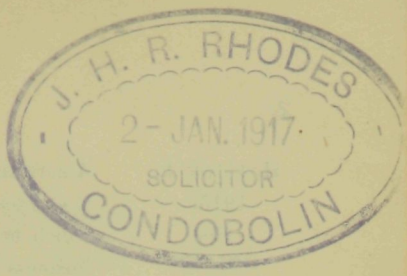

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1915-1916.

[HIGH COURT OF AUSTRALIA.]

BERWIN . . . . . APPELLANT;

AND

DONOHOE . . . . . RESPONDENT.

A. BERWIN & COMPANY LIMITED . . APPELLANTS;

AND

DONOHOE . . . . . RESPONDENT.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1915.

SYDNEY, *Sept.* 3; *Nov.* 29, 30; *Dec.* 14.

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

Trading with the Enemy—Attempt—Aiding and abetting—Evidence—Consent of Attorney-General to prosecution—Trading with the Enemy Act 1914 (*No.* 9 *of* 1914), *secs.* 3, 6—*Proclamation of 9th September* 1914, *clause* 5—*Acts Interpretation Act* 1904 (*No.* 1 *of* 1904), *sec.* 8.

B., the managing director of a company registered in New South Wales, on 25th September 1914 as such director wrote a letter to Amsinck & Co., their business correspondents in New York, as follows:—"Mr. H. T. Moors" (an

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American subject) "of Moors' Samoan Trading & Plantations Co. Ltd. is at present in Sydney, and on his arrival here found that 215 bags of cocoa which he had consigned to H. C. Bock" (a German subject who carried on business at Hamburg in Germany) "had not left Sydney. It is of course impossible to get this cargo away to Germany, and Mr. Moors has therefore consigned this parcel to Messrs. Atkins Kroll & Co., San Francisco. We thought that if there was a good opening for a first class cocoa in New York you might possibly assist in the disposal of same, and it may be advisable for you to get into touch with Messrs. Atkins Kroll & Co. for the purpose of getting samples of this and following lots. Mr. Moors does not know how to communicate with H. C. Bock to tell him of the disposal of the cocoa, and we also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock." The evidence bore out the statements in this letter. B. also assisted Moors to obtain shipment of the particular lot of cocoa to San Francisco. Moors had told B. that he owed Bock money and intended to leave the proceeds of the cocoa in America at the disposal of Bock. On the several prosecutions of B. and the company of which he was managing director, for that on 25th September 1914 they did, at Sydney, in connection with the shipping of certain goods to San Francisco, to the intent and for the purpose that the proceeds of the sale thereof should during the continuance of the war be placed to the credit of Bock of Hamburg in Germany, attempt to trade with the enemy, the defendants were convicted by a Stipendiary Magistrate. On appeal to the High Court,

Held, by *Griffith* C.J. and *Gavan Duffy* and *Rich* JJ. (*Isaacs*, *Higgins* and *Powers* JJ. dissenting), that there was no evidence of an attempt by Moors to trade with the enemy by sending the cocoa to the San Francisco firm which either B. or the company aided or abetted, or of an independent attempt on the part of B. or the company to trade with the enemy.

Semble, *per Griffith* C.J. and *Gavan Duffy* and *Rich* JJ., that if a neutral on a visit to a British possession takes advantage of the Post Office to ask his agent in his own country to pay a debt for him there to an enemy, he is not guilty of attempting to trade with the enemy within the meaning of the Proclamation of 9th September 1914 or at common law.

By *Isaacs J.*—The despatch of goods or the sending of a letter abroad by any person in Australia, neutral or not, as the first or intermediate step in a combined process which, if fully carried out, would constitute a trading with the enemy, is itself an attempt to trade with the enemy.

By *Isaacs*, *Higgins* and *Powers* JJ.—A document signed by the Attorney-General for the Commonwealth stating that he thereby "consents to a prosecution being instituted against A. of Sydney in the State of New South Wales for an offence against the *Trading with the Enemy Acts* 1914," is sufficient to authorize a prosecution of A. for an offence against sec. 3 of the Act No. 9 of 1914.

APPEAL from a Court of Petty Sessions.

At the Court of Petty Sessions, Sydney, an information was heard whereby John Thomas Tamplin Donohoe charged that "during the continuance of the present state of war as defined by" the *Trading with the Enemy Act* 1914 (No. 9), "that is to say, on or about 25th September 1914, Alfred George Berwin of Sydney aforesaid did at Sydney aforesaid, in connection with the shipping of certain goods, namely, 215 bags of cocoa beans, to San Francisco, United States of America, to the intent and for the purpose that the proceeds of the sale thereof should during the continuance of the war be placed to the credit of one H. C. Bock of Hamburg in Germany, attempt to trade with the enemy contrary to the Act in such case made and provided."

The defendant, having been convicted, appealed to the High Court on the grounds, as amended at the hearing: (1) that the information disclosed no offence; (2) that there was no evidence to support the conviction; (3) that there was no evidence that the consent of the Attorney-General had been given to the prosecution of the defendant on the said information as required by the *Trading with the Enemy Act* 1914; (4) that the penalty was excessive; (5) that the written consent of the Attorney-General was not in fact given to the initiation of the prosecution.

At the same Court, A. Berwin & Co. Ltd., of which A. G. Berwin was the managing director, were charged on an information similar in all respects, and were convicted, and an appeal was brought to the High Court on the same grounds.

The material facts are fully set out, and the nature of the arguments sufficiently appear, in the judgments hereunder.

Bavin, for the appellants, referred to *R.* v. *Bates* (1) and *R.* v. *Metz* (2).

[ISAACS J. referred to *R.* v. *Bray* (3).

RICH J. referred to *Knowlden* v. *The Queen* (4).]

Blacket K.C. (with him *Mack*), for the respondent in each case.

Cur. adv. vult.

(1) (1911) 1 K.B., 964.
(2) 31 T.L.R., 401.
(3) 9 Cox C.C., 215.
(4) 5 B. & S., 532, at p. 536.

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The following judgments were read :—

GRIFFITH C.J. and GAVAN DUFFY and RICH JJ.

Berwin v. *Donohoe.*—This is an appeal brought direct to this Court from a justice exercising federal jurisdiction.

The appellant, who is the managing director of Berwin & Co. Ltd. (the appellants in the second case) was charged that on 25th September 1914 he " did at Sydney . . ., in connection with the shipping of certain goods . . . to San Francisco . . . to the intent and for the purpose that the proceeds of the sale thereof should during the continuance of the war be placed to the credit of one H. C. Bock of Hamburg in Germany, attempt to trade with the enemy." We remark in passing that we construe the words " to the intent " as meaning the intent of the shippers. The charge is attempting to trade with the enemy, which, whatever else it may mean, involves an attempt to have intercourse, direct or indirect, between the person who makes the attempt and the enemy. The information was headed " Trading with the Enemy Act 1914 " with the words " Section 6 " written below.

Sec. 6 of the Principal Act enacts that whoever aids or abets or is knowingly concerned in or privy to the commission of an offence against the Act or doing outside Australia any act which, if done within Australia, would be an offence against the Act shall be deemed to have committed the offence and punishable accordingly. The writing of the words " Section 6 " upon the face of the information suggests that the charge intended to be made was of abetting some other person in committing the offence of attempting to trade with the enemy. The words were not, however, repeated in the summons.

Counsel who appeared for the prosecution before the Magistrate did not make any formal opening of the facts or reference to the statutory provisions which he alleged to have been infringed, and, on being asked by counsel for the defence for particulars, merely said that the defendant attempted to trade with the enemy by means of two letters of 24th and 25th September 1914.

The only evidence offered for the prosecution was a copy, seized in Berwin & Co.'s office, of a letter written on 25th September 1914 by the defendant, describing himself as managing director of the

Company, to their business correspondents at New York, Messrs. Amsinck & Co., statements made by the appellant in answer to questions put to him by the seizing authorities, and a letter written by one Moors on 24th September, addressed to H. C. Bock at Hamburg, which had been stopped in the Post Office.

Bock was a shareholder in Berwin & Co., who were his agents in Sydney, but, so far as appears by the evidence, they did not in any way act on his behalf in connection with the transaction in question.

The material part of the letter of 25th September was as follows: —"Mr. H. T. Moors of Moors' Samoan Trading & Plantations Co. Ltd. is at present in Sydney, and on his arrival here found that 215 bags of cocoa which he had consigned to H. C. Bock had not left Sydney. It is of course impossible to get this cargo away to Germany, and Mr. Moors has therefore consigned this parcel to Messrs. Atkins Kroll & Co., San Francisco. We thought that if there was a good opening for a first class cocoa in New York you might possibly assist in the disposal of same, and it may be advisable for you to get into touch with Messrs. Atkins Kroll & Co. for the purpose of getting samples of this and following lots. Mr. Moors does not know how to communicate with H. C. Bock to tell him of the disposal of the cocoa, and we also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock. There is another parcel of 81 bags of cocoa which Moors have also sent on to H. C. Bock, and which they have now in the *Zeiten* somewhere in the Mozambique Channel. Kindly notify Messrs. Bock of this and ask them to take measures to protect this cargo by insurance."

