All three alternatives have support in authorities.[21] It is submitted that the first is the correct course, on the principle that only testamentary documents should be admitted to probate. The second alternative raises the question of how far a court of probate can bind a court of equity regarding the interpretation of a will. Helsham, J., however, adopted the second course on the ground that it best clarified the position.

Conclusion

Because of the lack of binding authority and the existence of differing judicial opinions, it is uncertain whether Helsham, J.'s decision will be treated as a correct statement of the law. In the present case, the New South Wales Court was confronted with a vacuum as far as binding authority is concerned, and in choosing as it did it probably went against the legislative policy embodied in s. 13 of the Wills Probate and Administration Act. Perhaps this section is disliked by the courts for it has led to injustice more often than it has prevented fraud.[22]

It seems probable that the present case will be followed: the trend among the courts is to uphold as far as they can what they regard as the testator's probable preference had he been confronted with the full legal consequences.

K. S. WEE, Case Editor — Fourth Year Student.

AN EXERCISE IN SHADOW-BOXING

MADZIMBAMUTO v. *LARDNER-BURKE AND OTHERS*[1]

The Facts

In 1923 Southern Rhodesia was annexed by the British Crown.[2] In the same year the Legislative Assembly of Southern Rhodesia was established, with power to pass legislation for the peace, order and good government of the Colony. All legislation had to be assented to by the Governor, who was appointed by the British Crown which retained the power of disallowance of any law within one year of the Governor's assent. Nevertheless, although the Statute of Westminster did not refer to the Colony, by 1961 it had become an established convention that the Parliament of the United Kingdom would not legislate for the Colony in matters within the competence of the Legislative Assembly of Southern Rhodesia except with the agreement of the Southern Rhodesia Government.[3] In 1961 the United Kingdom granted

[21] The first alternative has the support of Jacobs, J.A. in *Re Mills (No. 1)* at 86; the second, that of Wallace, P. in *Re Mills (No. 1)* at 78, and of *Re Rich, supra* n. 8; and the third, that of *Re Tait, supra* n. 11.

[22] A remarkable example is the recent English case of *In the Estate of Bravda* (1968) 2 All E.R. 217.

[1] (1969) 1 A.C. 645.

[2] Southern Rhodesia (Annexation) Order in Council, 1923. This was made on 30th July, 1923, but was not numbered in the Statutory Rules and Orders series.

[3] Statement made by the U.K. Government in 1961. See *Cmd.* 1399. Sir Humphrey Gibbs, in his Speech from the Throne in 1962, said: "My Ministers have received the clearest assurances from Her Majesty's Government that they cannot revoke or amend the Constitution" (quoted by Macdonald, J.A. in *R.* v. *Ndhlovu & Ors.* (1968) 4 S.A.L.R. 515, at 543). *Sed quaere* whether the speech had carried the assent of the British Government.

Southern Rhodesia a new Constitution,[4] hereinafter referred to as "the 1961 Constitution". The 1961 Constitution provided for the executive authority of Southern Rhodesia to be vested in Her Majesty, and to be exercisable by the Governor, acting in accordance with the advice of the Governor's Council.[5] The legislative power was vested in the Parliament of Southern Rhodesia with the power to legislate for the peace, order and good government of Southern Rhodesia.[6] The Constitution also contained an entrenched Declaration of Rights[7] which expressly stated that no person shall be deprived of his personal liberty save as may be authorized by law.[8] However, the Declaration of Rights went on to provide an exception to this in the case of any period not exceeding three months during which a state of emergency might be declared to exist.[9] The Emergency Powers Act which was enacted by the Parliament of Southern Rhodesia in 1960, and which remained in force under the 1961 Constitution, provided that the Governor might declare a state of emergency for a period not exceeding three months during which time he might make provision for the summary arrest or detention of any person whose arrest or detention appeared to the Minister of Justice to be expedient in the public interest. There was provision for a fresh proclamation to be made by a resolution of the Legislative Assembly at or before the end of the proclaimed period.[10] On 5th November, 1965 a state of emergency was proclaimed by the Governor under the Emergency Powers Act, and on 6th November, 1965 the appellant's husband was arrested pursuant to an order made by the Minister of Justice.

On 11th November, 1965 the Prime Minister and his Ministerial colleagues (who will hereinafter be collectively referred to as "the rebel government") issued a Declaration[11] to the effect that Southern Rhodesia would thenceforth be an independent sovereign State.[12] On the same day they also purported to promulgate a new Constitution (hereinafter referred to as "the 1965 Constitution") which was passed by the Legislative Assembly but did not receive the assent of the Governor. On the same day the Governor issued a statement to the effect that Her Majesty had informed him, through her Secretary of State for Commonwealth Relations, that the rebel government had ceased to hold office, and had requested him to publish Her Majesty's pleasure. The Governor's statement went on to say:

> I call on the citizens of Rhodesia to refrain from all acts which 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.[13]

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[4] The Parliament of the U.K. passed the Southern Rhodesia (Constitution) Act, 1961, which authorised the making of an Order in Council to replace the Letters Patent of 1923, whereupon the Southern Rhodesia (Constitution) Order in Council, 1961 (S.I. 1961, No. 2314) was passed, granting the 1961 Constitution to Southern Rhodesia.

[5] Ss. 42-45.

[6] S. 20.

[7] S. 107 together with Schedule 3 has the effect of entrenching (*inter alia*) the provisions next hereinafter mentioned, *viz.* ss. 58, 69, 72.

[8] S. 58(1).

[9] Ss. 69(1) and 72(2).

[10] Emergency Powers Act, 1960 (Southern Rhodesia) ss. 3-4. It has not been doubted that it was within the powers of the Legislature to pass this Act, as the words "peace order and good government" had been given an extremely broad interpretation when appearing in earlier legislation in *R.* v. *McChlery* (1912) A.D. 196.

[11] Generally known as the Unilateral Declaration of Independence (U.D.I.).

[12] The final step was taken on 3rd March, 1970, when the rebel government declared Rhodesia to be a Republic.

[13] For the full text of the Governor's statement see (1969) 1 A.C. at 714-15.

