

The trustees, of course, get their costs as between solicitor and client; the plaintiff must be ordered to pay all the defendants' costs, and recoup out of income any corpus necessarily applied to trustees' costs—the income payable to plaintiff to be impounded for the purpose until the liability is satisfied; if plaintiff undertakes to devote until recoupment one half the income to the benefit of the children, or some or one of them, then the other half only of the income to be impounded.

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Isaacs J.

Order accordingly.

Solicitors, for plaintiff, *Eady & Bradford.*

Solicitors, for defendants, *Simmons, Wolfhagen, Simmons & Walch.*

B. L.

[HIGH COURT OF AUSTRALIA.]

IN RE ALEXANDER & COMPANY.

Trading with the Enemy—Appointment of Controller—Motion—Evidence—Interim controller—Partnership—Trading with the Enemy Act 1914 (No. 9 of 1914), secs. 3, 8—Trading with the Enemy Act 1914 [No. 2] (No. 17 of 1914), secs. 2, 4.

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SYDNEY,
Feb. 16, 17,
19;
March 16.
Barton, J.

The Minister for Trade and Customs having under sec. 8 (3) of the *Trading with the Enemy Acts* 1914 appointed an interim controller of the business of a firm on the ground that he believes that the firm will endeavour to transmit money from Australia to Germany for the benefit of enemy subjects,

Held, that on a motion to the High Court to appoint a controller it is sufficient that there shall be some evidence that there is a reasonable foundation for the Minister's belief.

In re Meister Lucius and Brüning (Ltd.), 31 T.L.R., 28, followed.

MOTION.

The firm of Alexander & Co. consisted of three partners—Eduard Alexander of Hamburg in Germany, a German subject

