out, or as to the conditions which were supposed to exist when the Special Board fixed the rates of wages. Again, when a prosecution takes place, the onus of proving that the rate fixed and the price paid are in accordance with the sub-section, in all cases lies on the defendant. It would be impossible for him, in a contract of this kind, fairly to discharge that onus. For these reasons, I am of opinion that the appellant did not come within the provisions of sub-sec. (19) in making this contract. I concur in the order of the Court.

Appeal allowed, with costs. Order appealed from discharged. Order nisi discharged with costs.

Solicitors, for appellant, *W. B. & O. McCutcheon*, Melbourne.

Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

CUMING SMITH & COMPANY PROPRIETARY LIMITED . . . . . DEFENDANT, . . APPELLANT;

AND

THE MELBOURNE HARBOUR TRUST COMMISSIONERS . . . . . PLAINTIFFS, . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA

Taxing Act—Wharfage rates on goods—Exception of named goods—Extension of meaning of name—"Guano"—Phosphatized Rock—Burden of proof—What

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necessary to be proved—Ejusdem generis—Melbourne Harbour Trust Act 1890 (*Victoria*) (*No.* 1119), *s.* 110,* *Seventh Schedule*†.

Where by an Act of Parliament a wharfage rate is imposed on all goods, except those described by names, coming from abroad and landed at a wharf, and, in an action to recover the rate on certain goods, it is alleged by the defendant that they come within the exception, the burden of proving that allegation is upon the defendant.

If the particular name has a well known original meaning, and the defendant wishes to prove that that meaning has been extended so as to include the goods upon which the rate is sought to be recovered, he must prove that, before the Act was passed, goods of that kind had been imported, that persons knowing the nature of those goods had called them by that name, and that, by their so doing, the goods had become commonly known by that name.

Held, therefore, in the absence of such proof, that limestone rock phosphatized by contact with the droppings of birds, is not "guano" within the meaning of sec. 110 of the *Melbourne Harbour Trust Act* 1890.

The words "goods not otherwise enumerated" in the Seventh Schedule to that Act mean "goods not otherwise enumerated in any other of the groups of articles contained in the Schedule," and are not confined to goods *ejusdem generis* with those goods the names of which they follow.

Under sec. 110 of that Act and the Seventh Schedule to it, the rate chargeable on any item set out in that schedule continues to be chargeable until an alteration in the rate on that particular item is made by the Commissioners.

Decision of the Supreme Court affirmed.

APPEAL from the Supreme Court.

* Sec. 110 of the *Melbourne Harbour Trust Act* 1890 is as follows :—

"110. It shall be lawful for the Commissioners to demand collect and receive in respect of all goods merchandise and things whatsoever except goods belonging to Her Majesty's Government passengers' luggage guano bones bone-dust and live stock and goods arriving coastwise from any place within Victoria landed from any vessel at any wharf dock pier jetty landing stage slip or platform within the port the tolls and rates to be from time to time determined by regulation under this Act; and until such regulation be made the tolls and rates to be demanded collected and received shall be the wharfage rates contained in the Seventh Schedule to this Act," &c.

† The Seventh Schedule is as follows :—

"Liquids in bulk—

		s.	d.
Tun or butt	each	3	0
Pipe or puncheon	,,	2	0
Hogshead	each	1	0
Barrel or quarter-cask	,,	0	6
Octave keg drum tin jar or other small single package	,,	0	3

Other goods—

Case crate cask bale box bundle trunk bag keg firkin or package measuring			
30 cubic feet and upwards		3	0
20 ,, ,, ,, to 30		2	0
10 ,, ,, ,, ,, 20		1	6
6 ,, ,, ,, ,, 10		0	9
3 ,, ,, ,, ,, 6		0	6
1 ,, ,, ,, ,, 3		0	3
Less than 1 foot		0	2
Steam boilers millstones chains machinery railway materials pig iron cordage oakum flax or other fibrous materials carriages furniture and goods not otherwise enumerated, &c., &c.	per ton	3	0"

An action was brought in the Supreme Court of Victoria by The Melbourne Harbour Trust Commissioners against Cuming Smith & Company Proprietary Limited, claiming £300 for wharfage rates at 3s. per ton on 2,000 tons of rock phosphate landed in Melbourne in May, 1901, ex "Emma." On a summons for directions it was ordered that the parties should proceed to trial of the questions agreed upon between them, viz.:—(1) Are the goods referred to in the endorsement on the writ of summons herein "guano" within the meaning of sec. 110 of the *Melbourne Harbour Trust Act* 1890? (2) Are the plaintiffs entitled to any, and, if so, to what sum for wharfage rates upon the said goods?

