[HIGH COURT OF AUSTRALIA.]

CARBINES . . . . . APPELLANT;
INFORMANT,

AND

POWELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

H. C. OF A. 1925.

MELBOURNE, *May* 20, 21; *June* 11.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Wireless Telegraphy—Regulation—Prohibition of manufacture, &c., of apparatus—Ultra vires—Wireless Telegraphy Act 1905-1919 (*No.* 8 *of* 1905—*No.* 4 *of* 1919), *sec.* 10—*Wireless Telegraphy Regulations* (*Statutory Rules* 1924, *No.* 101), *reg.* 92.

Reg. 92 of the *Wireless Telegraphy Regulations*, which provides that "No person or firm shall manufacture . . . equipment for use as broadcast receivers, or for use in those receivers, until he has been granted a dealer's licence," &c., is *ultra vires* the power conferred by sec. 10 of the *Wireless Telegraphy Act* 1905-1919 upon the Governor-General to make regulations not inconsistent with the Act "prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act": There is nothing in the *Wireless Telegraphy Act* 1905-1919 against the manufacture of such equipment.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Camberwell an information was heard whereby Frank Leslie Carbines, an Inspector of Wireless Licences, charged that A. L. Powell, "not being a person to whom a dealer's licence had been granted pursuant to the *Wireless Telegraphy Regulations*, did, contrary to the said Regulations,

manufacture certain equipment for use as broadcast receivers, to wit, two four-valve wireless receiving sets." At the close of the informant's case the Police Magistrate who heard it held that reg. 92 of the *Wireless Telegraphy Regulations* was invalid, and he therefore dismissed the information with £2 2s. costs.

From that decision the informant now, by way of order to review, appealed to the High Court.

Owen Dixon K.C. (with him *Hennessy*), for the appellant. Reg. 92 of the *Wireless Telegraphy Regulations* is valid. The Postmaster-General having under sec. 4 of the *Wireless Telegraphy Act* 1905-1919 the monopoly of establishing and using appliances for transmitting and receiving messages by wireless telegraphy and being entitled under sec. 5 to charge fees for licences, control of the manufacture and sale of apparatus is "necessary," or at any rate "convenient," within the meaning of sec. 10, for the preservation of the monopoly. Such control is incidental to the preservation of the system established by the Act. The words "giving effect to this Act" include prescribing what is expedient to protect the system of licensing.

Keating, for the respondent. Reg. 92 is beyond the power conferred by sec. 10. Secs. 4 and 5 relate only to conduct involved in transmitting and receiving wireless messages. Manufacture of instruments is antecedent to and not necessarily connected with the subject matter of those sections. No monopoly of manufacturing appliances was conferred by the Act on the Postmaster-General, nor was he given the power of regulating their manufacture. Regarding the Act as an empowering Act, it should not be read as including manufacture of appliances (*Wandsworth Board of Works* v. *United Telephone Co.* (1); *Craies on Statute Law*, 4th ed., p. 154); and regarding it as a restraint on what otherwise would be the common law right of every private individual, there can be no implied power to regulate or prohibit manufacture (*Rossi* v. *Edinburgh Corporation* (2); *R.* v. *Harrald* (3); *Craies on Statute Law*, 4th ed., pp. 173-175).

Owen Dixon K.C., in reply.

Cur. adv. vult.

(1) (1884) 13 Q.B.D. 904, at pp. 919, 920.
(2) (1905) A.C. 21, at pp. 25-31.
(3) (1872) L.R. 7 Q.B. 361.

H. C. OF A. 1925.

CARBINES v. POWELL.

June 11.

The following written judgments were delivered :—

KNOX C.J. I have had the advantage of reading the opinion prepared by my brother *Starke*, and I agree with him in thinking that for the reasons he has given the order nisi should be discharged.

ISAACS J. The appellant, who is a Commonwealth Inspector of Wireless Licences, on 7th March 1925 laid an information against the respondent for that, not holding a dealer's licence, he did manufacture, contrary to the Regulations, certain equipment for use as broadcast receivers, to wit, two four-valve wireless receiving sets. It must be observed that the offence charged is not one against the "Act," but one against the Regulations. There is no such offence mentioned in the Act as manufacturing. Nor does the information allege what the Act so strongly emphasizes, namely, the purpose of transmitting or receiving messages. In short, it is the mere manufacture of two receiving sets without the authority of a dealer's licence that is the offence alleged. There is no doubt that the act complained of is contrary to the terms of reg. 92 of the Statutory Rules 1924, No. 101, made under the *Wireless Telegraphy Act* 1905-1919.

