

victed; but it was assumed by the Chief Justice, and no doubt properly, that the condition of the skins was in itself evidence that they had been stolen. He says (1):—"In such a case the man could be indicted and convicted of attempting to steal the property of a person unknown. The prisoner in this case was in possession of property which appeared to have been stolen. All the marks of identification had been obliterated, and it was impossible to say to whom the skins belonged."

It seems to me therefore that that case, if examined, cannot be taken as an authority supporting the decision of the Supreme Court in this. In my opinion, therefore, the conviction must be set aside.

Appeal allowed. Conviction quashed.

Solicitors, for the appellant, *Sly & Russell* for *F. F. Mitchell*.

Solicitor, for the respondent, *The Crown Solicitor for New South Wales*.

C. A. W.

[HIGH COURT OF AUSTRALIA.]

CHARLES MARKELL AND ALEXANDER
MARKELL (TRADING AS MARKELL AND
Co.)

AND

H. N. P. WOLLASTON AND THE COM-
MONWEALTH

PLAINTIFFS ;

DEFENDANTS.

Customs Tariff 1902 (No. 14 of 1902), Schedule, item 104—*Insecticide*—*Paper coated with chemicals*—*Classification*—*Construction*—*Customs Act* 1901 (No. 6 of 1901), sec. 138.

By item 104, under the heading "Drugs and Chemicals," in Division IX. of the Schedule to the *Customs Tariff* 1902, "insecticides" are declared to be free of duty.

(1) 20 N.S.W. L.R., 424, at p. 427.

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Held, that the word "insecticide," construed in the light of the context, includes an article used solely for the destruction of insects, consisting of paper coated with chemicals destructive to insect life, the paper being merely a vehicle for the chemical ingredients.

In the tariff, words should, in the absence of evidence that they have acquired a special commercial meaning, be construed in their ordinary popular sense, unless the context otherwise requires.

Sec. 138 of the *Customs Act* 1901 does not apply where the goods, though capable of being classed under two headings, are included in one, and consequently excluded from another by the words "not elsewhere included."

Markell v. Lockyer, (1905) 5 S.R. (N.S.W.), 704, approved.

SPECIAL CASE stated under Order XXIX., rule 1, of the *Rules of the High Court* 1903.

This was an action in which the plaintiffs sought to obtain a declaration that the article known as "Tanglefoot Sticky Fly-paper" should be admitted into the Commonwealth duty free as being an insecticide within the meaning of item 104 in the Schedule to the *Customs Tariff Act* 1902. They also claimed an injunction restraining the defendants and their servants and officers from detaining any importations of the article under a claim for duty.

The plaintiffs were importers of the article in question from America, and the defendant, H. N. P. Wollaston, was the Comptroller-General of Customs under the *Customs Act* 1901 and the *Customs Tariff Act* 1902. The article consisted of sheets of paper coated with an adhesive mixture of chemicals, and was used for the purpose of catching and destroying flies and other insects. Until 8th October 1904, it was the practice of the Customs to admit the article free of duty, but on 7th July 1904 the Minister for Customs ordered that from 8th October duty should be charged at the rate of 25 per cent. *ad valorem*, as upon a manufacture of paper n.e.i. under Item 123 of the Schedule. In June 1905 the plaintiffs imported a shipment of the article, and, a dispute having arisen as to the liability of the article to duty, deposited the amount claimed as duty, and commenced an action in the Supreme Court of New South Wales, under sec. 167 of the *Customs Act* 1901, to recover the amount. By agreement between the parties a special case was stated for the opinion of

the Supreme Court, on the question whether the fly-paper was entitled to be admitted duty free as an insecticide within item 104 of the Schedule. The Court answered the question in the affirmative: *Markell v. Lockyer* (1).

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The defendant appealed to the High Court, but afterwards abandoned the appeal, and it was by consent dismissed with costs.

The Customs continued to demand duty on subsequent importations of the article at the rate of 25 per cent. *ad valorem*, and this action was brought for an injunction restraining them from so doing. The parties then stated a special case for the opinion of the High Court. The main contentions for the defendants, in addition to their claim for duty, were, that the plaintiffs' proper remedy, if any, was to proceed under sec. 167 of the *Customs Act* 1901, and that, as they had not complied with the provisions of that section, they were not entitled to the relief claimed; that no action other than such as may be given by Statute lay against the defendants for any act done in the performance by the Comptroller-General of his public duties under the *Customs Act* 1901; and that an injunction should not be granted to restrain the Commonwealth or an officer of the Commonwealth in the performance of a public duty, or to control the discretion of any such officer in the performance of his duty.

