THE

NEW LAW REPORTS OF CEYLON

VOLUME XVIII

[FULL BENCH.]

1914.

Present: Wood Renton C.J., Pereira J., and De Sampayo A.J.

HAGENBECK *et al. v.* VAITILINGAM *et al.*

354—D. C. Colombo, 35,008.

Action by an alien enemy before outbreak of war—Right to maintain action after outbreak of war—Inherent power of the Supreme Court—Civil Procedure Code, s. 4.

An action instituted by a person who in the course of it becomes an alien enemy by reason of the outbreak of hostilities between His Majesty the King and the Power to which he is subject cannot be continued by that person. In the absence of provision in the Civil Procedure Code to meet such a case, the Supreme Court made a special order, under section 4 of the Code, that the case be struck off all the rolls of the District Court and be treated as if it had never been instituted.

APPEAL from a judgment of the Acting Additional District Judge, Colombo (T. F. Garvin, Esq.).

The facts are set out in the judgment of Wood Renton C.J

This case was reserved for argument before a Full Bench by Wood Renton C.J. and De Sampayo A.J.

Bawa, K.C. (with him *F. M. de Saram* and *F. H. B Koch*), for plaintiffs, appellants.—The effect of the war is only to suspend the further prosecution of the action. A contract entered into by an alien enemy before the war can be enforced after the war terminates, and during the war the contract is only suspended. It is inequitable to hold that if the action was instituted he loses all rights under the contract when the war breaks out, but that if he had not come to Court he could sue after the war is over. Dismissal of the action can only be based on the ground that the property of the plaintiffs was confiscated to the Crown, but here the dismissal o

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the action would accrue to the benefit of the defendants. The District Judge was wrong in dismissing the plaintiffs' action altogether. Counsel cited *Le Bret v. Papillon*,[1] *Robinson & Co. v. Continental Insurance Co. of Mannheim*,[2] *Thurn and Taxis (Princess of) v. Moffitt*,[3] *Vanbrynen v. Wilson*,[4] *Loake on Contracts 382*, *1 Halsbury 20*, *ex parte Boussmaker*.[5]

The plaintiffs though alien enemies have a *locus standi* before the Courts, at least for the purpose of getting an order that the case be taken off the roll until their right of action revives. See *Robinson & Co. v. Continental Insurance Co. of Mannheim*.[2] In *ex parte Boussmaker*[5] an enemy creditor was allowed to claim in bankruptcy proceedings. In *Vanbrynen v. Wilson*[4] a plaintiff who became after verdict an alien enemy was allowed to issue writ.

At this stage Mr. Bawa, K.C., accepted the suggestion of the Bench that, acting under section 4 of the Civil Procedure Code, the Supreme Court shall give the plaintiffs the right to institute a fresh action on the contract after the war. He also agreed that prescription was to run till the date of the new action.

Hayley, for first defendant, respondent, agreed to the order proposed. He referred to *Alcinous v. Nigreu*.[6]

B. F. de Silva, for the second defendant, respondent.

Cur. adv. vult.

November 24, 1914. WOOD RENTON C.J.—

Although all parties to this appeal ultimately expressed their willingness to accept a suggestion made by the Bench as to the nature of the order by which it should be disposed of, it is, I think, desirable that we should give our opinion on the important question of law involved in the case. The plaintiffs, the appellants—John Hagenbeck and Bruno Werlick—who carried on business under the firm name of John Hagenbeck, instituted this action on September 6, 1912, against the first defendant-respondent, who was their broker, for the recovery of money alleged to be due to them on an agreement entered into between them and him. The original second defendant was sued in this action as the surety of the first, but died after action brought. The present second and third defendants-respondents, his executors, have been substituted for him on the record. On the outbreak of war on August 5 last between Great Britain and Germany the plaintiffs' action was still awaiting trial in the District Court of Colombo, and on June 22 it had been fixed for trial on August 18. On that date counsel for the plaintiffs stated that John Hagenbeck, the first plaintiff, a German subject, had been ordered to leave the Island and had