On 12th March 1925 the case came before a Police Magistrate. After the evidence for the appellant, two objections were taken for the respondent. They were, first, that reg. 92 is invalid as being *ultra vires* the powers given by the Act to make regulations, and next, that "manufacture" in that regulation did not include the assembling of equipment for the purpose of constructing a set. Without calling on the respondent for evidence, the Magistrate dismissed the information on the first ground. From that decision this appeal is brought.

The question turns entirely on whether reg. 92 is within the permission which Parliament has given to the Governor-General to make regulations. Before entering upon a comparison of the terms of the regulation with those of the statute, I would make one observation. In determining the extent of a power the construction of the words which convey it is influenced by the character of the instrument in which they are found, the relative situations and functions of the parties, and the nature of the subject matter.

Words, for instance, in a Constitution conferring powers on a Parliament might be more widely construed than if contained in a permission by a merchant to his caretaker. In the present instance we have to consider the force of an authority from the Legislature to the Executive. Reg. 92 is the first of a group ending with reg. 104 and under the heading "Sale of Apparatus." Reg. 92 says:— "No person or firm shall manufacture, sell, let on hire, or otherwise dispose of equipment for use as broadcast receivers, or for use in those receivers, until he has been granted a dealer's licence: Provided that a private person may dispose of a receiver or receiving equipment if advice of the disposal is sent within one month to the Department." It is clear that the regulation is aimed at the manufacture or disposal by A for someone else's use as or in a broadcast receiver. A licence *may* be granted. Reg. 96 enacts a licence fee, namely, £5 for Zone 1, £3 for Zone 2, and £2 for Zone 3, payable annually in advance. A dealer's licence (reg. 98) permits operation for the purpose of demonstration. Reg. 104 provides a penalty of £20 for contravention of these Regulations. Turning to the Act, the rule-making power is contained in sec. 10 in these words: "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." There are in the Act, as in sec. 5 and in sec. 6 (2), express provisions as to prescribing certain matters. To these the first part of sec. 10 as to prescribing applies. The latter part of sec. 10 enables the Governor-General to frame all such regulations as in his discretion are either necessary or convenient for "carrying out" or "giving effect to" what Parliament itself has enacted. Reg. 92 obviously does not fall within the first class. If within sec. 10 at all, it must be that it comes within the general words "necessary or convenient . . . for carrying out or giving effect to this Act." To "carry out" the Act means to enforce its provisions. To "give effect" to an Act is to enable its provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operations as that marked out by the Act itself.

H. C. OF A. 1925.

CARBINES v. POWELL.

Isaacs J.

It cannot be supposed that Parliament gave permission to the Executive to enlarge legislatively that field at discretion. The reasonableness of such a provision as reg. 92 may be at once conceded. One may also concede that in the absence of express parliamentary direction the power to make such a regulation may for weighty reasons be necessary for public safety and desirable for the protection of private purchasers. But the question for the Court is not whether that power should, but whether it does, exist. The principle by which this case must be tested is illustrated in *Rossi* v. *Edinburgh Corporation* (1). If I have to select one passage from that case, it is found in the judgment of Lord *Davey* (2) in these words : " I am of opinion that you cannot under the guise of giving better effect to the provisions of a statute extend the statute to the prohibition or the restraint of trades which are not included in the statute." That exactly expresses the position here.

I have in a former case—*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (3)—endeavoured to express the idea in more general terms, which, having been quoted with approval by *Barton* J. in *Stemp* v. *Australian Glass Manufacturers Co.* (4) I venture to repeat :—" It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met. . . . The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power." I must confess, not without some regret but certainly without hesitation, that I am forced to deny the existence of authority. The regulation does not complement, it supplements, the granted power. During the argument I briefly outlined the reason for my opinion, and further consideration confirms it.

Before stating the reason I would interpose two observations. One is that Parliament can readily confer the power. The other is

(1) (1905) A.C. 21.
(2) (1905) A.C., at p. 29.
(3) (1910) 11 C.L.R. 311, at p. 338.
(4) (1917) 23 C.L.R. 226, at pp. 233, 234.

that in the meantime the matter may not be entirely bare of remedy. If the dealer's licence be void so as to confer no authority, sec. 6 may be sufficient in all appropriate cases to enable the Department to secure considerable protection. If, for instance, an information had been laid for actually receiving messages contrary to sec. 6, a very different question would have presented itself. If the dealer's licence is void, what would excuse the act? However, that is not before us, and it need not be pursued.

