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Note and Comment

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NOTE AND COMMENT

ADMIRALTY RULE OF "CARE AND CURE" A LIMIT OF LIABILITY.—One of the very ancient doctrines of the general maritime law is that a sailor injured in the service of the ship is entitled to care and cure at the expense of the ship, and to his wages, but nothing more in the nature of damages for negligence of the master or others of the ship's company. In the sixth article of the Rooles d'Oleron, for example, it is said,—"But if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship."—*"ils doivent être gueris et pansès sur le cout de ladite nef."* To the same effect in the older codes commonly spoken of as the Rhodian Sea Law, see Ashburner, sub-title "Mariners" and elaborate discussions in *Reed* v. *Canfield,* 1 Sumn., 195 and *City of Alexandria,* 17 Fed., 390. While this rule has been very firmly fixed in the admiralty courts, *Osceola,* 189 U. S., 158, there has been debate about its enforcement in courts of the common law. A sailor suing in the admiralty for negligence of his superior officers would fail if he had received "care and cure," *Bunker Hill,* 198 Fed., 587, while at common law he might recover damages as in an ordinary action of tort. *Thompson v. Hermann,* 47 Wis., 602. See *Kalleck v. Deering,* 161 Mass., 469; *Hedley* v. *S. S. Co.* [1894], A. C. 222.

In the recent case of *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; 62 Laws, Ed. 1171, the Supreme Court holds that the admiralty rule must pre-

vail even where the action is brought in a common-law court. The plaintiff was a fireman who received injuries on shipboard through being negligently ordered to work in an exposed situation. He sued at common law for damages. He had received due care and hospital attention and made no claim for wages. Upon these facts appearing, a verdict was directed in favor of the defendant and affirmed on error (243 Fed., 536). The Supreme Court called up the record by certiorari and affirmed. The sailor's employment is maritime and rights and liabilities arising thereunder must be measured by the maritime law; that law must be uniformly applied and only the liabilities which it imposes are cognisable in whatever courts the litigation is brought, where the cause of action is maratime in its nature and within admiralty jurisdiction. The right to "a common-law remedy where the common law is competent to give it," the saving clauses of the Judiciary Act, refers to remedies and not to rights, and a right sanctioned by a maritime law may be enforced through any appropriate remedy recognized at common law. A plaintiff, however, cannot prevent measuring a defendant's liability by the standards of the maritime law by bringing his action in a common-law court. Maritime rights must be recognized there. The result is really an application of *lex loci delicti,* and it would be an anomaly if the rights and liabilities which inhere in a maritime tort should not be enforced in common-law jurisdictions. In *Craig* v. *Continental Insurance Company, 26* Fed., 798; 141 U. S. 638, an action at law, the Limited Liability Act was enforced under a plea of the general issue, the court taking judicial notice of its provisions as a part of the supreme law of the land. Our maritime law is coming within the view of the second paragraph of Article VI of the Constitution.

The word "cure" in the admiralty rule is not to be understood in a literal sense; it is employed in its original meaning of taking charge of, or giving attention to, rather than absolute healing (Atlantic Abb. Adm. 451). The obligation continues for at least the duration of the voyage, *Ben Flint,* 1 Abb. 126, and, on the Great Lakes, may logically be measured by the season of navigation which takes the place of the voyage, *Hercules,* Brown's Adm. 560. Neglect to comply with the rule creates a serious liability for damages against the ship for the damages sustained, *Troop,* 118 Fed., 769; the rule is inapplicable where the injury was caused by personal negligence of the owner, as where there is a breach of his positive and non-deputable duty to see that the ship is seaworthy and her equipment in safe condition at the outset of the voyage, *S. S. Co.* v. *Moss,* 245 Fed., 54; and where there is negligence on the part of the owner, contributory negligence of the injured party does not prevent recovery but is balanced by an apportionment of the damages, (*Max Morris,* 137 U. S. 1. The general doctrine of the admiralty in regard to injuries received on shipboard by members of the crew, including the master, is the result of the experience of ages and commends itself to a sound sense of fairness and justice. When the shipowner puts his ship in good order, safely equipped and supplied, he should not be held personally liable for the accidents attending her navigation over which he has no personal control. This is the spirit of the rule of limitation of liability of which this particular doctrine is really an expression.

GEORGE L. CANFIELD.