On 16th November, 1965 the United Kingdom Parliament passed the Southern Rhodesia Act which in effect declared that it had retained responsibility and jurisdiction for Southern Rhodesia as theretofore and provided for Her Majesty by Order in Council to make such provision as appeared to her to be necessary or expedient.[14] Immediately upon the passing of the Act, the Southern Rhodesia Constitution Order 1965[15] (hereinafter referred to as "the Order in Council") was made. The Order in Council provided, *inter alia*, that any law that the Legislative Assembly of Southern Rhodesia purported to promulgate, including any purported Constitution for the Colony, was void; and that the executive power of the Colony remained vested in Her Majesty, to be exercised on her behalf by one of the Secretaries of State.[16]

The rebel government and the members of the Legislative Assembly disregarded the Order in Council, and continued to act much as they had been acting before 11th November. They promulgated laws, including the 1965 Constitution, which purported to supersede the 1961 Constitution. The rebel government effectively and without major internal disturbance retained control of the country. The state of emergency that had been lawfully proclaimed by the Governor on 5th November, 1965 under the Emergency Powers Act having come to an end at the expiration of a period of three months therefrom, the Legislative Assembly passed a resolution as required by that Act to extend the period of emergency, whereupon the detention of the appellant's husband was continued. The appellant commenced proceedings against the defendants, who were the Minister for Justice and Law and Order in the rebel government, and the Governor of the prison where the appellant's husband was detained.[17] She argued that by virtue of the Order in Council, the resolution of the Legislative Assembly extending the period of emergency was void: whereupon, the state of emergency declared on 5th November, 1965 having lapsed, the provisions of the 1961 Constitution rendered her husband's detention illegal. The defendants' counsel on the other hand contended that the 1965 Constitution had superseded the 1961 Constitution, and that accordingly the resolution of the General Assembly was valid, and the detention of the appellant's husband was lawful. The Courts were therefore required in effect to determine the legal status of the laws passed by the rebel government.

The Decision

The case was heard at first instance in the General Division of the High Court of Southern Rhodesia by Lewis and Goldin, JJ.[18] The defendants argued that they were members of the *de jure* government, or alternatively of the *de facto* government which was the only effective government of the

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[14] Southern Rhodesia Act, 1965, esp. ss. 1-2.

[15] S.I. 1965, No. 1952.

[16] See esp. ss. 2-6, set out in full (1969) 1 A.C. at 715-16. Macdonald, J.A. in *R.* v. *Ndhlovu, supra* n. 3, observed that a more proper procedure in the light of the constitutional convention would have been to have Her Majesty's executive power exercised on her behalf not by a Secretary of State, but by a newly appointed Rhodesian government. However, the political realities of the situation made that quite impossible.

[17] No objection was at any time taken to the appellant's title to take the instant proceedings, probably because the rebel government also regarded this as a "test case" to test the legal status in the eyes of the judges of the High Court of Rhodesia. The rebel government took quite a different attitude to the subsequent appeal to the Judicial Committee of the Privy Council: see *infra* nn. 25, 31.

[18] It is important to note that all the judges on both the General Division and the Appellate Division of the High Court of Rhodesia before whom this case was heard were lawfully appointed before 11th November, 1965. (Hathorn, J.A. has since died, and Fieldsend, A.J.A. and Young, J. resigned on conscientious grounds on 4th March, 1968 and 13th August, 1968 respectively. The rebel government has since appointed Greenfield and MacAuley, JJ. to the High Court. See H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (1969) 86 *South African L.J.* 419 at 421, 427.)

country; and that accordingly the resolution passed by the General Assembly was valid and the appellant's husband's detention lawful. Both members of the Court upheld the appellant's husband's detention as valid but preferred to ignore the argument based on *de jure* and *de facto* governments. Instead they based their decisions on the basis that whilst the rebel government was not a lawful government, necessity required that effect be given to certain of its enactments. As Lewis, J. said:

> The (rebel) Government is . . . 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.[19]

On appeal from that decision the Appellate Division upheld the appeal on a technical point,[20] but by implication affirmed the reasoning of the General Division, both in not recognizing the 1965 Constitution and in nevertheless holding for the respondents. Four members of a Bench of five came to their conclusions by reference to the concepts of *de jure* and *de facto* governments. Beadle, C.J. and Jarvis, A.J.A. both considered that although the rebel government was not rendered *de jure* by virtue of its effective control of the territory (which control seemed likely to continue), it was a government *de facto* and legal effect could be given to such of its measures as would have been lawful if enacted by a lawful government governing under the 1961 Constitution.[21] Quènet, J.P. and Macdonald, A.J. did indeed go further and held that the government had acquired a *de jure* status from the fact of its effective and exclusive control of the territory, and therefore presumably legal effect would be given to all its measures, independently of whether the same would have been lawful under the 1961 Constitution.[22]

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[19] Quoted in (1969) 1 A.C. at 717.

[20] *Madzimbamuto* v. *Lardner-Burke* (1968) 2 S.A.L.R. 284. The Court held that the section of the Emergency Regulations promulgated by the rebel government under the Emergency Powers Act, 1960, pursuant to which the appellant's husband was being detained was *ultra vires* the Act and accordingly invalid. The rebel government thereupon immediately made a fresh order for his detention under another section of the Emergency Regulations which clearly was *intra vires* the Act. The appellant's husband was not released from custody.

[21] Beadle, C.J., in *R.* v. *Ndhlovu*, *supra* n. 3, at 522-26, vehemently maintained that this had not been the position, certainly as far as he himself was concerned. He stated that the majority had then already come to the conclusion that the 1961 Constitution had been annulled because of the efficacy of the change, and that the Court was sitting as the Court under the 1965 Constitution. He cited his own subsequent decision in *Dhlamini & Ors.* v. *Carter* (1968) 2 S.A.L.R. 464 as showing that "the majority of the Court who heard the appeal . . . did not consider that they then sat as a 1961 Constitution Court": *R.* v. *Ndhlovu*, at 526. With respect, however, that does not appear to be the correct analysis of his Lordship's judgment in *Dhlamini's Case*, though it was certainly the conclusion which he reached in *R.* v. *Ndhlovu* itself, and which Quènet, J.P. and Macdonald, J.A. reached in *Madzimbamuto's Case*. What Beadle, C.J. had actually said in the latter case was: "(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 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 legislative and administrative acts must conform to the 1961 Constitution." ((1968) 2 S.A.L.R. at 359-360, quoted in (1969) 1 A.C. at 718.) Similarly Jarvis, A.J.A. had said: "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." ((1968) 2 S.A.L.R. at 422, quoted in (1969) 1 A.C. at 719.)

