that suit he could not include the claim for interest. It is clear that the two claims were mutually exclusive, and if we uphold the contention of the defendant, we would have to hold that the plaintiff was bound to include in his previous suit a claim for possession. This view would contravene the terms of the contract entered into by the parties. It would mean one of two things: (a) that the mortgagee was entitled to sue for possession as well as interest, a right not conferred upon him by the instrument; or (b) that he was bound to sue, at any rate, for possession in the event of a default by the mortgagor, which would deprive him of the option conferred by the covenant. In either case we should be reading into the instrument a provision which not only does not exist there, but would run counter to an express stipulation entered into by the parties. It is beyond doubt that no sound interpretation of the law of procedure should lead to such an absurd result. The object of the rule embodied in O. 2, R. 2, is to avoid the splitting of claims and to prevent further litigation. The rule is based upon the salutary doctrine contained in the maxim *nemo debet bis vexari pro una et eaden causa*. We fail to see how a person can complain of being twice vexed in respect of the same cause, when he has himself given his adversary the option of making one claim or the other, but has not conferred upon him the right to make both the claims at the same time.

In this view of the clause, prescribing the penalty for a breach of the stipulation relating to the payment of interest, we are of opinion that the judgment in *Ganga Ram* v. *Abdul Rahman* (2) which has been relied upon by the learned counsel for the respondent, is not on all fours with the present case. That judgment enunciates the rule that when, under the mortgage deed, both principal and interest have become due, the mortgagee must sue for both together; otherwise he will be debarred from claiming in a subsequent suit what was not claimed by him in the prior suit. It appears that the mortgagee in that case was entitled to sue not only for interest but also for principal, and it was consequently held that his omission to include in the previous suit his claim for principal debarred him from recovering it in a subsequent suit. The case before us is, to some extent, similar to the cases dealt with in *Ram Bhaj* v. *Devia* (7) and *Badi Bibi Sahibal* v. *Sami Pillai* (11) in neither of which the contention now raised was acceded to. In view of the wording of the clause with which we are dealing we are of opinion that the question of the correctness or otherwise of the rule enunciated in *Ganga Ram* v. *Abdul Rahman* (2) does not arise. We accordingly answer the question put to us in the negative.

R.M./R.K. *Answered in the negative.*

(11) [1895] 18 Mad. 257.

✲✲ A. I. R. 1920 Lahore 4

SHADI LAL AND MARTINEAU, JJ.

Ali Jan—Plaintiff—Appellant.

v.

Abdul Jalil Khan and *others*—Defendants—Respondents.

Misc. First Appeal No. 1135 of 1916, Decided on 25th February 1920, from order of Dist. Judge, Delhi, D/- 19th January 1916.

✲✲(a) Civil P. C. (1908), S. 83 — "Alien enemy"—Not nationality but place of residence or place of business is test—Permanent residence is not necessary — Residence for substantial period in hostile country is sufficient unless it is with consent of Crown.

Nationality is not the test for determining whether a person is an "alien enemy" within the meaning of S. 83. For this purpose the place of residence or the place where the business is carried on is the determining factor and even a British subject will be treated as an alien enemy if he voluntarily resides or carries on business in a hostile country: *McConnell* v. *Hector*, (1802) 3 *Bos. & P.* 113 and *Porter* v. *Freudenberg*, (1915) 1 *K. B.* 857, *Foll.*

Residence need not amount to what is called domicile, namely permanent residence sine animo revertendi. A much less permanent residence is sufficient to constitute a man an alien enemy provided it is not of a temporary character.

If a person resides in a hostile country for a substantial period of time, he acquires the disability attaching to an enemy during that period unless such residence is with the consent of the Crown: *Daimler Company Limited* v. *Continental Tyre and Rubber Company Limited*, (1916) 2 *A. C.* 307, *Foll.* [P 6 C 1]

✲(b) Civil P. C. (1908), S. 83—Firm with alien enemy as partner—Neither firm as such, nor members who are not alien enemies can maintain suit.

