CURLEWIS, J.: I have had an opportunity of perusing the judgment of my brother WESSELS and concur with his interpretation of sec. 14 (1) (*a*) of Act 28 of 1914, and have nothing to add to his reasons. I agree that the point of law stated for decision in this case must be answered in favour of the plaintiff, viz., that the deduction of £44,818 15s. should not be made. I prefer to base my conclusion solely on the first ground urged by the plaintiff, namely, that the loss was not incurred in the Union by the defendant in the production of his taxable income, because, though I agree that money invested in loan must be regarded as capital when lost, it is, I think, conceivable that a loss of deposit with a banker on current account may in certain circumstances be regarded as a loss in the production of income and not a loss of capital, and there is nothing before us to show what it was in the present case.

Plaintiff's Attorney: *C. J. Pienaar*, Government Attorney; Defendant's Attorney: *J. MacIntosh.*

[G. v. P.]

DEDLOW v. MINISTER OF DEFENCE & PROVOST MARSHAL.

1915. *November* 15, 19, 26. WESSELS, MASON and BRISTOWE, JJ.

War.—Acts of military authorities.—Jurisdiction of civil courts.—Where war prevails.—Meaning.—Internment of naturalised British subjects of enemy origin dangerous to state.—Military act.

Statutes.—Interpretation.—Effect of title of Act on an unambiguous section.—Act 11 *of* 1915, *sec.* 6.—*Effect.*

Where war prevails the civil courts have no jurisdiction over the acts of the military authorities unless it appears *ex facie* the documents that there is *mala fides* on the part of such authorities. "War" includes such a condition of things as when active warlike preparations, such as recruiting, equipping and despatching of troops are going on, even though there be no actual fighting.

Where the Minister of Defence had ordered the internment of D, a naturalised British subject of German origin, and stated in an affidavit that a state of war existed between the British and German Empires, that the Union of South Africa was actively participating in the military operations both in Europe and in German and British East Africa by recruiting, equipping and

training troops in the Union and dispatching them to the seat of war, and that D was a person dangerous to the peace and welfare of the State, and that his internment was in the interest of military operations, *Held*, that war prevailed in the Union of South Africa. *Held*, further, that there was nothing inherently improbable in the statement of the Minister of Defence that D was a source of danger to the State, that the internment was a military measure and not justiciable in a Court of law.

Where the wording of a section of an Act is clear, the title of the Act cannot affect the interpretation of that section.

Section 6 of the Indemnity and Special Tribunals Act No. 11 of 1915 provides that all . . . regulations issued under Government Notice and 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, or for the suppression of rebellion in the Union shall be deemed to have the force of law. Under Government Notices Nos. 40 and 91 of 1915, issued during the existence of Martial Law—which had since been withdrawn—certain regulations, headed "Martial Law Regulations," were published, which empowered the Minister of Defence to intern naturalised British subjects, *Held*, that the said regulations were validated and obtained the force of law by virtue of the provisions of section 6 of Act 11 of 1915.

Decision of CURLEWIS, J., in *Halder* v. *Minister of Defence* (*infra*) overruled.

Ex parte Marais (1902, A.C. 109) and *Krohn* v. *Minister of Defence and Others* (1915, A.D. 191) interpreted and applied.

Return day of a rule calling upon the Minister of Defence and the Provost Marshal, Pretoria, to show cause why they should not be restrained from interfering with or removing the applicant to the camp for internment of enemy subjects.

Applicant stated in his petition that he was a medical practitioner, that he was born in Germany in 1861, and had emigrated to the United States of America at the age of 18, where he was naturalised as an American citizen in 1888. In 1896 he came to South Africa and was naturalised in the Transvaal in February, 1908, as a British subject. He stated further that he had never done any military service whatsoever in, for or on behalf of Germany. That he had never returned to Germany with the exception of a period of three weeks, when on his way from the United States to South Africa in 1896. On October 18th, 1915, he had been told to keep himself in readiness to be interned in Pietermaritzburg, and on October 19th he obtained a rule as above stated.

The Minister of Defence filed an affidavit, in which he stated that war was raging and had been raging since August, 1914, be-