It was agreed that judgment should be given by the Court in accordance with their opinion on the questions submitted to them, and that if the Court should decide that the plaintiffs were entitled to maintain the action, and that the article in question was entitled to be imported duty free, the defendants should repay to the plaintiffs the amount of duty deposited or paid by the latter since October 1905.

Langer Owen K.C. and *Windeyer*, for the plaintiffs. The action in the Supreme Court was an action under sec. 167 of the *Customs Act* 1901, and resulted in the plaintiffs being successful. If, notwithstanding that decision, the Collector continues to seize goods, the plaintiffs are not compelled to keep on bringing actions under sec. 167, but are entitled to have the matter finally settled

(1) (1905) 5 S.R. (N.S.W.), 704.

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by this Court. The granting of such an injunction is part of the inherent jurisdiction of this Court, as a Court of Equity, to interfere in order to prevent injustice and multiplicity of suits: *Mitford on Pleading*, p. 132; *Devonsher v. Newenham* (1); *Story, Equity Jurisprudence*, 2nd Eng. ed., p. 566. There is no difference in principle between the case of an injunction against a customs officer and one against a private individual. A declaration of right without an injunction would settle the question. There has been no change in the nature of the goods. This action may be regarded as a suit for the recovery of the goods or for the testing of the Collector's right to detain them rather than a suit for an injunction. The order of the Court would be to deliver up the goods.

The article is an "insecticide" within the meaning of item 104 of the Schedule. The word must be construed in its ordinary popular sense, as there is no evidence that it has acquired any special commercial meaning: *Patton v. United States* (2); *Bour v. United States* (3); *Hedden v. Richard* (4); *Magone v. Heller* (5); *Seeberger v. Schlesinger* (6); *Mason Bros. v. Lockyer* (7). According to *Webster's International Dictionary* and *The English Dictionary* "insecticide" means merely an agent or preparation for destroying insects. That covers the article in question. It is immaterial whether it destroys them by toxic or mechanical agency, provided that the destructive effect is produced wholly by the chemical ingredients. The paper is merely a vehicle or accessory for the application of the chemicals. The intention of the legislature was to make what is called in American authorities a classification by use. Reference to other items of the Schedule shows that all agencies for the destruction of vermin and natural pests, such as rabbits, sheep parasites, &c., were intended to be admitted free. It is almost inevitable that articles which are used for such purposes should be composed of other articles which, if imported separately, would be dutiable, but that cannot cut down the effect of an express exemption of the composite article: *Koch v. Seeberger* (8); *Magone v. Heller* (5); *Seeberger v. Cahn* (9);

(1) 2 Sch. & Lef., 199.

(2) 159 U.S., 500.

(3) 91 Fed. Rep., 533.

(4) 149 U.S., 346.

(5) 150 U.S., 70.

(6) 152 U.S., 581.

(7) (1903) 3 S.R. (N.S.W.), 289.

(8) 30 Fed. Rep., 424.

(9) 137 U.S., 95.

Goldsmiths' Company v. Wyatt (1). The article has lost its quality as paper. Even if it could be called paper, or a manufacture of paper, it would not come within items 122 and 123, because they are subject to the limitation n.e.i., and therefore cannot include an article which has been included in item 104 as insecticide. Sec. 138, therefore, has no application. [They referred to *Dieckerhoff v. Miller* (2); *American Net and Twine Co. v. Worthington* (3).] Any doubt in such matters should be resolved in favour of the importer, the onus being on the Customs to show that the article is taxable: see case last cited, and *Tennant v. Smith* (4).

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Bracket, for the defendants. An insecticide may be defined as a drug or chemical substance which kills insects by poisoning as distinct from mechanical agency. It is an essential part of the meaning of the word that the drugs or chemicals bring about the desired effect by virtue of their nature as drugs or chemicals, not as a mechanism.

This is not a compound manufactured article having a character distinct from the various ingredients, as was the case with the cartridges in *Mason Bros. v. Lockyer* (5). [He referred to *Weilbacher v. Merritt* (6); *United States v. Semmer* (7).] It is really paper specially prepared or a manufacture of paper, like sand-paper or sensitized paper. The trade name of the article shows that it is regarded commercially as a paper. It therefore comes either under item 122 or 123, and is liable to duty. Even if it may also be classed as insecticide under item 104, it is liable to duty under sec. 138 of the *Customs Act* 1901, and to the highest duty.

