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Article 11

# Enemy Aliens - Access to American Courts During Wartime

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v. *United States*, supra. A registrant who has already been inducted into military service may by writ of habeas corpus obtain a judicial determination as to whether the local draft board acted in an arbitrary manner. *United States* v. *Grieme*, supra. The case cited held that the writ of habeas corpus was the only way to obtain judicial review of the decision of the local draft board, that the only point in issue in a criminal prosecution for failure to report for induction was whether the registrant intentionally failed to report, that arbitrary action of the draft board was not a defense to a criminal prosecution for failure to comply with the order. *United States* v. *Grieme*, supra.

The theory underlying the decision in the case of *United States* v. *Grieme* would seem to be that the registrant must submit himself to the order of the draft board. Therefore, a writ of habeas corpus would be in order. The theory of the Seele case in allowing the point of the validity of the draft board decision to be brought into issue would seem to be that the registrant has some degree of choice as to whether or not he will submit himself to the order of the draft board. Whatever the underlying theories, both methods of getting a review are well established and probably will be continued in use, though seemingly in contradiction with one another.

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**War—Rights of Enemy Aliens in Our Courts.**—Petition for a writ of mandamus in the Supreme Court of the United States to compel the District Court of the United States for the Southern District of California to vacate a judgment dismissing an action on the ground that the petitioner, a resident of the United States, is an alien enemy, and to proceed to trial of his action.

The petitioner in this case, one Kumezo Kawato, was born in Japan, but became a resident of the United States in 1905. On April 15, 1941, he brought an action in libel against the vessel RALLY in the District Court for the Southern District of California, claiming damages for wages due him for services as seaman and fisherman on the RALLY. He also alleged that he had sustained severe injuries while engaged in the performance of his duties and sought an allowance for maintenance and medical expenses.

The owners of the vessel RALLY moved, on January 20, 1942, to abate the action on the ground that Kawato, by reason of the state of war then existing between Japan, his native country, and the United States, had become an enemy alien and therefore had no right to "prosecute any action in any court of the United States during the pendency of said war." The District judge granted the motion.

The petitioner sought mandamus in the Circuit Court of Appeals for the Ninth District to compel the District Court to vacate its judgment and proceed to trial of his action. This motion was denied. Leave was then granted to file in the United States Supreme Court. In the Supreme Court the writ of mandamus was issued, thereby granting the petitioner the right to proceed with trial of his action, the court upholding the plaintiff's contention that he had the right under the common law and treaties to proceed with his action, and that his right is not limited by the statutes. *Ex parte* Kumezo Kawato, 63 Sup. Ct. 115 (1942).

This decision raised a very pertinent question—that of the rights of resident enemy aliens in our courts while a state of war exists between the United States and their native country.

An enemy alien has been judicially defined as "one who owes allegiance to an adverse belligerent nation." *Dorsey* v. *Brigham,* 52 N.E. 303,304; 177 Ill. 250, 1898. Thus, for example, a citizen of Japan, residing in the United States at the time of the beginning of hostilities, automatically becomes an "enemy alien" and is subject to the restrictions imposed on such class. A distinction must be made, however, between enemy aliens and enemies of the United States. Thus, it was held in *Vowinckel* v. *First Federal Trust Company,* 10 F. (2d) 19, App. D. C. California, 1926, that an immigrant from Germany returning to Germany in 1915, and entering the service of the German army as a Red Cross surgeon was not an enemy of the United States. German citizens, residents of the United States during war were held not to be enemies of the United States within the Trading with the Enemy Act. *Reising* v. *Dampfschiffahrts-Gesellschaft Hansa,* 15 (2d) 259; (E.D. New York, 1926).

The term "alien enemy," as used in the Trading with the Enemy Act, is deemed to mean:

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business with such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United

> States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term enemy. Trading with the Enemy Act, Section 2: Definitions, 50 U.S. C.A. 189.