From the statements made by the appellant to the seizing authorities it appeared that Moors, a South Sea Island trader, and an American by birth, was a customer of Berwin & Co. and had an office in their warehouse in Sydney, and was also allowed the use of their private office when he visited that city, but was not connected with them in any other way, although their business relations were such that they desired to assist him.

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He had business dealings with Bock in Hamburg, and had before the outbreak of war consigned two parcels of cocoa beans to him, one of which was believed to be on board the German s.s. *Zeiten*, somewhere in the Mozambique Channel. The other had arrived at Sydney before the outbreak of war, and had been stored—by whom we do not know—in a warehouse there. Moors had by some means, which, in the absence of any evidence or even suggestion to the contrary, must be taken to be lawful, obtained possession or control of this parcel, 215 bags. The price of cocoa beans in Sydney being low, he desired to send it to San Francisco for disposal. He proposed to send it to a firm called Atkins Kroll & Co. there, and asked the appellant to assist him in securing space, which it was not easy for a stranger to obtain, in the s.s. *Sonoma* about to sail from Sydney to San Francisco. The appellant secured the space, and the cocoa beans were shipped accordingly. Moors also told the appellant that he owed Bock money, and intended to leave the proceeds of the cocoa beans in America for the disposal of Bock.

The sending of the cocoa beans by Moors to Atkins Kroll & Co. is now relied upon by the prosecution as an attempt by Moors to trade with the enemy, and the appellant's assistance in obtaining space in the *Sonoma* is relied upon as aiding and abetting him in the attempt. In order to show that Moors' act of sending was such an attempt the prosecution relied upon a letter written by him to Bock at Hamburg, which was detained and opened in the Post Office and never reached him. It was, in fact, typed in Berwin & Co.'s office and on their business paper. The appellant deposed, and there is no reason to doubt his statement, that this was done in pursuance of the ordinary courtesy shown him by Berwin & Co. when in Sydney, to which I have already referred, but that he had no knowledge of the contents of the letter. It is plain that the letter was not admissible in evidence against the appellant, and it must be rejected from consideration. But, even if there were sufficient *primâ facie* evidence to render it formally admissible, we have no right to refuse to believe the appellant's oath that he knew nothing of its contents.

For the rest of the facts we must go to the letter of 25th September, from which the following facts may be taken to be sufficiently

established against the appellant who wrote it:—The sending of the cocoa beans direct to Bock in Germany had manifestly become impossible: they were perishable goods, and Moors was minded to dispose of them in America: the appellant desired to help him in doing so, and he accordingly wrote to the Company's correspondents at New York suggesting that they should get into communication with Messrs. Atkins Kroll & Co. at San Francisco "for the purpose of getting samples of that and following lots." The only reasonable inference to be drawn from this expression is that Moors contemplated, if possible, sending further lots of cocoa beans from the South Seas to San Francisco for disposal in America. The letter proceeds: "Mr. Moors does not know how to communicate with H. C. Bock to tell him of the disposal of the cocoa." The only fair construction of this passage is that Moors (as he naturally would) desired to let Bock know what had become of the consignment of 215 bags. The appellant added: "We also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock."

We shall have occasion to refer again to this passage in dealing with an alternative case made against the appellant.

It is possible that Moors' action in sending the cocoa beans to Atkins Kroll & Co. was part of an attempt to sell the beans on behalf of Bock, and in that sense to trade with Bock. But whether it was or not must depend upon the nature of his instructions to Atkins Kroll & Co., of which we know nothing. It is suggested that the beans were Bock's property, and that Atkins Kroll & Co. were to act as his agents in disposing of them. But the suggestion is without foundation in the evidence, and is negatived by Moors' expressed intention to deal with the proceeds as his own by paying out of them a debt which he owed to Bock, the amount of which we do not know, and which might have been greater or less than the proceeds of the beans. It also seems difficult to understand how Moors would sell on behalf of Bock and transmit to him the whole price obtained if his position was that of unpaid vendor to Bock, and there is nothing in the evidence to suggest that he had in fact been paid. Under these circumstances it is impossible to say

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that it was proved that Moors attempted to trade with the enemy by sending the beans to Atkins Kroll & Co., or even if he did, that the appellant knew he was doing so.

Then it is suggested that Moors, at any rate, intended to trade with the enemy by paying Bock in America a debt which he owed him. Whether that intention was ever carried out so as to constitute an attempt, we do not know. All that the appellant did was to assist in putting Moors in a position to pay Bock's debt in America if Moors' intention continued and ripened into an attempt.

We should, however, be very loth to hold that, if a neutral on a visit to a British possession takes advantage of the Post Office to ask his agent in his own country to pay a debt for him there to a enemy, he is guilty of attempting to trade with the enemy within the meaning of the Proclamation of 9th September 1914, or at common law.

As, therefore, there is no evidence of any offence by Moors to the knowledge of the appellant, or at all, the charge of aiding and abetting the commission of that offence fails.

The other aspect in which the case was presented was that the request to G. Amsinck & Co. to tell Bock that a debtor of his in San Francisco intended to make arrangements for paying his debt was an independent attempt to trade with the enemy. If, as we have already intimated, Moors would commit no offence by paying Bock a debt which he owed him, we think that the appellant would commit no offence by requesting Messrs. Amsinck & Co. to intimate to Bock from Moors that Moors intended so to pay him. But, as we have already observed, so far as the evidence goes, it is not shown that Moors had taken any steps to make the payment. It all lay in intention, and unless there was a complete offence or an attempt to commit an offence on the part of Moors there was nothing for the appellant to abet within the meaning of sec. 6 or at common law.

The charge reduced to a concrete form is "attempted to trade with the enemy (Bock) by sending a message from Moors to Amsinck & Co. asking them to inform Bock that Bock's debtor intended to pay him his debt in the United States." The statement of the charge is its own refutation.

It is, of course, possible that the letter which Moors must have written to Atkins Kroll & Co. would, if produced, have disclosed an attempt by him to trade with the enemy, and that the appellant, notwithstanding his denial, was cognizant of the contents of the letter. But the rule of law that a person cannot be convicted of an offence upon mere conjecture or suspicion is not abrogated or even suspended in time of war, even in the case of the alleged offence of trading or attempting to trade with the enemy.

For these reasons we are of opinion that there was no evidence before the Magistrate upon which he could properly convict, and that on that ground the appeal must be allowed.

Under these circumstances it is unnecessary to express any opinion as to the sufficiency of the authority to prosecute given by the Attorney-General.

A. Berwin & Co Ltd. v. *Donohoe.*—The facts in this case are identical with those in the last, and were established by the same evidence. The only possible difference is that it may be doubtful whether the appellant wrote the letter of 25th September on behalf of his company or as a private friend of Moors, but it is not necessary to decide the point.

The same order should be made as in the former case.

ISAACS J.

Berwin v. *Donohoe.*—The appellant was convicted by the Stipendiary Magistrate of attempting to trade with the enemy, and was fined £200. I have no doubt that the intent charged is his intent. He could not well be charged with some one else's intent.

The first point of substance taken on this appeal is that there was no reasonable evidence of guilt, and if there was, the appellant, after his own explanation, ought to have been acquitted. The diversity of views developed during the argument has elevated what seems to me in essence a very simple case to a position of great importance as determining the law with respect to what is known as "trading with the enemy," and, consequently, of considerable practical interest in relation to the safety of the Empire.

The facts are that some time prior to 24th September 1914 there

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arrived in Sydney consigned to H. A. Bock of Hamburg, by Moors' Samoan Trading & Plantations Co. of the then German colony of Samoa, 215 bags of cocoa beans of 2 cwt. each, the value being £1,200. The King's Proclamation was gazetted on 12th September, that is, twelve days before, and it was impossible to get the cocoa beans despatched to Germany. One H. T. Moors the managing director of the Trading & Plantations Co. in Samoa—then German territory—happened to be in Sydney some little time before 24th September. He had been trading with Berwin & Co. eight or ten years, that is, as long as the latter firm has been here. Moors' company was an "Island company" and Berwin's company are "Island warehousemen" as well as manufacturers' agents and indentors. The Berwin Company has issued just under 21,000 shares, of which Berwin himself, a native of Germany and naturalized since the war began, holds 9,272; the Hamburg firm of Bock & Co. hold 4,500; and, among others, a person named Blacklock, 1,450; Wachsmuth & Co. of Hamburg, 1,000; Pavenstedt of New York, 875; Ruperti of New York, 875; Willink of New York, 250; Sieveking of New York, 250, and Baron von Schroder of New York, 250—some of these being the partners in Amsinck & Co. to be presently mentioned. The German control of the Company is unquestionable, and over a fifth of the shares are in the name of Bock & Co. of Hamburg. These facts are most material when we come to consider the nature and probabilities of Berwin's action.