Only Fieldsend, A.J.A. took an approach similar to that of the General Division. Rejecting the concepts of *de jure* and *de facto* as the basis of his decision,[23] his Lordship based his decision on the doctrine of necessity. He said:

> 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 the 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.[24]

The appellant thereupon appealed by special leave[25] to the Judicial Committee of the Privy Council from the order of the Appellate Division, the terms of which basically reflected the approach of Beadle, C.J. and Jarvis, A.J.A.[26] The Board[27] allowed the appeal. Their Lordships all agreed that the Parliament of the United Kingdom, despite the convention established by it of not passing legislation without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly of that country, had retained in law the full sovereign right of enacting laws

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[22] Quènet, J.P. said: "In the result I am satisfied that the present Government is the country's *de facto* government; it has, also, acquired internal *de jure* status; its constitution and laws . . . have binding force." ((1968) 2 S.A.L.R. at 375, quoted in (1969) 1 A.C. at 718.) Macdonald, J.A. said: "(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." ((1968) 2 S.A.L.R. at 415-16, quoted in (1969) 1 A.C. at 718-19.) Beadle, C.J. came to the same conclusion in *Ndhlovu's Case* after a detailed consideration of the actual position of the rebel government, and concluded that it was sufficiently firmly established to be entitled to total *de jure* recognition. Their Lordships thus used the simple test of physical power to establish legality: see *infra*, text accompanying nn. 73-89.

[23] His Lordship said: "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." ((1968) 2 S.A.L.R. at 431, quoted in (1969) 1 A.C. at 719.)

[24] (1968) 2 S.A.L.R. at 444, quoted in (1969) 1 A.C. at 719.

[25] She had first applied to the Appellate Division for a declaration that she had a right to appeal under s. 71(5) of the 1961 Constitution: *Madzimbamuto* v. *Lardner-Burke & Ors. (No. 2)* (1968) 2 S.A.L.R. 457. This was refused on two grounds. First, the Court construed s. 71(5) as inapplicable; this construction was subsequently reversed by the Privy Council. Second, the Court found a "more formidable" objection. An affidavit submitted by the respondents stated that "it is the deliberate and considered decision of the (rebel) Government that it will not in any way recognize enforce or give effect to any decision judgment or order of any other Court . . . which purports to be given on an appeal from a decision of this Honourable Court." In the circumstances Beadle, C.J., Jarvis, A.J.A. and Quènet, J.P. held that it was for the Privy Council to determine whether to hear the appeal. Fieldsend, A.J.A. confined his decision to the construction of s. 71(5), and Macdonald, J.A. refused to recognize the authority of the Privy Council. It is submitted that the effect of the decision is an implicit rejection of the Privy Council's authority. For, although the rebel government might be prepared to ignore its decision, the Rhodesian judiciary, if it still followed the Privy Council, would be bound to make the appropriate orders. It seems clear that a capitulation to the fact that the rebel government would not obey the orders based upon the advice of the Board destroys the basic premise upon which Beadle, C.J. purported to base his authority: *viz.*, that the government would actually enforce the Court's orders. See J. M. Eekelaar, "Rhodesia: The Abdication of Constitutionalism" (1969) 32 *Mod. L.R.* 19; and *cf. infra* at n. 89.

[26] "The rebel regime in the Colony of South Rhodesia is a *de facto* government and as such can lawfully do anything which its predecessor could have done under the 1961 Constitution. The first respondent can therefore in the same manner as the lawful Minister could have done before 11th November 1965 detain persons without trial under regulations made pursuant to proclamations of states of emergency issued by the rebel regime." (Quoted in (1969) 1 A.C. at 651.)

[27] Lords Reid, Morris, Wilberforce and Pearson; Lord Pearce dissenting.

for the colony.[28] Accordingly the Imperial Act of 16th November, 1965 and the Order in Council were of full legal effect; and consequently the resolution of the Legislative Assembly was of no effect.[29] Their Lordships also agreed that the concepts of *de jure* and *de facto* are applicable only when a Court of one State is required to consider (so far as the law of that State is concerned) the relative legal rights of two or more competing conglomerations of power within another State. The concepts are wholly inappropriate where a court of that other State is asked to decide the same question, and in such a case the court must give effect to the claims of the conglomeration of power that set it up. Accordingly in the present instance the Court set up and still purporting to be sitting under the 1961 Constitution[30] was bound to regard the enactments of the United Kingdom Parliament as binding, and any enactment inconsistent therewith as being of no effect. It is not intended to discuss these points in any further detail.

Necessity and Implied Mandate

The litigation presents an immense number of interesting and difficult issues. The present writer, however, for reasons of limitations of space, has preferred merely to indicate the existence of some of these issues by means of footnote comments, and investigate only a few in detail. Of particular interest is the aspect of the case dealing with the doctrine of necessity or implied mandate which was put to the Court on behalf of the respondents.[31] Whilst the majority of the Court rejected the argument, Lord Pearce dissented; and it is respectfully submitted that this dissenting opinion is most compelling. His Lordship accepted that there was a principle of necessity or implied mandate, which in the circumstances gave validity to the resolution of the Legislative Assembly. The substance of the principle is that, subject to certain limitations to which reference will be made later, where the legitimate sovereign is expelled by illegal means, there arises not merely a right but also a duty upon the citizens to obey the government actually in power. The need for this stems from the desire to avoid the chaos and anarchy that theoretically must arise if no legal effect whatever were given to the enactments of the government in actual control. Counsel for the respondents in a widely ranging argument cited from Grotius, Suarez, Lessius, Vitoria and Pufendorf, rationalizing the principle of necessity on the basis that ". . . it is very probable that the lawful sovereign . . . 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".[32] This rationale Lord Pearce declared to be "sound common

