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Isaacs J.

about which the Act is solicitous is to see that the Board takes care to get the rabbits eradicated, and that it does not require the Board to select as between owner and occupier the person who is to eradicate them and bear the cost of doing so. For these reasons I think that the appeal should be allowed.

RICH J. I agree.

Appeal allowed. Order appealed from discharged. Question asked by the case answered in the negative. Respondent to pay costs of appeal.

Solicitor for the appellant, *G. M. Westgarth*, Scone, by *Garland, Seaborn & Abbott.*

Solicitor for the respondent, *J. A. K. Shaw*, Scone, by *Abbott, Tout & Balcome.*

B. L.

Foll *Borcherdt, H.* 47 ACrimR 95

Foll *Will v Borcherdt* [1990] 2 QdR 399

Appl *Theologidis v Department of Community Services & Health* (1991) 25 ALD 40

Foll *Pearson v Swannell* (1920) 28 CLR 390

Cons *Faud Bin Mahboob v Minister for Immig & Ethnic Affairs (No2)* (1996) 65 FCR 248

Refd to *Faud Bin Mahboob v Minister for Immigration & Ethnic Affairs (No2)* (1996) 44 ALD 267

Foll *Lovering & Repatriation Commission, Re* (1997) 48 ALD 375

Foll *Lovering & Repatriation Commission, Re* (1997) 48 ALD 375

Appl *City of Mitcham v Heathhill Nominees* (2000) 76 SASR 133

Appl *Brott v Joachim* (2001) 27 FamLR 508

Appl *Brott v Joachim* (2001) 161 FLR 234

Foll *Territory Insurance Office v Kouimanis Enterprises* (2002) 12 NTLR 210

Appl *Tourism Holdings v Comr of Taxes* (2002) 166 FLR 368

[IN THE HIGH COURT OF AUSTRALIA.]

WORRALL AND ANOTHER . . . APPELLANTS;
APPLICANTS,

AND

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED . . . . RESPONDENTS.
RESPONDENTS,

H. C. OF A. 1917.

SYDNEY, *Dec.* 3, 4.

Barton, Isaacs and Rich JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Statute—Statutory rules—Interpretation—Retrospective operation—Prohibition of appeal—War Precautions (Moratorium) Regulations (Statutory Rules 1916, *Nos.* 284, 324; *Statutory Rules* 1917, *Nos.* 13, 76, 253), *regs.* 3, 4, 8c.

Reg. 8c of the War Precautions (Moratorium) Regulations (Statutory Rules 1917, No. 253), which provides that "any determination decision judgment direction order or assessment made or given by any Court in any matter

arising under these Regulations shall be final and conclusive and without appeal," is retrospective so as to include any determination of the Supreme Court of a State made before 28th September 1917, the date on which the regulation was made.

Appeal from the decision of the Supreme Court of New South Wales: *Worrall* v. *Commercial Banking Co. of Sydney*, 17 S.R. (N.S.W.), 457, dismissed as incompetent.

APPEAL from the Supreme Court of New South Wales.

An application was made to the Full Court of the Supreme Court by James Rhodes Worrall and Sydney Andrew Walker Worrall for an order that the *War Precautions* (*Moratorium*) *Regulations* should apply to a fluctuating advance exceeding £2,000 made by way of bank overdraft by the Commercial Banking Co. of Sydney Ltd. to the applicants, secured by certain mortgages executed by the applicants in favour of the Bank; and for a declaration that, having regard to the matters mentioned in reg. 4 (5) of those Regulations, it was desirable that such regulation should apply to those mortgages. The application was heard on 23rd, 27th and 28th August 1917, and on 14th September 1917 the Full Court dismissed the application: *Worrall* v. *Commercial Banking Co. of Sydney* (1).

From that decision the applicants now appealed to the High Court.

Maughan (with him *J. A. Ferguson*), for the appellants.

