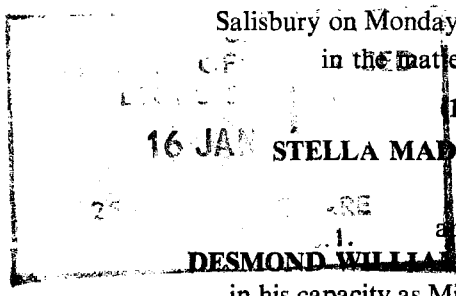
JUDGMENT

delivered in the Appellate Division of the High Court of Rhodesia at Salisbury on Monday, 29th January, 1968,

in the matters between:



(1)

STELLA MADZIMBAMUTO,

Appellant,

and

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and of Law and Order, First Respondent,

and

FREDERICK PHILLIP GEORGE,
in his capacity as Superintendent of Gwelo Prison, Second Respondent,

(2)

LEO SOLOMON BARON,

Appellant,

and

NORMAN AYRE,
in his capacity as the Officer in Charge of Que Que Prison, First Respondent,

and

HENDRIK STEPHANUS BEZUIDENHOUT,
in his capacity as Director of Prisons,

Second Respondent,

and

CLIFFORD WALTER DUPONT,

Third Respondent,

and

DESMOND WILLIAM LARDNER-BURKE,

Fourth Respondent,

alternatively

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and of Law and Order, Fifth Respondent.

(Printed at the request of the Court)

1. STELLA MADZIMBAMUTO,
Appellant,

and

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and
of Law and Order, First Respondent,

and

FREDERICK PHILLIP GEORGE,
in his capacity as Superintendent of
Gwelo Prison, Second Respondent,

2. LEO SOLOMON BARON, Appellant,

and

NORMAN AYRE,
in his capacity as the Officer in Charge of
Que Que Prison, First Respondent,

and

HENDRIK STEPHANUS BEZUIDENHOUT,
in his capacity as
Director of Prisons, Second Respondent,

and

CLIFFORD WALTER DUPONT,
Third Respondent,

and

DESMOND WILLIAM LARDNER-BURKE,
Fourth Respondent,

alternatively

DESMOND WILLIAM LARDNER-BURKE,
in his capacity as Minister of Justice and
of Law and Order, Fifth Respondent,

(Appellate Division, High Court, Rhodesia)

Beadle, C.J., Quénet, J.P., Macdonald, J.A., Jarvis and Fieldsend, A.JJ.A.

Salisbury. January 30, 31, February 1, 2, 3, 6, 7, 8, 9, 10, 11, 1967, October 9, 10, 11, 12, 13, 16, 17, 1967, January 29, 1968.

S. W. Kentridge, S.C., with him *H. T. Wheeldon*, for the appellants in both cases at the first hearing.

S. W. Kentridge, S.C., with him *N. J. McNally*, for the appellants in both cases at the second hearing.

O. Rathouse, Q.C., with him *the Solicitor General, E. A. T. Smith, Q.C.*, and *B. C. Brown*, for the respondents in both cases.

BEADLE, C.J.: The first appellant, the wife of Daniel Nyamayaro Madzimbamuto, originally applied to the General Division of the High Court for a writ of *habeas corpus* in respect of her husband, who was detained in Gwelo Prison. It then appeared, however, that prior to his detention in Gwelo Prison her husband had been lawfully restricted in terms of s. 50 of the Law and Order (Maintenance) Act [*Chapter 39*], under a restriction order issued in June, 1965, which order restricted him to the Gonakudzingwa Restriction Area for five years. The validity of this order has never been challenged. In the circumstances the most he was entitled to was to be released from detention in Gwelo Prison to restriction in the Gonakudzingwa Restriction Area. The first appellant accordingly amended her application from an application for a writ of *habeas corpus* (which may, of course, be brought by a third person) to an application on notice of motion served on the respondents, and asking for an order setting aside the detention order detaining her husband in Gwelo Prison. A significant feature of the application is that Madzimbamuto himself has never identified himself with these proceedings; he himself has not asked to be released from detention; he has not signified to the court his approval of the bringing of these proceedings, nor has he filed any affidavits supporting those filed by his wife. In these respects his application is different from that of the second appellant, Baron, who has brought all proceedings in his own name. Madzimbamuto has had ample opportunity to associate himself with the application made by his wife; for example, there was nothing to prevent him making his own application as the second appellant has done; but, as I have said, he has not done so. There is no precedent for an application on notice of motion being brought in the name of a third party when the person in whose name the application is being brought is himself in the country, at a known address, and is perfectly able to make his own application, which is the case with Madzimbamuto. In general principle a third party has no *locus standi* to make such an application, as the court does not know whether the person in whose name the application is being made wishes the relief claimed in the application. So far as this appeal is concerned, there is nothing to show that Madzimbamuto might not prefer to be detained in Gwelo Prison rather than to be restricted to the Gonakudzingwa Restriction Area. The procedural point that Mrs. Madzimbamuto has no *locus standi* to bring the application has not, however, been taken by the respondents; and, because of the importance of the issues raised, this technical point has not been raised by the court. I mention these details, however, to show that, so far as Madzimbamuto's application is concerned, it is quite clear that it is really in the nature of a test case, the object of which is to test the status of the present Government, its capacity to declare states of emergency, to make regulations thereunder, and to detain people in terms of those regulations.

The second appellant, Baron, brought his own application on notice of motion, and filed lengthy affidavits made by himself and others in support of his application. In his original application he asked that he "be released forthwith from custody and detention". Since the hearing of his application, however, he has been so released and has now left the country. During the hearing of the appeal, therefore, his counsel applied for an amendment of the order originally asked for, and asked instead for "a declaration that the applicant's detention by the respondent was unlawful". Today, therefore, the Baron application is also principally a test case, raising the same issues as those raised in the Madzimbamuto application.

There has been a very considerable delay between the first noting of these appeals and the delivery of this judgment, and it will be as well to explain why this is so. This delay has been due to the complexity of the matters which have had to be argued. As soon as the appeals were noted this court made an early date available for the hearing, so that judgment could be given as soon as possible. The matters involved were, however, so complicated that counsel asked for more time in which to prepare their arguments; and eventually the date of the first hearing on appeal was fixed, by agreement, for a day which suited the convenience of both sides. After the court had completed its consideration of the lengthy arguments presented at the first hearing, it was apparent that there were further important issues, which had not been raised at that hearing, and on which it was desirable that the court should hear argument. That these issues were of considerable difficulty and importance is evidenced by the fact that four-and-a-half months elapsed before counsel considered they were in a position to present their arguments, and by the fact that one of these issues has been decisive in determining the court's order. The date of the second hearing was again fixed by agreement so as to suit the convenience of both sides. Even so, after the conclusion of the second hearing there were still further matters which required argument, and on which argument had not been heard; and, to save the delay which might be occasioned by having a third oral hearing, the court agreed to receive written argument on those points. The appellants' final written argument was presented to the court on 18th November last.

The events leading up to the original detention of Daniel Nyamayaro Madzimbamuto and of the second appellant are accurately described in the judgment of LEWIS, J., in the court *a quo* in these terms:

> "As far as Mr. Madzimbamuto is concerned, he was detained on or about the 26th February, 1959, until the 14th May, 1959, in terms of the Emergency (Temporary Detention) Regulations, 1959. From the 15th May, 1959, he was detained under the Preventive Detention (Temporary Provisions) Act of 1959. His case was reviewed by the tribunal set up under that Act,

and the tribunal, over which a judge of this court presided, recommended that his detention be continued, which recommendation was accepted by the Governor. Thereafter, on the 8th June, 1961, he was released to a restriction area at Mafungabusi, and finally released altogether on the 15th January, 1963.

"Then, on the 28th April, 1964, he was served with an order issued by the Minister of Law and Order in terms of the Law and Order (Maintenance) Act of 1960 (now Chapter 39), restricting him to the area known as Gonakudzingwa, and on the 13th August, 1964, he was served with a similar order restricting him to the Sengwe Tribal Trust Area. That order expired on the 13th April, 1965, and he was released from restriction.

"On the 19th June, 1965, Mr. Madzimbamuto was served with an order issued by the first respondent, in his capacity as the Minister of Justice and of Law and Order, in terms of the Law and Order (Maintenance) Act, restricting him to the Wha-Wha restriction area for a period of five years. By a variation of that order he was transferred to restriction in the Gonakudzingwa area, otherwise known as the Sengwe Restriction Area. On the 6th November, 1965, the first respondent, in his capacity as Minister of Justice and of Law and Order, issued a detention order against Mr. Madzimbamuto in terms of section 21 of the Emergency (Maintenance of Law and Order) Regulations of 1965, published in Rhodesia Government Notice No. 736 of 1965. The effect of the order was to detain Mr. Madzimbamuto in the Gwelo Prison, and the order was stated to be based on the belief that Mr. Madzimbamuto 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.'

"As far as the second applicant, Mr. Leo Baron, is concerned, he was issued with a restriction order on the 28th May, 1965, by the same Minister (cited as the fifth respondent in the second application). The order was issued in terms of section 50 of the Law and Order (Maintenance) Act, and it restricted Mr. Baron's movements to a radius of 15 miles of the main Post Office at Bulawayo for a period of one year. This order was said to have been made by the Minister in the belief that Mr. Baron had actively associated himself with activities prejudicial to the maintenance of law and order in Rhodesia, such belief being founded on information which the Minister was unable to divulge because of the confidential nature of the complaint and sources of such information. Mr. Baron, in correspondence between himself and the Minister, which is annexed to the affidavits before the court, denied the allegations on which the restriction order was based, and invited the Minister to state his reasons for the order and to substantiate those reasons before a judicial tribunal sitting *in camera*. The Minister declined to amplify his reasons, declined to agree to this proposal, and declined to revoke the order in question, which has now in any event expired by effluxion of time.

"Thereafter, at about noon on the 11th November, 1965, the Minister issued a detention order against Mr. Baron, confining him to the Que Que Prison, in terms similar to those of the order against Mr. Madzimbamuto."

The first detention orders with which these appeals are concerned were issued in terms of the Emergency Powers Act [*Chapter 33*], as read with ss. 69 and 72 (2) of the Constitution of Southern Rhodesia, 1961 (to which I shall refer as "the 1961 Constitution"). On the 5th

November, 1965, the Governor, by Proclamation 51 of 1965, proclaimed a state of emergency in terms of s. 3 of the Act. At the same time he made the necessary regulations in terms of s. 4 of the Act, which empowered the Minister to make these original detention orders (see Government Notice 736 of 1965).

The validity of the original proclamation and regulations and of the original detention order for the detention of Daniel Madzimbamuto is not in issue; and, while it has not been conceded that the original detention order under which Baron was detained was validly made, in his application and in his notice of appeal he has challenged only the validity of his "continued detention" since 4th February, 1966.

In terms of s. 72 (2) of the 1961 Constitution, and of s. 3 (2) of the Emergency Powers Act, no proclamation of a state of emergency may remain in force for longer than three months, but provision is made for its renewal for further periods of three months at a time.

Before the original period of three months expired, however, the revolution with which these cases are mainly concerned occurred. On the 11th November, 1965, the Prime Minister and members of his Cabinet issued what they called "a proclamation", which purported to "give to the people of Rhodesia a new Constitution". This constitution was called "The Constitution of Rhodesia, 1965", and I shall refer to it as "the 1965 Constitution". The 1965 Constitution purported to make Southern Rhodesia an independent sovereign state. Since the 11th November, 1965, Southern Rhodesia has been governed by what I shall call "the present government".

In February, 1966, the members of the Southern Rhodesia Legislature, elected under the 1961 Constitution, who were deemed by the 1965 Constitution to be members of the Parliament created by that Constitution, passed Act 1 of 1966, the Constitution (Ratification) Act, 1966, which purported to ratify the 1965 Constitution. On the 3rd February, 1966, the Rhodesian Legislature purported to pass a resolution in terms of s. 3 (2) of the Emergency Powers Act, which authorized the Officer Administering the Government, appointed in terms of s. 3 of the 1965 Constitution (as amended), to issue Proclamation 3 of 1966, which extended the period of emergency. Thereafter the present Government purported to issue further regulations in terms of this proclamation, entitled The Emergency Powers (Maintenance of Law and Order) Regulations, 1966 (Government Notice 71 of 1966). These regulations authorized the continued detention of anyone detained under the previous regulations.

The detainees' detention up to 4th February, 1966, was authorized by individual orders of detention made specifically in respect of each detainee. These orders were made by "the Minister" himself in terms

of regulations published under Government Notice 736 of 1965. The detention of these detainees after 4th February was not, however, authorized by any individual detention orders. During the three-month period of emergency commencing on 4th February, 1966, the detainees were detained by virtue of Regulation 47 (3) of Government Notice 71 of 1966, which baldly stated that any person who had been detained in terms of the original regulations would continue to be detained as though his order for detention had been made under the new regulations. The continued detention of both detainees has always been made under subsequent regulations which repeated *verbatim* the provisions of Regulation 47 (3) of G.N. 71 of 1966. The later detention orders under which the detainees have been detained are, however, of no particular significance, as it has been conceded that they stand or fall with the validity or invalidity of Proclamation 3 of 1966, with the validity or invalidity of the Emergency Powers (Maintenance of Law and Order) Regulations, 1966 (G.N. 71 of 1966), and with the validity or invalidity of the original Regulation 47 (3). These applications are concerned with the validity or invalidity of all these measures.

In the court *a quo* the applicants argued that the 1965 Constitution was invalid, that the present Government was an illegal government, and in consequence all its acts, which included the measures above referred to, were invalid. The detention orders under which Daniel Madzimbamuto and the second appellant were detained were thus illegal and the applicants were entitled to the orders for which they asked.

The respondents argued, first, that the present Government was a valid *de jure* government and the 1965 Constitution the only valid lawful constitution, and that in consequence all these measures relating to the detention of Daniel Madzimbamuto and the second appellant were validly passed, and the respective detention orders validly made. As an alternative argument, the respondents argued that the present Government was at least in effective control of the country and, as a consequence, at least some of its legislative and administrative acts must be given the force of law. From this the respondents argued that these legislative and administrative acts which did not further the aims of the revolution, but were simply the normal acts of government done for the preservation of peace and order, should be enforced. The court *a quo* rejected the respondents' first argument and held that the present Government was an unlawful government and the 1965 Constitution an unlawful constitution. Against this finding the respondents originally noted a cross-appeal; but at the first hearing of the appeals Mr. *Rathouse*, who appeared for them, formally abandoned the cross-appeal because he considered that in terms of the rules of court and the authorities the matter raised in the cross-appeal was

not a permissible matter to raise by way of cross-appeal. He said that, while he did not concede that the ruling of the court *a quo* on this aspect of the case was right, he was not going to argue that it was wrong, because he considered that in the circumstances such argument was irrelevant. At the second hearing, however, Mr. *Rathouse*, at the request of the court, did argue this issue. The court *a quo* held in favour of the respondents' second alternative argument, and further held that all the measures relating to the detention orders fell within that category of legislative and administrative acts which were enforceable as normal acts of good government exercised by a government in effective control. On this reasoning the two applications were duly dismissed. The two appellants now appeal against the judgment of the court *a quo* on the following grounds:

"(1) The learned Judges erred in recognising what is referred to in the judgments as 'the Government of this country' as being the *de facto* government of this country and/or as being the government in effective control of this country.

(2) Even if the learned Judges did not err in recognising the said government as the *de facto* government of this country and/or as being in effective control of this country, they erred in holding that they could recognise or give effect to certain of the legislative and administrative acts of the said government and of the Parliament of Rhodesia.

(3) Even if the learned Judges did not err in holding that they could recognise or give effect to certain of the said legislative and administrative acts, they erred in holding that they could recognise or give effect to the following acts:—

(a) the proclamation of a state of emergency by the Third Respondent on 4th February, 1966 (Proclamation No. 3 of 1966, published in Government Notice No. 57 of 1966).

(b) the making of the Emergency Powers (Maintenance of Law and Order) Regulations, 1966 (published in Government Notice No. 71 of 1966).

(c) the continued detention of the Appellant in terms of such Regulations."

For convenience the two appeals have been heard together. At the hearing of the appeals Mr. *Rathouse* applied for certain evidence, which may not have been before the court *a quo*, to be considered by the court of appeal. He asked that the appeal court should take judicial notice (where it was entitled to take such notice) of the facts as they exist in Southern Rhodesia today, and not necessarily as they

existed at the date of the hearing of the applications. This application was granted. At the second hearing both parties filed additional affidavits purporting to demonstrate the factual position as it existed at the time (i.e., October, 1967). These appeals have, therefore, been considered on the basis of the facts as they exist today, and not as they existed when the applications were heard by the court *a quo*.

In a case of this complexity I think it advisable to deal with the various problems which arise under separate heads, and in order to avoid confusion I think it would be as well at the outset to outline these heads in the order in which I propose to deal with them.

1. I shall survey the constitutional position of Southern Rhodesia immediately before the Declaration of Independence, and the general factual position thereafter.

2. I shall deal with what I shall call "the no precedent argument". Mr. *Kentridge*, who appeared for the appellants, argued that no precedent can be found for supporting any view that there exists a middle course between the Scylla of complete repudiation of all the administrative and legislative acts of the present régime and the Charybdis of complete judicial recognition of the present régime and of the 1965 Constitution.

3. I shall deal with the status of the present Government today. This will involve dealing with two preliminary points: one, the effect of the Certificate of the Secretary of State for Commonwealth Affairs, which stated that the United Kingdom Government does not recognize the present Government of Rhodesia as either a *de facto* or a *de jure* one; and, two, the question of whether in any event this court has jurisdiction to inquire into the matter.

4. I shall deal with the position of the judges and of the High Court.

5. I shall deal with what really is the crux of the matter, which is, "what is the law to be applied in Rhodesia today".

6. Finally, I shall deal with the validity of (a) the Proclamations, (b) the Regulations, and (c) the continued detention of Madzimbamuto and of the second appellant.

1. The Constitutional Position of Rhodesia before the Declaration of Independence and the Factual Position thereafter.

The early history of the territory is adequately set out by GOLDIN, J., in the court below, in these terms:

> "In 1923, in terms of the Southern Rhodesia (Annexation) Order in Council, Southern Rhodesia was annexed to and declared part of His

Majesty's Dominions, as the Colony of Southern Rhodesia, thus terminating its administration by the British South Africa Company, which exercised its functions and duties by the authority of the Crown. The factual and legal position of Southern Rhodesia before 1923 is set out in *In Re Southern Rhodesia,* (1919) A.C. 211. Upon being constituted a colony, responsible government 'amounting almost to self-government' was conceded in the same year (see Halsbury's Laws of England, 3rd Edn., Vol. 5, pp. 591-2)."

It is perhaps as well to mention here, however, that never in its history has Southern Rhodesia been governed from Whitehall as a Colonial Territory. It was originally governed by the British South Africa Company under a Royal Charter granted in October, 1889, the relevant clause of which authorized the Company "to undertake and carry on the government or administration in territories, districts or places in Africa : . ." (See Clause 25.) This form of government continued until 1923, after which, in terms of the 1923 Constitution, the country was given internal self-government. Before accepting this form of "responsible government", however, the electorate of Southern Rhodesia, which then included few, if any, Africans, was given the opportunity of deciding whether it would not prefer Southern Rhodesia to join the Republic (then the Union) of South Africa. A referendum of the electorate was duly held, which referendum decided in favour of "responsible government."

The 1923 Constitution was introduced by Order-in-Council under the Royal Prerogative. Between 1923 and 1961 the convention that the United Kingdom would not legislate for Southern Rhodesia in a matter within her legislative competence, except at the request of the Southern Rhodesia Government, came to be accepted. It should, however, be mentioned that under the 1923 Constitution there were a number of reserved matters upon which Southern Rhodesia could not legislate without the approval of a Secretary of State. The most important of these were matters which differentiated between Europeans and Africans (see s. 28). The United Kingdom Government also retained the power of disallowance of any law within one year of the Governor's assent (see s. 31). This Constitution, furthermore, did not give the Southern Rhodesia Government any power to legislate extra-territorially. While, therefore, it was a constitution which undoubtedly gave Southern Rhodesia internal self-government, her governmental powers were subject to the limitations mentioned. As a matter of history, however, if the chronicles of the time are examined, an accurate appraisal will show that only minimal use was ever made by the United Kingdom of those so-called "reserved powers", and that any influence they may have had on the internal government of the country was negligible. A detailed discourse on this, however, is outside the scope of this judgment.

At a Constitutional Conference held in 1961 the Southern Rhodesia Government and the United Kingdom Government agreed to the intro-

duction of a new constitution. It was accepted, however, that whether or not this constitution was introduced would depend on the result of a referendum held of all registered voters. The United Kingdom prepared two White Papers, one (Command 1399) a summary of the other (Command 1400). These White Papers were placed before the Rhodesian voters at the time of the referendum in order to assist them in arriving at a decision. In the White Paper (Command 1399) the United Kingdom Government stated:

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

There is little doubt that the public recognition of this convention by the United Kingdom Government in this form influenced the result of the referendum, which decided in favour of accepting the new constitution. The White Paper (Command 1400), which set out what would be the detailed provisions of the constitution, made it plain that Rhodesia was to be given complete internal self-government. The only limitations on her governmental powers were set out in clauses 36 and 78, which read as follows:

> "36. (1) There will be no power of disallowance except where the Act passed—
>
> (a) is inconsistent with any international obligations imposed on the Queen in relation to Southern Rhodesia; or
>
> (b) alters to the injury of the stockholders or departs from the original contract in respect of any stock issued under the Colonial Stock Acts by the Southern Rhodesia Government on the London market.
>
> (2) Such laws may be disallowed by Her Majesty within six months of their being passed. Every law so disallowed will cease to have effect as soon as notice of disallowance is published in the Gazette."
>
> "78. The provisions which refer to the formal functions within the Constitution of the Sovereign and of the Governor in his capacity as the Sovereign's representative, will not be amendable by the Legislature."

The 1961 Constitution, which came into operation in November, 1962, unlike the 1923 Constitution was granted to Southern Rhodesia by virtue of an Act of Parliament, the Southern Rhodesia (Constitution) Act, 1961, 10 Eliz. II Ch. 2, which authorized the making of the necessary Orders in Council.

A proper interpretation of the terms of the 1961 Constitution will show that they conform to what was offered the people of Rhodesia in the White Papers (Command 1399 and 1400). In particular, clauses 36 and 78, already quoted (which are reflected in ss. 32, 105 and 111), in convenient form accurately define what few limitations there were on the territory's rights to complete self-government.

This observation perhaps requires some elaboration, as the effect of s. 111 has been largely misunderstood. What is not appreciated is that s. 111 is really only a corollary of s. 105, which section reflects clause 78 of the White Paper (Command 1400). It is only because of s. 105 that s. 111 becomes necessary. These two sections read:

> "105. 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:
>
> Provided that no Act of the Legislature shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms."
>
> "111. Full power and authority is hereby reserved to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1, 2, 3, 5, 6, 29, 32, 42, 49 and this section, and any Order in Council made by virtue of this section may vary or revoke any previous Order so made:
>
> Provided that the power and authority herein reserved to Her Majesty shall not be exercised for the purpose of amending this section or adding to it a reference to any section of this Constitution not included in this section on the appointed day."

Apart from those sections in s. 105 which are mentioned by reference to s. 111, all the other sections of the constitution are amendable by the legislature, although a special procedure is provided for the amendment of the entrenched clauses. Since the sections referred to in s. 111 and incorporated by reference in s. 105 could not be amended by the legislature, some provision had to be made for their amendment, should such amendment ever be necessary; and this explains the reason for s. 111, which provides the machinery for amending these sections.

The misunderstanding in interpreting s. 111 is due, I think, to a failure to appreciate fully the effect of—

(1) s. 1 (2) of the Southern Rhodesia (Constitution) Act, 1961, and of

(2) s. 22 of the Southern Rhodesia (Constitution) Order in Council, No. 2314 of 1961, and of

(3) the proviso to s. 111 itself.

Section 1 (2) of the Southern Rhodesia (Constitution) Act reads:

> "An Order in Council under subsection (1) of this section may authorise the amendment or revocation of any of the provisions of the Order in any manner specified by the Order in relation to those provisions respectively, but nothing in this Act shall authorise any other amendment or revocation of any of the provisions of the Order."

Section 22 of the Southern Rhodesia (Constitution) Order in Council reads:

> "Full power and authority is hereby reserved to Her Majesty, by Order in Council, to amend, add to or revoke this Order at any time prior to the

appointed day and any Order in Council made by virtue of this section may vary or revoke any previous Order so made." (The underlining is my own.)

The proviso to s. 111 makes it plain that the powers of amendment granted in s. 111 are strictly limited.

Section 22 of the Southern Rhodesia Order in Council, which ceased to be effective on "the appointed day", that is, the day on which the Constitution came into force, and s. 1 (2) of the Southern Rhodesia (Constitution) Act, emphasize the restrictions placed on the powers of the United Kingdom to amend the 1961 Constitution by Order in Council. From these provisions it clearly appears that no amendment could be made to any of the sections referred to in s. 111 which would have the effect of amending other sections not included in s. 111.

For example, ss. 45 (1) and 43 (1) of the Constitution read:

"45.—(1) In the exercise of his functions, the Governor shall act in accordance with the advice of the Governor's Council or the appropriate Minister or Deputy Minister, as the case may require, except where under this Constitution or any other law, he is required to act in accordance with the advice of any other person or authority:

Provided that the Governor shall act in accordance with his own discretion—

(a) in the exercise of the power of dissolving the Legislative Assembly conferred on him by subsection (2) of section 34; and

(b) in the appointment of a Prime Minister in pursuance of subsection (1) of section 43;

but in such cases the Governor shall observe the constitutional conventions which apply to the exercise of similar powers by Her Majesty in the United Kingdom."

"43. (1) The Governor—

(a) acting in his discretion in the manner prescribed by section 45, shall appoint a Prime Minister; and

(b) acting on the advice of the Prime Minister—

(i) shall appoint other Ministers of the Government and may assign functions to such Ministers, including the administration of any department of government; and

(ii) may appoint Deputy Ministers, etc."

These sections are perhaps two of the most important prerequisites of self-government, and they are not amendable by Order in Council. Any amendment of, say, s. 29, which might have the effect of limiting the rights conferred by these sections, 43 and 45, would therefore be *ultra vires*. Similarly, it is explicit in the framework of the Constitution that the Legislative Assembly would be the body responsible for passing bills (see ss. 6 and 7), and any alteration to s. 29 which derogated from this power would equally be *ultra vires*. Section 32 provides for the disallowance of certain laws dealing with government stockholders and

treaties affecting the Crown's international obligations. It has been suggested that this section might be amended to extend the powers of disallowance to virtually any law. But any amendment to this section by adding to it further laws which could be disallowed would not only be in breach of the whole general principle of the Constitution but also an infringement of the specific principle laid down in such cases as *Campbell v. Hall* (1 Cowp. 204) and *Sammut v. Strickland* (1938) A.C. 678, that a right of revocation must be specially reserved or it will not exist. See particularly the remarks of Lord MAUGHAM, reported at p. 704, in *Sammut's* case. The only right of revocation actually reserved in section 32 is in respect of the matters therein mentioned, and to use the provisions of section 111 to add to this list would clearly be *ultra vires* the Constitution.

While s. 111 retains Southern Rhodesia's link with the Crown and places some limitation on her complete political independence (for example, it would prevent her constituting herself a republic), it does not, except in so far as certain laws concerning government stockholders and certain foreign treaties are concerned (s. 32), limit her internal independence. This view is supported by Professor de Smith, who describes the effect of s. 111 in these words:

> "Of the few Constitutional provisions alterable by the Crown in Council, none is of first-rate practical importance, and there is no general power to legislate for Southern Rhodesia except by Act of Parliament and in conformity with the agreed convention." (*The New Commonwealth and Constitution*, 1964, p. 43.)

Another adjunct of self-government is the provision in the 1961 Constitution that the legislature shall have the power to make laws having extra-territorial operation (see s. 1 (1) of the Southern Rhodesia (Constitution) Act, 1961 and s. 20 (2) of the 1961 Constitution). The significance of this power is considerable, as it is a power which is not compatible with what may be called "Colonial Status". (See the case of *Low v. Routledge* (1865) L.R. 1 Ch. 42 at p. 47, where, in dealing with Canada, Sir JOHN TURNER, L.J., said:

> "As to his rights beyond the Colony, he cannot be affected by those laws, for the law of a Colony cannot extend beyond its territorial limits.")

Professor de Smith, *op. cit.*, at p. 43, states that Southern Rhodesia is in a constitutional position not significantly different from that of a Dominion in, say, 1918. The same view is expressed by Hepple, O'Higgins and Turpin in their article, "Rhodesia Crisis—Criminal Liabilities" (1966) (Jan.) Crim. L.R. 6, at p. 12. It is to be observed, however, that the Dominions did not have the power to legislate extra-territorially until they were expressly given this power by s. 3 of the Statute of Westminster, 1931. (See the case of *British Coal Corporation*

v. R. (1935) A.C. 500 at pp. 516 and 520.) To this extent, therefore, Southern Rhodesia possesses internally, perhaps greater political autonomy than did the great Dominions before the Statute of Westminster. The internal independence of Southern Rhodesia is further entrenched by the public recognition by the United Kingdom Government in the White Paper (Command 1399) that the Parliament of the United Kingdom will not legislate for a matter within the competence of the Southern Rhodesia Legislature except with the consent of the Southern Rhodesia Government. This, of course, covers legislation amending the Constitution itself, as it is within the competence of the Southern Rhodesia Legislature to amend all the sections of the Constitution, save those specified in s. 111. (See Professor de Smith, *op. cit.*, p. 43, and authorities there cited.) It may be said therefore, that before the Declaration of Independence Southern Rhodesia had for all practical purposes complete internal independence.

The internal autonomy of Southern Rhodesia is further enhanced by s. 1 of the British Nationality Act, 1948, the relevant portions of which read:

> "1.—(1) 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.
>
> (2) . .
>
> (3) The following are the countries hereinbefore referred to, that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon."

It must be remembered that this Act was passed after the Statute of Westminster was passed, and here Rhodesia is treated in exactly the same fashion as a fully independent Dominion, and not as a "Colony". By Act 13 of 1949 Southern Rhodesia passed a reciprocal Act in terms of s. 1 (1) of the British Act. Southern Rhodesia thus, like any independent Dominion State, has full power to make its own laws for conferring Rhodesian citizenship, the conferring of which citizenship automatically makes the person concerned a British subject; and in this respect Southern Rhodesia possesses powers identical to those possessed by the United Kingdom herself.

Externally also in many ways Southern Rhodesia was treated as an independent state. She had, as I have pointed out, the power to legislate extra-territorially, and she could issue her own "Letters of Citizenship" which gave British nationality, in the same way as any fully independent Dominion could. She could enter into treaties with foreign countries, subject only to the United Kingdom's limited power of disallowance preserved in s. 32 (already mentioned). She was in her own

right a member of such international organizations as the World Health Organization and the General Agreement on Trade and Tariffs.

Under the 1961 Constitution, therefore, there was a transfer, not merely of legislative power, to Southern Rhodesia, but in addition a transfer of governmental power, and the United Kingdom had not the right to revoke these powers. The effect of the 1961 Constitution was to give Southern Rhodesia a measure of self-government almost amounting to, but just falling short of, full independence. Full independence required a further Act of the United Kingdom Parliament, applying the provisions of the Statute of Westminster to Southern Rhodesia.

To define the status of Southern Rhodesia in terms of sovereignty involves first an explanation of the sense in which the word is used; because, as LEWIS, J., said, quoting from Ogg and Ray (see judgment, p. 50):

> " 'Sovereignty' is a tricky word. As someone has remarked, the history of it in the United States illustrates the familiar fact that in all argument, if you insist on making certain words mean what you want them to mean, you always can reach the conclusion you wish to reach. With easy fluency, the States are to-day sometimes spoken of sentimentally, even by the Courts, as 'sovereign'."

I use the word "sovereignty" in the sense that sovereignty is divisible and that it is possible for one State to possess internal sovereignty while another State exercises certain powers of external sovereignty in respect of that State.

This certainly seems to be in accord with the view of Lord EVERSHED, M.R., because in the case of *Ex parte Mwenya*, (1960) 1 Q.B. 241, he is reported as saying, at p. 298:

> " . . the statement . . . seems to proceed to some extent at least upon the basis of the theory of the indivisibility of sovereignty, particularly associated with the name of Austin. But if this theory was accepted in England 100 years ago (and influenced, as I shall show, the prevalent English view of those days as regards protectorates) it is not, as I believe, accepted now."

Modern English writers on the subject also adopt this view. See, for example, Oppenheimer, *International Law*, 8th Edn., Vol. 1, pp. 122 and 453, and Dias, *Jurisprudence*, 2nd Edn., p. 365.

This is also the view of the South African courts. In *R. v. Christian*, 1924 A.D. 101, INNES, C.J., is reported as saying, at p. 106:

> "This distinction between internal and external sovereignty is inherent. And of the two, the internal is the more important, for a law making and law enforcing authority is essential to the very existence of a state. Moreover in considering the question of treason it is the internal aspect of sovereignty which must be regarded; for that is the side from which it is attacked. This is recognized by *Voet* in the passage already quoted where

he states that treason can be committed only against a state or ruler which recognizes no superior in its own territory (*superiorem in suo territorio haud agnoscentum*). The test thus applied relates to internal sovereignty alone; and it is comparatively easy of application, whereas the limits of external sovereignty are often hard to determine. The line which demarcates the necessary degree of freedom from external control must from the nature of things be difficult to draw. And so it has always been found. Curtailment of external authority and dependence upon another power are not in themselves fatal to the sovereignty of the state concerned. It is in each instance a question of degree. The Civil law regarded as free peoples nations who had undertaken by treaty to recognize the *majestas* of Rome; for a recognition of superiority was not regarded as incompatible with freedom. *Liber autem populus est is, qui nullius alterius populi potestati est subjectus, sive is foederatus est: item sive aequo foedere in amicitiam venit, sive foedere comprehensum est, ut is populus alterius populi majestatem comiter conservaret: hoc enim adjicitur, ut intelligatur alterum populum superiorem esse, non ut intelligatur alterum non esse liberum.* (Dig. 49. 15. 7. 1.) That principle was recognized by Roman-Dutch writers; it is approved by Grotius (*de Jure Belli* 1. 3. 21. 2), and by Moorman (*Misdaden* 1. 2. 4), who instances as an example of its application the Swiss Cantons of Zurich and Berne. That small Commonwealth placed itself by treaty under the protection and overlordship of the King of France, without whose help and friendship it would have been compelled, in *Moorman's* opinion, to bow the knee to the house of Savoy. But that, he adds, did not prevent the Commonwealth being sovereign, and as such possessed of *majestas*. For even a treaty relationship according to which one people definitely places itself under the protection of another and expressly undertakes to respect the *majestas* (hoogheidt) of its protector, does not deprive it of sovereignty. A notable example of the curtailment of freedom in external relationship with the undoubted retention of sovereignty is afforded by the position of the Seven Provinces of the Netherlands which resulted from the Union of Utrecht in 1579 (*Groot Placaat Boek*, Vol. 1, p. 7). Designed to unite the Provinces in order to resist the King of Spain, and signed before their allegiance had been formally renounced, the practical effect of the provision of the treaty was to place the control of foreign relationships, the conduct of war, the making of treaties, and other important matters in the hands of the States General."

Here the similarity of the external powers enjoyed by the States General *vis-à-vis* the Seven Provinces, to the external powers enjoyed by the United Kingdom *vis-à-vis* Southern Rhodesia must be noted. In principle it does not seem to me to make much difference if the ultimate powers which a State possesses result from a grant to it of those powers from another State, or are the *residuum* of the powers remaining with it after the State has relinquished some of its former powers to that other State. The status of the State must be determined more by the powers which it actually possesses than by the method by which it came to possess them.

In *Christian's* case (*supra*) KOTZE, J.A., at p. 126 is also reported as saying:

"From what has been premised it will appear that sovereignty may exist in different degree. A given nation or country may possess complete and

full sovereign rights in every respect; or, while enjoying complete and full internal independence, it may externally, in some particular respect owe a duty to some other State. In both instances the nation or country will be considered a Sovereign State."

The court in *Christian's* case held that South Africa possessed internal sovereignty, that allegiance was owed to her in respect of that sovereignty, and that the breaching of that allegiance with hostile intent was an act of treason. This much appears clearly from the judgment of INNES, C.J., at p. 114, where he said:

> "That being so the allegation in the indictment that the accused owed allegiance to His Majesty King George the Fifth in His Government of the Union of South Africa was not in my opinion open to objection."

Christian's case is much in point here, because it was heard before the passing of the Statute of Westminster, and at that time the Union of South Africa possessed internally no greater political autonomy than Southern Rhodesia possessed under the 1961 Constitution.

To sum up, Southern Rhodesia's constitutional position before the revolution may be described with sufficient accuracy by saying she enjoyed internal sovereignty and also a large measure of external sovereignty, and that her subjects owed allegiance to her by virtue of that sovereignty. She was what Oppenheimer (*op. cit.* p. 122) describes as "a semi-independent *state*".

I pass on now to deal with the factual position after the Declaration of Independence in November, 1965.

The 1965 Constitution purported to effect two revolutionary changes to the 1961 Constitution. First, it purported to convert Southern Rhodesia into what I might call "an independent sovereign Dominion". See, for example, ss. 3 and 47, which read:

> "3. (1) There shall be an Officer Administering the Government in and over Rhodesia who shall be Commander-in-Chief of the armed forces of Rhodesia.
>
> (2) The Officer Administering the Government shall be either—
>
> (a) A Governor-General who may be appointed by Her Majesty the Queen on the advice only of the Ministers of the Government of Rhodesia; or
>
> (b) until Her Majesty appoints a Governor-General under paragraph (a) of this subsection, an Officer appointed by the members of the Executive Council presided over by the Prime Minister or in such other manner as may be prescribed by a law of the Legislature.
>
> (3) Pending the appointment of the first Officer Administering the Government under subsection (2) of this section, the members of the Executive Council, presided over by the Prime Minister, may appoint an Acting Officer Administering the Government."

"47. (1) The executive government of Rhodesia in regard to any aspect of its internal or external affairs is vested in Her Majesty acting on the advice of the Ministers of the Government of Rhodesia and may be exercised by the Officer Administering the Government as the representative of Her Majesty or such other persons as may be authorized in that behalf by the Officer Administering the Government or by any law of the Legislature.

(2) For the avoidance of doubt it is hereby declared that in addition to any other powers conferred by this Constitution or any other law, the Officer Administering the Government shall have power, acting on the advice of the Ministers of the Government of Rhodesia, as the representative of Her Majesty—

(a) to appoint and to accredit, to receive and to recognize ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;

(b) to enter into and ratify international conventions, treaties and agreements;

(c) to proclaim and terminate martial law or a state of emergency;

(d) to declare war and make peace;

(e) to confer honours and precedence.

(3) The Officer Administering the Government, as the representative of Her Majesty, shall in addition have such powers and functions as were immediately prior to the appointed day possessed by Her Majesty by way of prerogative.

(4) . . ."

Secondly, the 1965 Constitution also purported to make fundamental alterations to the internal domestic operation of the 1961 Constitution. The most important of these was the alteration in the procedure for amending the "entrenched clauses", which clauses dealt with such matters as qualification of voters, the judiciary, the Declaration of Rights and Tribal Trust Land. Under the 1965 Constitution these clauses are virtually not entrenched at all, as the procedure for amending them is for all practical purposes the same as that provided for amending any other clause (see ss. 115 and 116). The procedure for amending entrenched clauses is a little more cumbersome than that provided for amending other clauses, but any government possessing the necessary two-thirds majority in the Legislative Assembly can amend all clauses willy-nilly, now that the safeguards provided in the 1961 Constitution have been removed. The 1965 Constitution also has its own special provisions dealing with the appointment of the judiciary and with the High Court (see ss. 59 and 128). But otherwise it may be said, as a generalization, it follows the pattern of the 1961 Constitution. It is to be observed that the present Government has already taken advantage of the simplified procedure for amending entrenched clauses by amending various sections of the Declaration of Rights. (See the Constitution Amendment Act, 1966, No. 49 of 1966.)

Despite the revolution the Governor remained in his official residence and no attempt has been made to remove him, though the present

Government has not recognized him as Governor and has appointed one of the respondents, Clifford Dupont, as the Officer Administering the Government in terms of s. 3 of the 1965 Constitution.

Some hours after the Declaration of Independence the Governor issued the following 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 the 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 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."

The existing Parliament appointed under the 1961 Constitution was, however, not dissolved.

On the 16th November, 1965 the United Kingdom Government passed the Southern Rhodesia Act, 1965 Eliz. II, 13-14, [*Chapter 76*], the most important sections of which read:

> "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 Majesty to be necessary or expedient in conseqence of any unconstitutional action taken therein.
>
> (2) Without prejudice to the generality of subsection (1) of this section an Order in Council thereunder may make such provision—
>
> (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,

as appears to Her Majesty to be necessary or expedient as aforesaid; and any provision made by or under such an Order may apply to things done or omitted outside as well as within the United Kingdom or other country or territory to which the Order extends."

On the 18th November, 1965, in pursuance of this Act, the Southern Rhodesia (Constitution) Order in Council, 1965 (1952 of 1965), was made. The relevant provisions of this Order read:

"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.

"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 purpose 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; 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 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.

"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."

"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."

From time to time numerous Orders in Council have been made under the Southern Rhodesia Act, 1965, with the object of enforcing what are known as "economic sanctions" against Rhodesia. An Order in Council was also made revoking certain Censorship Regulations passed by the present Government. (See the Southern Rhodesia Revocation of Censorship Order, 1965.) Many of the Orders in Council passed purport to apply inside Southern Rhodesia. Since the revolution the present Government has, however, been in complete legislative and administrative control of Southern Rhodesia. Not one of the British Statutory Instruments which purport to apply here has been enforced, and the infringement of many must be a matter of daily occurrence; for example, the infringement of s. 3 of the Southern Rhodesia (Petroleum) Order, 1965. So far as I am aware, the United Kingdom Government has made no attempt at all to use the powers purporting to be given it by s. 5 of the Southern Rhodesia Order in Council which deals with the operation of the Consolidated Revenue Fund. Public expenditure has been controlled in the same manner as it was before the revolution, i.e., by the present Government passing the necessary Appropriation Acts to control expenditure and by passing the usual Finance Acts for the purpose of raising revenue. The Governor, while still in residence, has not exercised any of the powers purporting to be conferred upon him by s. 4 (c) of the Southern Rhodesia Constitution Order.

I turn now to the High Court. The court has never officially regarded the 1965 Constitution as a lawful Constitution. The judges appointed under the 1961 Constitution have continued to discharge the duties of their offices, and the officers of the present Government have duly enforced their judgments and orders. Despite the fact that the High Court has not officially recognized the 1965 Constitution as the lawful constitution, it would be wholly misleading to assume that the High Court has not recognized any of the acts of the present Government. So far as the "acts of everyday occurrence or perfunctory acts of administration" are concerned (I borrow here from the speech by Lord WILBERFORCE in the case of *Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd.* (1966) 2 All E.R. 536 at p. 577), the High Court has undoubtedly taken cognisance of its acts. For example, last year a new Master of the High Court was appointed by the present Minister of Justice (see Government Notices 962 and 963 of 1966). Such acts as the Insolvency Act [*Chapter 53*], the Companies Act [*Chapter 223*] and the Administration of Estates Act [*Chapter 51*], require reports from the Master of the High Court before the High Court can adjudicate on the various matters

concerned. The High Court has accepted the present Master as being lawfully appointed for the purposes of the administration of all these acts. The Magistrates Court Act [*Chapter 15*] grants to special magistrates and regional magistrates greater criminal jurisdiction than to ordinary magistrates. The present Government has appointed ordinary magistrates and has promoted ordinary magistrates to be special magistrates, and has appointed at least one regional magistrate. The present Minister of Justice, in terms of s. 3 (1) of the Children's Protection and Adoption Act [*Chapter 172*], has appointed new juvenile courts for the various areas of the territory. The High Court has recognized these magisterial appointments and has not queried the increased jurisdiction which these newly-appointed special magistrates and regional magistrates have now assumed, and their sentences come regularly before the High Court on automatic review (see s. 55, Chapter 15) and on appeal. Nor has the High Court queried the jurisdiction of the newly-appointed juvenile courts when their orders have come up for review, as they regularly do (see s. 32, Chapter 172). The High Court's cognisance of the present régime has furthermore not been limited to administrative acts. Cognisance has also been taken of certain legislative acts; for example, following a recommendation made by the judges before the Declaration of Independence, the Criminal Procedure and Evidence Act was amended to make it permissible for the court to impose a suspended sentence of imprisonment for the crime of rape. (See the Criminal Procedure and Evidence Amendment Act, 1966, No. 58 of 1966.) Since the passing of this Act the High Court has taken cognisance of this amendment and has at times imposed suspended sentences of imprisonment on offenders convicted of rape.

The respondents filed affidavits made by the heads of Ministries and by many departmental heads. The general effect of these depositions was that these officials accepted the Constitution of Rhodesia, 1965 as being the only effective Constitution of Rhodesia, and the present Government of Rhodesia as being the only effective Government, and that they carried out the instructions received from the present Government accordingly. They further deposed that they accepted the Parliament of Southern Rhodesia constituted under the 1965 Constitution as being the only effective Legislature of Southern Rhodesia, and they accepted and observed the Acts passed by this Parliament. They further deposed that they would not obey any instructions which they might receive from any government other than the present Government.

The Attorney General has made an affidavit in which he drew attention to the fact that he alone was vested with the functions and powers of prosecuting offences in Rhodesia, and that he regarded the 1965 Constitution as the only effective Constitution, and the present Government as the only effective Government, and the present Parliament

as the only effective Legislature. He then went on to say that he did not and had not at any time regarded the Southern Rhodesia Act, 1965, of the United Kingdom, or any subordinate legislation made thereunder, as having the force of law in Rhodesia; and he concluded by saying that he exercised his powers and functions accordingly.

The United Kingdom Government has declared that it will not resort to force to quell the revolution, but it will impose economic sanctions against the country, which it hopes will achieve the same end.

Affidavits made by deponents who purported to be able to forecast the effect of these sanctions were filed by the appellants and by the respondents. Each set of deponents, as was to be expected, took a different view. Much of the material in these affidavits is purely a matter of opinion and it is not easy to assess its value; not only because the court has not had an opportunity of seeing the deponents give evidence, but also because very often insufficient details are given of the facts on which the opinions are based. It must also be recognized that the opinion of even the most conscientious witness may be coloured by wishful thinking on matters on which emotions run high. Where, however, the affidavits deal with matters of fact, and the deponents are public officials, the court should not, I think, assume that such deponents will deliberately make false statements; and, unless there is good reason for rejecting such evidence, I think it should be accepted. I shall leave a more detailed examination of this affidavit evidence until later. Events, however, sometimes speak louder than affidavits.

The factual position in Southern Rhodesia today may therefore now be summed up as follows: The present Government is in complete administrative and legislative control of the country and is continuing to maintain the existing courts of law, whose orders it is enforcing. None of the legislative acts of the United Kingdom has been recognized or enforced in the territory since the Declaration of Independence. There is no other government within the territory competing with the present Government in the exercise of its legislative and administrative powers. The High Court has not officially recognized the legality of the 1965 Constitution, but has treated such of the administrative and legislative acts of the present Government as have so far come before it as if they had emanated from a lawful government.

2. The No Precedent Argument.

Mr. *Kentridge* submitted that the court had either to accept that it sat as a court deriving its authority from the 1961 Constitution (in which case it should hold that all the administrative and legislative acts of the present Government were unlawful) or else it should accept that it sat as a court under the 1965 Constitution (in which case it should

hold that all the administrative and legislative acts of the present Government were lawful). He suggested that any argument to the contrary would be wholly untenable because neither under British constitutional law, Roman-Dutch law, international law nor under any other recognized system of jurisprudence was there any precedent or principle which justified it. He argued that in all "the morass of conflicting authorities" no rule could be found which did not support his submission, and that the doctrines of "public policy" and "necessity", the rules which apply to the *"negotiorum gestor"*, the maxim *salus populi suprema lex* had no application to the facts of the present situation.

In all this he may well be right, especially if each system of law and each of the principles to which he has referred is treated *in vacuo*; but where does this argument take him?

That the present situation is a wholly unprecedented one seems beyond question. It is unprecedented because here, during the course of the revolution, a court which has not "joined the revolution" has been permitted to sit and continue to function and now has to adjudicate as such a court. We have been referred to authorities ranging in time from the Old Testament to the most recent decisions of the Judicial Committee of the Privy Council and of this court, and ranging in space over a dozen countries in five separate continents; but no exact precedent was found. If one existed I am sure that the industrious research of those engaged in the preparation of the arguments in these cases would have revealed it.

In a situation wholly unparalleled in legal history it may be that no existing legal tag or label which precisely fits the situation is to be found; but the law is a social science which is ever capable of adapting itself to new situations.

In an unprecedented situation, as C. K. Allen says, the judge must decide by "the common sense of the thing" (*Law in the Making*, 6th Edn., p. 292). But it will, of course, be the common sense of the trained lawyer craving in aid such analogies from legal principle and precedent and the writings of distinguished jurists that may be considered helpful.

This approach to a new problem is emphasized by many writers. In *A Textbook of Jurisprudence*, 3rd Edn., Sir George Paton says:

> "When there is no code which provides precise directions as to the sources in the absence of authority, a judge will normally turn to persuasive precedents, textbooks, the use of analogy, and such help as may be afforded by custom or the course of business." (P. 195.)
>
> "If analogy fails the judge may turn for help to any source. Such material as he discovers will not, of course, be imperatively binding upon him, and he will reach such a conclusion as can best be fitted into the general body of the law. Textbooks may provide an acceptable solution, or there may

be borrowing from a kindred system of law—thus American cases may provide useful material for English courts. Even systems whose basis is far removed may be drawn upon, and the Roman storehouse of legal learning has proved of considerable assistance to English jurists." (P. 197.)

This is also the view of the Roman-Dutch Law writers. Van Bynkershoek, for example, states:

> *"En dus oordeel ik, schoon wy geen wet hieromrent hebben, dat wy, de Rede tot leedsvrouw nemende, moeten vonnissen."* ("And thus I conclude, since there is no law, we can only give our judgment being led by reason.")

(Quoted from *Die Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, Vol. 1, p. 21.)

Grotius states, in *The Introduction to Dutch Jurisprudence*, 1, II, 22:

> "In the absence of any written law, charter, privilege or custom on any particular subject, the judges have from times of old been enjoined on oath to follow reason to the best of their knowledge and discretion." (Maasdorp's translation, 3rd Edn., p. 6.)

Wille, *Principles of South African Law*, 5th Edn., p. 16, states:

> "If, however, the judge can find no existing authoritative rule of law which is applicable to the facts, it is his duty to decide the rights of the parties not arbitrarily, but in accordance with fundamental principles of justice. The judge reviews and examines the various acknowledged authorities which bear on the facts in issue and, reasoning by inference or analogy from them, he deduces some principle which he considers relevant to the facts he has found proved. He then applies that principle to those facts and gives his judgment in accordance with it."

The flexibility and adaptability of the Roman-Dutch Law to new situations have always been its principal features. See, for example, the remarks of Lord TOMLIN in *Pearl Assurance Co. v. Union Government*, 1934 A.D. 560 (P.C.), at p. 563; the remarks of STRATFORD, C.J., in *Jajbhay v. Cassim*, 1939 A.D. 537 at p. 542, and *Hope v. Hope*, 1950 (1) S.A. 743 at p. 748.

