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Isaacs J.

plaintiff, it cannot be said the matter was not *bonâ fide* open to argument. The Commonwealth, as the employer, is free to frame its regulations in its own way, and as in this case the provision might have been framed so as to exclude all possible doubt, and as this is a ruling which enures for the benefit of the Commonwealth in cases other than the present, I think justice will be met by leaving both sides to bear their own costs.

Judgment for the defendants.

Solicitors for the plaintiff, *Loughrey & Douglas.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY THE KING . . . . APPELLANT;

AND

SNOW . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 28-31.

MELBOURNE, *June* 7.

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

Trading with the Enemy—Meaning at common law—Commercial intercourse—Communications upon business matters—Trading with the Enemy Acts 1914 (*No.* 9 *and No.* 17 *of* 1914), *secs.* 2, 3—*Imperial Proclamations of 5th August* 1914 *and 9th September,* 1914.

The term "trading with the enemy" at common law and as used in the *Trading with the Enemy Acts* 1914 includes all commercial intercourse with the enemy.

The Panariellos, 84 L.J. P., 140; 85 L.J. P., 112, considered and followed.

Held, therefore, that a person who took part in correspondence which was intended to conserve existing or promote future business relations with a person carrying on business in Germany might properly be convicted of the offence of trading with the enemy under sec. 3 of the *Trading with the Enemy Acts* 1914.

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Decision of the Supreme Court of South Australia reversed.

APPEAL from the Supreme Court of South Australia.

On the trial at the Criminal Sittings of the Supreme Court of South Australia, before *Murray* C.J., of Francis Hugh Snow on an information charging him with trading with the enemy, the learned Chief Justice stated the following case under sec. 72 of the *Judiciary Act* 1903-1915 for the consideration of the Full Court of the Supreme Court:—

At the Criminal Sittings of this Court beginning on 2nd November 1915 the defendant was charged and tried before me upon an information by the Attorney-General of the State of South Australia, the person appointed by His Excellency the Governor-General to prosecute by indictment for indictable offences against the laws of the Commonwealth, alleging as follows:—

First Count.—That Francis Hugh Snow late of Adelaide in the State of South Australia merchant during the continuance of the present state of war on 5th, 11th, 18th, 20th, 24th, 25th, 27th and 31st August 1914 and on 2nd, 8th, 10th, 24th, 25th, 26th and 29th September 1914 and on 1st, 7th, 8th, 12th and 29th October 1914 and on 2nd and 3rd November 1914 and on divers other days between 5th August 1914 and 7th November 1914 at Adelaide in the said State did unlawfully trade with the enemy to wit Aron Hirsch & Sohn then carrying on business at Halberstadt in Germany by entering by means of certain letters telegrams and cablegrams written sent and received to by and from the said Aron Hirsch & Sohn, A. S. Winter of Rotterdam in Holland, Naylor Benzon & Co. Ltd. of London, England, and Messrs. George Smith & Son of London, England, into a commercial contract with relation to pyrites for the benefit of the said Aron Hirsch & Sohn contrary to the Statute in such case made and provided and against the Peace of our Sovereign Lord the King His Crown and Dignity.

Second Count.—That he the said Francis Hugh Snow during the

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continuance of the present state of war on 5th, 6th, 7th, 10th, 11th, 13th, 14th, 15th, 17th, 18th, 19th, 20th, 21st, 22nd, 24th, 26th, 27th, 29th and 31st August 1914, and on 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 14th, 15th, 17th, 18th, 19th, 21st, 23rd, 24th, 25th, 26th, 28th, 29th and 30th September 1914 and on 1st, 2nd, 3rd, 5th, 6th, 7th, 8th, 10th, 12th, 13th, 15th, 16th, 17th, 19th, 20th, 21st, 22nd, 23rd, 26th, 27th, 28th, 29th and 30th October 1914 and on 2nd, 3rd, 4th, 5th and 6th November 1914 and on divers other days between 5th August 1914 and 8th November 1914 at Adelaide aforesaid did unlawfully trade with the enemy to wit the said Aron Hirsch & Sohn then carrying on business at Halberstadt in Germany by taking part in acts or transactions which at common law constitute trading with the enemy namely having commercial intercourse with the enemy the said Aron Hirsch & Sohn by means of certain letters telegrams and cablegrams written sent and received to by and from the said Aron Hirsch & Sohn, A. S. Winter of Rotterdam in Holland, George Smith & Son of London, England, L. Vogelstein & Company of New York in the United States of America, E. G. Hothorn of Rotterdam in Holland, and Naylor Benzon & Co. Ltd. of London, England, contrary to the Statute in such case made and provided and against the Peace of Our Sovereign Lord the King His Crown and Dignity.

There was evidence for the prosecution that prior and up to the commencement of the present war the defendant was an agent in South Australia for Messrs. Aron Hirsch & Sohn of Halberstadt in Germany in respect of that firm's dealing in metals and minerals, and that on or about days mentioned in the said second count the defendant sent letters on business matters in which the defendant and Aron Hirsch & Sohn were interested at the time the War broke out, and subsequently during the War addressed to one or other of the persons named in the said count, except Hothorn, and also cablegrams of a like nature to one or other of the said persons, except Naylor Benzon & Co. Ltd. and Aron Hirsch & Sohn, and received letters of a like nature from one or other of the said persons or firms, except Hothorn, and cablegrams of a like nature from one or other of the persons, except Naylor Benzon & Co. Ltd. and Aron Hirsch & Sohn.

There was no evidence that the letters appearing to be addressed to Messrs. Aron Hirsch & Sohn or to A. S. Winter were sent to them respectively or otherwise than to Messrs. George Smith & Son in London, England. There was evidence that Vogelstein & Co., Winter and Hothorn were or acted as agents for or channels of communication with Aron Hirsch & Sohn after the commencement of the War, but there was no evidence that either Messrs. George Smith & Son or Messrs. Naylor Benzon & Co. Ltd. were or acted as such agents or channels of communication at any time after the commencement of the War.

There was no evidence that the defendant replied to any of the letters from Messrs. Aron Hirsch & Sohn.

The *Commonwealth Government Gazettes* of 7th August 1914, 12th September 1914 and 12th October 1914 were put in evidence; a copy of each accompanies the case.

Respecting the second count in the information it was contended on behalf of the defendant (*inter alia*) as follows:—

1. That sec. 3 of the *Trading with the Enemy Act* 1914 is not within the powers of the Commonwealth Parliament.

2. That the said section if and so far as it purports to be retrospective or retroactive is not within the powers of the said Parliament.

3. That upon the true construction of the said Act the Act is not retrospective or retroactive.

4. That the second count did not disclose or allege any act or transaction or offence within the meaning of the said Act.

5. That there was no evidence to go to the jury of any act or transaction within the meaning of the said Act.

6. That the intercourse by correspondence appearing upon the evidence was not an act or transaction which at common law constitutes trading with the enemy.

7. That there was no evidence of any intercourse or attempt at intercourse with Aron Hirsch & Sohn by means of letters, telegrams or cablegrams, written, sent or received to, by or from George Smith & Son or Naylor Benzon & Co. Ltd., and that without this the defendant could not be convicted of the offence alleged.

I held and directed the jury as follows:—

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1, 2 and 3. That sec. 3 of the said Act is within the powers of the Commonwealth Parliament and is retrospective and retroactive.

4. That the second count did in the allegation of having commercial intercourse with the enemy by means of certain letters, telegrams and cablegrams, written, sent and received to, by and from the firms and persons named, disclose and allege an act or transaction and offence within the meaning of the said Act.

5 and 6. That "under the first Proclamation, which was published in Australia on 7th August, intercourse was not merely not prohibited but it was expressly permitted; that Proclamation remained in force until 12th September: so you must not find the defendant guilty of having commercial intercourse with the enemy between 7th August and 12th September. You may look at those letters, gentlemen, just as you may look at telegrams, cablegrams and letters written before 5th August (when the War broke out), to judge whether the persons named in the second count were the agents of Aron Hirsch & Sohn who could be used as channels of communication. You must judge whether the communications sent between 5th August and 7th August were of a commercial nature, and whether the communications between 12th September and 8th November were of a commercial nature. The only communications you can find unlawful are those between 5th August and 7th August and those between 12th September and 8th November."