Now, what was to be done with the cocoa beans sold by Moors' company to Bock? The shipping documents were apparently in Bock's name, and he or his agents must have had them unless hypothecated. By some means not disclosed, Moors while in Sydney got control of the beans, and the power to dispose of them. The market, it is said, was poor in Australia, but that is doubtful having regard to the evidence, which shows it was rising. The cocoa might, however, have been tried here, or it might have been sent to England, where possibly it would have found a ready sale. Neither of these courses was attempted. But, of all possible means of disposing of it, one and one only was selected, and that one, singularly enough, led the proceeds to the coffers of the German buyer H. S. Bock.

The way it happened is a plain story. Berwin & Co. carried on a regular trade with Bock of Hamburg, and acted in Sydney as his agents. Berwin & Co. were also Sydney agents for Amsinck & Co. of New York, and, in turn, Amsinck & Co. were shareholders in Berwin's company. So that Bock & Co. and Amsinck & Co. and Berwin are all co-shareholders in Berwin & Co., and so far as they are separate entities are inter-connected in trade. Berwin & Co.'s place of business is 35 York Street, Wynyard Square, and when Moors came to Sydney he was permitted to use one of their offices, and their letter paper, and typewriting machine and to dictate to their typewriter a certain letter of 24th September, hereinafter mentioned. Moors and Berwin consulted together, and as a result Moors decided to ship the beans to San Francisco to a firm called Atkins Kroll & Co. How this firm came to be selected we are not told, but there is some ground for believing that they were not the real agents in connection with the matter, that ground being the letter written by Berwin himself to Amsinck & Co. on 25th September. As to Moors' decision to ship to Atkins Kroll & Co., there is an added singularity that he had—that is the effect of what Berwin says—decided to ship to that firm before he knew he could get the freight. It was difficult to get freight to America, but Berwin personally assisted, and on 24th September got the freight allotted by the *Sonoma*, which was to sail two days later. Moors on the same day wrote a letter to Bock in Germany telling him that he had consigned the cocoa to Atkins Kroll & Co. to dispose of for Bock, and that the proceeds would be held in trust for him. One question is whether this letter is admissible as against Berwin. I think it is in the circumstances, because it is not a mere narrative: it was an act and part of a common scheme, otherwise shown to have been arranged between Berwin and Moors.

The day before the *Sonoma* sailed Berwin & Co. Ltd., by Berwin its managing director, as Berwin admits, wrote a business letter to Amsinck & Co., New York, which, in conjunction with the previous assistance as to freight, is the act said to constitute the attempt to trade with the enemy. The important passage is in these words:—"Mr. H. T. Moors of Moors' Samoan Trading &

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Plantations Co. Ltd. is at present in Sydney, and on his arrival here found that 215 bags of cocoa which he had consigned to H. C Bock had not left Sydney. It is of course impossible to get this cargo away to Germany, and Mr. Moors has therefore consigned this parcel to Messrs. Atkins Kroll & Co., San Francisco. We thought that if there was a good opening for a first class cocoa in New York you might possibly assist in the disposal of same, and it may be advisable for you to get into touch with Messrs. Atkins Kroll & Co. for the purpose of getting samples of this and following lots. *Mr. Moors does not know how to communicate with H. C. Bock to tell him of the disposal of the cocoa, and we also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock.* There is another parcel of 81 bags of cocoa which Moors have *also* sent on to H. C. Bock, and which they have now in the *Zeiten* somewhere in the Mozambique Channel. Kindly notify Messrs. Bock of this and ask them to take measures to protect this cargo by insurance."

The shipping agent's evidence shows that the goods were carried and delivered, and no circumstance appears which goes to show the intention as stated by Berwin was not strictly carried out.

If that letter is carefully read and compared with the suggestions made later, it will be seen : (1) that the only reason given for consigning to San Francisco is the impossibility of getting the cargo itself to Germany ; (2) that Amsinck's assistance was considered advisable in order to obtain the best price obtainable at the disposal of the cocoa in the neutral country where Bock could get the money ; (3) that the cocoa was sent to New York without any information whether there was a better demand for the article there than in Australia ; (4) that no reference is made to the sale being on behalf of Moors—an extremely important circumstance ; (5) that, on the contrary, Amsinck & Co. and not Atkins Kroll & Co. are requested to communicate with Bock, because they knew the " safest " way of advising him as to the proceeds ; (6) that he was to be told *the proceeds were intended for his account* and would be held by Atkins Kroll & Co. pending his instructions—that is to say, Berwin states

distinctly that Moors' intention was that the proceeds were to be treated as Bock's money, which shows that he understood the sale was not on Moors' account ; Amsinck was to be told that practically as messenger to Bock ; (7) that the other parcel of 81 bags of cocoa was spoken of as one " which Moors have *also* sent on to H. C. Bock "—in other words, that in effect the two cargoes were for Bock.

It seems to me little short of daring on the part of the defendant to set up the altered story that he has since ventured to ask the Court to believe. The Stipendiary Magistrate promptly rejected it, and I can well understand why. Sir *William Scott* observed that it is not " swearing," but " swearing credibly," that entitles a witness to belief : *The Odin* (1). If it were not so, justice would be at the mercy of every knave bold enough to disavow all he had said or written out of Court. The Stipendiary Magistrate, having heard and observed Berwin in the witness-box, evidently gave no credence to his story so far as it differed from his own letter. How, as a matter of law, can this Court overrule that, and particularly in view of the inconsistencies in his evidence ?

Before the Magistrate, Berwin, in attempting to explain away his own written statement, swore :—

(1) That Moors only asked him to get space and he helped him.

(2) That friends of Moors had shipped the 215 bags for San Francisco,—though who the friends were is not revealed.

(3) That Moors named Amsinck—which was highly probable in view of the scheme in hand, though how Moors came to know of him except for Berwin's own prior suggestion does not appear beyond Berwin saying " I think he had goods from Amsinck too ; I think he has got to know them through me."

(4) That Amsinck was mentioned by Moors so as to have " two strings to his bow," that is, to get the best possible price. (Amsinck was not instructed as to any price, and for the obvious reason, that the matter was out of Moors' hands and the best possible price was, of course, to be the best price for Bock.)

(5) That Moors had said he owed Bock money—(no amount mentioned, and no explanation of how he came to owe it, and, as

(1) 1 C. Rob., 248, at p. 252.

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the only suggested business relations between them was the purchase by Bock of island produce, it is difficult to imagine how Moors owed any debt to Bock.)

(6) *That Moors had also said he would leave the money in America for the disposal of Bock.* The suggestion of counsel for Berwin was that this meant payment of a debt, though no amount was stated, and nothing said about transmission of any surplus or making up any deficiency. And, besides, debts are not paid by leaving money in a foreign country for the disposal of the creditor; they are paid by handing the cash. Money that is left at another's disposal is naturally the property of that other. "Then," added Berwin, "I wrote the letter of the 25th as a result of the conversation." If Berwin considered Moors had authorized him to make that communication to Bock through Amsinck, and he does not even now deny he so understood it, how can we say, or rather conjecture, differently? In reply to the communication, Amsinck & Co.'s letter dated 22nd October 1914, said:—"Moors' Samoan Trading & Plantations Co. We have written to Mr. H. C. Bock of Hamburg what you state in regard to the shipments of cocoa." Observe the word "shipments." So that Berwin's effort here to communicate with Bock was successful, and what is decisive here on the question of attempt is that the intention of Moors to pay the money was communicated to Bock through the instrumentality of Berwin and Amsinck, Berwin acting upon the authority or direction which Moors gave him here.

Now, in my opinion, the matter is as plain as daylight: Moors had sold cocoa beans to Bock, and, the war having interrupted their delivery direct, all the ingenuity and resources at the disposal of Bock's fellow-countrymen, and fellow-shareholders, and business agents, were employed to carry out the transaction as closely as it could be carried out in effect, but so as to wear the best outward appearance consistently with carrying out the ultimate object.

The goods themselves could not reach Germany from Australia, but they could reach America. Any direction to forward them on in specie would have been too plain a contravention of the law, and therefore a device had to be adopted. Moors knew no one in Bock's confidence to send to except Bock himself, and took his

chance of writing him direct. This letter dated 24th September 1914 was stopped by the censor. If Moors' intention as an independent fact be sought for, this letter makes it plain, because in it he tells Bock direct that the goods and their proceeds are for him. But even if the letter be disregarded as inadmissible against Berwin, the matter is clear enough. Berwin knew how to reach Bock indirectly, and arranged to do so in conversation with Moors. And so, while the goods went to a firm with a partly non-German name, Atkins Kroll & Co., the German firm of Amsinck & Co., fellow-shareholders and American agents of Berwin and in close commercial touch with Bock, were commissioned by Berwin, apparently for no valuable consideration to be paid by Moors, to see to the effective disposal of the goods in America, and to placing the money at the disposal of Bock.

