer to question 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of evidence before it."

The appellants' case, my Lords, or rather the plaintiffs' as it then was, you will find summarised on the same page of the judgment immediately below what I have just read. You will see that the judgment says:

" The case for the plaintiff, put with great ability by Sir Walter Monckton, K.C. was based on three propositions:—

(a) That the Central Air Transport Corporation was wholly owned and controlled by the Nationalist Government (then in Formosa) and that on the 12th December, 1949, there was a valid sale by that Government to the partnership, General Chennault and Mr. Willauer, a condition being that the partnership was to organise a Corporation to which the physical assets were to be transferred;

(b) that the partnership duly transferred the assets by a sale valid in American law to the plaintiff Corporation; and

(c) that a change of Government is by succession and not by title paramount and accordingly the Nationalist Government was empowered to enter into this transaction, still being recognised de jure by His Majesty's Government, and that the doctrine of retroactivity did not apply to this transaction."

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

My Lords, on this judgment of Sir Gerard Howe, no question arises as to the validity of the contract between Messrs. Chennault and Willauer and the plaintiffs and all I need say with regard to that is to remind your Lordships that that aspect of the case was dealt with in the evidence of Mr. Marias given before the learned Trial Judge in which, to summarise the matter, he said that this is a valid sale put through according to American law by a Bill of Sale whereas by our law a deed would be required. With regard to the contract between the Nationalist Government and General Chennault and Mr. Willauer, I ask your Lordships to look at p.106 of the judgment, the second paragraph beginning on that page dealing with the matter right down to the next three paragraphs: 10

> "The document comprising the contract is a letter from the partnership, dated the 5th December, 1949, and addressed to the Minister of Communications of the Nationalist Government at Taipeh in Formosa and bears the acceptance of a person styled 'the Vice-Minister of Communications and concurrently Chairman of the Board of Directors of Central Air Transport Corporation'' which is dated 12th December, 1949. There is another acceptance signed by a person styled the Deputy Secretary-General of Executive Yuan and concurrently Chairman of the Board of Directors of China National Aviation Corporation and dated the 13th December, 1949. 20
>
> There is also a document dated the 12th December, 1949, signed by Yen Hsi Shan 'Premier concurrently as Minister of Communications' ordering one Liu Shao Ting to take over the duties of Chairman of the Board of Governors of Central Air Transport Corporation in conjunction with his other duties: it is this Liu Shao Ting who signed the endorsement on the partnership offer of the 5th December, 1949, on behalf of the Central Air Transport Corporation.
>
> A further letter dated December 12th, 1949, addressed to the partnership signed by Premier Yen Hsi Shan for the Nationalist Government: notifies the acceptance of the partnership offer, but the plaintiff Corporation bases the sale on the letter of the 5th December, 1949, as endorsed on the 12th December of that year. Finally, the representative of the Nationalist Government in London, on the 28th December, 1949, notified the then Foreign Secretary of the transaction. It was stated for the plaintiff Corporation that Chinese law was to govern this transaction while it was agreed that the Municipal law of Hong Kong governed any legal proceedings relating to the aircraft grounded there." 30

The only comment I have to make at this stage upon the contracts between the Chinese Government and Messrs. Chennault and Willauer, my Lords, is by way of a reference to the third-last paragraph of the judgment at p.112 in which after reviewing the position the learned Chief Justice finds that this was, in a sense, an executory contract and he finds also that by reason of the circumstances, into which of course I shall examine very much more carefully later in the course of my argument, the Central People's Government had reprobated the contract. Any question, my Lords, with regard to the contract being other than a complete contract will be dealt with, if necessary, by my learned friend 40

Mr. McNeill, suffice it for me to say at this moment this, that we do not admit that it was an executory contract. It is our case that by this contract the property in the aircraft in Hong Kong passed to the partnership. The consideration was the promissory notes which were made, and paid over, handed over; the fact that those promissory notes were not then due, possibly not even now due, does not affect the matter. And when, my Lord the Chief Justice talks about reprobation, he is really saying that by reason of the fact, as he finds it, the Central People's Government was entitled to repudiate the contract. It will be our case, my Lords, that whatever the Central People's
10 Government did, in the circumstances of the case, the matter is not one bit affected, the property having passed, that property now being in medio, no longer in the possession and control of the Central People's Government. Impleading being out of the picture, there is nothing to prevent judgment in terms of the Statement of Claim and delivery of these goods, the aircraft in question, to the plaintiffs. My Lords, the first point on which, with respect, I quarrel with the judgment of the learned Trial Judge, you will find set out in the second paragraph of his judgment at p.100 of the record where he says,

"The Central Air Transport Corporation, it is agreed, is unincorporated
20 and a department of the Government of China, inasmuch as from its organisation in 1942 it has been administered and controlled first as a department of the Ministry of Communications and now as a department of the Central People's Government controlled and administered by the Civil Aeronautical Administration."

My Lords, there is no question but that we agreed that this corporation was an unincorporated one, rather a contradiction in terms, but that is so, my Lords, but there is no question equally that we did not agree that this was a department of the Government of China. Nor, of course, do we agree, as seems to be suggested by the judgment, that that organisation had from 1942
30 been administered in the control first of the department and now as a department of the Central People's Government. Your Lordships may recall of course that in the earlier proceedings, the receiver proceedings, it was then the view of the plaintiffs that this was a department of the Government but since the hearing of these proceedings, my Lords, and since the inception of this action No. 269 of 1950, further evidence came to light. That evidence was led before my Lord the Chief Justice and, unless your Lordships wish me to refer to it now, I propose merely to give you the reference. That evidence your Lordships will find in File B, page 3 which is the evidence of one Wong Kuang. If your Lordships wish to look at the evidence later, may
40 I refer you to pages 15 and 16 of the same file, where the legal aspects are dealt with by Dr. Tuanmoh. If I may return now to the judgment, your Lordships will find that further reference to the fact that this is a Government department is made. At p.107. Your Lordships may turn to this, the evidence of Mr. Chen Cheuk Lin, which I have already read, my Lords, that is, the affidavit filed by that gentleman, sworn by that gentleman in O.J. Action No. 6 of 1950. Even if it is, as he calls it, a Government department, that is the second reference to the fact that it is a department in this judgment at p.112 in the third-last paragraph. Again, my Lord, the Chief Justice, says that this is a department of the Government of China. He says:—

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 44. Transcript of Proceedings on Appeal, *continued.*

"With respect to the actual contract itself, it is to be noticed that it purports to sell all the physical assets of Central Air Transport, a department of the Government of China."

It is our submission, my Lords, that the only evidence in support of the fact that this is a Government department is that of Mr. Chen which evidence, as I have already mentioned, we say the learned Trial Judge should not have looked at. Let me make it clear, my Lords, that whether or not this is a Government department, our submission is that the case for the appellants is not one whit affected.

Gould J.: That is what I hoped you would make clear, the importance of this distinction between emanation and a department. 10

D'Almada: My Lords, if I may deal with that later in its proper place?

Gould J.: Yes.

D'Almada: Thank you. Your Lordships recall the word "emanation" was used more than once by Sir Walter Monckton when he addressed the learned Trial Judge and it is our submission, my Lords, that this is not a Government department in the strict essence of the term, for reasons which become manifest from an examination of the evidence. You will see, my Lords, for example, that the revenues of this organisation do not form part of the budget of the Nationalist Government. There are other reasons too and I shall go 20 into them later, my Lords, if I may. That, my Lords, is the first point I ask your Lordships to note in our argument against this judgment. The next one, my Lords, is this, that the learned Trial Judge found that the recognition of the Central People's Government by His Majesty's Government had, in this case, a retroactive effect qua the property outside the territory over which the Central People's Government had effective control. The reason why he so found, my Lords, being that certain persons in possession and control of these aircraft had attorned to the Central People's Government. That your Lordships will find at p.111 and 112 of the judgment. Your Lordships will note that at the top of p.111 the Trial Judge quotes from the 30 judgment of Lord Justice Denning in Boguslawski's case and I won't worry your Lordships with that just now because I am going to deal with Boguslawski's case in full. Having set out those passages in Lord Justice Denning's judgment, he goes on to say:

"It was argued for the plaintiff Corporation that since the transaction was one which the Nationalist Government, then recognised de jure, had authority to enter into, then on the principle of succession it was one to which retroactivity, by recognition of the new Government as the de jure Government, could not affect.

To my mind, it appears that it is to the acts of the new Govern- 40 ment to which the principle would apply and it is necessary to consider those acts."

He then considers the acts, my Lords, in the next paragraph, the longest one. I think I had better read that, my Lords, as well as the next paragraph following. He says:—

"The Nationalist Government ceased to be de facto Government of different parts of China as from the date on 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 People's Government. On the 12th November, 1949, the Premier of the Central People's Government appointed Cheuk 10 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."

My Lords, a number of these findings of fact made by the learned Chief Justice in this paragraph are subject to the same objection, open to the same objection, as we made to the evidence of Mr. Chen, my Lords. For that, they are matters extraneous to the evidence filed in these proceedings. But to return to the point I am dealing with, the next paragraph goes on as follows:—

"Even though the aircraft were in Hong Kong, there is no doubt that 20 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."

This finding of the Trial Judge, my Lords, is based as I say on a passage in the judgment of Lord Justice Denning in which he said that had the masters of certain Polish ships concerned in that action attorned to the new Polish 30 Government, the Lublin Government, then certain consequences would have followed. But the facts in that case, my Lords, were very special indeed, as I shall show your Lordships when I come to examine them and, once on the point my Lords, with great respect to the learned Trial Judge, the fact that the Central People's Government purported to dismiss the ministers of the Nationalist Government cannot affect the position one whit for this reason, my Lords. Right up to the 6th January, 1950, His Majesty's Government recognised the Nationalist Government as the de jure Government of China. No Government can function without ministers, my Lords. Those ministers, in my submission, continued in office until withdrawal of recognition. That 40 is for the purposes of our laws, my Lords, and our jurisdiction. Until that time, the minister accredited to the Court of St. James by the Nationalist Government was recognised as such and there is no question of any retroactive effect of a dismissal such as was made, or even if that dismissal, as my Lord the Chief Justice finds took place in October 1949, no question of that dismissal being effective having regard to the fact that throughout the period, the Nationalist Government was recognised by His Majesty's Government as the de jure Government of China. I go even further, if necessary, and say this, if, as happened for example in the case of the Abyssinia or

even in the case of the Spanish civil war, you had contemporaneously de jure recognition of one Government and de facto recognition of another, both officially accorded, the situation would be no different, my Lords, because in fact, insofar as the acts of the de jure Government are concerned, that Government being recognised, its ministers are also recognised and any attempt by the de facto Government to take the line "Well we have dismissed your ministers and therefore they cannot function" is something, my Lords, which cannot be countenanced by this Court having regard, as I say, to the fact that you have two Governments recognised in my illustration, one de jure and one de facto. I can quite understand this, if you say that the minister of the de jure government has no power in the area over which the de facto Government has control, that is another matter entirely. But we are dealing, my Lords, with property outside the jurisdiction of the de facto Government, outside the area over which they had effective control. 10

The third point in my enumeration, my Lords, is the finding of the learned Trial Judge that this sale to Chennault and Willauer was a device of the Nationalist Government, that is, something, my Lords, mala fide or carried out for alien or improper purpose. That also, my Lords, is to a very great extent based upon the judgment of Lord Justice Denning in the Boguslawski case and perhaps, the better to make my point clear, I will read to your Lordships from that judgment. It is reported in (1951) 1 K.B. beginning at p.162 and the passage—and it is only the passage with which your Lordships need concern yourself for the moment, upon which the judgment of the Trial Judge is based, you will find, towards the end of p.182. You will find it in paragraph E of page 373 of (1950) 2 A.E.R. My Lords, Lord Justice Denning, after having examined the advantages of continuity and the question of succession of a new Government to the old Government, then talks about rights and obligations which have become vested under the old Government remaining intact unless the new Government passes a decree of divesting them if it had been able to do so. He then goes on to examine the position of curators appointed by the old Government and says this, my Lords, about 8 lines from the end of that particular paragraph: 20 30

> "So, also, it seems to me that offers made by the old government may lawfully be accepted during the time of the new government, unless they have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts, because the new government cannot be impleaded in our courts. 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 an alien and improper purpose." 40

Now there is no hint of a suggestion in the judgment of the learned Trial Judge of any question of ultra vires in this case. What he does examine is the bona fides of the transaction and he comes to the conclusion wrongfully, as I submit, that the transaction was mala fide and carried out for an alien or improper purpose. And in connection with that, I ask your Lordships to look first at p.106 of the judgment. My Lords, I have lost for the moment that part of the judgment which my Lord the learned Trial Judge talks about

a device. But, for the purposes of my argument, it matters not—I will come to it later. If you will look at the bottom of p.106 of the judgment you will see he says this, after setting out the moves made by the Nationalist Government in 1949 from Nanking to Canton, thence to Chungking, thence to Chengtu, and finally to Formosa, and to the fact that they purported to bring it to the parties and ministries with it on its travels and the fact also that technical equipment were in Hong Kong before September 1949 while the organisation itself appears to have moved to Formosa. He says this:

10 "At the date of this transaction, it is evident that the Nationalist Government had no effective control over the mainland of China save possibly in respect of those few areas of which evidence was given in these proceedings, but it is equally evident that no possibility existed of that government being able to defend these areas which awaited occupation by the Central People's Government."

Then, my Lords, you will see as I read on later, that this is one of the reasons why the learned Trial Judge came to the conclusion that this was a device and mala fide. I ask your Lordships to note the tense he employs in that particular paragraph. He says "At the date of this transaction, **it is evident".** It is just as if he were saying "It is evident that at the date of the transaction 20 something or other was or was not so." In other words, it will be our case that, in coming to the conclusions of fact which he did arrive at, the learned Trial Judge was not looking at matters as at the date of the transaction but ex post facto. He says, with regard to the possibility of defending certain areas, again "It is equally evident" he says. It may be, my Lords, that at the date of the transaction it was already so evident but it matters not to our case because this really is not the foundation for the finding that the transaction was mala fide. That, your Lordships will see, comes later. It is one of the cumulative reasons for that finding. Pass then, my Lords if you please, to p.109 of the judgment. You will see there, my Lords, that the 30 learned Trial Judge says this:

"The position then on the 12th December, 1949, (that is, immediately after *referring* to Mr. Chen's affidavit and his letter of appointment) when this contract was made, was that the Nationalist Government no longer exercised any effective control over the mainland of China; that Government was established outside Chinese territory; the aircraft were in Hong Kong and the members of the staff and employees having attorned to the Central People's Government. Subsequently the Courts of Hong Kong held, and, with respect, in my opinion rightly held, that these aircraft were and had been in the possession and control of the 40 Central People's Government. I will refer here to certain extracts from the document of sale:—"

Pausing there for a moment, my Lords, there is no finding by the learned Trial Judge that the Nationalist Government could not function outside China, that is to say, in Formosa. Indeed he could not have so found and, from my recollection of the history of those proceedings, there isn't anybody who so stated categorically. So, the fact that the Government was established in Formosa outside Chinese territory was not a consideration except qua the device or the mala fides of those transactions. And when he agrees with the

decision of the Courts of Hong Kong in other proceedings, your Lordships of course will bear in mind the fact that in those proceedings sovereign immunity was in the very forefront, and was the cause of our downfall. Having set out those facts, my Lords, Sir Gerard Howe goes on as follows. He sets out certain extracts from the documents of sale. These are:—

> "The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China; and
>
> Chennault and Willauer agree that the said assets shall not be used, directly or indirectly for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China."

Then he goes on as follows:—

> "By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's Government in the near future and in fact this took place as from midnight 5/6th January, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition de jure for the references to "Communist Areas of China" must relate to the areas controlled by that Government, recognised as the de facto Government of those areas."

My Lords, to criticise this passage I must examine it again piece by piece. "By normal diplomatic usage" says the learned Trial Judge "and indeed to be inferred from the terms of the contract, the then Nationalist Government must have been fully alive to the probability of withdrawal of recognition by His Majesty's Government." My Lords, it is easy enough to come to a conclusion like that after the 5th/6th January, 1950 because you have then after events to guide you on your findings. But I ask your Lordships where, in the terms of this contract, or from normal diplomatic usage, is there the least evidence that about the time of this contract it should have become obvious to the Nationalist Government that withdrawal of recognition was going to be made. I say, with great respect to the learned Trial Judge, but here again he is judging events and examining the value of evidence in the light of after events. He says "It is evident that this transaction was a device entered into with full knowledge by both parties by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition de jure." It presupposes, my Lords, that everybody was assuming in the first week of December 1949, that recognition of the Central People's Government was imminent and, of course as I say, when you have three or four weeks later de-recognition of one Government and recognition of another, it is easy enough to make a statement like this, when you consider the matter after that change. But if this matter were regarded, as it should have been regarded, as for example if it had been dealt with, my Lords, before the 5th

January, 1950, or if, look at it in this way, at the time when the Nationalist Government was recognised de jure there was even contemporaneous de facto recognition of the Central People's Government, still I say, my Lords, there is no justification, looking at it in the light of the events of that time, for the suggestion that the reason why this transaction was entered into was merely this, as a device to prevent the property falling into the hands of the Central People's Government on recognition de jure.

Gould J.: Why do you say "Even if there was de facto recognition"?

D'Almada: Well, I am putting it as high as possible against myself, my Lords.

Gould J.: But is there any doubt about the de facto recognition?

D'Almada: Oh unquestionably with great respect. I am talking about the time, at the time my Lords you see, not now. Now, of course, your Lordships, the position is quite different. On the 6th of January, there was de-recognition of the Nationalist Government, there was de jure recognition of the Central People's Government and then, insofar as the areas over which the Central People's Government had effective control, that recognition dated back as de facto recognition. That is to say, to the 1st of October, 1949, when the Central People's Government was set up. But I still deny that there was any question of de facto recognition outside the area, that is to say, qua the property of the Nationalist Government in Hong Kong while it was so recognised.

Gould J.: Yes, I only wanted to clear up that point. There is one passage where the Chief Justice said that it can be assumed that de facto recognition extended to Communist China, that is the People's Government, as from the time when they actually attained control. There is no need for any assumption because that was the subject of a further answer......

D'Almada: No, my Lord. I make it quite clear that by the 6th January, 1950, de jure recognition of the Central People's Government had the effect of retroactive de facto recognition of that government over the areas controlled by that government but no further.

Gould J.: Yes.

D'Almada: Now, my Lords, the question of bona fides and mala fides of a transaction like this has to be examined in the light of the true facts and the true facts are these; here, in December, 1949, there was a Government recognised de jure. The other Government, the Central People's Government, was to all intents and purposes an insurrectionary Government, my Lords, however successful it might have been by that time. And to conclude from subsequent events, that is to say, the recognition of the insurrectionary Government that the object of the old legitimate Government was mala fide is, I submit, entirely wrong. Later on, when I come to examine the Boguslawski's case, I shall submit to your Lordships that the only question of mala fides that can be considered by the Court in a case of this kind, is mala fides in the sense of real fraud, that is to say, if for example in this case, the sale had been carried out with the object of personal enrichment on the part of some ministers of the Government. And I shall make a point also, my Lords,

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No. 44. Transcript of Proceedings on Appeal, *continued.*

that on a question of the rival merits of different foreign governments, this Court cannot enter wherefore my Lord the Chief Justice went far beyond what any Court would do in the circumstances on the analogy, of course, of cases like Luther and Sagor in which your Lordships will remember the Court of Appeal decided that you couldn't examine into the legislative acts of a foreign state however much you might be critical of them provided they stopped short of an offence against natural justice.

(12.58 p.m.—Court adjourned to 2.30 p.m.—21.8.1951).

(2.30 p.m.—Court resumes. Appearances as before).

D'Almada continues: 10

My Lords, I think that unwittingly I gave your Lordships the impression this morning towards the close of the hearing that it was our case that on the answers to the questionnaire there was in fact a retroactive recognition of the Central People's Government dating back from the 6th January to say sometime from the 1st October or, in any event, some time earlier than that date. Our case, my Lords, is that, upon the answers to the questionnaire, the question for your Lordships whether or not the recognition was retroactive can only be answered in one way, that is, "No" by reason of the special wording of those answers. But nonetheless if it should be held against that submission that it was retroactive, then what I said this morning applies, that is to say, 20 it is retroactive only in regard to the area over which the de facto Government had effective control.

Gould J.: Are you referring to de jure recognition or de facto recognition or both?

D'Almada: The de jure recognition must date from the 6th January and no earlier; but it throws back the de facto recognition possibly in certain cases. In this case, I say "No" by reason of the answers to the questionnaire.

Gould J.: I think I should interpose here that during the lunch hour I have been verifying my recollection as to the answers given by the Secretary of State and I found that there is one not in this record. 30

D'Almada: Is that so, my Lord?

Gould J.: Yes, and I have sent for the file. I have that recollection from previous cases and neither is it quoted in the judgment of the Full Court in the earlier proceedings and yet it is a clarifying answer. I am speaking subject to any accident because I haven't got the original telegram but I have seen a copy of it during the lunch hour and it indicates that de facto recognition was extended to the People's Government in respect of the territory occupied by them as from the 1st October or, if they occupied that territory subsequent to the 1st of October, as from the date of effective control. I was proposing to get the original of this and show it to counsel and ask if, by 40 consent, it be included in the records.

D'Almada: Certainly, My Lord.

Gould J.: It will have to be, it will complete the record.

D'Almada: Of course it does. Anyway, your Lordships will kindly note my submission based, as it is, on the answers as we have them in the judgment and if the answers which your Lordship recollects are a little different, I may address your Lordships further upon the point.

Gould J.: Yes.

D'Almada: I wish to be protected against any suggestion that by reason of what I have said this morning I am agreeing that the answers to the questionnaire, that is to say, the recognition de jure of the Central People's Government on the 6th January, 1950, meant a retroactive recognition of that Government de facto. Obviously there could be no question of de jure recognition retroactively because you cannot have two de jure governments functioning at the same time.

Gould J.: I don't want to put you out of your argument, but you say that it is never possible to have retroactive de jure recognition?

10 D'Almada: You can have retroactive de jure recognition but what I say, my Lords, is that in this case you have a de jure government recognised right up to the 6th January and, in those circumstances, maybe your Lordship is right but you would have to have very express and explicit words to suggest that upon the withdrawal of that one de jure recognition and the according of it to the other, you would have the de jure recognition dating back. I need not put it any higher than that. In any event, it doesn't arise in this case because, in my submission, at its highest, all you could say is that the recognition of the 6th January, 1950 had, at worst against us, a retroactive effect in that it involved de facto recognition of the Central People's Govern-
20 ment over such areas and at such time as it had effective control.

Gould J.: But on the interpretation of it you say no such question arises?

D'Almada: Subject to what your Lordship has just told us.

Gould J.: Nothing in the other answer concerns de jure recognition? It relates to de facto recognition only. The other answer I referred to relates only to de facto recognition.

D'Almada: I see.

Gould J.: It doesn't touch on de jure.

D'Almada: The point I was on this morning was this, to resume my argument, the learned Trial Judge's finding that this sale was a device, something
30 for an alien or improper purpose, I say my Lords that this action, this sale, this transaction on the part of Nationalist Government was consistent equally with the object of obtaining funds with which to maintain its struggle against the other Government, and consistent, if you like, also with an attempt to deprive that other Government of the planes which would assist it in its rebellion. And the proper light in which to regard this transaction, of course, is the light cast upon it at the date of the transaction and not what has been added by subsequent events. I read to your Lordships this morning the paragraph at p.109 of the judgment in which, after having set out two clauses or two extracts from the documents of sale, the Chief Justice went on to state
40 that in his opinion this transaction was a device. You will see that he goes on in the same strain, my Lords. In the very next paragraph he says,

> "It is a transaction inimical to the Central People's Government and indeed, as the aircraft were used for a public purpose within and without China, inimical to the interests of the Chinese people."

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Continuing my Lords on this same point, he says,

" This then is the transaction to which the plaintiff Corporation submits the Central People's Government succeeded after midnight on the 5/6th January, 1950, basing this argument on the doctrine of succession."

My Lords, it is our submission that in this case, having regard to the terms of Section 1(1) of the Order-in-Council, this question of succession is really immaterial unless the Central People's Government was in a position to do something about the matter. We say that they couldn't by virtue of that Order-in-Council which enables the Court to examine into the nature or quality of the control or possession of the persons who claimed to hold those planes 10 on behalf of the Central People's Government. Your Lordships heard evidence this morning of the position with regard to those planes and, in our submission, impleading being out of the way, the only conclusion to be drawn from that evidence and the fact that injunctions were ignored is that these persons were in wrongful possession of those planes, in wrongful control. Furthermore, as you cannot bring into play the doctrine of sovereign immunity, because no question of impleading a sovereign foreign comes into the picture now, whether the Central People's Government succeeded to this transaction, as my Lord the Chief Justice puts it on the doctrine of succession, or in whatever other way you may regard it, it makes no matter, my Lords. It 20 is on this doctrine of succession upon which the judgment is to some extent based because in the last paragraph of p.109 of the judgment you will see that my Lord says this,

" The doctrine of succession of one Government to another rather than by title paramount has been recognised by judicial decision."

Then he cites McRae's case; the Peruvian Government against Dreyfus; and the American case, Guaranty Trust Company; and Boguslawski, and the purpose of and the reasons for that doctrine are well established. Then he goes on to say this,

" There must surely be, in my opinion, a limit to the scope of the acts 30 to which this doctrine applies; a limit to the transactions into which a Government, knowing that recognition will shortly be withdrawn from it, may enter."

My Lords, again with great respect to the learned Trial Judge, I quarrel with his statement there that the Nationalist Government in early December 1949, was a Government which knew that recognition was shortly to be withdrawn. Why should that be so, my Lords? Upon what evidence except the light of after events could my Lord the Trial Judge have so found? Why should it have been regarded as a possibility? He puts it higher than that, he makes it a probability that recognition was to be withdrawn. As your Lordships 40 know, you have judicial knowledge of it, in fact to this day that Government is recognised by many powers as the de jure Government of China. And to emphasize the point, may I repeat what I said this morning. What would have been the position if, in fact, this action came on for trial before the 5th January? In my submission, the true answer is this, de-recognition, to borrow a term used by Lord Justice Denning in the Boguslawski case, has no

effect whatsoever upon this transaction; and the imminence of de-recognition even less so, of course. Going on in the same strain, your Lordships see at the top of p.110 the Trial Judge says this,

"This transaction was clearly hostile to the present de jure Government of China and I consider hostile to the interests of the Chinese people. Counsel for the plaintiff Corporation did not suggest that the Central People's Government would wish to adopt these contractual rights but submitted that it could not escape from them and that if his proposition depended on its acquiescence then—cadit quaestio. Counsel further
10 stated that the plaintiff Corporation would consider itself bound by the terms of the contract and would not directly or indirectly permit the aircraft to be operated in China under the present Government."

Then follows the citation of a passage from Lord Justice Denning's judgment upon which this part of my Lord's judgment is based and after that, my Lords, these words:—

"In the transaction now before this Court, I have no hesitation in reaching the conclusion that not only was it one (that is the transaction) designed to embarrass the Central People's Government, but it was against the interests of the Chinese people and that it was a transaction
20 incompatible with that 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 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 of 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 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
30 an alien and improper purpose."

My Lords, I submit that there is nothing in the evidence before the Trial Judge in this case which justifies the conclusion that the Nationalist Government could not properly be said to have sold these aircraft for the purpose of fighting to retain its former territory. I take it "retain" should read "regain" in the judgment, my Lords. This also doesn't make sense, but that doesn't matter. I say that this sale was equally consistent with the object of providing funds for the maintenance of the struggle and equally consistent with the object of putting these planes out of the reach of the Government which the Nationalist Government was fighting. I said earlier
40 in my submissions that there is no question here of any finding of fraud in the sense of personal enrichment by any one or more of the ministers who took part in this transaction. And I go further, my Lords, and say this, that in the circumstances of such a case as this where you have at the relevant time a de jure Government recognised by His Majesty's Government, to say what the learned Chief Justice said that this was a transaction hostile and inimical to the present de jure Government and the interests of the Chinese people is in fact to make a political pronouncement which it is not open to an English Court to make because English courts do not concern themselves with the merits of the rival Governments of a foreign State.

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Gould J.: This is exactly what we have to do is it not? Is that not exactly what we have to do in this case by virtue of the Order-in-Council? We are adjudicating between, in effect, two rival Governments.

D'Almada: You are indeed. Yes. But you are adjudicating upon those terms within well-known fixed principles. I don't see how your Lordships can take it upon yourselves to say "In our view, what the de jure Government of China on the 12th December did was something inimical and hostile to the people of China on that date, the 12th December." It is just as much as if you were to examine into the morals of some decree published by a recognised foreign state which is well-known this Court will not do unless it is something 10 entirely contrary to natural justice. I say, my Lords, that so far from this transaction being hostile and inimical etc., it is one consistent with the legitimate object of the Nationalist Government to maintain itself and to continue the struggle. Your Lordships already have my point, of course, but this is an ex post facto judgment on the part of my Lord the Trial Judge taking into consideration events which occurred between the sale and the hearing of the action, and events which, of necessity, must have covered his decision upon the point. Now, my Lords, I don't think it will be necessary for me to refer your Lordships to any further portions of the judgment. I pass from it to a consideration of a number of cases which, I respectfully submit, have a bearing 20 upon the points I have made as well as cases which were examined at the trial. The first case to which I draw your Lordship's attention is Luther v. Sager (1921) 3 K.B. p.532. Headnote, my Lords,

"The Courts of this country will not inquire into the validity of the acts of a foreign government which has been recognised by the Government of this country. In this respect it is all one whether the foreign government has been recognised as a government de jure or de facto.

The Russian Socialist Federal Soviet Republic passed a decree in June, 1918, declaring all mechanical sawmills of a certain capital value and all woodworking establishments belonging to private or limited 30 companies to be the property of the Republic. In 1919 agents of the Republic seized the plaintiffs' mill or factory in Russia and the stock of manufactured wood therein. In August, 1920, agents of the Republic purported to sell a quantity of the stock so seized to the defendants, who imported it into England.

In letters dated in April, 1921, the Secretary of State for Foreign Affairs stated that His Majesty's Government recognised the Soviet Government as the de facto Government of Russia; that a government known as the Provisional Government came into power in March, 1917, and was recognised by His Majesty's Government, and remained in 40 session until December 13, 1917, and was then dispersed by the Soviet authorities.

In an action by the plaintiffs for a declaration that they were entitled to the wood above mentioned:—

Held, that the Government of this country had recognised the Soviet Government as the de facto Government of Russia existing at a date before the decree of June, 1918; that therefore the validity of that decree and the sale of the wood to the defendants could not be impugned, and that the defendants were therefore entitled to judgment."

This is another one of those cases, my Lords, in which, between judgment in the Court of First Instance and appeal, certain changes in the political situation had taken place, that is to say, recognition was accorded and the judgment of the Court of Appeal was based upon that altered state of facts as was the judgment of the Court of Appeal in another case to which I shall refer your Lordships, that is, Haille Selassie and the Cable and Wireless. But with that aspect of the matter your Lordships need not concern yourselves nor indeed with the facts apart from the manner in which they are set out in the headnote. My object in citing this case to your Lordships is to show the limits
10 to which the Court's enquiry are confined in the matter of the acts of a foreign state. You will see my Lords that the point is raised by Mr. Leslie Scott for the appellants at p.537 about 10 or 12 lines from the end of the page he says,

> "the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory."

At p.538 Mr. Barrington-Ward makes reference to the same cases and says three lines from the end of the page,

> "If the act is contrary to the morality or political institutions of this country His Majesty's Courts of Justice may treat it as null and void."

Seeking, therefore, to engraft exception upon the principle that in fact you don't
20 examine into the acts of a foreign state.

And I think I am right in saying, my Lords, that that is an unqualified statement save in regard to something which offends natural justice of our own constitution. My Lords, the way in which the Court of Appeal dealt with the matter you will find first in the judgment of Lord Justice Bankes at page 546 where, after citing Santos v. Illidge in the judgment of Mr. Justice Blackburn in the case, he says 8 lines from the top of p.546,

> "Even if it was open to the Courts of this country to consider the morality or justice of the decree of June, 1918, I do not see how the Courts could treat this particular decree otherwise than as the expres-
> 30 sion by the de facto government of a civilized country of a policy which it considered to be in the best interest of that country. It must be quite immaterial for present purposes that the same views are not entertained by the Government of this country, are repudiated by the vast majority of its citizens, and are not recognised by our laws."

My Lords, he was dealing with nationalisation by expropriation in that case. We have in our own political conceptions travelled a good deal in the last thirty years, between 1921 to 1951, my Lords, and it may be that the difference between the conceptions of our Government and that of the Russian Government at the time are not as different now as they were then. In any event,
40 you will see quite clearly that he says we cannot go into this question at all and the same view is expressed by Lord Justice Scrutton at pages 558 to 559 of the report. Beginning two lines from the end of p.558 he says this,

> "But it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legis-

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lation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognised."

My Lords, clearly those two passages in the judgments of Lord Justice Bankes and Scrutton are applicable to the point I have been making before your Lordships, that is to say, you cannot investigate the validity of a decree of such a foreign state which is recognised by His Majesty's Government, so also can you not enquire into the bona fides of a transaction of that Government, that Government at the time being the recognised de jure Government of the state. It matters not for this purpose, my Lords, that that Government had, in the course of a few months preceding this transaction, to move from place to place. It matters not equally that at the date of the transaction its seat was in Formosa. The fact remains that this Government at the time was de jure recognised by His Majesty's Government and its acts therefore cannot be impugned in our Courts. That is why I say it is important to understand the meaning of the words "mala fide, alien or improper purpose" because they must be limited in my submission to such an allegation as this that the sale was put through in order that the money may be pocketed by one or more ministers which is not the case here of course. My Lords, before I leave this case, may I ask your Lordships to look with me at pages 555 and 556 to show my Lords exactly how strict is the regard which the Court has for the acts of a foreign state and the importance of the Court not questioning the validity of those acts on any ground. In this case, your Lordships see in fact the wood in question, the subject-matter of the action, was sold in Russia, but you will see that Lord Justice Scrutton says this, that even if Monsieur Krassin, the Russian Minister concerned at the time, had brought these goods with him into England, still the Court could not concern itself with the question. He says, beginning at about 10 lines from the top of p.555 "If M. Krassin had brought these goods with him into England, and declared on behalf of his Government that they were the property of the Russian Government, in my view no English Court could investigate the truth of that statement. To do so would not be consistent with the comity of nations as between independent sovereign states."

And then he refers to Morgan v. Lariviere, I don't think I need trouble your Lordships to go into that portion of his judgment, he continues with a reference to Vavasseur v. Krupp. He says,

> " the Mikado, in joining as defendant, was held only to have done so in order more effectively to call the attention of the Court to the fact that inadvertently it had interfered by injunction with the property of a sovereign state. What the Court cannot do directly it cannot in my view do indirectly. If it could not question the title of the Government of Russia to goods brought by that Government to England, it cannot indirectly question it in the hands of a purchaser from that Government by denying that the Government could confer any good title to the property. This immunity follows from recognition as a sovereign state."

That all deals with immunity, my Lords. But it shows, you see my Lords, the strength of the point that whatever a friendly foreign state might do, we cannot question its acts, of course, even though the sale, the subject matter of the action, is a transaction taking place in England. If Mr. Krassin had brought the goods to England, made a declaration that this is property of the Russian Government and then sold it, you couldn't indirectly say "Well, true the Russian Government did certify a decree of this nature to take over the goods, but that was a decree of a confiscatory nature and therefore something which we frown upon, well, with regard and therefore we say this
10 transaction did not pass a good title to these persons." That is what Lord Justice Scrutton was aiming at, you see my Lords. He says "We cannot go into that question at all directly or indirectly" and, here again, you have your de jure Government with a dominion over these goods at the time, that is the planes in question, passing these goods in Hong Kong to the purchasers and, I submit, even assuming there were any possible suggestion of mala fide in the true sense of the term in the case, if it were some mala fide act of the state, that is a matter into which your Lordships couldn't enquire. But, as I say, it must be understood that has a very limited application, that is to say, in respect of personal enrichment.

