[HIGH COURT OF AUSTRALIA.]

BURKARD . . . . . PLAINTIFF;

AND

OAKLEY (COMMONWEALTH PUBLIC TRUSTEE) AND ANOTHER . . . . DEFENDANTS.

H. C. OF A. 1918.

SYDNEY, *Nov.* 25.

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

War Precautions—Regulations—Validity—Enemy shareholder—Transfer of shares to Public Trustee—Sale of shares—Defence power—War Precautions Act 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 4—*War Precautions* (*Enemy Shareholders*) *Regulations* 1916 (*Statutory Rules* 1916, *No.* 38), *reg.* 11—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (VI.).

Reg. 9 of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 authorizes the Attorney-General by order to declare (*inter alia*) that shares in a company held by an enemy subject are thereby transferred to the Public Trustee, and provides that thereupon such shares shall be transferred to and vested in the Public Trustee. Reg. 11 (2) provides that "the Attorney-General may, if he thinks fit, . . . direct the Public Trustee to sell the whole or any part of any shares which have been transferred to him and the Public Trustee shall sell the shares accordingly."

Held, that reg. 11 (2) is a valid exercise of the power conferred by sec. 4 of the *War Precautions Act* 1914-1916, and is within the defence power of the Commonwealth.

SPECIAL CASE.

In an action in the High Court brought by Louis Burkard against Robert McKeenan Oakley, Comptroller-General of Customs, as Commonwealth Public Trustee, and William Henry Barkley as Delegate of the Commonwealth Public Trustee, a special case for the opinion of the Full Court of the High Court was stated, which was as follows :—

This is an action brought by the plaintiff against the defendants claiming an injunction against the defendants, their servants and

agents, restraining them and each of them from selling or causing to be sold 5,250 shares in Whipstick Mines Limited, a company incorporated in New South Wales, of 4,500 of which the plaintiff was prior to 26th September 1916 the registered holder, and of 750 of which the plaintiff was prior to the said date entitled to become the registered holder; and further claiming a declaration that clause 2 of reg. 11 of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 is invalid, and that the defendants should pay the plaintiff's costs of suit: and pursuant to the order made herein on 28th August last the following case has been stated for the opinion of the Court :—

1. The plaintiff is and has at all material times been an enemy subject, and is at present interned in New South Wales by the Commonwealth military authorities.

2. Prior to 26th September 1916 the plaintiff was the holder of 4,500 shares in Whipstick Mines Limited, a company duly incorporated under the laws of the State of New South Wales, and was also entitled to be registered in the books of the said Company as the holder of 750 shares therein.

3. By virtue of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 the said 4,500 shares and the said 750 shares were on the said 26th September 1916 transferred to the defendant the Commonwealth Public Trustee against the plaintiff's wish and without any consideration to him.

4. The plaintiff alleges in the fourth paragraph of his statement of claim that at the date of the said transfer and at all material times the said shares were and are the joint property of himself and one Fred de Leeuw, a Belgian subject resident at Antwerp in Belgium, and that the plaintiff's interest in the said shares was in or about the month of May 1914 mortgaged by him to the said Fred de Leeuw to secure certain moneys then and still owing by the plaintiff to the said Fred de Leeuw.

5. The defendants in par. 3 of their statement of defence stated that they would contend that even if the said allegations in par. 4 of the statement of claim are true in fact (which they denied) the same are not material to the issues in this action.

6. The defendants by direction of His Majesty's Attorney-General threaten and intend to sell the whole of the said 5,250 shares by

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virtue of the provisions of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 unless restrained from so doing by the order of this Honourable Court.

7. The plaintiff does not consent to the said shares or any of them being sold by the defendants.

The questions for the opinion of the Court are :—

(1) Is clause 2 of reg. 11 of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 invalid and *ultra vires* the Governor-General ?

(2) Is the *War Precautions Act* 1914-1916 if and so far as it purports to authorize the making of the said clause of the said Regulations *ultra vires* the Parliament of the Commonwealth of Australia ?

(3) Are the said allegations contained in the fourth paragraph of the statement of claim or any of such allegations material for the purposes of this suit ?

8. The parties agree that the Court may make such order as to costs of this special case as to the Court may seem proper.

Leverrier K.C. (with him *J. A. Browne*), for the plaintiff. Accepting the decisions of this Court in *Farey* v. *Burvett* (1) and *Pankhurst* v. *Kiernan* (2), reg. 11 (2) of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916 is, nevertheless, *ultra vires*. Once the shares are transferred to the Public Trustee under reg. 9 so that they are entirely out of the control of the enemy shareholder, the defence of the Commonwealth cannot be served by selling the shares. There is no confiscation of the shares, and the holding of the money received on a sale cannot conduce to defence. Any benefit that can arise from a sale is too remote to justify the regulation. [Counsel also referred to *In re R. Pharaon et Fils* (3).]

