[HIGH COURT OF AUSTRALIA.]

DE BORTOLI . . . . . APPELLANT;
DEFENDANT,

AND

KENNY AND ANOTHER . . . . . RESPONDENTS.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 18-20.

Rich, Dixon and Williams JJ.

Appeal—High Court—Appeal as of right—Decision of Supreme Court (N.S.W.) on appeal from Court of Petty Sessions—"Civil right amounting to or of the value of Three hundred pounds"—Price fixation—Validity of notice—Sale of wine—Right to sell without the restriction of a notice as to fixed price—Competency of appeal—Special leave to appeal—Judiciary Act 1903-1947 (*No.* 6 *of* 1903—*No.* 52 *of* 1947), *s.* 35 (1) (*a*) (2)—*National Security* (*Prices*) *Regulations* (*S.R.* 1940 *No.* 176—1947 *No.* 36), *regs.* 23 (1) (*b*), 45B (*ba*)—*Prices Regulation Order No.* 1015.

Rules nisi for statutory prohibition granted for the purpose of bringing up for review seven convictions of the appellant for offences under the *National Security* (*Prices*) *Regulations*, and for each of which he had been fined £100, were discharged by the Supreme Court of New South Wales. The appellant appealed as of right to the High Court on the ground that the orders of the the Supreme Court fell within s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1947 because they indirectly involved a question respecting a civil right amounting to or of the value of £300, the civil right being to sell goods without the restriction of a notice given by the Prices Commissioner fixing prices chargeable by the appellant.

Held that the orders of the Supreme Court merely affirmed the convictions which in themselves did not involve any civil right amounting to or of the value of £300, therefore the appeals were incompetent.

Kidney v. *Melbourne Tramway and Omnibus Co. Ltd.*, (1902) 8 A.L.R. (C.N.) 29, disapproved.

In the circumstances, special leave to appeal from the decision of the Supreme Court of New South Wales (Full Court): *Ex parte Bortoli*; *Re Kenny*, (1948) 48 S.R. (N.S.W.) 288; 65 W.N. 93, in order to reconsider *Horsey* v. *Caldwell*, (1946) 73 C.L.R. 304, not granted.

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APPEALS from the Supreme Court of New South Wales and APPLICATION for special leave to appeal.

At a Court of Petty Sessions, Sydney, on the information of Charles Warren Kenny, an Investigation Officer of the Customs Department, Vittorio De Bortoli, of Bilbul, New South Wales, vintner, was charged as follows :—(i) upon an information dated 1st August 1947, that he between 6th December 1945 and 16th April 1947, failed to comply with a provision of the *National Security* (*Prices*) *Regulations* made in pursuance of the *National Security Act* 1939-1946 and in force by virtue of the *Defence* (*Transitional Provisions*) *Act* 1946 in that contrary to reg. 49 of the said regulations he being a person who in connection with a business carried on by him sold certain goods, namely wines, for the purposes of the said regulations did fail to keep proper books and accounts ; (ii) upon three informations, all dated 1st August 1947, that he on 29th August 1946 ; 3rd October 1946 ; and 22nd November 1946 respectively, at Bilbul, New South Wales, contravened a provision of the *National Security* (*Prices*) *Regulations* made in pursuance of the *National Security Act* 1939-1946 in that contrary to reg. 29 of the said regulations he did sell declared goods to wit certain specified wines at certain specified prices in each case being a greater price than the maximum price fixed in relation to the said goods. The overcharge alleged in respect of the goods the subject of these informations was respectively £70 19s. ; £68 4s. 6d. ; and £47 5s. ; and (iii) upon three informations, all dated 1st August 1947, that he on 28th February 1947 ; 14th March 1947 ; and 17th March 1947, respectively, at Bilbul, New South Wales, contravened a provision of the *National Security* (*Prices*) *Regulations* made in pursuance of the *National Security Act* 1939-1946 and in force by virtue of the *Defence* (*Transitional Provisions*) *Act* 1946 in that contrary to reg. 29 of the said regulations he did sell declared goods to wit certain specified wines at certain specified prices in each case being a greater price than the maximum price fixed in relation to the said goods. The overcharge alleged in respect of the goods the subject of these informations was respectively £24 11s. ; £119 5s.; and £123 9s.

De Bortoli was convicted on all seven charges and fined £100 for each offence.

Rules nisi for statutory prohibition, directed to the informant and the magistrate respectively, obtained by De Bortoli in respect of each conviction were discharged by the Full Court of the Supreme Court of New South Wales ; *Ex parte Bortoli* ; *Re Kenny* (1).

