

[HIGH COURT OF AUSTRALIA.]

MOSS APPELLANT;
DEFENDANT,

AND

DONOHOE RESPONDENT.
INFORMANT,

ON APPEAL FROM A STIPENDIARY MAGISTRATE OF
NEW SOUTH WALES.

Trading with the Enemy—Act prohibited by repealed Proclamation—Trading with neutral carrying on business in enemy country—Attempt—Evidence—Summary conviction—Trading with the Enemy Acts 1914 (No. 9 of 1914—No. 17 of 1914), secs. 2, 3—Imperial Proclamation of 5th August 1914—Acts Interpretation Act 1904 (No. 1 of 1904), sec. 8—Crimes Act 1914 (No. 12 of 1914), sec. 7.

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SYDNEY,
May 7.

A company incorporated in the United States of America, and having its head office at New York, had branch houses at Rotterdam in Holland and at Hamburg in Germany. The company's business was the sale and export of gin, which was manufactured for it in Holland by independent distillers. Before the outbreak of the war it was the company's practice to send the gin in bulk to its warehouse at Hamburg, where it was bottled and packed, and whence it was exported. M., a resident in Australia, who had dealt with the company for many years, was convicted before a Stipendiary Magistrate of an attempt, by means of a letter addressed and posted to the company at Hamburg in Germany on 11th August 1914, to trade with the enemy. On appeal to the High Court,

MELBOURNE,
Sept. 17.
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Griffith C.J.,
Isaacs,
Gavan Duffy,
Powers and
Rich JJ.

Held, by Isaacs, Gavan Duffy, Powers and Rich JJ. (Griffith C.J. dissenting), that on the evidence the Magistrate might properly find that the letter was an order by M. to the company which then in fact and as M. believed was carrying on business in Germany to supply goods, that M. intended the order to be executed in the ordinary course of the business they were carrying on there, and that he expected to receive the goods in Australia; that on such

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a state of facts the sending of the letter was an attempt to do an act forbidden by the Imperial Proclamation of 5th August 1914; and that such an attempt was an attempt to trade with the enemy within the meaning of sec. 3 of the *Trading with the Enemy Acts* 1914, and was punishable summarily under that section by virtue of sec. 8 of the *Acts Interpretation Act* 1904 and sec. 7 of the *Crimes Act* 1914.

Held further, by *Griffith C.J.*, that the provisions of sec. 8 of the *Acts Interpretation Act* 1904 and sec. 7 of the *Crimes Act* 1914 that any attempt to commit an offence against any Act is an offence against the Act itself have no retrospective operation so far as regards attempts made before the passing of the Act creating the offence.

APPEAL from a Stipendiary Magistrate of New South Wales.

At the Central Police Court at Sydney, before a Stipendiary Magistrate, an information was heard whereby John Thomas Tamplin Donohoe charged that on or about 11th August 1914 Laurence Edward Moss and Lawrance David Phillips did, by means of a letter of that date addressed to Messrs. Udolpho Wolfe Co., Hamburg, Germany, attempt to trade with the enemy. Moss, having been convicted, appealed to the High Court by way of statutory prohibition.

By an Imperial Proclamation dated 5th August 1914 (published in the *Commonwealth Gazette* of 7th August 1914) it was recited (*inter alia*) that "it is contrary to law for any person resident, carrying on business, or being in Our dominions to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our permission." The Proclamation then continued:—"Now, therefore, We have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation, and We do hereby warn all persons resident, carrying on business, or being in Our dominions: Not to supply to or obtain from the said Empire any goods, wares, or merchandise, or to supply to or obtain the same from any person resident, carrying on business, or being therein, nor to supply to or obtain from any person any goods, wares, or merchandise for or by way of transmission to or from the said Empire, or to or from any person resident, carrying on business, or being therein, nor to trade in or carry any goods, wares, or merchandise destined for or coming from the said Empire, or for or from any person resident,

carrying on business, or being therein: . . . And We do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts will be liable to such penalties as the law provides.”

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The material facts are stated in the judgment of *Griffith C.J.* hereunder.

Knox K.C. (with him *Campbell K.C.* and *Weigall*), for the appellant. On the evidence there was no intention on the part of the appellant that goods were to be got from Germany, and therefore no offence at common law was committed. It is not an offence at common law to trade with the enemy. No offence under the *Trading with the Enemy Acts* 1914 was committed, because the Proclamation of 5th August 1914, which was in existence when the letter was written, was repealed by the Proclamation of 9th September 1914, and sec. 2 (2) (a) only refers to an act prohibited by a Proclamation which was in force when the Act was passed.

