

[HIGH COURT OF AUSTRALIA.]

GRIFFIN APPELLANT;
 COMPLAINANT,
 AND
 CONSTANTINE RESPONDENT.
 DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS,
WESTERN AUSTRALIA.

H. C. OF A. *Constitutional Law (Cth.)—Taxation power—Excise duty—Validity of law prohibiting*
 1954. *sale or possession of article of drink etc. containing methylated spirits—The*
 } *Constitution (63 & 64 Vict. c. 12), s. 51 (ii.), (xxxix.)—Spirits Act 1906-1952*
 PERTH, *(Cth.) (No. 21 of 1906—No. 10 of 1952), s. 16 (b).*
 Oct. 22;
 SYDNEY,
 Dec. 17.
 Dixon C.J.,
 McTiernan
 and
 Kitto JJ.

APPEAL.

George Arthur Constantine was charged before the Police Court, Perth, with an offence against s. 16 (b) of the *Spirits Act* 1906-1952 (Cth.) in that he did on 19th November 1953 sell to one Bryant an article of drink containing methylated spirits.

At the hearing of the complaint, a preliminary objection was taken on behalf of Constantine that s. 16 (b) of the *Spirits Act* was ultra vires the Parliament of the Commonwealth and accordingly invalid. The magistrate upheld this preliminary objection, and dismissed the information. He observed that methylated spirits were exempt from duty under the *Excise Act* 1901-1952 (Cth.) and concluded from this that s. 16 (b) of the *Spirits Act* should be considered as enacted, not for the protection of the revenue, but in the interests of public health, and was not authorized by any head of Commonwealth legislative power.

From this decision this appeal was brought by the complainant by virtue of s. 39 (2) (b) of the *Judiciary Act* 1903-1950.

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J. Hale Q.C. (with him *P. Connaughton*), for the appellant. Section 16 (b) of the *Spirits Act* 1906-1952 is a law relating to taxation. In particular it relates to the imposition of excise duties. The taxation power is aided by s. 51 (xxxix.) of the Constitution which extends to matters reasonably arising in execution of the power, even if not strictly essential to its exercise. [He referred to *P. J. Magennis Pty. Ltd. v. The Commonwealth* (1); *Burton v. Honan* (2); *Insurance Commissioner v. Associated Dominions Assurance Society Pty. Ltd.* (3).] Historically, methylated spirits have always carried a lower rate of duty than spirits for human consumption, or they have not been taxed at all. The whole purpose of methylating spirits is to make them unfit for human consumption, so as to ensure that spirits taxed at a lower rate or exempted from tax on the basis of their use for industrial purposes are not used for human consumption. If methylated spirits are used for human consumption, then the revenue will be prejudiced. It is not necessary to show loss of revenue. Section 16 (b) is necessarily incidental to the main purpose of taxing spirits, but it is sufficient if the section fairly and reasonably represents a law in relation to a matter arising out of the power to levy excise duty. [He referred to *Burton v. Honan* (4).] The magistrate held that as methylated spirits were not dutiable, a law regulating or prohibiting their use for a particular purpose could not be supported by the taxation (excise) power. This is a *non sequitor*. The use of methylated spirits is controlled so as to protect the revenue which would result from excise levied on spirit to be used for human consumption. The legislation was not concerned with or enacted for the purpose of public health, although it may in its operation protect public health. The fact that it produces such an indirect result which, in itself, is beyond power is irrelevant. [He referred to *South Australia v. The Commonwealth* (5); *Bank of N.S.W. v. The Commonwealth* (6); *Melbourne Corporation v. The Commonwealth* (7).]

There was no appearance for the respondent.

Cur. adv. vult.

(1) (1949) 80 C.L.R. 382, at pp. 410, 411.

(2) (1952) 86 C.L.R. 169, at p. 177.

(3) (1953) 89 C.L.R. 78, at p. 87.

(4) (1952) 86 C.L.R., at p. 179.

(5) (1942) 65 C.L.R. 373, at pp. 424, 425.

(6) (1948) 76 C.L.R. 1, at pp. 186, 187.

(7) (1947) 74 C.L.R. 31, at pp. 47, 79.

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The following written judgments were delivered :—

DIXON C.J. I have had the advantage of reading the reasons prepared by *Kitto J.* and agree in them.

MCTIERNAN J. I have had the advantage of reading the reasons prepared by *Kitto J.* and agree with them.