At any rate the onus is on the plaintiffs to show that the Collector was wrong, the presumption being that his opinion is right. The duty claimed must be deemed to be the proper duty until the contrary is shown: sec. 167. This is not the proper procedure. The plaintiffs should comply with sec. 167. No other remedy is open. And the relief claimed is not such as the Act contemplates. The plaintiffs can only recover the amount of duty

(1) (1905) 2 K.B., 586.

(2) 93 Fed. Rep., 651.

(3) 141 U.S., 468.

(4) (1892) A.C., 150.

(5) (1903) 3 S.R. (N.S.W.), 289.

(6) 37 Fed. Rep., 85.

(7) 41 Fed. Rep., 324.

H. C. OF A. paid, even if this is regarded as substantially a proceeding under
 1906. sec. 167. They have no right to an injunction, or to a declara-
 MARKELL tion of right. The Court will not interfere with the Collector in
 v. the exercise of his discretion with regard to future shipments.
 WOLLASTON. [He referred to *Ellis v. Earl Grey* (1); *The Queen v. The Lords*
 ——— *Commissioners of the Treasury* (2).]

Langer Owen in reply.

Cur. adv. vult.

Aug. 7. GRIFFITH C.J. This action was brought by the plaintiffs against the Comptroller of Customs for the Commonwealth, asking for a declaration that an article known as "Tanglefoot Sticky Flypaper" is entitled to be admitted to the Commonwealth duty free, as an insecticide. The plaintiffs also asked for an injunction restraining the defendants, that is to say Dr. Wollaston, the Comptroller, and the Commonwealth, from detaining any future importations of the article until payment of duty. They also claimed a return of the duty paid by them in respect of a certain importation of these articles, that duty having been paid by them under protest. So far as the claim for a declaration of the rights of the plaintiffs to import the article is concerned, that does not seem to be a matter worthy of very serious consideration, because if the Court is of opinion that the plaintiffs are entitled to recover the duty already paid because the goods are not dutiable, the expression of that opinion is itself a declaration of the right of the plaintiffs. For, though it is in theory merely an order for the recovery of the duty already paid, it is in fact, accompanied by a declaration of the right of the plaintiffs to have the article imported free of duty. The substantial matter for consideration, therefore, is whether this article is dutiable or not.

It has been agreed by the parties that no objection is to be taken to the form or constitution of the action. It ought perhaps to have been brought against the Comptroller of Customs for the State. But no objection of that kind is to be taken.

(1) 6 Sim., 214.

(2) L.R. 7 Q.B., 387, at p. 394.

The special case stated for the opinion of the Court sets out these facts:—"The said article consists of thin sheets of Manilla paper coated on one side with an adhesive sticky substance composed of three parts resin and one part castor oil. The said article is used for the purpose of catching flies and other insects. The said insects are entangled by the said sticky substance and are unable to escape and the result is their death, but it is not known whether death is caused by toxic or mechanical agency."

The plaintiffs contend that that description brings the article within the meaning of the term "insecticide" used in item 104 of the *Customs Tariff*. The contention for the defendants is that the article is not an insecticide, but a "manufacture of paper not elsewhere included," or alternately "paper not elsewhere included," within the meaning of those terms as used in items 122 and 123 of the *Customs Tariff*, and, further, that, if it is an insecticide under item 104, it is also a manufacture of paper not elsewhere included, and therefore liable to duty under section 138 of the *Customs Act 1901*.

It was agreed that specimens of the article should be produced in Court, and by the Rules of Court the Court is entitled to draw all necessary inferences of fact from the facts admitted.

