[HIGH COURT OF AUSTRALIA.]

THE WELSBACH LIGHT COMPANY OF AUSTRALASIA LIMITED . . . } PLAINTIFFS;

AND

THE COMMONWEALTH OF AUSTRALIA AND ANOTHER . . . . . } DEFENDANTS.

H. C. OF A. 1916.

MELBOURNE, *Oct.* 9, 10, 11, 16.

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

Trading with the Enemy—Validity of Commonwealth legislation—Prohibition of dealings with certain companies—Proclamation by Governor-General—Declaration of Attorney-General—Cause of action—The Constitution (63 & 64 *Vict. c.* 12), sec. 51 (VI.)—*Trading with the Enemy Act* 1914 (*No.* 9 *of* 1914), *sec.* 2 (2) (*b*) —*Proclamation of 7th July* 1915.

Sec. 2 (2) of the *Trading with the Enemy Act* 1914, which provides that for the purposes of the Act a person shall be deemed to trade with the enemy if he performs or takes part in "(*b*) any act or transaction which is prohibited by or under any proclamation made by the Governor-General and published in the *Gazette*," is a valid exercise of the legislative power of the Commonwealth Parliament.

So *held*, by *Griffith* C.J., and *Barton*, *Isaacs* and *Higgins* JJ.

By a proclamation of the Governor-General it was proclaimed (1) that "any transaction with or for the benefit of a company to which this Proclamation applies is hereby declared to be trading with the enemy, and is prohibited"; and (2) that "this Proclamation applies to any company, whether incorporated in any enemy country or not . . . (*b*) which the Attorney-General, by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country." By a notice published in the *Gazette* the Attorney-General declared the plaintiff Company to be, in his opinion, "managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or

resident or carrying on business in an enemy country." In an action by the plaintiff Company against the Commonwealth and the Attorney-General claiming declarations that the Proclamation was unlawful and that the notice was unlawful and contrary to fact, and a consequent injunction and damages,

Held, by *Griffith* C.J., and *Barton*, *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Powers* J. dissenting), that the plaintiff Company was not entitled to either declaration:

By *Griffith* C.J., and *Barton*, *Isaacs* and *Higgins* JJ., on the ground that the Proclamation was within the authority conferred by sec. 2 (2) (*b*) of the *Trading with the Enemy Act* 1914, and (*Higgins* J. *dubitante*) that the notice was a sufficient compliance with the proclamation;

By *Gavan Duffy* and *Rich* JJ., on the ground that although the notice was not in conformity with the Proclamation the publication of the notice did not under the circumstances give the plaintiff Company a cause of action against either of the defendants.

DEMURRER.

An action was brought in the High Court by the Welsbach Light Co. of Australasia Ltd. against the Commonwealth and the Attorney-General for the Commonwealth in which the statement of claim was as follows:—

1. The plaintiff is a company duly incorporated under the law of Great Britain.

2. The plaintiff at all times material carried on business in England as a dealer in and seller of incandescent mantles and also imported such goods and appliances into and lawfully sold and dealt in the same in Australia.

3. On 7th July 1915 His Excellency the Governor-General in Council purporting to act in pursuance of the powers conferred by the *Trading with the Enemy Act* 1914 did proclaim as follows:— "1. Any transaction with or for the benefit of a company to which this Proclamation applies is hereby declared to be trading with the enemy, and is prohibited. 2. This Proclamation applies to any company, whether incorporated in any enemy country or not—(*a*) the shares of which are owned wholly or mainly by persons of enemy nationality, or resident or carrying on business in an enemy country; or (*b*) which the Attorney-General, by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country."

4. On 18th September 1915 the defendant the Attorney-General of the Commonwealth did publish in the *Gazette* the following notice :—(The notice recited the Proclamation of 7th July 1915 and continued :) " Now therefore I, William Morris Hughes, Attorney-General of the Commonwealth, do hereby declare the following company, namely—the Welsbach Light Co. of Australasia Ltd., to be, in my opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country."

5. The plaintiff Company is not and was not at any time material to this action in fact managed or controlled directly or indirectly by or under the influence of or carried on wholly or mainly for the benefit or on behalf of persons of enemy nationality or resident or carrying on business in an enemy country.

6. The opinion of the defendant the Attorney-General so declared and expressed as aforesaid was formed upon or could only have been formed upon a mistake of law as to the legal status and rights of naturalized British subjects and of companies formed within the Dominions of His Majesty.

