INTERNATIONAL LAW

Recognition of Divorce Decree by Rhodesian Court

The decision of Sir Jocelyn Simon P. in *Adams* v. *Adams* [1970] 3 W.L.R. 934 illustrates the rigorous effects that the imposition of a "legal blockade as a counterpart of the economic blockade" in the post-U.D.I. Rhodesian situation can have upon the private citizen. The petitioner, who was born in England, had been granted a decree of divorce from her husband in Rhodesia. She desired to remarry in England but could not obtain a marriage licence because the Registrar-General of Births, Deaths and Marriages would not recognise the divorce as a valid judgment of a lawful Court. She sought a declaration from the Court that the divorce granted by the High Court of Rhodesia was valid in England to dissolve her marriage. The Attorney-General intervened in the suit and opposed the petitioner's contentions. The petition was dismissed.

A Foreign Office certificate, given for the purposes of this case, stated that Southern Rhodesia had been since 1923, and continued to be, a colony within Her Majesty's Dominions, and that the United Kingdom Government did not recognise, and at no time had recognised, Southern Rhodesia as a state "de facto" or "de jure". Since the declaration of independence and the adoption of the new Constitution in 1965 by the Smith Government, the British Executive has declared that the only valid constitution of Rhodesia is the 1961 Constitution. This policy has received legislative and judicial endorsement in the Southern Rhodesia Constitution Order 1965 and the decision of the Privy Council in *Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 645. The Rhodesian legislature and judiciary have also purported to consolidate the position of the new regime: in *R.* v. *Ndhlovu* 1968 (4) S.A. 515 the Appellate Division of the High Court of Rhodesia held that the 1965 Constitution was the only lawful constitution and that the High Court was therefore constituted under that Constitution. Furthermore, in 1969 a new Republican Constitution was enacted.

In *Adams* v. *Adams, supra,* the Court was satisfied that the Rhodesian Courts were competent according to the rules of private international law and according to municipal law. The husband was domiciled in Rhodesia both at the time he deserted the petitioner and at the time when the divorce was granted, and both parties had a close and substantial connection with Rhodesia; the President also concluded that the Rhodesian Courts must be taken to be correctly applying the law laid down by the United Kingdom Parliament.

The status of Macaulay J. who had pronounced the decree in Rhodesia, proved to be the decisive factor in the dismissal of the petition. Since he had been appointed after U.D.I. and had failed to comply with the 1961-1964 Constitution in not taking the oath of allegiance and the judicial oath in the prescribed form, he was not a judge "de jure" of the High Court of Rhodesia.

The petitioner, conceding that the 1961-1964 Constitution was the only lawful one, contended that the decree of Macaulay J., although it was not pronounced by a judge competent to do so, should be recognised as legally valid under the doctrine of necessity or implied mandate (upon which Lord Pearce had based his powerful dissenting judgment in *Madzimbamuto* v. *Larnder-Burke, supra.*) This argument was re-

jected; nor did it appear to the President that the decree could be afforded recognition by reference to the petitioner's contention that Macaulay J. was a judge "de facto" (*ibid.*, 954):

> . . . I think that it would be a constitutional anomaly for our courts to recognise the validity of the acts of Macaulay J. as a de facto judge while the executive acts of those appointing him (which must include his very appointment) are refused recognition de facto by the executive here.

The wider argument of the Attorney-General that, since *R.* v. *Ndhlovu, supra,* no judgment of the High Court of Rhodesia was entitled to recognition in English Courts was also rejected. Since all but two (Macaulay and Greenfield JJ.) of the judges were appointed under the 1961-1964 Constitution, they could only cease to be judges in accordance with that Constitution. A mere declaration (particularly where three members of the Appellate Division purported to change the legal status of their fellow judges) did not suffice to achieve this. This conclusion invites differential recognition (as Sir Jocelyn Simon observed) of the acts of judges appointed respectively before and after U.D.I. Concluding his judgment the President observed that no argument had been presented to him concerning the possible effects upon the validity of a decree of divorce pronounced by a judge appointed before U.D.I., who had renounced his allegiance to the 1961-1964 Constitution, presumably by taking a new oath of allegiance and judicial oath under the 1965 Constitution. This matter thus remains undecided. It appears, therefore, that had Mrs Adams' divorce been granted by one of the judges appointed before U.D.I., her suit may have been successful.

