

**indar Chand Vs. Emperor**

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**Court :** Kolkata

**Decided On :** Mar-24-1915

**Reported in :** (1915)ILR42Cal1094

**Judge :** Woodroffe, ;Beachcroft and ;Greaves, JJ.

**Appellant :** indar Chand

**Respondent :** Emperor

**Judgement :**

**Beachcraft, J.**

1. The appellant has been convicted on two charges under Section 3 of Ordinance No. VI of 1914 for having contravened the provisions of Section 5 (7) of the Royal Proclamation of the 9th September relating to Trading with the Enemy. He was tried on three charges, but acquitted on the second. The first charge was to the effect that he had traded in a case of mica destined for a German firm in Germany, and third was to the effect that he had supplied to one Checcacci of Genoa 11 cases of mien, for and by way of transmission to a certain firm in Germany, and thereby traded in the said goods destined for the said enemy country and the said enemies. The Magistrate convicted that appellant on both charges of trading in goods destined for the enemy, and sentenced him to rigorous imprisonment for 18 months on each charge, the sentences to run concurrently, and also to a fine of Rs. 1,000 on the third charge.

2. The facts are not in dispute. The appellant is a member of a firm in Calcutta and was in charge of the mica business of the firm. The firm had an agent, named Checcacci, in Genoa, who was apparently their sole agent in Europe. Before the outbreak of the war the appellant had shipped a case of mica per s.s 'Nore' to a German firm, trading under the name of Rheinische Glimmerwaren Fabrik at Cologne vid Antwerp-Owing to the outbreak of war the ship did not proceed beyond London. On the 20th August Checcacci wrote to the accused that the German firm, whom for brevity I shall call the Rheinische Co. would pay for the case of mica on receipt of the goods. The accused then communicated with a London firm, Messrs. Baker and Startin, who had been buyers of mica from accused's firm, asking them to take delivery of the case from the London branch of the National Bank of India, and at the same time asked the National Bank in Calcutta to instruct their London branch to deliver the case to Baker and Startin. This was done, and the mica came into the hands of Baker and Startin. Apparently it never again came directly into the hands of the accused or Checcacci, for the Magistrate states in his judgment that Baker and Startin sold it. He does not, however say when Baker and Startin received it, nor when they disposed of it, and we have not been referred to any evidence on the point.

3. The prosecution relies on certain correspondence between the accused and Checcacci to establish the fact that negotiations went on between the Rheinische Co. and Checcacci on behalf of and with the authority of the accused, and that attempts were made to get the mica to Checcacci at Genoa to be forwarded to the Rheinische Co.

4. It will not be necessary to quote the correspondence in detail. A short reference to the various letters will be quite sufficient to indicate the position of the parties. In dealing with the correspondence it must be remembered that postal arrangements were so dislocated that we generally find answers dated about a month later than the letters to which they are replies.

5. On the 20th August, Checcacci wrote to accused that the Rheinische Co. would pay for the mica on receipt of the goods. The accused replied, on the 24th September, that he had instructed the Bank to deliver the mica to Baker and

Startin, that if Checcacci wanted the mica he should apply to Baker and Startin, whom the accused was instructing to deliver it to Checcacci, but Checcacci must not give it to the Rheinische Co. without payment. On the 9th September Checcacci wrote that the Rheinische Co., in common with other German firms, was enquiring for mica. He mentioned the arrival of s.s. 'Nore' in London. In the answer, on the 8th October, the accused stated that ho had already told Checcacci of the arrangements in connection with the mica on the 'Nore'. He recommended him not to sell to German buyers, but in a postscript added that he might sell to German buyers, if the Government did not mind or it was not illegal or if London people were selling. On the 16th September, Checcacci wrote that the Rheinische Co. wanted the case of mica sent to Rotterdam, but that he himself wanted it at Genoa. Replying on the 15th October, accused referred to the informal ion given in his letter of 24th September, adding that he hoped Checcacci had done the needful, which apparently means had applied to Baker and Startin, and repeated his injunction not to deliver without payment. On the 22nd October in answer to n letter referring to offers by German firms, accused repeated his information about telling Baker and Startin to deliver the case of mica arid again told Checcacci to deliver it against payment. These instructions were again given in a letter of the 29th October, but this letter being detained by the Censor never reached Checcacci, in a later letter of 29th November accused expressed the hope that Checcacci had applied to Baker and Startin, that he had done the needful, which evidently means sold the mica and sent on the money. This letter wan stopped by the Censor.

6. This is as much as in material to the first charge, though the matter was referred to in two other letters of Checcacci, one of 21st October, in which he showed his displeasure at accused having mixed up Baker and Startin in the matter, and refused to ask for the case, and another of 12th November, in which, he promised t enquire of Baker and Startin, who had never said a word.

7. The Magistrate has found that with the full authority of the accused Checcacci had entered into an arrangement with the Rheinische Co. under which the caso was to be transferred to the Rheinische Co. which was to pay for it and was awaiting its arrival, and that the arrangement was sufficiently completed to justify

the inference that but for the difficulty of exporting the mica from England it would have been delivered to the enemy, He found that the acts of the accused and his agent constituted trading in goods destined (sic) for the enemy. To his resume of the facts established, he might have added this that the accused had done all in his power to enable the goods to be sent (sic) to Genoa.

8. It is argued for the appellant that the facts found by the Magistrate do not justify the conviction. It is contended in the first place that, as all the other acts specified in Section 5 (7) imply handling of goods, the term 'trade' in the same Section involves handling, and the offence of trading is not complete without it. I cannot accept this contention. This is not one of those cases where the words used to define the offence are more or less synonymous and relate practically to the same or similar acts. The Section contemplates four sets of acts which are entirely separate, the one from the other.

9. All commerce is presumed to be for the benefit of the country which is a party to it, whether the country is paying for goods received or is receiving payment for goods supplied, And as commerce is presumed to be advantageous to an enemy country, the object of the Proclamation is to prevent the enemy receiving assistance by way of commerce. Section 5 (7) is designed to strike at that commerce by making penal certain operations of commercial intercourse, and has in view not only direct, but also indirect means of supply. When analysed the Section will be found to contemplate four distinct acts, any one of which may form, closely or remotely, part of the process of supply to an enemy or receipt from an enemy. The first is supply to or receipt from the enemy himself, the second is supply to an intermediary for transmission to the enemy, or receipt from an intermediary by way of transmission from the enemy, the third is the dealing in goods which are to be sent to the enemy or which have come from the enemy, the fourth is the carrying of goods to the enemy or from him. The third is the case under discussion.

10. The terms are wide enough to include trading between persons, neither of whom is an enemy, if the goods are intended to be sent to an enemy, and also the case where one of the parties trading is an enemy. In the latter case if the

trading comprises an actual supply of goods, the offence would also fall within the first clause.

11. It will be noticed that there are two essentials requisite to complete the offence, (i), a trading, (ii) in goods destined for an enemy. What is trading There was considerable discussion at the Bar as to the meaning of the term, and reference was made to various decisions on Prize Law to support the proposition that actual handling of goods was essential. I do not propose to refer to these authorities, for decisions on Prize Law must in the very nature of things relate to instances of handling of goods. I take to be included in the term 'trading' any commercial transaction between parties which has for its object the transfer of goods by purchase, sale, barter or exchange. I do not consider it necessary that goods should in fact pass. A man who takes a cargo of beads or bangles and offers them for sale to South Sea Islanders trades in those goods, even though he may not succeed in selling a single article. Language must keep pace with changes in the actual conditions of life. And with improvements in communications and development of commerce many kinds of goods become the subject of trading even before they actually come into existence. The term 'trading' cannot be limited to cases where one of the parties is actually in physical possession of the goods.

