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"We, as lawyers, hold fast to the ideal of an international order existing under law and equipped with instrumentalities able and willing to maintain its supremacy, and we renew our dedication to the task of pushing back the frontiers of anarchy and of maintaining justice under the law among men and nations."

—MR. JUSTICE ROBERT H. JACKSON, of the Supreme Court of the United States, in an address to the American Bar Association.

VOL. XVIII. TUESDAY, JUNE 2, 1942 No. 10

CROWN SUITS: ALIENS' RIGHTS TO PETITION.

A RECENT judgment of the Court of Appeal, *Arnerich* v. *The King* (to be reported), raised the interesting question whether it is competent for a friendly alien, a resident of New Zealand, to present and proceed with a petition under the Crown Suits Act, 1908.

The right to present petitions of right is given by s. 25 of the Crown Suits Act, 1908, subs. (1) of which says that where *any person* has any claim or demand against His Majesty within New Zealand, he may set forth in a petition the particulars of his claim or demand, in the same manner as nearly as may be in a statement of claim in an ordinary action. Section 29 provides that every petition and pleadings must be in the forms numbered (1) and (2) in the Third Schedule to the statute, or to the like effect. The form of the petition so given is addressed to the King's Most Excellent Majesty; and it begins "*Your faithful subject*, A.B. of" &c. This form has been prescribed since it first appeared in the Crown Redress Act, 1871. It differs from the form in the corresponding English statute, the Petitions of Right Act, 1860 (*5 Halsbury's Complete Statutes of England*, 47), in that the words "Your faithful subject" do not appear in the latter.

The question as to the competency of an alien to present a petition of right was raised on a motion by the Crown for an order striking out such a petition by a friendly alien seeking damages for personal injuries caused by the negligence of servants of the Crown, on the ground that the petition did not show that the suppliant was a subject of the King (the words "Your faithful subject" having been omitted purposely). The argument for the Crown was that no alien can truthfully describe himself to His Majesty as "Your faithful subject," and that, therefore, no alien can file a petition of right in the statutory form or to the like effect, because he must omit from it a matter made vital by the Legislature, namely the statement that he is a subject of His Majesty. Therefore, it was submitted no alien can make use of Part II of the Crown Suits Act, 1908, which deals with claims against the Crown. As Mr. Justice Callan observed that this argument assumes that His Majesty has no subjects other than persons born British subjects, or persons who have become British subjects by naturalization. But, His Honour said, there is sufficient authority for the view that His Majesty has other subjects—namely, friendly aliens who are for the time being resident in the King's dominions. The main submission for the suppliant was that the history of the legislation in New Zealand relating to the redress of grievances against the Crown shows a gradual widening of the scope of such claims; and that, apart from the Crown Suits Act, there is a general presumption that the operation of a statute extends to all persons who are temporarily resident within the borders of the Dominion, even though they may be the subjects of other States.

As the learned Chief Justice remarked in his judgment (with which Mr. Justice Blair concurred), it seems strange that the point should not previously have been raised and decided, but no record could be found of its ever having been judicially discussed. His Honour first dealt with the Crown's submission that the Schedule of the Crown Suits Act, 1908, must be read with s. 25, and that when the two are read together the words "any person" in s. 25 must be interpreted as being restricted to subjects of His Majesty by birth or naturalization, with the result, it was contended, that an alien is excluded from the benefit of s. 25 and has no right to present and proceed with a petition under the statute. His Honour said that the result would be somewhat startling in these days of vaunted enlightenment and liberalism; not only would a friendly alien be excluded from the right to present a petition, as in the present case, for redress for a tort under s. 3 (*a*) of the Crown Suits Amendment Act, 1910, but he would not be able to present a petition for redress even for a breach of contract. He proceeded:

> I am glad to find myself able to take what I consider the more liberal view. I consider that the words of the form in the Schedule should be construed so as not to limit to a greater extent than is necessary the wide generality of the language of s. 25; and I do not feel compelled to hold that

> they have the effect of limiting the words "any person" in the manner contended for. I see no reason why the word "subject" should not, and various reasons why it should if possible, in an Act of this nature, be read in a wider sense so as to include an alien *ami* in local allegiance to the King. There seems no very good reason why an alien *ami*, while having full access to the Courts to obtain redress from any subject of the King, should be debarred from presenting a petition to the King praying that right be done in respect of an injury alleged to have been done by the servants of the Crown.

His Honour went on to say that it was true that in *Clode's Petition of Right* (at p. 35) it is said that it seems doubtful whether an alien can present a petition of right. This point is discussed in *Robertson's Civil Proceedings by and against the Crown*, 364, where the learned author, after saying that it has been doubted whether anyone but a British subject can approach the Crown by petition of right, proceeds to say that there is nothing to support it in the Petitions of Right Act, 1860. He also says that *Staunford's King's Prerogative*,* fo. 72 *et seq.*, speaks of a petition of right as a remedy of "the subject," but he points out that Staunford was not applying his mind to the question of subject as against alien, and indeed that in his time the question would probably have remained an academic one. So in some New Zealand decisions where Judges have spoken of a petition of right as a remedy of "the subject" they were not applying their minds to the question of subject as against alien, for in none of the cases did that question arise.

The position of an alien *ami* has been referred to, as the learned Chief Justice pointed out, in many cases which were cited in argument—namely, *Holt* v. *Abbot*, (1851) 1 Legge 695, 697; *Jefferys* v. *Boosey*, (1854) 4 H.L. Cas. 815, 955, 10 E.R. 681, 786; *Re Sawers, Ex parte Blain*, (1879) 12 Ch.D. 522, 526; *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, 869; and *Johnstone* v. *Pedlar*, [1912] 2 A.C. 262. From these cases it appears that an alien *ami* while in this country is, as a matter of law, in the allegiance of the Crown, an allegiance to which several of the learned Judges refer as a local allegiance; and that while he is resident within the realm he is given the same rights for the protection of his person and property as a natural-born or naturalized subject. The suit in *Johnstone* v. *Pedlar* could not be brought against the Crown itself, because a claim in tort does not lie in England by petition of right. In New Zealand, however, it does; and if in England an action of tort can be brought by a friendly alien against an officer of the Crown there would seem to be no good reason why, in New Zealand, where a claim in tort does lie against the Crown, a petition cannot be brought by a friendly alien under the Crown Suits Act.

* "Imprinted at London in flete strete within temple Barre at the signe of the hand and starre by Richard Tottel, An. 1567." (This was the publishing house from which Messrs. Butterworth and Co. acquired the colophon, "the hand and the starre," which is still seen in some of their publications.)

His Honour thought that the *dicta* of numerous Judges in the cases cited support this view, and that the words in the form in the Schedule to the Crown Suits Act, 1908, when read with s. 25, are not to be construed as excluding a friendly alien who resides within this country and owes temporary allegiance to the King and who is, if one may use the expression, a subject *sub modo*. His Honour thought it unnecessary, nor was he inclined to go so far as to hold that the suppliant is entitled to describe himself as "faithful subject." He should use some other proper and respectful form of address; but, whether he adopts that course or uses the words of the form in the Schedule, his actual circumstances and condition should, be stated in the body of his petition.

In a judgment in which the authorities are exhaustively reviewed, Mr. Justice Callan came to the conclusion that, while none of the cases to which he had referred can be accepted as settling that in England a resident friendly alien may file a petition of right, it has certainly not been shown that he may not. No sufficient reason had been shown why the expression "Your faithful subject" should not be construed as including a resident friendly alien; and the judgments in *Porter* v. *Freudenberg*, [1915] 1 K.B. 857, contain sufficient authority for so doing. His Honour takes the matter a step further than the learned Chief Justice, when he says (it may be, *obiter*),

> In my view, anyone who, for the time being, owes allegiance to the Sovereign and enjoys his protection, is fairly described as a subject of the Sovereign, so long as the duty of allegiance and the right to protection exists. It was not disputed that Paul Arnerich owes some allegiance and enjoys some measure of protection including the right to resort to the King's Courts if injured by breach of contract or tort, provided always that his claim is not against His Majesty. But the duty of allegiance and the right to protection being admitted, it follows that Arnerich is a subject, and, in my opinion, it also follows that he may be a suppliant under New Zealand Crown Suits Act.

With His Honour's judgment, Mr. Justice Kennedy concurred. The motion was accordingly dismissed.

