[HIGH COURT OF AUSTRALIA.]

MOSS AND PHILLIPS . . . . . APPELLANTS;
DEFENDANTS,

AND

DONOHOE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A STIPENDIARY MAGISTRATE OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *May* 4, 5. 6, 7.

MELBOURNE, *Sept.* 17.

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

Trading with the Enemy—Attempt to obtain goods from an enemy country—Goods of neutral in enemy country—Contract with neutral to purchase goods—Goods to be brought to Australia—Evidence—Summary conviction—Trading with the Enemy Acts 1914 (*No.* 9 *of* 1914—*No.* 17 *of* 1914), *secs.* 2, 3—*Imperial Proclamation of 9th September* 1914, *clause* 5 (7)—*Acts Interpretation Act* 1904 (*No.* 1 *of* 1904), *sec.* 8—*Crimes Act* 1914 (*No.* 12 *of* 1914), *sec.* 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. and P., residents of Australia, who had dealt with the company for many years, having been convicted before a Stipendiary Magistrate of an attempt, by means of a cablegram sent to the company in New York on 7th December 1914, to trade with the enemy, on appeal to the High Court,

Held, by *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. dissenting), that on the evidence the Magistrate might properly find that the telegram was an acceptance of an offer by the company to sell to M. and P. goods of the company which were then in fact, and as M. and P. believed, at Hamburg and which were expected by M. and P. to be brought thence to Australia; that on such a state of facts the sending of the telegram was an attempt by M. and P.

to obtain the goods from an enemy country within the meaning of the Imperial Proclamation of 9th September 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.

Principles applicable to such cases discussed.

APPEAL from a Stipendiary Magistrate of New South Wales.

At the Central Police Court, Sydney, before a Stipendiary Magistrate, an information was heard whereby John Thomas Tamplin Donohoe charged that on or about 7th December 1914 Laurence Edward Moss and Lawrance David Phillips, by means of a cable addressed and transmitted to "Wolsey, New York," did attempt to trade with the enemy. Both defendants having been convicted, they appealed to the High Court by way of statutory prohibition.

The material facts are stated in the judgments hereunder.

Knox K.C. (with him *Campbell* K.C. and *C. E. Weigall*), for the appellants. The Proclamations and the *Trading with the Enemy Acts* 1914 must be read in the light of the fact that the thing aimed at is assisting the enemy or contributing to the resources of the enemy or contributing to the detriment of the Empire. The word "obtain" in clause 5 (7) of the Proclamation of 9th September 1914 should be read as "obtain by way of unlawful trading." The goods obtained must be contaminated in some way with enemy character. This is simply the case of a neutral who had property in the enemy country when the war broke out attempting to get his property out of that country. Such an act is not within the Statute: *The Ocean* (1). He has a reasonable time within which he may do so: *Nigel Gold Mining Co.* v. *Hoade* (2); *Cremidi* v. *Powell*; *The Gerasimo* (3); *The Hoop* (4).

[ISAACS J. referred to *R.* v. *Oppenheimer* (5).]

The Proclamation cannot be extended to include in the term "trading with the enemy" acts which at common law were not in it. Whatever that term meant at common law it never included trading

(1) 5 C. Rob., 90.
(2) (1901) 2 K.B., 849.
(3) 11 Moo. P.C.C., 88, at pp. 96, 115.
(4) 1 C. Rob., 196.
(5) "The Times," Feb. 19, 1915.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE

with a neutral unless he had acquired an enemy character, and the burden of proving that he had acquired such a character is upon the Crown. Goods belonging to a neutral are *primâ facie* free from enemy character unless they are connected with a business carried on by the neutral in an enemy country or are the produce of an enemy country. [He referred to *Pitt Cobbett's Leading Cases on International Law*, vol. II., pp. 23, 29, 387 ; *The Fortuna* (1).] The Udolpho Wolfe Co. is a neutral : *De Beers Consolidated Mines Ltd.* v. *Howe* (2). Whatever might have been the case while the Udolpho Wolfe Co. carried on their business in Hamburg, their goods lost their enemy character as soon as the Company ceased to carry on their business there. Goods belonging to a neutral even when captured in an enemy ship are free from condemnation unless they be contraband. The attempt must be to commit an offence against the laws of the Commonwealth. The only act alleged as constituting such an attempt is the sending the cablegram. But the cablegram amounts at most to an offer to take the goods if the Udolpho Wolfe Co. can ship them free on board in London. The attempt must be the doing of some act proximate to the offence attempted. It is different from an incitement to commit the offence. See *R.* v. *Williams* (3). But here the attempt was to obtain goods which had been in an enemy country, which is not an offence. To obtain goods from an enemy country means to remove them from an enemy country, and the sending the cablegram was not an act proximate to such removal.

Windeyer and *Peden*, for the respondent. The word "obtain" in clause 5 (7) of the Proclamation means obtain by way of transmission directly or indirectly. It includes an act done through an agent or independent contractor which results in goods being transmitted from Germany to Australia. It was intended by the Proclamation to add to the restrictions on trade which prevailed at common law. At common law, on the declaration of war by the King, restrictions are thereby imposed upon all intercourse with the enemy, commercial or non-commercial. The extent of

(1) 4 C. Rob., 278.
(2) (1906) A.C., 455.
(3) 1 Den., 39.

the area of restriction is a matter entirely within the King's prerogative. All non-hostile intercourse with the enemy is unlawful until permitted by the King: *The Rapid* (1); *The Venus* (2). The intention of the Proclamation is to deal with matters which may not have been theretofore regarded as prohibited by law; it is limited to commercial and financial transactions, but those words are used in the widest sense. Some of the things mentioned in clause 5 (7) of the Proclamation were not until then regarded as contrary to law, such as trading in or carrying goods coming from an enemy country or an enemy. If the Proclamation does not lay down the law for itself, but only proclaims what is the common law, it goes so far as to prohibit any relations with the enemy. The obtaining through an independent contractor is none the less obtaining within the meaning of the Proclamation. The word "obtain" contemplates an act in Australia. The sending of the telegram was one of a series of acts which were intended to result in goods being obtained in Australia from Germany, and was therefore an attempt to obtain them. [Counsel referred to *Trotter on Contract during War*, p. 428; *Law Quarterly Review* for January 1915, p. 30; *Scott's International Law*, p. 541; *The Jonge Pieter* (3).] When a transaction includes the carriage of goods from an enemy country to a neutral port and thence to an ulterior destination, the whole transaction is treated as one transportation: *Kershaw* v. *Kelsey* (4); *Pitt Cobbett's Leading Cases in International Law*, vol. II., p. 466. That doctrine is included in clause 5 (7) of the Proclamation. The real nature of the transaction is the only thing to be regarded, and forms must be disregarded. If there is in fact a single commercial transaction preconceived from the outset, that constitutes an obtaining. See *The Eliza Ann* (5). [Counsel also referred to *Potts* v. *Bell* (6).]

Knox K.C., in reply. The provision in clause 5 (7) of the Proclamation as to obtaining goods should be limited to cases where the transaction is between a subject at one end and an enemy at the other. If the whole transaction consists of two *bonâ fide* transactions

(1) 8 Cranch, 155.
(2) 8 Cranch, 253.
(3) 4 C. Rob., 79.
(4) 100 Mass., 561; 97 Amer. Dec., 124.
(5) 1 Hag. Adm., 257.
(6) 8 T.R., 548.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

each of which is lawful, the whole cannot be unlawful. The word "obtain" is not used in the same sense as "import." On the facts of this case there could be no "obtaining" of the goods from Germany later than their arrival in London. The word "obtain" signifies a transfer of possession from one person to another, and the operation of "obtaining" is finished as soon as that transfer has taken place. In this case that took place in London.