The old Roman-Dutch authorities are of particular significance because they reflect the approach of the old Dutch courts. The common law of Rhodesia is the law as in force in the Cape of Good Hope in 1834, which was the law as then applied by the old Dutch court (usually referred to as the Roman-Dutch law). See s. 31 of the Charter of Justice (Cape Statutes 1652-1871, Vol. 1, p. 100), which applies to this territory by virtue of s. 56 D of the 1961 Constitution, which section is repeated in s. 64 of the 1965 Constitution. While, as I shall show later, the main issues of these appeals should as far as possible be determined in the light of British Constitutional Law, if the authorities on British Constitutional Law are inconclusive this court may well follow the practice of the old Dutch courts in their approach to determining the law in an unprecedented situation.

Perhaps I may illustrate the fallibility of Mr. *Kentridge's* argument from a field outside the law. By the year 1900 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. But then Sir Harry Johnson, in the wilds of Central Africa (not so very far from here), discovered the okapi. In species the animal resembled the giraffe, the deer and the zebra; but it is not a giraffe, a deer or a zebra; and, what is more, it did not belong to the same genus as any of these, nor for that matter to any other known genus. Sceptical, however, as some zoologists may have been at the time, the fact that the okapi could not be fitted into any known pigeon-hole of zoological science could not justify a refusal to acknowledge the animal's existence, when it did in fact exist. The "common sense of the thing" determined that there was such an animal as the okapi, and that was that. Perhaps the instant cases may be the okapi of jurisprudence.

I summarize my conclusions here by saying that in wholly unprecedented circumstances the judge, like the explorer, may also within the sphere of his jurisdiction be justified in discovering something new; after all, as Pliny said, "*Ex Africa semper aliquid novi.*"

3. The Status of the present Government Today

The importance of determining the status of the present Government today is that the determination of this as a question of fact may well be decisive in determining what is the law to be applied in Rhodesia today. I propose here to deal first with the two preliminary points. One, the effect of the Certificate of the Secretary of State for Commonwealth Relations (to which I shall refer as "the Certificate"), and, two, whether in any event this Court, sitting as a domestic court, has the authority to adjudicate on this subject.

"The Certificate" is set out in the judgment of LEWIS, J., at page 26 and I will not repeat it in full. "The Certificate" states that Her Majesty's Government in the United Kingdom does not recognize the present government as either the *de facto* or the *de jure* government of Southern Rhodesia and it does not recognize any of the members of the present Government as ministers either *de facto* or *de jure.*

The appellant argued that the effect of "the Certificate" was two-fold. It was decisive not only on the "status" of the present Government but also on the validity of any of its administrative or legislative acts.

"The Certificate" is undoubtedly *evidence* of the "status" of the present Government, but whether it must be regarded as decisive evidence seems to depend on the particular court which is considering

it. Here, I think, the approach of an English court might well be different from that of this court, which is a Rhodesian and not an English court and which is sitting as a domestic court *in mediis rebus* and is not merely considering the validity of a law of another country. Rhodesia, before the revolution, was, as I have already shown, a semi-independent *state*. Today, she is a *state* which has rebelled, but nevertheless she still continues to possess the characteristics of a state. That this is so, is implicit in the various resolutions passed by the United Nations Organization, dealing with the present Government. See Security Council Resolutions No. 216 of the 12th November, 1965, No. 217 of the 20th November, 1965, No. 221 of the 9th April, 1966, No. 232 of the 16th December, 1966. These resolutions certainly cannot be construed as any form of international recognition but it is implicit in them that the Organization must have regarded Rhodesia as possessing the characteristics of a *state* because the actions which these resolutions have set in train are actions which, in terms of the United Nations Charter, can only be taken against another state. The wording of Article 40, and in particular the use of the words "parties concerned" in the context of Chapter VII, makes this plain enough. The question of the status of the present Government would, so far as an English court is concerned, appear therefore to be a matter of international rather than of municipal law. An English court may well on the question of status be bound by "the Certificate" from the Executive because if an English court were to recognize the present Government as, say, a *de jure* government, and the United Kingdom Executive not to recognize it as such, this might well be a case of the United Kingdom "speaking with two voices in the matter" in the sense in which that expression is used by Lord ATKIN in the *Arantzazu Mendi* (1939) A.C. 256 at page 264. See, also the case of the *Tinoco Arbitration*, Briggs, *The Law of Nations*, 2nd Edn., p. 197 at page 202. As I shall show, however, even if an English court accepted "the Certificate" as decisive on the question of the "status" of the present Government, it does not follow that "the Certificate" would bind even an English court to hold all the laws of the present Government as unlawful.

As far as this court is concerned, however, "the Certificate" stands on a different footing. It is evidence of the fact which it states—that is, that the United Kingdom does not recognize the present Government and, along with the evidence that no other countries of the world have recognized the present Government, is evidence which must be weighed up with all the other evidence in determining the present Government's status. This court, as a domestic court sitting *in mediis rebus*, must determine this issue on all the facts, and recognition by other countries, while it may be important, is certainly not decisive. Nowhere is this better illustrated than in the case of the *Tinoco Arbitration* (*supra*). The facts of the *Tinoco Arbitration* case were these:

Tinoco overthrew the Gonzales Government of Costa Rica and established a new government. He governed for two years when he was himself overthrown and the old government restored to power. During the time the Tinoco Government was governing it granted certain concessions to search for oil to a British company. It also passed legislation issuing certain new currencies, and British banks, in the course of business, became holders of much of this currency. The old government, when it was restored to power, passed acts nullifying the concessions granted by the Tinoco Government and nullifying the currency laws it had made. The United Kingdom Government argued, on behalf of its nationals, that the legislation passed by the restored government nullifying the acts of the Tinoco Government was invalid and that the restored Costa Rica Government should recognize the concessions given to British companies and the validity of Tinoco's currency held by British banks. The case was submitted to arbitration and was heard before TAFT, C.J., of the United States. The United Kingdom had always refused to recognize the Tinoco Government as either a *de facto* or a *de jure* government, but despite this it presented its claim at the arbitration proceedings on the basis that the Tinoco Government had in fact and in law been a *de facto* and a *de jure* government and therefore all its acts were valid and its successor had no right to repudiate them. Costa Rica objected to this argument on the ground that the United Kingdom, having consistently refused to recognize the Tinoco Government as either a *de facto* or a *de jure* government, was now estopped from arguing that the Tinoco Government had in fact been a *de jure* and a *de facto* one. TAFT, C.J., rejected this argument of the Costa Rica Government and held that while the failure on the part of Great Britain to recognize the Tinoco Government was evidence to be taken into account in deciding on the status of that government, it was not decisive because the status of the government had to be determined in the light of all the evidence. He came to the conclusion that in fact the Tinoco Government had been a *de facto* government during the period of its existence. At page 201 of the report of the case he is reported as saying:

> "Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by the record before me of the *de facto* character of the Tinoco Government."

I consider, therefore, that "the Certificate" does not preclude this court from inquiring into the status of the present Government or the validity of the laws it has made.

Even if, however, I am wrong in this, and "the Certificate" is decisive on the question of the present Government's "status", this does not seem to assist the appellants much unless they can also show that "the Certificate" is not only decisive on "status" but is also decisive

in compelling this court to hold that all the laws of the unrecognized Government are invalid. As I have said, the appellants argued that the weight of authority supported this contention.

The authorities quoted by the appellants in support of this argument, however, are primarily concerned with how far the courts of one country will recognize the laws of another country, and this does not really seem to be the problem which is facing this court which is now sitting *in mediis rebus*. Even assuming, however, that these authorities are relevant to the situation obtaining in Rhodesia today, the authorities on English law do not go as far as the appellants suggest. They do not, for example, as I understand them, lay down that under English law an English court is bound to regard as unlawful all the laws of a government which the United Kingdom Executive does not recognize as either a *de facto* or a *de jure* one. The most recent authority on English law dealing with the subject is the *Carl-Zeiss* case (*supra*). In this case at page 548, Lord REID is reported as saying:

> "The result of that would be far reaching. Trade with the Eastern zone of Germany is not discouraged; but the incorporation of every company in East Germany under any new law made by the German Democratic Republic or by the official act of any official appointed by its government would have to be regarded as a nullity so that any such company could neither sue nor be sued in this country. Any civil marriage under any such new law or owing its validity to the act of any such official would also have to be treated as a nullity so that we should have to regard the children as illegitimate; and the same would apply to divorces and all manner of judicial decisions whether in family or commercial questions. That would affect not only status of persons formerly domiciled in East Germany but also property in this country the devolution of which depended on East German law.
>
> It was suggested that these consequences might be mitigated if the courts of this country could adopt doctrines which have found some support in the United States of America. Difficult questions arose there with regard to acts of administration in the Confederate States during the civil war and again out of the delay in recognition of the U.S.S.R. A solution of the earlier difficulty was found by the Supreme Court in *U.S. v. Home Insurance Co.*, and other similar cases; and for the latter difficulty solutions were suggested, particularly by CARDOZO, C.J., in such cases as *Sokoloff v. National City Bank of New York* and *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank*. In the view which I take of the present case it is unnecessary to express any opinion whether it would be possible to adopt any similar solutions in this country if the need should ever arise."

Lord WILBERFORCE, in the same case (see page 581), said:

> "Merely because in the class of case, of which *Luther v. Sagor* (128) is an example, non-recognition of a 'government' entails non-recognition of its laws, or some of them, it does not follow that in a different situation this is so, nor that recognition of a law entails recognition of the law-maker as a government with sovereign power. The primary effect and intention of

> non-recognition by the executive is that the non-recognised 'government' has no standing to represent the state concerned whether in public or in private matters. Whether this entails non-recognition of its so-called laws, or acts, is a matter for the courts to pronounce on, having due regard to the situation as regards sovereignty in the territory where the 'laws' are enacted and, no doubt, to any relevant consideration of public policy."
>
> (The underlining is my own.)

While Lord REID regarded the matter as an open question, Lord WILBERFORCE, in the last passage quoted, seemed to think that the courts are not *bound* to hold all the acts of an unrecognized government as unlawful because he says that the recognition or non-recognition of such government's laws or acts is a matter for the courts to pronounce on, depending on the circumstances.

The earlier English authorities dealing with the attitude of the courts to these "Facts" or "Acts" of State are fully reviewed by LEWIS, J., in his judgment at pages 26-32 and I will not go over them again. Their effect is, I think, sufficiently summed up in an article entitled "The Carl-Zeiss Case and the Position of Unrecognized Governments", by D. W. Greig in the *Law Quarterly Review*, Volume 83, January, 1967, page 96 at p. 139, where the writer states:

> "As the survey of the earlier English authorities showed, there is no weight of precedent at all in favour of denying validity to the acts of an unrecognized government."

I appreciate that there are *dicta* of INNES, C.J., in *Van Deventer v. Hancke & Mossop* 1903 T.S. at page 410, which express a contrary view, and *dicta* from such an eminent lawyer cannot be lightly dismissed. It is significant, however, that though INNES, C.J., could have decided the case on these *dicta*, he preferred to go to considerable lengths to show that in any event the action of the republican officials with which the case was concerned was invalid when judged by their own laws. It is also significant that MASON, J., and BRISTOWE, J., (both distinguished English lawyers) did not adopt his *dicta*. These *dicta* of INNES, C.J., I do not regard as in accordance with the more recent decisions.

Political recognition by the executive and judicial cognizance of certain of a country's laws are not the same thing. The fact that the courts may take cognizance of certain of the laws of an unrecognized government does not therefore mean that "the State is speaking with two voices on the matter".

If I am wrong in my view that the weight of English precedent is not in favour of the courts denying validity to the laws of an unrecognized government, this still does not take the appellants' argument very much further, because these authorities have all been dealing with the

case of a court sitting in one country and considering the validity of the laws of another country, which is really the problem of how far a court will go in taking cognizance of certain "foreign law".

Here, however, this court is not concerned with "foreign law". It is sitting *in mediis rebus* and has to consider what is the law of its own country in which it is sitting and at the time when it is sitting. If its decision must be dictated by the political realities of the moment, as I think it must, then "the Certificate" takes this matter little further. It only tells the court what the attitude of the United Kingdom to the present Government is, which, as LEWIS, J., pointed out (judgment page 32) is something this court already knows.

If the instant cases are to be determined by the facts as they exist here today and the court is satisfied it knows what those facts are, it must give its decision accordingly. In this context it must be remembered that "the Certificate" does not even purport to set out what *are* the facts in Rhodesia today. It goes no further than stating what the United Kingdom Government recognizes, and this is a political decision, and one which, as I shall point out later, is not necessarily determined by fact or by law.

I now turn to the second preliminary point which is that, quite irrespective of "the Certificate", this court as a domestic court has no jurisdiction to adjudicate on the "status" of the present Government at all. This is a problem which is more conveniently dealt with under the heading "The Position of the Judges and the Court", and I will deal more fully with it in that part of the judgment. It is sufficient here to point out that there are precedents for a domestic court (which owes its origin to an old constitution) entering upon the inquiry of the status of a government which has overthrown that constitution. Two cases in point here are *S. v. Dosso* (1958) 2 Pakistan Supreme Court Reports, page 180, decided by the full Bench of Pakistan, and *Ex parte Michael Matovu*, Application 83/1966, Uganda High Court (apparently not yet reported), decided by the full Bench of the High Court of Uganda. In both these cases there had been a revolution in the form of a *coup d'état* and subsequently the question of the validity of the laws made by the new government came before the courts, courts which owed their origin to and whose judges had been appointed under the old constitution. In both these cases the courts, in order to determine the validity of the laws concerned, first inquired into the "status" of the new government, which involved a detailed inquiry into the factual situation. In both these cases the courts found on the facts that the revolution had succeeded and that the old Grundnorm had been replaced by the new. In consequence of this the courts held that the laws of the new government were valid laws. It is not correct to suggest,

as Mr. *Kentridge* has, that these cases are but examples of judges "joining the revolution". So far as these cases are concerned, there is nothing in the judgments of the two respective Chief Justices to indicate that they have become revolutionary judges and, as such, had joined in the overthrow of the old constitutional order. There is nothing, for instance, to show that they had adopted the same attitude as, for example, did Judge A. G. Magrath of Charlestown, South Carolina, who, on the 7th November, 1860, resigned his office and, in what must have been a dramatic ceremony, descended from the Bench into the body of the court and there *coram publico* formally divested himself of his judicial robes and declared, "The temple of justice is now closed". Later on, after playing a prominent role in triggering off the American Civil War, he returned and re-opened the "temple of justice" as a court of the revolutionary state. Here is an example *par excellence* of a judge "joining the revolution". A detailed examination of the judgments in *Dosso's* case and *Matovu's* case shows that Sir MUHAMMAD MUNIR and Sir UDO UDOMA had not joined the revolution, because had these judges simply regarded themselves as judges of a revolutionary court, the detailed inquiry which they made into the factual situation in order to determine whether or not the old Grundnorm had been superseded by the new would have been wholly unnecessary. For example, in the Uganda case, Chief Justice Sir UDO UDOMA stated:

> "The court thereupon felt compelled to enquire into the legal validity of the 1966 Constitution and consequently called upon the learned Attorney General to satisfy it that the 1966 Constitution (hereinafter to be referred to as the Constitution) was valid in law."

I conclude, therefore, that this court, sitting as a domestic court, has jurisdiction to conduct an inquiry into the "status" of the present Government. This inquiry I now proceed to undertake.

The respondents contended that the present Government was already a *de jure* one, but in the alternative, if it was not a *de jure* Government, then it was at least a *de facto* Government in the strict sense of the expression.

These expressions "*de jure* government" and "*de facto* government", like the word "sovereignty", are capable of having many meanings, and before examining this argument of the respondents, it is essential that the sense in which these expressions are used is understood and defined. Both expressions are ones which are generally used more in international than municipal law, but I can see no reason why an international law definition should not be used by a municipal court, because it would seem that if a government conformed to an accepted international law definition of either a *de jure* or a *de facto* government then *a fortiori* it should be recognized as such by a municipal court.

A relatively recent definition of these expressions in international law may be found at page 548 of the report of the *Carl-Zeiss* case *(supra).* Lord REID, in his speech, when explaining the general practice of the United Kingdom in granting recognition to a new government, referred to the much quoted statement of the late Herbert Morrison, the then Foreign Secretary, which statement purported to set out the international law on the subject. Lord REID quoted this statement of the Foreign Secretary without criticism, and had he considered it not to be a correct statement of international law one might have expected him to have mentioned this. It would appear, therefore, that this international law definition given by the Foreign Secretary is acceptable to the United Kingdom and without serious legal flaw. Because of this, and because it has recently received at least tacit approval by Lord REID, I propose to adopt it. The statement quoted by Lord REID reads:

> " . . it is [international] law which defines the conditions under which a government should be recognised *de jure* or *de facto,* and it is a matter of judgment in each particular case whether a régime fulfils the conditions. The conditions under international law for the recognition of a new régime as the *de facto* government of a state are that the new régime has in fact effective control over most of the state's territory and that this control seems likely to continue. The conditions for the recognition of a new régime as the *de jure* government of a state are that the new régime should not merely have effective control over most of the state's territory, but that it should, in fact, be firmly established." (The underlining is my own.)

It is as well to start this inquiry by examining the law dealing with the establishment of a new government by a revolutionary process. It may be accepted that a successful revolution which succeeds in replacing the old Grundnorm (or fundamental law) with a new one establishes the revolutionaries as a new *lawful* government. "Success" here must be equated with the words "firmly established" in the definition, because no revolution can be said to have succeeded until the revolutionary government is at least "firmly established". Using the word "succeeded" in this sense the determining factor is whether or not it can be said with sufficient certainty that the revolution has succeeded. If in the instant case the stage is reached when it can be said with reasonable certainty that the revolution has succeeded, then in the eyes of international law Rhodesia will have become a *de jure* independent sovereign state, its "Grundnorm" will have changed and its new constitution will have become the lawful constitution.

There is ample authority for this proposition, and extracts from passages from various authorities, most of them referred to by LEWIS, J., express this principle clearly enough. See, for example Kelsen, *General Theory of Law and State* at p. 118:

"d. *Change of the Basic Norm*

It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave, by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviour of individuals is interpreted as legal or illegal. But this means that a new basic norm is pre-supposed. It is no longer the norm according to which the old monarchical constitution is valid, but a norm according to which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then on the other hand, their undertaking is interpreted, not as a legal, a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm . . . It cannot be maintained that, legally, men have to behave in conformity with a certain norm, if the total legal order of which that norm is an intergral part, has lost its efficacy. The principle of legitimacy is restricted by the principle of effectiveness."

Lord Lloyd, *The Idea of Law* at p. 182:

"Certainly in this sense an operative legal system necessarily entails a high degree of regular obedience to the existing system, for without this there will be anarchy or confusion rather than a reign of legality. And where revolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate *de facto* power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity."

Professor Karl Olivecrona, *Law as a Fact* at p. 66:

"Perhaps the attempt fails. Then the planned constitution remains a scrap of paper, a mass of empty words. But if the revolution succeeds, if a government is set working according to the principles of the new imperatives, these are henceforth the constitution. To put it briefly: victory of the revolution corresponds to the *constitutional form* in ordinary law-giving. New rules are then given in accordance with the new constitution and are soon being automatically accepted as binding. The whole machinery is functioning again, with more or less difference in regard to the aims and the means of those in power."

Bryce, *Studies in History Jurisprudence* vol. II (1901) at p. 516:

"Sovereignty *de facto*, when it has lasted for a certain time and shown itself stable, ripens into Sovereignty *de iure*. Sometimes it violently and

illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system."

Salmond, *Jurisprudence* 11th G. Williams Edn. at p. 101:

"So, also, with every constitution that is altered by way of illegal revolution. By what legal authority was the Bill of Rights passed, and by what legal title did William III assume the Crown? Yet the Bill of Rights is now good law, and the successors of King William have held the Crown by valid titles. *Quod fieri non debet, factum valet.*"

Jennings, *Law and the Constitution* 4th Edn. at p. 116, expresses a similar view.

The *Tinoco Arbitration* case (*supra*), TAFT, C.J., at p. 201:

"To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary."

The State v. Dosso, (*supra*), Chief Justice Sir MUHAMMAD MUNIR at p. 184:

"Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change. In the circumstances supposed no new State is brought into existence though Aristotle thought otherwise. If the territory and the people remain substantially the same, there is, under the modern juristic doctrine, no change in the corpus or international entity of the State and the revolutionary government and the new constitution are, according to International Law, the legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful *coup d'état* is an internationally recognized legal method of changing a Constitution."

In re Michael Matovu (*supra*), Chief Justice Sir UDO UDOMA said:

"In his attractive and impressive submission, the learned Attorney-General contended that the four cardinal requirements in international law to give the 1966 Constitution and Government of Uganda validity in law have clearly been fulfilled. These requirements are:—

1. That there must be an abrupt political change, i.e. a *coup détat* or a revolution.
2. That change must not have been within the contemplation of an existing Constitution.
3. The change must destroy the entire legal order except what is preserved; and
4. The new Constitution and Government must be effective.

.....

Counsel then referred the Court to KELSEN'S GENERAL THEORY OF LAW AND STATE, 1961 Edition at pp. 117 to 118; and the Pakistan

case of The *State v. Dosso and Another* (1958) 2 Pakistan Supreme Court Reports, 180, as his authorities for the submission that the 1966 Constitution is legally valid and that the Court should so hold.

These submissions are doubtless irresistible and unassailable. On the theory of law and state propounded by the positivist school of jurisprudence represented by the famous Professor Kelsen, it is beyond question, and we hold that the series of events which took place in Uganda from 22nd February 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 pretentions on the part of the Prime Minister to follow the procedure prescribed by 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. There were even charges, to use the word in its popular sense, of treason having been committed by the then President.

The learned Attorney-General's contention was that the seizure of power in the manner in which it was done by the then Prime Minister was consistent with the principles of international law, although not based on the principle of legitimacy. In support of this proposition the attention of the Court was drawn to the Kelsenian principles to be found in his GENERAL THEORY OF LAW AND STATE at various pages commencing from p. 117. The various passages to which we were referred are headed (c) The Principle of Legitimacy, (d) Change of the Basic Norm, and (3) Birth and Death of the State as Legal Problems, which we now reproduce hereunder."

The learned Chief Justice then sets out in full passages from Kelsen's *"The Principle of Legitimacy"* and *"Change of the Basic Norm"*, and he then quotes this passage from Kelsen's *"Birth and Death of the State as Legal Problems"* (p. 220):

"The problem as to the beginning and ending of the existence of a State is a legal problem only if we assume that international law really embodies some such principle as indicated in the foregoing chapter. Even though some authors advocate the opposite view, the whole problem as usually formulated, has a specifically juristic character. It amounts to the question: Under what circumstances does a national legal order begin or cease to be valid? The answer, given by international law, is that a national legal order begins to be valid as soon as it has become—on the whole—efficacious; and it ceases to be valid as soon as it loses this efficacy. The legal order remains the same as long as its territorial sphere of validity remains essentially the same, even if the order should be changed in another way than that prescribed by the Constitution, in the way of a revolution or *coup d'état.* A victorious revolution or a successful *coup d'état* does not destroy the identity of the legal order which it changes. The order established by revolution or *coup d'état* has to be considered as a modification of the old order, not as a new order, if this order is valid for the same territory. The government brought into perma-

nent power by a revolution or *coup d'état* is, according to international law, the legitimate government of the State, whose identity is not affected by these events. Hence according to international law, victorious revolutions or successful *coups d'état* are to be interpreted as procedures by which a national legal order can be changed. Both events are, viewed in the light of international law, law creating fact. Again *injuria jus oritur:* and it is again the principle of effectiveness that is applied." (The underlining is Sir Udo Udoma's.)

The learned Chief Justice then goes on to say:

"The effect of these submissions and references to the Kelsenian principles quoted above on this aspect of the case, is that the 1966 Constitution was the product of a revolution. Of that there can be no doubt. The Constitution had extra legal origin and therefore created a new legal order. Although the product of a revolution, the Constitution is nonetheless valid in law because in international law revolutions and *coups d'état* are the recognised methods of changing governments and constitutions in sovereign states."

The learned Chief Justice then concluded:

"Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the above case, 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 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. The 1966 Constitution, we hold, is a new legal order and has been effective since 15th April, 1966, when it first came into force."

These authorities show clearly enough that success alone is the determining factor. It is argued, however, that these authorities only apply to countries which were already fully independent states before the revolution occurred. There is, however, no principle which supports this argument. The American War of Independence is sufficient proof of that. The appellants have stressed the fact that neither the United Kingdom nor any other country has recognized the present government as either a *de facto* or a *de jure* one. This, as I have already stated, is an important fact to take into account, and recognition either express or implied by the United Kingdom would, of course, be well nigh decisive; but the lack of recognition in itself cannot be decisive because political recognition is often based on pure political expediency quite unrelated to the real factual position. History abounds in such examples. It was seven years after the success of the Russian Revolution before Britain recognized the Government of the Soviet Union, and it was 17 years after before the United States of America did so. Today the United States of America has not yet recognized the Government of the Central People's Republic of China. For other historical examples of how capricious international recognition may be, see O'Connell, *International Law* Vol. I, p. 175-176.

The relation of political recognition to the real factual situation is well illustrated in the case of *M. Salimoff & Co. v. Standard Oil Co. of New York,* 262 N.Y. 220; 89, A.L.R. 345. This case concerned the recognition by the United States of the Government of the Soviet Union in the year 1933. The State Department issued a certificate in these terms:

> "1. The Government of the United States accorded recognition to the Provisional Government of Russia as the successor of the Russian Imperial Government, and has not accorded recognition to any government in Russia since the overthrow of the Provisional Government of Russia.
>
> "2. The Department of State is cognizant of the fact that the Soviet régime is exercising control and power in territory of the former Russian Empire, and the Department of State has no disposition to ignore that fact.
>
> "3. The refusal of the Government of the United States to accord recognition to the Soviet régime is not based on the ground that that régime does not exercise control and authority in territory of the former Russian Empire, but on other facts."

POUND, C.J., in commenting on this attitude of the United States Government, said at 89 A.L.R., p. 349:

> "It has recognized its existence as a fact, although it has refused diplomatic recognition as one might refuse to recognize an objectionable relative, although his actual existence could not be denied."

A classic example of what might almost be called the hypocrisy of international recognition is the *Tinoco Arbitration* case (*supra*). Here, the United Kingdom Government, after it resolutely refused to recognize the Tinoco Government as either a *de jure* or a *de facto* one, was not in the least inhibited when financial considerations became involved from arguing that its failure to recognize the Tinoco Government was an irrelevant consideration and that as a matter of fact as well as law the Tinoco Government had always been a *de facto* and a *de jure* one, despite the fact that the United Kingdom had refused to recognize it as such.

Wheaton, in dealing with the acquisition of "internal sovereignty", also emphasizes that internal sovereignty does not depend on external recognition. See *Wheaton's International Law,* 3rd Edn., p. 33:

> "Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent.
>
> This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient in this respect to establish its sovereignty *de jure*. It is a State because it exists."

This quotation from Wheaton occurs in a passage dealing with the recognition of a state by other states. When, therefore, in this context Wheaton talks of "internal sovereignty" he means a state which is in fact exercising full powers of sovereignty but has not as yet received recognition from other states. He is not dealing here with the conception of a divided sovereignty, one "internal" and the other "external".

A case in point arising out of the American War of Independence is *M'Ilvaine v. Coxe's Lessee*, 4 Cranch 209: 2 Law. Ed. 598, which illustrates that the sovereign independence of the revolutionary states did not depend on any express or implied acceptance by Great Britain that the revolution had succeeded. In that case, CUSHING, J., in giving the opinion of a court which included MARSHALL, C.J., said (p. 210 Law Ed.):

> "This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British King. The treaty of peace contains a recognition of their independence, not a grant of it." (The underlining is my own.)

Few nations (and certainly not the United Kingdom) apply the idealistic "Lauterpacht theory" of recognition, a theory which presupposes that recognition must always depend on an objective legal appraisal of the true facts. Political considerations are frequently the overriding ones and they, too often, depend on no principle other than political expediency.

It cannot therefore be assumed that the ultimate success of the present revolution must necessarily depend on some express or implied acquiescence by Great Britain or on recognition of the present Government by other states. At what particular stage it can be said the revolution has succeeded and the constitution changed is a question of fact and must depend entirely on the particular circumstances obtaining at that particular time.

This, I think, disposes of the argument that the failure of the United Kingdom and other countries to recognize the present Government is decisive in determining the status of the present Government. Its status must depend on an objective appraisal of all the facts as they exist today and I accordingly now return to the definition I have adopted of "*de facto* government" and "*de jure* government" to see how far the facts as they exist in Rhodesia today fit in with either of these definitions.

It will be seen that the definition of *de facto* and *de jure* governments which I have adopted contains two parts. The first part requires that a régime should be "in effective control over the territory" and this

requisite is common to both a *de facto* and a *de jure* government. The second part of the definition deals with the likelihood of the régime continuing in "effective control". If it "*seems* likely" so to continue, then it is a *de facto* government. When, however, it is "firmly established", it becomes a *de jure* government. The difference between the two types of government is the degree of certainty with which one can predict the likelihood of the régime continuing in "effective control". The difference between the two types of government may be narrowed down to the difference between "*seems*" likely and "*is*" likely, because a government which "is" likely to continue in effective control could be said to be "firmly established". The difference here then is the difference between "seems" and "is", a difference purely of the degree of certainty with which the future can be predicted.

The appellants argued here as a preliminary point that because the Rhodesian judges have not followed the example of Judge A. G. MAGRATH and "joined the revolution" the present Government is not a truly *de facto* government, and from this they argued that as it is not a truly *de facto* Government this Court may not recognize any of its administrative or legislative acts. I do not find this argument of assistance in solving the problem of the status of the present Government because it begs the whole question. The problem before the Court is whether or not this Court should recognize the administrative and legislative acts of the present Government, and what the appellants' argument really amounts to is this:

> "The problem whether or not the Courts will recognize any of the acts of the present Government is decided by saying that as the Courts will not recognize its acts it is not a *de facto* Government, and as it is not such a Government the Courts will not recognize any of its acts."

This circular reasoning is really no more helpful than the schoolboy reasoning of: "We won't because we won't". Furthermore, this whole argument turns on adopting a definition of "*de facto* government", which fits it, and again to quote from Professor Ogg:

> "If you insist on making certain words mean what you want them to mean, you always can reach the conclusion you wish to reach."

As Lord ATKIN said in *Liversidge v. Anderson* (1942) A.C. 206 at p. 245, the only support for this line of reasoning is Humpty Dumpty, *Alice Through the Looking Glass*, Cap. VI.

The same argument, but in reverse form, was submitted by the respondents. They argued that the present Government was a *de facto* Government, and because it was a *de facto* Government cognisance must be given to all its administrative acts and laws.

This argument is, of course, subject to exactly the same criticism as that of the appellants'. It again turns on adopting the particular

meaning on the words "*de facto* government", which suits it, and again because of this it begs the whole question.

The only way to bring the attitude of this Court into its proper perspective in this inquiry is to relate it to the definition which I have adopted and to keep to this definition for all purposes. As I have already pointed out, there are two parts to the definition, "effectiveness" and "continuity". The attitude of this Court towards the revolution is undoubtedly one of the facts which must be taken into account in determining, first, whether or not the present Government is in "effective control" and, second, what the likelihood is of it remaining in such control. I think this is the proper place which the attitude of this Court occupies in these proceedings.

I will deal now with the first part of the definition, i.e., whether or not the present Government can be said to be in "effective control of the territory"

In a relatively small community like Rhodesia no person taking an informed interest in public affairs can be insensitive to the general conditions (political and others) prevailing at any particular time. This is something of which I think judicial notice can fairly be taken. I am satisfied that few well-informed persons living in Rhodesia at the moment would disagree with the statement that the territory has been "effectively governed during the past two years", even though some may disapprove of the form of government. If the territory has been effectively governed, the question to be asked is: "By whom?" Certainly not by the Government of the United Kingdom or anyone purporting to govern under the 1961 Constitution. The only answer to this question is: "By the present Government." So far as the overwhelming majority of people are concerned, the territory has been governed in much the same manner as it was governed immediately before the revolution. This applies not only to the legislative and executive limbs of government but also to the judicial limb. It may be that this was because during the past two years there has been no confrontation with this Court, but be that as it may the plain fact is that during the past two years the courts have gone about their business in much the same manner as they did before the revolution. It is idle to suggest, therefore, that during the past two years the territory has not been effectively governed in all three spheres of government—executive, legislative and judicial—or that the present Government has not been maintaining courts of law. Courts of law have certainly been maintained, and no other government has been maintaining them. As the territory has been so governed for the past two years by the present Government, I consider it must now be accepted that the present Government "is in fact in effective control

over the state's territory" and therefore satisfies the first part of the definition, which applies both to a *de facto* and a *de jure* government. I reach this conclusion after paying due regard to the attitude of this court towards the revolution and to the part it has played during the past two years.

I turn now to deal with the second part of the definition, that is, the likelihood of the present Government continuing in such effective control. The determination of this issue will decide whether the status of the present Government is that of a *de facto* government, of a *de jure* government or of neither. I will consider first what bearing the fact that the Court has not "joined the revolution" has in deciding this question. If the fact that this Court has not "joined the revolution" seems likely to prevent the present Government from continuing in effective control, then this fact might well prove decisive in deciding its status. If, on the other hand, this fact is not likely to have any bearing on this issue, then it will be an irrelevant consideration.

This is a pure question of fact and not of law. LEWIS, J., touched on this matter in his judgment at p. 36 where he said:

> "It is fanciful to suppose that the judges of this court, by refusing to recognize anything done by the present *de facto* Legislature and Executive, could force the present Government to abandon the revolution, nor would it be an appropriate function of this court to attempt to influence the political scene in this way, even supposing that it could do so as a matter of reality . . .
>
> Those who embarked on the present revolution were not deterred by the illegality of their actions at the time, and it would be naïve to suppose that, if faced now with a decision of the court that nothing whatsoever done by the present Government could be recognized, the Government would tamely capitulate. The only course open would then be the drastic one of filling the vacuum by replacing all nine of the existing judges with revolutionary judges, who, regardless of judicial conscience, would be prepared to accept without question the 1965 Constitution as the *de jure* Constitution of this country, despite the ties of sovereignty and despite the anomalies in the Constitution itself to which I have already referred."

This was written somewhere about June, 1966, and what was true then is much more true today (some 18 months later) when all the indications are that the present Government is as firmly entrenched as ever. As a question of fact, therefore, I find that the attitude of this Court is not a significant factor in determining the likelihood of the present Government continuing in effective control of the government of the territory. This, however, by no means disposes of the second part of the definition and I will now proceed to examine the other facts which have a bearing on this, as I see them.

The likelihood of the present Government continuing in effective control of the territory depends on the likelihood of its being "over-

thrown", and "overthrown" here means being *displaced*, and not merely being *replaced* by another government elected in terms of the new revolutionary constitution. It is the new constitution which must be overthrown, not merely the persons who govern by virtue of it. This is so because a mere change of the personnel of the Government, if that change is effected in terms of the revolutionary constitution, still leaves a revolutionary government in control.

A common method of ending a revolution is by the use of force. The United Kingdom Government has, however, on more than one occasion categorically stated that it will not use force to do this. This, I think, is something of which this Court can take judicial notice. Force must, therefore, be ruled out as a method of ending the present Government's effective control of the territory. It is common knowledge, however, that the United Kingdom Government is endeavouring to achieve its objective by the use of economic sanctions. The likelihood of the present Government continuing in control seems, therefore, to depend on the likelihood of these sanctions succeeding or failing in their objective. "Success" or "failure" of sanctions in this context, however, must be judged in relation to the objective of ending the control of the present Government, and not judged merely in relation to the effect which such sanctions may have in damaging the economy of the country.

There would appear to be really only two effective methods by which sanctions might achieve their political objective and both must operate internally. One, by having such a calamitous effect on the economy of the country as to cause the present Government to capitulate, and the other by stirring up so much internal discontent against the present Government as to start an internal counter-revolution which would succeed not only in overthrowing the present Government but in restoring the old Grundnorm.

I have already mentioned that numerous affidavits have been filed by both sides, each of which purports to be able to forecast with accuracy what the effect of sanctions is likely to be, and I have already mentioned why I do not regard the "opinion" evidence contained in these affidavits as of much assistance, especially as much of it is based on hearsay. But even if I accept the opinions expressed by the appellants' deponents, they do not take the matter a great deal further as they deal purely with the "economic" and not the "political" effect of sanctions. The mere fact that sanctions might do great harm to the economy does not necessarily mean that they will have the political result desired. There are many examples in history of a country's economy being reduced to dire straits without this causing an internal revolution or an unconstitutional change in the Grundnorm of the country concerned. If people are satisfied with the constitution under which they are governed, they will endure great economic hardship without wishing

to overthrow the constitution, though they may be anxious to overthrow the Government which is then governing them under that constitution. This anxiety, however, would be for a constitutional and not a revolutionary change of government. The harm that sanctions may do to the economy of the country may cause the electorate to wish to replace the personnel of the present Government with another government, who would continue to govern under the present "independent" constitution, without necessarily causing the electorate to wish to abandon the present 'independent" constitution itself and return to the old pre-revolutionary semi-independent one. Even, therefore, if in the long term sanctions are likely to cause stagnation or a recession in the Rhodesian economy, this does not necessarily mean they will achieve their objective in replacing the present "independent" constitution with another. To achieve their objective sanctions must, as I have said, prove either to have such a calamitous effect on the economy as to cause the present Government to capitulate, or to cause an internal uprising which would succeed in overthrowing not only the present Government but also the present Constitution.

So far as the facts revealed in the two opposing sets of affidavits are concerned, the most important fact which emerges from the appellants' affidavits is that no country in the world today has as yet given any recognition to the present Government; and the most important fact which emerges from the respondents' affidavits is the statement in the affidavit of David Young, Secretary to the Treasury (the statements of fact in which I accept), which reads:

> "As far as exports are concerned, Rhodesia has been able to export sufficient quantities of goods to pay for all her imports. In fact, for the year 1966 there was a surplus of £1,500,000 in the balance of payments current account. In the first eight months of 1967 it has been possible to sustain a level of imports some 20 per cent. higher than in the corresponding period of last year and from all the information available to me I am able to say that this trend is continuing. This increase in imports has been made possible by the attainment of a level of exports adequate to ensure the provision of the foreign exchange necessary to meet the cost of imports."

The refusal of any country to recognize the present Government is an important factor to be taken into account. Recognition by the United Kingdom Government or by Rhodesia's major trading partners would, without doubt, have a profound effect in boosting the country's economy and also in determining its status, and continued lack of recognition plus the effect of sanctions may well cause economic stagnation, but lack of recognition in itself does not necessarily mean that the revolution will fail or that sanctions will succeed in their political objective. The bearing which non-recognition will have on the likelihood of the present Government continuing in effective control will depend on the political effect of such non-recognition, and this ultimately must depend

on the overall effect which non-recognition will have on the viability of the Rhodesian economy. The statement of the Secretary to the Treasury which I have quoted shows that the Rhodesian economy is still a viable one. It is apparent, therefore, that the refusal to grant recognition has not gone hand in hand with a refusal to trade; so non-recognition (certainly at the moment) does not seem to be a really significant factor in estimating the likelihood of the present Government continuing in effective control.

The evidence in the affidavits is not, however, in my view as persuasive as the actual living conditions in Rhodesia today. Here, as I have said before, no well-informed person living in Rhodesia today can be insensitive to these conditions, and I take judicial notice of them. There are no visible signs of any economic collapse; and if sanctions were having a calamitous effect on the economy one would expect such signs to be apparent. All the visible signs are that Rhodesia for the most part is carrying on in much the same way as usual; though it is true that certain particular industries, notably the tobacco industry, appear to have been hard hit by sanctions, and this must, of course, have a damaging effect on the economy as a whole. The overall picture, however, is not one of a collapsing economy; on the contrary, there are some visible signs which seem to support the opinion of the Secretary to the Treasury that sanctions are failing even in their economic objective. He said, for instance, that there had been a revival in the building industry. The number of new buildings that one sees now in the course of construction, and the general scarcity of residential accommodation in the principal towns, certainly bears out this statement. The state of the building industry in a country may not be an accurate thermometer with which to take the temperature of that country's economic health; but a building boom, even a minor building boom, is not, I would think, usually associated with a collapsing economy. Taking all the evidence together, therefore, I think that it all points to the conclusion that it "seems" unlikely that sanctions will have such an effect on the economy as to cause the present Government to capitulate.

What, then, is the likelihood of sanctions creating such internal hardship as will give rise to a successful internal revolt against the present Government? That sanctions are having a damaging effect on the country's economy is indisputable. This much appears from the affidavits which show that the country's exports have fallen from about £165,000,000 in 1965 to about £105,000,000 in 1966, and that during the same period imports have fallen from £120,000,000 to about £84,000,000. The real question here, however, is what effect are these economic conditions having on the political temper of the people? Here again, living *in mediis rebus,* one cannot be insensitive to the

general political climate which prevails, especially among the electorate. There are no signs at all of any internal revolt against the present Government. In fact, if the results of recent bye-elections are any indication, it would appear that the present Government is still popular with the electorate. The effect of sanctions may be causing discontent, but there are no signs that such discontent will cause a successful internal revolution against the present "independent" constitution. There are no signs either from the electorate or from any other quarter.

Perhaps the most pertinent evidence of all, however, is the fact that more than two years have elapsed since the Declaration of Independence; and, as I have said, the present Government is still in effective control. It is here that events speak eloquently. Nothing succeeds like success; and this is particularly true of revolutions. The longer the present Government remains effectively in control, so much more likely is it that it will continue indefinitely to remain in such control.

That is the evidence as I see it. From this evidence a conclusion must be reached as to whether the present Government "seems" likely to continue in control or whether one can go further and say with confidence that it "is" firmly established. On the evidence I come without hesitation to the conclusion that today it "seems" likely that the present Government will continue in control, because I cannot see that any other possibility "seems" at all likely.

Does the evidence, however, justify a more positive finding; a finding that on a balance of probabilities it "is" likely to remain in control, so likely as to justify holding that it can now be said that the present Government is "firmly established"? The evidence goes very nearly as far as to justify such a finding; but predicting accurately the future here is not an easy task, especially in the view of the conflicting and inconclusive nature of the affidavit evidence. The opinions expressed by the respondents' deponents may be right, but the court has not been favoured with the full facts on which these opinions are based; and therefore I do not feel justified in accepting this opinion evidence at its face value. I am not prepared to prophesy on the certainty of what may happen in the future. At this stage, therefore, I am hesitant about accepting the opinion evidence of the respondents' experts that events will necessarily turn out the way they predict. They may well do so, but I do not think there is sufficient evidence before me at the moment to hold that they *will* do so.

I can, however, as I have said, find with confidence what "seems" likely to happen. I might point out here that *de facto* governments ripen as a matter of course into *de jure* governments. As Bryce says (*op. cit.* at p. 516):

"Sovereignty *de jure* and sovereignty *de facto* have a double tendency to coalesce and it is this tendency which has made them so often confounded. Sovereignty *de facto*, when it has lasted for a certain time and shown itself stable, ripens into sovereignty *de jure*."

The dividing line between a *de jure* government and a *de facto* government in the present situation in Rhodesia today is an extremely narrow one, and future events may well prove the predictions of the respondents' experts to be correct, especially if in the days that lie ahead the present Government continues to remain as effectively in control of the government of the country as it is today.

I sum up on this question of status, therefore, by finding that the "status" of the present Government is that of a *de facto* government, in the sense that it is in fact in effective control over the State's territory, and that this control "seems" likely to continue. I do not find on the evidence before me that at this stage it can be said to be so "firmly established" as to justify a finding that its status is yet that of a *de jure* government; because, as I have said, I find that the evidence on what "is" likely to happen in the future is not yet sufficiently conclusive.

4. The Position of the Judges and of the High Court.

My approach to the position of the judges and of the High Court and, indeed, to these cases as a whole, is a "positivist" approach; because I think that in the situation which exists in Rhodesia today what "is" or what "is not" the law can only be decided on the basis of accepting things as they actually "are", and not simply as they "ought to be"

As I have already said, the appellants' basic argument was that in the present situation there were only two courses open to a judge of the High Court; either to abide by the 1961 Constitution and hold unlawful everything done by the present Government, or else to accept the 1965 Constitution and uphold everything done.

When this argument of the appellants is closely examined, however, it will be seen that it is based on the premise that the law to be applied in Rhodesia today must depend on the political views of the individual judge. If the judge decides to abide by the 1961 Constitution the law will be one thing. If, on the other hand, he decides to accept the 1965 Constitution, he will hold the law to be another thing. This I cannot conceive to be the right approach.

The vulnerability of the appellants' argument is this. Suppose one judge in Rhodesia decides to abide by the 1961 Constitution, and another decides to accept the 1965 Constitution, and each is faced with the same problem of the legality of some act of the present Government; the

judge who abides by the 1961 Constitution would declare the law to be invalid, while the judge who accepts the 1965 Constitution would declare it to be valid. On the appellants' argument, in the peculiar circumstances now existing in Rhodesia both decisions will be justified, though the one decision is the opposite of the other. If this is right it is difficult to conceive of a principle which is more calculated to cause uncertainty and chaos in the administration of justice.

Another fallacy in this argument is that it presupposes that the power to "declare" law is synonymous with the power to "enforce" law. If the "rule of law" is to be maintained, it is true that the power to "declare" and the power to "enforce" must go hand in hand; but the two powers are not synonymous. This was the mistake made by Charles I and George III, and it cost the one his head and the other his empire. Here it must be remembered that judges do not "enforce" the law; they merely "declare" it. Enforcement is a matter for the administration. In this regard the remarks of CHASE, C.J., in *Shortridge v. Mason* (U.S. Circuit Court, North Carolina, date not available) are in point. At p. 97 of this report he is reported as saying: "Courts have no policy. They can only declare the law." Ivor Jennings, in his work *Cabinet Government*, 3rd Edn., at p. 4, further elaborates this point. It is a wrong conception, therefore, to imagine that the judges, by "enforcing" or not "enforcing" a particular constitution, can play a part in the resolution of the struggle for political power which occurs in the time of a revolution. "Law enforcement" is not a judicial function, and the courts should not involve themselves in the political struggle for power; much less should the political predilections of the individual judge be a decisive factor in determining the judgment of the court.

It seems to me that at any one time in any one place there can only be one correct law. That law cannot vary with the political views of the individual judge who "declares" it. This, of course, is by no means the same thing as saying that the judge, having declared the law as he finds it to be, or even before so declaring, must necessarily remain in office and apply that law. Here his personal views may play a part, because in certain circumstances the judge may decide that rather than continue as a judge and apply such law he will go. So long, however, as he continues to sit as a judge he must declare the law as it "is", and not as it "was", or as what he thinks it "ought" to be.

I may perhaps illustrate this point by referring again to *Dosso's* case (*supra*) and to *Matovu's* case (*supra*). In these cases the revolution succeeded and the old constitution was replaced by another, and the "fundamental law" thus changed. Chief Justice Sir MUHAMMAD MUNIR and Chief Justice Sir UDO UDOMA had, after this change, to consider the validity of the laws made under the new constitution. They were satis-

fied that the revolution had succeeded and the "fundamental law" had changed and had been replaced by the new constitution. The question of whether or not at that time the "fundamental law" had changed was a question to which only one correct answer could in the circumstances be given, and this did not in any way depend on the political views of the Chief Justices. If the "fundamental law" had in fact changed, as was held to be the case, then it had changed and that was the end of the matter. But the question of whether or not the Chief Justices would continue in office under the new constitution and apply its laws was a personal decision. In the circumstances they decided to remain and accept the new constitution. They might, if they had been so minded, have taken the stand that they had been appointed under the old constitution which had been overthrown by the revolution, and they were not prepared to continue in office under the new one. In this event they would have relinquished their offices, but this would not have had any bearing on what at that time the law was. I have already shown that neither of these cases was one of judges "joining the revolution" There is a wide difference between the judge joining the revolution while the struggle for power is still unresolved, and the judge who, after the revolution has succeeded and the "fundamental law" has actually changed, declares this to be the case. If the "fundamental law" has in fact changed, what I consider the judge cannot do is to purport to continue to sit under the old constitution and declare that this constitution is still the law, when quite obviously it is not, and he knows quite well it is not. Such a decision would completely divorce law from political reality. The reverse position, of course, holds equally good. A judge whose political sympathies may lie with the revolutionaries may decide to relinquish his old commission and "join the revolutionaries". But even such a judge *should* declare the law objectively. He should declare the law as it "is", and not as he would "like" it to be. If, therefore, he sits at a time when the struggle for political power is quite unresolved he would be wrong to hold that the revolution had already succeeded and that the revolutionary norm had become the new *de jure* norm, and wrong to judge all the acts of the revolutionary government under this norm. Of course, in these circumstances the probabilities are that such a judge would do just that; but he would not be right in so doing. In the *lacuna* that exists during this stage of a revolution it ought to be possible to determine objectively what the correct law to be applied is, and both a judge who continued to sit without "joining the revolution" and a judge who sat after "joining the revolution" should declare that law, irrespective of what their personal political inclinations might be, and if they did they should both arrive at the same conclusion. The law cannot be measured by the

yardstick of the old constitution if in fact there are no longer any remains of the old constitution in existence.

It seems to me that in a revolutionary situation the political views of the judge do not play any more significant a part in determining what the law *is* than they do in normal times. In normal times the government may pass a statutory measure of which an individual judge strongly disapproves. He may disapprove so strongly that he may not be prepared to apply the statute, and he may as a consequence decide to resign his commission and refuse to sit any longer as a judge; but his disapproval cannot affect the validity of the law. If he decides not to resign, but to continue in office, he must apply the law as it "is", and not as he thinks it "ought to be", and this no matter how much he may disapprove of it.

The difficulty in holding that a judge appointed under an old norm must declare the law in terms of that norm, irrespective of whether or not he is satisfied that that norm has been replaced as a result of a successful revolution, is best illustrated by an example. I start by emphasizing that I accept the proposition that the validity of a new constitution does not depend on whether the old constitution has been changed by a lawful method or by an unlawful revolutionary method. The only fundamental difference in the two methods of change is that in the case of a change by a lawful method the time of change is precisely demarcated and clear-cut, whereas in the case of a change by a successful revolution it may not be so easy to determine the precise point at which it can be said with confidence that the issue is no longer in doubt and that the revolution has in fact succeeded. Once it is clear, however, that the revolution has in fact succeeded the ultimate result is the same. The validity of the new constitution does not depend on the method of change; it depends on the existing factual situation which determines as a question of fact whether the old constitution has disappeared, and the new constitution in the sense of the new norm has become the norm.