The first question is whether this article is an insecticide. There is no evidence that that term has acquired any special commercial meaning, and therefore we must interpret it as an ordinary English word used in a Statute. Reference of course may be made to the context, but subject to that, we must be guided solely by our knowledge of the English language. The word is used in item 104 in describing a group of articles under the general heading Drugs and Chemicals. The other items under that heading are: 100, which enumerates certain acids; 101, acids; 102, carbonate of ammonia and carbide of calcium; 103, drugs and chemicals. Then comes 104, the item in question, "insecticides, sheep-washes and disinfectants, not elsewhere included including coal-tar preparations for such purposes." Item 105 relates to medicines, a number of which are enumerated, amongst them, medical oils, of which, I suppose, castor oil is one. Item 106 is opium. The inference to be drawn from that context is that insecticide is something that ordinarily falls under the

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general heading of chemicals. That is all the assistance to be obtained from the context beyond our general knowledge of the language. In my opinion, the term insecticide, as commonly used in English, means, or at any rate includes, any preparation in the nature of a drug or chemical adapted solely or mainly to the destruction of insect life, and the effect of which is produced either by immediate contact with the insect or by some influence fatal to insect life inherent in or emanating from the preparation. That definition covers all insecticides of which I have ever heard. I do not think it necessary to give reasons for the different phrases in that definition.

The next question is, is this such a preparation? I think that it clearly is. The mixture of oil and resin is what gives it the character of an insecticide. It is clear that an article of that kind must have some vehicle, that is to say, some means by which it may be brought in contact with the insect so as to have its intended effect. Then the question is, in this instance, is the paper on which the preparation is smeared a substantial part of the article, or is it merely the vehicle for enabling the insecticide to be used? The question may be put in another way. Ought the paper on which the preparation is smeared to be regarded as the principal in the article or as a mere accessory? As to that I draw this inference of fact from seeing the article and from the description given of it in the special case—that the quality of paper is merged in the quality of insecticide. I think, therefore, that it is an insecticide within the meaning of item 104 of the tariff.

The defendants however contend that, even if so, it falls within the meaning of items 122 and 123, and that by virtue of sec. 138 of the *Customs Act* 1901 it is dutiable although it is an insecticide. That section provides that:—"If any goods enumerated in the Tariff are or can be classed under two or more names headings or descriptions with a resulting difference as to duty duty shall be charged when it is a difference between liability to or freedom from duty" &c. In order that that section may apply the goods in question must be capable of being brought under two or more headings. The section has no application where the goods are excluded from a class by the words "not elsewhere included." Item 122 (H) is paper "not elsewhere included." If, therefore,

insecticides are elsewhere mentioned in a class, they are excluded from that item, and they are not dutiable, inasmuch as they are excluded from the one by reason of their being included in the other. Sec. 138 therefore has no application. This article cannot be called paper not elsewhere included. The same argument applies to the contention that this is a manufacture of paper and therefore liable to duty even if it is elsewhere included as an insecticide. So, in my opinion, that argument fails. The result, in my opinion, is that the article ought to be admitted free of duty, and, according to the agreement between the parties, there should be judgment for the plaintiffs for the amount of duty paid with interest at 5 per cent.

I should like to add that I am very much disposed to think that, even if this is not an insecticide, the quality of paper is so far merged in the completed article that it could not properly be called a manufacture of paper, or paper not elsewhere included.

Judgment will be for the plaintiffs. The declaration asked for is not necessary, and as to the claim for an injunction, it is not necessary to express any opinion.

O'CONNOR J. In this case the Customs authorities claimed to be paid duty at the rate of 25 per cent. on the article in question, and the plaintiffs resisted the claim. In reference to the dispute both parties availed themselves of the provisions of sec. 167 of the *Customs Act* 1901. Under that section the duty charged and paid or deposited with the Customs is deemed to be the proper duty unless the contrary is shown in an action brought by the importer. This action was brought for the determination by the Court of the question whether the amount of duty deposited was the duty properly chargeable. The importer takes up the position that the substance is an insecticide, free of duty under item 104 of the Customs Tariff. The case turns on the question whether it is an insecticide within the meaning of that item. If it is, it cannot be classed under any item of the Tariff except insecticide, and the provisions of sec. 138 cannot be applied.

As to whether it could or could not be charged as a manufacture of paper "not elsewhere included," I do not think it necessary to express an opinion. It may very well be that the paper has lost

