Privy Council Appeal No. 15 *of* 1952

Civil Air Transport Incorporated - - - - - - *Appellants*

Central Air Transport Corporation - - - - - *Respondents*

FROM

THE APPEAL COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

DELIVERED THE 28TH JULY, 1952

Present at the Hearing:

VISCOUNT SIMON
LORD NORMAND
LORD OAKSEY
LORD REID
SIR LIONEL LEACH

[*Delivered by* VISCOUNT SIMON]

This Appeal came before the Judicial Committee in most unusual circumstances. It concerns the ownership of 40 aircraft lying on the Government airfield at Kai Tak in Hong Kong. An Order in Council cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council 1950, made by his late Majesty in Council on 10th May, 1950, which came into operation forthwith, after reciting that the ownership of these aircraft (part of 70 aircraft covered by the Order) was in dispute and that it was just and desirable that the question of their ownership and of right to their possession should be decided by a Court of Law before they are permitted to leave Hong Kong, provided (*inter alia*) 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 the 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.
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> (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 into the matter fully before giving judgment.
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> 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 . . . . may appeal therefrom to the Full Court and from thence (*sic*) to His Majesty in Council, and such an appeal shall lie notwithstanding such person has not taken part in previous proceedings.
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> 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 possession has been finally determined he may give such directions and take such steps as shall appear to him necessary to give effect to the 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 six months or to both such fine and such imprisonment.

* * * * *

6.—(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.

On 19th May, 1950, the present appellants, Civil Air Transport Incorporated, a Corporation formed under the laws of the State of Delaware, U.S.A., issued a writ in the Supreme Court of Hong Kong against the present respondents, Central Air Transport Corporation (hereinafter called C.A.T.C.) claiming a declaration " that the 40 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 ".

C.A.T.C. are not an incorporated body but are an organ of the Government of China. Service of the writ was attempted upon the Central People's Government of the People's Republic of China (which, for brevity, it will be convenient to call " the Communist Government ", and which may be taken as claiming these aircraft as its property) and subsequently an order was made for service by leaving a sealed copy of the writ at the office of the C.A.T.C. in Hong Kong. No appearance or notice of intention to appear was filed and, were it not for the Order in Council referred to above, the action might have proceeded no further, (although the Communist Government and C.A.T.C. had notice of it) since it might be regarded as impleading a foreign Sovereign State which enjoyed jurisdictional immunity. The Order in Council however expressly required the Hong Kong Court to entertain the action, even in the absence of the defendant, " enquiring into the matter fully before giving judgment ".

The action was tried before Sir Gerald Howe, then Chief Justice of Hong Kong, on the 27th and 28th of March, 1951. On 21st May, 1951, he delivered a reserved judgment dismissing the claim and, in view of the importance of reaching finality in the matter as soon as possible, directed that any appeal from his decision should be brought within two months. Notice of appeal to the Full Court was given within this time and the appeal was heard by the Full Court (Gould and Scholes JJ.) on the 21st and 22nd of August, 1951. On the 28th December, 1951, the Full Court dismissed the appeal, and it is from this decision that appeal is now brought to Her Majesty in Council.

C.A.T.C. are a State-owned enterprise operating under Ministerial control which provided Air-Services (including communication to and from Hong Kong) by means of civil aircraft belonging to the Government of China. This enterprise came into existence under the previous Nationalist Government of China and continued as an organ of that Government until it passed to the Communist Government which at a certain date, in the view of H.M. Government in the U.K., succeeded it. It is beyond dispute that the 40 aircraft which are the subject of this

case originally belonged to the Nationalist Government and formed part of the fleet of civil aircraft operated by C.A.T.C. as an organ of that Government. By September, 1949, these 40 aircraft were already lying on the Kai Tak airfield at Hong Kong, where they have remained up to the decision of this Appeal. They had been flown there by the orders of the Nationalist Government. That Government, under increasing pressure from Communist forces in China, had moved its headquarters in the preceding April from Nanking, its capital, to Canton; thence it moved to Chungking on 12th October; thence to Chengtu on 29th November; and thence to Taiwan (Formosa) on 9th December, 1949. By this last date nearly the whole of the mainland of China was under the control of Communist forces acting for the rival *de facto* Government, which on 1st October had proclaimed itself to be the Government of China and had purported by decree to dismiss the ministers of the Nationalist Government and to appoint new ones.