Put in a nutshell, the goods then in Australia were so dealt with by Moors in collusion with Berwin that they were exported from Australia and their proceeds were, *viâ* America, transmitted either in specie or by credit to Bock in Germany as his property. In all probability, from what we all know regarding the financial methods of the German Government, this very money has in some form or other, and in whole or part, been brought within the command of that Government and used to our detriment.

I regard the letter of 25th September, written immediately after the conversation with Moors, written for the purpose of carrying out an actual transaction, and, consistently with that, stating the facts in the best possible way for Berwin, as much more reliable than any later version made under the circumstances of this prosecution when Berwin was endeavouring to escape the consequences of his act.

I need not stop to consider whether the true function of this Court is to weigh the facts for itself, or to say merely whether there was material for the Magistrate's finding. That question—so far as a federal case is concerned—has not been argued, and could well stand over, so far as I am concerned, until a case presents itself where at least some element of doubt exists. In the face of the terms of the defendant's letter itself, I could not decide this appeal in his favour on the substantial ground without deciding necessarily

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that *Peck* v. *Adelaide Steamship Co. Ltd.* (1) does not apply to a case of federal jurisdiction. I leave that open with this observation: that it may be, on a true reading of par. (*b*) of sec. 39 (2) of the *Judiciary Act*, that the appeal which is given as of right to the High Court from a Court exercising federal jurisdiction is coextensive with the appeal which might be had as of right to the Supreme Court, and any further appeal is to be by special leave. In any case the demeanour and behaviour of the witnesses in the box are extremely material; these the Magistrate had before him, and we have not before us; and on the authority of cases such as *Coghlan* v. *Cumberland* (2), *Riekmann* v. *Thierry* (3) and *Nocton* v. *Ashburton* (4), I do not think we are at liberty in the circumstances to reverse the finding. The objection has been urged, however, that there is *no evidence* that Moors did actually so instruct Atkins Kroll & Co.; that Berwin's letter, plain as it is, and understood as it was by Amsinck, does not mean that the cargo was to be sold for Bock's benefit, or, if it does, that Moors may have changed his intention to so sell it, notwithstanding all that had been said to Berwin and all that had been done by arrangement with Berwin or in consequence of what Moors said to Berwin, and notwithstanding all that Berwin at this end, and Amsinck at the other, thought had been adhered to; that Moors, in short, might unknown to them have completely changed his mind. It is said he might, for all that appears, have given some direction to Atkins Kroll & Co. inconsistent with the arrangement Berwin thought he was helping to carry out. In other words, the view is that he may have sent the goods to be sold on his own account in America, and instructed Atkins Kroll & Co. to take the proceeds as being Moors' own money and pay it to Bock in discharge of an existing debt. A further possibility has been developed—not by counsel—that Moors' intention to pay the money, though coexistent with the intention to sell the goods, might in his mind be a separate intention, not acted on, and therefore he never attempted in what he did to trade with the enemy.

In my opinion it is a sound proposition of law, and, if sound,

(1) 18 C.L.R., 167.
(2) (1898) 1 Ch., 704.
(3) 14 R.P.C., 105, at p. 116.
(4) (1914) A.C., 932, at p. 957.

it determines this case against the appellant, that when an intention is once formed and expressed, and active steps are taken to carry it out, and all outward manifestations are consistent with and conducive to the effectuation of the intention—as here—then, in the absence of evidence of abandonment, it may be inferred that the intention was persevered in and was carried out as far as circumstances would permit. I have no doubt that Moors did all he said he would do.

But it is important that no misapprehension as to the law should exist, and I have no hesitation in holding that, whichever view is taken, Berwin has "traded with the enemy," or "attempted to trade with the enemy," and, with great respect to the opposite opinion, a great gap in the law and a great public danger would exist if that opposite opinion represented the true legal position.

In either case Berwin deliberately assisted Moors in the shipment of the goods to America for the known purpose of getting them converted into money for the ultimate benefit of Bock in Hamburg; in either case he himself, by an act done in Australia by arrangement with Moors, deliberately moved Amsinck in New York to assist in converting the goods into money and to pass on his—Berwin's—message to Bock that the money would be there at Bock's disposal. The communication from Berwin to Bock was delivered in two relays, instead of one, but it was sent and received, and the effect of what Berwin did was as effectual as if he had jointly with Moors transferred £1,200 less expenses from Australia into the pocket of Bock of Hamburg, and either as representing the goods or as payment for the debt. And, apart from all else, Berwin wrote these words, which I repeat:—"We also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which *are intended for his account* and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock." The word "advise" in commercial parlance means "tell" or "inform."

To my mind no reasonable man can doubt for an instant that that passage is a communication arranged between Moors and Berwin, made by Berwin to Bock, through Amsinck as intermediary, he being chosen because he knows what Berwin calls the

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"safest way" of telling Bock what Berwin wants him to know and what circumstances prevent Berwin from communicating direct. And in itself it subjects Berwin to be prosecuted, as I view the law, for trading or attempting to trade with the enemy, both at common law and under the Proclamation as embodied in the Statute, and that, whether the consignment was for Bock's benefit *ab initio*, or was primarily for Moors' benefit, the proceeds being destined for payment to Bock in discharge of a debt, or, if you like, as a present.

It has been said that in the second event mentioned, as Moors, an American not domiciled or carrying on business in Australia, only contemplated paying in America a debt owing to Bock, that act could not be trading with the enemy within the meaning of the Statute, and therefore Berwin had not offended. I take a view of the law very different from that expressed in the judgment just read.

Now, what is "trading with the enemy"? The offence implies three factors—(*a*) the offender, (*b*) the trading, (*c*) the enemy.

As to the first, the offender. The Act declares that a person—which, of course, means a person in Australia, and thereby subject to the Statute—who contravenes the King's Proclamation, or is guilty of trading with the enemy at common law, trades with the enemy within the meaning of the Act. Turning to the Proclamation so as to avoid argument, though the same result would in my view, explained in *Moss and Phillips* v. *Donohoe* (1), attend an examination of the common law, we find that His Majesty forbids "any person resident carrying on business or being in our Dominions" from doing certain acts. Mere presence in the King's Dominions, however temporary, imposes on all persons the obligation of not doing those acts while that presence continues. Moors, therefore, is in this regard in no different position from any other person in Australia, native-born or otherwise.

It further follows that a person who does an act which constitutes "trading with the enemy" within the meaning of the law, is liable whether he does that act as principal or as agent, as an individual

(1) 20 C.L.R., 580, at pp. 602 *et seq.*

trader, or as a director of a company. Both he and his principal, if he has one, must answer for the act which affects them both.

Next, as to the second essential—the act of trading. The Proclamation specifically enumerates certain acts as prohibited. These include: (1) not to pay any sum of money to or for the benefit of an enemy; (7) not directly or indirectly to supply to or for the use or benefit of an enemy any goods, wares, or merchandise; (9) not to enter into any commercial, financial, or other contract or obligation with or for the benefit of an enemy. There is also a general prohibition against aiding and abetting any of the prohibited acts.

The seventh prohibition specifically includes the word "indirectly"; but the same result is reached in the first and ninth prohibitions, by the words "for the benefit of." The ninth entirely precludes the notion that commercial transactions only are struck at. Apart from decided cases, it seems clear that, given the "offender," that is, a person in Australia, and given the "enemy," which is satisfied by an individual like Bock "resident or carrying on business in the enemy country," and given an act described in the Proclamation, it matters not where that act is to be done, whether in Australia or Germany or America. Our laws do not reach to America, but they reach to an act done here leading to an act to be done in America. If that were not so, it would be no offence if the payment or other event stipulated for were to be done in Germany. The Statute would be practically futile if the fact of the payment in America of Bock's debt constituted the transaction a lawful one. The door would be opened to enemies within our gates entering into transactions which it is vitally important to prevent, and which, as I read the Act, are already prohibited.

But the point has been expressly determined by the Court of Criminal Appeal in *R.* v. *Kupfer* (1), in which Lord *Reading* L.C.J. delivered the judgment. In that case the accused was convicted of trading with the enemy by contravening the first prohibition of the Proclamation. He had paid money to a neutral in Holland, but the payment, though in a neutral country, operated for the benefit of a person in Germany, and the conviction was sustained. In

(1) (1915) 2 K.B., 321.

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the judgment the Lord Chief Justice said (1) :—" The first question is what is the meaning of the words ' for the benefit of the enemy ' ? In our judgment those words were deliberately introduced for the purpose of preventing devices, tactics, and various means by which mercantile houses might seek, but for those words, to make payments indirectly, notwithstanding that there is an express prohibition of a direct payment. It was doubtless considered, that in making this Proclamation it was necessary to cover that ground and to throw the net wide in order that there should not be this means of evading the law and therefore of assisting the enemy by adding to or protecting his resources. Those words are very wide and must be construed to have a very wide application. It is not necessary or desirable to define exactly the meaning of the words. They are intended to cover the making of payments to the enemy by any device or by any recourse to indirect means."