7. By reason of the publication of the said notice of 18th September 1915 the business of the plaintiff in Australia has stopped to the great loss and injury of the plaintiff.

And the plaintiff claims :—

(*a*) A declaration that the *Trading with the Enemy Act* 1914, sec. 2 (2) (*b*), is *ultra vires* the Parliament of the Commonwealth.

(*b*) A declaration that the Proclamation of His Excellency the Governor-General dated 7th July 1915 is unlawful.

(*c*) A declaration that the notice of 18th September 1915 is unlawful and is also contrary to fact.

(*d*) An injunction restraining the defendant the Attorney-General further acting upon or publishing the said notice dated 18th September 1915.

(*e*) £5,000 damages.

The defendants demurred to the statement of claim on the following grounds :—

1. That the *Trading with the Enemy Act* 1914, sec. 2 (2) (*b*) is not *ultra vires* the Parliament of the Commonwealth.

2. That the Proclamation dated 7th July 1915 is not unlawful.

3. That the notice dated 18th September is not unlawful.

4. That pars. 5 and 6 of the statement of claim are immaterial averments.

5. That in any event the statement of claim discloses no right to relief by way of damages.

The demurrer was directed to be argued before a Full Bench.

Mitchell K.C. and *Starke* (with them *Eager*), for the plaintiffs.—Sec. 2 (2) (*b*) is on its face too wide. The Commonwealth Parliament has no power to say who is an enemy, because that is a matter which is within the King's prerogative of peace and war and the exercise of that prerogative has not been given to the Parliament of the Commonwealth by the Constitution. Looking at the contemporaneous legislation in England, it is clear that what is intended by sec. 2 (2) (*b*) is to give power by proclamation to prohibit any particular transaction with or by a person who already has been declared in England to be an enemy. The acts or transactions which may be prohibited must have something to do with defence and with trading with the enemy. The effect of what has been done in this case is to make it unlawful for anyone to deal with the plaintiff Company here or in England, where it is lawfully carrying on business.

[POWERS J. referred to *Moss and Phillips* v. *Donohoe* (1).]

By the Royal Proclamations of 9th September 1914, 8th October 1914 and 7th January 1915, power is delegated to the Governor-General in Council by proclamation to prohibit certain transactions. The power given by sec. 2 (2) (*b*) must be limited to those matters. If the power goes beyond those matters the sub-section is invalid as being inconsistent with those Royal Proclamations, which extend to the whole of the British Empire, and with the provisions of the Statutes 4 & 5 Geo. V. c. 87, secs. 1 and 2, and 5 Geo. V. c. 12, sec.

(1) 20 C.L.R., 580.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

10, which adopt those Proclamations and which also extend to the whole Empire. Those Statutes define who are enemies, and their effect is limited to enemies so defined. A person who in Australia committed an offence against the Royal Proclamations could be punished under sec. 1 of 4 & 5 Geo. V. c. 87. See *Berwin* v. *Donohoe* (1). The Proclamation of 7th July 1915 and the notice under it are not within the ambit of sec. 2 (2) (*b*). That sub-section contemplates the prohibition of some specific act or transaction which is described in the Proclamation, and does not enable the Governor-General to prohibit generally all acts and transactions with a specified person. The act or transaction prohibited must be described by reference to its character, and not by reference to the particular person with whom it is conducted. The sub-section contemplates that whatever acts or transactions can be and are intended to be prohibited shall be set forth in the Proclamation, and does not contemplate it being left to an executive officer either to define the acts or transactions or to certify that they have been prohibited. The acts and transactions prohibited must be such that the prohibition of them has some relevance to defence. The notice of 18th September 1915 is not a valid compliance with the Proclamation. It is not sufficient for the Attorney-General to declare that one or other of several alternative states of fact exists, but he must declare which one of them exists. [Counsel also referred to *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* (2).]

Mann (with him *Owen Dixon*), for the defendants, was called on only as to the sufficiency of the notice of 18th September 1915. The notice is sufficient. The Attorney-General is justified in publishing a notice in the very words of the Proclamation. The principle which would make an indictment in alternative words bad for uncertainty does not apply. The reason in that case is that a man should have an opportunity of meeting the charge made against him. Here such a reason does not exist.

(1) 21 C.L.R., 1, at p. 18.

(2) (1916) 2 A.C., 307, at pp. 339, 347.

Mitchell K.C., in reply, referred to *Janson* v. *Driefontein Consolidated Mines Ltd.* (1).