At common law an enemy alien resident could prosecute a civil action. Petition of Bernheimer, 130 F (2d) 396 (E.D. Penn. 1941). Again a distinction must be made, however, between resident aliens and non-resident aliens. In the case of the *Industrial Commission of Ohio* v. *Rotar,* 179 N. E. 135 (1931), the court said "it is an elementary fact that, when a state of war exists, an alien enemy cannot prosecute any claim in the courts of a country at war with his country." In this case, the plaintiff, the widow of an employee killed in the course of employment and seeking an award from the Industrial Commission, was a resident of the Austro-Hungarian monarchy with which the United States was at war. It was this fact which prevented her bringing an action in the courts of the United States until hostilities had ceased. In this case the court reasserts the common law rule that if the parties to the litigation are residents of belligerent nations, one residing in one, the other in the opposing contry, then the right of action is suspended until the close of the war, at which time it may be asserted by the alien.

In *Stumpf* v. *A. Schreiber Brewing Company,* 242 Fed. 80 (W.D. New York, 1917), the court held that the plaintiff, who became an alien enemy, cannot continue an action at law or equity, or institute further proceedings, until the war is ended, save in certain exceptional instances, as, for example, where commerce between nations at war is continued, or where the plaintiff in actions for debt becomes an enemy alien after verdict and judgment has been rendered. In the case here mentioned, the plaintiff was a resident of Germany. His action was begun before war was declared between Germany and the United States, but the judgment in the case had not been rendered when a state of war was declared to exist between his native country and the United States. This decision is in accord with the principle that a suit, properly brought by an alien against a citizen, will not be dismissed because of a subsequent declaration of war between the United States and the government of which the plaintiff is a subject, but may be suspended during the war. *Plettenberg, Holthaus & Co.* v. *I. J. Kalmon & Co.,* 241 Fed. 605 (S.D. Georgia, 1917).

The reason for a former rule denying a resident alien who is a citizen of a country with which the United States is at war the right to bring an action in the courts of the United States, namely, that the money recovered would be withdrawn and added to the funds available to aid the alien's country in the prosecution of the war no longer exists

in view of legislation providing for seizure of property belonging to enemy aliens situated in the United States with licensing restrictions governing their subsequent access to it. According to the Trading with the Enemy Act, Section 6, the President may appoint an alien property custodian who shall be empowered to receive all money and property within the United States due or belonging to an enemy, or ally of the enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of the Act. 50 U.S.C.A. 189.

The generally accepted rule, with which the present case is in accord, is that the courts of the United Sattes remain open to citizens of an enemy nation who are residing peaceably in the United States and under its laws. Only non-resident aliens are barred from prosecuting action. *Uberti* v. *Maiatico,* 44 F. Supp. 724 (D.C. of D. of C., 1942); *Anastasio* v. *Anastasio,* 44 F. Supp. 725 (D.C. of D. of C., 1942); *Stern* v. *Ruzicka,* 44 F. Supp. 726 (D.C. of D. of C., 1942).

One final point might be made in connection with the terms "enemy" and "ally of the enemy." In the case of *Sundell* v. *Lotmar Corp.,* 44 F. Supp. 816 (S.D. New York, 1942), it was held that since Finland, although formally at peace with the United States, was actively in concert with Germany in war against Russia which was an ally of the United States, residents of Finland were "allies" of the enemy and enemies of the United States and could not prosecute actions in the United States for injuries sustained by negligence.

The principal case, then, is in accord with the weight of authority in the United States, and restates several fundamental principles regarding alien's right as they are restricted in times of war:

(1) Any person, residing in the United States but not a citizen of the United States, automatically becomes an "enemy alien" upon declaration of a state of war between the United States and his native country.

(2) Resident enemy aliens may still enjoy the right of the use of the federal and state courts of the United States, even though a state of war exist between the United States and their native country.

(3) Non-resident enemy aliens may not begin an action in any court of the United States while a state of war exists between the United States and their native country.

(4) Actions pending in any court of the United States between a non-resident enemy alien and a citizen of the United States when a state of war is declared to exist are abated until the war is over and may then be revived.

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