[1] (*1804*) *1 East 502.*
[2] (*1914*) (*unreported*).
[3] (*1914*) (*unreported*).
[4] (*1808*) *9 East 321.*
[5] (*1806*) *13. Vesey 71.*
[6] (*1854*) *4 Ellis and Blackburn 217.*

done so, and that the second plaintiff, who was also a German subject, had not been resident in Ceylon "for some time past," and in view of the hostilities between England and Germany, he moved that the case should be taken off the trial roll until a state of peace existed between the two belligerent powers. The learned District Judge permitted the plaintiffs' counsel to verify these circumstances by affidavit. The motion was opposed by counsel for the defendants and the District Judge, after argument on both sides, dismissed the plaintiffs' action with costs, and allowed the defendants' counsel to withdraw a claim in reconvention, which had been pleaded in the answer, with liberty to re-institute it if so advised. The plaintiffs appeal.

The law applicable to the facts of this case does not appear to me to be doubtful. The contract on which the plaintiffs sue was entered into, and the action itself was instituted, prior to the outbreak of war. The contract, therefore, is valid, and when the war is ended it can be enforced.[1] An alien enemy, however, unless recognized in some way by the Sovereign,[2] or, where he is resident in a dependency, by the representative of the Sovereign there, cannot maintain an action in any of our Courts so long as hostilities last. In the recent case of *Robinson & Co. v. Continental Insurance Co. of Mannheim*,[3] Bailhache J. held that an alien enemy may be sued in our Courts during the continuance of hostilities, and that this liability conferred on the alien enemy the correlative right to defend himself by all proper forms of legal process and to appear by counsel. This decision, however, merely grafts an exception upon the general rule as to the disability of alien enemies to appear before the Courts, and leaves the rigour of that general rule otherwise entirely unaffected. The plaintiffs in the present case have in no way been recognized by the Sovereign. On the contrary, it is admitted that the first plaintiff was expelled from the Colony shortly after the war began, and the second is not resident here. In these circumstances, it is conceded that they could neither institute any fresh action on their contract, however valid it may be, nor proceed to enforce it in our Courts by active steps, till hostilities have ceased. But the question for determination here is whether they have such a *locus standi* as will enable them to move the Court that the case should be taken off the roll until their right of action is revived.

In my opinion this question must be answered in the negative. Apart from authority, this result flows directly from the principle that, while a state of war exists, an alien enemy is incapable of maintaining an action in a court of law. If the learned District Judge had acceded to the plaintiffs' application, the effect of his