Cur. adv. vult.

The following judgments were read :—

Sept. 17.

GRIFFITH C.J. In this case the charge was that the appellants "at Sydney on 7th December 1914 by means of a cable addressed and transmitted to Wolsey, New York, attempted to trade with the enemy." The prosecution was instituted under the *Trading with the Enemy Act* No. 9 of 1914, which enacts (sec. 3) that any person who, during the continuance of the present state of war, trades with the enemy shall be guilty of an offence. By sec. 2 a person is to be deemed to trade with the enemy if he performs or takes part in any act or transaction which is prohibited by or under any Proclamation issued by the King and published in the *Gazette*, or any act or transaction which at common law or by Statute constitutes trading with the enemy. By sec. 8 of the *Acts Interpretation Act* 1904 and sec. 7 of the *Crimes Act* No. 12 of 1914, any attempt to commit an offence against any Act is made an offence against the Act punishable as if the offence had been committed.

By a Royal Proclamation of 9th September 1914, published in the Commonwealth *Government Gazette* of 12th September, after reciting that it is "contrary to law for any person resident, carrying on business, or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission," it was declared (clause 5) that from the date of the Proclamation "the following prohibitions shall have effect, . . . and we do hereby accordingly warn all persons resident, carrying on business, or being in Our Dominions not to" do certain acts which the Proclamation proceeded to specify.

The warning or prohibition material to the present case is that numbered 7, which is as follows :—" Not directly or indirectly to supply to or for the use or benefit of, or obtain from, an enemy country or an enemy, any goods, wares, or merchandise, ... for or by way of transmission to or from an enemy country or an enemy, nor directly or indirectly to trade in or carry any goods, wares, or merchandise destined for or coming from an enemy country or an enemy."

The Proclamation defined the term " enemy country " to mean the territories of the German Empire and of the Dual Monarchy of Austria-Hungary, together with their Colonies and Dependencies. The term " enemy " was defined to mean any person or body of persons of whatever nationality resident or carrying on business in the enemy country. In the case of incorporated bodies, enemy character was declared to attach only to those incorporated in an enemy country.

I proceed now to state the relevant facts upon which the charge was based, premising that the word " Wolsey " in the cable message which it mentions was the code address of a joint stock company incorporated in the State of New Jersey in the United States of America and called the Udolpho Wolfe Co. This Company is, therefore, not an " enemy " within the meaning of the Proclamation. The Company's principal place of business is in New York, but it had also a branch house at Rotterdam in Holland. The business of the Company is the sale and export of gin, which is made for it in Holland by an independent firm of distillers. Before the outbreak of war it was the practice of the Company to send the gin in bulk to Hamburg in Germany, where it was bottled and stored for export, and where the Company had a branch establishment for that purpose. The appellants have for many years been the sole agents for the Company in Australasia, being what is called " buying agents," that is, agents who are the only purchasers with whom the principals deal. The course of dealing between the appellants and the Company was that the former corresponded directly with the latter at their head office at New York, sending press copies of the letters to the Company's Hamburg branch, and also occasionally corresponding directly with that branch.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

The gin was shipped by the Company to the appellants upon orders from the latter. Before the outbreak of war, while ships traded directly between Germany and Australia, it was usually shipped at Hamburg or Bremen, the terms of shipment being "as if f.o.b. London."

The words of the cable message on which the charge is based were "Can take twenty thousand cases." The message was sent in reply to one sent to the appellants by the Company from New York on 4th December, as follows:—"Can we ship you from old warehouse twenty thousand cases at once restrictions expected." The appellant Moss deposed that he understood the words "old warehouse" to mean the Company's warehouse at Hamburg, and further understood that the 20,000 cases referred to were 20,000 cases of gin that had been packed and stored in that city before the outbreak of war.

Having regard to the course of dealing between the parties as appearing from the correspondence between them, I think there can be no doubt that the cable message of 7th December was an incident of a commercial negotiation with the Company, which, if it had been entered into with an alien enemy, would have constituted a complete act of trading with the enemy within the meaning of that term as used in Prize Law and as used in the Proclamation. But, as the Company was not an alien enemy within the definition of the Proclamation, the charge must be treated as a charge of attempting to trade with the enemy by attempting to obtain from an enemy country goods which were then in that country, in violation of par. 7 of clause 5 of the Proclamation. It is contended for the Crown that if the 20,000 cases or some of them were then, to the knowledge of the appellants in Hamburg, the charge is proved, and that this was established by the evidence.

It is manifest that a charge of attempting to trade in the sense I have just stated involves the element of belief on the part of the accused that the goods are, or at least may be, in the enemy country.

I take the following statement of law from the judgment of the learned President of the Probate Division (Sir *S. T. Evans*) in the very recent case of *The Panariellos* (1):—"The following propositions can, I think, be established: First, when war breaks out

(1) 138 L T. Jo., 484.

between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State. Where the intercourse is of a commercial nature, it is usually denominated 'trading with the enemy.' This proposition is true also, I think, in all essentials with regard to intercourse, which cannot fitly be described as commercial." (The two following propositions relate to the obligations of citizens of allied States, and I need not read them.) "Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable whether they were acting honestly and with *bona fides* or not. The rule embodied in the proposition first mentioned was authoritatively stated by Lord *Stowell* in *The Hoop* (1) as follows:—'In my opinion, there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by *Bynkershoek* as an universal principle of law—*Ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant*, &c. . . . In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit?' And, after an exhaustive review of numerous authorities, he added: 'The cases which I have produced prove that the rule has been rigidly enforced; . . . that it has been enforced, where strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individual; that it has been enforced where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; and that it

(1) *Roscoe*, vol. i., 105; 1 C. Rob., 196, at p. 198.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

has been enforced not only against the subjects of the Crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied States in war had a right to notice and apply, mutually, to each other's subjects."

The learned President proceeded to deal with what he called the more general and fundamental conception of the illegality of intercourse with the enemy apart from the element of commerce and falling short of the act of trading. After referring to *The Cosmopolite* (1) and the passage cited from the Black Book of the Admiralty cited in a note to that case, " Item, soit enquis de tous ceux qui entrecommunent, vendent, ou achatent, avec aucuns des ennemis de Messieur le Roi *sans licence* especiale du Roi, ou de son Amiral," he quoted from the judgment of the Supreme Court of the United States in *The Rapid* (2) in which, dealing with the point that the only intercourse between the claimant and the enemy country was sending a vessel to fetch away his own property acquired before the war, the Court said " The force of the argument on this point depends upon the terms made use of. If by *trading*, in prize law, was meant that signification of the term which consists in negotiation or contract, this case would certainly not come under the penalties of the rule. But the object, policy, and spirit of the rule is to cut off all communication or actual locomotive intercourse between individuals of the belligerent States. Negotiation of contract has therefore no necessary connection with the offence. Intercourse inconsistent with actual hostility is the offence against which the operation of the rule is directed; and by substituting this definition for that of trading with an enemy, an answer is given to this argument."

I accept this statement of the law as accurate with regard to the subject matter dealt with in it. It is important, therefore, to consider carefully what is that subject matter. *The Hoop* (3) and *The Rapid* (2) were suits for confiscation of goods as prize. The former case was one of direct commercial trading by British subjects with an enemy country, and the only defence set up was that they

(1) 4 C. Rob., 8.
(2) 8 Cranch, 155.
(3) 1 C. Rob., 196.