H. C. OF A. resident in Germany, Bernhardt Hesslein, a naturalized British
 1915. subject resident in Australia, and Louis Frank, a German subject
 ~~~~~ resident in Australia. At the time of the outbreak of the war  
 IN RE the firm carried on business in Australia.  
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— The Minister for Trade and Customs, purporting to act under sec. 8 of the *Trading with the Enemy Acts* 1914, appointed an interim controller of the business of the firm, and he now applied to the High Court by motion for the appointment of a controller of that business.

The other material facts are stated in the judgment of *Barton J.* hereunder.

*Leverrier K.C.* and *Norris*, in support, referred to *In re Meister Lucius and Brüning (Ltd.)* (1).

*Ralston K.C.* and *Curtis, contra*, referred to *Burchell v. Wilde* (2).

*Cur. adv. vult.*

March 16.

BARTON J. read the following judgment:—This is a motion for the appointment of a controller under the *Trading with the Enemy Acts* Nos. 9 and 17 of 1914, sec. 8 of No. 9 as amended by sec. 4 of No. 17.

The principle upon which these Acts rest long preceded their passage. It is stated by *Chitty (Commercial Law, vol. I., p. 377)* as follows:—"It is the established law of nations that when war has taken place between two or more States, all commercial intercourse between the subjects of each must immediately cease, unless it be expressly stipulated otherwise by treaty, . . . on the principle that war puts every individual of the respective belligerent governments into a state of mutual hostility, and there is no such thing as a war for arms and a peace for commerce . . . Such trading would also facilitate the means for conveying intelligence and carrying on a traitorous correspondence with the enemy, which would more than counterbalance any advantage likely to accrue to individuals from such trading."

(1) 31 T.L.R., 28.

(2) (1900) 1 Ch., 551.



The Proclamation of His Majesty the King, dated 9th September 1914 and published in the *Commonwealth Gazette* of 12th September, prohibits the payment, by any person resident, carrying on business, or being in His Majesty's Dominions, of any sum of money to or for the benefit of an enemy. The expression "enemy", as defined in the Proclamation, applies to Eduard Alexander of Hamburg, a resident of an enemy country who carries on business there, but does not include the respondent Frank, a non-naturalized German who resides in this country, nor the respondent Hesslein, a naturalized German who resides here. Consequently, any trading merely between Hesslein and Frank is not within the provisions with which we are now concerned. They are in the same position—of course, only in relation to the Acts and Proclamations—as subjects of the British Crown. But in respect of the evils pointed out by *Chitty*, the position of Hesslein and Frank, especially that of the last named person, lends emphasis to the author's statement of the dangers to which the State is exposed as a result of such trading.

By the Act No. 9 of 1914, sec. 2, sub-sec. 2, a person is for the purposes of the Act to be deemed to trade with the enemy if he performs or takes part in (a) any act or transaction which is prohibited by or under any Proclamation issued by the King and published in the *Gazette*, whether before or after the commencement of the Act (23rd October 1914).

Trading with the enemy is an offence under sec. 3 of the same Act, and therefore the prohibited payment to or for the benefit of an enemy is such an offence.

By sec. 8 of the same Act, as amended by the Act No. 17 of 1914, sec. 4, it is provided by sub-sec. 1 that "where it appears to the Minister for Trade and Customs in reference to any person firm or company—

"(a) that an offence under sec. 3 of this Act has been or *is likely to be committed* in connection with the trade or business thereof, or

"(b) that (in the case of a firm or company) the control or management thereof has been or is likely to be so affected by the state of war as to prejudice the effective continuance of its trade or business, and that it is in

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the public interest that the trade or business should continue to be carried on, or

“(c) that the business thereof is controlled or managed directly or indirectly by or under the influence of enemy subjects, or is carried on wholly or mainly for the benefit or on behalf of enemy subjects; or

“(d) that it is necessary for the safety of the Commonwealth that a controller of the business should be appointed;

the Minister may apply to the High Court for the appointment of a controller of the person firm or company, and the High Court shall have power to appoint such a controller for such time and with such powers and subject to such conditions as the Court thinks fit, and the power so conferred may include any powers of controlling, conducting, continuing, discontinuing, extending, restricting or varying the business and operations of the person firm or company.”

Sub-sec. 2 provides as to the costs of the proceedings, and the remuneration, charges and expenses of the controller.

Sub-sec. 3 provides that “where the Minister is satisfied, in reference to any person firm or company, that the business thereof is managed controlled or carried on as mentioned in par. (c) of subsec. 1 of this section, or that it is necessary for the safety of the Commonwealth that a controller of the business should be appointed, he may, before applying to the High Court under that sub-section, appoint an interim controller of the person firm or company with such powers and subject to such conditions as he thinks fit; but in that case he shall as soon as practicable thereafter apply to the High Court under that sub-section,” *i.e.*, sub-sec 1 of the amended sec. 8.

To the definitions in sec. 2 (1) of the Principal Act the amending Act adds the following as a meaning of the term “enemy subject” used in the amended sec. 8 and elsewhere:—

“(a) any person who is an enemy within the meaning of any Proclamation by the King or by the Governor-General referred to in sub-sec. 2” of sec. 2 of the Principal Act.

Eduard Alexander is thus an enemy subject within the meaning of sec. 8 as amended.



The memorandum of the Minister for Trade and Customs, set forth in the affidavit of Stephen Mills, Comptroller-General of Customs, authorizes the deponent to inform the Court on affidavit or otherwise of the matters which it contains. It relates, as the results of "investigations which have been made," a number of matters which I need not quote at length, but which were the subject of evidence on this application.

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It proceeds thus:—"I have reason to believe and do believe that it is likely that the said firm will endeavour to transmit moneys from Australia to Germany, and I am satisfied that the said business is carried on wholly or mainly for the benefit of enemy subjects."