12. Now what are the facts? The accused had had dealings with the Rheinische Co. before the outbreak of the war. After the outbreak of war, his agent Checcacci is in communication in respect of the case of mica with the Rheinische Co., which offers to pay on receipt of the goods. The accused writes to Baker and Startin to send the goods to Checcacci, and writes to the latter to get the goods from Baker and Startin and to deliver them to the Rheinische Co., on payment. We do not know the exact understanding on which Baker and Startin paid for the goods. They were old customers of accused, and it may be that the accused wanted them to oblige him by purchasing the goods or that he merely wanted them to get the goods from the Bank and hold them at his disposal. We have only one letter which passed between the two firms, the letter of the 23rd October from Baker and Startin to accused's firm, and this letter to my mind supports the latter conclusion. Baker and Startin write, 'We are taking up this case as requested by you and will do our best to dispose of it at invoice rates. If Baker and Startin were purchasers

of the mica, it would be a matter of no concern to the accused at what price they disposed of it. Also they point out that it will be impossible to send the mica to Checcacci. Then referring to some other goods which presumably accused had also asked them to pay for they say, 'We await details before deciding if we can pay for them. It is understood of course that we can dispose of any such goods in order to release our money as quickly as possible.' I read the whole letter as an agreement to temporarily accommodate accused, by paying the Bank, getting delivery of the goods and disposing of them, for accused. The accused also evidently thought the mica was at his disposal when he instructed Baker and Startin to send it to Checcacci. In fact Baker and Startin disposed of the mica. I do not know when, nor whether on their own account or on account of accused. They could not have got it before the 23rd October, and the letter of the 14th December from the National Bank, Calcutta, to accused suggests that they did not even get the documents before November, allowing six weeks for communication of that fact to pass from the Bank in London to the Calcutta branch and from the latter to accused.

13. But whatever may have been the position of Baker and Startin, does the mere accident that accused could not actually get his goods to Checcacci alter the fact that he was trading in them I think not. He offered to an enemy firm goods which he thought he was in a position to send to them, and he did all that lay in his power, to get the goods to them. This to my mind was clearly trading.

14. Now I come to the second essential of the offence. It is argued that the mica does not come within the description of goods 'destined for an enemy,' for when originally consigned to the Rheinische Co. that firm was not an enemy, and when the mica was taken by Baker and Startin in London its destination was no longer Germany. This argument is based on what is to my mind a misinterpretation of the meaning of the words 'destined for an enemy.' That phrase cannot refer to the destination before the trading takes place, but to what will be the destination as the result of the trading, or after it takes place. An example will show that it must be so. Suppose A ships a quantity of goods for Germany in the care of an agent B. On the way B sells the goods to C who diverts them to England. Here the goods are in the first instance destined for Germany, they are so destined at the time that

B and C trade in them, but B and C obviously do not commit an offence against the Proclamation for they in effect carry out its object by preventing the goods from reaching tint enemy country. But if A sells to B goods, which ho known B intonds to send to Germany A and B both commit an offence against the Proclamation, for they trade in goads which are intended for, for that is all that 'destined for' means, an enemy country. In this case the accused in trading in the goods intended that they should go to Germany and the purchasing company intended the same. The offence of the accused is, therefore, in my opinion complete.

15. He is also, on the facts established, guilty under Section 3 of the Ordinance for another reason in that he abetted the supply of goods to an enemy. It was suggested in the course of argument that even if he was not guilty of trading in goods destined for the enemy he was guilty of such abetment. Learned Counsel's answer was that though instigation to sell to an enemy would be an abetment yet, as the proposal in this case came to accused from Checcacci, the accused could not he said to have abetted supply by his agent. The argument is ingenious but fallacious. Instigation is not limited to the person from whom the proposal first moves. In his letters, both of 22nd October and 29th October the accused directed Checcacci to deliver the goods to the Rheinische Co. against payment. The last mentioned letter not having reached Checcacci would not be an instigation, hut the letter of 22nd October was. It was not as suggested, merely a case of acquiescence but of positive direction.

16. Even if the charge as framed failed I should, therefore, be prepared to convict accused of abetment of supplying goods to the enemy. It was not suggested that he would be in any way prejudiced by the absence of a charge of abetment. The case depends entirely on the correspondence, and it has been reiterated on behalf of the accused that he has in every way assisted the prosecution by putting at the disposal of the Crown the whole of his correspondence.

17. The mica which forms the subject matter of the third charge bad also been shipped from India before the war broke out. Fourteen cases of mica had been shipped to Marseilles; eight cases by s.s. 'Chybassa,' for one Drouet of Paris, and six cases by ss. 'Nevassa,' three for Drouet and three for the Manufacture

Parisienne. The former consignment was landed at Marseilles, but the latter was sent on by mistake to London, The consignees were unable to take delivery, and the accused, having been advised of this by the Bank, wrote to Checcacci, on the 17th September, to try and get the goods and reship them to him. On the 24th September having the meanwhile received a letter from Checcacci, dated 20th August reporting what he had already learned from the Bank, accused wrote that he had instructed the Bank to deliver to Checcacci. Letters from Checcacci of the 7th and 10th September speak of a growing demand both in Germany and elsewhere for mica, and Checcacci advised accused to have a stock of mica at Genoa. In answer to the first letter accused wrote the letter of the 8th October, to which I have already referred, advising Checcacci not to sell to Germans, subject to the qualification mentioned in the postscript. Then on the 16th September Checcacci wrote that Jaroslaw had telegraphed to have the mica which had been consigned to Drouet and the Manufacture Parisienne sent to Genoa, and he asked accused to tell the Bank to make over the documents to him, on which he would dispose of the goods.

18. The firm of Jaroslaw's Erste Glimmerwaren Fabrik was an old customer of accused, with its head office in Berlin. From the terms of Checcacci's letter it would appear that he had been in communication with Jaroslaw about this particular consignment of mica. Accused answered this letter on 15th October saying that he had told the Bank to deliver the documents. He says 'We trust you would have received the same from them and brought those cases to Genoa. Please try your best to sell them elsewhere and remit us the amount.' It is suggested for the appellant that the word 'elsewhere', in view of the previous letter of the 8th October, means to some persons other than Germans. I think there can be no doubt that it means elsewhere than to the original consignees. Accused obviously does not mean to exclude Germans, for in the same letter he is consenting to the sale to the Rheinische Co. What he said in his letter of the following week is very clear. Checcacci had written on the 23rd September, 'Jaroslaw...wish to buy the R. C. 1, 2 & 3 lying at Marseilles.... Please instruct the Bank to deliver me free the documents for these goods. I shall have them sent to Genoa and will sell them from here. I cannot sell them from Marseilles, as buyers are Jaroslaw or Brandt or others whom the English Banks will not accept drafts



upon....' Then he refers to an offer by the Rheinische Co. and an Austrian merchant, and says 'there are no stocks on the Continent, if we are clever we shall gather all the trade of the Continent in our hands for now and for the future, but we must act quick and in earnest,' Accused's reply was an acceptance of the proposal and a direction to sell at profitable prices. He wrote 'We have already paid the money which the Bank advanced to us and instructed the Bank to deliver those documents to you free by cable, which we trust on receipt of that cable they have delivered those documents to you and you have brought those oases to Genoa. Please try to sell them promptly at profitable prices.' On the 30th September, Checcacci, who of course did not receive any of accused's instructions, even in answer to his earliest letters, till a latter date, again wrote that Jaroslaw wanted the goods. Accused's answer of the 29th October in which he repeated his instructions was detained by the Censor, On the 7th October Checcacci reported the sale of six cases to Jaroslaw, and that he hoped to sell him the other eight accused's reply on the 29th October, for this letter answered two of Checcacci's, was that Checcacci ought to have sold the six at a higher price, and that he must try to sell the eight at profitable prices. On the 14th October Checcacci reported having sold all 14 cases to Jaroslaw, but he had cancelled the sale of three as Drouet wanted them. On the 12th November Checcacci reported having shipped eight cases to the Jaros Mica, Company and received a cheque for the amount. The other three cases were apparently not delivered as, on the 19th November, Checcacci writes that the sis cases were still under consideration at the London Custom House.