tween the British Empire and its Allies on the one hand and the Germans and Austro-Hungarians and their Allies on the other side, and that in consequence thereof war was raging between the Union of South Africa and the said hostile Empires. That the Union of South Africa actively participated in the war by invasion and military operations of the German possessions bordering upon the territory of the Union. That actual conflicts were still from time to time taking place between the British Forces and the German Forces on or near the northern borders of Rhodesia. That the Union was further actively participating in the military operations both in Europe and in German or British East Africa by recruiting and training troops here and despatching them to the seat of war; and that His Majesty's Executive Government were acting in co-operation and in consultation with His Majesty's Government of the United Kingdom in regard to some of the military measures required to ensure the success of His Majesty's naval and military forces in the said war. He referred the Court to the regulations published under Government Notice No. 40 of 1915 (*Government Gazette*, 15th Jan., 1915), as amended by Government Notice No. 91 of 1915 (*Government Gazette*, 25th Jan., 1915). He further stated that after due investigation and consideration he was satisfied that the applicant was a person who was dangerous to the peace and welfare of the State and a danger to the safety of the Realm under existing circumstances arising out of the state of war, and that applicant's detention and internment, which he (the Minister) had authorised and directed, were necessary for military reasons and in the interest of military operations, and that the proposed internment of the applicant was a military act and an essential part of the general military measures rendered necessary by the existing war, and as such not justiciable in a Court of law. He further submitted that the regulations published under the aforesaid Government Notices had obtained the force of law under Act 11 of 1915; that the internment of naturalised British subjects of enemy origin had been found necessary and was being enforced in the United Kingdom for military reasons, which reasons were also to some extent applicable to the Union of South Africa with a view to ensure the success of His Majesty's Forces in the said war.

Applicant, in his replying affidavit, denied that he was a person who was dangerous to the peace and welfare of the State and a danger to the safety of the Realm. He stated that he had been resident at Johannesburg for 19½ years. He further stated

that subsequent to the outbreak of the war he had, with the sanction of the Minister of Defence, assisted in certain relief work for the assistance of the families of German subjects. He alleged that in consequence of an interview with a newspaper reporter a Press campaign was commenced against him, that this campaign was continued and that he eventually received information that he was to be interned.

Gey van Pittius (with him *A. S. van Hees*), moved for confirmation of the rule.

The first point raised is that the regulations published under Government Notices 40 and 91 of 1915 have obtained force of law under Act 11 of 1915. These regulations are headed: "Martial Law Regulations"; Martial Law has been deproclaimed by Proc. 97 of 1915 (*Government Gazette*, 23rd Aug., 1915), and with the withdrawal of Martial Law, those regulations also lapse. Sec. 6 of Act 11 of 1915 may be construed as meaning that all regulations, etc., issued under Martial Law obtain the force of law. This would lead to absurd results; it would mean that Martial Law in its full vigour has been legalized by Act of Parliament; that such regulations as prohibiting persons to be out of doors after 8 p.m. in certain places, or prohibiting meetings of more than 5 persons are in full force to-day. And having the force of law these regulations, and even the Proclamation proclaiming Martial Law, could not be withdrawn except by Parliament itself, because no authority is given to the Government to withdraw any of them. As a matter of fact the Government did, by Government Notice 424 of 1915 withdraw some of those regulations even after the Act came into force. It would mean that all the regulations would have the force of law, even after peace has been concluded, unless Parliament had previously repealed them. It would further mean that no Indemnity Act would be necessary in the future. Act 11 of 1915 is nothing but an Indemnity Act, to indemnify the Government and its officials for certain acts done: see the title of the Act which should be taken into consideration in construing section 6: see *Sheeley* v. *Registrar of the Supreme Court* (1911, T.P.D. 295, at pp. 298-299). The object of the section was to give those regulations, etc., the force of law as long as Martial Law continued, so as to avoid the necessity of a further Indemnity Act. The Court should follow the maxim: *In poenalibus causis benignius est interpretandum:* see *Moss* v. *Sisson and McKenzie* (1907, E.D.C. 156, at p. 167); see also *Chotabhai* v. *Union Government* (1911,

A.D. 13, at p. 43); *R.* v. *Sigcau* (12 S.C., at p. 262; 1897, A.C., at pp. 238, 246); *Halder* v. *Minister of Defence* (*infra*).

The second point is based on the allegation that war is actually raging in the Union, that the detention of the applicant is a military act and, therefore, not justiciable in a Court of law. The two cases in point are: *Ex parte Marais* (1902, A.C. 109), and *Krohn* v. *Minister of Defence and Others* (1915, A.D. 191). Those cases are not applicable; the principle attempted to be put forward in the present case goes far beyond the principle laid down in those two cases. Those cases lay down that where Martial Law is proclaimed and war is actually raging, the Courts have no jurisdiction over the acts of the military. *Marais'* case has been interpreted in *Krohn's* case, and this Court is bound by that interpretation. In *Krohn's* case rebellion was actually in progress. That case is based on the existence of Martial Law, and confined to places where war is "actually raging." Also in *Marais'* case the words "where war actually prevails" form the basis of the decision. It cannot be said, also in view of the wording of the Proclamation withdrawing Martial Law, that war is "actually raging" in the Union. The British Empire being at war, it may be said that the Union is also at war, and that a state of war exists, but the two cases referred to are not based on the principle "if war is declared," but where war is "actually raging." If war is declared between the British Empire and some petty State, situate thousands of miles from the Union, could it then be said that war is "actually raging" in the Union? That would be the logical conclusion of the proposition contended for by the respondent; and there is no authority for such a proposition. The principle is a most dangerous one and most seriously affects the rights of the subject as to liberty. It would be impossible to disprove allegations of a Minister that a person is a dangerous subject, as he could refuse to give his reasons "for reasons of State," which would end the matter. It is really only in cases arising out of abnormal circumstances as are at present prevailing, that the need is felt for the protection of the liberty of the subject, and that the Courts are resorted to, as the Ministers of Justice, for such protection. If drastic measures are necessary, a Government can always have its resort to Parliament to pass the necessary legislation.

