[HIGH COURT OF AUSTRALIA.]

THE BALTIC SEPARATOR COMPANY LIMITED Appellants; Defendants,

AND

DONOHOE . . . . . Respondent. Informant,

SIWERTZ . . . . . Appellant; Defendant,

AND

DONOHOE . . . . . Respondent. Informant,

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

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Sydney, *April* 4, 11.

Barton A.C.J., Isaacs and Gavan Duffy JJ.

Trading with the Enemy—Obtaining goods from an enemy country—Evidence—Trading with the Enemy Act 1914 (*No.* 9 *of* 1914), *secs.* 2 (2), 3—*Proclamation of 9th September* 1914, *clause* 5.

Goods which had been bought for an Australian company and consigned to them f.o.b. before the War at Copenhagen reached Hamburg, in Germany, on their way to Australia, after the beginning of the War. Later, the agents in Sweden of the company obtained the goods from Hamburg and sent them to Sydney, where they subsequently arrived. The company knew the goods were to be so obtained and sent, and knew they were in transit to Australia, and took no means to prevent their shipment or their delivery.

Held, on the evidence, that the company were properly convicted on a charge of trading with the enemy by obtaining goods from Germany.

Held, also, that the managing director of the company, who knew all the facts but was absent from Sydney when the goods arrived there, was properly convicted on a similar charge in respect of the same transaction.

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APPEALS from a Court of Petty Sessions of New South Wales.

At a Court of Petty Sessions at Sydney before a Stipendiary Magistrate two informations were heard whereby John Thomas Tamplin Donohoe charged that, in the one case, the Baltic Separator Co. Ltd. and, in the other case, Torkel Siwertz, the managing director of that Company, did, by obtaining goods from Germany, trade with the enemy. Each of the defendants was convicted, and each of them appealed to the High Court against the conviction by way of statutory prohibition. Both appeals were heard together.

The material facts are set out in the judgment of *Barton* J. hereunder.

Bavin, for the appellants in both cases. The goods in question were obtained from a neutral who was then in a neutral country, and who had a perfect right to get them from Germany. The Court should not hold that, by not repudiating the goods when they arrived in Australia, the defendants ratified the act of getting them out of Germany. As to the appellant Siwertz, there is no evidence that he did any act to obtain the goods.

H. E. Manning, for the respondent. The offence of trading with the enemy is complete if a person takes part in any act which directly or indirectly results in goods being obtained from an enemy country. As to the appellant Siwertz he himself produced the correspondence.

[ISAACS J. referred to *Attorney-General* v. *Robson* (1).]

Cur. adv. vult.

April 11.

The following judgments were read :—

BARTON A.C.J. Informations by the respondent set out as to the appellants respectively that "During the continuance of the War, as defined by the *Trading with the Enemy Acts* 1914, *i.e.*, on 5th May 1915, at Sydney, the defendant did trade with the enemy by obtaining goods from Germany, contrary to the Act in such case

(1) 5 Ex., 790.

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made and provided." The appellants were convicted on 2nd November 1916, and Siwertz was fined £20 and the Company £5.

The *Trading with the Enemy Act* 1914 (No. 9 of 1914), sec. 2 (2), assented to on 23rd October 1914, is 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."

The King's Proclamation of 9th September, published in the Government *Gazette*, No. 72, of 12th September 1914, forbids in art. 5, pl. 7, every person resident, carrying on business, or being in His Majesty's Dominions "directly or indirectly to . . . obtain from an enemy country or an enemy any goods, wares, or merchandise . . ."

The evidence before the Stipendiary Magistrate in the two cases was identical. The letters included in it were obtained at the office of the appellants.

The appellant Siwertz was at all material times the managing director of the appellant Company, and with the exception of a period between 29th April and 11th May 1915, when he was absent from Sydney, personally conducted the Company's correspondence with the Aktiebolaget Baltic of Sodertelje, Sweden (which I shall call "the Swedish Company"). On 18th February 1914 the appellant Company ordered from the Swedish Company, through Siwertz, to be shipped to Sydney, a quantity of goods which included those the subject of the transaction out of which the charge arises. They were to be obtained from one Raffel of Copenhagen, who had been in the habit of supplying similar goods which the appellant Company required before the War. The goods were dairy utensils, such as milk cans, buckets, and strainers. The practice was for Siwertz as managing director to order goods from the Swedish Company, which in the ordinary course Raffel supplied. The appellant Company is an offshoot of the Swedish Company. Siwertz in his evidence spoke of it as "our Swedish house" and "the Home company." The course was for the Swedish Company to order from Raffel for the appellant Company, upon whom Raffel drew for the price; they