[28] This had been doubted by the Appellate Division. Beadle, C.J. said that, the transfer of governmental power having been made, the U.K. had no right to revoke these powers. See (1968) 2 S.A.L.R. at 334, relying on the *dictum* in *Ndlwana* v. *Hofmeyer, N.O.* (1937) A.D. 229, at 237 (referring to the Statute of Westminster) that "Freedom once conferred cannot be revoked." Certainly Macdonald, J.A. in *R.* v. *Ndhlovu, supra* n. 3, makes the same point. *Sed quaere*, first, whether the Statute of Westminster is really irrevocable; and second, even if it is, whether Rhodesia is in the same position as the former territories to which the Statute of Westminster relates. The former question remains unanswered, as the Privy Council rejected the Appellate Division's judgment by reference to the latter.

[29] (1969) 1 A.C. at 722-23, 731-32.

[30] But see *supra* n. 21.

[31] The respondents did not appear before the Privy Council, nor were they represented. Counsel appeared as *amici curiae*, but for the sake of brevity will be treated as if they had appeared for the respondents.

[32] Grotius, *De Jure Belli ac Pacis* (1625) bk. 1, ch. 4, s. xv. A fuller quotation appears in the opinion of the majority ((1969) 1 A.C. at 728-29), and in the dissenting opinion of Lord Pearce (*id.* 735-36). It is interesting to note that the two passages are taken from different translations of Grotius—the former from an English translation of 1738, the latter apparently from a far more modern translation. It is also interesting to speculate on whether the difference has any significance.

sense".[33] His Lordship accepted the persuasive weight of a number of decisions, both old and recent, in England, the United States and other parts of the world. He cited from the judgment of Lord Mansfield in *Stratton's Case*[34] as supporting the existence of the principles of necessity in English law.[35] More convincingly, his Lordship relied on the judgments in three decisions of the Supreme Court of the United States, dealing with the legal positions of the States that had attempted to secede from the Union in the American Civil War.[36] It was held in those cases 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 ceased to have any lawful authority. But they 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 executives acts were valid."[37] His Lordship also placed reliance on the Cyprus case of *A.-G.* v. *Mustafa Ibrahim*[38] and the Pakistani case of *Special Reference No. 1 of 1955*,[39] which gave full effect and validity to the enactments of governments that had unlawfully repudiated the authority of the lawful government then in force. In those cases the government that had been expelled was no longer purporting to assert its authority, and the government actually in control had no acknowledged rivals. His Lordship did not consider the distinction significant.

His Lordship found further support for the application of the principles of necessity and implied mandate by looking at the factual situation in Rhodesia. He noted that the judges lawfully appointed under the 1961 Constitution continued to sit as judges under the 1961 Constitution, although the country was in the control of an illegal government which did not recognize the authority of the 1961 Constitution. This he considered to be a situation impliedly sanctioned by the Parliament of the United Kingdom. His Lordship placed heavy emphasis on the Governor's statement of 11th November,[40] and also on a further directive issued by him three days later where his Excellency had said:

> It is my sincere hope that the 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.[41]

He noted that neither statement had since been altered, countermanded or superseded. The United Kingdom made no attempt to pay the judges' salaries, and yet upon the Chief Justice's absence from Rhodesia, the Imperial Parliament appointed one of the other judges as Acting Chief Justice. From these circumstances, his Lordship drew the conclusion that the mandate which was implied by law and which was referred to above received additional support from what amounted to an express mandate from the Parliament of the United Kingdom. His Lordship concluded:

> The directive of the lawful Government to the police and the public

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[33] (1969) 1 A.C. at 736.
[34] (1779) 21 State Tr. 1046, at 1223.
[35] *Cf. R.* v. *Dudley & Stevens* (1814) Q.B.D. 273.
[36] *Texas* v. *White*, 74 U.S. (7 Wall.) 700 (1868); *Horn* v. *Lockhart*, 84 U.S. (17 Wall.) 570 (1873); *Baldy* v. *Hunter*, 171 U.S. 388 (1898).
[37] This summary of the effect of *Texas* v. *White* and *Horn* v. *Lockhart*, both *supra* last n., and of *Hanauer* v. *Woodruff*, 82 U.S. (15 Wall.) 439 (1872) was conceded by the majority of their Lordships at 726. And see *infra* n. 95.
[38] (1964) 3 Judgments of the Supreme Court of Cyprus 1.
[39] (1955) 1 F.C.R. 439.
[40] Quoted *supra* at n. 13.
[41] Quoted (1969) 1 A.C. at 738.

> 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. . . . The lawful Government was not seeking to impose its will by causing day-to-day chaos. It was relying on other sanctions and pressures.[42]

For these reasons his Lordship held that effect should be given to the resolution of the Legislative Assembly extending the state of emergency, and accordingly that the appeal should be dismissed.

The speech of Lord Reid, who delivered the opinion of the majority of their Lordships, covered substantially the same ground as did that of Lord Pearce, but their Lordships came to the opposite conclusion. Their Lordships also cited the passage from Grotius[43] but did not refer to the judgment of Lord Mansfield in *Stratton's Case*.[44] Their Lordships did, however, consider the effect of three decisions of the Supreme Court of the United States[45] but made three "observations"[46] in respect of them, presumably to distinguish the fact-situations and thus to decrease their persuasive force. They pointed to the system of divided sovereignty in the United States, to the fact that the cases came before the Court after the end of the civil war when the authority of the legitimate government had been re-establishd, and to the fact that the Congress of the United States did not (and perhaps under the United States Constitution could not) pass any laws similar to the 1965 Order in Council. Their Lordships similarly considered the Uganda case of *Uganda* v. *Commissioner of Prisons, Ex. p. Matovu*[47] and the Pakistani case of *The State* v. *Dosso*,[48] which also gave full effect and validity to the enactments of regimes that had unlawfully repudiated the authority of the lawful government then in force. As in the cases cited by Lord Pearce,[49] the expelled government was no longer purporting to assert any authority, the actual government had no acknowledged rival, and the judges regarded themselves as sitting as judges of the new government. Their Lordships held that the situation in Rhodesia was distinguishable:

> 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.
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> 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

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[42] *Id.* at 739.
[43] See *supra* n. 32.
[44] *Supra* n. 34.
[45] Namely, the cases cited *supra* n. 36.
[46] (1969) 1 A.C. at 738.
[47] (1966) E.A. 514.
[48] (1958) 2 P.S.C.R. 180.
[49] *Supra* nn. 38-39.

