that s. 6 is and always has been invalid in toto. However an order under that section might have been *ultra vires* the Trusteeship Agreement if it had been made before Tanzania became independent and purported to ban legitimate religious activity or a basic freedom in breach of the clear intendment of the Agreement, but this has not been shown to us to be the position in relation to the proscription of the societies mentioned in the charges. We have no information about them and their activities whatsoever. Notwithstanding their descriptions, these societies may for all we know have been indulging in most undesirable activities of a non-religious character, their religious aspect being a mere front. The courts will always assume, where a discretionary statutory power has been exercised, that it has been properly and lawfully exercised unless the contrary is shown. No effort whatsoever has been made by or on behalf of the appellant to show that the societies, the subject of the charges, are of such a nature as to fall under the protection of the Trusteeship Agreement. In any event the order declaring the societies to be unlawful was made after Tanzania became independent, and the right of the Government of Tanzania to legislate is absolute and unfettered by the Trusteeship Agreement. We consider that on this point the appeal fails.

The second head of argument relates to the presumptions arising out of s. 23 of the Societies Ordinance, which is set out earlier in this judgment. [The remainder of the judgment relates exclusively to a point of municipal law and is omitted.]

It follows that in our opinion this appeal fails on all grounds and must be dismissed, and we order accordingly.

[Report: [1969] East Africa Law Reports, p. 624.]

D—RECOGNITION

I.—Of States

States as international persons—Recognition—Of States—Rhodesia—Acts of officials of revolutionary regime—Whether such acts given legal effect abroad—The law of New Zealand

BILANG *v.* RIGG

New Zealand, Supreme Court, Auckland. 23 *March* 1971

(Henry, J.)

SUMMARY: *The facts.*—A person died intestate in May 1969 and under the law of Rhodesia his parents succeeded equally to his estate. The plaintiff on 16 July 1969 was appointed dative executor under the Administration of Estates Act 1907 by an order made by M. L. Perry, Additional Assistant Master of the High Court of Rhodesia. M. L. Perry had been appointed under the above-mentioned Act by the Minister of Justice on 13 September 1966.

On 22 December 1969 a certificate under the seal of the High Court of Rhodesia certifying the grant of administration was forwarded to the defendant, this certificate being granted by M. C. Atkinson, Assistant Master of the High Court who had himself been appointed on 1 January 1963 by the Minister of Justice. In 1965 Southern Rhodesia had made a Unilateral Declaration of Independence after which the United Kingdom passed the Southern Rhodesia Act 1965 and then the Southern Rhodesia Constitution Order 1965.

The Registrar of the Supreme Court of New Zealand, acting pursuant to s. 50 of the Administration Act 1952 (re-enacted as s. 71 of the Administration Act 1969), refused to reseal the grant of administration. The plaintiff sought an order of *mandamus* to compel the Registrar to reseal the grant.

Held: The issue of a writ of *mandamus* to compel the Registrar of the Supreme Court to reseal the grant was ordered.

(1) The appointment of Mr. Perry was made under the Administration of Estates Act 1907 which was a validly enacted statute in force in Southern Rhodesia.

(2) The act of Mr. Perry was done in the normal course of his duty as a civil servant and was in accordance with the directions of the lawful Governor promulgated on 11 November 1965 and repeated on 14 November 1965.

(3) Unless the United Kingdom legislation expressly forbade the act of Mr. Perry his grant was competent.

(4) The act of Mr. Perry was neither acting, nor supporting action, in contravention of the Southern Rhodesia Constitution Order 1965.

The following is the judgment of the Court:

This is a motion for the issue of a writ of *mandamus* to compel the Registrar of this Court to reseal a grant of administration made in Southern Rhodesia. The relevant authority for the resealing of such grants is s. 50 of the Administration Act 1952, which reads:

> " 50. Where any probate or letters of administration granted—
> " (*a*) By any competent Court in any Commonwealth country (other than New Zealand) or in the Republic of Ireland; or
> " (*b*) . . . . are produced to and a copy thereof deposited with any Registrar of the Supreme Court of New Zealand, the probate or letters of administration shall be sealed with the seal of the last-mentioned Court, and shall thereupon have the like force and effect and have the same operation in New Zealand, and every executor and administrator thereunder shall perform the same duties and be subject to the same liabilities, as if the probate or letters of administration had been originally granted by the Supreme Court of New Zealand."