honoured the draft. The Swedish Company appear to have looked to the appellant Company for the freight, insurance and expenses, having presumably paid these on their behalf. The order for the goods now in question included other goods to be supplied to the Baltic Paasch Simplex Machine Company of Melbourne, generally called in the letters "Baltic & Paasch." On the Swedish Company's instructions Raffel shipped these goods from Copenhagen on 29th July 1914 *viâ* Hamburg. They reached Hamburg after the outbreak of war, and were of course detained at that German port. (Their detention was reported by the Swedish Company to the appellants, who became aware of it in September 1914.) Afterwards the Swedish Company had the goods shipped from Hamburg to Gothenburg in Sweden. Arrangements to that end must have been made with the person or persons who had control of them in Hamburg, and they were shipped by the steamer *Natal* from Gothenburg to Sydney late in January or early in February 1915. The Gothenburg bill of lading is dated 20th January. The Swedish Company's invoice for the charges on the Sydney goods is dated 30th January 1915, and it appears therefrom that they charged the appellant Company with a sum for freight to Sydney which included "freight, &c., Copenhagen-Hamburg-Gothenburg"; and the war risk insurance and marine insurance also included that freight. The appellants had been advised by letter of the intention to have the goods shipped from Hamburg to Gothenburg and thence by steamer from Gothenburg to Sydney, and to this they do not seem to have taken any objection. In the circumstances that was an acquiescence in the proposed course. On 13th February 1915 the Swedish Company wrote informing the appellant Company that they had "shipped the cream cans, &c., which were stopped in Hamburg," and the same letter re-stated the amount of freight, insurance and expenses on the goods "as per enclosed invoice," at the same sum as was mentioned in the invoice of 30th January already referred to. That was the invoice enclosed in the letter, for there was only one invoice for these goods. On 9th April 1915 the appellant Company, writing to the Swedish Company, said, "the *Natal* is now in Fremantle; we note that the cans which were detained during transit in Hamburg are now being

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released and that they are arriving in the *Natal*." This letter must have been written after the receipt of the bill of lading of 20th January or the invoice dated 30th January, or both, as those documents contain the first mention of the name of the steamer which is to be found in the correspondence. That the appellants had given express authority for the return of the goods from Hamburg to Gothenburg does not appear, but it is clear that the Swedish Company were acting on behalf and for the interest of the appellant Company in obtaining their return to allow of their being re-shipped direct to Australia. The appellant Company and Siwertz as their managing director knew what had been done, and, as will be seen, they nevertheless received the goods. On their original voyage, interrupted at Hamburg, and on their final voyage from Gothenburg to Sydney, the goods were shipped f.o.b. The purchase was paid for about December, as Mr. Siwertz admits.

As already mentioned, the appellant Siwertz was away from Sydney from 29th April to 11th May 1915, but before leaving he knew, as the letter of 9th April shows, that the goods were coming in the *Natal*, and that the ship had arrived at Fremantle on her way to Sydney. He had told the Baltic Paasch Company the same thing on 6th April. As 23 days at least had elapsed from her arrival at Fremantle to the 29th of that month, he must have been in daily expectation of the arrival of the Sydney goods before he left, but it is not set up that he gave any instruction that their acceptance should be refused. On 5th May the appellant Company wrote to the Baltic Paasch Company as follows: "As requested by Mr. Siwertz we enclose you herewith Invoice for Freight and Insurance on Cans *ex Natal*, also Debit Note for Insurance Company." That letter is signed "Torkel Siwertz per T. B. MacDonald." Mr. MacDonald is the accountant of the appellant Company. The goods were received by the appellant Company about 10th May, a day or two before the return of Mr. Siwertz. Not only were there no prior instructions to refuse the expected goods, but Mr. Siwertz does not appear to have given any instructions or issued any protest in the matter after his return. The goods were clearly received by the Company in the ordinary course of trade, and it is

clear that Mr. Siwertz expected their arrival and acquiesced in their impending receipt.

On these facts it is contended that instead of convicting each appellant the Stipendiary Magistrate should have dismissed the informations. The grounds in each case are: (1) that there was no evidence to support the conviction; (2) that there was no evidence on which the Magistrate could reasonably have convicted; (3) that the conviction was against the evidence.

