### Shorter articles, comments and notes

<table>
<thead>
<tr>
<th>Item</th>
<th>Product</th>
<th>1964</th>
<th>1965</th>
<th>1966</th>
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<tbody>
<tr>
<td>85.09</td>
<td>Electrical lighting and signalling equipment</td>
<td>151,342</td>
<td>104,510</td>
<td>99,950</td>
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<td>85.15</td>
<td>Radiotelegraphic and radiotelephonic transmission and reception apparatus</td>
<td>85,120</td>
<td>150</td>
<td>355,020</td>
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<td>85.19</td>
<td>Electrical apparatus for making and breaking electric circuits</td>
<td>30,460</td>
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<td>87.06</td>
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<td>1,240,220</td>
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<td>88.02</td>
<td>Flying machines, gliders and kites; rotochutes</td>
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<td>487,400</td>
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<td>90.14</td>
<td>Surveying, hydrographic, navigational, meteorological, hydrological and geophysical instruments; compasses; range-finders</td>
<td>585,180</td>
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<td>Medical, dental, surgical and veterinary instruments and appliances</td>
<td>47,130</td>
<td>77,750</td>
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<td>90.25</td>
<td>Instruments and apparatus for physical or chemical analysis</td>
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<td>90.28</td>
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<td>48,440</td>
<td>10,160</td>
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<td>92.12</td>
<td>Gramophone records</td>
<td>111,000</td>
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<td><strong>TOTALS</strong></td>
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<td>100,159,000</td>
<td>99,676,720</td>
<td>98,826,000</td>
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**THE SHIFTING SANDS OF ALLEGIANCE AND TREASON IN RHODESIA**

Treason is a betrayal of a breach of the faith and allegiance due to the sovereign. It is correlative to protection by the sovereign. It is owed to the British Crown by citizens of the United Kingdom and of its Colonies, wherever they may be; by citizens of other Commonwealth countries and Irish citizens while they are in the United Kingdom; and by aliens while they are in British territory by the
Sovereign's licence either express or tacit. Described in feudal language, the essence of the crime of treason nowadays is *disloyalty to the state as a political entity* rather than to the Sovereign as a person.¹

On 12 November 1965, the British Attorney-General, referring to Rhodesia, said: "It is right that I should point out in general terms that there is abundant authority for the conclusion that the conduct of the kind that has taken place is treasonable."² But is it? Is this question to be regarded as being settled? Has the allegation of the British Attorney-General any validity? This allegation is of the utmost importance as treason is a uniquely serious crime and one that carries the death penalty. Blackstone referred to it as: "The highest civil crime, which (considered as a member of the community) any man can possibly commit . . ."³

It can be accepted that no-one can be convicted of treason under English law unless he owes allegiance to the Crown.⁴ The common law of Rhodesia is Roman-Dutch law, but as the present dispute concerns the position of the Crown in relation to its Government in Rhodesia, the dispute should be governed by the rules of English constitutional law.⁵

The broader aspect of "treason" in Rhodesia has been dealt with elsewhere⁶ and in this note emphasis will be placed on the question of allegiance and its place in the broader concept of treason.

The earliest statute on the subject is the *Statute of Treasons*, 1351, which, with certain amendments, is still in force. Coke said of this *Statute of Treasons*: "[T]his Act is to be understood of a king *in possession* of the crown and Kingdom . . . the other [king] that hath right and is *out of possession* is not within this Act."⁷ In other words treason can only be committed against the monarch *in possession* - there must be a breach of allegiance due to the monarch

⁴*R. v. Casement* [1917] 1 KB 98; *Joyce v. Director of Public Prosecutions* [1946] AC 347. (Joyce was popularly known as "Lord Haw-Haw" following his wartime broadcasts of Nazi propaganda).
⁵*Union Government (Min. of Lands) v. Estate Whittaker* 1916 AD 194; *Sachs v. Donges* NO 1950 (2) SALR 265 at 288 and 309; *VerLoren van Themaat, Staatsreg* (Butterworth, Durban, 1967) 62.
⁷*Institutes*, III, 7 as quoted by Honoré, *op. cit.*, 214.
Modern day writers such as Russell and Hood Phillips are of the opinion that the Treason Act, 1495, confirmed the common law principle that allegiance is due to the de facto sovereign (i.e. the king who is for the time being actually in possession of the crown), and not to king de iure (i.e., with a right to the crown) who is not also king de facto.  