STATUTE OF FRAUDS INAPPLICABLE TO MARITIME CONTRACTS.—The recent decision of the Supreme Court in *Union Fish Company* v. *Erickson* (Adv. Opinions, February 1, 1919, 143) may occasion surprise although it is only the logical outcome of the principle announced in *Workman* v. *New York*, 179 U. S., 552, and *Southern Pacific* v. *Jensen*, 244 U. S., 205. The Fish Company, a California corporation, had engaged Erickson to serve as master of one of its vessels, in Alaska waters, for a term of not less than one year, commencing at a future date. The contract was made in San Francisco and was wholly in parol. It was to be performed in Alaska and on the high seas. After a month's service the master was wrongfully discharged and then brought suit in admiralty for the damages sustained by the breach of contract. The shipowner contended that the contract was invalid under the statute of frauds of California, as well as of Alaska, being a parol agreement which could not be performed within one year. The Supreme Court decides that the contract, by reason of its being maritime in its nature, is not within the statute and sustains a decree in favor of the master; the uniformity of the maritime law must not be impaired by local statutes and the validity of maritime contracts must be determined by that law alone.

The ordinary rule by which the validity of a contract is tested, including the application of the statute of frauds, is that of the *lex loci contractus*. STORY ON CONFLICT OF LAWS §262. This, of course, may yield to the *lex loci solutionis* if the intention of the parties requires, *Jacobs* v. *Credit-Lyonnais* 12 Q. B. D., 589; and, in maritime transactions, both may be displaced in favor of the law of the ship's flag. CARVER ON CARRIAGE BY SEA § 204. In the *Erickson* case, however, the contract would have been invalid under either of these three rules. It was plainly within the statute of California, if the place where it was made determined the rule, *Seymour* v. *Oelrichs*, 156 Cal. 782; it was likewise within the statute of Alaska, if the place of performance were resorted to, WOOD ON FRAUDS, 490; and the law of the ship's flag would still leave it subject to the laws of California, since the ship was owned by a California corporation and continued to be a part of that state and subject to its laws, even while on the high seas. *Crapo* v. *Kelly*, 16 Wall, 610; *The Hamilton*, 207 U. S., 398. The decision, therefore, presents a new and predominating rule for testing the validity of maritime contracts, namely, the maritime law. Local statutes may not be invoked, it would seem to follow, either to impair or to protect maritime contracts because their validity must be tested by the maritime law alone. The case may have far reaching effects and necessitate legislation on the subject of maritime contracts. The maritime law, by itself, is quite meager on the subject of the formation of contract. It has no settled doctrines of its own, in this respect, but has usually followed local law. If a contract existed, according to the local law, and was maritime in its nature, the admiralty had jurisdiction. Whether or not a contract existed was determined by the doctrines of the local law. In countries following English doctrines, for example, the admiralty would not recognize an agreement void for want of consideration or mutuality, not because the admiralty has any rules of its own in regard to consideration or mutuality, but because there was no contract by local law where these ele-

ments were lacking. *Dennis* v. *Slyfield,* 117 Fed., 474. On the other hand, in countries where the English doctrine does not prevail, the absence of consideration would not prevent the admiralty enforcing an agreement otherwise within its jurisdiction. In other words, the admiralty has not yet evolved any law of contracts of its own except in regard to the secondary matter of testing their maritime nature. It has left this matter of formation of contract, the essentials of its validity and the requisite evidentiary conditions, to local law, common or statutory. Doubtless every local law, however, tends to impair uniformity. This can only be avoided by a general code of maritime law. Until it is promulgated, uniformity will be impossible. The logical effect of the decision in the *Erickson* case will be to emphasize the necessity for a complete revision and codification of our maritime law. Its development has been so interwoven with local law that a somewhat chaotic situation may develop, if the effect of this decision is correctly estimated to be a divorcement from the local law in respect of contracts before anything has been prepared to take its place.

The principle of the decision would, it seems, have been equally fatal to the statute of frauds if the action had been at law in a state court. A writ of error from the Supreme Court of the United States could have been invoked to review its judgment and the same result would have followed as is accomplished by the decision in the proceeding in admiralty.

GEORGE L. CANFIELD.

