Privy Council Appeal No. 13 of 1968

Stella Madzimbamuto – – – – – – *Appellant*

v.

D. W. Lardner-Burke and Another – – – – *Respondents*

FROM

THE HIGH COURT OF SOUTHERN RHODESIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL. DELIVERED THE 23RD JULY 1968

Present at the Hearing:
LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
LORD PEARSON

(*Majority Judgment delivered by* LORD REID)

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

It appears from the judgments of the learned judges in Southern Rhodesia that this case has been treated as a test case raising the whole question of the present constitutional position in Southern Rhodesia. It is therefore necessary to make a brief survey. Much of the early history of the territory is set out in the Report of the Board in *In re Southern Rhodesia* [1919] AC 211. That Report discloses a somewhat unusual relationship between the British South Africa Company and the Crown. But it is sufficient for present purposes to quote one passage from that Report—"Those who knew the facts at the time did not hesitate to speak, and rightly so, of conquest, and if there was a conquest by the Company's arms, then, by well settled constitutional practice, that conquest was on behalf of the Crown. It rested with Her Majesty's advisers to say what should be done with it" (p. 221).

The position was regularised and defined in 1923 by the Southern Rhodesia (Annexation) Order in Council. That Order narrated that the territories were under the protection of His Majesty and provided by section 3 "From and after the coming into operation of this Order the said territories shall be annexed to and form part of His Majesty's Dominions, and shall be known as the Colony of Southern Rhodesia." The Order came into operation on 12th September 1923. Letters Patent of 1st September 1923 provided "Whereas we are minded to provide for the establishment of Responsible Government, subject to certain

limitations hereinafter set forth . . ."; and then detailed provisions followed. In his judgment in the present case Beadle C. J. drew attention to the fact that by section 31 the United Kingdom Government retained the power of disallowance of any law within one year of the Governor's assent. He then quoted from a statement made by the United Kingdom Government in 1961: "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." (Cmd. 1399.)

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

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

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

Chapter VI is entitled "The Declaration of Rights" and is designed to secure "the fundamental rights and freedoms of the individual". Directly relevant in the present case are section 58, which provides "(1) No person shall be deprived of his personal liberty save as may be authorised by law", and section 69 which provides "(1) Nothing contained in any law shall be held to be inconsistent with or in contravention of" *inter alia* section 58 "to the extent that the law in question makes provision with respect to the taking during any period of public emergency of action for the purpose of dealing with any situation arising during that period . . .". Section 72 (2) defines "period of public emergency" as meaning *inter alia* any period not exceeding three months during which a state of emergency is declared to exist "by virtue of a proclamation issued in terms of any law for the time being in force relating to emergency powers, the reasons for the issue thereof having been communicated to the Legislative Assembly as soon as possible after the issue thereof, or by virtue of a further

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

The only other part of the Constitution to which reference need be made is Chapter IX entitled Amendment of the Constitution. Section 105 provides "Subject to compliance with the other provisions of this Constitution, a law of the Legislature may amend, add to or repeal any of the provisions of this Constitution other than those mentioned in section 111." Section 107 together with the Third Schedule creates certain specially entrenched provisions which include the whole of Chapter VI (The Declaration of Rights). Section 111 authorises Her Majesty in Council to amend, add to or revoke nine specified sections and no others. The only provision for disallowance of any law made by the Legislature is that set out in section 32 and it is of very limited scope.

Their Lordships must now refer to the Emergency Powers Act 1960 which remained in force under the 1961 Constitution. Section 3 enabled the Governor by proclamation to declare a state of emergency, but it provided by subsection (2) "No such proclamation shall be in force for more than three months without prejudice to the issue of another proclamation at or before the end of that period if the Legislative Assembly by resolution so determines." Section 4 provided that so long as a proclamation is in force regulations made by the Governor may "(*b*) make provision for the summary arrest or detention of any person whose arrest or detention appears to the Minister to be expedient in the public interest".