As appears from the judgment of the learned Chief Justice, the words in the form of petition, "Your faithful subject humbly sheweth," can be regarded as a form of respectful address to the Sovereign which should be used in all cases to which they are strictly applicable. In view of the Court of Appeal's judgment, they need not be regarded as an essential part of the petition where the suppliant is an alien *ami* living in, and owing to the Crown what is referred to by the Judges in the cases cited as a local or temporary allegiance. In the latter case His Honour thought the form might be altered to suit the circumstances. The alien suppliant's actual circumstances and condition should, whether he uses the words of the prescribed form or uses some other respectful form of address, be stated in the body of the petition.

THE PAPER SHORTAGE.

ATTENTION is drawn to the directions by Their Honours the Judges regarding the saving of paper in the preparation of Court documents (p. 112, *post*). While the Court of Appeal Amendment Rules, 1940 (Serial No. 1940/181), were directory and their adoption was to some extent optional, everyone filing Court documents must now follow the directions given. In all cases, common sense alone is required. The object is to conserve paper. Consequently, foolscap paper should primarily be used, with one inch margin and single-space typing (except between paragraphs, where a double space is to be left). Whenever possible, the reverse side of the paper should be used as the backing-sheet. Where, however, the whole document can be typed on one side of a quarto sheet of paper, then that size paper must be used, the reverse side becoming the backing-sheet.

SUMMARY OF RECENT JUDGMENTS.

JUDICIAL COMMITTEE.
1941.
November 24, 27, 28.
1942.
January 19.
Viscount Simon, L.C.
Lord Thankerton.
Lord Romer.
Clauson, L.J.

GUARDIAN, TRUST, AND EXECUTORS COMPANY OF NEW ZEALAND, LIMITED v. PUBLIC TRUSTEE.

Probate and Administration—Executors and Administrators—Distribution of Moneys of Estate by Executor—Notice to Executor by Next-of-kin that Proceedings for Revocation of Probate under Consideration—Payment by Executor of Legacies given by Will—Probate revoked and Letters of Administration granted—Whether Executor liable to repay Administrator Amount of such Legacies—Trustee Act, 1908, s. 74—Administration Act, 1908, s. 26.

It is a well-established principle of equity which has been recognized by the New Zealand Legislature in s. 26 of the Administration Act, 1908, that if a trustee or other person in a fiduciary capacity has received notice that a fund in his possession is or may be claimed, he will be liable to the claimant if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded.

This principle applies to an executor to whom probate in common form of a will has been granted, and who, after receiving notice from solicitors for some of the next-of-kin that the question of taking proceedings for revocation of the probate on the ground of lack of testamentary capacity on the part of the testator is under consideration, in disregard of that notice pays out of the testator's estate pecuniary legacies purporting to be given by the said will. On receipt of such notice the executor should at least apply to the Court for directions.

On the revocation of such probate, and proceedings by the administrator to whom letters of administration of the estate of the deceased have been granted, such executor will be ordered to refund to such administrator the legacies so paid.

The procedure of notice under s. 74 of the Trustees Act, 1908, cannot be invoked to protect the executor in such circumstances. The object of that section is to enable the executor or administrator to administer the estate without the expense and delay of an action. If proper advertisements are issued for creditors and others to come in and substantiate their claims, the executor or administrator is not liable for parting with the assets in due course of administration amongst those of whose claims he had notice. The only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator, as the case may be, in a due course of administration, and not persons whose claims are such that the executor or administrator has no right to administer the estate at all.

Newton v. *Sherry*, (1876) 1 C.P.D. 246, explained.

So held by the Judicial Committee of His Majesty's Privy Council, affirming the judgment of the majority of the Court of Appeal (*Sir Michael Myers*, C.J., and *Smith* and *Fair*, JJ., *Ostler*, J., dissenting), reported [1939] N.Z.L.R. 613.

Counsel: *Wallington*, K.C., *G. O. Slade*, and *Michael Bowles*, for the appellants; *Blanco White*, K.C., and *J. H. Stamp*, for the respondent.

Solicitors: *Stafford, Clark, and Co.*, London, as agents for *Russell, McVeagh, Macky, and Barrowclough*, Auckland, for the appellants; *MacKrell, Maton, Godlee, and Quincey*, London, as agents for *Barnett and Cleary*, Wellington, for the respondent.

Case Annotation: Newton v. *Sherry*, E. and E. Digest, Vol. 23, p. 224, para. 2715.

SUPREME COURT.
Wellington.
1942.
April 23.
Ostler, J.

PROSSER v. MAKARA COUNTY AND ANOTHER.

Rating—Native Land—Local Body's Right to sue for Rates—Rating Act, 1925, ss. 65 (1), 77, 102, 108 (2), 112.

Section 108 (2) of the Rating Act, 1925, providing that a claim for rates on Native land must be lodged with the Registrar of the Native Land Court within two years after the rate is levied, does not take away the right of the local authority to sue an owner, from whom it has demanded rates in the ordinary way, as a debt pursuant to Part I of the statute.

Whakatane Borough v. *Lawson*, (1932) 28 M.C.R. 79, approved.

In re Hurimoana 1B2 Block, [1937] N.Z.L.R. 859, G.L.R. 516, and *Minister of Lands* v. *Native Trustee*, [1941] N.Z.L.R. 503, G.L.R. 296, referred to.

Counsel: *Spratt*, for the plaintiff; *Evans-Scott*, for the defendant.

Solicitors: *Morison, Spratt, Morison, and Taylor*, Wellington, for the plaintiff; *Menteath, Ward, and Evans-Scott*, Wellington, for the defendant.

SUPREME COURT
In Chambers.
Christchurch.
1942.
April 30.
Northcroft, J.

In re **BOWES (DECEASED).**

Practice—Affidavit—Several Deponents in one Affidavit—Oaths to be made separately or severally.

Where several deponents' affidavits are contained in the one document, it must be shown by appropriate words that they made their oaths separately or severally.

SUPREME COURT.
Wellington.
1942.
April 30; May 2.
Sir Michael Myers, C.J.
Blair, J.
Smith, J.

ATTORNEY-GENERAL v. BLUNDELL AND OTHERS.
ATTORNEY-GENERAL v. GLOVER.

Contempt of Court—Jurisdiction—Supreme Court and Court of Arbitration—Respective Jurisdiction to punish for Contempt of the latter Court—Industrial Conciliation and Arbitration Act, 1925, ss. 102, 114, 115.

The jurisdiction of the Court of Arbitration to punish for contempt of Court is limited to the offences respectively specified in ss. 114 and 115 of the Industrial Conciliation and Arbitration Act, 1925, and is by virtue of that statute exclusive in respect thereof.

Section 114 (together with the provisions of the Crimes Act, 1908) leaves unaffected the inherent jurisdiction of the Supreme Court to punish for the contempt of an inferior Court committed out of Court, whatever the nature of the contempt, whether a contempt committed in respect of a proceeding actually before the Court or in respect of the general administration of justice in that Court.

Nash v. *Nash*, *In re Cobb*, [1924] N.Z.L.R. 495, G.L.R. 228, applied.

The Supreme Court, which has a general inherent power to protect inferior Courts from contempt committed out of Court over which the inferior Court has no jurisdiction, has, therefore, jurisdiction to punish for any contempt of the Court of Arbitration unspecified in either of ss. 114 and 115, such as a general statement made out of Court implying that workers had been unable to obtain justice in that Court.

Ambard v. *Attorney-General for Trinidad and Tobago*, [1936] A.C. 322; *R.* v. *Davies*, [1906] 1 K.B. 32; *R.* v. *McKinnon*, (1909) 30 N.Z.L.R. 884, 12 G.L.R. 423; and *R.* v. *Daily Mail (Editor), Ex parte Farnsworth*, [1921] 2 K.B. 732, followed.

Counsel: *Solicitor-General* (*Cornish*, K.C.), for the *Attorney-General*; *Buxton*, for the publishers of the *Evening Post*; *Cleary*, for the publisher of the *Standard*.

Solicitors: *The Crown Law Office*, Wellington, for the Attorney-General; *Bell, Gully, Mackenzie, and Evans*, Wellington, for the publishers of the *Evening Post*; *Barnett and Cleary*, Wellington, for the publisher of the *Standard*.

Case Annotation: Ambard v. *Attorney-General for Trinidad and Tobago*, E. and E. Digest, Supp. Vol. 16, para. 153a; *R.* v. *Davies*, *ibid.*, Vol. 16, p. 11, para. 43; *R.* v. *Daily Mirror (Editor)*, *Ex parte Farnsworth*, *ibid.*, p. 12, para. 54.

