

Federal Rules of Civil Procedure the joinder of parties and the joinder of causes of action in the instant case would be proper.⁷ England and American states with recently adopted codes of procedure, like that of Illinois,⁸ would also sanction the joinder in this case.⁹ The joinder of parties and the joinder of causes of action held to be improper in the instant case do not violate the present policy of the Missouri law because, as is demonstrated in this case and in other Missouri cases, another Missouri statute¹⁰ allows improper joinder to be waived by answering over.¹¹ The Proposed General Code of Civil Procedure for the State of Missouri, prepared by the Missouri Supreme Court Committee on Civil Procedure, Plan II, Article 2, Section 9, liberalizes the requirements for joinder and would allow the joinder in the principal case.¹²

It is submitted that the present Missouri procedure is out-dated. The instant case illustrates how a substantive right can, under present Missouri procedural rules, be blocked by a procedural technicality. J. L. D.

CONSTITUTIONAL LAW—SUITS BY ENEMY ALIENS—RIGHT OF RESIDENT ENEMY ALIENS TO SUE IN OUR COURTS—[Federal].—On April 15, 1941, the plaintiff, a native born Japanese enemy alien, who has resided in this country for the past thirty-seven years, attempted to sue the owners of the vessel *Rally* in the District Court for the Southern District of California for damages for injuries sustained and also for wages due him for services rendered, as fisherman and seaman. The defendants answered and, after a state of war had been declared between the United States and Japan, moved to the action on the ground that, since the peti-

7. Federal Rule 20 (a).

8. Illinois Revised Statutes 1941, c. 110, §147.

9. 25 Halsbury's Laws of England (2 ed. 1937) 263; New York Civil Practice, Art. 24 §209; New York Thompson's Laws (1939), Part II, p. 1646; New Jersey Revised Statutes (1937) Vol. I, §2: 27-24.

10. R. S. Mo. 1939 §926.

11. *Hendricks v. Calloway* (1908) 211 Mo. 536, 111 S. W. 60; *Wolz v. Venard* (1913) 253 Mo. 67, 161 S. W. 760; *Shaffer v. Chicago, R. I. & P. R. Co.* (1923) 300 Mo. 477, 254 S. W. 257; *Hanson v. Neal* (1908) 215 Mo. 256, 114 S. W. 1073.

12. Proposed General Code of Civil Procedure for the State of Missouri, Plan II, Article 2, Section 9, reads as follows: "*Permissive Joinder.* All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

tioner was an enemy alien, he had no "right to prosecute any action in any court of the United States during the pendency of the said war." The District Judge granted the motion to abate, and the petitioner's motion for leave to file a writ of mandamus in the Circuit Court of Appeals to compel the District Court to vacate its judgment was denied without opinion. Some months later the petitioner was interned, and the government intervened in his behalf, moving for leave to compel the District Court to proceed to immediate trial of the petitioner's cause of action.¹ *Held*: Motion granted. *Ex parte Kumezo Kawato*.²

Prior to this decision, the status of law-abiding resident enemy aliens in our federal courts was very uncertain, and many were deprived of recourse to them in the enforcement of their rights against others.³ Much of this confusion and misapplication of their common-law right to sue may be attributed to the failure of the federal courts to make a clear distinction between the rights of resident enemy aliens and those of non-resident enemy aliens.⁴ Yet the law on this point seems quite clear and simple: While non-resident enemy aliens may not maintain actions in our tribunals,⁵ resident enemy aliens may,⁶ in the absence of explicit statutes and executive

1. (1942) 316 U. S. 650.

2. (1942) 63 S. Ct. 115, 87 L. Ed. 94.

3. In *re Bernheimer* (1942) 130 F. (2d) 396, reversing (1942) 42 F. Supp. 830. See *Verano v. De Angelis Coal Co.* (1941) 41 F. Supp. 954, 955, in which the court said: "If this plaintiff should recover a judgment and it then appears to the court that a condition of war does exist between the two countries, appropriate action will be taken by the court on the basis of the facts and circumstances then existing."

4. In *Kaufman v. Eisenberg* (1942) 117 Misc. 939, 32 N. Y. S. (2d) 450, the judge on his own motion, after granting the defendants a stay of proceedings because the "plaintiff was an alien enemy, being a national of Germany," reconsidered his previous ruling, and reversed the same, saying: "However, upon further consideration it appears that the mentioned cases were dealing with the status of a non-resident alien enemy, while the plaintiff in the instant case is a resident alien enemy and a different rule is therefore applicable."