KITTO J. The respondent was the defendant to a summons issued out of the Police Court, Perth, to answer a complaint made by the appellant that he, the respondent, on 29th November 1953 at Perth was guilty of an offence against s. 16 (b) of the *Spirits Act* 1906-1952 (Cth.) in that he did sell to one Bryant an article of drink containing methylated spirits.

At the hearing a preliminary objection was taken on behalf of the respondent that s. 16 (b) of the *Spirits Act* is ultra vires the Parliament of the Commonwealth and for that reason invalid. The prosecution supported the validity of the provision by reference to pars. (ii.) and (xxxix.) of s. 51 of the Constitution, ascribing to it the character of a law with respect either to taxation, in particular the imposition of excise duties, or to a matter incidental to the enactment of a law with respect to taxation. The magistrate, however, upheld the preliminary objection. He observed that methylated spirits were exempt from duty under the *Excise Act* 1901-1952 and he concluded from this that s. 16 (b) should be considered as enacted, not for the protection of the revenue, but in the interests of public health, and was not authorized by any head of Commonwealth legislative power. Accordingly he dismissed the information. From his decision the appeal is brought by virtue of s. 39 (2) (b) of the *Judiciary Act* 1903-1950 (Cth.).

The *Spirits Act* 1906-1952 (Cth.) deals with a variety of matters concerning spirits, and not all of them have to do with the protection of the revenue. Section 9, for example, is on its face enacted in reliance upon par. (i.) of s. 51 of the Constitution. But there is no head of power to which it is possible to refer the group of sections beginning with s. 14 which, together with the schedule, relate specifically to methylated spirits, unless those sections have the character of legislation incidental to the imposition of taxation. This group of sections includes s. 16, under which the respondent was charged. So far as it need be quoted the section provides :
 “ 16. A person shall not—(a) sell or have in his possession any illicit methylated spirits ; or (b) sell or have in his possession any article of food or drink, or any scent essence tincture or medicine, containing any methylated spirits or methylating substance or any fractional part or ingredient thereof ”.

The section must be read with the aid of four of the definitions which are contained in s. 3. "Methylated" is defined to mean mixed with any prescribed methylating substance in the prescribed quantity and in the prescribed manner. "Methylating substance" means any substance required by any regulation to be mixed with spirits in order to make methylated spirits, and includes any fractional part or ingredient of any such substance, and particularly any such fractional part or ingredient as may serve to aid detection by means of chemical analysis of the presence in any article of food or drink or any medicines of a methylating substance. "Methylated spirits" means any spirits which have been methylated, and whether the methylating substance or any fractional part or ingredient thereof has afterwards been removed from the spirit or not, and includes all spirit which has been entered for home consumption as methylated spirit. "Illicit methylated spirits" means methylated spirits from which any methylating substance has been abstracted, or which has been refined, distilled, treated or dealt with in contravention of the Act or the regulations, and subject to the Act it includes any methylated spirits (not subject to the control of the customs) which are in any respect below the standards prescribed for industrial spirits or mineralized spirits.

Section 14 is the principal provision of the relevant portion of the Act. Sub-section (1) authorizes the methylation of spirits in accordance with the Act and the regulations. Sub-section (2) provides for four classes of methylated spirits, namely (a) industrial spirits for use in the arts and manufactures (other than the manufacture of articles of food or drink, scents, essences, tinctures or medicines), (b) mineralized spirits for lighting, heating and power purposes, (c) spirits for special manufactures or special purposes, and (d) spirits to be used for purposes of scientific investigation, in connection with universities or public institutions. Sub-section (3), read with the schedule, prescribes standards (subject to alteration by regulations) for industrial spirits and mineralized spirits: the spirit before methylation is to be of a strength not less than sixty-five degrees over proof, and it is to be methylated by the addition (in the case of industrial spirits) of two per cent of wood naphtha and one-half per cent of pyridine liquid, and (in the case of mineralized spirits) of one per cent of wood naphtha, one-quarter per cent of pyridine, two to twenty per cent of benzine, and one-quarter per cent of a solution of aniline violet or blue dye. Sub-sections (4) and (5) provide for prescribing the manner of methylation of spirits for any special manufacture or for any special purpose,

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and the manner in which spirits for use in scientific investigation are to be treated and dealt with.