SUPREME COURT. Christchurch. 1942. May 8, 11. *Northcroft*, J.

ATTORNEY-GENERAL v. MATHISON.

Contempt of Court—Newspaper Narrative of Commission of Crime by Accused Persons awaiting Trial—Prospective Witness's version of Happening—Whether Publication tending to Interfere with Forthcoming Trial.

Any publication of evidence before trial is not necessarily a contempt of Court. Each case must be considered separately and must be judged by its purpose or tendency to interfere with a forthcoming trial of accused persons.

Attorney-General v. *Tonks*, [1934] N.Z.L.R. 141, G.L.R. 172; *In re Packer, Ex parte Peacock*, [1911] V.L.R. 401, on app. (1912) 13 C.L.R 577; and *Ex parte Smith*, (1901) 1 N.S.W.S.R. 55, distinguished.

R. v. *Daily Mirror (Editor and Proprietors)*, [1927] 1 K.B. 845, referred to.

Thus, it was held that the publication in a daily newspaper of a narrative account of an incident—a grocer attacked in his shop at night—for which two men therein referred to were arrested and charged, and setting out a version of the happening, by the person attacked who would necessarily be a police witness, some of which might not be admissible at their trial, but without stating what was being published was to be the evidence of that witness, was not a contempt as tending or likely to interfere with or endanger a fair trial of the charge against the accused persons.

Counsel: *A. C. Perry*, for the plaintiff; *Penlington*, for the defendant.

Solicitors: *Wilding and Acland*, Christchurch, for the plaintiff; *Harper, Pascoe, Buchanan, and Upham*, Christchurch, for the defendant.

Case Annotation: Ex parte Smith, E. and E. Digest, Vol. 16, p. 47, note o; *R.* v. *Daily Mirror (Editor and Proprietors)*, *ibid.*, Supp. Vol. 16, para. 283a.

SUPREME COURT. Wanganui. 1942. March 4; April 24. *Blair*, J.

ELLIS v. ELLIS AND LETT.

Divorce and Matrimonial Causes—Practice—Respondent applying to have made absolute Decree nisi *for Divorce—Actual or authorized substituted Service on Petitioner required—Divorce and Matrimonial Causes Act, 1928, s. 26.*

Where a respondent applies to have made absolute a decree *nisi* for divorce under s. 26 of the Divorce and Matrimonial Causes Act, 1928, actual or authorized substituted service on the petitioner is required. Service at the former office of the petitioner's solicitors or service on one of the former partners who no longer acts for the petitioner is insufficient.

Counsel: *Brodie*, for the petitioner; *C. F. Treadwell*, for the respondent.

Solicitors: *A. D. Brodie*, Wanganui, for the petitioner; *Treadwell, Gordon, Treadwell, and Haggitt*, Wanganui, for the respondent.

EVIDENCE OF MEMBERS OF FORCES OVERSEAS.

Suggestions as to Method of Taking such Evidence.

In a recent action, *Rogers* v. *J. C. Milnes, Ltd.* (unreported), brought under the Deaths by Accident Compensation Act, 1908, by a widow, whose husband was killed in a motor accident, on behalf of herself and her infant children, the defendant applied for a commission to take the evidence of the driver of the car which collided with the deceased and of four passengers therein. All were Air Force trainees and had left New Zealand for service overseas, three for the United Kingdom and two for Canada.

His Honour Mr. Justice Blair, found that the whole blame for the delay in issue of the writ lay upon the plaintiff; and that the defendant was not to blame for steps not being taken to have placed on record the evidence of witnesses likely to go abroad and had not been guilty of any undue delay in applying for a commission. He said that it would be most unjust to deprive the defendant of an opportunity of producing what might turn out to be the only evidence now available in support of the defendant's case. His Honour then made the following suggestions as to the method of taking the evidence at a moderate expense, which may be of service in other cases where witnesses are abroad on active service.

"The main object which the plaintiff had in the case sought to be made by her in opposition to the granting of a commission was to support a claim for the imposition of terms involving the defendant's providing all the funds required by the plaintiff to secure the services of leading counsel at the taking of the evidence.

"I can see no reason why the evidence of the Air Force trainees should not be taken cheaply through the advocate-general or any officer holding a similar office in the air force. The matter to be obtained is of quite a simple description and no special or technical knowledge is called for to cross-examine on it.

"The witnesses are all Air Force men and there are no doubt plenty of men with legal experience in that force who could adequately take the evidence for the defendants or cross-examine for the plaintiff. Nor is there any reason for any but moderate expense to be incurred if the parties approach the matter reasonably, as I have no doubt they will."

DICKENS—AND THE NEW ZEALAND LAW REPORTS.

An Echo from the Past.

By W. E. LEICESTER.

The Privy Council in *Guardian, Trust, and Executors Co. of New Zealand, Ltd.* v. *Public Trustee of New Zealand*, [1942] N.Z.L.R. 297, draws attention to the limited protection afforded executors by s. 74 of the Trustee Act, 1908. In delivering the judgment of the Board (consisting of Viscount Simon, L.C., Lord Thankerton, Lord Romer, and Clauson, L.J., as he then was), Lord Romer points out that the only persons who are to be affected by the notices under the section are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration and not persons whose claims are that the executor or administrator has no right to administer the estate at all :

> A trustee who has received information of a charge on the interest of his *cestuique trust* in favour of a third party is not entitled to disregard it merely because he honestly believes the charge to be invalid. Nor can an executor who has information of the existence of a later will act in disregard of such information merely because he honestly believes that his testator was not at the time of making it of testamentary capacity. In all such cases, as in the present one, the question is whether the person acting in a fiduciary capacity has had notice of the claim, and not whether he formed a favourable or unfavourable view as to the prospect of the claim succeeding.

The judgment of the Court of Appeal was affirmed, their Lordships holding that the appellants had ample notice of the claims of the next-of-kin before they paid the legacies.

The matter concerns the estate of one Elizabeth Smith, formerly of Christchurch, who died in July 1935, leaving a will dated about thirteen months earlier in which she appointed the Guardian Trust her executor and trustee. Her estate was valued at approximately £70,000. In December, 1933, to the knowledge of this company, an application was lodged and an order made under the Aged and Infirm Persons Protection Act ; and some three weeks before the will was signed—it was prepared under the directions of the company—the local manager reported to his head office : " The old lady is a source of worry and our next move will have to be to get someone to take care of her. She wanders the streets at night picking up things from tins and the gutters which is a sorry state of affairs." This rationing psychosis she shared with the famous Hetty Green of Wall Street, and our local product, the Merry widow of Wellington ; but contrary to her more distinguished prototypes she looked upon thrift rather as a hobby than as a business, and provided a headache to the company by reason of the fact that to the itinerant share-pusher she was as easy a mark as the average medical practitioner, thinking little of frittering a few hundreds here and there in extremely hazardous speculation. Probate was obtained in favour of the company, and the trouble commenced.

By a petition and affidavits described by the trial Judge as " clearly misleading and entirely inexcusable," the company obtained an order under the Trustee Act barring claims ; and it was alleged that when the legacies were distributed the company had notice or knowledge that the testatrix was not of testamentary capacity, that many of the next-of-kin were resident in England and in other places outside New Zealand, and that certain of the next-of-kin claimed that the testatrix was not of testamentary capacity and contemplated taking proceedings for revocation of probate. It was further alleged and proved that, after posting cheques to legatees and before they were presented for payment, the company knew that proceedings were to be taken for revocation of probate and failed to stop payment of cheques—a cause of action that set up, in effect, that the conduct of the company was *mala fide* in procuring probate and thereafter also in administering the estate. Action was brought for the recall of probate and this was granted by Northcroft, J., as in his view the testatrix was not competent to make a will.

