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*645 Stella Madzimbamuto Appellant v. Desmond William Lardner-Burke and Frederick Phillip George Respondents

Privy Council

PC

Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Wilberforce, Lord Pearson.

1968 May 22, 23, 27, 28, 29; June 12, 13, 17, 18; July 23

On Appeal from the Appellate Division of the High Court of Southern Rhodesia .

Rhodesia--Constitution--Declaration of Independence--Revocation by United Kingdom of Legislative Assembly's powers--Transfer of legislative and executive powers to Her Majesty in Council--Adoption by Legislative Assembly of new constitution--Validity of emergency regulations--Governor's directive requiring judges "to maintain law and order ... and to carry on with their normal tasks "--Right of an "aggrieved" person to appeal to the Privy Council--Relevance of Roman-Dutch law--Whether conceptions of de facto and de jure status applicable--Doctrine of necessity not applicable--Duty of judiciary--Statute of Treason, 1495 (11 Hen. VII, c. 1)--Constitution of Southern Rhodesia 1961 (S.I. 1961, No. 2314), ss. 58 (1), 69 (1), 71 (5), 72 (2), 105, 107, Emergency Powers Act, 1960 (No. 48 of 1960), ss. 3 (2), 4--Southern Rhodesia Act, 1965 (c. 76), ss. 1, 2 (1) --southern Rhodesia (Constitution) Order, 1965 (S.I. 1965, No. 1952), ss. 2, 3 (1) (5), 4, 6--British Nationality Act, 1948 (11 & 12 Geo. 6, c. 56), s. 1 (1) (3).

Colony--Constitution--Powers of Crown--Southern Rhodesia--Limited grant of self-government--Convention that United Kingdom Parliament would not legislate on matters within the competence of Legislative Assembly--Unilateral "Declaration of Independence"--United Kingdom Statute and Order in Council transferring legislative and executive powers to Her Majesty in Council-- Southern Rhodesia Act, 1965, ss. 1, 2--southern Rhodesia (Constitution) Order, 1965, ss. 2, 3 (1) (5), 4, 6.

Crown--Allegiance to--Usurpation--Colony--Southern Rhodesia--Usurping government in effective control--Temporary allegiance knife owed to usurping government--Applicability of doctrine of necessity--Statute of Treason, 1495.

International Law--Recognition--Crown colony--Territory under effective control of usurping government--Whether conceptions of de facto or de jure status applicable in

courts of lawful Sovereign--Southern Rhodesia.

Parliament--Sovereignty--Colony--Southern Rhodesia--Limited grant of self--government--Convention that United Kingdom Parliament would not legislate on matters within the competence of the Legislative Assembly--United Kingdom statute and Order in Council transferring executive and legislative powers to Her Majesty in Council--Southern Rhodesia Act, 1965, s. 1--Southern Rhodesia (Constitution) Order, 1965, ss. 2, 3 (1) (5), 4, 6.

Privy Council--Leave to appeal--Special leave--Southern Rhodesia--Emergency regulations made after unilateral "Declaration of Independence"--Determination by High Court by implication that detention order made thereunder valid-- Detention without trial--Right of appeal to Privy Council by special leave only--Constitution of Southern Rhodesia, 1961, ss. 58 (1), 69 (1), 71 (5), 72 (2), 105, 107, 111--Emergency Powers Act, 1960, ss. 3 (2), 4.

Roman-Dutch Law--British Colony--Applicability--Whether applicable in determining nature of sovereignty--Southern Rhodesia.

Southern Rhodesia was annexed by the Crown in 1923, by virtue of an order in Council coming into operation on September 12, 1923, being given the status of a colony. In 1948 the British Nationality Act, 1948, created Southern Rhodesian citizenship. In 1961 the colony was granted a Constitution where under, inter alia, its legislature had power to make laws for the peace, order and good government of Southern Rhodesia and "the executive authority ... is vested in Her Majesty and may be exercised on Her Majesty's behalf by the Governor." The Constitution provided that the law to be administered was the law in force in the Cape of Good Hope in June 1891 (that being Roman-Dutch law), and it contained a "Declaration of Rights" [FN1]designed to secure "the fundamental rights and freedoms of the individual."

FN1 The Constitution of Southern Rhodesia, 1961, s. 58: "(1) No person shall be deprived of his personal liberty save as may be authorised by law." S. 69: "(1) Nothing contained in any law shall be held to be in consistent with or in contravention of ... section 58 ... to the extent that the law in question makes provision with respect to the taking during any period of public emergency of action for the purpose of dealing with any situation arising during that period; S. 71: "(1) If any person alleges that any of the provisions of sections 57 to 68 has been or is being contravened in relation to him ... that person may apply to the High Court for redress. ... (5) Any person aggrieved by any determination of the High Court under this section may appeal therefrom to Her Majesty in Council. ..." S. 72: "(2) In this Chapter, the expression "period of public emergency" means - ... (b) any period not exceeding three months during which a state of emergency is declared to exist ... by virtue of a proclamation issued in terms of any law for the time being in force relating to emergency powers, the reasons for the issue thereof having been communicated to the Legislative Assembly as soon as possible after the issue thereof, or by virtue of a further proclamation so issued on a resolution of the Assembly. ..."

On November 5, 1965, a state of emergency in Southern Rhodesia was validly proclaimed by the Governor, and emergency regulations were made, under which, on the

following day, the first respondent, as Minister of Justice, lawfully made an order for the detention of the appellant's husband, M., on the ground that he was "likely to commit acts in Rhodesia ... likely to endanger *647 the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service." Since 1959, M. had from time to time been detained or placed in a restriction area under earlier emergency powers. On November 11, 1965, the Prime Minister of Southern Rhodesia and his colleagues issued a "Declaration of Independence" purporting to declare that Southern Rhodesia was no longer a Crown colony but was an independent sovereign state. On the same day, in a message to the people of Rhodesia, the Governor informed them that the Declaration of Independence was unconstitutional, and that the Prime Minister and his colleagues had ceased to hold office. His message called upon the people to refrain from illegal acts furthering the objects of the illegal regime, and stated as follows:

"It is the duty of all citizens to maintain law and order in the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service.

On November 16, 1965, the United Kingdom Parliament passed the Southern Rhodesia Act, 1965, which declared that Southern Rhodesia continued to be part of Her Majesty's dominions and that "the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it." The Act provided that Her Majesty might make "such provision ... as appears to Her to be necessary or expedient ..." by Order in Council. On November 18, 1965, the Southern Rhodesia (Constitution) Order, 1965, was made, section 2 (1) of which provided that

"any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

By section 3 (1) the powers of the legislature to make laws, of the Legislative Assembly to transact business, and of any person or authority to take steps for the reconstitution of the Legislative Assembly or the election of members thereof, were suspended, and by section 6 any law made, business transacted or step taken in contravention of the order was declared void and of no effect. The Prime Minister and his colleagues disregarded their dismissal from office, and the members of the Legislative Assembly disregarded its suspension and purported to adopt the new Constitution of 1965, established by the illegal regime, section 3 of which provided that "there shall be an officer administering the Government in and over Rhodesia." The lawful state of emergency under which M. was detained expired on February 4, 1966, but his detention was continued under fresh emergency regulations invalidly made. In proceedings for a declaration that M.'s detention was unlawful Lewis and Goldin JJ. in the General Division held that the 1965 Constitution and the Government of the Prime Minister and his colleagues were unlawful but that, it being the only effective government, necessity required that effect be given *648 to the fresh emergency regulations and therefore the detention was lawful. On appeal, the Appellate Division affirmed that decision in the main, but held that the particular regulation under which M. had been detained since February 4, 1966, was ultra vires and invalid, and therefore allowed the appeal. A fresh detention order was immediately made under a regulation which the Appellate Division had by implication held to be valid.

On appeal to the Privy Council against so much of the decision of the Appellate Division as determined that the regulation under which the existing detention order was made was valid and M.'s detention therefore lawful, leave for such appeal having been refused by the Appellate Division:-

Held:

(1) allowing the appeal, that since the appellant, while not specifically relying upon the "Declaration of Rights" contained in the 1961 Constitution, had throughout the proceedings maintained that her husband had been unlawfully deprived of his personal liberty, and since the Appellate Division had impliedly determined that the emergency regulation under which he was detained was valid, the appellant and her husband were "aggrieved" persons within the meaning of section 71 (5) of the Constitution, and that, accordingly, the appellant had a right to appeal to the Privy Council (post, p. 720D-F).

Dictum of Beadle C.J. in Chikwakwata v. Bosman N.O., 1965 (4) S.A. 57, 59 applied.

(2) That the nature of the Sovereignty of The Queen in the United Kingdom Parliament over a British colony must be determined by the constitutional law of the United Kingdom and that it was therefore unnecessary to consider the principles of Roman-Dutch law as to the questions at issue (post, pp. 720G - 721C, E-F).

Dictum of Innes C.J. in Union Government (Minister of Lands) v. Estate Whittaker [1916] A.D. 194, 203 applied.

Dictum of Innes C.J. in Rex v. Harrison and Dryburgh [1922] A.D. 320, 330 considered.

(3) That since full Sovereignty over Southern Rhodesia was acquired when the territory was annexed by the Crown in 1923, and had not been diminished either by the limited grant of self-government then made or by United Kingdom legislation passed since that date, The Queen in the United Kingdom Parliament was still Sovereign in Southern Rhodesia in 1965 and that, accordingly. the Southern Rhodesia Act, 1965, and the Southern Rhodesia (Constitution) Order in Council, 1965, made thereunder, were of full legal effect in Southern Rhodesia; that nothing either in the British Nationality Act, 1948, or in the 1961 Constitution operated to confer even limited sovereignty upon Southern Rhodesia; and that the convention under which the Parliament of the United Kingdom did not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly, though politically important as a convention, had no legal effect in limiting the powers of the United Kingdom Parliament (post, pp. 722A - 723A, D-E).

*649 (4) That the conceptions of international law as to de facto or de jure status were inappropriate where a court sitting in a particular territory had to decide upon the validity or otherwise of a new regime which had gained control of the territory; and that, accordingly, the usurping government in control in Southern Rhodesia could not, for any purpose, be regarded as a lawful government, since the United Kingdom Government, acting upon behalf of the lawful Sovereign, was still taking steps to regain control (post, pp. 723F - 724C, 725C-F).

Per curiam: The Statute of Treason, 1495 (11 Hen. 7, C. 1), cannot be held to have enacted a general rule that a usurping government in control must be regarded as a lawful government (post, pp. 725G - 726C).

Uganda v. Commissioner of Prisons, Ex parte Matovu [1966] E.A. 514 and The State v. Dosso [1958] 2 P.S.C.R. 180; (1958) P.L.D. 1 S.C. (PAK) 533 distinguished.

(5) (Lord Pearce dissenting) That whether or not there was a general principle depending upon necessity or upon an implied mandate from the lawful Sovereign, which recognised the need to preserve law and order within territory controlled by a usurper, no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it deemed proper for territories under Her Majesty's Sovereignty; and that, therefore, the Southern Rhodesia Act, 1965, and the Order in Council made thereunder, whereby the power to make laws was transferred from the Legislative Assembly to Her Majesty in Council, were fully effective and no purported law made by any person or body in Southern Rhodesia, no matter how necessary such law might be for preserving law and order, or otherwise, could have any legal effect whatsoever (post, p. 729B-C, G).

Texas v. White (1868) 7 Wallace 700, 733 (74 U.S.); Hanauer v. Woodruff (1872) 15 Wallace 439, 449 (82 U.S.) and Horn v. Lockhart (1873) 17 Wallace 570, 580 (84

U.S.)considered.

(6) (Lord Pearce dissenting), That the Governor's message of November 11, 1965, to the people of Southern Rhodesia being annoyed before the date of the Order in Council, could not prevail over that Order, and therefore did not justify Her Majesty's judges in Southern Rhodesia in disregarding legislation passed or authorised by the United Kingdom Parliament (post, pp. 730E - 731B).

(7) (Lord Pearce dissenting) That, accordingly, the 1965 Constitution, which purported to provide for "An officer administering the Government in and over Rhodesia," and the emergency regulations purporting to have been made by such "officer" were void and of no effect, by virtue of section 2 (1) of the Order in Council, and the determination of the Appellate Division was therefore erroneous and the order under which M. was detained was invalid (post, p. 731B-F).

Per Lord Pearce dissenting. (i) The principle applicable, based on necessity or implied mandate from the lawful Sovereign, is *650 that acts done by those actually in control without lawful validity may be recognised by the courts as valid so far as (a) they are directed to and reasonably required for the ordinary orderly running of the state, (b) they do not impair the rights of citizens under the lawful Constitution, and (c) they were not intended to, and do not in fact, help the usurpation directly or run counter to the policy of the lawful Sovereign (post, pp. 732D-F, 733A).

(ii) The duty with which Her Majesty's judges were in fact entrusted, both by the lawful government and by the illegal regime, of continuing to sit and which the Governor's directive expressly enjoined upon them of maintaining law and order and carrying on with their normal tasks, necessarily involved the according of recognition to certain of the acts, orders and legislation of the illegal regime: the lawful government not having attempted or purported to make any provisions for the lawful needs of the territory, chaos would certainly result if the provision for those needs made by the illegal regime were disregarded (post, pp. 737B-F, 739A-G, 740D-F).

(iii) The conclusion that the detention order under which M. was detained was necessary for the ordinary orderly running of the country, was a finding of fact width which the Board should not interfere and the recognition of the illegal emergency regulation and the detention order made thereunder, although contrary to M.'s interests, did not in the true sense impair his rights under the Constitution, since the true test was whether or not the acts in question, if done by the lawful authorities, would have conflicted with those rights. Nor did the illegal emergency regulations and the detention order directly assist the usurpation or run counter to the policy of the lawful government, since the Governor's directive implied that a reasonable margin of common sense was to be applied to the factual situation existing in Southern Rhodesia, and neither the Southern Rhodesia Act, 1965, nor the Order in Council made thereunder rendered it necessary to treat all the acts or legislation of the illegal regime as invalid for any purpose at all, since neither the Act nor the Order in Council could have been intended to render compliance with the Governor's directive impossible. The Order was directed simply to preventing improper use or manipulation of the 1961 Constitution, and was not concerned, either expressly or impliedly, with any unauthorised Constitution. Accordingly the doctrine of necessity or implied mandate applied and the appeal should be dismissed (post, pp. 740F - 741A, E - 742A, F - 743D, G - 744A, 745A-F).

Decision of the Appellate Division of the High Court of Southern Rhodesia [1968] 2 S.A. 284reversed. [FN2]

FN2 Reporter's Note: This decision of the Privy Council was considered by the Appellate Division of the High Court of Southern Rhodesia (Beadle C.J., Quenet J.P. and Macdonald J.A.) in Archion Ndhlovu and Thirty-one Others v. The Queen (Judgment No. A.D 138/68) delivered on September 13, 1968, when the Appellate Division

concluded, inter alia, that a Rhodesian court should, as far as possible respect any ruling of the Judicial Committee of the Privy Council on any point of law, as having the highest persuasive value, that the Privy Council decision made it "legally impossible for any judge ... appointed under the 1961 Constitution to carry on as a judge ... without, at least, acquiescing in infringements" of the Order in Council of 1965; that the 1961 Constitution had been annulled by the efficacy of the change in the factual situation at present existing in Southern Rhodesia; that in the circumstances it was better for the judges (who were faced with the agonising decision whether to carry on with "the peaceful task of protecting the fabric of society and maintaining law and order" or "to go") even though going might "cause chaos and work great hardship on the citizens of all races," to carry on as a court in the new situation; and that if the court carried on at all it could only do so on the basis that "the present government" was now the de jure government.

*651 APPEAL No. 13 of 1968 by special leave from the determination of the Appellate Division of the High Court of Southern Rhodesia (Beadle C.J., Quenet J.P., Macdonald J.A., Jarvis A.J.A. and Field-send A.J.A.), dated January 29, 1968, that the first respondent, Desmond William Lardner-Burke, acting as Minister of Justice and of Law and Order in the rebel regime set up in Southern Rhodesia on November 11, 1965, was entitled to exercise powers of detention without trial over persons in Southern Rhodesia, including the appellant's husband, Daniel Nyamayaro Madzimbamuto, thereby and to that extent affirming the judgment of the General Division of the High Court of Southern Rhodesia (Lewis and Goldin JJ.), dated September 9, 1966. The second respondent, Frederick Phillip George, was the Governor of Gwelo prison. Special leave to appeal was granted by Order in Council, dated April 8, 1968, consequent upon a report of the Judicial Committee of the Privy Council (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson), dated March 27, 1968.

The determination of the Appellate Division of the High Court of Southern Rhodesia against which the appellant appealed was as follows: "The rebel regime in the Colony of Southern Rhodesia is a de facto government, and as such can lawfully do anything which its predecessor could lawfully have done under the 1961 Constitution. The first respondent can, therefore, in the same manner as the lawful Minister could have done before November 11, 1965, detain persons without trial under regulations made pursuant to proclamations of states of emergency issued by the rebel regime."

The appellant asked the Board to advise Her Majesty that (a) the above determination was wrong; and (b) that the following be substituted: "(i) the rebel regime in the Colony of Southern Rhodesia is not a lawful government. Its legislative and administrative acts have no legal validity. The rebel regime is, therefore, not *652 entitled to proclaim states of emergency under the Emergency Powers Act [Chapter 33], or otherwise, or to issue regulations thereunder. Any such proclamations or regulations made by the rebel regime are invalid. It cannot therefore lawfully detain persons without trial, and (ii) the detention of the appellant's husband. Daniel Nyamayaro Madzimbamuto is unlawful. It also contravenes his constitutional rights under section 58 of the Constitution of Rhodesia, 1961."

The facts are stated in the judgments.

1968. May22, 23, 27, 29, June 11, 12. Sydney Kentridge S.C. (of the South African and Rhodesian bars) and L. J. Blom-Cooper (of the English bar) for the appellant. The main issue is whether the Appellate Division of the High Court of Southern Rhodesia was correct in holding that the first respondent, as Minister of Justice and of Law and Order in the rebel regime established in Southern Rhodesia since

November 11, 1965, is entitled to detain the appellant's husband in prison, without trial, under proclamations of emergency and regulations made thereunder, issued, not by the lawful Government, but by the rebel regime. His arrest, on November 6, 1965, under emergency powers brought into force by the proclamation of a state of emergency, made on the previous day, by the governor, acting on the advice of his Ministers under section 3 of the Emergency Powers Act, 1960, was lawful. But those powers could only remain in force for three months unless lawfully renewed, and after the date of the unlawful declaration of independence no such renewal was possible. The extension of the state of emergency required a resolution of the Legislative Assembly and a proclamation by the Governor, neither of which events has occurred. The detention of the appellant's husband subsequent to February 4, 1966, is, therefore, illegal.

Possibly the most important question arising out of the appeal is whether it is the duty of Her Majesty's judges, who hold office under the legal Constitution of 1961, to maintain and enforce, so far as they are able to do so, the rights of citizens under the Constitution, or whether it is their duty to transfer their allegiance to those at present exercising physical power in the Colony.

The constitutional position in Southern Rhodesia.

The early history of the Colony is set out in In re Southern Rhodsia. [FN3] Before 1923 Rhodesia was a territory by conquest, *653 but in that year it was annexed as a Crown Colony by Order in Council. That order set up the 1923 Constitution, and provided for an elected legislature and cabinet government. The Legislature was given wide powers but there were reservations which made it impossible to say that the Colony was a fully self-governing territory. Southern Rhodesia is still a colony today, and as such Her Majesty's Government and the Parliament of Great Britain have responsibility for and jurisdiction over it. It is probably a settled colony, although Roberts-Wray, Commonwealth and Colonial Law, (1966), p. 749, suggests that it is a colony by conquest, and that the British Settlements Acts do not apply. The creation in 1953 and the dissolution in 1963 of the Federation of Rhodesia and Nyasaland were effected by Acts of the United Kingdom Parliament. In 1961, while the Federation was still in existence, the Southern Rhodesia Constitution Act, 1961, granted to Southern Rhodesia a new Constitution in the terms of the Southern Rhodesia (Constitution) Order in Council, of 1961 (S.I. 1961, No. 2314).

FN3 [1919] A.C. 211.

Section 1 (1) of the Southern Rhodesia Constitution Act, 1961 , gave Her Majesty power, by Order in Council, to amend or revoke the Constitution, but by subsection (2) of that section nothing in the Act was to authorise any amendment or revocation other than as authorised under subsection (1). The Southern Rhodesia (Constitution) Order in Council, 1961, made under that section, gave to the Legislative Assembly extensive powers of amending the Constitution, and in 1964 and 1965 a number of such amendments were made, but substantially the Constitution in force on November 11, 1965, was the 1961 Constitution, as amended by the Constitution Amendment Act, No. 13 of 1964.

The existing law and the High Court were retained for all purposes, by f sections 7 and 11, respectively of the Order in Council. By section 22 of the Order full

authority was reserved to Her Majesty to amend, add to or revoke the Order, by another Order in Council, at any time prior to the coming into force of the Constitution, but once the Constitution was in operation Her Majesty's general powers to amend or revoke under Royal Prerogative ceased, and thereafter any power that remained in Her Majesty in Council must be sought in the Constitution itself. While section 105 of the Constitution gave the Legislature of Southern Rhodesia power to amend, add to or repeal any section of the Constitution, other than those mentioned in section 111, section 111 reserved to Her Majesty the power to amend, add to or revoke *654 sections 1, 2, 3, 5, 6, 29, 32, 42, 49 and 111 itself, provided that that power was not to be exercised so as to include in section 111 any section of the Constitution other than those already included. The limit thus placed on Her Majesty's power by section 111 was the basis of Beadle C.J.'s finding that Southern Rhodesia must, for practical purposes, be regarded as an independent state. The sections, with which the Southern Rhodesian Legislature was precluded from dealing, concerned, inter alia, the office of Governor, his powers and duties (sections 1, 2, 3 and 5), the constitution of the Legislature, consisting of Her Majesty and the Legislative Assembly (section 6), the assent to bills by Her Majesty or the Governor on Her behalf (section 29), the power to disallow bills (section 32), the vesting of executive authority in Her Majesty (section 42 and the Prerogative of mercy (section 49).

The Governor, who holds office during Her Majesty's pleasure, on the advice of the Governor's Council, appoints the Prime Minister (see section 43 (1)), and, on the Prime Minister's advice, the other Ministers. The persons so appointed likewise hold office during Her Majesty's pleasure: see section 43 (2). Her Majesty was therefore entitled to dismiss them on November 11, 1965.

The discretion to dismiss rests in Her Majesty. The Governor merely notifies those concerned that Her Majesty's pleasure has ceased. It cannot be that, when Ministers are dismissed, the Governor acts on the advice of the very people who are to be dismissed. Under section 45 (2) in cases where the Governor is required to act on his own discretion or on the advice of any specified person or authority, a court may not inquire on whose advice he acted or whether any advice was tendered. When exercising the Royal Prerogative of mercy, in Her Majesty's name and on Her behalf, the Governor normally acts on the advice of the Governor's Council.

Sections 50 to 56 of the Constitution, as amended by the Constitution Amendment Act (No. 13 of 1964), deal with the establishment of the High Court of Rhodesia, the law to be administered, and appeals to the Privy Council. Section 54 (3) provides for the judges to take an oath of allegiance and a judicial oath. Subject to certain provisions as to customary law the law to be administered was to be the law in force in the Colony of the Cape of Good Hope on June 10, 1891, as modified by subsequent legislation having in Southern Rhodesia "the force of law." By virtue of sections 56, E to G, the appellate jurisdiction of the Privy Council was preserved; section 71 (5) gave to aggrieved *655 persons the right to appeal in cases of contravention of sections 57 to 68, which contained the "Declaration of Rights." The rights protected in those sections were not new rights; they are the fundamental rights to life, liberty and the enjoyment of property, etc. The object of including them in the Constitution was to "entrench" them so that they could not legally be removed and so as to provide a judicial procedure by which an individual might appeal to the Privy Council. By section 58 (1) no person shall be deprived of his personal liberty save as may be authorised by law. Section 69 provides that laws for dealing with emergencies were not to be treated as inconsistent, inter alia, with section 58. The detention of the appellant's husband could therefore only be justified if it were necessary during a period of public emergency as defined in section 72 (2). In the circumstances, therefore, the only period for which his detention was lawful was for

three months after the lawful declaration of emergency of November 5, 1965. Under section 71 (5) any person aggrieved by any determination of the High Court may appeal to Her Majesty in Council, and thus the rights protected in the Declaration of Rights are given this further protection

Chapter IX of the Constitution, containing sections 105 to 111, is extremely important since it deals with amendments to the Constitution. Clearly there are no concurrent powers of amendment; the sections which Her Majesty may amend or revoke may not be touched by the Government of Rhodesia at all under section 107. "Declaration of Rights and the right of appeal to the Privy Council" are included in the specially "entrenched provisions." By virtue of sections 107 (2) and 108, any amendment of a specially entrenched provision requires the concurrence of a majority of all the four principal racial groups in Southern Rhodesia, in a referendum, and every African citizen over 21 is entitled to vote in such a referendum, notwithstanding that he cannot ordinarily vote. An alternative method of amendment is by sections 107 (2) (b) and 109, but this requires a majority of two-thirds in the Legislative Assembly and the approval of Her Majesty, on a special address being presented to the Governor praying him to submit a bill for Her Majesty's assent. This therefore requires the consent of the United Kingdom Parliament.

Summarizing the position, it is clear that extensive legislative powers are given to the Legislature, including the power to pass laws with extra- territorial jurisdiction; but there are extremely important limits to those powers. In particular there is no power to remove *656 the Governor or to withdraw the executive power in the state from Her Majesty. Furthermore, although under the Constitution the powers of Her Majesty in Council to legislate are limited, the powers of the United Kingdom Parliament to legislate have not been cut down. The Statute of Westminster, 1931, does not apply. The Southern Rhodesia Constitution Order of 1965 has modified and amended the 1961 Constitution, but it has not destroyed it. The effect of the Order in Council of 1965 was to do away with the Governor's Council and the powers of the Legislative Assembly, but it leaves a substantial part of the 1961 Constitution intact.

The position of the judiciary remains untouched, as does the Declaration of Rights and the right of appeal to the Privy Council. Against this constitutional background, the illegality of the Unilateral Declaration of Independence (U.D.I.) is beyond dispute. Nor was it disputed in the courts below. Those who organised it were in any event clearly guilty of offences against section 2 of the Preservation of Constitutional Government Act, 1963 (No. 14 of 1963) .

When the Governor communicated to the Ministers the withdrawal of Her Majesty's pleasure his action was not a "dismissal" but merely the communication of an event which operated automatically, cf. Adegbenro v. Akintola . [FN4] The court may not enquire into the advice upon which the Governor acted. The Ministers of the illegal regime do not claim to be Ministers under the 1961 Constitution, although there is no evidence of any formal resignation on their part. The 1965 Constitution, introduced by the illegal regime, was of no legal force whatsoever. It attempted to endow Her Majesty with the position of "Queen of Rhodesia" and to establish, as her representative, "an Officer Administering the Government in and over Rhodesia. " It also purported to establish an oath of loyalty to the Queen as "Queen of Rhodesia" and a similar judicial oath, which new judges would be required to take before sitting as judges. In fact the 1965 Constitution followed closely the outlines of the 1961 Constitution, but it made no provision for any appeal to the Privy Council. Under section 128 the High Court was deemed to be properly constituted and the existing judges were permitted to continue to sit, but they could be asked to take the oaths mentioned above. Clearly, however, both the courts below regarded

themselves as still sitting under the 1961 Constitution.

FN4 [1963] A.C. 614, 628; [1963] 3 W.L.R. 63; [1963] 3 All E.R. 544, P.C.

No legislative process is being carried on otherwise than by *657 the rebel Parliament. The executive powers, in the physical sense, are being exercised by the rebel Ministers, but the High Court and the judges (with one exception) continue to recognise the 1961 Constitution. The Governor continues to occupy Government House and asserts the rights of the legitimate Government. Her Majesty and the Government of the United Kingdom have not relinquished Sovereignty and continue to be responsible for and have jurisdiction over the Colony.