Having come to these conclusions, the Minister appointed Mr. H. B. Allard, a public accountant, to be interim controller of the firm of Alexander & Co., and directed application to be made in his name as soon as practicable, as it is now made, to the Court for the appointment of a controller of that firm under the provisions the material parts of which I have read.

In appointing an interim controller the Minister acted under sub-sec. 3 of sec. 8. It is not necessary to decide, and so I do not decide, whether on the present application the Minister is necessarily restricted to the grounds on which he made that appointment. There is some force in Mr. *Leverrier's* contention that he still has open to him all or any of the grounds mentioned in the four paragraphs of sub-sec. 1 as amended, and that when sub-sec. 3 directs him to apply, as soon as practicable after the interim appointment, to this Court to appoint a controller "under that sub-section," he is, in following that direction, not restricted to the grounds on which he has purported to base the provisional action he has taken.

But in the present case he has stated two conclusions, one of which is that "it is likely that the said firm will endeavour to transmit moneys from Australia to Germany," and the context shows plainly that he is referring to the transmission of moneys from one or other of Eduard Alexander's partners in Australia to him in Germany; I do not say Eduard Alexander's former partners, because I am not sure that what has been called "the old firm" was dissolved by operation of the outbreak of war.



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There seems to be much reason in the view of Dr. *Schuster*, who, in his book on *The Effect of War and Moratorium on Commercial Transactions*, 2nd ed. (1914), p. 22, thinks it "natural to say that a partnership agreement with an alien enemy is, like other agreements, suspended during the war in so far as it involves intercourse with such alien enemy, but that it becomes fully operative after the termination of the war unless it has in the meantime expired by lapse of time;" and at p. 23 he says: "There is no reason why the partnership between the partners other than the enemy partner should be terminated or suspended by the outbreak of war." Dr. *Schuster's* book is characterized by Mr. G. G. *Phillimore*, in an article in the January number of the *Journal of the Society of Comparative Legislation*, as a contribution of considerable practical value to the study of the question under consideration—*i.e.*, trading with the enemy.

The business of Alexander & Co. continued to be carried on by Frank and Hesslein after the outbreak of war, at least by way of realization and liquidation; probably in other respects to some extent.

In that one of his conclusions which I have quoted, namely, that it is likely that the said firm will endeavour to transmit moneys from Australia to Germany, the Minister finds, though not in the words of sec. 8 (1) (a), that an offence under sec. 3, that is, the offence of trading with the enemy, is likely to be committed. It is common knowledge that endeavours to do business with enemy subjects resident in Germany, through neutral channels, have so frequently succeeded as to have led to energetic action on the part of certain of the belligerent powers with the view of frustrating such endeavours, which nevertheless continue, and are often successful. If the Minister's conclusion is correct, a ground for the success of the present application has been established.

I am of opinion upon the evidence that the Minister's opinion is well grounded. The case of *In re Meister Lucius and Brüning (Ltd.)* (1) was upon an application similar to the present, made under sec. 3 of the English Act 4 & 5 Geo. V. c. 87, and based particularly on par. (b), which is identical in terms

(1) 31 T.L.R., 28, at p. 29.



with par. (b) of the corresponding section in the Australian Act, sec. 8. In granting the application *Warrington J.* said :—"The Act provides that where it appears to the Board of Trade in reference to any firm or company that a certain state of things exists the Board of Trade may apply. It seems to me that that part of the section merely directs the Board of Trade as to the circumstances in which it may apply. Before it makes the application it must appear to the Board of Trade that that state of things exists. Then the section proceeds, 'and the High Court shall have power to appoint such a controller.' Now before the Court appoints the controller I think it is plain that it must have some evidence beyond a mere statement by the Board of Trade that it appears to them that the state of things exists. The Court must be satisfied on some evidence that the state of things really exists. With regard to the evidence, I think in such cases as this all that the Court ought to require is some evidence that the information of the Board of Trade has some reasonable foundation." The functions exercised in England by the Board of Trade in this connection are given by the Australian Acts to the Minister for Trade and Customs.

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While I am not bound to follow that case as an authority, I think that I ought to follow it, because I think it is founded on sound reason.

One cannot read either the English Act or the two passed in Australia without coming to the conclusion that the jurisdiction conferred here by sec. 8 and its amendments is protective and precautionary, as distinguished from the penal provisions, which are not invoked in this case. So much is evident without any detailed analytical statement.

The Court is not asked to convict anyone; that would involve a proceeding under provisions widely different from the amended sec. 8, and the quantum of evidence necessary would be such as would convince the Court of the commission of an offence.

In this case, however, it is only necessary for the Court to have some evidence that there is some reasonable foundation on which the Minister bases his opinion that the offence of trading with the enemy by a person or persons in the Commonwealth by the payment of money to or for the benefit of Eduard Alexander of



H. C. OF A. Hamburg, an enemy within the Proclamation of 9th September,  
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endeavours to remit to Eduard Alexander if persisted in or  