It is clear that, in writing and despatching his letter, Berwin at Moors' request did an act in aid and furtherance of what I find was, and he understood was, a consignment on Bock's direct account, but which may, for the purpose of argument only, be hypothetically assumed to have been a consignment on Moors' account to be followed by a payment of the same proceeds, but as Moors' money, in discharge of a debt. In either case Bock, an enemy, was to get the benefit of the money, and Berwin aided and abetted Moors to attain that end.

But, said learned counsel for the appellant, there are other objections of a legal nature. In the first place, the charge is for attempting to trade, and the act proved is only, at most, aiding and abetting another to trade. Is that a valid contention ? In my opinion it is not, and for this there is decided authority. One case is *R.* v. *Burton* (2), where the principal was acquitted, and the abettor tried at the same time was convicted. Another is *Du Cros* v. *Lambourne* (3) and a third *R.* v. *De Marny* (4), which show that the offence, not being a felony, the common law regards an aider and abettor as a principal.

Sec. 6 of the Act, by par. (*a*), is declaratory of the common

(1) (1915) 2 K.B., at p. 336.
(2) 13 Cox C.C. 71.
(3) (1907) 1 K.B., 40.
(4) (1907) 1 K.B., 388, at p. 392.

law, in the same way as Lord *Alverston* C.J. in the last-mentioned case said sec. 8 of the English Act of 1861 was declaratory. Par. (*b*) has a wider scope, and is immaterial to this case.

But it was observed—this coming rather from the Bench than the Bar—that there is no proof that Moors actually did hand over any money to Bock; that he may have altered his mind in time and so have stopped short of "trading with the enemy." Consequently, says the objection, Berwin did not and could not "aid and abet" an act which did not take place. The answer to that, as it appears to me, is this: that the inference from the affirmative facts in evidence, and from the absence of any facts showing abandonment of the project, is overwhelming.

How could such a fact be proved if not by inference? Production of a letter signed by Amsinck or Atkins that he had paid it to Bock, or of a letter signed by Bock that he had received the money, would be inadmissible if Moors' letter of 24th September is inadmissible on the ground that Berwin is not a party to it. If a messenger had been sent by Moors' agent to Germany with the money to hand to Bock, the same objection would exist—that the messenger might have died on the way, or spent the money; and, if he were undiscoverable, then proof would be impossible, for I assume it would not be suggested that evidence could be obtained in Germany.

In the affairs of life, inferences must often be drawn from the best material available; and when we have the fact that the goods were actually sent, with the declared intention to let Bock have the proceeds directly or indirectly, when the intimation was communicated so far as shown, when the return of goods or money has not been proved or suggested, and is in the highest degree improbable, it seems to me an absolute error in law to say there is no evidence. The question of whether there is or is not sufficient evidence is, of course, always a question of law (*per* Lord *Moulton* for the Privy Council in *Harendra Lal Poy* v. *Hari Dasi Debi* (1)). In my opinion there is abundant evidence, and, what is more, the inference is plainly against the appellant.

If I am wrong as to this, then the Act must, in the majority of

(1) L.R. 41 Ind. App., 119.

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instances, break down where aiding and abetting is relied upon as the actual contravention, unless sec. 8 of the *Acts Interpretation Act* 1904 averts the difficulty. If it does, as in my opinion it does, then it averts it here; for Moors when he consigned the goods in fact on either of the projects for getting the proceeds into Bock's hands was guilty of an attempt, and Berwin aided and abetted him. As already shown—except in felony—an aider and abettor is a principal, and therefore, as an attempt is by sec. 8 an offence in itself, a person who aids and abets the attemptor does himself commit the offence of attempting.

I need only add that Moors' offence of attempting was complete when the goods were consigned with the intention that Bock in some character and at some time should receive the proceeds or the amount of the proceeds, and that intention was by the authority of Moors communicated by the two links, Berwin and Amsinck, to Bock. It would make no difference even though the intention was afterwards abandoned, but the inherent probabilities of what would happen to the goods and the money from the proved facts, and the absence of any evidence of return of the goods or money to Australia, is as strong proof that the intention was carried out as any reasonable man could expect. Except that he said the money was to be paid as for a debt, the contingency of separating the matter into two distinct operations was never suggested by appellant's counsel, and for the excellent reason that it would be contrary to both Berwin's letter and his sworn testimony. It is, however, utterly immaterial, and I wish to emphasize this, whether the payment was intended to be the legal consequence of the sale of the goods, or was to be a technically separate transaction from the sale itself, but immediately connected with it as a practical method of getting the money in some way into Bock's hands. In either case the sale was not only a *sine quâ non* of the payment, but it was *the first step in the combined process*. In either case the goods were consigned with the double intention, and in either case Moors was guilty, and Berwin aided him. In either case the combined intention existed when the goods were despatched and both parties knew it, and the act of Moors in despatching the goods was, in the circumstances, an active step towards the effectuation of the

intention to pay, just as much as it was of the intention to sell, which was only itself a step towards the ultimate end intended.

It cannot, therefore, be said that the intention to pay the money to Bock rested in mere intention, and that it was destitute of any active manifestation on the road to execute it. Where a purpose is unconnected immediately with what is done, where you cannot say that what is done is any step on the way, the earlier acts may be regarded as preparation only, as in *R.* v. *Robinson* (1), which is an excellent example of the opposite position. There a man made a false statement to the police that he had been robbed, intending to go afterwards to the insurers and make a false pretence to them; he got no further than the false statement to the police, and neither communicated with the insurers, nor asked the police to do so: there was therefore, as to the necessary false pretence to the insurers, no overt step whatever. But here not only were the goods despatched with instructions to sell, which, at best for the appellant, would correspond with the preparatory steps Robinson took, but Moors' conversation with Berwin, which Berwin understood—and no one could understand better—to be an arrangement for him to write to Amsinck for Moors in order to communicate with Bock, which was done, supplies the link missing in Robinson's case, if such a link be necessary. If Moors did not so authorize Berwin, his intrusion would have been invalid and unavailing, and clearly would not have been made unless Moors intended the proceeds for Bock and told Berwin so. Consequently, in face of the communication to Bock it cannot be held that there was no attempt.

But I go further. An attempt to trade with the enemy as distinguished from actual trading needs no communication with the enemy. If Moors had sent money to his own bank in America with the avowed intention and purpose of getting his neutral agent there to draw on the sum for the benefit of the enemy, then even though he changed his intention he had in my opinion "attempted" to trade with the enemy, because he had taken the first step to do so, a necessary step in the circumstances, by getting the money to a neutral country. As is said in *R.* v. *White* (2), "it might be the beginning of the attempt, but would none the less be an attempt."

(1) (1915) 2 K.B., 342. (2) (1910) 2 K.B., 124, at p. 130.

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The property was put *en route* to its destination, with the intention to change trains, so to speak, in America. And, if Berwin assisted him to send the money there for that avowed purpose, he thereby aided and abetted the attempt, and himself in law attempted to trade with the enemy.

The pith and substance of the scheme was to get the money value of the goods into the hands of the German buyer, and apparently that nefarious scheme has been quite successful.

To that substantial meaning and effect I adhere. No escape for the appellant, therefore, seems to me possible, even by means of the finest-drawn distinction which ingenuity could weave out of the filmy fabric of conjecture. To acquit him, in the face of his own admissions, appears to me not merely contrary to law, but essentially dangerous, for not only would an actual offender escape in the present case, but an easy way would be indicated for the wholesale repetition of conduct striking at the safety of the Empire.

From every possible standpoint of the facts, the legal result is, in my opinion, that the offence charged is established. See *R.* v. *White* (1) and *Archbold's Criminal Pleading and Practice*, 24th ed., pp. 1431 and 1433, with the definition of "attempt" and the cases there cited.

The next objection to be noticed is that the prosecution must fail for want of compliance with sub-sec. 6 of sec. 3. The object of that sub-section is obviously to prevent persons being harassed by private prosecutions, which patriotic fervour might induce, without a careful examination of the circumstances of the particular case. (See the observations of *Shee* J. in *Knowlden* v. *The Queen* (2).) The written consent of the Attorney-General is required for the prosecution of an offence under sec. 3. As such sections are interpreted in England, the objection should fail in the present case. The objection taken at the trial is set out in the depositions, and from that statement we have no authority to depart, at all events without consent. The statement says:—"Mr. *Mack* tenders authority of the Attorney-General. Mr. *Bavin* objects to its admission on the ground that the authority does not specify the

(1) (1910) 2 K.B., 124; 4 Cr. App. R., 257, at p. 271.
(2) 5 B. & S., 532, at p. 558.

exact offence which he authorizes to be instituted against the defendant."

Mr. *Bavin* got leave to add to his grounds of appeal to this Court an objection that the Attorney-General had not consented, but, of course, it cannot alter what was done in the original hearing. Mr. *Mack* was clear that no objection was there made that the Attorney-General had not consented in fact, but that the only objection taken was that recorded and transmitted to us in the official transcript of the proceedings below.