No foreign state has given recognition, either de facto or de jure, to the illegal regime. It is important to note that the illegal regime submitted to the jurisdiction of the High Court as originally constituted, and did not claim that the court was sitting under the 1965 Constitution. However, Beadle C.J. considered that he was sitting as a member of a de facto court, neither under the 1961 Constitution, nor under the 1965 Constitution.

It is without precedent for rebels against Her Majesty to submit themselves to Her Majesty's courts, and to allow the legality and effectiveness of their rebellion to be judged by those courts. Of the seven judges in the courts below, only Macdonald J.A. stated that he was exercising his powers under the 1965 Constitution.

The relations between the Sovereign and a Colony are governed by English law, particularly in regard to the Royal Prerogative. Macdonald J.A. held that English law was applicable, but he regarded the Statute of Treason, 1495, as meaning that he owed allegiance to Mr. Dupont, as head of a de facto government for the time being, and not to Her Majesty.

Leave to appeal to the Privy Council.

On March 27, 1968, the Privy Council, when granting leave to appeal, reserved until the hearing the question of the competency of and necessity for any such grant. Clearly the judges of the Appellate Division did not regard their remarks as obiter dicta, but as a constitutionally binding decision [FN5]: see their judgment, dated March 1, 1968, when they refused to declare that the appellant could bring her appeal to the Privy Council as of right. The determination which was appealed against was that the rebel regime was a de facto government, and as such could lawfully do anything which its predecessor could lawfully have done under the 1961 Constitution, and that accordingly the *658 detention of the appellant's husband was lawful. The determination which the appellant asks should be substituted is that the rebel regime is not a lawful government, that its legislature and administrative acts have no validity; that it cannot proclaim states of emergency or issue regulations thereunder; that it cannot lawfully detain persons without trial, and that the detention of the appellant's husband is unlawful and contravenes his constitutional rights under section 58 of the Constitution.

FN5 [1968] (2) S.A. 457.

[LORD MORRIS OF BORTH-Y-GEST. Is the Board concerned solely with the state of affairs as it was in February, 1966, or with the present time?]

The Board's decision should be based on the latest state of facts ascertainable on the record, i.e., as at March, 1968.

While the Appellate Division's decision stands, the appellant cannot approach any other court in Rhodesia, since such courts would be bound by that decision. Although the appellant on her original application was technically successful, until a fresh detention order was made under a regulation which had been held not to be ultra vires she remained an "aggrieved person" within the meaning of section 71 (5) of the 1961 Constitution, and the Privy Council is always prepared to entertain an appeal on matters of substance or of great public importance, particularly where the liberty of the subject is involved: see Australian Consolidated Press Ltd. v. Uren. [FN6]The determination of the Appellate Division establishes a precedent for the Rhodesian courts that the rebel regime is a de facto government, and that, as such, it can lawfully do anything that its predecessor could have done under the 1961 Constitution: see Dhlamini and Others v. Carter N.O. and Another N.O. (2). [FN7]Shortly after the decision of the Appellate Division an application was made on behalf of certain persons under sentence of death, for a stay of execution on the grounds that to hang persons after two or three years in custody was inhuman, and that, even accepting the judgment in the constitutional case of Madzimbamuto v. Lardner- Burke N.O. and Another N.O. , the de facto government should not be accorded or conceded the power to put people to death. That application was refused, the decision in the constitutional case [FN8] being applied.

FN6 [1969] 1 A.C. 590; [1967] 3 W.L.R. 1338; [1967] 3 All E.R. 523, P.C.

FN7 [1968] (2) S.A. 445, 449.

FN8 [1968] (2) S.A. 284.

In Chikwakwata v. Bosman N.O., [FN9] Beadle C.J. pointed out that if all that was being asked for was a declaration that an *659 appeal lay of right, then no discretion was vested in the court, and that the object of making a declaration was to spare the Privy Council the necessity of itself making an inquiry. That statement was approved in Lopes v. Valliappa Chettiar . [FN10]

FN9 [1965] (4) S.A. 57, 60.

FN10 [1968] A.C. 887, 892; [1968] 3 W.L.R. 92; [1968] 2 All E.R. 136, P.C.

Since the rule of practice is that pleadings should contain a statement of the relevant facts, and not submissions of law, it was unnecessary specifically to include an allegation that there was a breach of section 58. In any case. however, the point was raised in argument. The basis of Beadle C.J.'s judgment, [FN11] (of March 1, 1968) was that the substance of the constitutional case [FN12] (the original proceedings) was that the rebel regime had violated the whole of the 1961

Constitution, and not simply an odd section of it, in contravention of the rights of the appellant's husband. But there is no doubt at all that the result would have been the same even if section 58 did not appear in the Constitution, since the Declaration of Rights did not create rights, it merely protected rights already existing at common law. Once unlawful detention is alleged, section 58 must apply, and the right of appeal could not depend on whether or not the section is referred to.

FN11 [1968] (2) S.A. 457.

FN12 [1968] (2) S.A. 284.

In Chikwakwata v. Bosman N.O., [FN13] Beadle C.J. said that there was no doubt that section 71 (5) of the Constitution gave an appeal to the Privy Council as of right, but that the question was whether the determination in that case [FN14] could be said to be under that section. Here the Appellate Division, by holding that the determination was not a determination of constitutional rights under section 58, erred in not following Chikwakwata's causal. [FN15]

FN13 [1965] (4) S.A. 57, 58.

FN14 [1965] (4) S.A. 57, 58.

FN15 [1965] (4) S.A. 57, 58.

An alternative basis for the judgment [FN16] of Beadle C.J. (with which Quenet J.P., Macdonald J.A. and Jarvis A.J.A. agreed. Field-send A.J.A. expressing no opinions) was that since the rebel regime had declared that it would not obey any order of the Privy Council, it was unnecessary to declare whether it was a proper case to go before the Board without first obtaining leave from the Board, and any decision of the Board granting relief would be a mere "brutum fulmen." Macdonald J.A., since he held that he was sitting under the 1965 Constitution, which does not recognise the right of appeal to the Privy Council, also refused [FN17] the declaration sought, but for different reasons.

FN16 [1968] (2) S.A. 457.

FN17 [1968] (2) S.A. 457.

Both the reasons for Beadle C.J.'s judgments were incorrect. *660 Even if the Board's decision were to be of academic interest only, the right of appeal could not be lost. E. W. Gillett & Co. Ltd. v. Lumsden [FN18]lays down that even where there is an appeal as of right it is still for the court a quo to consider whether there is such a right.

FN18 [1905] A.C. 601, P.C.

The question whether a person is an "aggrieved person" depends on whether the determination has an adverse effect on his or her legal rights. The Board's decision would not be brutum fulmen, since it would dispose of the precedent which otherwise would amount to an estoppel per rem judicatam in any future proceedings between the parties. In Australian Consolidated Press Ltd. v. Uren [FN19] the appellants succeeded in getting a verdict set aside and a new trial ordered. The High Court of Australia had held that Rookes v. Barnard [FN20]should not be followed. An application for leave to appeal from so much of the High Court's decision as held that Rookes v. Barnard [FN21]had been wrongly decided was granted. In that case [FN22] a new trial was pending, which is not the case here; nevertheless the result would be the same if the appellant were not regarded as an "aggrieved" person, since no new attempt could be made to obtain an order that the appellant's husband be set at liberty. The result of these proceedings cannot therefore be said to be academic.

FN19 ante, p. 590.

FN20 [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).

FN21 [1964] A.C. 1129; [1964] 2 W.L.R. 269; [1964] 1 All E.R. 367, H.L.(E.).

FN22 ante, p. 590.

As to the meaning of "aggrieved," see also Attorney-General of the Gambia v. N'Jie . [FN23]Lord Denning M.R., after commenting that the definition given by James L.J. in Ex parte Sidebotham, In re Sidebotham [FN24]was not exhaustive, said that the words "person aggrieved" are of wide import and should not be subjected to a restrictive interpretation.

FN23 [1961] A.C. 617, 634; [1961] 2 W.L.R. 845; [1961] 2 All E.R. 504, P.C.

FN24 (1880) 14 Ch.D. 458, C.A.

On the question whether special leave is necessary where the Appellate Division has wrongly refused to make the declaration sought, see Davis v. Chancy [FN25]where Viscount Dunedin, after referring to E. W. Gillett & Co. v. Lumsden [FN26]said that while it was the duty of the court a quo to decide whether there was appealable matter, nevertheless if the court a quo did not allow an appeal the unsuccessful appellant could always present a petition for special leave, although, since the granting of special leave was a matter of discretion, he would not necessarily be successful. *661 Although this dictum was followed in Lopes v. Valliappa Cheshire, [FN27] it is too widely stated where there is a statutory right of appeal. Notwithstanding, Davis v. Chancy, [FN28]if the Board is satisfied that the court below is wrong, it should be as a matter of right and not of discretion that an appeal is granted. If the Board should hold that the Appellate Division was wrong on that point it should grant leave irrespective of the prospects of success. Finally

in Rahimbhoy Hibibhoy v. Turner, [FN29]Lord Hobhouse said that, though not an appeal, if the court found that a certificate had been wrongly refused they could advise Her Majesty to admit the appeal. If a statute gives a person a right of appeal, that right cannot be taken away because the present illegal regime says that special leave is necessary. [Reference was also made to Attorney-General v. Sillem and Others, [FN30] and Annapurnabai v. Repro. [FN31]]

FN25 [1932] A.C. 106, 111, P.C.

FN26 [1905] A.C. 601, P.C.

FN27 [1968] A.C. 887.

FN28 [1932] A.C. 106, P.C.

FN29 (1890) 18 L.R.Ind.App. 6.

FN30 (1864) 10 H.L.Cas 704.

FN31 (1924) 51 L.R.Ind.App. 319.

J. G. Le Quesne as amicus curiae. The matter is one of discretion for the Board, no more need be said.

[The Bar was then cleared for their Lordships to consider the matter.]

[Lord Reid. We are satisfied that the appellant has a right of appeal which cannot be taken away.]

Sydney Kentridge S.C. Does your Lordship mean that it is therefore unnecessary to deal with the effectiveness of any order which the Board may make?

[Lord Reid. Your client is here as a matter of right. That right cannot be taken away whether or not anything we may say is unenforceable.]

General Submissions.

Every imprisonment save under judicial warrant is Prima facie unlawful and must be justified by the imprisoning authority: Principal Immigration Officer v. Narayansamy [FN32]and Ganyile v. Minister of Justice. [FN33] Both in English law and in Roman-Dutch law every person arrested is entitled to sue out a writ of habeas corpus asking the court for his release, and the court is bound to grant it unless there is some lawful cause for his detention.

FN32 [1916] T.P.D. 274 (S.A.).

FN33 [1962] (1) S.A. 647.

If deprivation of liberty cannot be justified under sections 58 (2) and 69 it cannot be justified at all.

The court can give recognition in effect only to (1) statutes having legal effect in Southern Rhodesia, i.e., the 1961 Constitution and statutes duly enacted thereunder or under previous legal *662 Constitutions of the Colony or by or under the authority of the Parliament of the United Kingdom, and (2) subject to any such statutes having legal effect in Southern Rhodesia, rules of law which were part of the law in force in the Cape of Good Hope on June 10, 1891. No attempt has been made to justify the detention without trial of the appellant's husband under any measure which is a law within the meaning of section 56 D of the 1961 Constitution, and its illegality is therefore incontestable.

The courts, whose judges are bound by their judicial oaths and their oaths of allegiance to Her Majesty ought not to recognise or enforce any measure contrary either to the 1961 Constitution or to any United Kingdom statute which extends to Southern Rhodesia. Nor should they recognise an illegal regime in Her Majesty's own territories as a de facto government. The judicial oath and the oath of allegiance continue to bind the judges notwithstanding that they are living under the physical power of the illegal regime. The majority of the judges, all but Field-send A.J.A., did not attempt to justify the detention by reference to the 1961 Constitution, and were compelled to go outside it to seek a cloak of legality for the power being exercised by the illegal regime. But neither law nor logic permits Her Majesty's judges, appointed under the 1961 Constitution, to find rules of law outside that Constitution. Beadle C.J., Quenet J.P., and Macdonald J.A. all base their conclusions on the view that the 1961 Constitution has ceased to exist because its legislative and executive machinery is not in actual operation. But even if that machinery has ceased to function it does not follow that Her Majesty's authority over the territory has ceased, or that the judges are no longer Her Majesty's judges. It is still the judges' duty to recognise the laws of the Sovereign Legislature, i.e., the United Kingdom Parliament.

The distinction between the breakdown of a constitution and the disappearance of the ultimate Sovereign or other authority was made clear in Sabally and N'Jie v. H.M. Attorney-General. [FN34]There, Lord Denning M.R. held that, where the Constitution set up by the Crown for the Gambia had ceased to function, the Crown must be able to resolve the impasse, and legislate by Order in Council with retrospective effect. The court was bound to recognise the continued Sovereignty of the United Kingdom.

FN34 [1965] 1 Q.B. 273; [1964] 3 W.L.R. 732; [1964] 3 All E.R. 377, C.A.

Beadle C.J. and Macdonald J.A. simply took the view that the Constitution was no longer working, and therefore whether it had *663 broken down or was revoked does not touch the broader question of the Sovereignty of the United Kingdom. There are passages in the judgments which express the view that, even before U.D.I., legislation of the United Kingdom Parliament had ceased to be effective in Southern Rhodesia by virtue of a convention, that Parliament would not legislate on matters within the competence of the Legislative Assembly, except with the agreement of the

Government of Southern Rhodesia. But that convention can have no application to the events of U.D.I. because the convention related to matters within the competence of the Legislative Assembly, which has ceased to exist, and the Southern Rhodesia Act of 1965, which suspended the Legislature, would not have been within the competence of the Legislative Assembly. It presupposes the continuance of lawful government, and, in order for it still to apply, it would be necessary to read into it such words as "even if the Colony goes into rebellion," a proposition which only needs to be stated to be shown to be ridiculous. In any event a convention cannot override a statute. The very existence of the convention implies that there is a right to legislate otherwise the convention would be unnecessary.

Beadle C.J. failed to advert to the powers of the United Kingdom Parliament to legislate which were not excluded. Ndlwana v. Hofmeyr N.O., [FN35]and British Coal Corporation v. The King, [FN36] upon which Beadle C.J. relied, were both decided after the Statute of Westminster, 1931, and neither of them applies where the Statute does not take effect. They decided that once the ties binding a territory to the United Kingdom have been cut, that situation cannot be reversed by the United Kingdom Parliament. A sufficient answer to the line of argument adopted by Beadle C.J. would seem to be, that if his argument were correct, there would have been no need for U.D.I.

FN35 [1937] A.D. 229 (S.Afr.).

FN36 [1935] A.C. 500, P.C.

In re Southern Rhodesia [FN37] shows that Rhodesia was conquered by the forces of the British South African Co., and, by well settled constitutional practice, that conquest was on behalf of Her Majesty. There was, however, no formal annexation of the territory until 1923. The effect of such an annexation is clear; see Sobhuza II v. Miller [FN38]referred to in Nyali Ltd. v. Attorney-General, [FN39]where the same approach is adopted. The annexation *664 of Southern Rhodesia as a Colony is a starting point behind which the judges cannot go. The court will not examine the treaty or grant under which the Crown acquired jurisdiction. The only cases on which Beadle C.J. appears to rely are Campbell v. Hall [FN40] and Sammut v. Strickland, [FN41] but those cases do not in fact support his argument. A grant of representative institutions once made, without reserving a power of concurrent legislation, precludes the exercise of the Royal Prerogative so long as the legislative institutions continue to exist. The power of Parliament, as distinct from that of Her Majesty, to legislate for a Colony is beyond question. In Campbell v. Hall [FN42] Lord Mansfield was dealing with the limited powers of legislation by Order in Council under the Royal Prerogative and he fully accepted that Great Britain could legislate as it chose for the Colony. The same contrast, between the Prerogative power and the power of Parliament, is seen in In re Colenso, the Lord Bishop of Natal, [FN43]and in Sammut v. Strickland. [FN44]

FN37 [1919] A.C. 211.

FN38 [1926] A.C. 518, P.C.

FN39 [1956] 1 Q.B. 1; [1955] 2 W.L.R. 649; [1955] 1 All E.R. 646; C.A.; affirmed

[1957] A.C. 253; [1956] 3 W.L.R. 341; [1956] 2 All E.R. 689, H.L.

FN40 (1774) 1 Cowper 204.

FN41 [1938] A.C. 678; [1938] 3 All E.R 693, P.C.

FN42 1 Cowper 204.

FN43 (1864) 3 Moo.P.C.N.S. 115.

FN44 [1938] A.C. 678.

In regard to Rhodesia, the right of the United Kingdom Parliament to revoke the Constitution and grant a new one was never questioned until the judgment in the court below. The British Parliament is a Sovereign body entitled to legislate for the whole empire: Rex v. McChlery [FN45] and Rex v. Christian, [FN46] per De Villiers J.A. [FN47] Beadle C.J. accepted that the constitutional position of Southern Rhodesia was not significantly different from that of a Dominion in, say, 1918, and it has never been doubted that before the Statute of Westminster, 1931, the United Kingdom Parliament had power to legislate for the Dominions, the Statute being necessary to sever the tie of Sovereignty. The judges of the Appellate Division must, therefore, as Her Majesty's judges, recognise the binding force of the Southern Rhodesia Act, 1965, and the Order in Council made thereunder.

FN45 [1912] A.D. 196 (S.Afr.).

FN46 [1924] A.D. 101.

FN47 Ibid. 116.

The question of the promulgation of statutes under Roman-Dutch law was raised by the Rhodesian judges, who held that United Kingdom statutes are not valid unless promulgated in Rhodesia. That contention is based on the provision of the Constitution which adopts the law in force on the Cape of Good Hope on June 10, 1891, i.e., Roman-Dutch Law.

*665 Roman-Dutch law of promulgation.

In Abeyawardene v. West [FN48] the Privy Council accepted, as a correct approach in considering the authority of the early Dutch Jurists, a passage from Professor Lee's Introduction to Roman-Dutch Law, 4th ed. (1946), p. 15; 5th ed. (1953) p. 14. The works of those writers have a weight comparable to the decisions of the courts, or of the limited number of books of authority" in English law. It is conceded that they drew liberally on all types of Roman and civilian writers, and not only those

in Holland. Roman-Dutch law is a system of positive law, and is not merely a form of undefined equity: see Grotius, Introduction to the Jurisprudence of Holland (as translated by Professor Lee (1926)) II, 5-14, and also Lazarus and Jackson v. Wessels [FN49] per Innes C.J. [FN50] and Weinerlein v. Goch Buildings Ltd., [FN51] which show that the principles of equity are only applicable in so far as not inconsistent with those of Roman-Dutch law. A Rhodesian court is, therefore, no more at large than is an English court. It cannot do justice in the abstract. There is no rule of Roman-Dutch law which permits a court to override a statute. The general rule is most clearly set out in Rex v. Harrison and Dryburgh. [FN52] The rule of Roman-Dutch law which requires promulgation of a statute before it could become effective does not apply to United Kingdom statutes or Orders in Council. If one starts with the proposition that "Parliament has full power to legislate for any colony," that must mean in the Usual manner, which in England does not involve promulgation. Roman-Dutch law only became operative in Rhodesia by virtue of the 1961 Constitution, and its adoption cannot have been intended to curtail the powers of Parliament. In Union Government (Minister of Land) v. Estate Whittaker [FN53]it is clear that though Roman-Dutch law was adopted to regulate the affairs of subjects in Natal inter se, the constitutional position of the Crown in regard to matters of government was unaffected. The Royal Prerogative remains effective, except so far as it may have been modified or abandoned: see Union Government v. Tonkin, [FN54] per Innes C.J. [FN55]and oSachs v. Drges N.O., [FN56] perCentlivres J.A. [FN57]

FN48 [1957] A.C. 176; [1957] 2 W.L.R. 281, P.C.

FN49 [1903] T.S. 499.

FN50 Ibid. 509.

FN51 [1925] A.D. 282 (S.Afr.).

FN52 [1922] A.D. 320, 330 et seq. (S.Afr.).

FN53 [1916] A.D. 194, 203 (S.Afr.).

FN54 [1918] A.D. 533 (S.Afr.).

FN55 Ibid. 539.

FN56 [1950] (2) S.A. 265 .

FN57 Ibid. 288.

*666 Even if one were to assume that it was the intention of the 1961 Constitution that a statute should only come into force on promulgation, that principle would yield to a contrary intention by Parliament, and Parliament must have intended the

Southern Rhodesia Act, 1965, to have immediate operation; its effectiveness cannot have been meant to be dependent on the ability to have it promulgated. Promulgation is achieved, nowadays, by publication in a printed form. The customary method of promulgation is in the Gazette, and this has now been given a statutory basis: see the Interpretation Act, 1962 [No. 25 of 1962], ss. 18 and 30 (3) and section 116 of the 1961 Constitution itself. Nothing in the 1961 Constitution can be construed as intending that the constitutional relationship between the Sovereign and the Colony should be governed by Roman-Dutch law, cf. Sammut v. Strickland. [FN58]

FN58 [1938] A.C. 678, P.C.

In In re Southern Rhodesia [FN59] it is stated that it is for the Sovereign to decide whether to allow local law to continue or to change it. The true nature of the rule as to promulgation is one of interpretation of the Legislature's intention, as is explained in Rex v. Offen. [FN60] In that case, in considering whether promulgation in South West Africa was necessary to give validity to a statute of the South African Parliament passed under its powers to legislate for South West Africa, Van den Heever J. said that it was a constitutional question which could not be affected by a Roman-Dutch rule of interpretation. This opinion, coming from a most disinguished exponent of Roman-Dutch law, who was jealous of any introduction of English law, must be of great weight.

FN59 [1919] A.C. 211.

FN60 [1934] S.W A. 73.

It is clear that in modern Roman-Dutch law promulgation is a mere formality. There is no rule that it must be brought to everyone's attention, or that it must be in published form: see also Rex v. Offen [FN61] per Wessels C.J. [FN62] That case shows that even if the rule of promulgation were binding, since a United Kingdom statute has doddered Southern Rhodesia to be part of Her Majesty's Dominions, all that would be necessary would be promulgation in the United Kingdom and this is achieved by publication by the Stationery Office.

FN61 [1935] A.D. 4 (S.Afr.).

FN62 Ibid. 7.

Promulgation is sufficiently achieved by publication in the capital or the country having the legislative power: see Reg. v. Jizwa. [FN63]In any case the terms of the Southern Rhodesia Act, 1965, were well known to the court below.

FN63 (1894) S.C. 387 (S.Afr.).

*667 The question of promulgation is important because the Southern Rhodesia Act, 1965, and the Order in Council made thereunder did not fail to become law although

not promulgated in Rhodesia. Beadle C.J. adopted a statement by Grotius in the Introduction to Dutch Jurisprudence, translated by Maasdorp, 3rd ed. (1903), p. 6, that in the absence of any written law judges must follow reason to the best of their knowledge and discretion.

The judgments in the Appellate Division.

Beadle C.J. attempted to follow a complicated path of legal necessity which led him to the conclusion that it was open to him, as a judge, to decide which was the true Constitution, and whether or not to recognise the illegal regime as either the de facto or de jure government. He regarded the situation existing in Southern Rhodesia as wholly unparalleled in legal history, and the court as sitting as a de facto court. Pointing to the discovery of the okapi in Central Africa in 1900, when zoologists believed that, even if they did not know of the existence of every large animal, at least they knew of the existence of every possible genus, Beadle C.J. compared his task to that of an explorer. But whereas the okapi was discovered by the zoologists, Beadle C.J.'s "okapi of jurisprudence" was invented. The certificate of H.M. Secretary of State, to the effect that Her Majesty's Government do not recognise the illegal regime either de jure or de facto, he regarded merely as evidence, upon which, with other evidence, the court, sitting as a Rhodesian court "in mediis rebus" and not as an English court, could decide whether or not to recognise the regime. But the Secretary of State's certificate is decisive not only of the "status" of the illegal regime, but also as to the validity of its administrative and legislative acts. The Tinoco Arbitration [FN64] and The Arantzazu Mendi [FN65] to which Beadle C.J. referred, relate purely to international law.

FN64 (1923) Herbert W. Briggs, The Law of Nations, 2nd ed. (1953), p. 197; 18 A.J.I.L. 147.

FN65 [1939] A.C. 256; [1939] 1 All E.R 719, H.L.(E.).

Beadle C.J. further sought to rely on dicta by Lord Reid and by Lord Wilberforce, in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [FN66]to the effect that recognition of a law does not entail recognition of the law- maker as a government with Sovereign power, in support of his contention that, in the circumstances existing in Rhodesia, it was permissible to recognise the legislative and administrative acts of the regime. But no English *668 court may recognise the laws of an unrecognised body in the face of, and contrary to, the express terms of a United Kingdom statute. He then attempted to rely upon the principles upon which Her Majesty's Government acts in deciding whether or not to recognise governments as de facto or de jure governments, but such principles of international law are not applicable where or.e is dealing with a rebellion within the Sovereign's own territory. The authorities upon which he sought to rely, namely Kelsen, Lord Lloyd, Bryce and Salmond, may afford an accurate jurisprudential analysis of a change in the basic laws of a country but they are not authorities upon which an English court should act.

FN66 [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.) at pp. 907 and 961 respectively.

The passage from Salmond's Jurisprudence, 11th ed. (1957), p. 101, dealing with the Bill of Rights and the accession of William III, which was cited by Beadle C.J., merely means that every legal system must have a starting point; it does not mean that it is the duty of a judge to consider the legitimacy of the Sovereign power under which he was appointed. By accepting commissions from William III and Mary, the judges must, perforce, have recognised their legitimacy; they could not legitimately have conducted an enquiry as to whether or not William III and Mary were de facto or de jure Sovereigns. The cases of Uganda v. Commissioner of Prisons, Ex parte Matovu, [FN67] and The State v. Dosso [FN68] are explicable on the same basis. It is clear that in both cases the judges started by accepting the effectiveness and success of the revolution, i.e., they clearly accepted office under the new Constitution and therefore the consideration which they devoted to its validity or otherwise was an arid exercise in each case.

FN67 [1966] E.A. 514.

FN68 [1958] 2 P.S.C.R. 180; (1958) P.L.D. I.S.C.(Pak.) 533.

The Appellate Division accepted that they were still sitting as Her Majesty's judges, and therefore those cases have little application to the present case. It does not fall within the purview of a domestic tribunal to enquire into the legality or otherwise of its own constitution. Whenever there was a change of monarch in England, all the judges accepted fresh commissions from the new Sovereign; there could therefore be no occasion for such an enquiry. Where there is a written constitution the judges derive their authority from the constitution, they do not sit in vacuo, nor do they derive their authority from "Divine Right." There are therefore only two choices open to them, they can continue to recognise the old Constitution or they can resign and accept office *669 under the new one. Sobhuza II v. Millar [FN69]and Nyali Ltd. v. Attorney-General [FN70]demonstrate that an act of annexation over territory is an Act of State behind which a judge cannot go. He may not inquire whether the Queen had power to annex. The High Court of Rhodesia must therefore accept that the only reason for its existence is the Constitution granted by the Queen, and it cannot consider whether or not the rebel Government has become a lawful one. A judge cannot depart from the laws of his lawful Sovereign unless he ceases to be one of Her Majesty's judges and joins the revolution. So long as the courts continue to sit, it cannot be said that the Sovereign has lost power; if the judges decide that the Sovereign has been displaced, their duty would be to say that they can no longer exercise their functions, they should not apply the laws of the usurper. If it were open for judges to decide, from day to day, who was exercising the Sovereign power, all objectivity would go. Beadle C.J. held that the illegal regime was in effective control, but though it seemed likely to continue in control he could not say that it was yet firmly established. Quenet J.P. on the other hand held that it was firmly established. Such a divergence of opinion illustrates the impossibility of this being the true test to be applied. As Beadle C.J. points out, one of the factors in deciding whether the present regime is in effective control is the attitude of the courts. But the attitude of the courts may also affect the likelihood of its remaining in effective control, and therefore what the court is really doing, on the basis of Beadle C.J.'s judgment, is to consider whether it has backed the "right horse." That cannot be the proper test of what is "the law." What was argued below was that there is only one law which the judge can apply, if he sits as one of Her Majesty's judges. If he decides to do otherwise it is a personal political decision, not a legal one. The conclusion which he reached that he must

decide what the law was "in the light of political realities" was wrong. Beadle C.J. and Jarvis A.J.A. appear to have reached the conclusion that the illegal regime is the de facto Government, but that it cannot govern under the 1965 Constitution which it established but is limited by the 1961 Constitution, which latter Constitution however they regarded as entirely suspended. The court, they held, could only exercise its powers because it was permitted to do so, but it was not necessary to recognise all *670 the laws of the illegal regime. This conclusion is so far removed from legal principles that it is its own refutation.