19. There was some discussion arising out of this last letter as to whether the eight oases of mica were delivered to Jaroslaw or to some other Company. I feel no doubt that Checcacci in writing of the Jaros Mica Co. refers to Jaroslaw in spite of some confusion raised by the passage in the letter which refers to 'this American Co' and the later passage 'send me samples...and I shall propose them to the Jaros Cincinnati Co. and Microw Mica Co. of Chicago.' It is suggested by the learned Advocate-General that the letter is a blind and that the writer is referring to German Companies. Perhaps it is so. But that fact should not go against the accused. Up to this point the correspondence had been perfectly straightforward. There is no reason to suppose that accused had at any time used veiled language in his letters to Checcacci, and if the latter suddenly took to doing so, any adverse

inference that, might be drawn against Checcacci from that fact must not reflect on the accused.

20. In this case, as in the first case, we have the fact that Checcacci was dealing with an enemy firm and finally sold to it the cases of mica which form, the subject matter of the charge and delivered some of the cases. We also have the fact that accused directed Checcacci in the letters of 15th, 22nd and 29th October, the first two of which reached Checcacci for they were answered, to sell the mica. But it is sought to exonerate the accused by a fact which distinguishes this case from the first, viz., that Checcacci sold the goods before he had any instructions from the accused to do so. He reports the sale of six cases in his letter of the 7th October and of all 14 in his letter of the 14th October, whereas it was only on the 21st October, that Checcacci received accused's letters of 17th and 24th September, and even in those two letters accused did not authorise Checcacci to sell to Germans. In the first he only told his agent to get the goods into his possession or reship, in the second he says he has told the Bank to deliver the mica to him and asks for an advance on it.

21. Checcacci, however, did not actually part with the mica till the 12th November on which date he also got payment for it. At that time he had received accused's letters of 8th October and 15th October. In the first accused had instructed him not to sell to Germans and then qualified the instructions in the postscript. The letter of the 15th was the one in which he told Checcacci to try and sell 'elsewhere.' At the time of the writing of the former letter, though trading with the enemy had been forbidden in the Royal Proclamation of the 5th August, published in India on the 12th September, a month before the letter was written, disobedience to the Proclamation had not been made an offence. But when the second letter was sent the Ordinance making disobedience to a Royal Proclamation penal had been published. Accused's instructions even of the 8th October did not reach Checcacci till early in November; long before they reached him they had become penal, accused was in a position to countermand the instructions and as he did not do so he must be held liable for the result arising out of his instructions. It is true that he qualified the permission to sell by the proviso, 'if the British Government do not take any offence or be contrary to their law or the London people are still selling

them,' but the accused cannot shelter himself by saying he left the matter to the discretion of his agent. The nature of his instructions will of course very largely affect the punishment to be awarded, but it will not affect the liability. As the goods, or some of them, were in fact delivered to an enemy the accused has committed an offence within the first Clause of Section 5 (7), viz., 'supplying goods to an enemy.' The offence does not come within the terms of the second Clause, which was the charge framed by the Magistrate, for accused supplied the goods to Checcacci not for transmission to an enemy, but with instructions contained in his letters of the 17th and 24th September.

22. The accused would also be liable for abetment of the offence of supplying goods in that in his letter of 32nd October he instigated his agent to sell to an enemy firm. The instigation constitutes the offence. In fact Checcacci had reported the sale of all 14 cases before the letter reached him but that was obviously a revocable arrangement and was revoked in respect of three cases. Eight of the cases had also been delivered before the letter reached Checcacci. There may be abetment by instigation of an offence which cannot in fact be committed, In this case three of the cases out of the 11, which Jaroslaw was to have, remained undelivered when Checcacci got accused's letter of the 22nd October, and in respect of these three, at any rate, there cannot be the slightest doubt that the accused committed the offence of abetting the supply to an enemy.

23. On two grounds, therefore, I consider the accused has been rightly convicted in respect of the subject matter of the third charge.

24. It may even be that accused would be liable for acts contravening the Proclamation, done by his agent, even if those acts were directly contrary to his instructions on the principle that where an act is itself an offence apart from any intention a principal is liable for his agent's acts. Whether that principle applies in the present case I do not consider it necessary to express an opinion.

25. The offence of trading with the enemy in contravention of the Royal Proclamation is an extremely serious one, and it is doubly serious if it takes the form of one of His Majesty's subjects supplying an enemy with material which can be used for the prosecution of the war while the efforts of His Majesty's Naval

forces are directed to stopping such supply. If the sentence of imprisonment imposed by the Magistrate has had the effect of bringing home to the public the gravity of a disregard of the Royal Proclamation it will have done good. But in the circumstances of this case I do not consider it necessary that a sentence of imprisonment should be imposed. The situation is novel, and the legislation is novel. The effects of the Proclamation are for some time but indistinctly realized even in England; there must be still mere uncertainty in India. In both cases the goods had been shipped before the outbreak of war, and though there is reason to think that owing to Checcacci's bad advice the accused allowed his business instincts to overcome his ideas of good citizenship, there is much to be said in respect of the first charge that he was carrying out a bargain entered into before the war. I think the convictions should be upheld, but that we should alter the sentence on the first charge to one of the maximum fine which the Magistrate could have imposed, viz., a fine of Rs, 1,000 and on the third charge remit the sentence of imprisonment allowing the fine to stand: in default of payment of fine in either case the accused to undergo rigorous imprisonment for six months. I trust the reduction of the sentence will not give birth to any false ideas as to the sentence that is likely to be imposed in case of any contravention of the Royal Proclamation in future.

26. I understand that my learned brother, while agreeing that the appeal on the third charge should be dismissed subject to the reduction of sentence proposed, is of opinion that the appellant should be acquitted on the first charge. In the circumstances the conviction on the third charge is upheld and the sentence reduced to one of a fine of Rs. 1000. In regard to the first charge our opinions must be laid before the learned Chief Justice for reference to a third Judge under Section 429 of the Code of Criminal Procedure.

Greaves J.

27. This is an appeal from a conviction of the accused by the Chief Presidency Magistrate of Calcutta of two offences in contravention of the provisions of Clause 5 (7) of His Majesty's Proclamation of the 9th September 1914. 'The Trading with the Enemy Proclamation Number 2,' The accused was further charged with an

offence in contravention of the provisions of Clause 5 (9) of the said Proclamation but was acquitted on this charge the Crown have appealed against the acquittal, but do not desire to proceed with, the appeal. The accused was sentenced, under the provisions of Clause 3 of Ordinance VI of 1914, which was published in the Gazette of India. Extra ordinary, of the 14th October 1914, to eighteen months' rigorous imprisonment under one charge (the first charge) and to a like term of rigorous imprisonment and a fine of Rs. 1,000 under the charge (the third charge), or in default of payment of the fine to six months' rigorous imprisonment, the sentences of imprisonment to run concurrently.

28. The accused is a member of the firm of Gunput Roy & Co. of Calcutta, The firm, consists of six members including the accused, and the accused was at the time that the offences against the Ordinance, of which the accused was convicted, were committed, in control of that branch of the firm's business which exports mica, and the correspondence, of the firm which deals with that branch of the business was conducted by and under the direction of the accused, and it was under his direction that the correspondence before us was written.