The position of the appellant's husband is dealt with in detail by Lewis J. in his judgment of 9th September 1966. He was first detained in 1959 under earlier powers. Then in 1961 he was released to a restriction area and in January 1963 he was released altogether. In April 1964 he was again restricted but released in April 1965. Then in June 1965 he was restricted to a restriction area for five years: that Order is still in force. On 5th November 1965 a State of Emergency was (validly) proclaimed by the Governor and Regulations were made under section 4 of the Act of 1960. Then on 6th November 1965 the respondent Mr. Lardner-Burke as Minister of Justice made an Order under section 21 of Emergency Regulations of 1965 for the detention of the appellant's husband in prison on the ground that he was "likely to commit acts in Rhodesia which are likely to endanger the public safety, disturb or interfere with public order or interfere with the maintenance of any essential service". It has not been argued that any of these Orders was invalid.

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

> "The Government have made an unconstitutional declaration of independence.
>
> I have received the following message from Her Majesty's Secretary of State for Commonwealth Relations:
>
> > 'I have it in command from Her Majesty to inform you that it is Her Majesty's pleasure that, in the event of an unconstitutional declaration of independence, Mr. Ian Smith and 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 the country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police, and the public service."

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

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

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

. . . . . "

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

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

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

(2) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.

3. (1) So long as this section is in operation—

(*a*) no laws may be made by the Legislature of Southern Rhodesia, no business may be transacted by the Legislative Assembly and no steps may be taken by any person or authority for the purposes of 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.

. . . . . .

(3) References in the Constitution or in any other law in force in Southern Rhodesia to a law of the Legislature of Southern Rhodesia or to an Act of that Legislature shall be construed as including references to an Order in Council made under subsection (1)(*c*) of this section.

. . . . . .

(5) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.

4. (1) So long as this section is in operation—

(*a*) the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State;

(*b*) sections 43, 44, 45 and 46 of the Constitution shall not have effect;

(*c*) subject to the provisions of any Order in Council made under section 3(1)(*c*) of this Order and to any instructions that may be given to the Governor by Her Majesty through a Secretary of State, the Governor shall act in his discretion in the exercise of any function which, if this Order had not been made, he would be required by the Constitution to exercise in accordance with the advice of the Governor's Council or any Minister;

(*d*) a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or a Deputy Minister or a Parliamentary Secretary; and

(*e*) without prejudice to any other provision of this Order, a Secretary of State may exercise any function that is vested by the Constitution or any other law in force in Southern Rhodesia in any officer or authority of the Government of Southern Rhodesia (not being a court of law) or (whether or not he exercises that function himself) prohibit or restrict the exercise of that function by that officer or authority.

. . . . . .

(4) References in this section to an officer of the Government of Southern Rhodesia shall be construed as including references to the Governor.

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

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

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

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

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

Thereupon the appellant raised the present proceedings maintaining that there was now no lawful ground on which her husband could be detained. Mr. Lardner-Burke recognised the jurisdiction of the High Court and, as appears from the judgment of Lewis J., his Counsel maintained that the usurping Government of which he was a member were the *de jure* Government, or alternatively that they were the *de facto* Government being the only effective government of the country, and therefore laws made by the new régime were valid at least in so far as made for the maintenance of law and order.

Both Lewis J. and Goldin J. held that the 1965 Constitution was not the lawful Constitution and that Mr. Smith's Government was not a lawful Government. But they held that necessity required that effect should be given to the Emergency Power Regulations and therefore the detention of the appellant's husband was lawful. Lewis J. stated his general conclusion as follows "The Government is, however, the only effective Government of the Country, and therefore on the basis of necessity and in order to avoid chaos and a vacuum in the law, this Court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."