And that trading with the enemy means "having commercial intercourse with the enemy in or carrying on business in an enemy country, and this may consist of either sending or receiving goods or specie to or from an enemy country or sending letters, telegrams and cablegrams of a commercial nature to an enemy country either independently or in reply to letters, telegrams and cablegrams received from an enemy country. . . . You will have to be satisfied that the intercourse charged under the second count is of a commercial nature. You may find that, if any of the communications sent were on business matters in which the defendant and Aron Hirsch & Sohn were interested either at the time the War broke out, or subsequently during the War. You will have the letters before you to judge."

7. That for conviction under the count it was not necessary that

all the persons and firms named should be proved to be channels of communication with Aron Hirsch & Sohn in Germany, but it would be enough if the jury were satisfied that any of them were and that the defendant made use of those in order to communicate on commercial matters with Aron Hirsch & Sohn.

The jury found defendant not guilty on the first count and guilty on the second count, and pursuant to the *Judiciary Act* I reserved for the consideration of the Full Court the question whether my said holdings and directions respectively were right in law.

The Full Court held that Snow ought not to have been found guilty or to be convicted on the information, and ordered that the verdict should be set aside and a verdict of not guilty entered.

From that decision the Crown now, by special leave, appealed to the High Court.

Cleland K.C. (with him *F. Villeneuve Smith* and *C. H. Parsons*), for the appellant. The direction given to the jury as to what constitutes trading with the enemy at common law is substantially correct. Trading with the enemy means all intercourse which is inconsistent with actual hostility (*The Rapid* (1)), and it is not necessary that there should be any contemplated transit of goods to an enemy country.

[BARTON A.C.J. referred to *Robson* v. *Premier Oil and Pipe Line Co. Ltd.* (2).

[ISAACS J. referred to *Coppell* v. *Hall* (3).]

Trade and commerce consists of acts (*New South Wales* v. *The Commonwealth* (4)), and trading with the enemy is the act of human intercourse independent of goods or whether goods are the subject matter of the intercourse. The term "trading with the enemy" is synonymous with "commercial intercourse with the enemy," and commercial intercourse does not imply trading in the technical sense. See *The Panariellos* (5); *The Julia* (6); *Zinc Corporation Ltd.* v. *Hirsch* (7); *Daimler Co. Ltd.* v. *Continental Tyre and Rubber*

(1) 8 Cranch, 155.
(2) (1915) 2 Ch., 124.
(3) 7 Wall., 542, at pp. 557-558.
(4) 20 C.L.R., 54, at p. 100.
(5) 84 L.J. P., 140; 85 L.J. P., 112.
(6) 8 Cranch, 181, at pp. 193-194.
(7) (1916) 1 K.B., 541, at p. 556.

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Co. (Great Britain) Ltd. (1); *Esposito* v. *Bowden* (2); *The Jonge Pieter* (3); *Moss* v. *Donohoe* (4); *The Kildonan Castle*—which was decided on 10th July 1916, in the Admiralty Division (in Prize), by Sir *Samuel Evans* P.; *Kent's Commentaries*, 9th ed., vol. I., p. 66; *Wheaton's International Law*, p. 434.

[ISAACS J. referred to *British and Foreign Marine Insurance Co. Ltd.* v. *Samuel Sanday & Co.* (5); *Chalmers' Opinions*, p. 575; *The Abby* (6).]

It is unnecessary to decide whether at common law intercourse which falls short of commercial intercourse constitutes trading with the enemy. Although, if the policy of the law is to prohibit unregulated intercourse altogether by reason of its danger, there is no reason for limiting the definition of commercial intercourse. Commercial intercourse constitutes the offence whether or not it falls short of technical or individual trading or technical or individual commerce. Commercial intercourse includes intercourse by means of the transmission of commercial correspondence, and correspondence is commercial if its subject matter is or may be the subject of business, trade or commerce. Trading with the enemy is a phrase used to describe that species of intercourse with the enemy which is prohibited at common law. That being so, the direction was right.

Sir Josiah Symon K.C. and *Piper* K.C. (with them *Norman*), for the respondent. Trading with the enemy at common law is only one form of commercial intercourse with the enemy. There is no case in which the two terms have been used synonymously or have been said to be synonymous. In order to constitute trading with the enemy, there must be a transmission of goods. The direction to the jury was based on the case of *The Rapid* (7), but that case decided that, although negotiation or contract was not essential to constitute trading with the enemy, the transmission of goods was essential. *Murray* C.J. recognized that there might be commercial intercourse which was not trading with the enemy, but he directed the jury that mere correspondence about business matters

(1) (1916) 2 A.C., 307, at p. 344.
(2) 7 El. & Bl., 763, at p. 779.
(3) 4 Rob. Adm., 79, at p. 83.
(4) 20 C.L.R., 615, at p. 618.
(5) (1916) 1 A.C., 650, at p. 671.
(6) 5 Rob. Adm., 251, at pp. 253-254.
(7) 8 Cranch, 155.

was trading with the enemy. If there had been anything more than correspondence about business matters, it should have been stated in the information. That the transmission of goods is essential to constitute trading with the enemy is shown by *Kershaw* v. *Kelsey* (1) and *Zinc Corporation Ltd.* v. *Hirsch* (2). In *The Panariellos* (3) and *Esposito* v. *Bowden* (4) there was a transmission of goods.

[BARTON A.C.J. referred to *United States* v. *Lane* (5).

[ISAACS J. referred to *Janson* v. *Driefontein Consolidated Mines Ltd.* (6); *Halsey* v. *Lowenfeld* (7).]

The Proclamations of 5th August and 9th September 1914 draw a distinction between trading with the enemy and having commercial relations with the enemy. The definition of trading with the enemy in sec. 2 (2) of the *Trading with the Enemy Act* 1914 makes an "act or transaction" necessary to constitute the offence. The act or transaction referred to is something which is forbidden to be done, and not the mere writing about commercial topics. The jury may have decided upon a letter which negatived any trading. [Counsel referred to *The Hoop* (8); *The Jonge Pieter* (9); *Gist* v. *Mason* (10); *Potts* v. *Bell* (11); *Reid* v. *Hoskins* (12); *Batey and Morgan on War, its Conduct and Legal Results*, pp. xii., xiii., 204; *Tudor's Leading Cases on Mercantile Law*, 2nd ed., p. 802.] Assuming that the terms trading with the enemy and commercial intercourse with the enemy are synonymous, there must be some act done which has the effect of changing the legal relations of the parties (*Robson* v. *Premier Oil and Pipe Line Co. Ltd.* (13)). There is a variance between the averments in the information and the evidence with regard to the persons with whom the correspondence was carried on. As the information has not been amended in that respect, the respondent should have been acquitted (*Russell on Crimes*, 4th ed., vol. III., p. 307; *Wright's Case* (14); *R.* v. *Hewins* (15); *Gray* v. *Palmers* (16); *R.* v. *Owen* (17)).

(1) 100 Mass., 561.
(2) (1916) 1 K.B., 541.
(3) 85 L.J. P., 112.
(4) 7 El. & Bl., 763, at p. 779.
(5) 8 Wall., 185, at p. 195.
(6) (1902) A.C., 484, at pp. 493, 509.
(7) (1916) 2 K.B., 707.
(8) 1 Rob. Adm., 196.
(9) 4 Rob. Adm., 79.
(10) 1 T.R., 88.
(11) 8 T.R., 548.
(12) 6 El. & Bl., 953.
(13) (1915) 2 Ch., 124.
(14) 1 Lew. C.C., 268.
(15) 9 C. & P., 786.
(16) 1 Esp., 135.
(17) 1 Mood., 118.

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BARTON A.C.J. We are all agreed that neither transportation of goods nor contract is essential to the commission of the offence of trading with the enemy at common law, and that communications for the purpose of conserving existing, or promoting future, business relations constitute that offence. This statement is not made as an exhaustive one, but it is sufficient for the present purpose. Under those circumstances we desire to know whether either party desires the inclusion in the special case of the communications admitted in evidence at the trial, or any part of them.

Cleland K.C. The appellant desires the inclusion of them or some portion of them.

Sir Josiah Symon K.C. If any of the communications are included, all of them should be.

Cur. adv. vult.

The following judgments were read :—

June 7.