—erroneously, as it turned out—believed that they had a Royal licence to do so. In the latter case a subject of the United States had sent a vessel to fetch away his own property from an enemy country, and this was held to be intercourse with the enemy, and as such to entail forfeiture of the goods. Both these cases involved and depended on the fact of intercourse with the enemy country. In neither of them did any question arise as to trading with neutrals outside an enemy country with regard to goods in an enemy country in which the neutrals were not carrying on business.

These cases are not, therefore, direct authorities on the point whether trading with a neutral outside an enemy country in respect of goods which are at the moment in an enemy country is necessarily unlawful.

The test must, I conceive, be whether the party charged contemplated, and attempted to obtain, the removal of goods from an enemy country for the purpose of the fulfilment of the proposed or actual contract, not whether in the course of its fulfilment some goods might happen to be so removed.

An important exception to the general rule was made in favour of neutrals.

Cremidi v. Powell; *The Gerasimo* (1) was a case in which the goods of neutrals who had carried on business in an enemy country were seized for violation of blockade on board a ship coming out of a blockaded enemy port, and the question was whether they were for the purpose of prize law to be regarded as belonging to enemies. Dr. *Lushington* had held that they were. Lord *Kingsdown* (then Mr. *Pemberton Leigh*), delivering the opinion of the Judicial Committee, said (2):—"Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies; and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment. Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided for the purpose of the trade, by the national character

(1) 11 Moo. P.C.C., 88.

(2) 11 Moo. P.C.C., at p. 95.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country." In the case of *Nigel Gold Mining Co.* v. *Hoade* (1) *Mathew* J. expressed an opinion to the same effect.

I apprehend that this exposition of the law must be accepted until overruled.

It has never, so far as I know, been decided that a negotiation with a neutral in a neutral country with respect to property which is at the moment in an enemy country, and which the neutral has used or is using all diligence to withdraw from that country, is trading with the enemy, and I am loth to lay down such a doctrine for the first time.

In *The Hoop* (2) Lord *Stowell* himself recognized an exception to the general rule, even in favour of subjects, in the case of cargoes laden before the war if the parties concerned " have used all possible diligence to countermand the voyage after the first notice of hostilities." But there is a distinction between the position of a national and that of a neutral. If goods, the property of a British subject, are in an enemy country, a contract made by another British subject with him for the sale of the goods and their removal from the enemy by the vendor is illegal. But why? Because it involves intercourse by a British subject with the enemy country. The same principle, I think, applies to a contract made by a neutral to sell to a British subject goods which are in an enemy country, if the British subject intends that they shall be removed by the neutral for the purpose of fulfilling the contract.

But, if a contract between a British subject and a neutral or even between two British subjects does not involve the removal of the goods the subject matter of the contract from the enemy

(1) (1901) 2 K.B., 849. (2) 1 C. Rob., 196.

country, I conceive that it would not be illegal, even though it happens that the goods are there. In any other view of the law, if a British subject being in an enemy country at the outbreak of war escapes from it, leaving goods behind him which he is unable to remove, he cannot lawfully sell them to another British subject who is perhaps compelled to remain there, or enter into a contract of insurance in respect of them. There is no authority in support of such a position. For these reasons I am of opinion that the mere fact that goods may be in an enemy country at the date of a contract made with respect to them does not *per se* invalidate the contract.

I think further that if a neutral carries on business in several places from some of which it is lawful to obtain goods and from others not, a negotiation with him for the purchase of goods of that kind cannot, without more, be treated as indicating an intention of obtaining them from one of the places as to which it is unlawful.

If I am right in this view, the question in the present case is really one of fact, namely, whether the actual subject matter of the negotiation was specific goods known or believed by the appellants to be then in the enemy country, and, if so, whether it was a term of the proposed contract that they should be removed from that country for the purpose of fulfilling it. I use the word "specific" in the sense of including part of a larger quantity of goods of the specified kind, so that delivery of goods, though of the same kind, from another place would not be a performance of the contract. In determining the question of fact we must in favour of the appellants bear in mind the rule that a person who does an act under an honest and reasonable but mistaken belief in the existence of any state of things is not criminally responsible for the act to any greater extent than if the real state of things had been such as he believed to exist.

I proceed, then, to examine the facts relevant to this point so far as they appear from the evidence.

War between the United Kingdom and Germany was declared on 4th August 1914. On 7th August the Company sent to the appellants at Sydney a cable message as follows: "Have you covered war risks on shipments afloat? Shipments entirely

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

stopped." By a letter of the same date from the Company's Hamburg house the appellants were informed that "all shipments from Hamburg have ceased." By a letter of 13th August from the same place the Company informed the appellants that they had caused certain goods which had been placed on board a lighter for shipment at Bremen to Australia to be taken off the lighter and re-stored in their Hamburg warehouse, and added: "We consider this the best thing to do because prohibition has been passed against the export of spirituous goods." In a letter of 28th August from the appellants to the Company's head office at New York, after referring to various orders given and executed before the war, they said:—"Doubtless it will be a long time before shipments can be made from Hamburg, and we are wondering if you have in contemplation any method of overcoming this serious difficulty of furnishing supplies to your various agencies. We deeply feel for you in this disastrous trade upheaval and would be only too pleased if we could see some way to help you, but owing to the serious disturbance this deplorable war must cause to everyone we must all expect to suffer loss and inconvenience independent of the worry, trouble and anxiety involved. We do not know whether we can say any more on the unfortunate position of things generally."

On 3rd September 1914 the appellants cabled to the Company at New York, "Are other arrangements contemplated resumption supplies," and on the same date received a reply as follows, "Making effort. Nothing decided."

A letter of 4th September from the Company's Hamburg house informed the appellants that they "of course" were unable to execute an order of 3rd July, and added: "Writer intends to go to Rotterdam next week and discuss the question of packing our article in that city temporarily and shipments to be made from there." The word "temporarily" must, I think, be construed to mean "during the war." The same writer in a letter dated Rotterdam, 17th September, wrote to the appellants as follows:—"We last had this pleasure on the 4th inst. We shall start putting up our article in this city as soon as possible and took occasion to cable you yesterday. Shall we ship unfilled orders Rotterdam bottling

Peninsular via London freight forty-five war risk about three per cent. and wait reply."

"Rotterdam bottling" means "Gin bottled in Rotterdam," and "Peninsular" means by Peninsular & Oriental Co.'s Steamer.

On 23rd September the Company cabled from New York to the appellants as follows :—"Arranged to ship from Rotterdam. Send orders to New York."

On 25th September the appellants wrote to the Company at Rotterdam a letter, which is of so much importance that I must read it at length :—"We were indeed pleased to receive your cablegram of the 16th instant reading 'Shall we ship unfilled orders Rotterdam bottling Peninsula via London freight 45 war risk about 3 % wire,' and signed 'Dietz, Wolfe, c/o Blenkenheim, Nolet, Rotterdam,' from which we take it that you desire to know if you are to ship unfilled orders as you are bottling at Rotterdam to be forwarded by Peninsula (P. & O. Company) via London at 45/- freight and war risk about three per cent. Our office being closed on Monday, 21st instant, we only received your cablegram on 22nd idem and at once replied 'Yes, telegraph when shipping,' as per copy of message herewith which we trust duly reached you and we anxiously await advices. We feel greatly relieved to know that your efforts have been successful in surmounting the enormous difficulties you must have been placed under by reason of the outbreak of the European conflagration and the consequent closing of your factory at Hamburg. Fortunately at the outbreak of the war we held fairly large stocks, and by careful supervision and judicious distribution we hope to keep the article consistently on the market until well into the New Year by which time it is to be hoped our stocks will be well replenished by the supplies coming via London. We fear that our several letters to your Hamburg firm reaching Hamburg after the commencement of hostilities never reached you, but doubtless your New York house have furnished you with the gist of the correspondence."