FN69 [1926] A.C. 518, P.C.

FN70 [1956] 1 Q.B. 1; affirmed [1957] A.C. 253, H.L.(E.).

The answer to that approach is correctly stated by Field-send A.J.A. where he adopts the separation of powers, and holds that unless the judicial as well as the legislative and executive functions of government are usurped, the rebel regime cannot be said to be a fully de facto government: see Hildreth's Heirs v. M'Intire's Devisee. [FN71] Field-send A.J.A. says that it is the courts' duty to stand in the way of what might be termed a legitimate attempt to override the Constitution: see grown v. Leyds N.O. [FN72]Field-send A.J.A. correctly points out that the court cannot recognise anything inconsistent with the Constitution, to which it owes its existence, and that where there is a separation of powers it is the duty of the judiciary to protect that Constitution: see Luther v. Burden. [FN73]

FN71 1 J. J. Marshall 206 (24 Kentucky Reports) U.S.A.

FN72 (1897) 4 O.R. 17 (S.Afr.).

FN73 (1849) 7 Howard 1 (48 U.S.).

[LORD REID. If there is no lawful means of altering the Constitution and if the vast majority are dissatisfied with the existing government, must it be civil war or is there any legal solution for the people?]

It is not a question into which a court can go. In Luther v. Borden [FN74]it was a political question solely for the U.S. Congress to decide. Where there is a written constitution the court's powers must be exercised in accordance with that constitution: see Liyanage v. Tote Queen. [FN75]It cannot consider whether there has been a successful coup d'etat. The court's function is to protect the Constitution: see also The State v. Powell [FN76]; Brown v. Leyds N.O. [FN77]

FN74 (1849) 7 Howard 1 (48 U.S.).

FN75 [1967] 1 A.C. 259; [1966] 2 W.L.R. 682; [1966] 1 All E.R. 650, P.C.

FN76 (1900) 27 Southern Reporter, Mississippi 927 pp. 931-2.

FN77 (1897) 4 O.R. 17 (S.Afr.).

Beadle C.J. frequently invokes "political realities." It is difficult to avoid saying that in so doing he departs from the terms of his judicial oath, since he appears to prefer "political realities" to the law. Both the courts below were clearly motivated by the fear of the social and political consequences of applying the law strictly, but whatever the consequences resulting from the nullification of all or many of the measures of the illegal regime may be, and however difficult the position of Her Majesty's judges in Rhodesia, their judicial oaths clearly required them to apply the law strictly, doing "right to all manner of people after *671 the laws and usages of Southern Rhodesia": see Eshugbayi Eleko v. Officer Administering the Government of Nigeria [FN78]; Ex parte Mwenya [FN79]; In re Willem Kok and Nathaniel Balie [FN80]; Central African Examiner (PVT) Ltd. v. Howman and Others N.N.O. [FN81]and Liyanage v. The Queen. [FN82]

FN78 [1931] A.C. 662, 670, P.C.

FN79 [1960] 1 Q.B. 241, 308; [1959] 3 W.L.R. 767; [1959] 3 All E.R. 525, C.A. reversing [1959] 3 W.L.R. 509, D.C.

FN80 (1879) 9 Buchanan 45, 66 (S. Afr.)

FN81 [1966] (2) S.A. 1 (S.Afr.).

FN82 [1967] 1 A.C. 259; [1966] 2 W.L.R. 682; [1966] 1 All E.R. 650, P.C.

The State v. Dosso [FN83] and Uganda v. Commissioner of Prisons, Ex parte Matovu [FN84] are not persuasive as authorities and are irrelevant in the particular situation in Rhodesia.

FN83 [1958] 2 P.S.C.R. 180.

FN84 [1966] E.A. 514.

[LORD REID. What is the right course for a court in a coup d'etat?]

In the Pakistan and Uganda situations, there were no conflicting claims to Sovereignty - the coups d'etat had been completely successful; the judges therefore had merely a personal choice to make, whether to sit or not. In Southern Rhodesia Her Majesty is still asserting her authority. In Uganda there was throughout a completely independent Sovereign state, whereas in Rhodesia there has been no change of Sovereignty. Luther v. Borden [FN85] was clearly distinguished in Uganda v. Commissioner of Prisons, Ex parte Matovu [FN86] on the ground that in that case there was a contest between two competing groups as to which should control Rhode

Island. The same applies to The State v. Dosso. [FN87] Neither of these cases supports Beadle C.J.'s view. In The Arantzazu Mendi, [FN88] Lord Atkin makes it clear that it is for the Sovereign to decide whom to recognise, and that the State cannot speak with two voices, the judiciary saying one thing and the executive another.

FN85 7 Howard 1 (48 U.S.).

FN86 [1966] E.A. 514.

FN87 [1958] 2 P.S.C.R. 180.

FN88 [1939] A.C. 256, 264.

When considering whether a government is a de facto government it would appear that the administration of justice is an important factor in the decision. It would therefore be illogical for the very court which is administering justice to be able to go into the question, as to the existence of a de facto government, since its own decision might be important on the question of the effectiveness of such government. Beadle C.J. wrongly took the view that the certificate of the Secretary of State, while binding upon United Kingdom courts, was not binding on a Rhodesian *672 court: see Civil Air Transport Incorporated v. Central Air Transport Corporation. [FN89]

FN89 [1953] A.C. 70; [1952] 2 All E.R. 733, P.C.

Beadle C.J. sought to rely upon the doctrine that even if the Sovereign did not recognise a government, that was not conclusive, and he relied on dicta of Lord Reid and Lord Wilberforce in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2), [FN90] but neither passage can mean that recognition is permissible when it is expressly forbidden by a United Kingdom statute.

FN90 [1967] 1 A.C. 853, 907, 954; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L.(E.).

There is direct authority against the proposition that a court may recognise a rebel regime: see Ogden v. Folliott, [FN91] per Lord Kenyon C.J., [FN92] and Dolder v. Lord Huntingfield, [FN93] per Lord Eldon L.C. [FN94]See also McNair on The Legal Effects of War, 4th ed. (1966), 403-6and Barclay v. Russell [FN95] The principle there deduced is that an English court, unless directed to do so by the Legislature, cannot give effect to the acts of a government which has taken its rise in a rebellion against Her Majesty and is still in a condition of rebellion at the date of the act in question.

FN91 (1790) 3 Term Rep. (Dumord & East) 726.

FN92 Ibid. 732.

FN93 (1805) 11 Ves.Jun. 283.

FN94 Ibid. 293.

FN95 (1797) 3 Ves.Jun. 424; 1 Ves.Jun.Supp. 393.

Further support for that proposition is derived from Van Deventer v. Hackle and Mossop, [FN96] per Innes C.J. [FN97] Secretary of State in Council of India v. Kamachee Boye Sahaba [FN98]; Lemkuhl v. Kock [FN99] and Olivier v. Wessels. [FN100] The decisions of Innes C.J. in the above cases are weighty and convincing.

FN96 [1903] T.S. 401.

FN97 Ibid. 409.

FN98 (1859) 13 Moo.P.C.C. 22; 7 Moo.Ind.App. 476, P.C.

FN99 [1903] T.S. 451.

FN100 [1904] T.S. 235.

American cases

The peculiarities of the United States Constitution are such that it is not safe to rely for guidance upon the post-Civil War American cases, when dealing with a British Colony: see The Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd. [FN101] All parts of the British Empire enjoy a common Sovereignty, but a fundamental difference, accepted by the United States courts, is that each American State had its own Sovereignty. Consequently the difficulties of recognizing an unrecognised state did not arise in the American cases as it must do in the case of a British Colony. The cases clearly lay down that notwithstanding the fact that the governments of the southern states were in *673 rebellion and therefore illegal, nevertheless certain of their measures, made for peace, order and good government, had to be recognised and to that extent they are authority for the proposition that recognition of some acts does not entail recognition of all acts. However they do not assist for the following reasons: (i) they were all decided when the Civil War was at an end, and when the public had been living for four years with no lawful government in existence. They are based on the inequity of refusing to recognise transactions which had governed the day-today life of the population in the rebel states and the impossibility of unravelling and nullifying what had been done. (ii) Recognition was granted to support the private rights of individuals and never in favour of the rebel governments themselves. No measure which was in aid of the rebellion or contrary to the Constitution of the United States or which infringed

the Sovereignty of the United States was ever recognised. (iii) Recognition was limited to measures of the state governments, and the Supreme Court refused to recognise, in any sense whatever however apparently innocent, the measures of the Confederacy.

FN101 (1920) 28 C.L.R. 129, 146.

The leading case on this subject is Texas v. White, [FN102] which shows that while recognition was given to certain acts necessary to peace and good order, the acts in question were those governing private relations between individual citizens, and that those acts which were in furtherance or support of the rebellion or which defeated the just rights of citizens were regarded as invalid and void.

FN102 (1868) 7 Wallace 700 (76 U.S.).

The cases seem to relate only to private individual relationships. The principles were applied only in favour of individual citizens, and not in favour of any measure of the confederacy, whose very existence was contrary to the Constitution.

The principles laid down cannot apply to Rhodesia since Her Majesty's judges in that country cannot recognise any acts of the rebel regime, as the Act of 1965 and the Order in Council specifically inform them; but even if the principles were applied without concession they would not assist here.

In Horn v. Lockhart , [FN103] where executors had invested trust funds in Confederate bonds, the investment in such bonds was held absolutely illegal, and not a proper use. It was stated that the executive, judicial and legislative acts of the state governments or their departments so far as they did not impair or tend to *674 impair the supremacy of the national authority or the just rights of citizens under the Constitution were to be treated as valid and binding, crime was to be prosecuted, but the constitutional rights of the citizens were to be preserved. Acts which were "not hostile in their purpose or mode of enforcement to the authority of the National Government" were valid: see also United States v. Insurance Companies [FN104]where insurance companies incorporated under the laws of rebel state governments were held validly incorporated. It should be borne in mind that the fighting was over and the principle involved seems to have been to avoid unnecessary hardship on individual citizens and to preserve their vested rights. The declaration of states of emergency, with powers of detention without trial, falls within a different category.

FN103 (1873) 17 Wallace 570, 580 (84 U.S.).

FN104 (1874) 22 Wallace 99 (89 U.S.).

While in a limited sense the states were entitled to deal with threats to peace and good order, it is clear that the Confederate states never had any right to try for treason. Peace and good government refers to ordinary rights including those for the protection of property. It is conceded that it would follow that the police could lawfully have arrested persons for theft.

These cases were all heard after the end of the Civil War, never during it. If people could have come to lawful courts the result might not have been the same. Recognition was sometimes only granted so far as necessary to sustain transactions which had taken place: see per Bradley J. in Thomas v. City of Richmond. [FN105]

FN105 (1870) 12 Wallace 349, 357 (79 U.S.).

In Keith v. Clark [FN106] the payment of taxes in Confederate notes was held valid. Bradley J. [FN107] said that the courts ought to regard as valid all those Acts of the state governments which were received and observed as laws for the government of the people in their relations with each other so far as that could be done without recognizing and confirming what was actually done in aid of the rebellion.

FN106 (1878) 7 Otto 454 (97 U.S.).

FN107 Ibid. 476.

Baldy v. Hunter [FN108] sets out fully the sort of transactions which were recognised, but they were very different from what is sought to be justified here, which is an exercise of Sovereign power. Detention without trial can never be necessary for the preservation of peace and good order, on the mere ipse dixit of a rebel Minister.

FN108 (1898) 64 Davies 388, 400, 401 (171 U.S.).

If it be suggested that the intention with which a person was acting should be considered, the answer is that that would result *675 in chaos. In Baldy v. Hunter [FN109] a guardian invested his ward's money in Confederate bonds, there was no other way in which he could have invested it, and it was held not wrong; an enquiry into motive would have resulted in chaos.

FN109 (1898) 64 Davies 388.

Another line of cases makes it clear that the Texas v. White [FN110]principle can have no application to any measure of the Confederacy whatever its nature. These cases show that the reason for this is to be found in the independent Sovereignty of the seceding states, whereas when it was a question of an unrecognised rebel government the same rule applies as in the English cases, i.e., in the Sovereign's own territory a rival authority cannot be recognised: see United States v. Keehler. [FN111]

FN110 (1868) 7 Wallace 700 (74 U.S.).

FN111 (1869) 9 Wallace 83 (76 U.S.).

It is a fallacy to attempt to equate Southern Rhodesia with a state of the United States whose relationship to Congress is entirely different.

In Hickman v. Jones [FN112] a prosecution for treason in a Confederate court was held to be a nullity, as also was the court itself. The American cases suggest that the executive, judicial and legislative acts of the Confederacy were a complete nullity: see Sprott v. United States [FN113]where it was said that the government of the Confederate states had no existence except as a conspiracy. In the individual states on the other hand the existing state organizations merely transferred to a new and different national head. The position in Rhodesia is not a true analogy because in Rhodesia there has been an attempt to set up a new Sovereign authority in Her Majesty's Dominions in rivalry to the lawful Government: see also Williams v. Bruffy [FN114] and Kenedy Pasture Co. v. State of Texas. [FN115]

FN112 (1869) 9 Wallace 197 (76 U.S.).

FN113 (1874) 20 Wallace 459 (87 U.S.).

FN114 (1877) 6 Otto 176 (96 U.S.).

FN115 (1921) 231 South Western Reporter 683.

So it is clear that the United States courts would not uphold any act contrary to the Constitution of the United States or such as to impair the constitutional rights of a citizen.

The doctrine of necessity cannot be applicable here because: (i) the proclamation which is relied on as justifying the detention without trial of the appellant's husband impairs his constitutional right to liberty; (ii) it constitutes an assumption of powers which are clearly in derogation of lawful Sovereignty; and (iii) the proclamation of a state of emergency, otherwise than in accordance with the terms laid down in sections 69 to 72 of the Constitution. is *676 a contravention of the Constitution and is therefore disqualified for that reason also.

The doctrine can only be applied ex post facto and only in the private sector. In America for four years there had been no lawful courts, but in Rhodesia the lawful courts are still sitting. During a rebellion a judgment of the court recognizing the acts of a usurper must necessarily assist the rebels.

By no stretch of the imagination can the proclamation of states of emergency with powers to detain without trial be included in the category of acts necessary for the existence of organised government as necessary to preserve the bonds of society. Lauterpacht's Recognition in International Law, 1st. ed. (1947), p. 146 fails to stress sufficiently the distinction between State and Confederate legislation.

Any possibility of the application of the doctrine of necessity to the present case is ruled out by the Act of 1965 and the Order in Council. Had a similar act

been in existence in America during the Civil War, the doctrine could never have been developed. In some future case the question may arise as to the validity of marriages performed in Rhodesia by a registrar appointed by the illegal regime, but whatever might be held in such a case it could afford no support for the validity of the proclamation of a state of emergency.

In the more recent American cases of Sokoloff v. National City Bank, [FN116] M. Salimoff & Co. v. Standard Oil Co. of New York [FN117] and Upright v. Mercury Business Machines Co. Inc. [FN118] it has been held that the non- recognition of the U.S.S.R. and of East Germany did not preclude recognition of certain measures of the governments of those countries. But, as in the Civil War cases, the doctrine applies to private rights. It is an exception to the general rule and is in every case subject to the question of public policy of the United States.

FN116 (1924) 239 N.Y. 158; 145 North Eastern Reports 917.

FN117 (1933) North Eastern Reports 679.

FN118 (1961) 213 New York Supplement (2nd series) 417.

The civilian authorities.

The civilian writers, Grotius, Pufendorf, etc., were greatly relied upon by the respondents, but they cannot be regarded as authorities on the modern constitutional law of Southern Rhodesia. It was said that, where there was no modern law dealing directly with the question, the court was entitled to look at the writings *677 of the civilians dealing with the jus gentium. That is not so because: (i) the constitutional law of Southern Rhodesia is English law, and there are clear statutes dealing with the question; (ii) the so-called authorities do not form part of Roman-Dutch law; and (iii) they are not even part of international law; they are merely precepts to be followed by private citizens in their attitude to a usurper.

The passage from Grotius, De Jure Belli ac Pacis, Bk. I, Ch. IV, XV, which Lewis and Goldin JJ. in the General Division wrongly regarded as part of the laws of Rhodesia, is wholly irrelevant to the question, whether the judges can recognise the regime's provisions, made contrary to a United Kingdom statute. Roman-Dutch law only became a part of the law of Southern Rhodesia by grant from the Crown, because it happened to be part of the law of the Colony in the Cape of Good Hope in 1891; and a grant of that sort cannot be construed as an abandonment of the Crown's Prerogative, or of the powers of the United Kingdom Parliament: see Rex v. Harrison and Dryburgh [FN119]and Sammut v. Strickland [FN120]Roman-Dutch law does not deal with the conception of a King in Parliament in the British sense at all. The decisions in South Africa on constitutional law have always been based on English constitutional law: see oSachs v. Dnges N.O. [FN121] where Watermeyer C.J. did refer [FN122] to Voet (1.4.21) and Centlivres J.A. said [FN123] that he would not refer to Roman-dutch law, because the law was clearly stated in Union Government (Minister of Lands) v. Estate Whittaker, [FN124]and Union Government v. Tonkin. [FN125]

FN119 [1922] A.D. 320, 330 (S.Afr.).

FN120 [1938] A.C. 678; [1938] All E.R. 693, P.C.

FN121 [1950] (2) S.A. 265, 275.

FN122 Ibid. 284.

FN123 Ibid. 288.

FN124 [1922] A.D. 194 (S.Afr.).

FN125 [1918] A.D. 533 (S.Afr.).

Harris v. Minister of the Interior, [FN126] a most important case on the constitutional law of South Africa, deals with the power of the South African Parliament, after the passing of the Statute of Westminster, 1931, to pass laws amending or repealing the South Africa Act, 1909, i.e., to pass an Act repugnant to that Act. English constitutional law was applied throughout, reference being made particularly to Moore v. Attorney-General for the Irish Free State. [FN127]

FN126 [1952] A.D. 428 (S.Afr.).

FN127 [1935] A.C. 484, P.C.

Similarly in Ex parte Schwietering [FN128] there was no reference to Roman- Dutch law, but such cases as Charles, Duke of *678 Brunswick v. The King of Hanover , [FN129] Ibrahim v. The King [FN130] and Calvin'scase [FN131] were referred to, and if there had been any relevant Roman-Dutch law, one may be sure that a judge of the caliber of Van den Heever J.A. would have referred to it. [Reference was also made to Van Deventer v. Hancke and Mossop [FN132], Secretary of State for India v. Kamachee Boye Sahaba, [FN133] Abeyesekera v. Jayatilake [FN134] and Campbell v. Hail. [FN135]]

FN128 [1948] (3) S.A. 378 (S.Afr.).

FN129 (1848) 2 H.L.Cas. 1.

FN130 [1914] A.C. 599.

FN131 (1608) 7 Co. Rep. 1(a).

FN132 [1903] T.S. 401.

FN133 (1859) 13 Moo.P.C.C. 22; 7 Moo.Ind.App. 476, P.C.

FN134 [1932] A.C. 260, P.C.

FN135 Cowper 204.

Liyanage v. The Queen [FN136] was a case as to whether the legislature in Ceylon could take over powers reserved to the judiciary under the Constitution, but Roman-Dutch law was not referred to, mainly because Roman-Dutch law did not know of the doctrine of the separation of powers. Indeed, Voet and Grotius, when speaking of a usurper, speak of him as a man who "ad ministers justice, " and not merely as the one who wields executive power, Beadle C.J. conceded that as far as possible the issues should be determined by English law but said that where that law was inconclusive the court could follow the civilian and early Dutch authorities. In support he quoted passages in Burmah Oil Co. Ltd. v. Lord Advocate [FN137]where Lord Radcliffe referred with approval [FN138] to Grotius and to Van Bynkershoek and where Lord Upjohn stated that the writings of the civilians were of great persuasive force. Macdonald J.A. held that the question of allegiance was governed by English law, and the writings upon which Beadle C.J. relied are not authorities of Roman-Dutch law. While Grotius was a great authority on Roman-Dutch law, his work De Jure Belli ac Pacis was not itself a work on Roman-dutch law: see Wessels' History of the Roman-Dutch Law, (1908), pp. 271-3 and Lee's Roman-Dutch Law, 5th ed. (1953).

FN136 [1967] 1 A.C. 259.

FN137 [1965] A.C. 75; [1964] 2 W.L.R. 1231; [1964] 2 All E.R. 348 H.L.(Sc.).

FN138 [1965] A.C. 75, 128, 129.

These authorities, therefore, can at most be of persuasive authority: see Burmah Oil Co. Ltd. v. Lord Advocate, [FN139] per Lord Reid [FN140] and Lord Radcliffe. [FN141] The writings themselves make no pretence to be stating the law of any particular country: see Grotius's Prolegomena or Introduction to De Jure Belli ac Pacis, translated (1738) by J. Barbaric, sections I, XIII XXVII, XXVIII, XLI, XLII.

FN139 [1965] A.C. 75.

FN140 Ibid. 108-9.

FN141 Ibid. 128.

The whole purpose of the passage in Grotius in De Jure Belli *679 ac Pacis at Bk. I, Ch. IV, s. XV is really just a statement, or advice, that a private individual

should not take the law into his own hands.

The works referred to, or relied upon below, included the following:- Pufendorf, De Jure Naturae et Gentium, Bk. VII, C. VIII, s. X (1744), translated by B. Kennet, D.D., with notes by M. Barbaric, 5th ed. (1749); Suarez, Tractatus De Legibus, Lib. III, Ch. X, s. 9 (1612); Victoria, De Potestate Civili N. 23; Lessius, De Justicia et de Jure, Lib. II, Ch. 29 and Dubitatio, Lib, IX, n. 73; Coccejus ad Grotius, Lib. I, Ch. IV, s. XV (1744).

In so far as Grotius, Suarez, Lessius, Victoria and Pufendorf state that the laws of a usurper are to be obeyed, it is on an implied mandate from the Sovereign, who would, it was said, probably prefer that they should be obeyed, rather than that the state should be exposed to chaos and anarchy. Lewis J. in the General Division took the view that the Governor's message to the people of Rhodesia was just such a mandate. The Governor's message, however, is incapable of bearing that interpretation.

The construction of the Governor's message

What the Governor's message called upon the judiciary to do was to perform its normal duty, i.e., to administer the law of the land and no other law. It cannot be interpreted as an instruction to give effect to measures taken under the illegal 1965 Constitution.

[LORD PEARSON. But if the law is changed what can the judge do? The old law has gone; how then are they to maintain law and order?]

Suppose a man is charged with theft under a new statute, the court's duty would be to treat the new statute as not being law.

[LORD REID. if the indictment specified the new Act, which the court says is not law, does the man go free?]

It is not for the court to give in; if the Attorney-General wishes to secure a conviction he must proceed under the old Act. If it be said that if people are to perform their normal tasks they must take orders from their superiors, since otherwise the law could not be enforced at all, the answer is that the orders to be obeyed must be lawful ones. The court's duty is to say what is law and what is not. The Governor's message cannot be read as a request to recognise proclamations of emergency by the illegal Ministers, because it would be in contravention of the Order in Council of 1965. If the courts had refused to accept prosecutions under new statutes, no taxes could have been *680 collected, and if they had refused at an early stage to enforce anything but the existing law, the illegal regime would have been forced either to return to legality or to have set up its own judiciary and courts.

The judges' duty is to administer the law, not to keep order. Even if the Governor were to be regarded as the equivalent of a Secretary of State exercising executive power on behalf of Her Majesty, he could not give directions contrary to the terms of the Order in Council. The majority of administrative acts by the regime would not raise constitutional issues. Doubtless in the many instances where some form of ministerial direction is required, such as under the Child Protection Acts, acts done without such direction would be unlawful.

[LORD REID. How can a civil servant carry on his normal tasks, if there is no one in the country who is in fact entitled to give the required ministerial direction?]

Notwithstanding the many instances where statutory provisions require such ministerial direction to be given, there is still a wide field of administrative or governmental action which requires no such direction. Although it might be difficult for a civil servant to carry out his normal tasks, the courts should have had no difficulty in guiding them as to what was lawful and what was not. The courts should not have shrunk from a strict application of the law, and possibly if they had not shrunk from doing so, the illegal regime would have been forced to alter its course.

The Order in Council suspending all further executive action in Rhodesia was similar to an Act of State, which the courts cannot question: see Secretary of State v. Sadar Rustam Khan, [FN142] per Lord Justice Atkin [FN143], Van Deventer v. Hancke and Mossop , [FN144] per Innes C.J, [FN145] who quotes Lord Kingsdown in Secretary of State in Council of India v. Kamachee Boye Sahaba. [FN146] The question whether the Sovereign's actions were politic or impolitic, just or unjust may not be enquired into.

FN142 [1941] A.C. 356; [1941] 2 All E.R. 606; [1941] 68 I.A. 109; [1941] A.I.R. 64, P.C.

FN143 [1941] A.C. 356, 369.

FN144 [1903] T.S. 401.

FN145 Ibid.

FN146 13 Moo.P.C.C. 22.

It is for the Sovereign to take what executive action seems necessary and if, for two and a half years, Her Majesty decides to take no action, that is a matter within Her Majesty's discretion. The Governor's message makes clear that the Ministers are no longer recognised, and calls upon the judiciary, the armed services, the police and the public service to carry on with their normal *681 tasks. The normal task of the judiciary is to administer the law not to stretch it. The police no doubt have a very difficult path to tread in order to do their work without recognizing illegal authorities, and if they are guilty of lapses that is excusable, but for the judiciary there is no excuse. Although the wording of the Governor's message may be open to criticism, the courts could not have been misled. If it be said that one cannot place the judiciary in a separate compartment, that the police, the armed services, and the civil servants always act subject to ministerial control, and that they cannot perform their normal tasks without taking orders, the answer is that the Governor's message cannot be read as meaning that the judiciary also were to assist by enforcing such laws as the rebel government might pass, since that would be in plain conflict with the terms of the Order in Council.

Under English law the executive has no power to direct the judiciary what law is to be applied. If the Governor's message could be construed as a call to enforce the rebel government's laws, it was the courts' duty to ignore it. The judiciary are the

watchdogs of the Constitution. They are expected to know the law and to apply it. They cannot rely upon a possible ambiguity in the Governor's message.

The doctrine of necessity.

The doctrine was referred to in both courts below. The doctrine is well recognised in Roman-Dutch law and is often applied. The statement by Kotze J. in White & Tucker v. Rudolph [FN147] which was cited by Fieldsend A.J.A. is adopted as an accurate statement of the law. It is only the latter's application of the principle to the facts of this case that is contested.

FN147 (1879) Kotze 115, 124 (S.Afr.).

The doctrine appears to be the same in English law also, as is shown by the judgments in Burmah Oil Co. Ltd. v. Lord Advocate, [FN148] per Lord Reid, [FN149] per Lord Pearce [FN150] and per Lord Radcliffe, dissenting. [FN151] Necessity entitles the Sovereign in time of war to exercise power equally over the person or the property of a subject: see Krohn v. The Minister of Defence of the Union of South Africa, [FN152] per De Villiers J.A. [FN153]where he cites the judgment of Solomon J. in Reg. v. Bekker: Reg. v. Naude. [FN154]The passage there cited is the classical view of "necessity" in law, *682 namely that it is a doctrine put in force when the maxim "salus reipublicae extrema lex" applies. The doctrine therefore is used to protect the Constitution of the Sovereign state, not to assist those who seek to destroy it. Here, the respondents would be excluded from its benefit. Here the Constitution itself provides for the proclamation of states of emergency in times of war or other periods of emergency, as defined in section 72 (2). So it is questionable whether the doctrine of necessity can be invoked when the Constitution itself makes provision for periods of emergency.