> 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.[50]

Their Lordships summarily dismissed the arguments based on the express mandate stemming from the Governor's statement of 11th November, 1965[51] and his directive of 14th November, 1965.[52] Their Lordships considered the statement and the subsequent directive to be subject to the qualification that they applied only in so far as they did not contravene the Order in Council. Their Lordships realized the practical consequences of their reasoning,[53] but concluded by saying that whereas it might be a general principle based on an implied mandate from the lawful Sovereign that subjects are under a duty to preserve law and order in the territory controlled by the usurper, in the instant case any such implied mandate was overridden by the express enactments of the Parliament of the United Kingdom. Accordingly, their Lordships held that there was no "legal vacuum" in Southern Rhodesia, as the body of law under the 1961 Constitution remained in force. Their Lordships therefore advised Her Majesty to allow the appeal.

An Exercise in Shadow-Boxing

It is submitted with respect that the approach of Lord Pearce is preferable both on the facts and authorities, and on general principles as well. So far as the authorities are concerned the majority of their Lordships, whilst not expressly distinguishing the American decisions,[54] did reflect adversely on their persuasive value by reference to the principles of divided sovereignty under the United States Constitution. With respect, however, it is submitted that the decisions in those cases were in no way, either expressly or by implication, dependent upon the principles of divided sovereignty, and the reasoning applied equally in the present situation. The "observation" relating to the fact that the cases were heard after the end of the period of rebellion, and concerned acts done during it, is probably best examined in conjunction with the distinctions drawn by their Lordships in respect of the Uganda and Pakistani cases.[55] As stated above, their Lordships drew the distinction that in those cases the expelled government was no longer purporting to assert its authority, and the actual government had no acknowledged rival, whereas in the instant case the Parliament of the United Kingdom was still purporting to assert its authority over the colony. With respect, the less theoretical and more realistic approach of Lord Pearce is clearly preferable. His Lordship pointed to the reality of the situation, rather than the sterile legal and political claims and counterclaims. In the instant case, the lawful Sovereign, though

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[50] (1969) 1 A.C. at 725.

[51] See *supra* at n. 13.

[52] See supra at n. 41.

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

Her Majesty's judges have been put in an extremely difficult position. But the fact that the judges among others have been put in a very difficult position cannot justify disregard of legislation passed or authorized 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." ((1969) 1 A.C. at 730-31.)

[54] *Supra* nn. 36-37.

[55] *Supra* nn. 47 and 48 respectively.

asserting a full right to govern, was not in fact governing. So far as the day-to-day administration of the Colony was concerned, the gap between omnipotence in theory and impotence in fact was wide. So far as the facts of the situation were concerned,

> 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 provisions for the needs of the country, there is a vacuum and chaos.[56]

Alternatively, his Lordship pointed out that even the existence of a competing lawful Sovereign does not prevent the principles set out in those cases from applying in the instant case.[57] With respect, it appears to be erroneous to delimit the application of the principles of necessity and implied mandate in the manner indicated by the majority of their Lordships. The principles are primarily for the benefit of the citizens and are basically directed at preventing hardship resulting from disorder and chaos, and at the preservation of the fabric of society through law and order.[58] To deny their application in cases where the expelled government is still purporting to assert its claim to sovereignty would not only itself be unduly harsh upon the citizens of the embattled state, but would invite a rebel government ruthlessly to silence the last remnants of resistance from the expelled authority. The interests of humanity seem far better served by the extension rather than the restriction of the principle of the implied mandate.

Additional support for the existence of the principle may well have been drawn from the decision of the House of Lords in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd. (No. 2)*.[59] In that case, the Court was dealing with the status of the Board of a Foundation, which Board was set up by and was in fact a quasi-governmental organ of the German Democratic Republic, which was not recognized by the government of the United Kingdom. In the course of their speeches Lords Reid and Wilberforce[60] both lent support to the existence

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[56] (1969) 1 A.C. at 740. The U.S. Supreme Court had adopted a similar realistic view in *Texas* v. *White, supra* n. 36, at 732-33, where it was said: "The legislature of Texas . . . cannot be regarded . . . , in the courts of the United States, as a lawful legislature, or its acts as lawful acts. And, yet, 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."

[57] "The fact that there was 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." ((1969) 1 A.C. at 735.)

[58] *Cf. Hanauer* v. *Woodruff, supra* n. 37 at 448, where the Confederate money in *Thorington* v. *Smith*, 75 U.S. (8 Wall.) 1 (1868) was described as "a currency imposed by irresistible force upon the community, in which currency the commonest transactions in the daily life of millions of people, even in the minutest particulars, were carried on, and without the use of which there would have been no medium of exchange among them. The simplest purchase in the market of daily food would, without its use, have been attended with inconveniences which it is difficult to estimate. *It would have been a cruel and oppressive judgment*, if all the transactions of the many millions of people . . . had been held tainted with illegality, because of the use of this forced currency. . . ." (Italics added.)

[59] (1967) 1 A.C. 853.