In order to determine the true character of the relevant provisions of the Act it is necessary to take account of the purpose which is served by so mixing spirits with a methylating substance as to produce "methylated spirits" of any of these four classes. The purpose is not disclosed on the face of the Act, but by the year 1906 when the Act was passed the methylation of spirits was a recognized device for effecting a reconciliation between, on the one hand, the interest of the revenue in exacting high duties in respect of spirits (i.e. ethyl alcohol, sometimes called spirits of wine, in the various forms in which it is used for beverage and other purposes of human consumption) and, on the other hand, the interest of industry in procuring such alcohol for its purposes at economic prices. The need for such a reconciliation became insistent in England in the middle of the nineteenth century. The *Encyclopaedia Britannica* (14th ed.) (1936), vol. 1, p. 541, tit. "Alcohol in Industry", explains that experiments conducted about the year 1853 led to the selection of wood naphtha (methyl alcohol) as a denaturant possessing the desired combination of qualities. First, its admixture with spirits, while not detracting from their utility for many industrial purposes, gives a product which is obnoxious to the human palate; secondly, it is difficult to remove from the mixture even by distillation; and thirdly, its presence in the mixture is readily detectable.

Two years later there was passed the *Spirit of Wine Act* of 1855, (18 & 19 Vic. c. 38) (Imp.) entitled "An Act to allow Spirit of Wine to be used Duty-free in the Arts and Manufactures of the United Kingdom". Section 1 of this Act empowered the Commissioners of Inland Revenue to permit a distiller or rectifier of spirits or other licensed person to mix, under prescribed conditions and regulations, spirit of wine of specified degrees of strength and in minimum quantities with not less than one-ninth (or other specified proportion) of its bulk measure of "wood naphtha or methylic alcohol" or such other article or substance as the Commissioners should approve and as to the satisfaction of the Commissioners should render such spirit unfit for use as a beverage and incapable of being converted to that purpose; and thereupon such mixture should be allowed duty-free for use in such branches of the arts and manufactures of the United Kingdom as the Commissioners should sanction and approve. Section 2 provided that the said mixture of spirit of wine with wood naphtha or methylic alcohol should be denominated methylated spirit, and the mixture of spirit of wine with any other

substance approved by the Commissioners should be designated by such term as they should direct. Sections 3 and 4 contained provisions with respect to licences to mix methylated spirit, the places in which it might be mixed, the time and mode of mixing it, and its sale, delivery and removal subject to rules, regulations, restrictions and securities. Other sections of the Act made detailed provisions for preventing abuses inimical to the revenue.

The statute law with respect to spirits generally was consolidated by the *Spirits Act* 1880 (43 & 44 Vic. c. 24). Section 3 defined "methylate" as meaning to mix spirits with some substance in such manner as to render the mixture unfit for use as a beverage, and "methylated spirits" as meaning spirits so mixed to the satisfaction of the Commissioners. Part I of the Act dealt with spirits other than methylated spirits and provided, amongst other things, for the charging and payment of an excise duty thereon. Part II, containing ss. 116 to 132 inclusive, was devoted to methylated spirits. Section 117 provided that methylated spirits should, subject to the provisions of the Act be exempt from duty. Section 123 prescribed the nature, strength and quantity of the spirits to be used for methylation, and provided that the substance to be mixed with spirits for that purpose should be wood naphtha or methylic alcohol, or some other substance approved by the Commissioners. Provisions for safeguarding the revenue were also made, and these included s. 130 which (subject to certain exceptions) made it an offence, entailing a fine and the forfeiture of the spirits concerned (a) to prepare or attempt to prepare any methylated spirits for use as or for a beverage or as a mixture with a beverage; (b) to sell any methylated spirits, whether so prepared or not, as or for a beverage, or mixed with a beverage; (c) to use any methylated spirits or any derivative thereof in the preparation of any article capable of being used wholly or partially as a beverage, or internally as a medicine; or (d) to sell or have in possession any such article in the preparation of which methylated spirits or any derivative thereof had been used.

