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Who Is an Alien Enemy?

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WHO IS AN ALIEN ENEMY?—One Gustav Müller, a native German, resided in England on May 20th, 1915. He had never been naturalized. He owned a leasehold house in England, and on the date just mentioned he executed a power of attorney to one John White to sell this leasehold house and make proper conveyance of the same. Six days later he was permitted by the British Government to return to Germany, and he started the same day, May 26th. He was known to be in Germany on June 11th, but the date of his arrival was unknown. On June 2 the leasehold was sold to Tingley, but the latter, upon learning the facts here given respecting Müller refused to proceed with the contract of sale, and commenced an action for a declaration that the contract was illegal because at the time it was made the defendant, Müller, was an alien enemy. EVE, J., held that this fact had not been proved, and dismissed the action, and an appeal was taken to the Court of Appeal, *Tingley v. Müller*, [1917] L. R. 2 Ch. 144, and the decision of EVE, J., was sustained.

The case raises the broad question of who is an alien enemy, and six judges of the Court of Appeal wrote extensive opinions upon it. All the judges agreed that Müller's German nationality and allegiance did not make him an alien enemy. Five of them agreed that his departure from England for the purpose of returning to Germany did not make him an alien enemy, and that he should actually have reached Germany before the character of alien enemy attached to him. They differed as to the proof necessary to show his return. EVE, J., had held that evidence of his departure for Germany on May 26th did not prove his arrival in Germany by June 2, and two judges of the Court of Appeal, agreed. But the other three judges who thought such arrival was necessary to be shown, were of opinion that there was a presumption of fact that he arrived within seven days after leaving England.

SCRUTTON, L. J., thought that Müller became an alien enemy the moment he departed for Germany, on the ground that he thereupon lost his commercial or trade domicile in England and until he acquired another his national character reverted and this made him an alien enemy.

The term "alien enemy" is used with different meanings, depending on the principles or rules sought to be applied to the class so designated. Thus by United States Revised Statutes, Sec. 4067, relating to war, it is enacted that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upward, shall be liable to be apprehended, restrained, secured, and removed, as alien enemies."

This meaning is used in the Presidential Proclamations of April 6 and

November 16, 1917, regarding the conduct of alien enemies, within the United States. And it is the meaning employed in such cases as *Dorsey v. Brigham*, (1898) 177 Ill. 250, construing statutes relating to naturalization.

But in connection with the regulations of trade with the enemy an entirely different meaning is given to the term. It was this meaning which was involved in *Tingley v. Müller*. The British Trading With the Enemy Act, 1914, (4-5 Geo. 5, ch. 87), does not define the term, but the Trading with the Enemy Proclamation, No. 2, of September 9, 1914, defined an "enemy" as any person of whatever nationality resident or carrying on business in the enemy country (*Tingley v. Müller*, p. 179, per SCRUTTON, L. J.). This is substantially the same definition as that given by our own Trading With the Enemy Act, of Oct. 6, 1917, which defines an enemy as a person residing in enemy territory or resident outside of the United States and doing business within enemy territory.

The term as employed in these acts has clearly taken on a meaning relevant to the purpose with which the acts were passed, namely, trade or commerce. Nationality has nothing to do with the matter, and domicile is not controlling. A German citizen residing in the United States, though domiciled in Germany, is not an alien enemy, while a neutral domiciled in a neutral country may be an alien enemy, if he is engaged in business within enemy territory. Even a citizen of the United States would be an alien enemy if voluntarily resident in a hostile country. DICEY ON PARTIES, p. 3. It is when one becomes a part of the business organization of the enemy, directly contributing by his trade or business to the welfare of the enemy, that he becomes an alien enemy under these Acts. The common law, which forbade trading with the enemy, as well as statutes regulating the matter, are "governed upon the public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State. Trading with a British subject or the subject of a neutral state carrying on business in the hostile territory is as much assistance to the alien enemy as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies." Per Lord READING, in *Porter v. Freudenberg* [1915] 1 K. B. 866.

This is analogous to the view taken by the prize courts as to "enemy property." Thus in *The Benito Estenger* (1899), 176 U. S. 568, 571, the Supreme Court said that "property engaged in any illegal intercourse with the enemy is deemed enemy property, whether belonging to an ally or a citizen, as the illegal traffic stamps it with the hostile character."

In the *Müller Case* there was nothing to show that the defendant had begun to carry on trade in Germany from any point outside of Germany, so that the establishment of commercial relations between him and the enemy could arise only through his re-establishment of residence in Germany. Hence not until he actually reached Germany could he be of any advantage to the enemy in the way of trade, and the views of the ma-

jority of the judges was in harmony with this commercial test of enemy character.

In *Daimler Co. v. Continental Tyre and Rubber Co.* [1916], 2 A. C. 307, the House of Lords was asked to go a step farther along the same line, and hold an English corporation to be an alien enemy because substantially all its shares were held by German subjects and its directors were all German subjects, three-fourths of them resident in Germany when war was declared. The Court of Appeal had held that it was not an alien enemy. In the House of Lords, Lord HALSBURY contended that it was an enemy, the corporation being substantially a mere partnership with a limited liability, all the partners presumably residing in enemy territory. He thought that "the unlawfulness of trading with the enemy could not be excused by the ingenuity of the means adopted." Lord ATKINSON thought an English Company might well be an alien enemy if in fact it could be shown that its real business activity was in enemy territory, but that the record was silent on that point. Lord SHAW dissented from both these positions, saying that since no dividends or assets could be paid to enemy shareholders, "and all trading with these shareholders * * being interpellated, there is no principle of law which would, in my humble opinion, justify the incongruity of dominating or regarding the Company itself as enemy either in character or in fact." Lord PARKER, with whom concurred Lords MERSEY and KINNEAR, took the position that enemy character could not be given to the company "merely because enemy shareholders may after the war become entitled to their proper share of the profits of trading," but he thought it might assume enemy character "if its agents or the persons in *de facto* control of its affairs, whether authorized or not, are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under control of enemies." He refused to admit, however, that the character of individual shareholders could affect the character of the Company; and on this point Lord PARMOOR was in accord.

The problems here suggested are equally relevant to conditions in this country. Our own TRADING WITH THE ENEMY ACT, so far as corporations are concerned, does not include companies incorporated in the United States. However, the illegality of trading with the enemy was recognized at common law, and the statute does not abrogate or narrow the common law principles, but only makes special regulations and provides special penalties for certain classes of acts of this character. The war has brought up a large number of cases in England involving both the common law and statutory rules relating to alien enemies, and in the controversies which are sure to arise here over trading with the enemy, these English cases are likely to prove of great practical value to American lawyers.

E. R. S.