SHOULD A CORRECT VERDICT BE SET ASIDE BECAUSE THE JURY FAILED TO FOLLOW ERRONEOUS INSTRUCTIONS?—One of the common grounds of a new trial is that the verdict is contrary to law. What law is meant,—the law as it really is, or the law that was given to the jury by the court's instruction? Most cases hold to the latter view. It is the duty of the jury to take the law from the court, whether the court in so giving it is right or wrong. Hence, the jury violate their duty if they fail to follow instructions, even if the instructions are wrong, and a verdict based on a breach of the jury's duty cannot be allowed to stand, even though intrinsically correct. *Talley* v. *Whitlock,* (Ala., 1917) 73 So. 976; *Gartner* v. *Mohan,* 39 S. D. 202; *Yellow Poplar Lumber Co.,* v. *Bartley,* 164 Ky., 763; *Soderburg* v. *Chicago St. P. M. & O. Ry. Co.,* 167 Ia., 123; *Freel* v. *Pietzsch,* 22 N. D., 113; *Barton* v. *Shull,* 62 Neb., 570; *Dent* v. *Bryce* 16 S. C., 14; *Murray* v. *Heinze,* 17 Mont., 353.

The argument on which this rule is founded is well expressed by the Supreme Court of Montana in *Murray* v. *Heinze, supra,* where the court said: "But counsel for the appellant contend that, the instruction being erroneous, the court erred in setting aside the verdict because of the fact that the jury wholly disregarded it . . . . This is the first time it has been seriously contended in this court that the jury have the right to determine the law in an ordinary suit at law and to absolutely disregard the instructions of the court on the ground that, in the opinion of the jury, the instructions of the court are erroneous. If the contention of the appellant is to be upheld, what may we not anticipate as the result in the administration of the law in this state? If the jury may rightfully invade the province of the court, why may not

the court retaliate by invading the province of the jury in determining questions of fact? As counsel for the respondent suggest, if the contention of the appellant is correct, then logically there is an appeal in all cases upon questions of law from the trial court to the jury. And as counsel for respondent further suggest in their argument, if the jury may determine the law, an attorney arguing the case may say to the jury: 'The court will charge you that the law is so and so, but I say to you the court is wrong!'"

But now and then we find a case where the court refuses to be terrorized by this reasoning. Such a case is *Public Utilities Co.*, v. *Reader* (Ind. App. 1919) 122 N. E., 26. The court held that a verdict was not "contrary to law" merely because is was contrary to an erroneous instruction given to the jury. And with the Indiana appellate court stand a few others who take the same view. *Lucken* v. *Lake Shore & M. S. R. R. Co.*, 248 Ill., 377; *Pitts* v. *Thrower*, 30 Ga., 212; *Van Vacter* v. *Brewster, Solomon & Co.*, 1 Sm. v. M. (Miss.), 400; *Cockrane* v. *Winburn*, 13 Tex. 143.

The argument of the majority sounds more like an excuse than a reason. Nobody claims that the jury has the right to pass on the law, any more than that the court has the right to do a great many things which it constantly does and which constitute error in the trial of cases. But if it appears that the jury was right on the law and the court was wrong, what should be done about it?

The real question is, what is the purpose of the trial,—to get a *correct result*, or to get it in a *correct manner?* Thousands of errors are committed every day by our courts in rulings made at the trial of cases, but they do not produce new trials unless prejudice has resulted from them. It is everywhere agreed that technical error and prejudicial error are very different things. Error which does not affect the final result is constantly ignored. There is no potency in error as such, any more than in carelessness as such. One can be as careless as he pleases, and if no harm comes from it there is no liability. Courts may make endless errors in trying cases, but if no harm comes from them they are very properly disregarded.

There is no apparent reason why the particular error here discussed should stand on any different basis from other errors. The dreadful spectacle of an attorney appealing to the jury to overrule the court in the law, which the Montana court so tragically suggests, is nothing but a bogie, for it is perfectly clear that such an appeal would constitute so flagrant a contempt of court that it could be instantly checked if anyone had the hardihood to attempt it. That being so, the rule requiring a correct verdict to be set aside when contrary to bad instructions, must be based upon the need of punishing the jury for disobedience. But setting aside the verdict does not punish the jury,—it only penalizes the party who gets the verdict. It could perhaps be suggested that the acceptance of such verdicts might develop insubordination among juries. But no such result has been noted in jurisdictions where they are accepted. The imposition of heavy penalties is a mark of social mal-adjustment. It was once thought that the prevention of insubordination among citizens required capital punishment for a score of petty crimes; that military discipline could be maintained only by frightful

punishments for the slightest cases of disobediences. Judges long contended that the allowance of amendments would put such a premium on careless pleading that the whole system of legal procedure would go to ruin. All that is being gradually discarded. Destroying verdicts as a means of disciplining inattentive or disobedient juries is on a par with shooting hostages to subdue a recalcitrant population.