Later Acts provided for new classes of duty-free methylated spirits, produced by the admixture of other ingredients in addition to wood naphtha; and s. 13 of the *Finance Act* 1924 (14 & 15 Geo. 5 c. 21) (Imp.) empowered the Commissioners of Customs and Excise to prescribe what substances or combinations of substances should be mixed with spirits for the purpose of methylation in the making of power methylated spirits, industrial methylated spirits and mineralized methylated spirits respectively, and re-defined "methylated spirits" for the purposes of the *Spirits Act* 1880 and amending

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It is interesting to observe, as *Chambers' Encyclopaedia* mentions (1950 ed., vol. 1, p: 251, tit. "Alcohols"), that the strictness of the precautions taken against the evasion of duty so hampered the early growth of the British chemical industry that for a time it lagged behind the German; and not until the Boer War had excited public interest in the need to promote the manufacture of high explosives was provision made (by s. 8 of the *Finance Act* 1902 (2 Edw. 7, c. 7) (Imp.)) enabling the Commissioners of Inland Revenue to authorize, subject to safeguards, the receipt of spirits (unmethylated) without payment of duty, for use in the case of any art or manufacture in which the use of spirits was required but the use of methylated spirits was unsuitable or detrimental.

In many other countries also, legislation provided for the denaturing of alcohol as a means of enabling industry to satisfy its needs while high duties continued to be exacted in respect of all forms of potable alcohol: see *Encyclopaedia Britannica* (14th ed.) (1936), vol. 1, pp. 542-544. By the time the Parliament of the Commonwealth came to deal with the subject of customs and excise, the nature and purpose of the methylation of spirits had become familiar. In New South Wales the *Customs Duties Act* 1871 (34 Vic. No. 21) (N.S.W.), for example, charged a duty of ten shillings per gallon on imported spirits generally, but only two shillings per gallon on methylated spirits; and it did not trouble to define methylated spirits. No doubt the expression had already become part of the language; see the definition of "methylate" in the *Oxford Dictionary* (1908): "to mix or impregnate with methyl; usually, to mix spirit of wine with such a quantity of pyroxylic spirit or some other substance as will render it unfit for drinking, so as to exempt it from the duties imposed in Great Britain and other countries upon alcohol".

In the first *Customs Act* of the Commonwealth (No. 6 of 1901), s. 90 provided for the methylation of warehoused spirits "in manner prescribed . . . so as to be rendered unfit for human use", and for its entry for home consumption for use in arts and manufactures subject to the payment of such duty (if any) as might be prescribed. This provision was supplemented by s. 91, which made it an offence to treat, refine or distil any methylated spirit for the purpose of rendering it fit for human use as a beverage, or to sell or offer for sale any methylated spirit so treated refined or distilled, or to sell or offer for sale for human use as a food or beverage any goods containing methylated spirits; and by s. 229 (s), which

forfeited to the Crown all spirits which having been methylated were afterwards treated filtered refined distilled or otherwise dealt with in any manner so that any substance might be extracted therefrom. The *Customs Tariff*, No. 14 of 1902 (Cth.), was thereafter passed imposing a duty of three shillings per gallon (and only one shilling per gallon on and after 18th April 1902) on methylated spirits, while charging fourteen shillings per gallon on other spirits. (The *Customs Tariff* 1933-1954 (Cth.) provides for heavy duties on various kinds of spirits, but only a nominal duty of one shilling per gallon on "spirit of strength not less than sixty-five per cent over proof, denatured or to be denatured prior to delivery subject to compliance with the conditions and restrictions applying to methylated spirit prescribed in the *Spirits Act* 1906-1935 and in the regulations issued thereunder": Item 3 (F)).

Likewise, the *Distillation Act* 1901, No. 8 of 1901 (Cth.), provided by s. 37 that a distiller might in the manner and subject to the conditions prescribed methylate spirits in his distillery, and the provisional *Distillation Regulations* contained in sched. III provided, by reg. 83, that spirits might be methylated and entered for home consumption in a distillery as in the case of spirits warehoused under the *Customs Act* 1901. Thereafter the *Excise Tariff*, No. 11 of 1902 (Cth.), imposed a duty of only sixpence per gallon on methylated spirits as compared with duties as high as thirteen shillings per gallon on other spirits. (The *Excise Tariff* 1921-1953 imposes high duties on the manufacture of various kinds of spirits, but leaves methylated spirits, subject to regulations, duty-free: Item 2 (N)).

In 1906 the Parliament enacted the *Spirits Act* 1906 (Cth.) under which the present case arises. It may be remarked that the Royal assent was given to this Act on 12th October 1906, the day on which assent was given to the *Excise Tariff* 1906 (Cth.), which established a new schedule of duties in respect of spirits, differentiating in favour of methylated spirits as had the *Excise Tariff* 1902 (Cth.). The *Spirits Act*, by s. 5, repealed ss. 90 and 91 and par. (s) of s. 229 of the *Customs Act* 1901 (Cth.), and it superseded them by provisions of its own. Section 14 to which reference has already been made, suggests by its initial words that it is concerned with excise and customs: "Spirits distilled in Australia and imported spirits may be methylated in accordance with this Act and the regulations". It provides, as has been mentioned, for four classes of methylated spirits for specified uses, and it adds, in sub-s. (6), that no methylated spirits shall be used in the manufacture or preparation of any articles of food or drink, or of any scents, essences, tinctures or medicines.

