

[HIGH COURT OF AUSTRALIA.]

DONOHUE APPELLANT ;
INFORMANT,

AND

SCHROEDER RESPONDENT.
DEFENDANT,

DONOHUE APPELLANT ;
INFORMANT,

AND

KABUTZ RESPONDENT.
DEFENDANT,

H. C. OF A. *Trading with the Enemy—Contract for the benefit of the enemy—Licence—Sale of*
1916. *property in Australia—Payment postponed until end of War—Trading with the*
~ *Enemy Acts 1914 (Nos. 9 and 17 of 1914), sec. 3.*

SYDNEY,

Nov. 14.

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

At the commencement of the present war two residents of Germany carried on a business in Australia which was managed for them by A, B and C. Shortly after the outbreak of the War, A, acting under a power of attorney for the members of the firm, by an instrument in writing purported to sell the assets of the firm in Australia to B for a price which was not to be paid until after the termination of the War. On informations against A and B respectively charging them with trading with the enemy by entering into a contract for the benefit of the enemy, such contract being described as that before mentioned,

Held, that, even if such a contract constituted trading with the enemy (as to which *quære*), the fact that it had been approved by the officer who was *de facto* entrusted by the Crown with the exercise of the prerogative to grant licences to trade with the enemy was an answer to the prosecutions.

APPEALS from a Stipendiary Magistrate of New South Wales.

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An information by John Thomas Tamplin Donohoe charged that during the continuance of the present state of war, that is to say, on or about 15th September 1914, Eugen Schroeder did at Sydney trade with the enemy "by entering into a contract for the benefit of the enemy, such contract being for the purchase through one Max Kabutz of Sydney aforesaid from Fritz Hardt and Gustav Engelbert Hardt, both resident in Germany, of the stock-in-trade, fixtures and fittings, furniture, books of account, book and other debts of the firm of G. Hardt & Co. of Sydney aforesaid, including the amounts at the credit of the said firm in the accounts kept by banks in the Commonwealth of Australia and New Zealand with the said firm and the lands both freehold and leasehold and all mortgages or other securities for the payment of such book or other debts held by the said firm in connection with its business at Sydney, Melbourne, Adelaide and Brisbane in the Commonwealth of Australia, contrary" &c.

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A second information by the same informant charged that Max Kabutz, mentioned in the first information, did on or about the same date trade with the enemy by entering into a contract for the benefit of the enemy, "such contract being for the sale by the said Max Kabutz under a power of attorney given him by Fritz Hardt and Gustav Engelbert Hardt on 6th October 1913" to Eugen Schroeder of the same stock-in-trade, &c., mentioned in the first information.

The two informations were heard together by a Stipendiary Magistrate, who at the close of the Crown case held that there was no evidence to support the informations, which he accordingly dismissed.

From those decisions the informant now appealed to the High Court by way of special case.

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

H. E. Manning, for the appellant. The contract to which the informations are directed is the real contract between the parties. That contract is to be found, not in the written document by itself,

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but in that document and the correspondence which passed between the parties. The correspondence shows that there was not an out and out sale to Schroeder, but that the real arrangement was either that the business should be carried on for the German principals in the name of Schroeder and under the sanction of the Crown, or that the contract contained in the written document might be disregarded by the principals at their option.

Windeyer, for the respondent Schroeder, and *Curlewis*, for the respondent Kabutz, were not called upon.

GRIFFITH C.J. At the time of the commencement of the War two persons named Hardt who were resident in Germany carried on business in New South Wales under the firm name of G. Hardt & Co. On the outbreak of the War it became impossible for that business to be carried on for them. It had been managed by the two respondents and a third person, who acted under a power of attorney. In September 1914, about a month after the outbreak of the War, an arrangement is said to have been made by which the respondent Schroeder bought the whole of the assets of the firm of G. Hardt & Co. in Australasia. The contract of sale was embodied in a document which was executed by Schroeder as purchaser and by the respondent Kabutz (who had authority to do so under the power of attorney) as attorney for the vendors. The principals were informed of what was done, and so far as is known no objection was taken to the transaction.

The present charges are that the respondents by entering into that contract, which is alleged to have been a contract for the benefit of the enemy, traded with the enemy. Whether, as a matter of law, a resident of Australia who buys from an enemy property which is situated in Australia on the terms (as in this case) that the price is not to be paid until after the War is ended thereby trades with the enemy is a question which may some day deserve consideration. It may, I think, be fairly presumed that any sale by a vendor to a purchaser is a contract for the benefit of the vendor, but whether when the owner of a property is a person resident in an enemy country such a contract is necessarily to be regarded as

trading with the enemy is a different matter. But trading with the enemy is not an offence if it is done with the licence of the Crown. The contract of sale embodied in the document executed by the respondents was submitted to the Attorney-General of New South Wales, to whom at that time was *de facto* entrusted the exercise of the prerogative to grant licences to trade with the enemy, and was by him approved. The Crown does not suggest that that authority should be disputed. The charge made in each case is the making of this contract. The fact that it was made with the licence of the Crown is a complete answer to the charges.

Another point is sought to be raised which is of so shadowy a nature that it is difficult to grasp it. It is suggested—that is the strongest term that can be used—that, although in form there was an out and out sale by G. Hardt & Co. to Schroeder, the real transaction was one by which Schroeder was to be a trustee for G. Hardt & Co. to carry on the business for them during the continuance of the War and to restore it to them at the end of the War. But there is not a scintilla of evidence to support the suggestion. To support such a charge it would be necessary to give evidence of facts which would entitle G. Hardt & Co. at the end of the War to come to a Court here and ask for an account of Schroeder's dealings with the trust property and restitution of it to them. There is not a shred of evidence to support such a suggestion.

That is all there is in the case.

I have assumed that there is no objection to the Crown raising such a case on these informations. But I think that where the Crown charges a person with trading with the enemy by entering into a particular contract, describing it by its date, the Crown cannot afterwards be allowed to say “We did not mean that contract at all but we meant another contract of which we cannot give particulars, and which can only be conjectured from the document itself and from correspondence which is consistent with the view that the document does not express the real contract.” There may be other states of facts of which there is no evidence whatever, which if proved would show that what the Court has before it, namely, the document, is misleading. It is conceivable that something was said

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or happened which would render the respondents liable to a prosecution for trading with the enemy. But there is no evidence of any such facts, and the whole matter rests on conjecture, which, so far as appears, is unfounded.
The appellant's case entirely failed, and the Magistrate was right in his decision.

BARTON J. I am of the same opinion.

ISAACS J. I agree.

GAVAN DUFFY J. I agree.

RICH J. I agree.

Appeals dismissed with costs.

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

Solicitors for the respondents, *Minter, Simpson & Co.*

B. L.