Cur. adv. vult.

GRIFFITH C.J. read the following judgment:—Sec. 2 of the Act No. 9 of 1914, which is entitled "An Act relating to Trading with the Enemy," and was assented to on 23rd October 1914, provides as follows:—"For the purposes of this Act a person shall be deemed to trade with the enemy if he performs or takes part in—(*a*) any act or transaction which is prohibited by or under any proclamation issued by the King and published in the *Gazette*, whether before or after the commencement of this Act, (*b*) any act or transaction which is prohibited by or under any proclamation 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."

In pursuance of par. (*b*) the Governor-General by a Proclamation dated 7th July 1915 proclaimed as follows:—

"1. Any transaction with or for the benefit of a company to which this Proclamation applies is hereby declared to be trading with the enemy, and is prohibited.

"2. This Proclamation applies to any company, whether incorporated in any enemy country or not—(*a*) the shares of which are owned wholly of mainly by persons of enemy nationality, or resident or carrying on business in an enemy country; or (*b*) which the Attorney-General, by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country."

It is contended by the plaintiffs that par. (*b*) above quoted is beyond the powers of the Commonwealth Parliament and invalid, and, alternatively, that the Proclamation is, so far as regards the second category, not authorized by it. The attack on the Act itself, so far as I have been able to apprehend it, is based in the first

(1) (1902) A.C., 484, at p. 505.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRAL-ASIA LTD. v. COMMON-WEALTH OF AUSTRALIA.

Griffith C.J.

place upon the contention that the words used are too general, and purport to authorize the Governor-General to prohibit any act or transaction whatever, although it has no possible connection with the subject matter of trading with the enemy. I do not think that this is the natural construction of such words used in such a context. But, if it is, the only consequence would be that a particular attempted exercise of the power of prohibition would not be within any power that the Commonwealth Parliament can confer on the Governor-General for the purposes of the defence of the Commonwealth. The objection does not, therefore, go to the validity of the Act but to the validity of a particular application of it (*Macleod* v. *Attorney-General for New South Wales* (1)). It is then contended that any prohibition made by the Governor-General must be limited to dealings with "the enemy" or "an enemy," and that the word "enemy" must be construed as limited to persons whom the King has by the exercise of his prerogative declared to be enemies. By a Royal Proclamation made on 9th September 1914 (before the passing of the Act) the King had declared a great number of transactions to be prohibited in all the British Dominions. The Proclamation declared amongst other things that, for the purposes of the Proclamation, in the case of incorporated bodies enemy character should attach only to those incorporated in an enemy country. The plaintiffs are a company incorporated in England. It is suggested that a rule which attaches to a company which is not of enemy character within the meaning of the Proclamation disabilities similar to those attaching to an enemy is repugnant to the English law, and therefore void.

This argument assumes that par. (*b*) adds nothing to par (*a*), the operation of which may vary from day to day as the King may modify or revoke or add to the Proclamation of September 1914. In my opinion it is plainly intended to confer a new and independent power upon the Governor-General to prohibit any act or transaction in the nature of dealing with persons who are acting in the interests of an enemy. In this connection I will read from the speech of Lord *Parker* of Waddington in the case of *Daimler*

(1) (1891) A.C., 455.

Co. Ltd. v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.* (1). Speaking of a company incorporated in England, and therefore not within the Proclamation of September, he said :—" Such a company may, however, assume an enemy character. This will be the case if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies. A person knowingly dealing with the company in such a case is trading with the enemy."

The Proclamation now attacked falls exactly within this language. I must not be supposed, however, to suggest that the construction of par. (*b*) is limited to such a case. It is sufficient to say that such a case falls within it.

The Proclamation is also attacked on the ground that it delegates to the Attorney-General the power of finally determining whether a particular company is within the prohibition or not. Such delegation has been of recent years, even before the War, very common. The validity of it must depend upon the power conferred. The words of both par. (*a*) and par. (*b*) are " prohibited by or under any proclamation." The meaning of the word " under " is well illustrated by the language of sub-par. 10 of par. 5 of the Proclamation of September 1914, which prohibits persons from entering into " any transactions with an enemy if and when they are prohibited by an Order in Council, . . . even though they would otherwise be permitted by law or by this or any other Proclamation." The word " under " is apt to denote the intermediate step of an Order in Council made in pursuance of a Proclamation, and plainly means " under the authority of." I think, therefore, that it implicitly authorizes such a delegation as that now in question.