B. A. Tindall, for the respondent: War prevails and is raging in any part of the Empire where comfort or aid can be lent to the enemy: see *Krohn's* case (*loc. cit.*, at p. 207). See a series of

articles by Sir Frederick Pollock and others in the *Law Quarterly Review* (vol. 18, at pp. 127, 128, 134, 137, 139, 141, 143, 147 and 152; also *Hampden's* case (3 St. Tr. 826). *Marais'* case draws a distinction between civil commotion and war. The Court should look at the safety of the State. Having regard to modern means of communication, the theatre of war cannot be confined to areas where actual fighting is taking place. See also *The State* v. *Brown* (1914, (C.) Am. An. Cas. 1); *In re Jones* (*ibid.*, at pp. 34, 46); *Attorney-General for the Cape of Good Hope* v. *Van Reenen* (1904, A.C. 114). Naturalized subjects of enemy origin can be interned if it is in the interests of the State.

The regulations under Government Notice No. 40 of 1915, are in force and have the force of law; that is quite clear from sec. 6 of Act 11 of 1915. There is no justification for reading into the section the words: "as long as Martial Law is in existence." The title of the Act cannot limit the scope of the section, if the wording of that section is not ambiguous or doubtful.

Gey van Pittius, in reply, referred to Dicey, *Law of the Constitution* (6th ed., pp. 506, 510, 517, 518).

Cur. adv. vult.

Postea (November 26).

WESSELS, J.: It appears that the applicant was born in Germany in 1861, that he emigrated to America and was there naturalized as an American citizen in 1888. In 1898 he came to South Africa, and in February, 1908, he was naturalized in the Transvaal as a British subject. On the 18th October, 1915, the applicant was told that he was to keep himself in readiness to be interned in Pietermaritzburg upon order of the Provost Marshal. On the 19th October, 1915, a rule *nisi* was issued calling upon the Minister of Defence and the Provost Marshal to show cause before this Court why they should not be restrained from interning the applicant. The Minister of Defence has filed an affidavit setting out the fact that war exists, that military preparations are being made in this country, and that the applicant is a person dangerous to the safety of the State.

The question for us to decide is, whether, under the circumstances of the case, the military authorities are entitled to intern the applicant.

The law as to the relationship between the military and civil

authorities when war prevails, has been authoritatively stated in *Marais' case* (1902, A.C. 109). In *Krohn's* case (1915, A.D. 191), in the Appellate Division, it was sought to obtain a modification of these principles but without success. The Appellate Court has regarded *Marais'* case as binding upon it and has accepted the fundamental principles as laid down by the Privy Council, and has not varied or explained them in any way.

The principles may be thus enunciated: (1) If war actually prevails, or if the fact of actual war is established, the ordinary Courts have no jurisdiction over the military authorities. (2) The fact that for some purposes some tribunals pursue their ordinary course is not conclusive proof that war is not raging.

Mr. *van Pittius* contends that war does not actually prevail in the Union of South Africa, because there are no actual warlike operations conducted here. The truth is that there is considerable difficulty in determining what is meant by the statement that when war actually prevails the action of the military is not justiciable by the Courts of law. Sir William SOLOMON, in *Krohn's* case, gives it the widest possible meaning. He says: "The broad principle as enunciated by the Privy Council is that *in time of war* the action of the military authorities is not justiciable by the Courts of law" (at p. 207).

Mr. Justice DE VILLIERS limits the period during which the acts of the military authorities are not justiciable to the time when *actual war is raging*. The CHIEF JUSTICE interprets *Marais'* case to mean that the civil courts of the country have no jurisdiction over military action *where war actually prevails, and while it prevails.*

It appears to me that the phrases: "Where war is actually raging," and "Where war actually prevails," are not quite synonymous. When we say that war is actually raging in a country, we mean something more than that war prevails. We mean that it prevails with violence: we mean that the conflict between the armed forces of the combatants is going on actively and intensely. When we say that war prevails in a certain place we mean that it exists or is in force there. When we speak of war actually prevailing in a certain place, we use the word in the same sense as when we say that Mohamedanism prevails in Northern Africa. As soon as one country declares war upon another, it would be correct to say war prevails in both countries, unless we restrict the term "war" to the actual fighting, and thus draw a distinction between "war" and "state of war" or the condition of things created by war.