BARTON A.C.J. In this case the Supreme Court of South Australia has pronounced the direction to the jury of the learned Chief Justice of the State to be erroneous, and on that ground has quashed the conviction of the respondent. It has also refused to remit the case reserved to the learned Chief Justice for amendment or restatement by the inclusion, in the case, of copies of certain letters, telegrams and cablegrams put in evidence on the trial.

The main grounds of the appeal to this Court are that the jury were correctly directed at the trial, and that at any rate the Supreme Court ought not to have come to the conclusion that they were erroneously directed before seeing whether the communications put in evidence were commercial, in the sense that they were for the maintenance or furtherance of business relations between the respondent and the alien enemy firm of Aron Hirsch & Sohn.

Before entering upon an examination of his Honor's direction to the jury, it is necessary to point out the terms of the *Trading with the Enemy Act*, and also the nature of the inquiry involved in the trial.

The Act is, in the particulars relevant to this inquiry, identical in substance with the Imperial Statute on the same subject passed

soon after the outbreak of the present war. The third section is retroactive in relation to the commission of the offence, and consequently the prohibition of the offence and the punishment prescribed apply to things done at any time since the outbreak of war (*R.* v. *Kidman* (1)). The second section of the Act provides in sub-sec. 2 that "a person shall be deemed to trade with the enemy if he performs or takes part in . . . (*c*) any act or transaction which at common law or by Statute constitutes trading with the enemy." The first count of the information, on which the respondent was acquitted, charged him with having traded with the enemy, to wit, Aron Hirsch & Sohn, then carrying on business at Halberstadt in Germany, by entering by means of letters, telegrams and cablegrams into a commercial contract with relation to pyrites for the benefit of the enemy. That charge was founded on the terms of the King's Proclamation of 9th September 1914 : so the case reserved informs us. The second count, under which the respondent was convicted, charges that on numerous specified dates during the present state of war the respondent "did unlawfully trade with the enemy to wit the said Aron Hirsch & Sohn then carrying on business at Halberstadt in Germany by taking part in acts or transactions which at common law constitute trading with the enemy namely having commercial intercourse with the enemy the said Aron Hirsch & Sohn by means of certain letters telegrams and cablegrams," &c.

The terms of the several Proclamations are material only as to the sense in which the Legislature has used the term "trading with the enemy," and will be referred to later on.

The case reserved sets out the direction very fully. His Honor refers therein to "commercial intercourse," "communications of a commercial nature," and "communications on business matters in which the defendant and Aron Hirsch & Sohn were interested," and leaves it to the jury to say whether the communications were "of a commercial nature," intimating that if they were, they constituted evidence of the offence charged in the second count. I think that the essence of the direction is to be found in the following passage :—"You will have to be satisfied that the intercourse charged under the second count is of a commercial nature. You may find

(1) 20 C.L.R., 425.

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that, if any of the communications sent were on business matters in which the defendant and Aron Hirsch & Sohn were interested, either at the time the War broke out, or subsequently during the War. You will have the letters before you to judge." It was intimated to the jury, in effect, that the intercourse would constitute the offence of trading with the enemy if it were commercial in the sense of being on business in which the respondent and Aron Hirsch & Sohn were interested. But it seems to me probable that his Honor in using the terms in question was really designating the class of letters, &c., to which the correspondence in question belongs, and was assuming that as writings of that class their tendency towards the continuance or promotion of business relations would manifest itself to the jury on inspection.

A more precise explanation of the kind of commercial intercourse that would be evidence of the offence was not given to the jury.

On the argument of the case reserved the learned Chief Justice concurred with his brother Justices in holding that his direction to the jury was too wide. He held that the "act or transaction" contemplated by sec. 2 (2) (*c*) of the *Trading with the Enemy Act* 1914 is not committed unless it amounts to the entry into a commercial or financial "transaction" or unless property is shipped for transportation from one enemy country to the other. His Honor here used the term "commercial or financial transaction" as equivalent to a commercial or financial contract, if I am not mistaken; otherwise a set of negotiations by correspondence not resulting in an actual contract would be in his Honor's view a "trading with the enemy" at common law, a view which would be inconsistent with the tenor of the several judgments below and with the order quashing this conviction. I should like to make and discuss longer extracts from the able judgments which were delivered, but I must beware of making my own judgment unduly long.

It is well settled that after the breaking out of war any intercourse of any kind between subjects of the belligerents is unlawful if it be inconsistent with the existing hostility of their States. There is, of course, an exemption where the sovereign power of a State has expressly licensed the intercourse. But bare intercourse, where

not commercial in its nature, is not pronounced to amount to "trading with the enemy," although it is unlawful if not licensed. Actual unlicensed exchange, sale or transportation of goods with or to an enemy subject, on the other hand, of course amounts to "trading with the enemy," and is not only forbidden but is a misdemeanour at common law, and also included in the prohibitions of the Australian Act. Between these two extremes lies the very extensive field which consists of that unlicensed intercourse with the enemy which is conducted for the purpose of keeping up or facilitating commercial transactions between parties whose countries are at war, and which may thus advantage the enemy or injure our own country. Is this intercourse merely forbidden, or is it included by the common law in the term "trading with the enemy"? That is the point to be determined, and I have come to the conclusion that such intercourse constitutes the offence named.

What is the basic principle on which it is forbidden to hold intercourse with the enemy, whether (1) in terms or by channels unconnected with commerce, or (2) by way of commercial correspondence, or (3) by way of sale, purchase, or transport of goods, or of contract with any such objects? The whole prohibition rests on the theory that any communication of either character, not licensed by the head of the State, may be advantageous to the enemy country, or detrimental to one's own country. But as war is directed to the destruction of the material resources of the enemy as well as to the protection of our own—the pursuit of the former object often being a means of attaining the latter—it follows that the more nearly the intercourse is connected with the commerce of the enemy the greater the danger of benefit to him or of injury to ourselves. Thus, though bare non-commercial intercourse is unlawful, it is not looked on with such severity as that which has either matured or is likely to mature into his getting the money that he wants for his goods or the goods that he needs for his money. But as any commercial intercourse is likely to lead to such sale or purchase, it should be classed with the actual sale or purchase rather than with the bare intercourse: for the plain reason that it may at any moment result in that, the most harmful way. Hence the more natural conclusion is rather that commercial intercourse is ranged with enemy trading, and as such

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is not only illegal but punishable, than that it is allied to bare non-commercial intercourse, merely unlawful.

Such seems to me the manner in which public policy, which is generally common sense, would view the matter *à priori*. Let us then see whether it is the way in which legal authority regards it.

Recent decisions of the Courts in England have been arrived at after such full investigation and review of prior authorities new and old, and are themselves of such high authority, that I conceive that the purpose of this inquiry will be best served by confining my attention to some of the more recent cases. But it is well to observe at the outset that the majority of the cases, and nearly all the old ones, are cases in Prize. As they by their nature arise from the naval right of search of cargo and its seizure and condemnation for due cause, they relate to the transportation of goods and not to mere correspondence on the subject. But it will be found that expressions in modern reviews of these cases carry the doctrine much further than is required to justify the seizure of cargo.

The oldest case from which I shall read a passage was not, however, a Prize case. *Esposito* v. *Bowden* is a decision of the Court of Exchequer Chamber (1). The gist of it is that performance of a contract cannot be insisted on where between its making and the time for its performance a state of war has arisen which would involve the party sued in a trading and dealing with the enemy if he carried out his promise. In such cases the contract is dissolved by law. In a very learned judgment delivered for the Court, *Willes* J. said (2): "It is now fully established that, the presumed object of war being *as much to cripple the enemy's commerce as to capture his property*, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal." Although the contract in that case involved only that the plaintiff's ship chartered by the defendant should proceed to Odessa and there load a complete cargo of specified goods and proceed therewith to a port of discharge, the ports of loading and of intended discharge being respectively in countries which after the contract came to war, yet the decision of the Court

(1) 7 El. & Bl., 763.

(2) 7 El. & Bl., at p. 779.

was rested by the judgment on the proposition stated in the broad terms I have quoted. The authority of the judgment is the greater because in addition to *Willes* J. the Court consisted of *Jervis* L.C.J., *Pollock* C.B., *Alderson* B., and *Cresswell* and *Crowder* J.J. That proposition is much wider than was essential to sustain the conclusion that the operation of war upon contracts of affreightment made before, but remaining unexecuted at, the time it is declared, and of which war makes the further execution unlawful or impossible, is to dissolve the contract and to absolve both parties from further performance of it. The proposition was stated in 1868 in terms as broad in the case of the *United States* v. *Lane* (1).