If one of the partners in a firm is an alien enemy, neither he nor his partner who does not bear an enemy character can recover money owing to the firm in the English Courts. *McConnell* v. *Hector*, (1802) 3 *Bos. & P.* 113 and *Candilis and Sons* v. *Victor and Co.*, (1916) 33 *T. L. R.* 20, *Foll.* [P 6 C 2]

In a suit for recovery of money due on account of costs of building it appeared that the plaintiff firm consisted of six persons, one of whom lived at Delhi and carried on the business of the firm, while the remaining five resided at Mecca where the partners had another firm of a different name. The action, though relating to a transaction entered into and probably carried out before the declaration of war between Britain and Turkey, was brought during the war:

Held: (1) that even if the five partners residing at Mecca were British subjects, they must still be regarded as alien enemies because of their residence in a hostile country. [P 5 C 2]

(2) that accordingly neither the firm as such nor the one member resident at Delhi could maintain the present suit: *Rodriguez* v. *Speyer Brothers*, (1919) *A. C.* 59, *Dist.* [P 5 C 2]

Mohammad Iqbal—for Appellant.

Moti Sagar—for Respondents.

Judgment.—The action, which has led to this appeal was brought by the firm of Haji Ali Jan against the defendant Abdul Shakur Khan, for the recovery of a sum of money due to the firm. The allegations in the plaint are that the predecessor of Abdul Shakur Khan had asked the firm to get his serai at Mecca repaired, and that the plaintiff carried out the repairs and spent thereupon a large sum of money, much in excess of the amount deposited with the plaintiff for the purpose. The action is accordingly for the balance of the money due to the plaintiff. It is common ground that the plaintiff firm consists of six persons, one of whom lives at Delhi and carries on the business of the firm Haji Ali Jan, while the remaining five members reside at Mecca where the partners have got another firm called "Abdul Sattar-Abdul Jabbar." Now, the city of Mecca is situate in the Turkish Vilayet of the Hedjaz, and a state of war was proclaimed in November 1914 between His Britannic Majesty and the Sultan of Turkey. The action, though relating to a transaction entered into and probably carried out before the declaration of war, was brought during the war; and the crucial question for determination is whether such an action can be maintained in the Courts of British India.

Section 83 sub-S. (2), Civil P. C., makes it perfectly clear that an alien enemy residing in a foreign country cannot maintain a suit in any of such Courts. It is however contended that as the five partners residing in the hostile country are British subjects they cannot be treated as alien enemies within the meaning of the aforesaid provision of the law. This contention is, in our opinion wholly erroneous. It is true that the phrase "alien enemy" in its natural significance has reference to nationality, and indicates a subject of a State which is at war with the United Kingdom of Great Britain and Ireland and would not include a British subject or a neutral subject.

But this is not the meaning of the expression when used in reference to civil rights and liabilities. For this purpose the place of residence or the place where the business is carried on, and not the nationality, is the determining factor, and even a British subject will be treated as an alien enemy, if he voluntarily resides or carries on business in a hostile country. In other words an enemy means a person, of whatever nationality, residing or carrying on business in the enemy country. The residence must of course be a voluntary one because it is clear that an involuntary residence, e. g., that of a prisoner of war or an internee, does not debar him if otherwise qualified, from invoking the assistance of the British Courts. That nationality is not the test for determining the status of a persons for the purpose of civil rights and liabilities is clear from the explanation appended to S. 83, Civil P. C., and the doctrine has been repeatedly affirmed in a series of judgments by the English Courts. It was enunciated during the Napoleonic wars in the case of *McConnell* v. *Hector* (1), when two of the Judges laid down that a British subject resident and carrying on trade in an enemy's country is an alien enemy and is consequently incapable of suing in an English Court. The reason of the rule is that the fruits of the action may not be remitted to a hostile country and so furnish resources against this country. For that purpose the case of an Englishman residing abroad does not differ from any other person. There can therefore be no doubt that even if the five partners residing at Mecca are British subjects, a matter upon which no definite opinion can in the absence of evidence be pronounced, they must still be regarded as alien enemies because they are residing in a hostile country. Their residence alone would be sufficient to bring them within the category of alien enemies. As pointed

(1) [1802] 3 Bos. & P. 113.

out by Lord Alvanley, C. J., in *Mc-Connell* v. *Hector* (1):

"Most certainly every natural born subject of England has a right to the King's protection so long as he entitles himself to it by his conduct but if he live in an enemy's country he forfeits that right."