How does the matter then stand ?

From recent cases of high authority I deduce the following propositions :—(1) If the Attorney-General has not in fact consented to that prosecution, the prosecution must fail (*R.* v. *Bates* (1)) ; (2) if the defendant does not object that the consent has not been in fact given to that prosecution, the consent in fact will be presumed (*R.* v. *Metz* (2)) ; (3) the principle is that the officer designated is presumed to do his duty (*R.* v. *Waller* (3)) ; (4) the defendant will be confined to the scope of his objection (cases *supra*).

Now, here the Attorney-General signed a consent in these terms : —" The Attorney-General of the Commonwealth hereby consents to a prosecution being instituted against Arthur George Berwin for an offence against the *Trading with the Enemy Act*."

No other section than sec. 3 requires such consent, and the presumption is that the consent was given with reference to sec. 3. No other prosecution or offence or challengeable conduct on the part of Berwin within the purview of the Act is suggested. In short, there is nothing but the present set of circumstances to which, so far as appears, the consent could possibly have reference, and the consent was entrusted to the Crown officer Donohoe actually prosecuting in this particular case.

If it is to be presumed that the Attorney-General has done his duty in examining the circumstances of this case, his consent in the terms in which he has given it is sufficient. And that is the conclusion to which I come. But if that is not to be the presumption,

(1) (1911) 1 K.B., 964. (2) 11 Cr. App. R., 164.
(3) (1910) 1 K.B., 364, at p. 367.

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if the written consent is to be treated as a memorandum under the *Statute of Frauds*, it would be disastrous. A complicated set of circumstances may be reviewed by the Attorney-General, and his consent to a prosecution under the Act may be given in general terms leaving it to the Crown Solicitor to formulate the charge. If the precise form of the charge were necessary to be stated, then the provisions in the Justices Acts and the Crimes Act permitting amendments and guarding against the old fatalities for variances would be inoperative. If the defence definitely challenges the fact that the Attorney-General has examined the facts of that particular case, the prosecution may be put to prove that he has; but, as I say, no such challenge was made here. The objection was merely as to the form of the documents. Then I see no distinction between this and a consent specifying sec. 3. Sec. 3 embraces a multiplicity of offences any one of which may have been or may not have been the subject of a consent merely specifying the whole section. In my opinion the protection intended by the sub-section has been fully afforded, and the objection should be overruled.

The last contention was that £200 was too high a penalty, especially as in the accompanying case against the Company a fine of £50 had been inflicted. The maximum penalty in a summary prosecution is a fine of £500, or imprisonment for twelve months, or both.

The defendant said he was not aware on 24th or 25th September of the King's Proclamation which was gazetted here on 12th September. Now, that Proclamation was not like an ordinary notice appearing in the *Gazette*. It is hard to believe that the Royal Proclamation issued in London and flashed all over the Dominions, and there publicly notified, was not well known to every merchant, and not less to Germans than to natural-born subjects of His Majesty.

Why were all the precautions taken ? The Stipendiary Magistrate had to consider the fact that the same act of writing and despatching the letter was the personal act of Berwin, and also his official act as managing director. But the moral blame was his personally, most of all, and in arriving at a total penalty of £250, only half the money maximum, he apparently apportioned it accordingly, making Berwin bear £200 and the Company £50.

Mr. *Bavin* asked the Court to reduce the £200. I must say, having regard to the nature of the offence, the serious consequences that arise from supplying the enemy with money, in this case of about £1,200, the penalty was by no means too great.

I quote, as entirely reflecting my own opinion respecting the present case, the following passage from the judgment of Lord *Reading* in *Kupfer's Case* (1) :—" We desire to make it quite plain in this Court that the offence of trading with the enemy is a serious offence and should be dealt with seriously by those whose duty it is to try these cases. The object of the punishment is to prevent trading with the enemy ; to deter persons who might be tempted for the sake of gain to engage in operations detrimental to the interests of this realm and which would have the effect of assisting the enemy and enabling him by adding to or protecting his resources to prolong the war. Nothing that we have said should give the slightest colour to the view that offences of this character should be met by a slight punishment only."

I agree with those of my learned brethren who think the appeal should be dismissed with costs.

A. Berwin & Co. Ltd. v. *Donohoe.*—The only point of difference between this and the individual case is in the terms of the Attorney-General's consent, which refers to " Section 3." I have already stated that that makes no difference, and in my opinion this appeal should also be dismissed.

HIGGINS J. The first objection taken is that the written consent of the Attorney-General to this prosecution is not sufficient ; or, as stated in the rule *nisi* now finally amended after argument, " that the written consent of the Attorney-General was not in fact given to the initiation of the prosecution." This is a very small objection, but it goes to jurisdiction.

One Berwin has been prosecuted for and convicted of an attempt to trade with the enemy, contrary to the Act No. 9 of 1914. The Act provides (sec. 3 (6)) that " A prosecution for an offence against this section shall not be instituted without the written consent

(1) (1915) 2 K.B., 321, at p. 340.

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of the Attorney-General." Before the prosecution was instituted, the Attorney-General signed a consent as follows :—" The Attorney-General for the Commonwealth of Australia hereby consents to a prosecution being instituted against Alfred George Berwin of Sydney in the State of New South Wales for an offence against the *Trading with the Enemy Acts* 1914." It is said that this consent is not sufficiently specific, does not specifically refer to this particular prosecution. It is not pretended that there is any other prosecution to which it could possibly refer. There is only one offence specified in the information, an offence under sec. 3 (see *Acts Interpretation Act* 1904, sec. 8) ; and there is no offence mentioned in the Acts that requires the consent of the Attorney-General except an offence against sec. 3. It is quite true that the words in the written consent might also be applicable to some other offence than that specified in the information ; but the words are distinctly applicable to that so specified. An indictment of John Smith would not be bad because there are other John Smiths to whom it might refer. A devise in a will of " my farm in the parish of Wycombe " is not void for uncertainty even if the testator had two farms in that parish ; and evidence would be admissible to show which farm was referred to. Here there are not two prosecutions of Berwin, and the difficulty of showing which prosecution is referred to does not arise. The words of the Act providing for the consent of the Attorney-General are similar to those found in leases providing for the consent of the landlord to an assignment. If we had before us the words " an assignment of the lease shall not be made without the written consent of the lessor," and if the lessor signed a written consent to " assignment," without restricting it to assignment to any definite person, how could anyone say that there was a breach of the covenant ?

Inasmuch as the prosecution in this case answers the description of the prosecution to which consent has been given, it is not necessary for the prosecutor to give evidence identifying the former with the latter. It is for the accused to rebut the presumption that the consent refers to this prosecution (*Sewell* v. *Evans* (1) ; *Leake on Contracts*, 5th ed., p. 137). It is for the accused to show that

(1) 4 Q.B., 626.

the written consent which on its face, and without any straining of words, can fit this prosecution, does not relate to it (and see *R.* v. *Metz* (1)). Even if there were two prosecutions to which the consent would be equally applicable, evidence would be admissible to show to which the consent is applicable ; the consent would not be a bad consent. There would be a sufficient description even if evidence had to be given to show to which prosecution the consent referred (*Shardlow* v. *Cotterell* (2) ; *Plant* v. *Bourne* (3)). I am clearly of opinion that the objection to the conviction is groundless, and that the rule *nisi*, so far as it relates to this ground, should be discharged.

In the case of the prosecution of A. Berwin & Co. Ltd., the consent specifies the section—sec. 3—against which the offence is alleged. *A fortiori*, the rule in this case, so far as it relates to this ground, should be discharged also.

The contention that the Act No. 9 of 1914 is invalid, has been abandoned by Mr. *Bavin* in view of our decision in *Snow's Case* (4). But it is contended that there is no evidence to support the conviction for an attempt to trade with the enemy. The material facts are few and undisputed. One Moors, managing director of a plantation company in Samoa, consigned before the war some cocoa to Bock in Hamburg—an enemy subject. After the war broke out, there were no means of getting the cocoa to Hamburg; and Moors, being indebted to Bock, managed, in Sydney, to consign it on 26th September 1914 to Atkins Kroll & Co. of San Francisco. Atkins Kroll & Co. were to sell the cocoa and hold the proceeds for Bock. Berwin, who is managing director of Berwin & Co. Ltd., aided Moors in getting space for the cocoa in the *Sonoma* bound for San Francisco ; and he wrote a letter, signed as for his company "*per* A. G. Berwin," to Messrs. Amsinck in New York (25th September 1914) telling them of the consignment to Atkins Kroll & Co., and asking them to assist in the disposal of the cocoa. The letter adds :—" Mr. Moors does not know how to communicate with H. C. Bock to tell him of the disposal of the cocoa, and we also think it better to advise you as you would know the safest way of advising Mr. Bock as to the

(1) 31 T.L.R., 401.
(2) 20 Ch. D., 90.
(3) (1897) 2 Ch., 281.
(4) 20 C.L.R., 315.