Windeyer (with him *Peden*), for the respondent. Sec. 2 (2) (a) refers to an act which at the time it was done was prohibited by a Proclamation then in force, and under sec. 3 an act the doing of which is afterwards prohibited by a Proclamation is included in the term “has traded with the enemy.” Under sec. 2 (2) (c) a person trades with the enemy for the purposes of the Act who does an act which at common law constituted trading with the enemy, and it is immaterial whether at common law trading with the enemy was a misdemeanour or not. Trading with the enemy was a misdemeanour at common law: *Halsbury's Laws of England*, vol. I., p. 311; *Hawkins' Pleas of the Crown*, bk. I, ch. 2; *Kent's Commentaries*, vol. I., p. 67; *Twiss's Law of Nations*, p. 85.

Cur. adv. vult.

The following judgments were read:—

GRIFFITH C.J. The charge in this case was that the appellant and L. D. Phillips, his partner, on 11th August 1914, by a letter addressed and posted to the Udolpho Wolfe Co. at Hamburg in

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The charge was laid under the *Trading with the Enemy Act* No. 9 of 1914, assented to on 23rd October of that year, which provides (sec. 3) that any person who, during the continuance of the present state of war, trades or who has before the commencement of the Act traded with the enemy shall be guilty of an offence which may be prosecuted either summarily or upon indictment. There is no doubt that trading with the enemy is a misdemeanour at common law.

That term includes having any commercial or financial business with any person resident or carrying on business in the enemy country, whether he is himself an enemy or not.

It will be noted that the date of committing the alleged offence was antecedent to the passing of the Act, but a Royal Proclamation had been made on 5th August calling attention to the existing law.

The relevant facts are not in dispute, and are, briefly stated, as follows :—

The appellant and his partner L. D. Phillips have for many years been the sole agents in Australasia for the Udolpho Wolfe Co., which is an American company incorporated in the State of New Jersey, and having its principal place of business in New York, having also a branch house in Rotterdam. Their business is the export of gin, which is manufactured for them in Holland by an independent firm of distillers. Before the outbreak of war it was their practice to send the gin in bulk from Holland to Hamburg, where it was bottled and stored for export, and where the Company had an office. A principal reason for selecting Hamburg as the place for these operations appears to have been that the wood required for the packing cases was not procurable in Holland.

The appellant's firm corresponded directly with the head office of the Company in New York, sending press copies of their letters to the Company's Hamburg house. They also occasionally corresponded directly with the latter.

Before 31st July 1914 the appellant's firm had sent to the Company at New York an order for a shipment of gin to Fremantle and other places in Australia. On 10th August they received from

the Company, from New York, a cable message dated the 7th, as follows:—"Have you covered your war risk on shipments afloat? Shipments entirely stopped." On the following day, having, according to the evidence of the appellant, occasion to answer a letter from the Company's Hamburg house advising certain shipments, and no mail leaving for America for some days, they wrote a letter to that house, in the course of which they said:—"Fremantle—Will you please add to next shipment for mark

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fifty cases each two dozen, and we trust that an opportunity to forward will be available at no distant date, and we will confirm this order when next addressing your New York house." On this letter the charge is founded. The letter never reached Hamburg, but on 28th August the appellant's firm sent a copy of it to the Company's head office at New York, by whom it was communicated to their house at Rotterdam. In the course of the letter in which the copy was enclosed they said:—"Doubtless it will be a long time before shipments can be made from Hamburg, and we are wondering whether you have in contemplation any method of overcoming this serious difficulty of furnishing supplies to your various agencies."

I am disposed to think that the letter of 11th August, which was in form a request to the Udolpho Wolfe Co. at Hamburg to send goods to the appellant firm in Australia, is, standing alone, capable of being construed as an attempt to trade with the enemy within the meaning of the Act.

But I think that it must be read in the light of the other facts of the case, including the letter of 28th August, which was, under the circumstances stated, practically contemporaneous. Read in that light, I think that it appears that the appellant did not contemplate that the gin ordered would be despatched from Hamburg, but expected that it would come from the Company's Rotterdam house. It is at least equally consistent with such an intention as with an attempt to obtain it from Hamburg. If the Company had carried on business at Hamburg only, different considerations would arise. But when a merchant carries on business in several places from some of which it is lawful to obtain goods and from

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others not, I do not think that a request to supply goods generally can be construed as a request to supply them from a place from which it is unlawful to obtain them.

The rule that a person charged with an offence cannot be convicted upon evidence which is equally consistent with his guilt and with his innocence is in force in time of war as well as in time of peace.