The Swedish Company without any doubt "obtained" the goods on behalf of the appellants from Hamburg, that is to say, from an enemy country. How can the transaction of procuring their return be more accurately described? I do not discuss the question whether they had any prior authorization to do so from the appellants. Quite probably their assent was assumed. The Swedish Company acted for the benefit of the appellants, who became aware that the goods, having been obtained for them from Hamburg, were to be, and then that they were, shipped from Gothenburg to Sydney in satisfaction of their prior order. So far from repudiating what was to be or what had been done on their behalf, their whole conduct was an adoption of the procurement of the return of the goods from Hamburg, and the subsequent acts of the Swedish Company in relation to the goods. They raised no objection to a course of freight to Sydney which included "freight Copenhagen-Hamburg-Gothenburg." And knowing as they did all that had been done on their behalf, their reception of the goods without protest completed the adoption, if indeed it was not complete already. It cannot even be successfully maintained that the appellant Siwertz was not a party to the receipt of the goods, although he was absent from Sydney when they arrived. In my opinion there was ample evidence on which the Stipendiary Magistrate could reasonably convict. The appellants clearly took part in, if they did not perform, the prohibited transaction. If it is necessary to decide the third question raised, I am of opinion that the convictions are not against the evidence. On the contrary the evidence seems to me to point only one way. A case of this kind may conceivably arise without any serious moral culpability on the part

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of the persons charged. But we are not called on to deal with such cases from that point of view.

In my judgment both appeals must be dismissed.

ISAACS J. The evidence with respect to the Company discloses these facts:—When the War began they had certain goods lying in Hamburg *en route* to Australia. They knew that fact shortly after, and were told the goods were stopped. Later, they were informed by their agents in Sweden that an effort would be made to send the goods on to Australia to the Company. They knew this would be done on their behalf and at their cost. They had ample time to prevent this being done, but allowed it to go on. It was done, they were charged the cost, and have recognized the acts of their agents. They were notified of the arrival of the ship at Fremantle with the goods on board. When the goods arrived the Company passed the customs entries and obtained the goods. Unquestionably the Magistrate was justified in holding the Company was liable.

As to Siwertz, he was the managing director. He had thereby, and in fact exercised, the control and direction of the Company's business. He personally knew all the facts down to the arrival of the ship at Fremantle. Of course, he was well aware that unless he gave special instructions to the contrary, the course pursued under his general directions would be followed in respect of these very goods. His personal absence, therefore, from Sydney at the time the goods actually arrived is no more material than if he were present in Sydney but gave no specific orders with respect to the particular entry. Knowing the whole of the facts up to that point, his silence was equivalent to a direction to proceed as usual, and he knew that a few days sooner or later this process would be applied to these goods. There is no escape for him either. The Magistrate was fully justified in holding him liable also.

Something was said about the hardship. That is not strictly material, but I think it desirable to state my view. The law is clear, and if the defendants wished to obtain the goods, then, in order to act within it, their manifest course was to apply to the proper department of the Crown for permission to receive the goods. If the Crown thought proper to give that permission, there would have

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been no offence. That was not done, and the offence was committed. It is always a grave offence, and a public danger, to have communication with an enemy country except with the consent of the Crown. The distinct warning by the Proclamation disregarded precludes any suggestion of ignorance of law.

I agree that the appeal should be dismissed.

GAVAN DUFFY J. I agree that both defendants were rightly convicted on the evidence before the Magistrate. In saying this I do not suggest that Mr. Siwertz necessarily knew that he was doing anything which was either *malum prohibitum* or *malum in se.*

Both appeals dismissed with costs.

Solicitor for the appellants, *W. E. Hawkins.*

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

B. L.

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IN RE HYNDS.

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HOBART, *Feb.* 23, 28.

Barton J.

IN CHAMBERS.

Mortgage—Foreclosure—Leave to take proceedings—Onus of proof—Discretion—War Precautions (Moratorium) Regulations (Statutory Rules 1916, *No.* 284—*Statutory Rules* 1916, *No.* 324—*Statutory Rules* 1917, *No.* 13), *regs.* 4 (5), 7.

On an application under the *War Precautions (Moratorium) Regulations* by a mortgagee for leave to take proceedings against the mortgagor for redemption or repayment, if the case falls within the terms of reg. 4 (5) the onus is upon the mortgagee to satisfy the Court either that by reason of the wasting nature of the security the continuance of the mortgage would seriously affect the security or that the conduct of the mortgagor has in the respects mentioned in the regulation been such as to render him undeserving of the benefit or protection of the Regulations, and unless the Court is so satisfied it has no discretion to grant the relief asked.