Now to proceed with the example: Many High Court judges were appointed under the 1923 Constitution. That Constitution was entirely superseded by the 1961 Constitution, which prescribed different qualifications for the appointment of judges of the High Court, and also a different method of appointment from that formerly prescribed. Section 11 of the Southern Rhodesia (Constitution) Order in Council, 1961, however, provided that the existing High Court shall continue to be the High Court for the purposes of the new Constitution. The 1961 Constitution became the new constitutional norm, and succeeded the old 1923 Constitution, which from then on ceased to exist. If a judge appointed under the 1923 Constitution objected to the new 1961 Constitution so strongly that he refused to accept it, he would be faced

with the personal decision of leaving or remaining. If, however, he remained, he would have to apply the new constitution. He could not remain and declare the law to be as it existed under the old constitution simply because he was appointed under that constitution and because he had never accepted the new one or any appointment made under it. He could not, for example, declare a statute validly passed under the 1961 Constitution to be invalid because it had not been passed in accordance with the provisions of the "reserved clauses" of the 1923 Constitution. If an old constitution is completely gone it is gone for all purposes; and, as I pointed out earlier, the method of its demise matters not. If a judge remains under the new norm he must accept that norm and cannot remain and seek to declare the law of a non-existent norm. He has no right to elect which norm he will apply.

These examples I have given are clear-cut examples where "the fundamental law" has already changed as the result of a successful revolution; examples where there can be no doubt as to what the law is. The principle to be drawn from these examples seems, however, to be clear. In the present circumstances obtaining in Rhodesia the judge must decide in the light of the political realities what the law is. This decision should be an objective one, because here the judge's personal inclinations and wishes can play no part.

Such cases as *In re William Kok* (1879), Buch. 45, and *Brown v. Leyds, N.O.* 4 O.R. 17, have no application in a revolutionary situation. They go no further than laying down the principle that a judge must fearlessly declare the law as he sees it to be, whatever the future consequences to himself may be.

So much for the duty of the individual judge. But the feature of these appeals which occasions the greatest difficulty is, where today does the court on which the judge sits derive its authority to adjudicate at all? Does it derive its authority from the 1961 Constitution or from the 1965 Constitution, or from some other source? This, as I see it, is really a matter of fact, and to determine this involves an examination of the real source from which as a matter of practical reality a court derives its authority. A court cannot derive its authority from a piece of paper on which may be written the provisions of some defunct or suspended constitution. In normal times a court originates either from an effective constitution, as was the case of the High Court before the revolution, or from a special statute, as is the case of many of the English courts, or perhaps from existence from time immemorial, as was the case of the old English court of Arundel; but it derives its real authority from the fact that the governmental power recognizes it as a court and enforces its judgments and orders. Ultimately it must always derive its authority from recognition by the governmental power

and from the fact that the governmental power enforces its orders. If it was not so recognized, and its orders not so enforced, its proceedings would have no more authority than a "mock trial" deciding academic questions of law. If the entire constitution under which a court is created disappears or is completely suspended, the court created under it must also disappear or be suspended along with that constitution. A revolutionary government cannot be held to be a *de facto* government (in the sense in which I have used the words) unless the old constitution is at least entirely suspended. This I consider to be the case in Rhodesia today, because as a matter of political reality no writ of any government purporting to govern under the 1961 Constitution runs in Rhodesia. What, then, is the position of this court at the present time? Strange as the conception might be, it cannot be said that the court owes its present existence to or derives its present authority from the old 1961 Constitution. It owes its existence to and derives its authority today from the fact that the present *de facto* Government which is in full control of the government of the country, knowing that the court as such has not "joined the revolution", has none the less permitted it to continue and exercise its functions as a court, and has authorized its public officials to enforce the court's judgments and orders. The orders of the High Court today are not enforced by any remnant of a government governing under the 1961 Constitution. They are enforced by the officials of the present *de facto* Government. The affidavits filed in these appeals which have been made by the various departmental heads of the Public Service, which include the responsible officials in the Ministry of Justice and the Ministry of Law and Order, make it crystal clear that these officials are carrying out the functions of their offices, not as servants of any government operating under the 1961 Constitution, but as servants of the present Government. The High Court itself, as I have pointed out, has accepted as lawful many of the administrative and legislative acts of the present Government. Such an acceptance I have difficulty in regarding as justified if these acts are to be judged by the norm of the 1961 Constitution. This recognition, particularly of the legislative acts of the present Government, I have, as I have said, difficulty in reconciling with the conception that this court is still a court of the 1961 Constitution and is applying the norms of that Constitution. If it still remains a court operating under the 1961 Constitution, then it seems to me there is a great deal in Mr. *Kentridge's* argument that it is now the duty of the court to declare at least all the legislative acts of the present Government to be unlawful. The argument that a court sitting under the 1961 Constitution may properly find some of the legislative acts of the present Government to be lawful on the application of the doctrine of necessity, as expressed in the maxim *salus populi suprema lex*, finds no favour

with me. In the first place, I cannot turn a blind eye to the fundamental principle of the doctrine of necessity that "nobody may take advantage of a necessity of his own making". In the second place, this doctrine or the maxim *salus populi suprema lex* is so imprecise in its application that if the court had to judge the validity of "all" the present Government's legislation by this yardstick it would in effect be usurping the function of the legislature, because it would then be charged with the authority of determining not merely whether one particular controversial measure was valid, but with the general authority to review the whole field of governmental legislation and to decide in its discretion which individual measure was necessary in the public interest and which was not. This is a legislative and not a judicial function. Lord ROCHE may have said:

> "Public policy, it is true, has been said to be an unruly horse, but no one denies that it is given to the Courts to manage." (See the judgment of GOLDIN, J., at p. 97.)

I do not imagine, however, that Lord ROCHE would have undertaken to ride the animal over the difficult terrain which this court is now transversing. For my part, I am not prepared to enter the lists riding such a beast.

On the other hand, the judgment of the court *a quo* has made it abundantly clear that the court has not recognized the 1965 Constitution as the *de jure* Constitution of the country. Indeed, had this court done this the main issue in these appeals could have been disposed of almost without argument in view of s. 142 of the 1965 Constitution, which reads:

> "The validity of this Constitution and, except as provided therein, of anything done thereunder shall not be inquired into in any court and the provisions of this Constitution and anything so done shall for all purposes be regarded as valid."

In these circumstances where then does this court derive its authority today? This, I think, is something that must be clearly enunciated. This court, true enough, originated from the 1961 Constitution, and also, true enough, it was only because it happened to be here as a court appointed under that Constitution at the time of the outbreak of the revolution that it was permitted to continue. The 1961 Constitution, however, certainly in Rhodesia, is now either completely defunct or at least entirely suspended; and (as I have found as a fact) it seems likely to remain so. The court therefore can no longer derive its authority from its original source. On the other hand, until the 1965 Constitution is recognized by the court as the *de jure* constitution of the territory (as the courts did in *Dosso's* case *(supra)* and in *In re Matovu (supra)*), the court cannot derive its authority from the 1965 Constitution either.

In the present situation, therefore, it seems to me the court does not sit under the authority of either the 1961 or the 1965 Constitution. It does not sit under the old norm, because that norm is no longer in force; and it does not sit under the new norm, because that is not yet a lawful norm. As a matter of practical reality it cannot be denied that the court is sitting and that its orders are being enforced. It is idle to suggest, therefore, that it sits with no authority at all. In these circumstances it seems to me that the court can only be regarded as deriving is authority from the fact that the present *de facto* Government allows it to function and allows its officials to enforce its orders. This does not amount to a "repudiation" by the court of the 1961 Constitution which gave it birth; it amounts simply to a "recognition" by the court of the factual situation under which it now sits, which is a different thing from "repudiation".

It is argued that the court cannot simply slide from deriving its authority from the 1961 Constitution to a court now deriving its authority from the present *de facto* situation, unless there has been some formal pronouncement of the change. I cannot, however, see the need for such a pronouncement. A court may simply be overtaken by events and if it carries on after circumstances have changed it derives its new authority from the new situation in which it finds itself. As I have previously pointed out many of the judges of this court were appointed under the 1923 Constitution, but when that Constitution changed and was succeeded by the 1961 Constitution no judge announced his formal acceptance of office under the 1961 Constitution. The judges simply carried on. Similarly, in recent years when the Union of South Africa became the Republic of South Africa, I am not aware that any formal statement was made by the Supreme Court that its judges were in future accepting office under the new Republic. The court just carried on. It is because of changed circumstances that I consider that today this court can only be regarded as a court which derives its present authority, not from the 1961 nor from the 1965 Constitutions, but from the fact that the present *de facto* Government allows it to function and allows its officials to enforce its judgments and orders.

In some respects the situation in Rhodesia today is not materially different from that of a territory occupied (perhaps for a lengthy period) by an invading enemy. The law to be applied by the occupying enemy is laid down by Article 43 of the Hague Regulations, 1907, which reads:

> "43. The authority of the legitimate Power having actually passed into the hands of the occupant, the latter shall take all steps in his power to re-establish and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

The enemy occupier may either establish his own courts or allow the local courts to continue, or he may both establish his own courts, exer-

cising certain specified jurisdiction, and permit the local courts to continue side by side with his own courts, also exercising a certain specified jurisdiction (see *Oppenheim's International Law,* Vol. 2, 7th Edn., p. 447). There are many examples of cases where the local courts have continued to sit and adjudicate under the rule of the invader and have applied the invader's laws so far as those laws conform to the Hague Regulations. Here it must be remembered that the Hague Regulations permit the invader to make certain laws which entrench his own occupation. It has not been considered improper for a local court to continue to perform its functions in these circumstances.

An example of a local court continuing to sit after invasion is that of the Royal Court of the Channel Islands during the German Occupation in the last war. This court not only continued to apply all the usual day-to-day laws, many of which owed their validity to the approval of the German commandant, instead of to the usual "Royal Assent", but also punished breaches of minor decrees made by the German commandant himself, and which were required for the purpose of entrenching the German Occupation. For example, it tried and punished breaches of the German curfew regulations. In one case the Royal Court during the Occupation convicted a number of persons on several counts of theft and duly sentenced them. After the end of the war the convicted prisoners appealed to the Judicial Committee of the Privy Council (the grounds of appeal are not relevant here). The Board dismissed the appeals (except in the cases of a few isolated counts). The Board, however, never in any way intimated that it considered that it had been improper for the Royal Court to continue to sit in these circumstances. See the case of *Quin and Ors. v. R.*, Privy Council Appeal Case No. 10 of 1952 (not reported).

Like this court, the Royal Court's original source of authority was derived from the old constitution under which it was appointed; but during the enemy occupation it no longer derived its authority from that source, as the Channel Islands were then being governed by the German invader. A proper analysis of these facts reveals that during the invasion the authority of the Royal Court was derived from the fact that the invader (though under no obligation to do so) permitted it to continue, vested it with certain jurisdiction and permitted its orders to be enforced. A court sitting in these circumstances and deriving its authority from such sources is none the less obliged to apply the law objectively as it sees it to be. It does not slavishly do the bidding of the power from which it derives its authority and is not bound to hold as valid every law an enemy occupier passes simply because the enemy occupier has the power to enforce such laws, and may dismiss the court should the court declare to be invalid a law which it considers the invader had no legal authority to pass. A case in point here is the Nor-

wegian case heard in 1943 in the District Court of Aker and known as the *Overland* case, reported as Case No. 156 in the *Annual Digest and Reports of Public International Law Cases*, Vol. 12, p. 446. The Germans had altered the Norwegian law dealing with allodial privileges. The Norwegian court considered that this alteration of the local law was a breach by the Germans of Article 43 of the Hague Regulations, and therefore declared the law to be invalid and refused to apply it. Oppenheim, *op cit.*, at pp. 436-445, gives other examples of cases where local courts continued to sit, and also examples of cases where they refused to sit because the enemy would not respect the Hague Regulations. The Supreme Court of Norway during the first year of the occupation refused to sit for this reason.

The High Court today seems to me to occupy a very similar position to a domestic court sitting in a territory occupied by an invader who is governing the territory at the time. It derives its authority from the fact that it is permitted to continue and from the fact that its orders are enforced, but it must none the less "declare" the law as it sees it to be in the situation existing at the time; and here its approach must be just as objective as that, for example, of KOTZE, C.J., in the case of *Brown v. Leyds, N.O.* (*supra*). (In *Brown's* case the issue was whether the court had the right to declare a Volksraad resolution to be invalid as being in conflict with the basic constitution (the Grondwet). While the case was pending the President threatened to dismiss the judges if they exercised this "testing right". They ignored the threat and declared the law as they saw it to be. These judges were ultimately dismissed. See J. G. Kotze, *Memoirs and Reminiscences*, Vol. 2, p. 229, and Introduction, p. xiv and pp. xxxiii-xxxv.)

5. The Law to be applied in Southern Rhodesia Today.

I now come to the fifth head, which is the law to be applied by a domestic court where there is a *de facto* government (in the sense in which I have defined it) in effective control over the territory. This, as I have said, is the real crux of the whole matter.

I have already mentioned the part that the "convention" that the United Kingdom Parliament will not legislate in any matter within the competence of the Southern Rhodesia Legislature, except at her request (which I shall call the "Convention"), played in the referendum on the 1961 Constitution, and the measure of sovereignty which that Constitution gave Southern Rhodesia. In view of this, I think a case can be made out for arguing that the "Convention" is part of the "fundamental law" (Grundnorm) of Southern Rhodesia and cannot be withdrawn any more than the United Kingdom Parliament can now repeal the Statute of Westminster 1931 (which was only declaratory of the existing conventions) and now make Canada a Crown Colony.

As STRATFORD, A.C.J., said in *Ndlwana v. Hofmeyer, N.O. & Others*, 1937 A.D. 229 at p. 237: "Freedom once conferred cannot be revoked." It is certainly arguable that this same principle applies to a grant of internal sovereignty.

On this argument, so much of the United Kingdom legislation which purports to interfere with Southern Rhodesia's rights of self-government would be regarded by the local courts as *ultra vires* the *powers* of the United Kingdom Parliament; this, no matter what the "abstract law" of the situation might be. I adopt this expression, "abstract law", from the judgment of Viscount SANKEY, L.C., in *British Coal Corporation v. The King*, (1935) A.C. 500, where, in dealing with Canada and the Statute of Westminster, the learned Lord Chancellor said (see page 520):

> "Indeed, the Imperial Parliament could as a matter of abstract law repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities." (The underlining is my own.)

Furthermore, the Orders in Council dealing with Rhodesia have not been promulgated here and, again, it can be argued that for this reason they may be regarded by a local court as invalid. I do not, however, propose to examine the validity of any of these measures, nor the impact of the Colonial Laws Validity Act, 1865, because I do not think their validity or applicability has any significant bearing on the law to be applied in Rhodesia today, in the revolutionary situation in which we find ourselves. The fact that what is done may be unlawful for more than one reason cannot make it more unlawful. The 1961 Constitution the recent United Kingdom legislation and the Colonial Laws Validity Act may really all be taken as one for the purpose of determining what is the law to be applied today. The whole problem turns on deciding how much value must be placed on the political realities of the present situation. If a positivist approach is the correct one, and the political realities are to be the governing factor, then whether they must be considered as overriding one or two or three otherwise lawful laws seems irrelevant. On the other hand, if the political realities are not to be the governing factor, everything done by the present Government is unlawful because it conflicts with the 1961 Constitution; and if in addition it is unlawful because it conflicts with recent United Kingdom legislation and with the Colonial Laws Validity Act, that takes these cases no further.

In determining the law to be applied in Rhodesia today I propose first to look at general principle. The broad general principle which I think may be most helpful here is the principle that every civilized country which is being governed must have a government, and that a government without laws is a mystery in politics.

I quote first from the speech of Lord WILBERFORCE in the House of Lords in the case of *Carl-Zeiss* (*supra*) at p. 577:

> "My Lords, if the consequences of non-recognition of the East German 'government' were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total or whether some mitigation of the severity of this result can be found. As Locke said: 'A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society' and this must be true of a society—at least a civilized and organized society—such as we know to exist in East Germany." (The underlining is my own.)

This same principle is illustrated by various *dicta* of judges in the cases arising out of the American Civil War. In *Horn v. Lockhart*, 17 Wall. 570: 21 Law Ed. 657 at p. 660, FIELD, J., in delivering the opinion of the court, said:

> "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 laws."

The passage in which this statement occurs has been quoted with approval in most of the leading cases arising out of the Civil War. In *The United States v. The Home Insurance Co.*, 22 Wall. 99: 22 Law Ed. 816, STRONG, J., in delivering the opinion of the court (p. 818, Law Ed.), approved this passage. In *Baldy v. Hunter*, (1898) 171 U.S. 388: 43 Law Ed. 208, the court also unanimously approved this passage (Law Ed. p. 211). In *Johnson v. The Atlantic Gulf and West Indian Transit Co.*, (1894) 156 U.S. 618: 39 Law. Ed. 556, SHIRAS, J. (who delivered the opinion of the court) when dealing with this point said (Law. Ed. 565):

> "This contention is disposed of by referring to the well-settled doctrine affirmed in repeated decisions of this court";

and the learned judge then quoted this passage from *Horn v. Lockhart* with approval. The same principle is expressed by HARLAN, J., in *Baldy v. Hunter* (*supra*) at p. 213 (Law. Ed.), where the learned judge, in expressing the unanimous view of the court, said:

> " . 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 administration of laws."

Again, the same principle is expressed by MILLER, J., in *Sprott v. The United States*, 20 Wall. 459: 22 Law. Ed. 371 at p. 372, in this way:

> "These laws, necessary in their recognition and administration to the existence of organised society, were the same, with slight exceptions, whether the authorities of the State acknowledged allegiance to the true or the false Federal power. They were the fundamental principles for which civil society is organised into government in all countries, and must be respected

in their administration under whatever temporary dominant authority they may be exercised."

The High Court of Holland, in dealing with a case arising out of the secession of the Province of Limburg of Holland to Belgium, which was ended after nine years, also expresses this principle in a somewhat different form. See a translation of the judgment of the Hooge Raad of the 28th August, 1847, reported in *Weekblad voor het Recht,* 1847, at p. 872, where the court stated:

"Taking into consideration that this also especially applies to the judgment of Courts, established by such usurping power and pronounced in the name of that power, all of which is based on the thesis that in society all public authority will never be lacking." (The underlining is my own.)

Here I must again direct attention to the fact that if none of the administrative or legislative acts of the present Government is to be treated as valid Southern Rhodesia is indeed a country without any administration and without any laws for the day-to-day running of affairs. The recent United Kingdom legislation, if valid, has suspended all the administrative and legislative provisions granted the country under the 1961 Constitution. (See ss. 3 and 4 of the Southern Rhodesia Order in Council 1965.) This being so, no administrative or legislative acts can today be validly carried out under the 1961 Constitution. In place of the powers granted to the territory under the 1961 Constitution, the United Kingdom Legislature has vested powers in the Governor and in the United Kingdom Government, but neither the Governor nor the United Kingdom Government has provided the country with either the administration or with the laws required for the country's day-to-day running. This is not a case of laws made under the old 1961 Constitution competing with laws made under the revolutionary 1965 Constitution; there is no such competition, because in this field the old 1961 Constitution has been suspended and replaced by other measures of which no use is, or, at the moment can be, made. If the United Kingdom legislation is invalid, and the 1961 Constitution thus remains unaffected by it, the result is still the same, because the present Government is not governing under that Constitution, and no laws are being made by virtue of its provisions. If, therefore, all the administrative and legislative acts of the present Government are invalid, Southern Rhodesia today is without any administration and without any laws whatsoever for the day-to-day running of its affairs; laws without which a country cannot possibly be governed, such as the Appropriation Acts which permit the payment of public servants from the Consolidated Revenue Fund, and the Finance Acts which authorize the raising of the necessary revenue with which to pay them. It is unnecessary to detail further all the multifarious minor administrative and legislative acts which are necessary to carry on the day-to-

day government of a civilized country. At the moment the present Government is the only government which provides the administration and these necessary legislative measures. If, therefore, all that the present Government does is unlawful, the present Government, whatever it may be called, will at least (to borrow again from Lord WILBERFORCE'S speech) enjoy the distinction of being regarded as one of the world's political mysteries because it will be a government without laws. This, of course, cannot be so; and I turn to examine what limits, if any, must be put on the validity of the present Government's administrative and legislative acts. This involves an examination of what recognition a municipal court which has not "joined the revolution" should accord the actions and laws of a *de facto* government which has not yet reached the stage of acquiring the status of a *de jure* government.

The common law of Rhodesia, as I have already pointed out, is the Roman-Dutch law. The present dispute, however, concerns the position of the Crown in relation to its government of Rhodesia; and it would seem that this should be governed by the rules of English constitutional law. This certainly is the view of the South African courts. In the case of *Union Government (Min. of Lands) v. Estate Whittaker*, 1916 A.D. 194, after pointing out that the law governing the acquisition of property in South Africa was the Roman-Dutch law, INNES, C.J., went on to say:

> "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." (See p. 203.)

This is the view of CENTLIVRES, J.A., and VAN DEN HEEVER, J.A. See *Sachs v. Donges, N.O.*, 1950 (2) S.A. 265 at pp. 288 and 309.

For this reason, and also because the matter, at the request of the court, was extensively argued, I propose first to examine such of the English law authorities as deal with *de facto* governments, in order to see what help can be got from this system in solving this difficult problem. The authorities dealing with *de facto* governments under English law seem largely to be concerned with the Treason Act of 1495, 11 Hen. 7 C.1 (*Halsbury's Statutes of England*, 2nd Edn., Vol. 5, p. 478). Such English law as there is on this subject therefore emerges from a critical examination of this Act.

The preamble to this Act recites that the duties of a subject are to serve "their prince and sovereign lord for the time being in his wars for the defence of him and the land against every rebellion power and might reared against him". (The underlining is my own.) The Act

then goes on to provide that no person who "do true and faithful service of allegiance" to the king for the time being or who serve him in his wars shall be attainted of treason, nor of any other offence. The proviso to the Act states, "Provided always that no person or persons shall take any benefit or advantage by this Act which shall hereafter decline from his or their said allegiance". This act is still part of the law of England (see Holdsworth, *History of English Law*, 3rd Edn., Vol. 4, p. 500). There is a considerable body of authority which states that this Act was declaratory of the English common law. See, for example, Sir Michael Foster, *A Report on Some Proceedings on the Commission of Oyer and Terminer and Gaol Delivery for the Trial of the Rebels in the Year 1746 and Discourses upon a few Branches of the Crown Law*, 1762 Edn., p. 399; Blackstone, *Commentaries on the Law of England*, 4th Edn., Vol. 4, p. 64; Bacon, *A New Abridgment of the Law*, 7th Edn., Vol. 6, p. 391 (quoting from *Foster's Criminal Law*); Hume, *Commentaries on the Law of Scotland representing Crimes*, 1844 Edn., Vol. 1, p. 520; Hood Phillips, *Constitutional and Administrative Law*, 3rd Edn., p. 434. This, however, was not the view of Emlyn, who edited the first edition of Hale's *The History of the Pleas of the Crown*, because he says:

> " . . and so it was said, that that act was an affirmance of the common law, yet that was only the saying of counsel, and unsupported by any book-case or record: so that the distinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the constitution or common law of this kingdom, all that is here said by him on that supposition must fall to the ground." (See Hale's *Pleas of the Crown*, 1800 Edn., Vol. 1, p. 102, note (s).)

I shall assume, however, that the broad principles of the Act are part of the English common law, and as such are applicable to Rhodesia today. It is clear from the earlier writers, however, that there is some confusion as to the precise effect of this Act, and for that matter as to the state of the common law itself.

I turn now to examine this Act. An understanding of the real import of this Act requires an intimate knowledge of the English history of the time; and here the Roman-Dutch lawyer treads warily in unfamiliar paths. Of this Act Stephen rightly says:

> "The words of the Act are very remarkable and if the history of the Wars of the Roses were unknown, would be wholly unintelligible." (See *History of the Criminal Law of England*, 1883 Edn., Vol. 2, p. 254.)

When examining the history of the time the first consideration to be borne in mind is that this was not an Act passed by a *de jure* king as a gesture of generosity to those of his subjects who may in the past have served a *de facto* king. It was an Act passed by a king who was himself no more than a *de facto* king at the time. In this sense the Act

itself has no more than a *de facto* origin; but in this it is little different from the Act of Settlement (1700), so this may not be a matter of any significance. What must be remembered, however, is that it was an Act passed by the *de facto* king (Henry VII) for the express purpose of entrenching his own *de facto* position. Of this Act, Hale *(op cit.)* says:

> ". . . and this act, tho extended to his successors, which were kings *de jure,* as well as *de facto,* yet was made for the security of himself and his servants in the first place, which appeareth more fully also by the preamble." (See *Pleas of the Crown* (*supra*), Vol. 1, p. 272.)

Reeves, *History of the English Law,* Vol. 4, p. 132, says the object of this law was to protect those who aided a king *de facto* from prosecution for treason in case of the eventual success of the party opposing such king. The statute was passed after the expedition of Perkin Warbeck, when the adherents of Henry VII, conceiving that other attacks might be made on his title, which might possibly succeed, prevailed upon the king to consent to a law for their security.

The very necessity for this Act, therefore, indicates that the common law on the subject must have been far from clear.

The Act furthermore was not designed to deal with a situation where no doubt existed as to who was the *de jure* king and who was the *de facto* usurper. It was designed to deal with the situation following upon the Wars of the Roses, when no-one was sure who in law was entitled to be regarded as the *de jure* king. The judges themselves refused at the time to adjudicate on this subject. See Holdsworth *(supra).* Vol. 2, p. 561, where the author says:

> "The House of Lords tried in vain to extract from the judges a decisive opinion upon the legality of the Duke of York's claim to the throne. They would only say that it was a matter for the lords who were of the king's blood. The king's serjeants and attorney, when applied to, said that if the judges could give no opinion *a fortiori* they could not do so."

The fact that at the time when this Act was passed the distinction between a *de facto* and a *de jure* king was never clearly demarcated is well illustrated in another note by Emlyn, where the editor says, when talking of a *de jure* king:

> "But who shall take upon them to determine who that is? Our author therefore prudently adds, *which afterwards obtained,* for this is the most effectual way of deciding questions of this nature; but then by the same rule, *if he should not obtain,* such act of hostility had been treason, for it cannot be imagined, that any prince in the actual possession of the government will suffer his own title to be disputed, nor indeed is it fitting, that private subjects should set themselves up for judges in such an affair, whose duty it is to pay a legal obedience to the powers that are in fact set over them; *for the powers* that be, *are ordained of God.* Rom. xiii.I.
>
> "This serves to show how idle the distinction is between a *rex de jure* and a *rex de facto,* which is not only founded on a precarious bottom, but

also must in fact prove a distinction without a difference, being equally serviceable to all sides and parties; and thus it was in regard of H.6 and E.4. who were both of them by turns declared by parliament to be rightful kings and usurpers." (See *Hale's Pleas of the Crown* (*supra*) at p. 102, note (*).)

It is against this historical background that this Act of Henry VII must be viewed. In considering the Act today, therefore, sight must not be lost of the fact that it was never intended to be a measure which would be of assistance to a usurper who sought to depose permanently the *de jure* sovereign, nor was it intended to deal with a situation where there was no shadow of doubt where the *de jure* sovereignty actually lay.

It seems clear enough that all the old writers are unanimous in holding that to obey the laws of a *de facto* sovereign is not treason; and it also seems reasonably clear that to assist a *de facto* sovereign in repelling another would-be unlawful usurper is not treason. There is, however, a sharp division of opinion among these writers as to whether or not it is treason to assist the *de jure* sovereign in an attempt to overthrow the usurping *de facto* sovereign; or, *vice versa,* whether it is treason to assist the *de facto* sovereign in repelling such an attack by the *de jure* sovereign.

The writer who goes furthest in entrenching the rights of a *de facto* sovereign, and who holds that allegiance is owed to a *de facto* sovereign alone, even *vis-à-vis* the *de jure* sovereign, is Hawkins, who states:

"Sect. 15. From hence it clearly follows, First, That every king for the time being has a right to the people's allegiance, because they are bound thereby to defend him in his wars against every power whatsoever.

"Sect. 16. Secondly, That one out of possession is so far from having any right to our allegiance by virtue of any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him." (See Hawkins, *Pleas of the Crown,* 8th Edn., Vol. 1, p. 10.)

This statement receives support from Bacon, who says:

"With respect, therefore, to the duty of allegiance, the only question is, who is the sovereign in possession; if the usurper is in possession, allegiance is due to him as sovereign lord, for the time being; and it must follow, that, as the subject cannot owe a divided allegiance, the rightful heir, even though he continue his style, title, and claim, cannot, during his exclusion be within the statute of treason." (Bacon *(op. cit.),* Vol. VI, p. 391.)

The statement of Hawkins is, however, criticized by Blackstone (*op. cit.*), Vol. 4, p. 64, where the author says that this statement "in truth seems to be confounding all notions of right and wrong". East's *Pleas of the Crown,* 1803 Edn., Vol. 1, at p. 54, seems, however, to favour Hawkins's view.

There is authority, however, in support of the view that while there is a *de facto* sovereign power allegiance is divided; as, although allegiance may be owed to the *de facto* sovereign, this is without prejudice to the allegiance still owed to the *de jure* sovereign. This seems to be implicit in the following statement by Coke:

> "This Act is to be understood of a king in possession of the Crown, and kingdoms: for if there be a king regnant in possession, although he be *Rex de facto,* and *non de jure,* yet is he *seignior le Roy* within the purview of this statute. And the other that hath right, and is out of possession, is not within this Act. Nay if treason be committed against a king *de facto,* and *non de jure,* and after the king *de jure* commeth to the Crown, he shall punish the treason done to the king *de facto:* And a pardon granted by a king *de jure,* that is not also *de facto,* is void." (See the *Third Part of the Institutes of the Laws of England,* 1648 Edn., p. 7.)

Coke here must obviously have been referring only to acts of treason against a *de facto* king which were not acts designed to assist the *de jure* king; otherwise the passage would mean that if a subject loyal to the *de jure* king were to assist the *de jure* king in displacing the *de facto* king it would be the duty of the *de jure* king, once he had regained the throne, to punish the loyal subject who had helped him regain the throne because, by helping him, the subject had committed treason against the old *de facto* king. Such a meaning is, of course, absurd, and was considered to be so by the old writers. See, for example, Foster *(op. cit.)* at p. 397, who, when commenting on a passage from *Hale's Pleas of the Crown,* says:

> "I fear it will avail very little towards the Settling any Point of Law or Rule of Right, to enquire in what manner Princes on such Revolutions as those alluded to in these Passages by the learned Author, have treated either their Friends or their Enemies. It is not to be imagined, that They will consider the Former as Traitors for Acts of Hostility done or attempted in Aid of Themselves. I verily believe no Prince in his Right Senses ever did."

Foster, however, does seem a little undecided in his views. He says, for example, when speaking of kings *de jure* and *de facto,* that allegiance is due to both (see Bacon, *A New Abridgment of the Law (supra),* Vol. VI, p. 390). But on balance Foster seems firmly to support Hawkins's view that allegiance is owed only to the *de facto* king and not to a *de jure* king out of possession (see *A Report on Some Proceedings, et cetera (supra),* pp. 188 and 399, and *Criminal Law,* p. 399, referred to in Bacon (*op. cit.*) at p. 390).

The most cogent authority, however, in support of the view that to assist a *de jure* sovereign to regain his sovereignty was not treason, while to assist the *de facto* sovereign against the *de jure* sovereign was treason, is Hale. In his *Pleas of the Crown,* 1800 Edn., Vol. 1, at p. 60, he says:

"And upon the same account it is, that tho there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, altho the true prince regain the sovereignty, yet such attempts against the usurper in compassing his death have been punished as treason, unless they were attempts made in the right of the rightful prince, or in aid or assistance of him, because of the breach of ligeance, that was temporarily due to him, that was king *de facto*." (The underlining is my own.)

And at pp. 101-103 he says:

"A king *de facto* but not *de jure*, such as were H.4. H.5. H.6. R.3. H.7. being in the actual possession of the crown, is a king within this act, so that compassing his death is treason within this law; and therefore the 4 E.4. 20.a. (t), a person that compassed the death of H.6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, which afterwards obtained, this had not been treason, but *e converso* those that assisted the usurper, tho in actual possession of the crown, have suffered as traitors, as appears by the statute of I E.4, and as was done upon the assistants of H.6. after his temporary re-adoption of the crown in 10. E.4. and 49 H.6." (The underlining is my own.)

Both Emlyn and Bacon criticize the examples given by Hale: see Emlyn's note (†) on p. 103 and Bacon (*op. cit.*), p. 390. There is little consistency in their criticism, however, because Emlyn criticized Hale's example because he says the example of the act of treason referred to by Hale must have been for acts against Edward IV before he first obtained the Crown, and since a "rightful heir before he has got possession of the Crown is not a king within the statute of 25.E.3", these acts could not have been treason. Bacon, on the other hand, criticized Hale's examples because he thinks they refer to acts of treason against Edward IV "some years *after* he was in full possession of the Crown"

Hume (*supra*), Vol. 1, at p. 520, in dealing with this statement of Hale's, states:

"This at least is the opinion of Sir Matthew Hale, which I do not find expressly controverted by other authorities but rather avoided to be touched on."

Hume, however, then goes on to give his own view of the law in these terms:

"Thus to be in arms, and in the field against the rightful Sovereign, in his attempt to repossess himself of the throne, ought not to be construed treason; because perhaps the party dare not, for his personal safety, decline the service. But secretly, and of free will, or for bribe and reward, to attempt to assassinate or poison the King *de jure*, though out of possession, is an act of quite a different and an inexcusable nature, and one which seems properly to fall under the rule laid down by Sir Matthew Hale, who, perhaps, only intended it for cases of this description."

Hume here seems to rely on the doctrine of "compulsion" as excusing acts of assistance given to a *de facto* sovereign in repelling a *de jure* sovereign. As Hale is the leading authority who supports the view that to assist a *de facto* king against a *de jure* king out of possession is an act of treason, it is as well to emphasize the high regard in which he is held as a lawyer. Holdsworth (*supra*) says this of Hale:

> "If we look at the law books of this period as a whole they can be described as considerable in quantity but very ordinary in quality. But to this description two exceptions must be made. Hale produced works upon criminal law, constitutional law and legal history which have become legal classics; and Dugdale produced a work upon the origins of the Inns of Court and the legal profession, a chronological list of the series of judges, law officers, and king's serjeants, and some notes upon legal history and legal literature, which are still valuable." (Vol. VI, p. 574.)
>
> ". . enables us to realize the extraordinary combination of moral qualities, which made him universally beloved in his lifetime, with intellectual qualities, which enabled him to write the books that have left an enduring mark upon our legal history." (*ibid.* p. 576.)
>
> "Hale was a consummate constitutional lawyer." (*ibid.* p. 580.)

When speaking of *Hale's Pleas of the Crown*, Holdsworth says:

> "Ever since its first publication it has been regarded as a book of the highest authority." (Vol. VI, p. 590.)

And, finally, Holdsworth says:

> "This review of Hale's life and works shows that he was the greatest common lawyer who has arisen since Coke; and that, though his influence has not been so great as that of Coke, he was as a lawyer, Coke's superior. The position which they respectively occupy in our legal history is as different as their character and mental outlook. Coke, as we have seen, stands midway between the mediæval and the modern law. Hale is the first of our great modern common lawyers." (*ibid.* p. 594.)

Another authority who supports Hale is Blackstone, who says:

> "And a very sensible writer on the crown-law carries the point of possession so far, that he holds (1 Hawk P.C. 36) that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c.1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration; and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown, (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince today, and by the same duty of allegiance to fight against him tomorrow. The true distinction seems to be, that the statute of Henry the seventh does by no means command any

> opposition to a king *de jure;* but excuses the obedience paid to a king *de facto.* When therefore a usurper is in possession, the subject is excused and justified in obeying and giving him assistance: otherwise under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience." (Blackstone *(op. cit.)* 15th Edn. Vol. 4. p. 76.)

This passage of Blackstone's, like many of the opinions of early writers, however, also has its critics and is criticized by a modern writer, Hallam, *Constitutional History,* Everyman's Edition, Vol. 1, p. 14, note 2.

There appear to be no reported cases which are of any assistance in resolving this difference of opinion between Hawkins and Hale. The earlier cases which are in point seem, as one would have expected, to have been decided on purely political grounds and provide no help. Typical of these cases are the "Regicide Cases" and "Vane's Case" (6 St. Tr. 120). It is of some significance, however, that there appear to be no reported cases in which the Treason Act of 1495 has been successfully pleaded as a defence where the prisoner was charged with an act of treason against a *de jure* sovereign.

The various draft Criminal Codes of the nineteenth century do, however, give some indication of what their authors considered the law to be. (The history of these Codes is conveniently set out in Holdsworth (*supra*), Vol. 15, pp. 142, *et seq.*) The Sixth Report of the Royal Commission which was published in 1841 deals with the Treason Act, 1495, and sums up the law in Article 2 of section 1 thus:

> "Provided that no person who shall attend upon the King and sovereign lord of this land for the time being, in his person, and shall do him true and faithful service of allegiance in the same, or shall be in other places by his commandment, in his wars, within this land or without, shall for the said deed and true duty of allegiance be in anywise convicted or attainted of treason."

The side-note to this Article reads:

> "Protection for those who aid the King *de facto*"

The Commission, in an unusually lengthy note, then proceeds to examine the opinions of the writers on the subject. The Commission quotes the opinions of Reeves, Hale, Hawkins, Blackstone, Foster and Bacon (to most of which I have already referred) and concludes its note with this observation:

> "In consequence of the difference of opinion expressed by learned writers as to the proper interpretation of this ancient statute, we have thought it better merely to give the words of the enactment in our Digest, and to submit the ultimate disposal of the question to the legislature. If it be determined that *bona fide* service rendered to a king *de facto,* should,

> under no circumstances, expose a party to the penalties of treason upon the eventual success of the king *de jure*, it will be easy to alter the expression of the law so as to effect the purpose without ambiguity." (The underlining is my own.)

From this note it is apparent that the Commission felt that as there was doubt on the true interpretation to be placed on this Statute the only satisfactory way of deciding the law was by further legislation. The last sentence of the note is, however, significant, as the words "under no circumstances" appear to indicate that, if serving a *de facto* king against the *de jure* king was not to be regarded as treason, special legislation would be required to make this plain. Article 2 is also of some value as illustrating the Commission's view of a paraphrase of the Statute itself.

In 1845 a fresh Commission was issued to revise and consolidate criminal law and procedure, and in its Fourth Report it dealt with high treason. This Commission omitted Article 2 of the Sixth Report and gave this as its reason for so doing:

> "We have omitted Article 2 of Section 1 of the Chapter of Treason (Act of Crimes and Punishments) as being unnecessary . . . There can be no reason for inserting such an Article since the only treasons contained in the Digest consist of acts or intentions against the king *de facto*."

In 1877, however, that great criminal lawyer and historian, Stephen, brought out his *Digest of the Criminal Law*, in which he reinstated Article 2 of the Sixth Report in the following terms:

> "No person who attends upon the king and sovereign lord of this land for the time being, in his person, and does him true and faithful service of allegiance in the same, or is in other places by his commandment in his wars within this land or without, is for any such act guilty of treason [even if the king *de facto* should not be king *de jure*]." (See 8th Edn., Art. 63, p. 58.)

It is apparent that this Article is copied from Article 2 of the Sixth Report, but the words in brackets are significant as emphasizing the meaning of the Article.

This Article accords in substance with Stephen's view of the effect of the Treason Act 1495, because in his *History of the Criminal Law* he describes the Act thus:

> ". . . which provides in substance that obedience to a king *de facto*, but not *de jure*, shall not expose his adherents to the punishment of treason when the rightful king re-establishes himself." (See Stephen's *History* (*supra*), Vol. II, p. 254.)

In 1878, at the suggestion of Stephen, another Royal Commission was appointed to inquire into and consider the provisions of a Draft Code relating to indictable offences. Stephen was a member of this

Commission. This Commission produced the Draft Code of 1879 (for the history of this Code, see Stephen, *History of the Criminal Law of England* (*supra*), Vol. 1, preface p. VI). Section 70 Title 1 Part 3 of the 1879 Draft Code replaced Article 2 of the Sixth Report. This Section reads:

> "Everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the Sovereign power in and over the place where the act is done."

The Section appeared under the heading, "Obedience to De Facto Law" When commenting on Section 75 of the Draft Code 1879, which deals with high treason, Stephen says this Section represents "the substance of the existing law free from all technicalities and from provisions obviously obsolete." (The underlining is my own.) (Stephen, *History of the Criminal Law* (*supra*), Vol. II, p. 283.) The Treason Act of 1495 is intimately tied up with the law of high treason, and it seems a fair assumption that the Commission, when dealing with this Act, also attempted to set out "the substance of the existing law free from all technicalities and from provisions obviously obsolete." It is a reasonable assumption, therefore, that Section 70 of the Draft Code 1879 sets out the law of England as the Royal Commission saw it to be at that time. It is of interest to note that the provisions of this Section of the Draft Code have been copied into the Penal Codes of both Canada and New Zealand, countries which purport to apply the English law. Section 15 of the Canadian Code reads:

> "No person shall be convicted of any offence in respect of any act or omission in obedience to the law for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the acts or omissions occur."

Section 88 of the New Zealand Code is in substantially similar terms.

Later writers, when dealing with the effect of the Treason Act 1495, seem understandably to focus attention on the crime of treason alone and do not generalize the protection given to those who obey *all* laws of the usurper. For example, Holdsworth states:

> " . . a statute was needed to make it clear that faithful service to a reigning king was no treason to a successful claimant to the throne." (Vol. 3, p. 468)
>
> "It enacted that faithful service to a king *de facto* should not render the person doing such service liable to the penalties of treason, on the restoration of the king *de jure*." (Vol. 4, p. 500.)

It is to be noted that Holdsworth expresses the effect of the Act in the form in which it was drafted; in what for convenience I may call "the negative form" of excusing faithful service to a *de facto* king.

rather than in what I may call "the positive form" of "compelling" service to such a king. This difference in form is the difference between "may" and "must". A subject may without risk obey the laws of a *de facto* government, but this is a somewhat different concept from the positive assertion that he is under a duty to do so. Self-defence may justify a homicide but no one is under a duty to kill in order to protect himself. It may not be an offence to obey the laws of a *de facto* government, but it does not follow from this that it *is* an offence to refuse to obey them.

Glanville Williams also describes the effect of the Act in the negative form, as providing a defence to a charge of treason (see his *Criminal Law*, 2nd Edn., p. 298).

There are, however, other authorities who do express the obligation to obey in the positive form, especially when dealing with allegiance and with the crime of high treason. For example, Halsbury, 3rd Edn., Vol. 7, p. 208, says:

> "Allegiance is by statute due to the Sovereign, whether the rightful heir to the Crown or not, and the subjects are bound to serve in war against every rebellion, power and might reared against the Sovereign, and are protected in so doing from attainder of high treason and from all forfeitures and penalties. The duty of allegiance is applicable to the Sovereign in both capacities, that is to say, as well in the natural as in the regal or political capacity." (The underlining is my own.)

The statute here referred to is the Treason Act, 1495, but this Act is not worded in the positive form which the above passage suggests, but in the negative form as set out by Stephen in Art. 63 of his *Digest* (*supra*). In the footnote to this passage Halsbury says:

> "It is said by Lord Hale (1 Hale, P.C. 134) that if the right heir once had possession, and then a usurper got possession, but the right heir still continued his claim, and ultimately regained possession, a compassing of his death during the interval is treason (*sed quaere* owing to the provisions of 11 Hen. 7 c.1 (1495)); but a compassing of the death of the *de facto* King, directed by the King *de jure*, who succeeds in obtaining the throne, is not treason (1 Hale, P.C. 103)."

Halsbury's footnote seems to suggest that in a war in which the *de jure* king is attempting to gain possession from the *de facto* king neither those who assist the *de facto* king or the *de jure* king are guilty of treason, and this either *vis-à-vis* a *de jure* king or *vis-à-vis* a *de facto* king. This seems a somewhat unrealistic view, and Hale's view, though queried, seems more logical.

Russell on Crime, 10th Edn., Vol. 1, p. 133, says:

> "The word 'king' includes a queen who is the reigning sovereign, and it is only to the sovereign 'for the time being' to whom there is duty of allegiance."

Hood Phillips (*op. cit.*), p. 434, says:

> "The Treason Act, 1495, confirmed the common law principle that allegiance is due to the *de facto* Sovereign (i.e., the King who is for the time being actually in possession of the Crown), and not to a King *de jure* (i.e., with a right to the Crown) who is not also King *de facto*."

These last two authors also, like Halsbury, do not appear to be paying the same regard to the actual wording of the Treason Act, 1495, as do Stephen and Holdsworth.

When dealing with the law of allegiance and of high treason, however, in situations where there has been a successful revolution or a successful counter-revolution, political rather than abstract legal conceptions are always likely to be the governing factors. Cases such as *Vane's* case (*supra*) illustrate this clearly enough. Gordon shares this view. See his *The Criminal Law of Scotland*, 1967 Edn., p. 871.

It seems to me extremely unlikely that the common law of any country would encourage the overthrow of its own Grundnorm to which it owed its existence, because as de Smith says (*op cit.* at p. 5):

> "Legal systems seldom provide for the manner of their own dissolution."

If English common law provided that immediately a *de facto* government replaced the *de jure* one, *all* allegiance was forthwith transferred from the *de jure* to the new revolutionary government and *all* the laws of that government became the only valid laws, then the common law would undoubtedly be a system which provided for its own dissolution by unconstitutional methods, because the new "unlawful" government could, at a stroke of the pen, "lawfully" replace the common law with some other system. I find it hard to accept that this is so. I find it hard to accept that the English common law has a built-in provision to encourage revolutions.

It therefore seems to me that (a) the plain wording and the history of the 1495 Act, (b) the weight of authority and (c) common sense, all support the views of those writers who favour the negative rather than the positive approach when dealing with the allegiance owed to a *de facto* government, or with the crime of treason *vis-à-vis* such government.

The instant appeals are not, however, so much concerned with the law of treason or of allegiance but with the general law to be applied in the present situation in the territory. From what I have said, however, it follows that it is not possible to state with confidence that the authorities on English law, which deal with the subject, go any further than what is stated in section 70 of the 1879 Draft Code or what is stated in the Penal Codes of Canada and New Zealand; that is, that it is no offence to obey the laws of a *de facto* government. This, as I

have already pointed out, is not the same thing as saying that there is a duty to obey these laws. It cannot, I think, therefore, be inferred from such of the authorities on English law which deal with the subject that all the laws of a *de facto* government must necessarily be regarded as lawful and binding on everyone during the period that the *de facto* government rules. I do not, therefore, find such English authorities as deal with this subject as being decisive, or for that matter very helpful, in determining precisely what the law to be applied in Rhodesia is today; to ascertain this I must look to other sources. These authorities on English law do, however, have a bearing on the side issues in these appeals, one of which is the question of allegiance. I have read what the Judge President has had to say on the subject of a dual allegiance and I agree with him, but I would add that obeying the laws of the present *de facto* government cannot be construed as a breach of allegiance to the body politic in the United Kingdom, because under English law it would appear that "everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced" by a *de facto* government. This does not mean, however, that such residual allegiance as was owed to the United Kingdom by virtue of the powers of the external sovereignty it enjoyed over Rhodesia has disappeared. It remains, I think, until it can be said that the present Government is a *de jure* one.

Under international law, so far as the validity of the laws of a *de facto* government is concerned, there is no distinction between such a government and a *de jure* one. Once a country is afforded recognition as a *de facto* government then all its laws are regarded as validly made. See the cases of *Luther v. Sagor* (1921) 3 K.B. 532 at p. 556; *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937) Ch. 513 at p. 521-522; and *Banco de Bilbao v. Sancha* (1938) 2 K.B. 176 at p. 195-196. Under international law, therefore, any administrative and legislative acts of the present Government, which conform to its own norm, would be considered to be valid. International law, however, is an unsafe guide: because, as O'Connell (*op. cit.*) at p. 176, states:

> "Since international law is indifferent to the forms of recognition, any distinction between recognition *de facto* and recognition *de jure*, must be discovered if anywhere in municipal law."

It has been argued for the respondents that the American cases dealing with the validity of the laws passed by the revolutionary States before the termination of the War of Independence are authorities for the proposition that all laws made by a *de facto* government must be accepted by a municipal court as valid. These cases fall into two groups: those which are heard while the war was still in progress, of which *Respublica v. Chapman* (1781) 1 Dallas 53: 1 Law Ed. 33, is an example; and those which were heard after the conclusion of the peace

treaty (1783), of which *Ware v. Hylton* (1796) 3 Dallas 197: 1 Law Ed. 568, *M'Ilvaine v. Coxe's Lessees* (1808) (*supra*), and *Inglis v. Trustees of Sailor's Snug Harbour* (1830) 3 Peters 99: 7 Law Ed. 625, are examples. So far as the first group are concerned, the courts who heard them, although the war was still *in esse*, regarded their governments as already being *de jure* governments. They are not decisions, therefore, of a court which did not recognize the *de jure* status of the government under which it sat. So far as the second group of cases are concerned, they affirm no more than what is trite law, which is that in the case of a successful revolution the validity of the new government's laws dates back to the day when the revolution first broke out. I therefore do not find any of these cases of much assistance.

The court has also been referred to many cases arising out of the American Civil War, of which *Texas v. White* (1869) 7 Wall. 700: 19 Law Ed. 227, is the *locus classicus*, and on which *Baldy v. Hunter* (1898) 171, U.S. 388: 43 Law Ed. 208, may be said to be the last word. In *Thorington v. Smith* (1869) 8 Wall. 1: 19 Law Ed. 361, there is a statement of CHASE, C.J., which is capable of being construed as meaning that during the existence of the Civil War all the laws of the Confederate Government were valid within those territories under its control. See page 363 Law. Ed., where the Chief Justice is reported as saying:

> "But there is another description of government, called also by publicists a government de facto, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1), that its existence is maintained by active military power within the Territories, and against the rightful authority of an established and lawful government; and (2), that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government."

Such a construction of this passage is, however, inconsistent with what the Chief Justice said in *Texas v. White* (*supra*) at page 240 Law. Ed., when he was dealing with the validity of the laws made by the rebellious State of Texas, and this is also inconsistent with the general principle which emerges from the Civil War cases, which is that laws which "were hostile in their purpose or mode of enforcement to those of the national government, or impaired the just rights of citizens under the Constitution", were void. See *Baldy v. Hunter* (*supra*) at p. 213 Law Ed. The Civil War cases, however, can be distinguished from the facts of the present cases, because neither the governments of the States nor the government of the Confederacy were regarded as fully *de facto* governments in the sense in which I have used the term. This is clear from the passage in *Thorington v. Smith* (*supra*) which I have already quoted, and from what was said by CHASE, C.J., in *Texas v. White*

(*supra*) at p. 240 Law. Ed. The Civil War cases may also be distinguished because they were decided *ex post facto* and after the South had lost the Civil War. It would, therefore, have been difficult for a court sitting after the event, and possessed of this hindsight, to have held that the Confederate Government during the existence of the war was a government "which seemed likely to continue in effective control", which is the case of the present Government. The status of the present Government must be equated with CHASE, C.J.'s, "*de facto* government in the strictest sense of the term", and not with his "government of paramount force", which was the status of the governments of the Confederacy and of the rebellious States.

The *dicta* of CHASE, C.J., in *Texas v. White* (*supra*) are, however, of some assistance in another respect because CHASE, C.J., was of the opinion that even in the case of a *de facto* government (in the strictest sense of the term) some limitation might have to be put on the validity of its laws because, when talking of such a government, he said (see page 240 Law. Ed.):

> "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." (The underlining is my own.)

The use of the word "almost" here clearly indicates that CHASE, C.J., did not consider that all the acts of even such a *de facto* government would be valid. These *dicta*, therefore, are some authority for the view that under municipal law cognisance must not necessarily be taken of all the laws of a *de facto* government.