It appears to me that in *Marais'* case the Court did not intend to use the term "war" in the sense of actual fighting, but in the sense of a state of war, for the place where the arrest of Marais was made was many hundreds of miles from the nearest scene of fighting, though the whole country was in a state of war and military preparations were actually proceeding in the Cape Province. This seems to be the view of Sir William SOLOMON, as expressed in *Krohn's* case. But even if we assume that the Privy Council did not mean by "war" such a mere passive state of war as may arise when war is declared, but not actively prosecuted, it appears to me that they must have meant by "war" such a condition of things as when active warlike preparations such as the recruiting, equipping and despatching of troops are going on even though there be no actual fighting.

If we confine the term "war" to the actual fighting, then no "war" prevails at present in England, Scotland and Ireland. If, however, we give it the meaning of "a state of war," or of "warlike preparations," then war prevails as well in South Africa as in the United Kingdom, and prevails here in the same way as it prevailed in the Cape Province at the time of Marais' arrest.

The word "war" seems to be used in *Marais'* case as an antithesis to civil commotion or riot, and to cover the case where warlike preparations are actively going on, though the theatre of the violence of the contest may be elsewhere. In determining, therefore, whether the Court has or has not jurisdiction to deal with the acts of the military authorities, the Court must first determine whether war prevails in South Africa in the sense in which it is used in *Marais'* case.

The solution of this depends very much upon the surrounding circumstances. We cannot ignore modern conditions. We cannot ignore the fact that for the purposes of communication, distance has, to a great extent, been annihilated. When, therefore, we apply the principle of *salus reipublicae suprema lex* to modern conditions, we must recognise that the source of a grave military danger may be found many thousand miles away from the actual spot where the damage may eventually be done. Sir Frederick *Pollock* rightly observes: "It also seems that the range of those acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of places where warlike operations are in sight. In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being con-

veyed to the enemy in the shape of information, supplies and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognising this fact we do not alter the law, but apply it to the facts as they exist" (*Law Quarterly Review*, 1902, at p. 156).

The mere fact that the person sought to be interned is a long distance from the actual theatre of hostilities, cannot be conclusive against the right of the military to intern him. Distance was ignored in *Marais'* case. A in Pretoria may be advising B in Cape Town how to blow up a transport in Table Bay. Before A can be cited in a Court of law the mischief may be done.

That the British Empire is at war with the Central European Powers is an established fact, and from this it follows that the Union of South Africa is just as much at war with Germany as England, or Canada, or Australia.

The Minister of Defence tells us in his affidavit: "that the Union of South Africa is actively participating in the military operations both in Europe and in German or British East Africa by recruiting, equipping and training troops here and despatching them to the seat of war." He also tells us that the military authorities here are co-operating with those in England, that the applicant is dangerous to the peace and welfare of the State, and that it is necessary for military reasons, and in the interest of military operations that his liberty should be temporarily restricted by interning him. It is true the applicant is a British subject, but we cannot shut our eyes to the fact that he is a German by birth and education, who has been an American citizen and is now a naturalised British subject, and, therefore, there is nothing *per se* extravagant in the suggestion that he is dangerous to the peace and welfare of the State.

The question whether under these circumstances the Court ought to say that the action of the military is not justiciable is a difficult one.

On the one hand the Court must protect the liberty of the subject whether he is a naturalised British subject or born within the Empire, and on the other hand the Court must apply the principles laid down in *Marais'* case and not hamper the military authorities in any way in the prosecution of the war to a successful termination. The refusal on the part of the Court to allow the military to curtail the liberty of a single person, may bring about the slaughter of thousands or even grave military disaster to the State. On the

other hand to allow the liberty of one subject to be interfered with may create a precedent which would enable the military to interfere unduly with the liberty of the civil population.

It seems to me extremely difficult to say exactly where the line between these conflicting interests should be drawn, but of this I am certain that both the propositions are sound. It may be said that the Court should satisfy itself that there is *prima facie* evidence that the military act is necessary, before it can allow the subject's liberty to be so restricted. But if the Court is to judge from evidence supplied, it must do so in open Court, and then a grave danger may arise from divulging the facts. Moreover a civil court, even if informed of the facts, will seldom be in a position to determine the necessity or otherwise of a military act. The military may have information that the applicant has been urged from Germany to blow up our transports, must the military allow the danger to proceed until formal proof can be laid before a Court of law?

The Court must in present conditions place reliance on the Minister of Defence and the high military authorities, and must assume that they are well aware of the gravity of such a step as the curtailment of a subject's liberty during the continuance of the war.

It is undoubtedly very difficult to define exactly where the line ought to be drawn, and perhaps it is wiser not to attempt to do so. The nature and extent of the war may be an important element in such cases, for the Court may recognise steps in a world war such as the present, which it might not regard in the case of a conflict with some Asiatic hill tribe. When war prevails, it seems to me that we may go so far as to say, that unless it appears on the face of the documents laid before the Court that there is *mala fides* on the part of the military authorities, the Court cannot interfere. If, however, it is patent from the documents that the military authorities are acting *mala fide*, they cannot be acting within the scope of their powers, and their action would be justiciable in the Courts.