20 Gould J.: Another point I find here which seems to be relevant—at page 93 Lauterpacht.

D'Almada: Page 93? I know the passage, my Lords. Yes. May I refer to it later, my Lords, or would you like to hear it now?

Gould J.: No, No. It seems relevant to this part of the argument but as long as you will be referring to it?

D'Almada: I shall be referring to it later, my Lords. My Lords will see that in this passage Lauterpacht was very careful to talk about treaties. He does not cite the transactions, not transactions between a state and an individual. And if I remember rightly, it also deals with the question of a Mexican
30 Government about to go out of power ceding certain territories to the United States of America against which, of course, the then American Ambassador to the Mexican Government very properly warned his Government.

Gould J.: Yes, that is the essence.

D'Almada: Yes. That again, my Lords, is at the bottom of page 93. He says:

"But, as in other matters, so also in this case good faith prescribes limits to the operation of a general rule. Thus it is doubtful whether political or commercial treaties of a far-reaching character may properly be concluded with a government thus situated. There is force in the
40 contention that, notwithstanding the general rule as to the continuity of the State, the successful revolutionary government would not be bound by such treaties concluded durante bello as being in fraudem of the general interests of the nation. When in 1858 and 1859 the United States recognised the Constitutionalist Government of Juarez in Mexico, while refusing recognition to the insurrectionist Miramon Government

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established in the capital, they were negotiating—and eventually concluded—important political treaties of alliance and of cession with the Constitutionalist Government. This they did notwithstanding the grave doubts entertained in the matter by the United States Minister to Mexico. He said: 'The cession of territory is the gravest and the most important act of sovereignty that a government can perform; it is therefore questionable whether it should be performed at a moment when it is in conflict with another government for the possession of the empire, even though it may be de jure and de facto much more entitled to respect than that with which it is struggling in civil war, and this considera- 10 tion is as important to the party purchasing as to the party ceding the territory'."

My Lords, with respect, I think what Professor Lauterpacht said in this case had to be implied from the very fact set out in that footnote. That is to say if, for example, in the course of its then losing fight with the Central People's Government, the Nationalist Government had purported to cede the province of Kwangtung to the Government of the United States, then you would say "Apply Lauterpacht's statement in the footnote."

Gould J.: Even though they wanted money to carry on the war?

D'Almada: Even though that is so, my Lords, because you would be going 20 into a question of treaty and international rights. Here, you are dealing only with certain goods, my Lords, certain planes, and, as I shall show your Lordships the case I am coming to later, where you have a continued de jure recognition of a certain monarch, even though that monarch is driven out of the country, still he is recognised as the de jure monarch and his rights, his recognition, involves a right on his part to do what he can to recover governmental control of his courts. I submit, therefore, that in this case unquestionably there was every right in the Nationalist Government, who had complete dominion over these goods at the time, my Lords, and in whom best lay the rights to dispose of these goods, these planes, to sell them in furtherance 30 of—shall we call it—war efforts, to use no other term. My Lords, there is no question of course about the right of disposal of these goods leaving aside for the moment the question of possession and control at the date in question. These goods were in Hong Kong, the planes were in Hong Kong. Who had dominion over them? Obviously the Nationalist Government. Who had the right to dispose of them? Obviously again the Nationalist Government. This is not the question, my Lords, in the judgment of my Lord the Trial Judge and, to show that in fact it is not open to question, take this illustration: Could they have sold one of those planes? The answer must be yes. But they have sold 2. Again the answer must be yes. If so, why not 10 or 20? 40 The reasons why they sell them are another matter. They may choose to sell a number of these planes because they feel they should be replaced by better, more efficient machines. They may choose to sell those planes in order to reduce the size of the fleet. They may choose to part with them because they find the operation of the fleet uneconomical and shut down so to speak. Obviously, the power of disposal of those planes must lie in the Nationalist Government for those purposes. Now if they choose to dispose of those planes with this object of putting it out of reach of the then rebelling Government as well as, incidentally, achieving the object of providing themselves with funds to maintain the struggle, I say, my Lords with great respect, who are your 50 Lordships to pass judgment upon that?

Gould J.: Assuming that it can be treated, as Lauterpacht treats the position, in the present circumstances would we not be compelled to pass judgment on that?

D'Almada: Well I can't likely imagine your Lordships dealing with the question whether or not the United States Government could lay claim to the province of Kwangtung.

Gould J.: If the Court was charged with the duty of saying in whom the ownership of Kwangtung lay, would it not have to do so? Because that was what it has been charged with as far as these planes are concerned.

10 D'Almada: I think the answer is what my learned friend Mr. McNeill has just said, my Lords, when you deal with the territory of a country, you are dealing with something on an entirely different footing from some commodities, goods, planes, ships belonging to that country. There must unquestionably be a very great distinction to be drawn between land on the one hand, that is, your country and part of your country, and what is owned by the Government in the administration of it. That, I submit, must be the true answer, my Lords.

Gould J.: Do you say that is a question of degree?

D'Almada: No, no, my Lords. Of kind, not degree.

20 D'Almada: I have been reminded by my learned friend Mr. Wright of the evidence which you will find in File C, page 2 of the letter of offer, paragraph (F):

> "The Government is particularly anxious to sell the physical assets and the stock of the said CATC and CNAC to Chennault and Willauer because of the trust and confidence it imposes in them by virtue of their loyal and devoted services during the war of liberation to China and to the cause of the United Nations, because the Government recognised that Chennault and Willauer have amply demonstrated their ability to operate efficiently air transport services, and because the Government is
> 30 confident that Chennault and Willauer will always use their best efforts to insure that the said assets will never be used for the benefit, directly or indirectly, of the Communist areas of China but rather will be used in furtherance of the anti-Communist cause."

I come to deal, as your Lordships see, with the use of these planes as well as the continuation—and I am looking now on page 4 sub-paragraph (7) on that page—to employ as many of the Chinese loyal employees and staff members of the CATC as is reasonable. Quite clearly, my Lords, the object of this transaction was, not personal enrichment but avowedly that of assisting the Nationalist cause against the Central People's Government. My Lords, I ask
40 your Lordships to look with me for the moment at the Haille Selassie case which you will find reported in 1939 Ch. at p.182. This case had to deal with a claim by the Emperor Haille Selassie against the Cable & Wireless for a sum due to the Government of Ethiopia as part of the public revenues of that power. This was in consequence to a contract entered into before, my Lords,

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Italy invaded Abyssinia. Abyssinia was conquered by Italy. After that conquest, Haille Selassie, who was the original sovereign, was still recognised by His Majesty's Government as the de jure sovereign and the conquering power was recognised as being in control de facto. You have the de jure on the one hand—de jure recognition on the other hand retrospectively. And in those circumstances, Haille Selassie brought an action in the English Courts to recover this money from the Cable and Wireless. There was no question of a denial of liability by the Cable and Wireless. They admitted that sum of money was due to someone. But their trouble was this, there was the de facto recognised Government of Ethiopia, that is, the King of Italy, and they had had an intimation, although no specific claim, intimation that the Italian Government would lay claim to these monies. No question of interpleader was possible but this was brought to the attention of the courts; quite properly so because the Cable and Wireless was not very certain that they would be protected if this money was paid over to Haille Selassie. Now, at the date of the trial before Mr. Justice Bennett, the position was this. The de jure recognition still extended to the Emperor, de facto recognition accorded to the King of Italy. In those circumstances, Mr. Justice Bennett gave, in the 1st decision, that by reason of the fact that this, a decision by him, would have involved deciding upon the claims of a foreign sovereign state, he could not deal with the matter. On that point, the case went to appeal. The Appeal Court over-ruled his decision on that point and remitted the case back to him for decision on the merits. This decision on the merits was given while the de jure recognition on the one hand and de facto on the other co-existed. You will see, my Lords, on the top of p.183 what the position was with regard to the Emperor Haille Selassie beginning with the third paragraph of that page,

> "It was ascertained from the Foreign Office that
>
> (1.) His Majesty's Government still recognised the plaintiff as de jure Emperor of Ethiopia;
>
> (2.) that His Majesty's Government recognised the Italian Government as the Government de facto of virtually the whole of Ethiopia; and
>
> (3.) that an Envoy Extraordinary and Minister plenipotentiary from His Majesty the Emperor of Ethiopia was accorded recognition at the Court of St. James."

My Lords, the facts mutatis-mutandis are very much similar to the facts of this case at the date of this transaction. His Majesty's Government still recognised the Nationalist Government of China as the de jure Government of China. There was, at that date, no recognition de facto or otherwise of the Central People's Government. On that score, we, I submit, are as it were better off on the facts. And, my Lords, the ambassador for the Court of St. James is one accredited by the Nationalist Government at the time. Now, if I may pass over the arguments of counsel and a good part of the judgment to bring your Lordships to the point I was on a little while ago, would you please turn, my Lords, to p.190 and p.191. You will see my Lords that on these two pages are set out a portion of the judgment of Mr. Justice Clauson in the case of the Bank of Ethiopia against the National Bank of Egypt and, beginning 6 lines from the end of p.190, the passage reads thus:—

"It was then sought, as I understood, to argue that the recognition of some measure of sovereignty de jure in the fugitive Emperor logically led to the denial of full sovereignty to the de facto government: and it was, as I understood, suggested that there existed this limitation on the acts of the de facto government which are to be recognised as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the de facto government."

I perhaps ought to have said, my Lords, that the fact that the Bank of
10 Ethiopia and the Bank of Egypt case turned upon the purported liquidation and winding up of the Ethiopian Bank by the Italian Government and, on that score, Mr. Justice Clauson gave a judgment in favour of the Bank of Egypt which judgment has since been criticised in more than one textbook dealing with the rights of an occupying power and the limitations on those rights. But, apart from that, I don't think your Lordships need concern yourselves with that fact at all. Well, to return to what I have just been reading, my Lords, the argument, my Lords, was this, that as some measure of sovereignty de jure is accorded to a fugitive emperor, the result was a denial of full sovereignty to the de facto sovereign and the judgment goes on:

20 "and it was, as I understood, suggested that there existed this limitation on the acts of the de facto government which are to be recognised as internationally valid, that they must be acts which are strictly necessary for preserving peace, order and good government within the area controlled by the de facto government. This seems to me to be entirely inconsistent with the authorities to which I have already referred, and in principle to be fallacious. The recognition of the fugitive Emperor as a de jure monarch, appears to me to mean nothing but this, that while the recognised de facto government must for all purposes, while continuing to occupy its de facto position, be treated as a duly recognised
30 foreign sovereign state, His Majesty's Government recognises that the de jure monarch has some right (not in fact at the moment enforceable) to reclaim the governmental control of which he has in fact been deprived."

I ask your Lordships to note that passage in particular because, quite clearly, in support of our submission, a de jure Government in the situation of the Nationalist Government in our case in December, 1949, quite clearly must be recognised by His Majesty's Government to have a right to fight back and anything it does in pursuance of that object cannot be said to be mala fide or done for an alien or improper purpose. And, my Lords, as Mr.
40 Justice Bennett was in sympathy with that view, if you will turn to p.194, after going into the question very fully and examining such cases as United States of America v. McRae and United States of America against Wagner my Lords, he ends up in this way—I am reading from the fourth last paragraph of this judgment. He says:

"I ask myself why should the fact that the Italian army has conquered Ethiopia and that the Italian Government now rules Ethiopia divest the plaintiff of his right to sue."

And then he tries to advance reasons against that. He says:

"The only reason can be, I suppose, that the money is not the plaintiff's own money, and that it is a sum which he is under some obligation to spend for the benefit of the people of Ethiopia—an obligation which he cannot now fulfil."

That might be a complete answer. Now can you say that the Emperor of Ethiopia is entitled to this money when really it is the money of which he is only a trustee for the benefit of the people; he is out of the country without any hope of going back at the time and, therefore, the Court should not give judgment in his favour because he is not the proper person to get the money. That argument apparently does not appeal to Mr. Justice Bennett although he posed it to himself because he says "There is a clear answer to this suggestion. I think it undesirable that I should state it." Why should he think it undesirable that he should state it, my Lords, because this Court is not concerned, and he was not concerned, with the question of what the Emperor Haille Selassie was going to do with that money in the sense that he could have employed it for his fight to regain governmental control which de jure recognition must necessarily have recognised to be existent in him, as Mr. Justice Clauson said in the Bank of Ethiopia case. Mr. Justice Bennett, of course, sitting as a Judge in the English Court, could not venture into those realms, my Lords, but clearly that is what is implied by his answer when he says "If you suggest to me that the Emperor should not have this money because now, as trustee, he cannot really employ it for the benefit of the people, that is, cestui que trust." The answer is "Well, it is a very good answer indeed but I don't think I believe it." Clearly uppermost in his mind at the time, my Lords, was that fact in the judgment of Mr. Justice Clauson. No question, I submit my Lords, but that any attempt on the part of the de jure government of China in December 1949 to maintain itself and to carry on the struggle with the object of reclaiming governmental control—to use Mr. Justice Clauson's words—cannot be regarded by this Court as a mala fide motive and any act done in pursuance of that object cannot be regarded as one carried out for an alien or improper purpose. My Lords, before passing from that case, may I refer you to two or three more passages in it of relevance rather on other points and save your Lordships returning to the case later. To continue, my Lords, with the quotation in the judgment of Mr. Justice Clauson at page 191 of the report, you will see that that quotation ends with this sentence, after having mentioned the recognition of the rights to reclaim governmental control, of which the Emperor has been deprived:—

"Where, however, His Majesty's Government has recognised a de facto government, there is, as it appears to me, no ground for suggesting that the de jure monarch's theoretical rights (for ex hypothesi he has no practical power of enforcing them) can be taken into account in anyway in any of His Majesty's Courts."

In that case, you will see they were seeking to limit the rights of the Italian Government on the ground that co-extensive with their de facto recognition by His Majesty's Government and the de jure recognition of the Emperor, and therefore whatever the Italian Government did in the matter of the winding up of the Bank of Ethiopia was something which had to be regarded in that light. But the point which I wish to bring to your Lordships' attention here is this, Your Lordships are not dealing here with any question of theoretical

rights at all. You are dealing with a case of property which, at the time of this transaction, was outside the jurisdiction of the de facto sovereign and while de jure recognition continued in the Nationalist Government. So that that Government, my Lords, had very real rights over the planes in question and their acts in pursuance of those real rights cannot be impugned in these Courts. What would have been the position, my Lords, in this case of Haille Selassie if, instead of sueing Cable & Wireless to recover a chose in action, he had in fact sold some state property in England while he was a de jure monarch. Could it be suggested in the circumstances of that case it would
10 have been an answer by the Italian Government to say "Oh, you have done this act mala fide"? The position is no different, my Lords, by reason of the fact that in one case you have, as it were, an enemy conquering country and, in another case, a rival faction of the same nationality, because you are dealing in both cases with rights of succession. My Lords, I ask your Lordships to look with me at one more passage in the judgment of Mr. Justice Bennett on this case because I shall avail myself of it later, my Lords, when I ask your Lordships to consider the meaning of Lord Justice Denning's words when he examined the question of mala fides or otherwise of the acts of Mr. Kwapinski in the Boguslawski case. My Lords, at p.189, Mr. Justice Bennett is concerned
20 with the case of U.S. of America v. McRae. That case is advanced in argument against the Emperor's claim, and, after citing the case, at the top of p.189, Mr. Justice Bennett says this:

> "I agree that the passage does contain a statement which, if it be a statement of the law of England applicable to the facts of the present case, would be an authority which would bind me to decide the case in the defendants' favour. But is it such an authority?"

That is to say, is it an authority applicable to the facts of the case heard before Mr. Justice Bennett. He goes on to say:

> "I desire to refer to Lord Halsbury's speech in Quinn v. Leathem and
> 30 to read a passage from it: 'there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides'."

My Lords, the statement is characteristic of course of all judgments of Lord Halsbury's, and a statement of the law which I ask your Lordships to bear
40 in mind when later on in the course of my argument we come to consider the Boguslawski case.

D'Almada: Unless your Lordships feel that I am omitting something by not dealing with the case when it came before the Court of Appeal, may I say this, my Lords, that the position in the Court of Appeal was this, that, in the interim, there has been de-recognition of the Emperor of Abyssinia wherefore it was held that the claim couldn't stand. Its basis, you see my Lords,

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well, is that if the chose in action belonged to the Government of Abyssinia, the right to sue therefore no longer vested in the Emperor because of the retroactive effect of de jure recognition having been accorded to the King of Italy, which automatically vested in that King the right of action. Now, my Lords, perhaps one last reference to this case before I leave it. If your Lordships will kindly look at the last paragraph of p.191 where, after dealing with Clauson's judgment in the Bank of Egypt case, Mr. Justice Bennett says this:

> " The learned judge was concerned to demonstrate that the plaintiff had no governmental control of any kind in Ethiopia, and gives as his reason that he had no means of enforcing control there. He was not considering or deciding questions of title to property in this country, where, if the plaintiff has a title, that title can be enforced."

My Lords, you will paraphrase that or adapt it to my case. Your Lordships are considering in this case no question with regard to areas over which the de facto government had effective control. You are asked to consider the title of property in this country which, on the 12th December, 1949, and until the offer and acceptance constituting the contract between Chennault and Willauer on the one hand and the Nationalist Government on the other, was vested in the Nationalist Government.

Court: Is it your submission that there is a distinction between the effect of retroactivity upon de jure recognition as regards the right to sue for a debt and as regards the power to pass a title to property?

D'Almada: The property had passed, my Lords. The property had already passed by the contract.

D'Almada: Well, my Lords, with respect, the difference as I say is manifest in this. What is the right to sue? The right to sue in the hearing of an action is vested in the Emperor of Ethiopia by virtue of being emperor. It was divested from him by de-recognition, so to speak, before he recovered the money, or, if you like, after judgment in his favour but before appeal. It is an entirely different proposition, I submit, from a question of title to property which existed in one Government unquestionably at the date when it entered into a contract and whereby it sold the goods in question to an individual and passed the property in those goods to him. My Lords, in spite of that fact really, what is the nature and what is the position of the Central People's Government? How does it succeed? The answer must be this, my Lord, it succeeds by right of succession or representation, if you like to call it, and not by title paramount. My Lords, there is an authority for that proposition. It is a case no doubt familiar to your Lordships, that is the United States of America v. McRae, L.R. 8 Eq. p.69. Your Lordships may concern yourselves with the facts of the case. They had to do with the question whether the United States Government could recover certain moneys in the hands of an agent of the Rebel Government, these moneys having been acquired by the Rebel Government, not by succession from the old Government, but in the course of its rebellion and it was held by the Vice Chancellor in this case that they could do that only, of course, if they agreed at the same time to an account between them because they could not be allowed to approbate and

reprobate. The fact, to which I draw your Lordships' attention in the judgment of Sir William James, the Vice Chancellor, begins at p.74 where he gives the position which would arise upon the suppression of the rebellion. And then he goes on, my Lords, to talk about the falling of the property into the hands of the persons who got it from them, the rebelling Government, that is to say, the falling of the property by the old constitutional government upon the separation of the powers. I needn't trouble your Lordships with that page but if you look at p.75, beginning at about 12 lines from the top of the page, you will find this passage. Perhaps, my Lords, properly to understand it, 10 it would be better to begin at about 6 lines from the top of the page. He says:

"I apprehend it to be the clear public universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or 20 restored power, vest ipso facto in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this right is the right of succession, is the right of representation, is a right not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative 30 obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it."

He then goes on to deal with an analogy, my Lords, which I don't think your Lordships need concern yourselves. Clearly, therefore in this case, the successor Government, my Lords, the Central People's Government, succeeds to all the rights and the correlative obligations. There is no question of any title paramount in this case, and the foundation, of course, for such a principle is the basis of continuity which, for reasons of convenience and practicality so to speak, must exist, else what would be the position, my Lords, of persons contracting with the Government? It is clear, my Lords in my submission, 40 that in so far, at least as the nationals of other countries are concerned, the principle applied by the Courts is this, that it ought to be safe to contract with a recognised Government whether that be a recognised Government de facto or de jure. There is an English case to support the proposition where a de facto Government was concerned and I will submit my Lords—and an American case also incidentally—the position is a fortiori where you are dealing with a de jure Government.

D'Almada continues: I don't know whether your Lordships propose to take any afternoon adjournment?

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(Court adjourns at 3.45 and resumes at 4 p.m. Appearances as before).

D'Almada continues: My Lords, I was on the principle established by the Courts in more than one decision that it ought to be safe for an individual, not the nationals of a particular country at least, to contract with the recognised de facto Government of that country, and it will be my submission, my Lords, that there is no reason for distinguishing this where in fact, a Government is de jure recognised. The case I am going to give you is one of a de facto Government. It is the case of the Republic of Peru against Dreyfus reported in 38 Chancery Division p.348 ((1888) 38 Ch.D. p.348). I read from the headnote, my Lords: 10

> " Where the revolutionary or de facto Government of a country has been recognised by the Government of a foreign State, a subject of such foreign State may safely contract with that de facto Government;"

Pausing there for a moment, my Lords, I would say of course no difference arises where the subject is that of some other state. The principles afforded there must be the same. We don't limit our administration of justice to the subjects of the state concerned.

> " and if, by subsequent revolution, the previously existing Government of the country is restored, the restored Government is bound by international law to treat any such contract as valid, and in a litigation with the foreigner, party to the contract, must adopt the contract, merely taking such rights as the de facto Government might have had under it." 20

The application of the principle is the same.

> " Semble, that even in the case of a contract by a foreigner with a rebel State which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract."

The facts, if I may summarise up to your Lordships, are these: Messrs. Dreyfus and Company, my Lords, who were French subjects, had entered into a contract with the Government of Peru, which I will call Government A. 30 Out of that contract arose a dispute between Dreyfus and that Government and, to summarise the dispute, Dreyfus claimed that this Government A owed them £4,000,000. Government A, on the other hand, denies that they were indebted to Dreyfus in any sum at all and maintained, on the other hand, that in fact Dreyfus owed them a £100,000. That being the position, Government A were succeeded by another Government which I will call a Senor Pierola Government. Senor Pierola's Government was recognised de facto by His Majesty's Government, by the Government of France and other governments. And Senor Pierola's Government arrived at a settlement with Dreyfus, the result of which was that Dreyfus reduced their claim to some £2,500,000. 40 Political events in the country caused Pierola's Government to resign and the old Government A, reconstituted, came back into power. That old Government passed an act of Congress declaring void all the internal acts of Senor Pierola's Government and at the time in question in this action certain funds were standing in the English courts, a sum of some £200,000 to the credit of

another action, and the plaintiffs in this action, my Lords, that is the Republican Government of Peru by Government A, the old restored Government, put through an injunction to restrain Dreyfus from removing from the courts this sum of money standing to the credit of that action. I think, my Lords, that I may go on with the facts now by asking your Lordships to read with me from the judgment of Mr. Justice Kay at p.355. About a third of the way down the page he says, after reciting the facts:—

> "The short result of these facts is this. At the time when Senor Pierola seized upon the supreme power there was a question pending between Messrs. Dreyfus and the Peruvian Government as to the result of the accounts of their dealings in guano under the first contract. By art. 33 of that contract this question was to be settled by the tribunals of Peru. With the assents of Messrs. Dreyfus this provision was waived, and the amount due was settled by Senor Pierola's Government reducing the claim of Messrs. Dreyfus by more than £1,400,000. To this settlement Messrs. Dreyfus assented. They were not subjects of the State of Peru, but of France. The French Government had recognised Senor Pierola's Government as the de facto Government of Peru. Senor Pierola made provision for paying this amount by consigning fresh cargoes of guano to Messrs. Dreyfus. They have recovered these cargoes after long litigation with the Peruvian Guano Company, who claimed them, and the present Government of Peru are now seeking to deprive them of moneys, the proceeds of these cargoes, on the ground that by the law of Peru the arrangement with Senor Pierola's Government was void."

Those then are the facts, my Lords, and, dealing with the law immediately after what I have read, occurs this passage in Mr. Justice Kay's judgment:

> "It is difficult to see how this can be determined by the law of Peru. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such State has recognised. If they may not, of what value to the citizens of a foreign State is such recognition by its Government? There have been successive Governments in European countries—usurpations of the power of previous Governments overthrown—altering the constitution essentially. These have in turn been recognised by this and other nations. When the Government of this country recognised the third Emperor of the French, if any Englishman entered into contracts with his Government, could it be maintained that the validity of such contracts must depend upon the law of France as settled by decree of the Republic which was established on his deposition? Obviously it would follow that no Englishman could safely contract with the present Government of France, or, indeed, with any existing Government, lest it in turn should be displaced by another Government which might treat its acts as void."

It therefore decides my Lords that this is not a question to be decided by the municipal law of the country concerned but must be decided on the footing of international law. And if your Lordships will turn with me to p.360 you will see that, there, Mr. Justice Kay cites the passage which I gave your Lordships,

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out of McRae's case at the first part of that page and then, my Lords, goes on to cite from Wheaton's International Law. And I don't need to trouble your Lordships with the first part of that citation but, if you will look over page 361 beginning with the third line of that page, you will find this statement from Wheaton's followed by an observation by Mr. Justice Kay:

> "Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorised. But in the case of international transactions, where foreigners and foreign 10 Governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign Governments and their subjects treat with the actual head of the State, or the Government de facto, recognised by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such Government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were acts of him who is considered by the restored sovereign as an usurper. On the other hand, it seems that such aliena- 20 tions of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of bonae fidei purchasers under such alienation to be indemnified for ameliorations." "This distinguishes the dealings as to the public property of a State between the State and its own subjects from similar dealings with foreigners, which the succeeding Government by international law must treat as valid."

He then refers, my Lords, to another case involving the United States 30 Government, the United States of America against Pierola, fourth line from the end of page 361, and says:

> "In United States of America v. Prioleau, a similar claim was made to goods which rebellious States of America had sent to a citizen of this country. The rebellious States had been conquered by the United States Government; they had never been recognised by England's Government. Yet it was held, and the decision has not been questioned, that the contract under which the goods were sent must be recognised, and that they could not be recovered in violation of that contract. It was not doubted that the United States were entitled to all public property 40 belonging to the rebellious States; but where these States had dealt for value with citizens of another country such property could not be recovered by treating the contract as void. In a litigation with the foreigner, party to the contract, they must adopt the contract and merely take such rights as the de facto Government of the rebel States might have had under it. This doctrine is recognised in some of the other citations already made, especially in the words of Lord Justice James, which I have quoted. It was applied even in the case of rebel States which had not been recognised by this country. It follows a

fortiori in this case that the Republic of Peru can only recover the proceeds of the eleven cargoes of guano if Senor Pierola's Government could have done so. That Government certainly could not have recovered them in violation of its own contract, as the Republic of Peru are now seeking to do."

The rest of this judgment, my Lords, deals with the position qua the injunction and, with respect, is no concern of your Lordships. This same principle, that there must be safety between the citizens of one state and the Government of another state with regard to its contracts, is the basis of a decision of an
10 American case, my Lords, Guaranty Trust Company against the United States Government which report I am afraid I haven't with me at the moment but which I shall bring to your Lordships to-morrow morning. In fact it is really hardly necessary to refer to the report at all because those portions of it which are relevant, my Lords, are cited in extenso in the judgment of Lord Justice Cohen in the Boguslawski case. Your Lordships will kindly note that there is no question but that this principle and this case as an authority for this principle is cited with approval in such books as Oppenheim, Hyde, and Lauterpacht. My Lords, this brings me now to an examination of Boguslawski's case and I ask your Lordships to look with me first, very briefly, at the
20 judgment in the Court of First Instance. The case is reported, my Lords, in (1950) 1 K.B. at p.157 and although the headnote is a fairly long one, I will take your Lordships through it because here are set out the facts and merits as briefly as possible and this will avoid the necessity of referring to them again when I come to deal with the claim in the Court of Appeal:

"At all material times prior to midnight of July 5/6, 1945, the Polish Government which was originally formed in Warsaw was established in London. At a meeting held on July 3, 1945, in London between the minister of that government designated the Minister of Industry, Commerce and Shipping (acting on behalf of the Polish shipping companies
30 under powers given to him by previous legislation of that government) on the one hand and the respective representatives of the unions of Polish ship officers and seamen (acting on behalf of their respective members) on the other hand, it was agreed that in the event of any of such members leaving their respective employments they would be entitled to receive compensation on an equal footing with the employees of the Polish State, namely, three months' salary. On June 28, 1945, the provisional Polish Government of National Unity was formed in Lublin, Poland, and by a certificate signed by the British Foreign Secretary on behalf of His Majesty's Government it was certified that
40 up to and including midnight of July 5/6 1945, His Majesty's Government recognised the Polish Government having its headquarters in London as being the government of Poland and as from midnight of July 5/6, 1945, His Majesty's Government recognised the Polish Provisional Government of National Unity as the government of Poland and as from that date ceased to recognise the former Polish Government having its headquarters in London as being the government of Poland.

The first plaintiff had been an officer in the employment of the defendants who were a Polish shipping company having its headquarters in London and the second plaintiff had been a seaman in that

employment. On July 5, 1945, both plaintiffs left the defendants' ship on which they were employed and which was lying in English waters and they ceased to be employed by the defendants. They then claimed from the defendants compensation on the basis of three months' salary in accordance with the agreement of July 3, 1945. The defendants refused to pay any compensation and they contended that on July 3, 1945, the former Polish Government no longer had any power to make any agreement on behalf of any Polish shipping company, because it had by then been replaced by the Polish Provisional Government of National Unity as from June 28, 1945, and they also contended that the certificate of the British Foreign Secretary which recognised the Polish Provisional Government of National Unity had retroactive effect back to June 28, 1945.

Held, that normally when the government of this country recognised the government of a foreign country it recognised it back to the time when it became over any particular area the effective de facto government; the new Lublin Government, however, up to midnight of July 5/6, 1945, never had any control over any Polish ships and Polish seamen because they were far removed from any area over which that government exercised any authority; on the contrary right up to that moment the only government which this country recognised as the government of Poland and the only government which in fact had any control over the ships and seamen concerned with the agreement of July 3, 1945, was the original Polish Government then established in London; furthermore, the effect of the certificate of the British Foreign Secretary was that the government of this country certified that it recognised the government of a foreign country up to midnight of July 5/6, 1945, and that it recognised another government of that country after that moment; it followed that the acts done by the former government of that country before that moment must be valid and there could be no retroactive effect of the recognition of the new government back to June 28, 1945, because otherwise the certificate would mean little or nothing; accordingly, as the terms of the agreement of July 3, 1945, were in accordance with the law which was then being administered by the former Polish Government, the Minister of Industry, Commerce and Shipping of that government had power to enter into that agreement on behalf of the defendants and the court should enforce its terms against the defendants."

Those are the facts, your Lordships will see. And your Lordships will see also from the headnote later, if necessary, from the judgment of Mr. Justice Finnemore who was the Trial Judge that his view of the terms of the certificate was this, there could be no question whatsoever of any recognition retroactive, that is to say, recognition of the Lublin Government before July 5/6th by virtue of the terms of this particular certificate although the Secretary of State did say in the certificate that the question of retroactive effect of recognition of a Government is a question of law for decision by the Courts. Similar in terms, as your Lordships will see, to the statements in the answers to the questionnaire to which I have already referred, you will find that portion of the answer by the Secretary of State in his certificate about the middle of p.160 of the report. At p.164 counsel, on behalf of the plaintiffs, made reference to the Guaranty Trust Company against the United States and, if

your Lordships will now turn—there is quite a few pages which concern themselves with the facts of the case and therefore do not really matter—and what I have to bring your attention to, you will find my Lords, beginning at the bottom of p.173 and, my Lords, so that the position can be put beyond all doubt, let us begin at the top of p.173, and the paragraph on that page. There is reference by Mr. Justice Finnemore to Luther and Sagor. He says this:—

"A number of cases have been cited to me, and I think the result of them is this: that when this country recognises a government of a foreign country as being the government, the recognition dates back to the time when that government became the effective de facto government. In the case of Aksionairnoye Obshestvo A.M. Luther v. James Sagor & Co. our Foreign Office said in their certificate: 'We recognise the Soviet Government as the government of Russia.' They were asked for more details, and they said: 'Well, we recognised originally the Provisional Government, which was the Kerenski Government. In 1917 that Government was displaced by what is now called the Soviet government.'

It was held on those statements of fact from the Foreign Office that the recognition dated back to 1917 or thereabouts; in other words, to the time when the government which was recognised became over Russia the effective de facto government. I think the general principle is just that, that when we recognise a foreign government we recognise it back to the time when it became, over the area concerned, the effective government, and it follows from that that we recognise the acts which it has carried out in the whole of that period.

In this case there are some unusual features. We are dealing with the government of Poland which was effective in this country and over Polish ships and Polish seamen, and as far as I know no one suggests that up to midnight on July 5, what I call the new government, the Lublin Government, had any control whatever over Polish ships and Polish seamen, because they were all far removed from any area, whatever it was, over which on June 28, the new Lublin Government exercised authority.

Therefore, when our Government recognises as from a precise hour, namely midnight on July 5, the new Lublin Government, as far as Polish ships or Polish seamen or the Gdynia-Ameryka Linie with its headquarters in London, are concerned, there is no time when any authority over those was ever exercised by the new government. On the contrary, right up to midnight on July 5, the only government which this country recognised and the only government which in fact had any control over ships and shipping, and the seamen with whom we are concerned, was the old government which came from Warsaw to Angers and to London.

I was told that the certificate which was given to me in this case is in an unusual form. I do not think it is the practice with regard to certificates of this kind hitherto to set the precise date and hour at which the new government is recognised. Be that so or not, I think it is unusual. I think it was said it is unique to set the limits of recognition of two governments.

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This certificate says that up to midnight on July 5/6, we, the British Government, recognise the Warsaw-Angers-London Government as the government of Poland for the Polish people, and, in particular, of course, the government of the ships, the seamen and the shipping company. As from that midnight we are recognising another government.

If this be the new form, it seems to me, if I may say so with the utmost respect, that it is a very commendable form, because I should have thought it settled the problem. It is quite true that the Secretary of State for Foreign Affairs, most properly and wisely no doubt, says at the end of his certificate that the question of any retroactive effect of this recognition is a matter to be decided by the courts. 10

I should have thought and I so hold—there being no authority on this that I know at all—that where the government of this country in terms certifies that it recognises one government up to midnight on July 5/6, and another government thereafter, the acts done by that government recognised up to midnight in this country while it was still recognised as the government, must be valid. Otherwise this certificate would seem to mean little or nothing. And I think if that is so, there can be no retroactive effect back, for example, to June 28 as is pleaded in this case. 20

I hope it will not seem to anyone in this case or to other courts that I am dealing with this very important question rather summarily. I am not, but I say so far as I know and so far as counsel know, there is no authority on it at all. We all understand how recognition normally dates back to the time when the government is the de facto government; but this is something quite different and I say with great respect that I should have thought it was really very clear that if the Foreign Secretary's certificate, on which alone I have to decide, says in terms, 'We recognise one government up to such a time and another after it,' it means what it says. 30

I think it can have in this country no retroactive effect at all, and therefore on July 3, Mr. Kwapinski was still the Minister of Industry, Shipping and Commerce in a legally recognised government, and therefore could exercise whatever powers he had in that capacity."

Mr. Justice Finnemore was not evading the fact that the Secretary of State, in his certificate, stated that the question of retroactivity is one for the courts. What he did say is this: upon the terms of this certificate, which is the sole evidence upon which he could decide, and is always the sole evidence as your Lordships know, there is no question whatsoever that there was no retroactivity at all in this case. And your Lordships will see that when this case went to the Court of Appeal, Lord Justice Cohen took the same view. He also, of course, having regard, bearing in mind that statement in the third paragraph of the certificate to the effect that the Secretary of State is advised that the question of retroactivity was one for the courts. 40

Gould J.: The certificate here refers to the Court's decision in the light of the answers and of "evidence before it."