A reference to the views of the Civilians seems also to support this. Grotius, *De Jure Belli ac Pacis*, Bk. I, Ch. IV, Sec. XV (Kellsley's translation at page 159), reads:

> "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 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 the one to whom the sovereignty actually belongs, whether people, or 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 (*quam legibus iudiciisque sublatis summam induci confusionem.*)
>
> .....
>
> 2. In the case of measures promulgated by the usurper which are not so essential, and which have as their purpose to establish him in his unlawful possession, obedience is not to be rendered unless disobedience would involve grave danger. But whether it is permissible to use violence in over-

throwing such a usurper of authority, or even to put him to death, is the question before us."

Grotius here is talking of all forms of *de facto* governments, because he only distinguishes between two types of government: the government which has "acquired a right through long possession or contract", which is a *de jure* government, and the type of government which is not such a government. It is true he makes no distinction between the various degrees of *de facto* government, or the limitations he places on the validity of the laws of such a government; but what is plain is that he places some limitation on the validity of the laws of all types of *de facto* governments, whatever their character might have been. This passage is also helpful, because it seems clear from his reference to "the suppression of the courts" by the usurper, if the courts did not apply the usurper's laws, that he was dealing with the law to be applied by domestic courts which were not the usurper's own courts.

One of the authorities on which Grotius relied is Francisco de Vitoria (sometimes referred to as the father of international law). De Vitoria, *De Potestate Civili*, No. 23 (G.L. Williams's Translation), said:

> "TWENTY-THIRD. Another question arises, namely: Whether the laws of tyrants are binding. It might seem that they are not binding, since tyrants have no power at all. Nevertheless, the contrary is true: For if the State is oppressed by a tyrant and is not *sui juris;* and if the tyrant has not the power to create laws, while at the same time it is impossible to put into execution the laws laid down before his time: then, unless obedience is rendered to the tyrant, the State must perish. It seems indeed that those laws which are acceptable to the State are binding, even when they have been created by a tyrant—not, to be sure, because he established them, but by the agreement of the State; for it is better to obey the laws created by a tyrant, than to obey no law at all. It is certain and obvious that the State would suffer injury if owing to the fact the princes possessed of no just title have seized the country, there should be no provision for judicial trials, and no way in which to punish or restrain malefactors; for if the laws laid down by a tyrant are not binding, then he is not a legitimate judge." (The underlining is my own.)

Here again de Vitoria is talking of a government which is not a *de jure* ("is not *sui juris*"), and he also does not distinguish between different forms of *de facto* governments. Here also de Vitoria clearly indicates that some limitation must be placed on the validity of the laws of a *de facto* government. It is to be noted that de Vitoria does attempt to apply some sort of test in prescribing what those limitations should be; because he seems to suggest that the laws which should be considered as valid are "laws which are acceptable to the state".

Another authority relied on by Grotius is Franciscus Suarez (a distinguished professor of the law). In his *De Legibus*, Bk. III, Ch. X, No. IX (a local translation), Suarez says:

"In the first acts it is not by itself evil to observe the enactments or orders of a usurper of power, because those acts are such, that they may be done lawfully of one's own accord and on one's own authority without a legal provision. The fact that they are done after a law to that effect was illegitimately enacted, does not have anything about it that turns the act into an evil one. Because there is not actual co-operation, but some bearing of violence, which is not hurtful to anybody: consequently it does not constitute evil by itself. I do say, however, by itself, because one should spurn what incurs widespread blame and one should not give the usurper the opportunity to continue the more firmly with his injustice, but one should rather put oneself in his way when that can be done without detriment. But the opposite seems to apply to the latter acts, because their probity is entirely depending on legitimate public power, without which no one has power to prosecute or condemn another, even with regard to just punishment, unless he has public authority which a usurper cannot grant. But here too one must be careful, or better, one must make a further distinction: for in all strictness this is true in respect of the usurper: but it happens that the State, because it is not able to resist him, may tolerate him, and allow itself to be governed by him, and may tacitly give its consent, and it may wish that justice be administered by him for a convincing reason, because it is a less evil to be governed by him than to lack all orderly constraint and direction; and in that case there will be no wrong in obedience even in respect of the said acts, because the lack of power of the usurper is made good by the consent of the State."

Suarez here seems to suggest that what could have been legitimately done by the State before the usurper usurped power, may after the usurpation be lawfully done by the usurper. This may prove to be a useful test of validity.

A third authority on which Grotius relies is Lessius (a Dutch jurist who studied under Suarez in Rome). In *De Justitia et Jure*, Bk. II, Ch. XXIX, Dubitatio IX, No. 73 (a local translation), he says:

"because his judgments and just orders, though they do not derive their binding force from the tyrannical power, have nevertheless binding force from elsewhere; firstly, and inchoately from the natural law, which, on such a state of affairs having been presupposed, dictates obedience for the common good, because otherwise there would be everywhere thefts and robberies: secondly, and completely from the State [Respublica] and this, either because as long as the aforesaid state of affairs lasts the State gives him authority by a kind of tacit consent while it wishes him to administer justice and to fulfil his usurped office as it ought to be fulfilled; or rather because it tacitly approves his orders and acts which are in agreement with the laws and the common benefit, and wishes his just judgments by which litigation between citizens is decided, and criminals are punished, to be valid and to be binding on the subjects: for unless these would be valid and binding, nobody would be obeying otherwise than in deceptive outward appearance, but everybody would secretly do the opposite, such to the great detriment of the State. The State may give this force to the judgments and the acts of the Usurper, because it is the superior of the individuals even though it is under usurped rule; and it may consider the just judgments of the usurper as its own." (The underlining is my own.)

Here Lessius seems to suggest that what the "State" could formerly have done the usurper may now do on its behalf; but the use of such words as "just orders", "as it ought to be fulfilled", "acts which are in agreement with the laws and common benefit" and "just judgments" clearly indicates that everything the usurper does is not to be considered as lawful.

Another Roman-Dutch jurist whose views always command respect, and who deals with this problem, is van Bynkershoek, who in *Questionum Juris Publici*, Bk. 2, Ch. XXV, Sec. 3 (Frank's Translation, pp. 277-278), says:

> "It is politically expedient therefore that the acts and agreements of all rulers whatsoever be considered valid, with the exception of those deeds that have furnished cause for civil war and the consequent struggle over the government. According to this principle, the Code of Theodosian does not rescind all acts of illegitimate rulers, but only those which have been unjustly committed." (The underlining is my own.)

Van Bynkershoek's exception of deeds that have furnished causes for civil war and the consequent struggle over government again indicates that some limitation must be put on the validity of the laws of a *de facto* government.

The value of these passages from the writings of the Civilians is that they all deal with the usurper who has not yet succeeded in consolidating his position, and so assumed the status of a *de jure* government. They all deal with the law to be applied *in mediis rebus* while the usurper is still in occupation. They all agree that some validity must be given to the usurper's acts and laws, and while none with any precision define the limits of such validity, they all agree that some limitation must exist. De Vitoria, Suarez and Lessius also seem to suggest that validity may well be limited to what the old government itself would have done.

It is true that these issues should be determined as far as possible by English constitutional law; but English lawyers agree that the opinions of the Civilians have great persuasive value. For instance, in the recent case of *Burmah Oil Co., Ltd. v. Lord Advocate* (1965) A.C. 75, Lord REID at pp. 108-109, and Lord RADCLIFFE at pp. 128 and 129, referred with approval to Grotius and van Bynkershoek, and Lord UPJOHN in his speech (see p. 164) said:

> "I find the writings of the civilians of peculiar assistance. These writers were not purporting, as I read them, to propound a general principle of international law but only to lay down the proper judicial concept of the municipal law of any civilised country; accordingly, they are of great persuasive force . ."

Another line of inquiry which I think is of assistance here is the analogy of an enemy occupier who has clearly established himself in

effective control of the government of the country which he occupies. Such an occupier usurps all the governmental powers of the displaced government, but he must none the less respect domestic law. Despite the authority which such an occupier exercises, his rights are limited, and this even though he has power to enforce any law he wishes to make. Local courts which are permitted by the invading occupier to carry on will acknowledge him as "ruler", but will not enforce those of his laws which run counter to international law; see the *Overland* case (*supra*). Any law which runs counter to the ordinary domestic law and offends the old Grundnorm would do just that.

A very cogent argument can be presented on the basis that a domestic court operating under a *de facto* government should not distinguish between such a government and a *de jure* one; and therefore it should hold that everything which a *de facto* government does (lawfully under its own norm) is lawful. This argument is, however, I think met by what I said earlier when dealing with the right of a domestic court to adjudicate on the status of the present Government. Once it is accepted, as I think it must be, that this court has jurisdiction so to adjudicate, then it seems to me this argument is answered; because if this court holds that the present Government, though a fully *de facto* one, has not yet achieved *de jure* status, and yet at the same time holds that everything it does is lawful, it would, I think, be guilty of inconsistency, because it would in effect be accepting the *de jure* status of the present Government when as a question of fact it has held that it is not such a government.

In the part where I dealt with the position of this court I set out the facts as I see them to be today. This court must, however, have an accurate yardstick with which to measure the validity of the laws of the present Government; there must be some "norm" to which it can look for guidance. I reject as too imprecise a yardstick, the doctrine of *salus populi suprema lex*. The only writer I have found who deals at all with the predicament in which this court now finds itself is Dias. In his *Jurisprudence*, 2nd Edn., p. 381, he states:

> "For instance, in the lacuna that exists during a revolution, when the old basis has been overthrown and something has still to replace it, there is no longer a *Grundnorm*, but the tribunals may continue to apply the law identified as such by means of some criterion which *they* still recognise, albeit provisionally. It does not matter that that criterion belongs to the order that has gone; as long as it is accepted by the judges as having imparted the quality of 'law' to the proposition in question that is all that is needed."

I consider that this extract gives the answer to the problem. It is what Ekelaar, in his article in the *Modern Law Review*, Vol. 30, No. 2, p. 175, calls "splitting the Grundnorm". The present Government has

effectively usurped all the governmental powers under the old Grundnorm, but has not yet succeeded in setting up a new Grundnorm in its place. As a result of this effective usurpation it can do anything which the government it usurped could have done; but until the present Government has achieved the status of a *de jure* government, and the revolutionary Grundnorm becomes the new Grundnorm, it must govern in terms of the old Grundnorm. This is the principle which I think should be applied to the validity of the acts and laws of the present Government. There is, I know, no precedent for this principle, but this is because the problem facing this court in the situation in which it now finds itself is an unprecedented one and can only be solved in accordance with the views I set out when dealing with "the no precedent argument". There are, as I have pointed out, glimmerings of this principle to be found in the passages I have quoted from de Vitoria, Suarez and Lessius, and it certainly seems to have the support of Dias. It also finds some support in the principles of international law applicable to the invading occupier, as such law does not regard as valid *any* law the invader may make. He is still bound to uphold the existing domestic law and to that extent observe the old Grundnorm.

This principle also seems to rationalize the present factual position. Before the revolution Rhodesia was a semi-independent state possessing internal sovereignty. The only limits to her complete independence were those few remaining ties relating to external sovereignty which the United Kingdom still retained. The present Government has certainly usurped complete and effective control of the internal sovereignty of Rhodesia. The present Government has thus complete and effective control of the governmental powers granted Rhodesia under the 1961 Constitution. The lingering doubt as to the ultimate success of the revolution exists in the field where the United Kingdom exercises her residual powers of external sovereignty. To satisfy the conditions of a fully *de jure* government the present Government must successfully sever those few remaining ties. In the meantime, therefore, although the present Government has usurped all the governmental powers granted to its predecessor, until it has finally succeeded in severing all ties with the United Kingdom it cannot have any greater powers than its predecessor possessed.

To sum up here, therefore, I consider that the present Government, having usurped effectively the governmental powers 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 has thus become the *de jure* constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution.

6. *The Validity of (A) the Proclamations (B) the Regulations and (C) the Continued Detention of the Detainees*

So far as the validity of the Proclamations and Regulations is concerned, the two appeals were argued on the basis that the same considerations apply to both. Many of the affidavits relating to the validity are common to both; and I approach the question of the validity of these measures on the basis that the evidence on those issues is the same for both appeals.

The validity of the Proclamations, the Regulations and the continued detention of the detainees must be determined under the norm of the 1961 Constitution. To be valid, therefore, they must be *intra vires* the 1961 Constitution and not made for an improper purpose when judged under the norm of that Constitution.

I turn now to deal with the validity of these measures individually.

(*A*) *The Proclamations*

Sections 69 and 72 (2) of the 1961 Constitution provide for the declaration of states of emergency and for the detention of persons during such an emergency. The Emergency Powers Act [*Chapter 33*], which was passed before the revolution, provides the machinery for the making of such Proclamations declaring states of emergency. This Act is clearly *intra vires* the Constitution and the Proclamations were made in terms of this Act. The power to make these particular Proclamations was thus clearly *intra vires* the 1961 Constitution. Unless, therefore, the Proclamations were made for an improper purpose (which would be the case if they were made *mala fide* for a purpose not authorized by the Emergency Powers Act [*Chapter 33*]), they would be validly made. If, however, they were made for some improper purpose, such as the purpose of keeping a particular political party in office, or of stifling public opposition to such a party, and were not made *bona fide* for the maintenance of public safety and public order, or for the maintenance of essential services, the Proclamations would be unlawful when judged by the norm of the 1961 Constitution.

The respondents in their affidavits stated that the Proclamations were *bona fide* made for the purposes set out in section 3 of the Emergency Powers Act. Is there evidence to show that this is not so? The history of the past shows that there have been six Proclamations declaring states of emergency in Southern Rhodesia between 1955 and November, 1965, and five such Proclamations during the six years preceding the revolution. Unhappily, therefore, Proclamations made for the maintenance of public order and preservation of the peace must be regarded as matters of everyday occurrence in the conditions presently existing

in Southern Rhodesia. They are acts which occur with almost as much regularity, unfortunately, as the passing of such measures as Finance Acts and Appropriation Acts.

Mr. *Rathouse* has stressed this fact, and has also drawn attention to the fact that the Proclamations with which these cases are concerned are no more than an extension of the original declaration of a state of emergency declared five days before the revolution, the validity of which has not been challenged. Therefore, argues Mr. *Rathouse,* this supports the respondents' affidavits, that the circumstances which made necessary the making of the 1965 Proclamation still obtained when the later Proclamations were made. This is a persuasive argument, and in the absence of evidence to show that these Proclamations were made for an improper purpose must be conclusive.

The appellants placed before the court a lengthy statement made by the responsible Minister, which explained in great detail the Government's reasons for continuing the state of emergency. In terms of section 3 (2) of the Emergency Powers Act and section 72 (2) of the 1961 Constitution a Proclamation extending a state of emergency may be made only if approved by the Legislature by resolution. The responsible Minister was obliged in terms of the Constitution to "communicate the reasons" for the need of the Proclamation to the Legislative Assembly. The statement which the appellants placed before the court was the speech made to the Legislative Assembly by the responsible Minister when he was "communicating" these reasons.

The statement was not, however, placed before the court as an extract from the Minister's speech in Parliament as appearing in *Hansard.* The Minister's speech was published specially by the Government Ministry of Information so that all might know why the present Government considered it necessary to continue the state of emergency. It was this official publication by the Ministry of Information which the appellants placed before the court, and its accuracy was not challenged by the respondents in the "further replying affidavits" which they filed.

The original speech of the Minister was, as I have said, made to Parliament in order to persuade its Members to pass the resolution which would authorize the making of the Proclamation. It was argued (and probably correctly), that it cannot be assumed that the Members of Parliament approved the resolution for the reasons given by the Minister in his statement. It is unsafe for a court to speculate on the reasons why a particular Member of Parliament approves a particular measure, especially as different Members may approve a measure for widely differing reasons. The resolution, however, is not a piece of legislation which becomes effective once it is passed by the legislature. It is purely an enabling measure; it has no operative effect at all until the

Government makes first a Proclamation and then regulations by virtue of that Proclamation. It is really a measure which gives the present Government what is almost a blank cheque to use in its discretion. In these circumstances it appears to me that it is the purpose for which the Government wants the cheque and intends to use it which is vital; not any speculative purpose for which the Legislature may have given it.

This is not one of those cases where the court is asked to look at what was said in Parliament in order to interpret the legislation it passed. The Proclamation is something the present Government asked for, and something the present Government alone is going to use. The purpose of the Proclamation is determined, therefore, by ascertaining why the present Government wanted it, and how it proposed to use it.

The most pertinent evidence to prove this is the official statement made by the present Government. The reasons why different Members of Parliament may have voted for the resolution do not disclose the purpose of the Proclamation; but the official reason given by the responsible Minister of the present Government certainly does. I therefore consider that this statement made by the responsible Minister is admissible evidence and may be used in ascertaining the real purpose of the Proclamations.

The present Minister's statement was produced by the appellants to show that one of the purposes for which the Government intended to use the Proclamation was improper; and thus, they argued, the whole Proclamation must be held to be invalid. A statement of this sort, however, must be taken in its entirety; it is not, in my view, permissible for the appellants simply to extract those passages which aid their case and ask the court to ignore those which aid the respondents' case. A statement such as this must be taken as a whole. See the case of *R. v. Valachia* 1945 A.D. 826, *per* GREENBERG, J.A., at p. 837.

The statement is a lengthy one and the bulk of it was directed to showing that the real purpose for the declaration of a state of emergency was to maintain peace and public order. There is, however, a passage in this statement which may be construed as meaning that the present Government might use the powers given to it under the Proclamation for the express purpose of stifling political opposition to its policy, opposition which would not have involved any danger to public order, essential services, peace or security. This would, of course, be an improper motive; and if this were the object of declaring the state of emergency the Proclamations would be unlawful. The evidence of this statement does not, however, I think, go as far as establishing this; but, even on the assumption that it did, it would not take the appellants' case much further, because it would only go as far as showing that the Proclamations were made for a dual purpose; one a lawful one to pre-

serve public peace, order and security, and the other an improper one, to stifle all party political opposition. This, however, would not make the Proclamations themselves unlawful. If the Proclamations were anything more than enabling measures the taint of illegality might have been sufficient to warrant the whole being considered unlawful. The Proclamations are, however, purely enabling measures, and if they are required for a legitimate purpose to hold them to be wholly unlawful would prevent their use for that purpose; and the peace, order and security of the community would in consequence suffer. If, on the other hand, they are used for an improper purpose, any regulations made for such purpose, if challenged, would be declared by the courts to be invalid.

The Proclamations are therefore measures in which the lawful is clearly separable from the unlawful purpose. In their application effect can be given to what falls within their lawful purpose, without prejudice to a court holding unlawful anything which falls outside that purpose. For this reason I do not think the Proclamations as a whole can be held to be unlawful.

I dealt with a somewhat similar problem in the case of *Maluleke v. Minister of Law and Order and Another* 1963 (4) S.A. 206. In that case I said, at pp. 211-212:

> "There are numerous statutes where delegated powers are given and where it is possible to exercise those powers in contravention of the Constitution and where nothing is specifically said in the statute that the powers given should not be exercised contrary to the Constitution. It would be unreasonable to hold that all these statutes were invalid, notwithstanding the fact that there never was any intention or any likelihood that the powers granted would be exercised in contravention of the Constitution. Local authorities are habitually given powers to regulate 'the use of' public sidewalks, public parks and other public amenities. Under these powers it is conceivable that offensive regulations contravening the Constitution might be made; in fact, experience does show that such regulations sometimes are made but the remedy is to have the particular regulation declared invalid, not the law which empowered the making of the regulation."

The American Civil War cases reflect the same principle. Where a legislative enactment could be used for both a proper and an improper purpose the courts did not regard the enactment itself as invalid, but looked to its mode of enforcement in determining whether what had been done under it was lawful or not. See the case of *Huntington's Executors v. Texas*, 16 Wall. 402: 21 Law. Ed. 316 at p. 318.

I hold, therefore, that the Proclamations with which these cases are concerned were validly made.

(B) The Validity of the Regulations

I propose here to deal only with the validity of the Regulations as a whole, and not with the validity of Regulation 47 (3), the one under which the detainees have been detained. The validity of Regulation 47 (3) is more appropriately dealt with under the heading, "The Continued Detention of the Detainees".

The extraneous evidence available in determining the validity of the Regulations is the same as that available for determining the validity of the Proclamations. Experience in Southern Rhodesia over the past six years has shown that these Regulations and the detention orders made under them are necessary to preserve public peace and security. Like the Proclamations, however, the Regulations are also capable of being used for either a proper or an improper purpose, and like the Proclamations they, so far as the making of detention orders is concerned, are also only enabling. While the Minister's statement indicates that the Regulations are required for making legitimate detention orders, there is at least a suggestion in the Minister's statement that the Regulations could also be used for making detention orders the purpose of which was simply to stifle party political opposition to the party in power. If detention orders were made for this purpose they would clearly be invalidly made, and the courts would declare them to be so. This, however, would not affect the validity of the Regulations as a whole, but only the validity of a particular detention order which might have been unlawfully made under them.

I hold, therefore, that (Regulation 47 (3) excepted) the Regulations with which these cases are concerned (except those Regulations which are subject to the same criticism as I have to offer on Regulation 47 (3)) were lawfully made.

(C) The Continued Detention of the Detainees

The validity of the original detention order in respect of Madzimbamuto has never, as I have said, been challenged; and, so far as the second appellant is concerned, his application and appeal are directed only against his "continued detention". It was suggested in a replying affidavit and in argument, however, that the original detention order under which the second appellant was detained, and which was issued before the revolution, was invalid because it was issued for an improper purpose. As, however, his application can be decided on the lawfulness of his "continued detention," and as in any event he has now been released from detention, I do not propose to canvass the validity of the original detention order. This order was made before the Declaration of Independence, so a decision on this point is of no assistance in determining the real issues with which these cases are concerned.

I turn now to consider the validity of Regulation 47 (3), under which Regulation the continued detention of Madzimbamuto and of the second appellant was authorized.

The original detention of Madzimbamuto and of the second appellant was authorized by an order made by the respondent, Lardner-Burke, in his capacity as Minister of Justice in terms of Regulation 21 of the Emergency (Maintenance of Law and Order) Regulations 1965, G.N. 736 of 1965. Under this regulation he applied his mind to each individual case and before making an order of detention satisfied himself that such detention was in the public interest. When, however, the original detention order expired, the detention of the detainees was authorized, first, by Regulation 47 (3) of the Emergency Powers (Maintenance of Law and Order) Regulations 1966, G.N. 71 of 1966, and subsequently by Regulations identical in terms to Regulation 47 (3), which Regulations were repeated in all succeeding sets of Regulations passed under the Emergency Powers Act [*Chapter 33*].

Regulation 47 (3) reads:

> "(3) Any person who, immediately before the date of commencement of these regulations, was being detained in terms of the Emergency (Maintenance of Law and Order) Regulations 1965 shall continue to be detained as though the order for his detention had been made under these regulations and shall be deemed to be in lawful custody so long as he is so detained."

It has now been argued for the first time, and at the request of the Court, that this Regulation is *ultra vires* the empowering Emergency Powers Act (to which I shall refer as "the Act"). This argument is quite unrelated to the legality of the present Government and would apply with equal force had there been no revolution.

Section 4—the empowering section of "the Act"—reads, *inter alia:*

> "4. (1) Where a proclamation of emergency has been made and so long as the proclamation is in force, it shall be lawful for the Governor to make such regulations as appear to him to be necessary or expedient for the public safety, the maintenance of public order, the maintenance of any essential service, the preservation of the peace, and for making adequate provision for terminating the state of emergency or for dealing with any circumstances which have arisen or in his opinion are likely to arise as a result of such state of emergency.
>
> (2) Such regulations may—
>
> (a) make provision for the removal from one part of Southern Rhodesia to some other part of Southern Rhodesia of any person whose removal appears to the Minister to be expedient in the public interest;
>
> (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;

(c) make provision for the arrest of persons contravening or offending against any regulation made under this section, and for the imposition of penalties specified therein for any contravention of any provision of the regulations:

Provided that no such penalty shall exceed a fine of five hundred pounds or imprisonment for a period not exceeding two years or both such fine and imprisonment.

(3) Nothing in this section contained shall authorize the making of any regulations whereby any action relating to a matter dealt with under the Industrial Conciliation Act [*Chapter 246*] or the Rhodesia Railways Act [*Chapter 287*], which may be at the date of the coming into operation of such regulations be lawfully taken, is rendered unlawful."

The respondents concede that Regulation 47 (3) could not have been validly made under subsection 4 (2) of "the Act" but argue that it was validly made under the general powers granted under subsection 4 (1).

The respondents argue that the fact that subsection 4 (2) made provisions for the making of regulations for the special purposes mentioned in that subsection does not derogate from the generality of the powers to make regulations under subsection 4 (1). For this argument the respondents rely on subsection 19 (1) (b) of the Interpretation Act [*Chapter 1*], which reads as follows:

"(b) when any enactment confers power to make a statutory instrument for any general purpose and also for any special purpose, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose."

There is ample authority for the proposition that where a statute contains a provision similar to that of subsection 19 (1) (b) of the Interpretation Act (which for convenience I will call here a "saving clause"), the fact that powers are given to make regulations for certain special purposes does not derogate from the generality of the powers conferred to make regulations for the purposes specified in the statute. See, for example, such cases as *R. v. Controller General of Patents: Ex Parte Bayer Products Ltd.* (1941) 2 A.E.R. 677 (C.A.) at p. 682; *R. v. Scheepers*, 1942 T.P.D. 122 at p. 124; *R. v. Beyers*, 1943 A.D. 404 at p. 410. As a general rule, therefore, it might be right to say that the maxim *"expressio unius exclusio alterius"* has little application in interpreting the meaning to be given to provisions such as those contained in section 4 of "the Act". But the Solicitor General has referred the court to no case and I know of none which is authority for the proposition that a power can be exercised under a general clause in a manner which directly conflicts with the provisions of a special clause. The case of *Ex Parte Bayer Products Ltd. (supra)* on which he relies strongly is certainly no authority for this proposition.

In that case SCOTT, L.J., disagreed with the judgment of BENNETT, J., in *Jones (E.H.) (Machine Tools) Ltd. v. Farrell and Muirsmith* (1940) 3 A.E.R. 608, because he held that BENNETT, J., had failed to give effect to the provisions of a general empowering clause. He also pointed out, however, that the regulation which BENNETT, J., held to be *ultra vires* was in any event *intra vires* the special clause. This appears from the last four lines of the judgment of SCOTT, L.J., at page 682 of the report. The case of *Ex Parte Bayer Products Ltd.* is therefore no authority for the proposition that regulations can be passed under a general clause although they conflict with the provisions of a special clause, as the particular regulations with which *Jones's* case was concerned could have been validly made under either the special clause or the general clause.

The overriding consideration, in the interpretation of any statute, is to give effect to the intention of the legislature. The provisions of the Interpretation Act itself only apply where its provisions are not "inconsistent with the intention or object" of the statute under consideration. See section 2 (1) (a) of that Act.

The legislature may indicate clearly that a special limitation is placed on the general powers. An excellent example of this is subsection 4 (3) of "the Act". It is beyond question that this subsection does derogate from the general powers given in subsection 4 (1) because it says so in terms.

The real question for determination here, therefore, is whether, notwithstanding the effect of the "saving clause" in the Interpretation Act, subsection 4 (2) (b) does place a limitation on the general powers granted in subsection 4 (1).

The Solicitor General argued that if subsection 4 (2) (b) was intended to be such a limitation this would have been expressly stated in language similar to that used in subsection 4 (3). Had this been done, all doubt would of course have been removed, but the fact that it was not done is by no means conclusive because if the legislature had not intended to prescribe the method of detaining persons without trial, one would have expected subsection 4 (2) (b) to read:

> "Make provisions for the summary arrest or detention of any person whose detention appears to be expedient in the public interest."

The inclusion of the words "the Minister" in the subsection seems a clear indication that the legislature intended that the Minister, himself, should apply his mind to every case where detention is ordered.

It is to be noted that the proviso to subsection 4 (2) (c) imposes a maximum penalty for the breach of any regulation. In order to support his argument that subsection 4 (2) (b) did not in any way limit the

general powers mentioned in subsection 4 (1), the Solicitor General was obliged to contend that a regulation providing for the detention of any persons whose detention appeared to a Sergeant in the Police to be expedient in the public interest (which is actually the effect of Regulation 24 (1) of the Regulations), or a regulation increasing the maximum penalty prescribed in the proviso to subsection 4 (2) (c) for the breach of a particular regulation, though conflicting with the express provisions of subsection 4 (2), could nevertheless be validly made under the general powers granted in subsection 4 (1). This, I cannot conceive to have been the intention of the legislature. The detention of a person without trial is such a drastic interference with the liberty of a subject and with the "Declaration of Rights" that it is not surprising that the legislature prescribed a particular method for the exercise of this power, and insisted that the Minister should himself apply his mind to each particular case. Having insisted in subsection 4 (2) (b) that the Minister should deal with these cases himself, it seems to me in the highest degree improbable that the legislature intended that this safeguard could be nullified by a regulation made under subsection 4 (1). As I read "the Act", I consider that the legislature intended that subsection 4 (2) (b) should provide the *only* method of detaining people without trial and any regulation providing for a different method of detaining people would be *ultra vires* "the Act". Subsection 4 (2) (b) is not therefore simply an example of a purpose for which a regulation may be made under the general powers granted in subsection 4 (1). It provides a specific method, and the only method of detaining a person without trial, and to this extent is a specific limitation of the purposes for which the general powers may be exercised. This view of the effect of subsection 4 (2) (b) does not violate the provisions of the "saving clause" because it is not inconsistent with the principle that subsection 4 (2) as a whole must not be read as derogating from the generality of the powers conferred by subsection 4 (1). It goes no further than enunciating the proposition that where it is apparent that the legislature intended that a particular power should only be exercised by a particular method the exercise of that power by any other method is *ultra vires* the empowering Act.

Regulation 47 (3) provides an entirely different method of detaining persons from that authorized in subsection 4 (2) (b) of the Act, because it relieves the Minister of the duty of satisfying himself under each set of new regulations, that the further detention of each individual detainee is still necessary in the public interest. Regulation 47 (3) is therefore *ultra vires* "the Act" and any person purporting to be detained under its provisions is not lawfully detained.

I hold finally, therefore, that the continued detention of both detainees, after the expiry of the original detention orders under which they were

detained (which were issued before the Declaration of Independence) was unlawful.

I might perhaps now sum up my conclusions, which are:

(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 powers granted Rhodesia under the 1961 Constitution, can now lawfully do anything which its predecessors 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.

(5) The various Emergency Powers (Maintenance of Law and Order) Regulations (with the exception of Regulation 47 (3) and any other individual regulations which are subject to the same criticism as Regulation 47 (3)) were lawfully made.

(6) Regulation 47 (3), which purported to authorize the continued detention of Madzimbamuto and of the second appellant, is *ultra vires* the Emergency Powers Act [*Chapter 33*], and this would be so irrespective of the Declaration of Independence. The continued detention, therefore, of Daniel Madzimbamuto and of the second appellant by virtue of Regulation 47 (3) was and is unlawful.

I turn now to the question of costs. The detainees have succeeded on a point which was not raised in the original application or at the first hearing before this court, and which was finally only argued at the request of this court. The time occupied in the hearing of this issue was little compared with the time spent in arguing the other issues on which

the appellants have failed. In the normal course, therefore, I would not have considered that the ultimate success on this issue alone would have carried more than a small proportion of the total costs. These cases arose, however, entirely out of what was an unlawful act of the present Government; and, as I pointed out at the beginning of this judgment, these applications are really test cases brought to determine the status of the present Government and the validity of its actions. It is an accepted principle, both under the 1961 and the 1965 Constitutions (see section 71 of the 1961 Constitution and section 80 of the 1965 Constitution) that if a case may properly be considered to be a test case brought for the purpose of determining the validity of an act of the legislature, then the person bringing that case is entitled to have his costs paid from the Consolidated Revenue Fund, irrespective of the court's decision on the merits. I can conceive of no case which could be more properly brought as a "test case" than the instant applications. I therefore think that the costs entailed in these applications should be borne by the respondents and paid from the Consolidated Revenue Fund. The order of the court should therefore be as follows: —

"Both appeals are allowed with costs, both in this court and in the court below."

The order of the court *a quo* is altered to read:

In the case of the first appellant: —

"The continued detention of Daniel Madzimbamuto under Regulation 47 (3) of the various Emergency Powers (Maintenance of Law and Order) Regulations was and is unlawful."

In the case of the second appellant:

"The continued detention of the appellant Leo Solomon Baron under Regulation 47 (3) of the various Emergency Powers (Maintenance of Law and Order) Regulations was unlawful."

QUÉNET, J.P.: By Order in Council issued in pursuance of the powers conferred by the Southern Rhodesia (Constitution) Act, 1961, Her Majesty granted the 1961 Constitution to this country. The constitution defined the composition and powers of the Legislature and the procedure it should follow; executive authority was vested in Her Majesty and could be exercised on her behalf by the Governor or by such persons authorized by the Governor or by any law of the Legislature; it constituted a High Court, defined its composition, and contained a Declaration of Rights which "(ensured) that every person (enjoyed) certain fundamental rights and freedoms" and made provision for the protection of those rights and freedoms; established a Board of Trustees and provided for the vesting of tribal trust land in the Board; it stated the manner in which the constitution could be amended and the limitations upon that power. *Section 111* reserved "full power and authority to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1, 2, 3, 5, 6, 29, 32, 42, 49 and (section 111), and any Order in Council made by virtue (of *section 111*) (could) vary or revoke any previous Order so made". And the *section* concluded with the words:

> "Provided that the power and authority herein reserved to Her Majesty shall not be exercised for the purpose of amending this section or adding to it a reference to any section of this Constitution not included in this section on the appointed day."

Prior to the declaration of independence, the power conferred by this *section*, as far as I am aware, had not been exercised. In a word, the 1961 Constitution embodied the fundamental principles by which the country should be governed; its provisions bound the Legislature, the executive, the judiciary, the people and, presumably, the United Kingdom Government.

On the 11th of November, 1965, the Prime Minister and the members of his Cabinet declared the country an independent, sovereign state. The 1961 Constitution was repudiated and replaced by the 1965 Constitution. On the 16th of November, 1965, the Southern Rhodesia Act 1965, Chapter 76, was passed by the British Parliament. It declared that Southern Rhodesia continued to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom had responsibility and jurisdiction "as heretofore for and in respect of it". *Section 2 (1)* read:

> "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."

And *subsection* (*2*):

> "Without prejudice to the generality of subsection (1) of this section an Order in Council thereunder may make such provision—
>
> (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;
>
> as appears to Her Majesty to be necessary or expedient as aforesaid; and any provision made by or under such an Order may apply to things done or omitted outside as well as within the United Kingdom or other country or territory to which the Order extends."

Subsection (*4*) stated that any Order in Council made under *section 2* could be "revoked or varied" by a subsequent Order in Council. *Section 3* defined the duration of *section 2* and provided for its continuance by Order in Council.

On the 16th of November, 1965, and in the exercise of the powers conferred by *section 2* of the Act "and of all other powers enabling Her in that behalf", Her Majesty in Council issued the Southern Rhodesia Constitution Order 1965. *Section 2* (*1*) read:

> "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."

Section 3 (*1*) (*a*) stated that so long as it was in operation "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 or 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". Chapter II dealt with the composition, powers and procedure (including the procedure in regard to Bills *et cetera*) of the Legislature, and Chapter III with the delimitation of constituencies and electoral districts. *Section 3* (*1*) (*b*) gave a Secretary of State the power to prorogue the Legislative Assembly at any time, and sub-paragraph (c) read:

> "Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia, including laws having extra-territorial operation."

Section 3 (*4*) stated:

> "Orders in Council made under subsection (1) (c) of this section shall, for the purposes of the Statutory Instruments Act 1946 (a), be statutory instru-

ments within the meaning of that Act and shall be laid before Parliament after being made."

Section 4 (1) (a) provided that so long as it remained in operation "the executive authority of Southern Rhodesia (could) be exercised on Her Majesty's behalf by a Secretary of State". *Sections 43, 44, 45 and 46* of the Constitution (not included in the *sections* specified in *section 111*) were to have no effect (*section 4 (1) (b)*). Subject to the provisions of any Order in Council made under *section 3 (1) (c)* and subject, further, to any instructions to the Governor "by Her Majesty through a Secretary of State", the Governor was authorized to "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" (*section 4 (1) (c)*). A Secretary of State was given the power to exercise any function "vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or a Deputy Minister or a Parliamentary Secretary" (*section 4 (1) (d)*). And, without prejudice to any other provision of the Order, he was authorized to exercise any function "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" (*section 4 (1) (e)*). In the exercise of the powers conferred by *section (1) (d) and (e)* a Secretary of State was exempted from "any requirement imposed on that Minister, Deputy Minister, Parliamentary Secretary or other officer or authority to consult with, or to seek or act in accordance with the advice of, any other person or authority" (*section 4 (2)*). *Section 5* provided for the issue of moneys from the Consolidated Revenue Fund on the authority of 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". *Section 6* 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 appellants' counsel did not, as I recall, refer specifically to the Order or analyse its effect, but in answer to a member of the Court he said it was the Court's duty to give effect to any legislation passed by the United Kingdom Government since the declaration of independence. Nor did the respondents' counsel deal with the Order although he challenged its enforceability. In my view, it is of the greatest importance to consider its effect. It declared the 1965 Constitution null and void and any laws made under it were "void and of no effect". The

Legislative Assembly as constituted under the 1961 Constitution was no longer permitted to make laws "for the peace, order and good government of Southern Rhodesia" or transact any business (see, *section 20* of the 1961 Constitution); complete legislative power was vested in Her Majesty in Council. The executive authority as defined in *section 42* of the 1961 Constitution ceased to exist; a new executive authority to be exercised on Her Majesty's behalf by a Secretary of State came into being. The Governor's Council "to advise the Governor in the government of Southern Rhodesia", established in terms of *section 44* of the 1961 Constitution, was abolished. The Governor retained a discretion in the exercise of any function which formerly he was required to exercise in accordance with the advice of the Governor's Council or of any Minister but the exercise of the discretion was made subject to any Order in Council made under *section 3 (1) (c)* and any instruction to the Governor by Her Majesty through a Secretary of State. It withdrew from the people of Southern Rhodesia the right to govern themselves. Rule was to be from Great Britain—not by the electorate. The original body of principles relating to the making of laws and the exercise of the executive authority no longer existed. And that would be the position until the Order was revoked or varied. To that extent the old constitution, by specific enactment, passed away. No matter how great or pressing the need to maintain peace, order and good government no measure could be passed in this country in terms of the 1961 Constitution. And assuming the existence of such a need, nothing, as far as I am aware, was done in terms of the Order in Council. Apart from the Southern Rhodesia (Revocation of Censorship) Order 1965, no measure affecting the internal affairs of this country was passed in pursuance of the Order.

When Sir JAMES ROSE-INNES said "a law making and law enforcing authority is essential to the very existence of a state" he meant, I have no doubt, that it would exercise its authority (see, *Rex v. Christian*, 1924 A.D. 101 at p. 106, and *per* KOTZE, J.A., at p. 131). In a civilized society every man has the right to peace, order and good government. A correlative duty rests upon the governing power. If the duty is fulfilled, the right is vindicated; if it is resigned, order and, with it, liberty come to an end. Since the 11th of November, 1965, the present Government has passed laws (including the measures here in question) and taken executive action in terms of the 1965 Constitution. We have, then, on the one hand, the present Government governing in terms of the 1965 Constitution and, on the other, to all intents and purposes, no legislative action in terms of the Order in Council. In such a situation cases such as *Brown v. Leyds N.O.* (1897) 4 O.R. 17 at p. 27 and *Luther v. Borden et al.*, 12 Law. Ed. 581 at p. 598 are immediately distinguishable. I do not believe it can be the Court's duty to test the validity of measures said to be necessary for the country's internal security by looking at

the provisions of a constitution shorn, if not of its arms and legs, then, certainly, of its entire body and the greater part of its head. Survival, in such circumstances, is a constitutional impossibility. The Order in Council was made in the exercise of the powers conferred by *section 2* of the Act "and of all other powers enabling Her Majesty in that behalf". There was no express reference in the Act or in the Order to the powers reserved to Her Majesty by *section 111* of the 1961 Constitution. Indeed, the Order could hardly have been made in terms of that *section* because it changed the country's entire system of government and applied control of a new and wholly different kind. *Section 111* did not expressly reserve such a power nor can such a power necessarily be implied from a power "to amend, add to or revoke" specific *sections* of the Constitution (*cf. Sammut v. Strickland* [1938] A.C. 678 at pp. 702-704).

If, notwithstanding the withdrawal from the people of this country of the right to govern themselves, the 1961 Constitution must still be regarded as an integrated body of principles unaffected by the dismemberment brought about by the Order, Her Majesty in Council (since the declaration of independence) has not given effect to it. Indeed, the Order shows quite clearly Her Majesty's desire it should not continue or operate in its original form. And since the 11th of November, 1965, the present Government has treated the 1961 Constitution as if it did not exist. At the first hearing the respondents' counsel said it was "in a state of suspense" and, at the resumed hearing, that it had ceased to exist. Certainly, it cannot be described as the body of principles by which the country is being governed. To insist it still provides the sole test of validity would be to demand that the present Government pause in its stride and pursue the ghost of a constitution it had itself put to death. If the Government is in effective control, an order made on the basis the 1961 Constitution is still binding and in disregard of the realities of the situation, would, in my opinion, be a case of *vox et praeterea nihil* and an acknowledgment of the law's impotence.

The appellants' counsel submitted the life of the Court was co-extensive with that of the 1961 Constitution—that was so because the Court was established and the judges were appointed in terms of that constitution; if the 1961 Constitution had in fact come to an end, the judges should quit the Bench. This submission raises the question whether the existing judges have the right to exercise judicial power. Neither Her Majesty in Council nor the present Government has interfered with the judiciary as constituted under the 1961 Constitution. On the 14th of November, 1965, the Governor said it was the judiciary's duty to maintain law and order and carry on its normal tasks. The present Government has not attempted to remove the judges from office; it has not placed any obstacle in their way and has given effect to their

decisions. In that setting the judiciary survives, if I may so put it, by reason of the fact of birth and because its position has not been assailed or called in question. Its mortality, in my opinion, is not linked to the fate which has overtaken the 1961 Constitution.

It was contended that if the judges remained in office it would mean they had "joined" the revolution and "accepted" the 1965 Constitution —a submission which concerns the consequences of survival. If an effective government defines a body of principles by which it will govern a country, then, since it is in effective control, it has the power to enforce obedience to its constitution. It would, of course, be possible to cleave to a constitution which had ceased to exist. Any such decision would be based upon sentimental or political considerations. A decision to "join" the revolution and "accept" the constitution of an ineffective government would be based on the same considerations (*cf. Austin on Jurisprudence*, 5th ed., v.1, pp. 326-328). But, in each case, the decision would have nothing to do with the necessity of obeying the constitution of an effective government capable of enforcing its will upon the people. In a word, a decision to adhere to a discarded constitution or to the constitution of a usurping government not yet in effective control, would be founded upon extra-legal considerations. But the duty of obedience to the laws of an effective government arises independently of a personal decision to accept or reject the constitution of such a government. Because it is in effective control obedience can be compelled by punishment. It follows the duty to obey is legal not extra-legal in character (see, Wille, *Principles of South African Law*, 4th ed., pp. 2 and 3 and the authorities there cited). If the present Government is in effective control the fact that the existing judges continue to exercise judicial power does not mean they are sitting as a court under the 1961 Constitution or that they have "joined" the revolution or made a personal decision to "accept" the 1965 Constitution. What it does mean is that while they perform the judicial function they must give effect to the laws and the constitution of the effective government (*cf. The State v. Dosso and Another* (1958) 2 Pakistan S.C.R. 180 at 184 *et seq.*; and, *In the Matter of a Writ of Habeas Corpus* and *In the Matter of an Application by Michael Matovu*, the passages cited in the "Respondents' Written Argument on Points Raised by the Court"). But they could not do that, so it was said, unless they were prepared to disregard their oaths of allegiance. Before assuming office a judge must take the oath of allegiance and also the judicial oath (see, *section 54 (3)* of the 1961 Constitution and the First Schedule). The judicial oath does not extend the duty set out in the oath of allegiance, and the duty of the judges to obey the laws is no greater and no less than the duty owed by any natural-born or naturalized Rhodesian, or by a foreigner resident in the country (*cf. section 3* and the First Schedule of The Citizenship of Southern Rhodesia and British Nationality Act, 1963). That is so because "allegiance

is not created by the oath, it exists apart from it; and before any oath has been taken . . . The oath of allegiance does but consecrate the allegiance already existing" (see, *Markwald v. Attorney General* [1920] 1 Ch. 348 at p. 363; *Ex parte Schwietering* 1948 (3) S.A. 378 (0) at pp. 381 to 383 and *Rex v. Neumann* 1949 (3) S.A. 1238 (T) at p. 1267). It is the duty "to obey and serve" and it is owed to the Queen in her politic, not in her personal capacity; that is to say, it is a duty to "the State, the land and the people" (see, *In re the Stepney Election Petition* 17 Q.B.D. 54 at pp. 62 and 65, and *Neumann's* case, *supra,* at p. 1260). It was submitted the duty was not owed to Southern Rhodesia *qua* Southern Rhodesia but to Her Majesty in her Government of the United Kingdom and Colonies; it was not owed to this country because it was not a "state"; it was not a "state" because it did not have sovereign independence; it did not have sovereign independence because in terms of *section 111* of the 1961 Constitution "full power and authority (was) reserved to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1, 2, 3, 5, 6, 29, 32, 42 and 49" and *section 111* of the Constitution. This reservation curtailed the country's independence; at the same time it preserved the power and authority of Her Majesty in Council to amend or revoke specified *sections* of the Constitution. The curtailment necessarily affected the country's control of external relationships, the making of treaties and, no doubt, other important matters. It disqualified Southern Rhodesia from being a "state" in the sense of "a full, perfect and normal (subject) of International law" (see, Oppenheim, *International Law,* 8th ed. at pp. 118 and 119). In *Christian's* case, *supra,* at p. 107, INNES, C.J., said:

> "Curtailment of external authority and dependence upon another power are not in themselves fatal to the sovereignty of the state concerned. It is in each instance a question of degree."

One must, then, in each case examine the limitations upon independence and decide whether or not they are inconsistent with the existence of internal sovereignity. In terms of the 1961 Constitution the Legislature was given power to make laws for the peace, order and good government of Southern Rhodesia (*section 20 (1)*). "That", as was pointed out in *Christian's* case at p. 111, "goes very far, for plenary authority to make laws and to enforce them covers the whole sphere of government". Indeed, the power to legislate included the making of laws having extra-territorial operation (*section 20 (2)*). No restrictions were placed upon internal policy. *Section 1* of the British Nationality Act, 1948 (c.56) envisaged the creation of Southern Rhodesian citizenship. Its provisions applied, also, to Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon (for a discussion of the statute's effect, see May, *The South African Constitution,* 3rd ed. at pp. 224 and 225). The Citizenship of Southern Rhodesia and British

Nationality Act, 1963, made provision, *inter alia*, for Southern Rhodesian citizenship. I am in no doubt the limitations upon sovereignty arising from the provisions of *section 111* did not prevent the operation of internal sovereignty. Indeed, the position of the mandatory in *Christian's* case was not as strong as that of Southern Rhodesia. Divided allegiance is not, of course, an unusual concept; a simple example is that of the foreigner resident in a country—he owes allegiance to the country of his birth and to the country in which he resides. Before the declaration of independence the duty of allegiance owed by Southern Rhodesians was divided—it was owed in part to the United Kingdom and in part to Southern Rhodesia. In regard to the latter aspect of sovereignty, allegiance was owed to Southern Rhodesia, that is, to the people of Southern Rhodesia organized as a not fully sovereign state with the Queen as its head, the executive authority being vested in the Queen acting through the Governor who, in turn, acted on the advice of his Council. To use the language of WATERMEYER, C.J., in *Rex v. Leibbrandt & Others* 1944 A.D. 253 at p. 279:

> "The various powers of the people so organised (e.g. legislative, executive, judicial) (were) exercised on behalf of the State by the persons entrusted by the State under its constitutional laws with these functions."

Specifically, there was a duty to obey the laws and the constitution. The duty of allegiance to the territorial sovereign did not in this or any other respect conflict with that owed to the external sovereign. Today there is a new constitution. The executive is described in this way:

> "The executive government of Rhodesia in regard to any aspect of its internal or external affairs is vested in Her Majesty acting on the advice of the Ministers of the Government of Rhodesia and may be exercised by the Officer Administering the Government as the representative of Her Majesty or such other persons as may be authorized in that behalf by the Officer Administering the Government or by any law of the Legislature" (*section 47 (1)* of the 1965 Constitution).

And *section 111* has disappeared. In a word, the limitations previously imposed upon independence were swept away and complete internal sovereignty was assumed. These events led to the conflict which now exists between the present Government and the Government of the United Kingdom. The question with which we are concerned is whether the existence of that conflict affects the duty to obey the laws passed by the present Government and the constitution to which it adheres. As I have already indicated, if it is the country's effective, *de facto* government then its laws must be obeyed. Obedience to the laws is one of the most important aspects of allegiance. In *Christian's* case at p. 106, INNES, C.J., pointed out that where allegiance was owed to an external and an internal sovereign, internal sovereignty was the more important because "a law making and law enforcing authority (was) essential to the very existence of a state". And that is so because without such an

authority peace and order in a community would disappear. Obedience to the laws is due as much by the judges as by the public at large. This consequence, as I have said, does not follow upon personal choice or inclination—it follows inevitably from the fact that there is a law making and law enforcing authority in effective control of the country's affairs. If the present Government is in effective control of Southern Rhodesia then cases such as *da Jager v. Attorney-General of Natal* [1907] A.C. 326, and *Queen v. Geyer* 17 S.C. 501, have no application. As the respondents' counsel pointed out, forcible possession of portion of a country while a war is raging and its outcome uncertain is a situation very different from that which exists when an effective, *de facto* government is in control of the country as a whole (see, East, *A Treatise of the Pleas of the Crown* (1803) v. 1., p. 54; and *cf. Thorington v. Smith* 19 Law Ed. 361 at pp. 363 and 364). For the reasons I have given, the existence of a conflict of the kind to which I have referred, does not justify the conclusion that obedience to the laws of an effective government can be declined.

Austin (*ibid.* p. 327) defines a "government *de facto* but not *de jure*" as "a government deemed unlawful or deemed wrongful or unjust, which, nevertheless, is present or established: that is to say, which receives presently habitual obedience from the bulk of the community" In the two years following the declaration of independence the present Government has established itself as the country's paramount authority. In the field of positive or national law it is the sole law-maker. It enforces its will and for that reason obedience to its laws is "not only a necessity but a duty" (see, *Thorington v. Smith*, *supra*, at p. 364). It maintains the courts and is in exclusive control of the country's administration and of its national forces. As I believe all this to be manifest, there can be no doubt that since the 11th of November, 1965, it has been the country's effective, *de facto* government.

The respondents' counsel submitted the present Government was not only *de facto* but was, also, *de jure*. I do not myself consider a finding in that regard is necessary for the decision of this case. But since some text-writers suggest the one is, simply, the corollary of the other I think I should state my views. As I say, some indicate that lawfulness is the *sine qua non* of effectiveness, others that a testing time must elapse before a *de jure* position is reached. Wheaton, *Elements of International Law*, 3rd English ed. by A. C. Boyd, at p. 33, puts the matter in this way:

> "Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent.
>
> This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two

species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists."

