plated by the Judicial Committee, and the parties had selected some system other than English law, such courts might have applied the *Defence Regulations* as part of the public policy of the indigenous proper law in the manner suggested by Dr. Cheshire.[10] " It should be regarded as contrary to the public policy of the *forum*, or at least as contrary to the comity of nations, deliberately to disregard the public policy of another civilized State which is substantially the *situs* of the contract."[11] This would still leave some field of operation for the proper law selected, for example, on questions of construction. On Denning L.J.'s reasoning, the expressed intention of the parties presumably would have no legal effect.

E. F. McCarthy
A. J. Ellwood

10. *Private International Law*, 3rd ed., p. 330.
11. *Ibid.*

PROCEDURE: SERVICE OUT OF THE JURISDICTION.

In *Tyne Improvement Commissioners v. Armement Anversois Societe Anonyme ; The Brabo*[1], is discussed the wreck of the *Brabo*, which obstructed shipping passing up the River Tyne to Newcastle. The task of removing it fell upon the Tyne Improvement Commissioners and involved them in an expenditure of close on £250,000. The *Tyne Improvement Act* 1890, section 42 gave them a general right to recover these expenses from the owners of the ship and her cargo. But in this instance the Commissioners encountered difficulties.

The cargo consisted of ordnance stores which, for all practical purposes of the action, were considered the property of the Ministry of Supply. The ship itself was owned by the respondent, a Belgian company, registered and resident in Belgium. The Commissioners sought leave to serve notice of the writ upon the respondent, who normally would be outside the jurisdiction of an English court. Reliance was placed upon O. XI. r. 1. (g), *R.S.C.*[2] allowing service when the person out of the jurisdiction is " a necessary and proper party to an action properly brought against some other person duly served within the jurisdiction."

It was therefore necessary to shew that the action was " properly brought " against the Minister of Supply.

Both the Court of Appeal and the House of Lords held that the Minister in this case was acting as agent of the Crown. Was he therefore bound by the *Tyne Improvement Act* which did not expressly or by necessary implication purport to bind the Crown ? Obviously not—*vide Bombay v. Bombay.*[3]

It was argued that the Minister might waive his immunity. The Lords rejected this on the ground that " the Court ought not to assume

1. [1949] 1 All E.R. 294
2. Victorian *R.S.C.* have the same provision. As to High Court, see O. IX. (3) of *High Court Rules.*
3. [1947] A.C. 58.

that the defendants within the jurisdiction would not avail themselves of any defence open to them "—*per* Lord Simonds.[4]

The House of Lords held,[5] affirming the decision of the Court of Appeal,[6] that since the action against the defendant within the jurisdiction was bound to fail the action was not " properly brought " against him. The Belgian company therefore could not be served with a writ out of the jurisdiction. Lord MacDermott dissented in respect of the question whether the action was " properly brought," but found against the appellants on the discretionary powers of the Court with regard to O. XI r. 1 (g).

The general result of the decision would seem to be this :—

1. The right to bring a foreigner before the English courts should be used sparingly. Consider the exceptional nature of O. XI r. 1 (g). It gives the English courts a wider jurisdiction than they themselves would allow to foreign courts: and it cuts directly across the principle of effectiveness in private international law.[7]

The Lords approved of the observations of Farrell L.J. (in *The Hagen*)[8] and of Lord Sumner (in *Russel v. Cayzer Irvine & Co.*)[9], both of whom counselled a policy of caution in applying the rule.

2. Having regard to this broad principle it is then the court's duty in the relevant case to decide :—

(*a*) Whether the action is " properly brought " against the defendants within the jurisdiction and, if this is decided in the affirmative, then

(*b*) whether the court in the exercise of its discretion should allow a writ to be served on the foreign defendant.

As to (*a*)—The Lords dismissed any suggestion that mere *bona fides* of the plaintiff meant that the action was " properly brought." As Lord MacDermott pointed out, this would be to place a premium on folly or ignorance. But further interpretations of the words proved to be the most difficult aspect of the case.

The test which all the Lords appear to have adopted seems best stated by Lord Simonds[10]: " If on the available materials the court comes to the conclusion that the action against the defendants within the jurisdiction must fail, it must equally conclude that the action is not properly brought." He adds a rider that the court should not be deterred in forming an opinion on this question by " any apparent difficulty or complexity of subject-matter."

Lords Porter and du Parcq, while agreeing with the rule as stated above, go somewhat further. Lord Porter says that the plaintiff must shew " a probable cause of action." Lord du Parcq agrees with the Court of Appeal that the question is whether " it can reasonably be argued."

Lord Simonds's test at least marks the limits of the rule. On the one hand, an action founded solely on *bona fide* belief is not properly brought;

4. [1949] 1 All E.R., at 304.
5. [1949] 1 All E.R. 294.
6. [1947] 2 All E.R. 363.
7. See Dicey, *Conflict of Laws* (5th Edn.), p. 30.
8. [1908] P. 189, at 201.
9. [1916] 2 A.C. 298, at 304.
10. At p. 304.

on the other hand, an action bound to fail is not properly brought. By implication, an action within these limits will be properly brought—that is, a *bona fide* action not bound to fail. But the boundaries may be yet narrower if the suggestions of Lords Porter and du Parcq are adopted. The limit may be between " not bound to fail " and " reasonable cause of action."

It is submitted that the " bound to fail " test is a sufficiently limiting factor. The court does not then need to make an exhaustive survey of all the circumstances at issue. It cuts out the cases clearly unjust to the foreign defendant. If other cases of inequity remain, the court can always fall back on its discretionary powers.[11] If the Court goes beyond the " bound to fail " test, it will go perilously near to usurping the functions of the court of trial. Certainly it will be driven to deal with subtle distinctions in such terms as " reasonably arguable " (*per* Lord du Parcq), " real issue between " the parties (*per* Morton J.)[12], " probable cause of action " (*per* Lord Porter), etc.

As to (*b*)—The court's jurisdiction is discretionary. Consequently, even if it decides that the action is " properly brought," it can still refuse to join the foreign defendants. This was the ground upon which Lord MacDermott based his decision. Such a discretion is exercisable in accordance with the broad principle already stated, so that the rule enures to the protection of the person out of the jurisdiction.

The unfortunate combination of circumstances which left the Tyne Commissioners responsible for £250,000 plus the costs of three court actions is unlikely to occur again, while the general principles laid down by the Lords in this case have done a great deal to clarify the application of O. XI. r. 1 (g).

J. A. ASCHE.

11. See 2 (*b*), *supra*.
12. *Ellinger v. Guinness, Mahon & Co.*, [1939] 4 All E.R. 16, at 22.

PROPERTY: ADVERSE POSSESSION.

The law on adverse possession is at last beginning to emerge as a body of coherent rational principles, and the decision of Lowe J. in *Kirk v. Sutherland*[1] may be welcomed as an indication of continued progress in this direction.

The facts of the case may be summarized as follows: A was the registered proprietor of an estate in fee simple in land under the *Transfer of Land Act* 1928, described as allotments 1, 2 and 3. In 1919, he sold allotment 3 to X. X thereupon proceeded to fence his land but at A's suggestion, in order to shorten the length of fence required, the fence was erected so as to enclose 5½ acres of allotment 1, which adjoined allotment 3. X claimed no title to this 5½ acres, but apart from the payment of rates in respect of allotments 1 and 2, neither A nor his successors in title asserted any rights of possession over it, and X and his successors in fact continued to occupy the whole of the land within the fence.

1. [1949] A.L.R. 262.