29. The firm of Gunput Roy & Co., prior to the war had been in the habit of exporting mica to European countries including Germany. Their course of business was as follows. One Checcacci, an Italian resident at Genoa, was the sole agent of the firm in Europe for the sale of mica, having been appointed such under or by virtue of an agreement dated the 8th May 1912 and made between Gunput Roy & Co. and Checcacci, and whereby Checcacci agreed (inter alia) to devote his whole time and attention to the business and not to engage in any other business. Checcacci was in the habit of forwarding to Gunput Roy & Co. orders for mica from firms in Germany and elsewhere, bills were drawn by Gunput Roy & Co. on the various purchasers and discounted by the Calcutta branch of the National Bank of India who forwarded the bills together with the shipping documents to their head office in London for realization and for the handing over of the shipping documents to the purchasers against payment of the bills. In the event of the purchasers failing to pay or accept the bills the National Bank of India were entitled to call on Gunput Roy & Co. to refund the money paid by the Bank to Gunput Roy & Co., and against such refund the shipping documents would be made over to

the order of Gunput Roy & Co.

30. The charges against the accused, in respect of which he was convicted, were (i) that during the months of September, October and November 1914 and during the continuance of a state of war between His Majesty and the German Empire, he at Calcutta, unlawfully did contravene the provision of Clause 5 (7) of His Majesty's Proclamation of the 9th September 1914. 'The Trading with the Enemy Proclamation Number 2' being a Proclamation of His Majesty for the time being in force relating to trade, commercial intercourse and other dealings with any subject of the said German Empire or any person residing, carrying on business or being in the territories of the said German Empire, by trading in goods, wares and merchandise, to wit, one case of mica shipped by the s.s. 'Nore' destined for an enemy country, to wit, the said German Empire and for enemies, to wit, certain persons trading and carrying on business together under the name and style of Rheinische Glimmerwaren fabrik at Weisliug, Cologne, in the said German Empire, and thereby committed an offence punishable under Section 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914. (iii) that during the months of September, October and November 1914, during the continuance of the state of war aforesaid, at Calcutta he unlawfully did contravene the provisions of Clause 5 (7) of the said Trading with the Enemy Proclamation No 2 by supplying to a certain person, namely, one G. Felice Checcacci of Genoa in Italy, certain goods, wares and merchandise, to wit, 11 cases of mica (which had been previously shipped to Marseilles per s.s. 'Nevassa' and s.s. 'Chybassa ') for and by way of transmission to an enemy country, to wit, the German Empire, and to enemies, to wit, certain persons trading and carrying on business together under the name and style of Jaroslaw Erste Glimmerwaren Fabrik at Berlin in the said German Empire, and thereby traded in the said goods destined for the said enemy country and the said enemies and thereby committed an offence punishable under Section 3 of the Commercial Intercourse with Enemies Ordinance No. VI of 1914.

31. The Proclamation in its preamble contains a recital that it is contrary to law to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without permission.

32. Clause 5 (7), which is the clause under which the accused was charged and convicted, divides itself into three parts and forbids (i) the supply of goods, etc., to or for the use of the enemy or the obtaining of goods, etc., from the enemy, (ii) the supply of goods by way of transmission to or from the enemy, (iii) the trading in or carrying of goods destined for or coming from the enemy: and the direct and the indirect carrying out of any of the acts above mentioned is prohibited by the Sub-clause, and the clause itself contains a provision at the end making any person who commits, aids or abets any of the aforesaid acts guilty of a crime.

33. The Proclamation is a penal Proclamation and it must be construed strictly, and the conviction of the accused can only be upheld if he be shown to have actually and in fact done one of the acts thereby forbidden, and it is not sufficient for the prosecution to show that he so acted as to show himself willing to do any of the acts forbidden by the Proclamation and, unless he in fact actually did one of the acts or possibly aided or abetted any such act, the accused cannot be convicted thereunder. The accused is of course, fully entitled to raise and rely on any defence however technical it may be to meet a penal charge and is entitled to have the fullest weight given to any such defence. On the other hand it is, of course, necessary that, so far as possible, no restricted meaning should be placed on the words of the Proclamation and that it should be so construed as to, as far as possible, prevent the mischief aimed at, namely, the enhancement of the actual resources of the enemy by supplying him with goods or with money.

34. It was forcibly contended before us that Sub-clause (7) involves an actual dealing with goods, and that unless it can be shown that goods were actually supplied to the enemy or so dealt with as to be placed in the enemy's power, there was no breach of the provisions of the Sub-clause, and that if the words 'trade in,' in the last part of the Sub-clause, refer to any commercial dealing or intercourse falling short of the supply of goods, or the putting of the enemy in the position of obtaining goods, there was no need for Sub-clause (9) as the matters there mentioned would, in this interpretation of the clause, equally fall within the provisions of Sub-clause (7). The first two parts of the Sub-clause present no real difficulty. To constitute an offence under the first part of the Sub-clause there must be a supply of goods to or for the use or benefit of the enemy, or an obtaining of

goods from the enemy, and in my opinion it would be an offence under this part of the Sub-clause if the enemy, as for example, by being placed in possession of the shipping documents, was placed in a position to obtain the goods.

35. To constitute an offence under the second part of the Sub-clause, there must be a supply of goods by way of transmission to or from an enemy country, or an obtaining of goods by way of transmission to or for the use of the enemy. Under the first part of the Sub-clause the merchant who supplies goods to or obtains goods from the enemy is aimed at, and under the second part of the Sub-clause the person who acts as the medium for the transmission of goods to or from the enemy is aimed at.

36. It is the third part of the Sub-clause which presents the difficulty, but, whatever may be the exact meaning of the words 'trade in,' the use of the word 'destined' makes it in my opinion clear that what is contemplated is an actual dealing in or negotiation with regard to actual ascertained goods or goods capable of ascertainment which are destined for or coming from an enemy country or an enemy, and this, of course, would include a dealing with the documents of title to the ascertained goods.

37. In my opinion, therefore, Sub-clause (7) deals only with goods actually in existence or capable of ascertainment, and there must be an actual dealing with the goods themselves or with the documents of title thereto to constitute an offence under this part of Sub-clause (7), and in my opinion the mere intention or desire to get goods for the enemy does not constitute an offence under this part of Sub-clause (7) unless, as before stated, there are goods in existence or capable of coming into existence. To constitute an offence thereunder there must be (a) definite ascertained goods in existence or goods capable of ascertainment which can be dealt with by the person accused, (b) they must be goods destined for the enemy or coming from the enemy, (c) there must be actual dealing in these goods. In my opinion the offer, for example, by a manufacturer of boots, to supply boots to an enemy or to an enemy's firm, even if these boots are not in actual existence at the time of the offer, provided they are capable of being made and forwarded to the enemy by the manufacturer, would be an offence against the Proclamation and



a trading in goods destined for the enemy, and in this view the sending to the enemy of a catalogue of goods manufactured by or stocked by the sender of the catalogue may be an offence against the Proclamation, and I think this is none the less so because Sub-clause (9) forbids the entering into commercial, financial or other contracts with or for the benefit of an enemy. It may well be that an offence which may be covered by the latter part of Sub-clause (7) is specified in greater detail in Sub-clause (9).

38. It is now necessary to consider what actually happened with regard to the case of mica forwarded by the s.s. 'Nore' which is the subject of the first charge. On or about the 30th June 1914 Gunput Roy & Co. shipped by the s.s. 'Nore' from Calcutta one case of mica to the Rheinische Co. of Cologne who were old customers of Gunput Roy & Co., and in response to an order received by Gunput Roy & Co. from the Rheinische (Jo. through the medium of Checcacci, Gunput Roy & Co. drew a bill on the Rheinische Do. for the value of the goods, which was discounted by the Calcutta branch of the National Bank of India and handed to them by Gunput Roy & Co. together with the shipping documents. The case was shipped to Cologne via Antwerp. When the s.s. 'Nore' arrived at London war had been declared, and the Peninsular & Oriental Steam Ship Company, who owned the s.s. 'Nore,' notified Gunput Roy & Co. that the ship would not proceed any further and that the case of mica had been landed in London the case of mica was in fact so landed towards the end of September 1914. Gunput Roy & Co. thereupon instructed the Calcutta branch of the Bank to instruct the head office of the Bank in London to take delivery of the case of mica from the shippers and to make over the same to an English firm trading in London in mica, named Baker and Startin, who had previously had dealings in mica with Gunput Roy & Co.