At the hearing of the action before *Hood* J. it was proved that regulations were made by the Melbourne Harbour Trust Commissioners in 1900 providing that:—"The tolls, rates and charges set opposite the items undermentioned shall be payable in respect of the several matters to which the same refer, and shall not be in lieu of any wharfage rate or toll if any for the same matters respectively prescribed by the Act, viz." Then followed a list of items and rates thereon varying considerably from those in the Seventh Schedule to the Act, and not containing any rate for "goods not otherwise enumerated." Evidence was given as to the composition and history of the material sought to be charged with the rate, and as to the commercial meaning of "guano." The nature of that evidence is sufficiently indicated in the judgment hereunder.

The learned Judge found that "guano" was originally the name given only to the accumulated excrement of sea birds found in the dry climate of Peru, and rich in phosphoric acid and nitrogen; that the meaning of the word had become extended so as to include bird excreta from which substantially all the nitrogen had been washed, but not so as to include a substance which had originally been coral but which had been phosphatized by contact with bird excreta; and that the substance in respect of which the rates were claimed was phosphatized coral and not bird excreta. He also held that the Seventh Schedule to the Act was operative except as to any particular item specifically altered

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by the regulations of 1900. He therefore gave judgment for the plaintiffs for £300 with costs.

On appeal to the Full Court [*Holroyd*, *a'Beckett* and *Hodges* JJ.] this judgment was affirmed. As to the meaning of sec. 110 of the *Melbourne Harbour Trust Act* 1890, and of the Seventh Schedule thereto, *Holroyd* J. said:—"In order to make any sense of the Seventh Schedule to the *Melbourne Harbour Trust Act* 1890, I am driven to construe the words 'not otherwise enumerated' as meaning not enumerated in any other of the groups of articles contained in the said Schedule, there being a different amount of rate assigned to each of such groups; and I agree therefore with the other members of the Court that the rates on the items in the Seventh Schedule are to be charged until the Commissioners deal with those rates respectively, and that an alteration in the amount to be charged upon any one or more items would not affect the rate upon any other item unaltered by the regulations."

The defendant Company now appealed to the High Court.

Coldham and *Cussen*, for the appellant. For the purposes of this appeal, it is admitted that the material in question here has been brought into existence by the phosphatization of coralline rock brought about by the chemical action of bird droppings upon that rock. The first question is, was this material commercially known as guano when the *Melbourne Harbour Trust Act* was passed? That depends on the proper inferences to be drawn from the evidence, and as the truthfulness of the witnesses is not impeached, this Court is in as good a position to draw the inferences as the Judge of first instance, and should draw them: *Montgomerie & Co.* v. *Wallace-James* (1). This first question turns on the history of the cargoes of material which were imported into Victoria prior to the present importation, and were admitted to be "guano." No finding was made by *Hood* J. as to whether that material consisted of bird droppings or not. If some of it was phosphatized coralline rock, the finding as to the meaning of "guano" is contrary to the evidence. The mercantile or trade meaning is that which should be adopted: *Swallow* v.

(1) (1904) A.C., 73, at p. 74.

Musgrove (1); *Lord Provost and Magistrates of Glasgow* v. *Farie* (2). The extent to which the trade meaning departs from the popular or ordinary meaning affects merely the difficulty of proof and nothing else. The question whether any particular cargo of material, which is different from that which has come in before, is covered by the trade meaning, depends upon the amount of difference and what the trade is. Here the difference alleged by the respondents is immaterial, and the theory on which it is based is unintelligible to merchants. The difference, if it exists, can only be proved by a microscopic examination by an expert scientist and by reference to a theory of geologists. Such an element cannot enter into the trade meaning of a word. If, as a matter of construction, the trade meaning is to be adopted, it will not be qualified by the popular or scientific meaning. *Hood* J. has not found what is the trade meaning of "guano." That trade meaning does not involve the fact, or the knowledge of the fact, that the material was composed either wholly or partly of the residue of bird excreta, or the result of the deposit of bird excreta, but it only involves the belief in that fact. The evidence shows that in 1890 the trade meaning of "guano" was material arriving in bulk from overseas containing a certain percentage of phosphates, whether with or without nitrogen, or whether in blocks or in powder, at all events if such material came from the guano islands of the Pacific. *Hood* J. adds to that meaning the words "and not being the result of the constituents of bird excreta permeating the subjacent rock." It is not destructive of this argument that merchants believe the material to be the residue or the result of bird excreta. That meaning involves a chemical test, but not a geological test to which no certain answer could be given. Assuming that there is evidence to support that trade meaning of "guano," there is no evidence which displaces that meaning. There is no substantial reason for differentiating between the residue and the result of bird excreta. *Hood* J. bases his finding as to the extension of the meaning on the fact that there was no conscious extension of that meaning to include the result of bird excreta. That is immaterial because the knowledge that the material was

(1) 11 V.L.R., 797. (2) 13 App. Cas., 657.