FN148 [1965] A.C. 75.

FN149 Ibid. 75, 106.

FN150 Ibid. 75, 140, 150-1, 158, 159.

FN151 Ibid. 75, 115.

FN152 [1915] A.D. 191 (S.Afr.).

FN153 Ibid. 210.

FN154 [1900] 17 S.C. 340, 355 (S.Afr.).

The high-water mark of the doctrine is Attorney-General for the Republic v.

Mustafa Ibrahim of Charnel In that case, owing to the immutable nature of the constitution of Cyprusand the political secession of the Turkish members of the judiciary and of the legislature, neither the courts nor Parliament had been able to function. The Greek members of Parliament took upon themselves to pass a "law" setting up a new Supreme Court with no racial quorum, such as had been provided for by the Constitution. The new court took office and was staffed by Greek judges only. It was contended that the "law," being unconstitutional, was a nullity, but all three judges held that the "law " should be read into the Constitution, by applying the doctrine of necessity, and that the new court was duly constituted.

Fieldsend A.J.A. attempted to state the doctrine, as applied in that case, [FN155] with its stringent limitations, as follows: (a) the necessity may be invoked only by the lawful organs of government; (b) the onus is on the authority invoking the doctrine to prove an imperative and unavoidable necessity to act outside the ordinary law; (c) the measure taken must be shown to be proportionate to the necessity and no more; and (d) the measure taken must be of a temporary character.

FN155 [1964] 3 Supreme Court of Cyprus 1.

That statement of the rule is adopted. No act by the illegal regime can satisfy those requirements. Not only was the 1961 Constitution functioning properly on November 11, 1965, but there could be no necessity to deviate from it. The respondents in the courts below shrunk from arguing that the judges themselves were operating under the stress of necessity. It is for the litigant to account for something illegal, not for the judges to deviate from the law.

The doctrine, if invoked, must be invoked by one seeking justification for action otherwise unlawful. If it is invoked by a *683 private individual, i.e., as an excuse for tort, the principle is that no one can rely upon necessity stemming from his own fault: see Southport Corporation v. Esso Petroleum Co. Ltd. [FN156]Here the onus is on the respondents to show what necessity there was for not applying the ordinary law. They cannot say that it was due to the absence of any other government, since they themselves were responsible for the break-down of normal government.

FN156 [1954] 2 Q.B. 182; [1954] 3 W.L.R. 200; [1954] 2 All E.R. 561, C.A.

The only necessity which could press upon the court would be in order to avoid a situation where, if the measures of the regime were invalidated, there would be nothing to take their place The argument that there would be a vacuum unless the regime's measures were enforced is untenable since, while there would be gaps in the statutes, such as taxing statutes, the bulk of the Statute Book would still remain, and there could be no question of chaos. It is not for the courts to fill gaps in the law, particularly when its duty is to enforce a written Constitution with entrenched rights and more particularly when the lawful Sovereign still claims the power and jurisdiction to legislate. It is not for the court to govern, nor is it its duty to assess whether or not the revolution has been successful. Its function is to administer the law and to attempt to curb the illegal acts of the rebel regime. It must either apply the law or capitulate. It cannot accept what it knows is not law on the pretext of necessity.

In any event there was no proof of the necessity for the proclamation of a state

of emergency or for the detention of the appellant's husband, other than the ipse dixit of Mr. Dupont. Even a lawful Sovereign must prove the necessity, except in case of war, and there is no basis on which the ipse dixit of Mr. Dupont, who is not a sovereign, can be accepted. Although Fieldsend A.J.A. was prepared to accept the necessity for the proclamation, he was not prepared to hold that the particular detention regulations were warranted. It may well be that a private individual can, in certain cases, invoke the doctrine, but he must nevertheless, prove the case strictly and the respondents in this regard can be in no better position than that of private individuals.

Allegiance

Macdonald J.A. dealt with allegiance at length in his judgment, taking a view as to it which was followed by Quenet J.P., but not by the other judges. His conclusions were that in English law when the lawful Sovereign can no longer give protection he forfeits *684 the right to allegiance; that allegiance is owed to the de facto monarch of a country, that the present regime in Rhodesia is a de facto government of the country, and that the regime is therefore entitled to his allegiance. He cites Calvin'scase, [FN157] stating that it is because allegiance is based upon actual protection as opposed to the theoretical right to protect, that English law demands obedience to the laws of a de facto Sovereign. On his view the phrase "Sovereign for the time being" in the Statute of Treason, 1495, means a de facto ruler; so that since Mr. Dupont is in actual physical power in Rhodesia at the moment, he is equivalent to a Sovereign.

FN157 7 Co.Rep. 1(a).

Macdonald J.A. pointed out that in section 30 of the Interpretation Act, 1889, the same phrase "Sovereign for the time being" is found and that it is inconceivable that the Legislature would not have been fully aware of the ancient origin and constitutional significance of the formula, and inconceivable that the formula would have been used in the above provision, if it were intended to bear an entirely different meaning to that which it had borne since 1495. But it was used in a different sense. Macdonald J.A. concluded that prior to U.D.I. the inhabitants of Rhodesia had a dual allegiance. But that doctrine is one that is unknown to British constitutional law and, while it may be true that in the Dominions British subjects owe a divided allegiance to Her Majesty, nevertheless in Rhodesia, which is a colony, allegiance is owed to "The Queen of the United Kingdom and Colonies." According to Macdonald J.A. the meaning of the Statute of Treason, 1495, is that where there is a de facto government, the duty of allegiance owed to such de facto government extends even to service in the armed forces against British forces, if invasion were to be contemplated. This is entirely contrary to the Board's decision in De Jager v. Attorney-General of Natal. [FN158]Macdonald J.A. seems to suggest that immediately the revolution took place the allegiance of the inhabitants of Rhodesia switched to the rebel regime. He holds that Her Majesty failed to take what would have been the appropriate political counter stroke of appointing Ministers to replace those dismissed, and instead took action which in his view was unconstitutional, in that it was in breach of convention. The conclusions reached by Quenet J.P. really amount to a capitulation in the face of force and need no further consideration, but those of Macdonald J.A. are put on an elaborate legal basis The foundation of his conclusions is the concept that protection and allegiance *685 are reciprocal duties (Calvin's case [FN159], constituting a double and reciprocal bond

(regere et protegere, duplex ligamen).

FN158 [1907] A.C. 326, P.C.

FN159 7 Co.Rep. 1 (a).

Macdonald J.A., also relied upon a dictum of Lord Russell of Killowen in Carrick v. Hancock [FN160] as showing that if the power to give protection does not exist, the duty of allegiance ceases, but there are weighty authorities to the contrary. Protection has not in fact been withdrawn from the inhabitants of Rhodesia, and consequently there could be no basis for Macdonald J.A.'s conclusion that the duty of allegiance having ceased he was not bound to apply United Kingdom statutes. There is nothing to equate protection with armed military force and there is no reason to suppose that Britain would not protect Rhodesia from foreign invasion. In De Jager v. Attorney-General of Natal, [FN161] a citizen of the South African Republic resident in Natal, joined the Boer forces during their six months occupation of the northern part of Natal, and when recaptured he was tried for high treason. Although protection was thus temporarily withdrawn, it was held that his duty of allegiance did not cease, and he was convicted: see per Lord Loreburn L.C. [FN162] Macdonald J.A. sought to distinguish De Jager v. Attorney-General of Natal, [FN163] on the basis that protection had only temporarily been withdrawn. The true test is whether or not the lawful Sovereign is attempting to reassert Her authority.

FN160 (1895) 12 T.L.R. 59 , D.C.

FN161 [1907] A.C. 326.

FN162 Ibid. 328.

FN163 [1907] A.C. 326.

There is ample authority that the allegiance originally owed by a British subject to the Sovereign cannot be thrown off except with the Sovereign's consent: see Blackstone Commentaries on the Laws of England, Vol. 1, 17th ed. (1830), p. 369. Apart from the provisions of certain Nationality Acts, that rule is clear.

[Lord Reid: Does Blackstone explain what happened in 1688? Natural allegiance was owed to James II and could not be thrown off. I do not follow it at all.]

The theory accepted by Blackstone was that James II abdicated. In accordance with practice a new commission was issued to every judge, so that for those who accepted, there was no conflict. Blackstone states that the natural-born subject of one prince to whom he owes allegiance may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits *686 and difficulties, of owing service to two masters. The difficulty [FN164] which Blackstone referred to, arose in Rex v. Neumann [FN165] where a German living in South Africa, who served with the South African forces, and was captured by the Italians, fought thereafter against South Africa and was held not to have thrown off

his allegiance by leaving the protection of South Africa, since even after leaving South Africa he could still have enjoyed its protection. That case [FN166] was referred to in Public Prosecutor v. Oie Hee Koi, [FN167]where it is stated that the continuance of allegiance may be shown in a variety of ways, and that it is to be determined as a matter of evidence. In Rex v. Neumann [FN168] Neumann had taken an oath of allegiance to His Majesty King George VI before leaving the Union of South Africa. In In re Stepney Election Petition, Isaacson v. Durant, [FN169] Lord Coleridge C.J., distinguishing Auchmuty v. Mulcaster, [FN170]states that allegiance cannot be got rid of, except by a treaty, to which the Crown is a party, by which the Crown's claim to allegiance is relinquished. In Murray v. Parkes, [FN171]a case where a person born in Eire who had resided in England since 1934, was held liable for National Service, Humphreys J. said that the only other way in which a natural born British subject would lose his British nationality was by loss of territory by the British Crown by cession, which would involve the loss of the right to allegiance. So it is not enough to attempt to secede: see also Joyce v. Director of Public Prosecutions, [FN172] per Lord Jowitt L.C. [FN173] Macdonald J.A.'s approach flies in the face of these authorities.

FN164 Reporter's note. In the paragraph referred to Blackstone was speaking of a natural-born subject. In the next paragraph, Blackstone says that "local allegiance is such as is due from an alien, or strange born, for so long as he continues within the King's Dominions and protection, and it ceases the instant such stranger transfers himself from this Kingdom to another."

FN165 [1949] 3 S.A. 1238.

FN166 [1949] 3 S.A. 1238.

FN167 [1968] A.C. 829, 859; [1968] 2 W.L.R. 715; [1968] 1 All E.R. 419, P.C.

FN168 [1949] 3 S.A.

FN169 (1886) 17 Q.B.D. 54, 61.

FN170 (1826) 5 B. & C. 771.

FN171 [1942] 2 K.B. 123; [1942] 1 All E.R. 558, D.C.

FN172 [1946] A.C. 347; [1946] 1 All E.R. 186, H.L.(E.).

FN173 [1946] A.C. 347, 366.

The manner in which the Sovereign chooses to afford protection is within the Sovereign's own discretion: see China Navigation Co. Ltd. v. Attorney- General [FN174]; per Scrutton L.J. [FN175] and Lawrence L.J. [FN176]; Attorney- General v.

Tomline [FN177]; and Chandler v. Directorof Public Prosecutions *687 [FN178] per Lord Reid [FN179] and per Lord Pearce. [FN180]There is no basis for the suggestion that the Queen, having withdrawn her protection, had lost her claim on his allegiance.

FN174 [1932] 2 K.B. 197.

FN175 Ibid. 218.

FN176 Ibid. 222.

FN177 (1880) 14 Ch.D. 58.

FN178 [1964] A.C. 763; [1962] 3 W.L.R. 694; [1966] 3 All E.R. 142, C.C.A. and H.L.(E.) .

FN179 [1964] A.C. 763, 791.

FN180 Ibid. 814.

Macdonald J.A. referred to Halsbury's Laws of England, 3rd ed. Vol. I (1952), p. 529 where Rex v. Francis, Ex parte Markwald [FN181] and Markwald v. Attorney-General [FN182] were cited in support. He held that after November 11, 1965, a conflict of allegiance arose, in which allegiance to Her Majesty as "Queen of the United Kingdom and Colonies" had to yield. This conclusion is not permissible.

FN181 [1918] 1 K.B. 617.

FN182 [1920] 1 Ch. 348.

There is no doubt whatever, that the British Nationality Act, 1948, places Southern Rhodesia in an unprecedented position, since while remaining a Colony it is treated similarly to the Dominions. The Act places Southern Rhodesia, for the first time, in a position to provide for Southern Rhodesia citizenship, for the purposes of the Act, and "for the purposes of the Act" in the definition section (s. 32 (1)) references to "colony" are to exclude Southern Rhodesia. The Act provides no answer to the question whether a citizen was to owe allegiance to the "Queen of Rhodesia" or to the "Queen of the United Kingdom and Colonies". There cannot be any doubt that in Canada, Australia, New Zealand and the other Dominions the Queen has a separate legal and political capacity as Queen of Canada, Australia, New Zealand, etc., but it would be a complete misunderstanding of the British Nationality Act 1948, to read it, as, by implication, extending the effect of the Statute of Westminster, 1931, so as to create a new and separate allegiance, and as endowing the Queen with a new status. Section 3 (1) means only that if a citizen of Southern Rhodesia commits treason in Southern Rhodesia it is not to be considered as an offence against the

laws of the United Kingdom and Colonies, as defined, but that is not to stop it being treason in Southern Rhodesia. It does not deal with dual citizenship.

The Act cannot be read as turning Southern Rhodesia into anything other than a Colony. No doubt Southern Rhodesia was very far advanced along the road to independence, in November 1965, but it had not yet achieved it. The British Nationality Act, 1948, whatever its effect was, did not change the person to whom allegiance was owed.

In exercise of the power granted by the Act, the Legislative *688 Assembly passed the Southern Rhodesia Citizenship Act 1963, (No. 63 of 1963), providing for Southern Rhodesian citizenship. Section 17 of that Act allows a citizen to make a declaration renouncing his citizenship. The form of oath of allegiance does not indicate any change in the Sovereign capacity of Her Majesty. In any event the 1961 Constitution, which is of later date than the British Nationality Act 1948, makes it perfectly clear that Sovereignty rests in Her Majesty as "Queen of the United Kingdom and Colonies": see section 117 (8) of the Constitution, and the Interpretation Act, 1889, s. 30. There is therefore no such concept as the "Queen of Rhodesia," and no dual allegiance. The Legislative Assembly could not change the identity of the Sovereign.

Lord Denning M.R. in Reg. v. Secretary of State for Home Department, Ex parte Bhurosah [FN183] said "In Mauritius the Queen is Queen of Mauritius and the Government is the Queen's Government of Mauritius". [FN184] The Government of Mauritius was the Queen's Government of Mauritius, and if Lord Denning M.R. merely intended to state that Her Majesty was a part of that Government the statement is unobjectionable, but if he meant that she had the capacity as "Queen of Mauritius" independent of her capacity as "Queen of the United Kingdom and Colonies," he was wrong.

FN183 [1968] 1 Q.B. 266, 284; [1967] 3 W.L.R. 1259; [1967] 3 All E.R. 831, D.C. and C.A.

FN184 [1968] 1 Q.B. 266, 284.

The Statute of Treason 1495.

The Statute of Treason, 1495, was passed at the end of the Wars of the Roses, and its object appears to have been to cast a veil over the past, but there are those who think that it was intended to apply to the future so that faithful service to the King should not be classed as treason, if it were subsequently found that he was not the King. Statements by Hale, Hawkins, East and Foster were examined by Macdonald J.A. who concluded that "obedience to the Sovereign Lord for the time being" was to be interpreted as obedience to Mr. Dupont, or at least to the Government represented by him. No Sovereign other than Queen Elizabeth II is in possession of the throne, or claims to be Queen of England, and whatever else it may mean, it must refer to England only, and not to a particular part of Her Majesty's Dominions, particularly not while she is still asserting Her authority.

If and in so far as it applies, its application is to servants, and *689 it does not deal with a rebel in opposition who does not claim legitimacy for himself. It is intended to deal with the case where the right to the throne is uncertain, and it is

to protect those who have obeyed "A Sovereign in possession", but here there is no uncertainty as to the rightful Sovereign, as there might well have been in the 15th century. Furthermore, it does not protect one who owes allegiance to the lawful Sovereign, but who breaks that allegiance to serve another. Macdonald J.A. does not refer to the proviso which states that "No person ... shall take any benefit ... by this Act which shall thereafter decline from his ... allegiance."

On its face the Statute does not deal with the question who is the lawful Sovereign, it simply provides a specific defence to a specific charge of treason. As an Act of Parliament, it must yield to later Acts, including the Act of Settlement, 1700, and the Promissory Oaths Act of 1868. In any case its effect would be overridden by the Southern Rhodesia Act of 1965. [Reference was then made to Hale's History of the Pleas of the Crown, Vol. I, paras. 60, 100, 101, 104, 272; Hawkins' Treatise of the Pleas of the Crown, 8th ed. (1824), Bk. I, Ch. 17, ss. 11 to 18, 87, 88; East, Pleas of the Crown (1803), Vol. I, pp. 54, 55; Blackstone Commentaries on the Laws of England, 15th ed., Vol. 4, pp. 76, 83-4 and Vol. I, p. 220.]

The principle which seems to be established by the Statute was that an individual citizen who was called upon to perform services for a usurper, committed no wrong in so doing. What Blackstone says is, that, if the Pretender, James III, had succeeded, those who had obeyed the Sovereign in possession for the time being would have been guilty of treason, and it was not for them to say which was King, and which not. But that principle could not be applied to judges whose duty it is to say what the law is. It is really only an example of duress as a defence to a criminal charge. Sir William Holdsworth, in his History of English Law, Vol. 3, p. 468, summed up the position accurately when he said that "a Statute was needed to show that faithful service to a reigning King was no treason to a successful claimant to the throne."

There is no reported instance of use being made of the Statute by anyone charged with treason.

Examination of a number of cases [FN185] dealing with adherence *690 to the Young Pretender are contained in Vol. 18 of the State Trials, but the Statute does not appear to have been pleaded as a defence, successfully or otherwise. In The Trial of John Cook [FN186] the court dealt with the Statute saying that it was intended to preserve the King's Government, not to preserve anti-monarchical governments. The judgments in the trials of the regicides, cannot be regarded as of great persuasive authority, but, Hawkins refers to the Trial of Sir Henry Vane, [FN187] where the court held that from the execution of Charles I, Charles II was both de facto and de jure King, no-one else having exercised Sovereign power of the type known to English law. Persons during the Protector's time were made to take an oath of allegiance to Parliament without either King or House of Lords, therefore Charles II was not recognised, but no steps were taken to depose him. In l660 legislation was passed validating certain of the Commonwealth measures and nullifying others. Emlyn in the preface to Sir Matthew Hale's Pleas of the Crown, records the attitude adopted by Hale C.J., "that truly learned and worthy judge," when asked by Oliver Cromwell to become one of his judges. Hale C.J. refused at first, but on being pressed to give his reasons, stated that "he was not satisfied with the lawfulness of his [Cromwell's] authority and therefore scrupled the accepting of any commission under it, to which Cromwell replied that since he had got possession of the Government he was resolved to keep it" stating that while it was "his desire to rule according to the laws of the land ... yet if they would not permit him to govern by red gowns he was resolved to govern by red coats. " Hale eventually accepted a commission in the Common Pleas, but having held a commission under Charles I, after the first two or three circuits "he absolutely refused to sit on the Crown side thinking it the safer course in so dubious a case." Macdonald J.A. was wrong in holding that by virtue of

the Statute of Treason, 1495, allegiance was lawfully transferred to an usurper.

FN185 Reporter's note. The cases examined appear to have been Rex v. MacGrowther (1746) 18 state Trials 391: Rex v. Kin loch (1746) 18 state Trials 395; and Rex v. MacDonald (1747) 18 State Trials 858.

FN186 (1660) 5 State Trials 1077.

FN187 (1662) 6 State Trials 119.

Sir Ivor Jennings in Constitutional Problems in Pakistan, 1st. ed. (1957), pp. 79, 259, 278, 295, deals with Federation of Pakistan v. Moulvi Tamizuddin Khan (Constitutional Civil Appeal No. 1 of 1955), [FN188] where the Governor- General had dissolved the Constituent Assembly and, there being then no legislative body, passed certain temporary laws, and it was held that he had acted in order to avert an impending disaster and to preserve the State and society *691 from dissolution: see Special Reference No. 1 of 1955. [FN189] This case [FN190] started with the proposition that the Constituent Assembly had been dissolved, and stated the results of the earlier case. [FN191] A similar case is Rex v. Stratton and Others [FN192] where Lord Mansfield held that an act which would otherwise have been illegal became legal if done bona fide under the stress of necessity to preserve the Constitution, the state, or society from dissolution. [Reference was made to Sabally and N'Jie v. H.M. Attorney-General , [FN193] perLord Denning M.R. [FN194] and to Attorney-General for the Republic v. Mystify Ibrahim of Kyrenia. [FN195]]

FN188 [1955] 1 F.C.R. 155.

FN189 [1955] 1 F.C.R. 439.

FN190 [1955] 1 F.C.R. 439.

FN191 [1955] 1 F.C.R. 155.

FN192 (1779) 21 State Trials 1045.

FN193 [1965] 1 Q.B. 273; [1964] 3 W.L.R. 732; [1964] 3 All E.R. 377; C.A.

FN194 [1965] 1 Q.B. 293.

FN195 [1964] 3 Supreme Court of Cyprus 1.

The respondents cannot point to any necessity equivalent to that existing in either Pakistan or Cyprus. The judges in the courts below should not have shrunk

from bringing about a situation where many acts of the illegal regime would have been invalid, even if gaps were thus left. The probable consequences have been exaggerated and the common law still exists, which can deal with them. Even if Her Majesty's Government were to fail to fill the gap, by legislative action, most of the ordinary functions of government could still be continued. The Criminal Procedure and Evidence Act, 1939, would still remain, and the Attorney-General, not being a Minister who has been dismissed, could still prosecute. Further, the Governor has power to appoint an Attorney- General.

For these reasons the Board should declare that the Appellate Division's determination was wrong, and the detention of the appellant's husband illegal.

1968, June12. L. J. Blom-Cooper following. Two reasons advanced by Beadle C.J. for enforcing certain of the legislative and administrative acts of the rebel regime were that the regime had acquired de facto status in international law, and that the court was in the position similar to that of Her Majesty's courts in the Channel Islands under German occupation during the War.

But Rhodesia has not acquired anything like de facto status in international law. In modern international law criteria, a regime which does not conform to certain minimum standards of human rights is not in "effective control," so as to entitle it to recognition. The regime in Southern Rhodesia does not conform to those standards, and it is thus not in effective control, as evidenced by *692 the absence of recognition by any other state in the international community. In any case it is not possible for the court to inquire into the status of an illegal regime within the court's own territory. The rebel regime does not enjoy Sovereign status in the eyes of Her Majesty's Government, and therefore there is no ground upon which Her Majesty's courts would accord to it the status which they would be bound to accord to a foreign Sovereign during time of war, when under belligerent occupation. In Quin and Others v. The King, [FN196] the Royal Court of Guernsey did no more than apply the rules of international law, as reflected in the Hague Regulations of 1907. Insurgents would not acquire de facto status against their own Sovereign.

FN196 Unreported. P.C. No. 10 of 1952.

The courts of the Sovereign must uphold the Constitution; the question of recognition is for the lawful Sovereign; it is not for the court to determine where true Sovereignty lies. The Hague Regulations were merely declaratory of the pre-existing international law and therefore, even before 1907, the position would have been the same. Under Article 45 of the Hague Regulations it is the duty of the occupying power to maintain law and order. They may alter the laws, but only so far as is necessary. [Reference was made to Oppenheim's International Law, 7th ed. (1952), Vol. 2, paras. 169, 172, and to Rex v. Maung Hmin. [FN197]] The analogy drawn by Beadle C.J. between Rhodesia after U.D.I. and the Channel Islands during the German occupation after 1940 is fallacious.

FN197 [1946] Annual Digest and Reports of Public International Law cases (edited by H. Lauterpacht, K.C., LL.D., F.B.A.) (1951) Case No. 139, p. 334.

1968 June12, 13, 17. J. G. Le Quesne Q.C., Andrew Bateson and Stuart McKinnon as emcee curiae. There can be no doubt that the Constitution remains that of 1961, subject to any amendments produced by the Southern Rhodesia Act, 1965, and the Order

in Council of 1965. There is a possible doubt as to whether the Act and the Order were effective to amend the Constitution. It is not contested that the Constitution has never been lawfully abandoned or replaced. Applying the Constitution strictly, the detention of the appellant's husband is obviously invalid, since it depends on the authority of a person not authorised under the Constitution to make such an order. There can be equally little doubt that, by the letter of the Constitution, neither the so-called Parliament nor the self-styled Ministers have, since November 11, 1965, had any authority, and that none of their legislative or executive acts, since *693 that date, has had any validity at all. In the end the Board may feel obliged to take that strict view of the situation, but, on the other hand, to take that view is to acknowledge a complete divorce between the position as it is in fact and that which exists in law. It ignores the fact that since November 11, 1965, the Government of Southern Rhodesia has been completely in abeyance, since the acts of those who have been governing have been null and void, while those who, in law, had the power and the duty to govern have made no attempt whatever to do so. The great question is whether the law does compel that conclusion, or whether it allows of any escape.

As amicus curiae, the proper contention to put forward is that the approach of Fieldsend A.J.A. is the correct one; namely that the law does not compel such a conclusion, and that Fieldsend A.J.A. was right in holding that, for the sake of the maintenance of law and order and the protection of the inhabitants of the territory, the law does allow some validity to be accorded to the acts of the actual, though unlawful, Government.

No arguments will be advanced on the power of the United Kingdom Parliament to legislate for Rhodesia, either before or after November 11, 1965, and on the question of allegiance which is irrelevant, unless the Board thinks that submissions should be made.

[LORD REID. You must assist us. The question of allegiance may be of importance.]

Under section 3 (1) (c) of the Order in Council, which suspended the Legislative Assembly, Her Majesty in Council was given general power to make laws for the peace, order and good government of Southern Rhodesia, and section 2 of the Southern Rhodesia Act, 1965, conferred an additional power to make such provision as appeared to Her Majesty to be necessary or expedient in consequence of any unconstitutional action taken in Southern Rhodesia. The powers thus conferred by section 2 have been exercised in about 38 Orders, mainly concerned with sanctions, prohibiting imports, the appointment of new directors to the Reserve Bank of Rhodesia, and so on. But the general power of legislation, under section 3 (1) (c), has never been exercised at all.

Action has been taken under section 4 (1) (e), to prohibit powers of censorship being exercised by the present regime; Lord Malvern was appointed Deputy Governor during the Governor's absence; Sir Vincent Quenet J.P. was appointed acting Chief Justice, and Mr. Justice Macdonald J.A., as acting Judge President *694 during the absence of Sir Hugh Beadle C.J. The mode of exercise was by executive act by the Governor. In two instances Her Majesty has exercised the Prerogative of Mercy to reprieve those under sentence of death, once in January, 1966, and again in March 1968. Further, two international agreements - The International Wheat Agreement and The Outer Space Treaty have been signed by the Secretary of State, on behalf of Southern Rhodesia, and the Secretary of State has, in a number of cases, recognised new consular representatives of foreign powers in Salisbury. Such representatives must necessarily have dealings with the illegal Government, and with the Ministers Furthermore the British Government maintains a residual mission, a fragment of the

former High Commission.

So far as legislative action is concerned, it has become impossible for taxes to be lawfully collected, or for money to be made available for any of the processes of government. This fact is peculiar when it is recalled that the Governor called upon all public officers to remain at their posts Despite that request, no provision has been made for the payment of their salaries. The unlawful regime has been left to do that. The lawful authorities have not passed any of the ordinary annual legislation, such as Finance Acts or Appropriation Acts, but the present regime has passed a great deal of legislation, including a completely new Income Tax Act, and certain Road Traffic Acts, of a permanent nature. Some Acts have altered the nature of and penalties for certain criminal offences, and people have been, and are being, prosecuted thereunder.