Blacket K.C. and *Flannery*, for the defendants, were not called upon.

GRIFFITH C.J. I do not think it necessary to say more than that I can see no reason to doubt the validity of the regulation impeached.

(1) 21 C.L.R., 433. (2) 24 C.L.R., 120. (3) (1916) 1 Ch., 1.

BARTON J. These regulations are made under sec. 4 of the *War Precautions Act* "for securing the public safety and the defence of the Commonwealth." That with which we are immediately concerned is reg. 11 (2) of the *War Precautions* (*Enemy Shareholders*) *Regulations* 1916. After a provision in reg. 9 that after 15th April 1916 the Attorney-General may by order declare that (*a*) shares specified in the order, or (*b*) some or all of the shares held by (*inter alios*) an enemy subject, are thereby transferred to the Public Trustee, with other consequential provisions, reg. 11 provides that "(1) Any enemy subject or naturalized person of enemy origin, whose shares have been transferred to the Public Trustee under these Regulations, may apply in writing to the Attorney-General for a direction to the Public Trustee to sell the whole or any part of the shares which have been transferred to him. (2) The Attorney-General may, if he thinks fit, and whether he has received any such application or not, direct the Public Trustee to sell the whole or any part of any shares which have been transferred to him, and the Public Trustee shall sell the shares accordingly." The plaintiff is an enemy subject. There has been a direction by the Attorney-General under reg. 11 (2) to the Public Trustee to sell certain shares which had already been transferred to him under reg. 9, and it has been contended that reg. 11 (2) is *ultra vires*. It is not contended that the power conferred by reg. 9 on the Attorney-General to declare shares to be transferred to the Public Trustee is *ultra vires*, but it is contended that reasonable precaution for the public safety and the defence of the Commonwealth with regard to disposing of the shares of enemy aliens cannot be held to justify reg. 11 (2). I do not think that we can say that. Granted that the power conferred by the *War Precautions Act* will support an order declaring that the shares are transferred to the Public Trustee, and a vesting of the shares in him by virtue of the order, it does not seem to me to be an unwarranted exercise of that power to authorize a sale of the shares so transferred. It may be that in some instances a beneficial interest remains in some person, firm or company, notwithstanding the transfer to the Public Trustee; but the shares are to be transferred in the books of the company to the name of the Public Trustee, who then has the sole control of the

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shares and of their disposal, subject to the Regulations. It is contended that the enemy shareholder may deal with his beneficial interest in the shares. That may or may not be so. If he has that right it may, on the one hand, be a due precaution for the public safety to take away that power to deal with the beneficial interest by disposing of the shares and handing the money, under reg. 11 (3), to the person by whom the shares were transferred unless the Attorney-General otherwise directs. On the other hand, it may be a wise precaution in the interest of the enemy shareholder himself that the Public Trustee should be able, by selling the shares, to prevent any undue loss to the beneficial interest through a fall in the market value. In whichever way the regulation is looked at, it is nothing more than the application of a little common sense to the consequences of an obviously valid regulation. I reject altogether the idea that reg. 11 (2) is to be regarded as an invasion of State rights. If that were so, State legislation would have to be invoked to enable the Public Trustee, an officer of the Commonwealth, to divest himself of the shares in the event of its being unsafe to the Commonwealth or needlessly injurious to the enemy shareholder that the officer should continue to retain them. That would be an absurd result. The provision is really incidental—it may fairly be considered necessarily so—to the exercise of the power.

I think, therefore, that the first and second questions should be answered in the negative.

GAVAN DUFFY J. In view of the previous decisions of this Court I think it is impossible to hold that any part of this regulation is invalid.

POWERS J. I agree that reg. 11 (2) is valid.

RICH J. In certain events the vesting of shares of alien enemies in the Public Trustee might have the effect of reducing the number of shareholders below seven, and if the Public Trustee may not sell and transfer the shares a winding up must follow. The company then ceases to carry on business except for the purpose

of the winding up. This is clearly against the interest of the Commonwealth, and justifies the exercise of the power.

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Questions 1 and 2 answered in the negative. Question 3 not answered. Plaintiff to pay costs of special case.

Solicitors for the plaintiff, *Villeneuve-Smith & Dawes.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

BARTON-SMITH . . . . . APPELLANT;
INFORMANT,

AND

RAILTON AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Local Government—Disqualification of aldermen—Penalty—Interest in agreement with council—Gift to aldermen of free passes by ferry company leasing lands from the council—Local Government Act 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *secs.* 70, 71.

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SYDNEY, *Dec.* 17.

Griffith C.J., Barton and Rich JJ.

Sec. 70 of the *Local Government Act* 1906 (N.S.W.) provides that a person is disqualified for the office of alderman if "(*j*) he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council, except in a contract or agreement for or in relation to . . . (vi.) any lease granted before his election of land belonging to