This Act has been replaced by the Act of 1969, but nothing turns on that. It is conceded that Southern Rhodesia is a " Commonwealth country ". The sole question is whether or not the Court making the grant was at the time a competent Court of that Commonwealth country.

It is now convenient to set out the agreed facts:

(1) Frederick Williams died in Bulawayo, Rhodesia, on 15 May 1969.

(2) The deceased died intestate and was a single man and

left no dependent children. Under the law of Rhodesia the parents of the deceased succeed equally to the deceased's estate.

(3) The above-named plaintiff Cyril Frederick Bilang, an attorney practising in Bulawayo, Rhodesia, applied for letters of administration. On 16 July 1969 an order was made in the High Court of Rhodesia appointing the plaintiff Frederick Bilang the executor dative of the estate. Such order was made under the Administration of Estates Act 1907 Chapter 51 of the Consolidated Laws of Rhodesia.

(4) The order appointing the plaintiff the executor dative of the estate was granted by M. L. Perry Esquire, Additional Assistant Master of the High Court of Rhodesia.

(5) That M. L. Perry Esquire was appointed Additional Assistant Master of the High Court of Rhodesia on 13 September 1966. M. L. Perry Esquire is a civil servant and his appointment to this post was made by the Minister of Justice under s. 3 (2) (*c*) of the above-mentioned Administration of Estates Act.

(6) The deceased Frederick Williams, was prior to his death, employed by the South British Insurance Company in Bulawayo and as at the date of death there was an amount of $5,150 payable to the estate by the South British Insurance Company Limited under its life assurance scheme for its employees.

(7) The constitutional history of Rhodesia is as explained in *Re Southern Rhodesia* [1919] A.C. 211 and *Madzimbamuto* v. *Lardner-Burke* [1969] 1 A.C. 645; [1968] 3 All E.R. 561.[1]

(8) That on 22 December 1969 the solicitors acting on behalf of the above-named plaintiff in New Zealand forwarded to the defendant, the Registrar of this Honourable Court, a certificate under seal of the High Court of Rhodesia certifying that the letters of administration had been granted on 16 July 1969. The certificate under seal of the High Court of Rhodesia was granted by M. C. Atkinson, Assistant Master of the High Court of Rhodesia at Bulawayo.

(9) That M. C. Atkinson Esquire was appointed Assistant Master of the High Court of Rhodesia at Bulawayo on 1 January 1963 and was appointed by the Minister of Justice under s. 3 (2) (*b*) of the above-mentioned Administration of Estates Act.

This case is just another problem caused by the Unilateral Declaration of Independence (called UDI) made by the Government in power on 11 November 1965. The United Kingdom Government took immediate steps to declare the new regime to be unlawful. It passed the Southern Rhodesia Act 1965, and thereafter the Southern Rhodesia Constitution Order 1965. These provisions are set out in *Madzimbamuto* v. *Lardner-Burke* (*supra*) at pp 715, 716; 567, 568. So far as the Court is aware the United Kingdom Government and its

[[1] *International Law Reports*, 39, p. 61.]

Secretary of State have done nothing to take control of the country but have, on the other hand, permitted the unlawful regime to carry on with the government of the country.

Two cases of importance will require to be discussed. First we have *Madzimbamuto's* case (*supra*) which was a decision of the Judicial Committee of the Privy Council, and, next the decision of Sir Jocelyn Simon P. in *Adams* v. *Adams* [1971] P. 188; [1970] 3 All E.R. 572. In *Madzimbamuto's* case the following passage appears at p. 730; 578:

> " Importance has been attached to the Governor's statement of November 11, 1965, quoted earlier. That statement was made before the making of the Order in Council and in any event it could not prevail over the Order in Council. So when it was said:
>
> > ' it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service '
>
> that must be taken with the qualification that it can only apply in so far as they can do so without acting or supporting action in contravention of the Order in Council.
>
> It may be that at first there was little difficulty in complying with this direction, and it may be that after two-and-a-half years that has become more difficult. But it is not for their Lordships to consider how loyal citizens can now carry on with their normal tasks, particularly when those tasks bring them into contact with the usurping regime. Their Lordships are only concerned in this case with the position of Her Majesty's Judges."