(1) (1948) 48 S.R. (N.S.W.) 288 ; 65 W.N. 93.

From that decision De Bortoli appealed as of right to the High Court from the judgment and order of the Supreme Court in each case whereupon the informant and the magistrate applied to the High Court, by motion of which notice had been given, for an order that De Bortoli's notices of appeal be set aside on the ground that such appeals could not be brought by De Bortoli as of right.

In affidavits filed on behalf of De Bortoli an accountant deposed that he had examined the books kept by him in connection with De Bortoli's business as a vintner and that :—(*a*) the total amount due to and uncollected by De Bortoli on 31st October 1947 in respect of sales of wine by De Bortoli prior to that date, as shown in the said books, was £6,113 19s. 6d. ; and that the total amount for which such sales of wine would have been made had they been made at the maximum prices which the Prices Commissioner purported to fix by notice in writing dated 14th July 1945, was £4,386 19s. 3d. ; a difference of £1,726 10s. 3d. ; (*b*) the total amount due to and uncollected by De Bortoli on 17th February 1948 in respect of sales of wine by De Bortoli prior to that date as shown in the said books, was £9,583 7s. 5d. ; and that the total amount for which such sales would have been made at the maximum price so purported to have been fixed by the Prices Commissioner was £7,087 12s. 3d. ; a difference of £2,495 15s. 2d. ; (*c*) the total price charged by De Bortoli for the sale of wines for the year ended 30th June 1948, amounted to the sum of £45,272 10s. 7d. ; (*d*) the estimated total amount of all sales of wine by De Bortoli for the year ended 30th June 1948, would have been approximately £31,591 17s. if each sale had been made at the maximum selling price so purported to have been fixed by the Prices Commissioner, the difference between that amount and the said total price charged by De Bortoli being £13,680 13s. 7d.

Other material facts appear in the judgment hereunder.

Holmes K.C. (with him *Hope*), for the applicants to the motion the respondents to the appeal. An appeal as of right does not lie in respect of the matters before the Court therefore the notices of appeal should be struck out. To obtain a review by this Court of the decisions complained of the respondent to this motion should apply for special leave to appeal.

Barwick K.C. (with him *Marr*), for the respondent to the motion the appellant to the appeal. The affidavits show (i) that at the date of the convictions and also at the date of the judgment of the court below De Bortoli had outstanding transactions which if his

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appeals succeed will return to him approximately £2,000, that is to say much more than £300, in excess of what they will return to him if his appeals fail; (ii) that the effect on his annual turnover of the loss of his appeals by reason of establishing the validity of the notice will be the diminishing of his income by approximately £13,681, that is to say by more than £300. A judgment, that is to say a conviction, or the upholding of a conviction, which has the result, of its own force, of prejudicing the appellant to the necessary financial amount, directly or indirectly, will satisfy the test laid down in s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1947 (*Oertel* v. *Crocker* (1)).

[DIXON J. In that case the controversy was as to the effect of the curial order.]

The judgments appealed from involve a civil right amounting to or of the value of more than £300 (*Kannuluik* v. *Hawthorn Corporation* (2)). The judgments do involve a claim because the foundation of the judgments is a claim to which the Court has acceded, namely that De Bortoli is bound to take a certain course which affects his property.

[DIXON J. Reference to several relevant judgments by the Privy Council appears in *Beard* v. *Perpetual Trustee Co. Ltd.* (3).]

The judgments appealed from " directly or indirectly " involve a claim within the meaning of s. 35 (1) (*a*) (2) of the *Judiciary Act*, the claim being that the order which purported to prohibit sales by De Bortoli above a certain price was bad. A similar case is *Kidney* v. *Melbourne Tramway & Omnibus Co. Ltd.* (4). In that case the claim was that a certain licence was unnecessary whereas it was held to be necessary. If the Court is of opinion that the appeals are incompetent then De Bortoli desires to move for special leave to appeal.