D'Almada: That is the view of the Secretary of State, my Lords. Yes, I will submit the true position is this, you have to decide upon the certificate alone. In the ordinary course, that is so. If you bring in the evidence here, that does not alter the position one whit in any event because, what have you got here? You have got a statement by way of questions and answers, it said recognition took place on midnight 5/6th January, 1950, and exactly the same circumstances as in the case of the Warsaw and the Lublin Government. And, 10 if your Lordships were to look round and consider whatever evidence there is on this particular point, it adds nothing to it my Lords, for these reasons.

Court interposes: The reference to "evidence before it" probably relates to the dates of de facto recognition of the various areas.

D'Almada: Yes, on that point I agree. If there is any question of retroactive effect of recognition, that can only date back in regard to the province taken when that province came under the effective control of (indistinct) and so on. But, insofar as any question of recognition is concerned, you are, by the very nature of things, limited to the certificate, no more. Mr. Justice Finnemore held in that case that there was a contract and that the shipping line expressed 20 was liable to pay these sums of three months wages to the seamen who were plaintiffs in the action on the grounds that at the date when that contract was made between the Minister, who had power so to do, and the Union on the other hand, on behalf of the seamen, that minister was a minister of a de jure Government; and that no question of retroactivity could affect the contract. The case went to appeal and was argued very fully there and was the subject of considered judgments by a court composed of Lord Justices Cohen, Denning and Bucknill. There is one portion of the headnote in that report, (1951) 1 K.B. p.162. You will see there, my Lords, after the facts were set out;

> "Held, that the principle that there could not be more than one govern-30 ment of a foreign State recognised by the British Government at the same time, truly stated, was that there could not be recognition of more than one such government at the same time in respect of the same territory. Comity seemed to be satisfied by a recognition of the validity of the acts done by the new Polish Government during the period from June 28, 1945, to midnight on July 5-6, 1945, only in territory under its de facto control, and convenience required that the validity of acts done in England by the old Polish Government during that period should not be questioned."

Now, with respect my Lords, if you examine that case, that principle is not 40 limited to acts done in England. It so happened that in this particular case, the Warsaw Government was functioning in London wherefore of course the decision was based upon those facts. But there is nothing in principle or otherwise which would make the decision any different if in fact, as in this Court, they were acts done by a Government recognised de jure whether those acts were done in British territory or elsewhere; and where, my Lords, you have also in this case the fact that the property in question was, and still is, within our jurisdiction. My Lords, in connection with this case, I will deal first with

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the question of retroactivity and place before your Lordships the views of the three members of the Court of Appeal on that point. Lord Justice Cohen, my Lords, held that in fact that the matter was concluded by the Certificate. Your Lordships will kindly turn to p.173 of the Law Report. You will see, my Lords, right at the very beginning of Lord Justice Cohen's judgment, Mr. Pritt, put in the forefront of his argument in the case on behalf of the appellants, that is, the Gydnia-Ameryka Linie;

> "Mr. Pritt put in the forefront of his argument the point that in English law recognition by His Majesty's Government of a foreign government de jure or de facto, has retroactive effect. Before I consider the validity of this point I must promise that, although, as the certificate itself points out, in para. 3, the question whether and to what extent recognition of a foreign government is retroactive is a matter of law for decision by this court, the facts as to the extent of recognition of the old and the new governments are decisively settled by the certificate of the Secretary of State. Paragraph 1 is the material part of that certificate for this purpose. It seems to me, as it did to the Judge, that where the Secretary of State certifies that His Majesty's Government recognises one government up to midnight on a specified day and another government thereafter, the position is the same as if a Secretary of State were to certify, for example, that His Majesty's Government recognised the government of one absolute monarch up to the moment of his death and the government of his son and heir thereafter. There would then be no question of retroactive effect: one government would be and could be recognised as the successor of the other. So here it seems to me that the Secretary of State is in effect saying that the new Polish Government is recognised as from midnight on July 5-6, as the legitimate successor of the old Polish Government. In these circumstances, it seems to me that the acts of the old Polish Government prior to midnight on July 5-6, are valid and binding on the new Polish Government at any rate unless and until the new Polish Government rescinds or repudiates them, an event which it is common ground between the parties has not occurred so far as any act relevant to the present case is concerned."

So you see, my Lords, fully alive to the fact that it was a matter for the decision of the Courts, Lord Justice Cohen nevertheless said "Upon the statement contained in the certificate, there is no question whatsoever of any retroactive effect. I say the matter is such" sharing the view held in the Court below of Mr. Justice Finnemore. Oh, my Lords, once on that point, this matter goes further with the judgment of Lord Justice Cohen because he goes on to deal with the position if, in fact, there were any question of retroactivity. He says:

> "As I have reached this conclusion, it is not strictly necessary for me to consider what the position would be if the recognition by His Majesty's Government of the new Polish Government were to have some retroactive effect. But, as the matter was fully argued, I ought to say that, even on this basis I would doubt whether Mr. Pritt was entitled to succeed. He argued that recognition not only validated all acts of the new Polish Government done during what he conveniently called the

twilight period (that is, the period between the date on which that Government attained power and the date of recognition by His Majesty's Government) but also invalidated all acts, whether executive or legislative, done during the twilight period by the old Polish Government. He admitted that there was no reported case that went this length, but he said that the principle laid down by this court in Aksionairnoye Obschestovo A.M. Luther v. James Sagor & Co., and approved by the House of Lords in Lazard Bros. & Co. v. Midland Bank, Ltd. was sufficiently far-reaching to entitle him to succeed.

10 That principle is concisely stated by Lord Wright in the latter case. The question at issue was whether or not the Industrial Bank, a Russian company, was an existing company or had been duly dissolved under Russian law. Lord Wright said: 'The Industrial Bank was a corporation established by an Act of the Tsar; but the governing authority in Russia, as recognised in the English Courts, is now and has been since October, 1917, the Soviet State. Soviet law is accordingly the governing law from the same date in virtue of the recognition de facto in 1921 and de jure in 1924 by this country of the Soviet State as the sovereign power in Russia. The effect of such recognition is retroactive and dates
20 back to the original establishment of Soviet rule which was in the 1917 October revolution, as was held by the Court of Appeal in Aksionairnoye Obschestovo A.M. Luther v. James Sagor & Co.' In that case, however, the question at issue was the validity of acts done by the foreign government in territory indisputably under its de facto control, and I think that the ambit of the decision was correctly stated by Bennett J., in Haille Selassie v. Cable & Wireless, Ltd., where he said, that Aksionairnoye Obschestovo A.M. Luther v. James Sagor & Co. had reference exclusively to the acts of a de facto government and a de jure government both recognised as such by His Majesty's Government and
30 both claiming to have jurisdiction in the same area with reference to persons and property in that area.''

So, Lord Justice Cohen says ''Even though I may be wrong in coming to the conclusion that on the certificate there is no question about it that there is no retroactive recognition, still, if being so wrong, there is retroactivity. That doesn't affect the case because the principle of retroactivity applies only within the area under the effective control of the de facto government.'' As I was going on to say, my Lords, a different view was taken by Lord Justice Denning as to the conclusiveness of the certificate. And, if your Lordships will kindly turn to p.180 of the judgment, at the paragraph beginning ''This all shows'',
40 I don't think your Lordships will bother about the first sentence or two, it goes on to say later, after referring to the position of the old Government, the Warsaw Government;

'' The time came later—namely, at midnight on July 5-6, 1945—when we ceased to recognise that government, but I cannot believe that the de-recognition, if I may so describe it, had any retroactive effect in respect of acts done here. It could not render invalid acts which we had previously sanctioned as valid; nor could it take away rights and obligations which had accrued only because we had permitted them to accrue.

This brings me to the next question: what was the legal effect of our recognition of the Polish Provisional Government of National Unity which was formed in Lublin on June 28, 1945? We recognised it as the Government of Poland as from midnight on July 5-6, 1945. To what extent did our recognition operate retroactively to June 28, 1945? I do not think that the certificate of the Foreign Secretary is conclusive on this point, because para. 3 expressly and correctly stated that the retroactive effect of recognition was a question of law for the courts. The matter must, therefore, be considered on principle."

And, on principle, he goes on to consider it. 10

" In the ordinary way of course, our courts do give retroactive effect to the recognition of a government, in that we recognise the acts of that government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently, from the time that it was an effective government. Thus, if it has already made decrees transferring to itself goods and chattels within its territory and sold them to British buyers, our courts will recognise the transfer as valid (Then he quotes the case of Luther v. Sagor). If it has already passed legislation dissolving companies incorporated within its territory, our courts will hold the companies to be non-existent as well here as there." 20

That, of course, of itself is a question of corporate home, my Lords, its domicile or siege local of an incorporated entity, as in the case of the Banco de Bilbao, which I don't think I need trouble your Lordships herewith because we are not dealing with any such entity in this case. He goes on to say:

" The reason for this retroactivity is that, just as we recognise the decrees of the government subsequent to recognition to have been lawful, so also we must recognise the prior decrees to be lawful, unless, indeed, we are to say that the government must re-enact those prior decrees all over again before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that government might 30 reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition.

The retroactive effect must, however, be confined to acts of the government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control: Banco de Bilbao v. Sancha, (1938) 2 K.B. 176; or acts with regard to ships which are registered there and whose masters attorn to it: Government of the Republic of Spain v. S.S. "Arantzazu Mendi", (1939) A.C. 256. Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactivity 40 is limited to the area of its effective control."

So, the view the Lord Justice Denning took, my Lords, was this, that the matter was not concluded by the certificate. Examining the certificate, his answer was, there was retroactivity or there would be retroactive recognition but it didn't affect the case because it is dealing with property outside the area in the effective control of the Lublin Government. Lord Justice Bucknill in a very short judgment at p.184 says this:

"On either view of the effect of the certificate of recognition signed by the British Foreign Secretary, the acts of the old Polish Government in England from June 28 to midnight July 5-6, 1945, were valid and binding, at any rate unless and until the new Polish Government rescinded or repudiated them."

You have therefore this position, my Lords, that of the four judges who dealt with this matter, one, a Judge of First instance and a Lord Justice of Appeal, came to the conclusion that, as the certificate stood, there was no question but that it was for the Courts to decide whether or not there was retroactive effect
10 in the recognition. But, they said, by reason of the terms of the certificate, clearly there was no recognition. Lord Justice Denning took the opposite view and Lord Justice Bucknill reserves an open mind on the question. I submit, my Lords, that applying those various judgments to the answers given in our case, that, if any question of retroactivity comes into the picture at all, this Court should find that, of the answers given, there is no question of any retroactivity here—retroactive recognition—and your Lordships will bear in mind, of course, my subsidiary argument. But, even assuming you do find against me that there was a retroactive recognition, that is still subject to the law of successor governments being bound by the same obligations; and the
20 fact that, impleading being out of the way, in fact, in this Order-in-Council, there is no question of your Lordships being trammelled in any way in coming to the conclusion that those persons who were purported to hold the planes for and on behalf of the Central People's Government were doing so wrongfully. There was in fact, my Lords, no possession in the Central People's Government. Once you get impleading out of the way, the possession was that of certain individuals who said: "We are holding on behalf of the Central People's Government." Your Lordships examining into the quality of that holding will say that holding is right in the teeth of certain injunctions. That holding was unlawful and therefore cannot avail.

30 (Court Adjourns to 10 a.m. to-morrow).

10 a.m. Court resumes. Appearances as before.

Gould J.: Mr. D'Almada, there has been made available to you this morning copies of the subsidiary question and answer which I trust you have had sufficient time to consider? If it makes any difference to your argument no doubt you will deal with it.

D'Almada: It doesn't, my Lords. Towards the close of yesterday afternoon's hearing, I was arguing that by reason of the questions and answers which we then knew of, your position was no different from that found by Mr. Justice Finnemore and Lord Justice Cohen in the Boguslawski case and that, therefore,
40 your Lordships should find that in fact there was no retroactivity at all in this case. But I went on to say, your Lordships recall it, that if you do so find, nonetheless that must be applicable only within such territories as it were within the effective control. Now, this question and answer seems to put an end to the argument that there was no question of retroactivity by reason of the answers given so that I rely on the second limb of my argument, that is to say, even though the recognition did have a retroactive effect, it did not affect property within the jurisdiction of this Court. In fact, it was

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limited to areas over which the Central People's Government had effective control.

Gould J.: I think it seems obvious that that should be incorporated in the record?

D'Almada: Unquestionably my Lords. I agree, with respect.

Gould J.: Yes, thank you. Yes, will you continue Mr. D'Almada?

D'Almada: As it pleases your Lordships. Towards the close of yesterday's hearing, my Lords, I was dealing with the judgments of the Lord Justice in the Court of Appeal in the Boguslawski case and, in particular, with this question of retroactivity. I was going on to refer to a passage in the judgment of Lord Justice Denning upon this point which is, I submit, pertinent and although, as I say, the argument is now not open to me that there was no question of retroactivity, this part of his judgment is on the other aspect of the case, or the other limb of the argument, and I ask your Lordships' attention to it. You will find, my Lords, beginning about the middle of p.180 of the Law Report of this case this statement by the Lord Justice. If I have already referred to it, I beg your Lordships' pardon for going over it again but it won't take me very long to deal with the point. He talks about this special recognition of the Polish Government in London, and goes on to say in the third sentence about two-thirds of the way down p.180 ((1951) 1 Law Reports, King's Bench Division):

> "The time came later—namely, at midnight on July 5-6, 1945—when we ceased to recognise that government, but I cannot believe that the de-recognition, if I may so describe it, had any retroactive effect in respect of acts done here. It could not render invalid acts which we had previously sanctioned as valid; nor could it take away rights and obligations which had accrued only because we had permitted them to accrue."

My Lords, pausing there for a moment, may I say that, of course, this doesn't enunciate any new principle. It is in keeping with Luther and Sagor, my Lords, which was referred to also by Lord Justice Cohen in his judgment, and in keeping with Mr. Justice Finnemore's view as well as the view expressed in numerous text-books on international law, as well as a number of cases following Luther and Sagor. And I submit, my Lords, that the fact the Polish Government, the Warsaw Government in this particular case, was established in London makes no difference whatsoever to the principle. Because, in our case, the Nationalist Government continued to be recognised as the de jure Government until the 6th January, 1950, and, if a distinction is sought to be drawn on the basis that there was a very special recognition in the case of the Warsaw Government, then the answer must be this, my Lords, that the continued recognition of the de jure Government in our case is a meaningless fiction. I submit that that continued de jure recognition meant this, that all the attributes and all the rights of sovereignty continued to attach to the Nationalist Government until de-recognition and that de-recognition did not affect acts or transactions done previously to it. Lord Justice Denning's view is further expressed, if you will look at the bottom of p.181,

and continued on on page 182. After examining Luther and Sagor and Banco de Bilbao and other cases, he says this in the paragraph beginning at the end of p.181:

"The result of all this discussion is therefore that, in the eyes of our courts, right up to midnight of July 5-6, 1945, the Polish Government in London had full right and title to exercise governmental functions in respect of the men and ships of Poland who were here or had their home ports here; and as from that same midnight they ceased to have any such right or title, and the same became vested in the new Polish
10 Government in Warsaw. There was, in short, at midnight a transfer by operation of law of all governmental functions and property from one government to the other. So far as our courts are concerned, it was nothing more than a case of an old government going out of office and a new government taking over. At such a time feelings may run high. The old government may be fearful of what the new Government may do. The new government may cast suspicious eyes on what the old has done. But none of these things concerns these courts. In the eye of the law, it was simply a case of one government succeeding to another by operation of law. Upon such a succession it is obviously
20 desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old government will remain effective except in so far as the new government decides to repeal them. Rights and obligations which have become vested under the old government will remain intact unless the new government passes a decree divesting them, if it can lawfully do so."

The proposition is a perfectly simple one of course, my Lords. It doesn't matter whether the new Government succeeds by revolution or constitutionally or otherwise. From the point of view of our law, it is clearly a case of succes-
30 sion, the new Government taking over from the old, and the legal consequences are as dealt with by Lord Justice Denning at p.192. I pass now, my Lords, to consider once more this question of the principle of convenience as illustrated in the Republic of Peru and Dreyfus case and your Lordships will recall that yesterday I told you that one of the leading cases upon the subject was Guaranty Trust against the United States Government, an American case reported in the United States Reports, Volume 304 at p.126. As this case is referred to with approval in, as I have already told your Lordships, numerous textbooks as well as in some cases including the Boguslawski case, the reference in that case to the Guaranty Trust I shall give your Lordships in a moment. I
40 propose to read to your Lordships, from the judgment of Mr. Justice Stone in this case, the relevant passage upon this point. There are other points in what is called the Opinion of the Courts according to the American system, my Lords, which do not fall to be considered in this case. I am reading from p.140 and p.141 of the Report. Mr. Justice Stone says this:

"The Government argues that recognition of the Soviet Government, an action which for many purposes validated here that government's previous acts within its territory (and then he refers to a number of cases) operates to set at naught all the legal consequences of the prior recognition by the United States of the Provisional Government and its

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representatives, as though such recognition had never been accorded. This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government. The argument thus ignores the distinction between the effect of our recognition of a foreign government with respect to its acts within its own territory prior to recognition, and the effect upon previous transactions consummated here between its predecessor and our own nationals. The one operates only to validate to a limited extent acts of a de facto government which by virtue of the recognition, has become a government de jure. But it does not follow that recognition renders of no effect transactions here with a prior recognised government in conformity to the declared policy of our own Government. The very purpose of the recognition by our Government is that our nationals may be conclusively advised with what government they may safely carry on business transactions and who its representatives are. If those transactions, valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.

So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in Russian Government v. Lehigh Valley R. Co., supra. An application for writ of prohibition was denied by this Court. 265 U.S. 573. We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition."

My Lords, there is no reason, in principle or otherwise, to suggest that that statement of the law is applicable only in regard to American citizens in the United States and that, correspondingly therefore, it should be applicable in a British Court only in respect of British subjects. Indeed, the very use of that case made by Lord Justice Cohen and Mr. Justice Finnemore in the Boguslawski case shows that the principle is applicable, broadly speaking my Lords, and without such limitations at all because, in this case, they were dealing with contracts between the Polish Government and Polish Nationals. If your Lordships will kindly look again at the Boguslawski case, you will find ((1951) 1 K.B.) at p.171 of the judgment of Lord Justice Cohen his reference to this case. He says beginning at the top of that page:

"Though it may be said that there is no reported case which decides precisely the proposition for which the defendants contend, that contention follows in logic from the observations of the judges in the cases above cited."

I beg your pardon, my Lords, that is in the course of the argument of Mr. Pritt and your Lordships will note the interjection by Lord Justice Cohen. He says this:

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"If during the period from June 28 to July 5-6 midnight, an Englishman paid in England a debt due to the Polish State to the proper officer of the London Polish Government and obtained from him a proper discharge, would not an action against the Englishman in the English courts at the instance of the new Polish Government for the debt fail?"

Mr. Pritt's answer is:

"That might be so, but that case is not analogous to the present, since the plaintiffs here are Polish nationals serving on Polish ships, that is, on Polish territory, and the transaction in question was not completed. The issue is whether an executory contract or, on another view, an offer not accepted by midnight July 5-6, remained in force after the recognition by the British Government of the new Polish Government. In Guaranty Trust Co. v. United States, on which the plaintiffs rely, the court was concerned with a completed transaction."

That, your Lordships see, is the way in which Mr. Pritt sought to distinguish the case. Your Lordships will see that, despite the attempts by Mr. Pritt to distinguish his case from the Guaranty Trust, Lord Justice Cohen would have none of it. But, before coming on to his judgment on the point, may I give your Lordships the argument adduced by Mr. Linton Thorp on behalf of the plaintiffs. He, in turn, refers to the Guaranty Trust case at 6.172 when he says:

"Guaranty Trust Co. v. United States is an authority for the proposition that retroactivity will not operate to invalidate acts by a duly recognised government. There is no basis in principle for drawing a distinction between acts which confer rights on the nationals of the recognising country and acts which confer rights on other nationals. Nor is there any reason to distinguish between acts which confer rights in future, e.g., executory contracts and acts which are completed, e.g., executed contracts. The only question is whether the act, whatever its nature, was at the time a valid act."

And, dealing with that aspect of the case, my Lords, Lord Justice Cohen has this to say, beginning at p.175 of his judgment. At the top of the page, my Lords:

"In the present case I am concerned not with the validity of acts done in Poland by a Polish Government, but with acts done in England by the old Polish Government which are alleged to have given rise to a contract between the defendants and persons all of whom were outside Poland. Mr. Pritt, as I have said, claimed that the retroactive principle still applied, but he found himself obliged to admit that there must be a limit to its application. Thus he conceded that if, during the twilight period, an Englishman paid in England a debt due to the Polish State to the proper officer of the old Polish Government and obtained a discharge from him, an action in the English courts at the instance of the new Polish Government to recover that debt must inevitably fail. He said, however, that the present case was not analogous because the plaintiffs were Polish Nationals, and the questions at issue were not the validity of a completed transaction, but whether an executory contract, or, on one view, an offer which had not yet resulted in a contract, remained in force after the recognition of the new Polish Government."

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And this is how he deals with the argument, my Lords. He dismisses it. He says:

"I do not think that either of these suggested distinctions affects the matter. The English Sovereign affords his protection not only to British subjects but to foreigners for the time being in England. Mr. Pritt admitted that no distinction could be made between British subjects and alien friends in England, but he said that we were dealing here with Polish subjects on Polish ships and, therefore, notionally on Polish territory. It seems to me, however, that the nationality of the plaintiffs and the ships is irrelevant, since the alleged contract of July 3, if made, was made in England, or if the matter rests on the telegram, then the offer was made from England and, having regard to its nature, acceptance by leaving the ship could only take place outside Poland." 10

No particular point was made of the fact, as your Lordships see, of the contract having been made in England, the only point of importance, of course, being this, that it was a contract made outside the area over which the de facto government had any effective control. That was really what was meant by Lord Justice Cohen and, of course, stated in those words because he was dealing with the facts of that particular case. And, my Lords, outside the territory over which the de facto Government had effective control. 20

Gould J.: Doesn't he seem to be going even further than that? The submission was that Polish ships were Polish territory, Lord Justice Cohen seems to be saying that the contract was made not on Polish territory because the offer was in England and the acceptance must have been outside Polish territory because it was only by leaving the ships......

D'Almada: Yes, my Lords, he goes even further, as your Lordships say. I respectfully agree. He then goes on to deal with what he calls the second distinction drawn by Mr. Pritt. That is, the fact that the contract was not a completed transaction. He said:

"The second distinction presents more difficulty, but I derive great assistance from the judgment of Stone C.J. in the Supreme Court of the United States in Guaranty Trust Co. v. United States, where the question at issue was whether a debt admitted to have been at one time due from the Guaranty Trust Company to the Provisional Government of Russia (hereinafter referred to as 'the Kerensky Government') was statute-barred at the date of issue of the writ. The answer to this question depended on whether a notice given by the Guaranty Trust Company to the representative of the Kerensky Government that, for reasons stated, the company repudiated all liability for the alleged debt, was effective to set the statute running against the Soviet Government and in favour of the Guaranty Trust Company. The Supreme Court held that it was effective." 30 40

And then my Lords, he refers to that part of the judgment of Chief Justice Stone which I have given your Lordships from the Guaranty Trust case and then he says (at the bottom of p.176):

"That decision is not, of course, binding on us, but I respectfully agree with every word that the Chief Justice said. I may add that, as Finnemore J. pointed out, in the present case a contrary conclusion would be particularly unfortunate, since the certificate of the Secretary of State says not only that as from midnight on July 5-6, His Majesty's Government recognised the new Polish Government, but also that up to midnight His Majesty's Government recognised the old Polish Government.

Mr. Pritt pointed out that, in the United States case cited, the court was concerned with a completed transaction. I cannot, however, think that a different principle applies where the contract is executory. In either case the other party to the transaction has acquired a vested right. A fortiori must this be the case where, as here, if there is a contract, that contract was made not by the government on its own behalf, but as agent for a third party, the defendants."

He goes on my Lords to deal further with the argument of Mr. Pritt in the third paragraph beginning on p.177. He says,

"Mr. Pritt objected that this conclusion involved the infraction of a well-established principle of international law which formed part of the municipal law of this country. That principle is that there cannot be more than one government of a foreign State recognised at the same time. I accept the principle, but I do not agree that a decision in favour of the Plaintiffs will infringe it. The principle truly stated is that there cannot be two governments recognised in respect of the same territory at the same time, but a recognition of the validity of the acts done by the old government, during the twilight period, outside the area under the de facto control of the new government does not, in my opinion, involve the recognition of two governments at the same time in respect of the same area."

He then deals my Lords with the point which I gave to your Lordships quite early on in the headnote of the case, that is, with regard to exigencies of the comity of nations and the requirements of convenience:

"Comity seems to us to be satisfied by a recognition of the validity of the acts done by the new Polish Government during the twilight period in territory under its de facto control, and convenience requires that the validity of acts done in England by the old Polish Government during the same period should not be questioned."

Again I remind your Lordships that the fact of the Warsaw Government being in England at the time does not affect the principle in any way whatsoever. My Lords, I pass now to an examination of that passage in the judgment of Lord Justice Denning in which he goes into the question of a possible mala fide or alien or improper purpose of the act of Mr. Kwapinsky in that particular case. He concludes, my Lords, on the issue of fact of an examination of the evidence that there is no question whatsoever of any mala fides on the part of Mr. Kwapinsky. You will find that dealt with at p.182 and p.183 of the report and I submit, my Lords, that, on this aspect of the case, it is of

cardinal importance that your Lordships bear in mind the principle set out by Lord Halsbury in Quinn v. Leatham, that is to say, that a judgment is only authority for the particular facts of the case which it decides. From that point of view, I ask your Lordships to go back with me a little to p.178 of the report and see what the particular facts were. Your Lordships will recall that in the judgment of the learned Trial Judge in this case, he said, well, it should have been obvious to the Nationalist Government that de-recognition would soon take place and, on that, he hinges to a great extent his argument, his finding, that the act of selling these planes to the partnership was an act inimical to and hostile to the Chinese people and the Central 10 People's Government. I have already made my point that there is nothing upon which the learned Chief Justice could find that it should have been so obvious to the Nationalist Government that within a short time they would be de-recognised. But the importance of the judgment of Lord Justice Denning upon this point, and which I say really had a most important bearing on the examination of the question mala fide or otherwise is this, that the Warsaw Government knew as a fact that its recognition would soon cease, you see at the very beginning of Lord Justice Denning's judgment he says this (at p.178):

> " At the beginning of July, 1945, the officers and crews of the Polish merchant navy were in a quandary: the ships on which they were serving 20 were not only Polish ships, flying the Polish flag, but they were also for all practical purposes owned and controlled by the Polish Government. That government, for instance, owned 98½ per cent. of the shares of the Gdynia-Ameryka Linie. All through the war the British Government had recognised the Polish Government which had its headquarters in London as being the government of Poland; but the end of that government was in sight. The British Government, in pursuance of an international agreement made in Yalta in the Crimean, had announced that it would soon recognise the new Polish Government which had been set up in Warsaw and that it would no longer recognise the old London 30 Government. Many of the men thought that this foreboded ill." and so on.

Your Lordships will kindly note that there was no question whatsoever of a speculation or reasonable probability in the case of the Warsaw Government's fate that had been announced quite clearly by His Majesty's Government and they knew, it is a foregone conclusion, that within a matter of days they were going to be snuffed out, my Lords, because this was a government existing by courtesy of His Majesty's Government in London. It was not a question of this Government being in a position similar to that of the Nationalist Government at any material time, a position to maintain and continue the 40 struggle and to attempt to fight back which is the inherent right of any recognised de jure Government. It was with that in mind, I submit, that Lord Justice Denning examined the question of bona fides and mala fides and another distinction, between that case and the case your Lordships are now considering, I might as well make now although it isn't particularly relevant to this point but is generally relevant that, whereas you are dealing here with a case of an agreement between the Chinese Nationalist Government and American nationals, the Court of Appeal in Boguslawski's case was dealing with a contract between the Polish Government and their own nationals. There was no question of the Warsaw Government, your Lordships see, having 50

any territory within its control, it had been completely ousted in consequence of the European war and there was no further question of that old government being able, in the circumstances, to fight back. Indeed, it would have placed, I submit, His Majesty's Government in a very awkward position indeed if they countenanced any such attempt on the part of the Warsaw Government which existed by its courtesy, whose existence had terminated by de-recognition contemporaneous with the de jure recognition of the new, the Lublin Government. The Warsaw Government, in other words my Lords, in the particular circumstances of that case, could not be said to have that right to re-claim 10 their Governmental control which is recognised by Mr. Justice Glauson in the Bank of Egypt case. My Lords, it has been suggested that I should call it the London Government. I think the London Government perhaps is better but that Government is referred to indifferently right through the judgment as the London or the Warsaw Government, the new one being the Lublin Government. So long as you remember the new one is the Lublin Government, my Lords any other relation I apply to the old Government, Warsaw or London, means the same thing.

Gould J.: Isn't there some suggestion in the judgment about that government having control of the ships as notionally as part of the territory?

20 D'Almada: Yes, my Lords.

Gould J.: That is, I think, more particularly in Lord Justice Denning's judgment.

D'Almada: Your Lordship is suggesting that by reason of the fact that the de jure Government had control over the ships, the ships being notionally a part of Polish territory, that is, Polish territory under the control of the de jure government, therefore control is valid? I don't think it goes as far as that, with great respect.

Gould J.: No, I am just querying what you say that there was no territory under the control. I am not sure what the effect is.

30 D'Almada: Well, when I say territory, my Lords I use the word in the strict sense of the term, that is to say, no area of land because a state cannot exist, my Lords, without some land. That is quite clear and that may perhaps have some bearing on the point your Lordships made to me yesterday out of p.93 of Lauterpacht. I am coming to that a little later, but when Lord Justice Denning talks about territory here, he means the notional idea that a ship is the territory of the particular state. My point, my Lords, on the question of fighting back is really this, they might have had handled the ships under their control, merchant ships, perhaps one or two armed ships. But the circumstances are very different because no one could suggest for a moment that 40 —it would be indeed a very far-fetched suggestion—this Government could function from a ship somewhere on the high seas and the basis of my distinction lies in that, in the peculiar circumstances of the Boguslawski case, there was no question of that Government being in a position to fight back, my Lords. I say that Government was extinguished by de-recognition whereas, of course, de-recognition in the case of the Nationalist Government did not by any means have that effect. So that, my Lords, for the purpose of this question

of a propriety or otherwise of Mr. Kwapinsky's acts, your Lordships will see that the words of Lord Justice Denning has to be looked at in regard to the particular circumstances of the case in question. Here, as I have said more than once to your Lordships I'm afraid, the circumstances are entirely different as, unless you say that continued recognition, which in fact was the case here for some three or four weeks after the contract in question, the fact of continued recognition must be a meaningless fiction unless you recognise that while that Government was a de jure Government it had rights over the property under its control insofar as that property was outside the area or territory under the effective control of the de facto Government. My point 10 yesterday, my Lords, was this, that it isn't open to the courts in circumstances such as prevail in the case now before your Lordships to enquire into the propriety or otherwise of the acts of two rival governments in the circumstances of the case. Now I go further, my Lords, and say this. Assuming your Lordships found that it is proper for you to make enquiry into this matter and make pronouncement upon it, which is in fact of course pronouncing upon the merits of two rival factions in a foreign country more than one faction really because at the time when this transaction took place one of those adjectives to which I gave the appellation 'faction' was the de jure Government, at that time this Government had all the rights of a sovereign. But, my Lords, if 20 your Lordships feel that it is within your province to pronounce upon such a matter, then I ask your Lordships to consider the evidence in the light of the principles attaching to de jure recognition and I say, my Lords, that upon the evidence you cannot conclude as did the learned Trial Judge that those acts were mala fide, hostile, inimical—call it what you like—because they have to be looked at from the point of view of two rival governments; the Nationalist Government in pursuance of its legitimate aspirations of recovering governmental control doing those acts. I said yesterday that those acts were at least as consistent with the object, and a perfectly legitimate object, of raising funds for the purpose of maintaining the struggle plus the object achieved at the 30 same time of putting these planes out of the hands of the Central People's Government. I would now put it even higher than that, my Lords, I submit, and say that, having regard to the position of the de jure government, those acts are much more consistent with what I have first stated than with any question of mala fides or alien or improper purpose. There remains, my Lords, that passage in Lauterpacht to which my Lord the learned President of this Court referred me yesterday, and I revert to it unless your Lordships think I dealt with it perhaps a little too casually in my remarks upon it yesterday. I ask your Lordships to kindly turn to it. You will find it at p.93. Well, my Lords, while he (the usher) is fetching the book, may I go on to 40 another point to save a little time. My Lords, when I dealt with this point on which your Lordships questioned me yesterday, this emanation. That term, my Lords, is implied to the CATC by Sir Walter Monckton when he addressed the Court in this case and your Lordships asked me what was the purpose of striving to show that in fact CATC was not a Government department. My answer, my Lords, is this, that it makes no odds whatsoever to this case whether in fact CATC was or was not a Government department but, whereas at the hearing of the receiver application and the appeal from the decision on that application, the case proceeded on the footing that CATC was a Government department. Further evidence became available in the course 50 of the action, now the subject matter of appeal, and clearly from that evidence this entity was not a department of the Government of China. Wherefore,

my Lords, we so placed the fact before the learned Trial Judge. You will find, my Lords, reference to this aspect of the case on the following pages of the transcript if you want it—I don't think your Lordships need trouble to turn to it at the moment—the emanation is dealt with at p.48 and p.49 of the transcript and, at p.97, a specific question and answer dealing with it will be found. Your Lordships see just about the middle of p.97:

" Court: There is one point on the question of these old judgments of the Full Court. I quote from the first three lines of the first paragraph of page 13 beginning 'it is necessary to bear in mind......' down to 10 'Republic of China.'

Court continues: 'That apparently was an admission on the part of the plaintiff in a different suit, it is true, but is it any part of your case that they are public assets and CATC is a government department?"

And Sir Walter Monckton in his answer says this:—

" No, my Lord, my case is, that the CATC, on the evidence, is not a public department but that its assets are the property of the government. Your Lordship has seen how it was put and, whether it was put in a different form below, upon the evidence I must and do so—that it is not a public department but these were assets of the government."

20 Now, my Lords, it is interesting to note that, as I reminded your Lordships at the very outset of my argument yesterday, that my Lord the Chief Justice in his judgment says "It is agreed that this was a Government Department." The second paragraph of his judgment, my Lords:

" The Central Air Transport Corporation, it is agreed, is unincorporated and a department of the Government of China, inasmuch as from its organisation in 1942 it has been administered and controlled first as a department of the Ministry of Communications and now as a department of the Central People's Government."

My Lords, there wasn't, so far from it being agreed, which is quite clear of 30 course from the transcript of the arguments, there wasn't even any evidence before the learned Trial Judge that this was a department of the Government of China. I ask your Lordships to look at the evidence on this point. You will find it in File B. beginning at p.3. That is the affidavit of Mr. Wong Kuang. Paragraphs 1 to 3 of that affidavit say this:

" C.A.T.C. was at all material times a Government-owned enterprise carrying on business according to Chinese civil law and directed by the Minister of Communications through a Board of Governors. It was not a Department of Government in the true sense as for example, the Bureau of Posts and Telegraphs, or the Civil Aeronautics Administra-40 tion.

C.A.T.C. was never incorporated but was under the control and direction of the Minister of Communications through the said Board. One of the two Vice Ministers in the Ministry of Communications was always Chairman of the said Board. There were no shareholders of the C.A.T.C. and its assets were owned solely by my Government."

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And if your Lordships will turn now to p.16 of the same File, I am going to read you extracts from the affidavit of Mr. Tuanmoh and Mr. Kenneth Kang-Hou Fu both of whom made this affidavit as experts in Chinese law. I am dealing with the legal status of CATC. You will find both at pages 15 and 16 the position fully set out:

"3. As to the legal status of CATC. From the evidence before us we say that:—

(a) CATC was not a Corporation;

(b) It was not a Government Department in a strict sense but was a Government-owned enterprise. 10

As to proposition (a):—

(i) It has never been registered under the provisions of Chinese Companies Law or under any special legislation.