On 5th December, 1949, two citizens of the United States, Chennault and Willauer, in partnership, wrote to the Minister of Communications in the Nationalist Government at Taiwan, a letter offering to purchase from that Government (*inter alia*) the physical assets of C.A.T.C. "a major part of which are now located in the Colony of Hong Kong". The letter also included an offer to buy the Nationalist Government's interest in a Chinese Company called the Chinese National Aviation Corporation hereafter referred to as "C.N.A.C." (the owner of the other 30 aircraft referred to in the Order in Council), but this does not affect the point now immediately in issue. The consideration for the sale, so far as assets of C.A.T.C. were concerned, was to be $1,500,000 in promissory notes and the purchasers were to organise a corporation to which the assets would be transferred and whose promissory notes would be substituted for those of the purchasers. The terms of the letter are elaborate and had evidently already been the subject of negotiation and informal agreement between the partnership and the Nationalist Government, for the letter ends with signatures of acceptance by Liu Shao-Ting, Vice-Minister of Communications and concurrently Chairman of Board of Directors of C.A.T.C., and also by the Deputy Secretary-General of Executive Yuan and concurrently Chairman of Board of Directors of C.N.A.C. Any doubt as to whether these signatures amount to an acceptance by the Nationalist Government of the partnership's offer is set at rest by a letter of confirmation dated 12th December, 1949, signed for the Nationalist Government by the Premier, Yen Hsi-Shan, and notifying the partnership that the sale is final and complete on the terms agreed. One of these terms was that the assets sold would not be used for transport to or from the Communist areas of China.

On 19th December, 1949, the partnership of Chennault and Willauer by Bill of Sale transferred these assets, including these 40 aeroplanes, to the Appellant Company. There cannot be any doubt that if the bargain of 12th December conferred on the partnership a good title to these specific goods, that title duly passed on 19th December to the Appellant Company.

It is now necessary to recount certain events which occurred before the alleged sale in December.

On 9th November, 1949, the then President of C.A.T.C., one Mr. Chen, flew from Hong Kong to Peking and transferred his allegiance to the *de facto* Communist Government. About the same time the majority of the C.A.T.C.'s employees in Hong Kong also defected from the Nationalist Government, though they remained in Hong Kong. In consequence of these occurrences the Chinese Civil Aeronautics Administration (a department of the Nationalist Government) on 13th November suspended the registration certificates of all C.A.T.C.'s aircraft, the result of which would be that the authorities at Kai Tak aerodrome would not have permitted the machines with which this case is concerned to leave the ground. On the same day, one Ango Tai, an employee of C.A.T.C., who had remained loyal to the Nationalist Government, was appointed

by that Government to be acting President of C.A.T.C. with full power to deal with all its affairs. On 16th November, Ango Tai, in exercise of this power, dismissed the defecting employees of C.A.T.C. and suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong; and also appointed one Parker, to be Chief of Security for C.A.T.C. at Hong Kong and to take all necessary measures permissible by law to ensure that the property of C.A.T.C. was not removed or injured by unauthorised persons. Parker was to engage special guards and to take other precautionary steps, such as roping off the areas where the 'planes were located on Kai Tak aerodrome, provided that the Hong Kong officials, viz., the Commissioner of Police and the Director of Civil Aviation, approved. Parker acted accordingly and by next day 75 special guards were appointed with police approval and duly posted. A few days later, however, for reasons not explained at the trial, the Commissioner of Police informed Parker that the guards at Kai Tak must be withdrawn and without Parker's consent certain of the defecting ex-employees took physical control of these assets. Thereupon Ango Tai commenced proceedings in the name of C.A.T.C. in the Supreme Court of Hong Kong against the principal ex-employees who had thus acted and on 24th November the then Chief Justice, Sir Leslie Gibson, granted an interim injunction against them prohibiting this interference, restraining them from entering or remaining upon the C.A.T.C.'s premises or removing or tampering with the C.A.T.C.'s property. Next day the defendants in that action obtained from Gould J. an interim injunction restraining C.A.T.C. from removing the property from the premises concerned. The injunction granted by Sir Leslie Gibson was, after some difficulty, duly served—but it was disregarded and the physical control of the aeroplanes by these ex-employees for the time being continued.

One other set of facts must be put on record, in order to complete the picture of the situation at about this date. On 12th November, 1949, Mr. Chow En-loi, acting as Premier of the *de facto* Communist Government, issued the following document:

"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.

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."

Cheuk Lin Chen is the Mr. Chen who had gone to Peking three days before to put himself under the *de facto* Government.

Two months later, the following instructions were issued:

"For the perusal of
Chi Yi Liu,
General Manager,
China National Aviation Corporation,
Des Voeux Road, Central, and

Cheuk Lin Chen,
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. Chung Chik Ping, Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. 13th January, 1950."