In this connection the language of *Blackburn J.*, delivering the judgment of the Court of Queen's Bench (consisting of *Cockburn C.J.*, *Mellor J.* and himself) in the case of *Waugh v. Morris* (1), which I have quoted in the preceding case, is very relevant.

It was necessary to show a wicked intention on the part of the appellant to break the law by procuring goods from Hamburg. In my opinion, so far from this being shown, it appears affirmatively that the intention as well as the expectation of the appellant was to obtain the goods from some other place and without breaking the law.

Since this case was argued another question involving the validity of the conviction has been fully debated before us in another case (in which, however, it was not necessary to decide it), namely, whether, as a matter of construction, the Act, assuming it to be valid as an *ex post facto* law, applies to attempts to trade with the enemy, and, although the point was not pressed in this case, I do not think that I can properly avoid expressing my opinion upon it.

I have already said that in my opinion trading with the enemy is a misdemeanour at common law. And it is well settled that an attempt to commit a misdemeanour is itself a misdemeanour. The offence charged in this case might therefore have been prosecuted on indictment without invoking the Act. But in order to support the conviction appealed from it must be shown that the offence could be prosecuted summarily. If it can, it must be because the offence charged is created by the Act.

By sec. 8 of the *Acts Interpretation Act* 1904 any attempt to commit an offence against any Act is declared to be, unless a contrary intention appears in the Act, an offence against the Act itself. Sec. 7 of the *Crimes Act* 1914 is to the same effect. On

(1) L.R. 8 Q.B., 202.

the one side, it is contended that these provisions are substantive enactments creating offences, and that the words "attempt to commit an offence against any Act" mean attempt to commit an offence against an Act in force when the attempt is made. On the other hand, it is contended that the provisions are in the nature of definitions, to the effect that in every Act creating an offence the verb, whatever it is (for example, "forge"), denoting the act which is to be an offence is to be read as if the words "or attempt to" were inserted (so that "forges" is to be read as "forges or attempts to forge").

In my opinion the latter view is untenable. Neither of the provisions is in the form of an interpretation clause, and in my opinion they are substantive enactments.

If the other view is adopted there is a further difficulty.

It is a well established rule of construction that Statutes are not to be construed so as to have a retrospective effect unless they contain express words to that effect, and that a larger retrospectivity should not be given to a Statute which is to some extent intended to be retrospective than that which it can plainly be seen that the Legislature intended (*Beal on Cardinal Rules of Legal Interpretation*, sec. viii.).

I am unable to find any express words in sec. 3 of the *Trading with the Enemy Act*, either alone or taken in conjunction with the *Acts Interpretation Act* or the *Crimes Act*, which show that the Legislature intended to make an attempt to trade with the enemy, made before the passing of the first-named Act, an offence. In *R. v. Kidman* (1) I expressed my opinion as to the validity of such an enactment if it were made.

For these reasons I am of opinion that the words "or attempted to trade" cannot be read into sec. 3 of the *Trading with the Enemy Act* after the words "has traded" and that the offence was therefore not justiciable on summary prosecution. In the Act 5 Geo. V. c. 12, from which the first-named Act is adopted (sec. 10), the necessary words are, as might have been expected, expressly inserted.

For all these reasons I think that the appeal should be allowed.

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(1) 20 C.L.R., 425.

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1915. beyond those which I have dealt with in the previous appeal. On
 { the facts, I do not see my way to disturb the conclusion arrived at
 MOSS by the Magistrate, and therefore I think the appeal should be
 v. dismissed.
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GAVAN DUFFY and RICH JJ. In this case we think that, at the time the order was sent, the Udolpho Wolfe Co. were, and the defendant believed them to be, carrying on business at Hamburg in Germany, and that the defendant intended the order to be executed by the Udolpho Wolfe Co. in the ordinary course of the business they were carrying on there, and expected ultimately to receive the goods in Australia. There was accordingly an attempt to obtain goods from Germany within the meaning of the Proclamation even if it is to be read as forbidding only that which is made unlawful by the common law. It was objected that there was no offence, inasmuch as sec. 3 of Act No. 9 of 1914 applied only to an act which was forbidden under a Proclamation in force both at the time of committing the offence and after the passing of the Act of Parliament, and the Proclamation under which the offence complained of was prohibited had ceased to exist before the Act was passed. In our opinion the Statute makes it an offence to do any act which, at the time it is done, is forbidden by an existing Proclamation, whether the Proclamation ceased to exist before the passing of the Statute or not.

POWERS J. The charge in this case was that the appellant and L. D. Phillips, his partner, trading as Moss & Phillips, on 11th August 1914, by a letter addressed and posted to the Udolpho Wolfe Co. at Hamburg in Germany, attempted to trade with the enemy. The Acts and Proclamations under which the charge was made have already been referred to by my learned brothers.

