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Since the case of *Ex parte Don Ascanio Colonna*,[1] decided by the United States Supreme Court on January 5, 1942, confusion seems to exist as to the rights of enemy aliens to prosecute actions in courts in this country. Much newspaper comment on this and subsequent decisions of inferior courts has created many misconceptions regarding the effect of this decision.

In the *Colonna* case, the Italian Ambassador sought permission to file writs of prohibition and mandamus directed to a federal district court upon the allegation that a vessel and its oil cargo, which were the subject of litigation in the district court, belonged to the Italian Government and were therefore entitled to the benefit of Italy's sovereign immunity from suit. After the petition was filed, war between the United States and Italy was declared. Section 7 (b) of the "Trading with the Enemy Act"[2] contains among other things, the following provision: "Nothing in this act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war except as provided in Section ten hereof: Provided, however, that an enemy or ally of enemy licensed to do business under this act may prosecute and maintain any such suit or action so far as the same arises solely out of the business transacted within the United States under such licenses and so long as such license remains in full force and effect, and provided further: That *an enemy or ally* of enemy may defend by counsel any suit in equity or action at law which may be brought against him."

In its opinion the court points out that the word "enemy" is defined by the act to include the government of any nation with which the United States is at war. It, therefore, declined to the plaintiff the right to file or entertain the application since "war suspends the right of enemy plaintiffs to prosecute actions in our courts."

In order, therefore, to understand what the court meant by "enemy plaintiffs" reference must again be made to Section 2 of the act[3] for a definition of the word "enemy." The act provides as follows: "That

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[1]62 S. Ct. 373, 86 L. ed. 357 (1942).

[2]40 Stat. 411, 50 U.S.C.A. Tit. 189.

[3]50 U.S.C.A. Tit. 191, §2.

the word enemy is deemed to mean (a) any individual or corporation of any nationality resident within the territory or territory occupied by any nation with which the United States is at war, or resident outside the United States and doing business in or being incorporated in such territory; (b) the government of any nation with which the United States is at war, or any political subdivision thereof, or any officer, official agent or agency thereof and (c) such other individuals as are natives, citizens, or subjects of any nation with which the United States is at war wherever resident and wherever doing business (other than citizens of this country) whom the President may by proclamation designate as an enemy." The words "ally of enemy" are similarly defined as they apply to allies of nations with which the United States is at war. In other words, an enemy or ally of enemy to come within the terms of the act, must be an enemy or enemy ally government or its governmental agency, a non-resident alien enemy or ally, or a resident alien enemy or ally who is designated as such by the President. Hence resident enemy aliens are not enemies within the meaning of the act unless proclaimed as such by the President. To this date no such proclamation has been issued. It should also be pointed out that no restriction of any sort appears against enemy aliens to defend any suit or action. If, however, their defense is in the nature of any affirmative relief, then the provisions of the act may apply.

The confusion with which the *Colonna* case was first regarded is illustrated by *Kaufman v. Eisenberg*,[4] where the New York Court at first ordered a tort action brought by a national of Germany stayed until the end of the war. Thereafter on its own motion, the court reversed itself stating that a different rule applies to cases dealing with resident enemy aliens than to cases dealing with non-resident enemy aliens. The court points out that a distinction was maintained at common law between the rights of non-resident and resident enemy aliens. The statute preserved this distinction and in addition gives to licensed enemy aliens the status of an "alien friend."

The court draws two conclusions. First, since the act is not of omnibus application and affects only the class or type of enemy alien therein proscribed, the resident enemy alien has a right to sue or prosecute in our courts until such right has been withdrawn by manifest legislative intention or presidential pronouncement. Second, the act is not intended to apply to non-commercial intercourse and since the instant suit was in tort, the status of the plaintiff was immaterial.

Prior to the *Kaufman* case, the federal district court in Pennsylvania on November 18, 1941, decided in the case of *Verano v. De Angelis Coal Company*,[5] that since no formal declaration of war ex-

[4] 32 N. Y. Supp. (2d) 450 (1942).
[5] 41 F. Supp. 954 (1941).

isted at that date between Italy and the United States, a motion to stay a damage action on the ground that the plaintiff was a national of Italy and an undeclared state of war then existed between the United States and Italy, would be denied. It is not necessary that a formal declaration of war exists, the court stated, referring to *Hamilton v. McClaughay*,[6] but a "condition of war" which is recognized by the proper political department is sufficient. The court was careful to state that if the plaintiff in that action should recover, 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." However, it should be pointed out that Section 2 of the Trading with the Enemy Act expressly defines the beginning of the war as "midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war." It would seem, therefore, that the limitations imposed by the act only apply when there has been an actual declaration of war by Congress; but this does not mean that limitations imposed on enemy aliens by common law may not be called into being in either situation.

The final decision appearing under the present re-enactment of the Trading with the Enemy Act is that of the Supreme Judicial Court of Massachusetts. In the case of *Cappellote v. General Wool Company*,[7] the defendant's motion for a stay on the grounds that the plaintiff was an enemy alien was denied since the action sounded in tort and the plaintiff was a resident of the United States. Cases interpreting the act during the last war are of the same general trend. There is no doubt that the President may enlarge the definition of the term "enemy" but until he does it would seem that resident enemy aliens have free access to our courts.[8]

[6]136 Fed. 445 (1905).
[7]Case No. 42587, decided Feb. 18, 1942.
[8]See statement of Attorney General Biddle under date of Jan. 31, 1942.

As Soon Come My Chake

Ray Moses of Alamosa sends us the following letter which was received in response to a request for payment of a delinquent account.

Antonito Colo Feb. 10 1942

Dear Friend I have a letter From you in what you say you Cant go so Far in my Count. Dont get so toff. I Start in my Job the third of this Month. As Soon Come my Chake I take Care in my Count. I Expect they Come Before the TWenty of this mount. You Know my Friend I was sow tight I cant send you all the amount But you wait for your money as soon they Come I send Some Money.

Your Verry Truley JOE C————