"P.S.—Since writing the above we have received cabled advice from New York under date 23rd instant confirming your advice as to arrangements having been made to ship from Rotterdam

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

which was greatly appreciated, and we to-day cabled them 'Bravo, Delighted.' M. M. and Co."

On the same day the Company wrote to the appellants from New York, informing them that they had noted several orders from them, and added "but they cannot be shipped from Hamburg exportation of spirits having been prohibited in Germany." In the same letter they said: "Our Mr. Dietz has been in Holland and arranged to have packing done there by the distillery"; and further on: "Owing to the strong prejudice against Germany in all the English Colonies we shall most likely continue to ship from Holland after the war ceases closing the Hamburg packing establishment altogether."

In a letter from Hamburg dated 3rd October the Company's agent, Dietz, informed the appellants that he had succeeded in getting a railroad car, which was on its way to Rotterdam filled with all kinds of packing material, and that they trusted to start bottling there at an early date. In a letter written by the Company from New York and dated 6th November they informed the appellants that packing at Rotterdam was going on smoothly, and that they would be able to keep the appellants supplied unless Holland should become involved. They also said: "We are now able to obliterate all connection with Germany." This letter could not have been received by the appellants before 7th December, but it was admitted as evidence of the facts.

In my opinion, the only fair inference to be drawn from the Company's cable message of 23rd September, their letter of 25th September and Dietz's letter of 3rd October, was that the Company had practically, if not altogether, ceased to carry on business at Hamburg, and that any contracts which they might make thereafter would have reference to goods which they had in their possession outside of Germany.

On 4th December the Company sent to the appellants at Sydney the cable message which I have already read, to which the appellants on the 7th replied by the message on which the prosecution is founded.

In order to understand the real meaning of this letter, regard must be had to the previous correspondence, and to the facts which

I will now narrate. It had been usual to enclose certain show cards in the packages of gin packed at Hamburg. Customs duty had recently been imposed in the Commonwealth on such show cards, and on 4th December the appellants by a cable message sent to the Company at New York had asked the Company to have these show cards removed before shipping any gin to Australia in execution of their orders. This message should have reached New York on 3rd December by New York time, and Moss says —and I see no reason to disbelieve him—that he understood the reference in the Company's message of 4th December to "the old warehouse" to relate to this matter. He also said that he and his partner assumed that the 20,000 cases, if sent, would be shipped from Rotterdam, but he admitted that he thought that some of them might still be in Hamburg. I understand this to mean that he understood the inquiry to be whether the appellants would object to receive the 20,000 cases, notwithstanding the inclusion in the packages of the show cards indicating that the gin had been packed in Hamburg.

The appellant Moss further deposed that before sending the reply of 7th December he consulted his partner Phillips, and also obtained the advice of their solicitor, Mr. Bradley, who was of opinion that, as the Company was an American corporation, and the goods were a product of Holland and owned by Americans at the outbreak of war, there was no legal objection to dealing with the Company for the shipment of the goods from Holland if the Company could get them to that country. Mr. Bradley, who made a statement before the Magistrate, which was accepted as evidence, said that he had in his mind that a person caught suddenly in a belligerent country had a right to remove his goods. The absence of intention of the appellants to do anything wrong affords, of course, no defence.

Under these circumstances I have arrived at the opinion that the cable message of 7th December, on which alone the charge is founded, cannot reasonably be construed as an attempt to obtain the goods from an enemy country within the meaning of the Proclamation, but should be construed as being what it was in fact, namely, no more than an expression of willingness to accept 20,000

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Griffith C.J.

cases of gin which the Company was then, or would shortly be, able to send them, notwithstanding that they had been in Hamburg. The words "from the old warehouse" do not, therefore, import that the gin was to be sent from Hamburg but only that it would have come from there.

The appellants maintain that the proper inference to be drawn from this correspondence and evidence is that on 7th December they honestly believed that the Udolpho Wolfe Co. were no longer carrying on their business of exporters of gin at Hamburg, but that, on the contrary, having been for some months desirous of removing, and having used all possible diligence to remove, the gin from their warehouse at that city to a neutral country, they had at last succeeded or were on the point of succeeding in doing so.

To sum up, the subject matter of the negotiation was 20,000 cases of gin of which the Company, neutrals who carried on business in New York and Rotterdam, and had formerly carried it on at Hamburg, but had ceased to do so, were the owners. The negotiation had no reference to specific goods and could have been carried out by delivery of the goods from any place. In this connection I think the case of *Waugh* v. *Morris* (1) is very relevant. *Blackburn* J., delivering the judgment of *Cockburn* L.C.J., *Mellor* J. and himself, said (2) :—"We quite agree, that, where a contract is to do a thing which cannot be performed without a violation of the law it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed, on the ground that there was an intention to perform it in an illegal manner, it is necessary to show that there was the wicked intention to break the law." The same principle was applied by this Court in the case of *Hutchinson* v. *Scott* (3).

So here, it was necessary to show the wicked intention on the part of the appellants to obtain the goods from Hamburg and not from some other place. For the reasons I have given I think that this intention was not shown.

In my judgment, therefore, the appellants are not shown to have attempted to "trade with the enemy" on 7th December by

(1) L.R. 8 Q.B., 202.
(2) L.R. 8 Q.B., 202, at p. 208.
(3) 3 C.L.R., 359.

attempting to obtain goods either directly or indirectly from an enemy country within the rule of law applicable to the case.

ISAACS J. This appeal is by way of statutory prohibition, and under sec. 39 (2) (*b*) of the *Judiciary Act* is brought direct to this Court.

In the view I take of the facts of this case it is unnecessary to determine whether the rule of *Peck* v. *Adelaide Steamship Co.* (1) applies or not.

The charge as laid was that the appellants by means of a cable addressed and transmitted to "Wolsey," New York, attempted to trade with the enemy contrary to the Act.

The Court below found they did; and the first question is: Can that finding be impugned?

The material facts, so far as they are undisputed, are very short. The appellants are Sydney merchants, and are a firm long established in Australia as the sole agents in the sense of exclusive purchasers in Australia from the Udolpho Wolfe Co., and its predecessors, for the sale of Wolfe's schnapps. The Company was incorporated in America in 1897. The schnapps in which it deals are manufactured in Rotterdam, and were up to the outbreak of the war sent in bulk to Hamburg. At Hamburg the Company had a long lease of expensive warehouses, where the goods were, by German labour, bottled in German bottles, packed in German cases, and there stored until despatched by German carriage on land and sea to their destination abroad. The shooks for the boxes are not procurable in Holland. After the outbreak of war in August, the German Government prohibited the export of spirituous liquors, all shipments from Hamburg ceased by 7th August, and the Udolpho Wolfe Co., so far as was possible, shipped goods from Rotterdam. Packing was going on there by the first week in November. Nevertheless, on 4th December 1914, the Company was still in possession of their leased warehouses in Hamburg, and had twenty thousand cases of spirits stored there. On that date they sent a cable from New York to the appellants: "Can we ship you from old warehouse twenty thousand cases at once

(1) 18 C.L.R. 167.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

ISAACS J.

restrictions expected." The "old warehouse" was the Hamburg warehouse, and it was certainly open to the Magistrate to find that the "restrictions expected" were expected German restrictions. The words "restrictions expected" were not intelligible to the appellants, and they consulted their solicitors and Customs agent. Then on 7th December they replied to New York "Can take twenty thousand." In their letter of 21st December to New York they say: "On Monday the 7th instant we gave the matter due consideration and cabled you that we can take this quantity and hope to have early advice of shipments." No doubt exists, therefore, that the recipients of the appellants' cable were intended to understand, and would understand, that it was an order, and that they would be expected to comply with it. The appellants admit they knew the cases were coming from the Hamburg warehouse, but understood they were packed before the war, and were paid for by the Company before the war, and would be shipped from Rotterdam, and so says Mr. Moss one of the appellants: "I thought for those reasons that it did not matter getting it from Hamburg under the circumstances"; adding afterwards, "they" (that is, the Company) "would have to get it from Hamburg to Rotterdam before they could supply us." The Company ordered the cases to be shipped, Mr. Dietz, the managing director of the Company, being then in Hamburg.