By section 40(1)(b) of the Matrimonial Causes Act 1965 (U.K.), the petitioner would have been compelled to wait three years in England (until March 1972) before instituting proceedings for divorce against her husband in Rhodesia. In the meantime he was free to remarry in Rhodesia. However, under the Southern Rhodesia (Matrimonial Jurisdiction) Order 1970, which came into operation in November 1970, the Courts in the United Kingdom are able to exercise jurisdiction in respect of divorce or nullity of a marriage, if either party to it is or was domiciled or resident in Southern Rhodesia, after the person instituting the proceedings has spent a qualifying period of not less than six months in the United Kingdom. Intended to rectify the situation that arose as a result of this case and previous instances, the Order represents a compromise since it shortens the residential qualification from the three years required under the Matrimonial Causes Act to six months in cases of this nature, but evades validating divorce decrees granted in Rhodesia, which, as the Lord Chancellor explained, would bestow a shade of recognition upon the acts of the illegal regime. It resolves the dilemma to a limited extent but relates only to one aspect of the law; consequently if acts of the Rhodesian judiciary again come before English courts for consideration, further ad hoc legislation may be necessary.

While the executive may justify the imposition of an economic embargo, on the grounds of political necessity and inevitability, the notion of a judicial blockade appears to involve the Courts in a role alien to their essential purpose. Lord Pearce recognised this in *Madzimbamuto* v. *Lardner-Burke* (*supra,* 737):

> . . . 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.

In *Carl-Zeiss-Stiftung* v. *Rayner & Keeler Ltd.* (*No. 2* [1967] 1 A.C. 853 both Lord Reid and Lord Wilberforce expressed concern at the consequences flowing from non-recognition, the former finding it unnecessary to form any opinion concerning the adoption of doctrines supported in the United States in order to mitigate the consequences of non-recognition, the latter stating that nothing in the English decisions prevented the acceptance of the United States doctrines, and that "some glimmerings" could be discovered, in the United States, of the notion that non-recognition could not be pursued to its ultimate logical limit.

Under section 28 of the Marriage Act 1955 in New Zealand a Registrar is obliged to issue a marriage licence unless he has reasonable cause to believe that the marriage is prohibited under the Act or that any of the requirements of the Act have not been complied with. Section 23 of the same Act requires that a person intending to marry in New Zealand shall give notice to a Registrar and shall make a statutory declaration that the particulars set forth in the notice are true, that he believes that the marriage is not prohibited under section 15 of the Act (marriage of persons within the prohibited degrees of relationship) and that there is no other lawful impediment to the intended marriage. It appears in practice, that if a person is unable to present documents evidencing the dissolution of a former marriage, the Registrar will accept the declaration under section 23(2) that there is no lawful impediment to the marriage, as conclusive. Thus it would seem that the Registrar-General in New Zealand does not exercise the power of the Registrar-General in England, as evidenced in Mrs Adams' application for a marriage licence, to refuse to recognise a decree of divorce as a valid judgment of a lawful court.

In New Zealand recognition of overseas decrees is governed by section 82 of the Matrimonial Proceedings Act 1963. If a New Zealand Court is called upon to examine the validity of a decree of divorce pronounced in Rhodesia since U.D.I., it is possible that the reference to "Court" in section 82 may be interpreted as a Court presided over by a judge competent to pronounce the decree under the 1961-1964 Constitution, and not one appointed since U.D.I., following the decision in *Adams* v. *Adams, supra.*

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JURISPRUDENCE

Precedent in English Court of Appeal—Civil Division

In *Young* v. *Bristol Aeroplane Co. Ltd.* [1944] K.B. 718 the English Court of Appeal was asked to overrule two earlier decisions. It would not and declared itself bound by its own decisions except in three situations: where there were two previous conflicting decisions; where an earlier decision of the Court of Appeal was in conflict with a subsequent decision of the House of Lords; and where a previous decision had been made *per incuriam.*

This decision still appears to hold except for the rather surprising dicta of Lord Denning M.R. in two recent cases. In *Gallie* v. *Lee* [1969] 2 Ch. 17, Lord Denning, disagreeing with the decision of the Court of Appeal in *Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489, said ([1969] 2 Ch. 37):