Next in the order of time I take the case of *The Panariellos* (2), decided on 22nd March 1915. There Sir *Samuel Evans* P. reviewed the authorities very closely and at great length. He cited *The Hoop* (3); *Story's Notes on Prize Courts*; *Wheaton's International Law*, 8th ed., pars. 309-315; *The Cosmopolite* (4); *The Rapid* (5); *The Julia* (6); *The Jonge Pieter* (7), and other authorities. He lays down four general propositions (8), only two of which need be given here :—"First, when war breaks out between States, all commercial intercourse between citizens of the belligerents *ipso facto* becomes illegal, except in so far as it may be expressly allowed or licensed by the head of the State. *Where the intercourse is of a commercial nature it is usually denominated 'trading with the enemy.'* This proposition is true also, I think, in all essentials with regard to intercourse which cannot fitly be described as commercial." (Obviously the last sentence refers to the illegality of certain intercourse, and not to the name "trading with the enemy" applied to commercial intercourse.) "Fourthly, when such intercourse in fact takes place, the property of the persons engaged in it is confiscable, whether they were acting honestly and with *bona fides* or not." (The last proposition of course applies to the cases where, *e.g.*, the claimant seeks the restitution of goods which were actually in transit, and does not diminish the generality of the first proposition.)

(1) 8 Wall., 185, at p. 195.
(2) 84 L.J. P., 140.
(3) 1 Rob. Adm., 196.
(4) 4 Rob. Adm., 8.
(5) 8 Cranch, 155.
(6) 8 Cranch, 181.
(7) 4 Rob. Adm., 79.
(8) 84 L.J. P., at p. 142.

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Their Honors of the Supreme Court seem to me, with all deference, to have taken a more restricted view of the term " commercial intercourse " than the learned President's words imply. In my belief they were intended to mean what they say, and to lay down a broad proposition, similar to that in *Esposito* v. *Bowden*, within which the case then in question fell as (I use again his Lordship's words) a commercial intercourse between the claimants and the enemy which amounted to a " trading with the enemy." I think the term " commercial intercourse " must have included in such " trade " any intercourse on commercial matters ; at any rate for the maintenance or furtherance of business relations between belligerent subjects. Otherwise such intercourse would be omitted from his Lordship's classification, which is hardly likely. I think he can scarcely have intended to leave out so highly important a class of prohibited intercourse. His Lordship was dealing with a case in which there was no trading with the enemy in the sense of actual exchange or actual sale of cargo, for the property admittedly remained in the original owners. This appears both from the head-note and from the fuller statement of the case.

On 6th May in the same year the Court of Appeal decided the case of *Robson* v. *Premier Oil and Pipe Line Co. Ltd.* (1). There it was decided that an alien enemy was not entitled to exercise by proxy or otherwise a right of voting in respect of shares in an English company, though the alien was a company which had a branch in England as well as a head office in Berlin. *Sargant* J. having decided against the alleged right of the alien enemy, an appeal was taken on two grounds : (1) that the prohibition at common law of intercourse with an alien enemy is limited to commercial intercourse or trading, and (2) that the transaction in this case did not come within the definition of commercial intercourse. The Court of Appeal negatived both of these contentions. The judgment was delivered by *Pickford* L.J. on behalf of Lord *Cozens-Hardy* M.R., *Warrington* L.J. and himself. The Court emphasized the unlawfulness of all intercourse during war as laid down by Lord *Stowell* in *The Hoop* (2) and *The Cosmopolite* (3) ; by English Courts in several other

(1) (1915) 2 Ch., 124.
(2) 1 Rob. Adm., 196.
(3) 4 Rob. Adm., 8.

cases; in America by decided cases and by great authorities such as *Story* and *Kent*; and again affirmed by Sir *Samuel Evans* in *The Panariellos* (1). The Court of Appeal not only held that the transaction then in question came within the prohibition of intercourse with enemies, holding it enough for their existing purpose to say that in their opinion all intercourse which could tend to the detriment of one's own country or the advantage of the enemy country was forbidden as inconsistent with the state of war. It went further, and it is in this respect that the decision is more peculiarly in point in the present case. The Court said (2):—"We think also that the rejection of these votes may be justified on the narrower ground that *this was a commercial transaction. Commercial intercourse is not confined to making contracts between an alien enemy and a British subject*, and such a transaction as this directed to obtaining the control of a trading company is in our opinion commercial." This passage may well be compared with that on p. 195 of the *United States* v. *Lane* (3), already mentioned. It contains no qualification of the view expressed by Sir *Samuel Evans* that "where the intercourse is of a commercial nature it is usually denominated 'trading with the enemy.'" Less than seven weeks elapsed between the two decisions.

On 27th January 1916 came the judgment in the case of *British and Foreign Marine Insurance Co. Ltd.* v. *Samuel Sanday and Co.* (4), in which, after saying that "the declaration of war amounts to an order to every subject of the Crown to conduct himself in such a way as he is bound to conduct himself in a state of war," Lord *Wrenbury* said (5):—"It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. There is 'a general rule in the maritime jurisprudence of this country by which all subjects trading with the public enemy, unless with the permission of the Sovereign, is interdicted': *The Hoop* (6). 'A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal':

(1) 84 L.J. P., 140.
(2) (1915) 2 Ch., at p. 136.
(3) 8 Wall., 185.
(4) (1916) 1 A.C., 650.
(5) (1916) A.C., at p. 671.
(6) 1 Rob. Adm., at p. 198.

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Esposito v. *Bowden* (1). . . . 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." Here again is an absence of any qualification of the breadth of the proposition laid down in previous cases, some of them so recent, that commercial intercourse with an enemy after the declaration of war amounts to trading with the enemy.

A few weeks after the last cited case, namely on 13th April 1916, came the judgment of the Privy Council in *The Panariellos*, on appeal from the learned President. That case is reported in 85 L.J. P., 112. The Judicial Committee, whose judgment was delivered by Lord *Sumner*, fully confirmed the decision appealed from and also its grounds. It was laid down (2) that "the general principles upon which trading with the enemy is forbidden to the subjects, or those who stand in the place of subjects, of His Majesty and of his allies, are well settled and need not be restated. Ample citations from the authorities are to be found in the learned and elaborate judgment in the Court below." Goods had been despatched from a foreign port after the outbreak of war, and with knowledge of it, by a British subject or a subject of an allied State for delivery as directed by an enemy firm and for their benefit; and the judgment proceeded thus:—"The despatch of the ore from Ergasteria, for delivery as directed by Beer, Sondheimer & Co., of Frankfort, and for their benefit, engaged the goods in forbidden intercourse with the enemy. Consignment of goods to an enemy port and vesting of them in an enemy while on passage, though common features in the reported cases, are not essential to the imputation of forbidden trading. Geographical destination alone is not the test. Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom. The development of communications, the increased complexity of commercial intercourse, and the multiplication of facilities for enemy dealings with goods, though at a distance from the enemy country, are incidents in the growth of modern commerce to which in its application the rule of law must

(1) 7 El. & Bl., at p. 779. (2) 85 L.J. P., at p. 116.

be adapted. They do not in themselves operate to defeat the application of an established principle." I am clearly of opinion that the rule of law is adaptable, and indeed that it already extends, to correspondence instituted or continued for the protection or advancement of commercial relations between a British and an enemy subject.

Only three months after the Privy Council's decision Sir *Samuel Evans* pronounced judgment in the case of *The Kildonan Castle*. This case is not in any report yet received here, but I quote from the transcript of the notes of the official shorthand writer. It was a case in which the original shipper of goods was given an opportunity of showing what, if anything, he had done to prevent the goods from reaching the enemy or to put an end to a commercial intercourse which his Lordship thought was taking place between him and the intended receiver of the goods. The goods were destined for Germany, but the property in them had not passed. The expressions of the learned President are in unison generally with those of which he made use in *The Panariellos* (1), and also show in what sense that high authority understood the judgment just previously delivered on the appeal; and I quote merely for that purpose. He said: "If it be true that the goods were engaged in a commercial and forbidden intercourse, and if it be true also that he did nothing to bring that intercourse to an end, I think there was a trading with the enemy which is amply sufficient to render these goods confiscable": and, with relation to the facts which he had recited, he went on to say: "On these grounds I am clearly of opinion that the proper order for me to make is that the goods be condemned as goods which were engaged after the outbreak of hostilities in a commercial intercourse with the enemy."

