[HIGH COURT OF AUSTRALIA.]

CHANDLER & CO. . . . . APPELLANTS;
PLAINTIFFS,

AND

THE COLLECTOR OF CUSTOMS . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1907.

MELBOURNE, *June* 10, 11.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Sept. 4, 5, 6, 27.

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

Customs Tariff 1902 (*No.* 14 *of* 1902), *Schedule Division XIII., Items* 122 *and* 123, *Exemption* (*k*)—*Customs duty*—*Manufactures of paper for advertising purposes*—"*Pictures* (*not being advertising*)."

By Item 122 of Division XIII. of the Schedule to the *Customs Tariff* 1902, under the heading "Paper and Stationery," a customs duty at the rate of 3d. per lb. is charged on "Paper, viz. :—(A) Manufactures of, unframed, for advertising purposes, including price lists, catalogues, and all printed or lithographed matter for such purposes." By special exemption (*k*) to that Division there are exempted from duty, "Pictures (not being advertising), viz. :—Autotypes, chromographs, engravings, etchings, oleographs, oil paintings, photographs, photogravures, and water colours."

Held (*Griffith* C.J. and *Barton* J. dissenting), that pictures printed on paper by a mechanical process, some being chromographs, and others photogravures, which when imported bore on their faces no advertisements, but the chief use of which was for advertising purposes, in which case advertisements were printed on the margins or mounts, or on the pictures themselves, were within Item 122, and were not within the special exemption (*k*), and were therefore liable to duty at 3d. per lb.

Per O'Connor, Isaacs and *Higgins* JJ.—Where goods are made liable to Customs duty as being for particular purposes, the principal or predominant use of them determines their classification.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

Per Griffith C.J. and *Barton* J.—Where goods, described as being for certain named purposes, are made liable to Customs duty, there must be apparent in the goods themselves, to those who know their character, a quality which shows them to be specially fit for the particular purposes specified rather than for any other. The word "used" cannot be interpolated.

Judgment of *Hodges* J. affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Chandler & Co. against the Collector of Customs, by which the plaintiffs claimed £3 5s. 8d. from the defendant, being the difference between £3 15s. 4d., the sum demanded by the defendant as customs duty on certain pictures, and deposited by the plaintiffs with the defendant in accordance with sec. 167 of the *Customs Act* 1901 and the regulations thereunder, and 9s. 8d., the sum which the plaintiffs admitted was the proper duty on the pictures.

The following questions were directed to be tried between the plaintiffs and the defendant, viz. :—

"(*a*) Whether or not the goods referred to in the endorsement on the writ herein, or any and which of them, are 'pictures (not being advertising) viz., autotypes, chromographs, engravings, etchings, oleographs, oil paintings, photographs, photogravures, and water colours' within the meaning of the *Customs Tariff* 1902.

"(*b*) Or whether or not the said goods, or any and which of them, are 'Paper viz. manufactures of, unframed, for advertising purposes, including price lists, catalogues, and all printed or lithographed matter for such purposes' within the meaning of the *Customs Tariff* 1902.

"(*c*) Or whether or not the said goods, or any and which of them, are 'Stationery, manufactured, viz. advertisements and pictures, framed, for advertising purposes; . . . . . calendars and almanacs, n.e.i.; . . . . . cards and booklets, ... manufactures of paper n.e.i.,' within the meaning of the *Customs Tariff* 1902."

At the trial of the issues before *Hodges* J. evidence was given that the pictures in question were all printed by some mechanical process upon paper, some of them being chromographs or chromolithographs, and others photogravures. One witness said that

they were known in the trade as "pictures unframed." Another witness said "we call them advertising pictures," but afterwards admitted that they were called by all sorts of names. Evidence was also given that the chief use of the pictures was for advertising when an advertisement was printed upon them.

Hodges J. answered questions (*a*) and (*c*) in the negative and question (*b*) in the affirmative, and gave judgment for the defendant with costs.

From this decision the plaintiffs now appealed to the High Court.

Arthur, for the appellants. The pictures are literally within exemption (*k*). The meaning of "pictures (not being advertising)" is pictures which are not advertising pictures, that is, at the time they are imported. There is no evidence that the words "advertising pictures" have a commercial meaning, and therefore the ordinary meaning of the words must be taken: *Markell* v. *Wollaston* (1). Apart from the exemption, these pictures would not be within Item 122. They are not manufactures of paper: *Markell* v. *Wollaston* (1). The only pictures which are dutiable are framed pictures for advertising purposes under Item 123.* The change of language from "for advertising purposes" in Items 122 and 123 to "not being advertising" shows that some change of meaning was intended: *Hardcastle on Statutory Law*, 4th ed., p. 133; *Casement* v. *Fulton* (2); *R.* v. *Buttle* (3). Even if "not being advertising" means "not for advertising purposes," these pictures cannot be said to be for advertising purposes. The liability of an article to duty is not to be determined by the ultimate use: *Clay* v. *Magone* (4).