[60] Ironically both their Lordships were members of the majority in the instant case.

of the principle. If it were otherwise, said Lord Reid,

> . . . the incorporation of every company in East Germany under any new law made by the Democratic Republic . . . would have to be regarded as a nullity, so that any such company could neither sue nor be sued in this country, and any civil marriage under any such new law . . . 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.[61]

And Lord Wilberforce said:

> 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 its total or whether some mitigation of the severity of this result can be found. . . . 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 everyday occurrence or perfunctory acts of administration are concerned . . . the courts may in the interests 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.[62]

It is submitted that one can state with far more certainty than was hazarded by the majority in the *Madzimbamuto* appeal, the conclusion that "it may be that there is a general principle, depending on implied mandate from the lawful Sovereign, which recognizes the need to preserve law and order in territory controlled by the usurper".[63]

Their Lordships did not feel compelled to decide the question as they considered that any such principle was expressly excluded by the effect of the Order in Council. Their Lordships considered that the Governor's statement of 11th November, 1965 and the subsequent directive were to be read subject to the Order in Council. On the other hand Lord Pearce considered (as had Lewis, J.[64]) that the Governor's statement made it clear that the acts of the British Government, rather than excluding the operation of the principle, in fact reinforced it, by the express mandate given by the Governor to the citizens. Utilizing the principle that *generalia specialibus non derogant* his Lordship, referring to the Directive of 14th November, concluded:

> Though its day-to-day application by a citizen must 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 . . . 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.[65]

It may be questioned whether statements by the Executive could have the effect claimed by Lord Pearce. At least one writer[66] has sought to argue

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[61] (1967) 1 A.C. at 907.
[62] *Id.* at 954.
[63] *Id.* 729. S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968) 7 *Western Ontario L.R.* 93 at 100, also accepts the principle of necessity as a constitutional concept of substantial importance.
[64] Quoted *arguendo* by counsel for the appellant: (1969) 1 A.C. at 679.
[65] *Id.* at 739.
[66] R. S. Welsh, "The Constitutional Case in Southern Rhodesia" (1967) 83 *L.Q.R.* 64 at 72-73.

that the Governor in his Statement[67] and Directive[68] enjoined the judges to remain in office and to go on administering justice in accordance with the "law". The "law" was to be limited to the law of Southern Rhodesia, as validly enacted by the Government of that country before 5th November, 1965, or *semble* by the Imperial Parliament after that date;[69] but did not include any enactment whatsoever of the rebel government. It is submitted that, especially in view of the failure of the Imperial Parliament to enact day-to-day legislation for Rhodesia, this construction is unduly narrow. Of more persuasive force, however, is the argument to the effect that the Executive has no power to "instruct" the judiciary to deviate from its task of administering the law in the first place. The Judicial Oath required the judges to administer justice in accordance with "the laws and usages of Southern Rhodesia":[70] and if that means only such laws as were validly enacted by the Government of that country before 5th November, 1965 or by the Imperial Parliament after that date,[71] then there is nothing that the Executive can do to alter that. What is submitted, however, is that the words "laws and usages of Southern Rhodesia" have a broader connotation than the one indicated and that accordingly the views advanced by Lord Pearce are not dependent upon the Governor's instructions to the judiciary.

There are two competing ends which the courts in such a situation should seek. On the one hand, they should seek to limit to the merest minimum the extent of recognition accorded to the acts of a government that had unlawfully expelled the lawful sovereign. On the other hand they should seek to avoid the chaos that theoretically would emanate from a complete refusal to accord any recognition to the acts and legislation of the existing authorities. As Fieldsend, A.J.A. pointed out,

> If such acts were to be without validity there would be no effective means of providing money for the hospitals, the police, or the courts, of making essential by-laws for new townships or of safeguarding the country and its people in any emergency which might occur, to mention but a few of the numerous matters which require 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.[72]

The litigation produced three different approaches to the handling of this difficult problem, each having serious problems of its own. At one extreme is the approach that is most clearly identified with the judgments of Quènet, J.P. and Macdonald, J.A. in the instant case, and the judgments of the Appellate Division in *R.* v. *Ndhlovu and Others*.[73] This approach is based upon that of Taney, C.J. in *Luther* v. *Borden*:

> 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 come to the conclusion that the government under which it acted had

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[67] *Supra* at n. 13.

[68] *Supra* at n. 41.

[69] A further problem is whether the status of a "law" that satisfies these requirements is impaired if it is administered by a person appointed by the rebel government. See *infra* at n. 99.

[70] 1961 Constitution, Schedule 1: "I will do right to all manner of people after the laws and usages of Southern Rhodesia without fear of favour, affection or ill-will".

[71] See *infra* at nn. 96ff.

[72] (1968) 2 S.A.L.R. at 435, quoted in (1969) 1 A.C. at 740.

[73] *Supra* n. 3.

> 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.[74]

This was also the approach in the Uganda case of *Uganda* v. *Commissioner of Prisons; ex p. Matovu*[75] and the Pakistani case of *The State* v. *Dosso*,[76] where the courts recognized revolutionary governments as having acquired legality. In such case, the courts could no longer function under the authority of the expelled government, and if they were to function at all, they would be functioning under the authority of the new government. Thus Beadle, C.J. in *R.* v. *Ndhlovu and Others* stated:

> If a 1961 Constitution Court embarking on the factual enquiry . . . came to the conclusion that the 1961 Constitution had been annulled because of the efficacy of the change, it would have to decline further jurisdiction as a 1961 Court because . . . it would have ceased to exist as a Court. If after arriving at the conclusion that the change had been effective the Court nevertheless continued to sit and adjudicate on the matter before it, it could only do so as a Court different from a Court sitting under the 1961 Constitution.[77]

Upon a close examination of the factual situation in Rhodesia,[78] his Lordship there concluded that the 1961 Constitution had indeed "been annulled because of the efficacy of the change", and that the Court was therefore now under the 1965 Constitution. That being so, his Lordship had no difficulty in holding that the "laws and usages" that the judges had sworn to uphold now included any of the laws enacted by the rebel government, which was now for all intents and purposes the legitimate government of the country. This approach has a certain attractive simplicity—not least because it follows that judges appointed under the former Constitution can carry on under the succeeding one, and are in fact bound to do so by virtue of the Judicial Oath, altered no doubt in its content but not in its binding force.[79] Beadle, C.J. then concluded:[80]

> To argue that (for a Judge to resign) is to uphold the "rule of law" is pure casuistry. It is not possible to adhere to a constitution which does not exist. The "rule of law" accepts the fact that constitutions can be changed by resolution. If in fact the Constitution has changed then the "rule of law" dictates that the fact be recognized. The new constitution becomes the new law and to serve under it is in conformity with and not in conflict with the "rule of law".[81]

