APPENDIX.

*HALDER v. MINISTER OF DEFENCE AND THE PROVOST MARSHAL OF PRETORIA.

1915. *October* 1. CURLEWIS, J.

CURLEWIS, J.: This is an application for confirmation of a rule *nisi* granted on the 10th September, calling upon the Provost-Marshal and the Minister of Defence of the Union to show cause on the 27th September (1) why they should not be restrained from removing the applicant from out of the jurisdiction of this Court; (2) why they should not be prohibited from interning him in a camp of enemy subjects; (3) why they should not be ordered to release him; and (4) why they should not be ordered to pay the costs of the application. There are further clauses in the rule *nisi* which it is unnecessary to mention at present.

The rule was granted on a petition by the applicant in which he alleged that he was born in Europe, in the kingdom of Wurtemberg, before it was consolidated into the German Empire; that he came to South Africa in 1880 and has remained in this country ever since; that in 1889, while at Leydsdorp, Transvaal, he became a burgher of the South African Republic, and consequently, upon the annexation of the Republic by the British Empire in 1900, he became a British subject by conquest; that during 1892 and 1893 he performed military duties in the service of the British Empire, and was a member of the Rhodesian Horse in Rhodesia, and that he did service as a special constable during the strike in January, 1914.

[His Lordship then stated the further facts relating to the question whether applicant was a burgher of the late S.A. Republic, which facts are, however, immaterial for the purposes of this report.]

*On appeal before DE VILLIERS, J.P., WESSELS, and BRISTOWE, JJ., decided on 18th October, 1915, the above decision of CURLEWIS, J., was reversed on the facts, the Court finding that applicant had failed to prove that he was a naturalised Burgher of the late S.A. Republic, and was, therefore, not a British subject. The decision of CURLEWIS, J., on the points of law was, however, referred to and overruled in the case of *Dedlow* v. *Minister of Defence and Provost Marshal* (*supra*, p. 543).—ED.

In reply the respondents have filed various affidavits—one by Col. Hamilton-Fowle, who states that he is the Commissioner for Enemy Subjects for the Union, and also Provost-Marshal, Defence Headquarters, Pretoria. In par. 2 he says: "After due investigation, I am satisfied that the applicant is a subject of the German Empire and a person dangerous to the safety of the Realm. (3) Acting in my capacity as Commissioner for Enemy Subjects, I ordered the detention and internment of the applicant as a prisoner of war." Then he refers to certain instructions issued by the Government at various dates.

In reply to these affidavits, the applicant has filed an affidavit denying Col. Hamilton-Fowle's allegation that he is a danger to the State.

The confirmation of the rule is opposed by Mr. *Tindall*, for the respondents, on three grounds. First, that the matter being a military act done by the military authorities during time of war, is not justiciable by this Court. For this contention he relied on the decision of the Appellate Division in *Krohn* v. *Minister for Defence and Others* (1915, A.D. 191), and also on two decisions of the Privy Council, referred to in *Krohn's* case. Counsel contended that war actually prevails, and therefore the doctrine laid down in *Krohn* v. *Minister for Defence*—namely, that when actual war is raging, acts done by the military authorities are not justiciable by the ordinary tribunals—should apply, and this Court would have no jurisdiction.

As regards the question whether war is actually prevailing in this country, no affidavits have been filed in this case, as was done in the case of *Krohn*, where the Minister of Defence set out certain facts for the information of the Court. But Mr. *Tindall* has urged that the Court must take judicial cognisance of the fact that war exists, and has existed since August, 1914, between the German Empire and the British Empire, and he argued that this country, forming part of the British Empire, must also be considered as being in a state of war. I agree that this country as an integral portion of the British Empire must be regarded as being in a state of war on account of the British Empire being at war with the German Empire. But the question is not whether a state of war exists in the British Empire, but whether war actually prevails in this country. I take that to be the meaning of what the Appellate Division laid down in *Krohn's* case. Had the mere