It is to be observed that the earlier of these documents, which was issued before the recognition *de jure* of the Communist Government, does not contain directions to "take over" the assets of the C.A.T.C. in Hong Kong, but enjoins officers and men of the Corporation to bear the responsibility of "protecting the assets" and to wait for further instructions. The later document, which was issued after *de jure* recognition, gives the further instructions to "take over all assets of the C.A.T.C. in Hong Kong". If, however, the contract of 12th December, 1949, had the result of transferring the property in the 40 aeroplanes effectively and finally to the partnership on that date, these aeroplanes would have ceased to be assets of the C.A.T.C. thenceforward.

Before reaching a decision in the present action, the Hong Kong Courts required to know what Government was recognised by His Majesty's Government in the United Kingdom as the Government of China, whether *de jure* or *de facto*, and between what dates, and this information was, as is usual (see the case of *Arantzazu Mendi* [1939] A.C. 256 at p. 264), obtained from the Foreign Office in London. A series of questions for this purpose had been propounded and answered before trial of the present action and Their Lordships thought it well to address an additional question to the Foreign Office during the hearing of the Appeal in order to clear up any possible ambiguity that remained.

The information thus obtained (which is to be regarded as matter of which British Courts take judicial notice) may be set out as follows:

(*a*) referred to at the original hearing:

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 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-à-vis China? "

Replies to above by Foreign Office on 11th February, 1950.

" 1. H.M.G. in the United Kingdom do not recognise the Nationalist Government (Republican Government) as *de jure* Government of the Republic of China.

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

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

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

5. H.M.G. do not recognise any Government other than the Central People's Government of the People's Republic of China as the *de facto* Government of the Republic of China. Attention, however, is invited to the second sentence of the answer to question 4.

6. In 1943 Formosa was part of the territory of the Japanese Empire and H.M.G. consider that 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 that all the territories that Japan had stolen from the Chinese including Formosa, should be restored to the Republic of China. On July 26th, 1945, at Potsdam, the Heads of the Governments of the United States of America, the United Kingdom and the Republic of China reaffirmed ' The terms of the 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 the Allied powers concerned, the Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon, with the consent of the Allied Powers, administration of Formosa was undertaken by the Government of the Republic of China. At present, the actual administration of the Island is by Wu Kou-Cheng, who has not, so far as H.M.G. are aware, repudiated the superior authority of the Nationalist Government.

I am advised that the effect of recognition by H.M.G. 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 the evidence before it."

(It will be appreciated that Reply No. 6 was given before the Treaty of Peace with Japan of December 1951, when Japan renounced any claim to Formosa.)

(*b*) referred to on appeal to Full Court:

Further question

" Does H.M.G. recognise the People's Government as having become the *de facto* sovereign Government or the Government exercising effective control on the 1st October, 1949, when it was proclaimed, or any other date between that date and the 5th January, 1950, of the part of China of which the Nationalist Government had ceased to be the *de facto* Government? "

Reply of Foreign Office on 13th March, 1950

" H.M.G. in the United Kingdom recognise that in the period between October 1st, 1949 and 5th-6th January, 1950 the Central

People's Government was the *de facto* Government of those parts of the territory of the 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."

(c) *Additional question addressed by Judicial Committee to Foreign Office*

"Referring to the above reply of the Foreign Office on 13th March, 1950, was there any declaration or other formal act by H.M.G. in the U.K. on October 1st, 1949, or on any and what later date, recognising the Central People's Government as the *de facto* Government, or is the reply to be understood as meaning that H.M.G. in the U.K., answering on March 13th, 1950, assert that their view was as stated in this answer but that there had been no declaration or other formal act of H.M.G. on October 1st, 1949 or during the period mentioned which announced or implied *de facto* recognition?"

Reply of Foreign Office dated July 28th, 1952

"The only communication relevant to this question made by His Majesty's Government to the Central People's Government during the period October 1st, 1949, to January 6th, 1950, was the following Note, which was delivered by His Majesty's Consul-General in Peking on October 5th, 1949.

> 'His Majesty's Government in the United Kingdom are carefully studying the situation resulting from the formation of the Central People's Government. Friendly and mutually advantageous relations, both commercial and political have existed between Britain and China for many generations. It is hoped that these will continue in the future. His Majesty's Government in the United Kingdom therefore suggest that, pending completion of their study of the situation, informal relations should be established between His Majesty's Consular Officers and the appropriate authorities in the territory under the control of the Central People's Government for the greater convenience of both Governments and promotion of trade between the two countries.'