Nor am I prepared to say that there may not be other circumstances in which the Court may not refuse to accept the bald statement of the authorities that they deem it necessary to interfere with the liberty of the subject. It is, however, unnecessary to enquire too curiously into what these circumstances may be, for *ex facie* the present application there is nothing extravagant in the

statement that a person born and educated in Germany who has changed his allegiance twice, may favour the land of his birth more than that of his adoption, and his own kith and kin, rather than strangers. This danger has been recognised in England and in this country, and, therefore, proclamations have been issued both in the United Kingdom and in South Africa (Government Notice No. 40 of 1915, sec. 2) giving the Government the right to intern persons born in Germany who may have been become naturalised British subjects (Affidavit of General Smuts, sec. 9).

There is, therefore, nothing inherently improbable in the assurance given to us by the Minister of Defence and by the military authorities that the applicant is a source of danger to the State.

It has been urged upon us that the military authorities could exercise this right by detaining a British subject only if Martial Law were actually proclaimed in the Transvaal. Although Martial Law did prevail here it was withdrawn at the time of the applicant's arrest. It has been repeatedly pointed out by the Courts that the proclamation of Martial Law is only a notification to the public, of the fact that danger prevails, and that if they do certain acts they are liable to arrest and punishment. The mere proclamation of Martial Law gives no greater rights to the military than they in fact possess if the necessity for their action arises. If a state of war prevails there is no need to proclaim Martial Law, though no doubt it may be advisable. When once a state of war exists, the military have a free hand to take such steps as they may deem fit, in order to protect the State against the force, or the machinations of the enemy.

The above, I think, are the logical conclusions to be drawn from *Marais'* case, *Krohn's* case and other cases upon this subject, but it must be confessed that the law was by no means so certain before the authoritative statement of the Privy Council. Differences of opinion existed, and still exist, amongst lawyers as to the exact relationship between the military authorities and the civil courts in time of war. It appears to me that it was due to the fact that these differences of opinion do exist, that the legislature enacted sec. 6 of Act No. 11 of 1915.

This section provides that (*a*) all proclamations of the Governor-General, and (*b*) all prohibitions, regulations, orders or instructions issued under any Government notice, which have been published since the commencement of the present war, and which relate to measures taken, or to be taken, for assuring good order,

public safety or the success of the naval and military operations against the enemy, shall have the force of law. Now one of these proclamations enables the Government or the military authorities to intern naturalised British subjects of German birth.

This proclamation was manifestly issued to secure the safety of the Union, and to ensure the success of the naval and military operations against our enemies. The natural and ordinary meaning of sec. 6 of Act 11 of 1915, is therefore to give this proclamation the force of law and to enable the authorities to act upon it. Mr. *Van Pittius*, however, has urged us to say that sec. 6 is part of an Indemnity Act, and must therefore be interpreted to give the proclamations, etc., the force of law only during such time as Martial Law was in operation; now that Martial Law is withdrawn, sec. 6 is no longer operative. This was the view taken by my brother CURLEWIS in *Halder's* case, and there is much to be said in its favour. The original proclamation of Martial Law is one of these proclamations, and if we gave a strict interpretation to sec. 6, it might be said that Martial Law is still in force, and cannot be withdrawn. The particular proclamation of Martial Law was only until further notice, and therefore strictly speaking, by sec. 6, notice of its withdrawal could be given. But we cannot get away from the fact that to give some of the notices the force of law might lead to absurdity. But even if we admit that this is so, it does not justify us to read into sec. 6 the words, "during the prevalence of Martial Law." The section makes no mention of any limitation, and therefore we are not justified in imposing a limit upon it. Some of the proclamations may *ex facie* show that they are not intended for the good order and public safety of the State, or for ensuring the success of military and naval operations, and then the Court may well apply the maxim, *cessante ratione cessat lex*, and hold that sec. 6 does not apply to some of the notices. But it appears to me that the fact that sec. 6 may be inapplicable to some, does not justify us in saying that it is inapplicable to all.

Mr. *Van Pittius* has also relied on the fact that there is an Indemnity Act, and that the title shows that it was not intended to be more than this. It is true that a part of the Act is an Indemnity, but a part of it is not, and where the wording of a section is as clear as it is in sec. 6, we cannot go to the title of the Act to discover what the section means. It is only where a section is ambiguous that we may refer to the title to see what the

Legislature intended the actual scope of the section to be (*per* DE VILLIERS, J.P., in *Sheeley* v. *The Registrar*, 1911, T.P.D. 295). The fact that the Government issued a notice that certain proclamations were withdrawn, has been used to show that it did not regard sec. 6 as giving the proclamations, etc., the force of law. The interpretation of a section of an Act by a Government department or a Minister, cannot be a guide to us as to the intention of the legislature.