In this case—as the Court has held that the Commonwealth Parliament can pass *ex post facto* laws, and, as trading with the enemy is not only a common law offence, but also a trespass on, or interference with, the power of the Commonwealth to defend the country, vested in it by sec. 51 of the Constitution—the principal

question to be decided is a question of fact: Was there an attempt to trade with the enemy within the meaning of the Act? The Court must also decide (1) whether trading with a *neutral company* for the purchase of goods at the time in an enemy country, to the knowledge of the trader, is an offence; and (2) whether an attempt to trade with the enemy is punishable as an offence under the Commonwealth Act.

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For the reasons given by me in my judgment in *Moss and Phillips v. Donohoe* (1) to-day, I hold (1) that trading with a neutral company for the purchase of goods which the trader knows, at the time, the neutral company holds in an enemy country, is an offence against the Act, especially if that neutral company is carrying on business, permanently or temporarily, in the enemy country; (2) that an attempt to trade with the enemy is punishable as an offence under the Act.

The only other important question to decide is a question of fact, whether in this case there was an attempt by the appellant to trade with the enemy within the meaning of the Act.

The facts, shortly, are:—War was declared on 4th August 1914. The Udolpho Wolfe Co. was an American company, incorporated in the State of New Jersey, having its head office in New York, but with a branch house at Rotterdam, and a branch house with warehouses and offices in Hamburg, Germany. The Company was also registered in Germany as a foreign company. Before the outbreak of war it was the practice of the Company to buy gin distilled in Holland and send it in bulk to Hamburg, Germany, where the Company had offices and warehouses, in which warehouses the gin was bottled and stored for sale and export by the Company. The Company held its large leasehold business premises at Hamburg on long leases. Before the war, it is admitted, the Company was carrying on business at Hamburg—bottling, packing, selling and exporting goods, including Wolfe's schnapps. It is admitted that the appellant's firm has, for many years, been the sole purchasers in Australasia of schnapps from the Udolpho Wolfe Co. It is also admitted that, prior to 4th August 1914, the goods so purchased were shipped from Hamburg, Germany,

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to the appellant's firm in Australia. The appellant's firm, prior to 4th August 1914, corresponded directly with the head office of the Company in New York, sending press copies of their letters and orders to the Hamburg house. They also, as will be seen later on, corresponded direct with the Company's Hamburg house, and sent copies of their letters to the Company in New York.

Before the war, on 30th July 1914, the appellant's firm sent to the Company at New York an order to be sent on to Hamburg for a shipment of schnapps to Fremantle and to other places in Australia. On 10th August they received from the Company from New York, a cable message dated the 7th as follows :—"Have you covered your war risks on shipments afloat? Shipments entirely stopped." On the following day, apparently believing the stoppage of shipments was only temporary, the appellant's firm wrote a letter to the Company's Hamburg house direct, in the course of which they said :—"Fremantle, will you please add to next shipment" (the one of 30th July) "for mark

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fifty cases each two dozen, and we trust an opportunity to forward will be *available at no distant date*, and we will confirm this order when next addressing your New York house." It is important to note that this order for goods was to be added to the goods ordered on 30th July, which were undoubtedly to be sent from Hamburg in accordance with the long established practice. The charge is founded on this letter. The appellant's firm on 28th August 1914 sent a copy of their letter of 11th August, to the Company's head office in New York, confirming the order given direct to the Hamburg house.

The letter of 11th August is an order for goods from the Udolpho Wolfe Co. at their Hamburg house, sent by the appellant's instructions, and was clearly an attempt to trade with that Company, if not a complete act of trading, and in my opinion the Court was justified in finding that the appellant in asking the Hamburg house of the Company to send him, as soon as the opportunity offered, fifty cases of schnapps, which he, the appellant, knew to be in Hamburg (in the enemy country), was attempting to trade with the enemy within the meaning of the Proclamation

and of the Act. It is admitted that, in order to establish a case of trading with the enemy, it must be shown affirmatively that the subject matter of the trade was intended to be obtained from the enemy, or from the enemy country.

The Magistrate was, in my opinion, quite justified in finding, on the evidence, that the intention of the appellant on 11th August 1914 was to obtain goods from the enemy country which he knew were, at the time, in the enemy country, especially as the attempt to obtain such goods on 11th August 1914 confirmed the order of 30th July for goods from Hamburg, and was confirmed by the letter of 28th August 1914. The Magistrate was therefore justified, on the evidence, in finding the appellant guilty of having attempted to trade with the enemy on 11th August 1914.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Bradley & Son.*

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

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