fact of war existing between the British Empire and the German Empire been sufficient to establish that war prevailed in this country, I do not see the necessity for the Appellate Court having inquired into the various allegations which were made by the Minister of Defence in *Krohn's* case. It was alleged by the Minister of Defence, first, that a state of war existed between the British Empire and the German Empire. Then he proceeded to set out further particulars—that that state of war had existed since August, 1914; that the Union of South Africa was actually participating in that state of war by means of military action against the enemy forces in the German possessions bordering upon the Union territory; that in October, 1914, armed rebellion broke out in the Union itself under the leadership of influential persons and by means of armed force for the purpose of overthrowing His Majesty's Government in South Africa; that the rebellion became very grave and spread to a very large extent; that, though the rebellion had considerably subsided, it had not yet been suppressed, and that Martial Law had been proclaimed throughout the Union. Both the CHIEF JUSTICE and Sir William SOLOMON referred to the allegations made by the Minister of Defence, and pointed out that they were not denied, but that counsel for the appellant relied on a statement made by General Botha, which had been communicated to the Press. Sir William SOLOMON deals with it in this way; he says (p. 204): "There is no evidence on the part of the appellant in denial of these allegations, but his counsel relied entirely upon a statement purporting to have been made by General Botha and by him to have been communicated to the Press, which appears by consent to have been put in in the Court below. In that statement General Botha says: 'The rebellion is now practically at an end. The principal leaders have disappeared through death or capture. The surrender of the principal commandants in the Orange Free State to-day near Bethlehem, leaves on the field only small scattered bands, whose operations will require measures more of a police than of a military character'". "These words" (Sir William SOLOMON continues) "are a prelude to an appeal to the inhabitants of the Union to cultivate a spirit of tolerance and forbearance towards the misguided persons who had gone into rebellion. It was published some days before General Smuts' affidavit was sworn, and that General Botha took too favourable a view of the situation is proved by the fact sworn to by Col. Truter, that the day be-

fore the application was made to the Court below a fight had taken place between the rebel and the Union forces twenty miles from Pretoria, in which the latter had some twenty casualties and in which twenty men were captured. In face of this fact, and the strong terms of Gen. Smuts' affidavit it is impossible to come to any other couclusion than that war was actually raging not only in the country but also in the very district in which the appellant was arrested, at the time when these proceedings were taken in the Court below." From the remarks made by the CHIEF JUSTICE, it appears that he took the same view. Taking all the facts into consideration, he came to the conclusion that war was actually raging in this country. In *Ex parte Marais*, and *Attorney-General of the Cape* v. *van Reenen and Smit*, the Privy Council, as Sir William SOLOMON points out in *Krohn's* case, laid down broadly this as being the law:—"Where war actually prevails the ordinary Courts have no jurisdiction to call in question the propriety of the action of the military authorities." The question to be decided is whether war can be said actually to prevail in this country —whether the mere fact of the British Empire being at war with the German and Austrian Empires is sufficient to establish the fact that war is prevailing in this country. As I have remarked, had the fact of the existence of war between the British Empire and the German Empire been sufficient to establish the fact that war existed in this country, I cannot understand what necessity there would have been for the judges in the Appellate Division to refer to the particulars set out in Gen. Smuts' affidavit with regard to the hostilities against German South West Africa and the rebellion, or for the remarks made by Sir William SOLOMON as to what took place near Pretoria a day or two before *Krohn's* application was heard before Sir John WESSELS. If the Appellate Division of our Supreme Court considered that the mere fact that a state of war exists between the British Empire and the German and Austrian Empires was sufficient to establish the fact that war prevails in this country, it would have been quite unnecessary to refer to all the other facts to which reference was made by the CHIEF JUSTICE and by Sir William SOLOMON. Therefore I think we must take the expression "where war actually prevails" not to refer to the fact that a state of war exists between the British Empire and the German and Austrian Empires, but as meaning that hostilities are actually carried on in this country. I take that also to be the