It must be mentioned, however, that Blackstone expressed his doubts as to the correctness of Coke's submission. Can it be the law, he asks, that "... were the King of Poland or Morocco to invade this kingdom, and by any means to get possession of the Crown the subject would be bound by his allegiance to fight for his natural prince today, and by the same duty of allegiance fight against him tomorrow?" Is the oath of allegiance but a shifting sand? Why is it that, according to De Jager v. Attorney-General of Natal, allegiance is not lost by the temporary withdrawal of the true sovereign's protection? Why did the court decide in Inglis v. Trustees of Sailors Snug Harbour that American colonists who were still British subjects retained their allegiance to George III until the Treaty of London, 1783, absolved them from it?

A brief examination of the Treason Act, 1495, produces the following: According to the preamble the subjects must serve their prince and sovereign lord for the time being in his wars; furthermore no persons who "do true and faithful service of allegiance" to the king for the time being shall be attainted of treason. This Act is still part of the law of England. It can be assumed that the broad principles of the Act are part of the English common law and as such applicable to Rhodesia. To grasp the real import of the Act requires an intimate knowledge of English history of the time and as Beadle CJ put it in Madzimbamuto v. Lardner-Burke NO and Another NO; Baron v. Ayre NO and Others: "... the Roman-Dutch lawyer treads warily in unfamiliar paths."

The Treason Act, 1495, was, so it appears, designed to deal with
the situation following the Wars of the Roses when nobody was certain who in law was entitled to be regarded as the de iure king. Henry VII was prevailed upon by his adherents to pass the law in order to protect them from prosecution for aiding him in the event of the eventual success of the party opposing him. The legal position regarding the de iure king was so fluid at the time that even the judges refused to adjudicate on the subject.\textsuperscript{17}

Even today the matter is far from settled - a fact which is not surprising when one glances at the earlier, and some of the modern, writers! The writer who goes furthest in entrenching the rights of a de facto sovereign is Hawkins who alleges that allegiance is owed to a de facto sovereign alone: “[I]t clearly follows . . . every king for the time being has a right to the people's allegiance, because they are bound thereby to defend him in his wars against every power whatsoever . . . [O]ne out of possession is so far from having right to our allegiance by virtue of any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him.”\textsuperscript{18}

Bacon\textsuperscript{19} supports this view: “With respect, therefore, to the duty of allegiance, the only question is, who is the sovereign in possession; if the usurper is in possession, allegiance is due to him as sovereign lord, for the time being . . .”

Blackstone criticizes these opinions as “. . . confounding all notions of right and wrong”.\textsuperscript{20} Hale is emphatic that assisting a de facto sovereign against a de iure sovereign is treason.\textsuperscript{21} One can also refer to Hume\textsuperscript{22} where he states: “This at least is the opinion of Sir Matthew Hale, which I do not find expressly controverted by other authorities but rather avoided to be touched on.”