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proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock."

I cannot see any room for doubt that Moors, at all events, was guilty of disobedience to clause 5 of the King's Proclamation, gazetted 12th September 1914. By this clause, all persons resident or carrying on business or being in the Dominions are warned (*inter alia*) "not to pay any sum of money to or for the benefit of an enemy" (clause 5 (1)) and "not directly or indirectly to supply to or for the use *or benefit* of an enemy any goods." To perform or take part in either of these transactions is to "trade with the enemy" (Act No. 9 of 1914, sec. 2 (2) (*a*)); and the mere *attempt* to commit the offence, even if the attempt fail, is an offence against the Act (*Acts Interpretation Act* 1904, sec. 8); and whoever *aids* or is in any way privy to the commission of any offence against the Act "shall be deemed to have committed the offence" (Act No. 9 of 1914, sec. 6). Therefore, the allegation contained in the information that Berwin did "attempt to trade with the enemy" has been proved, within the meaning of the Acts.

The facts that Berwin was born in Germany, that he was not naturalized till after the war broke out, that the partners in Amsinck & Co., as well as Bock himself, are shareholders in Berwin & Co. Ltd., that Moors is a customer of and indebted to Berwin & Co., that Berwin & Co. had business reasons for assisting Moors, are, no doubt, all of importance as tending to explain the conduct of the parties; but they do not seem to me to affect the substance of the offence.

For the purposes of my conclusion, it may be noticed that I have excluded from my consideration the letter of 24th September 1914, Moors to Bock; but it is not to be assumed that my opinion is against the admissibility of that letter in this prosecution of Berwin.

It is urged that sec. 6 of the Act No. 9 of 1914 is not retrospective. It is not retrospective; but it compels all Courts, after the passing of the Act (23rd October 1914), to treat anyone who aids in the commission of an offence as having committed the offence. Sec. 3 (1), however, is retrospective—any person who *before the commencement of the Act* has traded with the enemy is to be guilty of an offence;

and what "trading with the enemy" includes is to be found in sec. 6, combined with sec. 8 of the *Acts Interpretation Act* 1904.

In my opinion, in both cases the rule *nisi* should be discharged, and the convictions affirmed.

POWERS J. The appellants were, on 19th July 1915, convicted by a Magistrate for attempting to trade with the enemy. The appellant Berwin was fined £200, and the appellants A. Berwin & Co. Ltd. were fined £50. Orders *nisi* were made on 12th August last, in each case calling upon William Clarke, Stipendiary Magistrate, and the informant, John Thomas Tamplin Donohoe, to show cause why a writ of prohibition should not issue to prohibit the said William Clarke and the said John Thomas Tamplin Donohoe from further proceeding against Alfred George Berwin and A. Berwin & Co. Ltd., the present appellants, upon the information and convictions referred to. It was agreed to hear both appeals at the same time.

The grounds on which the appellants' counsel relied at the hearing were: (1) that there was no evidence to support the said convictions or either of them; (2) that the penalties were excessive; (3) that the written consent of the Attorney-General of the Commonwealth was not in fact given to the institution of the proceedings or either of them.

The informations against both appellants set out that they did, at Sydney, during the continuance of the present state of war, namely, on 25th September 1914, in connection with the shipping of certain goods, namely, 215 bags of cocoa beans to San Francisco, United States of America, to the intent and for the purpose that the proceeds of the sale thereof should during the continuance of the war be placed to the credit of one H. C. Bock of Hamburg in Germany, attempt to trade with the enemy. Further particulars were given during the hearing.

As the appellants' main ground for appeal is that there was no evidence to support the conviction, I propose to quote part of the evidence given on examination and cross-examination before the Magistrate in support of the charge made, but, before doing so,

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to refer to the Acts and Proclamations under which the charges were made.

The informations were laid under sec. 6 of the *Trading with the Enemy Act* 1914. The respondent contended that one Moors had, on or about 25th September 1914, attempted to trade with the enemy, and that as the appellants had aided and assisted him in that attempt they were deemed to have committed the offence (*Trading with the Enemy Act* 1914, see sec. 6). It is true that that Act does not expressly make it an offence to *attempt* to trade with the enemy, but the Commonwealth *Acts Interpretation Act* 1904 (No. 1 of 1904), sec. 8, provides:—"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." Any person, therefore, attempting in the Commonwealth to commit an offence on 25th September 1914 was deemed to have committed the offence, and by sec. 6 anyone aiding and abetting, or concerned in the commission of, an offence was deemed to have committed the offence.

The respondent contended that a man named Moors attempted, under the circumstances, to trade with the enemy by sending goods (cocoa beans) from Australia to San Francisco for the purpose of having those goods sold in America and paying to or for the benefit of Bock of Hamburg—an enemy in an enemy country—the proceeds of the sale of the said goods. The goods had originally been consigned from Samoa to Bock in Hamburg by Moors in Samoa, and would have gone on to Hamburg, in the ordinary course of business, if war had not been declared between England and Germany. After the declaration of war they could not be sent in Bock's name to Hamburg. The respondent contended that what was done by Moors, whether it was Bock's goods that were sent on to San Francisco for sale in order to pay a sum of money to or for the benefit of Bock, an enemy in an enemy country, or whether the goods which came from an enemy country (Samoa) were sent to America as a new transaction by Moors for disposal in the United States for the purpose of paying money to or for Bock, constituted breaches of par. 5 (sub-pars. 1 and 7) of the Proclamation of 9th September 1914 and amounted to trading with the enemy, and

that, as Berwin and Berwin & Co. (the appellants) assisted Moors in that attempt to trade with the enemy, they were properly convicted.

The main ground of the appeal is that there was no evidence to support the convictions. The evidence submitted to the Court is contained in two affidavits (and exhibits thereto) of David Moss Myers of Sydney, solicitor (one affidavit in each case), and in three letters marked Exhibits 5, 6 and 7. Exhibit 5 is a letter from Moors dated 24th September 1914; Exhibit 6 is a letter from A. Berwin & Co. Ltd. (signed by A. Berwin as managing director) to Amsinck & Co. of New York; Exhibit 7 is a letter from Amsinck & Co. of New York to Berwin & Co. Ltd. of Sydney.

It was further urged by the appellants' counsel that there was no evidence to prove that Moors did anything at all, or, if he did send the goods to America, that there was no proof that he intended to pay or cause to be paid directly or indirectly any sum of money to Bock. As the evidence on this point is given by Berwin, who was convicted, it is only right to see how far the evidence properly admitted before the Magistrate proved that Moors and the appellants were jointly working to get the goods out of Australia with a view of paying a sum of money to or for Bock in Hamburg. In dealing with that question, I leave out of sight the letter of 24th September 1914 written by Moors on the appellants' paper, which was objected to as inadmissible as evidence against the appellants.

Referring first to the appellant A. G. Berwin's own evidence for the defence, from the Appeal Book I find that he said (*inter alia*):—"I am a merchant, and managing director of Berwin & Co. I am eight or ten years in business, all the time in the one business. Up till a few minutes" (? months) "ago we had never handled cocoa at all, up till the time the war broke out." "Mr. Moors was a customer and had an office in our warehouse and had the use of our office whenever he came to Sydney, but was not connected with the firm in any shape or form. He had no interest in the firm." "Moors always used my letter paper when he was in Sydney. I had no supervision over his correspondence and never saw it." "Moors has been trading with me eight or

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ten years. He always paid his way. *He owes me to-day about* £250. It might be more than that. He paid the last about a month or six weeks ago and then paid us £200, speaking from memory. According to my estimate of the value of the beans they were about equal to the amount of Moors' indebtedness to me." "Moors is not a partner in our firm, it is only our particular friends who have the use of our office, we have plain paper for continuation sheets. Moors does use a type-writer, but when he is in my office he dictates it. Any of our intimate friends would use our business paper to write a private letter. Our most favoured friends would do that. I think he has goods from Amsinck also. I think he has got to know them through me." "A consignment of cocoa had, on account of the outbreak of war, been stopped here, which had previously been consigned to Bock in Hamburg. It was shipped from Samoa before the outbreak of war. He had to dispose of it elsewhere as there was a very poor market here, cocoa not being worth more than 5d. per pound. He decided to ship to Atkins Kroll & Co., San Francisco. He told me of the firm. I knew nothing of the cocoa up till that moment. He wanted me to get him freight. It was difficult to get freight at that time on boats going to America. I certainly helped him to get the space on the *Sonoma*. We are not big shippers, but we know them well enough to get accommodation. He only asked me to help him to get space. I did help him. He told me (later) that Friend & Co. had shipped 215 bags for San Francisco, and he wanted to have two strings to his bow, and asked me to write to Amsinck, so that he could get the best possible price. Moors is a friend of mine for many years. He was born in America. I had business reasons to assist him in any way that I could. He told me that he owed Bock money and would leave the money in America for the disposal of Bock. Then I wrote the letter of the 25th as a result of the conversation." "Beyond helping Mr. Moors to get space I had no part in the shipment, and my company had no part in the transaction except in so far as Bock was a shareholder and stood to make nothing out of the transaction except in so far as Bock was a shareholder. I don't know what size the cocoa bags were. I value them at about £500 or £600. I calculate that on the basis of one hundredweight bags,

at about five-pence per pound. I only saw the weight of the cocoa on the bill of lading." "On the 24th September last I assisted him to get space on the *Sonoma*. I suppose I went back to the office with him. He had his office in my office." "When this took place I had seen no Proclamations of the Commonwealth Government, but had seen references to them in the commercial papers. I saw none with reference to sending money. I felt quite certain that I was committing no offence in doing what I did, I gave no thought to it. I have had no commercial intercourse with Germany since the war began."

