ALIEN ENEMY CASE ARGUED IN APPEAL

King's Bench Court to Decide Whether Austrian Can Sue During War

MANY CASES PENDING

Decision in Test Case to Create Jurisprudence Governing Other Actions Held Up

The question as to whether an alien enemy can sue before a Canadian court, taking into consideration the state of war existing, will now be passed upon by Their Lordships of the Provincial Court of Appeals, as a result of argument which took place on Saturday in the case of Angelo Viola vs. Mackenzie, Mann & Company. As is known Viola sought permission to sue under the Workmen's Compensation Act, but when action was taken the defendants inscribed in law against the suit, on the grounds that plaintiff being an Austrian and thus an enemy, could not be said to have any standing before the courts. Mr. Justice Bruneau, whilst not denying plaintiff's right to sue, ruled that the suit should be held in suspense pending a termination of hostilities. As Viola is destitute and utterly unable to work as a result of the injuries received in an accident whilst in the employ of the defendants, his counsel, Messrs. Goldstein, Beullac and Engel, with Fabre Surveyor, K.C., as counsel, entered an appeal from Mr. Justice Bruneau's finding. Messrs. Cook and Magee, acting for the defendant company, opposed the appeal.

"The question at issue," argued counsel for appellants, "is whether a person of enemy nationality resident in Canada has a 'locus standi' before our courts. The appellant submits that the learned judge of the court below failed to distinguish between 'alien enemy' and 'alien friends.' This distinction is clearly established by the majority of international authors. Henriques—on Law of Aliens and Naturalization—the author cited in the judgment appealed from, at page 76, says: 'Our government has long ago ceased to enforce the ancient law in all its rigor, and since the commencement of the seven years' war in 1856, it has been the custom of our government to allow the subjects of a state with which we may be at war, who may be within the realm at the commencement of hostilities, to reside there so long as they demean themselves dutifully, and such persons are in effect alien friends and entitled to be treated as such.' Hall in his book on International Law, 6 ed., page 388, makes the same distinction—he says: 'Where persons are entitled to remain either for a specified time after the commencement of war or during good behavior they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners except that they cannot carry on a direct trade with the enemy country.' Cockburn — Nationality — Page 150; "In modern times, in declaring war the sovereign usually in the proclamation of war, qualifies it by permitting the subjects of the enemy state resident here to continue so long as they demean themselves peaceably, and such persons are deemed alien friends.' Halsbury on 'Laws of England'—Page 310, No. 682: 'It has been for a long time the custom to exonerate alien enemies, who have been allowed to remain in this country and of good behavior, from the disabilities of alien enemies.' Westlake, in his book on International Law, after citing on page 41 that the relations of enemies ought to be held to exist: between two states at war with one another; between each of those states and those subjects of the other whom it may be necessary to affect by act of force, and so far only as it is necessary so to affect them; but not between individuals, says on page 45: 'Permission to enemy subjects to remain in the country, even if in the express words of the treaty it should happen to stand alone, must in common sense carry with it permission to enjoy their property while so remaining.' Oppenheim, on International Law, 2nd ed. (1913), vol. 2, on page 133, enumerates six exceptions to the rule that enemy subjects are prevented from taking and defending legal proceedings which exceptions include the cases of enemy subjects who have a license to trade or are allowed to remain in the country of a belligerent. This doctrine has been accepted and approved of in the following cases: Princess Thurn and Taxis vs. Moffit, decided in England recently, and reported in the Times Law Reports of October 16th, 1914. His Lordship Mr. Justice Sargeant, in delivering the judgment of the court, said that the law was correctly stated in Hall's "International Law.' An American case in point is that of Clarke vs. Morey, 10 Johnson's Reports—page 68. This case gives a vivid conprehension of the earlier English law and decisions. This was a case on a note taken by a British subject before the courts of the State of New York during the War of 1812. The plea was that the plaintiff could not maintain his action because he was an alien born in the United Kingdom of Great Britain and Ireland, and not made a citizen of the United States by naturalization or otherwise, and that a state of war existed between Great Britain and Ireland and the United States of America. Kent, C.J., in delivering the opinion of the court, said: 'To render the plea of an alien enemy good, it seems now to be understood to be the law of England that the plea must not only aver that the plaintiff was an alien enemy but that he was adhering to the enemy.' The view that subjects of the enemy state resident here are entitled to sue and be sued has achieved a notable triumph at The Hague Conference of 1907 when an addition was made to the prohibitions of article 23 of the regulations respecting the laws and customs of war on land. It is cited as section H. The translation adopted, by the British Foreign Office in the Blue Book issued in 1908 reported in the British Parliamentary Papers, Miscellaneous, No. 6—1908—page 55, renders the section in English as follows (it is prohibited): 'To declare abolished, suspended, or inadmissible the right of the subjects of the hostile party to institute legal proceedings.' This treaty having been subscribed to by Great Britain and Austria-Hungary constitutes the law of this land until denounced."

In presenting his side of the case, J. W. Cook, K.C., pointed out that three points require consideration.