39. Gunput Roy at or about the same time, namely the 24th September 1914, asked Baker and Startin to take the case of mica and dispose of it, which they eventually did paying for the goods and informing Gunput Roy of this by letter dated the 23rd October 1914.

40. It is now necessary to refer shortly to the correspondence which passed between Checcacci and Gunput Roy in the months of September and October

1914, and in so doing I do not forget that the Ordinance under which the accused is convicted only came into force on the 14th October 1914. On the 24th September 1914 Gunput Roy & Co. write to Checcacci saying they have instructed the National Bank of India to deliver the case of mica to Baker and Startin, whom they had instructed to pay for it, and take delivery from the bank, and they tell Checcacci that if he wants the case, he is to ask Baker and Startin for it, but that he is not to give the case to the Rheinische Co. without payment: and on the 8th October 1914 Gunput Roy & Co. write to Checcacci recommending him not to sell any goods to German buyers, but in a postscript they add that he may sell to German buyers if the British Government do not take offence and if it is not against the law; they again write on October 15th telling Checcacci not to deliver the case to the Rheinische Co. without payment; and on October 22nd they tell him to receive the case from Baker and Startin and to deliver it to Rheinische Co. against payment; and on October 29th they tell Checcacci to ask Baker and Startin to send the case to him and that he is to deliver it to Rheinische Co. against payment; this last letter was stopped by the post and never reached Checcacci.

41. I should add that it appears from a letter of Checcacci of the 16th September 1914 written to Gunput Roy & Co. that Checcacci was in communication with the Rheinische, Co. who wanted the case of mica, that he passes on this information to Gunput Roy & Co. on the 16th September 1914, who got the letter on October 13th, and replied to it by the letter of October 15th, above referred to. I have come to the conclusion from the correspondence that at the time this letter was written the case of mica was no longer destined for the enemy within the meaning of Sub-clause (7) of the Ordinance. On the 24th September 1914 Gunput Roy & Co. wrote to Baker and Startin asking them to pay for and take from the Bank and dispose, of the case of mica. (I have no copy of this letter, but the reply of Baker and Startin of the 23rd October 1914 and Gunput Roy & Co.'s letter of the 24th September 1914 make it clear what the letter contained). Whether the transaction with Baker and Startin was an out-and-out-sale or not, or merely an arrangement whereby they paid for and took the mica to oblige Gunput Roy & Co., hoping to dispose of it, if possible, but looking to Gunput Roy & Co. as the real owners and liable to them if the case were not sold, is difficult to say, but after the 24th September 1914, that is to say when the letter of October 15th was written, in my

opinion, the goods in question were not destined for an enemy country within the meaning of the Proclamation and were not capable of being sent to an enemy country in view of the fact that the export of mica from England had been forbidden, and there has been, as before stated, no offence against that part of the Proclamation under which the charge was framed. The mere willingness of Gunput Roy & Co. that the mica in question should be delivered to an enemy firm is not in my opinion, under the circumstances, a breach of that part of the Proclamation under which the charge was framed and the conviction on this charge cannot, in my opinion, be upheld.

42. The circumstances with regard to the goods which form the subject matter of the third charge are as follows. On the 4th June 1914 Gunput Roy & Co. shipped from Calcutta by the s.s. 'Chybassa' eight cases of mica to the order of a Drouet of Paris, and on the 16th July they shipped other three cases by the s.s. 'Nevassa' to the same Drouet and three cases to the orders of the Manufacture Parisienne of Paris. Bills were drawn by Gunput Roy & Co. on the purchasers, and discounted by the Calcutta branch of the National Bank of India and sent to the National Bank of India in London for realisation. By the time the goods arrived in Europe war had broken out and both Drouet and the representatives of the Manufacture Parisienne had been called up for military service and were actually with the French forces at the front and could not be communicated with or take delivery of the goods, and the position was that the National Bank wanted to be repaid the monies paid by them to Gunput Roy & Co. for discounting the bills and Gunput Roy & Co. were desirous of disposing of the goods as they had to repay the Bank.

43. The eight cases of mica, shipped by the s.s. 'Chybassa' were delivered at Marseilles and the six cases shipped by the s.s. 'Nevassa' were delivered in London. There is no evidence before us as to what happened to three of the six cases which were delivered in London, but I am satisfied on the evidence that the remaining three were ultimately taken by Drouet, the original consignee, and that the eight cases shipped to Marseilles, under the circumstances hereinafter set forth, ultimately reached a firm called Jaroslaw carrying on business at Berlin in Germany (but having branches in England and other European countries) and an enemy within the meaning of Clause 3 of the Proclamation, and I am satisfied on

the evidence that these eight cases reached the Jaroslaw German business. Gunput Roy & Co. had previous dealings with Jaroslaw and with the German branch of the business. The circumstances under which the eight cases of mica reached Jaroslaw are set forth in the correspondence which was before us dealing with the third charge.

44. The first material letter is one from Checcacci addressed to Gunput Roy and Co. on the 16th September 1914 wherein he states that Jaroslaw had telegraphed to him asking him to have all the mica shipped to Marseilles and refused by Drouet sent to him at Genoa, where they (Jaroslaw) would take delivery, and saying that he thought Gun put Roy and Co. should instruct the National Bank to make over to him free the documents for all the Marseilles goods and that he (Checcacci) would dispose of them at Genoa.

45. This letter was received by Gunput Roy and Co. on the 13th October 1914 and answered by them on the 15th of that month, the answer stating that with regard to the 14 cases at Marseilles they had instructed the bank to deliver to him the documents and trusting that Checcacci had received the same from the bank and brought the cases to Genoa, and asking him to do his best to sell them elsewhere and remit the amount--the 'word' elsewhere 'in my opinion clearly means elsewhere than to the original consignees, Drouet and the Manufacture Parisienne. Checcacci wrote another letter to Gunput Roy & Co., on the 23rd September 1914, stating that Jaroslaw wished to buy the mica lying at Marseilles and not taken over by Drouet and the Manufacture Parisienne, and asking Gunput Roy & Co. to instruct the National Bank to deliver the documents to him and that ho would then have the mica sent to Genoa, as the buyers were Jaroslaw and he could not sell the mica from Marseilles. This letter was received by Gunput Roy and Co. on the 20th October and answered by them, on the 22nd, in a letter which stated that Gunput Roy & Co. had instructed the National. Bank to deliver the documents, and asked Checcacci to sell the goods promptly at profitable prices and remit the money.

46. Checcacci wrote a further letter to Gunput Roy & Co., on the 30th of September, saying that he could sell the Marseilles goods, and that possibly

Jaroslav would take them. This letter was received by Gunput Roy & Co. on the 29th of October, and answered by them on the 29th of October, the answer stating that Gunput Roy & Co. had instructed the National Bank to deliver the documents to him Checcacci and expressed a hope that he had received the documents and brought the 14 cases to Genoa and asking him to dispose of them at profitable prices; the letter further said that 'we note that you have sold six cases to Jaroslav.' This letter was intercepted in the post and never in fact reached Checcacci.

47. From the 14th October onwards Checcacci wrote various letters to Gunput Roy & Co. which were intercepted in the post, and letters were written to Checcacci by Gunput Roy & Co. on various dates in November, but these were with one exception, intercepted in the post, and in my opinion this further correspondence does not carry matters any further and need not be considered.