meaning of the Privy Council in the cases to which I have referred, where the expression was used, "when actual war is raging." Now, can it be said that actual war is raging here? Mr. *Tindall*, as I have stated, relied only on the fact that war exists and is actually raging between the British and German Empires. Can it be said to be actually prevailing in this country? It seems to me that there is nothing before the Court to justify me in holding that war is actually prevailing in this country. So far from the conditions in the present case being such as were set out in the affidavit of the Minister of Defence in *Krohn's* application in January last, the conditions are entirely different. By Proclamation No. 97 of 1915, signed by His Excellency the Governor on the 23rd August, 1915, Martial Law was withdrawn throughout the Union except as regards Cape Town, Wynberg, Simonstown, Walvis Bay and Durban, and as regards the matters set out in the second schedule. In the preamble of the Proclamation it is stated: "Whereas by Proclamation 219 of 1914, dated the twelfth day of October, 1914, I did declare, proclaim and make known that all magisterial districts in the Union were until further notice placed under Martial Law as Martial Law is understood and administered in time of war; and whereas the circumstances which rendered the enforcement of Martial Law throughout the Union now happily no longer exist except in certain areas specified in the first schedule hereto (where its continued enforcement is necessary owing to the unhappy existence of a state of war between the British Empire and the German Empire) and except also as to certain matters described in the second schedule hereto; now therefore I do hereby declare, proclaim and make known that as from the date of this my Proclamation, and except in the areas specified in the first schedule hereto and except also in respect of matters described in the second schedule hereto, Martial Law shall be and is hereby withdrawn throughout the Union." In face of this Proclamation, if I am right in the view that the expression "where war actually prevails" does not mean solely a state of war existing between the British and German Empires but means active hostilities, it seems to me impossible to uphold Mr. *Tindall's* contention that this matter is not justiciable by this Court. As laid down in *Krohn's* case, if war were actually prevailing here, and if this were an act of the military authority, it would be impossible for me to exercise jurisdiction in the matter. As Sir Willam SOLOMON pointed out in

Krohn's case, the principle laid down by the Privy Council in the two cases referred to left only two questions for consideration—namely, (1) whether war actually prevailed at the time application was made to the Court below; (2) if so, was the constitution of the special Court before which the appellant was to be tried an act of the military authorities? In order to exclude the jurisdiction of the Court it is necessary first to hold that war actually prevails in this country. For the reasons I have stated, I have come to the conclusion that war cannot be said to have prevailed in this country when the applicant was informed that he would be interned as an enemy subject. Therefore the objection taken by Mr. *Tindall*, that the Court has no jurisdiction, cannot, in my opinion, be sustained.

The second ground urged by Mr. *Tindall* was that the applicant was an enemy subject, and therefore could be dealt with as such by the military authorities. I have therefore to decide whether the applicant falls under the term "enemy subject," or whether he must be looked upon as a naturalized British subject of enemy descent. I have already referred to the allegations made in the affidavits. It seems to me quite clear that the applicant is of German descent; he himself states that he was born in the kingdom of Wurtemburg. Therefore, unless the Court is satisfied that he became a naturalized British subject he would be liable to be treated as an alien enemy. But on the facts before me I have come to the conclusion that the presumption is that he is a naturalized subject and no longer an alien enemy.

[His Lordship then dealt with the facts.]

The next point taken by Mr. *Tindall* is that, if the applicant is not an alien enemy, he is a naturalized subject of German descent and therefore can be dealt with by the military authorities under par. 2 of Government Notice No. 40 of 1915, published in the *Gazette* of the 15th January, 1915. That Notice provides that "Whereas it is deemed necessary and expedient to make special provision for dealing with British subjects of enemy extraction, who by word and action show themselves inimical to the Government and Parliament of the Union and to the welfare of the State, it is hereby notified that the regulations set out in the annexure to this notice will be enforced throughout the Union with effect from date hereof." Par. 1 of the annexure deals with persons convicted of sedition, treason or disloyal conduct. The second para-

graph provides for the "Internment of British subjects known to be or suspected of being inimical to the welfare of the State," and reads as follows: "If it shall appear to the satisfaction of the Minister of Defence that any such person as is described in the preceding regulations is dangerous to the peace and welfare of the State, the Minister may authorise the execution of an order for the internment of such person in a camp for the internment of enemy subjects during the continuance of hostilities." By a subsequent Notice par. 2 has been amended so as to make clear the meaning of the words "any such person as is described in the preceding regulation." Government Notice No. 91 of 1915, published in the *Gazette* of the 25th January, 1915, refers to par. 2 of Government Notice 40 of 1915, and amends it by deleting the words "such person as is," in line 2, and substituting therefor the words "person who has become a British subject as." Par. 2 of the annexure to Government Notice 40 of 1915 might be read as meaning "a person who has become a British subject by the naturalization of himself or his parents, and who is convicted by any Court for seditious, treasonable or disloyal conduct," etc. But the later Notice makes it clear that it is unnecessary for a person, in order to fall under par. 2, to have been convicted by any Court of seditious, treasonable or disloyal conduct. It deals with a person who has become a British subject by the naturalization of himself or his parents. It was contended by Mr. *Tindall* that under these notices the military authorities have the right to intern the applicant if the Minister of Defence is satisfied that he is dangerous to the peace and welfare of the State. He urged that notwithstanding that Martial Law has been withdrawn in this Province, this regulation remains of full force and effect, inasmuch as the Indemnity and Special Tribunals Act, 11 of 1915, has given the Government Notice the force of law. Sec. 6 of that Act provides: "(*a*) All Proclamations of the Governor-General, and (*b*) all prohibitions, regulations, orders or instructions issued under any Government Notice, which have been published in the *Gazette* since the commencement of the present war and relate to measures taken or to be taken by the authorities for the maintenance of good order and government and public safety in the Union, or for ensuring the success of naval and military operations against, or for preventing injury by, His Majesty's enemies, of for the suppression of rebellion in the Union, shall be deemed to have the force of law."