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

> "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 to-day is that of a fully *de facto* Government in the sense that it is in fact in effective control of the territory and this control seems likely to continue. At this stage however it cannot be said that it is yet so firmly established as to justify a finding that its status is that of a *de jure* Government.
>
> 3. The present Government having effectively usurped the governmental power granted Rhodesia under the 1961 Constitution, can now lawfully do anything which its predecessor could lawfully have done, but until its new constitution is firmly established and thus becomes the *de jure* Constitution of the Territory, its administrative and legislative acts must conform to the 1961 Constitution.
>
> 4. The various Proclamations of States of Emergency were lawfully made."

Quenet J. P. stated his conclusion at the end of his judgment "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."

Macdonald J. A. stated that "prior to the 11th November 1965, sovereign power over Rhodesia was divided between the governments of Rhodesia and Great Britain". Then later he stated that "Allegiance to the state imposes as one of its most important duties obedience to the laws of the sovereign power '*for the time being*' within the state." And after an exhaustive examination of a number of authorities he stated his main conclusions.

> "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."

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

> "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."

Fieldsend A. J. A. said "it is my firm conviction that a court created in terms of a written constitution has no jurisdiction to recognise, either as a *de jure* or *de facto* government any government other than that constitutionally appointed under that constitution". But he went on to consider the doctrine of necessity and concluded "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."

A new point had been raised in the course of the hearing by the Appellate Division. The original Emergency Regulations made before the Declaration of Independence had contained one section under which orders for detention could be made. But the new Emergency Regulations made thereafter contained both that section and another which was in wider terms, and the orders under which the appellant's husband was detained after 3rd February 1966 were made under the latter and wider section. The Appellate Division held that this latter section was *ultra vires* and that therefore orders made under it were invalid. So on that ground they allowed the appellant's appeal.

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

Their Lordships were referred to the decision of the Appellate Division in *Chikwakwata v. Bosman* [1965] 4 S.A. 57 at p. 59 where Beadle C. J.

said " It seems to me, therefore, (although the matter might have been expressed with a little more clarity) that where section 71 (5) talks of ' a determination under this section ', it means every determination which concerns the question of whether or not sections 57 to 68 of the Declaration of Rights have been contravened in any particular statute ". Their Lordships agree. But on application being made for leave to appeal in the present case it was held that there had been no determination under section 71 (5) because the case had been argued and decided without any express reliance on the Declaration of Rights. In their Lordships' view that is too narrow an interpretation. Section 58 provided that no person shall be deprived of his personal liberty save as may be authorised by law. The appellant's case has been throughout that her husband has been deprived of his personal liberty in a manner not authorised by law. It has been determined that the law under which he is now detained is a valid law and the appellant and her husband are aggrieved by that determination. That is in their Lordships' view sufficient to bring section 71 (5) into operation. Their Lordships therefore decided that the appellant has a right to appeal to Her Majesty in Council.

Before dealing with the questions which have to be decided in the appeal it is convenient to deal with the question of the applicability of Roman Dutch Law. No light is thrown on the matter by any Southern Rhodesia statute or decision cited to their Lordships, and therefore the question is what was the basis of the Constitutional law of the Colony of the Cape of Good Hope in 1891. With regard to private law affecting individuals Innes C. J. said in *R v. Harrison and Dryburgh* 1922 S.A. (AD) 320 at p. 330 " The Cape Articles of Capitulation dated 18th January, 1806, stipulated that the rights and privileges which the inhabitants had theretofore enjoyed should be preserved to them. Among those privileges the retention of their existing system of law was undoubtedly included ". That system of law was Roman Dutch Law. Then Innes C. J. referred to the Charter of Justice of 1832 which directed the Supreme Court to exercise its jurisdiction " according to the laws now in force in our said colony "— again Roman Dutch Law. But it does not at all follow that the British Government agreed in 1806 that the nature and extent of British Sovereignty over the colony should be defined by an alien system of law. In *Union Government v. Estate Whittaker* 1916 S.A. (AD) 194 Innes C. J. said (at p. 203) " Now, when the Sovereign agrees that the system of law prevailing in a conquered settlement shall continue in force thereafter, it would seem a necessary inference, in the absence of any stipulation to the contrary, that the rights of the State, with regard to the acquisition alienation and disposition of property, are intended to be regulated by the legal principles which the Sovereign expressly sanctions. Such questions as whether the Crown is amenable to the jurisdiction of the Courts, and its constitutional position in regard to matters of government stand on a different footing, and no inference affecting them could properly be drawn from the establishment of a system of law differing from that of England ". In their Lordships' judgment that must be right. The nature of the sovereignty of The Queen in the Parliament of the United Kingdom over a British Colony must be determined by the Constitutional law of the United Kingdom and it is therefore unnecessary for their Lordships to consider points under Roman Dutch Law which have been raised as to promulgation of laws and the like. But their Lordships would add that they are very far from being satisfied that if Roman Dutch Law were applicable the result would be in any way different.