It was further contended that the acts or transactions prohibited must be specified in detail, and not by words of merely generic description. The inconsistent proposition that transactions with a particular person cannot be prohibited was also set up. In my opinion the paragraph of the Proclamation of September to which I have just referred affords a sufficient answer to this argument. The words " any act or transaction " are in terms unlimited, and

(1) (1916) 2 A.C., 307, at p. 345.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Griffith C.J.

can only be limited with reference to the subject matter which is treated of (*In re Brocklebank* (1)).

The Attorney-General published in the *Gazette* a notice declaring that in his opinion the plaintiff Company was "managed or controlled &c.," following the words of the Proclamation of 7th July 1915 in their alternative form, and not further specifying within which of the categories specified in the Proclamation he was of opinion that the Company fell. It is objected that this declaration is void for uncertainty. The categories specified are 36 in number. I think that if similar terms had been used in an Act prohibiting a company falling within any of them from carrying on business, an indictment framed in the alternative would have been bad. But why? Because a person charged with an offence is entitled to know definitely the charge he is called upon to meet. I do not think that this rule necessarily applies to an enumeration of facts when each of them entails the same consequences, and when the fact alleged cannot be disputed or disproved. If, for instance, it were provided by law that a person certified by a medical officer to be in his opinion suffering from any one of four specified kinds of fever which may easily be mistaken for one another might be removed to a hospital, I do not think that it would be necessary for him to specify the particular fever from which the person suffered. I come to this conclusion by applying the rule that the intention of a legislative authority is to be ascertained, not by any technical rules applicable to proceedings in criminal cases, but by having regard to the subject matter, the evil to be remedied, and the nature of the remedy. I do not think, therefore, that I am compelled by any rule of strict grammatical construction to hold that in a case where it appears to the Attorney-General that a company falls within some or one of the 36 categories, but it is difficult to say which of them is technically the most accurate description of the particular case, he is bound, before exercising his authority, which is in its nature one to be exercised on emergency and without opportunity of full investigation, to hold his hand until he has made such an investigation. For these reasons I am of opinion that it is sufficient for the Attorney-General to declare that in his opinion

(1) 23 Q.B.D., 461, at p. 462.

a company falls within some or one of the categories, as to each of which the same consequences follow. This, I think, he has done.

I think, therefore, that this objection also fails.

The result is that the statement of claim discloses no cause of action, and there must be judgment for the defendants.

I have not discussed the question whether, if the Attorney-General's notice was insufficient under the Governor-General's Proclamation, an action would lie for damages either against him or the Commonwealth. As at present advised, I do not think that such an action would lie.

BARTON J. I am of the same opinion. It seems to me that the most substantial point is that as to the Attorney-General's declaration of opinion. If this point, which is taken on behalf of the plaintiffs, were taken in answer to an indictment, it would be fatal; and, if taken upon a finding by a jury, it would, at any rate in any such case as I can think of, justify the contention that such a finding was vitiated by uncertainty. But we are not dealing here with any such state of things. That which is impeached is the opinion declared by the Attorney-General; not an accusation, nor a finding. It is obvious that the meaning of the Proclamation, which declares that the shares of the company are held wholly or mainly for the benefit or on behalf of persons of enemy nationality or resident or carrying on business in an enemy country, is that in view of that declaration by him the Governor-General requires a declaration of the opinion of the Attorney-General whether the company, its shares being so held, is in its business relations under the influence of persons of enemy nationality or resident or carrying on business in an enemy country, and, considered as an opinion answering that requirement, the declaration of the Attorney-General is, I think, sufficient. I agree that the demurrer must succeed.

ISAACS J. read the following judgment:—Several questions of great importance have been raised, and I propose to consider them in order. The plaintiffs contend: (1) that sub-par. (*b*) in sub-sec. 2 of the second section of the *Trading with the Enemy Act* (No. 9 of 1914) is invalid; (2) that, if valid because limited to "trading

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Isaacs J.

with the enemy" in the true sense, the Proclamation is too wide, and therefore *ultra vires*; (3) that, if the Proclamation is good, the declaration of the Attorney-General is bad for uncertainty.

1.—The invalidity of the legislation is asserted because it is said the Act professes to concern itself with "trading with the enemy" as that is understood at common law, and yet purports by the sub-paragraph in question to reach out to every kind of transaction though irrelevant to such trading. It is also said that it is bad because sec. 6 extends it to the English transactions of the Company where the King's licence permits such trading as may be forbidden here.