5. *Daubigny v. Davallon* (1795) 2 Anstr. 462, 145 Eng. Rep. 936; *Masterson v. Howard* (U. S. 1873) 18 Wall. 99; *Seymour v. Bailey* (1872) 66 Ill. 288; *Hutchinson v. Brock* (1814) 11 Mass. 119; *Russ v. Mitchell* (1864) 11 Fla. 80; *Perkins v. Rogers* (1871) 35 Ind. 124; *Sanderson v. Morgan* (1868) 39 N. Y. 231; *Jackson v. Decker* (N. Y. 1814) 11 Johns. 418; *Rotar v. Industrial Commission of Ohio* (1931) 40 Ohio App. 168, 178 N. E. 209; *Speidel v. Barstow Co.* (D. C. R. I. 1917) 243 Fed. 621; *Rothbarth v. Herzfeld* (1917) 167 N. Y. S. 199, *aff'd* (1917) 223 N. Y. 578, 119 N. E. 1075.

6. State court decisions: *Kristel v. Michigan Central R. R.* (1919) 213 Ill. App. 518; *Breuer v. Beery* (1922) 194 Iowa 243, 189 N. W. 717; *Weiditschka v. Supreme Tent* (1919) 188 Iowa 183, 170 N. W. 300; *Wolf v. Cudahy Packing Co.* (1919) 105 Kan. 317, 182 Pac. 395; *Parkinson v. Wentworth* (1814) 11 Mass. 26; *Mittelstadt v. Kelly* (1918) 202 Mich. 524, 168 N. W. 501; *Posselt v. D'Espard* (1917) 87 N. J. Eq. 571, 100 Atl. 893; *Kaufman v. Eisenberg* (1942) 32 N. Y. S. (2d) 450; *Clarke v. Morey* (N. Y. 1813) 10 Johns. 69; *Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, 95 S. E. 851.

Federal Cases: *Verano v. De Angelis Coal Co.* (1942) 44 F. Supp. 726; *Anastasio v. Anastasio* (1942) 44 F. Supp. 725; *Otteridge v. Thompson*

pronouncements to the contrary. This rule is well established in numerous decisions of the state courts.⁷ However, this right of resident enemy aliens can be withdrawn or cancelled either by the legislature or by executive order at any time, but unless and until such time, the right exists.⁸

In England the distinction between resident and non-resident enemy aliens was recognized at an early date. The earlier rule barred enemy aliens entirely from suing in the English courts whether the alien was a resident or non-resident, friendly or unfriendly. However, in 1697, in *Wells v. Williams*,⁹ it was held that enemy aliens residing in England by the King's license and under his protection, could sue in English courts to enforce their rights. The rise of trade and commerce lay behind this distinction and was the basis for the amelioration of the old rule existing before the *Wells* case.¹⁰ Subsequently, Chancellor Kent, in 1813, in the celebrated case of *Clarke v. Morey*,¹¹ transplanted the English principle that permitted resident aliens to sue to American soil and extended the rule to aliens coming to this country and residing here, though without an express license from the government.¹² Though his presence is unknown, his license to sue is implied from his being suffered to remain. This case forms the bulwark on which all American authority is firmly established. The rule that only resident enemy aliens could sue was followed and applied when the question arose during the Civil War,¹³ and again during World War I the courts adhered consistently to the principles of *Clarke v. Morey*.¹⁴

Now again, in World War II, the courts with sporadic exceptions,¹⁵ have

(C. C. D. C. 1814) 18 Fed. Cas. 910; *Society for the Propagation of the Gospel v. Hartland* (C. C. D. N. H. 1814) 22 Fed. Cas. 753; *The Oropa* (S. D. Ala. 1919) 255 Fed. 132; See Sterck and Schuck, *The Right of Resident Alien Enemies to Sue* (1942) 30 Georgetown L. J. 421; *Battle, Enemy Litigants in our Courts* (1942) 28 Virginia L. J. 429.

7. *Breuer v. Beery* (1922) 194 Iowa 243, 189 N. W. 717; *Wolf v. Cudahy Packing Co.* (1919) 105 Kan. 317, 182 Pac. 395; *Mittelstadt v. Kelly* (1918) 202 Mich. 524, 168 N. W. 501; *Fronkling v. Berry* (1921) 125 Miss. 763, 88 So. 331; *Kaufman v. Eisenberg* (1942) 32 N. Y. S. (2d) 450; *Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, 95 S. E. 851.

8. For cases which established this congressional power, see: *Hamilton v. Dillon* (U. S. 1874) 21 Wall. 73; *Miller v. U. S.* (U. S. 1871) 11 Wall. 268. For delegation and restrictions of part of this Congressional power to the president, see: *Trading with the Enemy Act* (1917) 40 Stat. 411, 50 U. S. C. A. appendix 207, 209.