Their Lordships can now turn to the three main questions in this case.

1. What was the legal effect in Southern Rhodesia of the Southern Rhodesia Act 1965 and the Order in Council which accompanied it?

2. Can the usurping Government now in control in Southern Rhodesia be regarded for any purpose as a lawful Government?

3. If not, to what extent, if at all, are the Courts of Southern Rhodesia entitled to recognise or give effect to its legislative or administrative acts?

If The Queen in the Parliament of the United Kingdom was sovereign in Southern Rhodesia in 1965 there can be no doubt that the Southern Rhodesia Act 1965 and the Order in Council made under it were of full legal effect there. Several of the learned judges have held that sovereignty was divided between the United Kingdom and Southern Rhodesia. Their Lordships cannot agree. So far as they are aware it has never been doubted that, when a colony is acquired or annexed following on conquest or settlement, the sovereignty of the United Kingdom Parliament extends to that colony, and its powers over that colony are the same as its powers in the United Kingdom. So in 1923 full sovereignty over the annexed territory of Southern Rhodesia was acquired. That sovereignty was not diminished by the limited grant of self government which was then made. It was necessary to pass the Statute of Westminster 1931 in order to confer independence and sovereignty on the six Dominions therein mentioned, but Southern Rhodesia was not included. Section 4 of that Act provides "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof." No similar provision has been enacted with regard to Southern Rhodesia.

It has been argued that the British Nationality Act 1948 shows that Southern Rhodesia had by that time acquired at least a measure of sovereignty. Section 1 provides that "every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject". Subsection (3) mentions eight countries to which full independence had already been granted and also Southern Rhodesia. It has never been suggested that it can be inferred from this that Southern Rhodesia must be regarded as fully independent. So on any view the association of Southern Rhodesia with those other countries was anomalous. Their Lordships cannot infer from the mere fact that Southern Rhodesian citizenship was created that some limited but undefined measure of sovereignty was conferred on that colony.

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

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

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

With regard to the question whether the usurping Government can now be regarded as a lawful Government much was said about *de facto* and *de jure* Governments. Those are conceptions of international law and in their Lordships' view they are quite inappropriate in dealing with the legal position of a usurper within the territory of which he has acquired control. As was explained in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.* [1967] 1 AC 853 when a question arises as to the status of a new régime in a foreign country the Court must ascertain the view of Her Majesty's Government and act on it as correct. In practice the Government have regard to certain rules, but those are not rules of law. And it happens not infrequently that the Government recognise a usurper as the *de facto* Government of a territory while continuing to recognise the ousted Sovereign as the *de jure* Government. But the position is quite different where a Court sitting in a particular territory has to determine the status of a new régime which has usurped power and acquired control of that territory. It must decide. And it is not possible to decide that there are two lawful Governments at the same time while each is seeking to prevail over the other.

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

A recent example occurs in *Uganda v. Commissioner of Prisons* [1966] E.A. 514. On 22nd February 1966 the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the Government of Uganda. He was completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma C. J. said (at p. 535) " 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 in the 1962 Constitution in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and the Vice-President on the grounds mentioned in the early part of this judgment." Later he said (at p. 539) " 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 ".