On a subsequent action by the Public Trustee as administrator of the estate to recover the sum of £8,450 paid out as legacies by the company, Northcroft, J., although recording his strong disapproval of the manner in which the order under the Trustee Act had been obtained, was not able to find any adequate motive against the company for acting as it did and seemed to consider that no executor would be prepared to undertake his duties if he became liable personally to repay legacies paid out under a probate which was subsequently revoked. On the appeal by the Public Trustee from this later decision Sir Michael Myers, C.J., in the course of a lengthy judgment, said that the will, probate of which was subsequently recalled, was secured by the company, whose only interest in procuring it was the profit it would service from the administration of the estate if it were appointed executor. In his opinion the subsequently recalled probate had been irregularly and improperly obtained in the first instance through the company failing in its duty by not placing the facts of the case before the Court. The Chief Justice concluded his judgment by saying :

> In all the circumstances of the case, I can come to no other conclusions than that the probate was irregularly and improperly obtained ; that the payments to the legatees were made with knowledge and notice on the part of the respondent of facts and circumstances which should have made it plain to any ordinary, reasonable, and prudent man of business that the payments should not have been made ; that these payments would not have been made but for the order under s. 74 of the Trustee Act, 1908 ; that that order was also irregularly and improperly obtained ; and that, in all the facts and circumstances of the case, the payments cannot be regarded as having been made in good faith.

At the conclusion of a concurring judgment, Mr. Justice Smith said that there was no doubt that if the true position had been explained to the Court which originally granted the probate subsequently recalled, either the company would have been directed to prove the will in solemn form or a much longer period would have been granted for the barring of claims. Fair, J., also held that the appeal should be allowed, but in a dissenting judgment Ostler, J., considered that the

Guardian Trust had acted throughout in good faith and that the judgment given by the Court below in its favour was right.

During the hearing in the Court of Appeal, counsel were asked whether the books provided any authority precisely in point, but none could be found, and a similar difficulty seems to have confronted counsel who appeared before the Board. It is therefore of interest to find Lord Romer making reference to the executor in *Pickwick Papers* who tells his story to Sam Weller when they were fellow inmates of the Fleet prison. The testator had left five thousand pounds. He appointed as his executor a cobbler who had married a relation. One thousand pounds of this estate is bequeathed to the cobbler. "And being surrounded by a great number of nieces and nevys, as was always a quarrelling and fighting among themselves for the property, he makes me his executor, and leaves the rest to me: in trust, to divide it among 'em as the will provided." When the executor was about to take out probate, the nieces and nephews, desperately disappointed at not getting the whole estate, entered a caveat. Continued the cobbler:

> Finding that they couldn't agree among themselves and consequently couldn't get up a case against the will, they withdrew the caveat, and I paid all the legacies. I'd hardly done it, when one nevy brings an action to set the will aside. The case comes on, some months afterwards, afore a deaf old gentleman, in a back room somewhere down by Paul's Churchyard; and arter four counsels had taken a day a-piece to bother him regularly, he takes a week or two to consider, and read the evidence in six vollums, and then gives his judgment that how the testator was not quite right in his head, and I must pay all the money back again, and all the costs. I appealed; the case come on before three or four very sleepy gentlemen, who had heard it all before in the other Court, where they're lawyers without work; the only difference being, that, there they're called doctors, and in the other place delegates, if you understand that, and they very dutifully confirmed the decision of the old gentleman below. After that, we went into Chancery, where we are still, and where I shall always be. My lawyers have had all my thousand pound long ago; and what between the estate, as they call it, and the costs, I'm here for ten thousand, and shall stop here, till I die, mending shoes. Some gentlemen have talked of bringing it afore Parliament, and I dare say would have done it, only they hadn't time to come to me, and I hadn't power to go to them, and they got tired of my long letters, and dropped the business. And this is God's truth, without one word of suppression or exaggeration, as fifty people, both in this place and out of it, very well know.

It will be remembered that Sam Weller, so that he could look after his master in the Fleet prison, arranged for his father to arrest him on mesne process for debt—a procedure that was not abolished until after the beginning of the reign of Queen Victoria. This prison must have had its compensations since Sir Edward Sugden (afterwards Lord St. Leonards) in a speech to the House of Commons on February 11, 1830, cites the case of a solicitor who, although he need not have remained there for more than a few days, yet set up his shingle and practised his profession with much success. Why, it is often asked, did Messrs. Dodson and Fogg choose to arrest Pickwick when he seemed to have sufficient to satisfy the judgment. The answer is said to be that he possessed no land nor tangible assets, lived in hotels and boarding-houses and drew his income from investments, the latter circumstance being then a greater proof of solvency than it is today. The action of this firm, the sharks of Freeman's Court, in imprisoning Pickwick was exceeded in strategy by their procuring the arrest of Mrs. Bardell and sending her also to the Fleet when the unfortunate defendant found it desirable to pay her party-and-party costs and thus liberate himself from her presence.

The will in the cobbler's case was contested first in the Ecclesiastical Courts, and then in the Court of Chancery. For this tribunal, Dickens had a dislike as great as he had for Magistrates: here he had been victorious in five actions to restrain breaches of copyright and recovered costs in none. The unhappy fate of persons committed for contempt of this Court and left to die in prison stirred him into writing an article in *Household Words* on "The Martyrs of Chancery." We meet, in the first chapter of *Bleak House* Mr. Tangle, K.C., who is the only King's Counsel described by Dickens and who knows more about *Jarndyce* v. *Jarndyce* than anybody, being famous for it—"supposed never to have read anything else since he left school." This is the immortal doyen of Chancery suits, the greatest ever known in which "every difficulty, every contingency, every masterly fiction, every form of procedure known in that Court, is represented over and over again." It is of this suit that John Jarndyce observes:

> All through the deplorable cause, everything that everybody in it, except one man, knows already, is referred to that only one man who don't know it, to find out—all through the deplorable cause, everybody must have copies, over and over again, of everything that has accumulated about it in the way of cartloads of papers (or must pay for them without having them, which is the usual course, for nobody wants them); and must go down the middle and up again, through such an infernal country-dance of costs and fees and nonsense and corruption, as was never dreamed of in the wildest visions of a Witch's Sabbath.

Such criticism was fully justified. A legal writer of the period refers to two briefs in causes on Further Directions before the Vice-Chancellor. Both were twenty years old; during half that time they had waited, in different stages, their turn to be heard; and in neither had the legatees or residuary legatees received any part of their bequests. Failure on the part of a trustee to obey one of the never-ending decrees of this Court might result, if he had no estate or insufficient estate, in his being imprisoned for contempt and staying in goal for the rest of his life. In these more enlightened days, the lot of a trustee is a more sheltered one, and it may be a source of melancholy satisfaction to the appellant company in the *Elizabeth Smith Case* that the cobbler's misfortune cannot add to the legion of troubles that have already overtaken it.

Crime and Photographs.—There is always a chance that an accused person may be prejudiced before a jury if they hear that the Police have in any way been assisted by having seen his photograph. They jump to the conclusion that his picture is kept in a gallery of criminals whose portraits are preserved by the Police. The danger was illustrated by a recent decision of the Court of Criminal Appeal (*R.* v. *Wattam*, [1942] 1 All E.R. 178). A policeman had a chance of noting the appearance of an accused man at the moment of his crime, and of identifying him in Court. This he did. Nevertheless, he stated in cross-examination that he had seen a photograph of him the next day. The Judge saw that this statement might prejudice the prisoner and warned the jury in the most emphatic way that they must draw no inference that the prisoner was someone in the bad books of the Police.

DISCHARGES OF MORTGAGES OF LAND.

By E. C. Adams, LL.M.

(*Concluded from p. 103.*)

C. Absent or Dead Mortgagees.—Section 117 of the Land Transfer Act, 1915, and s. 75 of the Property Law Act, 1908 (enabling the Public Trustee to give a discharge where a mortgagee is dead or is absent and has no attorney in New Zealand) do not embrace all cases which occur in practice, although, if the other conditions are satisfied, they do apply when the mortgagee was absent from New Zealand when the advance was made: *National Bank of New Zealand, Ltd.* v. *Barclay*, (1899) 17 N.Z.L.R. 819; 1 G.L.R. 209. The amount of the mortgage debt must be *tendered* to the Public Trustee, and the mortgagor must satisfy him that the amount so tendered, is the whole amount due under the mortgage. Thus, these sections are applicable only when the mortgagor is about to redeem the mortgage; they cannot apply where the mortgagor has already paid the mortgage moneys, but, as sometimes happens, has omitted to get a proper discharge or release from the mortgagee. What is a mortgagor to do in these circumstances? Only the Supreme Court can give him assistance, if the mortgagee being still alive but out of the jurisdiction has no duly authorized attorney in New Zealand, or if the mortgagee being dead has no legal personal representative. The procedure to the Supreme Court will vary according to the circumstances.