Mr. *Tindall's* contention is that by sec. 6 of the Act Government Notice No. 40 of 1915 has, and must continue to have, the force of law until it is repealed by Parliament. In the same *Gazette* in which this Act was published Government Notice 424 of 1915 was issued, under the hand of Mr. Burton, acting for the Minister of Defence, in which it is stated: "It is hereby notified that as from the date when the Indemnity and Special Tribunals Act, 1915, shall come into operation—namely, the date when it is first published as an Act in the *Gazette*, the regulations published under the Government Notices specified in the annexure hereto shall be withdrawn." Then follow a number of regulations. Mr. *Tindall* has pointed out that Government Notice No. 40 of 1915, dealing with internment of naturalized British subjects, does not form one of the regulations which are withdrawn. But if his contention is correct, that by sec. 6 of the Act all Government Notices falling within sec. 6 have become law, I do not see how any Notice issued by the Minister of Defence or by the Government can cause those Proclamations and Notices to cease to have the force of law. If the contention is correct that these matters have all been given the effect of law by the Indemnity Act, they cannot cease to have the effect of law merely because the Government or the Minister desires to withdraw them. The most it can amount to is an announcement that the Government does not desire to enforce the regulations. But is the contention correct, that sec. 6 of the Indemnity Act gives Government Notice 40 of 1915 the force of law to such an extent that it remains law under all circumstances, even after war has ceased, until it has been repealed by Parliament? Sec. 6, it seems to me, is a very unusual provision in an Indemnity Act. I do not think such a provision is usually found in an Act passed by Parliament to indemnify the Government or its officials in respect of acts done during hostilities or during times of rebellion or riot. The question suggests itself, why was it necessary to include a provision giving the effect of law to all the Government Notices? It will be seen that the provision as regards the indemnity of the Government and its officials only refers to acts done since the beginning of military operations up to the passing of the Act. I cannot help thinking that the object of sec. 6 must have been to give the Government and its officials further protection in respect of acts which would be necessary even after the passing of the Act. We must remember that when this Act was passed military opera-

tions were still being carried on in German South-West Africa. Martial Law was still in force throughout the Union, and therefore the Government and its officials would have to do certain acts under Martial Law which might not be strictly covered by the ordinary common law and would require an indemnity. It seems to me the object of the legislature was to prevent the necessity of another Indemnity Act being passed for any acts done after the passing of this Act as long as Martial Law lasted. That could have been the only object of sec. 6. In order to prevent the necessity of the Government again asking Parliament to pass an Indemnity Act, the legislature deemed fit to give the Government Notices and Proclamations described in the section the force of law, so that anything done, after the passing of the Act, by the Government or its officials under those Notices and Proclamations would have the force of law and would not be required to be covered by a later Indemnity Act. But did the legislature, by giving these Government Notices and Proclamations the force of law, intend them to hold good as law until repealed, or was the intention merely to give them effect for the purpose for which they were issued—that is, for Martial Law purposes? I come to the conclusion that we must read sec. 6 as meaning, not that the various Government Notices are given the effect of law until such time as they have been repealed by Parliament, but only to give them the effect of law for the purpose for which they have been issued—in this instance, for the purpose of administrative and military measures while Martial Law is in existence. If we look at Government Notice No. 40 of 1915, on which Mr. *Tindall* relies, it is clear that it was issued for the purpose of Martial Law. It is headed "Martial Law Regulations." Therefore it appears to me that the true interpretation of sec. 6 of the Act is that the Government Notice only has the force of law as a Martial Law regulation—that is, it only has the force of law as long as Martial Law exists, and that when the object and reason for the regulation has ceased the regulation itself will cease to have the force of law. It seems to me quite unlikely that the legislature intended all these Government Notices to have the force of law until they were repealed by a formal statute. If that is so, can this Notice be said to have the force of law at the present moment? As I have pointed out, it is headed "Martial Law Regulations"; it is clearly, therefore, intended as a regulation to be administered under Martial Law. As