Pakistan affords another recent example. In *The State v. Dosso* [1958] 2 P.S.C.R. 180 the President had issued a Proclamation annulling the existing Constitution. This was held to amount to a revolution. Muhammed Munir C. J. said (at p. 184) " It sometimes happens, however, that a Constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the Constitution. Any such change is called a revolution, and its legal effect is not only the destruction of the existing Constitution but also the validity of the national legal order."

Their Lordships would not accept all the reasoning in these judgments but they see no reason to disagree with the results. The Chief Justice of Uganda said (at p. 533) " The Government of Uganda is well established and has no rival." The Court accepted the new Constitution and regarded itself as sitting under it. The Chief Justice of Pakistan said " Thus the

essential condition to determine whether a Constitution has been annulled is the efficacy of the change" (p. 185). It would be very different if there had been still two rivals contending for power. If the legitimate Government had been driven out but was trying to regain control it would be impossible to hold that the usurper who is in control is the lawful ruler, because that would mean that by striving to assert its lawful right the ousted legitimate Government was opposing the lawful ruler.

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

Their Lordships note that importance was attached by some of the judges in Southern Rhodesia to arguments regarding allegiance and also the effect of the Statute of 1495. 11 Hen. VII, C. 1. They do not find it necessary to deal with the question of allegiance generally. That Statute provides that no "persons . . . that attend upon the King and Sovereign lord of this land for the time being in his person and do him true and faithful service of allegiance in the same" shall be convicted of high treason or other offences. The true meaning of that statute was much canvassed by the older writers. Blackstone said in his chapter dealing with high treason "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.*" Their Lordships are satisfied that it cannot be held to enact a general rule that a usurping Government in control must be regarded as a lawful Government.

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

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

The first case decided by the Supreme Court was *Texas v. White* (1868) 7 Wallace 700. The Court laid down the principle to be applied in these terms (at p. 733):

"It is an historical fact that the government of Texas, then in full control of the State, was its only actual government; and certainly if Texas had been a separate State, and not one of the United States, the new government, having displaced the regular authority, and having established itself in the customary seats of power, and in the exercise of the ordinary functions of administration, would have constituted, in the strictest sense of the words, a *de facto* government, and its acts, during the period of its existence as such, would be effectual, and, in almost all respects, valid. And, to some extent, this is true of the actual government of Texas, though unlawful and revolutionary, as to the United States.

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

In *Hanauer v. Woodruff* (1872) 15 Wallace 439 Field J. said (at p. 449)

"The difference between the two cases is the difference between submitting to a force which could not be controlled and voluntarily aiding to create that force."

Similar statements of principle were made in many other cases. It will be sufficient to quote from what was said in *Horn v. Lockhart* 17 Wallace 570 at p. 580.

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

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

the cases cited conferred any validity upon Acts of the Confederate States which were contrary to the United States Constitution.

References were also made by the judges in Southern Rhodesia to the writings of civilians and jurists. It will be sufficient to quote from Grotius De Jure Belli et Pacis I.4.15 as translated in an English edition of 1738.

> "XV. We have treated of him, who has now, or has had a Right to govern; it now remains, that we say something of him that usurps the Government; not after he has either by long Possession, or Agreement obtained a Right to it, but so long as the Cause of his unjust Possession continues. The Acts of Sovereignty exercised by such an Usurper may have an obligatory Force, not by virtue of his Right, (for he has none) but because it is very probable that the lawful Sovereign, whether it be the People themselves, or a King, or a Senate, chooses rather that the Usurper should be obeyed during that Time, than that the Exercise of the Laws and Justice should be interrupted and the State thereby exposed to all the disorders of anarchy."