The truth appears to be that we have in this rule merely a survival of the once common doctrine of reversal for technical error, coupled possibly with an inherited fear that the judges, once the representatives of the king and the privileged classes, might lose their prestige by acknowledging that a jury could ever be right when it differed from the court. But we are rapidly losing our veneration for conventionality, and we no longer canonize rules of procedure in theory even though in practice we still sometimes insist that a good result is bad because it was not produced in the orthodox way. If the courts are to merit public confidence they must think more about their duty to the people and less about themselves, more about the justice of their results and less about the regularity of their methods.

Exaggerated self-consciousness, in an institution as in an individual, is always likely to produce excessive formalism. The more fully the interests of the litigants occupy the attention of the court, the more completely will technicalities of procedure lose their power to obstruct.

E. R. S.

NEGLIGENCE — THEATERS AND SHOWS — ASSUMPTION OF RISK — SPECTATORS AT A BASEBALL GAME.—The common law right of recovery as regards one who knowingly or indifferently incurs a risk in the course of his employment not necessarily incident thereto finds expression in the cases of *Southcote* v. *Stanley,* 1 H. & N., 247: *Wilkinson* v. *Farrie,* 1 H. & C., 631: *Chapman* v. *Rothwell,* El.B. & E., 168: also COOLEY ON TORTS, (3rd Ed.) 1042-1057. Further distinctions taken on the liability of an occupier of premises are found in the case of *Indermaur* v. *Dames,* L. R. 1 C. P. 274, where the static relations between such occupiers and one injured thereon are classified. Situations involving these questions may arise under a variety of circumstances. Probably the greater number grow out of the relation of master and servant. *Sullivan* v. *New Bedford, etc., R. Co.,* 190 Mass., 288: *American Car and Foundry Co.* v *Duke,* 218 Fed. 437. In a recent decision, the Supreme Court of Washington was called upon to determine whether one who pays admission to the grand stand to see a baseball game, knowing the nature of the game and having a choice of screened or exposed seats, choosing a seat exposed to wild throws and foul balls, may show in evidence as proof of negligence, defendant's plans for the park, which called for screens to protect the area in which he sat. The court held the evidence admissible and that the plaintiff's right to recover was properly submitted to the jury who found in his favor. *Kavafian* v. *Seattle Baseball Club Association* (Wash. 1919) 177 Pac. 776.

Cases precisely in point are few. In *Wells* v. *Minneapolis Baseball and Athletic Association,* 122 Minn. 327, 142 N. W. 706, it was held that if plain-

tiff chose an unprotected seat, it was properly submitted to the jury to determine whether in so doing she had assumed any risk arising from defendant's failure to protect the area where she sat with screening. In *Crane* v. *Kansas City Baseball Exhibition Company,* 168 Mo. App. 301, 153 S. W. 1076, the court upheld a directed verdict for defendant on the theory that defendant having provided a choice of protected and unprotected seats had performed its duty and that plaintiff in choosing an exposed seat assumed the risks incident thereto. In *Edling* v. *Kansas City Baseball Exhibition Company,* 181 Mo. App. 327, 168 S. W. 908, it was held a question for the jury to decide whether or not plaintiff had been guilty of contributory negligence or had assumed the risk of being hit by a ball in taking a seat in the protected portion of the stand but in line with a defective opening in the screen. The jury decided in favor of the plaintiff. These cases all agree with and contain statements similar to the general proposition laid down in *Crane* v. *Kansas City, supra,* where the court says "We think the duty of the defendants toward their patrons included that of providing seats protected by screening from wildly thrown or foul balls for the use of patrons who desire such protection." To what extent is this necessary? In the principal case the court says concerning appellee's choice of an unprotected seat, "by inference he was invited to that seat. There was an implied representation on the part of appellant that the seat he (plaintiff) took was reasonably safe." Such doctrine would impose upon defendants the burden of protecting those seats which in the usual course of the game would be within the ordinary range of the ball. In the *Crane Case, supra,* the court said, "Defendants fully performed that duty (to provide protected seats) when they provided screened seats in the grand stand and gave plaintiff an opportunity of occupying one of those."