(ii) By reason of paragraph 1 it is not a separate juristic person in Chinese law (see Articles 25 and 30 of the Civil Code and Articles 1 and 14 of the Chinese Company Law set out hereunder).

(iii) It is directed and controlled by the Minister of Communications through a Board of Governors. A corporate body in Chinese law is managed and controlled by a Board of Directors. The 20 characters used to designate Governors are (Chinese characters) whereas the characters used to designate Directors are (Chinese characters) the latter character being invariably applied to Directors of bodies incorporated under Chinese law.

(iv) It has no shareholders."

Then my Lords, they set out certain articles of Chinese Company Law and go on to deal with proposition (b), that is to say, the proposition that it is not a Government department but only a Government-owned enterprise. They sav at the bottom of p.15:—

"(i) There is no provision of funds for CATC in the National Budget. 30
(ii) It was run as a commercial enterprise without the status of a Government Department as stated by Wong Kuang in paragraph 1 of his affirmation to be filed herein."

That is the paragraph to which I have already referred your Lordships.

"(iii) It was directed and controlled by the Minister of Communications through a Board of Governors of which one of the two Vice Ministers of Communications was always Chairman.

(iv) The Government was the sole owner of the assets.

(v) An instance of a similar enterprise was the China Merchants Steam Navigation Co. with which we are familiar as the result of our professional experience. For many years this organisation was not incorporated but run as a government-owned enterprise without the status of a Government department but directed and controlled by the Minister of Communications. The ships and other assets of this organisation belonged entirely to the Government.

It is clear, therefore, that the legal status of CATC is unusual wherefore no express provisions in the Chinese Civil Code or Company 10 Law can be found to deal with it. What is quite clear is that the assets thereof belonged solely to the Government who had full direction and control of the same and who possessed the powers of disposal of an absolute owner. In our opinion it carried on business as a carrier within the definition of that term contained in Article 622 of the Civil Code."

There, my Lords, is all the evidence before my Lord the learned Trial Judge and I submit, with great respect, there also was he wrong when he found not only that it was a government department but that it was agreed that this was a Government Department.

Court: I am more particularly interested in what you said earlier that in 20 your view it makes no difference.

D'Almada: That is my submission, my Lords.

Court: I am wondering why there is such insistence upon it......

D'Almada: Only in the interests of accuracy and no more. I don't use the word emanation because I don't think it is a term that has found very much approval in these Courts, in our Courts. I would call it an enterprise or an organisation, my Lords, strictly not a Government department by reason of the evidence before the Court.

Court: Yes, but your position clearly is that even if it were a Government department, your position would be no weaker?

30 D'Almada: No weaker because there is no question of this department, assuming it to be one, having a domicile in China, my Lords. It is a department of the Government, it moves with the Government. Have your Lordships got Lauterpacht now?

Court: Yes.

D'Almada: My Lords, before dealing with that footnote to which my attention was drawn yesterday, I ask your Lordships to look at the text on p.92 which isn't without interest in connection with this case because the whole chapter is one dealing with international law and revolutionary change. Perhaps, my Lords, beginning at the end of p.91 would be better. The section deals 40 with recognition of governments and revolutionary change and, after setting out the notion of the independence of states etc., Professor Lauterpacht goes on thus:—

"The position is the same when the change is of a revolutionary character and accompanied by violence—although in that case the question often arises whether the new government, based as it is on force in the first instance, is an effective government with a reasonable prospect of permanency and although it is that question which makes recognition necessary. Apart from this, the nature of the change is of no legal relevance. This is so for the simple reason that, so far as international law is concerned, the legality or otherwise of the revolution is a matter of indifference. If revolution were an unlawful act in international law, it would produce no results valid in the international sphere; its factual success could not prevail against the unlawfulness of its origin. But international law does not prohibit revolution as a means of constitutional or purely governmental change within the State. From the point of view of foreign States and of international law generally, there is, in principle, no difference between a constitutional and a revolutionary change of government. Within the State the revolution destroys irrevocably the continuity of the legal system; the former law subsists only in so far as it is adopted by the new, revolutionary order. It is, in fact, international law which preserves the legal continuity of the State. It does so by laying down the rule that the State and its obligations remain the same notwithstanding constitutional or governmental changes, revolutionary or other."

And then, my Lords, following from that the fact, you will see, that whether you get the change by revolution, evolution, or constitutionally, the obligations remain the same. From an examination of that position, my Lords, Professor Lauterpacht goes on to the section dealing with the presumption in favour of established governments and he says this:

"Although international law does not stigmatize revolutions as unlawful, it does not ignore altogether the distinction between the revolutionary forces and the established government. So long as the revolution has not been fully successful, and so long as the lawful government, however adversely affected by the fortunes of the civil war, remains within national territory and asserts its authority, it is presumed to represent the State as a whole."

And after that comes the footnote thus. Before referring to that case, my Lords, may I go on overpage in the text and ask your Lordships to look at the paragraph beginning on p.94. Lauterpacht says this:

"In one respect, however, the presumption in favour of the lawful government is above controversy; the latter is entitled to continued recognition de jure so long as the civil war, whatever its prospects, is in progress. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the de jure recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law."

I am not going into the merits or demerits and the question of His Majesty's Government's recognition of the Central People's Government, my Lords, but

the point I am on at the moment is the fact that so long as a civil war, whatever its prospects, is in progress, de jure recognition must have some very real effect continued as it is in the case of the then temporarily perhaps unsuccessful government and that must carry with it what I have already submitted to your Lordships, that is, the right to fight back and to do such things necessary for the fight. Now, my Lords, to turn back to p.93 and this footnote to which your Lordships drew my attention yesterday, you will see that Professor Lauterpacht was very careful indeed in dealing with this aspect of the case. After the statement in the text that the de jure Government is
10 presumed to represent the State, he gives illustrations, my Lords, out of the Spanish Civil War and then gives this, a qualification which as I say is extremely cautiously worded. He says:

> "But, as in other matters, so also in this case good faith prescribes limits to the operation of a general rule. Thus it is doubtful whether political or commercial treaties of a far-reaching character (You will notice, my Lords, he limits it to political and commercial treaties and those of a far-reaching character) may properly be concluded with a government thus situated. There is force in the contention that, notwithstanding the general rule as to the continuity of the State, the
> 20 successful revolutionary government would not be bound by such treaties concluded durante bellow as being in fraudem of the general interests of the nation."

Then he cites the case of the warning given by the American Minister to Mexico to his Government in connection with contemplated, and I think executed, treaties between the then constitutional government which was about to be overpowered by the insurrectionary Government for the purpose of cession of territory. He says:—

> "When in 1858 and 1859 the United States recognised the Constitutionalist Government of Juarez in Mexico, while refusing recognition to the
> 30 insurrectionist Miramon Government established in the capital, they were negotiating—and eventually concluded—important political treaties of alliance and of cession with the Constitutionalist Government. This they did notwithstanding the grave doubts entertained in the matter by the United States Minister to Mexico."

And it is interesting to note what that warning was, my Lords. The United States Minister warned his country thus:

> "The cession of territory is the gravest and the most important act of sovereignty that a government can perform; it is therefore questionable whether it should be performed at a moment when it is in conflict with
> 40 another government for the possession of the empire, even though it may be de jure and de facto much more entitled to respect than that with which it is struggling in civil war, and this consideration is as important to the party purchasing as to the party ceding the territory."

My Lords, when you come to consider the other aspect of the matter, the principle laid down in the Guaranty Trust case and followed in the Boguslawski case and approved in numerous text-books as I have told your Lordships,

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when you consider that as against this statement by Professor Lauterpacht, isn't the conclusion this, my Lords, that if this statement is to have any force at all, and I will remind your Lordships again that it is a very carefully worded statement and only included in the footnote, it must have force only in respect of very limited matters such as the example I gave your Lordships yesterday of the cession by purchase, if you like, of a province of the Republic of China made to—shall we say—the United States Government by the Nationalist Government. And the reason for that, of course, is this because that is a matter of extremely far-reaching character. It is depriving the State of part of the soil upon which it exists and, from that point of view, is a questionable 10 act on the part of a government which is soon to be superseded. But there is no analogy between that, my Lords, and the case of personal property owned by a State such as the planes, the subject matter of this action. And, before leaving Lauterpacht, my Lords, may I ask you to look at the next footnote, on page 94, where there is an extract from a work by Sir William Harcourt:

> "While the issue can be still considered in any degree is ambiguo, the presumption is necessarily in favour of the former Sovereign. And a friendly State is bound to exact very conclusive and indisputable evidence that the sovereignty of a government with which it has existing relations over any parts of its former dominions has been finally and permanently 20 divested. It is not at liberty during the pendency of an actual struggle to speculate on the result, or to assume the probability of the ultimate failure of the ancient Sovereign, however plausible may be the grounds for such an inference."

The position, therefore, my Lords, is as I submit in this case entirely different from the facts being dealt with by Professor Lauterpacht at pages 93 and 94. Here he was dealing with treaties, that is to say, agreements of international relationship and dealing more particularly with treaties having far-reaching results, the particular illustration he gave being one of the most far-reaching possible. I said in the course of my argument just now, my Lords, that this 30 meant alienation of the soil which is part of the State. May I ask your Lordships to turn to a very short reference in Lauterpacht to the question of territory. You will find at p.30 this statement:

> "The possession of territory is, notwithstanding some theoretical controversy which has gathered round the subject, a regular requirement of statehood. Without it there can be no stable and effective government."

So, my Lords, if a Government about to go out of power, shall we say, purports to alienate the territory, it is doing something of a very utmost and fundamental importance to the state in question because it will carry an act 40 of that kind, of the power to do an act of that kind, to its logical conclusion, to sell the whole state. Wherefore of course Lauterpacht says at p.93 there is some limit which you must base upon the power of the Government which is still recognised de jure in the particular circumstances. But that is the case, my Lords. That illustrates......

Court interposes: The note also refers to commercial treaties—far-reaching commercial treaties?

D'Almada: Yes, my Lords, far-reaching commercial treaties also, he refers to. But, my Lords, whether they be far-reaching commercial treaties or whether they be treaties of cession by which part of the territory of the state is to be given to another state or sold to another state, those illustrations, my Lords, are very far remote from the facts of the case now before your Lordships. And then, I am reminded by my learned friend Mr. Wright, my Lords, that there is no question of likening this to a commercial treaty of far-reaching effect. This is a commercial transaction between one entity, the Nationalist de jure Government of China, and two individuals, private parties, who agreed to buy and did buy these planes. My Lords, I have very nearly finished my argument. I think I can summarise it in this way. I remind your Lordships of the fact as made here yesterday by the further evidence adduced here before you that the Nationalist Government, through its agents in Hong Kong, were in control and possession of these planes until, for reasons best known to himself, the Commissioner of Police ordered Mr. Parker and his men off the airfield. And it was only in consequence of that act that persons, whom I call defectionists, that is, people who were in the employ of CATC and were subsequently dismissed, assumed control and possession of these planes, and as I said yesterday, in the teeth of an injunction against it entered by this Court. The possession, my Lords, is a wrongful possession. Impleading is out of the way in this case by reason of the Order-in-Council, and I submit that when my Lord the Chief Justice in his judgment finds that by reason of the fact that this was a mala fide act done with a hostile purpose or, to use the words of Lord Justice Denning "an alien or improper purpose," he is going wrong in two respects. (1) He is passing judgment in a matter into which our Courts will never enquire; (2) if they are so entitled to enquire and pass judgment, he is wrong upon the evidence and with regard to the rights of the de jure sovereign at the time to regain governmental control. I therefore submit, my Lords, the appeal should be allowed. My learned friend Mr. McNeill will address your Lordship on other aspects of the case.

McNeill: May it please your Lordships, the aspect which my learned leader has asked me to deal with concerns the reception of certain evidence by His Honour the Chief Justice, evidence taken from other proceedings.

My Lords, in order to appreciate the full significance of what His Lordship did, I think it is necessary to consider the actual terms of this Order-in-Council of 1950. I may say there, my Lords, that the evidence, which was so received, was received without any intimation to the plaintiffs —any prior intimation—and, accordingly, the learned Chief Justice did not have the opportunity of hearing any argument either as to the meaning of the Order-in-Council—the meaning and intention of the Order-in-Council—or the final destination in which he would be led, and your Lordships will be led, if you accept his interpretation. He had the advantage of no argument by counsel. My Lords, the passage in the judgment in which the learned Chief Justice came to his conclusion is contained in p.102 and it has already been read by my learned reader but I think it would be useful to your Lordships if I read a few sentences again. If you look at p.102 (p.103 in Court file) at the bottom of the page you will see that the learned Chief Justice used these words:

> "This Court is directed that judgment in such an event shall not go by default and that this Court shall 'enquire into the matter fully before giving judgment'."

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Now "in such an event", my Lords, the event his Lordship is speaking of is contained in the previous sentence:

> " No appearance has been entered by the defendant to these proceedings and it is therefore subsection (2) that determines the duty of this Court in such circumstances."

Then comes the sentence which I have just read to your Lordships and then comes these words, these sentences:

> " These words are difficult to interpret. It is not possible for this Court to consider what defences the defendant might have raised, whether in fact or in law, had the foreign sovereign State appeared that would be a matter of speculation but in my opinion it must mean more than hearing the case for the plaintiff in full. I have interpreted this subsection as requiring this Court, in the circumstances of this particular proceeding, to go outside an examination of the Plaintiff's case and to consider the other suits and applications which have been decided in these Courts relating to the subject matter of these proceedings to which the present plaintiff Corporation was a party." 10

Now, my Lords, in contrast with that, it is to that passage that we take the strongest exception and when I conclude my argument, my Lords, I am confident that you will realise that to extend the meaning of the Order-in-Council that length will not only lead to great difficulties but it is an interpretation which is wholly at variance, cuts right across, the most fundamental principles of our law. My Lords, before leaving the judgment, I invite your Lordships' attention to the preceding page, p.102, the third paragraph in which His Lordship starts off to construe this Order-in-Council and he starts, in my submission, in an entirely correct way by saying: 20

> " This Order-in-Council therefore has to be construed; it is an incursion into established law and as such, in my opinion, must bear as narrow an interpretation as the wording will permit."

My Lords, if the learned Chief Justice had proceeded on that basis, we would take no exception to his judgment. But it does appear to us, I shall submit, that what he says at the bottom of the page is totally at variance with the excellent basis upon which he started. My Lords, the first thing to note—if your Lordships will have the Order-in-Council before you—is this, that there are three possible sets of circumstances which are envisaged by the Order-in-Council. One is that an action will be commenced by some party against another party; that the defendant will then enter an appearance, in which case you will have the normal form of action or proceeding. The second is this, some party commences an action but the party who is made defendant does not appear or does not file his defence, does not take those steps which a defendant would normally take. In the case before your Lordships, the defendants did not appear. The third is this, that nobody takes any step at all before this Court. No action or proceeding is commenced at all and that, my Lords, is provided for in Section 2(1). Now the words "enquire fully", my Lords, relate to the second and third sets of circumstances. But, as I shall point out to your Lordships later, the relevant section with regard to 30 40

evidence, which is Section 4, covers all 3 sets of circumstances and that fact, of course, has a very important bearing on the way in which it did indicate that your Lordships should construe this Order-in-Council. New Section 1(2) says:—

> "If a defendant in any such action or other proceeding fails to appear or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire fully into the matter before giving judgment."

10 He visualises, I suppose, in the widest terms any kind of proceeding at law commenced before your Lordships in accordance with the usual practice of these Courts—of your Lordships' Courts.

Section 2(1) of the Order-in-Council reads:—

> "If at any time after 21 days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which subsection (1) of Section 1 of this Order applies and in which, or as a result of which, the ownership of the aircraft or right to the possession thereof is likely to be finally determined, the Governor shall by Order published in the Gazette refer the question of
20 ownership of the aircraft and right to the possession thereof to the Court for determination."

Section 2(2) reads thus:

> "On any such reference to the Court it shall enquire fully into and determine the questions notwithstanding reference may implead a foreign Sovereign State."

So your Lordships there have the two sets of circumstances in which the Court is invited to enquire fully. When you come to Section 4(1), my Lords, it starts off in this way:

> "For the purpose of an action or other proceeding or reference—(that
30 is, sets of circumstances 1, 2 and 3, cases where the plaintiff and defendant appear; where the defendant does not appear; where nobody starts any action at all)—or for the purpose of any appeal which may be brought in accordance with Section 3 of this Order, a Court shall have power—
>
> (a) to hear evidence, to summon witnesses, to take evidence on affidavit and to call for production of documents;
>
> (b) to give such directions as it shall think fit to enable justice to be done."

I don't think I need trouble your Lordships with the rest of that subsection.
40 It goes on in subsection (2) of Section 4:

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"Subject to the provisions of this Order and to any directions of the Court under this section—

(a) The existing law and practice relating to civil proceedings in the Court shall apply as nearly as may be to an action or other proceeding or reference."

Now my Lords, the first point to note of this Order-in-Council is that it was, as in its term, an order made by His Majesty-in-Council in London. It was not made by His Excellency the Governor, Hong Kong, and it is quite clear from the document itself that the learned gentlemen who drafted it were not considering, had not before them, the Code of Civil Procedure, Hong Kong. 10 I say that, my Lords, because in Section 1(2) for example, which I read to your Lordships, it says that in the circumstances of the defendant not appearing "the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case," and so and so. My Lords, of course your Lordships are well aware that in the United Kingdom, in England, there is provision on non-appearance of a defendant for judgment by default. I think your Lordships will find it, to speak of the book, in Order 13, rule 2. Now there is no such (rules of the Supreme Court) Provision, my Lords, in our Civil Code. My Lords are aware that if a defendant does not appear, the plaintiff then must lead evidence and the action is heard. 20

Court: Not on a specially indorsed writ.

McNeill: Not on a specially indorsed writ. I am speaking of a normal action where judgment is not asked for in default of appearance. Now, my Lords......

Court interposes: In an action for the recovery of chattel, may not a plaintiff rely on a writ specially indorsed?

McNeill: This is for declaration of ownership, my Lords. Our action is for a declaration of ownership.

Court: Yes, but your action, your form was not before the draftsmen of this Order-in-Council. They may well have envisaged other forms of action to which these words could apply. 30

McNeill interposes: They might have envisaged any form of action, my Lords, in which the ownership of goods under this Order-in-Council in which the ownership of the goods could be brought—the question of ownership—before your Lordships, before the Supreme Court.

Court: My point is that then there might easily be some type of action to which those words "judgment by default" are applicable.

McNeill: I cannot for the moment envisage any such action because if, for example, we were suing for specific performance, which, as I shall mention to your Lordships later, it can be done of course in this case, specific performance of a contract to deliver identified goods. Not a specially indorsed writ. My 40 Lords, it would certainly not be judgment by default. Anyway, whatever way you look at it, my Lords, "enquire fully" merely means that the Court must hear the plaintiff's case and I am going to suggest that if it is to be given any

wider meaning at all, it merely means this that if, upon any aspect of the matter, the plaintiff—which the Court consider to be relevant to the issue—the plaintiff did not lead evidence, the Court would then be entitled to say "You must call evidence on this point. I require you to call evidence in order that I may be properly and fully informed". That is the proper meaning to be placed upon these words, my Lords, and that is what I think the learned Chief Justice meant when he said that the narrowest construction must be placed upon it. My Lords, there is just another section referred to, I have already read it, in the Order-in-Council which has the same amount of indication. Section 4(1)(a) entitles the Court to hear evidence, to summon witness, take evidence on affidavit. My Lords, we already have a provision in our Code, provision which enables the Court to take evidence on affidavit in certain circumstances. We already have that and yet, if this is inserted specifically, and we are told in subsection (2) (a) that subject to this special provision about taking evidence on affidavit, subject to that, the ordinary rules will apply. I am suggesting, my Lords, that it is quite clear that this Order-in-Council was made in London with the rules of the Supreme Court in mind and not with the Hong Kong Code in mind. Now, my Lords, we say that it should be construed; we say that the construction which should be put on this Order-in-Council is that which the learned Chief Justice first stated, that is, a narrow interpretation. My Lords, if your Lordships were to give the interpretation which the learned Chief Justice gave, that is to say, that he had in so many words a roving commission in respect of any action in which these airplanes were the subject matter of dispute, where would it lead you, my Lords? What would be the result? We say this, the defendants, in the first place, would be put in better a position than if he had personally appeared, all his work is done for him; he is allowed and will be in the position of a defendant who has filed no defence, whose case we do not know, as to whose possible evidence we have not the slightest idea. He will be allowed, not only to stay away from Court—for whatever reasons he may choose to do so, that doesn't matter; it has no bearing—he will be allowed to stay away from Court and your Lordships will be allowed to look over all the evidence and take any portion of the evidence which was put in upon affidavit. In using the term "affidavit", my Lords, I include matters deposed to on affirmation; matters set out in affidavits in respect of a totally different matter, a different matter, an interlocutory matter, an application for a receiver; not upon the trial of an action but upon an interlocutory application for a receiver. As I am going to point out to your Lordships later, the matters with which the Court is there concerned are not these matters with which the Court is concerned finally in the trial of the action. The introduction of these affidavits could not, it seems to me, be confined to the Original Jurisdiction Actions Nos. 5 and 6; the Court would be allowed, my Lords, upon the basis of the learned Chief Justice's ruling to go into Actions, I think they were, Nos. 518 and 519. I am not quite sure now that I can remember exactly how many actions there were, but your Lordships would be allowed to read the whole of those documents and, without any intimation to us, the plaintiffs, to act upon any part of them, any part of the matters deposed to as to which we have never had any right to cross-examine. Without our consent, and without our knowing what case was meant, and it must be apparent to your Lordships that this view of the Order-in-Council would be to end these difficulties. My Lords, I have said that the wide interpretation of the Order-in-Council adopted by the learned Chief Justice cuts right across the fundamental propositions of our law. One of

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No. 44. Transcript of Proceedings on Appeal, *continued.*

those propositions is this, that a Court cannot without the consent of the parties call any evidence. That is one of the fundamental propositions of our law and I will give your Lordships the leading case on that subject which is the case reported in (1910) 1 K.B. at p.327. I am speaking of civil cases of course, my Lords. The case of In re Enoch and Zaretzky, Bock & Co's arbitration. The headnote starts off in this way:

> " Neither a judge nor an umpire has any right to call a witness in a civil action without the consent of the parties."

Your Lordships will see at the bottom—the passage doesn't matter very much —this is a question of arbitration and the question of whether the arbitrator had acted properly or improperly in hearing evidence without the consent of the parties and without informing them of the nature of the evidence. My Lords, I think the judgment which I will read to your Lordships is a well known one of Lord Justice Fletcher Moulton at p.331. He says this at the bottom of the page:

> " The point to which I wish to allude is the question of the umpire himself procuring evidence in the arbitration. It is quite clear, both from his conduct and from the line that has been taken by counsel for the respondents on this appeal, that there is an idea that an umpire, a person in a judicial position, has the power, and, I suppose, the duty, to call witnesses in a civil dispute, whom the parties do not either of them choose to call. In my opinion there is no such power. A judge has nothing to do with the getting up of a case."

Then he goes on to give the facts of the case of Coulson and Disborough, in which he says "in which there are certainly dicta which require to be carefully examined". Further down the page:

> " One of the learned Judges, the Master of the Rolls, Lord Esher, does, however, give utterance to a dictum which has been relied on by counsel for the respondents. He says this: 'If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him'."

That is the quotation, my Lords. Lord Justice Fletcher Moulton goes on:

> " If that means to call him when either side objects, I am satisfied that there is no basis for that dictum; but it must be remembered that there is no suggestion in the report or the judgments that the witness was called by the judge against the will of either of the parties. It certainly was not necessary for the decision; and the consequences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never have given in the form of a mere dictum a decision so wide-reaching and so destructive of the fundamental principles of our laws of procedure. It does not purport to be based on any course of reasoning, and no authority was cited for it. I say that it would be destructive of the fundamental principles of our laws of procedure for the reason that if, according to the dictum witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy

of whose statements he would have no right to test by cross-examination;''.

I pause, there, my Lords, to say that we do impugn both the personal credibility and the accuracy of the statements and many of them made in the depositions in the matters deposed to in various affidavits in O.J. Actions Nos. 5 and 6. And I will say, your Lordships, in a minute, we had no right to cross-examine. We had no right to cross-examine. Your Lordships will appreciate that in an interlocutory application where evidence by affidavit there is no right on the part of the other parties to cross-examine—isn't that in the discretion of the
10 judge? I haven't a case before me, my Lords, but, speaking without the book, I think it is La Trinidad v. Browne, my Lords, 36 Weekly Reporter, is the case.

> '' because the Court of Appeal laid down that if a judge calls a witness, neither party can cross-examine him as of right.''

That is, speaking of the judgment in Coulson and Disborough.

> '' Such a proposition may be most reasonable if the witness has been called with the assent of both parties, because he cannot be called a witness of either party. But it would lead to consequences which I do not like to contemplate if the dictum were supposed to apply to cases where a
> 20 judge calls a witness to the facts of the case without the consent of the parties and then refuses, or has the power to refuse, to allow any cross-examination. I think, therefore, that the dictum refers only to cases where a judge has called a witness with the acquiescence of both parties, and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility, though not for the accuracy of his statements, for it is well known that if a party calls a witness he may not attack his general credibility. There may in some cases be a person whom it would be desirable to have before the Court; but neither party wishes to take the
> 30 responsibility of vouching his personal credibility, or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the dictum does not lay down, and in my opinion it is certainly not the law, that a judge, or any person in a judicial position, such as an arbitrator, has any power himself to call witnesses to fact against the will of either of the parties.''

My Lords, when the Lord Justice was speaking there of the judge calling a witness where neither parties wished to, he is saying of course that the learned
40 judge calls a witness with the consent of both parties, neither of them wishing to vouch for the credibility of the witness. This is really the only case on this subject, my Lords, because this fundamental principle has never been attacked or impugned in any case in which I have knowledge.

Court: If you have finished with that case, Mr. McNeill, I think we can rise for a few minutes.

McNeill: As your Lordships please.

(Court adjourns for few minutes).

(Court resumes. Appearances as before).

McNeill continues: I have just finished dealing with the case of Enoch and the first fundamental principle that evidence cannot be called without the consent of the parties. The judge cannot call evidence without the assent of the parties. Now, my Lords, this evidence which has been introduced is not only evidence which has not been called with the assent of the parties, but it is evidence taken from other actions, the evidence we object to, and I refer to, of course, when I am speaking of this, to the affidavit of Mr. Chen Cheuk Lin. And I also refer my Lords, to a number of passages in the judgment which are quite clearly based on evidence which has not been adduced by the plaintiffs. One of those, for example, was referred to by my learned leader when he said that there is no evidence before your Lordships that the Central Air Transport Corporation was a department of State. My Lords, the finding in the second paragraph of the judgment that it was a department of State is based, and can only be based on statements in affidavits or affirmations made in other proceedings because it cannot be based on evidence now before your Lordships. There was no such evidence led to that effect. There is another example, my Lords, at p.107 of the judgment in the paragraph on top of the page which states as a fact that some order was made by the Central People's Government with regard to a dismissal of ministers. There is no evidence which has been adduced by the plaintiffs to that effect. Now, my Lords, this evidence, as I was saying, is evidence which was led in interlocutory proceedings in another action. Now, my Lords, it is a fundamental principle and I will only give your Lordships a citation from Phipson to this effect. It is a principle which is well known to your Lordships and all of our courts and that is, that evidence, depositions from another proceeding, cannot be brought unless the parties, unless certain requirements are fulfilled one of which is that there was a right and opportunity for the other side to cross-examine. In the 8th Edition of Phipson on Evidence, my Lords, the learned editors deal with that point at p.430. Under the heading "Depositions in Former Trials":

> "At common law, testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent (or in a later stage of the same) trial in proof of the facts stated, provided (3) that the party against whom, or whose privy, the evidence is tendered had on the former occasion a full opportunity of cross-examination; and (4) that the witness is incapable of being called on the second trial."

Now that is, where there is a second trial, my Lords, and an attempt is made to adduce evidence from the earlier one. The fundamental principle of course is this right to cross-examine and those evidence to which we object having been led by way of affirmations or affidavit in interlocutory proceedings, we had no right to cross-examine. I gave your Lordships the name of the case before the short adjournment. It is the case of La Trinidad and Browne, I think both your Lordships are fully familiar with it. It is reported in 36 Weekly Reporter at p.138. I am not going to give your Lordships the facts, I will just read the judgment of North J. The application, I may say, was for leave to cross-examine.

> "I cannot admit that the rules oblige me to order the attendance of a deponent for cross-examination. If there was any rule requiring me to make such an order under any circumstances, the result would be a waste of time and expense. I do not say that I shall not make such an order when I hear the motion; all I decide is that I shall not do so now. When the rule provides that the court or a judge may do a thing, it does not mean that I must do it."

Your Lordships know that case and it deals precisely with my point which is, that we had no right to cross-examine. My next point is this, I say on the same matter of the interlocutory proceedings, any evidence which was led by affidavit or affirmation in Original Jurisdiction Actions Nos. 5 and 6, any evidence so led was led for the purpose of the particular application. The particular application was an application for a receiver. The result in the records shows that orders were made, that affidavits should be filed by the plaintiffs, and that affidavits in replyly should be filed and the usual procedure was followed. Now, my Lords, leave out the impleading question altogether and suppose that has not been in issue at all in those actions, the application was for a receiver and all the plaintiffs had to do there was to establish a prima facie case and he produces evidence which he regards as sufficient. Now, in any application of that sort, my Lords, the Court may dismiss the application, but that doesn't mean that the final rights of the parties are in any way established because naturally in many an action an application is made for a receivership which is refused on various grounds, not only upon the evidence of ownership, for example, there are other considerations as your Lordships are aware in an application of that kind. Hardship on one side or the other side is one of them. The application may be dismissed but that doesn't mean to say that the plaintiff has lost his action and the affidavits were and must have been directed to that particular interlocutory issue. The judgment which was delivered cannot be in any sense said to have been a final judgment because it did not purport to deal finally with the rights of the parties. It merely purported to state that the Court could not and would not deal with the question as to what were the final rights of the parties because it had no jurisdiction to do so. And that being so, my Lords, any evidence in that interlocutory application cannot be looked at in what is the trial of the final issue and, not only the trial of the final issue, the trial of the final issue in an entirely separate action. Your Lordships will appreciate that this action is brought by virtue of the Order-in-Council and it is an entirely new action. I think I am right in saying that the learned Chief Justice Sir Leslie Gibson was careful to say he did not want to prejudice the final trial of the action by anything he might then say and, of course, an application for a receivership......

Court interposes: By the Full Court?

McNeill: By the Full Court. I am much obliged to your Lordships. That would be and was a very proper thing for the Court to say because you cannot, and do not wish to, in interlocutory proceedings to decide the final rights of the parties. My Lords, just one further argument on that same point. The learned Chief Justice when it came to the question of the answers, questions to the Foreign Office and the answers given, he makes rather an interesting remark at p.103. These questions and answers were, of course, introduced by the plaintiffs in this action but, if you look at p.103, the Chief Justice says:—

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"In these proceedings, as in the others which were brought before these Courts, the question of the recognition by His Majesty's Government, de facto and de jure, of the Central People's Government and of the Nationalist Government was an essential factor and steps were taken in the proper manner to obtain this information and, although these steps were taken and the information received in another suit, the statement of His Majesty's Government was put in by the plaintiff."

It is my submission that the learned Chief Justice already was beginning to have doubts as to whether any kind of evidence in another suit could properly be introduced because he says: "Although this was evidence in another suit, nevertheless I take it in because it was introduced by the plaintiff." Now, in my submission, the learned Chief Justice, with respect, was entirely on the right track there when he used those words and the reason is this, had the plaintiff not introduced these questions and answers, I think without any doubt that the Court could look at this information for the simple reason, my Lords, that the only way of obtaining information with regard to the recognition or non-recognition of a foreign State is through information obtained from the Foreign Office because it is His Majesty himself who decides whether to recognise or not to recognise a State. Moreover, any information so obtained cannot be impugned by any parties to the proceedings or by the Court. My Lords, I must give your Lordships the necessary citation there. In the Banco de Bilbao case which is reported in the Court of Appeal.

Court: The Court does not need any authority for that proposition.

McNeill: That is right. No, my Lords, I think your Lordships wouldn't. It is not very important because it is stated by the Court of Appeal and in the higher Court without any doubt that neither the Court nor the parties can impugn the information and naturally it follows that you cannot cross-examine upon it and that distinguishes that piece of evidence from any other evidence in any other proceedings which has been herein produced, as we submit, wrongly, by the learned Chief Justice. My Lords, as far as any statements of fact are made in the judgment of the Full Court of the former Chief Justice are concerned, we say that they are based upon evidence which is not admissible in this action, in this proceeding and, moreover, they are based upon facts which are peculiar to the application for a receiver. My learned leader has already referred your Lordships to Quinn and Leatham, I don't think it is necessary for me to cite that well known passage to your Lordships. I only mention this because the learned Chief Justice did speak on occasion in his judgment of the Full Court or the Court of First Instance in O.J. Actions 5 and 6 having held, as his Lordship considered rightly, that possession was in one or other of the parties. Now, my Lords, a binding......

Court interposes: As far as those proceedings are concerned, as to the doctrine of sovereign immunity, were they not a final decision? You say it was not a final decision as regards to the receiver but surely it is a final decision as regards to the doctrine of sovereign immunity which was the issue in the forefront of those proceedings?

McNeill: Yes, my Lords. But, in that case, of course, the question of possession, that the learned leader has already advised your Lordships, was quite a different one because, in an action of that sort, if it is established that the

goods are in the physical possession of one party and that party claims, attorns to another, that in itself will be insufficient—I will refer your Lordships to the passage in the judgment of Sir Leslie Gibson. That being insufficient, it is necessary for the party to whom they attorn, to agree, to make a claim that they are so doing properly. In other words it makes two for the purposes of impleading requires both the holders of the goods to attorn to make a claim on behalf of the outside party and for the outside party to approve of that claim. Do your Lordships want the passage from Sir Leslie Gibson's......?

Court: I know the passage.

10 McNeill: You know that passage, my Lord?

McNeill continues: And the other thing, of course, is a question of whether such a claim is rightful or wrongful cannot arise when the impleading issue is before the Court, and that is very important, my Lords. My learned leader has already emphasized that and I won't repeat it. It doesn't matter whether the claim is rightful or wrongful in those circumstances, because, once the impleading issue is out of the way, it is an entirely different kettle of fish; because the question of possession in a case of the sale of goods is an entirely different one and I am obliged to your Lordships for raising the point. It enables me to say this, and my learned leader has asked me to do so, the 20 question of possession in the sale of goods is really one which is of not the slightest importance or relevance. It has not been quite clear to us, my Lords, from the judgment of the learned Chief Justice whether he was really saying that the fact that the goods, if it were so, were in possession of a third party would have some bearing on it. It seems to us he was saying so but we were not quite clear whether he was founding his judgment upon that. And my learned leader has asked me to say to your Lordships a few words on that subject to make the position clear. My Lords, there is nothing in the laws of Hong Kong to prevent me from selling the goods entirely in the hands of third parties. Suppose, my Lords, my learned friend Mr. Wright is occupying my 30 Chambers and I went away, there is nothing to prevent me selling my library to somebody. The mere fact that they are in the hands of the third party does not prevent me from selling those goods nor does it prevent the property from passing of course, and that is the important point. The only bearing the possession of the third party has when it comes to the sale of goods is this, if the sale is on the terms that the property had passed, and the goods are still in the hands of the third party, then there cannot be constructive delivery of the goods until that third party has attorned to the buyer. And I think that this is perhaps where a slight confusion may have arisen. I refer your Lordships to the Sale of Goods Ordinance Section 29(3), which of course follows 40 the Sale of Goods Acts precisely. Your Lordships will see these are sections which deal with the performance of the contract in the way of delivery. The section my Lords is this, Section 29, rules as to delivery. Subsection (1) which says that "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract". I don't think I need read the rest of that subsection nor subsection (2). Subsection (3): "Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; Provided that nothing in this section shall affect the opera-

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tion of the issue or transfer of any document of title to goods." I think this is where possibly some little confusion arose. I think the matter was put clearly by Sir Walter Monckton, but it may be that there was some misunderstanding between the learned Chief Justice and Sir Walter Monckton on this point. My Lords, the property in the goods passes on sale when it was intended by the parties to pass and that is Section 18 of the Sale of Goods Ordinance. Because these are specific goods.