This view accords with Kelsen's theory as applied in the Pakistani and Ugandan cases to which I have referred. It is a view which avoids the paradoxical conclusion that even though the laws of a *de facto* government have binding force, the source of those laws, that is to say, the *de facto* government, might itself be unlawful. And the appellants' counsel concede it is the correct view when they say:

". . . it is agreed that if this court holds that all or any of the measures of the rebellious legislature and executive are to be obeyed as the laws of the land then the court will be holding that such legislature and executive are de jure. For the municipal court to hold that the acts of the legislature and executive in Rhodesia are to be obeyed is to hold that they are 'de jure', since 'de jure' must here mean 'lawful in the eyes of the court'." (See, Appellants' Further Written Argument on the Evidence Placed Before the Court, p. 9, *para.* 23).

The other point of view is expressed by Bryce, *Studies in History and Jurisprudence,* 1901 ed., v. 2 at pp. 64 and 65:

"Sovereignty *de iure* and Sovereignty *de facto* have a double tendency to coalesce; and it is this tendency which has made them so often confounded.

Sovereignty *de facto,* when it has lasted for a certain time and shown itself stable, ripens into Sovereignty *de iure*. Sometimes it violently and illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system. Sometimes the old constitution becomes quietly obsolete, and the customs formed under the new *de facto* ruler become ultimately valid laws, and make him a *de iure* ruler. In any case, just as Possession in all or nearly all modern legal systems turns itself sooner or later through Prescription into Ownership—and conversely possession as a fact is aided by title or reputed title—so *de facto* power, if it can maintain itself long enough, will end by being *de iure*. Mankind, partly from the instinct of submission, partly because their moral sense is disquieted by the notion of power resting simply on force, are prone to find some reason for treating a *de facto* ruler as legitimate. They take any pretext for giving him a *de iure* title if they can, for it makes their subjection more agreeable and may impose some restraint upon him."

The difficulty in applying this test is to decide whether a sufficient period of what I shall call "adverse user" by the revolutionary government has elapsed. This criterion by which stability must be tested, involves the making of a value judgment on the known facts and those which are reasonably foreseeable. The decision, prophetic to some extent in character, must be reached on a balanace of probability. In the Pakistani and Ugandan cases the courts were concerned with the legal consequences attendant upon *coups d'etat* in fully sovereign states. In neither

case did the existence of an external *de jure* sovereign present a threat to the stabliity of the revolutionary government. It would, however, be wrong to assume either government, although set up on a permanent basis, was completely secure. At the time the judgments were delivered insurrectionary movements, for all we know, might have been at work or an armed assault within the contemplation of an ill-disposed and militant foreign power. Yet, within weeks of the revolutionary governments taking control, the courts recognized their *de jure* status. On the 5th of November, 1965, Southern Rhodesia was not a fully sovereign state. The United Kingdom declared its intention to put down the revolutionary government but made it clear it was opposed to the use of force. In company with the United Nations it took steps to cripple the country's economy. Although the measures were directed at the Government, the menace they held, cast its shadow upon the lives of the people of this country. However, economic stability was not undermined, law and order were maintained and, to all intents and purposes, civil unrest was absent from the land. In a word, during the past two years the country's internal stability was not shaken. To weather a storm does not mean no storm will come again. But steadfastness in the face of hardship provides a basis for saying, as a matter of probability, that it will not fail. And I would add to this the vitally important finding that the laws of the present Government must be obeyed. On either approach, so it seems to me, the present Government has achieved internal *de jure* status.

It was submitted the Commonwealth Secretary's certificate invalidated all new laws and executive acts of the present Government. In examining this argument it is not necessary to consider what effect a British or foreign court might attribute to the fact of non-recognition (see, in this regard, the remarks of Lord WILBERFORCE in the *Carl-Zeiss* case [1966] 2 All E.R. 536 at p. 577). I agree with LEWIS, J., that this is not a British court and with his reasons for holding that *van Deventer's* case 1903 T.S. 401 is distinguishable (see, the printed judgment at pp. 29 to 31). I would only add this: in *Salaman's* case [1906] 1 K.B. 613 at p. 639 FLETCHER-MOULTON, L.J., said:

> "Acts of State are not all of one kind; their nature and consequences may differ in an infinite variety of ways and these differences may profoundly affect the position of municipal Courts with regard to them" (and, see, the remarks of the same learned judge at pp. 640 and 641).

Van Deventer's case was concerned with an act of State which declared the fact of annexation, not the fact of non-recognition. Assuming an act of State can properly be made in respect of a British territory, the Commonwealth Secretary's certificate cannot by some alchemy turn reality into unreality or, so far as this Court is concerned, alter the con-

sequences which necessarily attend a finding that the present Government is in *de facto* control of the country's affairs.

It was submitted the motive of the persons who supported the resolution which led to the proclamation of emergency on the 4th of February, 1966, was to establish the Government in its unlawful possession and reliance was placed on the Minister's speech in the Legislative Assembly. The speech, so it was said, exhibited the presence of such a motive; it followed from this that the proclamation and the regulations were tainted with illegality (*cf.* Grotius, *de Jure Belli ac Pacis*, 1. 4. 15.). In a word, the measures were unlawful because the revolutionary government used them as a means of securing control. Assuming they were passed with that purpose in mind, the taint attaching to them loses significance once it is clear the revolutionary government has established itself as the country's *de facto* government. I shall deal with the submission, however, on the basis that this is a mistaken view of the matter. All we have before us is a copy of the Minister's speech. There is nothing to indicate whether others spoke on the motion, whether objections were raised or whole-hearted approval given to what the Minister said, whether the Minister replied and, if so, in what terms. Undoubtedly, the speech set out the reasons which in the Minister's opinion justified the Legislature's assent to the motion he proposed. I do not think, however, it would be right to assume the reasons of the individual members who supported the resolution necessarily coincided with those the Minister advanced or, even, as a matter of probability that they were the same. Experience does not support the conclusion that personal decisions are invariably reached in conformity with arguments advanced by others. Individual decision involves an examination of the arguments, the acceptance of some, the rejection of others and, sometimes, a consideration of matters not specifically mentioned. The position would be different if the reasons which influenced the individual members were before us. An acknowledgement of this element of uncertainty in regard to matters affecting human behaviour is to be found in the *Assam Railways Case* [1935] A.C. 445. At p. 458 Lord WRIGHT said:

> "It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted." (And, see, the remarks of PECKHAM, J., in *United States v. Trans-Missouri Freight Association* 41 Law. Ed. 1007 at 1020, and of PITNEY, J., in *Duplex Printing Press Co. v. Deering* 65 Law. Ed. 349 at p. 360.)

The rule against the reception of debates as a guide to the intention and meaning of an act of parliament is not based on some esoteric principle

but on the acceptance of the fact that they provide an unsafe guide when dealing with the motives which influence a collective decision. If that be a correct view of the matter, there can be no reason to limit the rule to the acts of lawful legislatures; it applies with equal force to all individual and collective decisions.

The proclamation of the 4th of February, 1966, and the regulations issued on the 5th of February were not of a novel character. Indeed, when the proclamation was made a state of emergency had just come to and end. *Section 69 (1)* of the Declaration of Rights embodied in the 1961 Constitution visualized the need for taking action "for the purpose of dealing with any situation arising during" a period of public eremgency. The circumstances described in the proclamation (and repeated by Mr. Dupont in his affidavit) if in truth they existed, would provide a complete justification of what was done because they are the matters of which *section 31* of the Emergency Powers Act [*Chapter 33*] speaks. The activity of terrorists was a matter of common knowledge; it had been said "a blood bath" would attend a declaration of independence; on the 14th of November the Governor called for calm and for the maintenance of law and order. That being the situation, I am in no doubt there was every reason to continue the state of emergency. I am certainly not prepared to accept the measures were not designed to achieve their declared purpose and were not, in fact, necessary for the country's peace and security. *Section 58 (2)*, as read with *section 69*, of the 1961 Constitution permitted detention during a period of public emergency; *section 67 (2)* and *section 78* of the 1965 Constitution are in identical terms. I agree it was for the respondents to establish the proclamation and the regulations were valid measures. Subject to what I have to say in regard to *regulation 47 (3)*, the respondents, in my opinion, have discharged the *onus* which rested upon them.

On the 5th of November, 1965, the Governor proclaimed a state of emergency; on the same day regulations were published in terms of *section 4* of the Emergency Powers Act [*Chapter 33*]; the next day, acting in terms of *section 21* of the regulations, the Minister ordered the detention of the first appellant's husband who, at that time, was restricted to the Sengwe area. The validity of that proclamation and of the regulations which followed is not in issue. And it was conceded the detention order was validly made.

On the 24th of March, 1966, the second appellant filed a notice of motion claiming an order for his release from detention. The material part of his affidavit reads:

> "The police came to my home in Bulawayo at approximately 1.17 p.m. on Thursday the 11th November 1965. I was formally arrested a few minutes later by Detective Inspector Ivey, who informed me that he effected the

arrest in terms of section 24 of the Emergency (Maintenance of Law and Order) Regulations 1965, Rhodesia Government Notice No. 736 of 1965, and who later informed me that he had received his instructions concerning my arrest at 12.30 p.m. on that day. At approximately 12.15 p.m. on the 12th November 1965 at the Charge Office in Bulawayo I was served with a document signed by the fourth respondent, a copy of which is annexed hereto marked 'A'. Later on the same day I was conveyed to Que Que Prison where I have at all times thereafter and in particular since the 4th February 1966 been held in detention in pursuance of the said purported order annexure 'A'. I respectfully submit that my continued detention after the 4th February 1966 was and is unlawful in that:—"

the emergency declared by the Governor on the 5th of November, 1965, expired on the 4th of February, 1966; the declaration made on the 4th of February, 1966, had no force or effect; in the result, the regulations were without force or effect. In a word, the claim for his release was based on the ground that his "continued detention" was unlawful—not that the order of the 11th of November, 1965, was unlawful. In reply, the Minister said, *inter alia:*

". . I say that the said order for the detention of the applicant was signed by me at approximately noon on the 11th November, 1965, and certainly some little time before 12.20 p.m. and prior to my purported dismissal by the said Sir Humphrey Gibbs."

And, further on:

". . I say that the original detention of the applicant pursuant to the order made by me on the 11th November, 1965, of which Annexure A to the applicant's affidavit is a copy, and his continued detention thereafter appeared and still appear to me to be necessary and expedient in the public interest, including the preservation of peace and the maintenance of order in Rhodesia, and for the good government thereof. In this connection, I would respectfully point out that on the 28th May, 1965, acting in my capacity as Minister of Law and Order, I considered it desirable for the purpose of maintaining law and order in Rhodesia to make an order against the applicant in terms of section 50 of the Law and Order (Maintenance) Act [*Chapter 39*]. Accordingly, on the said date, I made an order requiring the applicant to remain in the area contained within a fifteen mile radius of the main Post Office, Eighth Avenue/Main Street, Bulawayo, for a period of twelve months reckoned from the date of the delivery or tender of the order to him. The said order was duly tendered to the applicant on the 29th May, 1965."

In a replying affidavit, dated the 28th of May, 1966, the second appellant, for the first time, put the legality of the order of the 11th of November, 1965, in issue. He said:

"(1) I say that no facts have been put forward, and that no facts exist which could be put forward, to show that my original or continued detention was or is necessary or expedient in the public interest, the preservation of peace or the maintenance of order in Rhodesia or the good government thereof, or to justify the Fourth/Fifth Respondent's alleged opinion on these matters.

(2) I deny that my original detention on the 11th November, 1965, or my continued detention thereafter, was or is or at any time has been necessary or expedient in the public interest or for the preservation of peace or the maintenance of order in Rhodesia or for the good government thereof, and I deny that I have ever done or said anything that could reasonably lead anyone to believe otherwise.

(3) I say categorically that I have never committed nor been likely to commit nor contemplated committing any act likely to endanger the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service."

His conclusion was set out in this way:

". . I say that my original detention at the instance of the Fourth/Fifth Respondent was wholly, or alternatively partly, for the purpose of aiding and furthering the aims of the rebellion in which the Fourth/Fifth Respondent participated, and that my continued detention after the 4th February was and is for the same purpose."

The argument on this part of the case was stated in these terms:

"On the facts, the strong probability is that the arrest of the Appellant on the 11th November, 1965, was directly connected with the unlawful declaration of independence. The timing, and the absence of other explanation, gives rise to a moral certainty that this is so, and not merely to 'grave suspicion'."

Put shortly, the decision to detain the appellant made on the 11th of November was influenced by an improper motive; that conclusion is based on an inference arising from the fact that the order was made shortly before the declaration of independence.

At the time the decision was made, and for some time before, the Minister was a duly appointed Minister of the Crown. *Regulation 21* of the regulations published on the 5th of November, 1965, empowered him to order the detention of any person if it appeared to him to be expedient in the public interest. The decision was for the Minister and for no one else—the only assumption being he would honestly exercise his discretion. It is said the decision was not honestly made and that he was influenced by an improper motive. I am in no doubt it was not for the Minister to exclude that possibility but for the appellant to establish its truth on a balance of probability (see, *Shidiack's* case 1912 A.D. 642 at pp. 651 and 652, and *Ah Sing's* case 1919 T.P.D. 338 at pp. 342 and 343). The sole basis on which the allegation of improper motive rests is the fact that the order was made an hour or so before the declaration of independence. The time when a decision is made might, in itself, justify the inference we are asked to draw, but in this case there are other matters which must be considered. On the 28th of May, 1965, the Minister ordered the appellant's restriction because he "considered it desirable for the purpose of maintaining law and order in Rhodesia" On the 2nd of June the appellant wrote to the Minister

declaring, *inter alia*, that any information which might have been placed before the Minister to the effect that he had "actively associated (himself) with activities prejudicial to the maintenance of law and order" was false. He asked for the setting up of a judicial tribunal to inquire into the reliability of the information on which the Minister acted—"such an exercise" would "demonstrate the worth of (the Minister's) informants". He asked that the restriction order be revoked. On the 28th of June the Minister replied, saying he had considered the appellant's representations. He declined to set up a tribunal and refused to revoke the order. The appellant annexed a further letter, dated the 5th of August. The penultimate paragraph reads:

> "I assert my right, as a matter of elementary justice, to be informed:—
> (a) of the nature of the activities with which I am alleged actively to have associated myself
> (b) of the nature of my own activities which are alleged to constitute such association
> (c) whether my own activities under (b) are alleged to be illegal.
> I am not asking the Minister to divulge either the nature or the sources of his information. I am asking to be informed of the allegations against me."

I pause here to say the allegation upon which the restriction order was based had been made known to the appellant (see, the appellant's letter, dated the 2nd of June, 1965). He was, in effect, asking for particulars of that allegation. Had such particulars been given they would, I think, have involved disclosure of the information upon which the Minister acted. At all events, the Minister's reply to the appellant's letter of the 5th of August is contained in his letter of the 17th of August. Some point was made of the fact that this letter did not deal with the request contained in the penultimate paragraph of the appellant's letter of the 5th of August. The implication that the Minister was not prepared to depart from the terms of his letter of the 28th of June is irresistible.

I have no doubt a refusal to state the reasons for a decision and the absence of machinery enabling the aggrieved party to investigate the allegations on which the decision is based, often give rise to the belief there has been arbitrary and unjust treatment. But the Minister, in this case, was not under a duty to give his reasons or set up a tribunal to inquire into the matter. If the letters were intended to show the Minister's decision was wrong that was not sufficient. There was no suggestion, at that stage, the Minister was influenced by an improper motive. And that was how matters stood when the detention order of the 11th of November, 1965, was made. The restriction order was due to expire on the 27th of May, 1966. There was nothing to show the detention of the appellant would have aided the rebellion in a way not already achieved

by his restriction. In the result, we are left with the fact that the order was made an hour or so before the declaration of independence. That fact opens the door to the possibility of improper motive but it does not, in the circumstances, establish as a matter of reasonable probability that in reaching his decision the Minister was influenced by such a motive. Whatever view one might take of the wisdom of the refusal to give reasons, this is not a case where the refusal leads me to conclude, on a balance of probability, that the Minister was influenced by an improper motive (see, *Ah Sing's* case, *ibid.*, and *Jeewa v. Dönges, N.O. & Ors.* 1950 (3) S.A. 414 (A.D.) at p. 423, and *Pretoria North Town Council v. A.I. Electric Ice-Cream Factory (Pty.) Ltd.*, 1953 (3) S.A. 1 (A.D.) at p. 16). It is not without significance, however, that *section 69 (2)* of the 1961 Constitution and *section 78 (2)* of the 1965 Constitution provide that any person detained has the right to request that his case be submitted to a tribunal "for their recommendations concerning the necessity or expediency of continuing his detention". It may be, as Lord MACMILLIAN observed in *Liversidge's* case [1942] A.C. 206 at p. 255, that this special procedure was embodied "for the very reason that review by the law courts was excluded".

Pari passu with the ending of the state of emergency proclaimed on the 5th of November, 1965, a further state of emergency came into being in virtue of the proclamation of the 4th of February, 1966. For the reasons I have given, the Minister had the power to direct, *inter alia*, the detention of any person in terms of *regulation 21 (1)*. If properly made, effect would have to be given to his order. However, as from the 5th of February, 1966, the first appellant's husband and the second appellant were not detained in consequence of orders made in terms of *regulation 21 (1)*—they remained in detention by reason of the provisions of *regulation 47 (3)* (see, as regards the first appellant's husband, the record, p. 9, lines 1-10, and in the case of the second appellant, the record, p. 17, lines 18-21). If *regulation 47 (3)* is *ultra vires* the enabling Act (that is to say, the Emergency Powers Act [*Chapter 33*]), detention in terms of that *regulation* would necessarily be unlawful. I agree with what the learned Chief Justice has said in regard to *regulation 47 (3)* and with his conclusion that it is *ultra vires*. I wish, however, to add a few words of my own. The effect of the words "as appear to him to be necessary or expedient" in *section 4 (1)* is to give the Governor a complete discretion in deciding what regulations are necessary or expedient for the purposes stated in the *subsection* (see, *Rex v. Comptroller General of Patents. Bayer Products, Ld.* [1941] 2 K.B. 306 at pp. 311, 312, 314 and 315; *R. v. Langeveld* 1943, C.P.D. 302 at pp. 305 and 306). *In Rex v. Pretoria Timber Co. (Pty.) Ltd. & Another* 1950 (3) S.A. 163 (A.D.) at p. 182 VAN DEN HEEVER, J.A., said:

> "A point may arise where a regulation made pursuant to such powers is so unreasonable that the Courts will say Parliament could, although it used

the widest language, never have contemplated that such a measure be countenanced."

The correctness of this view does not arise for decision in this case and I would merely draw attention to what was said in *Gundu's* case 1965 R.L.R. 301 at pp. 311 and 312. I have no doubt the delegated authority described in *section 4 (1)* includes the power to detain any person if his detention is considered necessary or expedient to secure "public safety, the maintenance of public order, the maintenance of any essential service, the preservation of the peace". The fact that *section 4 (2) (b)* deals specifically with that power does not mean a limitation is placed upon the general powers mentioned in *section 4 (1)*, but the express statement as to the manner in which the power of detention should be exercised, limits the use of the special power. It indicates quite clearly, in my view, the Legislature's intention that it should only be exercised where detention appears to the Minister to be expedient in the public interest. This interpretation recognizes an appreciation by the Legislature that detention without trial is an exceptional remedy to be resorted to only in the circumstances described in *section 4 (2) (b)*. And it is a view which accords with the well-known remarks of JESSEL, M.R., in *Ex parte Stephens* 3 Ch.D. 659 at pp. 660 and 661:

> ". . . when there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done . . ." (and, see, *Hayne & Co., Ltd. v. Central Agency for Co-Operative Societies (in Liquidation)* 1938 A.D. 352 at p. 365; and *cf. Administrator, Cape Province v. Ruyteplaats Estates* 1952 (1) S.A. 541 (A.D.) at pp. 555 and 556, and *R. v. African Car Hire (Pty.) Ltd.* 1956 (4) S.A. 1 (C) at pp. 2 and 3).

Regulation 21 (1) properly expresses the delegated power to direct detention. But any *regulation* which purports to secure detention by a method other than that set out in *section 4 (2) (b)*—for example, in virtue of deeming provisions such as those contained in *regulation 47 (3)* and in circumstances which dispense with the necessity of the Minister directing his mind to the matter, falls outside the powers conferred by the enabling Act. The Minister's statement that the continued detention of the first appellant's husband and the second appellant appeared to him to be necessary and expedient in the public interest would have been relevant if, when the emergency of the 5th of November, 1965, came to an end, detention was directed in terms of *regulation 21 (1)* (see, as regards the first appellant's husband, the record, p. 9, lines 30-33 and p. 10, lines 1-3, and in the case of the second appellant, the record, p. 19, lines 1-7). But it has no relevance to and cannot validate detention where such detention is sought to be justified by reason of the provisions of an invalid *regulation*. That being so, there would be little point in examining the facts which are said to justify the continued detention of the first appellant's husband and the second appellant.

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. I am also satisfied both detention orders were properly made, but the continued detention of the first appellant's husband and the second appellant is unlawful because *regulation 47 (3)* is *ultra vires* the enabling Act. I agree with the order (including the order as to costs) proposed by the learned Chief Justice. I wish to make it clear, however, the *ultra vires* point was not raised at first instance and was only argued before us at the Court's request; it is not a matter which touches the constitutional issues with which this case is principally concerned. Finally, I should like to express my appreciation to counsel on both sides for the care and thoroughness with which they presented their arguments.

MACDONALD, J.A.: Prior to the 11th November, 1965, sovereign power over Rhodesia was divided between the governments of Rhodesia and Britain. Since 1923, and in increased measure after 1961 and the subsequent dissolution of the Federation, Rhodesia's sovereignty in the sphere of internal government has been virtually complete. The British Government's power after 1961 related, in the main, to the external affairs of Rhodesia. It was the possession of this power, coupled with Britain's constitutional right to refuse to cede control of external affairs to a Rhodesian government which, prior to the 11th November, 1965, effectively prevented Rhodesia becoming a state within the meaning of international law.

There can be no doubt when the respective powers of the governments are compared that the sovereign powers possessed by the Rhodesian Government in 1965, relating as they did to internal affairs, were incomparably more important in the daily life of the Rhodesian people than the sovereign powers possessed by Britain in the sphere of external affairs.

The relative importance of sovereign powers relating to internal affairs and similar powers relating to external affairs is accurately and clearly stated in the following passage in *Wheaton's International Law*, 3rd Ed., at p. 33:

> "Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent.
>
> "This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a state because it exists." (Unless otherwise indicated, the underlining in this judgment is my own.)

I am aware that there is a difference of opinion regarding the emergence of a country to full statehood (see, *Whiteman's Digest of International Law*, 1963, Vol. 2, p. 1 *et seq.)*. The differing opinions are concerned more with the entry of a state into the international community than with its existence as such. A municipal court is concerned not with the question of whether the state has been or should be accepted into the international community, but simply with the existence or non-existence of a law-making and law-enforcing government within the territory in which it exercises jurisdiction. The legal position is stated correctly, in my view, at p. 17 of the *Annual Digest of Public International Law Cases* (1919-1922) edited by Fischer Williams and H. Lauterpacht:

"International recognition is only a condition for the access of a State into the international community; the State becomes through it a person of international law, but the State draws its existence from its own internal substance. Its existence is granted at the moment on which its sovereignty has in fact been established . . ."

It is from this point of view that INNES, C.J., discusses the existence of a "state" in *Rex v. Christian* 1924 A.D. 101 at pp. 106 and 113:

"This distinction between internal and external sovereignty is inherent. And of the two, the internal is the more important; for a law making and law enforcing authority is essential to the very existence of a state. Moreover in considering the question of treason it is the internal aspect of sovereignty which must be regarded; for that is the side from which it is attacked. This is recognised by Voet in the passage already quoted where he states that treason can be committed only against a state or ruler which recognises no superior in its own territory (*superiorem in suo territorio haud agnoscentem*). The test thus applied relates to internal sovereignty alone; and it is comparatively easy of application, whereas the limits of external sovereignty are often hard to determine. The line which demarcates the necessary degree of freedom from external control must from the nature of things be difficult to draw. And so it has always been found. Curtailment of external authority and dependence upon another power are not in themselves fatal to the sovereignty of the state concerned. It is in each instance a question of degree.

"And where the internal characteristics of sovereignty are present; where a community is organised under a Government which has the power of making laws and enforcing them, then *majestas* adequate for the above purpose must reside either in the Government of that community or in some other Government to which it is subject. Voet's description of a subordinate ruler as one who is under the *majestas* of another is accurate. A duly constituted Government must either possess such *majestas* itself or be entitled to the benefit of the *majestas* of the power which it obeys. Were it otherwise, a subordinate ruler might be attacked with impunity, as far as liability for treason is concerned."

That the events of the 11th November, 1965, constituted a revolution there can be no question, but it is of paramount importance to a proper decision in this matter that the precise nature of the revolution should be understood.

The powers which the Rhodesian legislature and executive illegally usurped when independence was declared were those powers which the British Government retained under the provisions of the 1961 Constitution and which related in the main, but not exclusively, to external affairs. The revolution did not involve the usurpation of the power of internal self-government; this was a power which Rhodesia already possessed. The revolution also involved the illegal alteration of certain provisions of the 1961 Constitution relating to internal government. These alterations were in derogation of the rights conferred on Rhodesian citizens by the 1961 Constitution and not in derogation of the rights of the British Government.

The problem before this Court is the extent to which the acts of the legislature and executive, functioning in Rhodesia at the present time under the 1965 Constitution, must be given the force of law.

This is not a problem which can be solved by the application of the principles of international law. As Wheaton points out in the passage cited above, the existence of a *de facto* or *de jure* government within a country is in no way dependent upon external recognition. Nor is the test to be applied in deciding whether, for the purposes of municipal law, a *de facto* government exists, the same as the test to be applied in deciding this question for the purposes of international law.

In my judgment, the solution to the problem depends upon the answers to two questions:

(i) Is there a *de facto* government in Rhodesia at the present time? If there is such a government—

(ii) Must the laws of the *de facto* government, pursuant to an allegiance owed by Rhodesian citizens to Rhodesia, be obeyed or would obedience to such laws be a breach of allegiance?

At the first hearing of this appeal the Court was not referred to the English law of allegiance. Subsequent to the hearing I came to the conclusion that the principles of English law govern allegiance in Rhodesia and, accordingly, in framing my judgment on the constitutional issues involved in this appeal I relied upon the English law. Since the points covered in my judgment had not been dealt with by counsel the Court considered that counsel should be afforded an opportunity of dealing with them and at the request of the Court I drafted a document setting out the relevant points. This document was embodied in the request for further argument submitted to counsel and comprised paragraphs "1. A-G" thereof.

At the resumed hearing of the appeal counsel on both sides conceded that allegiance in Rhodesia is governed by the principles of English law. Since the arguments in favour of the correctness of this concession appear from the request submitted to counsel as well as from their arguments in response to that request, I do not intend to repeat them.

To understand the changes which have taken place in England over the centuries in the law relating to allegiance it is necessary to understand the fundamental changes in the constitutional position of the monarch. When and how these changes came about is stated with clarity and erudition by Sir William Holdsworth in his *History of English Law* (16 volumes. See, in particular, vol. 3, 3rd Ed., p. 459, and vol. 6, p. 161).

The concept underlying allegiance is and always has been that the possession of sovereign power involves an obligation—imperfect because

it cannot be enforced—to protect persons who are subject to it and that, reciprocally, persons receiving protection owe a duty of obedience and service. During those periods in England's history when the power of the monarch was absolute, or nearly so, allegiance was said to be owed to the monarch in person and to no other person or body of persons. With the passage of time the monarch's legislative, executive and judicial powers have passed to the three principal departments of government—the legislature, the executive and the judiciary. The transfer of sovereign power, coupled with the emergence of the modern territorial state in the place of a society organized on a purely feudal basis, has resulted in fundamental changes in the concept of allegiance. Salmond (*Jurisprudence,* 10th Ed., para. 41) accurately states the modern and existing English concept of allegiance:

> "The relation between a state and its members is one of reciprocal obligation. The state owes protection to its members, while they in turn owe obedience and fidelity to it. Men belong to a state in order that they may be defended by it against each other and against external enemies. But this defence is not a privilege to be had for nothing, and in return for its protection the state exacts from its members services and sacrifices to which outsiders are not constrained. From its members it requires the performance of public duties; from them it demands an habitual submission to its will, as the price of the benefits of its guardianship. Its members, therefore, are not merely in a special manner under the protection of the state, but are also in a special manner under its coercion."

The change that has come about over the centuries in the concept of allegiance is not only that allegiance is no longer owed to the monarch in his personal capacity but also that allegiance is owed to the state rather than to the sovereign power within the state. 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 (the reason for the use of the formula "for the time being" will emerge from the authorities cited later in this judgment). The germ of this idea was present at a very early stage in England's constitutional development but unhappily, and to the great confusion of students of English constitutional law, legal theory regarding the monarch's position and the existence of the state as a legal entity has failed to adapt itself to constitutional reality.

Closely allied to the law of allegiance is the law of treason. *Halsbury's Laws of England,* Vol. 10, 3rd Ed. at p. 557, states that:

> "The King or Queen regnant for the time being, whether the rightful Sovereign or not, is within the provision of the Acts relating to treason and protected thereby. The rightful Sovereign out of possession is not, it is said, within the provisions of the Acts; neither is a consort other than the Queen Consort, and, if it be deemed necessary, he must be protected by a special Act.

> "The essence of the offence of treason lies in the violation of the allegiance which is owed to the Sovereign and which is due from all British subjects wherever they may be."

This allegiance is now "owed to the Sovereign" in his politic capacity; that is, to express the constitutional reality, to the state.

The principal statute dealing with the crime of high treason in England is still the Treason Act, 1351 (25 Edw. 3 stat. 5 c.2). This Act affords protection against treason to the sovereign, his heirs and successors. Its full text is to be found in *Halsbury's Statutes of England*, Vol. 5, 2nd Ed. at p. 452. It is said to be "declaratory of the Common law *(Rex v. Sindercome* (1657) 5 St. Tr. 842) and remains to the present time, with few alterations, as the law governing the offence of treason" *(ibid.* 452). It became necessary at a very early stage in England's history to define the precise scope of the Act and, in particular, to decide whether a *de facto* or only a *de jure* sovereign was protected by its provisions.

While the language of the statute of 1351 remains substantially unaltered the concept underlying the crime of treason has undergone a change which, as would be expected, corresponds exactly with the change which has taken place in the concept underlying the law of allegiance. In feudal times allegiance involved personal loyalty to the king and treason was a breach of this personal allegiance. Under the present law allegiance is owed to the state and treason is now regarded as a crime against the state; against the office of the king rather than against the person of the king; against the kingdom rather than against the king. That this is so is recognized in *Stephen's Commentaries on the Laws of England*, 21st Ed., Vol. 4, p. 127:

> "The present law of treason rests almost entirely upon the Treason Act of 1351, as interpreted by the Judges through the succeeding centuries. This interpretation has of necessity been so generous as substantially to alter the conception of treason as determined by the statute. It is clear that a political offence of this gravity could not remain constant in character while the relations of the individual to the State suffered a complete revolution. The original wording of the statute was directed to the protection of a personal king. The present construction is designed to effect the security of the State, of which the Crown is the legal and political embodiment. The creation by the Judges of the so-called 'constructive treasons', while often the object of ill-informed criticism, has thus fulfilled an essential need."

And at p. 128 the learned author continues:

> "So in *R. v. Maclane* (1797), 26 State Tr. 722, Maclane was convicted of treason by imagining the King's death. The overt act charged was that he conspired with others to raise a rebellion in Canada and procure the invasion of that country by the French. The jury were told that the absence of the King from the scene of the rebellion was immaterial. The Statute referred, not to the natural life, but to the political existence of the King."

A similar view is expressed in Kenny's *Outlines of Criminal Law*, 18th Ed. at p. 388:

> "The historical development of our nation tended steadily, century after century, to make a consciousness of the importance of the stability of public order—rather than the feudal feeling of mere personal loyalty to a prince —become the binding force of the body politic. The criminal law had to begin to take cognizance of politicians who, whilst devoted to the reigning King, were nevertheless disturbing the order of the realm, though possibly only by assailing those institutions whereby the constitution had set a check upon the King's powers. Accordingly the judges became active and transformed the feudal conception of treason, as a breach of personal faith, into the modern one, which regards it as 'armed resistance, made on political grounds, to the public order of the realm'. This new idea they evolved out of Edward III's statute by forced interpretations of the language of forms (i) and (iii). Thus a compassing of the death of the King was held to be sufficiently evidenced by the overt act of imprisoning him, because, as Machiavelli had observed, 'between the prisons and the graves of princes the distance is very small'. And an attempt to raise a rebellion against the King's power, in even a remote colony, was similarly held to show a compassing of his death, though he were thousands of miles away from the scene of all the disturbances."

Sir William Holdsworth (*A History of English Law*, Vol. 8, p. 323) states the position as follows:

> "At the time when the statute of Edward III. was passed treason was regarded rather as an offence against the person of the king than as an offence against the state. It has never ceased to be an offence against the person of the king. In fact, since the Act of 1848, it is only offences against the state which take the form of attempts against the person of the king, which must be treated as treason. But it is obvious that, as the conception of the state was more distinctly realized, and as the king came to be conceived as the head and representative of the state, treason must come to be regarded as essentially an offence, and the most heinous offence, against the state. We have seen that technical expression was given to this transformation in the conception of treason, partly by the Legislature, and partly by the growth of the doctrine of constructive treason."

See, too, *Russell on Crime*, 12th Ed., Vol. 1 at p. 207, and Hood Phillips *Constitutional and Administrative Law*, 3rd Ed., pp. 429-430.

In summing up to the jury in *Casement's* case, Lord READING emphasized the representative character of the monarch's constitutional position at the present time when he spoke of:

> "The King, that is the State, that means the country, and that means those of us who are subjects of the King who live in a common society."

By these words Lord READING recognized the existence in England of the "modern territorial state", to the emergence of which Sir William Holdsworth makes frequent reference in his work *A History of English Law*.

In *Rex v. Leibbrandt and Others*, heard in 1942/1943 before a Special Criminal Court consisting of SCHREINER, RAMSBOTTOM and DE BEER, JJ., SCHREINER, J., delivering the judgment of the court said that:

> "For the purposes of the law of treason the Government is wholly identified with the State, the land, and the people."

The learned judge quoted Lord READING'S words *(supra)* and commented as follows:

> "It seems to us that this wisely untechnical language can be applied equally well in South Africa. In other words, the crime of high treason in South Africa is a crime against the country or the people represented by the Government, that is by His Majesty the King in his Government of the Union of South Africa."

In *Rex v. Neumann* 1949 (3) S.A. 1238, MURRAY, J., in a judgment in which NESER and CLAYDEN, JJ., concurred, stated in clear terms that allegiance is owed to the state. At page 1266 the following statement is to be found:

> "On the other hand, the accused undertook certain obligations. On reference to the form of oath it will be seen that the first matter he swore to was to be faithful and bear true allegiance to His Majesty King George VI, his heirs and successors, according to law (meaning thereby in our view to be faithful and bear allegiance to the State of the Union of South Africa)."

This statement accords with the views expressed in *Rex v. Christian* (*supra*) and with the following general statements to be found in *South African Criminal Law and Procedure* by Gardiner and Lansdown, Vol. 2, 6th Ed. at p. 988:

> "In all crimes, including high treason, in which a *laesio* to majestas is averred, consideration is necessary of the question where the quality of majestas resides. The majestas of the State is commonly spoken of, but it is necessary, for the purposes of averment and proof in criminal law, to determine the matter more precisely. In general, under the British constitutional system, the State consists of Queen, Legislature and Executive Government, and ultimately all authority flows from the people; but neither Queen nor Parliament nor Executive Government of itself has majestas. In whom then, or in what body, or in what combination of these resides the majestas to which *laesio* may be done? In an absoluate monarchy, the quality is in the monarch: in a government of aristocracy, it is in the oligarchy; in a republic, it is in the people, as in the days of Republican Rome, where it resided in the *Populus Romanus*—see Voet, *ad Pand.* 48.4.2, and cf. *State v. Gibson* (1898), 15 C.L.J. 1, where, in the Orange Free State Republic, majestas was held to be in the people and not in the Volksraad."

A state is not an abstract conception. So far as a municipal court is concerned, a state has a territorial existence in the sense that it occupies a defined area of the earth's surface, the people and institutions within such an area are its living force and an established government exercising at least supreme internal authority provides its administration.

Authority for the proposition that consequent upon the development of the modern territorial state allegiance was due under the constitutional law of England to the state is overwhelming. Such confusion as continues to exist arises from the fact that the British people in their reverence of the past preserve in the law the image—but not the substance—of institutions which have long since ceased to fulfil their former function. This observation applies with particular force to the role of the monarch in the modern British state.

To understand the present constitutional position of the monarch in Britain it is necessary to appreciate the wide gap which separates legal theory and constitutional reality.

The position of the monarch in legal theory and the reason for the failure of English law to develop the concept of the state as a legal personality in its own right is set out clearly and succinctly in *Salmond on Jurisprudence*, 11th Ed., pp. 372-376. At p. 373 the following passage is to be found:

> "How, then, are we to account for this failure of the law to make so obvious and useful an application of the conception of incorporation and legal personality? Why has it failed to recognise and express in this way the unity and permanence of the state? The explanation is to be found in the existence of monarchical government. The real personality of the monarch, who is the head of the state, has rendered superfluous, at any rate within Great Britain, any attribution of legal personality to the state itself. Most public property is in the eye of the law the property of the King—which word, since we are speaking of the sovereign generally, it is convenient to take as including the Queen. Public liabilities are those of the King; it is he, and he alone, who owes the principal and interest of the national debt. Whatsoever is done by the state is in law done by the King. The public justice administered in the law courts is royal justice administered by the King through his servants, the judges. The laws are the King's laws, which he enacts with the advice and consent of his Parliament. The executive government of the state is the King's government, which he carries on by the hands of his ministers. The state has no army save the King's army, no navy save the King's navy, no revenues save the royal revenues, no territory save the dominions of the King. Treason and other offences against the state and the public interest are in law offences against the King, and the public peace is the King's peace. The citizens of the state are not fellow-members of one body politic and corporate, but fellow-subjects of one sovereign lord . . .
>
> "In so far as the English lawyer thinks of the state as a whole, he expresses his thoughts by speaking of the King. This legal attitude reduces the need for recognising an incorporate commonwealth, *respublica*, or *universitas regni*. The King holds in his own hands most of the rights, powers and activities of the state. By his agency the state acts, and through his trusteeship it possesses property and exercises rights."

The gap between constitutional reality and legal theory is emphasized by Dicey in his *Law of the Constitution*, 8th Ed., p. 7 *et seq*. At p. 11, for instance, he comments:

"We have all learnt from Blackstone, and writers of the same class, to make such constant use of expressions which we know not to be strictly true to fact, that we cannot say for certain what is the exact relation between the facts of constitutional government and the more or less artificial phraseology under which they are concealed. Thus to say that the King appoints the Ministry is untrue; it is also, of course, untrue to say that he creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the Government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the Government are concealed under the fictitious ascription to the sovereign of political omnipotence, and the reader of, say, the first Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression.

"Let us turn from the formalism of lawyers to the truthfulness of our constitutional historians." (*Cf.* the remarks of Maitland, *Constitutional History*, p. 415).

The true constitutional position of the monarch is stated by Sir William Holdsworth in the following words (*History of the English Law*, Vol. 9, 3rd Ed., p. 6):

"The combined effect of the doctrines of the Tudor lawyers, which made the king the executive authority in the state and its representative, and of the clash between the doctrines of the parliamentary and prerogative lawyers of the seventeenth century, has been to retard the attainment by the law and the lawyers of a clear conception of the state as a legal entity. The law recognizes, not the state, but only the king—a person still possessed of all those semi-feudal rights which the mediaeval common law attributed to him, and still, as in the mediaeval common law, possessed, very inconveniently both for himself and for the state, of the ordinary wants and feelings and limitations of a natural man; a person who is representative of the state, and, as such, possessed of the many mystical qualities attributed to him by the Tudor lawyers; but, though the representative of the state, not the sovereign power wihin it. If the Stuart kings and the prerogative lawyers had had their way, king and state would really have been identified. Our legal thoughts about the state might have been clearer. We might have been saved the many strange shifts and circumlocutions and inelegancies of legal thought and language, to which we have had recourse, in our endeavours to make our constitutional king stand for our state—but there would have been no pattern of constitutional government for the nations of the world."

According to the principles of international law and, indeed, according to legal theory in force in most civilized societies, the modern territorial state which forms the basic unit of the international community is in itself a legal entity. As a legal entity it embodies all the institutions within its boundaries including, in particular, and without regard to the form which it takes, the institution of government. The failure of English law to subscribe to this generally accepted theory does not mean that Britain is not a state but only that English law has failed to bring legal theory into line with constitutional reality, with the result that in England

the monarch represents and embodies the state whereas in most civilized societies the state embodies, as one of its attributes, the government administering its affairs, be it a monarchy or any other form of government. It is this peculiar and unusual concept of the "state" in English law which gives rise to the "strange shifts and circumlocutions and inelegancies of legal thought and language", of which Sir William Holdsworth speaks.

The absurdity, in this respect, of English legal theory is pinpointed by Maitland when he says:

> "The worst of it is that we are compelled to introduce into our legal thinking a person whose personality our law does not formally or explicitly recognize. We cannot get on without the State, or the Nation, or the Commonwealth, or the Public, or some similar entity, and yet that is what we are professing to do." (Collected Papers, Vol. 3, pp. 252-267. Cited by Sir William Holdsworth in a footnote to p. 7 of Vol. 9, *supra).*

In this passage Maitland uses the word "person" in the sense in which it is used in international law; an international person, that is, a state *(cf. Oppenheim's International Law,* Vol. 1, 8th Ed., p. 117 *et seq.).*

Because English legal theory ignores constitutional reality English constitutional lawyers are obliged to commence any dissertation on English constitutional law with an explanation of the "shifts and circumlocutions and inelegancies" inherent in English legal theory. See, for example, the opening chapter of *Dicey's Law of the Constitution (supra),* and the passage from *Paley's Moral Philosophy* cited as a footnote at page 9.

I have dealt with this aspect of English constitutional law at some length because an appreciation of the English legal theory of the relationship between the monarch and the state is essential to a proper understanding of the oath of allegiance.

Since, in English legal theory, the monarch is the state and the state is not in itself a legal entity, it is not possible under English law for an oath of allegiance to be taken to the state as such. The oath must necessarily be taken to the monarch as representing and embodying the state. It is for this reason that Lord COLERIDGE, C.J., in *Isaacson v. Durant* 17 Q.B.D. 54 at p. 65, said:

> ". . . that to the king in his politic, and not in his personal capacity, is the allegiance of his subjects due."

It is of the greatest importance to a proper determination of the constitutional issues involved in this case that it should be appreciated that the oath of allegiance, although in form an oath of allegiance to the monarch in person, is in law an oath of allegiance to the state.

It should perhaps be remarked that it is by no means certain even when the doctrine of the divine right of kings enjoyed its greatest strength and vigour in England and the concomitant idea of the absolute power of a monarch reached its zenith, that it was ever the position in English law that allegiance was owed exclusively to the monarch in his personal capacity. Parry, in a searching analysis of the law on allegiance, in his book *Nationality and Citizenship Laws of the Commonwealth and The Republic of Ireland*, 1957, makes the following comments on Calvin's case at pp. 41, 42 and 43:

> "But in insisting that allegiance was due to the King personally rather than the Kingdom, the judges were probably adopting a thesis which was unhistoric as a result of their anxiety to reach a socially and politically desirable result.
>
> "But though the propositions of *Calvin's* Case seem to have a calm clarity about them when compared with earlier statements of the law, they are not in fact very clear. Natural allegiance is defined as the 'true and faithful obedience of the subject due to his sovereign.' Who, however, was a subject in this sense? The reference is to the natural-born subject, whose natural allegiance 'is an incident inseparable . . .' to his status and who 'as soon as he is born, he oweth by birth-right, ligeance and obedience to his sovereign.' Yet it is difficult in defining such a subject and explaining the inevitability and indelibility of his duty to avoid falling into the 'damnable and damned' heresy of regarding allegiance in the territorial rather than the personal sense—as due to the King only in his 'political capacity.'
>
> "There is perhaps some inconsistency between the passages quoted. Or, in other words, the doctrine of allegiance expounded in *Calvin's* Case is an intermediate one, neither wholly personal nor wholly territorial. Allegiance is to the King rather than to his Kingdom of England."

The historical background of the decision in *Calvin's* case, described by Sir Winston Churchill in Vol. 2, pp. 124-127 of his *History of the English-Speaking Peoples*, lends support to Parry's view that there was considerable anxiety on the part of the judges to arrive at a decision which was "socially and politically desirable".

In the circumstances in which the decision was reached it is not surprising that scant regard was paid to the statute passed by Henry VII (11 Hen. 7 c.1.). As Stephen remarked, this statute was "the earliest recognition to be found in English law of a possible difference between the person and the office of the king" *(Stephen's History of English Law*, Vol. 3, 3rd Ed., p. 468), a difference which the judges in *Calvin's* case, heard over a hundred years after the statute of Henry VII became part of the English law, expressly denied but impliedly accepted.

I propose now to consider the effect of a revolution in Britain on the allegiance owed to the state. Does this allegiance compel obedience to the laws of the sovereign power "for the time being" no matter what the title of that sovereign power to govern may be, or is obedience to

the laws of a sovereign power, established as a result of revolutionary change within the state as the only law-making and law-enforcing institution, a breach of allegiance?

A study of English constitutional law and of English legal theory based upon the constitutional history of England leads, in my view, to the inevitable conclusion that the first question must be answered in the affirmative and the second in the negative. The authorities cited later in this judgment establish that the only dispute between British jurists in regard to the duty of the subject to obey the laws of the sovereign power "for the time being" relates not to the existence of the duty but to its extent.

There are a number of reasons for the unanimous acceptance by English jurists of a duty to obey the laws of a sovereign power established within the state by revolution:

(i) First and foremost among these is the fundamental concept that allegiance is due in return for actual protection. The corollary of this is that allegiance is not due to a sovereign power which, while claiming the theoretical right to protect, fails to afford protection.

(ii) Secondly, and most importantly, there is the need in the interests of the state and its people to ensure the continuity of the law and avoid the anarchy which would result from a legal vacuum.

(iii) A third reason, refreshingly free from cant and hypocrisy, is the appreciation by jurists that because governments without exception have an extra-legal origin, courts exercising jurisdiction within a state must, if they are to function at all, obey the laws of the government "for the time being". If a court of law anywhere in the world were to insist that only the laws of a government with a legal origin may be obeyed and enforced, it would not be able to function because there is no such government. The feature which distinguishes one government from another is not that some have an extra-legal and others a legal origin but simply the variation in the length of time separating all existing governments from their extra-legal origin. Although the government "for the time being" within a state shares with all other governments the taint of extra-legal origin it has the obvious merit of being the only effective law-making and law-enforcing body within the state. To refuse to obey the laws of such a government is to take not a legal but a revolutionary, or a counter-revolutionary stand. I will examine the question of whether

it is right for judges to indulge in revolutionary or counter-revolutionary activity later in this judgment.

All governments are "extra-legal in origin" in the sense that none is able to trace its title to govern to a source which can properly be regarded as lawful. If the pedigree of any government is examined it will be found that at some point in time sovereign power has been established by naked force—by conquest, revolution, or war. The origin of European government in Rhodesia and thus of such title as the British Government possesses in Rhodesia at the present time conforms to this pattern of extra-legality. So, too, the source of the present British Government's title to govern in Britain can be traced to revolution—the Glorious Revolution of 1688 *(Maitland's Constitutional History of England*, pp. 283-285; *Holdsworth's History of English Law*, Vol. 6, 3rd Ed., p. 230). But the extra-legal origin of the present British Government's power to govern in Britain has long since ceased to be a relevant consideration in deciding whether it has power to make laws in Britain. As Lloyd rightly says in his book *The Idea of Law* (1964) at pp. 182-183:

> "And where roevolution or civil war has supervened it may even be necessary in the initial stages, when power and authority is passing from one person or body to another, to interpret legal power in terms of actual obedience to the prevailing power. When however this transitional stage where law and power are largely merged is passed, it is no longer relevant for the purpose of determining what is legally valid to explore the sources of ultimate *de facto* power in the state. For by this time the constitutional rules will again have taken over and the legal system will have resumed its regular course of interpreting its rules on the basis of its own fundamental norms of validity."

No less to the point is the view expressed by Sir W. Ivor Jennings, *The Law and the Constitution*, 5th Ed. at pp. 117-118:

> "A written constitution is not law because somebody has made it, but because it has been accepted. Anyone can draft a paper constitution, but only the people concerned in government can abide by it; and if they do not, it is not law. It is easy to show that the Parliament summoned by William of Orange was not a Parliament, that accordingly William and Mary were not lawfully made joint monarchs, that the Parliament which pretended to ratify the Bill of Rights was not a Parliament, that the Bill of Rights was not law, that Anne was not Queen of England, that the Act of Settlement and the Acts of Union were not law, and that therefore Elizabeth II has no right to the throne and the United Kingdom does not exist—provided only that the 'law' in question was that of 1687. In fact, however, the Revolution settlement was a revolution settlement, and revolutions, if sucessful, always make new law. What made William and Mary monarchs instead of James II and the person who called himself James III was the fact of recognition, not a pre-existing rule of law. All revolutions are legal when they have succeeded, and it is the success denoted by acquiescence which makes their constitutions law."

On the extra-legal origin of all governments, see, *inter alia, Salmond on Jurisprudence*, 11th Ed. by Glanville Williams, pp. 100-102; Paton, *A Textbook of Jurisprudence*, 3rd Ed., pp. 15-16; Olivecrona *Law as Fact* (1939) pp. 66-68 and 70-73.

(iv) The fourth and possibly the most compelling reason for the conclusion that obedience to the laws of the sovereign power "for the time being" is a necessary incident of the allegiance owed by a subject to the state is to be found in the provisions of the statute law of England.

I propose now to set out in chronological sequence the principal landmarks in the development of the principle of English constitutional law that allegiance is owed to an usurper. These landmarks clearly lead to the conclusion that under the English constitutional law in force at the present time allegiance is owed to the state and that this allegiance compels obedience to the laws of the government "for the time being" functioning within the state.

In feudal times the idea that allegiance was owed to the state as a political or legal entity rather than to a person or body of persons within the state was completely absent. As an incident of feudal tenure allegiance was simply a personal tie between a vassal and his liege lord. With the advent of strong central government under a king the concept of allegiance to the king, divorced from feudal tenure but owed to the king in his personal and natural capacity, began to take shape. Sir William Holdsworth outlines the development of the law of allegiance in volume 9 of his *History of the English Law*, p. 72 *et seq.*

In 1351 the Treason Act was passed. *Halsbury's Laws of England*, 3rd Ed., Vol. 10, p. 557, referring, *inter alia*, to this Act states that it affords protection against treason to a *de facto* monarch. This implies, of course, that allegiance was owed to a *de facto* monarch because there can be no treason and, therefore, no protection against treason without allegiance. The relevant passages read:

"The King or Queen regnant for the time being, whether the rightful Sovereign or not, is within the provision of the Acts relating to treason and protected thereby. The rightful Sovereign out of possession is not, it is said, within the provisions of the Acts; neither is a consort other than the Queen Consort, and, if it be deemed necessary, he must be protected by a special Act.