The directive was one of two given by the lawful Governor in the early days of the new regime. The instant case, so it appears to me, does raise questions concerning the normal tasks which, of necessity, must be performed for the orderly protection of property in a civilised community. I will return to this later. However, in *Madzimbamuto's* case their Lordships in a majority opinion stated that three points fell for determination. At p. 721; 572 the following passage appears:

> " 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? "

At p. 723; 573 the first point was answered by holding that such legislation had full legal effect in Southern Rhodesia and the ultimate finding is at p. 731; 578 where it is stated:

" . . . . it should be declared that the determination of the High Court of Southern Rhodesia with regard to the validity of Emergency Powers Regulations made in Southern Rhodesia since November 11, 1965, is erroneous and that such regulations have no legal validity, force or effect."

Their Lordships held in respect of a claim that the *de facto* exercise of power was legal and ought to be recognised:

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

Adams v. *Adams* concerned the validity of a decree of divorce granted by a Judge who had been appointed by the usurping power but who had not taken the oaths prescribed by the valid constitution known generally as the 1961 constitution. The headnote summarises the findings as follows:

" (i) Although the Southern Rhodesia Courts were competent to pronounce a decree of divorce according to the English rules of private international law, the wife had also to show that the Court whose decree was in question was competent to pronounce it by its municipal law.

" (ii) In satisfying the English Court that the Court whose decree was in question was competent to pronounce the decree, the relevant decree was that pronounced by Macaulay J. since it was the only decree purporting to dissolve the marriage.

" (iii) Macaulay J. having failed to take before the Governor, or someone authorised by the Governor, the oath of allegiance and judicial oath in the forms set out in Sched. I to the 1961–64 Constitution had, by virtue of s. 54 (3) of that Constitution, failed to enter on the duties of his office; his failure was not remedied by the omission of the Secretary of State to exercise his power under s. 4 (1) (*e*) of the 1965 Order in Council to prohibit or restrain the ostensible appointment (or himself to appoint a Judge to fill the vacancy on the Bench) since such omission did not by implication constitute approval of the ostensible appointment under the 1965 Constitution.

"(iv) The English Court was not entitled to accord recognition to the judicial acts of Macaulay J. by reason of the doctrine of necessity nor by reason of the doctrine of the validity of the acts of a *de facto* officer."

In the instant case Mr. Perry was fully qualified and the only point that has been taken is that there was no lawful Minister of Justice. The appointing authority under the relevant statute was a Minister of Justice. I will return to this in a moment. The absence of a lawfully constituted appointing authority does not seem to have been raised in *Adams* v. *Adams*. If the existence of such an authority were vital then it was a short answer and decisive of the case. However, that is now the sole point raised in this case and the Court is called upon to answer it.

The appointment of Mr. Perry was made under the Administration of Estates Act (Chap. 51). It is conceded that this is a validly enacted statute and that it is in force in Southern Rhodesia. This was to the contrary in *Madzimbamuto's* case where legislation since U.D.I. was under consideration. The preamble of the Act states that it is an Act:

> "To consolidate and amend the law relating to the administration of the estates of deceased persons, minors, mentally disordered or defective persons, and persons absent from Southern Rhodesia, and to provide for the control of moneys belonging to persons whose whereabouts are unknown."

This is done by the creation of an office of record (s. 4). Subject to the laws governing the public service, officers are to be appointed by the Minister of Justice. Mr. Perry was in every way qualified for appointment but the Minister of Justice was not, by reason of the United Kingdom legislation previously referred to, qualified to act as such. The power to make such an appointment lay with the United Kingdom Secretary of State who has taken no step in any way to control the internal affairs of the citizens of Southern Rhodesia. Nor has the United Kingdom Government taken any such step so far as this Court is aware. In so far as functions of law, order and good government are concerned, the United Kingdom Government and the Secretary of State have allowed the usurping power to act and it has continued so to act since U.D.I.

Counsel accepted, and the Court respectfully adopts, the test laid down by Sir Jocelyn Simon P. in *Adams* v. *Adams*. Any person duly appointed under the said Act is competent to exercise the jurisdiction but, it was agreed, that it was additionally necessary to show that, by the municipal law of Southern Rhodesia, Mr. Perry's act in making the said grant ought to be recognized as a valid exercise of the power, despite the absence of a *de jure* Minister of Justice. In short, if a Southern Rhodesian Court applied its own law correctly, ought it to recognize the grant notwithstanding the *de jure* lack of

qualification of the Minister of Justice who purported to make the appointment? It must always be clearly kept in mind what the true question is. It is not a determination of the validity of Mr. Perry's appointment, it is a determination of what validity (if any) ought to be accorded to his acts as such an officer in the circumstances of his appointment? His appointment might be successfully attacked, but the question is, are his *bona fide* acts, pursuant to the valid legislation, acts which ought, by the proper law of Southern Rhodesia, to be recognized as valid?