This communication was not intended at the time when it was made either to constitute or to convey *de facto* recognition. Nevertheless the answer made by the Foreign Office dated March 13th, 1950, to the questions addressed to it by the Hong Kong Courts and quoted in your letter is to be understood as meaning that His Majesty's Government in the United Kingdom answering on that date asserted that their view was as stated in that answer."

Her Majesty's Government in the U.K. is the Sovereign Government of Hong Kong and the effect of the above replies is to establish that, at any rate in the Courts of Hong Kong and in the present Appeal, the former Nationalist Government must be regarded as the sole *de jure* Sovereign Government of China up to midnight of January 5th-6th, 1950; that the present Communist Government was not the *de jure* Government until that time; and that, while the Foreign Office, in its answer of March 13th, 1950 acknowledged that from October 1st, 1949 onwards the *de facto* Government of those parts of China in which the Nationalist Government had ceased to be in effective control was the Communist Government, H.M.G. had not announced or communicated their recognition of the Communist Government as the *de facto* Government over any part of China before they recognised the Communist Government as the *de jure* Government of China on January 5th-6th, 1950.

The argument of the appellants before the Trial Judge was conveniently summarised by Sir Gerald Howe C.J. as follows:

> (*a*) The C.A.T.C. was wholly owned and controlled by the Nationalist Government and there was a valid sale on December 12th,

1949 by that Government to the partnership, a condition being that the partnership should organise a Corporation to which the physical assets were to be transferred ;

(*b*) the partnership duly transferred the assets by a sale valid in American law to the appellants ;

(*c*) a change of Government is by succession and not by title paramount and accordingly the Nationalist Government was empowered to enter into this transaction, being still recognised as the *de jure* Government by H.M.G., and the doctrine of retroactivity did not apply.

The Trial Judge rejected this argument on two main grounds, which call for the most careful examination.

The first ground (which was also adopted by both the Judges of the Full Court) is that the situation of the Nationalist Government on December 12th, 1949 was such that it could not validly enter into such a sale, and that the terms of the purported sale were not such as the Government could lawfully impose. In order fully to appreciate the learned Judge's view on this point, it is necessary to quote two passages from his judgment:

" The position 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 had 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

(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."

* * * * *

" 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 regain 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."

With great respect to the former Chief Justice, their Lordships are unable to accept this view of the facts and the inferences drawn from them as leading to the conclusions stated, or to regard them as justifying a denial of the appellants' title.

For the purpose of judging the correctness of this first ground (the second ground will be considered later) the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On 12th December, 1949, the Nationalist Government was the *de jure* Government of China, of which C.A.T.C. was an organ, and therefore the property in these aeroplanes was in the Nationalist Government. The machines had been moved to Hong Kong two months before and it was open to their owners to sell them, and thereby to pass the property in them to the purchasers. No doubt the motive for making the actual sale was to secure that, if they were flown to an area where the Communists were able to capture them, they should not be added to Communist resources, and the conditions of the contract make this abundantly clear. The Nationalist Government was in retreat and was by this time all but driven out of China, but it was still resisting its opponents and in their Lordships' view the impeached sale was no more "a device" adopted for an "alien and improper purpose" than would have been the blowing-up of a store of ammunition in an arsenal in China from which Nationalist forces were on the point of being driven out. Whether the Nationalist Government on 12th December, 1950, were "alive to the probability of the withdrawal of recognition by H.M.G. in the near future" is at best a matter of speculation: other foreign Governments did not take this course and there is no evidence of any warning by H.M.G. in the U.K. that they were themselves likely shortly so to act. The reference to "normal diplomatic usage" presumably points to the undoubted fact that by international law an established and recognised Government may be so completely overthrown by insurgent forces which claim to supplant it that the recognition hitherto afforded to it by foreign countries may properly be withdrawn—but when and by whom only the future can show. A Government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals and whether its action in this regard is against the interests of those it is supposed to serve is a political question. British courts cannot take it upon themselves to pronounce whether a foreign Government, recognised by H.M.G., is acting contrary to the interests of its people, and a Government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.