Court: Does that complete the case?

McNeill: Yes, my Lords. There is only one point there with regard to these witnesses, my Lords, two of them have come here for the purposes of this case from Taiwan and are very anxious to return there. They are not our employees, my Lords, they have their own occupations in Taiwan and I was wondering whether your Lordships would permit them to return there. Mr. Parker of course is always available. The question may arise, of course, of the necessity of their being here later in which case I take it your Lordships will let us know; and I am instructed they can be brought here at very short notice. 10

Court: Yes, there can be no objection to that Mr. McNeill.

McNeill: Thank you.

Court: The Court would like you to clarify its understanding of your submissions on the law of possession. The municipal law of Hong Kong has been dealt with; the law of possession as it affects immunity has been touched on. I am not sure that I have your submissions clearly as to the law of possession or effective control in Hong Kong as it relates to retroactivity. 20

D'Almada: My Lords, my submission on that point is this, quite clearly from the answers to the questionnaire and from the general principles of international law, it follows naturally from the recognition de jure of the Nationalist Government in Hong Kong that there can be no question whatsoever, impleading being out of the picture, of any control or possession of these goods, in the circumstances of this case, in the—I will call it—de facto Government, my Lords. The persons who assumed or took the control over these planes as a consequence of Mr. Parker and his watchmen being ordered off Kai Tak by the Commissioner of Police, did so without any colour of right whatsoever. If the doctrine of sovereign immunity were not excluded by the Order-in-Council, it would not be open to your Lordships to enquire into the nature or quality of the possession of these persons once they had said they attorned to the de facto Government and the de facto Government in turn had said "We claim possession through these people." But, by virtue of the Order-in-Council, the position is altogether different and the possession assumed or taken by these persons at the relevant time was as wrongful as could be; they were trespassers and they were in possession in complete disregard even of the injunctions issued by this Court. 30 40

Court: They were in possession before the injunctions issued, of course, on the evidence?

D'Almada: Yes that is so, my Lords. But the injunctions were issued before the contract.

Court: Yes.

D'Almada: I hope I have made my position clear on that aspect of the case, my Lords?

Court: I would like you to go a little further. Would you say that the doctrine of retroactivity would not apply even if their possession were not in breach of the, well, is it the municipal law that you rely on when you say wrongful possession or are you thinking of international law at this stage?

D'Almada: I am thinking of both, my Lords. I say it applies equally whether you regard it from the point of view of international law and international relations or municipal law.

10 Court: By international law their insurrection is a legal act, is it not?

D'Almada: The insurrection?

Court: Yes, the rebellion of the Central People's Government.

D'Almada: Is an illegal act?

Court: No, a legal act.

D'Almada: A legal act? Yes, of course.

Court: Therefore, it is legal in China to take by force under international law, territory.

D'Almada: Yes.

Court: But you say it is not legal to take property in Hong Kong?

20 D'Almada: I will say that indeed, my Lords, having regard to the fact you have your de jure Government still recognised. If you take it by force in Hong Kong, you commit an offence against municipal laws and, of course, if there were no Order-in-Council you will say "Well it just cannot be helped." The comity of nations demands that in circumstances like these, we cannot examine into the origins of the possession acquired by the sovereign but impleading, my Lords, is right out of the picture now and, in those circumstances, your Lordships will find that this possession was entirely wrongful.

Court: Yes. Well is, in your view, the test of whether the possession is wrongful or rightful in Hong Kong the test of whether retroactivity would 30 apply or not? Assuming that they had, without breach of our law, possession of certain property of the Chinese Government in Hong Kong, would the doctrine of retroactivity relate to that property as it would to property in occupied territory?

D'Almada: My Lords, it is difficult for me to assume that. It is really in a sense an academic question for this reason. We say that in this case the property at the time the contract was entered into, the property vested in the de jure Government which is recognised. Retroactivity had no effect upon the rights and property of the de jure Government outside the area or territory under the effective control of the de facto Government.

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No. 44. Transcript of Proceedings on Appeal, *continued.*

Court: Well that is a complete answer to what I ask. If you limit your retroactivity entirely to the territory in occupation.

D'Almada: I think that must be so, my Lords, yes. There is no question about that.

Court: That is your submission that it is entirely limited to property inside the territory?

D'Almada: Yes, my Lords, and further, of course, when you have the effect of the contract whereby the property has passed, my Lords. Of course, your Lordships' answer would be this, you have the earlier possession which......

Court interposes: If there is retroactivity, then there is no title to pass the property. I imagine that is the situation? 10

D'Almada: My Lords, that is why it is so important, as all the cases emphasize, that retroactivity should be limited to these areas or the territory under the effective control. Else, my Lords, you would have this extraordinary conflict arising: One Government recognised de jure and recognised de jure for years having no rights over its property in Hong Kong by virtue of some recognition which, by the doctrine of retroactivity, makes that Government a de facto Government.

Court: Yes:

D'Almada: That must be the real answer, my Lords. 20

Court: That is what I want to pin down your submissions to. You will not concede that any retroactive effect on property under the effective control of the, in this case, the Central People's Government but outside the occupied territory?

D'Almada: No, my Lords. I don't concede that, outside the territory.

Court: Yes thank you. That is the point that I wanted to get from you.

Court: The position being one of some difficulty, it may be the Court will have to hear counsel further in which case we will notify you.

D'Almada: As your Lordships please.

Court: If we require any of the witnesses to be recalled, we will let you know. 30

D'Almada: Thank you.

Court: We reserve our decision.

To the best of my knowledge and belief, the foregoing is a true transcript of the recorded proceedings in the aforementioned action.

(Sgd.) F. Gutierrez,
Court Stenographer,
11.9.1951.

No. 45.

EXTRACT FROM THE NOTES OF THE HONOURABLE THE SENIOR PUISNE JUDGE, MR. JUSTICE T.J. GOULD, TO FILL IN THE LACUNA AT PAGE 7 OF THE TRANSCRIPT OF THE WIRE-RECORDED PROCEEDINGS ON THE HEARING OF THE ABOVE APPEAL ON 21st AND 22nd AUGUST, 1951.

No. 45. Notes of the President to fill in Lacuna in Transcript.

D'Almada: Must consider that persons not parties may still appeal. And adduce further evidence. Clearly case where evidence should be admitted and its value and effect discussed later. Take but don't admit.

Court: Agree to that suggestion. Is it convenient to call it now?

10 D'Almada: Yes.

(Here follows the evidence of Ango Tai already extracted and appearing at pp. ...... of this Record.)

No. 46.

MEMORANDUM TO COUNSEL FROM THE FULL COURT.

No. 46. Memorandum to Counsel.

The Court will sit again at 9.30 a.m. on the 6th day of November, 1951. The Court being under a duty to inform itself fully feels that for the sake of completeness there should be evidence or admissions on the record on two points of fact touched upon in earlier proceedings. They are :—

(a) The place of registration of the aircraft at relevant times; and

20 (b) Whether a portion of the assets of Central Air Transport Corporation was situated at various places in China.

Dated this 2nd day of November, 1951.

(Sgd.) T. J. Gould,
President.

No. 47.

FURTHER EVIDENCE CALLED FOR BY THE FULL COURT.

Evidence of Hsun-Yen Lai dated the 13th day of November 1951.

No. 47. Further evidence. Affirmation of Hsun-Yen Lai.

I, HSUN-YEN LAI, of Number 4, Lane Number 151, Sin Sheng Road, South, Taipei, Taiwan, China, do hereby solemnly sincerely and truly affirm and 30 say as follows :—

1. I am the Director of the Civil Aeronautics Administration of the Ministry of Communications of the Government of the Republic of China and as such I have the custody of all the official archives of the Civil Aeronautics Administration.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 47. Further evidence. Affirmation of Hsun-Yen Lai, *continued.*

2. I have searched the official records for the years 1949 and 1950 and find that on the 13th day of November, 1949 the Registration Certificates of the C.N.A.C. and C.A.T.C. aircraft were temporarily suspended by my Government. Such suspension was notified to the Acting Director of Civil Aviation, Hong Kong, on the 13th day of November, 1949.

3. Such suspension was in force on the 12th day of December, 1949, on which day, upon the completion of the sale of the assets of the Central Air Transport Corporation to Chennault and Willauer, the Registration Certificates of the C.A.T.C. aircraft were permanently cancelled.

4. In accordance with customary procedure a notification to that effect was published in the next Official Government Gazette dated 2nd day of January, 1950. 10

Affirmed etc.

No. 48. Further evidence. Affirmation of Ango Tai.

No. 48.

EVIDENCE OF ANGO TAI.

Dated the 7th day of November 1951.

I, ANGO TAI of 33 Wuchang Street first section, Taipei, Taiwan, China do hereby solemnly, sincerely and truly affirm and say as follows :—

1. I refer to my earlier affirmation of October 19, 1950 filed in this case and to my oral testimony offered on the hearing of the appeal in this case.

2. In order to clarify the same in respect to the question of whether a portion of the assets of Central Air Transport Corporation was situated at various places in China at relevant times I affirm the following :— 20

Less than 10% of the assets of Central Air Transport Corporation consisting of some real properties, some radio equipment and some obsolete and unserviceable aircraft spare parts, accessories and components were left at various places on the mainland of China including Shanghai, Canton, Lanchow, Kunming and Chungking and also at Hainan Island. All of the remaining assets of the Corporation were and so far as I know still are located in Hong Kong. Those assets which were not eventually moved to Hong Kong were abandoned at their various locations since they were considered unimportant to the future operation of the corporation or in the case of real estate because physical removal was impossible. 30

AND lastly the contents of this my affirmation are true.

Affirmed etc.

No. 49. Further evidence. Saul Marias.

No. 49.

FURTHER EVIDENCE GIVEN ORALLY BEFORE THE FULL COURT AT THE COURT'S REQUEST.

Witness (Mr. Saul Marias) Xd by Mr. McNeill at the request of the Court.

Q. Mr. Marias, what is your profession?

A. I am an American Attorney.

Q. Are you familiar with the registration of aircraft in general in various countries?

A. Yes, I am.

Q. I think there is a convention called the Chicago Convention of 1944?

A. That is correct.

Q. And was that convention ratified by the United States of America?

A. It was.

Q. It was also ratified by the de jure government of the Republic of China, that is to say, the National Government?

10 A. Yes, it was.

Q. And by the Government of the United Kingdom?

A. Yes, it was.

Q. Was the ratification of the United States of America in March, 1947?

A. I can get that information exactly for you if I take steps to but I have no refreshed recollections of that date.

Q. You know the aircraft, the subject matter of this action?

A. I am familiar with them.

Q. Have those aircraft been registered in the United States of America?

A. The Aircraft involved were registered in the United States of America by 20 the Civil Aeronautics Authority on December, 1949, in the name of Civil Air Transport Inc.

Q. That is, the appellants in this action?

A. Yes, the appellants in this action.

Q. Have you got any documents relating to the certificates?

A. I have the American registration certificates for all 40 of the aircraft involved, the actual certificates, and I also have photostats of each which I would like to submit.

Court to Counsel: This is a fact which has been completely undisputed. If you will put in the photostatic copies . . . (put in and Marked Appeal 7).

30 *McNeill:*

Q. Could you give some explanation with regard to these documents?

A. The procedure for registration of aircraft is merely a form which consists both of a Bill of Sale of the aircraft and also a registration application. Both of these forms are separated by a perforated line. The application for registration portion is then detached and endorsed on the back with the actual registration. The photostats I have submitted consist of two photostats for each aircraft, one being the application side of each particular

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 49. Further evidence. Saul Marias, *continued.*

certificate and the other being the actual registration. They are not placed right in front but one after (behind) the other.

Q. Is the date shown on the reverse side?

A. The date is shown.

Q. That is 19th December, 1949?

A. Correct.

Q. Is national registration of aircraft effected at any particular place or effected as by a country as a whole?

A. As a country by a whole. There is only national registration of aircraft.

Q. Not as a ship at a particular port in a country . . . ? 10

A. No.

Q. Is that the position internationally in all countries which ratified?

A. Yes, under the Chicago Convention there is provision for only one registration, that is the national authority.

Q. There is no particular place of registration within the State but registration as a national chattel of the State, chattel having national character of the State?

A. Yes.

McNeill: I don't know if your Lordships will require any further questions?

Court: No. Thank you Mr. Marias. 20

No. 50. Further evidence. Albert James Robert Moss.

No. 50.

FURTHER EVIDENCE GIVEN ORALLY BEFORE THE FULL COURT AT THE COURT'S REQUEST.

MR. ALBERT JAMES ROBERT MOSS (s) Xd by Mr. McNeill on behalf of the Court.

Q. Have you got a copy or the original of a notice directed to Mr. Max Oxford who, I think, was the Deputy Director of Civil Aviation, dated the 13th November, 1949?

A. Yes.

Q. That was a notice addressed by Mr. C. C. Tso, Director of C.A.A. and M/C, China, to Mr. Max Oxford, who was at that time deputizing as Director of Civil Aviation? 30

A. Yes.

Q. Have you got any copies of that to make available to the Court?

A. I have (witness produces copies of notice).

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 50. Further evidence. Albert James Robert Moss, *continued.*

Q. There is also a letter from the new de jure Government, the Central People's Government. What is this letter?

A. That was a letter, dated the 22nd February, addressed again to Mr. Max Oxford and had reference to the re-registration of the aircraft belonging to C.A.T.C.

Q. And that is contained in the little bundle that you handed into Court?

A. That is correct. Schedule of planes which was attached to the letter and a translation of the certificate of registration.

Court: This is the earliest notification is it that you had of the re-registration?

10 A. That is correct, my Lord.

McNeill resumes: Xd.

Q. And then the last document in that, on the subject of these aircraft, is that appended to the last document?

A. That is a list of aircraft dated 22nd February.

Q. And this registration certificate also attached to that letter?

A. No. It is a separate document. Photostatic copies of these are actually on the aircraft at this moment. That is the last document.

Q. That is dated the 1st February, 1950, and that refers to the aircraft which are the subject matter of this action?

20 A. Yes.

Q. Your department is aware of registration in the United States of America?

A. Yes, we were aware of that.

Q. Because we have evidence that it was effected on the 22nd December, 1949.

A. Yes, we were aware of that.

Court: That is satisfactory as far as the Court is concerned Mr. McNeill.

McNeill: I have no questions to ask.

Court: Thank you Mr. Moss. Oh, there is just one more question. You have certified these yourself?

A. Yes.

30 (Certified copies marked Appeal Nos. 8, 9 & 10—certified by witness).

No. 51.

FURTHER EVIDENCE REQUESTED TO BE PUT IN BY COUNSEL FOR THE APPELLANTS AS A RESULT OF THE FURTHER EVIDENCE CALLED FOR BY THE COURT.

Dated the 7th day of November 1951.

No. 51. Further evidence (at request of Counsel for Appellants) Affirmation of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu.

WE, JOSEPH KEAT TWANMOH & KENNETH KANG-HOU FU, attorneys-at-law, with our Law Office at 16 Sing Yang Street, Taipei, Taiwan, China, do hereby solemnly, sincerely and truly affirm and say as follows :—

1. We have read the further Affirmation of Ango Tai affirmed to the Seventh day of November, 1951, deposing to the fact that certain physical 40 assets of the Central Air Transport Corporation were left on the mainland of China and abandoned by the said Corporation.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 51. Further evidence (at request of Counsel for Appellants) Affirmation of Joseph Keat Twanmoh and Kenneth Kang-Hou Fu, *continued.*

2. We are of the opinion that, despite the fact that these certain assets were left on the mainland, the contract for the sale of the assets of Central Air Transport Corporation to Chennault and Willauer was and is valid and enforceable under Chinese law, even though a problem of delivery may exist as regards some of the assets.

3. Our original joint affirmation of December 7, 1950, in this action as to Chinese law was given with this possibility in mind because we had understood from the previous affirmation of Ango Tai of October 19, 1950 in this action that certain of the assets of Central Air Transport Corporation had been left on the mainland. 10

4. In support of these facts, we refer to our earlier joint Affirmation of December 7, 1950, and in particular to Articles 153 and 345 of the Chinese Civil Code quoted in paragraph 6 of that Affirmation, we also specifically refer to paragraph 7 of that affirmation.

AND lastly the contents of this our affirmation are true.

Affirmed etc.

No. 52. Transcript of Notes taken on further hearing before full Court.

No. 52.

TRANSCRIPT OF THE SHORTHAND NOTES TAKEN BY THE COURT STENOGRAPHER ON THE HEARING OF THE FURTHER HEARING OF THE FULL COURT APPEAL ON 26th NOVEMBER, 1951. 20

(D'Almada, K.C., McNeill, K.C., Wright (Griffiths) for appellants)

D'Almada:

Following your Lordships' memorandum to counsel, we had a conference on this matter and my learned friend Mr. McNeill will address your Lordships.

Mr. McNeill:

May it please your Lordships. Your Lordships will remember that a notice was directed to the appellants in this case and that was by your Lordships, dated the 2nd November, 1951, and I suppose I may take it, my Lords, that this will form part of the record. The notice reads like this: (Reads).

My Lords, as far as the appellants are concerned, we desire to maintain the position before your Lordships—your Lordships will remember on the question of evidence, we maintain the position that, there being no defendant who has entered an appearance in these proceedings, the only evidence available before your Lordships is that which is called on behalf of the plaintiffs—now the appellants. 30

Your Lordships will remember that the argument was put further in this way that, at the very highest, it could not be said that under the terms of the Order in Council—the special Order in Council in this matter—the meaning of that order could not be put in higher terms than that if evidence were to be called and I submit it should be called by the Court, the plaintiffs will then have 40

the opportunity of cross-examining. My Lords, in a desire to assist the Court in this matter, the appellants can make available to your Lordships certain evidence covering the questions which have been referred to.

With regard to the first point, as to the place of registration of aircraft at relevant times, we can make available to your Lordships an affidavit by Hsuen Yen Lai. He could tell your Lordships in his affidavit facts with regard to the suspension and cancellation of the Chinese registration by the National Government of China, which was then of course the de jure Government. We can also make available to your Lordships the evidence of Mr. Saul Marias who
10 gave evidence before the Court of First Instance, and he can tell your Lordships as to the time of registration of the aircraft—the American registration.

Your Lordships may also require, from a point of convenience, evidence from the Director of Civil Aviation with regard to the notification of the cancellation of the Chinese registration. I think he can also tell your Lordships the date of the registration by the Central People's Government. Your Lordships will remember that in the recital in the Order in Council . . . . the first point was dual registration.

My Lords, we, the appellants, do not tender the affidavit of Mr. Hsuen Yen Lai with regard to the place of registration of the aircraft at the relevant
20 times nor do we tender the evidence of Mr. Marias. With regard to the second point, that is, where a portion of the assets of the Civil Air Transport was situated, at various places in China, we can make available to your Lordships an affidavit by one Mr. Ango Tai. There is also an affidavit by him on the record. These two affidavits are available to your Lordships.

We maintain that if this evidence is called by the Court, we should have the opportunity of tendering on behalf of the plaintiffs, appellants, a further affidavit with regard to Chinese law, and to address your Lordships very shortly.

Court: We will receive the affidavits and evidence and will admit any additional evidence to be called by you.

30 (Affidavits of Mr. Ango Tai and Mr. Hsuen Yen Lai handed in). (See pp 189, 190 of this Record).

McNeill: We have completed our case, my Lords.

Saul Marias (s) of 193 Mount Kellett Road, The Peak.

Court: Mr. McNeill, perhaps you would lead the evidence on behalf of the Court?

McNeill: I am glad to assist your Lordships in any way.

Here follows the evidence of Saul G. Marias extracted and appearing at pp 190 of this Record also of Albert James Robert Moss extracted and appearing at pp 192 of this Record.

McNeill:

We desire to put in with reference to the further evidence which has
40 been put in question, a further affidavit with regard to the law. It is an affidavit by two persons: Joseph Keat Tuanmoh and Kenneth Keung Hau-fu. (Hands document into Court). (See pp 193 of this Record).

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 52. Transcript of Motor taken on further hearing before full Court, *continued.*

Court: These are the two experts who have already sworn?

McNeill: Yes, my Lord, it reads as follows :— (Reads).

My Lords, on this further evidence very briefly, if you will permit me, the effect of this evidence with regard to registration is this, that on the 12th December, 1949, at the time when the contract of sale was made, the registration of these aircraft by the de jure Government of China was suspended and was then cancelled immediately after the contract. That is the effect of the evidence. On the 19th December, 1949, the aircraft were duly registered as aircraft of the nationality of the United States of America. They were registered in the United States of America. 10

My Lords, we point out that we should have said the original suspension was the 13th November, according to the new evidence, the notice to Mr. Max Oxford. The cancellation was 12th December.

The next date after the 19th December is the 1st February, 1950, when the dual registration—the purported dual registration, came into effect by the Order in Council. That is to say on the 1st February, 1950, registration by the Central People's Government of these aircraft as national aircraft of China. That registration of 1st February, 1950, which created this dual registration is referred to in the Order in Council.

My Lords, to clear up a point, Mr. Marias told your Lordships that the 20 aircraft are not like ships. A ship has a port of registry, e.g. ships registered in Glasgow, registered in London, in Bilbao, Spain. But, as regards aircraft, that is not so. A registration is a registration by a State and that, of course, clearly appears from the Chicago Convention of 1944.

The article with regard to dual registration, that is Article 18 Chapter 3 of that Convention, was referred to, my Lords, on p.641 of Shawcross & Beaument (2nd edition) on Air Law. I will give your Lordships the reference to the page showing that the United States of America and China had both ratified that evidence if your Lordships desire a list of the parties. China is contained at pages 1184—1185. The United Kingdom of course is also known 30 on p.1184.

My Lords, there is only one other passage I would like to refer your Lordships to in Shawcross & Beaumont (2nd edition) and that is page 467. The first two sentences of Section 511—Sale of Aircraft : "It is not within the scope of this book to give any account of the law relating to sale of aircraft. An aircraft is a chattel and therefore the law governing its sale is the law of Sale of Goods. For the same reason no special instrument is required in order to transfer the property in an aircraft." That puts highly the position which we take particular note.

Of course, a ship is a chattel too. The difference between them is that 40 in the case of a ship, a certain form of assignment had to be executed. In the case of an aircraft, there is no special form of assignment.

I do not think section 20, which is referred to, assists your Lordships very much. Section 23 which is also referred to in that note, it says that in a number of cases the British Maritime Rules have, by statute, been expressly

applied to aircraft. I don't think that that helps very much. The point in reading that section about sales to your Lordships is this, that an aircraft is a chattel and does not have to be transferred by any bill or Form of Assignment.

Court: The Court desires to express its appreciation to counsel and solicitor for making available the extra evidence. Our decision will be reserved.

C.A.V.

True Transcript of the shorthand notes taken of the above proceedings.

(Sgd.) F. Gutierrez,
10 Court Stenographer,
26.11.1951.

No. 53.

JUDGMENT OF THE PRESIDENT OF THE FULL COURT.

This is an appeal from the decision of the learned Chief Justice in an action brought by Civil Air Transport Incorporated, a Corporation duly incorporated under the laws of the State of Delaware, United States of America, against the Central Air Transport Corporation in which a declaration was sought "that the forty aircraft now on the Government airfield at Kai Tak in the Colony of Hong Kong formerly the property of the defendants together with all spare 20 parts, machinery and equipment for use in relation thereto wherever situate within the jurisdiction of this Honourable Court are the property of the plaintiffs and/or that the plaintiffs have the sole right to possession thereof."

The defendant did not appear in the action. In view of the history of the litigation surrounding the subject-matter of the action, I have no doubt that the steps taken to effect service were sufficient to bring the action to the knowledge of the defendant. In the judgment appealed from it is stated that it was agreed that the defendant is unincorporated and a department of the Government of China. That it had in fact been so agreed in an earlier action appears from the judgment of Sir Leslie Gibson, C.J., in Original Jurisdiction Action 6/1950, 30 but according to the record, in the present proceedings the appellants' submission was that the defendant was more in the nature of a state-owned enterprise—it was described as an "emanation of Government". There appears to be little difference: the highest that the two experts in Chinese law, whose affirmation was read on behalf of the appellants, could put it, was that, "It was not a Government Department in a strict sense but was a Government-owned enterprise." It was however "directed and controlled by the Minister of Communications through a Board of Governors." I see nothing in the judgment appealed from which appears to turn on this distinction—nor did counsel for the appellants submit that anything should turn upon it. Different considerations 40 would have arisen had the defendant been an incorporated entity, but as it was not I do not think it necessary to pursue the matter further.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 53. The Judgment on Appeal, *continued.*

It will be convenient to set out here the provisions of The Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, which has a vital bearing on the case, and which is as follows :—

" Whereas evidence has been produced to the Governor of Hong Kong that 70 aircraft now on the Government airfield at Kai Tak in Hong Kong are registered both in the United States of America and in China and, the aircraft not being State aircraft within the meaning of the Chicago Convention on International Civil Aviation, 1944, such dual registration is contrary to Article 18 of that Convention.

AND WHEREAS ownership of the aircraft is in dispute and there 10 are conflicting claims to their possession,

AND WHEREAS it is just and desirable that the question of ownership of the aircraft and of right to their possession should be decided by a Court of law before they are permitted to leave HONG KONG,

NOW THEREFORE, His Majesty, in exercise of all powers enabling him in this behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered as follows :—

1. (1) In any action or other proceeding concerning the aircraft which may be instituted in the Supreme Court of Hong Kong after the date of coming into operation of this Order, it shall not be a bar to 20 jurisdiction of the Court that the action or other proceeding impleads a foreign Sovereign State.

(2) If a defendant in any such action or other proceedings fails to appear, or to put in a defence, or to take any other step in the action or other proceeding which he ought properly to take, the Court shall, notwithstanding any rule enabling it to give judgment in default in such a case, enquire into the matter fully before giving judgment.

2. (1) If at any time after 21 days from the date of the coming into operation of this Order the Governor is satisfied that no action or other proceeding is pending to which sub-section (1) of section 1 of this 30 Order applies and in which, or as a result of which, the ownership of the aircraft or right to the possession thereof is likely to be finally determined, the Governor shall by Order published in the Gazette refer the question of ownership of the aircraft and right to the possession thereof to the Court for determination.

(2) On any such reference to the Court it shall enquire fully into and determine the questions notwithstanding reference may implead a foreign Sovereign State.

3. Any person claiming ownership or right to possession of any of the aircraft and aggrieved by the decision of the Court in an action or 40 other proceeding or reference may appeal therefrom to the Full Court and from thence to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken any part in previous proceedings.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 53. The Judgment on Appeal, *continued.*

4. (1) For the purpose of an action or other proceeding or reference, or for the purpose of any appeal which may be brought in accordance with section 3 of this Order, a Court shall have power—

(a) to hear evidence, to summon witnesses, to take evidence on affidavit and to call for production of documents;

(b) to give such directions as it shall think fit to enable justice to be done, and, in particular, but without prejudice to the generality of the foregoing power, to give directions as to the conduct and hearing of the action or other proceedings or reference, or appeals as the case may 10 be, as to the persons who may be parties thereto or may be heard therein, and as to the time within which any step therein is to be taken;

(c) to provide for the service of any documents whether inside or outside of Hong Kong.

(2) Subject to the provisions of this Order and to any directions of the Court under this section—

(a) the existing law and practice relating to civil proceedings in the Court shall apply as nearly as may be to an action or other proceeding or reference;

(b) the existing law and practice relating to appeals from a 20 decision of the Court in a civil matter shall apply as nearly as may be to any appeal which may be brought in accordance with section 3 of this Order.

5. (1) Until the Governor is satisfied that ownership or right to possession of the aircraft have been finally determined the aircraft shall remain in Hong Kong and the Governor may give such directions and take such steps whether by way of detention of the aircraft or otherwise, as shall appear to him necessary to prevent their removal and to ensure their maintenance and protection.

(2) When the Governor is satisfied that ownership or right to 30 possession has been finally determined he may give such directions and take such steps as shall appear to him necessary to give effect to decision of the Court.

(3) If any person fails to comply with any direction given by the Governor under this section he shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding H.K.$5,000 or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment.

6. (1) In this Order unless the context otherwise requires—

"action or other proceeding" means an action or other pro- 40 ceedings to which sub-section (1) of section 1 of this Order applies;

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 53. The Judgment on Appeal, *continued.*

"Court" means the Supreme Court of Hong Kong;

"person" includes any body of persons whether incorporated or not, and any Government;

"reference" means a reference to the Court by the Governor under section 1 of this Order.

(2) The aircraft referred to in this Order are the aircraft mentioned in the preamble to this Order together with any spare parts, machinery and equipment for use in relation to any of the aircraft, and the Governor may in case of doubt give directions designating more particularly the aircraft spare parts machinery and equipment referred to. 10

(3) The Hong Kong Interpretation Ordinance, 1911, as amended, shall apply for interpretation of this Order as it applies for interpretation of an Ordinance.

7. This Order may be cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, and shall come into operation forthwith."

The aircraft in question in the action being among those which are mentioned in the Order in Council, it is plain that the Court had to consider the questions of ownership and right to possession without regard to the well established doctrine of sovereign immunity. Furthermore, under Section 1(2) 20 in the circumstances of the case, the Court was charged with the duty of full enquiry before giving judgment. At the commencement of the hearing before the Full Court, the appellants took exception to the fact that, under this last mentioned provision, the learned Chief Justice had looked at and quoted passages from a certain affirmation by a Mr. Chen Cheuk Lin which had been used in earlier proceedings between litigants who were, in essence, the same as those in this action. The passages in question were quoted in the judgments in those earlier proceedings. The objection to the evidence was that the affirmation gave a false picture of the events of November 1949 which culminated in control of the aeroplanes by persons claiming for the Central People's Government. The 30 appellants submitted that this evidence should not be regarded at all, but they asked and obtained leave from the Full Court, to adduce further evidence in rebuttal or explanation of Mr. Chen's affirmation in case the Full Court decided not to eliminate the latter.

Mr. McNeill, who dealt with this phase of the argument for the appellants, submitted that on a proper construction of the Order in Council "enquire . . . fully" merely meant that the Court must hear the plaintiff's case. If it went further, it only implied that if upon any relevant aspect of the matter the plaintiff did not lead evidence, the Court would be entitled to ask the plaintiff to do so. He pointed to the fact that the affirmation had been made in an 40 interlocutory proceeding and without cross-examination. That proceeding was an application for a receiver and the affirmation was for the purpose of the particular proceeding. He pointed also to the well known fact that it is contrary to practice for a Court to call a witness in a civil proceeding without the

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 53. The Judgment on Appeal, *continued.*

consent of all parties. These are of course very material considerations but I am unable to accept Mr. McNeill's submission on the main point of construction. To limit the meaning of "enquire . . . fully" to the consideration of the evidence which the plaintiff chooses, or is requested, to lead, is neither in my opinion consistent with the ordinary meaning of the words or the spirit of the Order in Council. I take the view that the Court is given a wide discretion to inform itself of the facts by any proper means. Where one of the parties chooses not to present its own case, a situation of considerable difficulty arises under the Order in Council. The Government of Hong Kong, being in the position of a stake holder, could hardly be requested to provide legal or other assistance to ascertain and argue the case of the absent party, even if that ascertainment were possible. Fortunately the issues of fact are broad rather than intricate and no doubt the learned Chief Justice (I think, with respect, quite rightly) felt that the least that he could do pursuant to his duty to enquire, was to inform himself of the salient points made on behalf of the party now absent, in previous proceedings which, though different in immediate purpose, were brought with the same ultimate object as the present action. In the ordinary way of course it is quite improper to have regard to evidence given in previous litigation, even between the same parties, but in the unique circumstances I think that (subject to one condition) it was justifiable to do so. The alternative would have been to take steps (probably in vain) to try to find a witness to give the same evidence —otherwise it could not be said that there had been full enquiry. The condition upon which, in my opinion the admission of this affirmation was justifiable, is that the appellants should have had notice and an opportunity for reply. The Court could have been reconvened for the purpose if necessary. The appellants would still be unable to cross-examine of course, but in a case such as this I think that leave to give evidence in rebuttal would be sufficient compensation. In the special circumstances, I think that the ends of justice will be served, not by excluding the material in question, but by admitting also the evidence in rebuttal which was given before the Full Court. The earlier cases and the judgments in which the affirmation in question was quoted were, of course, referred to at the trial of the action, at which Sir Walter Monckton related the whole history of the litigation. A passage of his argument relevant to the affirmation now complained of was:—

> "The proceedings which have taken place in the Court and which I shall refer to shortly will also satisfy your Lordship that at or about this time (9/11/1949) a number of employees on the executive and technical staff of the Corporation were taking orders from what has become the People's Government and not from the organs of the National Government with the result that the authorities put in by the National Government were unable to get in touch with or control the aircraft, or the use of them."

I will now set out the portion of Mr. C. L. Chen's affirmation quoted by the learned Chief Justice:—

> " I say that from its organisation in 1942 the Corporation had been administered and controlled as a department of the Ministry of Communications and I say that the Corporation is still a Department of the Central People's Government now controlled and administered by the Civil Aeronautical Administration. I say that the possession, control and management on behalf of the Central People's Government of all the

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 53. The Judgment on Appeal, *continued.*

assets, properties, equipment machinery belonging to the Central Air Transport Corporation has been at all material times in myself as Managing Director and in the members of the staff of the Corporation appointed by me and acting under my instructions and orders to retain and maintain possession, control and management of this property as State Property."

" I further say that on the 9th November, 1949, I accepted the orders of the Central People's Government of the People's Republic of China and went to Peking with the intention of continuing to carry out the objects for which the State Property was to be used under the laws and constitution of the Republic of China, namely to fly the routes linking 10 the cities of Peking-Shanghai-Tientsin-Hankow-Chungking-Kunming-Mukden-Lanchow and other cities as well as to connect the said cities of China with Hong Kong and Bangkok."

" Prior to my departure for Peking as stated in Paragraph 8 of this Affirmation I authorised the Directors of the Business, Finance, Operations Departments and other senior officials of the Corporation to set up an Emergency Committee for the purpose of consultation on measures to prevent the officials of the deposed Nationalist Government from getting control of, sabotaging, damaging, or tampering with the assets and properties of the Corporation or from removing such assets and properties 20 from the jurisdiction of this Honourable Court to Formosa. Among such senior officials were some of the persons joined as third parties in this Action. Other senior officials of the Corporation are not Third Parties and were not defendants in any other suits before this Honourable Court. Acting under my instructions and in continuous communication with me these senior officials have directed the routine work of the offices, the necessary ground maintenance work on the aircraft, and have exercised complete and absolute possession and control in every respect of all the assets, properties, aircraft and real estate belonging to the Corporation. I say that I gave the said instructions and orders for and on behalf of the 30 Central People's Government. I further say that the wages of all of the employees and staff from the 15th November, 1949 have been paid by the Central People's Government."

Exhibited to the affirmation was the following communication :—

"To :

General Manager Chi Yi Liu,
General Manager Cheuk Lin Chen, and
All Officers and Workmen of
China National Aviation Corporation and
Central Air Transport Corporation. 40

My hearty welcome to you who rise gloriously to uphold the cause under the guidance of the two General Managers Liu and Chen.

I hereby accept in the name of the Cabinet of the People's Central Government of the Chinese People's Republic the telegraphic request made by you on 9.11.1949, declare the China National Aviation Corporation

and the Central Air Transport Corporation to be the property of the Chinese People's Republic and exercise (the right of) control of the said China National Aviation Corporation and the said Central Air Transport Corporation on behalf of the People's Central Government.

I hereby appoint Chi Yi Liu to be General Manager of the China National Aviation Corporation and Cheuk Lin Chen, General Manager of the Central Air Transport Corporation.