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

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

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

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

The position with regard to administrative acts is similar. It has not been argued that the dismissal from office of Mr. Smith and his colleagues was invalid. So when the Order in Council was made there were no Ministers in Southern Rhodesia. Section 4 (1) (*b*) by providing that sections 43, 44, 45 and 46 of the Constitution shall not have effect prevented any

lawful appointment of new Ministers. Section 4 (1) (*a*) provided that the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State, and section 4 (1) (*d*) authorised a Secretary of State to exercise any function vested by the Constitution or any other law in force in Southern Rhodesia in a Minister or Deputy Minister or Parliamentary Secretary. And section 6 declared that any function exercised in contravention of any prohibition or restriction imposed by or under the Order is void and of no effect.

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

Importance has been attached to the Governor's statement of 11th November 1965 quoted earlier. That statement was made before the making of the Order in Council and in any event it could not prevail over the Order in Council. So when it was said—" it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police, and the public service "—that must be taken with the qualification that it can only apply in so far as they can do so without acting or supporting action in contravention of the Order in Council.

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

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

The issue in the present case is whether Emergency Powers Regulations made under the 1965 Constitution can be regarded as having any legal validity force or effect. Section 2 (1) of the Order in Council of 1965 provides " It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect." The 1965 Constitution, made void by that provision, provides by section 3 that " There shall be an Officer Administering the Government in and over Rhodesia "—an office hitherto unknown to the law. The Emergency Powers Regulations which were determined by the High Court to be valid were made by the Officer Administering the Government. For the reasons already given their Lordships are of opinion that that determination was erroneous. And it must follow that any order for detention made under such Regulations is legally invalid.

Their Lordships will therefore humbly advise Her Majesty that it should be declared that the determination of the High Court of Southern Rhodesia with regard to the validity of Emergency Powers Regulations made in Southern Rhodesia since 11th November 1965 is erroneous, and that such Regulations have no legal validity force or effect.

(*Dissenting Judgment by* LORD PEARCE)

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

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

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

I accept the existence of the principle that acts done by those actually in control without lawful validity may be recognised as valid or acted upon by the Courts, with certain limitations namely

(*a*) so far as they are directed to and reasonably required for ordinary orderly running of the State, and

(*b*) so far as they do not impair the rights of citizens under the lawful (1961) Constitution, and

(*c*) so far as they are not intended to and do not in fact directly help the usurpation and do not run contrary to the policy of the lawful Sovereign. This is tantamount to a test of public policy.

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

Grotius (quoted below) substantially equates the principle to an implied mandate from the lawful Sovereign for the preservation of His realm.

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

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

". . . It is not necessary to attempt any exact definitions, within which the acts of such a State government must be treated as valid, or invalid. It may be said, perhaps with sufficient accuracy, that acts necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfer of property, real and personal, and providing remedies for injuries to person and estate, and other similar acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States, or intended to defeat the just rights of citizens, and other acts of like nature, must, in general, be regarded as invalid and void. . . ." (*Texas v. White* 19 Lawyer's Ed. 316 at 733.)

". . . We admit that the acts of the several States in their individual capacities, and of their different departments of government, executive, judicial, and legislative, during the war, so far as they did not impair or tend to impair the supremacy of the National authority, or the just rights of citizens under the Constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society, or do away with civil government, or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary States touching these and kindred subjects, where they were not hostile in their purpose or mode of enforcement to the authority of the National government, and did not impair the rights of citizens under the Constitution. . . ." (*Horn v. Lockhart* 17 Wallace 570 at 580.)

". . . From these cases it may be deduced—

That the transactions between persons actually residing within the territory dominated by the Government of the Confederate States were not invalid for the reason only that they occurred under the sanction of the laws of that government or of any local government recognizing its authority;

That, within such territory, the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war, under the control of the local governments constituting the so called Confederate States;

That what occurred or was done in respect of such matters under the authority of the laws of these local *de facto* governments should not be disregarded or held to be invalid merely because those governments were organized in hostility to the Union established by the national Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws, and because transactions in the ordinary course of civil society as organized within the enemy's territory, although they may have indirectly or remotely promoted the ends of the *de facto* or unlawful government organized to effect a dissolution of the Union, were without blame 'except

when proved to have been entered into with actual intent to further invasion or insurrection; ' and,

> That judicial and legislative acts in the respective States composing the so called Confederate States should be respected by the courts if they were not ' hostile in their purpose or mode of enforcement to the authority of the National Government, and did not impair the rights of citizens under the Constitution '. . . ." (*Baldy v. Hunter* 171 U.S. 388 at 400–401.)