If the land is not under the Land Transfer Act, and twenty years have elapsed since the last payment under the mortgage, the land is freed of the mortgage by operation of the Real Property Limitation Act, 1833: *Campbell* v. *District Land Registrar, Auckland*, (1909) 28 N.Z.L.R. 816; on app. (1910) 29 N.Z.L.R. 332. If the land is under the Land Transfer Act, and but for the provisions of that Act, the mortgage would be extinguished as against the land by the Real Property Limitation Act, 1833, then the appropriate procedure is application to the Supreme Court for an order under s. 43 of the Statute Amendment Act, 1936. (For an article on this section see (1937) 13 N.Z.L.J. 124, and for a precedent see *ibid.*, 203). The stamp duty on such an order is 5s., as it operates as a discharge of the mortgage.

But supposing the mortgage has been repaid and the necessary twenty years to cause the Real Property Limitation Act, 1833, to operate, have not elapsed. There have to the writer's knowledge been several recent instances of this in New Zealand.

On one occasion the Supreme Court, on an originating summons by the mortgagor under the Judicature Act, 1908, made an order under R. 550 of the Code of Civil Procedure, that the mortgage be discharged, and that the District Land Registrar should enter a memorandum of the discharge thereof in the Register Book and on the outstanding instruments of title. It is submitted, however, that this is the wrong procedure, for R. 550 does not expressly authorize the Court itself to effect the discharge, and if this Rule is available in such cases, then certain petitions to the Court under the Trustee Act appear to have been unnecessary.

1. If the mortgagee is dead and the land is not under the Land Transfer Act, the correct procedure appears to be a petition to the Supreme Court for a vesting order under s. 21 of the Trustee Act, 1908. The order will read like this:—

> UPON READING the petition for a vesting order filed herein the motion in support of the said petition and the affidavits of A.B. (the mortgagor) and C.D. filed in support thereof AND UPON HEARING Mr. of counsel for the petitioner IT IS ORDERED that all that piece of land containing being [set out here official description of land] do vest in A.B. of freed and discharged from Memorandum of Mortgage No. and any moneys intended to be secured thereby.

But if the land is under the Land Transfer Act, s. 21 of the Trustee Act, 1908, cannot be invoked, for, as the legal estate is not vested in the mortgagee, there is no legal estate to be re-vested in the mortgagor, and consequently no order made under s. 21 of the Trustee Act, 1908, could be registered under s. 92 of the Land Transfer Act, 1915. The mortgage would still remain a blot against the certificate of title.

2. If the land is under the Land Transfer Act, and it is not proved that the mortgagee is dead, and if the mortgagee is out of the jurisdiction, or in the circumstances it is reasonable to presume that he is out of the jurisdiction, then the Court on petition will make an order under s. 11 of the Trustee Act, 1908, vesting the memorandum of mortgage in the mortgagor: *In re A Mortgage, McDonald to Martin*, [1933] N.Z.L.R. 603; *In re Rogers*, [1921] N.Z.L.R. 245; in the matter of Memorandum of Mortgage 29511, Hawke's Bay Registry Order No. 5201. The reason for this procedure is that when a mortgage has been repaid, the mortgagee is a constructive trustee for the mortgagor. The order may read as follows:—

> UPON READING the petition of A.B. (the mortgagor) of Wellington carpenter filed herein and the affidavit of the said A.B. filed in support thereof and the affidavits of C.D. of company secretary and E.F. of Wellington solicitor all filed in support thereof AND UPON HEARING Mr. Smith of counsel for the petitioner IT IS ORDERED that all the estate and interest of G.H. (the mortgagee named and described in Memorandum of Mortgage No. : Land Registry) in the piece of land comprised in Certificate of Title Vol. Fol. Land Registry BE AND THE SAME is hereby vested in the said A.B.

3. If the land is under the Land Transfer Act, and it is known that the mortgagee is dead, petitions should be lodged for orders under ss. 41 and 43 of the Trustee Act, 1908: *In re Park*, (1907) 10 G.L.R. 111.

Where vesting orders have been made as under 2. or 3. above, they may be registered in the Land Transfer Office, and the way will then be open for the mortgagor to get the mortgages expunged from the Register, either by way of merger, or by express discharge by the mortgagor himself.

The principal thing under 1. 2. and 3. above, is to prove to the satisfaction of His Honour the Judge, that the mortgage moneys have actually been repaid. The best possible evidence should be adduced: possession by the mortgagor of the instrument of mortgage and of the outstanding certificate of title if it is a first Land Transfer mortgage, appears to be of great probative value. Orders under 1. 2. and 3. above are liable to

(*Concluded on p. 119.*)

PAPER SHORTAGE.

Supreme Court Documents: Judges' Directions.

In order to conserve stocks of paper and prevent wastage, the Judges have agreed upon the following practice which all practitioners will be expected to follow strictly :—

(1) Rule 597c of the Code of Civil Procedure shall be treated as if the word "shall" were substituted for the word "may." That is to say, both sides of the sheet shall be used instead of one side only.

(2) All documents to be prepared with a margin of one inch instead of one quarter of the width of the paper as now required by rule 597A (*a*).

(3) Single spacing to be adopted in all documents where practicable instead of double spacing, provided however that where a document is divided into paragraphs a double space shall be left between paragraphs.

(4) Where a document consists of only one sheet of paper and its contents can be typed on a sheet of quarto size, paper of that size to be used instead of foolscap.

(5) Documents are to have the endorsement on the last or only sheet thereof—that is to say no separate endorsement sheet will be required.

General Order.

For the convenience of practitioners, the Paper (General) Control Notice, 1942 (Serial No. 1942/126), which came into force on May 15, may be summarized as follows :—

Clause 3.—No person shall type duplicate or write any matter or cause or permit any matter to be typewritten duplicated or written—

(*a*) Upon paper larger than is necessary when both sides are used :

(*b*) With margins at sides, top, and bottom of the sheet of paper larger than are necessary for legibility and reasonable convenience.

Clause 4.—*Nothing the last preceding clause* shall be deemed to require printer's copy to be typed or written on both sides of the paper.

Clause 5.—No person shall type or duplicate any typewritten matter or cause or permit any matter to be typed or any typewritten matter to be duplicated if such matter is of a commercial or professional character otherwise than with single-spacing.

Clause 6.—The last preceding clause shall not apply to drafts requiring space for revision.

Clause 7.—No person shall use or cause or permit to be used any envelope which exceeds in area the equivalent of an area 6in. by 3½in.

Clause 8.—The last preceding clause shall not apply to the use of envelopes for enclosures which are intended to pass forthwith out of the possession of the user and the size and weight of which make the use of an envelope of area larger than hereinbefore specified reasonably necessary for the safety in transit of the contents.

LONDON LETTER.

Somewhere in England,
March 7, 1942.

My dear EnZ-ers,

Nobody will complain that the truth, however unpalatable, should be told in Parliament. Hence, when a member of the House of Commons who formerly held high ministerial office, as Minister of Transport, was responsible for the Beacons which, until they shared in the universal blackout, warned motorists of the pedestrian's right to safe passage, says that we have lost part of our Colonial Empire, and with it material sources of supply, there is only one answer possible; for the time being that is so. But it is singular that this should only be a recurrence of the still severer loss that was suffered by this country one hundred and seventy years ago when the American Colonies fell away from the Motherland. Still more singular is it that President Roosevelt should use the words with which George Washington then encouraged his men, as an encouragement for these present times when the breach has been wholly closed, since now Great Britain and the United States stand in solid brotherhood against the forces that try to stem spiritual civilization and to turn back the hands of the clock to the Dark Ages of the world. I refer to the broadcast address which President Roosevelt delivered at Washington on the night of February 23. It is nearly a fortnight ago, but the lapse of time does not affect the pregnancy of his quotation. "'These are the times that try men's souls.' Tom Paine wrote those words on a drumhead by the light of a camp fire. It was when Washington's little army of ragged, rugged men were retreating across New Jersey, having tasted nothing but defeat."