The answer is that, assuming the Parliament on the true construction of its own words in sub-par. (*b*) did intend to reach out beyond "trading with the enemy," then, as it cannot estop itself by any inconsistent statement in any other part of the Act, the only question must be whether it has the lawful power under the Constitution to enact its will. For Australia, the defence power is ample, in my opinion, both as regards transactions confined to Australia, and as regards transactions originating in Australia even though their continuation may take place elsewhere. If assistance be needed, it is found in the foreign trade and commerce power in sec. 51 (I.) of the Constitution.

Then it is also said, it is beyond the competence of the Parliament to enlarge the area of "enemies." No doubt, the supreme power of creating a state of war or of peace for the whole Empire resides in His Majesty in his right of his whole Empire, and does not reside in His Majesty in right of Australia or of any one of his overseas dominions. But when once a state of war is created, then His Majesty acting by his Australian Parliament and his Australian Government may, in respect of the Commonwealth, regulate the rights of alien enemies here resident, and regulate the right of all persons here resident to do anything here in relation to persons of enemy character anywhere in the world, and irrespective of whether they are considered as individuals, or as constituent parts of corporations. The local right is, of course, subject to any paramount legislation by the Imperial Parliament. I shall say something further on this in connection with the next point. But when

it is argued that the prerogative is something entirely apart, I do not agree with it. Within the limits of peace and war created by His Imperial Majesty, the Constitution of Australia allows the Legislature full freedom of action with respect to its enumerated powers. In *Bonanza Creek Gold Mining Co. Ltd.* v. *The King* (1) Lord *Haldane*, for the Privy Council, said: "A Constitution granted to a dominion for regulating its own affairs in legislation and government generally, cannot be created without dealing with the prerogative."

2.—The second point is as to the construction of the sub-paragraph. I regard the words "trade with the enemy" in sub-sec. 2 of sec. 2 of the *Trading with the Enemy Act* (No. 9 of 1914) as intended to limit the application of the sub-par. (*b*) to acts and transactions prohibited in relation to what is in substance trading with enemies. The Governor-General has very wide powers under that sub-paragraph, but they are not in my opinion unlimited; they are controlled by their substantial relation to trading with the enemy in fact. The Proclamation may go below the surface of things, it is not restricted, for instance, by the mask of British nationality conferred on the abstract entity called a corporation; the Governor-General may pierce that mask and examine the living constituents of the corporate abstraction. Now the root of the matter may be found in these few words of Lord *Wrenbury* in the *British and Foreign Marine Insurance Co.* v. *Samuel Sanday & Co.* (2): "Immediately the Royal prerogative is exercised and war is declared against another nation every subject of His Majesty is bound to regard every subject of that nation as an enemy, and the consequences ensue which I have mentioned." Among these consequences the learned Lord had included this—that the declaration of war is "an order to every civilian subject to cease to trade with the enemy." Lord *Atkinson* (3) and Lord *Parmoor* (4) spoke to the same effect.

The Crown may always allow an alien enemy to reside here and trade with the Dominions. If he is so permitted, he is not treated as an alien enemy. But the King may make the permission as broad or as restricted as he pleases. The law is well stated by

(1) (1916) 1 A.C., 566, at p. 586.
(2) (1916) 1 A.C., 650, at p. 671.
(3) (1916) 1 A.C., at p. 665.
(4) (1916) 1 A.C., at pp. 669, 670.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Isaacs J.

Low J. in *R.* v. *Superintendent of Vine Street Police Station*; *Ex parte Liebmann* (1), in these terms :—" At common law an alien enemy had no rights (see *Sylvester's Case* (2)), and he could be seized and imprisoned and could have no advantage of the law of England. This position, however, has been softened by custom and by decision of the Courts, and the judgment of *Sargant* J. in *Princess Thurn and Taxis* v. *Moffitt* (3), approved by the Court of Appeal in *Porter* v. *Freudenberg* (4), shows that an alien enemy registered under the *Aliens Restriction Act* 1914 as this applicant is, is entitled to sue in the King's Courts (which would, I suppose, include such an application as the present) as he is resident here by tacit permission of the Crown, and so is *sub protectione domini regis*. He is therefore in a similar position to an alien enemy resident here under licence from the Crown. That licence, however, can be terminated at any time by the Crown, and, although this point was not presented to us in the present case, I have little doubt that it might be successfully contended that the notice of internment given by the authority of the Secretary of State is a sufficient revocation of the licence. Of course the alien enemy is protected from outrage, because in such case it is not the alien who invokes the aid of justice, but the King in vindication of his peace." See also *per* the Court of Appeal in *W. Wolf & Sons* v. *Carr, Parker & Co. Ltd.* (5).