This rule has since been affirmed in several cases vide, inter alia, *Porter* v. *Freudenberg* (2). What residence in an enemy country will suffice to make a man an alien enemy is a question of degree. It is clear that the residence contemplated by the rule need not amount to what is called domicile namely, permanent residence *sine animo re ervendi*. A much less permanent residence is sufficient to constitute a man an alien enemy provided that it is not of a temporary character. The correct proposition appears to be that if a person resides in a hostile country for a substantial period of time he acquires the disability attaching to an enemy during that period, vide *Porter* v. *Freudenberg* (2) and *Daimler Company Limited* v. *Continental Tyre and Rubber Company Limited* (3), unless such residence is with the consent of the Crown. The residence must however be of a voluntary character, for example, a prisoner of war kept in the enemy country cannot be regarded as an alien enemy. A person may not be resident in an enemy country and yet he may acquire an enemy status if he carries on business in that country. As observed by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines Limited* (4):

"When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

There can be little doubt that of the six members of the plaintiff firm five not only reside in a hostile country, but also carry on business there, and they must therefore be treated as alien enemies, but the sixth is not an enemy. What then is the effect of this constitution of the firm upon the suit brought by it? Now, it is beyond dispute that a partnership firm is not a juristic person like a limited company, and has no existence in law apart from the members composing it. A firm is only a short expression for denoting the several persons who are members thereof. We must therefore take it that the present suit is brought by six persons, of whom one is a friend and five are enemies. Now, a series of cases decided by the English Courts, beginning with the case of *Mc-Connell* v. *Hector* (1), have laid down the rule that if one of the partners in the firm is an alien enemy as defined above, neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the English Courts. A discordant note however appears to have been struck in a recent judgment of the House of Lords in *Rodriguez* v. *Speyer Brothers* (5), and it is necessary to examine this case carefully in order to see what it did decide. The firm dealt with in that case carried on a banking business in London until the outbreak of war with Germany and consisted of six persons, only one of whom was an enemy having an interest to the extent of 1/40th. The partnership was ipso facto dissolved by reason of one partner having become an alien enemy, and in order to get in the assets and wind up the affairs of the firm an action was brought in 1916 by the firm for the recovery of a debt alleged to have accrued due before the commencement of the war. The question arose whether the action was maintainable. Of the five law lords, who decided the case, two were of the opinion that, as one of the plaintiffs was personally disqualified from seeking the aid of the Bristish Courts, the suit could not be maintained. On the other hand, the remaining three members of the Bench, while recognizing the validity of the rule referred to above, considered that the rule was not a definite and an inflexible one and should not be applied to cases where its application would be mischievous and contravene the principles of public policy, which alone gave rise to the rule.

They pointed out that the special circumstances of the case showed that the action was really for the benefit of the partners who were not enemies, and the enemy alien could not during the war reap any benefit from the action. It was accordingly held that to prevent an alien enemy, in these circumstances, from being a party to an action as plaintiff would do much more harm to British subjects

(2) [1915] 1 K. B. 857.
(3) [1916] 2 A. C. 307.
(4) [1902] A. C. 484.
(5) [1919] A. C. 59.