Having regard to his pronouncement in *The Panariellos* (1) that all unlicensed intercourse between citizens of the belligerents is illegal even when not fitly to be described as commercial, in collocation with the additional pronouncement in that case, evidently made with the subsequent approval of the Judicial Committee, that where the intercourse is of a commercial nature it is usually denominated "trading with the enemy," it is clear that his Lordship intended

(1) 84 L.J. P., 140.

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his proposition to cover commercial intercourse at any stage at which, if not commercial, it would still have been forbidden, that is, at any stage short of the actual transit of goods as well as at and after that stage. Endorsed by the Judicial Committee and in full consistence with his remarks in *The Kildonan Castle*, it can only be concluded that the proposition covers the commercial intercourse even where that intercourse has not ripened into its natural and probable fruits.

Reverting, then, to my classification early in this judgment, of the two forbidden extremes of mere intercourse on the one hand and the exchange, sale or transportation of goods on the other hand, and of the extensive field of commercial intercourse which lies between them, I come to the conclusion that the commercial intercourse, tending as it must tend towards trade, must be placed in the same category with the sale or purchase or transport of goods to or from an enemy country, and is properly classed therewith by the common law as "trading with the enemy." "The presumed object of war being," in the words of the Exchequer Chamber (1), "as much to cripple the enemy's commerce as to capture his property," the doctrine strikes at all commerce or dealings with him even before the point of the sale, &c., of goods or of a bargain to traffic in them. Surely, it would tend to disaster if the law were otherwise. Surely, when transactions of that nature are defeated before they can fructify in actual contract or even sale or purchase, they do not at that point fall into the same category as mere non-commercial correspondence. In my view the "trading with the enemy" begins when the intercourse begins to further the forbidden commerce.

I cannot help thinking that if their Honors of the Supreme Court, whose judgment was anterior to that of the Judicial Committee in *The Panariellos* appeal (2), had had the advantage of considering what that tribunal said by the mouth of Lord *Sumner*, as well as the President's still later judgment in *The Kildonan Castle*, they would probably have come to a different conclusion.

It is of interest to glance at two of the Proclamations of the King relating to this subject. The first is that of 5th August 1914,

(1) 7 El. & Bl., at p. 779. (2) 85 L.J. P., 112.

notified here on the 7th of that month. This Proclamation deals with the supply and transmission of goods, the movements of ships, the making of contracts of insurance, the entry into new commercial, financial or other contracts or obligations, and cognate subjects, and warns all persons against committing aiding or abetting any of the acts forbidden under these heads. This Proclamation declares the state of war, and recites that it is "contrary to law for any person resident, carrying on business, or being in Our dominions to trade or have any commercial intercourse with any person resident, carrying on business, or being in the German Empire without Our permission." This Proclamation is headed thus:—"By the King. A Proclamation setting forth *the Law and Policy with regard to Trading with the Enemy.*" The next Proclamation is dated on 9th September 1914, and was notified here on the 12th of that month. It makes a similar recital and also recites the previous Proclamation "relating to trading with the enemy," and it applies its provisions to Austria-Hungary, restating and extending them. It does that by repealing the previous Proclamation and making fresh provision. Now, this Proclamation is headed thus:—"By the King. A Proclamation relating to Trading with the Enemy." Both these Proclamations, therefore, place under the same head of "trading with the enemy" the prohibition to trade or have any commercial or financial transactions with enemy residents.

They both precede the *Trading with the Enemy Act* No. 9 of 1914 "relating to trading with the enemy," which was assented to on 23rd October in the same year. They are of assistance, if assistance be necessary, in arriving at the sense in which the Parliament of the Commonwealth, following that of the United Kingdom, has used the same phrase.

But the case does not end at this point. I have said that the jury had not the assistance of a precise explanation of the kind of commercial intercourse that would be evidence of the offence. It was not exactly stated to them that such intercourse, when conducted by communications, means intercourse of such a nature as to indicate that it was intended to conserve existing or promote future business relations between belligerent subjects. If these

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exhibits, or any of them, were such as to evidence that intention, they were within the term his Honor used. It may be that the letters, telegrams, &c., themselves, when inspected by the jury, amply showed that they were of this nature, and themselves elucidated the sense in which his Honor used the words "commercial intercourse" and similar terms. If the writings warrant that interpretation, I think the direction may be taken in connection with them. Still, that may not be so, and it is a question which can only be cleared up completely by an examination of the writings themselves. It is not, as it stands, a case for a new trial, because they or some of them may show that if taken together with the direction they are conclusive as to the sense in which the term was used. Indeed, there is much to be said for the proposition that the term "commercial intercourse," when conducted by correspondence, would be understood in common acceptation as intercourse which tends to, or facilitates, or promotes commercial relations, and even Sir *Josiah Symon* saw the difficulty of contending to the contrary. I find it difficult to see that the term, when used as here to describe correspondence with the enemy, even if it is said to bear a technical sense, has any meaning which differs from that common or colloquial sense. It is quite probable that the term as used by his Honor was understood by the jury, in considering the correspondence, as conveying just this sense, and if so, it might be regarded as sufficient to safeguard the jury against any condemnation grounded upon intercourse without that tendency. Still, we cannot be sure of all this. We cannot be quite certain, until we see the writings, that, when his Honor told the jury that they might find that a commercial intercourse such as was charged under the second count had been proved if any of the letters, &c., were on business matters in which the respondent and Hirsch & Sohn were interested when the present war broke out or subsequently, they might not have applied that expression to perfectly innocuous letters, even discouraging further communication, as *Gordon* J. pointed out. I prefer to say nothing at present as to the probability of this. But we find that communications which might have made the use of such words as "commercial intercourse" clear beyond misapprehension are not before us, and without them we cannot

judge whether the direction was given in a sense which showed that absolute clearness, probable though it be. It is therefore open to some question whether the case reserved is stated with absolute sufficiency to enable the Court to deal finally with the matter.

Now the appellant's counsel have continued to urge that ground of appeal, and the respondent's counsel intimate that while it is not necessary in their view that the communications should have been appended to the case, still, if the Court thinks that their inclusion would conduce to the ends of justice, counsel do not resist that course. As we do think that the communications or some of them would if so appended tend to elucidate the matter, we propose to make an order to meet the circumstances. By this means the case reserved will come before the Supreme Court in a form in which the direction will be freed from any possible uncertainty.

Various points were taken categorically by the respondent; there are seven. The first three were not argued, as it was recognized that they were covered by the case of *R. v. Kidman* (1). The fourth, fifth and sixth will be finally decided upon the amended special case. The seventh ground is obviously untenable, and I do not think any authority is necessary for that opinion. However, I will merely mention *R. v. Hill* (2).

ISAACS J. Although the answer to the main question presenting itself for our consideration may be stated in small compass, it is necessary, both for the detachment of that precise question from the rest of the case and for the purpose of stating some other points, which, though subsidiary, are nevertheless essential, that the position should be briefly stated.

The respondent Snow was charged on two counts, for contravention of the Commonwealth Act relating to trading with the enemy. He was acquitted on the first, and convicted on the second. The present appeal relates only to the second, as to which sec. 72 of the *Judiciary Act* empowers the Court to "reserve any question of law which arises on the trial for the consideration of a Full Court." The powers of the Full Court are stated in sec. 73. The second count charged the defendant with the statutory offence of "trading

(1) 20 C.L.R., 425. (2) Russ. & R., 190.

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with the enemy to wit . . . Aron Hirsch & Sohn" of "Halberstadt in Germany by taking part in acts or transactions which at common law constitute trading with the enemy namely having commercial intercourse with the enemy the said Aron Hirsch & Sohn by means of certain letters telegrams and cablegrams written sent and received to by and from the said Aron Hirsch & Sohn" and various other persons mentioned. That, if proved, would be an offence, as enacted by sec. 3 of the Act. The case stated by the learned Chief Justice of South Australia, before whom the trial took place, is all the Full Court could, or this Court can, look at to determine the questions reserved.