Here the Commonwealth is invested by the King in his Imperial Parliament with the function and the duty of providing specially for the defence of Australia. Defence includes every act which in the opinion of the proper authority is conducive to the public security. Those who are entrusted with the ultimate power of guarding the national safety are not bound to subordinate that consideration to any other. Lord *Parker* in *The Zamora* (6) said :—" Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise discussed in public." Consequently, we reach the point where the Governor-General under the Act may consider

(1) (1916) 1 K.B., 268, at pp. 278, 279.
(2) (1702) 7 Mod., 150.
(3) (1915) 1 Ch., 58.
(4) (1915) 1 K.B., 857, at p. 874.
(5) 31 T.L.R., 407.
(6) (1916) 2 A.C., 77, at p. 107.

it necessary in the supreme interests of the nation to prohibit acts and transactions with a corporation nominally of British origin, but essentially, in whole or in part, of enemy character. Its corporate character is the mechanism, the living forces that control it are hostile.

Nothing can more clearly or more forcibly express this idea than the passage read during the argument from the judgment of Lord *Parker* of Waddington in the *Daimler Case* (1) at pp. 339-340, the words of Lord *Halsbury* in the same case at p. 316, and, as I read them, the observations of Lord *Shaw* at p. 329.

The Proclamation of 7th July 1915 seizes upon this idea and describes as prohibited transactions "any transaction with or for the benefit of a company to which this Proclamation" is declared to *apply* (*inter alia*, to a company in respect of which the Attorney-General by *Gazette* notice makes a certain declaration). As to the objection to this on account of its generality, the power conferred extends to make the prohibition as wide as the common law unaffected by any licence, or as narrow as desired within that ambit. And this is not prohibited by anything contained in any Imperial Act.

The declaration which it authorizes is itself, when made, a fact. It is a fact which enables the company with respect to which it is made to be identified as one to which the Proclamation applies.

There is no delegation of legislative or regulative power to the Attorney-General. It is a declaratory power; the effect of that declaration, if made, is determined by the Governor-General himself in his Proclamation, and that he is empowered to do by the Parliament.

3.—The only remaining question is whether the declaration is such as is indicated by the Proclamation. I cannot entertain any doubt it is. Having regard to the subject matter, the known difficulties of precise ascertainment and the necessity for prompt action, the words of the Proclamation cannot, in my opinion, be fairly read as requiring the Attorney-General to pin himself down to any one of the many possible alternatives arising under the words of the Proclamation. The outstanding fact is that the possibilities specified are all elements of public danger, and the same public danger and

(1) (1916) 2 A.C., 307.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Isaacs J.

its consequences are in effect identical. No reason can be suggested for insisting on elimination, and the broad principle is that they and each and every of them lie on the side of public peril; and the absence of all of them is considered necessary for safety. In this view the declaration as made conforms, in my opinion, with the requirements of the Proclamation.

4.—I would add a few words on a subject not directly raised but mentioned incidentally during the argument, because in a sense it touches the jurisdiction of this Court to decide this case. The point relates to the plaintiffs' right to bring such an action as this, even supposing their view of the law were well founded.

As to injunction, as nothing now turns on it, I say nothing more than this, that as no repetition of the declaration is suggested, that remedy seems out of place. I say nothing as to damages.

But as to the declaration claimed, there seems to me to be little room for doubt that if the plaintiffs could have shown the Attorney-General's declaration to be unauthorized, they could have properly claimed from this Court the judicial declaration they seek. True, such a declaration is discretionary (see *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (1)), but it would have been properly claimed (*John Russell & Co.* v. *Cayzer, Irvine & Co.* (2)) and within the power of the Court to grant if the law were as the plaintiffs say it is.

And the reason would be this. Supposing the plaintiffs had been able to show that either the Act or the Proclamation or the *Gazette* declaration was invalid, they would thereby have shown that the Commonwealth Government was in effect, with all the latent force of the country behind it, stopping by means of the three things combined, the Company's business in Australia by threatening all Australians with severe pains and penalties for trading, which, in the supposed circumstances, would not be unlawful and therefore not punishable. It would not be substantially different from the case of a person obstructing the entry to business premises. The right said to be invaded is a distinct property right, and, having regard to sec. 75 (III.) of the Constitution, sec. 64 of the *Judiciary*

(1) 20 C.L.R., 148, at p. 165. (2) (1916) 2 A.C., 298.