Holmes K.C. The sum or matter at issue neither amounts to nor is of the value of £300 within the meaning of s. 35 (1) (*a*) (1), (2) of the *Judiciary Act*. It does not follow that the amounts outstanding as at the date of conviction and as at the date of the judgment of the Supreme Court could not be recovered by De Bortoli. At those dates sums in excess of £300 were outstanding. There was no suggestion that any purchaser was essential, or that there was any action pending between De Bortoli and any of his purchasers in which some defence of illegality had been raised. Also,

(1) (1947) 75 C.L.R. 261, at pp. 267, 270, 274.
(2) (1903) 29 V.L.R. 433.
(3) (1918) 25 C.L.R. 1, at p. 8.
(4) (1902) 8 A.L.R. (C.N.) 29.

it does not follow that the purchaser or purchasers will not voluntarily make the payment which they originally undertook to do. There is no evidence that any purchaser refuses to pay. Payment and receipt of the moneys is not an offence (*National Security* (*Prices*) *Regulations*, reg. 32). De Bortoli's claim as regards the six "excess price" prosecutions was that the notice in writing given under the Prices Regulations was invalid, but that is not a claim with respect to any property or to any civil right. The validity or invalidity of the notice does not determine the rights of De Bortoli with respect to the outstanding moneys. So far as the charge of failure to keep proper books and accounts is concerned the only issues before the court below were whether the prosecutions had been assented to and as to sufficiency of evidence. There is a distinction between sub-s. (1) (*a*) and sub-s. (1) (*b*) of s. 35 of the *Judiciary Act*. The former sub-section deals with the right to appeal on clearly civil matters—judgments given or pronounced, and the latter sub-section deals with special leave to appeal. Sub-section (1) (*a*) is not applicable to an appeal in a criminal matter; sub-s. (1) (*a*) (1) is clearly restricted to cases of a civil character; sub-s. (1) (*a*) (2) is an extension of the matter dealt with in sub-s. (1) (*a*) (1). Sub-section (1) (*b*) refers to "any" and not "every" judgment and includes criminal matters.

[Dixon J. The concluding words of s. 35 (1) (*a*) seem to indicate that the legislature was considering a curial order throughout.]

That is so. The matters before the Court do not come within s. 35 (1) (*a*).

Barwick K.C. in reply.

Rich J. The Court will hear you on an application for special leave to appeal.

Barwick K.C. The consent to prosecute given by the Crown Solicitor in respect of the alleged failure to keep proper books and accounts and the other offences alleged to have been committed during 1946, cannot be taken distributively and assumed to be consent to a series of offences within dates, the offences being laid as one offence and the consent being a single consent. On the repeal of the *National Security Act*, the *Defence* (*Transitional Provisions*) *Act* 1946 did not keep on foot powers given to the various Crown Solicitors to consent to prosecutions. The authority given to the Crown Solicitors was general and not specific and was not continued. There was not sufficiency of evidence. The notice

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purporting to fix the price of the goods referred to in the 1946 charges was invalid. There was no gazettal of the name of the person to whom the notice was to be given, nor of the goods in respect of which the notice was to be given. The notice could not be given without gazettal both of the name and the goods. The notice did not actually fix prices, therefore it was bad for uncertainty. The notice purporting to fix the prices respectively of the goods referred to in the 1947 charges, was invalid. The notice was " uncertain." It did not fix a price at all. There was no publication in the *Gazette* either of De Bortoli's name or of the goods to which the notice was to relate as required by reg. 23 (1) of the *National Security* (*Prices*) *Regulations* (*Willmore* v. *The Commonwealth* (1)). Paragraph (*ba*) inserted in reg. 45B of the regulations subsequent to the decision in *Willmore* v. *The Commonwealth* (2) did precisely nothing to alter the result in that case because the par. (*ba*) only applied to notices which were authorized to be made under the regulations ; it did not authorize any notice. The invalidity of the notice was not cured by par. (*ba*). The case really covered by par. (*ba*) is where there is some provision in an order which is susceptible of being made applicable by giving notice. The case now under consideration is not such a case. Notwithstanding par. (*ba*) the position continued that the regulations do not authorize the Commissioner to take power to give notices generally, he must comply with statutory conditions before he could take the power, and the peculiar form of reg. 23 (1) of the Prices Regulations was a means by which he could take power, if he took the necessary steps to give individual notices and in relation to specified goods. The observations in *Horsey* v. *Caldwell* (3) with respect to par. (*ba*) of reg. 45B, are *obiter dicta* and are incorrect. The matters involved in that case were (i) the meaning of the words " any part of Australia," and (ii) that the powers respectively conferred by pars. (*a*) and (*b*) of reg. 23 (1) could not be exercised concurrently. Even so far as the nomination of the person's name is concerned, reg. 45B, as amended by the insertion of par. (*ba*) does not obviate the need for the gazettal of the name of the person to whom it is proposed to give a notice pursuant to reg. 23 (1) (*b*), or, applying the reasoning in *Willmore* v. *The Commonwealth* (2), for the nomination of the goods the price of which it is desired to fix by a notice. In view of the vast number of operations under the Prices Regulations in respect of the fixation of prices, the matters now raised and proposed