That case states what the evidence for the prosecution was upon which the jury convicted the respondent. It showed "that prior and up to the commencement of the present war the defendant was an agent in South Australia for Messrs. Aron Hirsch & Sohn of Halberstadt in Germany in respect of that firm's dealing in metals and minerals, and that on or about days mentioned in the said second count the defendant sent letters on business matters in which defendant and Aron Hirsch & Sohn were interested at the time the War broke out, and subsequently during the War" addressed to and received from one or other of the other persons mentioned, with certain exceptions, communications of a like nature.

On the trial an objection was taken that the intercourse by correspondence appearing in evidence was not an act or transaction which at common law constitutes trading with the enemy. Another objection was taken that inasmuch as with regard to two of the five persons mentioned in the second count, as intermediaries, the evidence did not show they had acted as such intermediaries since the commencement of the War, the whole charge failed.

The learned Chief Justice in his directions to the jury dealt with these two objections as follows:—As to the first, he gave a general definition of "trading with the enemy" at common law, and he also gave a specific direction on this subject as to the communications in evidence. His words were:—"Trading with the enemy means having commercial intercourse with the enemy in or carrying on business in an enemy country, and this may consist of either sending or receiving goods or specie to or from an enemy country or sending

letters, telegrams and cablegrams of a commercial nature to an enemy country either independently or in reply to letters, telegrams and cablegrams received from an enemy country. . . . You will have to be satisfied that the intercourse charged under the second count is of a commercial nature. You may find that, if any of the communications sent were on business matters in which the defendant and Aron Hirsch & Sohn were interested, either at the time the War broke out, or subsequently during the War. You will have the letters before you to judge." As to the second objection, he said:—"That for conviction under the count it was not necessary that all the persons and firms named should be proved to be channels of communication with Aron Hirsch & Sohn in Germany, but it would be enough if the jury were satisfied that any of them were and that the defendant made use of those in order to communicate on commercial matters with Aron Hirsch & Sohn."

The Full Court dealt with the first objection only, finding it unnecessary in the view their Honors held to deal with the second. Both points, however, were, by force of circumstances, argued before us. With regard to the first objection, it divided itself into two distinct questions, namely, the general definition, and the specific application of the definition to the communications in evidence. I propose to keep these separate.

The first branch raises pointedly the question whether the expression "trading with the enemy" is synonymous with "commercial intercourse with the enemy." The Supreme Court held in the negative, considering that the latter term was wider than the former. The view taken was that whereas "commercial intercourse" includes all forms of commercial negotiation, "trading with the enemy" is restricted to some act or transaction of a final nature, that is either the actual transportation of goods, or the conclusion of some binding contract or transaction resulting from the prior negotiations.

The learned Chief Justice stated the question reserved as he understood it, in these words: "The essential question is whether mere correspondence with an enemy on business matters in which

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both sender and receiver are interested without any resulting contract or transaction amounts to 'trading with the enemy' at common law." His Honor ultimately answered that question in favour of the respondent, considering that the words of Sir *Samuel Evans* in the case of the *Panariellos* (1), "where the intercourse is of a commercial nature it is usually denominated 'trading with the enemy,'" were too wide. His Honor also considered that the learned President did not intend them to convey more than to add transportation to ordinary transactions by which some "trading" in the sense of a completed contract was effected. His Honor, however, treated this as the only point of law demanding his consideration, and apparently did not apprehend there was any question as to the applicability of the legal test, whatever it was, to the correspondence actually in evidence. And the fact that his Honor so treated the question is, or may eventually be, a very material matter in the determination of this case. At the present juncture I say no more regarding it, than to indicate that it is still open.

The rest of the Court took the same view of the general question as the learned Chief Justice, and, in addition, rested their judgments on the possibility that "communications on business matters in which the defendant and Aron Hirsch & Sohn were interested" might be taken by the jury to include a communication by the defendant saying that he refused to do any business at all. I should have some difficulty in assenting to that interpretation being reasonably open upon those words alone, and more particularly having regard to the rest of the charge as appearing in the case stated. The observations of the Privy Council in *Blue & Deschamps* v. *Red Mountain Railway Co.* (2) are important in this connection.

The final consideration of this branch, however, remains until the case is returned with such of the correspondence as may be annexed to it. When that occurs, it may be that the conviction should be affirmed or quashed or a new trial granted. We are at present unable to say which course should be finally adopted.

As to the general question, I am of opinion the limitation placed by the Supreme Court on the legal phrase "trading with the enemy" is not well founded. I suggested during the argument, and further

(1) 84 L.J. P., 140 at p. 142. (2) (1909) A.C., 361, at pp. 367-368.

consideration has confirmed my impression, that the fallacy of that view lies in thinking of "the enemy" simply as "an enemy"—in other words, in regarding the members of the enemy country as separately prohibited individuals, instead of members of one prohibited political community. The war, so far as Germany is concerned, is as the Act itself states (sec. 2) between "His Majesty the King and the German Emperor." Trading with the enemy means, at common law, trading with the political community occupying the territory of the German Emperor, and all persons adhering to that community. The learned Chief Justice, after quoting from my judgment in *Moss and Phillips* v. *Donohoe* (1), observes: "Trading with the enemy therefore means trading with a person resident or carrying on business in the enemy country." Now, my object in that case was to show that enemy character attached to individuals not according to their personal nationality, but according to their territorial character. So far from regarding them as having individual separateness for the purpose, I was enforcing the opposite conception, and said (1): "When he" (the Sovereign) "declares war, the whole nation is at war, and is in a state of hostility to the whole of the opposing nation considered territorially."

That conception lies at the root of the present question. Whatever is "trade," not in the narrow sense of binding contracts between individuals or the exchange of goods in terms of a given arrangement, but in the larger sense of prosecuting trade as between the territories at war with each other, is "trade with the enemy." If we were bound to inquire whether a contract ensued from negotiations, we might be driven to inquire whether the law of Australia or the law of England or the law of Germany prevailed. In questions of private international law, as it is called, when mercantile transactions are interpreted and enforced in times of peace, that might be a very relevant inquiry. But on a question of "trade with the enemy" no such distinctions can arise. All intercourse is unlawful, either towards the enemy or from the enemy. In either case, it is "with" the enemy. Trading with a particular individual enemy, though the most common form of offending, is

(1) 20 C.L.R., 580, at p. 602.

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after all only an instance of the offence. Decided cases establish this beyond question.

Learned counsel for the Crown advanced the contention that all intercourse with the enemy is "trading," using "trading" in a rare and practically obsolete sense. He based it on the words in *The Rapid* (1), "intercourse inconsistent with actual hostility," which were there substituted by the Court for "trading with the enemy." The words "inconsistent with actual hostility" have reference, apart from recognized military communications, to contracts for ransom at common law, and so far as I am aware to nothing else. But in the case of *The Rapid* the word "intercourse" read in its surroundings must mean commercial intercourse, because it was used with respect to intercourse in relation to the property with which the Court was dealing. I reject on the one hand this suggested universal extension of the term "trading with the enemy," and on the other the restricted signification attached to it by the respondent.

"Trading with the enemy" means in law "commercial intercourse" direct or indirect between this country and the enemy country, including in the latter persons adhering to that country. The futility of indirectness to evade the law is conspicuously shown in the *Daimler Co.'s Case* (2).

The word "trade," when used with reference to foreign trade, has always had a wide signification. Without going to any earlier sources, we find in the opinion of the Attorney-General in 1681 this statement: "Your Majesty's subjects ought not to trade or traffic with any infidel country, not in amity with your Majesty, without your licence"; and further on he uses the phrase "to trade into India"—*Chalmers' Opinions*, at p. 582. Similarly, at pp. 590 to 597, in the year 1720.

