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GOVIND
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GOPAL.

On these grounds we allow the appeal, set aside the decree of the Assistant Judge and restore the trial Court's decree with costs throughout subject to the variation that the first instalment will fall due on the 1st day of March 1917 and thereafter the money will be payable by annual instalments of Rs. 75.

Decree set aside

R. R.

ORIGINAL CIVIL.

Before Mr. Justice Macleod.

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January 25.

February 10.

WILFRED R. PADGETT (PLAINTIFF) v. JAMSHETJI HORMUSJI-
CHOTHIA (DEFENDANT).^o

Contract with alien enemy—Status of hostile firms—Common law doctrine—Trading licenses granted to hostile firms, their effect—Licenses granted to Manager of a firm, not ultra vires—The Hostile Foreigners' Trading Order of 1914—The Indian Councils Act of 1861, section 23—Act I of 1915—Interest made payable under contracts entered into before war—Suspension of interest after war—American cases though not authoritative, noted on a novel point.

The existence of a state of war between the respective countries of the debtor and the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities.

SUIT on promissory notes.

The defendant signed five promissory notes for various amounts payable on demand with interest at

^o Q. C. J. Suit No. 1437 of 1915.

6 per cent. per annum, between the 2nd April 1913 and 14th April 1913, in favour of Messrs. Bume and Reif. There remained due for principal and interest, when the suit was filed, Rs. 15,017-8-11.

The partners in the firm of Bume and Reif were Mr. Bume and Mr. Reif, both Austrians, but Mr. Reif was a naturalized British subject. The firm had its Head Office in Bradford in Yorkshire, but had branches at Hamburg, Bombay, and other places. The expenses of the Bombay Branch were debited to the account of the Hamburg Branch, the Bombay Branch being virtually an offshoot of the Hamburg Branch.

At the outbreak of war between Great Britain and Austria, the firm of Bume and Reif became according to the common law doctrine, a hostile firm. The said firm was also a 'hostile firm' within the definition contained in clause 2 of the Hostile Foreigners Trading Order.

On the 9th February 1915, a license was granted to the firm of Bume and Reif on the application of the plaintiff, Wilfred Rycroft Padgett, the Assistant Manager of the firm, under the Hostile Foreigners' Trading Order to carry on business under certain conditions. The said license expired on the 14th August 1915. On the 15th August 1915, a fresh license was granted for the purpose of winding up the business and the same expired on the 14th November 1915, further extensions after that date being refused by a notification in the Gazette on the 17th January 1916. However, on the 24th November 1915, a special license was issued to Mr. W. R. Padgett for the purpose of enforcing by legal proceedings payments of debts due to and claims and demands by the firm of Bume and Reif with the previous authority of the Controller, but not otherwise. The said license was worded as follows:—

“And whereas Bume and Reif being merchants and commission agents, importers of piece-goods and sundry goods and exporters of timber and Indian

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produce, and having their principal office, agency, or place of business at Bradford, Yorkshire, in England and also carrying on business at Bombay, Delhi, Cawnpore, Amritsar, Madras, Karachi and Calcutta in British India and a hostile firm within the meaning of the said Order were on the 15th day of August 1915 granted a license under clause 4 of the said Order to carry on or engage in the said trade or business subject to the conditions of the said license ;

And whereas the said license expired on the 14th day of November 1915 and has not been renewed ;

And whereas the said license was, as set out in the conditions therein mentioned, granted for the purpose, *inter alia*, of enabling the said Bume and Reif to realize outstandings and debts and with the authority of the Controller of Hostile Trading Concerns (hereinafter referred to as the "Controller ") to sue for and enforce by legal proceedings, payments of debts due to and claims and demands by the said Bume and Reif ;

And whereas the said Bume and Reif have been unable within the period of the said license, to institute, continue or conclude all such legal proceedings as are necessary in the course of and for the purpose of winding up and closing the said business ;

And whereas it appears to the Governor-General of India in Council desirable to grant the license hereinafter set out ;

Now, therefore, the Governor-General of India in Council does hereby give and grant license to W. R. Padgett as follows, namely :—

With the previous authority of the Controller, but not otherwise, to bring, institute, defend or refer to arbitration any action, suit or other legal proceeding at law in equity or in insolvency, or any claim by or against any person or persons, relating to the property, credits or effects of the said Bume and Reif and the said W. R. Padgett shall forthwith as directed by the Controller, sue for, collect and get in, receive and enforce by any legal proceedings against any person or persons payment of any debt due to, and claim and demand by, the said Bume and Reif.

" This license shall continue in force until the 31st January 1916 subject nevertheless to the powers of the Governor-General in Council exercisable at any time to revoke this license or at any time or from time to time modify, alter or add to the conditions, restrictions or suspensions imposed hereunder."

Mr. Padgett filed this suit on the 17th December 1915, as liquidator of Bume and Reif with the previous authority of the Controller.

