MAN.

K. B.

PESCOVITCH v. WESTERN CANADA FLOUR MILLS CO.

Manitoba King's Bench, Galt, J. November 11, 1914.

1. ALIENS (§ III—19)—IN WAR TIME—SUITS BY OR AGAINST—STATUS OF ALIEN ENEMY.

A person of German or Austro-Hungarian nationality, domiciled in Canada, as to whom there is no reasonable ground for believing that he is engaged in hostile acts or is contravening the law, may by virtue of the Orders-in-Council (Can.) of August 7 and 15, 1914, maintain an action in negligence against his employer for personal injuries sustained in following his avocation where such action would lie were his country not at war with Great Britain; and, *semble*, the onus is not upon the alien to prove, on the defendant's motion to stay proceedings in an action brought before war was declared, that he had not contravened the restrictions specified in the Royal Proclamation of August 15, 1914 (Can.).

[*Bassi* v. *Sullivan*, 18 D.L.R. 452, 50 C.L.J. 539, 7 O.W.N. 38, criticized; *Topay* v. *Crow's Nest Pass Coal Co.*, 18 D.L.R. 784, followed.]

Statement

MOTION to stay the plaintiff's action involving the right of an alien enemy to sue in our Courts and the onus of proof as to hostile conduct by such alien.

The motion was dismissed.

T. J. Murray, for the plaintiff.

E. A. Cohen, for defendants.

Galt, J.

GALT, J.:—This action was commenced on July 24, 1914, and the statement of defence was filed on August 12, and an amended statement of defence on October 2, 1914. The plaintiff claims damages for injuries sustained by him while in the employ of the defendants. The defendants now move to stay all proceedings in the action upon the ground that the plaintiff in an Austrian citizen and has not yet become a naturalized British subject.

The argument had been almost concluded before I ascertained that counsel were arguing the case upon mutual admissions made between themselves, and not on the usual sworn evidence. It occurred to me that, under such circumstances, the question was merely an academic one. I thereupon adjourned the argument, and gave leave to the defendants to establish the necessary facts by affidavit. I am confirmed in the view above expressed by the judgment of Kekewich, J., in *Williams* v. *Powell* (1894), W.N. 141, where his Lordship held that a declaratory order settling the rights of parties must be made on evidence, not on admissions.