In *Wells* v. *Minneapolis, supra,* the court says "We believe that as to all who with full knowledge of the danger from thrown or batted balls attend a base ball game, the management cannot be held negligent when it provides a choice between a screened and an open seat, the screen being *reasonably sufficient as to extent* and substance." In *Edling* v. *Kansas City, supra,* under somewhat different circumstances the injury being due to a defective opening in the screen, the court says, "Being in the business of providing a public entertainment for profit, defendant was bound to exercise reasonable care to protect its patrons against such injuries. * * * The courts of this state have always adhered to the doctrine * * * that where one person owes a duty to another, the person for whose protection the duty exists cannot be held to have assumed the risks of injury created solely by a negligent breach of duty."

In substance, the *Crane Case* imposes a duty upon the defendants to afford a choice of protected or exposed seats and that having done so its duty is at an end. The Minnesota court in the *Wells Case* adds to this requirement that the screening must be reasonably sufficient as to extent. The *Edling Case* goes farther and refuses to exonerate defendant on the theory that the plaintiff has assumed the risk if it be shown defendant owed plaintiff a duty to protect him against the injury. A distinction should, however, be made

between the *Edling Case* and the others. In that case, defendant had recognized a duty to protect the area in which plaintiff sat but had negligently allowed the secreen to become defective. In this connection the words of Montague Smith, J. in *Crafter* v. *Metropolitan Railway Company*, L. R. 1 C. P. *304 are in point. He says, "The line must be drawn * * * between suggestions of possible precautions and evidence of actual negligence such as ought to reasonably and properly be left to a jury."

The cases all agree that defendant is not an insurer of plaintiff's safety and is therefore under no duty to screen the whole stand. They are equally well agreed that defendant is under a duty to provide some protection against the dangers of the game even as to those who attend with full knowledge of these dangers. The test applied in the *Crane Case* imposing an obligation to afford a choice of protected or exposed seats is no doubt of some value as evidence in deciding in a given case whether or not plaintiff in choosing an exposed seat assumed the risk of being hit. As a criterion for determining the extent of the area defendant is duty-bound to screen, it has no merit. On one occasion a small attendance may find ample room behind a very limited screen, while on others with a capacity audience, the defendant would be bound to screen all the seats if those attending were to have an opportunity of occupying protected seats. On the one hand, a strict application of the doctrine of assumption of risk would preclude a recovery in a majority of instances where plaintiff knew the dangers incident to the game. On the other hand, denying its applicability to such cases as these would tend to throw the entire burden on the defendant. Experience has shown that the sections of the stand directly behind the batter, and for a distance along the first and third base lines to be those exposed to the greatest danger. It is the occupants of these seats who are most apt to feel the driving effect of a pitched ball deviated from its course by glancing off the bat. In imposing an absolute duty on the baseball association to protect its patrons against this danger, the courts will have fixed the relative rights and liabilities of the parties in a manner consistent with legal theory and practical application.

A. B. T.

ENEMY ALIEN LITIGANTS IN THE ENGLISH LAW.—It is said that as a general rule an enemy alien cannot bring an action in the English courts. "And true it is, that an Alien enemie, shall maintaine neither reall nor personall action, *Donec terrae fuet' communes*, that is untill both Nations be in peace." COKE ON LITTLETON, (2 ed.) L. 2, c. 11, sec. 198. LORD STOWELL'S famous dictum in *The Hoop* (1799), 1 C. Rob. 196, 200, is regarded as a classical statement of the doctrine: "In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain in the language of the civilians a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour.—The same principle is received in our courts of the law of nations; they are so far *British* courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hâc vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass,

or some other act of public authority that puts him in the *King's* peace *pro hâc vice.*" Perhaps the most useful recent discussion of the law on this question is to be found in the opinion of LORD CHIEF JUSTICE READING in *Porter* v. *Freudenberg* [1915], 1 K. B. 857, 866. There is an exhaustive review of the authorities in *Rodriguez* v. *Speyer Brothers* (1918), 88 L. J. K. B. 147, discussed *infra.* See also 16 MICH. L. REV. 621. For a comparative study of the law and practice of different countries, see GARNER, "TREATMENT OF ENEMY ALIENS," 13 AM. JOUR. OF INT. LAW 22-59.