9. (1697) 91 Eng. Rep. 1086.

10. (1697) 91 Eng. Rep. 1086.

11. (N. Y. 1813) 10 Johns. 69.

12. Chief Justice Kent said: "A lawful residence implies protection, and a capacity to sue and be sued" . . . "By the law of nations, an alien who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the protection; and it requires the express will of the sovereign power to order him away."

13. *Caperton v. Bowyer* (U. S. 1871) 14 Wall. 216.

14. *Speidel v. Barstow Co.*, (D. C. R. T. 1917) 243 Fed. 621. See: *Birge-Forbes Company v. Heye* (1920) 251 U. S. 317.

15. See: *In re Bernheimer* (1942) 42 F. Supp. 830, reversed (1942) 130 F. (2d) 396; Cf. *Verano v. DeAngelis Coal Co.* (1941) 41 F. Supp. 954, 955, (dicta to the effect that if a state of war had been declared between Italy and the United States, the defendants' motion to stay would have been

reaffirmed the common law rule giving to resident enemy aliens the right to enforce their claims in our courts. The recent trend is to enlarge the scope of the rule and to allow suit where the fruits of the action would not be remitted to the hostile country so as to give aid and comfort to the other side¹⁶ even though the petitioner be a non-resident of this country.¹⁷ As a corollary, the residence of the petitioner is immaterial where merely equitable relief is prayed for,¹⁸ or where the courts control the proceeds to be recovered by the plaintiff.¹⁹

Thus in view of the strong common law authority permitting resident enemy aliens to sue in times of hostilities, in view of the fact that neither Congress nor the president by executive order has affected that right in any way, and in view of the Attorney General's press release of last January 31, 1942,²⁰ it would seem that the Supreme Court has reached a very desirable result in the instant case. Keeping the doors of our courts open "to peaceable law-abiding aliens to enforce rights growing out of legal occupations"²¹ is commendable in these times of deep feeling and strong passions.

C. A. L.

granted). These recent exceptions to the rule may be attributed in part to the misinterpretation given by the lower federal courts to the Supreme Court's decision in the case of *Ex parte Colonna* (1942) 62 S. Ct. 373. In that case the Italian Ambassador Colonna sought relief and possession of the Italian vessel *Brennero* and its cargo held by the United District Court of New Jersey. The petitioner, though a resident, contended that the vessel and cargoes of oil were property of the Italian government and entitled to the benefit of Italy's sovereign "immunity" from suit, and he sued to regain possession on behalf of the Italian government. The court granted the defendant's motion to stay the proceedings and based its holding entirely on the Trading with the Enemy Act. (1917) 40 Stat. 411, 50 U. S. C. A. Appendix §2(b). This act defines "enemy" to include the government of any nation with which the United States is at war, and the Act specifically prohibits such "enemy" plaintiffs recourse to our courts. This case is readily distinguished from the instant case on factual basis in noting the difference between the status "in judicio" of a resident enemy alien who has resided here for thirty-seven years, and of an Ambassador of an enemy government suing to regain possession of property in which the enemy government is the real party in interest. Thus there seems to be no justification for the confusion that follows the Colonna decision.

16. *Birge-Forbes Co. v. Heye* (1920) 251 U. S. 317.

17. *Weiditschka v. Supreme Tent* (1918) 188 Iowa 183, 170 N. W. 300; *Krachanake v. Acme Mfg. Co.* (1918) 175 N. C. 435, 95 S. E. 851; *Hanger v. Abbott* (U. S. 1867) 6 Wall. 532. Also see: *Brown v. J. P. Morgan & Co., Inc.* (1941) 31 N. Y. S. (2d) 815.

18. *Posselt v. D'Espard* (1917) 87 N. J. Eq. 571.

19. *Propper v. Buck* (1942) 33 N. Y. S. (2d) 11.

20. "Attorney General Francis Biddle today issued the following statement clarifying the right of natives, citizens, or subjects of enemy countries, who are resident in the United States, to institute and prosecute suits in federal and state courts: ' . . . Accordingly, it is important to note that no native, citizen, or subject of any nation with which the United States is at war and who is resident in the United States is precluded by federal statute or regulations from suing in federal or state courts.'" Dep't of Justice Press Release, Jan. 31, 1942, 1 C. C. H. War Service par. 9544.

21. *Justice Black in Ex parte Kumezo Kawato* (1942) 63 S. Ct. 115.