"The essence of the offence of treason lies in the violation of the allegiance which is owed to the Sovereign and which is due from all British subjects wherever they may be."

And at p. 561 it is stated that:

"Service in war under the Sovereign *de facto* is not an act of treason against the Sovereign *de jure*."

I have not been able to discover when this construction was first placed upon the Treason Act of 1351, but the idea that allegiance was owed to a *de facto* monarch makes its appearance at a very early stage in English constitutional history.

A glimpse of the idea is to be found in the authorities cited in the course of the Creighton lecture delivered by Vinogradoff at the invitation of the University of London in 1913. A verbatim report of the lecture is to be found in the *Law Quarterly Review*, Vol. 29, p. 273, and at p. 278 the following passage is to be found:

> "In the midst of the political turmoil of these times the Year Books testify to the growth of an idea which developed into what has been appropriately termed 'the rule of law'. This tendency makes itself felt in two directions. To begin with, it is gradually realized that legal *continuity* is necessary for the existence of Civil Society. Sometimes this idea is voiced by the petitions and declarations of Parliaments (e.g. in 1461: Rot. Parl. v. 489 (concerning the acts of the Lancastrians)). In a King's Bench case of 1469 (Y.B., Pasch., 9 Ed. IV, pl. 2, Trin. pl. 3.) W. Swyrenden and Henry Bagot brought an assize of novel disseisin against Thomas Ive for having ousted them of the office of Clerks of the Hanap in the Chancery. The defendant pleaded as regards Bagot that the latter had no right to bring an action, being an alien, and born to the allegiance of Charles who called himself King of France, and was an adversary and bitter enemy of the King of England. Bagot replied that his father and mother had been born in England, and as for himself, though born in Normandy, he had obtained letters of denization from Henry, lately King of England in fact, though not in law. The Court, in spite of a protest by the serjeants and apprentices, admitted the contention of Bagot's counsel that Henry had been king in possession, and 'it is necessary that the Realm should have a king under whose authority laws should be held and upheld, and though the said Henry was in power by usurpation, any judicial act done by him and touching Royal jurisdiction would be valid, and will bind the rightful king when the latter returns to power'."

This decision in 1469 anticipated by 16 years the famous statute of Henry VII (11 Hen. VII c.1.) passed in 1495. This Act is to be found in *Halsbury's Statutes of England*, Vol. 5 at p. 478, but, for the sake of clarity, I am citing from *Stephen's History of the Criminal Law of England*, Vol. 2, where at p. 254, the Act is rendered in modern English and in a slightly abridged form:

> "The king, calling to his remembrance the duty of allegiance of his subjects, and that they are bound to serve their prince for the time being in his wars for the defence of him and the land against every rebellion, and to do him service in battle, and that for the same service what fortune ever falls by chance in the same battle against the mind and will of the prince (as in this land some time passed hath been seen), that it is not reasonable, but against all reason, that the said subjects going with their sovereign lord in wars, anything should lose or forfeit for doing their true duty and service of allegiance; be it enacted, that from henceforth 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, for the said deed and true duty of allegiance be in nowise convict or attain of high treason, or of other offences for that cause."

This Act was passed to clarify the law relating to treason and to confirm the common law. Hood Phillips in his book *Constitutional Law,* makes the following comment on the Act at p. 528:

> "The Treason Act, 1495, confirmed the common law principle that allegiance is due to the *de facto* Sovereign (i.e., the King who is for the time being actually in possession of the Crown), and not to a King *de jure* (i.e., with a right to the Crown) who is not also King *de facto.*"

Sir William Holdsworth expressed much the same view:

> "In Henry VII's reign it was recognized that the king might be seized of land 'in right of the crown or otherwise;' but in the same reign a statute was needed to make it clear that faithful service to a reigning king was no treason to a successful claimant to the throne; and Stephen is probably warranted in saying that this statute is 'the earliest recognition to be found in English law of a possible difference between the person and the office of the king.' (*A History of English Law,* Vol. 3, 3rd Ed. at p. 468).
> "The only statute of this period which made any relaxation in the severity of the substantive law of treason as defined by Edward III's statute was the famous statute of 1494. It enacted that faithful service to a king *de facto* should not render the person doing such service liable to the penalties of treason, on the restoration of the king *de jure.* Though passed to meet the political needs of the moment, it has been more permanent than any of the other statutes of this period on the subject of treason. It is the only one of them which still forms part of our present law." (Vol. 4 at p. 500).

A short survey of the events which led up to the enactment of this statute is given by Sir Winston Churchill at pp. 13 and 14 of Vol. 2 of *A History of the English-Speaking Peoples.*

In 1608 the judges in *Calvin's* case 7 Co. Rep. 18a; 77 E.R. 377; stressed that temporary as opposed to perpetual allegiance is based upon the fact of protection and not upon the theoretical and legal right to afford it. It is because allegiance is based upon actual protection as opposed to the theoretical right to afford it that English law demands obedience to the laws of a *de facto* sovereign power. Allegiance is a branch of the law which, of necessity, takes full account of and gives full effect to the factual position. Thus, it comes as no surprise to find the following statements in *Calvin's* case at p. 399 in the English reports:

> "There be regularly (unless it be in special cases) three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom, albeit afterwards one kingdom descend to the King

> of the other. For the first, it is termed actual obedience, because, though the King of England hath absolute right to other kingdoms or dominions, as France, Aquitain, Normandy, &c. yet seeing the King is not in actual possession thereof, none born there since the Crown of England was out of actual possession thereof, are subjects to the King of England."

This statement flows logically from the principles of English common law and statutes governing the law of allegiance of persons born or resident in England. In accordance with these principles persons born in France, Aquitain or Normandy when the Crown of England was out of actual possession of these countries would have owed allegiance to the *de facto* sovereign power and the parents of such persons born before actual possession was lost would have owed temporary allegiance to the *de facto* sovereign power. The perpetual allegiance owed to the Crown of England by such persons by reason of birth would not have been extinguished, but would have been in suspense until the Crown of England either regained possession or lost it permanently. The case of *De Jager v. The Attorney-General of Natal* (1907) A.C. 326 illustrates the converse rule of English law that so long as "the protection of the Sovereign has not ceased", the duty of allegiance continues. The facts of that case showed that there had been a temporary withdrawal only and that, in the words of East *(Pleas of the Crown,* Vol. 1, p. 54), the occupation by the enemy was "a mere forcible possession of the external symbols of royalty, flagrante bello."

In 1615 Francis Bacon in his conference with Coke in *Peacham's* case (1615) Cro. Car. 125, contended that:

> ". . . there be four means or manners whereby the death of the king is compassed or imagined. The first by some particular fact or plot. The second by disabling his title; as by affirming that he is not lawful king, or that another ought to be king, or that he is an usurper or a bastard or the like. The third by subjecting his title; as either to pope or people; and thereby making him of an absolute king a conditional king. The fourth by disabling his regiment, and making him appear incapable and indign to reign."

Since, under the common law, allegiance was owed to a *de facto* king, there can be no doubt that Bacon was correct when he said that it was treason to affirm of a king on the throne that he is not 'lawful king, or that another ought to be king, or that he is an usurper or a bastard or the like', even if all such affirmations be true. Thus the Treason Acts passed in the years 1695 to 1696 *(infra)* conformed to the common law.

The next landmark of importance is the statement of the law by Sir Edward Coke *(Institutes of the Laws of England,* Third Part, pp. 6 and 7, completed in 1628 but first published in 1641):

"[Le Roy] Is to be understood of a king regnant, and not of one that hath but the name of a king, or a nominative king, as it was resolved in the case of king Philip, who married queen Mary, and was but a nominative king, for queen Mary had the office and dignity of a king, so as she that wanted the name of a king, but had the office and dignity, was within this Act of 25, E.3. And he that had the name, and not the office and dignity of the king, was not within it. And therefore an Act was made, that to compasse or imagine the death of king Philip, &c. during his marriage with the queen, was treason. A queen regnant is within these words, [nre seignior le Roy] for she hath the office of a king."

Referring to the Statute 11 Henry VII, Ch. 1, the learned author continues:

"This Act is to be understood of a king in possession of the Crown, and kingdome: for if there be a king regnant in possession, although he be Rex *de facto, & non de jure,* yet is he *seignior le Roy* within the Purvien of this statute. And the other that hath right, and is out of possession, is not within this Act. Nay if treason be committed against a king *de facto, & non de jure,* and after the king *de jure* commeth to the Crown, he shall punish the treason done to the king *de facto:* And a pardon granted by a king *de jure,* that is not also *de facto,* is voyd."

For a comment on the impact of *Coke's Institutes* on the constitutional and common law of England see Holdsworth (*supra*) Vol. 5, pp. 471-493.

Prior to the civil war in 1641 Hale had completed the first volume of his *History of the Pleas of the Crown.* In paragraph 60 he set out the common law of allegiance to a *de facto* sovereign in the following words:

"And upon the same account it is, that tho there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, altho the true prince regain the sovereignty, yet such attempts against the usurper in compassing his death have been punished as treason, unless they were attempts made in the right of the rightful prince, or in aid or assistance of him, because of the breach of ligeance, that was temporarily due to him, that was king *de facto;* and thus it was done 4 E. 4. 9 E. 4 1. tho H. 6. was declared an usurper by act of parliament 1 E. 4. and therefore king *Edward* IV. punished Ralph Grey with degradation, as well as death, not only for his rebellion against himself, but also pur cause de son perjury and doubleness, qu'il avoit fait al roy H. 6. 4. E. 4. 20."

Dealing with the related subject of treason and interpreting the first article of the Treason Act, 1351, which reads:

"When a man doth compass or imagine the death of our lord the king, or of our lady his queen, or of their eldest son and heir",

Hale (*ibid.*, para. 100) expressed the view that these words "extend to his successor, as well as to him". This view has been accepted as correctly stating the law of England and indeed the oath of allegiance both in Rhodesia and England is taken to the reigning monarch and to

her "heirs and successors according to law". That the words "successor" and "king" in the Treason Act, 1351, include a *de facto* king is clearly stated by Hale (*ibid.*, para. 101):

> "A king *de facto* but not *de jure,* such as were H. 4. H. 5. H. 6. R. 3. H. 7. being in the actual possession of the crown is a king within this act, so that compassing his death is treason within this law; and therefore the 4 E. 4. 20. a., a person that compassed the death of H. 6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, which afterwards obtained, this had not been treason, but *é converso* those that assisted the usurper, tho in actual possession of the crown, have suffered as traitors, as appears by the statute of 1 E. 4. (a footnote added by Emlyn when this work was first published in 1736 reads: 'This must have been for acts before E. 4. first obtained the crown, and therefore was wrong according to our author's own doctrine, because, as he says below, even the rightful heir before he has got possession of the crown is not a king within the statute of 25 E. 3.'), and as was done upon the assistants of H. 6. after his temporary re-adeption of the crown in 10 E. 4. and 49 H. 6."

Dealing with the Act of 1495 passed in the reign of Henry VII (11 Hen. 7. c. 1.) Hale in para. 272 had this to say:

> "This wise prince duly considering the various revolutions, that had formerly happened in this kingdom touching the crown especially to the houses of York and Lancaster, and that every success of any party presently subjected all that opposed the conqueror, to the penalties of treason; and weighing that, altho by his marriage with the heir of the house of York, he had reasonably well secured his possession of the crown, yet otherwise his title, as in his own right, was not without some difficulties; he therefore made a law, not to enact treason, but to give some security against it, *viz.* 11 H. 7. *cap.* 1."

After reciting the terms of the Act, Hale continued:

> "That this act was not temporary or for the life of King Henry VII. but was perpetual, and extended to all succeeding kings and queens of this realm, for it is for attendants upon the king or sovereign lord of this land for the time being.
>
> "It is observable, that this act extendeth to a king *de facto,* tho not *de jure,* for in truth such was Henry VII. for his wife was the right heir to the crown . "

When Hale says that a *de facto* king is protected by the laws of treason he necessarily implies that allegiance is owed to a *de facto* king; that is to say, the king "for the time being", because it is trite law that there can be no treason without allegiance.

The points of significance which emerge from the Commonwealth period (1641-1660) are the following:

(i) The absence of any indication that it was so much as suggested that the courts should refuse to give the force of law to the acts of the *de facto* governments and even less, of any

indication that the courts did not in fact give full force and effect to all their acts.

(ii) The fact that Charles I was first deposed and later executed and the fact that his heir did not succeed to the Throne until the Restoration appear to have created no insuperable difficulty in the courts so far as the exercise of the prerogatives was concerned. I find no suggestion, for instance, that the fact that the prerogative of mercy could not be exercised by the rightful heir to the Throne created difficulty so far as the punishment of criminals was concerned.

(iii) Many judges continued in office and the oath of allegiance taken upon appointment to the Bench does not appear to have been regarded as a bar to service under the Commonwealth.

(iv) Of particular significance is Sir Matthew Hale's acceptance of an appointment in 1654. The full significance of this point can only be understood if the position of Hale in the history of the English law is appreciated. Sir William Holdsworth gives a brief biographical sketch in Vol. 6 of *A History of English Law* at pp. 574 to 595 and remarks that he was "the greatest common lawyer who had arisen since Coke; and, that, though his influence has not been so great as that of Coke, he was as a lawyer, Coke's superior" (p. 594). He adds that he was "a consummate constitutional lawyer" (p. 580) and "a consummate master of English law on all sides" (p. 581) and speaks of his "undisputed pre-eminence as a lawyer" (p. 582). He was not, however, remarkable only for his legal ability. His integrity as a lawyer was apparently of the same high order. In these circumstances, his acceptance of an appointment in 1654 would be inexplicable but for the English law relating to the duty of allegiance to a *de facto* sovereign.

The deposition of Charles I and his subsequent execution were unquestionably acts of treason and the persons responsible for committing them were rightly convicted of treason after the Restoration in 1660. The principle that allegiance is due to a *de facto* government within a state affords no defence to a charge of treason brought against persons actually responsible for a revolutionary change within the state. If a revolution fails the persons responsible for it are normally put on trial for treason; if a revolution succeeds its anniversary is invariably celebrated as a national and, no doubt, personal day of thanksgiving. Of revolutions it may truly be said that nothing succeeds like success. A sharp distinction is drawn in law between persons who set up a *de*

facto government by revolution and persons who, taking no part in the revolution, obey the laws of the *de facto* government in pursuance of the duty of allegiance owed to the state. If obedience to the laws of a *de facto* government were not enjoined by the law, anarchy would be likely to ensue. In a choice between anarchy and order the law wisely makes a realistic and sensible choice of order.

Certain persons charged with treason after the Restoration in 1660 were not in fact revolutionaries but persons who had acted in pursuance of the duty of obedience owed under English constitutional law to the government "for the time being" within the state. The conviction of these persons was based on a fiction that Charles II was, from the death of Charles I, *de facto* king of England, as well as upon a literal and narrow construction of the Act of 1495. Commenting on one of these trials Glanville Williams in his book on *Criminal Law*, 2nd Ed., p. 298, says:

> "The restriction is supported by text-writers, and perhaps by the old case of Axtell (1660), where the commander of the guards at Charles I's trial was on the Restoration sentenced for treason, notwithstanding that he acted under the command of his superior officer, who himself acted by authority of the Commonwealth Parliament. But the decision in this case was a monstrous one, for Axtell was acting in obedience to the *de facto* government. An Act of 1495 made it a defence to a charge of treason that the accused was serving the *de facto* king; but the distinction taken in the regicide cases was that this defence did not avail one who served a *de facto* government that was not monarchial. The decision was unreasonable; and the Draft Code of 1879 proposed to generalise the usurper rule to give protection to those who comply with any *de facto* system of law. This has been adopted in some overseas Codes."

I agree that certain of the decisions after the Restoration were "monstrous" and "unreasonable" and a perusal of Vol. 5 of *State Trials* reveals that all the trials were conducted without regard to elementary principles of justice. This was indeed a black chapter in the history of the English criminal law.

The next important point in chronological sequence is the Glorious Revolution of 1688. The events leading up to the Revolution of 1688 are described by Sir William Holdsworth in Vol. 6, pp. 191-194 in *A History of English Law* and the steps taken to give the semblance of legality of James II's deposition are set out in the following passage at p. 194:

> "A Convention Parliament was summoned, drew up the Declaration of Rights, and offered the throne to William and Mary. The offer was accepted, and the Convention was declared, as the Convention which effected the Restoration had been declared, to be a true Parliament. The Parliament turned its Declaration of Rights into the Bill of Rights; passed other statutes, such as the first Mutiny Act and the Toleration Act, which laid

the foundations of the Revolution settlement; and some other temporary Acts, which were made necessary by the exigencies of the situation. As at the Restoration, the Revolution was formally completed and regularized by an Act of the succeeding Parliament, which recognized all the Acts of the Convention Parliament as valid; and as it had been found impossible to induce the Convention Parliament to pass a comprehensive Act of Indemnity, like that passed at the Restoration, William took the initiative, and sent down an Act of Grace, which it was necessary for both Houses to pass without amendment or not at all. Both Houses passed it unanimously."

At p. 230 the learned author stresses the nature of the Revolution:

"The fact that James II. was in substance deposed gave a fatal blow to the theory of divine right, and the legitimist notions based upon it. No doubt, the formula adopted by the House of Commons endeavoured decently to veil the fact of his deposition, and the fact that Parliament had created a new king. But, as against the House of Lords, the House of Commons insisted successfully on its resolution that the throne was vacant; and this was decisive. The throne had been vacated, and Parliament had filled it. As the judges and lawyers, when consulted by the House of Lords, admitted, none of the rules of the common law were applicable to such a case. It was a Revolution; and the people, through their representatives in Parliament, had assumed the right to make and unmake kings."

And at p. 400 he remarks that:

". in 1695-1696 it was declared an offence to refuse the oath of allegiance when tendered, to publish that the king was not rightfully king, or that James II. or any other person had any right to the crown." (*Cf.* the views expressed by Francis Bacon (*supra*).).

I have not been able to find any suggestion that any of the judges who accepted appointment or continued in office after the Revolution experienced any difficulty in administering the law under the *de facto* sovereigns. The explanation of this must again be sought and found in the allegiance owed under English law to a *de facto* sovereign. There would appear to be no doubt at all that the judiciary after the Revolution gave full force and effect to the acts of the legislature and executive. Commenting on this period Dias in his book on *Jurisprudence,* 2nd Ed. at p. 80 says:

"The conflict up to that date had been between Parliament and the prerogative, and in 1689 Parliament emerged victorious when the judiciary accepted the Crown in Parliament as the ultimate legislative authority."

And Sir William Holdsworth sums up the situation in Vol. 13, *ibid.*, p. 11, as follows:

"But the Revolution of 1688 had been effected with the minimum of change in the law and institutions of England. Both statesmen and lawyers regarded it as being merely the assertion by the Legislature of the better opinion as to certain points of constitutional law; and, though the dynasty was changed, all the other institutions of government remained unchanged

and hardly at all reformed. Thus the main defect in a purely *a priori* theory of government was remedied. The law and institutions of England were the product of the long political and legal experience of the race. They were reverenced, and rightly reverenced, because they worked on the whole well. At the same time the political theory by which they were justified did admit the possibility of changes and reforms to remedy proved abuses, provided that fundamental laws and institutions were not touched. It was generally recognized that, as Horace Walpole put it, there was 'a wide difference between correcting abuses and the removal of landmarks.' "

A study of English history reveals that in dealing with revolutionary situations both the law and lawyers have invariably adopted a realistic approach to the problems created.

In 1716 Hawkins published his great work *A Treatise of the Pleas of the Crown.* Sir William Holdsworth remarks that:

"The Treatise is remarkable both for the learning of the author and his skill in the presentment of his material." *(ibid.,* Vol. 12, p. 362.)

The following passages from Hawkins' *Treatise* are relevant (Vol. 1, Ch. 17):

"Sect. 11. As to The Third Point, *viz.* Who is a king within this Act? it seems agreed, that every king for the time being, in actual possession of the crown, is a king within the meaning of this statute. For there is a necessity that the realm should have a king, by whom and in whose name the laws shall be administered; and the king in possession being the only person who either doth or can administer those laws, must be the only person who has a right to that obedience which is due to him who administers those laws; and since by virtue thereof he secures to us the safety of our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

"Sect. 12. And this plainly appears even by the prevailing opinions in the time of king *Edward the Fourth,* in whose reign the distinction between a king *de jure* and *de facto* seems first to have begun; and yet it was then laid down as a principle, and taken for granted in the arguments of *Bagot's Case,* that a treason against *Henry the Sixth* while he was king, in compassing his death, was punishable after *Edward the Fourth* came to the crown; from which it follows, that allegiance was allowed to have been due to *Henry the Sixth* while he was king, because every indictment of treason must lay the offence *contra ligeantiae debitum.*

"Sect. 13. It was also settled, That all judicial acts done by *Henry the Sixth* while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by *Edward the Fourth* before he was actually king, was void even after he came to the crown.

"Sect. 14. And by the 11 Hen. 7. c. 1. it is declared, 'That all subjects are bound by their allegiance to serve their prince and sovereign lord for the time being, in his wars, for the defence of him and his land against every rebellion, power, and might reared against him, &c. and that it is against all laws, reason and good conscience, that they should lose or forfeit any-

thing for so doing;' and it is enacted, 'That from thenceforth no person or persons that attend on the king for the time being, and do him true and faithful allegiance in his wars, within the realm or without, shall for the said deed and true duty of allegiance be convict of any offence.'

"Sect. 15. From hence it clearly follows, First, That every king for the time being has a right to the people's allegiance, because they are bound thereby to defend him in his wars against every power whatsoever.

"Sect 16. Secondly, That one out of possession is so far from having any right to our allegiance by virtue of any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him.

"Sect. 17. It is true indeed, that after the restoration of king *Charles the Second,* it was resolved, that all those who acted against, and kept him out of possession, in obedience to the powers then in being, were traitors.

"Sect. 18. But it ought to be considered, that it was first resolved by the same judges, and king *Charles the Second* was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws."

Sir Michael Foster (1689-1763) endorsed the views expressed by Hawkins, and in his First and Fourth Discourses dealt with allegiance owed by a British subject to a *de facto* king:

"Protection and Allegiance are reciprocal Obligations, and consequently the Allegiance due to the Crown must, as I said before, be paid to Him who is in the Full and Actual Exercise of the Regal Power, and to none Other. I have no occasion to meddle with the Distinction between Kings *de facto* and Kings *de jure,* because the warmest advocates for that Distinction and for the Principles on which it hath been founded, admit that even a King *de facto* in the Full and Sole Possession of the Crown, is a King within the Statute of Treasons; it is admitted too, that the Throne being Full, any other Person Out of Possession but claiming Title, is no King within the Act, be His Pretensions what they may.

"These Principles I think no Lawyer hath ever yet denied. They are founded in Reason, Equity and good Policy." (Discourse I, Sec. 8, p. 188).

In Discourse IV, p. 397, Foster criticizes the views expressed by Hale. At p. 397 the following passage is to be found:

"The learned Author asserteth with great Truth, that a King *de Facto,* in the Full and Sole Possession of the Sovereignty, is such a King, against whom High Treason may be committed within the Statute of Treasons. And addeth that Treasons against a King *de Facto,* not being *Attempts in Aid of the Rightful Heir,* may be punished in the time of a King *de Jure*; and that Those who have Assisted the Usurper, though in Actual Possession of the Crown, have on the Regress of the Crown to the Right Heir suffered as Traitors.

"I fear it will avail very little towards the Settling any Point of Law or Rule of Right, to enquire in what manner Princes on such Revolutions as those alluded to in these Passages by the learned Author, have treated either their Friends or their Enemies. It is not to be imagined, that They will consider the Former as Traitors for Acts of Hostility done or attempted in Aid of Themselves. I verily believe no Prince in his Right Senses ever did."

At p. 398, still dealing with the views of Hale, the learned author says:

> "His Lordship admitteth, that a Temporary Allegiance was due to *Henry* the 6th as being King *de Facto*. If this be true, as it undoubtedly is, with what Colour of Law could Those who paid Him that Allegiance Before the Accession of *Edw.* the 4th be considered as Traitors? For call it a Temporary Allegiance, or by what Other Epithet of Diminution you please, still it was due to Him *while in full Possession of the Crown*. And consequently Those who paid Him that due Allegiance, could not with any sort of Propriety, be considered as Traitors for doing so.
>
> "The 11th of *Henry* the 7th, though subsequent to these Transactions, is full in Point. For let it be remembered, that though the Enacting Part of this Excellent Law can respect only Future Cases, the Preamble, which His Lordship doth not Cite at large, is Declaratory of the Common-Law; and consequently will enable us to judge of the Legality of past Transactions. It reciteth to this Effect, 'That . . . allegiance.' It then enacteth, That no Person attending upon the King for the Time being in His Wars shall for such Service be Convict or Attaint of Treason or other Offence by Act of Parliament, or Otherwise by any Process of Law.
>
> "Here is a clear and full Parliamentary Declaration, that by the Ancient Law and Constitution of *England*, founded on Principles of Reason, Equity, and good Conscience, the Allegiance of the Subject is due to the King for the Time being, and to Him alone. This putteth the Duty of the Subject upon a Rational and Safe Bottom. He knoweth that Protection and Allegiance are Reciprocal Duties. He hopeth for Protection from the Crown, and He payeth his Allegiance to *it* in the *Person* of Him whom He seeth in Full and Peaceable Possession of it: He entereth not into the Question of Title, He hath neither Leisure nor Abilities, nor is He at Liberty to enter into that Question: But He seeth the Fountain, from whence the Blessings of Government, Liberty, Peace, and Plenty flow to Him; and there He payeth his Allegiance. And this excellent Law hath secured Him against all After-Reckonings on that Account."

The high regard in which Foster is held appears from Sir William Holdsworth's biographical note, *ibid.*, Vol. 12, pp. 135-137.

Matthew Bacon's *Abridgement* was published in five volumes between the years 1736 and 1776. He was not the author of the fifth volume, nor of the whole of the fourth volume. Between 1736 and 1832 it had run through seven editions and had been extended from the original three to eight volumes. Maine refers to the work as "our classical English Digest". At p. 584 of the seventh edition (1832) and under the heading "Against whom High Treason may be committed", the following views are expressed:

> "High treason may be committed against the person in actual possession of the crown, although such person be only king or queen *de facto*, and not *de jure*: for as the lives and properties of the people are protected by such king or queen, during his or her administration of the laws, allegiance is in return due for this protection.
>
> "By the 11 H. 7. c. 1. it is enacted, 'That . treason'.

"And it has been holden, that, if high treason have been committed against a king *de facto*, and the king *de jure* afterwards come to the crown, the offence is still punishable as high treason.

"It is, in the general, true, that high treason cannot be committed against the person who has a right to the crown, so long as a king *de facto* is in the possession thereof; because allegiance is only due to the latter.

"It was indeed resolved by the judges, after the restoration of King *Charles* the Second, that all the acts done to prevent him from acquiring the actual possession of the crown were high treasons.

"But this resolution is quite reconcileable with what is laid down in the books last cited: for it had been first resolved by the same judges, that King *Charles* the Second, notwithstanding he had been for some years hindered from exercising the regal power, had all that time been king *de facto* as well as *de jure*; and it is certain, that no other person had, during that time, been in the actual possession of the crown.....

"As there must sometimes be a failure of justice, if there were not always a person in whose name the laws might be administered, it is a maxim *that the king never dies;* and, consequently, high treason may be committed against a king before his proclamation; for he becomes a king immediately upon the demise of the person to whom he succeeds."

Blackstone in his *Commentaries on the Laws of England* published in 1765 gives a most interesting and instructive account of the law of allegiance and of the reasons which underlie it (Vol. 4, 15th Ed. at p. 76 *et seq.*):

"But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans promulged by Augustus Caesar, comprehended all the ancient laws, that had before been enacted to punish transgressors against the state. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

"1. 'WHEN a man doth compass or imagine the death of our lord the king, of our lady his queen, or of their eldest son and heir.' Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects: but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him. The king here intended is the king in possession, without any respect to his title: for it is held, that a king *de facto* and not *de jure*, or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute; as there is a temporary allegiance due to him, for his administration of the government, and temporary protection of the public: and therefore treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by act of parliament. But the most rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary possession of the throne, as was the case of the house of York during the three reigns of the line of Lancaster, is not a king within this statute against whom treasons may be committed (3 Inst. 7. 1 Hal.

P.C. 104). And a very sensible writer on the crown-law carries the point of possession so far, that he holds (1 Hawk. P.C. 36), that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him. A doctrine which he grounds upon the statute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture, which do assist and obey a king *de facto*. But in truth, this seems to be confounding all notions of right and wrong; and the consequence would be, that when Cromwell had murdered the elder Charles, and usurped the power (though not the name) of king, the people were bound in duty to hinder the son's restoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get possession of the crown (a term, by the way, of very loose and indistinct signification), the subject would be bound by his allegiance to fight for his natural prince to-day, and by the same duty of allegiance to fight against him to-morrow. The true distinction seems to be, that the statute of Henry the seventh does by no means *command* any opposition to a king *de jure*: but *excuses* the obedience paid to a king *de facto*. When therefore an usurper is in possession, the subject is *excused* and *justified* in obeying and giving him assistance: otherwise, under an usurpation, no man could be safe: if the lawful prince had a right to hang him for obedience to the powers in being, as the usurper would certainly do for disobedience. Nay farther, as the mass of people are imperfect judges of title, of which in all cases possession is *prima facie* evidence, the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him." (See, too, Vol. 1, p. 366 *et seq.*)

Blackstone, in stating that "the statute of Henry the seventh does by no means command any opposition to a king *de jure*; but excuses the obedience paid to a king *de facto*" was not contradicting his earlier statement in the same passage that "temporary allegiance" is due to a *de facto* king who is not also the *de jure* king. He was dealing with the problem which arises in law when the *de jure* king is actually engaged in an armed attempt to regain his throne. It was with reference to this particular circumstance that Blackstone remarked that, "the statute of Henry the seventh does by no means command any opposition to a king *de jure*; but excuses the obedience paid to a king *de facto*". By adding that "the law compels no man to yield obedience to that prince, whose right is by want of possession rendered uncertain and disputable, till Providence shall think fit to interpose in his favour, and decide the ambiguous claim: and therefore, till he is entitled to such allegiance by possession, no treason can be committed against him", the learned author clearly stated that no allegiance at all is due to a *de jure* king out of possession.

Hume, in his *Commentaries on the Law of Scotland Respecting Crimes*, first published in 1797, summarizes the law of allegiance. Deal-

ing with the scope of the Treason Act, 1351, the learned author states (Vol. 1, 1844 Ed., p. 520):

> "Also it seems not to be disputed, that the statute applies to the King *de facto*, to him who is in plenary possession of the crown, though without rightful pretentions, equally as to the King *de jure*. The reason of this lies in his administration of the laws and government for the time, and in the protection thence derived by the inhabitants of the realm; in return for which, they owe him duty and allegiance, while his possession shall endure.
>
> "From this it follows on the other side, that the rightful heir of the Crown, so long as the usurper is in plenary possession, and while no possession is in the heir (as was the case with the House of York, during the reigns of Henry IV, V, and VI,) is not a King within the sense of the act of Edward, against whom any treason can be committed. In conformity to this principle, the statute 11. Henry VII, c. 1. has pronounced, that all persons are excused of any penalty or forfeiture, on account of assistance or obedience, whether in the field or otherwise, rendered to the King in possession for the time. This can only be considered as declaratory of the common law; since it were certainly against all reason to prescribe the duty of allegiance towards a Sovereign, how rightful soever, who is in no condition to protect any one against the power or violence of the usurper.
>
> "What has now been said, seems to be justly applicable to the case of the rightful heir, who has never been in possession or vested with the character of King: and to whom, as he has never yielded any protection, no allegiance can be due. But it is more doubtful how far the same shall hold in the case of the rightful King who has once been in possession, and is turned out for a time by an usurpation; which notwithstanding, he maintains his claim, continues to bear his style and title of King, and finally repossesses himself of the throne of his inheritance. This at least is the opinion of Sir Matthew Hale, which I do not find expressly controverted by other authorities, but rather avoided to be touched on. Yet it may require to be considered, whether, to reconcile this doctrine with equity, or with the other articles of the law already mentioned; a distinction must not be received between those acts of compassing, which may be necessary in compliance with the usurper's dominion for the time, and out of dread of his power and vengeance; and those voluntary attempts, which proceed from a zeal and affections of the man. Thus to be in arms, and in the field against the rightful Sovereign, in his attempt to repossess himself of the throne, ought not to be construed treason; because perhaps the party dare not, for his personal safety, decline the service. But secretly, and of free will, or for bribe and reward, to attempt to assassinate or poison the King *de jure*, though out of possession, is an act of quite a different and an inexcusable nature, and one which seems properly to fall under the rule laid down by Sir Matthew Hale, who, perhaps only intended it for cases of this description."

The true basis of allegiance is stated in the first paragraph of the above statement. In English law allegiance to an usurper is certainly not based upon the "dread of his power and vengeance". This is an idea expressed by some continental jurists but is not to be found in the writings of English jurists. It is unfortunate that the author expresses conflicting ideas regarding the basis of allegiance to a *de facto* king and that he was apparently unaware of the views expressed by the editor

of *Hale's Pleas of the Crown* (Emlyn) as well as those expressed by Hawkins and Foster.

East, in his *Pleas of the Crown*, published in 1803, expresses the following views (Vol. 1, p. 54):

> "It is also agreed that a king *de facto*, in the full and sole possession of the crown, is a king within the same statute of Edward 3.; and that any other person out of possession is no such king, be his pretensions what they may. Mr. Justice Blackstone, indeed, seems to insinuate, that 'the possession of the crown' is a term of too loose and indistinct a signification; but Hawkins refers it to the king in whose name the laws are administered, by virtue of which, liberty, life, property, and all other advantages of government are secured to the subject; which is, in truth, the legitimate and solid foundation of allegiance. A possession of this sort does at least imply a general acquiescence on the part of the nation, and not a mere forcible possession of the external symbols of royalty, *flagrante bello*. But when Sir Henry Vane, to an indictment for levying war against King Ch. 2., justified that all that he had done was by authority of parliament, and that the king was then out of possession of the kingdom, and the parliament the only power regnant; it was resolved, that though King Charles 2. was in fact kept from the exercise of his royal authority by rebels, yet he was king both *de facto* and *de jure*, and that all the acts done to keep him out were high treason. The latter part of this resolution furnishes the true ground of the judgment. Sir H. Vane was actively instrumental in preventing the king from assuming his authority. But it is a misapplication of terms to say that that prince was king *de facto* before the period of the restoration."

Prior to June, 1832, John Austin delivered a series of lectures on jurisprudence at the recently established University of London. In 1861 and 1863 these lectures were published in two volumes. His views on the authority of a *de facto* government as a law-making and law-enforcing body accord with both the English law of allegiance and the related law of treason. Dealing with the authority of a *de facto* government he expressed the following views in Vol. 1 of the 5th Ed., p. 326:

> "A government *de jure* and also *de facto*, is a government deemed lawful, or deemed rightful or just, which is present or established: that is to say, which receives presently habitual obedience from the bulk or generality of the members of the independent political community. A government *de jure* but not *de facto*, is a government deemed lawful, or deemed rightful or just, which, nevertheless, has been supplanted or displaced: that is to say, which receives not presently (although it received formerly) habitual obedience from the bulk of the community. A government *de facto* but not *de jure*, is a government deemed unlawful, or deemed wrongful or unjust, which, nevertheless, is present or established: that is to say, which receives presently habitual obedience from the bulk of the community (pp. 326 and 327).
>
> "For though the present government may have supplanted another, and though the supplanted government be deemed the lawful government, the supplanted government is stripped of the might which is requisite to the enforcement of the law considered as positive law. Consequently, if the law were not enforced by the present supreme government, it would want the appropriate sanctions which are essential to positive law, and, as positive

law, would be not be law imperative: that is to say, as positive law, it would not be law.—To borrow the language of Hobbes, 'The legislator is he (not by whose authority the law was first made, but) by whose authority it continues to be law.' (pp. 327 and 328.)

"The truth is, that in respect of the positive law of that independent community, the supplanted government, though deemed *de jure*, is unlawful: for, being positive law by the authority of the government *de facto*, this positive law proscribes the supplanted government, and determines that attempts to restore it are legal wrongs." (p. 328).

Austin's statement that a government is a *de facto* government if it "receives presently habitual obedience from the bulk of the community" emphasizes the point that a government need not be established permanently to be a law making body. This accords with the views of Blackstone who speaks of "the temporary allegiance" due to a *de facto* sovereign for his "temporary protection of the public", and with the views of Hale who speaks of the allegiance which "was temporarily due to him who was the king *de facto*".

In 1833 a Royal Commission on Criminal Law was appointed to digest into two statutes the enacted and unenacted criminal law, to enquire how far it would be expedient to codify the whole criminal law in one statute, and how far it was expedient to consolidate particular branches of the criminal law (Holdsworth, *ibid.*, Vol. 15, p. 144). The Commission issued seven reports between 1834 and 1843. The sixth report was a digest of the law relating to treason and other offences against the state, as well as of certain other offences.

The following two Articles, with comments thereon, by the Commission appear at pp. 23 and 24 of the Sixth Report:

"Art. 2. Provided that no person who shall attend upon the King and sovereign lord of this land for the time being, in his person, and shall do him true and faithful service of allegiance in the same, or shall be in other places by his commandment, in his wars, within this land or without, shall for the said deed and true duty of allegiance be in any wise convicted or attained of treason. (c)"

Note (c) reads:

"11 Hen. VII. c. 1. The object of this law was to protect those who aided a king *de facto* from prosecution for treason in case of the eventual success of the party opposing such king. The statute was passed after the expedition of Perkin Warbeck, when the adherents of Henry VII., considering that other attacks might be made on his title, which might possibly succeed, prevailed upon the king to consent to a law for their security.—Reeve's History of the English Law, vol. iv. p. 132. Lord Bacon characterises this law as 'rather just than legal, and more magnanimous than provident.' From several passages in Lord Hale's Pleas of the Crown, it appears that he thought that persons assisting an usurper, though in the actual possession of the crown, might be punished as traitors on the regress of the crown to the right heir. 1 Hale's P.C. 60, 61, 101 to 105. Mr. Ser-

geant Hawkins deduces from this statute the doctrine that 'a king out of possession is so far from having any right to 'our allegiance by virtue of any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him.'—Hawkins's P.C., book i.c. 17, s. 16. This doctrine is opposed by Sir William Blackstone, who says that the true distinction introduced by the statute is, that 'it does not command any opposition to a king *de jure*, but excuses the obedience paid to a king *de facto*.'—Commentaries, vol. iv. p. 77. Sir M. Foster, however, strongly supports Hawkins's position, and refers to the preamble of the statute of Henry VII., as 'a parliamentary declaration that by the ancient law and constitution of England, founded on principles of reason, equity, and good conscience, the allegiance of the subject is due to the king for the time being, and to him alone.' 'This,' he goes on to say, 'putteth the duty of a subject upon a rational and safe bottom.' Foster's Fourth Discourse, p. 399. The preamble to the statute recites '. . . . . .' In consequence of the difference of opinion expressed by learned writers as to the proper interpretation of this ancient statute, we have thought it better merely to give the words of the enactment in our Digest, and to submit the ultimate disposal of the question to the legislature. If it be determined that *bona fide* service rendered to a king *de facto*, should, under no circumstances, expose a party to the penalties of treason upon the eventual success of the king *de jure*, it will be easy to alter the expression of the law so as to effect the purpose without ambiguity.

"Art. 3. The term 'King' in the two preceding Articles, and in all other Articles relating to treason, shall be deemed to signify the person invested with the office and dignity of the King or Queen (d) of the United Kingdom of Great Britain and Ireland, and being in actual possession of the crown. (e).

(d) .....

(e) See note to Article 2; and 3 Inst. 7; 1 Hawkins, P.C. c. 17, s. 20. Sir M. Foster says, 'Protection and allegiance are reciprocal obligations; and consequently the allegiance due to the Crown must be paid to him, who is in the full and actual exercise of the regal power, and to none other. The warmest advocates for the distinction between Kings *de facto* and Kings *de jure*, and for the principles upon which it hath been founded, admit that even a King *de facto*, in the full and sole possession of the Crown, is a King within the statute of treasons. It is admitted, too, that the throne being full, any other person out of possession, but claiming title, is no King within the Act, be his pretensions what they may. These principles, I think, no lawyer hath ever yet denied. They are founded in reason, equity, and good policy.'—Foster's Discourse on High Treason, I. s. 8."

In 1845 a fresh Commission was issued. This Commission made five reports, the fourth of which dealt, *inter alia*, with treason and other offences against the state. In their report Article 2 (*supra*) was omitted with the following comment:

"We have omitted Article 2 of Section 1 of the Chapter of Treason (Act of Crimes and Punishments) as being unnecessary . . . . There can be no reason for inserting such an Article since the only treasons contained in the Digest consist of acts or intentions against the king *de facto*."

In 1878 a Royal Commission considered and passed a draft Code of Criminal Law drawn up by Stephen. Title I part 3 of this draft Code

is headed "Justification and Excuse for Acts which would otherwise be Offences" and Section 70 of this part is headed "Obedience to De Facto Law", and reads:

> "Everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the Sovereign power in and over the place where the act is one."

It will be noticed that in this section of the draft Code the words "for the time being", first introduced in the preamble to the Act passed by Henry VII in 1495, are retained.

The draft Code was embodied in a Bill but the Government was unable to find the time to get it through Parliament. The above provision has, however, been introduced into the statute law of New Zealand and Canada. Sir William Holdsworth reviews the work of these Royal Commissions in Vol. 15 of the *History of the English Law*, pp. 143-149.

Section 70 of the draft code is not, of course, part of the statute or common law of Britain and the law of allegiance to a *de facto* sovereign is still to be found in the statute of 1495, in the Interpretation Act, 1889, as well as in the common law.

In the English Interpretation Act, 1889, section 30, the following provision is to be found:

> "In this Act and in every other Act, whether passed before or after the commencement of this Act, references to the Sovereign reigning at the time of the passing of the Act or to the Crown shall, unless the contrary intention appears, be construed as references to the Sovereign for the time being, and this Act shall be binding on the Crown."

The formula used in section 30—"the Sovereign for the time being"—is identical with the formula used in the Act of Henry VII (11 Hen. 7. c. 1) and bears the same meaning.

This provision is clearly designed to remove any doubt as to the authority of a *de facto* sovereign and to afford to a *de facto* sovereign by statute the same recognition as the common law affords. It will be noticed that the section speaks of the "crown" in contradistinction to "the sovereign" Lord CRANWORTH in *Attorney-General v. Köhler* (1861 9 H.L.C. 654 at 671) said:

> "The crown is a corporation sole, and has perpetual continuance."

It is in this sense that the word "crown" is used in the above provision, and the words "shall be binding on the crown" are introduced to emphasize that the accession of a *de facto* sovereign to the throne does not interrupt the continuity of the law.

Mr. *Kentridge* submitted that the formula "for the time being" in this provision is not used in the same sense as it is used in the Act of

1495 and he submitted, in effect, that the words "the sovereign for the time being" add nothing to and mean no more than the earlier words "the sovereign reigning at the time". If this were true the provision would be meaningless. It is inconceivable that the legislature would not be fully aware of the ancient origin and constitutional significance of the formula, and it is inconceivable, too, that this ancient formula would have been used in the context of the above provision if it was intended to bear a meaning entirely different from the meaning which it has borne in English law since 1495.

That Mr. *Kentridge's* opinion is not shared by eminent constitutional lawyers in England is clear from the following extract from *Halsbury's Laws of England*, 3rd Ed., Vol. 7, para. 450:

> "Every King for the time being, whether he be an usurper or not, is a King regnant and is protected by the law of treason (Co. Inst. 7; (Bac, Abr., Prerogative, A; and see 11 Hen. 7 c. 1 (1495); and p. 208, *ante*. As to treason, generally, see title Criminal Law), and references in statutes to the reigning Sovereign are to be construed as references to the Sovereign for the time being, unless the contrary intention appears (Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 30. This Act is binding on the Crown (*ibid.*, s. 30))." (See, too, the earlier editions of this work.)

The English constitutional law on this aspect was expressly introduced into the law of Rhodesia by the following provision in the first Interpretation Act [Chapter I of the first edition of the revised statutes]:

> "In every law references to the Sovereign reigning at the time of passing of the law, or to the Crown, shall be construed as references to the Sovereign for the time being."

In the light of these provisions there can be no doubt that in Rhodesia, as in England, the word "sovereign" includes a *de facto* sovereign and that in both countries allegiance is owed to a *de facto* sovereign as the representative and embodiment of the state. If, prior to the 11th November, 1965, events similar to those of 1688 in England had been repeated and an usurper had occupied the throne in Britain, Rhodesians would, to the extent to which allegiance was owed to Britain at that time, have continued to owe such allegiance under English and Rhodesian law, notwithstanding the accession of an usurper to the throne.

A survey of the allegiance owed to an usurper under English constitutional law would not be complete without a reference to *Halsbury's Laws of England*. Reference has already been made above to the statement in Vol. 7, para. 450 of the 3rd Edition. The following passage in Vol. 7, para. 436, is also relevant:

> "Allegiance is by statute due to the Sovereign, whether the rightful heir to the Crown or not, and the subjects are bound to serve in war against every rebellion, power, and might reared against the Sovereign, and are

protected in so doing from attainder of high treason and from all forfeitures and penalties. (t)* The duty of allegiance is applicable to the Sovereign in both capacities, that is to say, as well in the natural as in the regal or political capacity.

"Allegiance has been distinguished as of three kinds, according to the persons from whom it is due, namely, natural, local, and acquired. The practical effect of owing allegiance is to be liable for the offence of treason."

(*Note (t) reads: "11 Hen. 7 c. 1 (1495). It is said by Lord HALE (1 Hale, P.C. 134) that if the right heir once had possession, and then a usurper got possession, but the right heir still continued his claim, and ultimately regained possession, a compassing of his death during the interval is treason) *sed quaere* owing to the provisions of 11 Hen. 7 c. 1 (1495)); but a compassing of the death of the *de facto* King, directed by the King *de jure*, who succeeds in obtaining the throne, is not treason (1 Hale, P.C. 103). As to treason, see also title Criminal Law").

The same view is expressed by the distinguished contributors of the title on *Criminal Law* (*ibid.*, Vol. 10, paras. 1025, 1026 and 1032):

"The King or Queen regnant for the time being, whether the rightful Sovereign or not, is within the provision of the Acts relating to treason and protected thereby. The rightful Sovereign out of possession is not, it is said, within the provisions of the Acts; neither is a consort other than the Queen Consort, and, if it be deemed necessary, he must be protected by a special Act. (para. 1025).

"The essence of the offence of treason lies in the violation of the allegiance which is owed to the Sovereign and which is due from all British subjects wherever they may be. (para. 1026.)

"Service in war under the Sovereign *de facto* is not an act of treason against the Sovereign *de jure*." (para. 1032.)

It will be seen from the authorities cited above that from 1495 until the present time it has been accepted as axiomatic in English legal theory that allegiance is owed to an usurper. In the light of the changes over the centuries in the constitutional position of the monarch and with the emergence of the modern territorial state, the English legal theory that allegiance is owed to an usurper means in the modern English constitutional law that allegiance continues to be owed to the state, notwithstanding revolutionary changes within it. Such allegiance compels, as one of its most important incidents, obedience to the laws of the government "for the time being" functioning within the state (*cf.* the views expressed by Glanville Williams (*supra*)). Thus, the laws of the government "for the time being" under William and Mary after 1688, and the laws of the governments "for the time being" during the Commonwealth (1641-1660), were laws which residents in the United Kingdom, pursuant to their duty of allegiance, had to obey.

It will be noticed that a difference of opinion exists regarding the duty, if any, owed to a monarch who, because his throne has been

usurped, is out of possession. When allegiance was owed to the monarch in his personal capacity and the concept of allegiance to the state had not been developed it was understandable that the problem of the allegiance owed to such a monarch should have exercised the minds of jurists and resulted in dispute. But with the changes that have come about in the concept of allegiance there can, I suggest, be no doubt that the views of Hawkins and Foster are to be preferred to those of Hale and Blackstone (see, in this connection, note (t) to paragraph 436, Vol. 7 of *Halsbury's Laws of England* (*supra*).

A study of the events subsequent to the revolution in 1688 reveals that the majority of persons living in the United Kingdom, whether they were aware of the views of Hawkins and Foster or not, acted in conformity to them in resisting the attempts of James II and his heirs to regain the throne. It is not essential, however, to resolve the dispute between Hale and Blackstone on the one hand, and Hawkins and Foster on the other for the purpose of deciding the fundamental constitutional issue in this case which is whether the laws of a government "for the time being", that is, of a *de facto* government, must be obeyed. On this aspect there is no disagreement at all between English jurists.

A study of Rhodesia's constitutional position prior to the 11th November, 1965, leads to the conclusion that although it was certainly not at that time a full sovereign state it was in the sense in which Lauterpacht uses the phrase (Oppenheim's International Law, Vol. 1, 8th Ed., paras. 64-69) "a not-full sovereign State", and as such attracted the allegiance of persons living within its borders.

The need to consider the constitutional position in dealing with allegiance is emphasized by Wheare in his book, *The Statute of Westminster and Dominion Status*, 5th Ed., where, dealing with the position of the Dominions under the Statute of Westminster, at p. 291 he said:

> "In the first place they said that they were all freely associated members of the British Commonwealth of Nations. In the second place they said that they were united by a common allegiance to the Crown. It is not easy to say just precisely what each of them meant by this. 'Allegiance' is a legal term. It describes the mutual bond and obligation between the King and his subjects, or, in certain circumstances, aliens. It has a central position in the law of treason. It was true, as a matter of law, that people in the Dominions and in the United Kingdom in 1931 did all owe allegiance to the King. What that allegiance involved in terms of law might not be identical in each member; it would be determined by the law of that member."

Lord COLERIDGE indicated the fundamental constitutional changes which had taken place between the delivery of his judgment in 1886 and the decision in *Calvin's* case (*supra*) in 1608. The constitutional changes which have accompanied the disintegration of the British

Empire have been no less fundamental than those which took place before 1886.

Prior to the 11th November, 1965, Rhodesia was subject to the sovereign power of two separate and distinct governments, the British and Rhodesian. British sovereign power related almost exclusively to foreign affairs and external security. Power in respect of external affairs was not expressly reserved under the 1961 Constitution and arose from the fact that Britain possessed limited powers of disallowance under the Constitution. Because these residual powers were vested in Britain Rhodesia was not a state within the meaning of international law and lacking this status was unable to manage all her external affairs.

Wight in his book, *British Colonial Constitutions 1947*, deals with Rhodesia's constitutional position prior to the 1961 Constitution and accurately sums it up at p. 38 as follows:

> "There is no absolute distinction between what we have called semi-responsible government and the responsible government that is enjoyed by Southern Rhodesia. Responsible government of this kind—responsible government short of independent status—may be defined by the absence of any internal control by the imperial government, and the dwindling of its external control to a point where it no longer includes any positive legislative powers apart from the sphere of foreign relations and defence. With this abiding exception, the residue of external control is negative in character. It can comprise a limitation on the scope of the colonial legislature, and the retention of a minimum power of constituent amendment by the Crown. This is the position in Southern Rhodesia. The political dualism is now only vestigial; the imperial government has become a sleeping partner; its power is atrophied. As to the negative legislative powers of the governor and the Crown—the governor's power to refuse assent and to reserve bills for the ascertaining of the Crown's pleasure, and the Crown's power of disallowance—these tend to become obsolete, because they submit to the conventions governing the Crown's legislative veto in the United Kingdom."