The difficulty with this approach is that it leaves the ultimate test of lawfulness dependent solely on the factual question of success or failure. This is an abdication of constitutionalism, and reverts to the Justinianic precept of "*quod principi placuit legis habet vigorem*". This precept is not part of English law as we know it.[82] To adapt the judgment of van den Heever, J.A. in

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[74] 48 U.S. (7 How.) 1 at 40 (1849).
[75] *Supra* n. 47.
[76] *Supra* n. 48.
[77] *Supra* n. 3, at 522.
[78] See esp. 518-19.
[79] See *id.* 533, where his Lordship said: "If it is possible for a Judge to carry on and 'do right to all manner of people after the laws and usages of Rhodesia without fear or favour, affection or ill-will', then it is his duty to do so and carry on with his peaceful task of protecting the fabric of society and maintaining law and order in accordance with the laws and usages of Rhodesia *as they may be at the time.*"
[80] *Id.* at 534.
[81] This did not, of course, stop Fieldsend, J.A. and Young, J. from resigning. See *supra* n. 18.
[82] F. W. Maitland, *Constitutional History of England* (1908) 285 observed of the "Glorious Revolution" of 1689: "It seems to me that we must treat the Revolution as a revolution, a very necessary and wisely conducted revolution, but still a revolution. We cannot work it into our constitutional law."

Minister of the Interior v. *Harris*,[83] it permits acts of levitation: of lifting oneself above one's own powers by the bootstrap method. The correct logical sequence, it is submitted, is first to consider whether to treat the revolutionary enactments as "laws", and if the answer is in the negative, then to ignore them. "Once the Judges had held that the 1965 Constitution is not the lawful Constitution and had affirmed their own continued allegiance to Her Majesty the Queen there was no room for the compromise they adopted. The High Court has no constitutional power to recognize as constitutionally valid any acts of the unconstitutional authorities."[84]

On a practical level also, the solution is subject to criticisms. Unlike the South African Courts which continued to perform their constitutional duty in the 1950's,[85] the Rhodesian judges were all too quick to look at the possible consequences of their refusal to recognize at least certain acts of the rebel government.[86] They were concerned to avoid forcing the rebel government to take the drastic step of replacing all the existing judges with revolutionary judges[87] who, regardless of judicial conscience, would be prepared to accept without question the 1965 Constitution.[88] But it is certainly doubtful whether a court may take into account in its judgment the possibility that one of the parties would defy an adverse order of the court or may even unlawfully depose the existing members of the court. Besides, as Fieldsend, A.J.A. pointed out,

> 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.[89]

A second, more moderate and preferable approach, was to recognize only such of the acts and legislation of the rebel government as met severe preconditions. In the General Division both Lewis and Goldin, JJ., took the view that recognition of the acts of the rebel government should be limited to such matters as could lawfully have been effected by the lawful government under the 1961 Constitution. In the Appellate Division Beadle, C.J. and Jarvis, A.J.A.[90] took the same approach, and the Order of the Appellate Division included this limitation.[91] On the other hand the test of limitation proposed by Fieldsend, A.J.A. above [92] was the one accepted by Lord Pearce.[93] On the facts the orders made under the Emergency Powers Act were found to be within each of the suggested tests of limitation, although Lord Pearce did concede that the instant 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".[94] It is sub-

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[83] (1952) 4 S.A.L.R. 769 (A.D.), at 790.

[84] Welsh, *supra* n. 66 at 87-88. However, the present writer submits that the compromise referred to, as worked out by Lewis and Goldin, JJ., is justified for other reasons to be discussed below.

[85] *Harris* v. *Minister of the Interior* (1952) 2 S.A.L.R. 428 (A.D.); *Minister of the Interior* v. *Harris*, *supra* n. 83; *Collins* v. *Minister of the Interior* (1957) 1 S.A.L.R. 552 (A.D.).

[86] See *supra* n. 25.

[87] Lewis, J., for one, had no doubt this would happen when he said: "Those who embarked on the present revolution were not deterred by the illegality of their actions at the time and it would be naive 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" (quoted by Welsh, *supra* n. 66 at 71-72).

[88] See *id.* 88 for the rather drastic conclusion that "that will just be the price which must be paid for the revolution".

[89] (1968) 2 S.A.L.R. at 430.

[90] Despite what Beadle, C.J., said in *Ndhlovu's Case*: see *supra* n. 21.

[91] See *supra* n. 26.

[92] Quoted *supra* at n. 24.

[93] (1969) 1 A.C. at 740-42.

[94] *Id.* at 742.

mitted that these "limited recognition" approaches succeed in achieving both the competing ends referred to above: they permit the orderly running of the machinery of the state, whilst refusing recognition to any Act of the rebel government aimed at entrenching its position *vis-à-vis* the lawful Sovereign.

It is conceded that this approach is also not free from difficulties. Both suggested tests are extremely broad and yet extremely vague. The limits of the "margin of tolerance" are most difficult to define. Even so seemingly clear an example as a law determining whether cars are to be driven on the right or the left hand side of the road might turn out to raise problems—for example, if such a law were enacted in order to bring the country into line with some friendly neighbouring country, perhaps permitting closer co-operation with that country in the manufacture of automobiles. The difficulties of defining the margin of tolerance are also illustrated by several of the American cases decided after the Civil War.[95] It is surprising that the Emergency Powers Act, being capable of serious political misuse, would unanimously be found to be within the "margin of tolerance". If this judicial attitude is representative, very few Acts would fail to meet the tests of recognition.