The Crown says the appellants contravened par. 7 of clause 5 of the Proclamation. That paragraph says, *inter alia*, that persons in His Majesty's dominions (unless under licence) are "not directly or indirectly to obtain from an enemy country or an enemy any goods, wares, or merchandise." The Proclamation explains what is meant by an enemy, and an enemy country. "Enemy" means any person or body of persons of whatever nationality resident or carrying on business in the enemy country; but an incorporated body not incorporated in the enemy country is not included. Therefore, the Udolpho Wolfe Co. is not an enemy within the meaning of the Proclamation and Act: *Continental Tyre and Rubber Co.* v. *Daimler Co.* (1). The case for the Crown must, and does, rest on the attempt to obtain goods from the "enemy country"; Hamburg

(1) 31 T.L.R., 159.

is part of enemy country as defined: and so it is said for the Crown the case was complete.

The argument of learned counsel for the appellants may be thus summarized: (1) that there was no attempt to "obtain" the goods in Australia, but at the port of shipment, and therefore the transaction was outside Commonwealth control; (2) that the commercial transaction was with a neutral as a principal, and therefore there was no trading with an enemy; (3) that on the proper construction of the Proclamation, and therefore of the Act, the expression "enemy country" should be limited to the case of a British subject getting his goods from an enemy country.

As to the first contention, the essence of the transaction was that goods then in Germany should be, by a series of acts of transportation operations, transferred to Australia, and arrive here as the appellants' goods. Whatever may be said as to the passing of the ownership in the goods on shipment, or as to the agency of the carrier, the substantial fact is that when the goods arrived they would have been actually obtained by the appellants themselves, by being handed over to them by some person whose part in the transportation was simply a link in the single chain. The contention really was that the moment the goods were handed over to an agent at Rotterdam, they were "obtained," and there the matter ended. I am clear that "obtain," as applied to the Commonwealth Act, includes the last step of receiving the goods in Australia. The Proclamation is addressed to all His Majesty's subjects, but sub-par. 7 of par. 5 is specially directed to those engaged in mercantile business with foreign countries directly or indirectly. What would a merchant understand by "obtaining" goods from Germany? He would understand it to mean so acting as to land the goods in Australia, and that, whether he sent direct to a German house, or employed his own agent there to purchase, or an indentor here, or a neutral in another country. And any overt step taken by him immediately connected with obtaining the goods, and forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence of obtaining them, constitutes an attempt (see per *Kennedy* J.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Isaacs J.

in *R.* v. *Linneker* (1), and per Lord *Reading* C.J. in *R.* v. *Robinson* (2).

The second proposition was that inasmuch as the contract was with a neutral it was quite immaterial where the neutral was to get the goods from.

If the appellants in ordering the goods had no contemplation that they were to come from an enemy country, the mere circumstance that the neutral in fact procured them there, would not have involved the appellants. But here they admittedly knew that some at least of the goods were in the Hamburg warehouse, and ignorance that conduct constitutes a breach of the law will not excuse the contravention. They took the wise precaution, in view of the Royal Proclamation and the Act of Parliament, of consulting their legal advisers and Customs agent before sending their cable; they apparently desired, while not sacrificing their own business interests, to avoid doing anything that would amount to a breach of the law, but that is not conclusive. In the case of *The Hoop* (3) Sir *William Scott* had to deal with the case of a man who had first consulted the Commissioners of the Customs as to importation, and then acted on their view. "There is still," said that learned Judge (4), "the fact against them of that actual contravention of the law, which no innocence of intention can do away." Similarly here, the law has been broken, and no error, however *bonâ fide* as to its requirements, can afford an answer to the charge of contravention. The error was not in respect of the facts; if there had been such an error, the position as put by the Chief Justice, with which I entirely agree, would in that event arise. But the error was in respect of the law itself, and no man is excused for that. The endeavour to keep within the law may fairly be regarded in awarding the penalty.

In the circumstances proved, the goods were attempted to be indirectly obtained by the appellants from Germany by means of the neutral who had command of them. It is quite immaterial for that purpose whether the person used as an instrument to get them from the enemy country contracts as a principal, or as an

(1) (1906) 2 K.B., 99, at p. 103.
(2) (1915) 2 K.B., 342, at p. 348.
(3) 1 C. Rob., 196.
(4) 1 C. Rob., 196, at p. 219.

agent, or a servant, or makes no contract at all. In any of these cases, he is simply part of the complete mechanism—a living part of that mechanism—utilized for the purpose of effecting the transfer of the goods from the enemy country to this country, there to be received by the appellants. The words " directly or indirectly " are inserted in the Proclamation for the very purpose of striking at every method and every device which in substance has that effect.

One reason given by learned counsel for the appellants, why they do not come within the terms of the Act and Proclamation should be specially mentioned. It was that a neutral has a perfect right to trade with an enemy country, and, therefore, so long as the contractual relations of the appellants were confined to the neutral, no trading with the enemy could be imputed to them. The answer is twofold. First, as the prohibition is to a subject, and is against procuring goods from the enemy, it is plain that the employment of an innocent intermediary to effect the first necessary step cannot absolve the subject from his duty to his Sovereign. The next is closely allied to the first. The neutral abroad owes no allegiance to our Sovereign, and is not amenable to our laws, and may, without violating them, obtain what goods he pleases from a belligerent. But that does not clothe a British subject with immunity from responsibility to the King, if he joins in the act by employing the neutral to do it with the ultimate object of having the goods passed on to himself.

A recent case, *H. M. Advocate* v. *Innes* (1), tried before Lord *Strathclyde*, the Lord Justice General of Scotland, and a jury, on 11th January this year, is very much in point, always supposing I am correct as to the facts—and, as said by the Chief Justice, this case really turns on the facts, It was there argued for the accused that there was no offence unless the proposal to supply the goods were made to an enemy, and that in that case the letter was written to a person in a neutral country who was neither an enemy nor the agent for one. Lord *Strathclyde* said :—" I am of opinion that that objection is not well founded. A trader in this country who desires or has an intention or proposes to trade with the enemy may well select as an intermediary any person resident in a neutral

(1) 52 Sc. L.R., 275.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE

ISAACS J.

country, even although that person is not at the time when the communication is addressed to him a representative either of the proposed buyer or the proposed seller. The statutory crime is that of indirectly supplying goods or procuring the supply of goods, or trading with the enemy, and one of the ways in which a man may indirectly effect his purpose is by selecting an intermediary through whose intervention he will secure his aim, and it does not appear to me to be necessary to say that that intermediary is at the moment when he is selected the active agent or representative of the intending purchaser or the intending seller."