The purpose and effect of the 1961 Constitution was to reduce these vestigial powers still further. Indeed, because of the changes introduced by that Constitution and the conventions governing the Crown's legislative veto in the United Kingdom, these vestigial powers had almost reached vanishing point.

A further advance towards full independence occurred when Britain in enacting the British Nationality Act, 1948, expressly conferred on Southern Rhodesia the right to create a distinctive "Southern Rhodesian citizenship." For the purposes of the Act, Southern Rhodesia was treated in exactly the same way as a Dominion (section 1) and was expressly excluded from the definition of "colony" in section 32.

The importance of nationality in deciding whether a country has one of the essential attributes of a state, the power to create its own nationals, is discussed at pp. 642 *et seq.*, in *Oppenheim's International Law*, Vol. 1 *(supra)*. At p. 645 the author remarks, correctly in my view, that:

> "In the British Commonwealth of Nations it is the citizenship of the individual States of the Commonwealth which is primarily of importance for International Law, while the quality of a 'British subject' or 'Commonwealth citizen' is probably relevant only as a matter of the Municipal Law of the countries concerned."

The new basis of citizenship introduced by the 1948 Act is discussed at length by Parry *(Nationality and Citizenship Laws, 1957)* at pp. 93 *et seq.*, and at p. 99 he emphasizes that the status of a British subject is a secondary status, local citizenship being the primary status:

> "Though, as has been seen, the status of a British subject has been made, under the new system, a secondary status, capable of acquisition, the transitional case of British subjects without citizenship apart, only as a result of acquisition of local citizenship, and although the ancient concept of allegiance has been ignored altogether in the definition of local citizenship, the bases of nationality have not in fact been altered much. Allegiance is now the consequence rather than, as before, the cause of the acquisition of nationality."

The primary result of Rhodesian citizenship is the duty of allegiance to "the not-full sovereign State" of Rhodesia. The concept of local allegiance is by no means novel. Thus, in note (m) on p. 528 of Vol. 1 of *Halsbury's Laws of England*, it is correctly stated:

> "So from a very early period there have been colonial British subjects, i.e. persons whose allegiance was local and did not apply outside the territorial area of the Government by which naturalisation was conferred (*R. v. Francis, Ex parte Markwald* [1918] 1 K.B. 671; *Markwald v. A.-G.* [1920] 1 Ch. 348)."

The remarks of the judges in the two cases cited in this footnote are most pertinent. It should be remembered that Britain has not always accepted responsibility for protecting naturalized British subjects outside the territory in which they were naturalized (see, *Nationality and Citizenship Laws (supra)* pp. 13, 77).

Having regard to the provision of the *Southern Rhodesian Citizenship and British Nationality Act, 1949* (now Act 63 of 1963), Mr. *Kentridge's* submission that Rhodesian residents owe allegiance to "the Queen of the United Kingdom and Colonies" is quite untenable.

The primary allegiance of all Rhodesian citizens prior to the 11th November, 1965, was to the Queen in right of Rhodesia, that is, to the "not-full sovereign State" of Rhodesia. The secondary allegiance of Rhodesian citizens prior to the 11th November, 1965, was to the

State of Britain for the external protection afforded to them by Britain.

The vital question for decision is the effect of the Declaration of Independence on the allegiance owed by Rhodesian citizens to Britain and Rhodesia, respectively.

The result of the declaration was to create a conflict between these two allegiances; a conflict in the sense that it is clearly not possible for Rhodesian citizens to obey the dictates of both governments since their laws affecting Rhodesia are no longer in harmony. The question of which government is to be obeyed in the circumstances now existing is settled by applying the principles of the English conflict of laws. These principles have been developed as a result of the emergence of the modern territorial state. Sir William Holdsworth notes the foundation of these principles when he remarks at p. 310 of Vol. 8 of his *History of the English Law*:

> "In the first place, the modern territorial state was now well established. It was coming to be generally recognized that allegiance to the state ought to override all other ties."

To the same effect is his remark in Vol. 6, *ibid.*, p. 291:

> "The coming of the territorial state had made the problem of sovereignty the political problem of the century." (The learned author is referring to the seventeenth century.)

Story (*Conflict of Laws*, 7th Ed.), indicates how this problem was resolved and refers with approval to the views expressed by Vattel at p. 9:

> "And he affirms in the most positive manner (what indeed cannot well be denied), that sovereignty, united with domain, establishes the exclusive jurisdiction of a nation within its own territories, as to controversies, to crimes, and to rights arising therein."

At p. 19, dealing with general maxims of international jurisprudence, he says:

> "The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every state affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it.....
>
> "Accordingly, Boullenois has laid down the following among his general principles (Principes généraux). He says, (1) He, or those, who have the sovereign authority, have the sole right to make laws; and these laws ought to be executed in all places within the sovereignty where they are known, in the prescribed manner. (2) The sovereign has power and authority over his subjects, and over the property which they possess within his dominions." (p. 20.)

Lord *Russell* expresses the same idea in *Carrick v. Hancock* 12 T.L.R. 59:

"All persons within any territorial dominion owe their allegiance to its sovereign power and obedience to all its laws and to the lawful jurisdiction of its courts."

Parry (*Nationality and Citizenship Laws, 1957*) emphasizes the same point:

"Now the term 'personal jurisdiction' is familiar enough. It connotes a jurisdiction which a State has outside its territories over individuals, irrespective of the local situation of such individuals. It is thus to be distinguished from territorial jurisdiction, and from quasi-territorial jurisdiction, i.e., the jurisdiction which a State may claim over persons aboard ships wearing its flag." (p. 14)

"The rules, such as they are, defining the extent of personal jurisdiction are, as has been seen, inadequate guides as to who is or may be made a national of a particular State. And the reason for this, as has also been seen, is that territorial sovereignty has always been the principal basis of jurisdiction. Both jurisdiction and allegiance have largely been conceived as of geographical tracts, and theories of the State as a jurisdictional complex divorced from territory have had little influence in international law." (p. 19) (*cf. Oppenheim's International Law (supra)*, Vol. 1. p. 645).

Westlake's *(Private International Law, 6th Ed., p. 365)* view is very much in point:

"Nationality is always in principle single, and where a person is claimed by two states, either from a conflict between the *jus soli* and the *jus sanguinis* or for any other reason, we are in presence of jarring claims to his entire allegiance. So far as in either state its claim has to be dealt with by its courts of law, it will be enforced in accordance with the law of that state on its national character. But so far as the claim has to be dealt with by the executive, as in the question whether legal treason shall be pardoned in deference to the culprit's justification of his conduct by his tie to another state, or in that whether protection shall be extended to a legal subject abroad, the executive is free to act with due consideration of the circumstances."

Schmitthof, in his 3rd Ed., p. 423, of the *English Conflict of Laws*, states the position as follows:

"In the conflict between territoriality and allegiance, however, territoriality is regarded by the English conflict of laws as the superior principle."

The reason why territoriality is the superior principle is simply that the existence of a sovereign power exercising, at least, internal sovereignty within a territory is essential to the well-being of its inhabitants. The authority which an external sovereign power seeks to exercise within a territory from outside must, of necessity, conflict with the authority of an existing internal sovereign power in the territory and chaos would result if the territorial courts were to attempt to support such an external sovereign power in defiance of the existing internal sovereign power.

I entertain no doubt at all that the present Rhodesian Government is a *de facto* government and I have nothing to add in this regard to the views expressed by the Chief Justice and the Judge President.

The result of the application of the principles of English constitutional law governing allegiance to a *de facto* government within a state and of the principles of the English conflict of laws governing a situation which arises when the allegiance of a citizen is claimed by two competing states is that the allegiance of Rhodesian citizens at the present time is owed exclusively to Rhodesia. The correctness of this view can be demonstrated by considering the allegiance of a person who has taken up residence in Rhodesia since the 11th November, 1965. There cannot be the slightest doubt that because territoriality is the superior principle such a person, so long as he remains, owes allegiance exclusively to Rhodesia. It is not possible for residents to have differing allegiances because, as Westlake says, "Nationality is always in principle 'single'." This does not mean that plural nationality is impossible but simply that where there are competing claims by different states to a person's allegiance, the claim with a territorial basis is paramount.

This allegiance to Rhodesia imposes a duty of obedience to the laws which continue in force under the authority of the *de facto* government, as well as in laws passed by it; provided, of course, these are passed in accordance with the *de facto* constitution; the duty of service is also a consequence of the allegiance owed to Rhodesia and this duty would include service against British forces if an invasion of Rhodesia were to be contemplated. A necessary corollary of this duty of allegiance is that the *de facto* government of Rhodesia is protected in its task of governing by the laws of treason.

In the light of the English law governing the allegiance owed to a *de facto* sovereign, the protection afforded a *de facto* sovereign by the laws of treason and the principles which apply when a conflict of allegiance arises, it is instructive to consider the decisions reached in the American courts after the illegal Declaration of Independence on the 4th July, 1776. The American courts were faced with precisely the same problem as this Court but it should be borne in mind that whereas Rhodesia, with responsible government, the power to legislate extra-territorially and the power to create its own citizens, had almost reached full statehood, the American colonies were "colonies" in the fullest sense of the word; indeed, in 1776 the constitutional device of responsible government had not, as yet, been fully developed.

In the case of *Respublica v. Chapman* 1 Law. Ed. 33, which was heard in the Supreme Court of Pennsylvania in 1781, M'KEAN, C.J., at p. 35 stated the law of allegiance as follows:

"Locke says, that when the executive is totally dissolved, there can be no treason; for laws are a mere nullity, unless there is a power to execute them. But that is not the case at present in agitation; for before the meeting of council in March, 1777, all its members were chosen, and the legislature was completely organized: so that there did antecedently exist a power competent to redress grievances, to afford protection, and, generally, to execute the laws; and allegiance being naturally due to such a power, we are of opinion, that from the moment it was created, the crime of high treason might have been committed by any person, who was then a subject of the commonwealth."

This was not, of course, a decision that from the moment of the Declaration of Independence everyone living in Pennsylvania owed perpetual allegiance to the *de facto* sovereign power but simply that temporary allegiance was owed by everyone within the protection of the *de facto* sovereign power to such power. The circumstances in which persons residing in the American Colonies after the 4th July, 1776, ceased to owe perpetual allegiance to the Crown and became citizens of the United States is a different, although related, question and is dealt with in such leading cases as *Inglis v. The Trustees of the Sailor's Snug Harbor* 7 Law. Ed. 617 and *United States v. Wong Kim Ark* 42 Law. Ed. 890.

In *Ware v. Hylton* 1 Law. Ed. 568 at 579 CHASE, J., in 1796 stated the effect of the Revolution on the allegiance of persons resident in the Colonies after the Declaration of Independence as follows:

"From the 4th of July, 1776, the American states were *de facto* as well as *de jure*, in the possession and actual exercise of all the rights of independent governments. On the 6th of February, 1778, the King of France entered into a treaty of alliance with the United States; and on the 8th of Oct., 1782, a treaty of amity and commerce was concluded between the United States and the states general of the United Provinces. I have ever considered it as the established doctrine of the United States, that their independence originated from, and commenced with, the declaration of Congress, on the 4th of July, 1776; and that no other period can be fixed on for its commencement; and that all laws made by the legislatures of the several states, after the declaration of independence, were the laws of sovereign and independent governments."

In *M'Ilvaine v. Coxe's Lessee* 2 Law. Ed. 598 CUSHING, J., dealt with the same question at p. 599 and said:

"The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by the ties of allegiance.

"This opinion is predicated upon a principle which is believed to be undeniable, that the several states which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign states, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it."

In *The Pizarro* 4 Law. Ed. 226 at 231 STORY, J., states the rule of international law:

> "Indeed, in the language of the law of nations, which is always to be consulted in the interpretation of treaties, a person domiciled in a country, and enjoying the protection of its sovereign, is deemed a subject of that country. He owes allegiance to the country, while he resides in it; temporary, indeed, if he has not, by birth or naturalization, contracted a permanent allegiance; but so fixed that, as to all other nations, he follows the character of that country, in war as well as in peace."

In my view, the opinions expressed by the learned judges in these cases conform to the principles of the English law of allegiance and the English conflict of laws and are undoubtedly correct.

Bearing in mind the English law governing allegiance to a *de facto* sovereign, it is of value for this Court to consider the conduct of English judges in the face of internal revolution.

The early history of England and the English law relating to the allegiance due to a *de facto* sovereign explain in large measure the view strongly adhered to by all English judges that the judiciary should not meddle in politics. That this view extends not only to issues between political parties but also to issues having a fundamental and even revolutionary effect on the existing constitutional position is, I think, clear.

The attitude of the English judges during the 14th and 15th centuries to internal strife and constitutional dispute is summed up by Sir William Holdsworth in Vol. 2, *ibid.*, 3rd Ed., p. 560, in the following passage:

> "As in the seventeenth century so in the fourteenth, the judges either chose or were compelled to take the side of the Crown—with results disastrous to themselves. The circumstances which led to this unfortunate incursion of the judges into the arena of politics began in 1386 with the impeachment of de la Pole, the chancellor, and the appointment of the commission which took away from the king the government of the state. The king determined to get a judicial opinion that all this was contrary to law. Tresilian, the chief justice of the King's Bench, who was devoted to the royal interests, summoned the judges to Shrewsbury and afterwards to Nottingham, and there presented to them a set of questions and answers to which he desired them to append their seals. All the judges who appeared assented to the propositions, either voluntarily or, as they afterwards alleged, under threats of violence. As soon as Parliament met all these judges were arrested. Tresilian at first escaped, but having imprudently come to Westminster in disguise, he was arrested and executed. The rest were condemned to death; but their lives were spared upon the intercession of the queen and the bishops, and they were sentenced to banishment to various parts of Ireland.
>
> "The part which the judges played during the reign of Richard II is in striking contrast with the part which they played during the Wars of

the Roses. They refused to commit themselves to either party; and whether the Lancastrians or the Yorkists were uppermost the same men continued to administer the law. No doubt this is partly due to the fact that no great principle was involved. The dynastic claims of the house of York were but the pretext for the outbreak of a turbulence with which the government had long found it difficult to cope. But it is probably also due to the fact that, as the professors of the law withdrew from political life, they had very little interest in dynastic or personal feuds, and were more and more unwilling to intervene in political disputes. The House of Lords tried in vain to extract from the judges a decisive opinion upon the legality of the Duke of York's claim to the throne. They would only say that it was not for them to decide such high matters of policy—it was rather a matter for the lords who were of the king's blood. (The learned author in a footnote adds: '. . . they explained that their proper business was to do justice between party and party, and that this 'matter was so high, and touched the king's high estate and regalie, which is above the lawe and passed their lernyng; wherefore they durst not enter into any communication thereof, for it perteyned to the Lordes of the Kyng's blode . . to meddle in such matters.'). The king's serjeants and attorney, when applied to, said that if the judges could give no opinion *a fortiori* they could not do so. Similarly in Thorpe's Case they declined to give any decided opinion upon the scope of Parliamentary privilege; and thus the establishment of the rule that Parliament only is the proper judge as to the mode of the user of its privileges may have originated partly in the natural dislike of the judges of this period of civil war and comprehensive acts of attainder to give opinions upon questions of mixed law and politics. At any rate, the breadth of the terms used in laying down the rule in this case has required explanation in more settled times when they were less fearful of dealing with such cases.

"But though the judges were averse from interfering with cases of a political kind, they did not shrink from upholding the independence and the majesty of the law."

At p. 559 the learned author remarks:

"All through this period we see the feeling growing that the law should be supreme above party strife, and that the judges should be supreme above party strife, and that the judges should hold their offices undisturbed by political changes."

Sir William Holdsworth deals with the position of the judges during the 16th century and the first part of the 17th century in Vol. 5, *ibid.*, pp. 340-355, indicates the high standard attained under the Tudors and remarks at p. 350:

"We cannot doubt but that the position which the judges thus occupied outside political controversy, coupled with their just reputation for learning and uprightness, led to a respect for their rulings and decisions which helped in no small degree the peaceful government of the state."

In the first half of the 17th century and, in particular, under Charles I, the position of the judges changed for the worse, but it was not until the Great Rebellion under Cromwell and the execution of Charles I in

the course of that rebellion that the allegiance of judges in a revolutionary situation again assumes importance.

Sir William Holdsworth deals with this period in Vol. 1, *ibid.*, 3rd Ed. at pp. 428-434. Referring to the administration of the common law he says at p. 429:

> "The common lawyers had generally been favourable to the cause of the Parliament; and, although comparatively few approved of the execution of the king and the revolutionary measures which accompanied it, though drastic changes were proposed in the judicial system of the common law, very little change was actually made. The King's Bench became the Upper Bench; the Common Pleas remained as before; and it was not till 1657 that the jurisdiction of the court of Exchequer was in any way affected; some of the Palatine jurisdictions were included in the judges circuits; the reform made by the Act of Settlement in the tenure of the judges offices was anticipated when they were appointed during good behaviour. But otherwise the machinery of justice worked much as usual. The justices of the peace continued to perform their functions, and the judges rode their circuits."

At p. 431 he says:

> "It is true that the Commonwealth government found it necessary to establish High Courts of Justice to deal, as the Star Chamber had dealt, with political offences; and that it gave them powers to try and sentence to death those convicted of treason—a jurisdiction more extensive than any that the Star Chamber had ever possessed."

And after referring to the changes which were proposed in Chancery but never made, he remarks at p. 433:

> "But the Nominated Parliament was dissolved before its bill for the reform of the Chancery could become law; and matters went on very much as before."

Further light on this period is shed by the following statement by Shaw (*Cambridge Modern History*, Vol. 4, p. 435):

> "Beneath the Council and the concomitant Parliament the lower ranges of administration remained practically undisturbed. After negotiations with the Parliament a sufficient number of judges were induced to continue in office to work the Common Pleas and the Upper (formerly the King's) Bench . . "

See, too, the earlier comments in this judgment on the conduct of judges during the Commonwealth and Protectorate (1641-1660) and after the Revolution of 1688.

The municipal courts, unlike a foreign government, cannot wait upon events. The function of courts of law within a territory is to maintain law and order and to avoid by every possible means anarchy, chaos, or uncertainty and this is an urgent task. I adopt with respect the following statement by Bodenheimer in his book on *Jurisprudence* (Harvard

University Press, 1962) at p. 237 regarding the overriding aims and objects of the law:

> "When a state of balanced power and social equilibrium has been achieved, the law will strive to protect it from serious disturbances and disruptions. This is one of the essential functions of the law. The elimination of tensions which the law attempts to bring about would be largely illusory and of little value if the adjustments and arrangements made through legal control were of an entirely temporary and fleeting character. Law, wherever its reign is securely established, will seek to avoid and thwart indiscriminate, chaotic, and perpetual change and to surround the existing social structure with certain guarantees of continuity and durability. A totally ephemeral system of law which does not aim at least at temporary consolidation and self-perpetuation of its normative arrangements is hardly consistent with the stabilizing objectives of the institution."

The lesson to be gleaned from the history of English law is that judges should not allow themselves to become embroiled in political controversy and, in particular, should not take part in revolutionary or counter-revolutionary activity. If a judge believes that a situation has arisen which in all conscience compels him to exercise the "sacred right" of revolution or counter-revolution he should leave the Bench and not seek to use his position on it to further his revolutionary or counter-revolutionary designs. The more unsettled the times and the greater the tendency towards the disintegration of established institutions, the more important it is that the court should proceed with the vital, albeit unspectacular, task of maintaining law and order and by so doing act as a stabilizing force within the community. This objective can only be achieved if the acts of a government "for the time being" within the state are given the force of law. Under English law judges, in common with all other citizens, owe allegiance to the state and this allegiance involves obedience to and service under the government "for the time being" within the state. Moreover, a *de facto* government under English constitutional law is, as stated earlier, protected in its task of government by the laws of treason. Thus, for example, acts prohibited by the Treason Act, 1351, and committed against William III, or his Government, would unquestionably have constituted treason, and the Treason Acts of 1695 to 1696 were passed in conformity with the common law of England. Compare, in this connection, the treatment meted out to the "rebels" who supported the "lawful" heir in his attempt to regain the throne of England at the battle of Culloden in 1745. Unless the views of Foster and Hawkins regarding allegiance are correct these "rebels" were wrongly convicted of treason.

Under our system of government sovereign power is shared between three principal departments of government—the legislature, the executive and the judiciary—and of these it is the legislature which posesses paramount power. Co-operation between these three departments is

essential if orderly government is to be established and maintained. The refusal by any one of these departments to co-operate with the other two can, at best, lead to grave uncertainty and at worst to anarchy.

Mr. *Kentridge* submitted that this Court is, as a matter of law, functioning at the present time under the 1961 Constitution and that giving effect to that Constitution, this Court had no option but to declare illegal acts done under and by authority of the 1965 Constitution. If it were true that the judges of this Court are, in law, functioning under the 1961 Constitution and that their oaths of allegiance and judicial oaths oblige them to apply that Constitution and no other, Mr. *Kentridge's* arguments would be unanswerable. In these circumstances, the recognition by the judges of this Court of the acts of the existing legislature and executive functioning under the 1965 Constitution could only be given if all or some of the judges of this Court made a personal decision to join the revolution. The flaw in Mr. *Kentridge's* argument is that the provisions of English constitutional law and, in particular, the respect paid under English constitutional law to the government "for the time being", have been ignored. Indeed, the existence of such respect is denied. I am satisfied that this denial is made in the face of overwhelming authority. As indicated above, English constitutional law is unique in making express provision both in its common law and statute law for the possibility of revolutionary change. The English law on this aspect is summed up pithily by Hobbes in his statement (adopted by Austin and cited above) that, "the legislator is he not by whose authority the law was first made but by whose authority it continues to be law". And this is the effect of the definition of "sovereign" in the Interpretation Act, 1889. There is no difference in law between a written constitution and an unwritten constitution and under English constitutional law respect is paid not to a constitution as such but to the government which by its authority gives the constitution the force of law.

Constitutions and governments constantly change in the course of history and, not infrequently, by revolution, but, in the words of Sir William Holdsworth *(supra)*, "the laws and institutions . . . the product of the long political and legal experience of the race" continue and it is with the preservation of these fundamental laws and institutions that the courts are vitally concerned. So long as this vital function can be performed it must be performed, and nothing is more likely to do permanent harm to fundamental laws and institutions than open conflict between the courts and the government—be it *de jure* or only *de facto*. This is the approach which I am satisfied English judges, as a result of experience over the centuries, have adopted in similar situations and this is the approach which this Court should adopt. The desire of the opponents of an existing government

to draw the courts into political controversy must be resisted. If this Court, in the circumstances which presently exist, were to insist upon compliance with the 1961 Constitution, it would be acting not in accordance with constitutional law but in a counter-revolutionary capacity.

If the judiciary were to reject any of the laws of the government "for the time being" duly passed in accordance with the constitution under which the government functions, its action would be counter-revolutionary and calculated to precipitate an entirely new conflict. The function, however, of a judge is to assist in bringing about stability, not conflict.

Before a government can be said to be a *de facto* government it must be effective in all its departments—the legislature, executive and judiciary. This means of necessity that each department must recognize and accept the authority of the other two in their respective spheres of influence.

If the judiciary refuses to recognize and accept the acts of the executive and legislature performed in accordance with the constitution under which these departments operate, the effect of such refusal is to deny the effectiveness and authority of these constituent elements of government.

It follows that it is not possible for a court to rely upon the effectiveness of a government as the justification for enforcing its acts but at the same time assert that it is free to exercise a discretion in deciding which acts it will enforce.

Cutting through all subterfuge and pretence, TANEY, C.J., stated the true position with admirable clarity and directness in *Luther v. Borden* 7 How. 1; 12 Law. Ed. 581:

> "Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

In the court *a quo* LEWIS, J., while asserting that the government was an effective government, fell into the error of denying this assertion by

claiming the right to refuse to recognize as valid acts of the legislature and executive carried out in accordance with the constitution under which they operate. If the effectiveness of a government provides the justification for treating its acts as valid, it cannot possibly be a ground for refusing to treat some of its acts as valid, that they are designed to make the government even more effective; that is, are in aid of the revolution. Avoiding this pitfall, GOLDIN, J., as I understand his judgment, accepted that the recognition of a government as an effective government necessarily implies full recognition of its legislative and executive competence.

Once the correct role of the courts in the present situation is determined there can, in my view, be no doubt at all that the present Government is a *de facto* government. It was in full possession of the reins of internal self-government before the 11th November, 1965. Since that date it has continued in full possession of them and has been solely responsible for the protection and security of Rhodesian citizens in Rhodesia. Indeed, it was only the uncertainty which existed in regard to the attitude of the High Court which cast any doubt upon the status of the Government. For the reasons given in this judgment, I am satisfied that all doubt on this aspect should now be removed and that it is the duty of this Court to state clearly that obedience and service is owed by the judges of this Court and by all persons resident in Rhodesia to the *de facto* government at present in control. I am satisfied this is a consequence of the allegiance owed by Rhodesian citizens to Rhodesia and, in my view, it would be wrong for this Court to weaken the authority of the Government in its crucial task of maintaining law and order by suggesting, contrary to what I believe to be clearly the law, that the Government is not entitled to the full obedience and service of Rhodesian citizens at the present time or that its legislative competence is limited by a requirement that it must adhere to the 1961 Constitution. The acceptance of this limitation would, as a matter both of law and fact, involve the abandonment of the Revolution and a return to the 1961 Constitution.

The cases coming before the courts provide eloquent testimony of the need for protection and of the threat to security of Rhodesia which has existed not only since the 11th November, 1965, but from a much earlier time.

While I am satisfied that the government "for the time being" within the state commands obedience and service. it must not be thought that it is my view that judges, warned in advance of a government's intention to set aside the existing constitution, should stand by supinely and allow the unconstitutional act to take place without public protest and without taking all reasonable steps to prevent its occurrence. I believe that judges

are entitled to speak freely and publicly against unconstitutional change and that they lose the respect of the public if they fail to do so. I expressed these views prior to the 11th November, 1965. It was my view that by public statement the judiciary should support the persons and bodies opposed to unconstitutional action and by so doing attempt to dissuade the Government from taking the threatened course. I believed then and, with a better understanding and knowledge of the law governing the situation which presently exists, believe even more strongly now, that if judges intend to resist unconstitutional change within the state such resistance should precede the threatened change and should not be delayed until after the new "constitution" has been set up and a government has commenced to function under it. The role of judges pursuant to their allegiance to the state is to support the government "for the time being" within the state and to avoid both revolutionary acts before, and counter-revolutionary acts after, a revolution.

I do not believe that there is any legal basis on which the courts can give qualified support only to the government "for the time being" within a state. If such a government is the sovereign power within the state it is entitled to full support; if it is not the sovereign power it is not a government and is entitled to no support at all. There is no middle course and, indeed, the entirely novel idea that there may be runs counter to the concept of the need in the interests of every civilized society for an established government exercising sovereign power within its territory. The concept of a territory in which the judiciary, on the one hand, and the legislature and executive, on the other, are at loggerheads is a concept, not of established law and order but of anarchy and as such can find no place in law.

There was a constitutional counterstroke which could have been taken in response to the Declaration of Independence on the 11th November, 1965. This was the dismissal of the Ministers concerned in the unconstitutional act, the appointment of ministers in their place, followed by a fresh election within the period fixed by the 1961 Constitution. If this constitutional step had been taken those members of the public who wished, as the judges did, to follow a constitutional course would have had the opportunity of doing so. The course taken by the British Government, involving as it did the breach of established convention, was wholly unconstitutional. In addition, it was an unrealistic course because its practical effect was to leave the internal government in the hands of the existing government. In the circumstances, it is not surprising that the existing government, continuing its administration without interruption, became the *de facto* government, if not immediately, then certainly within a very short period of time.

While I was opposed to an unconstitutional declaration of independence by the Rhodesian Government, I was also completely opposed

to the course which the British Government proposed to take in the event of such a declaration. It was always my belief that countermeasures should be taken but that these should be taken within the framework of the 1961 Constitution. This was not done.

I am satisfied that the British Government should have adopted the counterstroke outlined above not only because it was the correct constitutional course but also because there was a strong possibility that by adopting it, the extreme act of waging economic war against a friend and ally could have been avoided. While the Rhodesian people have been united to a substantial extent by the initial unconstitutional counteraction taken by the British Government as well as by its subsequent approach to the United Nations (an approach of doubtful validity in international law and under the Charter and made in circumstances which violated almost every principle of natural justice enshrined in the common law of this country and England), it must be remembered that there were a large number of Rhodesians opposed to a unilateral declaration of independence.

My knowledge of Rhodesian affairs and Rhodesia leads me to believe that if the clear warning by the Rhodesian Government of an intended declaration of independence had been met by a firm statement that the constitutional counterstroke mentioned above would be taken, the risk of a division of loyalty between two "Governments" within Rhodesia would have been sufficient to deter the Rhodesian Government from taking independence unilaterally. Even if it would not have been sufficient, I am by no means satisfied that, supported by the Courts and a substantial section of the community, a constitutional Governnment appointed as a counterstroke under the 1961 Constitution would not, in fact, have established itself successfully.

It matters not, however, whether I am right or wrong in believing that the correct constitutional counterstroke would, by the one means or the other, have obviated any occasion for waging war. What is of importance is that the adoption of the correct constitutional course might have done so.

The attraction of the unconstitutional course in fact taken by the British Government was the clear belief in Britain that an economic war could not fail to bring Rhodesia to its knees in "weeks rather than months" coupled with the knowledge that when this happened Britain, as the victor, would be in a position to dictate Rhodesia's future.

The British Government in dealing with the Rhodesian situation makes frequent reference to its "principles". Surely a first principle of the British Government should be that before the extreme act of waging economic war against a friend and ally is embarked upon,

every reasonable and less harmful step, in particular, any constitutional step which might avoid the occasion for making a war at all, should first be taken?

This Court has been asked to declare that the Rhodesian Government is not only a *de facto* government but also a *de jure* government. In the sense that it is the only law-making and law-enforcing government within the state, a *de facto* government is the *de jure* government. This is what is meant by Wheaton *(supra)*, when he says:

> "A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*."

A municipal court recognizes the legality of the only law-making and law-enforcing government functioning "for the time being" within the state. It cannot do more and, in particular, it is not possible for a municipal court to ascribe to governments under which it functions different degrees of legality. From the point of view of a municipal court a government either is or is not lawful. I am satisfied that the present Government is the only existing law-making and law-enforcing government within the state of Rhodesia and if I am to carry on my functions as a judge I must enforce laws passed in accordance with the 1965 Constitution. To do so is in accordance with, and not in breach of, my allegiance to the state of Rhodesia. It is important, in this connection, to remember that in law it is the state and not a government within a state which has the quality of "perpetual continuance". Allegiance is owed to the state as a legal entity with perpetual existence. Obedience to the laws of the government "for the time being, and service under the government "for the time being", are requirements of the allegiance owed to the state and it is only in a loose and inexact sense that it is possible to speak of allegiance being owed to a particular government.

From time to time suggestions are made in public that a republic should be declared in Rhodesia. Her Majesty the Queen of Great Britain, acting on the advice of the British Government, has declined to accept the 1965 Constitution and is, accordingly, not performing any function under it. The effect of Her Majesty's decision is that Rhodesia is now a *de facto* republic and no longer enjoys a monarchical form of government. A declaration by the Government that this is now the constitutional position would serve no purpose.

My conclusions may be summarized as follows:

1. Rhodesian citizens, prior to the 11th November, 1965, owed allegiance on a territorial basis to the semi-independent state of Rhodesia, and on an extra-territorial basis to the state of Great Britain.

2. The effect of the Declaration of Independence on the 11th November, 1965, was to create a conflict between these two allegiances.

3. This conflict must be resolved by applying the principles of the English conflict of laws and the necessary conclusion is that allegiance is now owed on a territorial basis only; that is to say, exclusively to the state of Rhodesia.

4. Allegiance to the state of Rhodesia compels obedience to the laws of the government "for the time being" functioning within the state of Rhodesia, as well as service in the Armed Forces.

5. The present government is the government "for the time being" within the state of Rhodesia; that is to say, a *de facto* government within the meaning of English constitutional law.

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 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.

8. Her Majesty the Queen of Great Britain, has declined to accept any position under the 1965 Constitution. The effect of Her Majesty's decision is that Rhodesia is now a *de facto* republic.

I have had the advantage of reading the judgments prepared by the Chief Justice and Judge President on the *ultra vires* point and agree with their views. The orders made against the appellants were invalid because section 47 is *ultra vires*, and for no other reason. I agree with the order proposed, including the order for costs. This case is a constitutional test case and, in my view, it is right and proper that the costs should be borne by the State.

JARVIS, A.J.A.: Before the Declaration of Independence the basic law (Grundnorm) of Southern Rhodesia was to be found in (a) the Southern Rhodesia (Constitution) Act, 1961, of the United Kingdom, (b) the 1961 Constitution, (c) the Colonial Laws Validity Act, 1865, of the United Kingdom, and (d) the constitutional convention that the United Kingdom Parliament would not legislate for Southern Rhodesia in matters within the competence of the Southern Rhodesia legislature except with the agreement of the Southern Rhodesia Government.

The Southern Rhodesia (Constitution) Act, 1961, enabled Her Majesty in Council to revoke the 1923 Constitution and replace it with a new constitution. This is the origin of the 1961 Constitution referred to in this case. The Act also provided that the Order in Council so made could authorize the amendment or revocation of any of the provisions of the Order, in any manner specified by the Order in relation to those provisions, *but nothing in the Act authorized any other amendment or revocation of any of the provisions of the Order.* The Order in Council in question was cited as the Southern Rhodesia (Constitution) Order in Council, 1961, and the Annex to it (which contained the new constitution) was to be cited separately as the Constitution of Southern Rhodesia, 1961. Under section 22 of the former document the power of Her Majesty by Order in Council to amend or revoke it was limited in time to the day before the date of the coming into operation of the new constitution (the appointed day). Thereafter the only power left to Her Majesty by Order in Council to amend, add to, or revoke any of the provisions of the 1961 Constitution was the limited power contained in section 111 of the Constitution. If any other amendment of the Constitution was required by the United Kingdom Government a further Act of the United Kingdom Parliament was required and, of course, before such a measure could be enacted the agreement of the Southern Rhodesia Government was required in terms of the convention to which reference has been made. The Southern Rhodesia (Constitution) Act, 1961, thus, itself, provided a bar against any further amendment by Order in Council of the 1961 Constitution, except as provided in section 111 thereof.

The Colonial Laws Validity Act, 1865, was intended primarily to validate certain colonial laws by removing doubts about their validity. It has since come to be regarded, in theory at least, as a cornerstone in what used to be called the Imperial constitutional structure, because section 2 of that Act is said to "preserve to the Imperial Parliament a right of legislation for a Colony to which a local legislature has been assigned" (Halsbury's *Statutes of England*, Vol. 6 p. 523). Such provision is offset in Southern Rhodesia by the same convention to which I have referred.

When the Declaration of Independence was made the United Kingdom enacted the Southern Rhodesia Act, 1965, thereby indicating that the convention ceased to be binding, and the various Orders in Council were made in relation to Southern Rhodesia, to which reference has been made in other judgments in this case.

Jennings, in his book *The Law and the Constitution* (4th Edn.), deals at some length with the conventions of the constitution and says:

> "The short explanation of the constitutional conventions is that they provide the flesh which clothes the dry bones of the law; they make the legal constitution work; they keep it in touch with the growth of ideas. A constitution does not work itself; it has to be worked by men." (p. 80.)
>
> "They determine the manner in which the rules of law, which they presuppose, are applied, so that they are, in fact, the motive power of the constitution . . these conventions are always directed to secure that the constitution works in practice in accordance with the prevailing constitutional theory of the time." (p. 82.)

A convention is often a recognition of political reality. The convention to which I have referred is a recognition of the reality that the Southern Rhodesia Government was in effective control of its internal affairs and that the United Kingdom Government was unable to govern or enforce its own laws in Southern Rhodesia, so far distant from Westminster. That this is so is borne out by the results. If the convention is regarded as no longer binding the political reality has remained, and the Orders in Council which have been made are not being, and cannot be, enforced in Southern Rhodesia.

The apparent object of the 1965 Constitution was to establish Southern Rhodesia as an independent sovereign state within the British Commonwealth, with the Queen as its head. The unlawful act of repudiating the 1961 Constitution, the Declaration of Independence, the purported substitution of the 1965 Constitution (which collectively may be said to have constituted an act of usurpation), and the lack of enforcement of the legislative measures taken by the United Kingdom, have, in combination, brought about a state of affairs in which Southern Rhodesia as a matter of strict law is without an effective, lawful government, although this Court, duly constituted for the purposes of the 1961 Constitution, has continued to sit *in mediis rebus* without interference.

It is accepted that the situation is unprecedented, and this fact makes it exceptionally difficult to ascertain the law to be applied in present circumstances. A wide range of authorities were referred to in argument, which have been extensively examined and referred to in the judgment of the Chief Justice. I propose to avoid, as far as possible, repetitive reference and quotations from authorities and to confine my views to a limited number of matters.

In the judgment of the court *a quo* both judges found that the present Government had complete and effective control within the boundaries of Southern Rhodesia. The sanctions which have been imposed in order to bring down the present government have undoubtedly had some effect on the economy of the territory. The evidence contained in the affidavits which were produced on this part of the inquiry do not enable me, on a balance of probabilities, to come to any firm conclusion as to the likelihood or otherwise of the success of sanctions. It is a matter of common knowledge that the agricultural industry has suffered a severe setback, particularly in its tobacco production, and adverse weather conditions might at any time aggravate the position. On the other hand, the building industry, which in this territory at least is regarded as one of the guides in assessing the economic situation, has enjoyed such an upsurge of building activity as to indicate a reliable trend in the opposite direction. Moreover, one cannot conclusively eliminate the possibility of a settlement being reached in the political dispute. It cannot be said yet that the revolution has succeeded. I find as a fact that the present Government still has effective control of the territory and this control seems likely to continue.

This is emphasized in a statement which appeared recently in the Rhodesia press, which purported to set out verbatim the reply the United Kingdom Foreign Office gave to a demand by Zambia that certain police officers of the Republic of South Africa who had strayed into Zambia should be sent to the United Kingdom for trial there, for a breach of Rhodesian law. The newspaper report, which sets out the reply from the Foreign Office in quotation marks, reads as follows:

> "Even if they had committed a crime under Rhodesian law, they couldn't be tried here any more than a British criminal could be tried in Rhodesia. Rhodesia has had internal self-government—including its own legal system since 1923—so it's out of our jurisdiction."

I appreciate, of course, that one cannot accept a newspaper report as a correct statement of facts and I am not taking this report into account at all in my judgment. I merely mention it, however, in order to draw attention to the fact that should this report be accurate it is abundantly clear that, despite the fact that the United Kingdom Government has given no diplomatic recognition to the present Rhodesian Government, it at least accepts as a fact that the present Rhodesian Government is in "effective" control of Rhodesia and the United Kingdom no longer has any jurisdiction to interfere in an internal Rhodesian matter. This would, of course, greatly fortify my conclusion as to the effective control which the present Government exercises over the territory.

The High Court was established under the Southern Rhodesia Order in Council, 1898, and continued to be the High Court for the purposes of the 1923 Constitution. Section 11 of the Southern Rhodesia (Constitution) Order in Council, 1961, provided that it should continue to be the High Court of Southern Rhodesia for all purposes under the 1961 Constitution. Since the Declaration of Independence, provisions of the 1961 Constitution regarding the legislature and executive have been suspended by the legislative measures taken in the United Kingdom. It is, I think, agreed that before the Declaration of Independence this Court derived its jurisdiction from the 1961 Constitution. That Constitution had a legal origin. Chapters 5 and 6 of that Constitution have not been lawfully repealed or suspended. Chapter 5 deals with the establishment of this court, its jurisdiction, the appointment, tenure of office and removal from office of its judges, and of the law to be administered. Chapter 6 deals with the Declaration of Rights. Both form part of the law of Southern Rhodesia, having been lawfully enacted. The 1965 Constitution has an extra-legal origin and can only become law if and when the revolution is successful, in which event it becomes a *de jure* constitution. Until the 1965 Constitution becomes "law" any "deeming" provisions contained in that Constitution can have no legal force and effect because the operation of "deeming" involves the supposition that a thing is that which it is not (see Jennings, *Constitutional Problems in Pakistan*, "Judgment in the Case of The Federation of Pakistan and Others v. Moulvi Tamizuddin Khan", judgment of MUHAMMAD MUNIR, C.J., at p. 209). In the case of *Regina v. County Council of Norfolk* 65 L.T.N.S. 222 at p. 224, CAVE, J., dealing with a "deeming" provision under an Act of Parliament said:

> "Now, that language is, generally speaking, loose, because when it is said that a thing is to be deemed to be something, it is not meant to say that it is that which it is deemed to be. It is rather an admission that it is not that which it is deemed to be, and notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is deemed to be that thing."

There are several "deeming" provisions in the 1965 Constitution, notably and most relevantly in subsections (1) and (2) of section 128 which puports to deal with the High Court and the judges.

The present Government has submitted to the jurisdiction of this Court in the knowledge that the original source of that jurisdiction is the 1961 Constitution. Had this Court derived its jurisdiction from the 1965 Constitution, it would have been prevented from giving a decision in this case by reason of the provisions of section 142 of that Constitution, which prohibits *any* court from inquiring into the validity of *anything* done under the provisions of that Constitution. At the same time it must, I think, be acknowledged that as a matter of fact (but not of law)

the tenure of office of the judges of this court since the Declaration of Independence has become, in a sense, *precarious* by reason of the provisions of section 128 (4) (b) of the 1965 Constitution, which the present Government has the power to enforce. Subject to this acknowledgment, I consider that source of the jurisdiction of this Court is still the 1961 Constitution and that the present Government has not usurped its functions.

The major problem before this court is to determine to which legislative and administrative measures, if any, the court can give effect, sitting *in mediis rebus* in a revolutionary situation. In the court *a quo* LEWIS, J., after a careful and exhaustive examination and analysis of the authorities over a wide range presented to that court, came to the conclusion, having found the present Government to be the only effective government in the territory, that on the basis of necessity and in order to avoid chaos and a vacuum in the law, the court should give effect to such measures 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. GOLDIN, J., in a similar manner, reached his conclusions on the basis of public policy required by absolute necessity.

Apart from the well-known *dicta* already quoted that a government without laws is a mystery in politics, the vacuum or gap in laws, when a break in legal continuity occurs, is likely to be considerable in a modern state because "there is universal agreement that deliberate law-making of this kind (i.e. legislation by Act of Parliament) is indispensable to the efficient regulation of the modern state." (Dias, *Jurisprudence*, p. 77.) Modern statutes often confer on the executive a power to make regulations and to perform administrative and executive acts. In such cases the absence of a lawful executive authority would render inoperable the provisions of the main enactment. This applies both to statutes in force before the Declaration of Independence and statutes made thereafter. It has been urged that it is not a function of a court to fill any gap in the laws and that the law must be administered strictly and regardless of consequences. This well-known principle certainly applies in the sense of consequences personal to the judge, but I cannot believe it inhibits a court sitting in the present circumstances from taking into account, to some extent, the effect of a decision on the general community. There is little to help in the way of a statement of legal principle outside the field of jurisprudence. Kelsen's Theory regarding the change of the basic norm through a revolution has already been referred to. Professor S. A. de Smith, in his book *The New Commonwealth and its Constitution*, says at p. 5:

"Legal systems seldom provide for the manner of their own dissolution. If a breach of legal continuity occurs through revolutionary action (as in England in 1688 and in Pakistan in 1958) the judicial obligation to apply the criteria of legal validity inherent in the old order is replaced by judicial discretion; acquiescence in and recognition of the criteria presupposed by the new order cure all irregularities and in the last resort all that succeeds is success."

In a footnote to this passage he gives a reference to Professor Hart's book *The Concept of Law* pp. 114-116. At p. 114 Professor Hart discusses what he calls "the pathology of a legal system", but before commencing he postulates (p. 113):

"There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public stands of official behaviour by its officials."

In the text I take the word "officials" to include judges. He then proceeds to the discussion of his theme (p. 114), as follows:

"Evidence for the existence of a legal system must therefore be drawn from two different sectors of social life. The normal, unproblematic case where we can say confidently that a legal system exists, is just one where it is clear that the two sectors are congruent in their respective typical concerns with the law. Crudely put, the facts are that the rules recognized as valid at the official level are generally obeyed. Sometimes, however, the official sector may be detached from the private sector, in the sense that there is no longer general obedience to the rules which are valid according to the criteria of validity in use in the courts. The variety of ways in which this may happen belongs to the pathology of legal systems; for they represent a breakdown in the complex congruent practice . . Such a breakdown may be the product of different disturbing factors. 'Revolution', where rival claims to govern are made from within the group, is only one case, and though this will always involve the breach of some of the laws of the existing system, it may entail only the legally unauthorized substitution of a new set of individuals as officials, and not a new constitution or legal system. Enemy occupation, where a rival claim to govern without authority under the existing system comes from without, is another case."

In this field of juristic theory I find a passage in Dias's work, *Jurisprudence,* to be helpful. In discussing Kelsen's *General Theory of Law and State,* the author offers certain criticisms of Kelsen's notion of the Grundnorm, one of which is as follows (p. 381):

". . the idea of some medium, accepted by courts, which imparts to the law its distinctive quality, is more useful than that of a *Grundnorm* enjoying a minimum of effectiveness. For instance, in the lacuna that exists during a revolution, when the old basis has been overthrown and something has still to replace it, there is no longer a *Grundnorm,* but the tribunals may continue to apply the law identified as such by means of some criterion

which *they* still recognise, albeit provisionally. It does not matter that the criterion belongs to the order that has gone; so long as it is accepted by the judges as having imparted the quality of 'law' to the proposition in question that is all that is needed."

In the approach to this problem I consider the Governor's message issued on the 11th of November, 1965, to be basic as justifying the judges continuing in office. The message includes these words:

> "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 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."

This clearly should not be construed as an instruction to the judiciary as to the manner in which they should apply the law or as an attempt to interfere with the independence of the judicial discretion. It does, however, place an emphasis on the social need to preserve peace, order and good government. The instruction must have been given, however, with the knowledge that some legislation and some administrative acts would be required. Other facts which, in my view, are important are:

(a) The United Kingdom Government is unable to enforce any of its own legislative measures within this territory.

(b) There is no body in the territory, other than the present Government, functioning or purporting to function as a government for the people.

(c) Since 1898 the local legislature has had lawful authority to make laws for the peace, order, and good government of the territory (see s. 35 Southern Rhodesia Order in Council, 1898).

(d) The United Kingdom Government has never directly governed the territory.

(e) A body, wholly of persons elected by the electorate, is, in fact, functioning as a legislature for the whole of the territory and with a duly elected Opposition.

(f) A Constitutional Council is functioning in relation to measures proposed to be passed and passed by that body.

(g) There is no evidence of a break in the habit of obedience of the people either to laws made before the Declaration of Independence or to measures passed by that body since then.

In the present situation it is more important than ever before that the fundamental rights of the people should be watched and protected. These rights are protected by the Declaration of Rights contained in Chapter 6 of the 1961 Constitution, which is still a valid law of the

territory since it has not been lawfully repealed. If, therefore, the powers of internal autonomy already granted to the territory by the 1961 Constitution are exercised by the only body in the territory at present capable of functioning as a government, then, it seems to me, that the quality of law and legality may legitimately be attached to both the legislative and administrative acts of that body so long as they conform with the Declaration of Rights in the 1961 Constitution and do not go beyond anything a lawful government under that Constitution could have done. I consider, therefore, 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.

In regard to the question of the validity of the proclamations, the regulations, and the continued detention of the detainees, I have read the judgment of the Chief Justice and respectfully agree with his findings. I also agree with what he has said on the question of costs.

As the only statute put in issue in this case was the Emergency Powers Act [*Chapter 33*], I wish to observe merely there is room for the view that this particular statute, as distinct from other statutes, appears to be an instance where Parliament has legislated for a matter of State necessity.

A summary of my conclusions is as follows:

1. So far as the status of Rhodesia before the Declaration of Independence is concerned, I have nothing to add to the summary given by the Chief Justice.

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.

4. In regard to the question of validity of the proclamations, the regulations, and the continued detention of the detainees, I have read the judgment of the Chief Justice and respectfully agree with his findings. I also agree with what he has said on the question of costs.

In the result I agree with the order proposed by the Chief Justice.

FIELDSEND, A.J.A.: As I appreciate the problems that arise in these appeals, the decision must turn upon the answers to two principal questions: one involves the very source of authority of the Court itself, and the other concerns the powers and duties of the Court, depending upon what is found to be the source of its authority. Before considering either of these questions I feel that I must summarize the facts which I consider to be important and the conclusions which, in my view flow from the facts, and particularly from the declaration of independence on 11th November, 1965.

The 1961 Constitution was granted to us by the sovereign on the authority of the British Parliament and accepted by Rhodesia for the benefit of the state and all its inhabitants after the most extensive negotiation and consideration. It is in the rigid form it is for the protection of all communities, whatever the nature of the majority in the Legislative Assembly.

An examination of the salient features of the Constitution shows that Southern Rhodesia is part of the domains of the Sovereign of the United Kingdom, bound to the United Kingdom through the Queen of the United Kingdom, and that the Queen in that capacity has powers under the Constitution. *Inter alia*, those powers include the sole power of appointing the Governor, and the sole power of consenting to legislation amending those sections of the Constitution which refer directly to the Queen.

The Queen is an essential part with the Legislative Assembly of the Legislature, and the executive government is vested in her and may be exercised on her behalf by the Governor. Her functions within Southern Rhodesia, apart from those mentioned above, are performed and can only be performed by her duly authorized representative, the Governor, or someone authorized by him or by a law of the Legislature thereto. In the exercise of his functions the Governor can act only on the advice of the Governor's Council or the appropriate Minister, save when appointing the Prime Minister, or dissolving the Legislative Assembly, in which cases he acts in accordance with his own discretion, observing the constitutional conventions applying to the exercise of similar powers by Her Majesty in the United Kingdom. But the underlying essential of this form of government is that the Queen is the embodiment of the executive power and an essential part of the legislative power.

The sections of the Constitution dealing with the Queen's powers and functions cannot be amended by the Legislature, but only by the Queen by Order in Council. Certain other sections of the Constitution require for amendment a favourable vote of two-thirds of the members of the Assembly, and others a favourable vote of each racial group voting

separately at a referendum; there are also entrenched certain provisions of the electoral law by the same machinery. The Legislature does not, therefore, have unrestricted legislative power in regard to all internal affairs, and constitutionally Southern Rhodesia still has direct links with the British Crown which the Legislature cannot break.

The High Court derives its existence and powers from the Constitution, and cannot exercise any powers other than those derived from it. Not only is the Court given specific power to rule upon the validity of any legislation alleged to violate the Declaration of Rights, but it is also clear that it has the right to determine the validity of any act by the yardstick of the Constitution, save where the Constitution specifically precludes this.