In *The Neptunus* (3), in 1807, Sir *William Scott* said: "A declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce." Sir *William Scott* manifestly used the term "commercial intercourse" in the sense

(1) 8 Cranch, 155, at p. 162.
(2) (1916) 2 A.C., 307.
(3) 6 Rob. Adm., 403, at p. 405.

of *Bynkershoek's* "commercia" (*Quæst. Jur. Pub.*, lib. I., c. 3). He had previously so expressed himself in *The Hoop* (1). So the Supreme Court of the United States understood *Bynkershoek's* word in *Matthews* v. *McStea* (2); and so did *Story* J. understand it in *The Julia* (3), because the reasoning of the Court of Massachusetts was adopted, and as to this point see the report at p. 193. See also per Lord *Wrenbury* in *Sanday & Co.'s Case* (4), and per Lord *Reading* C.J. in *Halsey* v. *Lowenfeld* (5). *Chitty* on the *Law of Nations* (1817), at p. 1, assumes the identity of meaning of the two expressions; so does *Manning* on the *Law of Nations*, at p. 167. In *Vandyck* v. *Whitmore* (6) Lord *Kenyon* speaks of a "trading with an enemy's country." In *Chitty* on the *Prerogatives of the Crown*, published in 1820, we find (p. 171) the expressions "the general prohibition upon all traffic with the enemy" and "a trade with the enemy"; and see per Sir *Samuel Evans* in *The Kildonan Castle*. The numerous decisions by which property has been condemned without any transaction which would amount to trading between individuals, in the narrow sense, compel the admission that contract, or quasi-contract, as I may call it, is not the only criterion of "trading with the enemy." The decisions include the case where a subject sends for his own goods to enemy territory, not for the purpose of selling them to an enemy, but for the purpose of bringing them to his own country (*The Rapid* (7); *The St. Philip* (1747), cited in *Potts v. Bell* (8)). It includes the case of a ship merely sailing towards an enemy port, with the intention of going there (*The Abby* (9)). I pressed that case upon the attention of learned counsel, because it seems to me to be of great relevance to the present. Sir *William Scott* there said (10): "If the ship had been taken *on a voyage to a colony now become an enemy*, the Court would have required it to be shown, that due diligence had been used to alter the voyage, and to exonerate the claimant from the *charge of an illegal trading with the enemy*." It is clear from that passage, the italics being mine, and from the rest of the judgment, that the mere act of sailing would be "trading with

(1) 1 Rob. Adm., 196, at pp. 199-200.
(2) 91 U.S., 7, at p. 10.
(3) 8 Cranch, 181.
(4) (1916) 1 A.C., 650, at p. 671.
(5) (1916) 2 K.B., 707, at p. 712.
(6) 1 East, 475, at p. 486.
(7) 8 Cranch, 155.
(8) 8 T.R., 548, at p. 556.
(9) 5 Rob. Adm., 251.
(10) 5 Rob. Adm., at p. 253.

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the enemy." The commencement of the voyage, said Sir *William Scott*, would be "an act of trading." Its continuation would be equally so (see per Lord *Parmoor* in *Sanday & Co.'s Case* (1), and per Lord *Shaw* in *Horlock* v. *Beal* (2); see also *Halleck's International Law*, vol. II., p. 165). The mere entry into an enemy port is trading with the enemy (*The Teutonia* (3)). See also the *Nayade* (4), a report which clearly shows the ample meaning of "trade with the enemy."

An excellent example of the meaning of the word "trade" in relation to the enemy is found in the case of *The Speculation* (5). By Order in Council of 7th January 1807 it was ordered "that no vessel shall be permitted *to trade* from one port to another" belonging to France or her allies. (See *Edwards*, appendix D, note to p. 17). Sir *William Scott* said (6): "If this vessel was proceeding to Riga to be sold, I am of opinion that this would be in itself a trading in contravention of the Order of 7th January, and therefore the ship would be liable to confiscation." In the same appendix D, in the case of *The Pelican*, Sir *William Grant* spoke of a ship returning from San Domingo as "trading" in the sense we are considering, and said that if the port from which she sailed had been an enemy port she should have been condemned.

It was urged on behalf of the respondent that *Kershaw* v. *Kelsey* (7) was still of importance, notwithstanding all adverse references to that case. It was relied on as indicating what is meant by commercial intercourse. I cannot regard that case as a safe guide, but in this respect it is adverse to the respondent. The Court there said (8) "every kind of trading or commercial dealing or intercourse, whether by *transmission* of money or goods, or *orders for the delivery of either*, between the two countries" at war, "directly or indirectly, or through the intervention of third persons or partnerships, or by *contracts* in any form looking to or involving such transmission," is prohibited. Indeed, it was laid down in *Kent's Commentaries*, 7th ed. (1851), vol. I., at p. 74, under the heading "Trading with the

(1) (1916) 1 A.C., at pp. 669-670.
(2) (1916) 1 A.C., 486, at p. 507.
(3) 8 Moo. P.C.C. (N.S.), 411, at pp. 421-422.
(4) 4 Rob. Adm., 251.
(5) Edw., 344.
(6) Edw., at p. 346.
(7) 100 Mass., 561.
(8) 100 Mass., at p. 573.

Enemy," that " one of the immediate and important consequences of the declaration of war is the absolute interruption and interdiction of all commercial correspondence, intercourse and dealing between the subjects of the two countries." I would add that in appendix A and appendix C to the same volume of *Edwards' Reports* as I have quoted, in two Orders in Council (19th November 1806 and 15th July 1807), the phrase " commercial intercourse " is used in precisely the same sense as " trade " is used in the Order in Council of January 1807 already referred to. And in the case of *The Manilla* (1) they are referred to as if the two expressions were identical in meaning.

Reference to these earlier precedents is rendered necessary because the verbal accuracy of the summation of the learned President of the Admiralty Court in the case of *The Panariellos* has been questioned. When the case came before the Privy Council (2), their Lordships (1) referred to the judgment under appeal in terms which indicated they found no fault with it; (2) expressly said that the point was unavailing that the intercourse in that case fell short of technical " trading "; (3) held the charge of " trading with the enemy " proved because the goods were " so shipped as to be engaged in commercial intercourse with the enemy."

The Privy Council obviously used the two expressions as identical in import, and thought the interchange of expression justified by the authorities to which they had made reference. In the *Daimler Co.'s Case* (3) Lord *Shaw* appeared to have been clearly of opinion that " negotiation " might have been regarded as trading. His Lordship is there dealing with trading with the enemy, and in his fourth proposition says: " No firm or company wheresoever or howsoever directed can so trade " (that is, by the company itself), " nor," continued the learned Lord, " can anything be negotiated or transacted for it through any person or agency in this country."

If the word " trading " be critically examined, it does not necessarily import a concluded bargain. In *Owners of S.S. Edenbridge* v. *Green* (4) Lord *Halsbury* L.C. said: " A shopkeeper in London is trading as long as his shop is open, although at the particular

(1) Edw., 1.
(2) 85 L.J. P. 112.
(3) (1916) 2 A.C., at p. 330.
(4) (1897) A.C., 333, at pp. 335-336.

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moment of time to which you refer there may be no customer in his shop engaged in the act of barter." So if a man embarks on a trading adventure, he may succeed, or he may fail, or the adventure may be intercepted, but every act he does in the course of that adventure, is "trading." And if he is a British subject,and the adventure is one which connects itself in any way with the enemy, he has committed the act of trading with the enemy. It is impossible, as it would be unwise, to limit by enumeration the acts which would constitute trading with the enemy.

Lord *Stowell*, in *The Neptunus* (1), as far back as 1807 said "the world has grown more commercial," that is, in comparison with the time of earlier wars. So the Privy Council in *The Panariellos* (2) referred to the increased complexity of commercial intercourse and the multiplication of facilities for enemy dealings with goods. It is apparent that the mere instance of transportation, which was the particular method of effecting trade with the enemy, or the mere instance of a binding relation cannot now be the sole test.

The view, pressed by the respondent, that before the intercourse can amount to "trading" there must be a definite result—in the form of contract, or, as I term it, quasi-contract, or transmission or exchange—is inconsistent with the cases of the class of *The Rapid* and *The Abby* and *The Hoop*. A British subject commencing a voyage with his ship and cargo *en route* to Germany, and captured on the way, may have had no prior communication with that country. He may have had no "intercourse" at all in the narrow sense, that is, if actual contact, so to speak, is an essential factor in the intercourse. His transportation is not final, and in fact there has been no transportation to Germany if he is taken on the way. Nevertheless, upon the authorities, he is guilty of "trading with the enemy" and his property is confiscable. He has taken the first step, committed the first overt act, to carry out his intention of trading. No individual enemy could be pointed to as the person with whom he even intends to trade, he may even intend to retain the goods there for his own use, and yet, in the eye of the law, his

(1) 6 Rob. Adm., at p. 406. (2) 85 L.J. P., 112.

goods have " adhered to the enemy " (*The Nelly* (1)). See also the *Encyclopædia of the Laws of England*, 2nd ed., vol. XIV., p. 566.