It appears to their Lordships that the view under this head adopted by the Trial Judge, and by the Full Court, really is that on 12th December, 1949, the Nationalist Government knew that it was on the point of being succeeded by a Communist Government, which would be recognised as the *de jure* Government of China, and that, without any regard to public interests or to any injury it was doing to the Chinese people, it got rid of these aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involves assumptions which their Lordships are not prepared to make. The Trial Judge claimed to found himself on a sentence in the judgment of Lord Justice Denning in *Boguslawski* v. *Gdynia Ameryka Linie* [1951] 1 K.B. 162 at p. 182. That sentence was

not necessary to the actual decision, and it was the decision which was confirmed by the House of Lords. The sentence occurs in a passage where the Lord Justice was emphasising the paramount importance of the principle of continuity, i.e., of a succeeding Government accepting what has been done by its predecessor, and if the qualification introduced by the Lord Justice were to be read as authorising a Court to treat as a nullity political decisions and actions of a former Government which have resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfully disagree. At the same time, their Lordships must not be understood to reject the possibility of our Courts refusing, in a conceivable case, to recognise the validity of the disposal of state-property by a Government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with state assets for some private purpose.

The second ground upon which the decision appealed against was based in the Hong Kong Courts (Gould J. dissenting) depends upon the alleged retroactive effect of the recognition by H.M.G. in the U.K. of the Communist Government as the *de jure* Government of China as from 5th-6th January, 1950. This argument assumes that up to 12th December, 1949, the aeroplanes were the disposable property of the Nationalist Government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellants' predecessors in title. On this assumption, the appeal can fail only if the subsequent recognition *de jure* of the Communist Government annulled the passing of the property.

Subsequent recognition *de jure* of a new Government as the result of successful insurrection can in certain cases annul a sale of goods by a previous Government. If the previous Government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a *de facto* new Government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old Government. But if the old Government never regains the goods and the *de facto* new Government becomes recognised by H.M.G. as the *de jure* Government, purchasers from the old Government will not be held in Her Majesty's Courts to have a good title after that recognition.

Primarily, at any rate, retroactivity of recognition operates to validate acts of a *de facto* Government which has subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government. It is not necessary to discuss ultimate results in the hypothetical case when before the change in recognition both Governments purport to deal with the same goods. The crucial question under this branch of the analysis in the present Appeal is whether anything that happened in Hong Kong to these aeroplanes at the instigation of or on behalf of the *de facto* Communist Government before the change of recognition on 5th/6th January, 1950, is retrospectively validated, so that the title conferred by the contract of 12th December, 1949, is extinguished.

It might be too wide a proposition to say that the retroactive effect of *de jure* recognition must in all cases be limited to acts done in territory of the Government so recognised, for the case of a ship of the former Government taken possession of by insurgents on the high seas and brought into a port which is under the control of the *de facto* Government would have to be considered (see *Banco de Bilbao* v. *Sancta* [1938] 2 K.B. 176). But the actual question now to be answered concerns chattels in the British colony of Hong Kong, which at the time of the sale belonged to the Nationalist Government. Whatever the degree of physical control over these chattels maintained by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on 24th November. Moreover, if these persons could be regarded as acting on behalf of the *de facto* Communist Government, their action would be a direct infringement of

the Representation of Foreign Powers (Control) Ordinance of 4th November, 1949, and would be a criminal offence by the law of Hong Kong. This Ordinance provided that no person should "function on behalf of any foreign power" without the consent of the governor, and "foreign power" was defined to include "the government whether legal or *de facto* of any foreign state". The governor gave no consent. In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity. Mr. Justice Gould pointed out that Lord Wright's proposition in the *Christina* case [1938] A.C. 485 at p. 506 that it did not matter by what mode possession was obtained

> "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.
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> 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."

Their Lordships agree with the argument and conclusions of Mr. Justice Gould on this point.

The learned Trial Judge attached importance to the announcement of 1st October, 1949, the authors of which proclaimed themselves to be the Government of China, and to the decree issued on that date purporting in the name of that Government to dismiss the ministers of the Nationalist Government. Their Lordships cannot accept the view that this is any reason for saying "that as from the 1st October, 1949 these aircraft were owned by the Central People's Government". They adopt on this point the opinion of Mr. Justice Gould, who observed:—

> "The purported dismissal on October 1st, 1949 of the ministers of the Nationalist Government . . . can only be deemed effective within the territory and as regards assets from time to time in the control of the People's Government. Elsewhere, and as long as the Nationalist Government retained *de jure* recognition, such a decree could have no effect."

For the above reasons, Their Lordships have reached the conclusion that the Appeal should be allowed. They have already humbly advised Her Majesty, as announced on 28th July last, to this effect and the Order in Council allowing the Appeal was made next day. No order is made as to costs.

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In the Privy Council

CIVIL AIR TRANSPORT INCORPORATED

v.

CENTRAL AIR TRANSPORT CORPORATION

DELIVERED BY VISCOUNT SIMON

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DRURY LANE, W.C.2.

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