The Sixth Report of the Royal Commission of 1841 dealt, \textit{inter alia}, with the \textit{Treason Act}, 1495, and under a side-note entitled “Pro-

\begin{footnotes}
\item[17]Holdsworth, \textit{History of English Law} (Methuen, London, 1923) vol. 2, 561: “The House of Lords tried in vain to extract from the judges a decisive opinion upon the legality of the Duke of York's claim to the throne . . . The king's serjeants and attorney, when applied to, said that if the judges could give no opinion \textit{a fortiori} they could not do so.”
\item[20]Blackstone, \textit{op. cit.}, vol. IV, 64.
\item[22]Commentaries on the Law of Scotland representing Crimes, 1884, vol. 1, 520, quoted by Beadle CJ in \textit{Madzimbamuto}'s case at 430, \textit{supra} note 16.
\end{footnotes}
tection for those who aid the King *de facto*" summed up the legal position to be that "... no person who shall attend upon the King and sovereign lord of this land *for the time being* ... and shall do him true and faithful service of allegiance ... shall for the said deed and true duty of allegiance be in anywise convicted or attainted of treason". The Commission indicated the conflicting views expressed and seemed to suggest that the only satisfactory way of deciding the law was by further legislation. In 1877, however, Stephen in his *Digest of Criminal Law* adheres wholeheartedly to the legal position as set out by the Commission of 1841 *supra*. In 1878 a fresh Commission was appointed to consider a draft Code relating to indictable offences and this Commission suggested that: "Everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession *de facto* of the Sovereign power in and over the place where the act is done." This is also the position in section 15 of the Canadian Code and section 88 of the New Zealand Code.

Beadle CJ in *Madzimbamuto's case* sums up the legal position as follows: "A subject *may* without risk obey the laws of a *de facto* government, but this is a somewhat different concept from the positive assertion that he is under a duty to do so." In other words the difference is between "may" and "must".

From a legal point of view it is unfortunate that the issue is unclear. It is difficult to accept that the English common law has a built-in provision to "encourage" revolutions by providing that immediately a *de facto* government replaces the *de iure* one, all allegiance is transferred from the *de iure* to the revolutionary one.

The position therefore seems to be the following: Obeying the laws of the present *de facto* government in Rhodesia cannot be construed as a breach of allegiance to the body politic in the United Kingdom, because, as indicated above, "everyone is protected from criminal responsibility for any act done in obedience to the laws for the time being made and enforced" by a *de facto* government. It would appear that Rhodesians may thus obey the *de facto* government with impunity.

Wharam has therefore much authority for stating that the alle-
igation by the Attorney-General in the House of Commons\textsuperscript{29} is not only totally unfounded but directly contrary to the established law and traditions of six hundred years.\textsuperscript{30}

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University of South Africa

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ACT NO. 97 OF 1963 OF THE SOCIALIST CZECHOSLOVAKIAN REPUBLIC

The legal system of the Socialist Republic of Czechoslovakia is one of the legal systems that has a special law on the conflict of laws. In fact, Act No. 97 of 4 December 1963 of the Compiled Laws of the Socialist Czechoslovakian Republic, which is the law on private international law and international procedure, regulates these matters in civil law, family law, labour law and other legal relations which include a foreign element.

The Act which preceded the one under discussion, Act No. 41 of 1948 of the Compilation of Laws, governed only questions on conflict of laws and the status of foreigners. The present Act includes provisions relating to procedure which had previously been governed by the Code of Civil Procedure. It may well be asked whether the introduction of provisions concerning problems of private international law as well as procedure is warranted. The main reason for this approach is the fact that problems of private international law and those of international procedure are interlocked inseparably in practice and are frequently also intermingled in legal provisions. This is evident in problems like those of reciprocity, the immunity of a foreign state and of its diplomats and of legal assistance in relations with the foreign state.

\textsuperscript{29}Supra note 2.

\textsuperscript{30}See Honoré, \textit{op. cit.}, 222 who gives another interpretation to the phrase “king for the time being,” namely, that it means the “rightful monarch”. This interpretation he says is linguistically unobjectionable, though admittedly unhistorical. See further Barrie, “The High Court of Rhodesia and UDI”, 30 \textit{THRHR} (1967) 147, and Barrie, “Rhodesian UDI - an Unruly Horse”, 1 \textit{CILSA} 1968, 110.

\*This article was translated from the French text by Mr Gerd Spreen of the Institute of Foreign and Comparative Law of the University of South Africa.