

Judgment.Starke J.

The plaintiff was born in Australia of British parents. She married in 1892 Martin Simmat, who was born in Germany and landed in N.S.Wales about the year 1879. Simmat had applied in or about the year 1888 to the proper authorities in N.S.Wales for a certificate of naturalization which was prepared but never issued. see Aliens Act 39 Vic. No.19 sec.5 .

Simmat was a watchmaker and jeweller by trade. Apparently he made a small competence for in 1897 he retired from business and his property was realised and invested in the name of his wife - the plaintiff - in the shares of various public companies.

In 1914 war broke out and was soon followed by legislation and regulations "for securing the public safety and defence of the Commonwealth" .

One regulation was that called the War Precautions (Enemy shareholders) Regulations 1916*, purporting to be passed pursuant to the War Precautions Act. By these regulations enemy subjects and naturalised persons of enemy origin were required to transfer shares held by them in any Company incorporated in the Commonwealth to the Public Trustee who was empowered to hold them until after the end of the war or to sell them in manner prescribed. Regulations 2,4,5,5a

In the regulations unless the contrary intention appears Enemy Subject means (inter alia) a subject of a country with which the United Kingdom is at war r2.

Naturalised person of enemy origin means a person who having been a subject of a country with which the United Kingdom is now at war is a naturalised British Subject by virtue of a certificate of naturalization issued in any part of the British Dominions to himself - - - or (in case of a married woman) to her husband and includes the wife of any such naturalised person. r 2.

And for the purpose of the regulation a woman who is the wife of an enemy subject and who prior to marriage was a natural born British subject shall be deemed to be a ~~xxxx~~ naturalized person of enemy origin. r 5A - added by Stat. rule 1916 No. 74 20th Mar. 1918. The decisions of this Court in Burkard v Oakley 25 C.L.R. 422 and 27 C.L.R. 520 establish, in my opinion, the validity of these regulations.

The plaintiff has not had the advantage of professional assistance in framing her claim. It is not therefore surprising that her action is defective as to parties and her statement of claim contrary to the rules of the Court. But I am prepared, as I said at the ~~trial~~ ^{hearing} to make any amendment as to parties and to the statement of claim which would support any real claim against the Commonwealth. The matters ~~alleged in~~ ^{raised by} the statement of claim ~~on~~ ^{or} which I am prepared to accept, for present purposes, as ~~alleged in~~ ^{raised by} the statement of claim may be stated as follows :- (1) That the provisions of the War Precautions (Enemy Shareholders) Regulations 1916 are not warranted by law. Burkard V Oakley disposes of this contention.

(2) That the plaintiff was not a person subject to the regulations. It is not very material to determine whether Simmat was an enemy subject or a naturalised person of enemy origin. The better view I think is that he was an enemy subject for his Certificate of Naturalization was never issued to him see. Aliens Act supra ^{Reg. 2}. If Simmat~~x~~ was an enemy subject regulations 5A prescribes that a woman who is the wife of an enemy subject and who prior to marriage was a natural born British subject shall be deemed to be a naturalised person of enemy origin; if Simmat was not an enemy subject then he was a naturalized person of enemy origin and that term includes the wife of any such person. Reg. 2.

Consequently in my opinion the plaintiff was a person to whom the regulations applied.

She was therefore required under the regulations to transfer

that the Public Trustee sold them ^{4.3} and alleged that she did so and
her shares to the Public Trustee. *showed her share that*
the plaintiff alleged that she was to receive her share from the Public Trustee
I was referred on behalf of the plaintiff to the Aliens Restriction

Order 1918 r.2 which provides that a woman born of a British subject who has married an alien enemy is not to be deemed an alien enemy.

But this definition is for the purpose of the restrictions authorised by that order and has no bearing upon the provisions of the Enemy Shareholders ^P Regulations.

(3) That the Public Trustee had no authority to sell her shares. The statement of claim does not make it very clear whether the plaintiff means to allege that the sale was made by direction of the Attorney General or was made without such direction and ^{so} ~~was~~ compelled the defendant to justify under r.11 (2). But I think the proper construction of the claim taken as a whole is that the sale was made by direction of the proper authority under the regulations but in abuse of that authority.

I deal separately with the suggestion of abuse of authority. If ~~the~~ ^{the} regulation is valid, as I have already held, the allegations made by the plaintiff merely show that a sale was made within the power. ~~and~~ I feel no doubt that the facts are as I have taken the plaintiff to allege them,

(4) That the sale was made in abuse of power.

The sense in which this phrase is used in the ^{statement} ~~statement~~ of claim covers both the want of power and a hard, unjust, oppressive, and unnecessary exercise of that power. The former sense has already been disposed of and the latter attacks the ^{discretion} ~~discretion~~ of the officer appointed by the regulations to authorise the sale. But no Court of law can interfere with the exercise of that discretion. *Theodore v Duncan* 1919 A.C. at 706; *Widge Council v Bonney* 4 C.L.R. at pp. 982-6.)

(5) That the plaintiff has suffered loss by reason of the sale of her shares.

7.4.
There is no allegation in the statement of claim of negligence in the conduct of the sale or of ~~the~~ failure ^{on the part of} by the defendants to account for the monies realised by the sale. ~~and~~ So far as I can gather from papers submitted to me by the plaintiff such an allegation could not have been sustained in fact.

The defendants demurred to the statement of claim and the demurrer came before me for argument and determination.

An application in Chambers to strike out the statement of claim would have been more advisable and I mark my opinion of the procedure followed by the defendants in this case in the order as to costs. But as the matter stands the better course is to dispose of the demurrer. The statement of claim, as I have indicated, alleges no cause of action in the plaintiff. ~~and~~ The demurrer is *therefore* allowed.

Demurrer allowed. Judgment for defendant. Each party to abide ~~his~~ ^{or her} own costs.