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It is not necessary to analyse the various letters in detail. I will refer only to three. It is plain that there was for some time an intention to remit if possible. It is plain also that after a cessation—I prefer the term suspension—of actual endeavours to remit there were efforts on the part of Frank to continue correspondence with Eduard Alexander through neutral ports such as New York, Rotterdam, and Amsterdam. He asks Hesslein to secure reliable information from the Bank as to remittance to Hamburg, “If the Bank guarantees the payment of all remittances in Hamburg.” If the Bank cannot do this, he tells Hesslein to “send the remittances to A. & Co. Paris or stop sending *until we have instructions.*” At the same time he encloses a letter to E. A., and Eduard Alexander is the only person of those initials whose name occurs in the rest of the correspondence. He tells Hesslein to read that letter through and “send it closed *via* Frisco or Dutch Steamer.” There is throughout an endeavour to keep up correspondence with Hamburg, and it is most unlikely, in view of the letters we have actually seen, that the correspondence which does not appear was confined to domestic and private affairs. The last letter quoted was dated 8th August. On 10th August, writing to Hesslein, he says: “If you remit home, do so by drafts on sight A. & Co., Paris; send them through with a request that they be placed at the disposal of A. & Co., Hamburg, or Herr E. A.” Frank’s endeavours to reach Alexander by letter are continued after he has been informed by Hesslein of their solicitor’s advice that they cannot have any connection with A. & Co. in Hamburg, with whom the solicitor advised them not to correspond “*for the present.*” In September he writes a letter to Alexander, which is among the intercepted correspondence, in which he instructs the Hamburg partner how to avoid interception. In the same letter he tells him: “If you have a chance of getting new hair ornaments delivered from Paris only and shipping here, order with confidence.” This was six weeks after Hesslein’s letter last



described informing him of the solicitor's advice not to have any connection with A. & Co. in Hamburg, and to suspend correspondence with them for the present. Here was clearly an endeavour to do business with the enemy in Hamburg even after advice against that course. He explains that he was writing for a new firm of Alexander & Co. consisting of Hesslein alone. That does not avail him. I am not clear that this is not itself an attempt to commit trading with the enemy; and the *Commonwealth Acts Interpretation Act 1904*, sec. 8, places the attempt at commission on the same footing as the offence itself. But can it be denied that the offence is likely to be committed when such a letter is written deliberately?

There are many more passages in the correspondence to which reference might be made as showing Frank's intention and the likelihood of his adopting any chance to get letters or money through to Hamburg. If he could once have established the feasibility of getting the letters through, a reasonable mind can scarcely doubt that he would have seized the opportunity to enclose in them drafts for money due to Alexander as his share of the proceeds of sales before and since the outbreak of war. In a sense there would be no great moral turpitude in such transactions, which he might easily view as a rendering to Alexander of his due, but the law forbids such transactions, and the preventive jurisdiction is instituted so that businesses of this kind may be placed under control for the prevention of the very things that a German merchant here might very easily think right.

What I have said I think shows the foundation for the exercise of the precautionary jurisdiction, and a statement of the remainder of the correspondence could only go to justify that view more amply.

It was urged that an order, if made, should apply only to Alexander's share of the funds. It was shown by the interim controller that since the receipt from Hamburg of a statement made up to the end of March last year there was nothing to show the position of the accounts, which were kept at Hamburg, since the end of 1913; and the same witness, a skilled accountant, told us that the March statement had no bearing on the respective

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profits and losses of the three partners. He said it was not possible to ascertain on the available information how much was due to each partner by way of either capital or profit on 4th August 1914, and it is clear that the ascertainment is not more possible now. The Court could not, even if it thought right to make the order suggested, arrive at the respective sums which should be impounded as against Alexander or released to the other two partners. However, I more than doubt whether I have any power to make such an order, and if the power existed I should decline to exercise it.

I appoint Horace Bately Allard of 12 O'Connell Street, Sydney, controller of the business of the firm of Alexander & Co. as carried on up to 4th August 1914 by Eduard Alexander, Louis Frank, and Bernhardt Hesslein, such control to continue until the end of the present state of war or until further order. He is to control the receipt, custody and disposal of all real and personal property of the firm, including moneys and securities whether now existing or hereafter to arise in the course of the business of the firm, so far as may be necessary or proper to secure that none of the firm's property shall pass directly or indirectly to the King's enemies. The moneys of the said partnership to be deposited in the Bank to the joint credit of the controller and Hesslein so far as such funds are in Sydney, and of the controller and Frank so far as they are in Melbourne and Adelaide. All securities of the firm to be in the joint control and custody of the controller and such one of the two Australian partners as is resident in the place where such securities exist, no security to be realized without the consent of the controller. All books and documents in the possession or control of Frank or Hesslein and relating to the business of Alexander & Co. as registered on 4th May 1913 or that of Alexander & Co. as registered on 19th August 1914, to be discovered to the controller whenever he so demands. The controller to have liberty to make such allowances as he thinks proper from time to time to either of the respondents appearing on this application in respect of living expenses. Subject to the aforesaid powers the controller is to afford facilities to the last named respondents to carry on the lawful business of the firm in the ordinary course. The controller to be



at liberty to report to this Court such matters as he may desire to report from time to time respecting the said business and its control, and as to the results of carrying it on. The moneys and securities handed to his wife and daughter or either of them by the respondent Frank, and any securities representing money so handed by him to them or either of them, to be placed in the same control as the moneys and securities of the firm. The costs of all parties as between solicitor and client to be paid out of the funds placed under control, but (all parties consenting) such costs are not to be taxed unless the controller so requires. The controller to receive such remuneration as may be agreed upon by all parties to this application, but, failing such agreement, the degree of his remuneration to be reserved. The further hearing of this motion adjourned, with liberty to all parties to apply.

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*Order accordingly.*

Solicitor, for the applicant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondents, *F. W. Barker*.

B. L.