[Lord Reid. If people are being detained under laws which do not exist they should be set free. We have to see how the administration of justice is affected, and what difficulties confront the judges.]

The relevance of what has happened since November 11, 1965, is that, when one remembers the Governor's direction, it is fair to infer that the lawful authorities have acquiesced in some measure of recognition being given by the police, the armed services, the civil service and the judiciary, to the acts of the unlawful authorities.

As to administrative action, section 42 of the Constitution, which provides that the executive authority is vested in Her Majesty, and may be exercised on Her behalf by the Governor, is unaffected by the repeal, by section 4 (1) (b) of the Order in Council, of other sections of the Constitution. But the executive *695 authority has been exercised so seldom by the Secretary of State, the Governor, or any other person authorised by the Governor, as to be of little more than theoretical importance, and no attempt has been made by the lawful authorities to carry on the government of the country. Executive functions of government have been carried out partly by the unlawful Ministers, and partly by the civil servants, who have simply been doing what the Governor told them to do, in his message. That shows that the lawful authorities have acquiesced in some recognition being given.

The armed services, the civil service, and the police are all under the ultimate control of Ministers. Those Ministers have been dismissed, and no new Ministers have been appointed. It must have been recognised by Her Majesty's Government that they were acting under the control of the unlawful Ministers. As to the judiciary, Beadle C.J., in his judgment, stated that while the court had never regarded the 1965 Constitution as the lawful Constitution, the judges had continued to discharge their duties, and their judgments and orders had been enforced by the officers of the present regime. Furthermore, he stated that as to "acts of everyday occurrence or perfunctory acts of administration, " the court had taken cognizance of acts of the illegal regime.

No direct attempt has been made to displace the unlawful authorities. Those are the circumstances in which the question "Is a court of law with jurisdiction in Rhodesia obliged to ignore all the legislative and administrative acts of the illegal regime which the lawful authorities have permitted to occur since November, 1965, and are they bound to hold that, in those fields, government has been in abeyance for two and a half years? " arises. The answer is "No." The clearest analogy is provided by the decisions of the United States Supreme Court after the end of the American Civil War.

The American cases.

The principle established by the American cases was that, in the circumstances with which the Supreme Court was dealing, a court of law ought to give a wide measure of recognition to the acts of an unlawful government. The principle was first established in Texas v. White [FN198]: see per Chase C.J. [FN199]It appears to have been conceded [FN200]that during the hostilities the right of the state to sue in the Supreme Court was suspended. The state's existence was not interrupted by secession, but it was not entitled *696 to sue. Chase C.J. said that so long as the war was in progress no suit could be instituted in the Supreme Court. Logically it is difficult to see how the recognition which it was said must be given for preserving order and maintaining the bonds of society could be limited to the period after the cessation of hostilities. The acts which were to be recognised were described as "acts necessary to peace and good order among citizens, such for example as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property. ... " It was further stated that acts in furtherance or support of rebellion against the United States must be regarded as void.

FN198 (1868) 7 Wallace 700 (74 U.S.).

FN199 Ibid. 732.

FN200 Ibid. 727.

In United States v. Insurance Companies, [FN201]where the question was whether the court would recognise insurance companies incorporated by the rebel states during secession, Strong J. said [FN202] that despite the throwing off by the State of Georgia of its connection with the United States, it did not follow that the state legislature "was not a legislature the acts of which were of force when they were made, and are in force now."

FN201 22 Wallace 99 (89 U.S.).

FN202 Ibid. 101.

If the propositions established in the American cases are part of the law of England, they would nevertheless have to yield to the Act of 1965. But that is not obvious with regard to the Order in Council of 1965. Section 6 of the Order merely says that for the avoidance of doubt anything done in contravention of the prohibitions or restrictions imposed by the Order is to be void and of no effect. One is therefore thrown back to section 3 (1) (a) which simply suspends the functions and existence of the Legislative Assembly, established by the 1961 Constitution. The question at issue is whether any validity can be given to acts of a body not created by the 1961 Constitution, a body with no lawful origin, but one in fact carrying out the legislative functions of government in Rhodesia. If what the Order sought to achieve was merely that the acts of such a body were to be

invalid, all that need have been said was that no recognition was to be given to any body purporting to act as a government. Section 3 of the Order deals only with the lawful Legislature, not with any other. The Order in Council does not prevent the Board giving recognition to the acts of the unlawful legislature if satisfied that there is some grounds for such recognition.

The principle is what is described as the devil's authority, to wit, necessity. During the American Civil War, litigants would *697 have had access to the United States Supreme Court, although it would have been an original jurisdiction. Tn fake the cases were not heard until after the end of the war. By contrast, in Rhodesia the rebellion is still in force, and the Board is dealing with an appellate jurisdiction. Nevertheless, if one could suppose an action being tried in the United States Supreme Court during the Civil War, there is no reason to suppose that the result would not have been the same. It would still have been the court's duty to recognise such acts as were necessary to preserve order and maintain the bonds of society, even during hostilities.

The scope of recognition granted in the American cases was very wide: see Baldy v. Hunter . [FN203] The court there speaks in general terms, subject to exceptions in the case of acts "hostile in their purpose or mode of enforcement " to the authority of the United States, or where they impaired the rights of citizens under the Constitution. Acts which could legitimately be recognised include those for the preservation of public order. That principle is frequently mentioned in other cases: see Thomas v. City of Richmond. [FN204] [Reference was made to Horn v. Lock [FN205]and Keith v. Clark. [FN206]]

FN203 64 Davis 388, 400, 401 (171 U.S.).

FN204 12 Wallace 349, 357 (79 U.S.).

FN205 17 Wallace 570, 580 (84 U.S.).

FN206 8 Otto 454 (97 U.S.).

It is important to see what meaning was given to the words "did not impair the rights of citizens under the Constitution." The United States Constitution required members of the state legislature to take an oath to support the Constitution, but despite this fact the legislation to which recognition was given was passed by those state legislatures who had all sworn allegiance to the Confederacy. No recognition which was thereby granted was held to impair the rights of citizens under the Constitution. Williams v. Bruffy [FN207] shows that the court did not mean acts were not to be recognised merely because some person who was required to have certain qualifications did not in fact possess those qualifications. This is important when one tries to apply what was decided by the American cases to what is in fact happening in Rhodesia today.

FN207 6 Otto 176 (96 U.S.).

The principle of these cases is that certain steps are necessary to preserve order

and to maintain the bonds of society. The next step in the argument is that, if there is no lawful authority to take those steps, then it is essential to recognise such necessary steps as have been taken by the unlawful authority. That was how Fieldsend A.J.A. put it.

*698 That the necessity of recognizing certain acts was the basic underlying principle is also demonstrated by such cases as First National Bank of Washington v. Texas, [FN208] Keith v. Clark, [FN209] and Sprott v. United States. [FN210]It is an application of the rule of necessity as a justification for something which has been done which is not in accordance with law. When judging whether the act in question was necessary, the United States Supreme Court simply accepted the situation as it was at the relevant time. It was necessary that the acts of the state governments, as the only governments in existence, should be recognised. The fact that the unlawful government had driven out the lawful one or that it could have returned to legality was disregarded It clearly arose out of the idea that it was necessary to preserve order and th bonds of society, even during the Civil War: see Horn v. Lockhart . [FN211]

FN208 (1873) 20 Wallace 72, 75 (87 U.S.).

FN209 7 Otto 454, 477 (97 U.S.).

FN210 (1874) 20 Wallace 459, 464 (87 U.S.).

FN211 17 Wallace 570, 580 (84 U.S.).

A few English cases, admittedly dealing with circumstances remote from the present case, do show that in circumstances of public violence, riot, or rebellion, necessity has been regarded as justifying acts otherwise unlawful whether done by the Crown or by private citizens: see Burmah Oil Co. Ltd. v. Lord Advocate, [FN212] per Lord Pearce. [FN213] It also established that necessity is the only justification for the establishment of martial law. Martial law, if proclaimed, does not depend for its validity upon the proclamation, but on the necessity which occasioned it: see Tilonko v. Attorney-General of the Colony of Natal, [FN214] per Lord Halsbury L.C., [FN215] and Krohn v. Minister for Defence of the Union of South Africa, [FN216] per De Villiers C.J. [FN217]

FN212 [1965] A.C. 75, H.L.(Sc.).

FN213 Ibid. 143.

FN214 [1907] A.C. 93.

FN215 Ibid. 94.

FN216 [1915] A.D. 191 (S.Afr.).

FN217 Ibid. 209, 210.

Rex v. Stratton and Others [FN218] shows that the doctrine of necessity is applicable in circumstances quite different from war or riot. Lord Mansfield applied it in a manner which gave protection to individuals for acts which otherwise would have been unlawful. [Reference was also made to Reg v. Dudley and Stephens [FN219]and Phillips v. Eyre. [FN220]]

FN218 21 State Trials 1045.

FN219 (1884) 14 Q.B.D. 273, 285, D.C

FN220 (1870) 6 Q.B. 1, D.C.

There are no other English authorities, but there are two important cases, one in Pakistan, i.e., Special Reference No. 1 of 1955, [FN221] and one in Cyprus, i.e., Attorney-General for the Republic *699 v. Mustafa Ibrahim of Kyrenia . [FN222] While it is true that in the Cyprus decisional the judges were sitting under the new law which created the court, the value of the decision whatever it may be, is not affected by that fact.

FN221 [1955] 1 F.C.R. 439

FN222 [1964] 3 Supreme Court of Cyprus 1.

Sir Muhammad Munir C.J. did not say in the Pakistan case, [FN223] that the action was taken "in defence of the Constitution," but rather under necessity, in defence of the state and sovereignty. Although the action was taken by the lawfully appointed Governor-General the terms of his office did not authorise him to act as he did, and since he was doing something outside the scope of his constitutional powers, he was virtually in the position of a private individual: see Rex v. Stratton, [FN224] per Lord Mansfield. [FN225] That case and the American cases show that the principle applies not only for the benefit of the lawful authorities but of anyone who is in actual control.

FN223 [1955] 1 F.C.R. 439.

FN224 21 State Trials, 1045.

FN225 Ibid. 1224.

[LORD REID. There are two quite different situations. The first is where there is

no one who can put the state on its feet again in a lawful manner, and someone has therefore to come in to put things straight. The other is where you have an invader or usurper, who ought not to be there at all.]

In both cases no lawful action can be taken to meet the situation. The fact that in one case the person acting had lawful authority to do other acts does not affect the principle. The courts are justified in co-operating with the usurping government to the extent necessary by recognizing certain measures. The court must consider on each occasion whether to recognise the act in question. Applying the rules laid down in Baldy v. Hunter [FN226]it means that the acts of the present Rhodesian Legislature should be respected provided that they are not hostile in their purpose or mode of enforcement to the authority of the United Kingdom, and provided that they do not impair the rights of citizens. The question will always arise whether the particular act is so much in aid of the rebellion that it cannot be recognised: see Thomas v. City of Richmond. [FN227]Acts of the Confederate States were regarded as lawful in the same way as were the acts of the British occupying authorities in United States v. Rice. [FN228]

FN226 64 Davis 388, 401 (171 U.S.).

FN227 12 Wallace 349, 353 (79 U.S.).

FN228 (1819) 4 Wheaton 246 (17 U.S.).

The principles to be applied would not have been different in February, 1966, from those to be applied at a later date, but of *700 course the difficulty of proving the necessity would have been increased.

There is no indication that the United States Supreme Court relied upon the circumstance that each of the separate states had its own sovereignty, and not simply on the fact that there was no other effective government within territories concerned. The consequences would have been the same whether the territories had, before the illegality, been independent sovereign states or had been dependent. In either case the same necessity would have existed to preserve law and order.

The argument that the American cases are all based on hardship, and are therefore distinguishable from the present case, is not really tenable. It was said that the cases were all decided after the Civil War had ended, when people had been living with no lawful government in existence for four and a half years, and that it would have been inequitable not to recognise measures affecting the ordinary transactions of civilized society. But in Rhodesia, although the period of time may not be so long, it is nevertheless considerable, and the hardship would be equally great. There is, in fact, no lawful government in existence in Rhodesia, since the lawful authorities have, for over two and a half years, made no attempt whatever to govern. This circumstance renders the situations comparable.

That the United States Supreme Court in every case acted in favour of private rights and never "in favour of the rebel governments" is true in the sense that in no case was a rebel government ever a successful party to the proceedings, but the phrase "in favour of the rebel government" requires careful study. The concept that it was acting "in favour of one party or the other" is inappropriate. The underlying principle is the necessity to preserve law and order. Subject to the principle that

it must not be actually in aid of the opposition power, it is immaterial in whose interest recognition is given.

There was a limit to the extent to which the court would go in ignoring everything which the Confederacy had done: see Thorington v. Smith, [FN229] per Chase C.J. [FN230]A contract for the sale of land in Alabama during the War was said to be illegal because the consideration was Confederate money, but that contention was rejected. Thorington v. Smith, [FN231] was referred to in Williams v. Bruffy [FN232] where a statute of the Confederacy which purported to *701 sequestrate estates was enforced as one which the state government had allowed the Confederate Parliament to pass.

FN229 (1868) 8 Wallace 1 (75 U.S.).

FN230 Ibid. 6, 9.

FN231 8 Wallace 1 (75 U.S.).

FN232 6 Otto 176 (96 U.S.).

The distinction between Confederate acts and state acts is most clearly stated in Sprott v. United States. [FN233] The position of the present regime in Rhodesia can be distinguished from that of the Confederacy, since like the seceding states and unlike the Confederacy, it is maintaining the pre-existing laws and organisations in the same manner as the lawful authorities did before U.D.I. The distinction between acts of the Confederacy and acts of the states is no ground for refusing to apply the American decisions.

FN233 20 Wallace 459, 464 (87 U.S.).

A possible explanation of the statement by Chase C.J. in Texas v. White, [FN234]that the court would not entertain any suit in which Texas was the plaintiff, is that it is similar to the rule of common law whereby no enemy alien can sue in an English court in time of war: see Porter v. Freudenberg. [FN235] Chase C.J. was not dealing, [FN236] in the passage referred to, with substantive rights but with procedural matters.

FN234 7 Wallace 700, 709, 727 (74 U.S.).

FN235 [1915] 1 K.B. 857, C.A.

FN236 7 Wallace 709, 727.

Mr. Kentridge argued that the American authorities applied only to acts within the ordinary criminal law, and did not enable usurpers to take measures which they

considered necessary for the preservation of law and order. But there can be no doubt that the principle applied by the United States Supreme Court did extend to legislation relating to crime, subject to the usual exception as to acts hostile to the United States: see Baldy v. Hunter, [FN237]and United States v. Insurance Companies. [FN238]If the object is to preserve law and order it is essential to recognise acts necessary for that purpose, otherwise the object will not be achieved. Any act necessary for the preservation of law and order should be recognised provided the necessity for the acts is established.

FN237 64 Davis 388, 401 (171 U.S.).

FN238 22 Wallace 99 (89 U.S.).

It was said that Ogden v. Folliot [FN239] and Dolder v. Lord Huntingfield [FN240] established that in English law no recognition can be given to any act of an illegal regime, but what was in issue in Ogden v. Folliot [FN241] was legislation by the State of New York confiscating the property of loyalists, and the court held that the rebel regime had no authority to make laws at all. The question *702 whether recognition should be given to certain acts, even though unlawful was never considered, the act in question was not necessary for the preservation of law and order.

FN239 3 Term Rep. (Durnford & East) 726.

FN240 11 Ves.Jun. 283.

FN241 3 Term Rep. (Durnford & East) 726.

Barclay v. Russell , [FN242] shows that there can be no question of a court of this country enforcing the confiscatory laws of another country. Dolder v. Lord Huntingfield [FN243] similarly turned on the principle that the English law of trusts could not be affected by a Maryland Statute.

FN242 (1797) 3 Ves.Jun. 423.

FN243 11 Ves.Jun. 283.

Van Deventer v. Hancke and Mossop [FN244] is authority for the proposition that no recognition can be given by an English court to a foreign government in English territory, but it does not touch upon the position of rebellious British subjects. The argument advanced by Smuts in that case [FN245] shows that he was contending that the Boer Government ought to have been accorded de facto recognition, but Innes C.J. refused to accept that argument, and pointed out that the Act of the Crown in annexing the territory was an act the validity of which could not be enquired into. The question, essentially, concerned the Crown's dealings with a foreign state; but after annexation no recognition could be given. Here there is no question of

dealings with a foreign state, nor is recognition of a de facto government being claimed. The submission is that recognition should be given to certain acts of a government admittedly unlawful. There can be no doubt that the present regime is in effective control of Rhodesia.

FN244 [1903] T.S. 401.

FN245 [1903] T.S. 401.

The fact that the Secretary of State has given a certificate to the effect that Her Majesty's Government here does not recognise Southern Rhodesia either de facto or de jure has no application to the present situation. It adds nothing to the Order in Council.

Assuming that the American cases apply, the question of fact remains as to whether it is necessary to give effect to any of the legislative or executive acts of the present regime. Such recognition was necessary in February, 1966, and it has remained so ever since.

The circumstances in Rhodesia at the date of the proclamation of emergency, and ever since, have remained such that in the interests of law and order recognition ought to be given to certain acts of the present regime and the particular acts leading to the detention of the appellant's husband fall within the permitted limit of the acts so to be recognised. Once the proclamation of emergency is recognised the necessity for the regulations made under it and for the actual detention are not matters for the court.

*703 The necessity for the individual detention is no more a matter for the court than it would have been under the lawful government Once the law is held to be necessary, the detention of anyone thereunder should be recognised. But if the proclamation cannot be upheld, the case falls to the ground. The appeal is primarily against the determination, not against the detention. The determination should have been that although the present regime is not the lawful authority, yet if necessity is proved to the court's satisfaction recognition should be given to the proclamation and to the things done under it.

The court must form the best judgment it can as to whether the act in question was intended to or did in fact tend further to entrench the usurpation. The phrase "the ordinary orderly running of the country" means not only what is necessary for the preservation of law and order but also other ordinary functions of government, which must be carried on; but if the court thinks that the intention or effect is to entrench the usurpation, then it must be held invalid: see Texas v. White. [FN246]

FN246 7 Wallace 700 (74 U.S.).

It is necessary to show that the regulations were validly made under the powers conferred by the proclamation. Where acts can only lawfully be done by a particular person, the court can recognise acts done by others than those actually named, if necessity justifies it. There is always the reservation that no act should be recognised which impairs the just right of citizens under the Constitution. Since the present regime is the only effective government in the territory attempting to

govern, and since the lawful authorities have abandoned any attempt to do so, the acts of the regime should be recognised. The lawful authorities have made no provision for the payment of the salaries of those whom the Governor called upon to remain at their posts, so the judges have in fact been paid by the illegal regime.

As the Governor's statement was made in advance of the Order in Council there is no objection to its use for the purpose of interpreting the Order. When seeking the intention of the Minister responsible for the preparation of the Order the text of the Governor's message, which must have been more or less contemporaneously drafted, would be admissible. But the power of the court to give effect to the acts of the present regime is not put forward simply on the basis of the Governor's message. Had the Order in Council definitely said that no recognition was to be given to the acts of anyone unlawfully purporting to be the Government of *704 Rhodesia, that would have been conclusive but as the Order is ambivalent the Governor's message can be used to construe it. The Governor's message clearly contemplated that some degree of recognition should be granted. It would be impossible for the judges to remain at their posts performing their normal tasks, unless they could do so. The message is therefore evidence of what the lawful authorities intended. Other methods were to be used to bring down the regime. When it became clear to Her Majesty's Government that the judges were working under the control of illegal ministers they were still not dismissed, and no effort was made to replace them.

Before November 11, 1965, the lawful Government had repeatedly found it necessary to institute states of emergency for considerable periods. That fact affords some ground for holding that it was still necessary after U.D.I.

One other ground advanced for refusing recognition was that the Constitution itself provided a way of dealing with emergencies. But study of section 72 (2) reveals that that way would have been unworkable in the circumstances.

As to allegiance Macdonald J.A.'s view appears to spring from a misinterpretation of the Statute of Treason, 1495, as to which Beadle C.J.'s view is the correct one; namely, that adherence to a de facto Sovereign is not obligatory but is merely not to be punishable as high treason. Having reached an erroneous conclusion as to the Statute, Macdonald J.A. wrongly concluded that there was a de facto Sovereign over him. His error lay in treating Rhodesia as a separate subject for Sovereignty, not merely as a part of "the United Kingdom and Colonies."

Southern Rhodesia became a Colony in 1923. It was therefore subject to laws passed by the United Kingdom Parliament, and, although it had its own legislature, it could not pass laws repugnant to United Kingdom Acts: see the Colonial Laws Validity Act, 1865. It follows that since 1923 Southern Rhodesia has remained a part of one realm (the United Kingdom, the Colonies and Dominions), with one Sovereign at its head. Section 1 of the 1961 Constitution calls Southern Rhodesia a Colony, and such it remains. No law has been passed which could have deprived the United Kingdom Parliament of the power to revoke the 1961 Constitution. The revocation of the 1961 Constitution cannot be attacked as being illegal. The British Nationality Act, 1948, did not alter the position in the slightest degree. Between 1923 and 1948 the Statute of Westminster, 1931, *705 was passed, which created ten Sovereign States (the Dominions), but it did not apply to Southern Rhodesia, and nothing else that has been passed has changed the situation.

Section 1 of the British Nationality Act, 1948, did grant to Southern Rhodesia, in the same way as it granted to the Dominions, a power to regulate its own citizenship, and to confer the status of British subject on persons, but the conferring of this power did not affect its status as dependent, and it did not

equate Southern Rhodesia with the Dominions for any purpose other than for the purposes of the Act itself. A later Act of the United Kingdom Parliament could have taken away again the power thus granted. But in the case of the Dominions the power to regulate citizenship could not have been taken away without offending against the Statute of Westminster, 1931.

Under section 3 of the Act of 1948 English courts lose their jurisdiction, so far as relates to Southern Rhodesia, over the acts of British subjects in Southern Rhodesia, save only as to high treason. It follows that the fact that the United Kingdom saw fit to deprive itself of jurisdiction in this way did not mean that the Act conferred a new and higher status on Southern Rhodesia. For these reasons no further submissions are advanced as to allegiance.

The proper determination for the Board to direct is that the present regime is not the lawful Government of Southern Rhodesia, but that the regime's measures should be given recognition in accordance with the terms of para. 2 of the summarised holdings of Fieldsend A.J.A.

1968, June17, 18, Kentridge S. C. in reply. Although the American cases are of interest, the basic principle is not always easy to find and is not always stated consistently. It was only the legislation of the states that was ever upheld as such, although transactions in Confederate currency were sometimes upheld. The common factor giving rise to the illegality in these cases was the failure to take the appropriate oath of allegiance: see In the Matter of Caesar Griffin. [FN247] The doctrine could only have applied ex post facto. It was applied only in favour of private transactions. Irrespective of any resulting hardship to individuals, nothing that was contrary to the United States Constitution or in aid of the rebellion was ever recognised. Nothing that impaired or derogated from United States sovereignty was recognised.

FN247 (1869) 25 Texas (Supplement) 623.

In argument in The State of Texas v. White and Chiles [FN248] it *706 was contended that a dictum of Cadwalader J. in United States v. Smart [FN249]that a revolutionary government cannot be held entitled to the privileges of a de facto government whilst the contest continues (pronounced during the first heat and passion engendered by the war) ceases to apply when such revolutionary government has been recognised as a belligerent. That dictum shows that the doctrine could never have been applied during the war. The underlying principle is not really based upon necessity, but upon hardship and inequity - the hardship and inequity which would have resulted to millions of people, who had for four years been living under the laws of the rebel governments, if no recognition had been accorded to those acts and laws necessary for maintaining the bonds of society. That interpretation of the cases accords with the view of Lord Wilberforce in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2). [FN250] During a rebellion, the court must always consider the public policy of the Sovereign, and no recognition can be given without assisting the rebel regime to entrench itself. What could be more calculated to assist the regime than a judgment recognizing its powers?

FN248 (1868) 25 Texas (Supplement) 464.

FN249 (Unreported). See (1868) 25 Texas Supplement 529.

FN250 [1967] 1 A.C. 853, 954.

The length of time during which the rebel regime has been in control is immaterial; the feature which distinguishes the present case from the American cases is that, in the American cases, there was no lawful court to which citizens could apply, whereas here Her Majesty's courts are continuing to sit.

The duty of the court is to apply the law whatever the difficulties. To apply the law by agreement with the illegal regime is tantamount to submitting to it. Maybe Her Majesty's Government is content to let the regime purport to raise taxes under an invalid taxing statute, but if a taxpayer were to challenge the taxes in court, it would be the duty of the court to declare the charging Acts to be a nullity. If one attempts to extend the doctrine of necessity beyond its proper limits, it is impossible not to infringe on public policy. It is wrong to say that the failure of Her Majesty's Government to pass necessary laws as to future government is equivalent to creating a vacuum. Her Majesty's Government may have good reasons of public policy for failing to do so.

The American courts looked at a system that had been operated and had passed away. They never had to assist the rebel governments to enforce their illegal laws.

*707 Another difficulty in applying Texas v. White [FN251] is that under the principles there applied nothing was to impair the constitutional rights of citizens. Those rights are absolute; no person may lawfully be kept in prison without trial, except by virtue of a lawful proclamation of a state of emergency. That can only be issued by the lawful Governor acting on the advice of lawful Ministers, who enjoy Her Majesty's confidence, and on a resolution approved by the Legislative Assembly. Detention under any other proclamation would infringe constitutional rights. It was possible to apply the Texas v. White [FN252] doctrine without derogating from the United States' Sovereignty, because the individual states had their own Sovereignty which continued to exist, even during the war. The same thing is not possible in Rhodesia. In Texas v. White , [FN253] the fons et origo of the doctrine, the state of Texas was really treated as a foreign state.

FN251 7 Wallace 700 (76 U.S.).

FN252 7 Wallace 700 (76 U.S.).

FN253 7 Wallace 700 (76 U.S.).

If it be suggested that the same principles should be applied to insurgents as apply in the case of belligerent occupation, the answer is that where the lawful Sovereign is attempting to put down a revolt by non-violent means it is impossible to presume tacit acquiescences in the recognition of the laws of the rebel regime.

In Thorington v. Smith [FN254] Chase C.J. referred to the "necessity of civil obedience" from those who remained in the territory under the insurgent government, but there were no lawful courts from which to seek redress.

FN254 8 Wallace 1 (75 U.S.).

[LORD MORRIS OF BORTH-Y-GEST: Did the United States accord belligerent status to the states?]

Only in the most limited sense. Prisoners of war were not treated as traitors, but belligerent recognition did not extend to legislation.

United States v. Keehler [FN255] proves that the Confederacy was regarded as an unlawful authority: "incapable of passing any valid laws." In Hickman v. Jones [FN256]a trial for treason against the Confederacy was held to be a nullity. The object of the Supreme Court was simply to avoid injustice. In Thomas v. City of Richmond, [FN257]a case where a municipal corporation had issued bills, it was held that the issue being in aid of the rebellion was void. It was said [FN258] that laws made for the preservation of public order and for the regulation of business transactions between man and man, and not to aid or promote the rebellion would be so far *708 recognised as to sustain the transactions which have taken place under them - a clear indication that such laws were not regarded as lawful ab initio, but only ex post facto to validate such transactions.

FN255 9 Wallace 83, 86 (76 U.S.).

FN256 9 Wallace 197 (76 U.S.).

FN257 12 Wallace 349 (79 U.S.).

FN258 Ibid. 357.

In Hanauer v. Woodruff [FN259] bonds issued by Arkansas were held void, Thorington v. Smith [FN260]being distinguished. The basis of the latter decision was that it would be cruel in 1870 to set aside transactions affecting millions of citizens through the years.