The third contention was based on the notion that, at common law, not all intercourse was prohibited with an enemy country, but only commercial intercourse, because that alone was really trading with the enemy and could be of assistance to him; and therefore the King, who cannot by Proclamation extend the law, could not be supposed to intend more than to prohibit that which would be an illegality. An innocent letter to a British subject, it was said, could not be an offence. And so the words "enemy country," which had to be given some meaning, were, it was suggested, to be limited to the single case of a British subject, bringing his goods from the enemy country—conduct which has been decided to be unlawful.

But the underlying notion is unsound. During the argument I expressed an opinion in which I am since confirmed. We have to start with the fundamental truth that war means hostility between nations, and nations are to-day regarded from the standpoint of territoriality. With us, the Sovereign has the prerogative of declaring war and making peace. When he declares war, the whole nation is at war, and is in a state of hostility to the whole of the opposing nation considered territorially.

Dr. *Twiss* in his work *The Law of Nations* (vol. II., at pp. 298-299), in the chapter headed "Enemy Character," says:—"When a Sovereign Power is at war with another Sovereign Power, all the subjects *de facto* of the one Power are enemies *de jure* of the other Power, and the juridical obligations of amity, which exist between them as individuals, are suspended during the continuance of war. It does not however follow, according to the modern practice

of Nations, that all the natural-born subjects of a belligerent Power are enemies *de facto* of the other Power. It was the ancient practice in formal Declarations of War for the Sovereign Power, which declared war, to require all its subjects to treat as enemies all the subjects of the Enemy-Power, in other words to require all persons who owed allegiance to it to treat, as enemies, all persons who owed allegiance to the Enemy-Power. But when the principle of Territorial Sovereignty came to be recognized by the Nations of Europe, as the basis for regulating their mutual relations as Nations, the character of an individual for international purposes came to be regarded from a territorial point of view, and personal allegiance ceased to be an absolute criterion of Enemy-Character. Under the feudal system individual men were bound, in virtue of their personal relations towards their Lord, to treat, as enemies, all who were enemies of their Lord. Under the theory however of Territorial Sovereignty the character of enemy-subjects is held to attach to the occupants of an enemy's territory, for all the occupants of the territory of a belligerent Sovereign are regarded as his subjects *de facto*, and are consequently enemies *de jure* of the other belligerent."

In *Porter* v. *Freudenberg* (1) the Lord Chief Justice of England, speaking for the Full Court of Appeal, and referring to commercial intercourse, said that "the test for this purpose is not nationality but the place of carrying on the business," and dealt comprehensively with the matter on the basis I have stated.

Intimately connected with this is another distinction endeavoured to be drawn so as to keep this transaction clear of the prohibition in the Proclamation. It was said that the common law against trading with the enemy struck only at strictly commercial transactions with the enemy, whether that meant an enemy person or an enemy country. Then it was said, in view of the intention of the appellants as to the neutral obtaining the goods, there was in law no commercial transaction as between the appellants themselves (for the neutrals were not their agents, but independent contractors) and the enemy.

Reliance was placed on the case of *Kershaw* v. *Kelsey* (2). The

(1) (1915) 1 K.B., 857, at p. 868. (2) 100 Mass., 561.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

ISAACS J.

doubts then expressed from the Bench as to the accuracy of the law there laid down, have been since confirmed by the English Court of Appeal. Lord *Stowell* in *The Hoop* (1) and in the *Cosmopolite* (2) by his dicta placed the matter much higher, and the case of *Robson* v. *Premier Oil and Pipe Line Co.* (3) definitely makes the decision. *Pickford* L.J. (speaking for Lord *Cozens-Hardy* M.R. and *Warrington* L.J., as well as himself) said (4) :—" We do not think it necessary to decide whether the principle extends to intercourse, if such there be, which could not possibly tend to detriment to this country or to advantage to the enemy ; it is enough to say that in our opinion all intercourse which could tend to such detriment or advantage, whether commercial or not, is, to use the language of the learned Judge before mentioned, inconsistent with the state of war between the two countries and therefore forbidden."

The result is that the Proclamation, in respect of the relevant prohibition, follows the common law exactly, and there does not exist any reason either for limiting the application of the words "enemy country" as suggested, or for cutting down the prohibition to mere commercial transactions between British subjects and the enemy country on the principle of *The Rapid* (5) and *Nigel Gold Mining Co.* v. *Hoade* (6).

So far, then, as concerns the direct arguments in this particular case, the appeal should be dismissed.

But since then we have had most serious contentions in other cases, as to whether the Act is on its true construction retrospective as to attempts to trade with the enemy, and if so, whether such retroactive operation is valid. The last mentioned point is material to the next appeal, but I mention it now for convenience of reference. It was decided yesterday in *Kidman's Case* (7), in relation to another Statute, this principle being the same in both cases. As to the construction of the Act, which is material to both this and the succeeding case, and in a special manner to the second case, this depends entirely on the meaning and application

(1) 1 C. Rob., 196.
(2) 4 C. Rob., 8.
(3) (1915) 2 Ch., 124.
(4) (1915) 2 Ch., 124, at p. 136.
(5) 8 Cranch, 155.
(6) (1901) 2 K.B., 849, at p 853.
(7) 20 C.L.R., 425.

of sec. 8 of the *Acts Interpretation Act* 1904, which says :—" Any attempt to commit an offence against any Act shall, unless the contrary intention appears in the Act, be an offence against the Act, punishable as if the offence had been committed."

By sec. 2 of the same Act it is provided that " This Act shall apply to all Acts of the Parliament passed after the commencement of this Act." Therefore sec. 8 applies to the *Trading with the Enemy Act* 1914. And so applied, sec. 3 (1) of that Act in its expanded form reads as follows :—" Any person who, during the continuance of the present state of war, trades or attempts to trade or has before the commencement of this Act traded or attempted to trade with the enemy, shall be guilty of an offence." Then sub-sec. 2 says :—" An offence against this section may be prosecuted," &c. And sub-sec. 3 says :—" The punishment for an offence against this section shall be " &c. Adapting to this case the words of Lord *Robertson* in *Coster* v. *Headland* (1) in relation to another Act, I would say that the *Acts Interpretation Act* is not merely a general Statute, but it is a Statute applicable to future offences, and lies in wait, as it were, for Acts which may be passed, and imprints upon them a certain operation. Since the argument I have found a case bearing very directly on the question—*H.M. Advocate* v. *Mitchell* (2), a decision of the Scottish High Court of Judiciary. Lord *Strathclyde*, the Lord Justice General, said :—" By the combined effect of the 61st section of the *Criminal Procedure Act* of 1887 coupled with the interpretation section (sec. 1) of that Act and sec. 28 of the *Interpretation Act* of 1889, the 1st section of the Statute " (that is, the *Trading with the Enemy Act*) " may be read thus : That any person who has attempted to trade with the enemy since the fourth of August 1914 shall be liable to certain punishment, because of the second sub-section of sec. 1 of the Statute it is clearly set out for the purposes of the Act a person shall be deemed to have traded with the enemy if he has—I take it shortly—done any act which was by Statute an offence of trading with the enemy at its date. 'Statute' meaning not merely the Statute of 1914, but the Statute of 1887. It was accordingly a crime to attempt to commit an indictable crime, and to trade

(1) (1906) A.C., 286, at p. 289. (2) 52 Sc. L.R., 273.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Isaacs J.

with the enemy is an indictable crime. . . . It seems to me that the indictment is relevant under the first Statute of 1914 re-inforced by the operation and effect of the Statute of 1887 " ; and sec. 61 of the Act of 1887 says :—" Attempt to commit any indictable crime shall itself be an indictable crime, and under an indictment which charges a completed crime, the person accused may be lawfully convicted of an attempt to commit such crime."