Passing now to the question in hand, the central feature, the nucleus of the Act, is that it is intended to secure to the Commonwealth the exclusive right of transmitting and receiving wireless messages. Obviously, in the present state of science, this is vital to the security of the country. Parliament, however, has turned its attention to the means it selects of attaining this end. It did this when the general inducement to multiply apparatus that now exists was not within the range of expectation. It went as far as making exclusive the privilege of "establishing, erecting, maintaining, and using stations and appliances for the purpose of" such transmission and reception. It has not gone farther, even though in 1919 it expressly added "telephony." What is meant by the "purpose"? It does not mean the ultimate purpose of the station or the appliance in the sense of the use for which it is destined: it means the purpose the person has in "establishing," "erecting," "maintaining" or "using" the station or appliance. In other words, the "purpose" is that of the establishing, erecting, maintaining or using the thing. An ironmonger who has a gun for sale, has the gun for the purpose of sale and not for the purpose of killing animals. A chemist has strychnine for sale and not for the purpose of committing murder. The particularity of pars. (*a*), (*b*) and (*c*) of sec. 4 shows that it is the personal purpose the Act has in view and not the general use to which a station or an appliance might be put. The purpose of transmission or receipt of messages is essential to the legislative concept. This purpose is preserved throughout the Act. Sec. 5 is confined to licences for that purpose. These licences may be granted "for such terms and on such conditions"—and there is added what is of great moment—"on payment of such fees as are prescribed." That is the only parliamentary authority to prescribe

H. C. OF A. 1925.

CARBINES v. POWELL.

Isaacs J.

licence fees. In view of the fundamental principle restated and enforced by the House of Lords in *Attorney-General* v. *Wilts United Dairies* (1) and in *Greenwood* v. *F. L. Smidth & Co.* (2), relied on in this Court in *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (3), this would in itself be sufficient to invalidate the particular regulation relied on. It is necessary to say that this is a reason entirely independent of whether sec. 10 authorizes a regulation like reg. 92 if unaccompanied by a requirement of licence fee. The principle as stated by Lord *Buckmaster* and Lord *Wrenbury*, with the concurrence of the other learned Lords, is that, however broad the general language of an Act may be, it requires express language to enable the Executive to impose a tax.

On the distinct question of authority to enact reg. 92 at all, sec. 6 is most significant. In sub-sec. 1, par. (*a*), there is penalized a breach of the widest area in the Act. In par. (*b*) there is penalized expressly the mere unauthorized transmission or receipt of wireless messages. I understand that that paragraph applies when a person transmits or receives, even though he is wholly unconnected with establishing, erecting, maintaining or generally using a station or appliance. This indicates very clearly the central matter dealt with, and is supported by sub-sec. 2 applying to foreign ships. Heavy penalties are imposed for breach of the substantive privilege created, that is, of the central privilege of actual transmission and receipt, and of the protective privilege of apparatus established, erected, maintained or used *for that purpose*. The forfeiture clause (sec. 7) and the search clause (sec. 8) are similarly limited. Sec. 9, providing for procedure, is limited to offences against "this Act."

The structure erected by Parliament itself is precise and elaborate, the fees permitted are expressed, and the substantive offences are provided for. It appears to me impossible to suppose that sec. 10 entrusted to the Executive the authority to create a wider sphere of substantive criminal law so as to embrace *the mere manufacture of articles apart from the personal purpose* which lies at the root of the protective legislation. Least of all can *licence fees* be considered as authorized beyond those mentioned in sec. 5.

The appeal should, therefore, be dismissed.

(1) (1922) 91 L.J. K.B. 897.
(2) (1922) 1 A.C. 417, at p. 423.
(3) (1922) 31 C.L.R. 421, at pp. 462, 463.

HIGGINS J. In my opinion, the Police Magistrate was right—reg. 92 is invalid. The defendant Powell is charged with manufacturing certain equipment for use as broadcast receivers without a dealer's licence, as required by the regulations (Statutory Rules 1924, No. 101, reg. 92). But this regulation, so far as it relates to manufacture, is beyond the powers of the Governor-General in Council. The only power to make regulations is that contained in sec. 10 of the Act of 1905: "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act." It is urged that it is necessary or convenient to prescribe regulations forbidding the manufacture of equipment in order to carry out or give effect to the Act. The Act (sec. 4) gives the Minister administering the Act the exclusive privilege of establishing, creating, maintaining and using stations and appliances for wireless messages; under sec. 5 licences to establish, erect, maintain or use such stations or appliances may be granted on such conditions and on payment of such fees as are prescribed; under sec. 6 no person (except as authorized by the Act) is to establish, erect, maintain or use any station or appliances; under sec. 7 all appliances erected, maintained or used in contravention of this Act or the regulations are to be forfeited to the King. But there is no prohibition of *manufacture* of such appliances; and reg. 92, therefore, prescribes something which is not necessary or convenient *for carrying out or giving effect to the Act*, however convenient it might be in other aspects. The regulation oversteps the Act, and the appeal should be dismissed.