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the result and not the residue of bird excreta is not involved in the trade meaning. The use of the words "bones and bone dust" in sec. 110 of the *Melbourne Harbor Trust Act* 1890 favours the view that material which can be used for manure, whether ground or unground, is included in the word "guano." Words of exception in a taxing Act should be given a liberal construction: *Armytage* v. *Wilkinson* (1); *Commissioner of Railways* v. *Hyland* (2). The Seventh Schedule is not clear or unambiguous. The words "goods not otherwise enumerated" should be interpreted *ejusdem generis* with "steam boilers, millstones" &c. That might leave a large number of goods free from wharfage rates, but the Commissioners have power to make other regulations. [They also referred to *Casher* v. *Holmes* (3).]

Duffy K.C., *Mitchell* K.C. and *Bevan*, for the respondents, were not called on.

24th August.

GRIFFITH C.J. This case has been very fully argued, and the argument has left no doubt on our minds as to the conclusion at which we ought to arrive. The question is whether the material in question which formed the cargo of the ship "Emma," is "guano" within the meaning of sec. 110 of the *Melbourne Harbor Trust Act* 1890. It is conceded that the question for the Court is, whether at the time when that Act was passed, this material had acquired the name of "guano" in such a sense that Parliament must be understood to have included it in the term "guano" in the exception to sec. 110.

There was a great deal of evidence which was very fully discussed before us. For my own part I should be contented to rest upon the conclusions of fact at which *Hood* J., the Judge of first instance, arrived, and the reasons he gave for arriving at those conclusions, and also upon the reasons given by *Holroyd* J. on the appeal to the Full Court. But, as the matter was argued so fully, it is perhaps more satisfactory to the parties to state the conclusions which appear to follow from the evidence taken as a whole.

(1) 3 App. Cas., 355. (2) 56 L.J.P.C., 76.
(3) 2 B. & Ad., 592.

It is admitted, and is common ground to both parties, that "guano" is a term which was originally applied to deposits of bird droppings generally found on islands, sometimes in caves. Those droppings in the course of many years, centuries, or perhaps thousands or millions of years, have in many instances become consolidated, and on casual observation would appear to be a mineral. It is said that in some cases it is necessary to adopt blasting in order to get the material out. But the original sense in which the word "guano" was used was bird droppings either in an unconsolidated form or in a consolidated form as the result of rain falling upon them for a long period of time. The way in which *Hood* J. put it was "the meaning of the word must be confined to the deposit of sea birds whether leached or not." The question then is *primâ facie* whether the material in question comes within that definition. The defendants allege that in Victoria before 1890 the word "guano" had acquired a more extended meaning, and was no longer referable to the substance consisting of bird droppings lying upon the surface of the ground, but had been extended to everything found on certain islands, which has the same chemical constituents as the consolidated bird droppings. It appears from the evidence, and may be taken to be a matter of common knowledge, that these deposits were generally made upon coral islands in the Pacific. Everyone who has seen coral reefs knows that the surface is usually very uneven, and that there are often great depressions. In the course of time these vast deposits of bird droppings appear to have covered the coral and filled the depressions until the whole surface was level, much as the desert sandstone often covered great tracts of country filling up the inequalities to one level. The material has been then acted upon by rain which has consolidated portion of it and washed the rest away. That appears to be the ordinary way in which these deposits have been formed. It appears that there are several islands in the Pacific Ocean and the neighbouring seas from which this guano has been imported into Victoria for many years. Particular evidence was given as to two of them, Maldon Island and Ocean Island, and photographs were produced of the latter island. On that island the deposit is some feet in thickness, and in the course of working the underlying coral rock has been denuded. In the case of

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Maldon Island we have the evidence of two witnesses who have been there. One of them says that the depth of the deposit is from 2 to 6 feet, and that there are pockets which are very deep, some going below the level of the sea. The other witness gives similar evidence.