R. H. L. Innes K.C. (with him *F. A. A. Russell* and *W. A. Parker*), for the respondents, took a preliminary objection. Under regs. 2 and 4 of the *War Precautions* (*Moratorium*) *Regulations* the application for leave might be made either to the Supreme Court or to the High Court, and as the applicants chose to make the application to the Supreme Court they cannot appeal to the High Court (*Banks* v. *Norris* (2); *In re Knight* (3)). The Regulations deal only with procedural matters (*Welby* v. *Parker* (4)), and reg. 8c will be given a retrospective effect in the absence of any clear indication that it is not intended to be retrospective. See *Zollner Ltd.* v. *Municipal Council of Sydney* (5). There is no vested right to an appeal in

(1) 17 S.R. (N.S.W.), 457.
(2) 11 N.S.W.L.R., 77.
(3) 18 N.S.W.L.R., 315.
(4) (1916) 2 Ch., 1.
(5) 17 S.R. (N.S.W.), 164.

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such a matter, and the decision in *Colonial Sugar Refining Co.* v. *Irving* (1) does not apply. [Counsel also referred to *Saunders* v. *Borthistle* (2); *Parkin* v. *James* (3).]

Maughan. Words in an Act which purport to take away a right of appeal should *primâ facie* not have a retrospective effect. The taking away of a vested right of appeal is not a matter of procedure *Colonial Sugar Refining Co.* v. *Irving* (1). Under the Regulations as they stood prior to 28th September 1917, when reg. 8c was made, orders made under reg. 3 were, and orders made under regs. 4 and 8 were not, subject to appeal. On that date the provision taking away the right of appeal from orders made under regs. 4 and 8 was repealed. Under those circumstances reg. 8c should not be read as taking away retrospectively the right of appeal which then existed in respect of orders made under reg. 3. There is nothing in the language of reg. 8c which renders such a construction necessary. There must be plain, clear and unambiguous language in order that a right of appeal which has accrued should be taken away (*Dines* v. *Gordon* (4); *Marsh* v. *Higgins* (5); *Midland Railway Co.* v. *Pye* (6)). A Statute will not be interpreted retrospectively to a greater extent than is necessary (*Reid* v. *Reid* (7)).

[ISAACS J. The question in every case is what did the Legislature intend (*Pardo* v. *Bingham* (8); *Reynolds* v. *Attorney-General for Nova Scotia* (9)).]

[Counsel also referred to sec. 11 of the *Acts Interpretation Act* 1904-1916.]

Cur. adv. vult.

Dec. 4.

The judgment of the COURT, which was read by BARTON J., was as follows:—

A preliminary objection has been taken that this appeal is incompetent. The objection is based on reg. 8c of the *War Precautions (Moratorium) Regulations*. It raises the question whether that

(1) (1905) A.C., 369.
(2) 1 C.L.R., 379.
(3) 2 C.L.R., 315.
(4) 14 N.S.W.S.C.R., 372.
(5) 9 C.B., 551.
(6) 10 C.B. (N.S.), 179, at p. 191.
(7) 31 Ch. D., 402.
(8) L.R. 4 Ch., 735, at p. 739.
(9) (1896) A.C., 240.

regulation is to be read retrospectively so as to include a "determination" of the Supreme Court "made" before 28th September 1917, the date of the regulation. That question must be answered by ascertaining the intention of the legislative authority acting under its statutory law. Considerable discussion took place as to whether its provisions forbidding appeal concern "rights" or "procedure." There can be no doubt that the power to "appeal" is a right, and not procedure. Procedure may and generally does surround it, but the central notion of an appeal is undoubtedly a right. Lord *Westbury* described it thus: "An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below" (*Attorney-General* v. *Sillem* (1)). In *Colonial Sugar Refining Co.* v. *Irving* (2) Lord *Macnaghten* for the Privy Council said expressly that appeal is a right and not procedure.