Trying Times.—"These are the times that try men's souls." It may be that our experience so far in the present war has not been greatly different from that of Washington's soldiers. There is, however, the lesson not only of Paine's words but of the great unity between the colonies he led to independence and this country, which will restore any temporary loss which either the United States or the British Empire have sustained. President Roosevelt spoke very clearly about the dangers which still lie ahead. He exploded the last ditch fallacy. To die in the last ditch is mistaken heroism. The enemy must not be allowed to get near it. That is why he enlarged again on the universality of the war. The enemy must be met everywhere, and especially where the danger is greatest; on the supply lines in the North and South Atlantic, the Pacific Ocean and the Indian Ocean. It is not to be an easy task. That is why the matter had been made prominent, not only by Mr. Roosevelt but in the Grand Inquest of the nation in Parliament. In the future, when the Axis capacity

for the production of implements for wars has been surpassed, and this reign of force has come to an end, it will remain that the colonizing spirit is with the English race and those who are sprung from it. It is as true now as ever that

> "*Regions Caesar never knew*
> *Thy posterity shall sway.*"

Civil Servants as Ministers.—An eminent correspondent writes to the *Law Journal* (London): "The appointment of a civil servant to high political office raises a question of enormous political and constitutional importance. It has been one of our treasured principles that the Civil Service has no politics, and though there can be no objection to a retired Civil Servant being elected to the Commons or receiving a peerage, the rule debarring him, while in the service, from political office, has everything to commend it. If Cabinet rank is to be included among the legitimate objects of ambition of a civil servant, it will be impossible to prevent him from taking steps to achieve that ambition, and the principle will be impossible to maintain. It used to be thought imprudent to give Cabinet office to anyone unless he had served an adequate apprenticeship in one or other of the Houses of Parliament, and it is a matter for serious anxiety if it be true that the Peers and Commons cannot provide from their numbers a proper supply of available talent. There would be something seriously wrong with our political system if that were the case. The one thing that the country has been restive about is the extension of bureaucratic control; and the promotion of civil servants, however eminent, is not calculated to allay feelings of anxiety on that account. The Civil Service has a great function to perform; but, by the very nature of that function, its members are not qualified for the political direction of affairs, and it is suggested that the civil servant is best serving his country if he sticks to his job." The principle that the Civil Service has no politics is, one entirely agrees, of the very greatest importance; and such an appointment as that of Sir James Grigg to the War Office would, in peace-time, have been as impossible as would Defence Regulation 18B. Of recent years, as landed estates have disappeared and private fortunes have diminished, politics have become more and more the sport of the careerist; and it cannot, we fear, be denied that the level of ability from which a party Prime Minister has to choose is lower than it was even a generation ago. At the moment, party politics have disappeared, and everything must give way to the effective prosecution of the war; nothing else could justify the appointment of a serving civil servant to the Cabinet.

The Earl of Selborne.—The death of the Earl of Selborne not only closes a public career of great usefulness and interest, but also recalls the important part which his father, the first earl, played in the reform of our legal procedure. The late earl earned the gratitude of his country for his services to the Navy and in the early stages of the making of the Union of South Africa, where, in 1905, he succeeded Lord Milner as High Commissioner. At home he was interested in agriculture, and in the course of the last war was not only Minister of Agriculture, but was also Chairman of the Agricultural Committee which was set up by the Minister of Reconstruction, and produced a very valuable report. Altogether the late earl was an Elder Statesman of outstanding probity and influence. To his father was especially due the passing of the Judicature Acts of 1873–75. He became Lord Chancellor at a time when our legal procedure had already been considerably modernized by Lord Brougham and by the Common Law Procedure Acts of 1852 and 1854. Twenty years later more drastic reforms became necessary. The severance between common law and equity was of great historic interest, but equally was a cause of great expense and inconvenience. The fundamental idea of the Judicature Acts was to get rid of this severance. At first it was thought that the two systems of jurisprudence had been merged into one. That was soon found to be a mistake; law and equity remained separate and still so remain. What was accomplished was to make the rules of equity prevail over the rules of law, and to enable the rules of equity to be applied in all Courts.

Mr. A. W. Baker-Welford.—Sir Fiennes Barrett-Lennard, in a letter to the *Law Journal* (London), says: "I was very sorry to learn recently of the death of A. W. Baker-Welford. He was a man of charming character, a fine classical scholar, and a first-rate lawyer. I met him first in 1903, and, except during my service overseas, saw him often as from then until 1941. He was the eldest son of a Nonconformist minister, and a devoted follower of Mr. Gladstone, so liberalism was his natural inheritance; but he was too tolerant, too widely read, to suppose that it was the only political creed for a man of sense. Born in 1871, near Manchester, he was sent to the famous Grammar School, and showed very soon a taste for scholarship. Walker was, I think, the headmaster, and, of course, the friend of all hard-working boys. Welford went up to Emmanuel College, Cambridge, in 1890, and took a first in Greats in 1893. During the next seven years he was a schoolmaster, but in 1898 he was called to the Bar, and, some two years later, entered the chambers of the late Lord Sumner, then J. A. Hamilton. There Welford laid the foundation of his remarkable knowledge of the common law. His classical training made him an excellent pleader and writer of opinions. Success, however, came slower to him than to any man of my acquaintance really suited to the profession of a barrister. He lectured, devilled, contributed to *The Laws of England*, and wrote textbooks, but until the last war the business he desired did not flow in upon him in any volume. By 1919, if not earlier, a thin trickle had increased to a stream. He became standing counsel to the Fire Offices. Their business extends, of course, to many countries, and is of great interest to a highly-educated man. Further, they pay good fees to the counsel of their choice. Welford's pleasant situation enabled him to marry, to buy a charming house, and to feel that in a modest way he had arrived. It is a pity that no Lord Chancellor thought of him as a County Court Judge. The probable explanation is that he seldom met the men to whom Lord Chancellors listen."

Libel by Mistake.—Since the memorable decision of the House of Lords in *Hulton* v. *Jones* [1910] A.C. 20, we have all known that A. may libel B. without any intention of referring to him, and although he does not know of B.'s existence. An example of another form of innocent libel—libel by mistake—was given last week before Mr. Justice Asquith (*Domvile* v. *Associated Newspapers, Ltd.*; *Times*, February 27). If anyone was innocently to blame for the libel we must say, with due respect, that we think it was the Home Secretary. If the report of a speech which he made in the House of Commons is correct, he said, so far as material, that

persons who were detained under the much-debated Reg. 18B, on the ground that the Home Secretary had reasonable cause to believe that they had been recently concerned in acts prejudicial to the public safety or the defence of the realm, *were persons* whom he believed to have been concerned with sabotage attempts to get secret information, and with seeking to make contact with the enemy. It is not surprising that a journalist thought that these words applied to all " controllees " ; but later the Home Secretary said that this was not so. The mischief was done and the plaintiff was libelled as one charged with sabotage. Now things have been put right at some expense to the defendants.

Fresh Evidence.—The Court of Criminal Appeal has, of course, the right to admit fresh evidence which was not before the jury and may, on a proper occasion, quash a conviction when that evidence has been heard. *R.* v. *Knox*, (1927) 20 Cr. App. Rep. 96, and *R.* v. *Jones*, (1928) 21 Cr. App. Rep. 27, are examples ; and no doubt your industrious readers can find others. But if an accused person pleads insanity and thus takes the *onus probandi* upon himself, he must lay all the evidence upon which he relies to support that plea before the jury at his trial. It is no use for him to come before the Court of Criminal Appeal and ask for time in order that evidence of his sanity forty years ago may be searched for with doubtful hope of success. This appears to be the rule to be extracted from *R.* v. *Trevor* (*Times*, February 24) in which the Court of Criminal Appeal gave judgment last week. In justice to counsel for the defence, let us add that the possibility of discovering evidence of insanity so far back as 1893 was only revealed to him by the accused man on the day of the appeal.

Bills of Exchange.—Last week an interesting point on bills of exchange came to the Court of Appeal (*Bank Polski* v. *Mulder*). The question to be decided was whether the appellants had accepted certain bills in such words as made their acceptance qualified, or whether it was a general acceptance. The drawers and acceptors marked the bills as to be paid at a named bank in Amsterdam ; but it was admitted that English law was the law by which the difference at issue between holders and acceptors must be determined. In defining the term " general acceptance," the Bills of Exchange Act, 1882, says that an acceptance to pay at a particular place is a general acceptance, unless it states expressly that the bill is to be paid at that place *and nowhere else*. The appellants, who were sued on the bills here, argued that an acceptance to pay at a named bank in Holland was an acceptance to pay only there ; but this argument did not succeed either before Mr. Justice Tucker or in the Court of Appeal. The law is well laid down and well understood. The old case of *Halstead* v. *Skelton*, (1843) 5 Q.B. 86, still holds the field and is aptly quoted on the subject by the indispensable " Chalmers."