Act and Order IV. of the *High Court Rules*, such a right can be protected by a declaration.

The Crown in this case does not deny the propriety of the claim as a mere matter of procedure, but denies, and, in my opinion, successfully denies, that the law supports it. That is a very proper attitude, for otherwise the Crown would be substantially setting up a claim to what *Farwell* L.J. called "a superiority to the law which was denied by the Court to the King himself in Stuart times" (*Dyson* v. *Attorney-General* (1)). Apart from the justice of the position so taken up by the Crown, having reference not merely to the Company but to all Australian citizens who desire, without incurring possible penalties or acting unpatriotically, to know their position in regard to the matter, it seems to me that, after the exposition of the corresponding English rule by Lord *Davey* in *Barraclough* v. *Brown* (2) and by the Privy Council regarding this very rule in the *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (3), where they adopted the reason given by the learned Chief Justice, any contention to the contrary would have been unsustainable. But I hold that the plaintiffs wholly fail on the merits for the reasons I have given, and therefore the demurrer should be allowed, and judgment entered for the defendants.

HIGGINS J. (whose judgment was read by BARTON J.). In my opinion, the power of the Commonwealth Parliament to make laws with respect to naval and military defence covers legislation which forbids trading with a company suspected of relations with the enemy.

The difficulty of this case comes mainly from the successive steps —Act, proclamation, notice. If these were welded together, they prescribe, in effect, that no person is to trade with the Welsbach Company even in Australia, as it is suspected of relations with the enemy. Such a law, as it seems to me, is within the competence of the Commonwealth Parliament.

Under the Act and Proclamation, the law is made to operate on the declaration of the Attorney-General as to his opinion; and for

(1) (1911) 1 K.B., 410, at p. 422.
(2) (1897) A.C., 615, at pp. 623, 624.
(3) (1914) A.C., 237, at p. 250; 17 C.L.R., 644, at p. 649.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Higgins J.

the purpose of the Act the declaration is made final, even though (as must be assumed for the purpose of the demurrer) the opinion of the Attorney-General be wrong. The Attorney-General does not legislate; Parliament legislates conditionally on the declaration of the Attorney-General (*Russell* v. *The Queen* (1)).

I do not think that sec. 2 (2) (*b*) of the *Trading with the Enemy Act* limits the power of the Governor-General to proclaiming some *class* of acts or transactions to be prohibited; the Proclamation may prohibit any transactions with a specified firm.

The terms of sec. 2 (2) (*b*) are certainly very wide, so wide as to exceed any purpose of defence if read without the context: "A person shall 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 made by the Governor-General." But this is only "for the purposes of this Act"; and in view of the title and the nature of the Act and the reference to the War, the power may be reasonably read as confined to the subject of trading with the enemy. It is the duty of Courts, if the words of the Act leave it possible, to treat the Act as limited to such subjects as would be within the power of the Legislature *ut res magis valeat quam pereat* (*Macleod* v. *Attorney-General of New South Wales* (2)).

The form of the declaration published by the Attorney-General has, I confess, given me some difficulty. There is force in the contention that the Proclamation meant "We shall take your declaration of a fact as final; but what is the fact that you declare?" The Attorney-General has not declared his opinion as to any definite fact. But inasmuch as the same consequences follow whichever of the alternative facts be found, it is possible that the Proclamation should be read as meaning (in effect) that if the Attorney-General declares a company to have the enemy taint, whether by virtue of enemy management or enemy control or enemy influence or otherwise, trading with that company is prohibited. At all events, I am not prepared to dissent from the view of my colleagues, although I have doubt.

GAVAN DUFFY J. and RICH J. (whose judgment was read by

(1) 7 App. Cas., 829, at p. 835.

(2) (1891) A.C., 455.