The defendant admitted liability, but contended (1) that the plaintiff could not maintain the suit as the license was *ultra vires*, being granted to an individual and not to the firm, and (2) that the defendant was not bound to pay interest from the date of the outbreak of war until he was informed that a license to trade has been issued to the firm of Bume and Reif.

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The following issues were raised :—

1. Whether the plaintiff is entitled to maintain the suit ?
2. Whether the plaintiff's license was not *ultra vires* of the Government ?
3. Whether in any case the defendant is liable for interest after the 4th of August 1914.

Campbell, for the plaintiff.

Inverarity, for the defendant.

Campbell :—The plaintiff is entitled to maintain the suit on behalf of the firm of Bume and Reif, the same being expressly authorised by the Controller of Hostile Trading Concern by a letter dated 6th December 1915. The promissory notes make interest payable.

Inverarity :—The license is *ultra vires* of the Government, as the same is to an individual and not to the firm. The Ordinances of the Governor-General in Council under section 23 of the Indian Councils Act of 1861 expire after six months. As the license expires on 31st January 1916 no decree can be passed after that date. Interest is not payable during war: see the remarks of Abbott C. J. in *Du Belloix v. Lord Waterpark*⁽¹⁾. American cases show that interest is not payable: see Trotter's Law of Contracts, p. 61: see also *Hoare v. Allen*⁽²⁾; *Foxcraft v. Nagle*⁽³⁾ and *Brown v. Hiatts*⁽⁴⁾.

⁽¹⁾ (1822) 1 D. & R. 16.

⁽³⁾ (1791) 2 Dallas 132.

⁽²⁾ (1789) 2 Dallas 102.

⁽⁴⁾ (1872) 15 Wall. 177 at p. 185.

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Campbell, in reply :—The license under the Hostile Foreigners' Trading Order can be granted to individuals ; see section 4 (1) of the Order. American cases as to interest are not authoritative. Besides they are conflicting. The defendant could have paid even the principal without incurring a penalty.

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MACLEOD, J. :—Between the 2nd April 1913 and the 14th August 1913 the defendant signed five promissory notes for various amounts payable on demand with interest at 6 per cent. in favour of Messrs. Bume and Reif. Deducting various payments made from time to time there remained due for principal and interest, when the suit was filed, Rs. 15,017-8-11.

When war broke out between Great Britain and Austria the firm of Bume and Reif became a hostile firm.

On the 9th February 1915, a license was granted to the firm of Bume and Reif on the application of W. R. Padgett, Assistant Manager of the firm, under the Hostile Foreigners' Trading Order to carry on business under certain conditions. The license was to remain in force until the 14th August 1915.

On the 15th August 1915, a fresh license was granted to the firm for the purpose of winding up their business which expired on the 14th November, and, on the 17th January 1916, it was notified in the Gazette that an extension after that date had been refused. But, on the 24th November 1915, a license was issued to Mr. Padgett, with the previous authority of the Controller but not otherwise, to bring, institute, defend, compromise or refer to arbitration any action, suit or other legal proceeding, relating to the property, credits or effects of the said firm.

The license was to continue in force until the 31st January 1916.

Mr. Padgett accordingly filed this suit on the 17th December 1915 as Liquidator of Bume and Reif with the consent of the Controller.

The claim is admitted but it has been contended that the plaintiff cannot maintain the suit and that the license giving him leave to take legal proceedings against the debtors of the firm is *ultra vires*.

In my opinion the license, as granted to the plaintiff, was within the powers of the Governor-General acting under the provisions of the Hostile Foreigners' Trading Order.

Then it was contended that the defendant was not liable to pay interest, which was recoverable as damages, from the date of the outbreak of war until a license to trade had been issued.

This raises a novel point. The common law of England must be applied, but there is no direct authority which lays down what is the common law.

In *Du Belloix v. Lord Waterpark*⁽¹⁾ the plaintiff sued on a promissory note signed in Paris on the 27th December 1787 payable six months after date. The defendant pleaded limitation but there was no evidence that the plaintiff had been in England since the making of the note. The Jury asked whether they were bound to give the plaintiff interest as well as principal and the learned Judge charged them, that interest being the damage for the detention of the debt, the question was peculiarly for their consideration. The Jury gave a verdict for the principal only.

A rule was moved for to show cause why the verdict should not be increased but the Court held that the

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(1) (1822) 1 D. & R. 167.

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question of interest had been rightly left to the Jury. Abbott, C. J. concluded :

“ But there is another objection to the plaintiff's recovering interest on the debt, for during the greatest part of that time he was an alien enemy, and could not have recovered even the principal in this country, and at all events during that portion of the time the interest could not have run, and it would even have been illegal to pay the bill while the plaintiff was an alien enemy.”