Hood J. was of opinion that the commercial use of the word "guano" had been extended to cover these deposits, although they had been consolidated so as to be hardly distinguishable from rock, and a good deal of evidence was given to show that it was known as rock phosphate. In the present case the defendant endeavoured first to prove that the material in question consisted of deposits of this sort, or, that if it did not, the term "guano" had been extended so as to cover other material of the same chemical constitution. The first point is not in question before this Court, nor was it before the Full Court, because it is formally admitted that the material in question was phosphatic rock, which was explained by Mr. Coldham to mean coralline rock phosphatized by overlying bird deposits. It appears that in some instances when guano properly so called has been lying for a long time upon coralline rock, the element of phosphorus in the guano has in some way passed down to and come into chemical combination with the element of lime in the coralline rock forming phosphate of lime. The question is whether the coral so changed in consequence of contact with the guano lying above it into phosphate of lime, which chemically is not distinguishable from the phosphate of lime in the guano, is guano.

It appears to me upon that question the onus is upon the parties alleging it.

We start with the proposition that "guano" means the deposit of bird droppings. It is said that in Melbourne guano means anything having certain properties which it has acquired from contact with bird droppings, or, as Mr. Cussen put it, "material arriving in bulk from overseas, containing a certain percentage of phosphates whether with or without nitrogen or whether in blocks or powder, at all events if such material comes from the guano islands of the Pacific." The onus is upon the defendant. How is it discharged? In order to discharge it, it appears to me the defendant must establish three things: first, that before 1890

material of that kind had been imported into Victoria; secondly, that persons knowing the nature of that material called it guano; and thirdly, that by their so doing the material had become commonly known as guano. I am bound to say that taking the whole of the evidence for the defendant, I do not find any evidence fit to be left to a jury on any one of these points. There was no evidence that any material of this sort was introduced into Victoria before 1890. The evidence is that Christmas Island, from which this material came, has only been used for a short time as a place from which phosphates have been obtained. Three cargoes have arrived in Melbourne within the last two years. That island is said to be of a singular character in that the deposits of guano have gone, and that nothing is left but the underlying coralline rock upon which the deposit had rested. On Maldon and Ocean Islands the deposit still remains. But if any material of this sort had been introduced into Victoria before 1890, and had been mistaken by some persons for guano—as it might have been—that would only prove that these persons thought something was guano which was not guano, and, without intending to mislead others, had called it guano. That seems to me a very different thing from saying that guano, instead of meaning the residue of bird droppings, had come to include rock phosphatized by bird droppings.

Shortly, the evidence on this point was that of two persons engaged in the importation of this material, who used the word without reference to origin, because for their purposes it made no difference where the material came from. All they were concerned with was the chemical constituents of the material. So long as it contained 80 per cent. of phosphates they were satisfied. So that on that point also it appears that the defendant failed. There was no evidence from which the Court could come to the conclusion that the word guano had the extended meaning for which the defendant contends.

The material being admitted to be not guano in the sense in which that term is generally accepted, or in the wider sense to which it had become extended, cannot be brought into Melbourne without paying the wharfage rate imposed by the Seventh Schedule, unless it can be so brought in by reason of the construc-

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tion of the language of the Schedule itself, that is by holding that it is not within the words "goods not otherwise enumerated" because it is not *ejusdem generis* with the things mentioned immediately before. Upon that point I agree with the Supreme Court.

For these reasons I am of opinion that the appeal fails.

Even if the evidence had not been so clear as I think it is against the appellant, still it would have required a great preponderance of evidence in the appellant's favour to induce us to reverse a judgment of the Full Court in which they unanimously supported the judgment of the Judge of first instance on a question of fact. For these reasons the appeal will be dismissed.

BARTON J. I am entirely of the same opinion.

O'CONNOR J. I am also of the same opinion.

Appeal dismissed with costs.

Solicitors, for appellant, *Braham & Pirani.*

Solicitors, for respondents, *Malleson, England & Stewart.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CROWLEY . . . . . APPELLANT;
DEFENDANT,

AND

GLISSAN . . . . . RESPONDENT (No. 2).
PLAINTIFF,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Sept.* 4, 5, 6, 7, 11.

Action for malicious prosecution—Onus on plaintiff—Absence of reasonable and probable cause—Evidence of plaintiff not inconsistent with reasonable belief in his guilt—Nonsuit.

Griffith C.J., Barton and O'Connor JJ.

Libel—Criminal offence—Defence of truth and publication for public benefit—Nature and manner of publication to be considered—Motive of libeller immaterial—Defamation Act (N.S.W.) (No. 22 of 1902), secs. 12 and 13.