48. It is in evidence before us that Checcacci effected the sale to Jaroslav on or about the 9th October, and before he received the letters of Gunput Roy & Co. above referred. I cannot find any letter from Gunput Roy & Co. to Checcacci which in express terms directs or sanctions a sale of the mica to Jaroslav, but in my opinion the correspondence certainly shows that Gunput Roy & Co. know that Checcacci was effecting a sale to Jaroslav and that they did not in express terms forbid such a sale. Under these circumstances did the accused commit the offence against Sub-clause (7) with which he is charged, that is to say did he supply goods for transmission to an enemy country or an enemy and trade in goods destined or an enemy In my opinion he clearly did unless he is saved by the fact that Checcacci effected the sale before he, the accused, knew or impliedly assented thereto.

49. Ordinarily a person is not criminally liable for an act or omission unless he has himself committed or omitted the act, or authorised or known of, or shut his eyes to, the commission, or omission, and the condition of mind of an agent is not imputed to the master or principal so as to make him criminally liable, and a master is not criminally liable merely because his agent commits a wrongful act. But in cases where a particular intent or state of mind is not of the essence of the

offence, the acts or defaults of an agent in the ordinary course of the employment may make the master or principal criminally liable, although he was not aware of such acts or defaults and even where they were against his orders: *Commissioner of Police v. Cartman* [1896] 1 Q. B. 655, *Cuppen v. Moore* [1898] 2 Q. B. 306 the *Laws of England* by the Earl of Halsbury Vol. IX, p. 235 [note (d)] and cases there cited. In my opinion the principles expressed above apply to the acts forbidden by the Proclamation. To constitute an offence punishable thereunder a particular intent or state of mind is not in my opinion necessary, it is sufficient to constitute an offence thereunder by the principal that the act has been committed by the agent, even although not expressly authorised by the principal, although of course in awarding punishment for the offence those circumstances would and must be taken into account.

50. Considering the enormous importance as illustrated by the present war of the cutting off from the enemy of all sources of supply, this view of the Proclamation and its effect is not, in my opinion, unduly harsh or an undue straining of the words and spirit of the Proclamation, It is necessary that the trading community should realise not only that, they must take no actual steps to add to or increase the resources of the enemy, but that they must be active to prevent any act by their servants or agents which can possibly add to the enemy's resources and that unless they do so they fall within the mischief aimed at by the Proclamation and render themselves liable to the penalties imposed by the Ordinance for any breach of what is forbidden by the Proclamation.

51. The result is that, in my opinion, the accused was rightly convicted on the third charge, but in my opinion the sentence was under the circumstances excessive and in my opinion the sentence of imprisonment should be remitted, but the fine of Rs. 1,000 imposed by the Presidency Magistrate should stand. I wish to add that in my opinion the correspondence is perfectly open and straight forward, but I regret that the accused, although he apparently had considerable doubt as to whether any sale to the enemy was not illegal, did not take immediate steps to make it impossible that any of the goods in question should reach the enemy and take legal advice as to his position. It is only fair to the accused to add that he apparently made no attempt to ship goods after the outbreak of war but only

concerned himself with goods which had been shipped some time before war broke out. And of course the matters dealt with by the Ordinance are new so far as this generation is concerned, the Ordinance, moreover, was not. I understand, translated into the vernacular and the accused is ignorant of the English language. With regard to the question as to whether the accused could, in respect of either, in respect of both charges, be convicted of abetment, the fact remains that he was not originally charged with any such offence, and although our powers are wide under Section 423 of the Code of Criminal Procedure, and although the question was to some extent argued before us and the advisers of the accused were offered an opportunity for further argument on this point which they did not desire to avail themselves of, I for myself should be loath, under the circumstances of this case, and at this stage, to alter the charge and convict the accused of abetment, and, moreover, there seems considerable doubt whether a conviction for an offence can be altered into a conviction for abetment of that offence.

52. Owing to this difference of opinion between the learned Judges, the case was referred, under Section 429 of the Criminal Procedure Code, to Woodroffe J.

53. Sir S. P. Sinha (with him Mr. C. C. Ghose, Mr. Khaitan and Babu Manmatha Nath Mookerjee), for the appellant. The only question here is as to the legality of the conviction on the first charge. The case of *Sarat Chandra Mitra v. Emperor* (1910) I. L. R. 38 Calc 202 is distinguishable as there was but one offence charged there.

54. [Mr. Monnier. Under Section 429 of the Criminal Procedure Code the third Judge has to decide the case only with reference to the point on which there was a difference of opinion: *Durga Charan Sanyal v. Emperor* 8 C. L. J. 59, 63 and *Chukkapalli Ramayya v. Emperor* (1910) Mad. W. N. 77, 106.

55. Sir S. P. Sinha (after stating the facts and reading and commenting on the Letters relating to the first charge). The letters form a series and must be read as subject to the instructions contained in that of the 8th October against the sale to Germans which are not qualified by the postscript to it. Baker & Startin took up the case per 'Nore.' It never left London nor was put in the course of transmission to Checcacci or the German firm. The directions to the former were contingent, and

he refused to apply to Baker & Startin for it. To support the conviction there must be (i) a trading with the enemy and (ii) goods destined for an enemy country. As to the first point actual supply is required by the first two portions of Sub-clause (7) and actual carriage under the last portion. As three out of the four prohibited acts in Sub-clause (7) require actual dealing with goods, the words 'trade in' must also be taken to imply an actual handling of the goods or the documents of title. Trading is not complete without handling. To constitute trading there must be delivery or the goods put in the course of transmission. Mere intention or willingness is not sufficient. The stages of a transaction, of trading are, generally negotiation, contract and supply. If 'trade in' means any commercial dealing short of supply or putting the enemy in the position of obtaining goods, Sub-clause (9) would be covered by Sub-clause (7) and become redundant. But the former relates only to contracts and is not included in Sub-clause (7). The Sub-clauses antecedent and subsequent to Sub-clause (7) refer also to specific overt acts. Refers to meaning of 'trade' in Cent. Diet., Vol. VIII, and Halsbury's Laws of England, Vol. XXVII, p. 509. The literal meaning of 'trade' is buying and selling: Bank of India v. Wilson (1877) 3 Ex. D. 108, 113. If I have goods in my shop and tell my servant to sell them to a German, it is not trading, still less if the former refuses to do so. The present case may be one of intention, willingness or an attempt to trade but not of trading: The Abby ((1804) 5 C. Rob. 251, 254.). Abetment is punishable by the Proclamation but not an attempt. Section 511 of the Penal Code does not apply. Next, the mica when shipped was not destined for an enemy country there being no war then. On arrival at London they were taken up by Baker & Startin and Germany was no longer their destination. The goods must be in existence at the time of destination. They were bought by the said firm. 'Destined' read with 'coining from' means 'on the way to.' The accident of the prohibition of export of mica turned the case in my favour: The Abby (2). Refers to view of Greaves J. The offence is not abetment. The appellant did not actively instigate the sale to Germany but merely gave his agent permission to sell to Rheinische: see Ratanlal on 'Crimes,' 7th Ed., p. 209. The Appellate Court cannot alter the conviction to one of abetment: Reg. v. Chand Nur((1874) 11 Bou. II. C, 240.), Padmanabha Panjikannaya v. Emperor (1909) I. L. R. 38 Mud. 264., Singaravelu Pillay v. Emperor (1912) 14 Ind. Cas. 203., though a different view



appears to have been held in *Yeditha Subbaya v. Emperor* (1912) 23 Mad. L J. 722.