First. Has Viola, a subject of a nation with which the British Empire is at war, the right to sue British subjects in the Courts of this Pro-

vince? Second. Assuming that he has not such a right at common law, has he acquired such a right owing to the terms of the various Proclamations that have been made? Third. Under any circumstances, can the Respondent so deal with Viola as to make effective the various terms of the Workmen's Compensation Act to which reference has been made? "The common law governing the rights of aliens in times of war," said Mr. Cook, "is clearly defined by Lord Davey in Jason vs. Driefontein Consolidated Mines, Limited, 1902, A. C. 484, where he points out at p. 499 that actions on contracts are suspended during the continuance of the war and revive on the restoration of peace. This apparently is the only modern authority prior to the outbreak of hostilities on the 4th August last, but it is well to note that Lord Halsbury at 6. 493, makes the statement that an alien enemy cannot sue while war lasts, similar statements being made by Lord Landley at pp. 509 and 510. The effect of war is also clearly stated by Oppenheim, 2 International Law, p. 111, in the following words: "As regard British law, there is no doubt that it prohibits commercial and other friendly intercourse between British and enemy subjects, cancels existing contracts, including partnership, does not allow an enemy subject to sue or be sued in British Courts." Henriques' Law of Aliens and Naturalization is to the same effect. Thus, he states at p. 76, "An alien enemy is unable to sue upon any cause of action, even though it has arisen before the commencement of hostilities; but in this case, his right of action is not destroyed, it is merely suspended during the continuance of the war." In Bacon's Abridgement, Vol. I (7th Edition), p. 183, the law is thus stated: "The plea of an alien enemy is a bar to a bill for relief in equity as well as to an action at law, etc., etc." If it were necessary, abundant additional authority might be quoted in support of the proposition that no right of action whatever might be quoted in support of the proposition that no right of action whatever during war vests in an alien enemy. The proposition is elementary, the rule being 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 and 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. Judgments similar to the one now appealed from have been rendered by many of the judges of the Superior Court and, indeed, it may be said that the practice of suspending actions, such as the present, is now definitely fixed. The same rule has been applied by the Courts of Ontario, the Respondent referring to the case of Bassi vs. Sullivan, 7 Ontario Weekly Notes, p. 38 (a decision of Mr. Justice Hodgins rendered in September, 1914) and to the case of Dumenko vs. Swift Canadian Company, 7 Ontario Weekly Notes, p. 155. In this latter case, which was decided on the 24th October last Chief Justice Falconbridge, in rendering judgment, says: "As to the Defendant's motion, it is quite clear upon the authorities that the Plaintiffs, having become alien enemies, ought to be barred from further having and maintaining this action. See Le Bret vs. Papillon 4 East 502; Brandon vs. Nesbitt (1794) 6 T.R., 23 Mew's Digest, Vol. 8, pp. 210, 211. The Plaintiff's action is therefore on this ground also dismissed with costs. This dismissal is not necessarily, and I do not mean it to be, a bar to a subsequent action in respect to the same matter after peace shall have been declared."

For the above reasons, the Respondent submits that as the Appellant is admittedly an Austrian subject, he has prima facie no right whatever to appear before the Courts of this Province, that no presumption exists in his favor and that in consequence the judgment appealed from is on general principles unquestionable.

It was held by Mr. Justice Charbonneau in the case of Touchette vs.

Dominion Textile Company (15 Q P R, p. 298) that an action instituted under the provisions of the Compensation Act was necessarily an action ex contractu. A judgment similar in effect was rendered by Mr. Justice Lafontaine in the case of Vincent vs. The Grand Trunk Railway (R.J.L., 45, S.C. 353). This is undoubtedly correct as the right of recovery in such a case is in no way dependent upon the fault of the Defendant or his employees, and is in no way subject to the rules governing delictual claims under Articles 1053 and following of the Civil Code. In the present case, the Plaintiff bases his claim upon the legal contract created by the Act, which obliges the employer in the event of an accident, and even in the total absence of fault on his part, to pay a settled compensation. Various rules are laid down by the Act defining the respective rights of the parties. The workmen has the right to claim a fixed annuity under certain conditions, and by a recent amendment (4 George V., Cap. 57) can claim in lieu of such annuity a fixed capital sum. Thus, even after the action has been instituted, further definite agreements in certain cases can be arrived at between the parties. We have already endeavored to show that the Proclamation relating to trading with an enemy and to contracts with an enemy has no application, but if the reverse were held, it is apparent that the Respondents in this case would be prohibited from entering into any contract or arrangement with the Appellant or from paying him any sum or sums of money until they were absolutely satisfied that he was not an alien enemy and that he came within the terms of the proclamation of the 15th August, which we repeat has in no way been established in the present case. Further, under Article 27 of the Compensation Act, the Judge of the Superior Court is given the right "to use such means as he may think useful to bring about an understanding between the parties, and if they agree, he may render judgment in accordance with such agreement." In the present case, Mr. Justice Bruneau has in effect declared that the Plaintiff as an alien enemy is not entitled to invoke the provisions of the Act pending hostilities. If his Lordship, under the terms of Article 27, had endeavored to bring about a settlement of the present case, he would thereby have been approving of an illegal agreement and one contrary to the public policy of this country. On the record as it now stands it is quite impossible for the parties to in any way take advantage of the useful provisions of the Statute.