Martial Law has been withdrawn, it follows, in my opinion, that this regulation must be considered to have been withdrawn, except in the places mentioned, and in respect of the subject-matters set out, in the schedules to the Proclamation withdrawing Martial Law. Had the Government intended that the subject-matter dealt with by Government Notice 40 of 1915 should be retained notwithstanding the withdrawal of Martial Law, I cannot help thinking that that would have been specifically stated in the Proclamation withdrawing Martial Law. That Proclamation points out that the circumstances, which rendered the enforcement of Martial Law necessary now happily no longer exist, except in certain areas and except as to certain matters described in the second schedule. If we look at the second schedule, we find that the matters in respect of which Martial Law shall continue in all districts are: "(1) Detention in the Union under Martial Law of persons who are charged with having committed offences in the Protectorate of South-West Africa, or who have committed offences in the Union and sought refuge in the said Protectorate; (2) the continued withholding by the military authorities or persons acting under their directions of arms, ammunition, vehicles, livestock or other articles which were so withheld on the date when the Indemnity and Special Tribunals Act, 1915, came into operation; (3) the continuance of the measures taken under the authority of the Minister of Defence for the censorship of any postal or telegraphic communications within or in transit through the Union." None of these matters embrace the matter which is dealt with by Government Notice No. 40 of 1915. Had it been intended that Martial Law should be retained to the extent with which it deals with internment of naturalized British subjects, that would have been stated in the Proclamation. Not having been so stated, I must assume that it was the intention of the Governor-General not to retain regulations in respect of matters dealt with under Notice No. 40—namely, in respect of the internment of naturalized British subjects of enemy origin, except, of course, at Cape Town and the other places mentioned in the first schedule. It may be, and probably is, very desirable that the Government and military authorities should have power to deal with naturalized British subjects of enemy origin, and it may be that this regulation has been accidentally omitted from the second schedule in Proclamation 97 of 1915. But I can only deal with the Law as I find it, and if it is a *casus*

omissus it is not for me to rectify it. If I am right in the view which I take, that Government Notice No. 40 of 1915 is only given the effect of law by Act 11 of 1915 as a Martial Law regulation, and that when Martial Law was withdrawn the regulation ceased to have the force of law, however unfortunate it may be, it is a matter for the Government to consider and with which this Court cannot concern itself. In my opinion, therefore, the grounds urged on behalf of the respondents against the confirmation of the rule *nisi* cannot be sustained. The rule must be made absolute, with costs.

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*REX v. RORKE.

1914. *June, July* 13. DE VILLIERS, J.P., BRISTOWE, and CURLEWIS, JJ.

Criminal law.—Procedure.—Reserving points of law.—Ord. 1 *of* 1903, *sec.* 270.—*Sheriff.—Proc.* 17 *of* 1902.—*Public servant.—Theft.—Rules of Court* 83 *and* 85.—*Ord.* 1 *of* 1903, *secs.* 126 *and* 223.—*Admission of evidence of acts not charged in indictment.—Proc.* 16 *of* 1902, *sec.* 11.—*Prejudice.—Separate trial.—Ord.* 1 *of* 1903, *secs.* 140 *and* 167.

BRISTOWE, J., delivered the following judgment of the Court:—

The accused, C. F. Rorke, formerly sheriff of the Transvaal, was charged with one du Saar, the accounts clerk and bookkeeper in the sheriff's office, with theft of sheriff's moneys on three counts, of which the first was a general deficiency of £3,126 19s. 11d. The case was tried before GREGOROWSKI, J., and a jury. The accused was convicted on the first count (except that on the suggestion of the learned Judge a sum of £534 8s. 3d. representing arrears of fees owing to deputy sheriffs was deducted) and was acquitted on the other two. As regards du Saar the jury failed to agree and the case against him has been since withdrawn. At the request of counsel for the accused certain points, which I will mention in a moment, were reserved under sec. 270 of the Criminal Procedure Code for the consideration of this Court.

*An appeal from this judgment was dismissed : See *R.* v. *Rorke* (1915, A.D. 145). The judgment of the T.P.D. was not inserted in the A.D. report. It is now printed here, on account of its importance.—ED.