The general rule has been deprived of much of its original significance by the progressive tendency of the courts to mitigate the harshness of its application. It is applied, for example, only to parties plaintiff. An enemy alien may be sued as a defendant, and when sued he has a right to enter an appearance and defend the action. *Robinson & Co.* v. *Continental Insurance Company of Mannheim* [1915], 1 K. B. 155. If the decision goes against him he has a right to appeal. *Porter* v. *Freudenberg, supra.* As applied to parties plaintiff the principle is qualified by many important exceptions. LORD STOWELL suggested that an enemy alien might be discharged from his enemy character *pro hâc vice* if he entered the realm under a flag of truce, a cartel, a pass, or some other act of public authority capable of putting him in the King's peace. *The Hoop, supra.* In the case of *The Möwe* (1914), 84 L. J. P. 57, SIR SAMUEL EVANS laid down the rule that an enemy alien claiming any protection, privilege, or relief under the Hague Conventions of 1907 should be entitled to appear as claimant and argue his claim before the prize court. There is considerable authority for the proposition that an enemy alien may sue *en autre droit, e. g.,* as administrator or executor. *Richfield* v. *Udal* (1679), Carter 48, 191; 1 WILLIAMS ON EXECUTORS, (6 Am. ed.) 269, 270 note. In at least one instance an enemy alien has been admitted to prove a debt under a commission of bankruptcy in order to protect his right to a dividend. *Ex parte Boussmaker* (1806), 13 Ves. 71. By all odds the most important exception is the rule, long established, that an enemy alien may sue in the King's courts if he is in the realm by license of the crown. *Wells* v. *Williams* (1697), 1 Ld. Raym. 282; 1 BAC. ABR., (5 ed.) 83, 84. License may be either express or implied. It was implied from the fact of registration under the Aliens Registration Act and Order of 1914. *Princess Thurn and Taxis* v. *Moffitt* [1915], 1 Ch. 58. And the license implied from such registration was not revoked but on the contrary was strengthened by internment. *Schaffenius* v. *Goldberg* [1916], 1 K. B. 284. It has been suggested that license would probably be implied from the circumstance that an enemy alien, in pursuance of prescribed procedure, had applied for and been granted exemption from internment on condition. PICCIOTO, 27 YALE LAW JOUR. 169. In brief, it would seem that, as regards enemy subjects residing or carrying on business in the realm, the number to whom the courts are closed under modern conditions has become almost negligible.

As regards enemy subjects residing or carrying on business in other countries, it is by no means universally true that they are denied a *persona standi in judicio.* In the first place, the test of enemy character is place of residence or business rather than nationality. *Porter* v. *Freudenberg, supra.* See 16

MICH. L. REV. 256. Thus an action has been maintained by a partnership carrying on business in an allied country, although one of the partners was an enemy subject residing in an allied or neutral country. *In re Mary Duchess of Sutherland* (1915), 31 T. L. R. 248, 394. See *Janson* v. *Driefontein Consolidated Mines Ltd.* [1902], A. C. 484, 505. In the second place, enemy subjects residing or carrying on business in an enemy country may sometimes be joined as co-plaintiffs as a matter of form where the action in substance is brought to protect the rights of English subjects. In *Mercedes Daimler Motor Co.* v. *Maudslay Motor Co.* (1915), 31 T. L. R. 178, a patent had been vested jointly in an English company and a German company by a deed which provided that the English company should have the sole right of bringing actions for infringement and might join the German company in such actions as co-plaintiff. An action was allowed to proceed in the name of the two companies on the ground that it was in substance for the protection of the English company. In *Rombach Baden Clock Co.* v. *Gent & Son* (1915), 84 L. J. K. B. 1558, a German subject resident in Germany and his two sons, one a German subject resident in England, and the other a naturalised Englishman, had carried on a partnership business in England. After the outbreak of war the naturalised Englishman commenced proceedings for dissolution and was appointed receiver. He was permitted in the principal case to bring in action in the name of the firm to recover a debt due the partnership.

The significance of the recent decision of the House of Lords in *Rodriguez* v. *Speyer Brothers* (1918), 88 L. J. K. B. 147, may be adequately appreciated in the light of the authorities reviewed above. In this case the plaintiff firm was a partnership of six persons one of whom was a German subject resident in Germany. The firm had carried on a banking business in London before the outbreak of war. The dissolution of the firm by the outbreak of war made it necessary to get in the assets and wind up the partnership affairs. An action was brought in the name of the firm to recover a debt due from the defendant. Judgment was signed against the defendant in default of appearance. It was attempted to have this judgment set aside on the ground that one of the plaintiffs was an enemy alien and so incompetent to sue in the King's courts. The House of Lords decided, by a vote of three to two, that the rule against the bringing of actions by enemy aliens did not apply.