(1) (1945) 70 C.L.R. 587, at pp. 592, 593, 595.
(2) (1945) 70 C.L.R. 587.
(3) (1946) 73 C.L.R. 304, at pp. 312, 313.

to be raised are of great public importance. The notice is uncertain as to price. Three highly subjective things must be done before it can be determined whether the price at a given date was the correct price. The notice is in common form, so there is abundant public interest to warrant the Court considering the matter of special leave. It is shown in *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (1) and *Cann's Pty. Ltd.* v. *The Commonwealth* (2) that there must be a money sum or a formula which will result in a money sum of necessity and leave no room for two opinions as to the correct result. As to whether the Court should deal with the matter as an appeal see *Horsey* v. *Caldwell* (3). It is not correct as stated in the court below that in the circumstances, having regard to s. 46 (*b*) of the *Acts Interpretation Act* 1901-1941, the fixation must be regarded as valid so far as it fixes definite prices and that that is all that matters in this case. The delegated authority to consent to summary prosecutions given under s. 10 of the *National Security Act* 1939-1946 ceased upon the expiration of that Act. It was not kept on foot by s. 8 of the *Defence (Transitional Provisions) Act* 1946 nor by s. 8 of the *Acts Interpretation Act* 1901-1941. The consent so given under the *National Security Act* was indivisible, therefore it was not competent for the prosecutor to elect to proceed in respect of one of two offences shown to be charged in the information relating to the alleged failure to keep proper books and accounts.

Holmes K.C., on the question of the application for special leave to appeal. There is a difference between the consent given under the *National Security Act* and the consent under the authority. It is purely a matter of construction that there were two offences. The consent was one to prosecute summarily. It is not a matter which would justify the granting of special leave. The decision in *Horsey* v. *Caldwell* (3) as to the proper construction of reg. 23 and reg. 45B (*ba*), was given before the hearing of the subject prosecutions. De Bortoli, under s. 39 of the *Judiciary Act*, could have appealed direct to this Court as of right, but, notwithstanding the decision in *Ex parte Byrne*; *Re King* (4) he chose to appeal to the Supreme Court which was then bound by the decision in *Horsey* v. *Caldwell* (3). Recent and proposed relevant legislation by the various States follows the Commonwealth legislation which they are designed to replace. It is a proper assumption that that State legislation was or will be enacted with knowledge of the decision in *Horsey* v.

(1) (1945) 71 C.L.R. 184.
(2) (1946) 71 C.L.R. 210.
(3) (1946) 73 C.L.R. 304.
(4) (1944) 45 S.R. (N.S.W.) 123.

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Caldwell (1) so that the meaning of words and expressions established by that decision would be the meaning given to those words and expressions where used in the State legislation. Further to litigate the matter may well create confusion rather than clarity. It follows from the emendation of reg. 45B that the word " authorized " where first appearing in that regulation must mean " otherwise authorized " ; that reg. 45B is a definition extending the ordinary meaning of reg. 23. So far as gazetting the name of the person was concerned, that was the objective and that was attained. *Willmore* v. *The Commonwealth* (2) was concerned with " services " not " goods." The matters involved are, in the circumstances, not matters of general importance.

Barwick K.C. *Willmore* v. *The Commonwealth* (2) overruled *Ex parte Byrne* ; *Re King* (3) on all the points material in this case.

Cur. adv. vult.

Aug. 20.

The following written judgment of the Court was delivered :—

RICH, DIXON AND WILLIAMS JJ. The appellant has appealed as of right from an order or orders of the Supreme Court discharging seven rules nisi for statutory prohibition. The rules nisi were granted for the purpose of bringing up for review seven convictions of the appellant for offences under the *National Security* (*Prices*) *Regulations*. The appellant was fined £100 for each offence. The respondent objects that no appeal lies as of right from the orders and that the appeal is or the appeals are incompetent. For the appellant, however, it is contended that the orders of the Supreme Court fell within s. 35 (1) (*a*) (2) of the *Judiciary Act* because they indirectly involved a question respecting a civil right amounting to or of the value of £300.