I hope all officers and workmen of the said two Corporations remaining in Hong Kong and Specially Liberated Areas will hereafter unite in a body under the guidance of the two General Managers Liu and Chen, heighten their precautions, shatter the secret plots of the reactionaries, bear the responsibility of protecting the assets and wait for further instructions (from me). The (cost of) living for all the officers and workmen shall be borne by the People's Central Government. I again hope that you will stick to the position of patriots, strive to make progress and exert yourselves in the cause of establishing the civil aviation enterprise of New China.

Dated the 12th day of November, 1949.

(Sgd. & Chopped) Chow En-loi."

It is appropriate to mention here that the Full Court has itself acted on the principle indicated above in connection with two matters of evidence. In the first place the following statement of fact appeared in the judgment appealed from :—". . . . Central Air Transport—possessing in addition to the aircraft in Hong Kong property to the value of HK$6,000,000 in China . . .". Although counsel at the appeal took no specific objection to this passage, it is unsupported by evidence on the record except possibly by the implication arising from the statement in the agreement for sale that the "major part" of the assets were in Hong Kong. The statement abovementioned was taken from a judgment in earlier proceedings. Secondly, the Court felt that there was insufficient information on the record concerning the registration of the aircraft. The Court was therefore reconvened and at the request of the Court the appellants made available further evidence on these points and it was called by the Court. There was no question of surprise, as the major part of the evidence was given by witnesses who had already given evidence for the appellants. Counsel for the appellants maintained their objection to the evidence but on its admission by the Court asked only leave, which was given, to put in one supplementary affirmation on Chinese law.

I proceed now to a statement of the facts as I see them, taking into consideration the additional evidence adduced before the Full Court, that called by the appellants as well as that called by the Court itself.

The Nationalist Government of China originally at Nanking, moved its seat of Government to Canton in April, 1949, thence to Chungking on the 12th October, 1949, thence to Chengtu on 29th November, 1949, and finally to Taiwan on 9th December, 1949. The Central People's Government was proclaimed on

the 1st October, 1949, and purported by decree to dismiss the ministers of the Nationalist Government and appoint new ones. By the 12th December, 1949, virtually the whole of the mainland of China was under the control of the Central People's Government—a few southern provinces and Hainan Island had not yet been taken.

Prior to the material time, the Nationalist Government operated through the Central Air Transport Corporation (hereinafter called CATC) air services within China and to Hong Kong and other territories. CATC was unincorporated, state-owned, and operated by a Board of Governors under the direction of the Minister of Communications. Another like air service was owned and 10 operated by the China National Aviation Corporation (hereinafter called CNAC) a corporate body in which the Chinese Government owned 80% of the stock and an American company 20%. All of these aircraft were registered in China. By June 1949, the whole organization of CATC had been moved from Shanghai to Canton. By the 1st September, 1949, it had been moved to Hong Kong and operated from there. The CNAC aeroplanes and organization were also in Hong Kong at the material date.

On the 9th November, 1949, Mr. C. L. Chen, the "Managing Director" of CATC left Hong Kong for Peking and accepted the orders of the Central People's Government. He left behind him in Hong Kong a committee of 20 officials with the object of holding control and excluding those adhering to the Nationalist Government. By a document dated the 12th November, 1949, the Nationalist Minister of Communications appointed Mr. Ango Tai a Governor of the Board of Governors of CATC and on the 13th November appointed him Vice-President and concurrently Acting President. The evidence of Mr. Ango Tai given before the Full Court, is that Mr. C. L. Chen was at the same time dismissed, and as far as the Nationalist Government is concerned there is no reason to doubt this statement. The Minister of Communications, according to Mr. Tai's evidence came personally to Hong Kong from Taiwan to attend to these matters—a fact which in passing seems to indicate that Taiwan was already 30 contemplated as the future seat of the Nationalist Government. On the 13th November, the Nationalist Government suspended the certificates of registration of the aircraft. From then on there was a struggle for possession and control of the aircraft both of CATC and CNAC. The details are not material. It is sufficient that Mr. Tai endeavoured to retain or regain control, but despite his best endeavours, de facto possession and control had passed to those (a majority of the employees) claiming to hold for the Central People's Government by, at the latest, the 22nd November, 1949. The document dated the 12th November, 1949, signed by Mr. Chow En-loi and quoted above, indicates the attitude of the Central People's Government. 40

On the 24th November, 1949, CATC in an action brought by the Nationalist Government representatives obtained an interim injunction against some twenty named defendants, prohibiting them, personally or by servants or agents from entering or remaining on certain premises or removing (inter alia) the aeroplanes. On the 25th November, those defendants obtained a "counter" injunction prohibiting the plaintiff corporation from removing the same property. The appellants claim that the first injunction was disobeyed, but I think little reliance can be placed upon the evidence to that effect; in view of the number

of employees (in the region of three hundred) who had "attorned", control could probably be retained without disobedience to the injunction. The injunctions, however, served to immobilize the aircraft and remained in force until certain other litigation in 1950 was disposed of. That litigation was designed to effect the same purpose as the present action and is briefly described in the judgment of the learned Chief Justice. Save that it was decided by the application of the doctrine of sovereign immunity and thereby provided the background for the Order in Council abovementioned, I do not think that litigation is material here.

The next event of importance took place in December 1949. A contract of sale was concluded by offer dated the 5th and by acceptance dated the 12th between officials representing the Nationalist Government as vendors and General C. L. Chennault and Mr. Willauer, as purchasers. On the 12th December also the Nationalist Government purported to cancel the certificates of registration of the aircraft. The contract of sale forms the basis of the appellants' claim to title and is in the following terms:—

" December 5, 1949.

His Excellency the Minister of Communications
National Government of China,
Taipeh, Taiwan.

Your Excellency:

This letter is written to confirm our mutual agreement, that whereas:—

(A) The National Government of the Republic of China (hereinafter referred to as the Government) is the legal and beneficial owner of all the outstanding shares of stock of the Central Air Transport Corporation (hereinafter referred to as CATC) and 80% of the outstanding shares of stock of the China National Aviation Corporation (hereinafter referred to as CNAC), and

(B) We, the undersigned C. L. Chennault and Whiting Willauer (hereinafter referred to as Chennault and Willauer) desire to purchase and operate the physical assets of the said CATC and CNAC, and to acquire the shares of stock in CATC and CNAC held by the Government.

(C) These physical assets, a major part of which are now located in the Colony of Hong Kong, are now subject to various injunctions issued by the Supreme Court of the said Colony of Hong Kong, with the result that the said CATC and CNAC have been forced to cease their operations and the said physical assets have materially decreased in value, and

(D) The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China, and

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(E) The Government is concerned and anxious to secure the future of the loyal staff members of the said CATC and CNAC, and

(F) The Government is particularly anxious to sell the physical assets and the stock of the said CATC and CNAC to Chennault and Willauer because of the trust and confidence it imposes in them by virtue of their loyal and devoted services during the war of liberation to China and to the cause of the United Nations, because the Government recognised that Chennault and Willauer have amply demonstrated their ability to operate efficiently air transport services, and because the Government is confident that Chennault and Willauer will always use their best efforts to insure that the said assets will never be used for the benefit, directly or indirectly, of the Communist areas of China but rather will be used in furtherance of the anti-Communist cause.

NOW THEREFORE it is agreed as follows :—

(1) The Government agrees to cause the said CATC and CNAC to sell, and Chennault and Willauer agree to buy, all of the physical assets and such stock as is owned by the Government of the said CATC and CNAC, free and clear of encumbrances, for the sum of United States Currency One Million Five Hundred Thousand Dollars (US$1,500,000.00) in the case of the CATC assets, and the sum of United States Currency Two Million Dollars (US$2,000,000), in the case of the CNAC assets and for the further considerations referred to herein.

(2) Chennault and Willauer agree to pay the said purchase price as follows :—

(a) By issuing to the said CATC three joint promissory notes, numbered serially, each in the sum of United States currency Five Hundred Thousand Dollars (US$500,000), payable to bearer without interest, and subject to the terms and conditions set forth in the form of note attached to this letter, and

(b) By issuing to CNAC three joint promissory notes, numbered serially, and payable to bearer without interest, of which the first such note shall be in the sum of United States Currency Six Hundred Thousand Dollars (US$600,000), and the second and third such notes shall be in the sum of United States Currency Seven Hundred Thousand Dollars (US$700,000) each, subject to the terms and conditions set forth in the form of note attached to this letter, and

(c) By causing to be organized a corporation or corporations or other legal entities under the laws of such country or countries or place or places as Chennault and Willauer may select, to which corporation or corporations or legal entities Chennault and Willauer shall transfer the said physical assets and shares

of stock of CATC and CNAC in consideration of which the corporation or corporations shall issue its or their promissory notes, payable to bearer without interest, in substitution for the aforesaid notes jointly issued by Chennault and Willauer; the said substitute notes shall be in the same amounts and substantially subject to the same terms and conditions as the notes of Chennault and Willauer for which they are substituted, excepting only that such corporation notes shall not be limited to payment out of the said physical assets of CATC and CNAC but shall be fully payable out of the assets of any nature belonging to the new corporation, corporations or legal entities.

(3) Chennault and Willauer agree that at any time after the organization of said corporation or corporations or legal entities referred to in paragraph (2) (b) above they will, at the option of the holder of any of the said promissory notes and upon surrender of such note, instead of paying cash, issue or transfer to the holder or holders of such note a proportion of stock or evidence of ownership in the new corporation or corporations or legal entities equal to the proportion the note surrendered bears to all the notes issued, *provided, however,* that the holder of such note who wishes to exercise such option shall be a person whom Chennault and Willauer in their uncontrolled discretion shall consider

(a) to be a person free of any connection with or commitments to any Communist forces or powers in China but who rather represents the true forces of Anti-Communism in China, and

(b) to be a person designated or intended to exercise such option by the authorized representatives of the Government or their designees, and

Further provided that there shall have first been executed between the said corporation or corporations or legal entities and Chennault and Willauer a management contract in form, duration and terms satisfactory to Chennault and Willauer.

(4) Chennault and Willauer agree to use their best efforts and to do everything within their power to reduce the said assets to their possession and absolute control.

(5) The Government agrees to use its best efforts and to do everything within in its power to assist Chennault and Willauer to reduce the said assets to their possession and absolute control.

(6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly, for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China.

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(7) Chennault and Willauer agree to use their best efforts to continue in their employment as many of the loyal employees and staff members of the said CNAC and CATC as is reasonably possible and to dispose of the rightful claims of Pan American Airways, if any are proved, in the case of CNAC.

(8) This letter and the promissory notes and bills of sale issued hereunder contain the whole and entire agreement between the parties.

If this letter meets with your approval and agreement will you kindly sign and return to us the enclosed duplicate copy.

Yours respectfully, 10
C. L. CHENNAULT and WHITING WILLAUER

(signed)
By ....
C. L. Chennault, U.S. Citizen.

(signed)
By ....
Whiting Willauer, U.S. Citizen.

the above terms accepted and approved :

(signed) 20

....

Nih Chun-sung, Deputy Secretary-General of Executive Yuan and concurrently Chairman of Board of Directors of CNAC, 13 December, 1949.

(signed)

....

Liu Shao-ting, Vice-Minister of Communications and concurrently Chairman of Board of Directors of CATC, 12 December, 1949." 30

By a document dated the 19th December, 1949, the purchasers under the above-mentioned contract of sale transferred their right, title and interest in and to the assets affected thereby to the appellant corporation. With a letter dated 31st December, 1949, and signed by Mr. Willauer as Vice-President of the appellant corporation and also on behalf of the partnership Chennault and Willauer, were enclosed four promissory notes in "full settlement of all our obligations in connection with the purchase of the stock and all assets of whatsoever nature of CATC". Certain further evidence, which I do not deem it necessary to detail, was produced, tending to confirm that the sale was made by or on behalf of the Nationalist Government. New registration certificates 40 were issued by the United States Authorities on the 19th December, 1949, and by the Central People's Government about the 1st February, 1950.

The question of recognition of the two governments was dealt with by the production of information received from His Majesty's Government in another suit. It is in the form of questions and answers :—

Questions.

"1. Does His Majesty's Government recognise the Republican Government of China (the Nationalist Government) as the de jure Government of China?

2. If not, when did His Majesty's Government cease so to recognise that Government?

10

3. Is the Central People's Government or any other Government recognised as the de jure Government and, if so, from what date?

4. Has the Republican Government ceased to be the de facto Government (either at the time of moving seat of Government to Formosa or otherwise) and, if so, from what date?

5. Is any other Government recognised as the de facto Government and, if so, from what date?

6. What is the status of Formosa? Is Formosa part of China or is it Foreign territory vis-a-vis China?

Answers:

20

1. H.M. Government in the U.K. does not recognise Nationalist Government (Republican Government) as de jure Government of Republic of China.

2. Up to and including midnight January 5th/January 6th 1950 H.M. Government recognised Nationalist Government as being de jure Government of the Republic of China and as from midnight January 5th/January 6th 1950 H.M. Government ceased to recognise former Nationalist Government as being de jure Government of the Republic of China.

3. As from midnight of January 5th/6th 1950 H.M. Government recognised Central People's Government as de jure Government of the Republic of China.

30

4. H.M. Government recognise Nationalist Government has ceased to be de facto Government of the Republic of China. It ceased to be de facto Government of different parts of the territories of Republic of China as from date on which it ceased to be in effective control of those parts.

5. H.M. Government does not recognise any governments other than Central People's Government of the People's Republic of China as de facto government of the Republic of China. Attention, however, is invited to the 2nd sentence in answer to question 4.

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6. In 1943 Formosa was a part of the territories of Japanese Empire and H.M. Government consider Formosa is still de jure part of that territory.

On December 1st, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared all territories that Japan had stolen from Chinese including Formosa should be restored to the Republic of China. On July 26th, 1945 at Potsdam, the heads of the Government of United States of America, the United Kingdom and the Republic of China reaffirmed 'The terms of Cairo Declaration shall be carried out.' On October 25th, 1945, as a result of an order issued on the basis of consultation and agreement between Allied Powers concerned, Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon with the consent of the Allied Power Administration, Formosa was undertaken by the Government of the Republic of China. At present, actual administration of the island is by Wu Kou Cheng, who has not, so far as H.M. Government are aware repudiated superior authority of Nationalist Government.

I am advised that the effect of recognition by H.M. Government as stated in answer to question 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of evidence before it. Ends. Copy of letter follows by air."

It is unfortunate that at the time of the proceedings before the lower Court it was not known to Court or counsel that a supplementary reply had been received in answer to a further question by the then Chief Justice, Sir Leslie Gibson. It was received apparently on the 16th March, 1950—that is, after the proceedings in O.J. Actions Nos. 5 & 6 of 1950, but prior to the hearing of the appeal. It was not however used at the hearing of the appeal. As in the present case prominence was given by the appellants to a point of construction which it apparently clarified, the Court brought it to the notice of counsel who agreed that it must be incorporated in the record. The question and answer are as follows :—

Question:

" Chief Justice would be grateful if he could be further informed whether H.M.G. recognises the People's Government as having become the de facto sovereign government or the government exercising effective control on first October, 1949 when it was proclaimed, or any other date between that date and fifth January, 1950, of the parts of China of which the Nationalist Government had ceased to be the de facto government."

Answer:

" H.M's Government in the United Kingdom recognised in period between October 1st, 1949 and 5th/6th January, 1950 the Central People's Government was *de facto* Government of those parts of territory of Republic of China over which it had established effective control and if control was established after October 1st, 1949 as from dates when it so established control."

Mr. D'Almada, for the appellants, conceded that in view of the terms of the answer he could not maintain his argument that upon the construction of the earlier answers there was no question of de facto recognition prior to midnight on the 5th/6th January, 1950.

Upon these facts it was submitted on behalf of the appellants that the learned Chief Justice was wrong in holding that by virtue of the doctrine of retroactivity the aircraft were owned by the Central People's Government as from the 1st October, 1949. The argument was based on the quality of the possession in those holding for that government. It was further submitted that
10 the other finding that the sale was incompatible with the trusteeship of the Nationalist Government was based on no evidence; as to the principle of law involved, while I think it was conceded that there might be such a principle, it was contended that it was not one which could apply to the present circumstances, which must be governed by the principle of continuity.

The essential question is whether the Nationalist Government had as at the 12th December, 1949, power to and did effectually dispose of and give to the purchasers a good title to the aeroplanes in question. Recognition de jure at that date remained with the Nationalist Government but on my reading of the answers to the questionnaire, de facto recognition must be deemed to have
20 been extended as at that date to the Central People's Government as regards the areas then under their control. That view is strengthened by the answer to the supplementary question. The Nationalist Government could not therefore effectively dispose of any part of the public domain within those areas; it is well established by authority that during de facto recognition the government so recognised has full rights of ownership and control in its own territory. In the Arantzazu Mendi, 1939 A.C. 256 at 265, Lord Atkin said :—

"It necessarily implies the ownership and control of property whether for military or civil purposes, including vessels whether warships or merchant ships. In those circumstances it seems to me that the recognition of a
30 Government as possessing all those attributes in a territory while not subordinate to any other Government in that territory is to recognise it as sovereign, and for the purposes of international law as a foreign sovereign State. It does not appear to be material whether the territory over which it exercises sovereign powers is from time to time increased or diminished."

In Wheaton's International Law (4th Edition, p.48) the writer puts the position as follows :—

"Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the
40 public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized. But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign governments and their subjects treat with the actual head of the State, or the

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government de facto, recognised by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper. On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of bonae fidei purchasers under such alienation to be indemnified for ameliorations."

This presumption in favour of the validity of an alienation of part of the public domain to a foreigner must be read, I think it is obvious, where there are de jure and de facto governments in conflict and in control of different areas, with reference only to the portion of the public domain in the area of the government responsible for the alienation in question. As regards publicly owned moveable property which either government thinks fit to take from its own to neutral territory during the continuance of recognition, there can be no reason to suppose that it thereby loses any power to alienate which it previously had. I leave aside for the moment any special considerations which may be thought to attach to ships and aeroplanes by reason of their peculiar character.

The aeroplanes the subject matter of these proceedings (being civil commercial aircraft and not war-planes) had been sent to Hong Kong by the Nationalist Government in its retreat. As a belligerent government it was entitled to take steps to preserve for its own benefit, and to remove from possibility of capture, such important assets. Up to a date in November 1949, the aeroplanes remained in the possession of the Nationalist Government, but then against the will of that government certain of its employees claimed to hold the aeroplanes for the Central People's Government, and obtained effective physical control of them, despite the efforts to the contrary of those acting on behalf of the Nationalist Government. The Central People's Government having adopted the actions of those holding physical control, there was a sufficient claim of possession to invoke the doctrine of sovereign immunity. But with that doctrine the Court has now no concern and it is necessary to decide whether physical control so obtained is effective to antedate the title of the Central People's Government to the assets in question, to the commencement of that control. In the judgment appealed from, the learned Chief Justice held that the doctrine of retroactivity did, by virtue of that control, operate so as to render of no effect, the acts of the Nationalist Government relating to the aeroplanes.

The ordinary rule as to the retroactive effect of de jure recognition is expressed by Denning, L.J., in Boguslawski v. Gdynia-Ameryka Linie (1951) 1 K.B. 162 at 181—

" In the ordinary way, of course, our courts do give retroactive effect to the recognition of a government, in that we recognise the acts of that government within its proper sphere to have been lawful, not merely from the time of recognition, but antecedently, from the time that it was an

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effective government. Thus, if it has already made decrees transferring to itself goods and chattels within its territory and sold them to British buyers, our courts will recognise the transfer as valid: Aksionaroye Obschestvo A.M. Luther v. James Sagor & Co. If it has already passed legislation dissolving companies incorporated within its territory, our courts will hold the companies to be non-existent as well here as there: Lazard Bros. & Co. v Midland Bank Ltd. The reason for this retro-activity is that, just as we recognize the decrees of the government subsequent to recognition to have been lawful, so also we must recognise
10 the prior decrees to be lawful, unless, indeed, we are to say that the government must re-enact those prior decrees all over again before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition."

Then follows this qualification :—

" The retroactive effect must, however, be confined to acts of the government within its proper sphere, that is to say, acts with regard to persons and property in the territory over which it exercised effective control: Banco
20 de Bilbao v. Sancha; or acts with regard to ships which are registered there and whose masters attorn to it: Government of the Republic of Spain v. S.S. "Arantzazu Mendi". Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its effective control."

There is, I think no act of the Central People's Government affecting persons and property in its own territory which has any bearing on the question. The purported dismissal on October 1st, 1949 of the ministers of the Nationalist Government which has been frequently referred to, can only be deemed effective within the territory and as regards assets from time to time in the control of
30 the People's Government. Elsewhere, and so long as the Nationalist Government retained de jure recognition, such a decree could have no effect. The only "act" of the Central People's Government with direct reference to the aeroplanes was a declaration signed by Mr. Chow En-Lai that CATC was the property of that Government, a declaration which could not of itself possibly have the legal result of divesting any title of the Nationalist Government to the property in question, but was no more than an acceptance and adoption of the acts of those who claimed control on behalf of the Central People's Government. These acts have been referred to as an "attornment" to the People's Government and while that is a possible description I think there is not very great similarity between the
40 position of those attorning and that of the master and crew of a ship. I doubt whether either possession or custody of the aircraft could be said to be in Mr. Chen Cheuk Lin as Chairman of the Board of Governors (and replaced by the Nationalist Government, according to evidence adduced before the Full Court, by Mr. Ango Tai on 12th November, 1949 while the question of physical control remained unsettled) and there is no evidence that the Board of Governors attorned as a body. Those who finally ended up in actual control were a majority of the employees including Mr. Chen and a number of the other senior officials. I see no point however in going further into this matter as I think there is no essential difference in principle between an attornment in the strict sense and a

mere forcible taking of possession. As against those who were up to that moment rightly in possession, both are wrongful acts. A bailee cannot by attorning to a third person against the will of his bailor deprive the bailor of any title which he may have to the goods in question. If he is the true owner his rights are not affected. If the persons attorning in the present case had the custody of the aeroplanes they had it by virtue of their employment by the Nationalist Government. Their exclusion of their employers from possession must therefore be a breach of municipal law. If, on a wider view, the actions of the persons concerned might possibly be regarded, in view of the adoption of those acts by the Central People's Government, as acts either of civil war or of sovereignty, they cannot be regarded as being in accordance with international law. No government may carry on its civil war in neutral territory and as Denning, L.J., said in the Boguslawski case (supra) at page 180 referring to the Polish government in exile—"No such remedies could have been exercised in England except by the permission of our government. No other government can exercise acts of sovereignty here except with our consent." In the "Christina", 1938 A.C. 485 it was held that it was unnecessary to consider by what mode possession was obtained; but that was in relation to a claim of sovereign immunity arising from the independent status in international law of the foreign sovereign. In the present case no such question can be considered, and the court must make a declaration of legal rights. If those rights are dependent to any extent on possession of the subject matter of the dispute, I think that acquisition of possession by a wrongful act, cannot confer upon the party so acquiring it, any benefit which he did not previously enjoy. In other words the question must be settled with reference to the right to possession. In Lauterpacht's "Recognition in International law" (1948) the application of the principle "Ex injuria jus non oritur" to international law is dealt with on pp.420-426. It is subject to exceptions but the following general statement—(from pp.420-1)—seems to me to be applicable in the present circumstances:—

> "The principle ex injuria jus non oritur is one of the fundamental maxims of jurisprudence. An illegality cannot, as a rule, become a source of legal right to the wrongdoer. This does not mean that it cannot produce any legal results at all. For it gives rise to a legal liability of the law-breaker; it may become, in the interests of intercourse and general security, a source of rights for third persons acting in good faith; it may, temporarily and provisionally, confer upon the wrongdoer a measure of protection of his possession; it may, if the rigid conditions of lapse of time and of other requirements have been complied with, crystallize into a legal right as the result of the operation of prescription. But to admit that, apart from well-defined exceptions, an unlawful act, or its immediate consequences, may become suo vigore a source of legal right for the wrongdoer is to introduce into the legal system a contradiction which cannot be solved except by a denial of its legal character. International law does not and cannot form an exception to that imperative alternative."

A passage in the judgment of Hill, J., in the Jupiter (No. 3) 1927 P.D. 122 at 135-6 appears to be particularly apt in the present circumstances. One Lepine the captain of the vessel had allowed representatives of the U.S.S.R. to take possession of it. After holding that the captain had custody only of the vessel and that the right to possession was in Mr. Bourgeois, an administrator appointed by a French court, Hill, J., said:—

"The result of these considerations is that in March, 1924, when Lepine allowed the U.S.S.R. to take possession of the ship, M. Bourgeois was in actual possession and had the right to possession. Lepine may have acted as a loyal subject of the U.S.S.R., but he betrayed his trust to his employers. Prima facie the act of Lepine was wrongful. Prima facie M. Bourgeois, who had possession in fact and law, was wrongfully deprived of possession in fact. Prima facie M. Bourgeois is entitled to recover possession. His right does not depend merely upon a right to sue given by the French decrees. It depends upon possession, and right to
10 possession, in England, and wrongful dispossession in England, and the ship is under the arrest of this Court. If M. Bourgeois had possession, and the right to possession, here, and was dispossessed here, there can be no question as to his right to sue here. Judgment must be pronounced in his favour, unless the Cantiere Olivo Societa Anonima can show that the U.S.S.R., who sold the ship to them, had a superior title. It is upon the title of the U.S.S.R. that the Cantiere defend."

Similarly here, I think that only if the Central People's Government had a right to possession superior to that of the Nationalist Government could they rely upon the control actually obtained on their behalf, as giving them exclusive
20 jurisdiction over the aeroplanes. If the latter are to be regarded as ordinary chattels there can be, in my opinion, no question of any such superior right. As I have already said I think that the Nationalist Government as a belligerent and de jure Government was entitled to maintain its original, unchallengeably rightful possession and control.

If, putting it at the highest, the aeroplanes are to be regarded as being in the same position as a ship registered in territory occupied by the Central People's Government, the matter presents greater difficulty. The question is one of the right to possession of state-owned property. Perhaps the closest analogy is to be found in the cases where there have been competing requisition-
30 ing decrees by the de facto and de jure governments in respect of ships, but I know of no such case which has been decided on the merits. The doctrine of sovereign immunity has proved the deciding factor and obviated the necessity for consideration of anything further. That was the case in the "Arantzazu Mendi" (supra); in the "Christina" (supra) the extent to which the vessel in territorial waters remained subject to the law of the flag was similarly not considered. Whatever the importance that might attach to the port of registry if the vessel were in the possession of a third party in the position of a stake-holder, I do not think that it has ever been suggested that any such consideration could over-ride the belligerent rights of a government rightly in possession of the
40 vessel. It would be an absurdity if one recognised belligerent could by decree wrest property from another in neutral territory, and no neutral court could in my opinion give it any effect, in the unlikely event of its being called upon to adjudicate upon the merits. In any event, there is no complete analogy between ships and aircraft. They differ in many ways including the matter of registration; that of ships is in a particular port whereas the registration of aircraft is national. The opinion expressed in Shawcross and Beaumont on Air Law (2nd Edition at p.14) is that (subject to the influence of statute law in particular cases) aircraft are sui generis.

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No. 53. The Judgment on Appeal, *continued.*

My opinion therefore upon this aspect of the case is that the Central People's Government could not show any superior title or right to possession: nor can it rely upon any rights arising out of actual possession acquired in the way it was; therefore it had no possession which could bring into effect the doctrine of retroactivity. That doctrine I think relates to the acts of a government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful. On this point I hold therefore that the ordinary principle of continuity was not displaced by any consideration of retroactivity and that it follows that the Nationalist Government was entitled to possession of and had jurisdiction over the aeroplanes. 10

In arriving at this conclusion I have accepted that the principle of retroactivity applies only to the acts of a government relating to persons and property within its effective control. This seems to be the effect of all the leading authorities from Luther v. James Sagor & Co. (1921) 3 K.B. 532 to Boguslawski v. Gdynia-Ameryka Linie (supra) with the possible exception of the case of Haile Selassie v. Cable & Wireless (No. 2) 1939 Ch.D. 182 which contains the only hint that title to a right in neutral territory might be included. In the court below Bennett, J., had, in that case, held that the principle of succession as expressed in U.S.A. v. McRae L.R., 8 Eq. 69 did not operate so as to divest a de jure sovereign of a right to sue for a public debt recoverable in England, in 20 favour of a usurping government recognised de facto. The learned judge gave weight to a passage from the judgment of Lord Cairns in U.S.A. v. Wagner L.R., 2 Ch. 582 at 593 the important portion of which is as follows:—

"This argument, in my opinion, is founded on a fallacy. The sovereign, in a monarchical form of government, may, as between himself and his subjects, be a trustee for the latter, more or less limited in his powers over the property which he seeks to recover. But in the Courts of Her Majesty, as in diplomatic intercourse with the government of Her Majesty, it is the sovereign, and not the state, or the subjects of the sovereign, that is recognised. From him, and as representing him 30 individually, and not his state or kingdom, is an ambassador received. In him individually, and not in a representative capacity, is the public property assumed by all other states, and by the Courts of other states, to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, is held to remain and to reside in the state itself, and not in any officer of the state. It is from the state that an ambassador is accredited, and it is with the state that the diplomatic intercourse is conducted."

Upon this Bennett, J., rested his decision, though it is not entirely clear whether he would have been of a different opinion if the plaintiff had been an 40 exiled de jure government of a republic. Before the appeal was heard, His Majesty's Government had recognised the King of Italy as Emperor of Abyssinia, and counsel conceded that the appeal must therefore be allowed and the action dismissed. At page 197 of the report the Master of the Rolls said:—

"It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognised as existent. Further, it

is not disputed that that right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place. That was in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett J. to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced."

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In my respectful opinion this passage takes the matter further than was necessary for the decision of the point at issue. Appeal being by way of rehearing, it would surely be enough to dispose of the matter if the plaintiff were deprived of his right to sue at any time before the litigation was finally disposed of. I do not think in any event that it was intended to hold that in all cases recognition of a government as the de jure government would antedate to the date of its de facto recognition title to the whole of the public domain. How would that principle work in cases like the present where de facto recognition was extended gradually to the different areas occupied? To what date would the antedating of title go if it is not to be determined by effective control? Assuming that Bennett J's decision had been upheld on appeal by the highest tribunal prior to de jure recognition of the King of Italy, and the claim paid, can it be supposed that after de jure recognition Cable & Wireless would have had to pay again on the ground that they had paid someone who had no title to sue? That would be contrary to the principle of convenience as expressed in the passage from the judgment in Guaranty Trust Co. v. U.S. (304 U.S. at 140) quoted with approval by Cohen L.J. in the Boguslawski case, (supra) at p.176. It is noteworthy that in the last mentioned case Cohen L.J. interjected during the argument (at page 171 of the report):—

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"If during the period from June 28 to July 5-6 midnight, an Englishman paid in England a debt due to the Polish State to the proper officer of the London Polish Government and obtained from him a proper discharge, would not an action against the Englishman in the English courts at the instance of the new Polish Government for the debt fail?"

The court of appeal in that case did not apparently feel that any difficulty in coming to its decision on retroactivity arose out of Haile Selassie v. Cable & Wireless Ltd. Each case must be considered with regard to its own facts, and I do not think it is correct to read into the Haile Selassie decision an intention to differ from the oft repeated view that a new government in the ordinary way does not take the public property of the government which it follows by title paramount.

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A further ground upon which the learned Chief Justice based his dismissal of the action, and which it is now necessary to consider, had relation to the nature of the transaction upon which the appellants relied for their alleged

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acquisition of title. It is an established rule, and one to which I have already referred, that any Government which succeeds another, succeeds to all the public property of the displaced power, but it succeeds by representation and not by title paramount. Therefore it succeeds subject to any correlative rights and obligations by which the displaced Government would have been bound. The rule as stated in United States of America v. McRae (supra) is subject to an exception which need not be mentioned here. Upon this rule the appellants submitted that the Central People's Government succeeded the Nationalist Government by representation as at the date of de jure recognition and acquired the rights of the latter under the contract of sale. It follows of course that the Central People's Government could not acquire such rights without accepting any outstanding liabilities. As to this doctrine the learned Chief Justice said :— 10

> "There must surely be, in my opinion, a limit to the scope of the acts to which this doctrine applies; a limit to the transactions into which a Government, knowing that recognition will shortly be withdrawn from it, may enter."

He based this opinion upon a passage from the judgment of Denning L.J. in Boguslawski v. Gdynia-Ameryka Linie at pages 182-3 :—

> "Upon such a succession it is obviously desirable that there should be continuity in the administration of the affairs of State, and the law will make every presumption in favour of it. Decrees which were passed by the old government will remain effective except in so far as the new government decides to repeal them. Rights and obligations which have become vested under the old government will remain intact unless the new government passes a decree divesting them, if it can lawfully do so. Orders which have been issued by the old executive may lawfully be obeyed unless the new executive countermands them. Curators who have been appointed by the old government will remain curators unless and until the new government dismisses them. So also it seems to me that offers made by the old government may lawfully be accepted during the time of the new government, unless they have meanwhile been revoked. There may be a difficulty in enforcing the ensuing contracts, because the new government cannot be impleaded in our courts. 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 an alien and improper purpose. . . . . . Secondly, did Kwapinski make the declaration in good faith, or did he do it for an alien and improper purpose? It was argued before us that it was most detrimental to the shipping companies for the men to leave the ships and thus immobilize them : that a payment of three months' wages if they left would have the effect of inducing them to leave and was therefore unjustifiable; and it was to be inferred that the purpose of the declaration was to embarrass the new government on its taking over the ships. If that were the purpose of the declaration, I do not think it would be valid."

20 30 40

Mr. D'Almada contended that the Court could not enquire into the acts of a sovereign government then accorded de jure recognition. In an ordinary case the Court would be relieved of that enquiry by the operation of the doctrine of sovereign immunity: as Lord Atkin said in The Arantzazu Mendi (p.265):

> "The non-belligerent state which recognizes two governments, one de jure and one de facto, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts."

That is the position we have here but with the bar of sovereign immunity removed. The Central People's Government was at the time of the transaction 10 in question equally to be regarded as a sovereign government in respect of the very large area it occupied—almost the whole of China. The property with which the action is concerned was public property of the state of China and the Court is charged with the duty of determining its ownership. As I see it, the only way in which that duty can be discharged is by the application to the facts of the case of the principles of international law as recognised and applied in British courts. But for the sale relied upon by the appellants, the Central People's Government would now, in the view of those courts, undoubtedly be the owner of the property by succession as trustee, of course, for the state. If the validity of the sale can be impugned on the ground that it 20 was a breach of international law, that is a matter that the court must enquire into in order to determine the ownership. The appellants themselves rely on the wrongful nature of the possession of the Central People's Government as negativing the operation of the doctrine of retroactivity, and as I have said, that government must also be regarded as a sovereign government. There is no hint in the judgment of Denning L.J. in the Boguslawski case that he regarded himself as precluded from deciding whether Mr. Kwapinski (acting for the de jure government) acted for an alien and improper purpose. He did in fact consider that question, and decided that he had not.

Before proceeding to consideration of the facts of this case I will set out 30 a passage from Lauterpacht's Recognition in International Law at Page 93:—

> "Although international law does not stigmatize revolutions as unlawful, it does not ignore altogether the distinction between the revolutionary forces and the established government. So long as the revolution has not been fully successful, and so long as the lawful government, however adversely affected by the fortunes of the civil war, remains within national territory and asserts its authority, it is presumed to represent the State as a whole."