[1] *See The Hoop, (1799) 1 Roscoe, Prize Cases, 104.*

[2] *See Thurn and Taxis (Princess of) v. Moffitt, (1914) (unreported).*

[3] *(1914) (unreported).*

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order would have been to enable them to maintain their action by keeping themselves before the Court as litigants and their action itself as a pending case. But the authorities are conclusive on the point. I may notice, in the first place, the cases relied upon by counsel for the plaintiffs in support of the appeal. *Thurn and Taxis (Princess of) v. Moffit*[1] and *Robinson & Co. v. Continental Insurance Co. of Mannheim*[1] are clearly distinguishable. In the former the alien was recognized, and the application to stay proceedings was made, not by the alien plaintiff, but by the subject defendant. I may observe in passing that the fact that the defendant in this case applied only for a "stay of proceedings" does not by any means involve the consequence that, if the stay had been granted, the action could have been proceeded with by the plaintiff at the close of the war. In English practice the term "stay of proceedings" while it sometimes means only their "suspension" until something else happens,[2] is more frequently used as meaning "to restrain or stop the proceedings definitely."[3] The case of *Robinson & Co. v. Continental Insurance Co. of Mannheim*[1] merely presents an exception to the general rule. It would clearly have been inequitable to hold that an alien enemy is liable to be sued, and at the same time refuse him a *persona standi in judicio* for the purposes of his defence. In *Vanbrynen v. Wilson*[4] the Court refused on a summary application to stay judgment and execution because the plaintiffs, after verdict, had become alien enemies, even although the defendant offered to bring the money recovered by the verdict into Court. Whatever remedy, if any, the defendant might have had at law was, however, reserved to him. The Court only declined to give him summary relief. It may be, although it is unnecessary at present to decide the point, that where a plea of alien enemy becomes available to a defendant after judgment has been recovered against him, the judgment may fairly be recognized as imposing on the defendant a fresh liability, which could be enforced by an action of the judgment itself when hostilities have ceased. The last case to which it is necessary to refer is *ex parte Boussmaker*,[5] where the claim of an alien enemy in bankruptcy was allowed to be recorded in order to preserve the alien enemy's right to share in the fund on the restoration of peace. The order in this case was made *ex parte*, and was expressly based on the ground that, unless something of this kind were done, the fund itself would be distributed, and the claimants would have no remedy at the end of the war.

With these exceptions the authorities present no difficulty. In *Le Bret v. Papillon*[6] an alien *amy* at the time of action brought became an alien enemy before plea. The defendant set up the plea, to which I will refer more particularly in a moment, of alienage,

[1] *(1914) (unreported).*
[2] *See R. S. C. Order 58. Rule 16.*
[3] *See Stroud s. v. "Stay"; and see Shackleton v. Swift. (1913) 2 Q. B. 304.*
[4] *(1808) 9 East 321.*
[5] *(1806) 13 Vesey 71.*
[6] *(1804) 4 East 502.*

and judgment was given that the plaintiff should be debarred from further having or maintaining his action. Counsel for the plaintiffs in this case contended that this order operated merely as a suspension of the proceedings in the action. But the case of *Le Bret v. Papillon*,[1] if closely examined, at once disposes of this contention. The plaintiff was an alien *amy* when he sued. The defendant pleaded that he ought not to have or maintain his action because he was before, and at the time of, exhibiting his bill, and that he now is, an alien enemy, and concluded that he ought to be debarred from having or maintaining his action. The plaintiff replied that at the time of exhibiting his bill he was an alien *amy* and prayed for judgment. The defendant demurred. The Court held that the plea was technically incorrect, inasmuch as the plaintiff, being an alien *amy* at the date of the institution of the action, was then entitled to have and maintain it, but that as it clearly appeared from the record that he had subsequently to the institution of the suit become an alien enemy he ought to be *debarred from further having or maintaining his action*. The effect of the words which I have placed in italics clearly is that while the plaintiff had a *locus standi* when he sued, that *locus standi* was permanently taken away from him, so far as the particular action was concerned, on the outbreak of war. That this was the law is clear both from the form of pleas in abatement in which the defendant prayed "judgment of the writ and declaration," and "that the same may be quashed," and from such cases as *Alcinous v. Nigreu*,[2] from which it appears that effect was given to the plea of alien enemy by judgment for the defendant.

On these grounds I am of opinion that the plaintiffs had no *locus standi* to apply to the District Judge for the order, the refusal of which forms the subject of this appeal. This interpretation of the law is in accordance with the rules in force in English Prize Courts. I have endeavoured to show in a recent judgment[3] that an alien enemy cannot be heard in any prize cause till he has shown affirmatively by affidavit that he has been in some way legally recognized by or on behalf of the Sovereign.