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its quality of paper and become part of a new preparation, insecticide. On the other hand, if it is not free as an insecticide, it may be that the mere smearing of the mixture on the paper does not destroy its properties as paper to such an extent as to render it no longer capable of being described as paper. As to these matters it is not necessary to express an opinion. The case, as I have said, really turns on whether the substance is an insecticide within the meaning of item 104. The general rule of interpretation is that words used in a Statute must be taken to have been used in their ordinary meaning. If it is contended that there is a commercial or other special meaning of the word, there must be evidence before the Court on which it can come to the conclusion that the word is so used, and then it is for the Court to determine whether the legislature has used the word in its ordinary signification or in the special sense. If any authority for that proposition were necessary, it is to be found in one of the judgments cited by Mr. Windeyer, *Seeberger v. Schlesinger* (1):—"The commercial designation of an article, however, is not a matter of which Courts can take judicial notice, but is a fact to be proved like any other—by evidence." Mr. Blacket's contention therefore has no foundation, because there is no evidence here that any special commercial meaning attached to the word "insecticide." We must therefore ascertain the ordinary meaning of the word. Now the ordinary meaning of the word "insecticide," is shortly stated in *Murray's Dictionary*, which was read to us in the course of the argument, as "a preparation used for the destruction of insects." The generality of that description must of course be cut down by the context in which the word occurs in the Statute. As it occurs there amongst a series of items imposing duties on drugs and chemicals it is clear that the kind of insecticide intended to be made free is an insecticide composed of drugs or a combination of drugs and chemicals. There is another limitation which must be gathered from the context, and that is that the main use and purpose of the mixture or combination of substances must be the killing of insects. There are many chemicals applied to a variety of purposes which may also be used as insecticide. If insect destruction is only one out of many

(1) 152 U.S., 581, at p. 585.

uses of a chemical substance, it would not come within the meaning of item 104. To get the benefit of that exemption a substance must have been prepared for that purpose, and the main use of it must be for that purpose. I, therefore, entirely concur in the definition stated by my learned brother the Chief Justice in his judgment. Such being the definition of an insecticide under item 104, we must apply it to the substance in question. It is a mixture of drugs spread upon paper. It is necessary for the effective use of those drugs that they should be spread upon paper or some like substance. The drugs and the paper constitute the insecticide. The preparation so composed kills insects in some way, whether by poisoning or by imprisoning and strangling them is not known. It appears to me to be quite immaterial how it operates, if the general effect of the combination is that it destroys insects. Mr. Blacket admits that if the combination destroyed insects by poisoning them it would be an insecticide within the meaning of item 104, but he argues that there is implied in that item a limitation beyond those that I have mentioned, that is, that the drug or chemical must kill by poisoning, as distinct from mechanical means. I entirely fail to see any ground upon which a distinction can be drawn between killing insects by poison and killing them by mechanical means. If Mr. Blacket could establish that distinction he would, of course, have gone a long way towards maintaining his argument. But I see no reason why the ordinary meaning of the word "insecticide" should be restricted as Mr. Blacket contends. Therefore it appears to me that this substance spread upon paper, being a combination of drugs and chemicals, prepared specially for the purpose of killing insects, is an insecticide within the meaning of item 104. The article, therefore, being under that item, is free, the duty was not properly charged, and it follows that the plaintiffs are entitled to recover the amount claimed in the action.

I also agree that it is not necessary that our order should go further than that decision. The law, as expounded by the Courts, is as binding on the Government as if it had been expressed in so many words in the Tariff itself. We have no reason to suppose that the law as laid down by this Court will

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MARKELL v. WOLLASTON. I agree that judgment should be entered for the plaintiffs for the amount of duty paid with interest.

O'Connor J. Judgment for the plaintiffs for £78 15s. 4d. with interest at 5 per cent. and the costs of the action.

Langer Owen K.C., for the plaintiffs, asked for a direction that the costs be taxed upon the highest scale in force in the Supreme Court.

GRIFFITH C.J. The costs will be taxed in accordance with the practice in the Supreme Court. They should be allowed on the highest scale, as more than £100 is involved in the case.

Solicitors, for the plaintiffs, MacLachlan & Murray.

Solicitors, for defendants, Macnamara & Smith for The Crown Solicitor for the Commonwealth. C. A. W.

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[HIGH COURT OF AUSTRALIA.]

HENRY WHITE APPELLANT;

AND

THE KING RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. Criminal law—Misdemeanour at common law—Fraudulent attempt to have conviction set aside—Attempt to pervert course of justice—Uttering forged documents—Sending false petition to Governor—Attempt to procure inquiry under Crimes Act (N.S.W.), (No. 40 of 1900), sec. 475—Demurrer—Several counts—Information bad in part.

SYDNEY, Aug. 28, 29, 31. A solicitor, who had been struck off the rolls after conviction and sentence for stealing, was charged, after his release from imprisonment at the expiration of his sentence, upon an indictment containing three counts, which Griffith C.J., Barton and O'Connor JJ.