Then as a footnote:—

> "Thus, for instance, during the Spanish Civil War of 1936-9 the lawful 40 government, deprived of the major part of national territory, continued to represent Spain in the Council and the Assembly of the League of Nations and before the Permanent Court of International Justice. See the Judgment of 6 November 1937, in the Borchgrave case between Belgium and Spain (P.C.I.J. Series A/B, No. 72). But, as in other matters, so also in this case good faith prescribes limits to the operation

of a general rule. Thus it is doubtful whether political or commercial treaties of a far-reaching character may properly be concluded with a government thus situated. There is force in the contention that, notwithstanding the general rule as to the continuity of the State, the successful revolutionary government would not be bound by such treaties concluded durante bello as being in fraudem of the general interests of the nation. When in 1858 and 1859 the United States recognized the Constitutionalist Government of Juarez in Mexico, while refusing recognition to the insurrectionist Miramon Government established in the capital, they were negotiating—and eventually concluded—important 10 political treaties of alliance and of cession with the Constitutionalist Government. This they did notwithstanding the grave doubts entertained in the matter by the United States Minister to Mexico. He said: 'The cession of territory is the gravest and the most important act of sovereignty that a government can perform; it is therefore questionable whether it should be performed at a moment when it is in conflict with another government for the possession of the empire, even though it may be de jure and de facto much more entitled to respect than that with which it is struggling in civil war, and this consideration is as important to the party purchasing as to the party ceding the territory' :" 20

The type of case dealt with in this footnote is I think akin to the acts done "not in good faith as trustees for the State" referred to in the passage from Denning L.J's judgment quoted above. In dealing with this passage Mr. D'Almada submitted that in the first place the cession of territory was an act of such fundamental importance to a State that it occupied a special position—there was a difference in kind. He said further that here we do not have a far-reaching commercial treaty but a mere sale of state-owned personal property. He quoted, to point the importance of territory, from Lauterpacht (at page 30):—

"The possession of territory is, notwithstanding some theoretical controversy which has gathered round the subject, a regular requirement of 30 statehood. Without it there can be no stable and effective government."

It is obvious of course, that questions of territory are fundamental, though even in such a matter there can be wide variations in degree. I do not however agree that the principle should be limited thereto; there are many other matters of high importance. If a government about to go out of power gave an oil concession to a foreign country or foreign nationals in consideration of a lump sum of money, I would say it was in the same category. A sale of the British Navy, or Merchant Navy, would be a matter of vital concern to the state—and would not be completely dissimilar to what is here under consideration. I am not impressed by the argument that we are in this action concerned only with 40 deliverable chattels—the subject matter of the alleged sale was the whole assets of two major airlines, of inestimable value in a country like China.

On the facts, the learned Chief Justice found that the sale was a device to prevent the aircraft falling into the hands of the Central People's Government on its recognition de jure. The following passage in his judgment was strongly criticized by counsel :—

"By normal diplomatic usage, and indeed to be inferred from the terms of the contract quoted above, the then Nationalist Government must have been fully alive to the probability of the withdrawal of recognition by His Majesty's Government in the near future and in fact this took place as from midnight 5/6th January, 1950, and it is evident that this transaction was a device entered into with full knowledge by both parties, by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition de jure for the references to 'Communist Areas of China' must relate to the areas controlled by that Government, recognised as the de facto Government of
10 those areas."

The ground of criticism was that the learned Chief Justice was here examining events and the value of evidence in the light of after events. I am not inclined to agree. I am not conversant with "normal diplomatic usage" and am not therefore aware whether this would entail notification of the intention to withdraw recognition some four weeks before the event. But however that may be, what is quite clear is that by the 12th December, 1949, the Nationalist Government had lost all but a very small portion of the Chinese mainland, and it is to my mind an inescapable inference that it knew that it was about to lose the remainder. That inference arises from two considerations. Firstly, the
20 Nationalist Government itself had moved to Formosa; it had already moved to Canton, thence to Chungking and thence to Chengtu. It is not to be supposed that it would leave Chinese territory proper while it retained any hope of successfully defending any portion of it. Secondly, recognition by His Majesty was withdrawn some 24 days afterwards. The state of affairs which led to that withdrawal cannot but have been amply apparent to the Nationalist Government on the 12th December. Such a step is not taken lightly or without lengthy deliberation. The implications are set out in Lauterpacht—at page 94:—

"In one respect, however, the presumption in favour of the lawful govern-
30 ment is above controversy: the latter is entitled to continued recognition de jure so long as the civil war, whatever its prospects, is in progress. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the de jure recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law. For such recognition amounts to recognizing the rebels either as the government of the entire State or as the government of a new State. An authority cannot be recognised, de jure, as a government without being recognised as the government of a State. In
40 either case recognition of the revolutionary party as a de jure government constitutes a drastic interference with the independence of the State concerned. The illegality of such action is so generally admitted that, as in the corresponding case of recognition of States, even those who adhere to the political view of recognition admit that at least this particular aspect of it is governed by international law. Premature recognition is a tortious act against the lawful government; it is a breach of international law."

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No. 53. The Judgment on Appeal, *continued.*

It is not for the Court to suggest that this recognition was premature, (even though other states have not yet extended recognition) and a state of affairs which induced His Majesty's Government to believe that by the 5th January resistance by the Nationalist Government was "ostensibly hopeless or purely nominal" must have been amply evident to the Nationalist Government on the 12th December. If that is so (and I do not think this is an ex post facto view) the Nationalist Government must have been aware that, putting it at the lowest, transfer of de jure recognition was not improbable.

It is next necessary to examine the contract of sale itself. The property affected was "all of the physical assets and such stock as is owned by the Government of the said CATC and CNAC". That means in the case of CATC the whole of its assets. Paragraph C of the contract indicates that the purchasers as well as the vendor were aware that the assets were already being claimed by the Central People's Government as they were already subject to various injunctions issued by the Supreme Court of this Colony. Paragraph 4 in which the purchasers agree to do everything in their power to reduce the assets to their possession and absolute control and paragraph 5 in which the vendor agrees to assist them to do so are a further indication to the same effect. The total purchase price was U.S.$3,500,000 payable by the issue by the purchasers of six promissory notes, payable to bearer without interest, all, by paragraphs 2(a) & (b), "subject to the terms and conditions set forth in the form of note attached to this letter". A further obligation of the purchasers was to organize a corporation or corporations in such country as they might select, to transfer the assets thereto, and to obtain bearer promissory notes from the corporations in substitution for those issued by the purchasers. The substitute promissory notes were to be subject to the same terms and conditions as the originals "excepting only that such corporation notes shall not be limited to payment out of the said physical assets of CATC and CNAC but shall be fully payable out of the assets of any nature belonging to the Corporation". It seems clear from this that the purchasers' liability under their notes was to be limited. If they failed to get control of the assets purchased they were under no liability. It was stated by Sir Walter Monckton in the Court below that in fact the only notes signed and delivered were those signed by the corporation—the present appellant. These were not subject to conditions but would of course in any event be payable only out of the assets of the corporation. Then follows an interesting provision. The promissory notes at the option of the holder are to be convertible into stock in the corporation provided that the holder is deemed by the purchasers to be anti-Communist and to be the authorized representative of the Nationalist Government or its designees. The purchasers also agree that the assets should not be used for the benefit of Communist China directly or indirectly.

This contract was held by the learned Chief Justice to be hostile to the present de jure Government and to the interests of the Chinese people; a breach of trusteeship and done for an alien and improper purpose. With this finding I am in full agreement, for reasons which I will now enumerate. Firstly, as I have said, the contract was entered into at a time at which the Nationalist Government must have known at the very least that withdrawal of recognition was not improbable. The state of affairs would also no doubt be known to the purchasers by virtue of their close association with China referred to in paragraph

F of the contract. Secondly, it was entered into at a time when to the knowledge of all parties the assets in question had already been claimed by the Central People's Government and were under Court control. The Central People's Government at the time was in occupation of almost the whole of China and the assets were peculiarly associated with that territory. With regard to that association, it is interesting to note the opinion of Beale that a state has jurisdiction over a chattel if it is habitually kept within the state but is temporarily outside it; and of Martin Wolff that to all means of transport is to be attributed some fixed resting place, in which they are as it were resident, even if temporarily absent. (Both of these I have taken from McNair's "Legal Effects of War" (3rd Edition) at p.446). These are considerations which might well give pause to a purchaser, though it would appear that the immediate purchasers here took no risk under the original contract. Thirdly, the nature of the contract was such that it not only sought to deprive the Central People's Government and the Chinese people within its jurisdiction of the aeroplanes, but also was at pains to ensure that no possible benefit could accrue to that government if it, as successor, became entitled to the benefit of the contract. The first of these objects is legitimate, so long as the Nationalist Government retained de jure recognition: but the prohibition of the use of the aircraft for the benefit of Communist China was of course unlimited. As to the second point, in the inconceivable event of the Central People's Government seeking to approbate and enforce the contract, it would be met by a plea that the promissory notes were to bearer and were negotiable—they would no doubt by then have been negotiated. There would be a further plea that the contract included the whole of the assets of CATC some of which (a proportion described as "less than 10%") were in China itself. Though at the time of the contract the Nationalist Government had definitely no jurisdiction to sell these particular assets, the Central People's Government could not approbate a part only of the contract; it was an entire contract and these assets would have to be delivered. If the Central People's Government in fact obtained possession of the promissory notes and sought to become holders of stock in the appellant corporation it would be met by paragraph 3(q) which denies such a privilege to anyone not anti-Communist. Fourthly, the provision last referred to provided the means whereby the Nationalist Government, while parting with title to the assets could acquire a major share in the stock of the holding corporation. This it could conceal, if desired, by the employment of a nominee. That such an interest would probably be a controlling one is indicated by the proviso that the purchasers should have first obtained a satisfactory management agreement with the corporation. From this point of view, the contract provided a cloak to conceal a large measure of continued beneficial ownership. It is no answer to say that the option has not been exercised; it is the contract which is under examination. The result of the latter, if valid, is that the Chinese people, who had previously a commercial public asset of immense value to their country, have that asset no longer; neither would their legally recognised Government be able to secure by succession any quid pro quo, but the benefit of the transaction still rests with persons no longer recognised as being trustees for the State. It appears that this position was arrived at deliberately, with the full knowledge of all parties, and therefore in my opinion, the transaction cannot stand as against the claim of the de jure Government.

I have already dealt with two of Mr. D'Almada's arguments on this phase of the case. A further submission was that the Nationalist Government

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No. 53. The Judgment on Appeal, *continued.*

did no more than it was entitled to do as a belligerent government than retaining recognition. It was entitled to fight back and in this way differed from the London Government in the Boguslawski case. The sale was consistent, he said, with the object of providing funds for the struggle, and equally with the object of putting the aeroplanes out of reach of its opponents. As to the provision of funds, this can hardly have been the object when all that was received was a series of promissory notes maturing at intervals of one year from the transaction. It is to be noted that there was no provision in the contract requiring the planes to be retained and operated from Formosa for the benefit of the vendors' war effort. The argument that they were entitled to put the 10 planes out of reach of the Central People's Government is an attractive one, but I think it does not prevail in view of the fact that the contract was to my mind obviously designed to off-set the consequences of a possible withdrawal of recognition.

I come to my decision on this part of the case with hesitation, not because of any doubt on the facts, but because of the paucity of legal authority. I have particularly in mind the following passage from the judgment in West Rand Central Gold Mining Company v. Rex (1905) 2 K.B. at 401, which points the difficulties in the ascertainment of international law :—

> "In support of his first proposition Lord Robert Cecil cited passages from 20 various writers on international law. In regard to this class of authority it is important to remember certain necessary limitations to its value. There is an essential difference, as to certainty and definiteness, between municipal law and a system or body of rules in regard to international conduct, which, so far as it exists at all (and its existence is assumed by the phrase 'international law'), rests upon a consensus of civilized States, not expressed in any code or pact, nor possessing, in case of dispute, any authorized or authoritative interpreter; and capable, indeed, of proof, in the absence of some express international agreement, only by evidence of usage to be obtained from the action of nations in similar cases in the 30 course of their history. It is obvious that, in respect of many questions that may arise, there will be room for difference of opinion as to whether such a consensus could be shewn to exist. Perhaps it is in regard to the extraterritorial privileges of ambassadors, and in regard to the system of limits as to territorial waters, that it is least open to doubt or question. The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to 40 be, from an ethical standpoint, the conduct of nations inter se, than the enunciation of a rule or practice so universally approved or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, 'law'."

The principle, however, is stated with confidence by Denning L.J. in the Boguslawski case and seems to be allied to municipal law as to following property in respect of which a breach of trust has been committed, and to be in accord-

ance with commonsense. To what degree convenience permits the application of the principle is where difficulty arises, but in the present case I do not think the purchasers could complain of any lack of knowledge of the exact state of affairs at the date of their contract.

For the foregoing reasons my view on the whole case is that, because of the quality of the possession and control of the aeroplanes exercised on behalf of the Central People's Government the doctrine of retroactivity did not operate so as to vest in that Government jurisdiction over them prior to the date of de jure recognition; nevertheless the transaction of the 12th December, 1949 did
10 not, by reason of its nature and the surrounding circumstances, vest in the purchasers a good title to the property in question as against the Central People's Government, which therefore became entitled thereto as state property, upon de jure recognition. In my opinion the appeal must therefore be dismissed.

(Sd.) T. J. GOULD,
President.
28.12.51

No. 54. The Judgment on Appeal (Mr. Justice Scholes).

No. 54.

JUDGMENT OF HIS HONOUR MR. JUSTICE SCHOLES APPEAL JUDGE.

I agree that the appeal should be dismissed for the reasons given by the
20 President in the judgment which he has just delivered; and I also agree that the additional evidence adduced before the Full Court by the appellants should be admitted in evidence in the special circumstances of this case for the reasons given by the President. However, I should like to add a few words on the question of retroactivity in this case, because I have doubts as to whether or not the appeal should not also be dismissed on that ground. Denning L.J., in Boguslawski and another v. Gdynia-Ameryka Linie, 2 A.E.R. 1950, said this about retroactivity :—

"The reason for this retroactivity is that, just as we recognise as lawful the decrees of the government which are made subsequent to our
30 recognition of that government, so also we must recognise as lawful the decrees made prior to our recognition of the government, unless, indeed, we are to say that the government must re-enact those prior decrees before they can have any validity in our eyes. That would be a work of supererogation and humiliation to which that government might reasonably object, and it would be inconsistent with the sovereignty which is involved in recognition. The retroactive effect must, however, be confined to acts of the government within its proper sphere, i.e., acts with regard to persons and property in the territory over which it exercised effective control: see Banco de Bilbao v. Sancha; or acts with regard to
40 ships which are registered there and whose masters attorn to them; see The Arantzazu Mendi. Just as the new government only gains its right to recognition by its effective control, so also the extent of the retroactivity is limited to the area of its effective control.

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No. 54. The Judgment on Appeal (Mr. Justice Scholes), *continued.*

The relevant period in this case is from June 28, 1945, to midnight of July 5/6, 1945. During that week the Polish Provisional Government of National Unity had control only over the territory of Poland itself. It had no control over the men and ships who were subject to the Polish government in London. During that time no master of any of those ships attorned to the new Polish Government. It follows, therefore, that our recognition of the new Polish government had no retroactive effect whatever, so far as those men and ships were concerned. The result of all this discussion is, therefore, that, in the eyes of our courts, until midnight of July 5/6, 1945, the Polish government in London had full right and title to exercise governmental functions in respect of the men and ships of Poland who, or which, were here or had their home ports here, and, as from that same midnight, they ceased to have any such right or title, and the same became vested in the new Polish government in Warsaw. There was, in short, at midnight a transfer by operation of law of all governmental functions and property from one government to the other''.

I think it rather appears from that, that if the masters of the ships had attorned to the new Polish Government and had the new Polish Government been in effective control of the ships in England between the 28th June, 1945, and midnight on the 5/6th July, 1945, which would have been somewhat similar to the position of the aircraft in this case, that Denning, L.J., may have been of the opinion that retroactivity would have applied.

The Master of the Rolls, in Haile Selassie v. Cable & Wireless Limited (No. 2) 1939 Ch.D. 182 said this :—

'' It is not disputed that in the Courts of this country His Majesty the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto is no longer recognized as existent. Further, it is not disputed that that right of succession is to be dated back at any rate to the date when the de facto recognition, recognition of the King of Italy as the de facto Sovereign of Abyssinia, took place. That was in December, 1936. Accordingly the appeal comes before us upon a footing quite different to that upon which the action stood when it was before Bennett, J. We now have the position that in the eye of the law of this country the right to sue in respect of what was held by Bennett, J., to be (and no dispute is raised with regard to it) part of the public State property, must be treated in the Courts of this country as having become vested in His Majesty the King of Italy as from a date, at the latest, in December, 1936, that is to say, before the date of the issue of the writ in this action. Now that being so, the title of the plaintiff to sue is necessarily displaced''.

At the relevant date, the 12th December, 1949, the Central People's Government was in actual possession and in effective control of public property of the State of China, the aircraft in question in this case, although the aircraft were not in their own territory but in that of a non-belligerent country. It appears to me that the Central People's Government was in actual possession and in

No. 54. The Judgment on Appeal (Mr. Justice Scholes), *continued.*

effective control of the aircraft while they were still registered in China. The Nationalist Government purported to suspend the certificates of registration of the aircraft on the 13th November, 1949, and at that time the Central People's Government was in control of most of China. It was not until the 12th December, 1949, that the certificates of registration purported to be cancelled by the Nationalist Government. Article 17 of the Chicago Convention on International Aviation, 1944, states "Aircraft have the nationality of the State in which they are registered". If the Central People's Government succeeded to the aircraft retroactively, or if they succeeded to them by succession on gaining
10 effective control of them, then the aircraft vested in the Central People's Government by succession before the 12th December, 1949, and in that case their possession at that date would not have been wrongful.

(Sd.) A. D. SCHOLES,
Appeal Judge.
28/12/51

No. 55. Application for Directions as to Notice of Appeal to Privy Council.

No. 55.

APPLICATION FOR DIRECTIONS AS TO THE NOTICE TO BE GIVEN OF THE APPEAL TO THE PRIVY COUNCIL.

Application on the part of the Plaintiffs for directions as to the Notice
20 to be given (if any) under Rules 3 and 17 of the Additional Instructions passed under the Royal Sign Manual and Signet on the 10th day of August, 1909.

Dated the 4th day of January, 1952.

(Sgd.) Wilkinson & Grist,
Solicitors for the Plaintiffs.

No. 56.

No. 56.

ORDER OF THE FULL COURT AS TO NOTICE OF THE APPEAL TO THE PRIVY COUNCIL.

Upon the application of the Appellants and upon hearing the Solicitors for the said Appellants IT IS ORDERED as follows :—

1. That notice of the application for leave to appeal to the Privy Council
30 shall be advertised in the South China Morning Post and the Wah Kui Yat Po, Hong Kong (two consecutive insertions in each) not less than seven days prior to the hearing of the application. The form of such notice to be approved by the Registrar and to contain the date of the application. The said notice also to be posted on the Notice Board of this Honourable Court.

2. That not less than fourteen days before the hearing of the application for final leave to appeal to the Privy Council notice of such hearing shall be advertised in the South China Morning Post and the Wah Kui Yat Po, Hong Kong (for two consecutive issues in each case). The form of such notice to be approved by the Registrar.

40 3. That no notice to the Respondents other than those contained in paragraphs 1 and 2 hereof shall be required.

Dated the 4th day of January, 1952.

L.S. (Sgd.) C. D'Almada e Castro,
Registrar.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 57. Petition for leave to Appeal to the Privy Council.

No. 57.

PETITION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL.

To their Honours the Judges of The Supreme Court of Hong Kong.

THE HUMBLE PETITION of the above-named Appellants RESPECTFULLY SHEWETH :—

1. That this Action was brought by the above-named Appellants against the Respondents by Writ of Summons dated the 19th day of May, 1950.

2. That by an Order of this Honourable Court dated the 16th day of June, 1950 it was directed that the Central People's Government of the Republic of China should be served with a Notice of the Writ of Summons which said Notice contained a provision that the said Government could within thirty days after receipt thereof give notice of their intention to appear in this Action and that in default of such Notice of intention being given the Central People's Government of the Republic of China and the Central Air Transport Corporation should be bound by any judgment given in this Action. 10

3. That no Notice of intention to appear was given and by order of this Honourable Court of the 2nd day of December, 1950 the Appellants were given leave to proceed ex parte.

4. That the claims of the Appellants appear from their Statement of Claim filed the 18th day of February, 1951. 20

5. That the trial of this Action came on for hearing before His Honour the Chief Justice on the 27th and 28th days of March, 1951.

6. That on the 21st day of May, 1951 His Honour the Chief Justice dismissed the Action brought by the above-named Appellants.

7. That on the 20th day of July, 1951 the Appellants filed a Notice of Motion that this Honourable Court would be moved at 10 o'clock on Tuesday, the 21st day of August, 1951 or so soon thereafter as Counsel could be heard by Counsel for the Appellants that the Judgment of His Honour the Chief Justice dismissing the action be reversed and that Judgment should be entered for the Appellants in the said Action. 30

8. That on the 21st and 22nd days of August, 1951 the said Motion was heard before this Honourable Court consisting of the Puisne Judge and the second Puisne Judge sitting together on the 21st and 22nd days of August, 1951.

9. That on the 2nd day of November, 1951 this Honourable Court by Memorandum to Counsel called for further evidence which was heard on the 26th day of November, 1951.

10. That on the 28th day of December, 1951 His Honour the Puisne Judge and His Honour the Second Puisne Judge dismissed the Appeal and gave leave to the Appellants to appeal to His Majesty the King in his Council within two months. 40

11. Your Petitioners the above-named Appellants feel aggrieved by the said Judgment of this Honourable Court affirming the said Judgment of His Honour the Chief Justice dated the 21st day of May, 1951' and desire to appeal therefrom.

12. The said Judgment affects the matter in dispute amounting to $5,000.00 and upwards and further involves directly a claim or question to or respecting property amounting to or of the value of $5,000.00 or upwards.

13. By an Order of this Honourable Court under the provisions of Section 4 (1) (b) of the Supreme Court of Hong Kong (Jurisdiction) Order in Council 1951 it was ordered that notice of the application for leave to appeal to His Majesty the King in his Council should be advertised not less than seven days prior to the hearing of the application in certain newspapers circulating in Hong Kong. By the same Order it was also directed that not less than fourteen days before the application for final leave to appeal to His Majesty the King in his Council notice of such hearing should be advertised as therein directed and that no notice to the Respondents other than those directed in the said Order of the 4th day of January, 1952 should be required.

14. YOUR PETITIONERS THEREFORE PRAY :—

(1) That this Honourable Court will be pleased to grant to your Petitioners the above-named Appellants formal leave to appeal from the said Judgment of this Honourable Court to His Majesty the King in his Council.

(2) That this Honourable Court may make such further or other Order as may seem just.

And your Petitioners the above-named Appellants will ever pray, etc.

Dated Hong Kong the 9th day of January, 1952.

(Sgd.) Wilkinson & Grist,
Solicitors for the above-named Petitioners.

(Sgd.) Leo D'Almada,
Counsel for the above-named Petitioners.

This Petition is filed by Messrs. Wilkinson & Grist of No. 2 Queen's Road Central, Victoria in the Colony of Hong Kong, Solicitors for the above-named Appellants.

It is intended to serve notice of this application by advertisement in accordance with the Order of this Honourable Court dated the 4th day of January, 1952.

In the Supreme Court of Hong Kong Appellate Jurisdiction.

No. 58. Affidavit of Peter John Griffiths.

No. 58.

AFFIDAVIT OF PETER JOHN GRIFFITHS.

I, PETER JOHN GRIFFITHS of No. 2 Queen's Road Central, Victoria in the Colony of Hong Kong, Solicitor, hereby make oath and say as follows:—

1. The facts contained in the Petition for leave to appeal to the Privy Council filed herein on the 9th day of January, 1952 are true to the best of my knowledge, information and belief.

2. Notice of the hearing of the application for provisional leave has been given in accordance with the Order of this Honourable Court dated the 4th day of January, 1952. 10

3. Advertisements approved by the Registrar were inserted in the South China Morning Post and the Wah Kiu Yat Po for two consecutive issues on the 11th and 12th days of January, 1952. The said notification was also posted on the Notice Board of this Honourable Court.

AND lastly the contents of this my Affidavit are true.

SWORN at the Courts of Justice, Victoria
Hong Kong this 21st day of January, 1952 (Sgd.) P. J. Griffiths.
Before,

(Sgd.) C. D'Almada e Castro,
A Commissioner &c. 20

No. 59. Order giving provisional leave to Appeal to the Privy Council.

No. 59.

ORDER OF THE FULL COURT DATED THE 26th DAY OF JANUARY 1952 GIVING PROVISIONAL LEAVE TO APPEAL.

Upon the Petition of the Appellants filed herein dated the 9th day of January, 1952 praying for leave to appeal to His Majesty in His Privy Council from the Judgment of the Full Court dated the 28th day of December, 1951 dismissing the appeal from the Judgment of The Honourable the Chief Justice Sir Gerard Lewis Howe, Kt., K.C., dated the 21st day of May, 1951 and upon hearing Counsel for the Appellants and upon reading the said Petition and the Affidavit of Peter John Griffiths in support thereof dated the 21st day of January, 30 1952 this Court being satisfied that the value of the subject matter of the Appeal is more than $5,000.00 and is a proper case in which to allow such appeal doth order that subject to the performance by the Appellants of the order of this Court by them 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 the King in His Privy Council against the said Judgment of this Honourable Court dismissing the appeal from the said Judgment of The Honourable the Chief Justice be granted to the Appellants AND THIS COURT DOTH FURTHER ORDER:—

1. that the said Appellants do within 4 months from the date of the 40 hearing of the said Petition for leave to appeal enter into good and sufficient security to the satisfaction of the Registrar of this Court in a sum of $2,500.00 for the due prosecution of the appeal;
2. that the said Appellants shall prepare and dispatch the record of this Action within the said period of 4 months;
3. that there shall be liberty to apply generally.

(Sd.) C. D'Almada e Castro,
Registrar.

(L. S.)

EXHIBITS

LST 1.
Appointment Order.

PART A.

Exhibits produced at the hearing in the First Instance before the Chief Justice.

EXHIBIT LST 1.
(Translation).

THE EXECUTIVE YUAN—APPOINTMENT ORDER

Order is hereby given that during the absence of Ma Sung Luk acting concurrently as Chairman of the Board of Governors of Central Air Transport Corporation who is going to Hong Kong on official business and prior to his
10 return all duties of the said Chairman of the Board of Governors of Central Air Transport Corporation shall be taken over by Liu Shao Ting in conjunction with his other duties.

Premier concurrently as Minister of Communications,

(Sgd.) Yen Hsi Shan.
(Chopped) "Chop of Yen Hsi Shan".

Dated the 12th day of December in the 38th year of the Republic of China (1949).

(Chopped) "Seal of the Executive Yuan."

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

(Sgd.) Chan Kwok Ying
Court Translator
21.2.1951.

EXHIBIT LST 1A.

LST 1A.
Letter of Offer and Acceptance.

Original in Chinese attached to original Affirmation.

This is the Exhibit marked LST-1A to the Affirmation of Liu Shao Ting
30 affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs
H.B.M. Consul—Tamsui

Exhibits.

LST 1A.
Letter of
Offer and
Acceptance,
continued.

(True Copy).

December 5, 1949

His Excellency the Minister of Communications
National Government of China,
Taipeh, Taiwan.

Your Excellency:

This letter is written to confirm our mutual agreement, that whereas:—

A) The National Government of the Republic of China (hereinafter referred to as the Government) is the legal and beneficial owner of all the outstanding shares of stock of the Central Air Transport Corporation (hereinafter referred to as CATC) and 80% of the outstanding shares of stock of the China National Aviation Corporation (hereinafter referred to as CNAC) and 10

B) We, the undersigned C.L. Chennault and Whiting Willauer (hereinafter referred to as Chennault and Willauer) desire to purchase and operate the physical assets of the said CATC and CNAC, and to acquire the shares of stock in CATC and CNAC held by the Government.

C) These physical assets, a major part of which are now located in the Colony of Hong Kong, are now subject to various injunctions issued by the Supreme Court of the said Colony of Hong Kong, with the result that the said CATC and CNAC have been forced to cease their operations and the said physical assets have materially decreased in value, and 20

D) The Government is unwilling to sell or otherwise dispose of said physical assets or stock except upon the most binding assurances that after such sale or disposition they will not be used in any way for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China, and

E) The Government is concerned and anxious to secure the future of the loyal staff members of the said CATC and CNAC, and 30

F) The Government is particularly anxious to sell the physical assets and the stock of the said CATC and CNAC to Chennault and Willauer because of the trust and confidence it imposes in them by virtue of their loyal and devoted services during the war of liberation to China and to the cause of the United Nations, because the Government recognised that Chennault and Willauer have amply demonstrated their ability to operate efficiently air transport services, and because the Government is confident that Chennault and Willauer will always use their best efforts to insure that the said assets will never be used for the benefit, directly or indirectly, of the Communist areas of China but rather will be used in furtherance of the anti-Communist cause. 40

NOW THEREFORE it is agreed as follows:—

Exhibits.

LST 1A. Letter of Offer and Acceptance, *continued.*

1) The Government agrees to cause the said CATC and CNAC to sell, and Chennault and Willauer agree to buy, all of the physical assets and such stock as is owned by the Government of the said CATC and CNAC, free and clear of encumbrances, for the sum of United States Currency One Million Five Hundred Thousand Dollars (US$1,500,000:00) in the case of the CATC assets, and the sum of United States Currency Two Million Dollars (US$2,000,000), in the case of the CNAC assets and for the further considerations referred to herein.

10

2) Chennault and Willauer agree to pay the said purchase price as follows:—

(a) By issuing to the said CATC three joint promissory notes, numbered serially, each in the sum of United States Currency Five Hundred Thousand Dollars (US$500,000), payable to bearer without interest, and subject to the terms and conditions set forth in the form of note attached to this letter, and

(b) By issuing to CNAC three joint promissory notes, numbered serially, and payable to bearer without interest, of which the first such note shall be in the sum of United States Currency Six Hundred Thousand Dollars (US$600,000), and the second and third such notes shall be in the sum of United States Currency Seven Hundred Thousand Dollars (US$700,000) each, subject to the terms and conditions set forth in the form of note attached to this letter and

20

(c) By causing to be organised a corporation or corporations or other legal entities under the laws of such country or countries or place or places as Chennault and Willauer may select, to which corporation or corporations or legal entities Chennault and Willauer shall transfer the said physical assets and shares of stock of CATC and CNAC in consideration of which the corporation or corporations shall issue its or their promissory notes, payable to bearer without interest, in substitution for the aforesaid notes jointly issued by Chennault and Willauer; the said substitute notes shall be in the same amounts and substantially subject to the same terms and conditions as the notes of Chennault and Willauer for which they are substituted, excepting only that such corporation notes shall not be limited to payment out of the said physical assets of CATC and CNAC but shall be fully payable out of the assets of any nature belonging to the new corporation, corporations or legal entities.

30

40

3) Chennault and Willauer agree that at any time after the organisation of said corporation or corporations or legal entities referred to in paragraph 2 (b) above they will, at the option of the holder of any of the said promissory notes and upon surrender of such note, instead of paying cash, issue or transfer to the holder or holders of such note a proportion of stock or evidence of ownership in the new corporation or corporations or legal entities equal to the proportion the note surrendered bears to all

Exhibits.

LST 1A.
Letter of
Offer and
Acceptance,
continued.

the notes issued, **provided, however,** that the holder of such note who wishes to exercise such option shall be a person whom Chennault and Willauer in their uncontrolled discretion shall consider

a) to be a person free of any connection with or commitments to any Communist forces or powers in China but who rather represents the true forces of Anti-Communism in China, and

b) to be a person designated or intended to exercise such option by the authorized representatives of the Government or their designees, and

Further provided that there shall have first been executed between the said corporation or corporations or legal entities and Chennault and Willauer a management contract in form, duration and terms satisfactory to Chennault and Willauer. 10

4) Chennault and Willauer agree to use their best efforts and to do everything within their power to reduce the said assets to their possession and absolute control.

5) The Government agrees to use its best efforts and to do everything within its power to assist Chennault and Willauer to reduce the said assets to their possession and absolute control.

6) Chennault and Willauer agree that the said assets shall not be used, directly or indirectly, for the benefit of or for the carriage of passengers or goods within, to or from the Communist areas of China. 20

7) Chennault and Willauer agree to use their best efforts to continue in their employment as many of the loyal employees and staff members of the said CNAC and CATC as is reasonably possible and to dispose of the rightful claims of Pan American Airways, if any are proved, in the case of CNAC.

8) This letter and the promissory notes and bills of sale issued hereunder contain the whole and entire agreement between the parties.

If this letter meets with your approval and agreement will you kindly sign and return to us the enclosed duplicate copy. 30

Yours respectfully,
C.L. Chennault and Whiting Willauer

(signed)
By ....
C. L. Chennault, U.S. citizen

(signed)
By ....
Whiting Willauer, U.S. citizen

Exhibits.

LST 1A. Letter of Offer and Acceptance, *continued.*

the above terms accepted and approved:

(signed)

....

Nih Chun-sung, Deputy Secretary-General of Executive Yuan and concurrently Chairman of Board of Directors of CNAC, 13 December 1949.

10 (signed)

....

Liu Shao-ting, Vice-Minister of Communications and concurrently Chairman of Board of Directors of CATC, 12 December 1949.

EXHIBIT LST 2.

LST 2. Letter of Confirmation.

THE EXECUTIVE YUAN
CHINA

Taipeh, Taiwan,
December 12, 1949.

20 General C.L. Chennault
and Whiting Willauer,
c/o Chennault and Willauer,
(a partnership pursuant to the laws of Delaware, U.S.A.).

Dear Sirs,

We take pleasure in notifying you that your offer to purchase CNAC and CATC has been accepted by the highest authority of the Government of the Republic of China.

The Government of the Republic of China has sold and transferred to you and you are now the sole owners of all the assets, airplanes, spare parts, 30 machinery, tools and other property of whatsoever nature of CNAC and CATC including also all of the shares of stock or other evidences of ownership in CNAC and CATC held by the Government.

This sale and transfer has been made to you in consideration of promises and undertakings heretofore made by you.

It is hereby certified to you that the foregoing action is final and complete.

We have instructed the Minister of Foreign Affairs to make all necessary certification of this sale and transfer to any foreign governments upon your request.

Exhibits.

LST 2. Letter of Confirmation, *continued.*

We have further instructed all officials of the Government to execute any necessary documents required by you as evidence of your ownership and title.

Sincerely yours,

FOR THE GOVERNMENT OF THE REPUBLIC OF CHINA
(Sgd.) Premier Yen Hsi-Shan

NOTE: This English letter is legal and true; any Chinese version is but a translation of it.

This is the Exhibit marked LST-2 to the Affirmation of Liu Shao Ting affirmed before me this 19th day of October 1950. 10

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

EXHIBIT WK 1.
(Photostatic Copy).

WK-1. Letter enclosing Promissory Notes.

31 December 1949.

His Excellency Marshal Yen Hsi-shan
Premier of Republic of China and
Vice-Minister Liu Shao-ting of Communications
concurrently Chairman of Board of Directors of CATC 20

Your Excellencies:

We enclose herewith four Promissory Notes dated 18 December 1949 of Civil Air Transport, Inc., a Delaware Corporation, payable yearly over a period of four years totalling $1,500,000:00, the same being full settlement of all our obligations in connection with the purchase of the stock and all assets of whatsoever nature of CATC as per our offer of 5 December 1949 which was accepted and upon which transfer deed of 12 December 1949 was based.

It is our understanding that with the delivery of these Promissory Notes to you we now have taken all steps required as to payment. 30

Yours respectfully,

CIVIL AIR TRANSPORT, Inc.
A DELAWARE CORPORATION

(Sgd.) Whiting Willauer
By: ....
Whiting Willauer, Vice-President

CHENNAULT AND WILLAUER,
A DELAWARE PARTNERSHIP

(Sgd.) Whiting Willauer
By: 40
Whiting Willauer, Partner

This is the Exhibit marked WK-1 to the Affirmation of Wong Kuang affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

Exhibits.

WK 2.
Promissory
Note

EXHIBIT WK 2.
(Photostatic Copy).

US$375,000:00

Victoria, Crown Colony of
Hong Kong.
18 December 1949.

One year after date Civil Air Transport, Inc., a Delaware Corporation, promises to pay to the order of Bearer the sum of Three Hundred Seventy-five Thousand Dollars without interest for value received.

10

CIVIL AIR TRANSPORT, INC.

Whiting Willauer
By: (Sgd.) ....
Vice-President

Payable at the Chase National
Bank of New York.

