

O. Wuthrik Vs. David

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Court : Chennai

Decided On : Oct-24-1916

Reported in : (1916)31MLJ860

Appellant : O. Wuthrik

Respondent : David

Judgement :

Srinivasa Aiyangar, J.

1. This is a suit to recover rent. The plea is that the lease was granted by and the covenant to pay rent entered into with an alien enemy and the covenant was therefore void and unenforceable. The trial Judge accepted the plea and dismissed the suit and this application is to revise the decree. To make the plea intelligible it is only necessary to state the following facts. The land leased is in South Canara in British Territory and belongs to the Basel Evangelical Mission. The lease was granted by a Mr. Buhus, a German, the then secular Agent of the Mission on October 2, 1914 after war was declared, to the defendant, a British subject. The suit to recover rent was instituted by the present secular Agent of the Mission one Mr, Wuthrik. Enemy character was not attributed to the Basel Mission, at any rate no point was raised about it in the Lower Court and there are no materials on record to determine the nationality of the Mission. We know nothing about its constitution ; whether it is a trading corporation or a corporation at all,

how and under what authority was it constituted, who are its members, or what is its principal place of residence, or business if any, we do not know.

2. Again there was no contention that the plaintiff Mr, Wuthrik is an alien enemy and was not entitled to sue in British Indian Courts by reason of the prohibition contained in Section 83 of the Code.

3. There was further no contention that Herr Buhus could not, after the declaration of war, act or continue to act as the agent of the Mission; i. e., that the Basel Mission could not after war was declared appoint a German as agent or if there was a previous contract of agency, that agency was abrogated by the war.

4. The only question then is whether the covenant to pay rent is void as Herr Buhus was a German. I am not familiar with this branch of law, but on the best investigation that I could make of the matter for the present purpose, I have arrived at the following conclusions as best supported by authority.

5. On a declaration of war the citizens or subjects of the belligerents become enemies of each other and political status determines the question of enemy ownership. Vattel, Droit des Gens liv 3 c, Section 70 cited in Janson Driefontein Consolidated mines, Ltd. (1902) A.C. 484 The Beneto Estenger (1900) 176 U.S.R. 568 per Fuller, C.J.

6. On a declaration of war it appears the Sovereign has in theory full right to take the persons and confiscate the tangible property of the enemy found within his territory; this right however is said to be a naked and impolitic right condemned by the enlightened conscience and judgment of modern times, Hanger v. Abbott (1867) 6 Wal 532 and in practice is not likely to be resorted to except in case of public necessity or by way of reprisal; but a declaration of war per se does not import a confiscation of enemy property found on land or on the high seas. Brown v. United States 8 Cranch p. 110.

7. During war all commercial intercourse and trading between enemies is illegal unless sanctioned by the authority of the Government. Persons in enemy country whatever their nationality are treated as enemies as far as relates to their trade.

Their commercial domicile during war or the war domicile determines their enemy character. *Janson v. Driefontein Consolidated Mines Ltd.* (1902) A.O. 484 per Lord Davey and at pp. 505 and 506 per Lord Lindley, From this it follows that enemy subjects resident in British territory who are permitted to remain there are not alien enemies and can contract like subjects ; whether such permission should be express or may be implied by a person being allowed to remain is a point on which there appears to be some diversity of opinion; but the weight of authority appears to favour the view at any rate in the case of aliens who were residing in British Territory before the outbreak of war, who continue to remain after such outbreak, that permission should be presumed, unless they are ordered to remove themselves within a certain time and they do not. This I think is the effect of the decisions in *Wells v. Williams* (1697) 1 Salk. 46 : *Ld. Raym* 282 *Daubigny v. Davallon* (1794) 2 Ans 462 s. c. 145 E.R. 936

8. *Janson v. Driefontein Consolidated Mines Ltd.* (1902) A.C. 484 the bottom of page 505 and top of page 506 per Lord Lindley, *Kershaw v. Kelsey* (1869) 100 Mass 861: 97 Am. Deo. 124 and *Schaffenius v. Goldberg.* (1916) 1 K.B. 284

9. The prohibition as regards intercourse between hostile aliens is, on the best authority, confined only to commercial intercourse and does not render illegal all contracts whatever be their nature. The question was elaborately discussed in the leading case of *Kershaw v. Kelsey* (1869) 100 Mass 861: 97 Am. Deo. 124 by Gray, J. and the conclusion reached that the prohibition extended only to intercourse between citizens of the two belligerents which was inconsistent with the state of war between them including any act or contract which tends to increase his resources and every kind of trading or commercial dealing, but it did not prevent an agreement made in enemy territory to pay money there out of funds accruing there. It was also said that when a creditor although a subject of the enemy remains in the country of the debtor or has a known agent there, authorised to receive the amount of the debt during war, payment there to such creditor or his agent can in no respect be construed as a violation of the duties imposed by the war. This appears also to be the opinion of Lord Davey and Lord Lindley in *Janson v. Driefontein Consolidated Mines Ltd* (1902) A.C. 484 and of Lord Stowell in '*The Hoop*'. In *Willison v. Patteson* (1817) 7 Taunt 139 it is said in

general terms that all contracts with an alien enemy is void, but the drawing of the bill in that case appears to be a commercial transaction and involved the withdrawing of money from England to France. In 'The Julia' 8 Cranch 181 at p. 193 Story, J. took a different view, but the observations appear to be obiter. In *United States v. Lane* 8 Wal. 185 at 195 Davis, J. said 'by a universally recognised principle of public law commercial intercourse between states at war with each other is interdicted.'

10. If either of the last two conclusions is correct, there can be no doubt that the defendant's plea is not an answer to the suit. It is not said that Mr. Buhus came into British India after the declaration of war. Again the lease cannot be said to be a commercial transaction ; the rent payable was intended apparently to be used in this country for the purpose of the mission. The case of *Kershaw v. Kelsey* 100 Mass. p. 561 appears to be on all fours with the present case and is precisely in point.

11. I therefore reverse the decree of the Lower Court and remand the suit for trial according to law.

12. Costs will abide.

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