56. Mr. Monnier (with him Babu Manindra Nath Banetyee), for the Crown. The facts I rely on are, in the first place, that between the 22nd and 24th September the appellant wrote to the Bank to deliver the mica to Baker and Startin, and to the latter to pay and take delivery and to send the same to Checcacci, and that he directed the agent by letter to apply to Baker and Startin for the case and to deliver to the Rheinische against payment. Although these letters were written and posted before the date of the Ordinance, the directions contained in them became operative only on the receipt of the letters after the 14th October, and the letters might be regarded as acts done, and the instructions as directions given, after such date. Further the appellants intimated the contents of the above letters in his own of October 15th, 22nd and 29th and 5th November, and directed his agent to act on those instructions. He ratified his previous acts and directions done and given between the 22nd and 24th September by these subsequent letters. If these contentions are not correct, I rely, in the next place, on the two letters of the 15th and 22nd October putting aside the intercepted letters of the 29th October and 5th November which could only be used to prove collateral facts, though a conviction has been had in England -even on intercepted letters. I contend that the directions contained in the letters of the 15th and 22nd October are themselves sufficient to constitute trading with the enemy. The language of the Ordinance and Proclamation No. 2 is wanting, in legal precision. The preamble to the former, and Section 3, refer to 'trade, commercial intercourse or other dealing' but the short title is 'Commercial Intercourse, etc.' The second preamble to the Proclamation speaks of 'trade or any commercial or financial transaction' but the title is 'Trading with the enemy.' The words 'trade' and 'commercial intercourse' appear to be used interchangeably in these enactments. Compare Section 2 of the Trading with the Enemy Act (45 Geo. V c. 87) in England.

57. Trading with the enemy is contrary to law independently of the Ordinance and Proclamation, (see second preamble of the latter), which are merely based on and give statutory effect to, the rule of International and English law that one of the immediate consequences of war is the interdiction of all commercial intercourse

with the enemy unless by license; Wheaton's Inter. Law, 4th (Eng.) Ed., Section 309. The Hoop (1799 1 C, Rob. 196. Esposito v. Bowden (1857) 7 E. & B. 763, 779 and Porter v. Freudenberg [1915] 1 K. B. 857, 867. The scope and object of the Ordinance and Proclamation is, therefore, to prohibit all unlicensed commercial intercourse with the enemy. Turning next to Sub-clause (7) and (9) of Proclamation No. 2, they must firstly be read as mutually exclusive, and the four parts of Sub. Clause (7) must be interpreted similarly. 'Trading' does not include supply or carriage of goods or a commercial contract, otherwise these provisions would overlap and be redundant. Next the word 'trading' must be taken in connection with the scope and aim of the Ordinance and Proclamation: see Maxwell on Interpretation of Statutes, Ed. 1912, pp. 85, 85. In this view trading is any dealing with goods by way of commercial intercourse with the enemy excluding the specific acts of supply, carriage and contract provided for in Sub-clause. (7) and (9), whether the goods or the shipping documents pass or not. From the point of view of the dictionary meaning at the word 'trade,' it should be noted that 'trade' is derived from 'treaden' and not the Latin 'traders' (see Century Dict. Vol. VIII, p. 6415). The term has a variety of meanings from buying and selling to 'commerce and traffic': see Diet. Cent. p. 6415 'trade ' (8); Webster's Diet, p. 2181 'trade' (6) (b); and the v. i.: Halsbury, Vol. XXXII pp. 509, 510. Bank of India v. Wilson (1877) 3 Ex. D. 108. cited by the opposite side is really in my favour: see pp.113, 120, 121, where it was held that, 'trade' is not limited to buying and selling. Trading does not necessarily involve a physical handling of goods, as when a man opens a shop and exhibits goods but sells nothing. The real question is which of the several meanings of the word 'trade ' is the most apt with reference to the scope and intent of the enactments. This is, I submit, 'commerce' or 'traffic.' A direction to an agent to deliver property capable of transfer at the time is ' trading': see Wheaton supra pp. 439, 443, Rex v. Louis Bartel (1914) Unreported.) mentioned in 50 L. 7. 52, and the case in the 'Times' of 31 Dec. 1914, Both the Judges of the Divisional Bench agreed that the appellant's acts amounted to trading. Comments on Greaves J.'s judgment on the point. As to the argument that ' trading' involves a handling of goods because the word appears in the Sub-clause with 'supply' and 'carry", I submit that the four acts therein prohibited are not ejusdem generis. Refers to In the matter of the Second Grade Pleaders

((1910) I. L. R. 34 Mad. 29,39.).

58. The next question is whether the mica was 'destined' for an enemy after 14th October the date of the Ordinance. The word 'destined' in Sub-clause (7) when used in connection with 'trade in' implies 'intended for' : see Cent. Dict. Vol. II p. 1568 and Webster's Dict. p. 606. The expression 'coming from' means 'having its origin' in the enemy country, and not 'on the way from' it. The question of the destination of goods depends on intension. Goods acquire the character of an enemy destination when the owner or the person having control of them specifically intends to send them to such place and performs overt acts in pursuance of such intention, though they have not been put in the course of transmission nor even moved at all. The directions contained in the appellant's letters of 15 and 22 October to Checcacci, showed that the former intended the mica to go to Genoa for sale to a German firm, and were sufficient overt acts to effectuate his intention. The mica then became destined for an enemy even if the direction to Baker and Startin to send the same to Checcacci is considered to be an act done before the date of the Ordinance. Greaves J.'s view that the mica could not be destined for Germany because of the Proclamation of 15th October prohibiting export of it to Italy, it is respectfully submitted, confuses the distinction between lawful and actual destination. The prohibition was not in the first place absolute: the mica could have been exported to France and thence to Genoa. In the next the question is not whether the goods were legally destinable for Germany but whether they were in fact so destined. Even if the prohibition had been absolute but the owner determined to send it to Germany in violation of the law the goods would become destined for an enemy country, Baker and Startin took the mica as agents of the appellant, as appears from the directions given by him to Baker and Startin to send it to Genoa, and to Checcacci to apply for it, bring it to Genoa, and sell it to Rheinische against payment. I concede that, if at the time the instructions reached Baker and Startin and Checcacci, the mica had been sold by the former, it could not thereafter be destined for an enemy country, but there is no evidence when the English firm disposed of it so that the ownership of the appellant in it passed to the purchaser. The present case is not one merely of intent, willingness or attempt to trade. The appellant did all he could to get the mica to his agent at Genoa for sale to Rheinische. The writing and posting of the

appellants intercepted letters of October 29 and November 5 may have amounted to an attempt [as to the meaning of which, see *Queen-Empress v. Luxman Narayan Joshi* (1899) 2 B.com L. R. 286.], but the offence was completed when the letters of the 15th and 22nd October reached Checcacci.

59. If the charge of the substantive offence fails, the acts of the appellant amount to abetment of supply to, or of trading by Checcacci, within Sections 40 and 41, read with Section 108, Expl. (2), illust. (a) and Section 108 (A) of the Penal Code, and the punishment would be governed by Section 116. The appellant's directions to Checcacci in the letters of the 15th and 22nd October amount to abetment. The passage in Ratanlal, p. 209, is really against the appellant. Even if the English law applies there is abetment, though the act abetted was not committed: see *Rex v. Higgins* (1801) 2 East 5., *Rex v. Phillips* (1805) 6 East 464. and the recent case of *Rex v. Spencer* (1914) 138 L. T. 37. decided under the Proclamation No. 2. The Appellate Court has power to alter a conviction of a substantive offence into one of abetment on the same facts which the accused had to meet at the trial if he is not thereby prejudiced: *Lala Ojha v. Queen-Empressa* (1899) I. L. R. 26 Calc. 863. This principle was applied by the Privy Council in *Henry v. King-Emperor* (1906) 11 C. W. N. xc. and by the Allahabad, Court in *Emperor v. Madho Ram* (1906) 4 All. L. J. 44, 46. A conviction of a substantive offence may be altered on appeal to one of abetment: *Emperor v. Prasanna Kumar Das* (1904) I. L. R. 31 Calc. 1007, 1010. The case of *Padmanabha Panjikannaya v. Emperor* (1909) I. L. R. 33. Mad. 264 has been explained in *Yeditha Subbaya v. Emperor* (1912) 23 Mad. L. J. 722.