It has been suggested that sec. 6 only applied to measures and military operations carried on during the rebellion and the German West campaign, and that when these came to an end sec. 6 ceased to be operative. It may be, but sec. 6 does not say so, and I am not entitled to read this into a section so generally worded.

It has also been argued that Government Notice No. 40 is headed "Martial Law," and therefore it shows that it was to be of force during Martial Law only. This does not seem sound to me. The fact that it was promulgated during the prevalence of Martial Law and was to be regarded as a regulation which the military would enforce, is sufficient to account for this heading, but it is none the less a notice issued since the commencement of the war, relating to measures for ensuring the success of naval and military operations against the enemy.

It appears to me that the legislature, aware of the uncertainty of the law as to the powers of the Government and the military authorities during a state of war, deliberately intended exactly what it said, viz., that all proclamations and notices relating to measures, taken or to be taken, for the purpose of ensuring the success of our naval and military operations shall have legal force and effect, and can be acted upon.

In these circumstances I think the military authorities were entitled to intern the applicant, and therefore the rule must de discharged with costs.

MASON, J.: As this application raises questions of great importance I propose to add something to the judgments of the other two Judges, with whom I concur.

I agree that the regulation for the internment of persons of enemy origin who have become British subjects by naturalisation is validated by the provisions of sec. 6 of the Indemnity Act of 1915, but as the respondent denies the jurisdiction of the Court to

enquire into the propriety of the act challenged by the applicant, it seems to me right that this initial objection should be considered and determined.

That objection is based upon the decision of the Privy Council in *Marais'* case (1904, A.C. 109) and of the Appellate Division in *Krohn's* case (1914, A.D. 191).

The decision in the former case appears to be ambiguous on two points:—First: What is the meaning of the phrase, "where war actually prevails"? Second: Do the words, "the ordinary Courts have no jurisdiction over the action of the military authorities" apply only during the state of war or have the Courts at no time such a jurisdiction? As to the latter question, both interpretations have been put upon the judgment by legal writers. (See 70 *Law Quarterly Review*, Article by Eric Richards, p. 140; Article by *Cyril Dodd*, p. 148; Article by Sir F. Pollock, pp. 153, 156, 157).

In *Krohn's* case the CHIEF JUSTICE seems to adopt the view that it was only during the time of war such acts could not be investigated by the Courts, whilst Sir W. SOLOMON uses language indicating the other construction (p. 206-207). DE VILLIERS, A.J.A., does not express any opinion on this point.

The passage as cited in the Privy Council from the case of *Elphinstone* v. *Bedreechund* would seem to imply complete immunity at all times for any military action during war. But though in that case action was brought long after peace had prevailed, the transaction challenged was the seizure of property of an alien enemy by British military authorities in enemy territory before peace had been made, and seems to me to come rather within the principle laid down in the *Secretary of State in Council for India* v. *Kamachee Boye Sahaba* (1859, 13 M.P.C. 22).

In the case, however, of the *Attorney-General for the Cape of Good Hope* v. *Van Reenen* (1904, A.C. 114) an endeavour was made after peace had been declared to set aside certain Martial Law convictions of British subjects; the Privy Council declared expressly that the Court had no jurisdiction to deal with or to affect the judgments of Martial Law Courts. But there was no discussion of the question whether the military authorities or the persons acting under them who were responsible for the actions challenged were freed for all time, because a state of war then existed, from any liability to those whom they might have used wrongfully, nor am I aware of any judgment to that effect. It seems to me that if a

plaintiff were to show that a military person had, under cover of his office, *mala fide* and for improper purposes without any military necessity oppressed or injured him, the Courts would grant him redress at any rate after the termination of hostilities, as was done in the famous case of *Wright* v. *Fitzgerald* (1799, 27 St. Tr. 759).

The existence of an ultimate right to redress in these cases has, to my mind, an important bearing upon the question whether or not an injured person's right of immediate action is suspended. If no such ultimate right exists, the existence of actual war would convert the military authorities into absolute and irresponsible despots, because no immediate relief could be given if there were no legal liability which would support the ultimate right to redress.

Such a wide-reaching immunity has never been sanctioned by any Court of Law or any Constitutional Legislature to my knowledge; it would indeed render Acts of Indemnity a delusive and superfluous farce.

But granting that the ultimate right of redress exists, has a suitor no right to appeal to the Courts for protection under any circumstances during actual war?

The general rule that any executive officer of the Crown is not responsible for the consequences of acts done within the scope of his authority is qualified by the limitation that this freedom from liability is at an end if it be shown that the act was not done *bona fide* for the purpose of exercising the authority entrusted to him but for some other purpose whether laudable or improper. (*Struben* v. *Minister of Agriculture* (1910, T.P.D. 903), and authorities there cited). This principle seems to me applicable to acts done by military or other authorities during war.

Can a suitor then bring before the Courts authorities concerned in the prosecution of the war to determine whether the act of which he complains was within the scope of their authority or to try his allegation that this act was not done for the purposes of war?