It is clear from his own evidence that Mr. Berwin did not consider that commercial intercourse with Germany through Amsinck could be regarded as commercial intercourse with Germany.

The evidence also includes statements made by A. G. Berwin (the appellant) to the Customs officer:—"I am a native of Germany. I became naturalized since the outbreak of the war. We carried on a regular trade with H. C. Bock *of Hamburg, for whom we acted as agents in Sydney*. But we have not received any letters from Germany, nor sent any letters to Germany, since the outbreak of the war, and we stopped all communications for business transactions with Germany after the war started—after the declaration of the war." "H. T. Moors is an island trader, managing director of Moors' Samoan & Plantations Co., Samoa. In *September* 1914 Mr. Moors was on a visit to Sydney from Samoa, and being a customer of ours I placed one of the officers" (? offices) "at his disposal." The following is a copy of the letter (letter Exhibit 5):—"Mr. H. T. Moors of Moors' Samoan Trading & Plantations Co. Ltd. is at present in Sydney, and on his arrival here found that 215 bags of cocoa which he had consigned to H. C. Bock had not left Sydney. It is of course impossible to get this cargo away to Germany, and Mr. Moors has therefore consigned this parcel to Messrs. Atkins Kroll & Co., San Francisco. We thought that if there was a good opening for a first class cocoa in New York you might possibly assist in the disposal of same, and it may be advisable for you to get into touch with Messrs. Atkins Kroll & Co. for the purpose of getting samples of this and following lots. Mr. Moors does not

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know how to communicate with H. C. Bock to tell him of the disposal of the cocoa, and we also think it better to advise you as you would know the safest way of advising Mr. Bock as to the proceeds which are intended for his account and will be held by Atkins Kroll & Co. pending instructions from H. C. Bock. There is another parcel of 81 bags of cocoa which Moors have also sent on to H. C. Bock, and which they have now in the *Zeiten* somewhere in the Mozambique Channel. Kindly notify Messrs. Bock of this and ask them to take measures to protect this cargo by insurance." Mr. Berwin in his evidence added :—" We are agents in Sydney for Amsinck & Co. of New York." " Partners of Amsinck & Co. of New York are shareholders in our company (A Berwin & Co. Ltd.)."

Sec. 2 of the *Trading with the Enemy Act* 1914 declares that for the purposes of this Act a person shall be deemed to trade with the enemy if he *performs* or *takes part in*, (*a*) and (*b*), any act or transaction which is prohibited by or under any Proclamation issued by the King, or made by the Governor-General, and published in the *Gazette*, or, (*c*), any act or transaction which at *common law* or by Statute constitutes trading with the enemy.

The respondent contends that the evidence proves that what Moors did, and the appellants took part in and assisted him in doing, amounted to breaches of sub-sec. 2 of sec. 2 because the acts deposed to were all done to benefit an enemy in an enemy country, namely, with the object of paying a sum of money to or for the benefit of an enemy.

Appellants' counsel went so far as to contend that there was no proof of anything but an intention by Moors to send the goods out of Australia, but Mr. Hamilton (clerk in the employ of the Oceanic Steamship Co., one of whose ships was the *Sonoma*) swore the goods were sent by the *Sonoma* to San Francisco and were not returned, and appellant Berwin swore that Moors told him that he had shipped the goods before the letter of 25th September was written.

On the evidence before the Magistrate—namely, the letter of 25th September, the oral evidence given by appellant Berwin himself, and the statements made to the Customs officer by appellant Berwin, the Magistrate could reasonably find that before war

was declared Moors consigned from Samoa—then an enemy country —215 bags of cocoa beans to an enemy in Hamburg, one Bock. The goods were consigned *viâ* Sydney. Before the goods left Sydney for Hamburg war was declared, and the goods could not be sent on from Australia direct to Bock in Hamburg. Such goods on their arrival here could have been detained as goods of an enemy. Moors, the consignor from Samoa, paid a visit to Sydney in September 1914 and found that the goods, which ought to have been on their way to Hamburg, were detained in Sydney because of the war. A prior consignment of cocoa beans to Bock in the *Zeiten* was at that time on its way to Hamburg. Moors, while in Australia, decided with the assistance of the appellants, *the Sydney agents of Bock* (the enemy), to get the goods sent out of Australia for the purpose of sale in the United States so that a sum of money due by Moors, then in Australia, could be paid to or for the benefit of Bock, an enemy in Hamburg. It was difficult to get freight at the time according to the evidence, but the appellants, agents for Bock in Sydney, at the request of Moors, the consignor from Samoa, obtained freight by the *Sonoma*. The goods arriving from an enemy country consigned to an enemy in Hamburg were sent from Australia to San Francisco in an English name (Moors) to a firm bearing (in part) an English name (Atkins Kroll & Co.) by the *Sonoma*. The goods were sent to San Francisco by Moors for the purpose of having the proceeds of the sale paid to or for the benefit of Bock an enemy then in Hamburg. The appellants assisted Moors to get the goods away from Australia knowing the purpose and intent of Moors, and that they were to be sent to San Francisco for the purpose and with the intent mentioned. Appellants (Bock's agents here) agreed to request his New York agents (Amsinck & Co.) to assist *in the disposal of the goods* in the United States. The appellants (agents for Bock & Co.) assisted Moors materially in his purpose of letting Bock get the benefit of the proceeds of the sale. The appellants told their agents in New York by letter, 25th September, that Moors did not know how to communicate with Bock himself, and they, therefore, at his request, asked them (Amsinck & Co. in New York) to communicate with Bock in Hamburg as they would know *the safest way* of

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advising Bock, and thus enable him to get the benefit of the sum of money Moors, then in Australia, desired to pay Bock, then in Germany. Amsinck & Co. did communicate with Bock in Hamburg as requested by the appellants. The appellants wrote the letter of 25th September 1914 on the day the goods were shipped, when Moors and appellants were in Sydney, and the appellant Berwin did not deny in his oral evidence what he said in the letter about the intention of Moors to let Bock in Hamburg get the benefit of the proceeds of the sale of the goods.

I do not propose to repeat what I said in the case of *Moss and Phillips* v. *Donohoe* (1) as to the law about trading with the enemy through a neutral or a neutral country. If the decision of this Court in that case was right, an offence is committed against the *Trading with the Enemy Act* 1914 if a person in Australia obtains goods in the way of business from an enemy company, or if a person in Australia pays money to or for the benefit of an enemy in an enemy country, even if the transaction by which the money is to be paid is partly carried out by a resident or a company in a neutral country.

As to the objection that the consent of the Attorney-General was not obtained to the proceedings, I do not propose to add anything to the reasons given by my brothers *Isaacs* and *Higgins* why that objection fails.

I agree that the objections fail in both appeals.

It was pointed out by appellants' counsel that the appellants did not appear to have obtained any benefit by giving Moors the assistance they did, but when it is recognized (see the evidence) that Moors had been a customer of the appellants for over eight years, that Bock (a German) in Hamburg was a shareholder in the appellants' Sydney company, that appellants' company *was agent for Bock in Sydney*, that the appellant Berwin was only naturalized after the declaration of war, that partners in Amsinck & Co. (the New York firm) were also shareholders in the appellants' Sydney company, it is easy to understand why the appellants should assist to get a sum of money paid to Bock through what they termed the safest way available, namely, a firm in a neutral country the

(1) 20 C.L.R., 580, at p. 607.

members of which were shareholders in their Sydney company and joint shareholders with Bock.

The Magistrate was, in my opinion, quite justified on the evidence in coming to the conclusions he did and convicting both appellants; I would personally have come to the same conclusions on the evidence. I need not, therefore, consider whether in this case this Court ought not, if there was evidence before the Magistrate on which he could reasonably convict the accused, to uphold the conviction even if the majority of this Court would have taken a different view on that evidence.

The fines were not excessive.

I hold that the appeals should be dismissed.

Appeals allowed. Convictions set aside. Respondent to pay costs of appeals.

Solicitors for the appellants, *D. M. Myers & Hill.*

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

B. L.