RICH J. In my opinion the decision of the Police Magistrate was correct. He held that reg. 92 of the Statutory Rule No. 101 of 1924 was *ultra vires* of the Governor-General under sec. 10 of the *Wireless Telegraphy Act* 1905-1919.

In *R.* v. *Halliday* (1) Lord *Wrenbury*, to test whether a regulation purporting to be made under an Act was *ultra vires* or not, said:—"I turn to the Act at once to see what upon its terms are the characteristics—the scope, the purpose, the limits, and the character

(1) (1917) A.C. 260, at p. 305.

H. C. OF A. 1925.

CARBINES v. POWELL.

Rich J.

—of the regulations which the Act allows. I shall then go on to inquire whether the regulation in question falls within them." Pursuing the same line of investigation here, I begin with sec. 10. The only relevant words in that section, apart from the requirement of consistency, are "necessary or convenient for carrying out or giving effect to this Act." There is, no doubt, a considerable deal of elasticity in the words "necessary or convenient" on account of the discretion always given to the Executive. But that discretion is limited to carrying out and giving effect to "this Act." Sec. 10 does not give carte blanche to enact independent legislation. Independent legislation is a matter for Parliament itself. But, in my opinion, reg. 92, however desirable such a rule of conduct might be, does amount to independent legislation, and not to mere incidental regulation to carry out or give effect to the legislation of Parliament. The Act is confined to vesting in the Postmaster-General a monopoly of transmitting or receiving telegraphic and telephonic messages together with a monopoly of "establishing, erecting, maintaining, and using stations and appliances" for such a purpose. Those monopolies are enforceable by strict penalties. Parliament has also provided for licensing the private use of the monopolies it has created, and has authorized fees to be taken for that use. Reg. 92 and its associated regulations appear to me to go beyond this and set up a further monopoly, i.e., manufacture apart from the purpose mentioned in the Act, and they also authorize licences for fees and for the use of this further monopoly. Both for the reason that reg. 92 is independent legislation and because without parliamentary authority (see cases cited in the *Wool Tops Case* (1)) licence fees are demandable as a condition of licence, the regulation is, in my opinion, invalid.

STARKE J. The question in this case is whether a regulation, prohibiting the manufacture and sale of wireless equipment for use as broadcast receivers, or for use in those receivers, without a dealer's licence, is a lawful exercise of power under the *Wireless Telegraphy Act* 1905-1919. That Act confers upon the Minister of State administering it the exclusive privilege of establishing, erecting, maintaining and using stations and appliances for the purpose of

(1) (1922) 31 C.L.R., at pp. 462, 463.

transmitting and receiving messages by wireless telegraphy as therein mentioned, and it empowers the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

It was said that manufacture was a necessary ingredient of the establishment of wireless stations or appliances for the purpose of transmitting or receiving messages, or else that the monopoly demanded the full regulation of all those engaged in operating transmitters or receivers, including those manufacturing such appliances, in order to prevent abuses, or the use of inefficient plant, or infringements of the Act and Regulations. The Act, as Lord *Davey* said in *Rossi* v. *Edinburgh Corporation* (1), " ought to be construed fairly " and " so as reasonably to effect the " purposes of the Legislature. But it ought not to be extended, by implication, to matters beyond those necessary to accomplish those purposes, which are the transmission and receipt of wireless messages. A power to set up or to erect wireless appliances does not necessarily involve the manufacture of such appliances : they may be otherwise acquired. And the regulation of those engaged in transmitting and receiving wireless messages does not warrant, in my opinion, the regulation of those engaged in the manufacture of wireless appliances.

Some reliance was placed upon the words in sec. 10 of the Act giving power to the Governor-General to make regulations convenient for carrying out or giving effect to the Act. But those words carry the case no further, for the regulations they refer to must be regulations convenient for carrying out the purposes of the Act, that is, the transmission and receipt of wireless messages, and not the purpose of manufacturing plant.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *H. H. Hoare*. B. L.

(1) (1905) A.C., at p. 27.