The Frenchman's Dilemma.—Writers and students of International Law have expended much time and ingenuity in discussing what things civilians may do or may not do in time of war. It is a somewhat fruitless task, because when war breaks out these carefully discussed rules often go by the board, and the belligerents have a way of adopting such rules as suit their own purposes. Especially is this so when a war has become in present language, a totalitarian war, and civilians, almost as much as fighting men, are caught in the net. Moreover, whatever rules there are are useless in practice unless the civilian knows them, and can guide his conduct by them. The recent air-raids on the Renault factory and other factories in France are likely to have brought this home to French workmen. Professor Goodhart, in a letter to *The Times* of March 5, referred to Hall's *International Law* for the statement that an enemy is entitled to compel work from the inhabitants of occupied territory provided they are not employed in the manufacture of munitions. It is unfortunately probable that French workmen have been killed in the recent raids. What was the French workman to do ? Without work he must starve ; if he refuses to work for the Germans, the Germans may shoot him ; if he works for the Germans, the British will bomb him That is the dilemma which the war has brought, and the responsibility lies on the Germans as the makers of the war.

Long Judgments.—A Lord Justice of Appeal made some caustic comments last week on the length of a judgment given below. He complained that a decision on a very simple case was far too long, and indicated that if he had not seen it, he would have said that such an utterance " exceeded the bounds of human prolixity." In general, we think, our readers will echo this unusual criticism with an approving "Hear, hear." But, in general also, let us bear in mind that when a case first comes to trial, the litigants may raise a number of different points, with all of which the Court is bound to deal. When a case gets to the Court of Appeal, some of the points may have disappeared and the case have been fined down so that only the main issues remain for decision. Thus a judgment on appeal may be made much shorter if the Lords Justices can say in a few words that they agree with Mr. Justice X., and with his reasons for arriving at it. Nor do I think that prolixity is confined to Courts of first instance. Even the speeches in the House of Lords might sometimes, if we may say so with respect, be shortened with advantage. On the whole the warning is valuable. Let us never forget, however, that the first person to be considered is the litigant. He is entitled to a full decision on all his pleas.

" On any Decree."—The Judicature Act of 1925 provides that the Court may " on any decree " for divorce secure maintenance to a divorcing wife. The Matrimonial Causes Rules of 1937 cap this enactment by saying that an application for maintenance must not be made later than one month after decree absolute—except by a Judge's permission. Last week the Court of Appeal had before them a case in which a wife, who got her decree absolute seven years ago, applied for maintenance (*Fisher* v. *Fisher* ; *Times*, March 7). This seems at first sight too long for anybody to be able to say that an order so made for maintenance is made *on* a decree. Yet the Court, overruling a Judge of the Divorce Division, allowed a wife to make this apparently long-belated application. There seems to have been ample reason for allowing the appeal. The husband had agreed to pay a respectable sum to his wife each year before the petition was heard at all. He continued to pay it up till last May. Then he stopped payment, and negotiations, which ultimately fell though, were begun between the parties. The wife did not wish to prejudice these by an earlier application, and evidence on affidavit, which had not been heard below, satisfied at all events the majority of the Court that the delay caused by them was reasonable. So now we can say that an order for maintenance is made " on " a divorce, though it is made in 1942, and the divorce was in 1934.

Yours as ever,
APTERYX.

PRACTICAL POINTS.

1. Magistrates' Court.—*Set-off—Filing.*

QUESTION: Must a set-off in the Magistrates' Court be filed?

ANSWER: Yes: see *Brodie* v. *Connell*, (1914) 17 G.L.R. 301, 302, 303).

2. Magistrates' Court.—*Summons—Proper Form—Scandalous matter.*

QUESTION: Should a Clerk see that a summons is in proper form before he issues it? Should a Clerk of Court refuse to issue a summons because the statement of claim contains scandalous matter?

ANSWER: He should see "that it is in proper form, and that it contains nothing irregular—as, for example, scandalous matter": *Mc Alister* v. *Walters*, (1890) 7 T.L.R. 105.

The Clerk's duty to refuse to issue a summons containing scandalous matter depends upon whether or not a scandalous pleading or allegations is necessary or relevant to the issue or one of the issues. In any event, it would be wiser and better to issue the summons and leave the matter to the Court for amendment, if necessary, on the application of the aggrieved party.

3. Practice.—*Court Orders—Drawing-up.*

QUESTION: Is there a duty on a Registrar or Clerk of Court to see that Court orders are correctly drawn up?

ANSWER: Yes: see the remarks of Atkin, L.J., in *Ellerman Lines, Ltd.* v. *Read*, [1928] 2 K.B. 144, 157, 158.

4. Magistrates' Court.—*Magistrate's Notes of Evidence—Whether his Private Property.*

QUESTION: Are the notes of evidence taken by a Magistrate during the hearing of a case, his private property?

ANSWER: Yes, if the notes are not taken in pursuance of any duty to take such notes; but contrariwise if such duty exists: *Bandanis* v. *Liquidators of Jersey Banking Co.*, (13 App. Cas. 832).

5. Judgment Summons.—*Conduct Money—Purpose—Judgment Debtor removing to Another Place after Service.*

QUESTION: What is the object of the rule providing for conduct money in judgment summons cases? If a debtor removes from a place after receiving a judgment summons but before the return date, is he entitled to additional conduct money?

ANSWER: The object of the rule is "to place a debtor in the same position as if he lived within the district of issue": per Atkin, J., in *Ward* v. *Neild*, [1917] 1 K.B. 830, 836. When the debtor receives the summons, it is his business to arrange for appearance at the hearing, should he wish to appear: that is clearly one of the reasons why a seven-day period of service is prescribed. Also, the Clerk in fixing the amount of conduct money is not concerned with any possible change of address on the part of the defendant; otherwise it would be impossible for him to assess conduct money. Additional conduct money could be ordered by the Court under Rule 15 of Magistrates' Courts (Imprisonment for Debt Limitation) Rules, 1916, where the hearing could not proceed owing to the absence of the creditor or his witness, and the debtor himself was present at the time of the adjournment. Where a judgment summons was issued but no conduct money was tendered to the debtor at the time of service within five miles of the Court of issue and hearing, and he was then in the course of changing his residence to a distant town where he joined his family after service, it was held that the Court should make an order under R. 15, adjourning the hearing for four weeks, subject to the judgment creditor's depositing the conduct-money necessary to enable the debtor to attend the adjourned hearing: *Webb* v. *Carter*, (1942) 2 M.C.D. 276.

6. Divorce.—*Answer—Order fixing time—Respondent serving Overseas—Change of Place of Residence before Service.*

QUESTION: An order was made in divorce proceedings fixing the time within which the respondent may file an answer. At the time of making the order the respondent was serving overseas with the Australian Military Fôrces. Before service could be effected he returned to Australia. It is now desired to effect service in Australia. What is the position concerning the present order, which was made under the conditions laid down in *A.* v. *A.*, [1940] N.Z.L.R. 394.

ANSWER: A fresh application to the Court for an order fixing the time for service in Australia will be necessary. The procedure is by way of motion with supporting affidavit, the latter to set out the information as to the making of the previous order, and the change of circumstances since then. As there is a distinct possibility of the non-return of the documents, including the original citation, which would have been sent overseas for service on the respondent when he was on active service, it would be a wise precaution to include the motion on application for leave to dispense with the requirements of R. 19 of the Divorce Rules (that is for the return and filing of the original citation in the Registry of issue), and for leave to extract another citation for service.

DISCHARGES OF MORTGAGES OF LAND.

(*Concluded from p. 115.*)

stamp duty of 15s. (Sections 64 of Trustee Act, 1908, 81 (*d*) of Stamp Duties Act, 1923, and 168 *ibid.*, as amended by s. 19 of Finance Act, 1930). If not presented for stamping within one month from the date of signing of same, they are liable to the statutory fines imposed by the Stamp Act. That a Court order liable to stamp duty can be liable to a fine, is a point sometimes overlooked or not known by practitioners.

PRECEDENTS.

Precedent No. 3. Discharge for a Pecuniary Consideration of Part of Land comprised in a Memorandum of Mortgage. Partial Discharge.