or to friendly neutrals than to the enemy; and this was a consideration most material to be taken into account in determining whether a case falls within the true scope and extent of the rule. In view of these special circumstances the majority of the House of Lords allowed the case to proceed. It is to be observed that in the cases of *McDonnell* v. *Hector* (1) and *Condilis and Sons* v. *Victor and Co.* (6) the majority of the firm consisted of alien enemies and in both the cases it was decided that the action brought by the firm could not be maintained. No dissent was expressed by the majority of the House of Lords from the rule laid down in these cases, which were distinguished on the ground of the special circumstances in *Rodriguez* v. *Speyer Brothers* (5). In view of the constitution of the firm with which we are dealing, there can be no manner of doubt that even the ground, upon which the majority of the House of Lords took that particular case out of the purview of the rule, has no application to the case before us. We are accordingly of opinion that the District Judge was right in nonsuiting the plaintiffs. The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(6) [1916] 33 T. L. R. 20.

A. I. R. 1920 Lahore 7

WILBERFORCE, J.

Rulia Ram — Decree-holder — Petitioner.

v.

Sultan Khan and *others*—Judgment-debtors—Opposite Parties.

Civil Revn. Petn. No. 775 of 1918, Decided on 29th January 1919, from the order of Sr. Sub-Judge, Gurdaspur, D/- 20th December 1917.

(a) Punjab Alienation of Land Act (1900), S. 2 (3)—Definition of "land" is not exhaustive.

The definition of "land" given in S. 2 (3) is not intended to be exhaustive. [P 7 C 2]

(b) Maxims—*Quicquid plantatur solo, solo cedit*—Maxim does not apply to trees growing on land.

Although the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in India as having the wide meaning attached to it in England, it does cover the case of trees growing on the land. 52 *P. R.* 1906, *Foll.* [P 7 C 2; P 8 C 1]

(c) Punjab Alienation of Land Act (1900), Ss. 2 (3) and 16—"Land" includes trees standing on it—Trees are therefore exempt from attachment.

It was not the intention of the legislature to exclude standing trees from the definition of land given in S. 2 (3) and consequently such trees are exempt from attachment and sale under the provisions of S. 16 of the Act. [P 8 C 1]

Jai Gopal Sethi—for Petitioner.

Judgment.—In this case a decree-holder attached miscellaneous trees situated on agricultural land and the lower appellate Court has held, especially on the authority of *Nihal Kaur* v. *Hari Singh* (1), and on orders of the District Judge, that in the definition of land trees are included. Against this decision an application for revision has been preferred. The petitioner's counsel relies specially on *Dhani Das* v. *Aya Ram* (2) and on remarks made therein by Stogdon, J., at p. 75 (of 1892) *P. R.* to the effect that trees are not land within the definition of S. 4, cl. (1), Punjab Tenancy Act, 1887. He also relies on *Yaru* v. *Adil* (3), which follows the previously recited judgment, and on *Nur Muhammad* v. *Tiloka Mal* (4) to the effect that a proprietor's share of standing crops is not "land." These judgments however are merely to the effect that a suit for trees or crops is not necessarily for the purpose of the Punjab Courts Act a suit for land. *Dhani Das* v. *Aya Ram* (2) was a suit relating to fruit trees and it followed *Dewa* v. *Hira Singh* (5), in which Sir Meredyth Plowden remarked that it was a common practice to sell or let or mortgage fruit trees independently of the land on which they stand. It is clear that such judgments are of no assistance in determining whether the definition of land as given in the Punjab Alienation of Land Act includes the trees situated thereon. This definition is silent with regard to trees; and as many other objects annexed to land are mentioned, it is argued that the legislature did not intend to include trees in the definition of land, but it is clear that the definition itself is by no means intended to be exhaustive. There appears to be no published authority of this Court dealing exactly with the matter before me, though *Wali Muhammad* v. *Mariam Bi* (6) is in some way applicable to this case.

In that case it was held that though the maxim *quicquid plantatur solo, solo cedit* cannot be accepted in this country

(1) [1903] 32 P. L. R. 1903.
(2) [1892] 15 P. R. 1892.
(3) [1893] 46 P. R. 1893.
(4) [1905] 14 P. R. 1905.
(5) [1890] 119 P. R. 1890.
(6) [1905] 52 P. R. 1906.