The lawful government gave two directives. I cite from the dissenting opinion of Lord Pearce in *Madzimbamuto's* case at pp. 737, 738; 582, 583, where his Lordship said:

> " (*a*) The lawful Government through its Governor on November 11 announced that all the Ministers had been dismissed and gave the following directive to its citizens:
>
> 'I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the judiciary, the armed services, the police and the public service.'
>
> " (*b*) That directive was repeated on 14 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.* 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 11 and 14 November in force."

Sir Jocelyn Simon P. in *Adams* v. *Adams* (*supra*) dealt with the validity of acts of persons acting *de facto sed non jure.* The following passages are apposite:

> " Finally, I think that both the majority of their Lordships and Lord Pearce found the most satisfactory basis of the doctrine in an implied mandate from the lawful Sovereign, since this does not involve denying his legal right to govern or admit in any way the lawfulness of the usurpation. As the majority put it:

" ' 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 territories controlled by a usurper.'

" But it is of the essence of the common law that its rules, even though fallen into disuse, may be revived if circumstances develop in which they may prove to be again of value: I can certainly conceive of circumstances where the doctrine of the validity of the acts of officers (including judicial officers) *de facto sed non de jure* would be useful.

" ' The *de facto* doctrine was introduced into the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers.'

" What I have said about public policy in relation to the doctrine of ' necessity ' is therefore again relevant here."

His Lordship then went on to point out that, with one possible exception, he could not find that the doctrine had ever been applied to the prejudice of the right of a Sovereign. Lord Pearce in *Madzimbamuto's* case (*supra*) at p. 739; 583 said:

" The directive of the lawful Government to the police and the public service ' to maintain law and order in the country and to carry on with their normal tasks ' and to ' all people to remain calm and to assist the armed services and the police to continue to maintain law and order ' obviously did not mean that they should decline every order that came from an unlawful source. The task of the civil service and the police force would be wholly unworkable in a matter of hours, or days, or, at most, weeks if no directions from on top were 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."

I do not overlook that this opinion was not accepted by the majority, but it was in respect of the question then under review. Here, this Court is reviewing that area of activity in respect of which their Lordships were at pains to state was not in issue.

I turn again to the appointment which is now in question. It is to an officer [*sic*] who is essential for the day to day control of the property of persons who are themselves unable to exercise such control. The office is obviously exercised as part of the public service. The law does not, as in the case of a Judge, require him, as a part of his qualification for office, to conform with conditions precedent as to oaths of allegiance and the judicial oath. These matters are set out fully in the judgment in *Adams* v. *Adams* at pp. 200; 579, and appear to have been decisive of that case. The Judge, whose legality was questioned, was appointed under a purported legislative enactment of the usurping power, which enactment was declared by the United Kingdom Government to be invalid. The power exercised in the instant case was one exercised under valid legislation and not under invalid legislation which was the position in *Madzimbamuto's* case and in *Adams* v. *Adams*. The only defect is that it was exercised by a *de facto* Minister of Justice—a point which, as I earlier said, does not seem to have been taken in *Adams* v. *Adams*, although, if valid, would be clearly decisive. The central finding in that case was that the Judge failed to take before the Governor, or before someone authorized by the Governor,the oath of allegiance and judicial oath in the forms set out in Sched. I to the 1961–64 Constitution and had, by virtue of s. 54 (3) of that Constitution, failed to enter on the duties of his office.

It is true that in *Madzimbamuto's* case the majority of their Lordships held that the doctrine of " necessity " did not there apply. Their Lordships said at pp. 729; 577:

> " 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 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 authorize the Southern Rhodesia (Constitution) Order in Council, 1965. There is no legal vacuum in Southern Rhodesia. Apart from the provisions of this legislation and its effect upon subsequent ' enactments ' the whole of the existing law remains in force. But it is necessary to determine what, on a true construction, is the legal effect of this legislation."