FN259 (1872) 15 Wallace 439 (82 U.S.).

FN260 (1868) 8 Wallace 1 (75 U.S.).

Horn v. Lockhart [FN261] makes it clear that, while the executive, judicial, and administrative acts of the rebels during the war were recognised, it was always subject to the qualification that they must not be acts which impaired or tended to impair the supremacy of the United States or the just rights of citizens. Cook v. Oliver [FN262] shows that where the act was not in aid of the rebellion it was valid, and so was the judgment enforcing alight. United States v. Insurance Companies [FN263]makes it perfectly plain that the avoidance of hardship or injustice was really the basis of the doctrine and not necessity: see Kent's Commentaries on American Law, 14th ed. (1896) Vol. II, p. 295 [Reference was made to

Sprott v. United States [FN264]; Williams v. Bruffy [FN265]; Keith v. Clark [FN266]; Ketchum v. Buckley [FN267] and Lamar v. Micou. [FN268]]

FN261 17 Wallace 570, 580 (84 U.S.).

FN262 (1870) 1 Woods 437; 6 Fed.Cas. 412.

FN263 22 Wallace 99, 101, 103 (U.S. 89).

FN264 20 Wallace 459 (87 U.S.).

FN265 6 Otto 176, 187, 189 (96 U.S.).

FN266 7 Otto 454, 476 (97 U.S.).

FN267 (1878) 9 Otto 188 (99 U.S.).

FN268 (1884) 5 Davis 452 (112 U.S.).

In Baldy v. Hunter [FN269] the investment of funds by a guardian in Confederate bonds was held valid, Lamar v. Micou [FN270] being distinguished. Finally The Confederate Note case [FN271] makes clear beyond doubt that the whole basis of these cases was the avoidance of hardship or injustice. No case can be found on the basis of which detention without trial could possibly be upheld. Confiscation of property was not upheld, and, a priori, detention would not have been upheld.

FN269 (1898) 64 Davis 388 (171 U.S.).

FN270 5 Davis 452 (112 U.S.).

FN271 (1873) 19 Wallace 548 (86 U.S.).

As to whether the principles concerning non-recognition of a foreign government, as exemplified in the American cases, are part of the English law, the position seems to be that in Carl Zeiss Stiftung v. Rewriter & Keeler Ltd. (No. 2), [FN272] Lord Reid [FN273] and Lord Wilberforce [FN274]have held that there is no trace of the doctrine in English law, but that the question of possible future applications *709 was left open. Their Lordships however regarded the doctrine as applicable to cases involving private international law: see Sokoloff v. National City Bank [FN275] and M. Salimoff v. Standard Oil Co. of New York. [FN276] In this connection it should be noted that the United States Supreme Court, in United States v. Insurance Companies, [FN277]really treated the state governments as if they were foreign governments and, in effect, applied the rules of private international law.

FN272 [1967] 1 A.C. 853.

FN273 [1967] 1 A.C. 853, 908.

FN274 Ibid. 954.

FN275 (1924) 239 N.Y. 158.

FN276 (1933) North Eastern Reporter 679.

FN277 22 Wallace 99 (89 U.S.).

The doctrine of necessity, both in English and in Roman-Dutch law, has a strictly limited application: viz., (i) in cases of state necessity, where the principle is applied to uphold a constitution, which is otherwise unworkable: see The Cyprus case [FN278]; The Pakistan case [FN279] and Sabally and N'Jie v. H.M. Attorney-General [FN280]; (ii) in cases of martial law: see Krohn v. The Minister for Defence of the Union of South Africa [FN281] and Burmah Oil Co. Ltd. v. Lord Advocate [FN282]; and (iii) cases where private individuals have acted under the stress of necessity in the public sphere in defence of the Constitution: see Rex v. Stratton. [FN283] The common thread underlying all these cases is that necessity was invoked to save the existing legal order, not to overthrow it: see Special Reference No. 1 on 1955 , [FN284] per Sir Muhammad Munir C.J. [FN285]and Krohn v. Minister for Defence of the Union of South Africa, [FN286] per De Villiers C.J. [FN287]It cannot be applied in aid of a rebel regime or to prevent subversive acts against such a regime. Treason against the Confederacy, as in Hickman v. Jones, [FN288] was held not to be action against law and order. No recognition can be accorded to the public policy of the rebels. Where Her Majesty claims the right to legislate it would be very difficult to uphold illegal measures of the regime on the basis of necessity.

FN278 [1964] 3 Supreme Court of Cyprus 1.

FN279 [1955] 1 F.C.R. 439.

FN280 [1965] 1 Q.B. 273.

FN281 [1915] A.D. 191 (S.Afr.).

FN282 [1965] A.C. 75.

FN283 21 State Trials 1045.

FN284 [1955] 1 F.C.R. 439, 504.

FN285 Ibid.

FN286 [1915] A.D. 191, 210 (S.Afr.).

FN287 Ibid.

FN288 12 Wallace 349 (79 U.S.).

Although no argument on the lines of Texas v. White [FN289] was advanced in Ogden v. Folliot, [FN290] Dolder v. Lord Huntingfield [FN291] and Van Deventer v. Hancke and Mossop [FN292] the judgments *710 state, in absolute terms, that no recognition can be given: see also McNair, Legal Effects of War, 4th ed. (1966), p. 403.

FN289 7 Wallace 700 (74 U.S.).

FN290 3 Term.Rep. (Durnford & East) 726.

FN291 11 Ves.Jun. 283.

FN292 [1903] T.S. 401.

Even if the argument as to necessity had been raised in those cases, the result would not have been different. The court may not presume that Her Majesty's Government will not fill any gaps there may be in the legal system and the administration of the country. There can be no basis upon which a lawful court can come to terms with illegality. On the facts of the present case no necessity has been shown for the proclamation of states of emergency. If ministers wish to go into rebellion and then come before Her Majesty's courts, they come as private citizens and as such they have no more right to detain the appellant's husband than anyone else would have. If necessity is invoked it would have to be on the basis of Rex v. Straighten. [FN293] The terms of the Order in Council are perfectly clear and unambiguous. Any doctrine of necessity, or quasi-necessity, is therefore inapplicable.

FN293 21 State Trials 1045.

The language of the Governor's message cannot be used to interpret the Order in Council: see Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue. [FN294] Although the Governor may have consulted with Her Majesty's. Government his words cannot be taken even to be those of a Minister of the Crown for the United Kingdom. It was just a political message and can have no legislative effect

FN294 [1935] A.C. 445, 458.

For these reasons, therefore, the determination of the Appellate Division should be reversed, and the detention declared illegal.

The respondents did not appear and were not represented.

Cur. adv. vult.

1968. July 23. The judgment of the majority of their Lordships was delivered by LORD REID.

This is an appeal from a determination contained in a judgment of the Appellate Division of the High Court of Southern Rhodesia dated January 29, 1968. The appellant's husband is detained in prison at Gwelo. If that determination is right he is lawfully detained. The appellant contends that that determination is wrong in law and that he is unlawfully detained. For reasons which will appear later their Lordships decided that the appellant has a right to appeal: no objection has been taken at any stage of this case to the appellant's title to raise these proceedings.

*711 It appears from the judgments of the learned judges in Southern Rhodesia that this case has been treated as a test case raising the whole question of the present constitutional position in Southern Rhodesia. It is therefore necessary to make a brief survey. Much of the early history of the territory is set out in the report of the board in In re Southern Rhodesia. [FN295] That report discloses a somewhat unusual relationship between the British South Africa Company and the Crown. But it is sufficient for present purposes to quote one passage from that report [FN296]:

"Those who knew the facts at the time did not hesitate to speak, and rightly so, of conquest, and if there was a conquest by the company's arms, then, by well settled constitutional practice, that conquest was on behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it."

FN295 [1919] A.C. 211.

FN296 Ibid. 221.

The position was regularised and defined in 1923 by the Southern Rhodesia (Annexation) Order in Council. That Order narrated that the territories were under the protection of His Majesty and provided by section 3

"From and after the coming into operation of this Order the said territories shall be annexed to and form part of His Majesty's Dominions, and shall be known as the Colony of Southern Rhodesia."

The Order came into operation on September 12, 1923. Letters Patent of September 1, 1923, provided "Whereas we are minded to provide for the establishment of responsible government, subject to certain limitations hereinafter set forth ..."; and then detailed provisions followed. In his judgment in the present case Beadle C.J. drew attention [FN297] to the fact that by section 31 the United Kingdom Government retained the power of disallowance of any law within one year of the Governor's assent. He then quoted from a statement made by the United Kingdom

Government in 1961 [FN298]:

"it has become an established convention for Parliament at Westminster, not to legislate for Southern Rhodesia on matters within the competence of the Legislative Assembly of Southern Rhodesia, except with the agreement of the Southern Rhodesia Government."

FN297 [1968] (2) S.A. 284, 296.

FN298 [1961] Cmnd. 1399.

Then the Parliament of the United Kingdom passed the Southern Rhodesia (Constitution) Act, 1961, which authorised the making of an Order in Council replacing the Letters Patent of *712 1923 by new provisions. Thereafter the Southern Rhodesia (Constitution) Order in Council (1961 S.I. 2314) was made whereby, by section 1, Her Majesty granted to Southern Rhodesia the Constitution contained in the annex to the Order. This Constitution has been referred to throughout this case as the 1961 Constitution. In view of its importance in the present case their Lordships will refer briefly to the leading provisions.

Section 1 of that Constitution provides that there shall be a Governor "in and over the Colony of Southern Rhodesia" who shall hold office during Her Majesty's pleasure. By section 2, subject to the provisions of the Constitution, the Governor "shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him." Chapter II provides for the composition, general powers and procedure of the legislature, section 20 providing that it shall have power to make laws for the peace, order and good government of Southern Rhodesia. Chapter IV makes provision for executive powers. Section 42 provides: "The executive authority of Southern Rhodesia is vested in Her Majesty and may be exercised on Her Majesty's behalf by the Governor. ... " Section 43 provides for the Governor appointing a Prime Minister acting in accordance with his own discretion and appointing other Ministers on the advice of the Prime Minister, and it states "Any person so appointed shall hold office during Her Majesty's pleasure." Section 44 provides for a Governor's Council, and section 45 provides that the Governor shall act in accordance with the advice of the Governor's Council.

Chapter V deals with the judicature. None of its provisions appear to be directly relevant to the issues in the present case. But it must be noted that section 56 provides that the law to be administered by the courts shall be the law in force in the Colony of the Cape of Good Hope on June 10, 1891, as modified by subsequent legislation having in Southern Rhodesia the force of law. The law then in force in the Cape of Good Hope was Roman-Dutch law and the reason for that date is that in the time of the British South Africa Company the law of Cape Colony was declared to be the law to be applicable in the territories under their control.

Chapter VI is entitled "The Declaration of Rights" and is designed to secure "the fundamental rights and freedoms of the individual." Directly relevant in the present case are section 58, which provides "(1) No person shall be deprived of his personal liberty save as may be authorised by law," and section 69 which provides *713

"(1) Nothing contained in any law shall be held to be inconsistent with or in contravention of," inter alia, section 58 "to the extent that the law in question makes provision with respect to the taking during any period of public emergency of action for the purpose of dealing with any situation arising during that period.

Section 72 (2) defines "period of public emergency" as meaning, inter alia, any period not exceeding three months during which a state of emergency is declared to exist ...

"by virtue of a proclamation issued in terms of any law for the time being in force relating to emergency powers, the reasons for the issue thereof having been communicated to the Legislative Assembly as soon as possible after the issue thereof, or by virtue of a further proclamation so issued on a resolution of the assembly."

Section 71 provides methods by which any person alleging contravention of any of any provisions of sections 57 to 68 can apply for redress, and subsection (5) provides "Any person aggrieved by any determination of the High Court under this section may appeal therefrom to Her Majesty in Council. " Their Lordships will state later their reasons for holding that that subsection entitles the appellant to appeal in the present case.

The only other part of the Constitution to which reference need be made is Chapter IX, entitled "Amendment of the Constitution." Section 105 provides:

"Subject to compliance with the other provisions of this Constitution, a law of the legislature may amend, add to or repeal any of the provisions of this Constitution other than those mentioned in section 111."

Section 107 together with Schedule 3 creates certain specially entrenched provisions which include the whole of Chapter VI (The Declaration of Rights). Section 111 authorises Her Majesty in Council to amend, add to or revoke nine specified sections and no others. The only provision for disallowance of any law made by the legislature is that set out in section 32 and it is of very limited scope.

Their Lordships must now refer to the Emergency Powers Act, 1960, which remained in force under the 1961 Constitution. Section 3 enabled the Governor by proclamation to declare a state of emergency, but it provided by subsection (2)

"No such proclamation shall be in force for more than three months without prejudice to the issue of another proclamation at or before the end of that period if the Parliament by resolution so determines."

*714 Section 4 provided that so long as a proclamation is in force regulations made by the Governor may "(2) (b) make provision for the summary arrest or detention of any person whose arrest or detention appears to the Minister to be expedient in the public interest."

The position of the appellant's husband is dealt with in detail by Lewis J. in his judgment [FN299]of September 9, 1966. He was first detained in 1959 under earlier powers. Then in 1961 he was released to a restriction area and in January, 1963, he was released altogether. In April, 1964, he was again restricted, but he was again released in April, 1965. 'Then in June, 1965, he was restricted to a restriction area for five years: that order is still in force. In November, 1965, a state of emergency was (validly) proclaimed by the Governor and regulations were made under section 4 of the Act of 1960. Then on November 6, 1965, the respondent, Mr. Lardner-Burke, as Minister of Justice, made an order under section 21 of Emergency Regulations of 1965 for the detention of the appellant's husband in prison on the ground that he was

"likely to commit acts in Rhodesia which are likely to endanger the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service."

FN299 [1968] (2) S.A. 284, 291, 292.

It has not been argued that any of these orders was invalid.

On November 11, 1965, Mr. Smith, the Prime Minister, and his Ministerial colleagues, including the respondent, Mr. Lardner-Burke, issued a "Declaration of Independence" to the effect that Southern Rhodesia was no longer a Crown Colony but was an independent sovereign state. They also issued a new constitution. On the same day the Governor issued this statement:

"The Government have made an unconstitutional declaration of independence. I have received the following message from Her Majesty's Secretary of State for Commonwealth Relations: 'I have it in command from Her Majesty to inform you that it is Her Majesty's pleasure that, in the event of an unconstitutional declaration of independence, Mr. Ian Smith and other persons holding office as Ministers of the Government of Southern Rhodesia or as Deputy Ministers cease to hold office. I am commanded by Her Majesty to instruct you in that event to convey Her Majesty's pleasure in this matter to Mr. Smith and otherwise to publish it in such manner as you may deem fit.'

In accordance with these instructions I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain from all acts which *715 would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service."

On November 16, 1965, the Parliament of the United Kingdom passed the Southern Rhodesia Act, 1965, the leading provisions of which were:

"1. It is hereby declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it.

2. (1) Her Majesty may by Order in Council make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appears to Her to be necessary or expedient in consequence of any unconstitutional action taken therein."

There followed a number of specific provisions including authority by Order in Council to suspend, amend, revoke or add to any of the provisions of the 1961 Constitution. Section 3 provided that section 2 should continue in force for one year but authorised its continuance by further Orders in Council approved by each House of Parliament. Section 2 has been continued in force by Orders in Council, the last being the Southern Rhodesia Act, 1965 (Continuation) Order, 1967 (1967 S.I. 1674), made on November 13, 1967.

Immediately after the passing of that Act the Southern Rhodesia (Constitution) Order, 1965 (1965 S.I. 1952), was made. The leading provisions of that Order are:

"2. (1) It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect (2) This section shall come into operation forthwith and shall then be deemed to have had effect from November 11 1965.

3. (1) So long as this section is in operation - (a) no laws may be made by the Legislature of Southern Rhodesia, no business may be transacted by the Legislative Assembly and no steps may be taken by any person or authority for the purposes of Aisle otherwise in relation to the constitution or reconstitution of the Legislative Assembly or the election of any person to be a member thereof; and Chapters II and III of the Constitution shall have effect subject to the foregoing provisions of this paragraph, (b) a Secretary of State may, by order in writing under his hand, at any time prorogue the *716 Legislative Assembly; and (c) Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia, including

laws having extra-territorial operation ... (3) References in the Constitution or in any other law in force in Southern Rhodesia to a law of the Legislature of Southern Rhodesia or to an Act of that Legislature shall be construed as including references to an Order in Council made under subsection 1 (c) of this section ... (5) This section shall come into operation forthwith and shall then be deemed to have had effect from November 11, 1965.

4. (1) So long as this section is in operation - (a) the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State; (b) sections 43, 44, 45 and 46 of the Constitution shall not have effect; (c) subject to the provisions of any Order in Council made under section 3 (1) (c) of this Order and to any instructions that may be given to the Governor by Her Majesty through a Secretary of State, the Governor shall act in his discretion in the exercise of any function which, if this Order had not been made, he would be required by the Constitution to exercise in accordance with the advice of the Governor's Council or any Minister; (d) a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or a Deputy Minister or a Parliamentary Secretary; and (e) without prejudice to any other provision of this Order, a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in any officer or authority of the Government of Southern Rhodesia (not being a court of law) or (whether or not he exercises that function himself) prohibit or restrict the exercise of that function by that officer or authority ... (4) References in this section to an officer of the Government of Southern Rhodesia shall be construed as including references to the Governor.

5. So long as this section is in operation, monies may be issued from the Consolidated Revenue Fund on the authority of a warrant issued by a Secretary of State, or by the Governor in pursuance of instructions from Her Majesty through a Secretary of State, directed to an officer of the treasury of the Government of Southern Rhodesia.

6. It is hereby declared for the avoidance of doubt that any law made, business transacted, step taken or function exercised in contravention of any prohibition or restriction imposed by or under this Order is void and of no effect."

In their Lordships' judgment those provisions are within the authority conferred by the Act of 1965 and are as effective as if they were contained in an Act of Parliament.

Mr. Smith and his colleagues disregarded their dismissal from *717 office, and the members of the legislature disregarded the prohibition contained in section 3 (1) (a) of the Order in Council. All continued to act much as they had done before November 11. There was no disturbance in the country. It does not appear how far that was due to observance of the direction of the Governor or how far to support for the new regime. The members of the legislature adopted the 1965 Constitution and thereafter they and Mr. Smith and his colleagues proceeded on the basis that the 1965 Constitution had superseded the 1961 Constitution.

The state of emergency lawfully proclaimed on November 5, 1965, came to an end on the expiry of three months, i.e., on February 4, 1966. It could not be prolonged in accordance with the law as it existed on November 11, 1965, without a resolution of the Legislative Assembly. But the Order in Council by its prohibition in section 3 (1) (a) prevented such a resolution. Nevertheless less acting under the 1965 Constitution steps were taken to prolong the state of emergency and new Emergency Regulations were made. By an order made by the respondent, Mr. Lardner-burke, under these regulations, the detention of the appellant's husband was continued.

Thereupon the appellant raised the present proceedings maintaining that there was now no lawful ground on which her husband could be detained. Mr. Lardner- Burke

recognised the jurisdiction of the High Court and, as appears from the judgment of Lewis J., his counsel maintained that the usurping government of which he was a member were the de jure government, or alternatively that they were the de facto government being the only effective government of the country, and therefore laws made by the new regime were valid at least in so far as made for the maintenance of law and order.

Both Lewis J. and Goldin J. held that the 1965 Constitution was not the lawful Constitution and that Mr. Smith's government was not a lawful government. But they held that necessity required that effect should be given to the Emergency Powers Regulations and therefore the detention of the appellant's husband was lawful. Lewis J. stated his general conclusion as follows:

"The Government is, however, the only effective government of the country, and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law, this court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful Government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."

*718 On appeal to the Appellate Division no attempt was made to contend that the 1965 Constitution was the legal Constitution, and the position taken by the court was that it had never recognised the 1965 Constitution. The five judges of the Appellate Division of the High Court delivered learned and elaborate judgments which are difficult to summarise. At the end of his judgment Beadle C.J. stated his general conclusions thus [FN300]:

"1. Southern Rhodesia before the declaration of independence was a semi-independent state which enjoyed internal sovereignty and also a large measure of external sovereignty, and her subjects, by virtue of the internal sovereignty she enjoyed, owed allegiance to her, but they also owed a residual allegiance to the United Kingdom by virtue of the external sovereignty which that country enjoyed. 2. The status of the present Government today is that of a fully de facto government in the sense that it is in fact in effective control of the territory and this control seems likely to continue. At this stage however it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a de jure government. 3. The present Government having effectively usurped the governmental power granted Rhodesia under the 1961 Constitution. can now lawfully do anything which its predecessor could lawfully have done, but until its new constitution is firmly established and thus becomes the de jure constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution. 4. The various Proclamations of States of Emergency were lawfully made."

FN300 [1968] (2) S.A. 284, 359, 360.

Quenet J.P. stated his conclusion at the end of his judgment [FN301];

"In the result, I am satisfied the present Government is the country's de facto government; it has also acquired internal de jure status; its constitution and laws (including the measures here in question) have binding force."

FN301 Ibid. 375, 376.

Macdonald J.A. stated that [FN302] "prior to November 11, 1965, sovereign power over Rhodesia was divided between the Government of Rhodesia and Great Britain."

Then later he stated that [FN303]"Allegiance to the state imposes as one of its most important duties obedience to the laws of the Sovereign power ' for the time being' within the state." and after an exhaustive examination of a number of authorities he stated his main conclusions [FN304]:

"6. So far as a municipal court is concerned a de facto government is a de jure government in the sense that it is the *719 only law-making and law-enforcing government functioning 'for the time being' within the state. 7. The 1965 Constitution is the de facto constitution under which the de facto government operates and, in the sense set out in 6 above, is the de jure constitution."

FN302 Ibid. 376.

FN303 Ibid. 378, 379.

FN304 Ibid. 415, 416.

Jarvis A.J.A. was in general agreement with Beadle C.J. He said in his conclusions [FN305]:

"2. I find as a fact that the present Government has effective control of the territory and this control seems likely to continue. 3. I consider that legal effect can be given to such legislative measures and administrative acts of the present Government as would have been lawful in the case of a lawful government governing under the 1961 Constitution."

FN305 [1968] (2) S.A. 284, 422.

Fieldsend A.J.A. said [FN306]:

"It is my firm conviction that a court created in terms of a written constitution has no jurisdiction to recognise, either as a de jure or de facto government any government other than that constitutionally appointed under that constitution."

FN306 Ibid. 431.

But he went on to consider the doctrine of necessity and concluded [FN307]:

"Necessity, however, provides a basis for the acceptance as valid by this court of certain acts of the present authorities, provided that the court is satisfied that - (a) any administrative or legislative act is directed to and reasonably required for the ordinary orderly running of the country; (b) the just rights of citizens under the 1961 Constitution are not defeated; and (c) there is no consideration of public policy which precludes the court from upholding the act, for instance if it were intended to or did in fact in its operation directly further or entrench the usurpation."

FN307 Ibid. 444.

A new point had been raised in the course of the hearing by the Appellate

Devaluation. The original Emergency Regulations made before the Declaration of Independence had contained one section under which orders for detention could be made. But the new Emergency Regulations made thereafter contained both that section and another which was in wider terms and the orders under which the appellant's husband was detained after February 4, 1966, were made under the latter and wider section. The Appellate Division held that this latter section was ultra vires and that therefore orders made under it were invalid. So on that ground they allowed the appellant's appeal.

But the appellant's success was short-lived. Immediately a new *720 order was made under the former section and in fact the appellant's husband was never released from custody. In their Lordships' view it is implicit in the judgment of the Appellate Division in this case that the section of the Emergency Regulations under which the new order for the detention of the appellant's husband was made is one which the court must recognise as valid. Therefore that judgment is a determination of the validity of the regulation: on the authority of that judgment all Rhodesian courts would so decide.

Their Lordships were referred to the decision of the Appellate Division in Chikwakwata v. Bosman N.O. [FN308] where Beadle C.J. said [FN309]:

"It seems to me, therefore, (although the matter might have been expressed with a little more clarity) that where section 71 (5) talks of 'a determination under this section,' it means every determination which concerns the question of whether or not sections 57 to 68 of the Declaration of Rights have been contravened in any particular statute."

FN308 [1965] (4) S.A. 57.+

FN309 Ibid 59.

Their Lordships agree. But on application being made for leave to appeal in the present case it was held that there had been no determination under section 71 (5) because the case had been argued and decided without any express reliance on the Declaration of Rights. In their Lordships' view that is too narrow an interpretation. Section 58 provided that no person shall be deprived of his personal liberty save as may be authorised by law. The appellant's case has been throughout that her husband has been deprived of his personal liberty in a manner not authorised by law. It has been determined that the law under which he is now detained is a valid law and the appellant and her husband are aggrieved by that determination. That is in their Lordships' view sufficient to bring section 71 (5) into operation. Their Lordships therefore decided that the appellant has a right to appeal to Her Majesty in Council.

Before dealing with the questions which have to be decided in the appeal it is convenient to deal with the question of the applicability of Roman-Dutch law. No light is thrown on the matter by any Southern Rhodesia statute or decision cited to their Lordships, and therefore the question is what was the basis of the constitutional law of the Colony of the Cape of Good Hope in 1891. With regard to private law affecting individuals Innes C.J. said in Rex v. Harrison and Dryburgh [FN310]: *721

"The Cape Articles of Capitulation dated January 18, 1806, stipulated that the rights and privileges which the inhabitants had theretofore enjoyed should be preserved to them. Among those privileges the retention of their existing system of law was undoubtedly included."

FN310 [1922] A.D. 320, 330 (S.Afr.).

That system of law was Roman-Dutch law. Then Innes C.J. referred to the Charter of Justice of 1832 which directed the Supreme Court to exercise its jurisdiction [FN311] "according to the laws now in force in our said colony " - again Roman-Dutch law. But it does not at all follow that the British Government agreed in 1806 that the nature and extent of British Sovereignty over the Colony should be defined by an alien system of law. In Union Government (Minister of Lands) v. Estate Whittaker Innes C.J. said [FN312]:

"Now, when the Sovereign agrees that the system of law prevailing in a conquered settlement shall continue in force thereafter, it would seem a necessary inference, in the absence of any stipulation to the contrary, that the rights of the State, with regard to the acquisition, alienation and disposition of property, are intended to be regulated by the legal principles which the Sovereign expressly sanctions. Such questions as whether the Crown is amenable to the jurisdiction of the courts, and its constitutional position in regard to matters of government stand on a different footing, and no inference affecting them could properly be drawn from the establishment of a system of law differing from that of England."

FN311 [1922] A.D. 330.

FN312 [1916] A.D. 194, 203 (S.Afr.).

In their Lordships' judgment that must be right. The nature of the Sovereignty of The Queen in the Parliament of the United Kingdom over a British colony must be determined by the constitutional law of the United Kingdom and it is therefore unnecessary for their Lordships to consider points under Roman-Dutch law which have been raised as to promulgation of laws and the like. But their Lordships would add that they are very far from being satisfied that if Roman- Dutch law were applicable the result would be in any way different.

Their Lordships can now turn to the three main questions in this case: (1) What was the legal effect in Southern Rhodesia of the Southern Rhodesia Act, 1965, and the Order in Council which accompanied it? (2) Can the usurping government now in control in Southern Rhodesia be regarded for any purpose as a lawful government? (3) If not, to what extent, if at all, are the courts of Southern Rhodesia entitled to recognise or give effect to its legislative or administrative acts?

*722 If The Queen in the Parliament of the United Kingdom was Sovereign in Southern Rhodesia in 1965, there can be no doubt that the Southern Rhodesia Act, 1965, and the Order in Council made under it were of full legal effect there. Several of the learned judges have held that Sovereignty was divided between the United Kingdom and Southern Rhodesia. Their Lordships cannot agree. So far as they are aware it has never been doubted that, when a colony is acquired or annexed, following on conquest or settlement, the Sovereignty of the United Kingdom Parliament extends to that colony, and its powers over that colony are the same as its powers in the United Kingdom. So, in 1923, full Sovereignty over the annexed territory of Southern Rhodesia was acquired. That Sovereignty was not diminished by the limited grant of self government which was then made. It was necessary to pass the Statute of Westminster, 1931, in order to confer independence and Sovereignty on the six Dominions therein mentioned, but Southern Rhodesia was not included. Section 4 of that Act provides

"No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof"
No similar provision has been enacted with regard to Southern Rhodesia.

