1914.

THE COLONIAL COURT OF ADMIRALTY IN PRIZE

Present: Wood Renton C.J. and P.

IN PRIZE ss. "REICHENFELS."

Cause No. 5.

Alien enemy—Locus standi *in Prize proceedings.*

An alien enemy has no *locus standi* in Prize proceedings, unless he is in a position to rely upon some ground which exempted him from the general disability of alien enemies in this respect.

"An alien may show, if he can, that, although an alien, he is not an enemy, or that, although an enemy, his *locus standi* has in some way been recognized by the Sovereign. It is in such cases as these, and in such cases alone, that under the new procedure, as under the old, he can put forward before the Court the grounds of his claim."

THE facts appear from the judgment.

The Hon. Mr. Anton Bertram, K.C., A.-G., and *Obeyesekere, C.C.*, for the Crown.

Allan Drieberg, for the claimants.

October 23, 1914. WOOD RENTON C.J. and P.—

On the motion by the Attorney-General for the first hearing of the above cause, Mr. Allan Drieberg, as counsel on behalf of the Deutsches Kohlen Depôt G. M. B. H., who are the alleged owners of 4,354 tons of coal forming part of the cargo of the *Reichenfels* at the time of her capture, applied for the entry of his appearance in these proceedings. This application was opposed by the Attorney-General on the ground that the Deutsches Kohlen Depôt are alien enemies, and have, therefore, no *locus standi* in this Court. This contention raises an interesting point of law, which was fully and ably ragued before me on both sides. I have no doubt but that the Attorney-General's argument is entitled to prevail. The same point has recently been considered by the Prize Court in England in two cases: the *Chile* and the *Marie Glaeser*. In the former of these cases, Sir Samuel Evans expressed, without directly deciding the matter, a strong opinion against the right of an alien enemy to appear in Prize proceedings, unless he was in a position to rely upon some ground which exempted him from the general disability of alien enemies in this respect. In the latter case this *obiter dictum* assumed the form of a direct decision in the same sense.

The authorities, when carefully looked into, establish beyond all question the soundness of the conclusion at which the learned President of the Prize Court in England has thus arrived. The Deutsches Kohlen Depôt is admittedly a company incorporated in Germany and under German law, and the present case has been argued on the assumption that it possesses no commercial domicil in this country. In these circumstances, has it any *locus standi* here? Mr. Allan Drieberg strenuously argued that this question should be answered in the affirmative; in the first place, because the policy of the law in regard to alien enemies has been modified by recent international treaties, such as The Hague Convention, while the new Prize Rules (see Order III., r. 5) themselves recognize the status of aliens; and, in the second place, because the Crown had itself made his clients a party to the proceedings by serving on them a notice of the motion for the appraisement and sale of the cargo under the rule 93 of the old rules. Before dealing with these contentions, I may point out the basis of the disability with which we are here concerned.

The Maritime Jurisprudence of England, in common with that of most other civilized countries, has from the earliest times prohibited all trading with a public enemy, unless with the permission of the Sovereign.

"In my opinion," said Lord Stowell (then Sir William Scott) in *The Hoop*, [1] "no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow if every person in time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side that the merchant should be compelled in such a situation of the two countries to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?"

This principle is not one of mere ephemeral importance evolved during the Napoleonic wars, and now invested only with historical interest. It rests upon broad and permanent grounds of public policy, and since the time of Lord Stowell it has been re-asserted and enforced whenever an occasion for its application arose. It holds as prominent and as firm a place in the Prize cases decided during the Crimean war and during the war between England and the old South African Republics as it did at the end of the eighteenth and in the early part of the nineteenth centuries (see *The Panaja Drap aniotisa* [2] and *Janson v. Driefontein Consolidated*

[1] *(1799) Roscoe 's English Prize Cases 106.*

[2] *(1857) 2 Roscoe 's English Prize Cases 560.*

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Gold Mines [1]). Lord Stowell, in the judgment from which I have just cited, proceeds to show that, as the relation existing between two belligerent countries is consistent by its very nature with the continuance of commerce between them, it is equally inconsistent with the existence of any right to sustain any contract by an appeal to the tribunals of the one country on the part of the subjects of the other.

"In the law," he says, "of almost every country, the character of alien enemy carries with it a disability to sue, or to sutain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our Courts of the law of nations. They are so far British Courts that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace *pro hâc vice*. But otherwise he is totally *ex lege*. Even in the case of ransoms, which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill, but the payment was enforced by an action brought by the imprisoned hostage in the Courts of his own country for the recovery of his freedom."