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The remaining sections of the Act, other than s. 26 which authorizes the making of regulations, are similar in general character to s. 13 of the *Spirits Act* 1880 (Imp.) and s. 90 of the *Customs Act* 1901 (Cth.), though their provisions are more elaborate. Section 15 creates a variety of offences : abstracting any methylating substance or any fractional part or ingredient thereof from any methylated spirits ; refining or distilling any methylated spirits except as allowed by the regulations ; and treating, dealing with or using any methylated spirits or spirits containing any fractional part or ingredient of a methylating substance in contravention of the Act or the regulations (e.g. by use in the manufacture or preparation of articles of food or drink contrary to s. 14 (6)).

It is obvious that offences of this nature are likely to be difficult to detect and prove, and the fact that this is so is sufficient to account for the enactment of the next provision of the Act, par. (a) of s. 16. As already stated, this paragraph makes it an offence to sell or have in possession any “ illicit methylated spirits ”, that is to say any methylated spirits from which any methylating substance has been abstracted, or which has been refined, distilled, treated or dealt with in contravention of the Act or the regulations, and any methylated spirits (not subject to the control of the customs) which are in any respect below the standards prescribed for industrial spirits or mineralized spirits. The prescribed standards are not, of course, standards of purity fixed in the interests of users, but standards of unfitness for purposes other than those referred to in s. 14.

Then comes par. (b) of s. 16, the provision in question in this case, which creates the offence of selling or having in possession any article of food or drink, or any scent, essence, tincture or medicine, containing any methylated spirits or methylating substance or any fractional part or ingredient thereof. This paragraph is complementary to par. (a), and is to be explained by the fact that the revenue may be defrauded, not only by the abstraction from methylated spirits of the substance which has made it unsuitable for human consumption, but equally by the mixing of other substances with methylated spirits so as to overcome its distastefulness and enable it to be consumed for the sake of its ethyl alcoholic content.

This appeal is not directly concerned with the words added to s. 16 (b) by the amending Act, No. 35 of 1918, which make it an offence to sell or have in possession any article of food or drink etc., not only if it contains any methylated spirits, but also if it contains any methylating substance or any fractional part or ingre-

dient thereof. But clearly enough the operation of the amendment is to make the provision still more effective by facilitating detection of the kind of fraud on the revenue at which it is aimed. Methylating substances, because of the qualities which have led to their being chosen as such, are unlikely to be found in food, drink, etc., unless methylated spirit has been introduced for the sake of its ethyl alcoholic content, and the amendment operates to preclude the success of a defence that the presence in food, drink, etc. of both ethyl alcohol and a methylating substance, since they could have been introduced separately from one another, does not indicate that methylated spirits has been misapplied. Much the same may be said in relation to a fractional part (referring, no doubt, to a product of fractional distillation) or ingredient of a methylating substance.

The foregoing considerations point unmistakeably to the conclusion that both paragraphs of s. 16 are incidental to the exoneration of methylated spirits from the duties, or portion of the duties, imposed upon unmethylated spirits. They are natural, if not indeed necessary, concomitants of customs and excise tariffs which make methylation the qualification of spirits for preferential treatment as compared with unmethylated spirits. They provide safeguards against the danger that spirits, after having been dealt with by the revenue authorities on the assumption that, having been methylated, they will be applied to purposes mentioned in s. 14, may be so treated as to be applicable to other purposes.

It is evident, therefore, that s. 16 (b) is within the legislative power conferred by par. (xxxix.) in association with par. (ii.) of s. 51 of the Constitution, and the preliminary objection raised at the hearing of the prosecution should have been overruled.

The appeal should be allowed, the order of the magistrate dismissing the complaint should be set aside, and the complaint should be remitted to the Court of Petty Sessions at Perth for adjudication.

Appeal allowed with costs.

Order of the Court of Petty Sessions at Perth set aside. Cause remitted to the said Court of Petty Sessions for rehearing with an intimation that s. 16 (b) of the Spirits Act 1906-1952 is a valid law of the Commonwealth.

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

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