It has been argued that the British Nationality Act, 1948, shows that Southern Rhodesia had by that time acquired at least a measure of Sovereignty. Section 1 (1) provides that

"Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject."

Subsection (3) mentions eight countries to which full independence had already been granted and also Southern Rhodesia. It has never been suggested that it can be inferred from this that Southern Rhodesia must be regarded as fully independent. So on any view the association of Southern Rhodesia with those other countries was anomalous. Their Lordships cannot infer from the mere fact that Southern Rhodesian citizenship was created that some limited but undefined measure of Sovereignty was conferred on that colony.

The learned judges refer to the statement of the United Kingdom Government in 1961, already quoted, setting out the convention that the Parliament of the United Kingdom does not *723 legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. That was a very important convention but it had no legal effect in limiting the legal power of Parliament.

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things, If Parliament chose to do any of them the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.

Finally on this first question their Lordships can find nothing in the 1961 Constitution which should be interpreted as a grant of limited Sovereignty. Even assuming that that is possible under the British system, they do not find any indication of an intention to transfer Sovereignty or any such clear cut division between what is granted by way of Sovereignty and what is reserved as would be necessary if there were to be a transfer of some part of the Sovereignty of The Queen in the Parliament of the United Kingdom. They are therefore of opinion that the Act and Order in Council of 1965 had full legal effect in Southern Rhodesia.

With regard to the question whether the usurping government can now be regarded as a lawful government much was said about de facto and de jure governments. Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control. As was explained in Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2) [FN313] when a question arises as to the status of a new regime in a foreign country the court must ascertain the view of Her Majesty's

Government and act on it as correct. In practice the Government have regard to certain rules, but those are not rules of law. and it happens not infrequently that the Government recognise a usurper *724 as the de facto government of a territory while continuing to recognise the ousted Sovereign as the de jure government. But the position is quite different where a court sitting in a particular territory has to determine the status of a new regime which has usurped power and acquired control of that territory. It must decide. and it is not possible to decide that there are two lawful governments at the same time while each is seeking to prevail over the other.

FN313 [1967] 1 A.C. 853; [1966] 3 W.L.R. 125; [1966] 2 All E.R. 536, H.L. (E.).

It is an historical fact that in many countries - and indeed in many countries which are or have been under British Sovereignty - there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.

A recent example occurs in Uganda v. Commissioner of Prisons, Ex parte Matovu. [FN314] On February 22, 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquility he had taken over all powers of the Government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma C.J. said [FN315]

"we hold, that the series of events, which took place in Uganda from February 22 to April, 1966, when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy. But deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed in the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and the Vice-President on the grounds mentioned in the early part of this judgment."

FN314 [1966] E.A. 514.

FN315 Ibid. 535.

Later he said [FN316]:

"... our deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no *725 longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its de facto and de jure validity."

FN316 Ibid. 539.

Pakistan affords another recent example. In The State v. Dosso [FN317] the

President had issued a proclamation annulling the existing Constitution. This was held to amount to a revolution. Muhammed Munir C.J. said [FN318]:

"It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order."

FN317 [1958] 2 P.S.C.R. 180; (1958) P.L.D. 1 S.C. (PAK) 533.

FN318 [1958] 2 P.S.C.R. 180, 184.

Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results. The Chief Justice of Uganda (Sir Udo Udoma C.J.) said [FN319]: "The Government of Uganda is well established and has no rival." The court accepted the new Constitution and regarded itself as sitting under it. The Chief Justice of Pakistan (Sir Muhammed Munir C.J.) said [FN320]: "Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change." It would be very different if there had been still two rivals contending for power. If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler.

FN319 [1966] E.A. 514, 533.

FN320 [1958] 2 P.S.C.R. 180, 185.

In their Lordships' judgment that is the present position in Southern Rhodesia. The British Government acting for the lawful Sovereign is taking steps to regain control and it is impossible to predict with certainty whether or not it will succeed. Both the judges in the General Division and the majority in the Appellate Division rightly still regard the "revolution" as illegal and consider themselves sitting as courts of the lawful Sovereign and not under the revolutionary Constitution of 1965. Their Lordships are therefore of opinion that the usurping Government now in control of Southern Rhodesia cannot be regarded as a lawful government.

Their Lordships note that importance was attached by some of the judges in Southern Rhodesia to arguments regarding allegiance and also the effect of the Statute of 1495 (11 Hen. 7, c. 1). They *726 do not find it necessary to deal with the question of allegiance generally. That Statute provides that no

"... persons ... that attend upon the King and Sovereign Lord of this land for the time being, in his person, and do him true and faithful service of allegiance in the same"

shall be convicted of high treason or other offences. The true meaning of that statute was much canvassed by the older writers. Blackstone said in his chapter dealing with high treason (Commentaries on the Laws of England, St. ed. (1769), Chap. 6, p. 77):

"The true distinction seems to be, that the statute of Henry the Seventhdoes by

no means command any opposition to a king de jure; but excuses the obedience paid to a king de facto."
Their Lordships are satisfied that it cannot be held to enact a general rule that a usurping government in control must be regarded as a lawful government.

The last question involves the doctrine of "necessity" and requires more detailed consideration. The argument is that, when a usurper is in control of a territory, loyal subjects of the lawful Sovereign who reside in that territory should recognise, obey and give effect to commands of the usurper in so far as that is necessary in order to preserve law and order and the fabric of civilized society. Under pressure of necessity the lawful Sovereign and his forces may be justified in taking action which infringes the ordinary rights of his subjects but that is a different matter. Here the question is whether or how far Her Majesty's subjects and in particular Her Majesty's judges in Southern Rhodesia are entitled to recognise or give effect to laws or executive acts or decisions made by the unlawful regime at present in control of Southern Rhodesia.

There is no English authority directly relevant but much attention was paid to a series of decisions of the Supreme Court of the United States as to the position in the states which attempted to secede during the American Civil War. Those authorities must be used with caution by reason of the very different constitutional position in the United States. It was held that during the rebellion the seceding states continued to exist as states, but that, by reason of their having adhered to the Confederacy, members of their legislatures and executives had ceased to have any lawful authority. But they had continued to make laws and carry out executive functions and the inhabitants of those states could not avoid carrying on their ordinary activities on the footing that these laws and executive acts were valid. So after the end of the war a wide *727 variety of questions arose as to the legal effect of transactions arising out of that state of affairs.

The first case decided by the Supreme Court was Texas v. White. [FN321]The court laid down the principle to be applied in these terms. [FN322]
"... it is an historical fact that the government of Texas, then in full control of the state, was its only actual government; and certainly if Texas had been a separate state, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a de facto government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States. It is not necessary to attempt any exact definitions, within which the acts of such a state government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void."

FN321 (1868) 7 Wallace 700 (74 U.S.).

FN322 Ibid. 733.

In Hanauer v. Woodruff [FN323] Field J. said [FN324]:
"The difference between the two cases is the difference between submitting to a force which could not be controlled, and voluntarily aiding to create that force."

FN323 (1872) 15 Wallace 439 (82 U.S.).

FN324 Ibid. 449.

Similar statements of principle were made in many other cases. It will be sufficient to quote from what was said in Horn v. Lockhart [FN325]:
"We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the *728 Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution."

FN325 (1873) 17 Wallace 570, 580 (84 U.S.).

Their Lordships would make three observations about this series of cases. In the first place there was divided sovereignty in the United States, the United States only being sovereign within defined limits: that is reflected in the first part of the above quotation from Texas v. White. [FN326] Secondly, the decisions were concerned with the legal effect, as regards the civil claims of individuals, after the end of the civil war, of acts done during it. None of them were cases of courts called upon, during the rebellion, to pass upon the legality of the governments of the rebelling states or of their legislation. and thirdly the Congress of the United States did not, and perhaps under the Constitution could not, make laws similar to the Southern Rhodesia Act, and Order in Council of 1965, providing what the legal position was to be in the seceding States during the war. None of the cases cited conferred any validity upon Acts of the Confederate States which were contrary to the United States Constitution.

FN326 7 Wallace 700.

References were also made by the judges in Southern Rhodesia to the writings of civilians and jurists. It will be sufficient to quote from Grotius De Jure Belli ac

Pacis, Bk. I, Ch. IV, Sect. XV, as translated in an English edition of 1738. [Hugo Grotius, "De Jure Belli ac Pacis." Translated by J. Barbaric (1738), St. ed., p. 121.]

"XV. We have treated of him, who has now, or has had a right to govern; it now remains, that we say something of him that usurps the government; not after he has either by long possession, or agreement obtained a right to it, but so long as the cause of his unjust possession continues. The acts of sovereignty exercised by such an usurper may have an obligatory force, not by virtue of his right (for he has none), but because it is very probable that the lawful sovereign, whether it be the people themselves, or a king, or a senate, *729 chooses rather that the usurper should be obeyed during that time, than that the exercise of the laws and justice should be interrupted, and the state thereby exposed to all the disorders of anarchy."

It may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognises the need to preserve law and order in territory controlled by a usurper. But it is unnecessary to decide that question because no such principle could override the legal right of the Parliament of the United Kingdom to make such laws as it may think proper for territory under the Sovereignty of Her Majesty in the Parliament of the United Kingdom. Parliament did pass the Southern Rhodesia Act, 1965, and thereby authorise the Southern Rhodesia (Constitution) Order in Council, 1965. There is no legal vacuum in Southern Rhodesia. Apart from the provisions of this legislation and its effect upon subsequent "enactments" the whole of the existing law remains in force. But it is necessary to determine what, on a true construction, is the legal effect of this legislation.

The provisions of the Order in Council are drastic and unqualified. With regard to the making of laws for Southern Rhodesia section 3 (1) (a) provides that no laws may be made by the Legislature of Southern Rhodesia and no business may be transacted by the Legislative Assembly: then section 3 (1) (c) authorises Her Majesty in Council to make laws for the peace, order and good government of Southern Rhodesia: and section 6 declares that any law made in contravention of any prohibition imposed by the Order is void and of no effect. This can only mean that the power to make laws is transferred to Her Majesty in Council with the result that no purported law made by any person or body in Southern Rhodesia can have any legal effect, no matter how necessary that purported law may be for the purpose of preserving law and order or for any other purpose. It is for Her Majesty in Council to judge whether any new law is required and to enact such new laws as may be thought necessary or desirable.

It was argued that the Order in Council only refers to and only makes. illegal future Acts of the previously lawful Legislature and has no relation to those of the unlawful regime which are therefore left to the appreciation of the courts. This would indeed be paradoxical. But in their Lordships' opinion the Act of 1965 and the Order in Council have made it clear beyond doubt that the United Kingdom Parliament has resumed full power to legislate for Rhodesia and has removed from Rhodesia the power to legislate for itself.

*730 Their Lordships were informed that, since the making of the 1965 Order in Council, 38 Orders in Council have been made which affect Southern Rhodesian affairs, but that none of these has been made under section 3 (1) (c) as a law for the peace, order and good government of the colony.

The position with regard to administrative acts is similar. It has not been argued that the dismissal from office of Mr. Smith and his colleagues was invalid. So when the Order in Council was made there were no Ministers in Southern Rhodesia. Section

4 (1) (b) by providing that sections 43, 44, 45 and 46 of the Constitution shall not have effect prevented any lawful appointment of new Ministers, Section 4 (1) (a) provided that the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State, and section 4 (1) (d) authorised a Secretary of State to exercise any function vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or Deputy Minister or Parliamentary Secretary. and section 6 declared that any function exercised in contravention of any prohibition or restriction imposed by or under the Order is void and of no effect.

Their Lordships have been informed that no executive action has been taken by a Secretary of State under section 4 (1) (a) or section 4 (1) (d).

Importance has been attached to the Governor's statement of November 11, 1965, quoted earlier. That statement was made before the making of the Order in Council and in any event it could not prevail over the Order in Council. So when it was said -

"it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service"

- that must be taken with the qualification that it can only apply in so far as they can do so without acting or supporting action in contravention of the Order in Council.

It may be that at first there was little difficulty in complying with this direction, and it may be that after two-and-a-half years that has become more difficult. But it is not for their Lordships to consider how loyal citizens can now carry on with their normal tasks, particularly when those tasks bring them into contact with the usurping regime. Their Lordships are only concerned in this case with the position of Her Majesty's judges.

Her Majesty's judges have been put in an extremely difficult position. But the fact that the judges among others have been put *731 in a very difficult position cannot justify disregard of legislation passed or authorised by the United Kingdom Parliament, by the introduction of a doctrine of necessity which in their Lordships' judgment cannot be reconciled with the terms of the Order in Council. It is for Parliament and Parliament alone to determine whether the maintenance of law and order would justify giving effect to laws made by the usurping Government, to such extent as may be necessary for that purpose.

The issue in the present case is whether Emergency Powers Regulations made under the 1965 Constitution can be regarded as having any legal validity, force or effect. Section 2 (1) of the Order in Council of 1965 provides:

"It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

The 1965 Constitution, made void by that provision, provides by section 3 that "There shall be an Officer Administering the Government in and over Rhodesia" - an office hitherto unknown to the law. The Emergency Powers Regulations which were determined by the High Court to be valid were made by "the Officer Administering the Government." For the reasons already given their Lordships are of opinion that that determination was erroneous. and it must follow that any order for detention made under such regulations is legally invalid.

Their Lordships will therefore humbly advise Her Majesty that it should be declared that the determination of the High Court of Southern Rhodesia with regard

to the validity of Emergency Powers Regulations made in Southern Rhodesia since November 11, 1965, is erroneous, and that such regulations have no legal validity, force or effect.

LORD PEARCE

delivered the following dissenting judgment. Although I agree with much of their Lordships' judgment, I have the misfortune to differ from some parts of it and thereby to reach a different conclusion.

I agree that the United Kingdom Parliament can legislate for Rhodesia. The British Nationality Act, 1948, and the Citizenship of Southern Rhodesia and British Nationality Act, No. 63 of 1963, by which Rhodesia acquired separate citizenship, show how near that country was to acquiring full Sovereign independence such as that possessed by all the other countries referred to in section 1 (3) of the former Act. But the legal tie was not yet cut. Therefore *732 in legal terms Rhodesia was still a colony over which the United Kingdom Parliament had Sovereignty. That Parliament still had the legal power to cut down the 1961 Constitution and alter the status of Rhodesia to that of a colony governed from the United Kingdom through a Governor. While I appreciate the careful reasoning of the learned Chief Justice [Beadle C.J.], by which he seeks to say that the United Kingdom Parliament had no such power, I cannot accept its validity.

Likewise I cannot accept his argument that the de facto control by the illegal government gave validity to all its acts as such so far as they did not exceed the powers under the 1961 Constitution. The de facto status of sovereignty cannot be conceded to a rebel government as against the true Sovereign in the latter's courts of law. The judges under the 1961 Constitution therefore cannot acknowledge the validity of an illegal government set up in defiance of it. I do not agree with the view of Macdonald J.A. that their allegiance is owed to the rebel government in power. It follows that the declaration of emergency and the regulations under which it is sought to justify the detention of Daniel Madzimbamuto are unlawful and invalid. The appeal therefore must be allowed unless the emergency and the regulations can be acknowledged by the courts as valid on some other ground than that they are the acts of a de facto government simpliciter. It is at this stage that I feel compelled to part company with their Lordships.

I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the courts, with certain limitations namely (a) so far as they are directed to and reasonably required for ordinary orderly running of the State. and (b) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and (c) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This last, i.e., (c), is tantamount to a test of public policy.

In this view of the matter I agree with the judgment of Fieldsend A.J.A.

Grotius (quoted below) [Hugo Grotius, De Jure Belli ac Pacis, translated by F. W. Kelsey, and published by the Carnegie Endowment for International Peace, in vol. 2 of "The Classics of International Law," edited by J. B. Scott, St. ed. (1927), p. 159 (Oxford University Press)] substantially equates the principle to an implied mandate from the lawful Sovereign for the preservation of his realm.

*733 This principle whether one calls it necessity or implied mandate, can in my opinion be extracted from the cases in the Supreme Court of the United States when dealing with the aftermath of the unsuccessful rebellion of the Southern States. These cases have been much canvassed in the able argument on both sides. They present a helpful analogy. So far as the decisions may have a slight quasi-international flavour derived from the sovereignty of the various states subject only to the obligation to the Union, that flavour is not out of place in dealing with the peculiar position of Rhodesia. I do not accept the argument that because the cases all took place after the rebellion had failed, and were therefore concerned only with retrospective acknowledgment of unlawful acts, their principle cannot be applied during a rebellion. If acts are entitled to some retrospective validity, there seems no reason in principle why they should not be entitled to some contemporaneous validity. It is when one comes to assess the question of public policy that there is a wide difference between the retrospective and contemporaneous. For during a rebellion it may be harmful to grant any validity to an unlawful act, whereas, when the rebellion has failed, such recognition may be innocuous.

The following extracts from three judgments of the Supreme Court sufficiently show the grounds on which retrospective acknowledgment was accorded to acts which lacked lawful validity:

"... It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void. ..."

(Texas v. White. [FN327])

"... We admit that the acts of the several States in their individual capacities, and of their different departments, of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to *734 impair the supremacy of the national authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution. ..."

FN327 (1868) 7 Wallace 700, 733 (74 U.S.).

(Horn v. Lockhart. [FN328])

"... From these cases it may be deduced - That the transactions between persons actually residing within the territory dominated by the Government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its

authority; that, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so called Confederate States; that what occurred or was done in respect of such matters under the authority of the laws of these local de facto governments should not be disregarded or held to be invalid merelybecause those governments were organised in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular ad ministration of the laws, and because transactions in the ordinary course of civil society as organised within the enemy's territory, although they may have indirectly or remotely promoted the ends of the de facto or unlawful government organised to effect a dissolution of the Union, were without blame 'except when proved to have been entered into with actual intent to further invasion or insurrection'; and, that judicial and legislative acts in the respective States composing the so called Confederate States should be respected by the courts if they were not 'hostile in their purpose or mode of enforcement to the authority of the National Government, *735 and did not impair the rights of citizens under the Constitution.' ..."

FN328 (1873) 17 Wallace 570, 580 (84 U.S.).
(Baldy v. Hunter. [FN329])

FN329 (1898) 64 Davis 388, 400, 401 (171 U.S.).

The Cyprus case of Attorney-General v. Mystify Ibrahim [FN330] and the Pakistan case [FN331] give support to the principle of necessity. The fact that there was there no competing lawful Sovereign does not distinguish them from the present case. Ex hypothesi the acts under discussion are unlawful, whether it be as against a constitution or a law or a lawful Sovereign. The existence of a lawful Sovereign creates no relevant difference, though it may be important when public policy has to be assessed, since an acknowledgment of validity may be against that Sovereign's policy. In the present case, however, the lawful Sovereign, though asserting a full right to govern, was not in fact governing, but had given certain indications of policy which have to be carefully considered.

FN330 [1964] 3 Supreme Court of Cyprus 1.

FN331 Special Reference No. 1 of 1955 [1955] 1 F.C.R. 439.

Further support for the principle is given by Lord Mansfield in the case of Stratton. [FN332] There the lawful Governor of Madras was unlawfully put under arrest by certain persons under the plea of alleged necessity.

FN332 Rex v. Stratton (1779) 21 State Trials 1045.

Lord Mansfield said [FN333] to the jury that in England it cannot happen because there is a regular government to which they can apply

"... but in India you may suppose a possible case, but in that case, it must be imminent, extreme, necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme, and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves - with a view of preserving the whole. But in the case here, where is that extreme necessity? But that I leave to you as judges of it. For as in natural necessity, so in the other, the jury are to judge, if a case exists, or if you think this is a case existing of that nature."

FN333 Ibid. 1224.

Grotius rationalises the allowance of some validity to a usurper's acts, equating it to an implied mandate from the lawful Sovereign, in the following passage (quoted by Beadle C.J.) from De Jure Belli ac Pacis, Bk. 1, Ch. IV, Sect. XV:

"1. We have spoken of him who possesses, or has possessed, the right of governing. It remains to speak of the usurper of power, not after he has acquired a right through *736 long possession or contract, but while the basis of possession remains unlawful. Now while such a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that one to whom the sovereignty actually belongs, whether people, king, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts."

This is sound common sense.

International law as crystallised in the Hague Rules has from a similar point of view concerned itself with the preservation of courts and law and order during enemy occupation. But those rules are confined to national belligerents and have no application to a domestic rebellion. Nevertheless, there seems no reason why the law should not even in the case of rebellion have some regard to the preservation of the citizens from chaos and disorder. Particularly is this so when, as here, there is a full-scale rebellion in complete control over the whole area of one isolated unit of the realm.

Dr. Lauterpacht in his Recognition in International Law (tat ed., 1947) at p. 147 says:

"In 1924 and in subsequent years the courts of the United States extended the doctrine of 'justice and public policy' to cover acts of unrecognised foreign governments. They interpreted the Civil War cases as suggesting, in the words of Cardozo J. in Sokoloff v. National City Bank, [FN334] 'the possibility that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done.' In the same judgment Cardozo J., while affirming the principle that [FN335] juridically, a government that is unrecognised may be viewed as no government at all, if the power withholding recognition chooses thus to view it, qualified the general rule by the statement that 'in practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War.'"

FN334 (1924) 239 N.Y. 158; 145 N.E. 917, 918.

FN335 239 N.Y. 158, 165.

The United Kingdom Parliament may, of course, refuse for its own purposes to recognise any act of any body to which it *737 does not choose to accord recognition. But the gap between omnipotence in theory and impotence in fact is wide. It would be unfortunate if common sense and fairness to the citizen were not allowed, where this is possible, to make some contribution in an attempt to bridge the gap.

The practical factual situation in Rhodesia is this. The judges lawfully appointed under the 1961 Constitution and representing its judicial power, have been entrusted by both sides with the duty of continuing to sit. They have continued to sit as judges under the 1961 Constitution although the country is in the control of an illegal government which does not acknowledge or obey that Constitution and does not acknowledge any right of appeal to their Lordships' Board. This is an uneasy compromise which has been adopted by both sides from, no doubt, a consideration of many factors. The primary reason, one presumes, is the reasonable and humane desire of preserving law and order and avoiding chaos which would work great hardship on the citizens of all races and which would incidentally damage that part of the realm to the detriment of whoever is ultimately successful. This would accord with the common sense view expressed by Grotius (above). For this reason it is clearly desirable to keep the courts out of the main area of dispute, so that, whatever be the political battle, and whatever be the sanctions or other pressures employed to end the rebellion, the courts can carry on their peaceful tasks of protecting the fabric of society and maintaining law and order. Such a compromise is bound to create difficulties in its application. This compromise can be brought to an end by either side. Such a step, however, would be an act of policy. It would, no doubt, not be taken by either side without a full and anxious consideration Fife what other situation is both preferable and practical. This is a matter which is outside the scope and powers of a judiciary.

That the present situation is a compromise deliberately adopted by both sides is inescapable.

The approval of the lawful Government is shown by the following facts:

(a) The lawful Government through its Governor on November 11 announced that all the Ministers had been dismissed and gave the following directive to its citizens:
"I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal *738 tasks. This applies equally to the judiciary, the armed services, the police and the public service."

(b) That directive was repeated on November 14 in identical terms with the addition of the following:
"I have been asked by Mr. Smith to resign from my office as Governor. I hold my office at the pleasure of Her Majesty The Queen, and I will only resign if asked by Her Majesty to do so. Her Majesty has asked me to continue in office and I therefore remain your legal Governor and the lawfully constituted authority in Rhodesia" (my italics). "It is my sincere hope that lawfully constituted Government will be restored in this country at the earliest possible moment, and in the meantime I stress the necessity for all people to remain calm and to assist the armed services and the police to continue to maintain law and order."

(c) That directive has never been altered, countermanded or superseded. There is a lawful Governor and the lawful Government has a right to govern and to tell its citizens what are its wishes or its policy. It has chosen to leave the directives of November 11 and 14 in force.

(d) No provision (we are told) was made for payment of the judges' salaries (or indeed those of the other services) by the lawful Government and presumably it intended that they should be paid by the illegal government out of taxes illegally collected for so long as the rebellion continued in force.

(e) Not only did the lawful Government acquiesce in the judges (and the other services) carrying on as they did, and receiving their salaries from the illegal government, but two years later, in 1967, when the Chief Justice had to be absent from Rhodesia, the lawful Government appointed one of the judges, Sir Vincent Quenet, as acting Chief Justice. This was one of its very few acts of government since November, 1965, and it appears to be a ratification or confirmation of the judges' conduct in carrying on according to the mandate given by the Governor in November, 1965.

On the other side the illegal government has equally clearly demonstrated its approval of the compromise by the following facts:

(a) It has acquiesced in the judges carrying on as they have done, by allowing them to sit, by acknowledging and enforcing their judgments, by paying their salaries, and so forth. It could have had its own judges.

(b) The judges appointed under the 1961 Constitution have been deemed by the unlawful government to sit under the unlawful 1965 Constitution (see section 128 (1)) and have not so far been *739 asked under section 128 (4) to swear allegiance to the 1965 Constitution.

The directive of the lawful Government to the police and the public service "to maintain law and order in the country and to carry on with their normal tasks" and to "all people to remain calm and to assist the armed services and the police to continue to maintain law and order" obviously did not mean that they should decline every order that came from an unlawful source. The task of the civil service and the police force would be wholly unworkable in a matter of hours, or days, or, at most, weeks if no directions from on top were recognised. The directive clearly meant what it said - that they were to carry on with their normal tasks. and it was obvious that many of those tasks would consist in carrying out orders which originated from Ministers who had, as the directive had informed them, been dismissed and had, therefore, no legal power to give such orders. But the services must of course refuse, where necessary, to carry out any such orders as would actively further the objectives of the illegal authorities. These two behests contained in one short message made it perfectly clear that the lawful Government was not seeking to impose its will by causing day-to-day chaos. It was relying on other sanctions and pressures.

This is in my opinion the clear meaning of the message and I see no reason to doubt that this was intended for reasons of humanity and common sense. The directive was short and unambiguous. No doubt every word of it was drafted by the Government with anxious care. Though its day-to-day application by the citizen must obviously be enormously difficult, the intention of the message was plain. I do not think one should countenance the argument that the message has no force in law. When a government in a crisis of dire peril and difficulty gives a directive to its

distressed and anxious citizens through its lawful Governor (claiming, as above, to be "the lawfully constituted authority in Rhodesia") it speaks with a voice that must be relied on by them as the voice of authority. and when for years, though able to speak, it has not sought to correct or countermand its message, it can be taken that there was no mistake in the message and that it still stands.

The judiciary were expressly included with the others. It seems to me that the message was a mandate to the judges to do that which in fact they have done (see the judgment of Beadle C.J. [FN336] *740 and also that which, if I am right in my view as to the principle of necessity or implied mandate, that principle permitted them to do.

"The necessity relied on in the present case," said Fieldsend A.J.A., [FN337] "is the need to avoid the vacuum which would result from a refusal to give validity to the acts and legislation of the present authorities in continuing to provide for the every day requirements of the inhabitants of Rhodesia over a period of two years. If such acts were to be without validity there would be no effective means of providing money for the hospitals, the police, or the courts, of making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require attention in the complex and modern state. Without constant attention to such matters the whole machinery of the administration would break down, to be replaced by chaos, and the welfare of the inhabitants of all races would be grievously affected."

FN336 [1968] (2) S.A. 284, 313.

FN337 [1968] (2) S.A. 435.

The lawful Government has not attempted or purported to make any provision for such matters or for any lawful needs of the country, because it cannot. It has of necessity left all those things to the illegal government and its Ministers to provide. It has appointed no lawful Ministers. If one disregards all illegal provision for the needs of the country, there is a vacuum and chaos.