The majority recognized the general rule. "There is no doubt that, as a general rule, an alien enemy cannot bring an action in the King's Courts as plaintiff, although he may, of course, be made a defendant. The rule seems to have its origin in two considerations. First, that the subject of a country then at war with the King is, in this country, unless he be here with the King's permission, *ex-lex*, and that he cannot come into the King's Courts to sue any more than could an outlaw; and, secondly, that the King's Courts will give no assistance to proceedings which, if successful, would lead to the enrichment of an enemy alien and therefore would tend to provide his country with the sinews of war." Per LORD CHANCELLOR FINLAY, 88 L. J. K. B. 147, 151. The general rule was conceived by the majority to rest fundamentally

upon public policy. VISCOUNT HALDANE pointed out that courts are guided by public policy in applying rules of at least three different types: (1) the public policy involved may never have crystallised into a definite or exhaustive set of propositions and will control only where the particular circumstances disclose the mischief which the policy seeks to prevent, *e. g.*, the rule as to wagers in the days when wagers were enforced; (2) the public policy involved may have partially precipitated itself into definite rules of law but the rules have remained subject to the moulding influence of the real reasons of policy from which they proceeded, *e. g.*, the rule as to covenants in restraint of trade; (3) the public policy involved may have become completely crystallised in definite and exhaustive rules of law which can be changed only by statute, *e. g.*, the rule against perpetuities. The Lords were divided in opinion as to whether the general rule that an enemy alien cannot sue in the King's courts should be placed in the second or in the third category above. LORD CHANCELLOR FINLAY, VISCOUNT HALDANE, and LORD PARMOOR held the opinion that it should be placed in the second category. Consequently, when confronted with a situation in which the application of the rule would have done more harm to British subjects or friendly neutrals than to the enemy, they found no difficulty in recognizing an exception and permitting the enemy alien to be joined as a co-plaintiff in order to get in the partnership assets. The "balance of public convenience" was distinctly in favor of making an exception to the general rule.

LORD ATKINSON and LORD SUMNER, on the other hand, regarded the rule as belonging to the third category. In their opinion the enemy alien's incapacity to sue is a well established personal disability depending neither upon the nature of his claim nor upon the result of his suit, if successful, in enriching him or benefiting his country. "This rule of our law, like many other of our rules of law, was, no doubt, originally based upon and embodied certain views of public policy; but in this case, as in many others, the principles of public policy so adopted have, as numerous authorities conclusively show, crystallised, as it were, into strict and rigid rules of law to be applied, to use LORD STOWELL'S words, 'with rigour.' If that be so, as I think it clearly is, then the cases establish that it is wholly illegitimate for any judicial tribunal, which may disapprove of the principles of public policy so embodied in the rigid rule, to disregard that rule in any particular case and base its decision on other principles of public policy of which it more approves. To do so would be to usurp the prerogative and powers of the Legislature, since it is the function of the Legislature, not of judicial tribunals, to discard the principles embodied in such rules, and in its enactments embody others which it prefers." Per LORD ATKINSON, 88 L. J. K. B. 147, 163. "I think that it would be difficult to find another rule so little qualified over so many centuries. When first we hear of it, not long after the beginning of recorded decisions, it was already clear. We never find it emerging from doubt into certainty under the influence of successive decisions, if that is what is meant by 'crystallising'; it has always been as certain as language could make it, as curt as the Commandments. It has never been doubted; the current of decision has run strong and steady and always the same way. It

has always been a rule of personal disability." Per LORD SUMNER, 88 L. J. K. B. 147, 176.

LORD SUMNER'S choice of a metaphor was not exactly a happy one. In the light of the authorities reviewed briefly at the beginning of this note, it would seem that the ancient rule as to enemy alien litigants could have been more appropriately presented as an obstruction which has been yielding gradually to the eroding current of a more liberal principle. Looking at the question from this point of view, the real significance of the decision rendered by the majority in *Rodriguez* v. *Speyer Brothers* becomes apparent. Not only does the decision add another exception of considerable importance to a rule that is already well on the way to being engulfed in its exceptions, but it establishes beyond peradventure that the rule is not rigid and that it remains subject to the moulding influence of the real reasons of public policy from which it has proceeded. In effect, the eroding process is approved and may continue unobstructed in the future.

E. D. D.