The Cyprus case of *Attorney-General v. Mustafa Ibrahim* (1964 3. Judgments of Supreme Court of Cyprus 1) and the Pakistan case (1955 1 F.C.R. 439) give support to the principle of necessity. The fact that there was there no competing lawful Sovereign does not distinguish them from the present case. *Ex hypothesi* the acts under discussion are unlawful, whether it be as against a Constitution or a Law or a lawful Sovereign. The existence of a lawful Sovereign creates no relevant difference, though it may be important when public policy has to be assessed, since an acknowledgment of validity may be against that Sovereign's policy. In the present case however the lawful Sovereign though asserting a full right to govern, was not in fact governing, but had given certain indications of policy which have to be carefully considered.

Further support for the principle is given by Lord Mansfield in the case of *Stratton* in 21 State Trials p. 1045. There the lawful Governor of Madras was unlawfully put under arrest by certain persons under the plea of alleged necessity. '

Lord Mansfield said to the jury (at p. 1224) that in England it cannot happen because there is a regular government to which they can apply " but in India you may suppose a possible case, but in that case it must be imminent, extreme, necessity; there must be no other remedy to apply to for redress; it must be very imminent, it must be very extreme, and in the whole they do, they must appear clearly to do it with a view of preserving the society and themselves—with a view of preserving the whole. But in the case here where is that extreme necessity? But that I leave to you as judges of it. For as in natural necessity, so in the other, the jury are to judge, if a case exists or if you think this is a case existing of that nature."

Grotius rationalises the allowance of some validity to a usurper's acts, equating it to an implied mandate from the lawful Sovereign, in the following passage from De Jure Belli et Pacis, Bk. 1 Ch. IV, Sect. XV (quoted by Beadle C. J. at 74):

> " 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 one to whom the sovereignty actually belongs, whether people, King, or senate, would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the Courts."

This is sound common sense.

International Law as crystallised in The Hague rules has from a similar point of view concerned itself with the preservation of courts and law and order during enemy occupation. But those rules are confined to national belligerents and have no application to a domestic rebellion. Nevertheless, there seems no reason why the law should not even in the case of rebellion have some regard to the preservation of the citizens from chaos and disorder. Particularly is this so when, as here, there is

a full-scale rebellion in complete control over the whole area of one isolated unit of the realm.

Dr. Lauterpacht in his Recognition in International Law at p. 147 says:

> "In 1924 and in subsequent years the courts of the United States extended the doctrine of 'justice and public policy' to cover acts of unrecognized foreign governments. They interpreted the civil war cases as suggesting, in the words of Mr. Justice Cardozo in *Sokoloff v. National City Bank* (239 N.Y. 158; (1924) 145 N.E. 917 at p. 918), 'the possibility that a body or group which has vindicated by the course of events its pretensions to sovereign power, but which has forfeited by its conduct the privileges or immunities of sovereignty, may gain for its acts and decrees a validity quasi-governmental, if violence to fundamental principles of justice or to our own public policy might otherwise be done'. In the same judgment Mr. Justice Cardozo, while affirming the principle that 'juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it', qualified the general rule by the statement that 'in practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness, as we learned in litigations following our Civil War'."

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

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

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

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

(*a*) The lawful Government through its Governor on 11th November announced that all the Ministers had been dismissed and gave the following directive to its citizens,

> "I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities.