Therefore, if the matter depended upon that, the objection would fail. But the matter does not depend upon that. The distinction between "rights" and "procedure" is only an aid to interpretation, and not the test. The test is: What did the Legislature mean when its words are read, after giving due weight to every relevant consideration? In *Irving's Case* (2) the Judicial Committee only entered into consideration of the distinction between "rights" and "procedure" after stating that "the *Judiciary Act* is not retrospective by express enactment or by necessary intendment." If it had been, inquiry as to the nature of appeal would have been useless. This was the method of approach which the Master of the Rolls preferred in *Welby's Case* (3); and see *West* v. *Gwynne* (4). To follow this method, we have the guidance of Lord *Hatherley* in *Pardo* v. *Bingham* (5). There it is said: "We must look to the general scope and purview of the Statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated." The language of Lord *Selborne* in *Main* v. *Stark* (6), and of Lord *Morris* in *Reynolds* v. *Attorney-General for Nova Scotia* (7), runs in the same direction.

(1) 10 H.L.C., 704, at p. 724.
(2) (1905) A.C., 369.
(3) (1916) 2 Ch., 1.
(4) (1911) 2 Ch., 1.
(5) L.R. 4 Ch., at p. 740.
(6) 15 App. Cas., 384, at pp. 387-388.
(7) (1896) A.C., at p. 244.

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If, doing this, we find that though no express words are found, yet the necessary intendment of the language is retrospectivity, the task is at an end. Necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable. (See per Lord *Eldon* in *Wilkinson* v. *Adam* (1).)

The Regulations as they stood prior to 28th September 1917 provided broadly and in various ways for the relief of mortgagors as defined, if they were in default. Among other things it may be observed that by reg. 4, without the leave of the Court, actions commenced even after 20th September 1916, that is, about six weeks before the first Regulations (10th November 1916), were not allowed to continue. Reg. 4 made elaborate provisions (*inter alia*) for application by the mortgagee to obtain leave to proceed. Sub-reg. 6 said: "The decision of the Court upon an application for leave under this regulation shall be final and conclusive and without appeal." Apart from this provision, the standing provision in the Constitution as qualified by Commonwealth legislation would have permitted appeals in many cases. The Regulations provided, however, that in case of any fluctuating advance exceeding £2,000 by bank overdraft, the Regulations should not apply unless on application by the mortgagor to the High Court or the Supreme Court it were "determined" that they should apply. That provision, however, was in reg. 3, and not in reg. 4, so that the provision for finality did not apply to it. The provision for a mortgagor's application was manifestly an appendage to the exception, and the exception was in substance a part of the provision in reg. 4. Reason points to the desirability of placing both on the same footing, but the bare language did not permit it. Finality as to reg. 8 was attained by expressly applying the finality provision of reg. 4 to it.

On 28th September 1917 the legislative authority placed all these matters on the same footing. It was not done by leaving the old provision to stand, and simply making a new provision applicable as from that date to reg. 3. The course taken was first to repeal sub-reg. 6 of reg. 4, and then enact reg. 8c covering every

(1) 1 V. & B., 422.

description of curial decision referred to in the Regulations. Unless reg. 8c includes all decisions formerly covered by the repealed provision made or given up to 28th September, then the ordinary law as to appeals would apply to them, and wherever the prescribed conditions could be complied with an appeal could be had from a decision under reg. 4 or reg. 8. This is so opposed to the unquestionable intent of the legislative authority as to lead to instant rejection. But if reg. 8c includes prior decisions under reg. 4 and reg. 8, it cannot be denied that it includes those under reg. 3, which is an adjunct of those regulations.

The intent of the legislating authority to put all these matters on the same footing, namely, total non-appealability, is quite clear, and in accord with the subject matter, namely, relief to mortgagors hard pressed and unable to meet their engagements, and mortgagees whose debts are left temporarily unpaid, to both of which classes protracted and expensive litigation would be oppressive as well as being a waste of national funds in a time of crisis. This leads to the conclusion that reg. 8c covers the present case, and this appeal should be dismissed as incompetent.

Appeal dismissed as incompetent.

Solicitors for the appellants, *Dobbin & Spier.*

Solicitors for the respondents, *Dibbs, Parker & Parker.*

B. L.