"This legislation" was a legislative enactment made in defiance of the legislative prohibition placed on the usurping power by the United Kingdom Government. Here we have no such condition. It is sought to enforce the existing law on matters which rise from day to day concerning the property of those citizens who are unable to exercise such a right. To do so, I think, comes directly within the directions given by the Governor and, I think, is the presumed intention of the

United Kingdom Government in the circumstances set out, in particular by Lord Pearce. The Judge whose jurisdiction was called in question in *Adams* v. *Adams* was appointed under invalid legislation and not in accordance with the personal qualifications required by the valid legislation. Some of the hardship adverted to in *Adams* v. *Adams* has since been ameliorated by a further Order in Council made in pursuance of the United Kingdom legislation.

In my judgment, unless the United Kingdom legislation expressly forbids the act of Mr. Perry, his grant was competent. This follows from *Re Aldridge* (1893) 15 N.Z.L.R. 361, and from the opinion of Lord Pearce. This also does not conflict with *Madzimbamuto's* case because there the exercise of the Sovereign power forbade the legislation under which the prisoner was held. I have some difficulty in distinguishing the case of *Adams* v. *Adams.* It did not, as I read it, rely upon the lack of qualification of the appointing authority, but relied upon the failure of the Judge to qualify under the only valid constitution. Perhaps, more correctly, it was an appointment under a statute (constitution) declared by the United Kingdom legislation to be invalid. In so far as *Adams* v. *Adams* may conflict with *Re Aldridge* (if it does) then I propose to follow the latter case because I think it binds me on this question unless the United Kingdom legislation has expressly declared the act of Mr. Perry to be void, so I turn finally to that legislation.

In *Madzimbamuto's* case, in the passage earlier cited, it was made clear that any purported Ministerial act which is in contravention of the Order in Council cannot be supported by the declarations of the Governor. Administrative acts come within the prohibitions of the Order in Council. Ministers have no power to act. In fact there have been no Ministers since the Order in Council (see *Madzimbamuto's* case pp. 730; 577). Clause 6 of the Order in Council reads:

> " 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."

The question I have to determine is whether this clause also renders the act of Mr. Perry in exercising a valid statutory power also void and of no effect. There is no prohibition or restriction in the exercise of such a power. The act of Mr. Perry was neither "acting or supporting action in contravention of the Order in Council." By implication I think that there has been implied recognition of acts not specifically declared to be contrary to law. I cannot believe that the true construction of this provision requires acts such as those now under review must be done only by existing appointees. An argument that cl. 6 prohibited the granting of a decree of divorce by the latter appointed Judge was put forward but abandoned in *Adams* v. *Adams.*

I conclude therefore that cl. 6 does not apply, so there is no derogation of the rights of the Sovereign power.

Mr. Bridger raised the question of proof of the foreign law. It is clear from the concessions made that, subject only to the effect of the absence of a Minister of Justice *de jure*, all foreign law was admitted. Counsel were content to accept that the law applicable to that point was the common law as discussed in the cases cited.

In my judgment the writ claimed ought to issue.

[Report: [1972] N.Z.L.R. p. 954.]

E—STATE SUCCESSION

I.—Succession to Rights

States as international persons—Succession of rights and obligations—Belgium and Belgian Congo—Whether Belgium succeeded to Belgian Congo's assets and liabilities after independence—Principles of public international law—Action brought by individual—Primacy of municipal law—Irrelevance of international law—The law of Belgium.

See p. 8 (*État belge* v. *Dumont*; *Pittacos* v. *État belge*).

II.—Succession with regard to Contractual and Other Obligations and Concessions

States as international persons—State succession—Succession with regard to contractual and other obligations and concessions—Contract concluded between company and French State in Algeria before independence—Termination of contract by Algerian authorities—Whether French State liable to pay compensation—The law of France

RE ALGIERS LAND AND WAREHOUSE COMPANY LTD.

France, Conseil d'Etat. 13 *July* 1967

SUMMARY: *The facts.*—The Algiers Land and Warehouse Company, Ltd. claimed compensation from the French State in respect of the seizure by the Algerian State of warehouses in Algiers for which it had a concession.

Held: The claim must be dismissed. The contractual obligations arising under the concession had been transferred to the Algerian State on its independence. The occurrences in question concerned the relations of the French Government with a foreign State and could not engage the responsibility of