60. Mr. Ghose, in reply. If the acts of the appellant do not amount to trading, they win not amount to abetment of trading by Cheecaeci.

### **Woodroffe, J.**

61. This matter has been referred to me on a difference of opinion between Mr. Justice Beachcroft and Mr. Justice Greases.

62. The accused was charged with three offences. He was acquitted on the second charge by the Magistrate and the Government appeal against that acquittal was withdrawn. Both the learned Judges convicted the accused under

the third charge. Therefore, the only matter before me for decision is that on which the learned Judges differed, namely, the first charge: Mr. Justice Greaves being of opinion that the accused should be acquitted and Mr. Justice Beachcroft expressing the opinion that he was guilty of the offence, and if not, of abetment of it though not charged therewith. He would, therefore, have fined the accused Rs. 1,000 on this charge in addition to the fine which both the learned Judges have agreed should be imposed in respect of the third charge.

63. It is not necessary for me to recapitulate the facts which are set out in the judgments which are before me. The questions are firstly as to the meaning of the word 'trading' in the first charge, and nextly whether, if there was a trading here in respect of one case of mica Shipped by s.s. 'Nore,' it can be said that, at the date of the operation of the Ordinance, that is the 14th October 1914, the goods were destined for an enemy country.

64. For the prosecution it is contended that the acts of the accused in directing the bank to make over the goods to Messrs. Baker and Start in of London, the direction to the latter to take up the goods, the direction to the latter to send the goods to Checcacci, an Italian agent at Genoa on his application, and lastly his direction to the latter to deliver the goods to Rheinische Co., and receive payment constitute trading. Now it seems to me clear that, as the Ordinance was not retrospective, the only acts at which I can look, for the purpose of establishing the offence with which the accused has been charged, are such as took place after it was enacted, namely, the directions to Checcacci to hand over the case of mica to the German firm. The other facts are only relevant as establishing the circumstances under which it is alleged that it became possible to do the last-mentioned act, unless they also amount to ratification of acts done and directions given prior to the date of the publication of the Ordinance.

65. I may here mention that the prosecution does not rely on the letter of the 5th November 1914 as it was never sent, being intercepted by the Censor.

66. Now, does the act to which I have referred, assuming for the sake of argument that there is a ratification of instructions given to Messrs. Baker and Start in, amount to 'trading'? For the defence it is contended that this term involves an

actual handling' with the goods and not mere directions such as we have before us, which were in fact not carried out. For the prosecution it is contended that the word 'trading' includes all forms of commercial intercourse. Both the learned Judges appear to have rejected the contention on this point which was put forward on behalf of the accused. It is not necessary, however, to go further into this part of the case, for, even assuming in favour of the prosecution that the acts charged amounted to 'trading' within the meaning of the Ordinance, I agree with Mr. Justice Greaves that, whether there was a trading or not (which it is unnecessary to decide) the goods were not, on or after the 14th October 1914, the date of the Ordinance, destined for an enemy country. Now, what is the meaning of the word 'destined'? For the defence it is contended that if we look at the words 'or coming from' in the Proclamation, 'destined' must mean going to, that is, on the way to an enemy country. The goods were then, it is said, in London and remained there from before the date of the operation of the Ordinance and were, it is contended, incapable of being sent to an enemy country as export of mica from England had been forbidden except to Belgium, France, Russia, Spain and Portugal (see page 407 of the Manual of Emergency Legislation). I do not assent to all the terms of the argument by which the accused's contention is sought to be supported. But I come to the conclusion on the whole that the contention itself should be given effect to.

67. I agree with Mr. Monnier, who appears on behalf of the prosecution, that we must not confuse legal destination with actual destination. It is true that after the Proclamation the exportation of mica was prohibited at law. But it is possible, of course, that it might in fact be exported in disobedience of that law. Nextly, the export of mica was not altogether forbidden. It was allowable to some countries from which the goods exported might possibly have found their way to enemy destination. Nextly, I am disposed to accept his argument that the words 'destined,' when used in connection with the word 'trading,' is not limited to the sense which the defence asked me to accept, but is equivalent to the term 'intended for.' But assuming this point in favour of the prosecution can it be then said that the goods had an enemy destination at any time after the proclamation of the Ordinance on the 14th October 1914. The case of mica was shipped before the war. It had then undoubtedly an enemy destination. But on its arrival at London war had then broken out and the goods were landed there. Messrs. Baker and

Start in of London under instructions of the accused took up and paid for the goods. If this was a real purchase by them and not a mere accommodation, there is no case for the prosecution. For in that event the goods were not in existence, so far as any disposition of them by the accused was concerned, after the date upon which Messrs. Baker and Start in took over the goods from the bank and paid for them. But I will again assume for the sake of argument in favour of the prosecution that Messrs. Baker and Start in did not purchase outright for themselves, but merely took over the goods on behalf of the accused and held them for him subject to his further directions. If so when was it, that the enemy destination, which had been intercepted by the landing of the goods and the taking over of them by Messrs. Baker and Start in, again arose. As regards any acts which are said to re-establish the enemy destination by the accused, I can, as I have already said, only look to what was done by him subsequent to the date of the Ordinance of the 14th October. Then, are the two letters of the 15th and 22nd October in which the accused directed his Italian agent to deliver the ease against payment to the German Company sufficient to give the goods an enemy destination? The point is one which is not altogether free from doubt. But on the whole I am of opinion that the question should be answered in the negative; and in any case, if the point is a doubtful one the accused is entitled to the benefit of it. For we must note that at the time when, these two letters were written the accused was unaware of what had happened to the goods at home, namely, that Messrs. Baker and Start in had refused to export the goods and in fact the goods were never exported. They had refused to export the goods, because, as they stated, such exportation was forbidden by the Ordinance. The directions given by the accused in ignorance of this fact could in any event only take effect on the arrival at London of the letters in which they were contained; and even upon such arrival they had no operation for the reasons stated and the goods, therefore, never in fact acquired an enemy destination.

68. I may point out in this connection that the letter of the 15th October was sent only one day after the Ordinance which may, therefore, very well not have come to the notice of the accused. The Ordinance itself was not translated into the vernacular until the 22nd of December after the date of the second letter of the 22nd of October. Nothing, moreover, has been shipped by him after the date of the

Ordinance.

69. Then it is sought to establish that, if that be the case, there has been an abetment of supplying or of trading by the accused, which is prohibited by the Ordinance. I am not prepared to hold as a universal rule that in no case can there be a conviction for abetment where the charge was only for the principal offence. In the present case the accused was not originally charged with abetment. There is also the question which has been raised, by Mr. Ghose, on behalf of the accused, as to whether there can be in fact an abetment of an offence under the Ordinance where in fact no offence has been committed, in other words, whether the principle enacted by the Penal Code is applicable to an offence punishable under the Ordinance. In any case it is in the discretion of the Court whether it should allow fresh charges being tried in appeal. Mr. Justice Greaves expressed the opinion that this was not a case in which this should be done. I agree with him in holding that, assuming that the Court has jurisdiction to entertain this new charge in appeal, this is not, under the circumstances, a case in which I should do so.

70. I, therefore, agree with him that this first charge has not been established and I acquit the accused of it. As a result the accused is acquitted of the first two charges and convicted of the third charge for which he has been fined Rs. 1.000.

71. The accused is entitled to get back the briefs made over for the use of the Court and books of account and other papers which have been taken, by the prosecution and which are now held by them.

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