Marais' case clearly restricts the right of suitors to relief during war; does it absolutely abolish it?

If some person under cover of military authority does an act which on the face of it is clearly not directed to the prosecution of war, but to some other purpose to the injury of a British subject, can such an act be termed any part of the action of a military authority? Is it not in reality an injury done by a private individual who also happens to be clothed with public authority?

It seems to me that Courts of Justice, so long as they are not

closed by force, would be bound to entertain a prayer for protection against patent violations of right and justice of this nature.

But if from the circumstances of the time or of any special case, it appears that the act challenged may be advantageous to the prosecution of the war, and if the responsible officer declares that he has done the act for that reason, then the Court has no jurisdiction whilst war actually prevails to enter upon any enquiry as to whether the act was advisable or what motive actuated him.

This rule seems to me to be consistent with the main principles of *Marais'* case and to harmonise, so far as that can be done during a time of war, the elementary rights of the citizen with the supreme consideration of the safety of the State.

There still remains the question as to the meaning of the phrase, "where war actually prevails."

The principle of *Marais'* case has been summarised by the CHIEF JUSTICE in these words: "Where war actually prevails and while it prevails, the civil courts of the country have no jurisdiction over military action." But there has been no clear exposition of the meaning of the words; do they mean that the civil courts may judge of the propriety of all military action outside the immediate area of military operations, that is of the actual fighting? That is not consistent with *Marais'* case and is expressly repudiated by DE VILLIERS, A.J.A. (*Krohn's* case, p. 211).

It is true that in *Krohn's* case the Judges examined the facts, which showed that fighting was taking place in the very district concerned, but the opinions expressed by SOLOMON, J.A., in the concluding portion of his judgment are very much wider.

Having regard to warfare under modern conditions, the recruiting, munitionment and supply of the armies in the field, from a base which is not the theatre of actual fighting, and the restriction of interference with or information about these processes may well be a portion of the military operations which is vital to the success of the nation on the field of battle itself.

Whether any particular act is a necessary military measure is one which, speaking generally, the military authorities alone are able to determine; such a question could not in most cases even be discussed in Court without grave prejudice to national interests.

But does the mere existence of a state of war to which the Empire is a party clothe the military authorities with universal autocratic powers? If war were declared for instance on some African native potentate, could the military authorities in Canada do what

they chose? Would the Courts of Law be helpless before such an abuse of power?

It is almost impossible to define exhaustively the circumstances which would bring any place really within the direct influence of military considerations, but it seems to me that war may properly be said to prevail in any district which is the base, even though not the theatre, of military operations, or from which there are reasonable grounds for believing that the enemy may obtain aid and comfort or information. These conditions are clearly applicable at the present time to South Africa.

I have come, therefore, to the conclusion that war actually prevails in South Africa within the meaning given to that phrase in the Privy Council judgment, and that as the internment of the applicant not only may be advisable upon military grounds, but is declared by the responsible Minister of the Crown to be a necessary military measure, this Court has at the present time no jurisdiction to interfere.

The rule *nisi* must, therefore, be discharged with costs.

BRISTOWE, J.: I agree with the conclusions arrived at by my brother Judges. But having regard to the interest and importance of the subject of Martial Law and the obscurity which surrounds its exact nature and extent, I propose to add a few words on that part of the case.

I must first point out that in *Krohn's* case the rebellion was in progress, so that the real question which we now have to face, namely, what is the position of a colony when the Empire is at war and there is no local disturbance, did not arise. The learned Judges of the Appellate Division did, however, deal to some extent with the subject of Martial Law generally; but it is sufficient for my present purpose to say that the view they took was that the question depends upon the true interpretation to be placed on *Marais'* case.

The decision in *Marais'* case only deals with actual war or with rebellion or insurrection amounting to war. Any riot or disturbance less than this is not affected by the decision. But it clearly lays down that in case of war certain very definite consequences follow. "Where war actually prevails," say their Lordships, "the ordinary Courts have no jurisdiction over the action of the military authorities," and again, "once let the fact of actual war be established and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of the military authorities."

Now what is the precise extent of this doctrine?—First, does war prevail wherever a state of war exists? If the Empire is at war does war prevail in every territory and colony of the Empire, however remote from the theatre of hostilities? Or is it limited to the actual fighting zone or to territories from which recruits or supplies are being actually drawn or does it extend to all regions where measures are required to frustrate the devices of the enemy and his accomplices? If the latter, then in these days of instantaneous communication that must be held to include the whole Empire. Again, within the limits in which war is prevalent, are all the actions of the military authorities protected from the civil jurisdiction, and if so does such exemption endure for all time (in which case an Act of Indemnity would be unnecessary) or only during the continuance of hostilities? These are serious questions. They are not specifically dealt with in *Marais'* case, though *Van Reenen's* case goes to show that to some extent at all events the exemption is perpetual. They did not arise in *Krohn's* case. But they do arise in the present case and they have to be faced.