But, while I think that the decision of the learned District Judge is right in substance, in view of the effect attached in our procedure to the dismissal of an action, I should propose to deal with the present case under section 4 of the Civil Procedure Code. We may, I think, fairly consider that we are in presence of an application by the District Court to make whatever order the peculiar circumstances in which the parties are placed require. Even if section 4 be not applicable literally, we have sufficient inherent powers to permit of its application by way of analogy. I would quash all the proceedings in the District Court from and after August 18,

[1] *(1804) 4 East 502.* [2] *(1854) 4 Ellis and Blackburn 217.*

[3] *S.S. Reichenfels (1914). 17 N. L. R. 432.*

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1914, and direct that this action should be struck off the rolls of the District Court as if it had never been instituted, and that it should not in any way be revived at the close of the present war. No costs of the action or of the appeal shall be due to or payable by either side. This order shall, however, be without prejudice to whatever rights or remedies, if any, the parties may have in regard to either the original contract or the defendants' claim in reconvention.

PEREIRA J.—

This is an appeal from an order of the District Judge dismissing the plaintiffs' claim with costs on the ground that the plaintiffs are alien enemies and cannot therefore be allowed a *locus standi in judicio*. The plaintiffs are subjects of the German Emperor, while the defendants are British subjects, and since the institution of this action war has been declared between His Majesty the King and the German Emperor, and the question is whether by reason of that fact the plaintiffs have not lost their status in Court, and have thus become incapacitated to continue this action. The defendants had made a claim in reconvention, but they have been allowed to withdraw it with leave to institute a fresh action in respect of it, and nothing more need therefore be said here about it. There is abundant authority for the proposition that alien enemy cannot sue or maintain an action. Indeed, the learned District Judge notes in his judgment that "it is conceded that an alien enemy has no status in Court." Kent, in his work on International Law, says that an alien enemy cannot "sue or sustain, in the language of the civilians, a *persona in judicio;*"[1] and Travers Twiss, citing from the judgment in the case of *The Hoop* (*Twiss on the Law of Nations 109*), lays down: "In the law of almost every country the character of an alien enemy carries with it a disability to sue or to sustain, in the language of the civilians, a *persona standi in judicio.*" "But," he adds, "the right of an alien to enforce a contract which is suspended whilst he is an alien enemy will revive as soon as he is again clothed with the character of an alien friend." Thus far the law is clear, and the particular question for decision in the present case is as to the form that the order should take in an action commenced before the outbreak of hostilities when it is made clear to the Court that as a result of the outbreak of hostilities the plaintiff has become liable to disabilities as an alien enemy.

In *Brandon v. Nesbit*,[2] after plea taken, the Court held that judgment must be given for the defendant on the ground that an action would not lie either by or in favour of an alien enemy, and judgment was entered accordingly. Apparently the action was commenced after the outbreak of hostilities, but the order made

[1] *Kent's Com., 2nd ed., p. 187.*

[2] *6 T R. 23 Eng. Rep., vol. 101, p. 415.*

effectually terminated proceedings so far as that particular action was concerned. The case cited by the District Judge is perhaps more in point (*Le Bret v. Papillon*[1]). There, although there was plea and counterplea on the question as to whether the plaintiff was an alien enemy at the time of action brought, the judgment proceeded on the footing that the plaintiff was, at any rate at the date of judgment, an alien enemy, and therefore incapable of maintaining further his suit. The judgment was that the plaintiff "be barred fom further having or maintaining his action." The effect of this judgment was no doubt to terminate the litigation so far as that particular suit was concerned. Before proceeding further, I should like to say a word about two cases of very recent date cited in the course of the argument in appeal. In the case of the *Princess Thurn and Taxis v. Moffitt* the defendant applied to a Judge of the Chancery Division of the High Court of Justice in England, in which the action had been brought, that all proceedings by the plaintiff in the action might be stayed on the ground, *inter alia*, that the plaintiff was an alien enemy and thereby disentitled to relief in that Court. It appeared that since the action was begun the plaintiff had duly registered herself as an alien and Hungarian under Act 4 and 5 George V. ch. 12, and it was urged on her behalf that having complied with the Law of England and come under the protection of the Government she was entitled to sue in the Courts of that country. Mr. Justice Sarjant adopted that view, inasmuch as the Act referred to with the Proclamations under it amounted to a command to stay in England and within a particular area, and the plaintiff had by her registration under the Act acquired the right to enforce her claim notwithstanding the state of war now existing. The case has no application whatever to the present.