Nevertheless, it is submitted that the second approach is the preferable one. Certainly it is to be preferred to the third approach, the other extreme, associated with the majority view in the Privy Council. That view, which has been discussed above, is an example of rigid constitutionalism at its worst. Refusing to acknowledge the enormous gap between the claims of the United Kingdom Parliament and the factual situation in Rhodesia,[96] their Lordships adopted a sterile Diceyan approach based on the omnipotence of the Imperial Parliament and refused to accord recognition to any Act or enactment whatever of the rebel government. The difficulties of the approach are made apparent when the extent of its application is considered. To borrow an example from Lewis, J.,[97] their Lordships' approach would prevent the Rhodesian judges from enforcing quarantine laws passed by the rebel government to counteract a sudden outbreak of cholera or smallpox. All taxes levied by the rebel government would be unenforceable.[98] Taking the approach to its logical conclusion, any act of any public servant of whatever importance

[95] In *Texas* v. *White*, *supra* n. 36, an Act passed by the rebel government of Texas in 1862 to ease negotiation of U.S. bonds, issued to the State of Texas in 1848, was held not entitled to recognition since its main purpose was the furtherance of the war against the United States. In *Horn* v. *Lockhart*, also there cited, investment by an executor in 4% bonds issued by the rebel government of Alabama was held to be a misappropriation of trust funds, since the bonds were issued "for the avowed purpose of raising funds to prosecute the war" against the U.S. (at 580). A similar conclusion was reached in *Hanauer* v. *Woodruff*, *supra* n. 37. On the other hand it was held in *Thorington* v. *Smith*, *supra* n. 58, that a promissory note was enforceable even though it was part of a transaction in which Confederate bills were the currency used. Similarly *Delmas* v. *Merchants' Mutual Insurance Co.*, 81 U.S. (14 Wall.) 661 (1872), *Planters' Bank of Tennessee* v. *Union Bank of Louisiana*, 83 U.S. (16 Wall.) 483 (1873) and the *Confederate Note Case*, 86 U.S. (19 Wall.) 548 (1874) all held that a contract was not to be avoided merely because the amounts paid or payable thereunder were paid or agreed to be paid in Confederate Treasury Bonds. Further, the decision of *Baldy* v. *Hunter*, *supra* n. 36, is submitted to cast serious doubts on the decision in *Horn* v. *Lockhart*, *supra*.

[96] Eekelaar, *supra* n. 25, points out that their Lordships' approach is ironically reconcilable with the first approach discussed above—the complete abdication of constitutionalism. Their Lordships "saw no reason to disagree with the results" in the Uganda and Pakistani cases cited *supra* nn. 47-48 (see (1969) 1 A.C. at 574), but went on to distinguish those cases. The rationale behind the distinction has been criticized above; but even assuming the distinction to be valid, the analysis of the factual situation by Beadle, C.J. in *Ndhlovu's Case*, *supra* n. 3 at 518-19, no longer leaves room for it. Are we then to assume that their Lordships would today reach the direct opposite result if the question arose anew?

[97] Quoted by Welsh, *supra* n. 66 at 74. His Lordship also used the example of laws enacted to combat a large-scale invasion of terrorists. This might, of course, be a less obvious example because of its potentially political aspects.

[98] Lewis, J. had conceded that each year it is necessary for the legislature to enact a charging Act determining the rate of income tax to be levied for the current year. See Welsh, *supra* n. 66 at 70.

would be refused recognition if he were appointed since November, 1965, even if pursuant to an Act passed before that date. The most minor traffic offence would turn out to attract immunity if the policeman bringing the charge had been appointed to the Police Force, or perhaps even promoted within the Police Force, subsequently to the Unilateral Declaration of Independence. Would their Lordships refuse recognition to any judgment of a Rhodesian judge appointed by the rebel government? Would their Lordships refuse recognition even to judgments of the legally appointed judges, on the grounds that they had received their salaries from the rebel government, had sat on the same bench with judges since appointed, and had relied for enforcement of their orders on court officers illegally appointed?[99]

With respect their Lordships failed to appreciate the political subtleties of the situation. They failed to give their seal of approval to the compromise worked out by five out of seven of Her Majesty's loyal Rhodesian judges, and in fact denied the reality of the whole legal system in Rhodesia. Their judgment made it quite unworkable, and made it impossible for any judge both to accept the authority of the 1961 Constitution and yet to exercise effective judicial functions in Rhodesia. This was the direct cause of Beadle, C.J. in *R.* v. *Ndhlovu and Others*[100] concluding:

> It is now legally impossible for this Court to sit as a 1961 Constitution Court or for any public servant to continue to serve under that Constitution. This is so because as I have pointed out the Board [ruled that] the "order in Council" [had] full legal effect in Southern Rhodesia

and

> In this situation, this Court, if it carries on at all, can only carry on as a Court taking cognisance of the fact that the present government is now the *de jure* government and the 1965 Constitution the only valid Constitution, which this Court now proceeds to do.

Yet one cannot but discern an air of unreality surrounding the whole Privy Council appeal. Reference has already been made[101] to the inauspicious commencement of the appeal and to the fact that the respondents were not unrepresented, with *amici curiae* presenting submissions on their behalf; and it must have been obvious to their Lordships that their advices to Her Majesty would have the force of Canute's commands. No doubt sympathetic to the cause of the British Government, their Lordships decided to lend it as much moral support as possible. Yet even despite the apparently rigid constitutionalism espoused by their Lordships, the present writer respectfully agrees with Professor Hahlo[102] that it is difficult to imagine that a court in the United Kingdom would refuse to recognize a Rhodesian divorce because it was granted by a judge appointed by the Rhodesian government without the concurrence of the Crown; or to refuse to give effect to a liquidation of an estate effected in Rhodesia because the Master of the High Court in Rhodesia was invalidly appointed. The law, like nature, abhors a vacuum; and almost certainly if Britain should be restored to actual power in Rhodesia, she would pass legislation expressly validating almost all the laws and decrees of the rebel government.[103] Meanwhile, their Lordships continued the pantomime by flexing Britain's theoretical muscles in what was merely an exercise in shadow boxing.

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[99] In fact the person who had served the functions of Master, Registrar and Sheriff of the High Court resigned in November, 1965, and his successor was appointed by the rebel government. What is the effect of this?

[100] *Supra* n. 3 at 532, 537.

[101] See *supra* nn. 25, 31.

[102] *Supra* n. 18 at 436.

[103] A great volume of legislation of this type was enacted in the U.S. after the Civil War.