It seems impossible in the first place to limit the military exemption from civil interference to the country in which the actual fighting is taking place. If that were so then half, perhaps more, of the military value of the doctrine would be entirely lost; for the preparations which have necessarily to be made elsewhere than in the fighting zone and the constant care and watchfulness which may be required in the most distant regions of the Empire to prevent the machinations of the enemy and his friends and sympathisers are hardly less essential to success than the actual operations at the front. On the other hand if an imperial war prevails over the whole Empire and every professedly military act is to be protected, then important results follow, which, to say the least, merit attentive consideration. Let us forget, if we can, the tremendous nature of the present conflagration and reflect what would or might occur if the imperial war were merely with an Indian frontier tribe or with a West African potentate of more than ordinary truculence. Suppose in such a case that the military authorities of the Union professed to find it necessary to establish Martial Law with the rigour and minuteness with which (let us say) it was imposed during the late strike; or suppose a case of clear and palpable misuse of military authority, gross oppression or glaring misconduct, incapable under any conveivable circumstances of being justified on the ground of military necessity.

Would the civil courts be bound to sit with folded hands and watch unmoved the imposition, perhaps, of a military despotism? It is no answer to say that such a case is not likely to arise. It might arise. Nor is it any answer to say that Ministers should be trusted not to act oppressively. So should Kings. But Kings have oppressed notwithstanding. It is the love of freedom and the cry for protection against high-placed tyranny and sometimes timidity or ignorance which has been largely responsible for the elevation under the British constitutional system of the Judicial Bench to the dignity of an independent State department. Experience has shown that individual liberty is safest not in the hands of rulers, statesmen, politicians or bureaucrats, however distinguished, but in the hands of Courts of Justice presided over by officials secured in their position by constitutional safeguards and removed from the necessity or temptation of weighing or even taking into account the approval or disapproval which their decrees may excite.

What then is the solution of these difficulties? Well, I cannot decide, but I suggest that it may be found not so much in the actual judgment in *Marais'* case as in the reasons upon which that judgment was founded, which I take to be the maxim: *salus reipublicae est suprema lex.*

No one in his senses would deny that in time of war the exigencies of the military situation are the first consideration. As the CHIEF JUSTICE says in *Krohn's* case (p. 197), "the State may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself." When the safety, even the existence of the State is imperilled, it is not a time to dwell on private rights or private harships. Everything must give way to the need for communal protection. And the necessities of the military position may involve any, even the most remote, portions of the Empire. All acts and measures coming within the purview of this principle are, I should say, absolutely protected. They are justifiable at common law. They require no Act of Indemnity. They are not cognisable by the civil courts either before or after the cessation of hostilities.

But this only covers a portion of the ground. There is or may be a limit to military necessity. No doubt it must vary widely according to the nature and extent of the particular war and according to the geographical position of the particular colony or territory in which the question arises; nor is to be drawn too narrowly or scrutinised too closely. Still there is a limit outside of which the plea of military exigency cannot justly be urged. Now it may

well be that the maxim: *salus reipublicae,* etc., is not only an absolute protection to acts and measures coming within the limits I have described but is also provisionally protective of acts and measures of a more doubtful character though still *bona fide.* It may not be desirable that such questions should be debated in the Law Courts, while the war is in existence. It might very seriously hamper military operations if while they are actually in progress officers were liable to have any of their acts challenged in a Court of law. Probably we reach here the true sphere of an Act of Indemnity. It is to protect the military authorities from having the necessity of their acts disputed or investigated. Now I am inclined to think that *Marais'* case was intended to go to this length and to exempt the military from the liability to have their *bona fide* actions challenged while hostilities are still going on; though I am not sure that it matters very much, because the Courts themselves, even if they had the authority, would certainly decline to exercise it.

There remains a *residuum* of cases to which I have already incidentally referred, in which military authority may be used as a cloak for acts of private vengeance or personal enrichment or wanton or capricious oppression. What is the position of the Courts with regard to them? I answer that in such a case as this, if it arose, so long as the military power is not used to close the Courts and to drive the Judges from their seats, they must exercise their constitutional authority.

The case now before the Court is one in which clearly the act complained of may be one which military necessity requires. The Court, therefore, cannot entertain the application.

Applicant's Attorneys: *Webb & Dyason.*

[G. v. P.]

EX PARTE MORRIS.

1915. *November* 22, 29. WESSELS, MASON and GREGOROWSKI, JJ.

Insolvency.—Composition.—Rehabilitation.—Dominium *of Insolvent estate.—Conditional rehabilitation.—Law* 13 *of* 1895, *secs.* 132, 135, 139.—*Registration of bonds.—Act* 25 *of* 1909, *sec.* 48 (2).

Where an insolvent has made a composition with his creditors he is, upon rehabilitation, reinstated by operation of law with the *dominium* of his assets,