If this view is correct it seems that the question of allowing interest during the period of hostilities ought not to have been left to the Jury.

I have been referred to several American cases on the point and though these are not to be considered as authoritative, I may refer to the principle which can be extracted from them to ascertain whether it is so consonant with the dictates of common sense that I may safely assume that it agrees with the common law of England.

The result of these American cases may be stated as follows. The existence of a state of war between the respective countries of the debtor and creditor suspends the accrual of interest when it would ordinarily be recoverable as damages and not as a substantive part of the debt. So limited the reason of the rule is obvious, that a party should not be called upon to pay damages for retaining money which it was his duty to withhold and not to pay it over. It is essential to the application of the rule suspending interest when the respective countries of the debtor and creditor are engaged in war that the circumstances be actually such that the payment of the debt was made impracticable, if not impossible. Thus interest is not suspended in cases where the creditor, although a subject of the enemy, remains in the country of the debtor or has a known agent there authorized to receive the debt.

The first proposition I accept, but I should like to hear further arguments on the question whether or not

interest was suspended, as this firm remained in Bombay, until the firm was granted a license to trade or until the plaintiff was granted the license under which the suit was filed.

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The case was further heard on the 31st January 1916.

Campbell :—The firm did not become a hostile firm until the publication of the Hostile Foreigners' Trading Order on the 14th November 1914. The Head Office of the firm was in England, and the same was licensed on 24th October 1915. - The firm had a license in India on 9th February 1915 which was extended to 14th November 1915. On the 24th November 1915 the plaintiff got the present license. Under the Hostile Foreigners' Trading Order, a hostile firm has a month's time within which to apply. On 26th November 1915, Mr. Hardy was appointed to receive the assets of hostile firms : see the Bombay Government Gazette, p. 2890. The defendant could have paid the monies lawfully to Mr. Hardy : see Proclamation dated 9th September 1914 and especially clause 6. That Proclamation entirely supports our contention that we were not a hostile firm.

Inverarity :—Clause 6 of the Proclamation refers to new transactions after the war : see *Wolf & Sons v. Carr, Parker & Co.*⁽¹⁾ and *Orenstein & Koppel v. Egyptian Phosphate Co.*⁽²⁾. As to interest see Leslie Scott on "The Effect of War on Contract" 2nd Edn., p. 27 and Article in the Law Quarterly Review, Vol. XXXI, p. 297, wherein all the cases on the point are noted.

Campbell, in reply :—As against the *Wolf's case*⁽³⁾, see *W. L. Ingle, Limited v. Mannheim Insurance Company*⁽⁴⁾. Moreover, we submit that on the outbreak of war, the partnership was dissolved, there not being

(1) [1915] W. N. 195.

(3) (1915) 31 T. L. R. 407.

(2) (1915) S. C. 55.

(4) [1915] I K. B. 227.

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any branch of the partnership left at law to trade in Germany. Thus we are not a hostile firm even now. see *Griswold v. Waddington*⁽¹⁾; *Esposito v. Bowden*⁽²⁾ and *Armitage v. Borgmann*⁽³⁾.

C. A. V.

MACLEOD, J.:—I have now taken further evidence regarding the status of the firm of Bume and Reif and have heard further arguments on the question of suspension of payment of interest.

It appears that the partners in the firm of Bume and Reif were Mr. Bume and Mr. Reif, both Austrians, but Mr. Reif was a naturalised British subject. The Head Office was at Bradford in Yorkshire. There were branches at Hamburg, Bombay and other places. But the expenses of the Bombay Branch were debited to the account of the Hamburg Branch and it seems as if the Bombay Branch was really an offshoot of the Hamburg Branch. The outbreak of war between Great Britain and Austria dissolved the partnership, and on the 24th October 1914 Mr. Reif was granted a license by the Secretary of State under the Proclamation of the 9th September 1914.

Meanwhile Mr. Liebel, an Austrian, who was in charge of the Branch at Bombay was interned. There can be little doubt that at the outbreak of war the firm was a hostile firm within the definition contained in clause 2 of the Hostile Foreigners' Trading Order.

According to the original common law doctrine an alien enemy had no rights at all and commercial intercourse with alien enemies was illegal.

On to this plain and obvious doctrine there were grafted by custom various exceptions. For instance, an alien enemy was not to be considered as an alien enemy unless he was residing in enemy territory.

⁽¹⁾ 16 John 438.⁽²⁾ (1857) 7 E. & B. 763 at p. 785.⁽³⁾ [1915] W. N. 21.

The Proclamation of the 5th August 1914 with regard to trading with the enemy, published in India on the 7th August 1914, only forbade commercial intercourse with persons resident, carrying on business in, or being in the German Empire and it was expressly stated that the Proclamation did not apply to trading or commercial intercourse carried on by such persons solely from the branches of business which they might have in some other country including the British Dominions.