How, then, consistently with that, can an actual contract be an essential element ? The truth is that the illegality of the transportation or the contract is the consequence of the rule, and not the rule itself. The rule itself is recognized, as it seems to me, by Lord *Parmoor* in the *Daimler Co.'s Case* (2). There the learned Lord, evidently referring to the Act, says : " If any official of the company in this country entered into any intercourse with the enemy directors or corporators, he would be liable to a charge of misdemeanour, and subject, if convicted, to a heavy punishment." His Lordship there assumes of course that the intercourse would be commercial intercourse. The expression " commercial intercourse " in relation to an enemy must connote for the effective operation of the principle involved a comprehensive meaning to both " commerce " and " intercourse."

The principle of prohibiting commercial intercourse is itself simple, but, as indicated by the Privy Council in *The Panariellos* (3) and by Lord *Parker* with the concurrence of three other learned Lords in the *Daimler Co.'s Case* (4), the sphere of its application widens with the expansion of its subject matter and its methods, and the necessities of self-protection for which vital purpose it arose. In the *Daimler Co.'s Case* Lord *Parker* said (5) that even a British company would assume an enemy character if the persons controlling it take instructions from enemies, and that any person knowingly dealing with the company in such a case is " trading with the enemy."

Now, suppose a person were, in such circumstances, knowingly to arrange for the delivery to the company of goods on approval, would not that be an act of trading with the enemy, even though the arrangement were never carried out ? It would be admitted on the strength of the decided cases, that if the goods were despatched by messenger, the act of trading would be complete even though a government officer intercepted them. But the argument is that

(1) 1 Rob. Adm., 219, note.
(2) (1916) 2 A.C., at p. 352.
(3) 85 L.J. P., 112.
(4) (1916) 2 A.C., at p. 344.
(5) (1916) 2 A.C., at p. 345.

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notwithstanding the distinct arrangement—short of contract—to forward the goods, there is no " trading " but commercial intercourse, which does not amount to " trading." Modern conceptions of trading and commerce, and the nature of the interests intended to be guarded by the rule against trading with the enemy, lead me to reject the distinction. *Robson's Case* (1) is an instance of the wide meaning attachable to " commerce." As to modern methods, I may instance the not impossible case of the transmission to the enemy by wireless telegraphy of a valuable invention which would revolutionize food production. That would, *ex concessis*, be intercourse; but why in our present understanding of foreign commerce would it not also be commercial intercourse ? And would not that enrichment of the enemy country be " trading with the enemy " even though it were gratuitous ? In my opinion it would. So, in my opinion, would be the offer of goods stored in a neutral country. The offence cannot depend on whether the enemy says " yes " or " no " to the trade operation of submitting the offer. The guilt of the subject is as great as if this offer were accepted : he has done all in his power to endanger his country by means of undoubted " commerce," and both reason and necessity demand that his act be regarded as an act of commerce.

It is enough, strictly speaking as to the first branch, to say that the general definition of trading with the enemy given by the learned Chief Justice at the trial was correct.

Again, if we had before us the whole of the correspondence it would be sufficient, at all events, to say whether it could possibly be regarded as negativing all commercial intercourse in the way suggested by *Gordon* J.

As it is, it seems to me desirable at this juncture to state what I think is the criterion of trading with the enemy.

Anything done, either by word or deed, (1) which is done with the intention of taking part directly or indirectly in any commercial transaction, operation or relation with the enemy country generally or with any person having at common law enemy character, and (2) which either creates or in some degree effectuates such a transaction, operation or relation, or else constitutes a step or would, if the

(1) (1915) 2 Ch., 124.

transaction, operation or relation were completely created, constitute a step in its creation or effectuation, is, in my opinion, at common law, commercial intercourse with "the enemy," and consequently "trading with the enemy."

It might still be a question in any given case whether the act charged as an offence against the Statute was trading with "the enemy" within the meaning of the particular sub-paragraph of sub-sec. 2 of sec. 2 upon which the charge was founded. For instance, it might be that "enemy" under sub-par. (*c*) has a larger connotation than under sub-par. (*a*). I express no opinion as to this, but merely guard myself against any supposition that the question has been overlooked.

The first branch, then, I decide against the respondent.

As to the application of the definition at the trial to the actual correspondence in evidence, it seems convenient, the Crown desires it, and the defendant does not object, that, in view of the second ground taken by two of the learned Judges of the Supreme Court, the case should be remitted to the Chief Justice to append the correspondence submitted to the jury as the act of contravention, or such of it as he considers necessary for the questions reserved.

With regard to the remaining question, I am clearly of opinion that there is no substance in it. I am not sure that the direction was not too favourable for the respondent, because I am not clear that the mere fact that two British firms had not actually transmitted the correspondence exonerates the defendant, even as to that correspondence. It does not enter into the consideration of this case, but I desire, to prevent it being thought I assent to the view without further consideration, to say that if it should ever become material I should wish to consider it in connection with the judgment of Lord *Strathclyde* in the case of *His Majesty's Advocate* v. *Innes* (1). However it may be, that fact does not clear him if he engaged in commercial correspondence with the enemy by means of the other agents. A man might duplicate his letters by sending identical correspondence to two separate intermediaries; if he succeeded in transmitting by means of one, he is not exculpated because

(1) (1915) Sess. Cas., 40, at p. 42.

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the other fails him. If authority were wanted, an analogous precedent is found in the case of *R.* v. *Hill* (1).

I agree that the appeal should be allowed, and the order made as proposed.

Gavan Duffy J. Rich J.

GAVAN DUFFY AND RICH JJ. Several points were argued before us, but every substantial question in the case turns on the meaning at common law of the expression "trading with the enemy." It is clear that by the common law all intercourse with an alien enemy is forbidden, but we have to determine what part of that intercourse is covered by the phrase "trading with the enemy." It appears originally to have been applied to sea-carriage or other transport, and it has since been used by Judges and text-writers to express varying expansions of that meaning, but we have no doubt that at the time of the passing of the *Trading with the Enemy Act* 1914 it embraced all commercial intercourse, or, in other words, all business dealings with an alien enemy, whether such dealings imposed legal obligations, or were preliminary to the imposition of such obligations, or were merely communications intended to promote or preserve business relations between the parties. We therefore think that the argument urged by the respondent before the Supreme Court is not sound. But it is said that the direction of the learned Chief Justice to the jury is wrong because, in obedience to it, the jury may properly have considered that the sending of a communication not intended to promote or preserve business relations, or even intended to put an end to such relations, constituted "trading with the enemy." The direction must be taken in connection with the evidence in respect of which it was given, and that is not before us. We think the case should be remitted to the learned Chief Justice with an intimation that it should be amended by setting out so much of the correspondence as in his opinion is necessary to enable the Supreme Court to determine whether such a miscarriage as is suggested may, in fact, have occurred.

POWERS J. I do not think it necessary to repeat, or to add anything to, the reasons given by my learned brothers in their judgments, why the proposed order should be made on this appeal.

(1) Russ. & R., 190.

I agree that the order should be made, and the "case reserved" should be remitted to the learned Chief Justice for amendment, or restatement, by the inclusion, in the case, of the letters, telegrams and cablegrams put in in evidence on the trial, or by setting out so much of the correspondence as, in his opinion, is necessary to enable the Supreme Court to determine whether the correspondence in question—referred to in his direction to the jury—was "commercial intercourse" in the sense that it was intended to preserve or further existing, or promote future, business relations with an enemy subject, by or through the persons mentioned in the second count, or any of them, or with the enemy regarded as the enemy country.

Appeal allowed and order appealed from set aside. Case remitted to the Chief Justice of South Australia for the addition to it, for the consideration of the Supreme Court of the State, of copies of the letters and telegrams which were admitted in evidence at the trial, or of such portion thereof as, consistently with the reasons of this Court and this order, his Honor may deem material for the purpose of elucidating his direction to the jury in relation to the points reserved. All questions of costs reserved.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher & Powers*.

Solicitors for the respondent, *Bakewell, Stow & Piper*.

B. L.