I may state that in sec. 1 of the Act of 1887 " crime " is defined to include " attempt." So that the two sets of legislation are on the same footing.

For these reasons, I am of opinion that attempts to trade with the enemy at any time after the publication in Australia of the King's respective Proclamations, and in contravention of them, are offences against the Act, though committed prior to its passing. I cannot help adding that independently of the Statute such attempt would be a criminal offence. In *Esposito* v. *Bowden* (1). *Willes* J. said :—" The force of a declaration of war is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an Act of State, done by virtue of the Prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law."

As to the power to summarily convict, it follows, from what I have said, that, in my opinion, as a matter of construction attempts are included in sec. 3 of the Act, and are therefore summarily justiciable.

The appeal should, for all these reasons, be dismissed.

GAVAN DUFFY and RICH JJ. In this case we think the evidence shows that the defendants, by their cable message, attempted to obtain from Germany certain cases of schnapps which were then lying in Hamburg. We think their order would have been executed by the Udolpho Wolfe Co. as part of and in the course of the business then carried on at Rotterdam and that the defendants intended it to be so executed, but the goods intended to be obtained were stored and were known by all parties to be stored in the sellers' warehouse in Hamburg. It does not appear whether the goods ever reached the defendants in Australia or their agents elsewhere.

(1) 7 E. & B., 763, at p. 781.

If the defendants had succeeded in their attempt, they would have obtained the goods from Germany, and obtained them within the Commonwealth of Australia by ultimately receiving them there. We think, therefore, that the conviction was right, and that the rule for prohibition should be discharged. It is unnecessary to consider whether such an obtaining is made unlawful by the common law; it is forbidden by the Proclamation, and what is forbidden by the Proclamation is unlawful under the Statute which was in existence when the Proclamation was issued.

POWERS J. The charge was that the defendants, the appellants, at Sydney on 7th December 1914, by means of a cablegram sent by them addressed to "Wolsey," New York, attempted to trade with the enemy. The prosecution was under the *Trading with the Enemy Act* No. 9 of 1914, sec. 3, which has already been quoted. My learned brothers have referred fully to the Proclamation and the Acts which have been issued and passed, in any way affecting the case.

Dealing with the questions of law first—I hold on the cases decided in English Courts, and on the interpretation placed on the words "trading with the enemy" by the Proclamation and Act, that it is an offence against the Act to obtain goods from an enemy country whether the seller is an alien enemy, a British subject or a neutral, and that trading with a neutral company which has a place of business in any enemy country, or goods which it intends to dispose of while they are in the enemy country, is an offence against the Act.

When considering questions arising with an alien enemy it is not the nationality of a person, but his place of business during the war, that is important. A man may have mercantile concerns in two countries, and if he acts as a merchant in both he must be liable to be considered as a subject of both with regard to the transactions originating respectively in those countries. See also *The Portland* (1). Trading in a country is the strongest proof of domicile therein—at least so far as the acquisition or not of enemy character is in

(1) 3 C. Rob., 41.

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Powers J.

question: *The Vigilantia* (1) and Lord *Lindley's* judgment in *Janson* v. *Driefontein Consolidated Mines Ltd.* (2).

A corporation may have a commercial domicile in the country where it carries on business, and thus acquire an enemy character by continuing to conduct business therein after the outbreak of war between that country and Great Britain: *Nigel Gold Mining Co.* v. *Hoade* (3). It is not necessary that the intention should be to permanently carry on business. It is sufficient if there is an intention to carry on business at the time.

As to the question whether an attempt to trade with the enemy is punishable as an offence against the Act, I have some doubt; but we must read the *Acts Interpretation Act* 1904 (No. 1 of 1904) with the *Trading with the Enemy Act* 1914, and with all Acts passed after the first Act was assented to. Sec. 8 of the Act No. 1 of 1904 declares:—"Any attempt to commit an offence against any Act shall, unless the contrary intention appears in the Act, be an offence against the Act punishable as if the offence had been committed." The contrary intention does not appear in the Act. It is declared to be an offence against the Act if any person trades or has since 4th August 1914 traded with the enemy. An attempt to commit an offence against the Act is by sec. 8 of No. 1 of 1904 declared to be an offence against the Act, &c. An attempt to trade with the enemy (within the meaning of the Act) on 7th December 1914 is therefore punishable as if the offence of trading with the enemy after 4th August 1914 had been committed.

On the question whether, as a fact, the appellants did trade with the enemy, the most important piece of evidence is the cable of 7th December 1914. The following is a copy of the cable of 7th December 1914:—"Can take twenty thousand." This was sent by the appellants to the Udolpho Wolfe Co. at New York, in reply to a cable message sent from New York by the Company to the appellant, dated 4th December 1914, as follows:—"Can we ship you from old warehouse twenty thousand cases at once restrictions expected." It is not disputed that the goods, or some of them, were in Germany, an enemy country, when the

(1) 1 C. Rob., 1.
(2) (1902) A.C., 484, at p. 506.
(3) (1901) 2 K.B., 849.

offer was made and accepted (7th December 1914), and the Crown contended that it was an offence under the Proclamation and under the Act, and at common law, "directly or indirectly to obtain from an enemy country any goods or merchandise," and, also, that under the Act read with the *Acts Interpretation Act* 1904 an attempt to do so was an offence. The Court was asked to say whether, upon the evidence, the Magistrate could properly find the appellants guilty of any of the acts included in the definition in the Act or Proclamation as "trading with the enemy."

The Udolpho Wolfe Co. is an American company incorporated in the State of New Jersey, having its head office in New York, and branch houses at Hamburg, Germany, and at Rotterdam, Holland. It was also registered as a foreign company at Hamburg. At the date of the war (4th August 1914), the Company's most important place of business on the Continent was at Hamburg, where it had large warehouses, and where it bottled, stored, sold and exported the Udolpho Wolfe's schnapps. At the Rotterdam branch the gin, in its raw state, was bought from an independent distilling firm, and sent to the Hamburg house. The evidence the Magistrate had before him as to the Company carrying on business at Hamburg on 7th December is contained in the oral and documentary evidence submitted by the prosecution and by the appellants, and the admissions made by the appellants. It is clear from the evidence that the appellants had, for very many years prior to 4th August 1914, carried on business with the Company as the sole purchasers in Australia of Wolfe's schnapps, that such goods were always obtained from Hamburg and were shipped from Hamburg direct to the appellants in Australia. The payment of the freight of the goods was on the basis of goods f.o.b. from London, the Company bearing the cost of freight or expenses on goods f.o.b. Hamburg (if any) over and above that of goods f.o.b. London. The shipments were, however, invariably, before 4th August 1914, from the Company *at Hamburg* to the appellants, to different ports in Australia.

The Crown contended that the Company continued to carry on business in Hamburg although it was clear that for a time exports of schnapps from Germany were prohibited by Germany. In

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Powers J.

support of that contention it was pointed out that, although a cablegram was sent on 7th August stating that shipments had been stopped, it was evidently understood that business was still carried on at Hamburg, because the appellants wrote on 11th August 1914 *direct to the Hamburg house* ordering further goods to be sent with a prior order of 30th July, when opportunity offered.

The first question to decide is whether there was evidence on which the Magistrate could properly find that there was any attempt on 7th December to obtain goods from *Germany*, or only from Holland, as the appellants contended.