The civil right said to be in question is to sell without the restriction of a notice given by the Prices Commissioner fixing prices for the appellant. The Supreme Court has overruled an objection on the part of the appellant to the validity of the notice. The decision that the notice was valid forms part of the essential groundwork upon which the orders were based. If the notice is valid, certain consequences affecting the appellant's rights would follow. Among these, the appellant says, would be the inability to recover from his customers to whom he has sold goods at prices exceeding the prices named in the notice large amounts which are still outstanding :

(1) (1946) 73 C.L.R. 304.
(2) (1945) 70 C.L.R. 587.
(3) (1944) 45 S.R. (N.S.W.) 123.

amounts exceeding £300. Another consequence which the appellant says must ensue is what may be compendiously, but perhaps not quite accurately, called a loss of the value of the goodwill of his business, a loss exceeding £300.

We think that the appellant's contention cannot prevail. The reason is that it confuses the financial consequences which may ensue from the decision of a point of law as part of the court's *ratio decidendi* with the question respecting a civil right involved in the curial order. It is the curial order of the court from which the appeal must be brought, not the decision of points of law in the course of reaching the judgment embodied in the order. There must be a question directly or indirectly respecting a civil right of the required value and that question must be involved not in what the court holds to be the law but in what the court does by its order. Here what the orders of the Supreme Court do is to affirm convictions for offences. The legal points lying behind those orders are another matter. The convictions themselves do not involve any civil right of the required amount. We have never admitted appeals in criminal matters without special leave, either because of the financial consequences of the questions involved in the reasoning supporting the conviction or of those ensuing from the punishment, whether imprisonment or fine.

We do not think that *Kidney* v. *Melbourne Tramway & Omnibus Co. Ltd.* (1) can be relied upon as an authority on the meaning of s. 35 (1) (*a*) of the *Judiciary Act*.

We think that the appeals are incompetent.

We shall proceed to deal with the application for special leave to appeal. The applicant if he had wished could have appealed to this Court as of right but he chose to appeal to the Supreme Court. Of the points raised by Mr. *Barwick*, none appears to us to raise any question of public importance except the point that the price fixing order under which the applicant was prosecuted was not authorized by the *National Security* (*Prices*) *Regulations*. The order in question was a notice in writing dated 14th July 1945 which notified the applicant that the maximum prices at which he might sell certain brands of wine on and from the date thereof should be as therein set out. It was a notice purporting to be made under the provisions of par. 8 of Prices Regulations Order 1015 which has been before this Court on several occasions and is known as the "Ceiling Prices Order." The decision of this Court in *Willmore* v. *The Commonwealth* (2) established that par. 8 was not authorized by these regulations so that any notice given under it

(1) (1902) 8 A.L.R. (C.N.) 29. (2) (1945) 70 C.L.R. 587.

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would be invalid. But after that decision the Prices Regulations were amended by 1946 Statutory Rules No. 19 which came into force on 29th January 1946, and *inter alia*, by reg. 6 amended reg. 45B of the Prices Regulations by inserting par. (*ba*). Regulation 45B as so amended then read that any notice authorized to be made or given under these regulations may be made or given so as to apply according to its tenor, in the case of an order, to any person to whom a notice is given in pursuance of an order. Regulation 6 (2) of 1946 Statutory Rules No. 19 provided that every order and provision of an order purporting or appearing to have been made in pursuance of par. (*b*) of sub-reg. (1) of reg. 23 before the commencement of this regulation and every notice in writing given under such order or provision should, by virtue of this regulation, have, after the commencement of this regulation, the same force and effect as it would have had if reg. 45B as amended by this regulation had been in force at the time when the order or provision was made. In *Horsey* v. *Caldwell* (1) the view was expressed by this Court that since reg. 45B (*ba*) the objection which was successful in *Willmore* v. *The Commonwealth* (2) was no longer open. Paragraph 8 of Prices Order 1015 was there considered to be a provision of an order purporting or appearing to have been made under reg. 23 (1) (*b*) so that a notice given to a person under this paragraph would be a notice given in pursuance of an order within the meaning of par. (*ba*). If reg. 6 (2) of 1946 Statutory Rules No. 19 cured the failure to notify the name of the person in the *Gazette*, it must have equally cured the failure so to notify the goods. Mr. *Barwick* pointed out the verbal difficulties involved in this view but the intention with which the amendment was made is sufficiently apparent. In all the circumstances, therefore, we do not think that any case has been made to give special leave in order to reconsider *Horsey* v. *Caldwell* (3). Special leave should therefore be refused, and the appeals struck out with costs.

Appeals struck out with costs. Special leave to appeal refused.

Solicitors for the appellant, *Mervyn Finlay & Co.*

Solicitor for the respondents, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1946) 73 C.L.R., at p. 313.
(2) (1945) 70 C.L.R. 587.
(3) (1946) 73 C.L.R. 304.