The Bank Limited the mortgagee under and by virtue of Memorandum of Mortgage registered No. IN CONSIDERATION of the sum of four hundred pounds (£400) paid to it by [the mortgagor] (the receipt of which sum is hereby acknowledged) and being satisfied with the collateral securities held by it and with the security of the land comprised in the said mortgage after releasing the lands hereinafter mentioned for payment of the moneys owing thereunder DOTH HEREBY RELEASE AND DISCHARGE from the said mortgage all that piece or parcel of land containing being (set out official description of land to be discharged) WITHOUT PREJUDICE HOWEVER to the said mortgage registered No. and to the rights powers and remedies of the mortgagee thereunder as regards the balance of the land comprised therein and the payment of the balance of the moneys owing thereunder and without releasing or discharging the mortgagor thereunder or any other person or persons or any other security or securities for the time being held by it from payment of any moneys whatsoever remaining owing to it under the said memorandum of mortgage or any collateral instrument or otherwise.

Precedent No. 4. Discharge of Part of Land comprised in a Memorandum of Mortgage. No Money passing.

The Bank Limited (hereinafter called "the bank") being registered as the proprietor of an estate or interest as mortgagee under and by virtue of a

certain memorandum of mortgage registered in the Land Transfer Office at under No. in (*inter alia*) ALL THAT piece of land [set out official description of land intended to be released] FOR DIVERS GOOD CAUSES AND CONSIDERATIONS the bank thereunto moving DOTH HEREBY RELEASE AND ABSOLUTELY DISCHARGE the said piece of land above described from the said Memorandum of Mortgage registered No. and from all moneys intended to be secured thereby and from all claims and demands in respect thereof BUT NEVERTHELESS WITHOUT PREJUDICE to the said memorandum of mortgage in so far as the remaining lands therein comprised are thereby made a security for the due repayment by [the mortgagor] to the bank of the balance for the time being secured by the said memorandum of mortgage AND WITHOUT PREJUDICE ALSO to any securities collateral or otherwise held by the bank for ensuring payment of the said balance.

RECENT ENGLISH CASES.

DIVORCE.

Summary Jurisdiction—Maintenance—Agreement to pay Weekly Sum in Compromise of Proceedings—Payments under Agreement duly Made—Whether Jurisdiction to make New Order.

A husband who has regularly paid all sums due under an agreement for maintenance cannot be said to be guilty of neglect to maintain.

MORTON *v.* MORTON, **[1942] 1 All E.R. 273.**

As to maintenance: see HALSBURY, vol. 10. pp. 838, 839, para. 1340; and for cases: see DIGEST, vol. 27, pp. 558, 559, Nos. 6134–6150.

Service—Dispensing with Service—Respondent Resident in Enemy Territory—Matrimonial Causes Act, 1857 (c. 85), s. 42—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 99 (1) (*a*), (*g*)—R.S.C. Ord. 9, r. 14B—R.S.C., Ord. 13, r. 10—Matrimonial Causes Rules, 1937, rr. 10, 81, 82.

The Matrimonial Causes Act, 1857, s. 42, has not been repealed by the Matrimonial Causes Rules, 1937, r. 82.

R.S.C., Ord. 9, r. 14B, has no application to divorce proceedings.

READ *v.* READ, **[1942] 1 All E.R. 226.**

As to service of divorce petition: see HALSBURY, vol. 10, pp. 705–707, paras. 1055–1060; and for cases: see DIGEST, vol. 27, p. 396, Nos. 3928, 3929.

EMERGENCY LEGISLATION.

Mortgages—Foreclosure Order Absolute—Whether Leave Necessary for Writ of Possession—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*b*)—Possession of Mortgaged Land (Emergency Powers) Act, 1939 (c. 108).

Mortgages—Foreclosure—Order for Delivery of Possession Contained in Order Absolute—Mortgagee's Right to Possession Without Leave of Court—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2) (*b*)—Possession of Mortgaged Land (Emergency Powers) Act, 1939, (c. 108).

No leave is necessary under the Courts (Emergency Powers' Act, 1939, to enforce an order for the recovery of possession of the land included in an order absolute of foreclosure.

WOOD *v.* SMALLPIECE, **[1942] 1 All E.R. 252.**

For the Acts referred to: see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 32, pp. 946, 1179. See also BUTTERWORTH'S EMERGENCY LEGISLATION, Statutes Volume, pp. 206, 220.

Emergency Legislation—National Service—Conscientious Objector—Functions of Tribunal and Justices—Class of Work—Refusal to Undergo Medical Examination—Punishment—Probation—Probation of Offenders Act, 1907 (c. 17)—National Service (Armed Forces) Act, 1939 (c. 81), ss. 4, 5.

Punishment—Probation—Good Character and Antecedents—Deliberate Refusal to Comply with Statutory Obligation—Conscientious Objector Refusing to Undergo Medical Examination—Probation of Offenders Act, 1907 (c. 17)—Criminal Justice Administration Act, 1914 (c. 58), s. 8.

The Probation of Offenders Act, 1907, has no application to a case of a deliberate refusal to obey statutory provisions.

EVERSFIELD *v.* STORY, **[1942] 1 All E.R. 268.**

As to probation orders: see HALSBURY, vol. 9, p. 232, para. 327; and for cases: see DIGEST, vol. 14, pp. 492, 493, Nos. 5412–5420.

Mortgage—Application for appointment of Receiver—No Person liable to perform Obligation—Assignment of Equity of Redemption—Application to be made *ex parte*—Practice as to Costs—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (1), (4).

Where there is no person liable "to perform the obligation" within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (4), a mortgagee's application under that section should be made ex parte.

Re WOOLWICH EQUITABLE BUILDING SOCIETY'S APPLICATION (T. HAYWOOD), **[1942] 1 All E.R. 284.**

For the Courts (Emergency Powers) Act, 1939: see HALSBURY'S COMPLETE STATUTES OF ENGLAND, vol. 32, p. 946. See also BUTTERWORTH'S EMERGENCY LEGISLATION SERVICE, Statutes Volume, p. 206.

HIGHWAYS.

Obstructions—Lighting of Obstruction—Barrier placed across Road on account of Bomb Damage—Towns Improvement Clauses Act, 1847 (c. 34), ss. 78, 81, 83—Public Health Act, 1875 (c. 55), ss. 145, 160.

Negligence—Erection of Obstruction in Highway by Local Authority—Barrier placed across Road on account of Bomb Damage—Duty to light Obstruction.

Where a local authority erects an obstruction on a highway, and it does so without statutory authority to erect that particular type of obstruction, it is the duty of the local authority to keep it lighted.

FOSTER *v.* GILLINGHAM CORPORATION, **[1942] 1 All E.R. 304.**

As to obstructions in highway: see HALSBURY, vol. 16, pp. 323, 324, para. 436; and for cases: see DIGEST, vol. 26, pp. 392–395, Nos. 1187–1212.

RULES AND REGULATIONS.

Shipping and Seamen Act, 1908. Masters and Mates Examination Rules, 1940. Amendment No. 2. No. 1942/137.

Primary Industries Emergency Regulations, 1939. Milking-machine Control Order, 1942. No. 1942/138.

Animal Protection and Game Act, 1921-22. Animals Protection Warrant, 1942. No. 1942/139.

Labour Legislation Emergency Regulations, 1940. Cheese-factories Labour Legislation Suspension Order, 1941. Amendment No. 1. No. 1942/140.

Control of Prices Emergency Regulations, 1939. Price Order No. 83 (Three-in-One Oil). No. 1942/141.

Emergency Regulations Act, 1939. National Service Emergency Regulations, 1940. Amendment No. 10. No. 1942/142.

Emergency Regulations Act, 1939. Industrial Absenteeism Emergency Regulations, 1942. No. 1942/143.

Animals Protection and Game Act, 1921-22. Opossum Regulations, 1934. Amendment No. 4. No. 1942/144.

Emergency Regulations Act, 1939. Social Security and Pensions Emergency Regulations, 1942. No. 1942/145.

Emergency Regulations Act, 1939. Delivery Emergency Regulations, 1940. Amendment No. 1. No. 1942/146.

Emergency Regulations Act, 1939. Labour Legislation Emergency Regulations, 1940. Amendment No. 2. No. 1942/147.

Rabbit Nuisance Act, 1928. Rabbit Destruction (Ohura North Rabbit District) Regulations, 1942. No. 1942/148.

Emergency Regulations Act, 1939. Naval Enlistment Emergency Regulations, 1942. No. 1942/149.

Control of Prices Emergency Regulations, 1939. Price Order No. 84 (Whakatane Board Products). No. 1942/150.

Samoa Act, 1921. Samoa Crown Lands Revesting Order, 1942. No. 1942/151.

Emergency Regulations Act, 1939. Motor-vehicles Registration Emergency Regulations, 1942. No. 1942/152.