The authority of this rule of law has been invariably upheld by the Courts. The fact—and here I come to deal in detail with Mr. Drieberg's argument—that in modern times, partly by international engagements, such as The Hague Convention, and partly by concessions made by one belligerent to the subjects of another, the rigours of war have been somewhat abated does not warrant the conclusion that the position of alien enemies has been modified in matters with which such international engagements and concessions do not deal, but rather the reverse. The provision in Order III., r. 5, of the new Prize Rules that "an alien shall, before entering an appearance, file in the registry an affidavit stating the grounds of his claim," presents no difficulty when the subject is considered from the historical point of view. Mr. Drieberg, of course, did not argue that the rule just mentioned, even if it bore the construction which he sought to put upon it, would be a binding authority, inasmuch as this Court has decided that all pending Prize causes shall be concluded under the old rules. But he invited me to regard it as throwing light upon the modern policy of the law with respect to the position of alien enemies in legal proceedings, and he urged in particular that the words "grounds of his claim" showed that the alien enemy was now no longer to be required to prove a *locus standi*, but that he had a right to have the claim itself dealt with

[1] *(1902) Appeal Cases 484.*

oon the merits. The recent decision of Sir Samuel Evans in the *Marie Glaeser* is a direct authority against Mr. Drieberg's contention oon this point. But the matter is conclusively disposed by the judgrment of Dr. Lushington in an older case, *The Panaja Drapaniotisa*,[1] vwhich came before the English Prize Court during the Crimean war.

"Now, speaking," says Dr. Lushington, "to the best of my rrecollection, and so far as I have been able to refresh my conviction l by search as to matters with which I have not been directly con- r versant for so many years, and which involve only questions of [practice and not principle, and consequently take less hold of the r memory, with respect to the claim offered in this case, and the ; affidavit in support thereof, I have caused a search to be made as to r the practice both in the former and present war, and I am glad to t find that the principle and the practice, with a few unimportant) exceptions, entirely concur.

"The principle is this, that to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral States resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims."

The learned Judge proceeded to hold that the claimant in his affidavit must describe the place to which he belonged, and negative all enemy's interests "in a form specially framed for that purpose, and intended to apply ..... to any person resident within the territories of the enemy, to whatever country he may owe allegiance."

Then comes the passage applicable to aliens: "The excepted cases are where an enemy merchant claims under an Order in council, or license, and then of necessity the form is altered and the ground of the special claim inserted." The case of the *Phœnix*[2] is to the same effect, and incidentally shows the meaning to be attached to the provision in Order III., r. 5, of the new Prize Rules as to the grounds of an alien's claim. The *Phœnix*, a Russian vessel, was captured soon after the outbreak of the Crimean war and sent to London for condemnation. A claim to the ship was made on behalf of the owners, who were Russian subjects. The Queen's Advocate took a preliminary objection to the form of the affidavit of claim, inasmuch as it contained no statement of "the ground" on which the claim was made, and added that, while he could not speak from any experience of his own, he had been informed by the Advocate of the Admiralty (Dr. Phillimore) "that when

[1] *(1857) 2 Roscoe's English Prize Cases 560.*
[2] *(1854) 2 Roscoe's English Prize Cases 238.*

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a claim was made by an enemy, it was always necessary to set forth on what ground the claim was made, whether under a license, under an Order in Council, or on what other ground." Dr. Lushington disposed of the case on the main issue involved in it without calling for a further affidavit. But he recorded his opinion on the Queen's Advocate's preliminary objection as follows: "In the last war the principle and the practice was that in the case of enemy claimants it was always necessary to state something to show that they had a *locus standi;* the same course must be followed in the present war."

It clearly results from these citations that, even under the old practice, provision was made for claims by aliens; that such claims had to be supported by affidavit; and that where the alien was also an enemy, his claim could be entertained only where he could show a "ground" for it, or, in other words, where he could bring himself under one of the excepted categories. Order III., r. 5, is merely a rule of procedure, and does not, in my opinion, place alien enemies in a position different from, or more favourable than, that which they have hitherto occupied in regard to their *locus standi* in the Courts. An alien may show, if he can, that although an alien, he is not an enemy, or that, although an enemy, his *locus standi* has in some way been recognized by the Sovereign. It is in such cases as these, and in such cases alone, that under the new procedure, as under the old, he can put forward before the Court the "grounds of his claim." It is not suggested that the Deutsches Kohlen Depôt is in a position to set up any claim of this description. The fact that the company has been served with notice of the motion under rule 93 for appraisement and sale of the cargo cannot give to it any right to intervene in these proceedings. Such notices are served in conformity with the express requirement of rule 93 of the old procedure. The owner is not called upon to appear in Court and show cause against the motion, and no right to do so is conferred upon him.

I dismiss the application.

Application dismissed.