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

(*b*) That directive was repeated on 14th November in identical terms with the addition of the following:

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

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

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

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

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

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

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

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

short message made it perfectly clear that the lawful Government was not seeking to impose its will by causing day-to-day chaos. It was relying on other sanctions and pressures.

This is in my opinion the clear meaning of the message and I see no reason to doubt that this was intended for reasons of humanity and common sense. The directive was short and unambiguous. No doubt every word of it was drafted by the Government with anxious care. Though its day-to-day application by the citizen must obviously be enormously difficult, the intention of the message was plain. I do not think one should countenance the argument that the message has no force in law. When a government in a crisis of dire peril and difficulty gives a directive to its distressed and anxious citizens through its lawful Governor (claiming, as above, to be " the lawfully constituted authority in Rhodesia ") it speaks with a voice that must be relied on by them as the voice of authority. And when for years, though able to speak, it has not sought to correct or countermand its message, it can be taken that there was no mistake in the message and that it still stands.

The judiciary were expressly included with the others. It seems to me that the message was a mandate to the judges to do that which in fact they have done (see Judgment of Beadle C. J. at p. 21–2) and also that which, if I am right in my view as to the principle of necessity or implied mandate, that principle permitted them to do.

> " The necessity relied on in the present case " said Fieldsend J. (at p. 185) " 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 people in any emergency which might occur, to mention but a few of the numerous matters which require 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."

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

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

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

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

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

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

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

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

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

" (*a*) for suspending, amending, revoking or adding to the provisions of the Constitution of Southern Rhodesia 1961;

(*b*) for modifying, extending or suspending the operation of any enactment or instrument in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia;

(*c*) for imposing prohibitions, restrictions or obligations in respect of transactions relating to Southern Rhodesia or any such persons or things."

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

In my opinion the relevant part of the Order was simply directed to prohibiting any improper use or manipulation of the 1961 Constitution by those in control of Rhodesia, and to preventing that Constitution being taken over and used as a speciously lawful Government by those who did not intend to obey its limits (as has been done on occasion elsewhere)— in short to make it clear beyond argument or subterfuge that this was rebellion.

Section 2 (1), section 3 (1) and section 6 are the relevant sections. Section 3 (1) provides that " so long as this Section is in operation—(*a*) no laws may be made by the legislature of Southern Rhodesia . . . ". That is clearly the lawful legislature under the 1961 Constitution. " . . . No business may be transacted by the Legislative Assembly . . . ". That is clearly the Legislative Assembly under the 1961 Constitution. " . . . No steps may be taken by any person or authority for the 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 . . . ". That still clearly refers to the Legislative Assembly under the 1961 Constitution. " . . . And Chapters II and III of the Constitution shall have effect subject to the foregoing provisions of this paragraph; ". Those two chapters deal with the Legislative Assembly, its procedure and powers and with the franchise. This has no relevance save that it emphasizes the fact that the whole subsection is concerned with the 1961 Constitution. Subsection (*b*) provides that the Secretary of State may prorogue the Legislative Assembly, *i.e.*, the Assembly under the 1961 Constitution. Subsection (*c*) gives to Her Majesty in Council the right to make orders for the peace order and good government of Rhodesia.

Section 6 says " It is hereby declared for the avoidance of doubt that any law made, business transacted, step taken or function exercised in contravention of any prohibition or restriction imposed by or under this Order is void and of no effect." The prohibitions or restrictions are those contained in section 3 (*a*). They are concerned, as we have seen and as one would expect, with any attempt to work the lawful Constitution unlawfully. They do not concern an unauthorised Constitution. That is dealt with in section 2 (1) which declares " for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect ". This was of course unnecessary since such instrument or act in purported promulgation of an unlawful Constitution was void anyhow, but it was intended to make quite clear that the new Constitution would not be valid.

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

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

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

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

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In the Privy Council

STELLA MADZIMBAMUTO

v.

D. W. LARDNER-BURKE AND ANOTHER

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