An explanatory announcement as to this Proclamation was issued by the Treasury on the 22nd August. It stated that as a rule there was no objection to British firms trading with German or Austrian firms established in neutral or British territory, what was prohibited was trading with any firm established in hostile territory. If a firm with headquarters in hostile territory had a branch in neutral or British territory, trade with the branch was permissible as long as it was *bona fide* and no transaction with the Head Office was involved. There was no objection to making payments to firms established in hostile territory on contracts entered into before the war broke out when nothing remained to be done save to pay for goods already delivered or for services already rendered. The explanation was issued in order to promote confidence and certainty in British commercial transactions.

This Proclamation was revoked by the Proclamation of the 9th September 1914 which was not published in India until the 31st October. The expression 'enemy' was defined as meaning any person or body of persons of whatever nationality, resident or carrying on business in the enemy country, but it did not include persons of enemy nationality neither resident nor carrying on business in the enemy country.

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Under clause 5 the payment of any sum of money to or for the benefit of an enemy was prohibited.

By clause 6 it was provided that where an enemy had a branch locally situated in British, allied, or neutral territory, not being neutral territory situated in Europe, transactions by or with such branch should not be treated as transactions by or with an enemy.

It was held in *W. Wolf & Sons v. Carr, Parker & Co., Limited*^(a) that this clause referred only to new transactions.

Now it may be that if the defendant had paid in the money due on the promissory notes to the firm in Bombay he would not have been doing anything which involved a penalty, but I think he was entitled to say: "I am not going to do anything which may enure for the benefit of the enemy and I am not going to pay what I owe until I am satisfied that the money which I pay will be retained in safe custody until the cessation of hostilities." That was his duty as a good citizen, whatever might be permissible under Proclamations of Government. It ought not to have needed the experience gained in the present war to make it obvious that trading with an enemy wherever he may be resident or carrying on business must almost certainly benefit the enemy country, and although individuals may suffer, the common good must be paramount.

It would certainly be strange if I were to mulct a man in damages because he failed to assist the enemy, while it would be contrary to reason that he should continue to profit by the money or goods which he received in times of peace when Government had provided the means whereby the debt could be paid without assisting the enemy.

(a) (1915) 31 T. L. R. 407.

Therefore I think that the right principle to lay down is that the accrual of interest is suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal debt can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities.

As Mr. Inverarity contended that various Ordinances made by the Governor-General under section 23 of the Indian Councils Act of 1861 were limited to expire within the period of six months from their promulgation, it seems necessary to point out that under Act I of 1915 the provisions of the said Ordinances have effect as if they had been enacted by the Governor-General in Council and remain in force during the continuance of the present war and six months thereafter.

It was also contended that the license granted to the plaintiff expired on the 31st January 1916 and that, therefore, he was not entitled to obtain a decree. That may be so ; but I understand that a renewal has been applied for and the decree can be drawn up when the new license is filed.

In my opinion, therefore, interest was suspended from the 14th August 1914 until the defendant was notified that the license of the 9th February 1915 had been granted ; for under the terms of that license all monies belonging to the firm and all monies to be received thereafter were to be paid into the account of the Controller at the Bank of Bombay.

It does not appear that any notice was given until this suit was filed, and therefore, interest will not begin to run again until the 17th December 1915.

The defendant must pay the plaintiff's costs except such as were incurred on the question whether interest

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was suspended and if so for how long. That was a novel point and each party will bear his own costs of that issue.

Attorneys for plaintiff : Messrs. *Little & Co.*

Attorneys for defendants : Messrs. *Payne & Co.*

Decree accordingly.

G. G. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

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December
15.

CHANDULAL DALSUKHRAM (ORIGINAL PLAINTIFF), APPLICANT v.
JESHANGBHAI CHHOTALAL (ORIGINAL APPLICANT-SURETY), OPPONENT.*

Civil Procèdure Code (Act V of 1908), Order XXXVIII, Rule 5, sections 115 and 145—Attachment before judgment—Surety for defendant—Death of defendant before hearing—Legal representative brought on record—Application by surety for discharge, whether premature.

The petitioner plaintiff having obtained an attachment before judgment against the defendant, the opponent stood surety for the defendant whereupon the attachment was raised. The defendant died before the hearing of the suit and his widow was immediately brought on record as his legal representative. The surety afterwards applied to the Court for his discharge on the ground of the death of the defendant. The lower Court ordered that the surety should be discharged. The petitioner, therefore, having applied to the High Court in revision,

Held, that the order of the Court discharging the surety was premature and should be set aside under section 115 of the Civil Procedure Code, 1908, as the proceedings had not come to an end, because they had been revived by the substitution of the widow of the defendant and the stage had not been reached at which the liability of the surety could be decided.

APPLICATION under extra-ordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908)

* Application under Extra-ordinary Jurisdiction No. 99 of 1916.