This is the Exhibit marked WK-2 to the Affirmation of Wong Kuang affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

20

WK 3.
Promissory
Note

EXHIBIT WK 3.
(Photostatic Copy).

US$375,000:00

Victoria, Crown Colony of
Hong Kong.
18 December 1949.

Two years after date Civil Air Transport, Inc., a Delaware Corporation, promises to pay to the order of Bearer the sum of Three Hundred Seventy-five
30 Thousand Dollars without interest for value received.

CIVIL AIR TRANSPORT, INC.

Whiting Willauer
By: (Sgd.) ....
Vice-President

Payable at the Chase National
Bank of New York.

This is the Exhibit marked WK-3 to the Affirmation of Wong Kuang affirmed before me this 19th day of October 1950.

40

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

Exhibits.

WK 4.
Promissory
Note.

EXHIBIT WK 4.
(Photostatic Copy).

US$375,000:00

Victoria, Crown Colony of
Hong Kong.
18 December 1949.

Three years after date Civil Air Transport, Inc., a Delaware Corporation, promises to pay to the order of Bearer the sum of Three Hundred Seventy-five Thousand Dollars without interest for value received.

CIVIL AIR TRANSPORT, INC. 10
Whiting Willauer
By: (Sgd.) ....
Vice-President

Payable at the Chase National
Bank of New York.

This is the Exhibit marked WK-4 to the Affirmation of Wong Kuang affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui 20

WK 5.
Promissory
Note.

EXHIBIT WK 5.
(Photostatic Copy).

US$375,000:00

Victoria, Crown Colony of
Hong Kong.
18 December 1949.

Four years after date Civil Air Transport, Inc., a Delaware Corporation, promises to pay to the order of Bearer the sum of Three Hundred Seventy-five Thousand Dollars without interest for value received.

CIVIL AIR TRANSPORT, INC. 30
Whiting Willauer
By: (Sgd.) ....
Vice-President

Payable at the Chase National
Bank of New York.

This is the Exhibit marked WK-5 to the Affirmation of Wong Kuang affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui 40

NCS 1.
Order of
Executive
Yuan.

EXHIBIT NCS 1.
(Translation).

Order to the Ministry of Communications

During the absence of the Minister of Communications Tuen Mo Chieh who is going to Hong Kong on official business and prior to his return all the affairs of your Ministry shall be temporarily administered by the Premier of the

Exhibits.

NCS 1. Order of Executive Yuan, *continued.*

(Executive) Yuan concurrently with his other duties. Please take note forthwith. This is order.

The 11th day of December in the 38th year of the Republic of China.

(Sgd.) Yen Hsi Shan, Premier.
(Chopped) "Seal of Executive Yuan."

Supervisor of Chop:
Comparer: (Chop Illegible)

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

10

(Sgd.) Chan Kwok Ying
Court Translator
21.2.1951.

EXHIBIT NCS 2.
(Translation).

NCS 2. Order for Removal of CATC issued by Executive Yuan.

Despatched

The Executive Yuan

Exceptionally urgent document to be delivered at once
To Department concerned: The Ministry of Communications

20 Document: confidential order

Subject Matter:

Premier: (Sgd.) Sun Fo. "Seal of Executive Yuan"
Time day month

Assistant Secretary General:

(Sgd.) (Illegible) 22nd January.

Document drafted by: Cha Mo To, forenoon, January 22.

Document dated: The 22nd day of January in the 38th year of the Republic of China (1949).

Confidential Order: "Yuan" 38 "Confidential" 75.

30 Order to Ministry of Communications:

The (National) Government has decided to administer its affairs in Canton on the 5th February this year. All subordinate organs such as the China National Aviation Corporation, the Central Air Transport Corporation, the China Merchant Steamship Navigation Co. Ltd., the General Post Office, the Telegraph Administration, the Highways Administration, the Central Meteorological Bureau, and the Civil Aviation Bureau shall at once move to Canton to conduct affairs there without delay. You are requested to give separate confidential orders at once to all of them directing them to act in accordance herewith. This is important. This is order.

40

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

(Sgd.) Chan Kwok Ying
Court Translator
21.2.1951.

Exhibits.

YHS 1.
Letter of
Authority.

EXHIBIT YHS 1.
(Photostatic Copy).

THE EXECUTIVE YUAN
CHINA

December 12, 1949.
Taipeh, Taiwan,

General C.L. Chennault
and Mr. Whiting Willauer
c/o CHENNAULT and WILLAUER,
(a partnership pursuant to the laws of Delaware, USA). 10

Dear Sirs,

The Executive Yuan of the National Government of the Republic of China takes pleasure in notifying you that Mr. Nih Chun-sung, Deputy Secretary-General of the Executive Yuan, and General Liu Shao-ting, Vice-Minister of the Ministry of Communications, are designated at Chairman of the Board of Directors of CNAC and Chairman of the Board of Directors of CATC respectively. They are authorised to sign the Agreement with you.

FOR THE GOVERNMENT OF THE REPUBLIC OF CHINA
(CHOPPED)
Premier Yen Hsi-shan 20

This is the Exhibit marked YHS-1 to the Affirmation of Yen Hsi Shan affirmed before me this 19th day of October 1950.

(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

GY 1.
Letter from
Chinese
Ambassador
to Foreign
Office.

EXHIBIT GY 1.
(Photostatic Copy).

CHINESE EMBASSY,
LONDON, W.1. 30
28th December, 1949.

F.O.49/121

Your Excellency,

Referring to my Note No.F.O.49/120 dated 28th December, I have the honour, under instructions from my Government, to inform your Excellency that after all the shares and assets owned by the Chinese Government in the CNAC and the CATC have been sold to the American citizens Mr. Chennault and Mr. Willauer, Mr. Ne Kwing Sing (倪炯聲), Assistant Secretary General of the Executive Yuan, have been authorised by the Executive Yuan to take charge in Hong Kong all legal proceedings in which the two corporations are involved as well as all other matters relating to the two corporations, and 40 that Mr. Ne Kwing Sing has been duly authorised to sign all relevant documents required to be signed by the concurrent Minister of Communications, General Yen Shih Shan, as well as to exercise all powers in dealing with all matters relating to the two corporations.

Exhibits.

GY 1.
Letter from Chinese Ambassador to Foreign Office, *continued.*

It is urgently requested that His Majesty's Government will be good enough to communicate by cable the above information to the Government in Hong Kong.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,
(Sgd.) F. I. Cheng.

The Rt. Hon. Ernest Bevin,
Etc. Etc. Etc.,
Foreign Office,
10 S. W. 1.

This is the Exhibit marked GY-1 to the Affirmation of George K. C. Yeh affirmed before me this 19th day of October 1950.
(Sgd.) E. F. Biggs,
H.B.M. Consul—Tamsui

EXHIBIT GY 2.
(Photostatic Copy).

GY 2.
Further Letter from Chinese Ambassador to Foreign Office.

H.B.M. Consul—Tamsui
20 CHINESE EMBASSY,
LONDON, W.1.
4th January 1950.

F.O.50/2

Your Excellency,

Referring to and supplementing my note No. F.O. 49/120 to Your Excellency dated 28th December, 1949, I have the honour under cable instructions from my Government, to certify as follows:—

1. The 20% share interest in China (Chinese) National Aviation Corporation (CNAC) formerly owned by Pan American Airways Corporation has been purchased and transferred to Civil Air Trans-
30 port, Inc., a United States Corporation.

2. The formal corporate name of the Chennault and Willauer corporation referred to in my note No. F.O. 49/120 dated 28th December, 1949, is "Civil Air Transport, Inc.", and you are requested to be good enough to take note of the same.

3. The Government of the Republic of China has, for good and valid consideration heretofore given to and received by it, sold and transferred to Civil Air Transport, Inc., and Civil Air Transport, Inc. is the sole and complete owner of, all the assets, including airplanes, spare parts, machinery, tools and other property of whatever nature, of CNAC and of Central Air Transport Corporation (CATC), in-

Exhibits.

GY 2. Further Letter from Chinese Ambassador to Foreign Office, *continued.*

cluding also all of the shares of the stock or other evidences of ownership in CATC formerly held by the Government of the Republic of China and all of the shares of the stock or other evidences of ownership in CNAC formerly held by the Government of the Republic of China and/or by Pan American Airways Corporation.

4. The foregoing action is final and complete.

As the Court in Hong Kong before which litigation is pending will, we are informed, recognise the validity of the above transfer and ownership only when it has received evidence in the form of a certification thereof made by the Chinese Ambassador in London to His Majesty's Foreign Office and certified by His Majesty's Foreign Office, it is urgently requested that His Majesty's Government will be good enough to make full certification to the Colonial Secretary and the Court in Hong Kong as soon as possible of the foregoing and also of my note to you No.F.O.49/121 dated 28th December 1949. The authority to Mr. Ne Kwing Sing referred to in note No.F.O. 49/121 became effective after the above transfer, and is in full force and effect.

I have the honour to be, with the highest consideration,

Your Excellency's obedient Servant,
(Sgd.) F. I. Cheng

The Rt. Hon. Ernest Bevin,
etc., etc., etc.,
Foreign Office,
S. W. 1.

This is the Exhibit marked GY2 to the Affirmation of George K.C. Yeh affirmed before me this 19th day of October 1950.
(Sgd.) E.F. Biggs,

WW 1. Power of Attorney.

EXHIBIT WW 1.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, That the undersigned CHENNAULT and WILLAUER, a partnership consisting of C.L. CHENNAULT, residing at 12 Kent Road, Kowloon, Hong Kong and WHITING WILLAUER, residing at 266 The Peak, Victoria, Hong Kong, do hereby make, constitute and appoint THOMAS G. CORCORAN of 1511 K. Street, Northwest, Washington, D.C., U.S.A., their true and lawful ATTORNEY IN FACT for and on their behalf to bargain, sell and transfer unto Civil Air Transport, Inc., a Delaware Corporation, its successors and assigns all of their right, title and interest in and to the following described property:

(1) All the property and assets, real, personal or mixed, tangible and intangible, of whatsoever kind and wheresoever situated, including (without limiting the generality of the foregoing) all airplanes, spare parts, tools, machinery, equipment, real estate, leases, contracts, choses-in-action, bank accounts, accounts receivable, and cash, formerly owned by China National

Aviation Corporation, as of December 12th 1949: All the aforesaid property and assets having on that day been sold and transferred to Chennault and Willauer as sole owners by deed of the Government of the Republic of China;

Exhibits. WW 1. Power of Attorney, *continued.*

(2) All the property and assets, real, personal or mixed, tangible or intangible, of whatsoever kind and wheresoever situated, including (without limiting the generality of the foregoing) all airplanes, spare parts, tools, machinery, equipment, real estate, leases, contracts, choses-in-action, bank accounts, accounts receivable, and cash, formerly owned by Central Air Transport Corporation, as of December 12th, 1949; All the aforesaid property and
10 assets having on that day been sold and transferred to Chennault and Willauer as sole owners by deed of the Government of the Republic of China.

The undersigned hereby authorise their said attorney to execute and deliver for and on their behalf any or all bills of sale, certificates, or other instruments necessary or appropriate to give effect to and confirm any sale or transfer made pursuant to the powers herein conferred.

The undersigned hereby authorise their said attorney to substitute and appoint from time to time an attorney or attorneys under their said Attorney in Fact with the same or more limited powers and to delegate to or otherwise authorise any such attorney or attorneys to have and exercise any or all of the
20 powers herein expressed; and at pleasure to remove such attorney or attorneys or to appoint another or others in their place instead.

The undersigned hereby ratify and confirm all that their said Attorney in Fact or any substitute or substitutes shall lawfully do or cause to be done by virtue hereof and under and pursuant to the powers herein conferred.

IN WITNESS WHEREOF, the undersigned have caused this instrument to be executed by the said Whiting Willauer, a partner thereunto duly authorised, this 18th day of December, 1949.

CHENNAULT and WILLAUER
By: (Sgd.) Whiting Willauer
A Partner

30 for identification
(Sgd.) Thomas G. Corcoran

Bill of Sale. WW 2.

EXHIBIT WW 2.

BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that on this Nineteenth day of December, 1949, Chennault and Willauer, a partnership operating under the laws of Delaware for and in consideration of unconditional bearer notes in the sum of $3,900,000 United States currency, to be issued by Civil Air Transport Inc., a corporation organized and existing under the laws of Delaware, and for other good and valuable consideration, do hereby grant,
40 bargain, convey, assign, transfer and set over, unto Civil Air Transport, Inc., its successors and assigns, all their right, title, and interest, in and to the following described property:

(1) All the property and assets, real, personal or mixed, tangible and intangible, of whatsoever kind and wheresoever situated, including (without limiting the generality of the foregoing) all airplanes, spare parts, tools, machinery, equipment, real estate, leases, contracts, choses-in-action, bank

Exhibits.

WW 2.
Bill of Sale, *continued.*

accounts, accounts receivable, and cash, formerly owned by China National Aviation Corporation, as of December 12th 1949; all the aforesaid property and assets having on that day been sold and transferred to Chennault and Willauer as sole owners by deed of the Government of the Republic of China;

(2) All the property and assets, real, personal or mixed, tangible or intangible, of whatsoever kind and wheresoever situated, including (without limiting the generality of the foregoing) all airplanes, spare parts, tools, machinery, equipment, real estate, leases, contracts, choses-in-action, bank accounts, accounts receivable, and cash, formerly owned by Central Air Transport Corporation, as of December 12th, 1949; all the aforesaid property and assets having on that day been sold and transferred to Chennault and Willauer as sole owners by deed of the Government of the Republic of China. 10

Chennault and Willauer do, for themselves and their successors, covenant that on demand of Civil Air Transport, Inc., its successors or assigns, they and their successors will execute, acknowledge, and deliver all such further deeds, conveyances and assurances as may be necessary for effecting the intention of these presents and for the better assuring unto Civil Air Transport Inc., its successors and assigns, the property and assets conveyed by these presents.

IN WITNESS WHEREOF, Chennault and Willauer have caused these presents to be signed in Washington, D.C., U.S.A., this Nineteenth day of December, 1949. 20

CHENNAULT and WILLAUER
By: (Sgd.) Thomas G. Corcoran (L.S.)

WW 3.
Power of Attorney.

EXHIBIT WW 3.

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that the undersigned Major-General C.L. Chennault, U.S. Army (Ret'd) and Whiting Willauer, citizens of the United States of America, residing at No. 12 Kent Road, Kowloon and 266 The Peak, Victoria, Colony of Hong Kong, respectively, being a partnership hereby on behalf of ourselves jointly and severally and on behalf of our partnership hereby appoint as our true and lawful Attorney, THOMAS G. CORCORAN of Washington, D.C. to act for us and in our stead in all matters involving any property or assets of any nature whatsoever and more particularly without limiting the generality of the foregoing in all matters involving aviation, aircraft, equipment, tools, machinery, spare parts and accessories, stocks and evidences of ownership in aircraft companies and without limiting the generality of the foregoing in connection with any property or assets having to do with aviation or otherwise now owned or claimed by us or either of us and we hereby empower our said Attorney to do and perform all acts of any kind whatsoever in connection with said property or assets including conveying, mortgaging or otherwise encumbering, obtaining registration or airworthiness certificates or other documents necessary from relevant authorities for the operation or ownership of said property or assets; and to make any oath, affirmations or certifications for and on our behalf in connection with said property, or assets; and in 30 40

general to do everything concerning said property or assets which we or either of us could do ourselves.

Exhibits.

WW 3. Power of Attorney, *continued.*

IN WITNESS WHEREOF we have hereunto set our hands and seals this 19th day of December 1949 at Hong Kong:

WITNESSES:

(Sgd.) Lillian Chu

(Sgd.) J.J. Brennan

(Sgd.) C.L. Chennault
Major-General, U.S. Army (Ret'd)

(Sgd.) Whiting Willauer

For identification
(Sgd.) Thomas G. Corcoran

10

EXHIBIT WW 4.

(Photostatic Copy).

WW 4. Bill of Sale of Civil Aeronautics Administration.

FORM ACA-500
(5-47) DEPARTMENT OF COMMERCE
PART C Civil Aeronautics Administration

BILL OF SALE

RETAINED BY PURCHASER—USE TYPEWRITER

For and in consideration of $1:00 and other good consideration the undersigned owner of the full legal and beneficial title of the aircraft described as follows:—

Aircraft make Serial No. CAA Registration No.

20

As per the annexed schedule made a part hereof

Does this 19th day of December 1949 hereby sell, grant, transfer, and deliver all of his right, title, and interest in and to such aircraft unto:

Name of Purchaser: CIVIL AIR TRANSPORT, INC.

Address of Purchaser (Number, street, city, zone and State):
317-325 South State St., Dover, Del., USA

and to executors, administrators, and assigns, to have and to hold singularly, the said aircraft forever, and certifies the same is not subject to any mortgage or other encumbrance except:

Type of Encumbrance Amount Date

30

in favour of

in testimony whereof we have set our hands and seals this 19th day of December 1949.

Name of Seller: C.L. Chennault and Whiting Willauer (L.S.)

By (Signature in ink): (Sgd.) Thomas G. Corcoran

Title (if signed on behalf of a Corporation or Partnership or if signed by an Agent): Attorney-in-Fact

Acknowledgment: City of Washington, District of Columbia

on this 19th day of December 1949 before me personally appeared the above-named seller, to me known to be the person described in and

40

who executed the fore-going Bill of Sale, and acknowledged that he executed the same as his free act and deed. Given under my hand and official seal the day and year above written.

Notary Public

(Sgd.) Annetta M. Behan My Commission expires 3/14/50.

Seal Read instructions at right carefully.

Exhibits.

Exhibits.

WW 5. Schedule attached to Bill of Sale of Civil Aeronautics Administration.

EXHIBIT WW 5.

(Schedule).

Name of Aircraft	Serial No.	CAA Registration No.	
Consolidated	100	8300-C	
	126	8301-C	
	127	8302-C	
	129	8303-C	
	130	8304-C	
	131	8305-C	
Curtiss	44-78594	8306-C	10
	44-75899	8307-C	
	44-76622	8308-C	
	44-76619	8309-C	
	44-78596	8310-C	
	44-78630	8311-C	
	44-78612	8312-C	
	44-78613	8313-C	
	44-78592	8314-C	
	44-78632	8315-C	
	44-78587	8316-C	20
	44-78600	8317-C	
	44-78595	8318-C	
Curtiss	44-78276	8319-C	
	44-78245	8320-C	
	44-78199	8321-C	
	44-72442	8322-C	
Curtiss	43-47379	8323-C	
Douglas	43-15922	8324-C	
	42-93291	8325-C	
	42-93390	8326-C	30
	43-15880	8327-C	
	43-15694	8328-C	
Douglas	44-76256	8329-C	
	44-49443	8330-C	
	44-76246	8331-C	
	43-49645	8332-C	
	43-16425	8333-C	
	43-16351	8334-C	
	43-16625	8335-C	
Douglas	42-47871	8336-C	40
Douglas	41-20089	8337-C	
	2183	8338-C	
	2184	8339-C	
	2130	8340-C	
	2185	8341-C	
	1954	8342-C	

Exhibits.

WW 5. Schedule attached to Bill of Sale of Civil Aeronautics Administration, *continued.*

	Name of Aircraft	Serial No.	CAA Registration No.
	Douglas	10442	8343-C
		18370	8344-C
		10538	8345-C
		10510	8346-C
		10748	8347-C
	Douglas	19313	8348-C
		19620	8349-C
		4193	8350-C
10		10699	8351-C
		19452	8352-C
		16069	8353-C
		15782	8354-C
		19062	8355-C
		4573	8356-C
		6151	8357-C
		18901	8358-C
	Douglas	M2261	8359-C
		M2135	8360-C
20	Douglas	4927	8361-C
		4871	8362-C
	Curtiss	396-CK	8363-C
		398-CK	8364-C
		346-CK	8365-C
		426-CK	8366-C
		364-CK	8367-C
		406-CK	8368-C
		2560-CU	8369-C
		2558-CU	8370-C
30		393-CK	8371-C
		404-CK	8372-C
		402-CK	8373-C
		2537-CU	8374-C
		438-CK	8375-C
		483-CK	8376-C
		392-CK	8377-C
		33371	8378-C
		33372	8379-C
		32950	8380-C
40		32960	8381-C
		32954	8382-C
		30195	8383-C
		30377	8384-C
		30380	8385-C
		30222	8386-C
		30369	8387-C
		22379	8388-C
		22459	8389-C
		22465	8390-C
		22500	8391-C
	Curtiss	22508	8392-C
50	North American	121-42649	8393-C

Exhibits (Appeal).

Appeal No. 1. Order of Ministry of Communications.

PART B.

Exhibits produced at the hearing on Appeal before the Full Court

EXHIBIT APPEAL No. 1.

(Translation).

ORDER OF THE MINISTRY OF COMMUNICATIONS
TO ANGO TAI
No. Teh. 900544

Date: Nov. 13, 38th year of the Chinese Republic.

The said officer is hereby appointed to the posts of Vice President and concurrently Acting President of the Central Air Transport Corporation. The said officer is hereby given full power to deal with all affairs of the said Corporation. 10

TWANMOH CHIEH
Minister.

Seal of the Ministry
of Communications

Appeal No. 2. Order of Ministry of Communications.

EXHIBIT APPEAL No. 2.

(Translation).

ORDER OF THE MINISTRY OF COMMUNICATIONS
TO ANGO TAI
No. Teh. 2238 20

Date: November 12th, 38th year of the Chinese Republic.

The said officer is hereby appointed a Governor on the Board of Governors of the Central Air Transport Corporation.

TWANMOH CHIEH
Minister.

Seal of the Ministry
of Communications

Appeal No. 3. Letter Ango Tai to W.R. Parker.

EXHIBIT APPEAL No. 3.

Appeal 5/51
Ex. Appeal 3 30
(Sgd.) —
21/8/51.

CENTRAL AIR TRANSPORT CORPORATION
HONG KONG STATION

November 16, 1949.

Mr. W.R. Parker,
Hongkong.

Dear Sir:

You are hereby appointed Chief of Security for CATC and requested to take all necessary measures permissible by law to insure that the property of 40 our Company is not removed or injured by unauthorized persons.

We are handling you herewith letters to the Commissioner of Police and the Director of Civil Aviation requesting their co-operation to prevent further unlawful acts involving our property.

Exhibits (Appeal).

Appeal No. 3. Letter Ango Tai to W.R. Parker, *continued.*

You are requested and authorized to retain special guards with the approval of the Commissioner of Police and the Director of Civil Aviation, and are further requested to take such other precautionary steps, such as roping off the areas where the property and planes are located, as you deem necessary and which meet with the approval of the aforesaid officers of the Hongkong Government.

Very truly yours,
Ango Tai,
(Sgd.) ....
Ango Tai, Acting President

10

THIS Office hereby certifies that the signature of Mr. Ango Tai, Acting President of CATC is true and genuine.

Thos. S. Lea
(Sgd.) ....
Secretary

(Chopped)
Commissioner for Kwangtung and Kwangsi,
20 Ministry of Foreign Affairs,
Hong Kong Office.

EXHIBIT APPEAL No. 4.

(Extracted from the South China Morning Post dated 19th November 1949).

Appeal No. 4. Extract from South China Morning Post.

CENTRAL AIR TRANSPORT CORPORATION

NOTICE

In accordance with orders received from the Ministry of Communications dated November 15, 1949 all the staff of CATC employed by the Corporation prior to the reorganization of the Corporation, which commenced on November 15, 1949 with the appointment of Mr. Ango Tai as Acting President, are
30 notified as follows:—

1. All the staff of the respective Companies who absconded and conspired with the former President C.L. Chen are hereby dismissed and appropriate prosecutions against these persons shall be instituted.
2. All Chinese staff of the Corporation in Hong Kong are to be temporarily suspended from duty. The new Acting President hereby notifies all the staff of the Corporation to come forward to register with it and resume duty if found loyal after thorough investigations.
3. The whole staff of CATC are hereby warned not to remain upon
40 or enter into the property or offices of the Corporation in Hong Kong or Kowloon temporarily. They are to wait for further instructions as to when and where they should report for registration and investigations.

(Sgd.) ANGO TAI
Acting President.

Hong Kong, Nov. 16, 1949.

Exhibits (Appeal).

Appeal No. 5. Injunction.

EXHIBIT APPEAL No. 5.

IN THE SUPREME COURT OF HONG KONG
ORIGINAL JURISDICTION
ACTION No. 518 OF 1949

BETWEEN

CENTRAL AIR TRANSPORT CORPORATION — Plaintiffs

and

S.Y. Ho, W.M. Lau, C.S. Liao, V.L. Zee, H.T. Hang, T.M. Hung, Kwan Wing, Y.T. Chow, C.W. Chen, Ben Fong, L.T. Loh, Robin Lou, C.K. Su, L.T. Wen, M.B. Tang, S.H. Lee, P.C. Cheng, K.S. Chen, S.I. Cheng and S.K. Chang. — Defendants

10

BEFORE HIS HONOUR THE CHIEF JUSTICE SIR LESLIE BERTRAM GIBSON Kt., K.C. IN CHAMBERS

UPON the Application of the Central Air Transport Corporation and Upon hearing of Counsel for the Plaintiffs and Upon reading the Affirmation of Ango Tai filed the 24th day of November 1949 IT IS ORDERED as follows:—

That the Defendants by themselves and their servants and agents or otherwise be prohibited from entering into or remaining upon or interfering 20 with the Plaintiffs use and enjoyment of the premises specified in the Writ of Summons or any of them.

That the Defendants by themselves and their servants and agents or otherwise be prohibited from removing from the said premises any property of any kind whatsoever belonging to the Plaintiffs.

That the Defendants by themselves and their servants and agents or otherwise be prohibited from interfering or tampering with the Plaintiffs' property of any kind in or wheresoever about the said premises.

That the Defendants by themselves and their servants and agents or otherwise be prohibited from taking possession of or dealing in any way what- 30 soever with any moneys of the Plaintiffs in the Colony whether deposited in the custody of Banks or any other person or persons or else wheresoever.

That further or alternatively the Defendants by themselves and their servants and agents or otherwise be prohibited from removing interfering or tampering with or otherwise in any way whatsoever dealing with property of any kind of the Plaintiffs in the Colony whether in or upon or about the said premises or elsewhere.

And that the Order made herein shall continue for five days from the date hereof with liberty to apply for extension.

This Order is made on the usual undertaking as to damages. 40

The Plaintiffs undertake to accept notice within the said five days of any application to discharge this Order.

Dated the 24th day of November, 1949.

(Sgd.) C. D'Almada e Castro,
Registrar.

(L.S.)

EXHIBIT APPEAL No. 6.

IN THE SUPREME COURT OF HONG KONG

ORIGINAL JURISDICTION

ACTION NO. 518 OF 1949

BETWEEN

CENTRAL AIR TRANSPORT CORPORATION Plaintiffs

and

S.Y. Ho, W.M. Lau, C.S. Liao, V.L. Zee, H.T. Hang, T.M. Hung, Kwan Wing, Y.T. Chow, C.W. Chen, Ben Fong, L.T. Loh, Robin Lou, C.K. Su, L.T. Wen, M.B. Tang, S.H. Lee, P.C. Cheng, K.S. Chen, S.I. Cheng and S.K. Chang Defendants

10

BEFORE HIS HONOUR THE PUISNE JUDGE MR. JUSTICE TREVOR JACK GOULD IN CHAMBERS

Upon the application of the Defendants filed herein on the 25th November, 1949 and upon the hearing of Counsel for the Defendants and the Plaintiffs respectively IT IS ORDERED as follows:—

1. That the hearing of the first part of the said Application be adjourned to the 21st December, 1949, 10:00 o'clock in the forenoon before His Honour the Chief Justice in his Chambers.

20

2. That the Plaintiffs do not remove from the premises concerned the property affected by the Injunction herein before that date.

3. That the Plaintiffs have liberty to apply in the event of the affidavits of the Defendants not being filed within ten days from the date hereof.

4. That by consent the said Injunction be extended to the 21st December, 1949.

5. That there be liberty to apply generally.

6. That the costs of this Application be costs in the cause.

Dated, the 25th day of November, 1949.

(Sgd.) C. D'Almada e Castro,
Registrar.

30

(L.S.)

Exhibits (Appeal further Hearing).

Appeal No. 7. Application for and Certificate of Registration.

PART C.

Exhibits produced at the further hearing of the Appeal as a result of the Memorandum to Consul.

EXHIBIT APPEAL No. 7.

(Photostatic Copy).

Specimen.

FORM ACA-500 (5-47) — DEPARTMENT OF COMMERCE, Civil Aeronautics Administration — FORM Approved Budget Bureau No. 41-R889.1.

APPLICATION FOR REGISTRATION

PART B

1. REGISTRATION No. N8300-C

2. Name of Applicant
Civil Air Transport, Inc.

3. Address (Number, street, city, zone and State)
c/o 1016 Investment Bldg.
1511 K St., N. W.
Washington 5, D.C.

4. Aircraft Make
CONSOLIDATED
CONVAIR

Serial No.
100

5. I hereby certify that Part A, Form ACA-500 and Legal Evidence of ownership were forwarded to the Chief, Certification and Recordation section Civil Aeronautics Administration, Washington 25, D.C. on December 20, 1949 that the above described aircraft is not registered under the laws of any foreign country and that the owner thereof is a citizen of the United States as defined in subsection (13) of section 1 of the Civil Aeronautics Act of 1938.

Signature of Applicant

CIVIL AIR TRANSPORT, INC.
By (Sgd.) Whiting Willauer
The Director & Vice President

If all the above statements are true and made in good faith, the Aircraft herein described may be operated pending registration for 60 days provided airworthiness requirements of applicable Civil Air Regulations are complied with. The original of this application (Part B) must be retained in the aircraft during such time.

(On the reverse of this Exhibit).

AMERICAN CONSULATE GENERAL
HONG KONG, Dec. 21, 1949.

This is to certify that the aircraft described on the face of this application for registration has been duly entered on the Register of the United States Civil Aeronautics Administration in the name of Civil Air Transport, Inc. owner, 317-325 South State Street, Dover, Delaware, U.S.A. This entry was made on Dec. 19, 1949.

(Chopped) Consulate General
of the U.S. of America
Hong Kong.

(Sgd.) James W. Gould
American Vice Consul

EXHIBIT APPEAL No. 8.

Appeal No. 8. Letter Colonel C.C. Tso to Max Oxford.

CIVIL AERONAUTICS ADMINISTRATION
MINISTRY OF COMMUNICATIONS
CHINA

13 November 1949

TO: Mr. Max Oxford, Director of Civil Aviation, Hong Kong.
FROM: Colonel C.C Tso, Director, Chinese C.A.A., M.O.C.
SUBJECT: Action Regarding CNAC and CATC

1. This will advise you the Chinese Civil Aeronautics Administration has cancelled the pilot licences of all CNAC and CATC pilots until further authorization.
2. The Chinese Civil Aeronautics Administration has also temporarily suspended the registration certificates of all CNAC and CATC aircraft.
3. It is requested that the Hong Kong Government furnish adequate guards to prevent sabotage to the CNAC and CATC aircraft now located at Kai Tak airfield. The two airlines are prepared to pay whatever extra costs these guards may require.
4. It is further requested that the Director of Civil Aviation refuse to issue any clearance out of Kai Tak airfield for CNAC and CATC aircraft until authorization for such clearance is received from the Chinese Government.
5. The Chinese Government requests that field identification permits for all CNAC and CATC personnel be cancelled at once.

(Sgd.) C.C. Tso
Director, C.A.A., M.O.C.

c.c. His Excellency,
Governor Grantham.

P.S. As to the case of XT-543 which is operated by the Lutheran Mission we will take immediate steps to make special arrangements for their flights as soon as they contact us.

C.C. Tso
(Chopped) Department of Civil Aviation
(Sgd.) —
Certified true copy
Hong Kong
26.11.51.

EXHIBIT APPEAL No. 9.

Appeal No. 9. Letter Colonel C.L. Chen to Max Oxford.

CENTRAL AIR TRANSPORT CORPORATION

Kwan Sing Building,
213 Taiping Road (South),
Canton, China.
February 22nd, 1950.

Mr. Max Oxford,
Director of Civil Aviation
Statue Square,
Victoria, Hongkong.

Sir,

I have the honour to inform you that I have received instructions from H.E. Mr. Chung Chek Ping, Director of the Civil Aeronautics Administration of the Central People's Government, to inform you that the Certificates of

Exhibits (Appeal further Hearing).

Appeal No. 9. Letter Colonel C.L. Chen to Max Oxford, *continued.*

Registration issued to the aircraft of the Central Air Transport Corporation by the erstwhile National Government have been now replaced by Certificates of Registration of the People's Government to the said aircraft.

As formerly, inasmuch as the aircraft will be engaged in flights to Hongkong as occasion demands, the management of the Central Air Transport Corporation will furnish you with photostatic copies of the Certificates of Registration similar to those which are carried on each plane.

You will recall that the Certificates of Registration which are now replaced by the present ones were suspended by the orders of the erstwhile Nationalist Government after the 1st October, 1949, on which date the Central People's Government took office in Peking. I am instructed to inform you that the former Certificates are no longer valid, and that the only valid Certificates of Registration are those which are now herewith being presented to you for your information.

Yours faithfully,
(Sgd.) Col. C.L. Chen,
Managing Director,
Central Air Transport Corp.
(Chopped) Department of Civil Aviation.

Certified true copy
(Sgd.) —
Hong Kong
26.11.51.

Appeal No. 10. Specimen Certificate of Registration.

EXHIBIT APPEAL No. 10.
(Translation).

CIVIL AERONAUTICS ADMINISTRATION
CENTRAL PEOPLES' REPUBLIC OF CHINA No. ....
AIRCRAFT REGISTRATION CERTIFICATE

This is to certify that the aircraft mentioned below, not registered in any other state, has been duly entered on the register of this Administration on the 1st day of February 1950, in accordance with the civil aeronautics law of China and has been allocated the nationality and registration mark .... and is of Chinese nationality.

Nationality and registration mark ....
Serial No. ....
Type and make ....
Name of owner ....
Nationality of owner ....
Address of owner ....
Date of issue: 1st February 1950. Director ....

(Chopped) Department of Civil Aviation
Certified true copy
(Sgd.) —
Hong Kong
26.11.51.

Exhibits (Appeal further Hearing).

Appeal No. 10. Schedule of Aircraft.

CENTRAL AIR TRANSPORT CORPORATION

CERTIFICATE NO.	PLANE NO.	TYPE OF PLANE
No. 1	XT-600	CV-240
2	XT-602	,,
3	XT-604	,,
4	XT-606	,,
5	XT-608	,,
6	XT-610	,,
251	XT-502	C-46F
252	XT-508	,,
253	XT-510	,,
254	XT-512	,,
255	XT-516	C-46D
256	XT-518	,,
257	XT-522	C-46A
258	XT-524	C-46F
259	XT-526	,,
260	XT-528	,,
261	XT-530	,,
262	XT-532	,,
263	XT-534	,,
264	XT-536	,,
265	XT-540	C-46D
266	XT-542	C-46F
267	XT-544	,,
351	XT-503	C-47A
352	XT-505	C-53
353	XT-509	C-47D
354	XT-511	C-47A
355	XT-513	,,
356	XT-515	C-47B
357	XT-517	C-47D
358	XT-521	C-47A
359	XT-523	C-47B
360	XT-525	,,
361	XT-527	,,
362	XT-529	,,
363	XT-531	DC-3
364	XT-533	,,
365	XT-535	,,
366	XT-537	,,
367	XT-539	,,
368	XT-541	,,

Department of Civil Aviation
Certified true copy

(Sgd.) —
Hong Kong
26.11.51.

No. .... of 195......

In the Privy Council.

ON APPEAL

FROM THE APPEAL COURT OF HONG KONG

BETWEEN

CIVIL AIR TRANSPORT INCORPORATED (Plaintiffs) - - *Appellants*

AND

CENTRAL AIR TRANSPORT CORPORATION (Defendants) - *Respondent*

RECORD OF PROCEEDINGS

MESSRS. MARKBY, STEWART & WADESONS,
5 Bishopsgate,
London, E.C.2,
Solicitors for the Appellants.