It is admitted that the neutral Company was carrying on business in Germany up to 4th August 1914, and that it had supplied the appellants with Wolfe's schnapps for very many years. Such goods were supplied from Hamburg, and were shipped from Hamburg to the appellants direct to different ports in Australia. It was also clear on the evidence, that the appellants believed, for some time prior to 4th December 1914, that the Company could not, because of the restrictions by Germany, export schnapps from Hamburg. If the cablegram in question had been sent between 14th September and 4th December 1914 without the words "old warehouse" the Magistrate might not have been justified in finding, on the correspondence submitted, that the appellants were attempting to trade with the enemy by obtaining goods from Germany. The cablegram of 4th December and the reply thereto, and the evidence of the appellants themselves in the Court below, however, showed that the position was entirely different after that cablegram was received.

The cablegram of 4th December was in the following words: —"Can we ship you from *old warehouse* twenty thousand cases at once restrictions expected."

Counsel for the respondents contended that the cablegram informed the appellants that the restrictions previously existing against the export of schnapps from Hamburg had been removed. That they could supply schnapps from the old warehouse, Hamburg, and that it was not unlikely that new restrictions might be placed by Germany on the export from Hamburg later on. The Magistrate could, in my opinion, have construed the cablegram to mean that.

That it was so construed by the appellants, the evidence, I think, proves.

On receipt of that cablegram the appellants replied as follows:—"Can take twenty thousand." The most important question the Magistrate had to decide on was what the appellants meant by the words "old warehouse" in the cablegram of 4th December. On the correspondence before 4th December there could not be much doubt about the words meaning the warehouse at Hamburg, but whatever doubt there was about it from the correspondence was, I think, cleared away by the evidence of the appellants themselves given in the Court below.

The following are extracts from the evidence of the appellant Laurence Edward Moss, as it appears in the appeal book:—"I remember the cable of the 7th December. I signed that cable. That had reference to an offer which had been made from New York. By 'old warehouse' I understood goods from the old warehouse in Hamburg, packed before the war. The bottles and stuff were stored in the Hamburg warehouse and paid for before the war. I presumed that those things were coming from the old warehouse. I knew that bottling only began in Rotterdam after the war began . . . We had not paid for this stuff before the war. I understood that 'old warehouse' meant the warehouse in Hamburg, or portion of it. The object in telling us that, was that the goods had the old show cards in them, and that some had come already, and some of the 20,000 cases were still in the old warehouse."

There was also the evidence of Edwin Abbott, an examining officer in the Customs Department, whose evidence the Magistrate could, if he thought fit to do so, believe. Referring to an interview with the appellant Moss on 2nd February last, he said:—"I then asked Mr. Moss in relation to the cable of 4th December. I said to him, 'Will you tell me what is the interpretation you place on this cable?' and showed him this cable marked Exhibit 5, relative to the words 'old warehouse'; he replied: 'The Hamburg warehouse.'" Referring to a later interview, on 5th March last, he said:—"I then said to him: 'On a former occasion you stated that the words "old warehouse" in the cable dated 4th December,

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Powers J.

from New York, referred to the Hamburg house.' He replied: 'Yes.' I then said to him: 'When you wrote this letter of 21st December you were aware that the cases mentioned therein were coming from the Hamburg warehouse.' He replied: 'Yes, we thought these cases were on the same plane as those coming out of the detained vessels.'" The correspondence refers to goods on "detained vessels" in Hamburg, which goods were taken out and stored in the Hamburg warehouse.

On the evidence referred to, I think the Magistrate could properly find that (1) on 7th December the appellants attempted to trade with a neutral carrying on business in an enemy country, by attempting to obtain goods which they knew were, at the time (four months after war was declared), in the warehouses of the Company in the enemy country.

(2) The appellant knew the goods he attempted to obtain were to come from Hamburg. In giving evidence the appellant Moss, under cross-examination (referring to the 20,000 cases in question), said:—"The American firm had paid for it before the war, and we were therefore under the impression that it did not matter getting it from Hamburg . . . They would have to get it from Hamburg before they could supply us."

To rebut the defence raised that the Company *as a fact* had ceased to carry on business in Hamburg immediately after the war and was not carrying on business there on 7th December 1914, the Magistrate had before him a mass of documentary evidence, including a cablegram from Rotterdam to the Company at New York, dated 4th December last. This cablegram must have been the foundation of the cablegram of 4th December from the Company at New York to the appellants here, offering 20,000 cases. It reads:—"Rumours afloat exportation of shooks will be prohibited advise storing here rest contract value twelve thousand dollars can ship Australian stock old warehouse twenty thousand cases Peninsular line monthly steamers touching Sydney Melbourne Adelaide costs one mark seventy-five per case everything included insured to Rotterdam only Moss must arrange local rates through rates other ports too high Cable." This cable shows an intention to send stock monthly from the old warehouse, and apparently fixed the price to be paid

by the appellants, per case, including insurance to Rotterdam, but not beyond ; leaving the insurance after Rotterdam (because of the high rates caused by the war) to the appellants to arrange. As this cablegram was not seen by the appellants before 7th December, it cannot be used to show knowledge on their part.

The evidence at the hearing showed that the appellants knew goods could be sent from Hamburg to Rotterdam, thus avoiding the blockade by the English Fleet of goods exported direct from German ports. The fact that they were to be shipped from Holland on the way from Hamburg to Australia does not affect the question.

As to the question whether business was, in fact, carried on by the Company at Hamburg on 7th December, the Magistrate could, I think, properly find, on the evidence, that, although the export business of schnapps was suspended from 7th August till early in December 1914, the business otherwise was not closed, and that on or before 4th December 1914 the export business of schnapps from Hamburg was resumed, and that it was intended to continue that business until new restrictions, if any, were imposed by Germany. Evidence to support that view includes :-- (1) The letter of 3rd October 1914 from the Hamburg house to the appellants containing (*inter alia*) the following words : " We have a large stock of cases on hand which we must ship after restoration of peace." That letter was received before 4th December 1914. (2) The definite offer on 4th December 1914 of 20,000 cases from the old warehouse (at Hamburg). Further evidence was also before the Magistrate (see letter of 16th December 1914) showing that the Company had not decided to close their Hamburg business, at least until after the war was at an end. The following are extracts from that letter :—" Shipment of 20,000 cases. We acknowledge receipt of your cable of 6th inst. namely :—' Can take 20,000.' In ordering these cases shipped we directed show cards to be removed. We afterwards asked what this would cost as removing them might prove more expensive than we expected. We hoped to be able to write you when these cards would be shipped but our cable has not been answered. Mr. Dietz is in Hamburg and it is most likely it had to be sent to him by post. . . . German Trade— This is hardly the time to decide where it would be best to locate

H. C. OF A. 1915.

MOSS & PHILLIPS v. DONOHOE.

Powers J.

when this disastrous war finally comes to an end. One cannot tell what the conditions will be at that time. There are many things to be considered, not the least of which is the long lease of our extensive warehouses in Hamburg which we could hardly dispose of if the expected depression in commerce after the close of war becomes a fact. We readily recognize the advantage of being located in England."

On the evidence before the Magistrate I think he could properly find that the appellants attempted, on 7th December 1914, to trade with the enemy, by attempting to obtain goods from an enemy country from a neutral company, which Company, they knew, was, after 4th December 1914, carrying on business in an enemy country. If that is so, the appellants were properly convicted.

On the evidence before the Magistrate, failing the above finding, he could properly find that the appellants attempted, on 7th December 1914, to trade with the enemy by attempting to obtain goods "from an enemy country" through a neutral, knowing the goods to be at the time "in the enemy country." If that is so, the appellants were properly convicted, because the charge is attempting to trade with the enemy within the meaning of the Act, by obtaining goods "from an enemy country."

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

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

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

B. L.