The case of *Robinson & Co. v. Continental Insurance Co. of Mannheim* is even less applicable to the present case. There, the defendants, who were admittedly alien enemies, were sued in the King's Bench for a loss under a marine insurance policy, and they applied that all proceedings against them be stayed during the present war as they were alien enemies, and Mr. Justice Bailhache, having discussed the reason for the rule that an alien enemy could not sue as plaintiff in the English Courts and could not proceed with an action pending in those Courts, observed as follows: "But to hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy, and to defeat the object and reason of the suspensory rule. It is to turn a disability into a relief. To allow an action against an alien enemy to proceed, and to refuse to allow him to appear and defend himself, would be opposed to the fundamental principles of justice." The rule and exception are here set forth in plain terms, and it is clear that in the present case we are concerned, not with the exception, but with the rule.

[1] *4 East 502 Eng. Rep., vol. 102, p. 923.*

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Now, while on the one hand the District Judge dismissed the plaintiffs' claim with costs, on the other the plaintiffs claimed that the action be merely struck off the trial roll, to be restored at the termination of hostilities. The latter order, in my opinion, could on no account be made. The moment war was declared the plaintiffs became disentitled to sustain, as shown above, a *persona standi in judicio*, and to allow the action merely to be struck off the trial roll, to be restored thereafter, would be tantamount to allow the plaintiffs to sustain a *persona standi in judicio* in the interval; in other words, to be before the Court as parties to an action. On the other hand, under our procedure, which does not allow of non-suit, a decree of dismissal is a bar to the institution of a fresh action on the original cause of action (section 207, Civil Procedure Code). That being so, the plaintiffs would be prejudiced by the present decree, if they have in law the right (as to the existence of which I do not feel called upon to express an opinion here) to institute a fresh action after the termination of hostilities. The order should be one which, while it effectually and conclusively terminates the action, should conserve to the plaintiffs the right (if any) that I have referred to. Such an order is not provided for by the Code, and therefore it is, I think, open to us to call in aid the provision of section 4 of the Code in formulating an order. That section provides for the giving by the Supreme Court to District Courts of special orders and directions on matters of procedure and practice for which no provision is made by the Code. I think that the section is sufficient authority to the Supreme Court, in the absence of provision in the Code itself, to make a special order when the exigencies of a case call for it.

For these reasons I agree to the order proposed by my Lord the Chief Justice.

DE SAMPAYO A.J.—

There is no doubt as to the incapacity of an alien enemy either to institute or to prosecute actions in British Courts during the continuance of hostilities. The right, however, to sue on a contract made before the war is not extinguished, but is only suspended, and revives in full force on the restoration of peace. This incapacity appears to me to be based, not so much on the loss of *persona standi in judicio*, as on the principle that the Courts will not assist an alien enemy to enforce rights against the subjects of the country. In the recent case of *Robinson & Co. v. Continental Insurance Co. of Mannheim*, Mr. Justice Bailhache stated the matter thus: "I take it that the reason why an alien enemy when plaintiff cannot proceed with his action against a British subject during hostilities is founded upon the assumption that when two countries are at war all the subjects of each country are at war, and that it is contrary to public policy for the Courts of this country to