RICH J.). In our opinion the defendants are entitled to judgment on this demurrer. We think the plaintiffs are right in their contention that the notice published by the Attorney-General of the Commonwealth on 18th September 1915 is not in conformity with the Proclamation of the Governor-General, and its validity is therefore not affected by the validity or invalidity of the Proclamation or of the Act of Parliament under which the Proclamation purported to be made. The mere publication of such a notice in the circumstances and with the consequences set out in the statement of claim does not in our opinion constitute a cause of action against either of the defendants. In the case of *Farey* v. *Burvett* (1) we fully stated what we considered to be the meaning and scope of sec. 51 (VI.) of the Constitution, and we adhere to what we then said so far as it is not inconsistent with the decision of the majority of the Court in that case, by which we are, of course, bound. In the present case we think it unnecessary to express any opinion as to the validity of sec. 2 (2) (*b*) of the *Trading with the Enemy Act* (No. 9 of 1914), or of the Proclamation of the Governor-General, as any such opinion is unnecessary for the decision at which we have arrived.

POWERS J. (whose judgment was read by RICH J.). Sec. 2 of the Act No. 9 of 1914 and the Proclamation of 7th July 1915 have been quoted by my learned brothers.

On 18th September last, a notice, purporting to be under the Proclamation of 7th July, was published in the *Gazette*. The following is a copy of that notice :—"Commonwealth of Australia.—*The Trading with the Enemy Act* 1914.—Whereas by a Proclamation dated the seventh day of July, one thousand nine hundred and fifteen, made under the *Trading with the Enemy Act* 1914, and published in the *Gazette* of the said seventh day of July, the Governor-General proclaimed that any transaction with or for the benefit of a company to which the Proclamation applies is thereby declared to be trading with the enemy and is prohibited, and that the Proclamation applies (*inter alia*) to any company, whether incorporated in any enemy country or not, which the Attorney-General,

(1) 21 C.L.R., 433.

H. C. OF A. 1916.

WELSBACH LIGHT CO. OF AUSTRALASIA LTD. v. COMMONWEALTH OF AUSTRALIA.

Powers J.

by notice published in the *Gazette*, declares to be, in his opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in any enemy country: Now therefore I, William Morris Hughes, Attorney-General of the Commonwealth, do hereby declare the following Company, namely—The Welsbach Light Company of Australasia Limited, to be, in my opinion, managed or controlled, directly or indirectly, by or under the influence of, or carried on wholly or mainly for the benefit or on behalf of, persons of enemy nationality, or resident or carrying on business in an enemy country. —Dated this eighteenth day of September, 1915.—W. M. Hughes, Attorney-General of the Commonwealth."

It was contended on behalf of the Welsbach Company: (1) that sec. 2 (2) (*b*) of the Act was invalid; (2) that the Proclamation was not authorized by the Act, and, if authorized by it, was *ultra vires*, and (3) that the notice purporting to be issued under the Proclamation was not authorized by the Proclamation.

I regret that I feel compelled to disagree with the decisions arrived at by the majority of my learned brothers in this important case, but in my opinion the Proclamation of 7th July 1915 was not authorized by sec. 2 of the Act No. 9 of 1914. Parliament, later on, by Act No. 20 of 1916, expressly dealt with the matter by declaring any company to be an enemy subject if the Attorney-General made a declaration similar to that required by the Proclamation in question. The act or transaction, whatever those words mean under the Act No. 9 of 1914, must, I think, be definitely fixed by the Governor-General, who is authorized to exercise the very wide powers given by sub-sec. 2 (*b*) of sec. 2.

I also hold that, even if the Proclamation was valid; the notice of 18th September 1915 published by the Attorney-General is not in conformity with the Proclamation under which it purported to be made and published. The Proclamation, in my opinion, required the Attorney-General to arrive at some definite opinion as to some fact before he made the declaration which was to be final. I do not find any such definite finding, and, if the contention of the plaintiffs that the "enemy" in Australia must be construed as

limited to persons whom the King has, by the exercise of his prerogative, declared to be enemies, or that the term cannot include persons whom His Majesty has declared by his Proclamation not to be enemies, the validity of the notice of the Attorney-General would depend on the fact declared in the notice. In such a case the enumeration of each fact alternatively would not entail the same consequences.

It is unnecessary for me, as I hold that the Proclamation and the notice in question were not authorized, to express any opinion as to the validity of sec. 2 (2) (*b*) of the Act, or of any prohibition by the Governor-General of Australia not limited to dealings with countries, classes of persons, or persons whom the King has declared to be enemies; or whether such prohibition in any case can, or cannot, be made by the Governor-General in Australia against persons or classes of persons declared by His Majesty's Proclamation not to be enemies.

Judgment for the defendants.

Solicitors for the plaintiffs, *Hodgson & Finlayson.*

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

B. L.