In my view, the principle of necessity or implied mandate applies to the present circumstances in Rhodesia. I cannot accept the argument that there was no necessity since the illegal regime can always solve the problem by capitulating. So too a foreign army of invasion can always return home. The principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, rebus sic stantibus, regardless of whose fault it is that the crisis has been created or persists. Subject therefore to the facts fulfilling the three necessary qualifications, the principle of necessity or implied mandate applies in this case. This, according to Lord Mansfield, [FN338] with whom I agree, is a question of fact.

FN338 21 State Trials 1224.

1. Does the ordinary orderly running of the country reasonably require it? Fieldsend A.J.A. [FN339]held that it did. The other judges accepted different principles, and therefore their overall conclusion is not of much assistance on this point. But Fieldsend A.J.A. approached the case from what, in my view, is the right angle, and would therefore accept his finding. He decided this matter sitting *741 in mediis rebus. He had evidence before him. He had observations of the illegal Minister referring to sabotage and the like. There were many matters of which he

could take judicial notice, whereas we are ignorant of the local background. and their Lordships' Board is always reluctant to interfere in questions of fact. We do know, however, that there had been very troubled times in Rhodesia of late, that there had been some lawful proclamations of states of emergency (which one must suppose were necessary) prior to the Unilateral Declaration of Independence, that one such period was actually running at the time of U.D.I., that there were at that time regulations permitting detention and that there was a lawful detention order in force against Daniel Madzimbamuto (which also one must suppose was necessary) at the time of U.D.I. I should feel very surprised if after U.D.I. there was less emergency and trouble than beforeit. Had this been a case where there had been no previous state of emergency and no detention order, different considerations might apply. But in the present case I see no reason to suppose that Fieldsend A.J.A., with whose careful conclusions of law I agree, was wrong in his conclusion of fact. It is to be noted that the judges held that the existing order was unlawful in so far as it exceeded Emergency Powers under the lawful Constitution which they took to be the limiting factor of what one might describe as the margin of tolerance.

FN339 [1968] (2) S.A. 284, 444.

2. Do the declaration of emergency and the detention order impair the citizen's rights under the Constitution? In one sense any recognition of an unlawful order adverse to a citizen impairs his rights under the Constitution, since he would be better off if the unlawful order were not recognised. But this is not the true sense or the sense intended by the American cases. If it were, the doctrine of necessity or implied mandate would never apply when anyone's interest is adversely affected. The true question is whether the act, if done by the lawful authorities, would conflict with his rights under the Constitution, This proclamation of a state of emergency and detention order could (and, it seems likely, would) have been made lawfully under the Constitution had the lawful Government continued.

3. Is this declaration of emergency intended directly to help or does it directly help the usurpation or does it run counter to the policy of the lawful Government? Is it in a word against public policy? I think not. In one sense every tax paid, every job of work done, every malefactor apprehended helps a government. But this is not the sense in which the problem has to be approached. The American cases show that it has to be approached with *742 common sense and with a reasonable margin of tolerance. In this problem the Governor's directive is obviously of great importance. It clearly implied a reasonable margin. It made clear that the battle was not to be fought by a breakdown of law and order or an interference with normal administration but by other pressures and sanctions. Civil servants could not carry on without accepting some directions from illegal Ministers. Judges could not carry on without acknowledging some formalities and acts that had an illegal origin. The difficulty lies in deciding how wide was the intended margin of tolerance and whether in fact it covers a particular case. That matter was left to the judges without any subsequent and more precise directive as to policy. That fact and the appointment of Sir Vincent Quenet as acting Chief Justice seems to show that as late as 1967 the lawful Government did not feel that its policy was being offended by what the judges had done so far in their very difficult task. It may have considered that there is not always great value in directions shouted by those who are ashore to those who are trying their best to manage a storm-ridden boat in the bay. For your Lordships to overrule the judges on a very difficult question of fact, on which the lawful Government can shed light at any moment but have (perhaps wisely) refrained, seems to me, with all respect, erroneous. There is in the circumstances so large an element of policy involved that it would be inappropriate. The present case may approach the limits of the margin of tolerance permitted in this situation

both by the Governor's directive or mandate and by the principle of necessity or implied mandate. But I accept Fieldsend A.J.A.'s finding that it does not exceed them.

Finally, does the Southern Rhodesia Act, 1965, or the Order in Council made thereunder prevent one from taking this view and compel the courts to deny all validity for any purpose to all the acts of the illegal Government or its purported Ministers? In my opinion they do not.

It is argued that in construing the Act and the Order in Council one should disregard the Governor's directive, as having no legal effect, and that it is not permissible to make any use of it as a guide to their intention. But in the circumstances of November, 1965, it is impossible to disregard the Governor's directive, given as that of "the legal authority in Rhodesia." In that extreme national crisis it was the plain duty of the Government of Rhodesia to speak to the people of Rhodesia and tell them what to do. and it was the duty of the people to harken and, so far as possible, obey. The Governor was the voice of the Government, and his *743 directive was careful and plain. At about the same time (and probably at the same time) that the message was drafted there was being drafted an Act of Parliament and an Order in Council. The dates of the directive were November 11 and 14. The date of the Act was November 16. The date of the Order in Council was November 18. The directive would probably reach the ears and eyes of the people of Rhodesia. The Act and the Order in Council would probably not do so (and in any event they would not be intelligible to the layman). In those circumstances how can it be argued that the Act or the Order in Council were intended to do anything which would stultify the directive or render impossible (unknown to the people) that performance which the message enjoined on them? The Governor's message was well known to Parliament. One approaches the construction of the Act and the Order in Council therefore with some contemporaneous knowledge of the legislator's intentions. Whatever else they meant, their intention cannot have been to stultify the Governor's message. There remains of course the possibility that such a result might have been produced per incuriam. But if so, this fact had not been apparent to the lawful Government, since there has been no subsequent amendment of the Governor's directive or the Act or the Order in Council.

The terms of the Act do not affect the present problem. Section 1 declares that Southern Rhodesia continues to be part of Her Majesty's Dominions and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore in respect of it. Section 2 provides that Her Majesty in Council may make such provision in relation to Southern Rhodesia as appears necessary or expedient in respect of any unconstitutional action taken therein. Without prejudice to the generality of such power an Order in Council may provide:

"(a) for suspending, amending, revoking or adding to any of the provisions of the Constitution of Southern Rhodesia, 1961; (b) for modifying, extending or suspending the operation of any enactment or instrument in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia; (c) for imposing prohibitions, restrictions or obligations in respect of transactions relating to Southern Rhodesia or any such persons or things."

Thus the Act gives the widest powers to govern by Order in Council, but it does not in itself affect this argument. It is to the Order in Council that one must turn.

In my opinion the relevant part of the Order was simply *744 directed to prohibiting any improper use or manipulation of the 1961 Constitution by those in control of Rhodesia, and to preventing that Constitution being taken over and used

as a speciously lawful government by those who did not intend to obey its limits (as has been done on occasion elsewhere) - in short, to make it clear beyond argument or subterfuge that this was rebellion.

Section 2 (1), section 3 (1) and section 6 are the relevant sections. Section 3 (1) provides that:

"So long as this section is in operation - (a) no laws may be made by the Legislature of Southern Rhodesia ..." - That is clearly the lawful Legislature under the 1961 Constitution "... No business may be transacted by the Legislative Assembly ..." - That is clearly the Legislative Assembly under the 1961 Constitution - "... No steps may be taken by any person or authority for the purposes of or otherwise in relation to the constitution or reconstitution of the Legislative Assembly or the election of any person to be a member thereof" - That still clearly refers to the Legislative Assembly under the 1961 Constitution - "And Chapters II and III of the Constitution shall have effect subject to the foregoing provisions of this paragraph."

Those two chapters deal with the Legislative Assembly, its procedure and powers and with the franchise. This has no relevance save that it emphasises the fact that the whole subsection is concerned with the 1961 Constitution. Subsection (b) provides that the Secretary of State may prorogue the Legislative Assembly, i.e., the assembly under the 1961 Constitution. Subsection (c) gives to Her Majesty in Council the right to make orders for the peace, order and good government of Rhodesia.

Section 6 says:

"It is hereby declared for the avoidance of doubt that any law made, business transacted, step taken or function exercised in contravention of any prohibition or restriction imposed by or under this Order is void and of no effect."

The prohibitions or restrictions are those contained in section 3 (a). They are concerned, as we have seen and as one would expect, with any attempt to work the lawful Constitution unlawfully. They do not concern an unauthorised Constitution. That is dealt with in section 2 (1) which declares:

"... for the avoidance of doubt that any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

This was of course unnecessary since such instrument or act in *745 purported promulgation of an unlawful constitution was void anyhow, but it was intended to make quite clear that the new Constitution would not be valid.

In my view, therefore, the Order in Council did not affect the present problem by its express terms. I would not imply any meaning which did so.

Moreover, for the present argument it makes no difference if an Order in Council expressly made acts illegal and void, so that instead of being plainly illegal and void as contrary to the lawful Constitution and lawful Government of Rhodesia they also become illegal and void as contrary to an Order in Council. They were still subject to the principle of necessity or implied mandate and still within the margin of tolerance laid down in the Governor's directive. There is no indication in the Order in Council that it intended to exclude the doctrine of necessity or implied mandate by enjoining (inconsistently with the Governor's directive) continuing disobedience to every act or command which had not the backing of lawful authority. Even had it done so, I feel some doubt as to how far this is a possible conception when over a prolonged period no steps are taken by the Sovereign himself to do any acts of government and the result would produce a pure and continuous chaos or vacuum. and even apart from the Governor's directive I would certainly not be prepared to infer such an intention where it was not expressly stated.

Perhaps one may emphasise, what should be obvious, that no question as to "the merits" of the main contest between the lawful ruler and the illegal government have any relevance whatever to the arguments in this case. Questions of martial law do not depend on the merits of an invasion. When a state of rebellion or invasion exists the law must do its best to cope with the resulting problems that beset it.

For the reasons I have given, I would dismiss the appeal.

Representation

Solicitors: Bernard Sheridan & Co.; Treasury Solicitor; the respondents were not represented .

(T. C. C. B.)

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[1926] A.C. 518
1926 WL 22032 (Privy Council)
(Cite as: [1926] A.C. 518)
<Citations>

*518 Sobhuza II. Appellant; v. Miller and Others Respondents.

Privy Council

PC

Viscount Cave L.C., Viscount Haldane , Lord Parmoor, Lord Phillimore, and Lord Blanesburgh.

1926 April 15.

On Appeal from the Special Court of Swaziland.

Constitutional Law--Protectorate--Swaziland--Administrative Power--Order in Council--Act of State--Foreign Jurisdiction Act, 1890 (53 & 54 Vict. c. 37).

An extension of British jurisdiction in a British protectorate by Orders in Council may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or to statutory powers given by the Foreign Jurisdiction Act, 1890, under which the jurisdiction acquired by the Crown in a protected country is indistinguishable in legal effect from that acquired by conquest. The Crown cannot, except by statute, deprive itself of freedom to make Orders in Council, even such as are inconsistent with previous Orders.

Before the conquest and annexation of the South African Republic Swaziland was an independent native State, treated as a protected dependency of that Republic, by

which it was administered under a Convention made in 1894 between Great Britain and the Republic. The Convention provided for the preservation of native law, and the agricultural and grazing rights of the natives. The annexation did not extend to Swaziland. Subsequently under Orders in Council certain lands in Swaziland were expropriated to the Crown, to the extinguishment of the use and occupation of them by natives under native law, certain lands being allotted exclusively to the natives:-

Held, that the Orders in Council were effective, even if they were not within the powers recognized by the Convention.

Rex v. Earl of Crewe [1910] 2 K. B. 576 approved.

Judgment of the Special Court of Swaziland affirmed.

APPEAL (No. 158 of 1924) from a judgment of the Special Court of Swaziland (May 27, 1924).

The appellant, who was paramount chief of Swaziland, presented a petition to the Special Court of Swaziland, on behalf of himself and the chiefs and natives of Swaziland; he claimed an order ejecting the respondents from certain land in that country, a declaration of rights, and an injunction.

*519 The petition called in question the validity of certain Orders in Council, and proclamations and grants of land made thereunder.

The facts are fully stated in the judgment of the Judicial Committee.

The Special Court dismissed the petition.

1926. March 2, 4, 8. Horace Douglas for the appellant. Swaziland does not form part of the British dominions, and the Crown had no rights to dispossess the natives of their lands, or of their rights of user or occupation. The country was merely a species of protectorate; it was not a protectorate of the kind known in international law. The only rights which the Crown possessed were such as were acquired upon the conquest of the South African Republic. Those rights were subject to the condition contained in art. 2 of the Convention between Great Britain and the Republic; the effect of that article was to guarantee to the natives their use and occupation of the land under native law. The Foreign Jurisdiction Act, 1890, is not applicable. Further, the Orders in Council did not divest the natives of their rights in respect of the land in dispute. [Reference was made to Johnston v. M'Intosh [FN1]; St. Catherine's Milling Co. v. The Queen [FN2]; Attorney-General v. De Keyser's Royal Hotel [FN3]; and Amodu Tijani v. Secretary, Southern Nigeria. [FN4]]

FN1 (1823) 8 Wheaton, U. S. 543.

FN2 (1888) 14 App. Cas. 46.

FN3 [1920] A. C. 508, 562.

FN4 [1921] 2 A. C. 399, 407.

Sir Douglas Hogg A.-G. and Giveen for the respondents. Swaziland was a foreign country, in which there was jurisdiction under the Foreign Jurisdiction Act, 1890, and the Orders in Council had statutory effect under that Act. [Reference was made to Jenkyn's British Rule and Jurisdiction beyond the Seas (1902), pp. 179, 181, 182; Hall's Foreign Jurisdiction of the British Crown, p. 225; Westlake's Collected Papers on International Law, p. 190; Rex v. Earl of Crewe [FN5]; and In re Southern Rhodesia. [FN6]] Even if the above Act was not applicable, the Orders in Council were acts of State and not questionable by the Court. There may be an*520 annexation of jurisdiction without any annexation of territory. The proclamation and the grant were within the Orders, and, not being repugnant to any statute, were valid and effective.

FN5 [1910] 2 K. B. 576.

FN6 [1919] A. C. 211, 233, 234.

Horace Douglas in reply. Jurisdiction in Swaziland was not acquired in any of the manners referred to in the preamble to the Foreign Jurisdiction Act, 1890, and that Act does not apply. If that is so the Orders in Council were ineffective in the absence of ratification by Parliament: Forester v. Secretary of State for India. [FN7]

FN7 (1872) L. R. I. A. Supp. 10.

April 15. The judgment of their Lordships was delivered by VISCOUNT HALDANE.

This is an appeal from a judgment of the Special Court of Swaziland, by which a petition of the appellant has been dismissed with costs. The petition was presented against the first respondent, and the second respondents were added at the trial on the footing that they claimed to own the land in controversy and that the first respondent was acting as their manager. The substance of the petition was that certain lands, known as Farm 188, formed part of an area originally subject to a concession known as the "Unallotted Lands Concession, " granted by the former King of the Swazis, Umbandine, on July 26, 1889. Under this concession the grantees bound themselves to respect all prior rights, and, further, in no way to interfere with the rights of the native subjects of the grantor. The concession of 1889 was expressed to have been made by the King with the advice and consent of his Indunas in Council in favour of two persons, Thorburn and Watkins, of exclusive grazing, and to have conferred agricultural and planting rights over the unoccupied land within the concession, for fifty years, with a right to renewal, at a yearly rent of 50l. The King, in consideration of this, undertook to protect the concessionnaires in the exercise of their rights. The claim made in the petition was that the first respondent had trespassed on the existing rights of native occupiers and had caused them to be ejected from the land they occupied.

*521 Evidence was taken at the trial of the petition. It was found that certain natives and their predecessors had been for a long time in occupation of portions of the land included within the concession, and that they were now being ejected from the portions of the land other than such as had been demarcated for the sole and

exclusive use of the natives. The judgment of the Court set out that the original concession had been confirmed on December 17, 1890, by the High Court of Swaziland, a Court constituted by the King of the Swazis with the assent of the British Government and the South African Republic, and having jurisdiction to inquire into the validity of concessions such as that in question. But on September 19, 1908, the concession was expropriated by the High Commissioner by notice to the concessionnaires under art. 12 of Proclamation No. 3 (Swaziland), 1904. The judgment went on to state that by Order in Council of November 2, 1907, the area of the concession became Crown land, as having been expropriated, and that a portion of it was granted to the respondent company, who claimed a clear freehold title under the grant. The natives, on the other hand, claimed that their rights of use and occupation under native law had not been affected. It was contended for them that the rights they possessed before and after the granting of the concession remained intact, and had been recognized later on by art. 5 of the Order in Council made on June 25, 1903, and that these rights had not been subsequently cut down. The Court held that, at all events by the Order in Council made on November 2, 1907, the ownership of the land had passed to the Crown, and that the effect of this was to extinguish any rights of use and occupation that were in the natives; and that the documents and circumstances showed that it was intended to extinguish all such rights. As matter of fact, the natives were given instead sole and exclusive rights over one-third of the land included in the concession, and the concessionnaires had been given such rights over the remaining two-thirds. In the opinion of the Court below, the Order in Council of November 2, 1907, was validly made. Even if Swaziland *522 was no more than a protectorate, it was one which approximated in constitutional status to a Crown Colony, and the Crown had power to make laws for the peace, order and good government of Swaziland, and of all persons therein. Any original native title had, therefore, been effectually extinguished.

The question which their Lordships have to consider is whether this conclusion was right in point of law. Into any topic of policy they are, of course, precluded from entering. In order to come to a conclusion on the legal question it is necessary to look at the history and circumstances in which it has arisen.

Swaziland lies on the east of the Transvaal, between that country and the coast. It was treated as an independent native state both by the South African Republic and by the British Government, notwithstanding a good deal of interference by both in its affairs, and it was recognized, and still is recognized, as a protectorate. But the South African Republic appears, from the terms of the Convention made in 1894, to have become preponderant in the internal control. The relationship seems to have been recognized as being one in which Swaziland stood to the Republic as a protected dependency administered by the South African Republic. This protectorate stopped short of incorporation, but apparently it was recognized by the Convention of 1894 between Great Britain and the South African Republic (art. 2) as giving the latter, without incorporation, all rights of protection, legislation, jurisdiction and administration over Swaziland, and the inhabitants thereof. The natives were, however, guaranteed in their laws and customs, so far as not inconsistent with laws made pursuant to the Convention, and in their grazing and agricultural rights, with the proviso that no law thereafter made in Swaziland was to be in conflict with the guarantees given to the Swazi people in the Convention.

The question which at once presents itself is, what is the meaning of a protectorate? In the general case of a British Protectorate, although the protected country is not a British*523 dominion, its foreign relations are under the exclusive control of the Crown, so that its Government cannot hold direct communication with any other foreign power, nor a foreign power with its Government. This is the substance of the definition given by Sir Henry Jenkyns at p. 165 of his

book on British Rule and Jurisdiction beyond the Seas. Their Lordships think that it is accurate, and that it carries with it certain consequences. The protected state becomes only semi-sovereign, for the protector may have to interfere, at least to a limited extent, with its administration in order to fulfil the obligations which international law imposes on him to protect within it the subjects of foreign powers. A restricted form of extra-territorial sovereignty may have its exercise called for, really involving division of sovereignty in the hands of protector and protected. But beyond this, it may happen that the protecting power thinks itself called on to interfere to an extent which may render it difficult to draw the line between a protectorate and a possession. In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890. This statute provided, upon the preamble that by treaty, capitulation, grant, usage, sufferance, and other lawful means, the Crown has power and jurisdiction in divers countries and places outside its dominions, and that it was expedient that Acts relating to the exercise of such jurisdiction should be consolidated, that it should be lawful for the Sovereign to hold, exercise and enjoy any jurisdiction now or hereafter possessed within a foreign country in the same and as ample a manner as if the jurisdiction had been acquired by cession or conquest of territory, and that every act and thing done in pursuance of any such jurisdiction was to be as valid as if it had been done according to the local law then in force in that country. It was provided that any Order in Council made in pursuance of the Act should be laid before both Houses of Parliament within a limited time, and should*524 have effect as if enacted in the Act. The Foreign Jurisdiction Act thus appears to make the jurisdiction, acquired by the Crown in a protected country, indistinguishable in legal effect from what might be acquired by conquest. It is a statute that appears to be concerned with definitions and secondary consequences rather than with new principles. This view of it was also that taken in an important judgment of the Court of Appeal: Rex v. Earl of Crewe. [FN8] There, by an Order in Council, the High Commissioner for South Africa had been authorized to provide in the Bechuanaland Protectorate for the administration of justice and for the peace, order and good government of all persons within that protectorate and the prohibition and punishment of all acts tending to disturb the public peace. Sekgome, the chief of a native tribe, was detained in custody under a proclamation purporting to have been made by the High Commissioner under the powers so conferred. He applied for a habeas corpus against the Secretary of State for the Colonies. It was held that the protectorate was a foreign country within the meaning of the Foreign Jurisdiction Act, and that the proclamation was validly made.

FN8 [1910] 2 K. B. 576.

It was further held that the detention was lawful, inasmuch as the construction of the Act settled by practice rendered it impossible to limit its application to British subjects in the foreign country. Vaughan Williams L.J. considered that the proclamation under which the detention took place was valid as a law which the Act gave the Crown absolute power to make and apply, just as if the territory had been obtained by cession or conquest. He also held that the detention could be independently justified as an act of State. Kennedy L.J. concurred, definitely on the view that the detention could be justified as an act of State, as well as under the Foreign Jurisdiction Act. The stress in the judgment of Farwell L.J., who arrived at the same conclusion as to the validity of the proclamation under which the detention was made, was laid on the construction of that Act, which he interpreted in a similarly wide sense.

*525 In the Southern Rhodesia case [FN9] Lord Sumner, in an elaborate judgment given on behalf of the Judicial Committee on a special reference, expressed views which are substantially similar. He held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. Both of these cases imply that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be as little generally understood as it is, where it can operate, in law unquestionable.

FN9 [1919] A. C. 211.

Such being the principle, it remains to ascertain whether it has been put in operation in the case under consideration. To answer this question it is first necessary to recall the true character of the native title to land throughout the Empire, including South and West Africa. With local variations, the principle is a uniform one. It was stated by this Board in the Nigerian case of Amodu Tijani v. Secretary, Southern Nigeria [FN10], and is explained in the report made by Rayner C.J. on Land Tenure in West Africa, quoted in the case referred to. [FN11] The notion of individual ownership is foreign to native ideas. Land belongs to the community and not to the individual. The title of the native community generally takes the form of a usufructuary right, a mere qualification of a burden on the radical or final title of whoever is sovereign. Obviously such a usufructuary right, however difficult to get rid of by ordinary methods of conveyancing, may be extinguished by the action of a paramount power which assumes possession or the entire control of the land.

FN10 [1921] 2 A. C. 399.

FN11 Ibid. 404.

Turning next to the history of what was done in Swaziland by the British Government, the material events may be stated briefly.

Swaziland was originally under the rule of native kings, and concessions conferring rights in respect of land were granted by them to persons other than natives. The land in*526 question was granted, by the concession known as the "Unallotted Lands Concession" of July 26, 1889, to Thorburn and Watkins, as already stated. The grant was made by King Umbandine, who reigned between 1875 and 1889. The grant, which was of farming and planting rights for fifty years, with a provision for renewal, at an annual rent of 50l., bound the grantees in no way to interfere with the rights of the King's native subjects. There was conferred power to sublet or transfer.

In September, 1890, Ungwane, the then King of the Swazis, set up by organic proclamation a Chief Court composed of three judicial members approved by the British High Commissioner and the President of the South African Republic, such Court to have full jurisdiction over all persons in Swaziland of European extraction, and over all questions, matters and things in which such persons were concerned. The Court was to undertake judicial inquiry into the validity of disputed

concessions. In 1890 it confirmed the concession in question. By deed of cession the grantees transferred the area comprised in it, including the territory in dispute, but excepting certain distinct areas which had previously been transferred to others, to the second respondents. Ungwane was succeeded by his son, Sobhuza, the appellant, who is the present king or paramount chief.

When the Boer war broke out in 1899 Swaziland had for some years come to be under the protectorate of the South African Republic. This was the result of the Convention of 1894 between the Republic and the British Government. After the conquest and annexation of that Republic, by Order in Council of June 25, 1903, the Crown, on the recital that by the conquest and annexation all rights and powers of the South African Republic had passed to the British Sovereign, ordered that the Governor administering the Transvaal might exercise all powers and jurisdictions of the Crown and take all such measures and do all such things as were lawful and in the interest of His Majesty's service, as he might think, subject to instructions, expedient. The Governor was expressly empowered by proclamation to provide for the *527 administration of justice, the raising of revenue, and generally for the peace, order and good government of Swaziland, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. He was, in issuing such proclamations, to respect any native laws by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection were regulated, except so far as the same might be incompatible with the due exercise of His Majesty's power and jurisdiction or clearly injurious to the welfare of the natives. Such proclamations were to be published, and might be disallowed or modified by the Sovereign.

By Order in Council of December 1, 1906, the powers given to the Governor administering the Transvaal were transferred to the High Commissioner for South Africa.

By a subsequent Order in Council of November 2, 1907, on the recital that it was intended that portions of certain lands in Swaziland the subject of concessions or grants made by paramount chiefs and confirmed by the Chief Court under the organic proclamation of 1890, should be set apart and demarcated for the exclusive use and occupation of natives, and that the remaining portions should be granted or leased to European persons claiming rights under such concessions or should be held by the High Commissioner for South Africa, His Majesty, by virtue of the powers vested in His Majesty under the Foreign Jurisdiction Act or otherwise, ordered that all rights in any land in the said territory not being land set apart and demarcated by the authority of the High Commissioner for the sole and exclusive occupation of the natives, and proclaimed as Crown lands, and also in any land within the territory lawfully transferred to or expropriated by the High Commissioner in exercise of the powers vested in him by proclamation or otherwise for the peace, order, and good government of the territory, should vest in and be exercised by the High Commissioner, who might make grants or leases of such lands.

By proclamation of the High Commissioner made on March 16, 1917, certain areas were proclaimed as Crown*528 lands, and among these areas was a portion of the lands included in the Unallotted Lands Concession of 1889. This had been in 1908 expropriated by notice given by the High Commissioner under the powers vested in the Governor of the Transvaal by the Order in Council of June 25, 1903, the exercise of which he had provided for by Swaziland Proclamation No. 3 of 1904. Under a Crown grant of March 16, 1917, the High Commissioner granted to the second respondents a part of the land subject to the concession and now in dispute, as compensation for lands which they had relinquished in his favour. By proclamation promulgated on the same date the High Commissioner had proclaimed to be Crown land the portion of the

unallotted land included in the original Unallotted Lands Concession, and this portion included the land granted as compensation to the second respondents and now in dispute.

The principles of constitutional law laid down in the earlier part of their Lordships' judgment render it in their opinion impossible to maintain the argument submitted for the appellant. That argument is that the Crown has no powers over Swaziland, except those which it had under the conventions and those which it acquired by the conquest of the South African Republic. The limitation in the Convention of 1894 on interference with the rights and laws and customs of the natives cannot legally interfere with a subsequent exercise of the sovereign powers of the Crown, or invalidate subsequent Orders in Council. But if this be true it makes an end of the appellant's case. For the Order in Council of 1907, after providing for power to set apart certain lands in Swaziland, the subject of concessions by the paramount chiefs, enabled the High Commissioner to acquire the remaining land and to deal with it. He had therefore full power to make the Crown Grant of March 16, 1917. The power of the Crown to enable him to do so was exercised either under the Foreign Jurisdiction Act, or as an act of State which cannot be questioned in a Court of law. The Crown could not, excepting by statute, deprive itself of freedom to make*529 Orders in Council, even when these were inconsistent with previous Orders.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the question involved is concerned with constitutional issues and is of far-reaching public interest, they will advise, following precedents in other cases, that there should be no costs of the appeal.

Representation

Solicitor for appellant: E. F. Hunt.

Solicitor for respondents: Treasury Solicitor.

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