render any assistance to an alien enemy to enforce rights which but for the war he would be entitled to enforce to his own advantage and to the detriment of a subject of this country." Accordingly it was held in that case that the suspensory rule did not apply to the converse case where the alien enemy was the defendant, and that the alien enemy had a status in Court for the purposes of defence. That being so, and the present action having been instituted before the outbreak of the war, the only question is, How is the suspension of the further prosecution of the action to be effected? It is curious that no previous case is available to show the precise form of order to be made in similar circumstances, except what may be gathered from *Le Bret v. Papillon.*[1] In that case the defendant had argued that the plaintiff should be barred from having and maintaining the action, which in the old system of pleading would have resulted in the extinguishment of the whole right of action, but the Court held, and so ordered, that the plaintiff should only be barred from further having or maintaining his action. It may be that the result of this order under the old system put an end to the pending action, but it is clear that it did not extinguish the right of action of the plaintiff, and that it was expressly intended to leave untouched the plaintiff's right to enforce his claim on the restoration of peace. In this action the District Judge entered an absolute decree of dismissal. Under our Civil Procedure the effect of such a decree is to disentitle the plaintiff to bring another action at any time hereafter on the same cause of action. This point was brought to the notice of the District Judge, but he said that the ordinary consequence of the loss of status by a plaintiff after action brought was the dismissal of the action, and he added , "if the question is to be decided upon the broad ground of the interests and convenience of the respective parties, I think the verdict must be for the defendants, who are British subjects, and, who cannot directly or indirectly be held responsible for the circumstances which make it impossible for the plaintiffs to proceed." This amounts to saying that the defendants being British subjects may justly be for ever relieved of their actual liability. Obviously this cannot be the right way of dealing with the matter. The English Courts appear to act more in accordance with the fundamental principle of justice. The rule of international law in question is not intended to be for the benefit of private individuals, but in the interest of the State, so that the enemy may not, by enforcement of claims, be supplied with means to prosecute the war. Indeed, if as undoubtedly is the case, an alien enemy may bring his action after the restoration of peace, it is impossible to see any valid reason why one who has brought his action before the commencement of hostilities should be in a worse position. I have already referred to the case of *Le Bret v. Papillon.*[1] Other cases appear to me even

[1] (1804) 4 *East* 502.

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to recognize some degree of status and to grant some measure of relief. For instance, in *Harman v. Kingston*[1] the defence of alien enemy was rejected because it had not been properly pleaded in due time. In *ex parte Boussmaker*[2] the Court allowed a claim in bankruptcy to be entered in favour of an alien enemy, and only reserved the payment of dividends. It will be borne in mind that the admission of a claim in bankruptcy is of the nature of a judgment for the amount claimed. In *Vanbrynen v. Wilson*,[3] where plaintiff had recovered judgment, the Court refused to stay execution even though the defendant offered to bring the money into Court. It is true that the Court, while refusing to give the defendant the summary relief asked for, referred him to whatever other remedy he might have at law, but the effect of the refusal was to leave the alien enemy as plaintiff on the record, with a judgment in his favour which he might or might not be able during the existence of hostilities to execute.

I think in this case we should find a way to give effect to the suspensory rule without destroying altogether the right of action. I am inclined to think that the appropriate order would be to stay proceedings. This is in fact what was applied for in the recent cases of *Robinson & Co. v. Continental Insurance Co. of Mannheim* and *Princess Thurn and Taxis v. Moffitt* (*supra*). These cases turned upon other points, but no exception was taken to the form of order asked for. It may be that in England a stay of proceedings sometimes involves their complete termination so far as those proceedings themselves are concerned. If that be so, then it seems to me that that form of order would be all the more appropriate, since it would enable the party to commence proceedings afresh at the proper time. It is significant that in the first of the above cases Mr. Justice Bailhache contemplated the contingency that the alien enemy defendant, against whom the action was held to be capable of being proceeded with, might ultimately have an order for costs, and with regard to that he suggested that the difficulty might be met by suspending the execution of the order. This, again, seems to me to illustrate the fact that the Court in certain circumstances will accord to the alien enemy some measure of aid, though the enforcement of any relief granted will be suspended.

However, I agree to the order proposed by my Lord the Chief Justice, as it substantially carries out the suspensory rule without extinguishing the entire remedy.

Varied.

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[1] *(1811) 3 Camp. 150 and 153.* [2] *(1806) 13 Ves. jun. 71.*
[3] *(1808) 9 East 321.*