There is thus assured by the Constitution both the country's connection with the United Kingdom, and the protection of the various races that make up the population against their being over-reached by any one racial group, whether it be a majority in the country, or whether it has a majority in the Legislative Assembly. This Constitution was not only granted by the Sovereign on the authority of the British Parliament, but accepted by the electorate of this country acting on behalf of the country as a whole. Whether this type of constitution was devised by Britain after the loss of the American Colonies to strengthen the links with the mother country by granting a measure of internal independence whilst retaining a firm connection with the Crown, or whether the rigidity of the Constitution was insisted upon to ensure fair treatment of all races, is immaterial. What is important is that in a dependent territory such as Southern Rhodesia, governed by a written and comparatively rigid constitution, the powers and duties of the separate organs of government are prescribed, and for any organ to act in contravention of those provisions is illegal. This puts a particular responsibility upon the judiciary, which is raised in effect to a position above that of the other elements of government, and which is the only sure guardian of the terms of the Constitution and of the trust reposed in the people by the grant of the Constitution. Both the Crown and the people of Rhodesia as a whole have a vital interest in the preservation of the legal Constitution and it is the duty of the Court so long as it sits to ensure that nothing derogates from the supremacy of that Constitution. In short this is a classic case of the separation of powers such as is dealt with by the Privy Council in *Liyanage v. R.*, [1966] 1 All E.R. 650 at p. 658.

The essence of what occurred on 11th November, 1965, was that the ministers then holding office under the 1961 Constitution usurped the authority and the powers of the Governor. Whether or not this was a treasonable act may be debatable (see Criminal Law Review, 1966, p. 5), but at least it was a contravention of the Preservation of Con-

stitutional Government Act [*Chapter 45*]. Apart from this unconstitutional act there has been no overt act hostile to the Sovereign of the United Kingdom who held ultimate sovereignty over Southern Rhodesia under the 1961 Constitution. There has been no question of the illegal authorities adhering to an enemy of the Sovereign, although there has been a good deal of loose talk about psychological and economic war. Certainly the present authorities are not seeking to levy even an economic war against the United Kingdom; on the contrary they are seeking to trade as much as possible with all countries including the United Kingdom.

In consequence of what occurred on 11th November, the Governor, on the instruction of the Queen, dismissed the ministers who then held office under the 1961 Constitution, and he called on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. His statement continued:

> "Subject to that 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."

Although the Governor is still in residence at Government House, he has not since that date exercised any of his functions (with certain minor exceptions) in relation to the governing of Rhodesia, either under the 1961 Constitution or under the Southern Rhodesia Constitution Order in Council, 1965. On the contrary the present authorities have prevented him from exercising his functions, which they have usurped. There is, therefore, no lawful executive exercising power within Rhodesia in terms of the 1961 Constitution.

Subsequently the legislature, or a majority of it, by openly functioning as the legislature under the 1965 Constitution in fact usurped, together with the Officer Administering the Government, the legislative power of the country. There is, therefore, no lawful legislature exercising power in terms of the 1961 Constitution, nor is there any legislative authority competing with the usurping legislature and purporting to deal with the everyday affairs of the country which require constant attention.

The position can best be summarized by saying that effective executive and legislative machinery under the 1961 Constitution is completely in abeyance, and that executive and legislative control is firmly in the hands of the usurping authorities, who are ordering the day-to-day affairs of the country and have been for two years.

The present authorities took, in the 1965 Constitution, the power to establish a High Court and provided in the transitional arrangements for the change over of the High Court existing under the 1961 Constitution. Section 128 reads:

"128. (1) The High Court of Southern Rhodesia in existence immediately prior to the appointed day shall be deemed to have been duly constituted as the High Court of Rhodesia under this Constitution.

(2) Every person who immediately prior to the appointed day holds the office of Judge of the High Court shall, subject to subsections (3) and (4) of this section, continue to hold the like office as if he had been appointed thereto under the corresponding provisions of this Constitution.

(3) Any person who under the provisions of subsection (2) of this section holds the office of Judge of the High Court on or after the appointed day by virtue of having been the holder of the like office immediately prior to that day shall, subject to the provisions of subsection (4) of this section, be deemed to have complied with the requirements of this Constitution relating to the taking of oaths on appointment to such office.

(4) A person who under the provisions of subsections (2) and (3) of this section continues to hold the office of Judge of the High Court may be required by the Prime Minister or a person assigned thereto verbally or in writing by the Prime Minister, to state forthwith whether he accepts this Constitution and will take the oath of loyalty and the judicial oath in the forms set out in the First Schedule, and if such person—

(a) agrees to accept this Constitution he shall forthwith take the said oath of loyalty and the judicial oath before the Officer Administering the Government or some person authorized by the Officer Administering the Government in that behalf;

(b) refuses to accept this Constitution his office shall be deemed to have become vacant on the day of such refusal and such person shall not be entitled to any compensation for his loss of office."

Apart from so providing the present authorities have taken no steps to establish a High Court. The judges have continued to sit as before, and they have not been interfered with either to prevent them sitting or to impose any condition upon their continuing to sit. Although the present authorities have not invoked section 128 (4) to compel any judge to take the prescribed oath on pain of loss of office without compensation, they can have been in no doubt that the Court has not accepted the 1965 Constitution as the valid constitution of the country.

On the contrary summonses and indictments have continued to be issued and presented as before, and orders made on such documents by the Court have been obeyed. Two judges have declared the fact that they are sitting as judges of the 1961 Constitution, bound by the oaths taken by them in terms of that Constitution and they are still in office. Their decision purporting to be a decision of the Court appointed under the 1961 Constitution has been brought on appeal.

In short there has been no overt step taken by the present authorities to revolutionize the Court or to set up their own Court or to appoint their own judges, or to ascertain formally if any of the judges were accepting office on the terms set out in the 1965 Constitution. Nor is there any allegation in the papers that the judges or any of them have accepted office, either tacitly or expressly, under the 1965 Con-

stitution. Indeed, during the original argument before us in February, it was not contended that the Court was anything but a court of the 1961 Constitution. The problem then was what should such a court hold valid in the existing situation.

The pre-existing judges have continued in office, and, as I have always understood the position, this was because, as LEWIS, J. said in the Court below at p. 22:

> ". . . the judges were personally directed by the Governor, as Her Majesty's personal representative in this country, to continue on in office and not to resign. Accordingly, the judges do not have a choice of resigning or 'joining the revolution'."

That the illegal authorities were aware of this instruction, there can be no doubt. I compare here the position of the judges in Uganda who, according to the judgment in *In re Matovu*, High Court of Uganda, Application 83 of 1966, p. 17, remained in their posts in response to the appeal by the Prime Minister to do so. The Prime Minister was the usurper in that case. In my view there can be no question of the judges having expressly or tacitly agreed to hold office on any basis other than that of their original commissions. Continuation in office in compliance with the Governor's direction does not imply such an acceptance of any *de facto* situation as would change the origin and basis of the judicial power. The Governor has no power to authorize any person to depart from the law or to recognize as binding what is not the law, and I am sure that he did not mean to suggest that in order to continue his normal tasks a person should depart from the law. It is implicit in his request that the judges should remain and perform their duties under the 1961 Constitution. His statement of the duty of the judiciary and the civil service may, however, have a considerable effect upon an individual, in assisting him to decide the personal problem of whether he will remain in office, even if it means giving limited cognizance to some of the acts of the usurping authorities.

Nor do I think that the fact that the present authorities have allowed the Court to sit and its orders to be enforced affects the position. It certainly does not constitute a new basis for the existence of the Court, if only because there has been no enunciation by the authorities, and acceptance by the Court, of any new basis of continuation and existence. For a new court to come into existence the authority creating it and the personnel comprising it must at least be *ad idem* on the law that the court is to enforce. There is no basis in the present situation for assuming that there is such a consensus.

In my view this Court is nothing more nor less than the Court appointed under the 1961 Constitution, and I can see no basis which entitles it to hold that its source of authority has altered. Just as the

Governor is still the Governor appointed and holding office under the 1961 Constitution, so with this Court. The only difference is that the usurping authorities have not prevented the Court from carrying out its functions, and are enforcing its orders. I specifically agree with LEWIS, J., where he says at p. 22:

> "The judges themselves hold office under the 1961 Constitution and derive their functions from that Constitution,"

and with GOLDIN, J., where he says at p. 92:

> "This Court, therefore, derives its origin from and was lawfully constituted under the 1961 Constitution, and the judges thereof continue to hold office and are bound by the oaths taken by them in terms of the 1961 Constitution."

Mr. *Rathouse* contended, that in English law allegiance is owed to a *de facto* government, and that, therefore, the judges owed allegiance to the present authorities. This proposition is based upon the Treason Act, 1495, and the modern glosses put upon it. Hood Phillips, *Constitutional and Administrative Law*, 3rd ed. p. 434 says:

> "The Treason Act, 1495, confirmed the common law principle that allegiance is due to the *de facto* sovereign (i.e. to the King who is for the time being actually in possession of the Crown) and not to a King *de jure* (i.e. with a right to the Crown) who is not also King *de facto*."

But to be *de facto* sovereign the King must hold and exercise all the powers of sovereignty, including the judicial power. This is implicit in the passage from Hawkins, *Pleas of the Crown*, Vol. 1 p. 9 where he says:

> "For there is a necessity that the realm should have a King by whom and in whose name the laws shall be administered; and the King in possession being the only person who doth or can administer those laws, must be the only person who has a right to that obedience which is due to him who administers those laws,"

and the passage from Hume, *Commentaries on the Law of Scotland*, p. 520 where he says:

> "The reason of this lies in his administration of the laws and government for the time, and in the protection thence derived by the inhabitants of the realm."

The administration of the laws referred to in each passage must refer *inter alia* to the exercise of judicial power, for courts certainly do administer the laws (see section 56D of the 1961 Constitution) though they may depend upon others for the enforcement of their orders.

In the medieval times in which the statute originated the King was, of course, supreme and was personally concerned in one way or another with the exercise of executive, legislative and judicial powers. Once,

therefore, a King had seized power he at once in fact personally exercised all powers for they were concentrated in him. This concept of the personal monarch has given way to the modern notion that the King merely represents the body politic. *Isaacson v. Durant*, (1886) 17 Q.B.D. 54. The sovereign power in this sense reposes in the executive, the legislature and the judiciary. As Halsbury, 3rd ed. vol. VI p. 192 sets out:

> "Thus the original concentration of power in the Sovereign no longer exists; and in the eighteenth century this division of the powers of government seemed to be such an essential characteristic of the English constitution that it was made the basis for the important doctrine of the 'separation of powers'. This doctrine, which is to the effect that in a government which has liberty for its object, no one person or body of persons ought to be allowed to control the legislative, executive, and judicial powers, or any two of them, has never to any great extent corresponded with the facts of English government."

However, as I have already said, with a written constitution such as the 1961 Constitution there is a clear separation of powers. In order that a *de facto* government be set up it is necessary that all the powers of sovereignty or government should be actually exercised by the body purporting to be a *de facto* government. Executive powers are to be exercised through the appointment of ministers, legislative powers through the approval of bills, and judicial powers through the appointment of a judiciary. This does not mean that a usurper must necessarily establish a court in the sense that there had been one previously, but he must establish something in its place, whether it be an independent court or a military tribunal. The usurper of a government constituted under a written constitution must take the responsibility of replacing the legitimate court and its judges—yet a further illegal act—before he can be said to have usurped all the powers of sovereignty. To hold otherwise is merely to assert that the repository of one part of the sovereign power must acquiesce in the illegal assumption of power by the repository of another part.

The passage from *Hildreth's Heirs v. McIntyre's Devizee*, 1 J. J. Marsh 206 is significant:

> "When the government is entirely revolutionized, and all its departments usurped by force, or the voice of a majority, then prudence recommends and [necessity] enforces obedience to the authority of those who may act as the public functionaries, and in such a case, the acts of a *de facto* executive, a *de facto* judiciary and a *de facto* legislature, must be recognized as valid. But this is required by political necessity. There is no government in action excepting the government *de facto*, because all the attributes of sovereignty have by usurpation been transferred."

In fact, I do not consider that the present authorities have usurped the judicial function, either by establishing their own courts, or by

appointing judges bound to them to the existing courts. They are not, therefore, administering the laws in the sense necessary to constitute them a fully *de facto* government or sovereign. On this basis any argument based on the Treason Act, 1495 has no application. In any event, however, I agree with the conclusions of the learned Chief Justice in regard to the effect of the English law.

The Court is now asked to decide *inter alia* on the status of the present usurping administration of this country and to say whether it is the *de jure* or the *de facto* government, a decision which in effect involves a pronouncement on the source of its own authority.

This raises in the forefront of the case the competence of a domestic tribunal to pronounce upon such a question—a pronouncement which the English Court in the Middle Ages astutely refused to make in language which is significant:

> "The matter was so high and touched the Kyng's high estate and regalie, which is above the laws and passed their lernyng, wherefore they durst not enter into any communication thereof, for it perteyned to the Lordes of the Kyng's blode . . . to meddle in such matters."

In order to determine the competence of a domestic tribunal created by a written constitution to decide such a matter it is necessary to consider in general and in particular the position of a court so created.

In a country which is governed by a written constitution, that constitution is—

> "the fundamental law of the country, the express embodiment of the doctrine of the rule of law in one of its senses. All public authorities—legislative, administrative and judicial—take their powers directly or indirectly from it." Jennings, *The Law and the Constitution*, 4th ed., p. 61.

Whatever the nature of the written constitution it is clear that there is a fundamental distinction between constitutional law and the rest of the law.

This distinction becomes of great importance when considering the position of the courts in relation to the state as a whole, for a written constitution itself usually establishes a Supreme Court, sets out the principle that judicial power is vested in these courts, and may give the courts specific powers of pronouncing upon the validity of legislation. Even where no specific power is given to a Supreme Court to pronounce upon the validity of legislation, the courts have had no difficulty in finding that they had such power, and this is so as much in a unitary as in a federal state. See *The Queen v. Burah*, [1878] 3 A.C. 889 (P.C.) 904, where the Court merely stated, when the validity of an Act of the Indian Legislature arose:

"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question."

The question was closely and convincingly reasoned by KOTZE, C.J., in *Brown v. Leyds N.O.*, (1897) 4 O.R. 17, in reaching the conclusion that the High Court of the Transvaal Republic was bound to judge the validity of legislation by reference to the Grondwet, which alone was binding on the Court.

The same position was accepted in the two South African constitutional cases, *Harris & Others v. Minister of the Interior and Another* and *vice versa*, 1952 (2) S.A. 428, and 1952 (4) S.A. 769. As SCHREINER, J.A., said in the latter case at p. 787:

"The sanction of invalidity unquestionably requires a tribunal or hierarchy of tribunals for its enforcement . . . The Constitution makes no express provision for the determination of questions of validity or invalidity and must therefore be taken to have left such determination to the Courts of Law of the Land."

These features, in my view, indicate both the extensive powers of the courts under a written constitution and their limitations. On the one hand they are the guardians of the constitution and obliged to ensure that no act or legislation contravenes the constitution to the detriment of any person with rights under it; and on the other, their powers and indeed their very existence are dependent upon the constitution. In a unitary state as much as in any federal system, the legal supremacy of the constitution is essential to the existence of the state. In the words of MARSHALL, C.J., quoted with approval by KOTZE, C.J., in *Brown v. Leyds N.O.* (*supra*) at p. 30:

"Those, then, who controvert the principle that the Constitution is to be considered, in Court, as a paramount law are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution and see only the law. This doctrine would subvert the very foundation of all written Constitutions."

In the words of Story, referred to at p. 31,

"it becomes the duty of the judiciary to follow that only which is of paramount obligation . . . for otherwise the acts of the Legislature and Executive would in effect become supreme and uncontrollable . . and usurpations of the most unequivocal and dangerous character might be assumed without any remedy being within reach of the citizens"

The courts become the pivot on which the constitutional arrangements of the country turn, for the Bench can and must determine the limits of the authority both of the executive and of the legislature. The consequence follows that the Bench of judges is the guardian of the constitution. Dicey, *Law of the Constitution*, 9th ed., p. 175.

The natural corollary of this is that the court cannot sit to determine whether the constitution under which it was created has disappeared. Nor can it continue to exist to enforce some other constitution. That this is so is apparent from such cases as *Luther v. Borden*, 12 Law Ed. 581 at 598, and *Brittle v. The People*, (1875) 2 Nebraska 198 at 209.

In the former case TANEY, C.J., said:

> "And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside, it would cease to be a court and be incapable of pronouncing a judicial decision upon the question which it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

I read this case as deciding that a court cannot embark on such an inquiry, not as deciding what decision it should reach if it does.

Judges appointed to office under a written constitution, which provides certain fundamental laws and restricts the manner in which those laws can be altered, must not allow rights under that constitution to be violated. This is a lasting duty for so long as they hold office, whether the violation be by peaceful or revolutionary means. If, as in South Africa, the courts were obliged to stand resolutely in the way of what might be termed a legitimate attempt to override the Constitution, *a fortiori* must a court stand in the way of a blatantly illegal attempt to tear up a constitution. If to do this is to be characterized as counter-revolutionary, surely an acquiescence in illegality must equally be revolutionary. Nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled *ipso facto* to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality. It may be that the court's mere presence exercises some check on a usurper who prefers to avoid a confrontation with it.

It is not part of a court's legal function to repudiate the legal and constitutional system under which it was appointed, or to involve itself in the construction or justification of a new and different foundation for its own existence. That may or may not be what the courts did in *The State v. Dosso*, (1958) 2 Pakistan, and in the Uganda case of *In re Matovu* (*supra*), but, with respect to the learned judges in those cases, they do not appear to have adverted to the significance of the position of a judiciary appointed under a written constitution. In particular in *Dosso's* case the Chief Justice appears to have:

> "appraised the existing constitutional position in the light of the juristic principles which determine the validity or otherwise of law-creating organs

in modern States which being members of the comity nations are governed by International Law".

There may be pressing and convincing reasons for judges as individuals to accept what an executive has done to overthrow an established order in the name of the public good, but, in my view, a court constituted on one constitutional basis cannot legally support the unconstitutional overthrow of the foundation upon which it is founded.

A court created by a written constitution can have no independent existence apart from that constitution; it does not recieve its powers from the common law and declare what its own powers are; it is not a creature of Frankenstein which once created can turn and destroy its maker. It is a matter of the supremacy of the constitution, not a matter of the supremacy of the common law as in England, where there is no fundamental difference between constitutional law and the rest of the law. This doctrine has its expression in section 4 of the Act of Settlement, 1700 in these words:

> "Whereas the laws of England are the birthright of the people thereof, and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws . . . the same are ratified and confirmed accordingly."

This principle of the supremacy of the common law is of particular importance when considering the position and the powers of the courts in England. All courts are created by the authority of the Sovereign as the fountain of justice. This authority is exercised either by statute, charter, letters patent or Order in Council, though in some cases a court is held by prescription as having existed from time immemorial. Halsbury, vol. 9, p. 344. Once established by law these courts never lose their existence until the statute or instrument creating them is repealed by later legislation. The courts take their place among the institutions by which the country is governed. The clearest example of this development is the establishment of the Court of Common Pleas by Magna Carta C. 11, which was replaced eventually by the Civil Procedure Acts Repeal Act, 1879. But they are still only creatures of the statute creating them and lose that existence if the statute disappears. But those statutes, having become a part of "the birthright of the people", continue regardless of revolutionary or other change until validly repealed, and the courts established by them retain their existence.

So far as the powers of the courts are concerned Jennings, *op. cit* p. 226 points out:

> "They do not receive their powers from a constitution. They used to take them from the common law; they took them because they had successfully claimed them. They developed the common law, and they

therefore declared what their own powers were. Now they are, almost without exception, statutory bodies, exercising those functions which statutes have accorded to them. Since, however, the statutes giving powers to the High Court refer to the powers possessed by its predecessors, the effect is that the High Court exercises certain powers derived from the common law and certain powers derived from statute."

Whatever may be the position in the case of a court in the United Kingdom, it is my firm conviction that a court created in terms of a written constitution has no jurisdiction to recognize, either as a *de jure* or *de facto* government any government other than that constitutionally appointed under that constitution. If it were to do so it would only be declaring that it was incompetent to give a decision because its *raison d'etre* had disappeared. This would be an absurdity and is the strongest possible argument to show that the inquiry we were invited to embark upon is beyond the court's competence. A court cannot sit to decide under what system of government it is exercising jurisdiction. It must accept its reason for existence as stemming from its original constitution as an unchallengeable fact. It was common cause that there had been no constitutional abrogation or replacement of the 1961 Constitution or of the court created by it, and so far as this Court is concerned, if it continues to sit, as it has, that concludes the matter. There is no room in the proceedings of a domestic tribunal for the application of broad theoretical jurisprudential principles in order to determine whether a government exists in its territory *de facto* or *de jure*, or whether certain norms receive general obedience in its territory, and are therefore to be enforced.

I do not find in the English law relating to allegiance anything to controvert this conclusion. It may be that if one were to adhere to the present authorities one might not be guilty of treason on a proper application of the 1495 Treason Act of Henry VII. That would depend upon whether the present authorities constituted a *de facto* government, and more particularly upon whether they could be so regarded when they have not established in fact their own court — a matter I have already dealt with. I find no support in the English law for the existence of an obligation in the pre-existing judiciary to transfer automatically their judicial functions to a successful usurper.

There is no historical precedent for such a course, and indeed such would be impossible. Judges of the superior courts are appointed by the Crown by letters patent, and in fact have always been appointed by the Sovereign. Formerly, until 6 Anne C.41, 1 Geo. III C.23 and the Demise of the Crown Act, 1901, the demise of the Crown had the effect of dissolving Parliament, vacating offices under the Crown and discontinuing legal processes and indictments. Fresh judicial appointments, then being required with each new sovereign, acceptance of

office under a new sovereign could in every case only have been a purely personal decision, and would in itself have been an acknowledgement of the legitimacy of the new sovereign.

Once it is accepted, as, in my view, it must be, that this Court is sitting as a court of the 1961 Constitution, it follows that in determining what the law is on any given topic, it must be bound by that Constitution. There can, in my view, in the present circumstances, be no half-way house in regard to the Courts: either they derive their authority from the 1961 Constitution or from the 1965 Constitution. If they derive their authority from the 1965 Constitution they must be bound by it entirely, even to the extent of being precluded from inquiring into its validity (section 142); if they derive their authority from the 1961 Constitution then they must be bound by that. A court which derives its existence and jurisdiction from a written constitution cannot give effect to anything which is not law when judged by that constitution. To hold otherwise is to abandon a stable anchorage and to set sail into uncharted and, indeed, unchartable seas. The law to be administered by a municipal court is not an abstract concept, determined by general and theoretical jurisprudential principles; it is something concrete determined solely by the set of norms prescribed by the legal order upon which the court considering the case is founded.

But in considering each individual case that comes before it, the court must not lose sight of the factual situation and the political realities. The question is whether these political realities create such a situation that, judging by the yardstick of the 1961 Constitution, the Court should decide that even that Constitution calls for the according of validity to some acts or measures done or enacted otherwise than by the machinery of that Constitution.

LEWIS, J., in the Court *a quo* relied on the maxim, "*salus populi suprema lex*", which is, in effect, the doctrine of state necessity, to justify a departure from the express terms of the 1961 Constitution. In his alternative argument in this Court Mr. *Rathouse* said that he preferred not to put his case squarely upon this basis, but to rely rather upon what he termed "natural necessity". To determine whether or not there is any room for the introduction of a doctrine of necessity to mitigate the strict application of the Constitution it is necessary first to ascertain the principles underlying the commonly accepted meaning of the doctrine. This can best be done by reference to certain of the cases from which these emerge.

In *R. v. Bekker & Naude*, (1900) 17 S.C. 340, SOLOMON, J. said at p. 355:

> "Martial law is nothing more nor less than the law of self-defence or the law of necessity. It is put in force in times of public danger, when the

maxim *salus reipublicæ extrema lex* applies, and when in consequence it becomes necessary for the military authorities to assume control and to take the law into their own hands for the very purpose of preserving that constitution which is the foundation of all the rights and liberties of its subjects. When such a state of things arises in any district, the ordinary rights and liberties of the inhabitants are subordinated to the paramount interests of the safety of the State . Both the justification for proclaiming martial law and the actual exercise of authority thereunder are strictly limited by the necessities of the situation.";

and in *White & Tucker v. Rudolph*, 1879 Kotze 115, KOTZE, J. said at p. 124:

"It must be admitted that the law distinctly recognizes the maxim *necessitas non habet legem, quod cogit defendit.* The meaning of this is not, as some writers lay down, that necessity overrides all law, and is superior to it; but that the law justifies in certain cases, as where the safety of the State is in imminent danger, a departure from the ordinary principles protecting the subject in his right of private property. This right of private property is sacred and inviolable: any interference with it is, *prima facie*, wrongful and unlawful, and it is incumbent upon the respondent in the present instance to justify what he has done by showing that it was dictated by necessity that will justify a departure from the ordinary principles of law. It must be necessity extreme and imminent."

Further, it is quite clear from *Ex parte Marais*, [*1902*] A.C. 109 (P.C.) at pp. 114-115 and from *Krohn v. The Minister for Defence & Others*, 1915 A.D. 191 at pp. 199 and 201 that once it is sought to rely on some disturbance short of actual war, it is for the court in every case to judge of the existence of the necessity. The latter case is particularly interesting on the question of the nature and *quantum* of the evidence led even when there was no serious dispute on the facts relied upon to justify the existence of a state of public disorder.

An example of the application of the doctrine in a field other than martial law is *Attorney-General v. Mustafa Ibrahim*, Supreme Court of Cyprus, November, 1964. The facts were that there had been in Cyprus an armed insurrection against the government with uncertainty as to which of the combating forces might eventually prevail. Due to the political secession of the Turkish sector of the judiciary, the courts set up under the Constitution had been unable to function for about 14 months. Due to the political secession of the Turkish vice-president of the Republic and of the Turkish members of the legislature, it was impossible to remedy the situation by legislation.

Accordingly the President of the Republic with the Greek remnant of the legislature purported to pass legislation setting up a new system of courts. As the preamble to the "Law" stated:

". . recent events have rendered impossible the functioning of the Supreme Constitutional Court and of the High Court of Justice and the administration of justice in some other respects.";

it was contended that the "Law" was a nullity as it was unconstitutional.

All three judges of the Supreme Court held that the doctrine of necessity should be read into the written Constitution. In the words of VASSILIADES, J., at p. 25:

> "This Court now, in its all-important and responsible function of transforming legal theory into living law, applied to the facts of daily life for the preservation of social order, is faced with the question whether the legal doctrine of necessity discussed earlier in this judgment, should or should not, be read in the provisions of the written Constitution of the Republic of Cyprus. Our unanimous view, and unhesitating answer to this question, is in the affirmative."

Whilst in no way binding, either on this point, or on the limitations which it placed on the application of the doctrine, the judgment is some persuasive authority for the proposition that necessity may override even a written constitution.

The limitations placed upon the application of the doctrine in that case were very stringent and were—

(a) that necessity may be invoked only by the lawful organs of government;

(b) that the *onus* is on the authority invoking the doctrine to prove an imperative and unavoidable necessity to act outside the ordinary law, in the sense that no other remedy is open to it;

(c) that the measure taken must be shown to be proportionate to the necessity, and no more;

(d) that the measure taken must be of a temporary character.

A further example of the application of the doctrine is to be found in the judgment of MUHAMMAD MUNIR, C.J., in a Special Reference by the Governor-General of Pakistan to the Federal Court, reported in Jennings, *Constitutional Problems in Pakistan*, p. 259 at pp. 298-309. It is unnecessary to embark upon a full description of the confused political and constitutional position in Pakistan pertaining for a number of years prior to April, 1955. It is sufficient to say that 44 Acts passed by the Constituent Assembly had not received the assent of the Governor-General as required by law, and that in consequence a vast number of legislative acts both of the Constituent Assembly and of Provincial Legislatures from 1950 onwards were invalid. The Assembly had been dissolved by the Governor-General in October, 1954, and had not been reconstituted.

By Proclamation in April, 1955, the Governor-General declared certain essential laws to be enforceable until their validity was decided upon by the new Constituent Assembly.

It was held that he had acted in order to avert an impending disaster and to prevent the State and society from dissolution, and that on the ground of necessity his Proclamation should be treated as having given the force of law to the measures specified. The principal authority relied upon was the address to the jury by Lord MANSFIELD in the case of *George Stratton & Others,* of which the essence is given at p. 306 of Jennings' book in these terms:

> "The principle clearly emerging from this address of Lord Mansfield is that subject to the condition of absoluteness, extremeness and imminence, an act which would otherwise be illegal becomes legal if it is done *bona fide* under the stress of necessity, the necessity being referable to an intention to preserve the constitution, the State or the Society and to prevent it from dissolution, and affirms Chitty's statement that necessity knows no law and the maxim cited by Bracton that necessity makes lawful [that] which otherwise is not lawful."

The conclusion finally reached is at p. 307 in these terms:

> "The manner in which such power is exercised, whether in individual cases or by positive directions or restraint orders of a general character, is essentially a question of method and detail, not affecting the main principle. The emergency legislative power, however, cannot extend to matters which are not the product of the necessity, as for instance, changes in the constitution which are not directly referable to the emergency."

It appears from these authorities that the normal law of the land may, on occasions, have to give way before necessity. This is as much so in the case of the 1961 Constitution as it was in the cases of the constitutions in both Cyprus and Pakistan, particularly in a situation where the welfare of the State and its people might be at stake. In a proper case, I think it would be the Court's duty to recognize such a situation and to act upon the principle *salus populi suprema lex* despite the express provisions of the Constitution. Any departure from these express provisions must, however, be fully justified especially where personal liberty is at stake.

Once the principle is admitted of necessity allowing a departure from the express provisions of the Constitution then the precise nature of the necessity and the extent of the departure must depend upon all the circumstances of the case.

The necessity relied on in the present case 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 safe-guarding the country and its people in any emergency which might occur,

to mention but a few of the numerous matters which require regular attention in the complex 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.

That this is a necessity with which the law concerns itself is apparent not only from the Cyprus and Pakistan cases but also from the more general sources of authority to which we were referred. It underlies the English law doctrine which excuses obedience to a *de facto* sovereign, the writings of the Roman-Dutch authorities, particularly Grotius *De Jure Belli Ac Pacis* 1. 4. 15., the *Texas v. White* line of cases and the international law of belligerent occupation.

None of these situations is, of course, precisely similar to that in which this Court now finds itself, where it is sitting, as I have found, as a Court of the 1961 Constitution in a situation where the remaining elements of government are not acting in terms of that Constitution, which they claim to have replaced. Indeed we were referred to no truly comparable situation, nor to any authorities directly in point on the question of what validity should be accorded in these circumstances.

Where a judge is faced with a problem where there is no direct guidance in precedent then in the words of C. K. Allen in *Law in the Making*, 6th Ed., p. 292:

> "If he has to decide upon the authority of natural justice, or simply 'the common sense of the thing' (*Pearce v. Gardner*, [1897] 1 Q.B. 688), he employs that kind of natural justice or common sense which he has absorbed from the study of the law and which he believes to be consistent with the general principles of English jurisprudence. The 'reason' which he applies is, as Coke said, 'not every unlearned man's reason' but that technically trained sense of legal right with which all his learning imbues him."

Aid will also be sought from persuasive precedents, textbooks and the use of analogy, Paton, *Text Book of Jurisprudence*, 3rd Ed., p. 195.

Though relying on the general necessity for there to be orderly administration in a country "in order to avoid the utter confusion which would result from subversion of laws and suppression of the Courts", neither the Roman-Dutch authorities nor the English law offer any detailed or practical example of the doctrine having been put into force. On the contrary, where in English constitutional history one might expect instances of its application it appears to have been neglected or at least avoided. As Wade points out in *The Basis of Legal Sovereignty*, 1955 Cambridge Law Journal 172 at p. 188, the Courts after the restoration of Charles II refused to accept as valid any of the laws of the Commonwealth.

The international law of belligerent occupation has more detail to offer. The occupant is under a duty to maintain order and to provide

for the preservation of the rights of the inhabitants, and has a right under international law to govern the occupied territory. He must, however, govern it according to the laws of the country which he must respect. He may temporarily alter the law, but only in so far as it is necessary for his own military purposes or to maintain order. He may carry out these duties and exercise these rights either through the ordinary courts and administration or by setting up his own courts and administration.

If the ordinary courts are permitted to function they do so by grace and favour of the occupying power and exercise such rights as they are given, and enforce such laws as they are entitled and bound to enforce.

As Oppenheim, *International Law*, 7th Ed., vol. 2 p. 437, says:

> "The administration of the occupant is in no wise to be compared with ordinary administration, for it is distinctly and precisely military administration. In carrying it out the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare, and the maintenance and safety of his forces and the purpose of war, stand in the foreground of his interest, and must be promoted under all circumstances and conditions. But, although as regards the safety of his army and the purpose of war the occupant is vested with an almost absolute power, as he is not the sovereign of the territory he has no right to make changes in the laws, or in the administration, other than those which are temporarily necessitated by his interest in the maintenance and safety of his army and the realization of the purpose of war. On the contrary, he has the duty of administering the country according to the existing laws and the existing rules of administration; he must ensure public order and safety, must respect family honour and rights, individual lives, private property, religious convictions and liberty."

Overland's case, No. 156, reported in *Annual Digest of International Law Cases*, vol XII, p. 446, is interesting. A Norwegian District Court sitting during the occupation held invalid a German law altering the civil law relating to allodial privileges because it was in breach of the Hague Regulations. The basis is that a court functioning by leave of an occupying power can turn to the Hague Regulations in deciding what is the law. It can be said that this is a term implied in the appointment of a court by an occupying power. This is quite a close analogy to the present case where this Court is sitting in rebel-held territory, though as yet untouched by any revolutionary pressure brought to bear upon it.

The essential differences between a case of belligerent occupation and the present are that the lawful sovereign in case of war accepts the existence of the invader as a person with rights and duties over the occupied territory, whereas no recognition will normally be accorded to any official acts of states in rebellion, McNair, *Legal Effects of War*,

2nd ed. p. 347-348 and *Ogden v. Folliot,* 100 E.R. 825 at 829; and that the government is essentially a military government with a right to alter the law for its own military purposes. Further, the pre-existing courts are permitted to function only by grace and favour of the occupying power, under a set of norms prescribed by the occupier and the Hague Regulations, whereas here, in my view, the court is funtioning as of right because it has not been usurped.

But of all the sources of authority the *Texas v. White* line of cases are the most modern and in many ways the closest to the present circumstances.

Mr. *Kentridge* argues that this whole series of cases is really based upon the principle of upholding what has been done by a *de facto*, though unqualified holder of a *de jure* office where to upset what had been done would be contrary to fairness and human justice.

Such an analysis is probably a true one, if one is to look only at what was held to be valid in the mass of decisions that there are. The measures held valid were related to such matters as the administration of deceased estates, the incorporation of insurance companies, contracts in the usual course of business, guardians' or trustees' investments in good faith and judgments in civil disputes. There was no case in which any measure interfering with personal liberty was held to be valid and what authority there is shews that arrest other than one a normal criminal charge would have been held invalid.

But it is not correct to say that this was the basis upon which the cases were decided. There are passages in *Thomas v. City of Richmond*, 20 Law Ed. 453 at 457, in *Hanauer v. Woodruff*, 21 Law. Ed. 224 at 227 and 228, which do lay stress upon the hardship that would follow after the event were transactions not to be upheld, but for the most part the decisions are based upon the necessity to hold that even during the illegality certain measures had validity. The clearest examples of this reasoning are the following extracts:

> "While [the State's] enactments outside the sphere of her normal authority were without validity, those within it passed for ordinary administration of her powers and duties as a state had the same effect as if the rebellion had not occurred. The latter principle springs from an overruling necessity. A different rule would involve the dissolution of the social compact and resolve society back into the original elements." *First National Bank of Washington v. Texas*, 22 Law. Ed. 295 at 298.

> "The existence of a state of insurrection and war did not loosen the bonds of society, nor do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected . . . 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 national government, and did not impair the rights of citizens under the Constitution." *Horn v. Lockhart*, 21 Law. Ed. 657 at 660.

"They are transactions in the ordinary course of civil society and though they may indirectly and remotely promote the ends of the unlawful government, are without blame except when proved to have been entered into with the actual intent to further the invasion or insurrection." *Thorington v. Smith*, 19 Law. Ed. 362 at 364.

"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 courts 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*, 19 Law. Ed. 227 at 240.

I am satisfied that the cases do establish the principle that binding force may be given by the courts to what has been done under measures enacted by an illegal government, and in their reasoning they do accord with the general principle enunciated by Grotius that the need for avoiding a vacuum in the law is a reason for allowing a limited regocnition.

The limits suggested in the American cases appear from such cases as *Baldy v. Hunter*, 43 Law Ed. 208 which distinguishes between transactions conducted under the aegis of the unlawful authority and the essential validity of acts of the authority itself. That case sets out two tests or approaches; one relates to judicial and legislative acts which it is said should be respected "if 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"—words originating in *Horn v. Lockhart* (*supra*). The other relates to *transactions* in the ordinary course of civil society between private individuals, which may have indirectly or remotely promoted the ends of the unlawful government. These were said to be without blame "except when proved to have been entered into with actual intent to further invasion or the insurrection"—words originating in *Thorington v. Smith* (*supra*).

In regard to the tests which relate to the validity of legislative or administrative acts it may be that the earlier American cases such as *Garlington v. Priest*, (1869) Federal Supreme Court Reports 599, *Hanauer v. Doane*, 20 Law. Ed. 439 and especially *Leak v. Commissioners of Richmond County*, (1870) North Carolina Supreme Court 130, go too

far in limiting the acts to which validity will be given to those which are not "tinctured with the vice of giving aid and support to the rebellion". But if one applies the test adopted in *Williams v. Bruffy*, 24 Law. Ed. 716 at 720, that validity will be given only to those acts which "do not impair or tend to impair the supremacy of the national authority" as read with the test in *Horn v. Lockhart*, one has a test which does happen to coincide with the instruction given by the Governor, that persons should carry on with their normal tasks, subject to their "refraining from all acts which would further the objectives of the illegal authorities".

Finally in regard to *onus* the American cases, being *ex post facto*, could afford to adopt a lenient approach, and one would expect this especially as the memory of the Civil War receded, and particularly because no public policy was offended by *ex post facto* recognition; rather the more appropriate attitude was one of reconciliation.

The essential differences between the American post-Civil War situation and the present are fourfold:

First, there one was dealing with a government fully effective in all its fields including the judicial: here there is control by the usurpers only of the executive and the legislature.

Secondly, there the decisions were all *ex post facto* after the conclusion of an unsuccessful revolution and the restoration of constitutional government: here the Court is sitting *in mediis rebus* in a situation where any recognition such as is presently sought may well assist the usurpation.

Thirdly, there the courts recognized the acts of the unlawful government only in so far as commercial transactions were founded upon them: here recognition is sought by the régime itself of acts relied on by it to justify the deprivation of personal liberty otherwise than for an ordinary criminal offence.

Fourthly, there the necessity in fact, though not always so expressed, was to prevent hardship after the revolution had ended: here the necessity is to prevent a vacuum in the law during the progress of the usurpation.

It is true that these differences are not unimportant ones but, in my view, they affect more the precise rules that can be extracted from the cases than the general principle which emerges from them. I find the cases of strong persuasive value in laying down a principle, based upon justice and common sense, whereby binding force can be given to some of the respondent's acts. But care must, in view of the differences I have referred to, be exercised before adopting slavishly the precise tests found suitable and applied in a different situation.

The greatest point of difference between the most usual application of the doctrine of necessity and its application here is that it is not now relied upon by the legitimate sovereign, but by a usurper. This is an important difference, but is not necessarily fatal to the invocation of necessity. The American cases are of little assistance on this point for in none of them did the illegal authorities seek recognition of their own acts. Nor does the principle of belligerent occupation provide the complete answer, for that is based upon the occupier's legitimate right following the usages of war. But where the very survival of the people as an ordered community is at stake there is little, if any, room for insistence on such a rule as applies in contract, that reliance can never be placed on necessity of one's own creation. But the very fact that it is a usurper who seeks to rely on necessity must be a reason for the most careful scrutiny of all the circumstances.

From a consideration of all these sources and their similarities to and differences from the cases now under consideration, it seems that the only proper conclusion is that natural justice, in the form of a controlled common sense, dictates that, for the welfare of the mass of people innocently caught up in these events, validity must be accorded to some acts of the usurping authorities, provided that no consideration of public policy to the contrary has to prevail. It is unnecessary, and indeed undesirable, to attempt to define precisely the limits within which this validity will be accorded. The basis being broadly necessity, the decision is one which must be arrived at in the light of the circumstances of each case.

In a general way one can say with justification that administrative acts and legislation directed to and reasonably required for the ordinary orderly running of the country should be accorded validity, provided that they do not defeat the just rights of citizens under the 1961 Constitution, and are not actually intended to aid and do not have the natural and probable consequence of directly aiding the usurpation. If there is any doubt as to whether the acts fall within the main category then the act will not be upheld, nor will it be upheld if there is a possibility that thereby the just rights of citizens will be defeated or the usurpation directly aided.

By adopting this approach the Court will, in the unusual situation in which it finds itself, be performing as best it can the obligations entrusted to it by the Constitution for the protection and welfare of the inhabitants of the country, and yet will, so far as possible, be remaining above the political struggle for power. The Courts, however, are not concerned with the recognition of a government whether as *de jure* or *de facto*; they are concerned only with the validity of any act, whether it be legislative or administrative, challenged before them, and

I would stress that the approach outlined above is that the validity is to be decided upon in each individual case.

I do not think that the according of validity to acts and legislation on this basis is precluded by the certificate from the Secretary of State relied on by Mr. *Kentridge,* in which it is stated that Her Majesty's Government in the United Kingdom does not recognize the present authorities as constituting a government in Southern Rhodesia either *de facto* or *de jure.*

Assuming this certificate to be binding, the opinions of Lord REID and Lord WILBERFORCE in *Carl-Zeiss-Stiftung v. Rayner* (No. 2), [1966] All E.R. 536 leave open the question of whether this non-recognition entails the non-recognition of every act of a non-recognized authority. I refer in particular to the words of Lord WILBERFORCE at p. 577:

> "In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of every-day occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interest of justice and common-sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.
>
> No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognized governments, which would prevent its acceptance or which prescribes the absolute and total invalidity of all laws and acts flowing fron unrecognized governments. In view of the conclusions which I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked."

Where, as here, there is a legitimate court sitting to consider the problem now before it, I cannot see that it can be precluded from looking at the factual position within the country, proved as it is by evidence on affidavit, that the present authorities are in control of the executive and the legislature.

To use the reasoning of Lord REID at p 548: Britain has not prohibited all trade with Rhodesia, and yet a company registered by a registrar of companies appointed by the régime would not, if no recognition were to be accorded, be able to sue or be sued either here or in England. This surely leads to an absurdity.

In my view, provided the recognition of any act by the courts is subject to the limitations expressed by Lord WILBERFORCE, there is no reason why this Court should not recognize at least acts done which are acts of every-day occurrence or perfunctory acts of administration.

The tests to be applied for this purpose are not, I think, different from the tests I have propounded for validity.

In my view, therefore, the correct approach in considering the validity of any challenged act of the present authorities, whether it be a legislative or administrative act, is as follows:

First, the court must be satisfied that the act or legislation is directed to and reasonably required for the ordinary orderly running of the State.

Secondly, the court must be satisfied, particularly when the act interferes with the rights and liberties of individuals, that the just rights of citizens under the 1961 Constitution are not defeated.

Thirdly, the court must be satisfied that there is no consideration of public policy which precludes it from enforcing the act. In the simplest terms this means that the act must not be intended to, or in fact in its operation directly, further or entrench the usurpation. In addition, it would clearly be contrary to public policy, as administered by this Court, to give effect to anything which could not have been done under the 1961 Constitution.

In each of these inquiries the *onus* is upon the person seeking to have enforced what has been done otherwise than in accordance with the normal law of the land. This is particularly so when the person seeking enforcement is one of the authors of the usurpation.

In each of the present cases it has been established *prima facie* that a person is being detained otherwise than in accordance with the proper law. This is as much the position in regard to Madzimbamuto, who personally made no affidavit that there were no grounds for his detention, as it is with Baron who did make such an affidavit, for it is common cause that the continued detention depended upon a Proclamation and upon regulations made by someone other than the Governor.

I have already found, in effect, that in the present circumstances the respondents have shown that if any legislative or executive action is necessary in the country in the public interest, it is the present legislative or executive that is the only organ effectively able to provide it. But they must still justify the action taken.

To justify such detention outside the normal law the respondents must, in my view, establish that the regulations and any detentions are reasonably required for the ordinary orderly running of the country, that they do not defeat the just rights of citizens under the Constitution and that they are not intended to and do not directly aid the usurpation. Since in terms of the 1961 Constitution regulations authorizing deten-

tion without trial can be valid only when there is a state of emergency in the country and that can only be declared in circumstances defined in the Emergency Powers Act [*Chapter 33*], the respondents must first justify the continuation of a state of emergency from 5th February, 1966, up to the present time.

It has been shown that there have been a number of occasions in recent years when a legitimate government has seen fit to declare a state of emergency. However unpalatable it may be to have to accept the situation, experience dictates that in Africa in these days a state of emergency involving arbitrary powers of detention is frequently necessary for the ordinary orderly running of a State. There is, therefore, *prima facie* nothing unusual or sinister in the continuation of the state of emergency in itself. It is, however, denied by the appellant Baron that the proclamation and the regulations were measures necessary for the preservation of peace and the maintenance of order in Rhodesia or for the good government thereof as alleged by the third respondent. There is very little on the respondents' affidavits on which to judge the necessity for the continuation of the state of emergency beyond the allegation in the formal words of section 3 (1) of the Emergency Powers Act, but the appellants have put before the Court the speech of Mr. Lardner-Burke in which he urged Parliament to resolve in terms of section 3 (2) of the Act that a further proclamation should be issued.

Accepting the speech at its face value, it is clear that, at least in part, the emergency powers were required to maintain the sovereignty the régime had seized, to give it—

> ". . some tool to counter effectively the economic and financial sanctions imposed on Rhodesia, in particular, the iniquitous Orders in Council passed by the British Parliament",

and to enable it to prevent the formation of any legal government under the ægis of the Governor.

These passages must not, of course, be taken in isolation for that the respondents can rely on those sections of the speech which are in their favour is clear from such a case as *R. v. Valachia & Another*, 1945 A.D. 826 at 837.

Mr. Lardner-Burke had said also:

> "The House will remember that I made a statement on November 25, giving the full reasons for the declaration of the existing State of Emergency. It was to provide the necessary powers for the security forces to deal with the influx of saboteurs, mainly from Zambia, and also to deal with certain subversive activity which had been occurring in various parts of Rhodesia, and particularly in the Bulawayo area . . ."
>
> "I mentioned the fact that in the previous twelve months over 80 trained terrorists had been arrested by our Police after their arrival in this country.

"I also mentioned that we had evidence to the effect that it was estimated that there were between 700 and 800 trained men or trainees, outside Rhodesia, who were awaiting orders to undertake their subversive activities inside this country. This number still remains approximately the same . . . Therefore, the terrorists can and still do infiltrate back, and the menace still exists, as detailed by me in November. Accordingly, we have no option but to keep a strict watch on our borders . It is, therefore, quite apparent that the build-up of terrorists and offensive material in such territories as Zambia and Tanzania with the implied connivance of the governments of those countries, poses no less a threat now than it did prior to the declaration of the State of Emergency on the 5th November, 1965 . . An example of the powers we need to keep saboteurs under control, and which is provided by our emergency powers, is the power of detention. The only provision for detaining persons under our law is by virtue of the powers conferred on us by the Emergency Powers Act. We would indeed be foolish, and not worthy of our responsibility to maintain law and order, if, because a saboteur could not be brought before the courts for the reasons I have so often given for example intimidation of witnesses, we let him loose on the public to blow up trains, pylons, bridges, etc. We cannot let trained saboteurs run loose in the country, and if they cannot be put out of harm's way by the courts, then they must be put out of circulation by being detained."

The reasons as a whole are perhaps best summed up in these words from the speech:

"Rhodesia is now a Sovereign Independent Country and it behoves us to see that we maintain our territorial integrity and that sovereignty which we have now gained . the main threat to the security of this counrty, and the maintenance of law and order in it, is an external one; this is reason enough for continuing the State of Emergency, but we also need extraordinary powers, some of which are already being used, to fight the war on the economic and propaganda fronts."

From these passages there is some evidence, albeit not evidence on oath, that the declaration of a state of emergency was necessary at least in part for the preservation of peace and order, and for reasons unconnected with the unconstitutional action. Where the welfare of the state and its inhabitants might be at stake I do not think that one should take too restricted a view of the facts. I consider that on a balance of probabilities it has been established that the disputed continuation of the emergency was a measure at least in part reasonably required for the ordinary orderly running of the country unconnected with the usurpation. But I would stress that anything done by virtue of this declaration, whether it be a legislative or administrative act, should be carefully scrutinized because it was within the contemplation of the present authorities that it could well be used to take measures to further their illegal action at least by entrenchment.

The appellants were originally detained under section 21 of the regulations which empowered the Minister by order under his hand to direct

any person to be detained if that person's detention appeared to him to be expedient in the public interest. But the detention with which we are concerned in these appeals is the continued detention of the appellants in terms of section 47 (3) which reads:

> "(3) Any person who, immediately before the date of commencement of these regulations, was being detained in terms of the Emergency (Maintenance of Law and Order) Regulations, 1965, shall continue to be detained as though the order for his detention had been made under these regulations and shall be deemed to be in lawful custody so long as he is so detained."

It is by this section that the respondents maintain that the original detention order was continued in force.

That a person's detention should be automatically continued with each successive state of emergency without any consideration having to be given to the necessity or the circumstances is a very serious interference with personal liberty. The respondents have made no attempt on the facts to justify such a drastic interference, and it is difficult to see how such a provision could ever be said to be reasonably required for the ordinary orderly running of the State.

On the application of the first test which I have enunciated to determine the validity of any challenged act, I am of the view that the regulation cannot be upheld as being reasonably required for the ordinary orderly running of the State.

Further, I agree with the learned Chief Justice that the regulation is *ultra vires* the empowering Act, and I consider that it, therefore, clearly interferes unjustifiably with the just rights of citizens. On the application of the second test the regulation cannot be upheld.

These conclusions make it unnecessary to apply the tests which I consider have to be satisfied, to the remainder of the Regulations such as regulation 21, which was primarily considered by the Court *a quo*, and unnecessary to consider whether the original exercise of power by the minister was warranted.

To summarize my judgment:

1. My basic conclusion is that while the present authorities are factually in control of all executive and legislative powers in Rhodesia, they have not usurped the judicial function.

   For this reason they are neither a fully *de facto*, nor a *de jure*, government, and this Court remains a court constituted by and deriving its authority from the 1961 Constitution.

2. 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.

3. Applying these tests, I am satisfied that the Proclamation continuing the state of emergency can be upheld, but I am not satisfied that section 47 (3) of the Regulations, providing, as it does, for automatically continued detention, is reasonably required for the ordinary orderly running of the country, and as it is *ultra vires* the empowering Act, it defeats the just rights of citizens under the 1961 Constitution.

4. For these reasons I would decline to uphold the validity of section 47 (3) of the Regulations and agree with the order of the learned Chief Justice.

Messrs. Scanlen & Holderness, attorneys for the appellants in both cases.

Government Attorney, for the respondents in both cases.

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