[ISAACS J.—The designation of an article of commerce by merchants and importers, when clearly established, determines the construction of a revenue law when that article is mentioned: *Arthur's Executors* v. *Butterfield* (5).]

A commercial designation must be the result of established

* Item 123. "Stationery, manufactured, viz:—Advertisements and pictures, framed, for advertising purposes, . . . *ad val.* 25%."

(1) 4 C.L.R., 141.
(2) 5 Moo. P.C.C., 130.
(3) L.R. 1 C.C.R., 248.
(4) 40 Fed. Rep., 230.
(5) 125 U.S., 70, at p. 75.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

usage, and must be definite, uniform and general: *Sonn* v. *Magone* (1); *Maddock* v. *Magone* (2). It cannot be made out by the evidence of one dealer: *Berbecker* v. *Robertson* (3); *Wollaston on Customs Law*, p. 112; *Erhardt* v. *Ballin* (4).

[ISAACS J.—The commercial designation is the first and most important thing to determine: *Robertson* v. *Salomon* (5).]

If there is any doubt, the matter should be resolved in favour of the importer, as duties are never imposed on citizens upon vague or doubtful interpretations: *Hartranft* v. *Weigmann* (6); *American Net and Twine Co.* v. *Worthington* (7); *Hardcastle on Statutory Law*, 4th ed., p. 109; *Partington* v. *Attorney-General* (8); *Lord Advocate* v. *Fleming* (9).

[ISAACS J. referred to *Benziger* v. *United States* (10).]

Starke, for the respondent. Where articles are described as being for particular purposes that means that they are used for those particular purposes, and the ordinary or predominant use to which the articles are put determines their classification: *Meyer* v. *Cadwalader* (11); *Meyer* v. *United States* (12). Apart from the exemption, these pictures would be within Item 122 (A), for they are printed matter for advertising purposes, otherwise they would fall within Item 123 as being "manufactures of paper, n.e.i.," and would be liable to 25% *ad valorem* duty. In the exemption the words "not being advertising" mean "not for advertising purposes," corresponding with "for advertising purposes," in Item 122. There are no special conditions of construction for revenue Acts: *Attorney-General* v. *Carlton Bank* (13).

[ISAACS J.—The burden of proof is upon the plaintiff in these cases: *Arthur* v. *Unkart* (14).]

Arthur in reply. The appellants proved their case when they brought themselves within the plain meaning of the words of the exemption.

Cur. adv. vult.

(1) 159 U.S., 417.
(2) 152 U.S., 368.
(3) 152 U.S., 373.
(4) 55 Fed. Rep., 968.
(5) 130 U.S., 412.
(6) 121 U.S., 609, at p. 616.
(7) 141 U.S., 468.
(8) L.R. 4 H.L., 100, at p. 122.
(9) (1897) A.C., 145.
(10) 192 U.S., 38.
(11) 89 Fed. Rep., 963.
(12) 124 Fed. Rep., 293.
(13) (1899) 2 Q.B., 158, at p. 164.
(14) 96 U.S., 118.

The case was subsequently directed to be re-argued before the Full Bench.

Arthur, for the appellants.

Starke, for the respondent.

The following additional authorities were referred to:— *Arnold* v. *United States* (1); *Saltonstall* v. *Wiebusch* (2); *Armytage* v. *Wilkinson* (3); *Attorney-General* v. *Selborne, Earl of* (4); *Heward* v. *The King* (5); *Magone* v. *Wiederer* (6).

September 4.

Cur. adv. vult.

September 27.

The following judgments were read:—

GRIFFITH C.J. This is an action brought by the plaintiffs to recover from the defendant a sum of money demanded upon the importation of certain pictures, and paid under protest. The question arises upon the construction of Division XIII. of the Customs Tariff, which is headed "Paper and Stationery," and contains two Items, 122 and 123, and several exemptions, of which that marked (*k*) is the only one material for the present purpose. Item 122 is "Paper, videlicet—" then follow several sub-paragraphs describing different things which are collectively called "Paper"; and most of which are paper in its ordinary acceptation, as distinguished from things made of paper. The first paragraph (A) is "manufactures of, unframed, for advertising purposes, including price lists, catalogues, and all printed or lithographed matter for such purposes," on which the duty is at the rate of 3d. per lb.

Item 123 is "Stationery, Manufactured, videlicet—" then follows an enumeration of a great number of things which are regarded as manufactured stationery, including inkstands. The first things enumerated are "Advertisements and Pictures, framed for advertising purposes." Later on we find "Manufactures of Paper n.e.i." The duty on all the goods enumerated in this item is 25% *ad valorem*. Exemption (*k*) is as follows:—"(*k*) Pictures (not being advertising) viz., autotypes, chromographs, engrav-

(1) 147 U.S., 494.
(2) 156 U.S., 601.
(3) 3 App. Cas., 355.
(4) (1902) 1 K.B., 388, at p. 396.
(5) 3 C.L.R., 117.
(6) 159 U.S., 555.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

Griffith C.J.

ings, etchings, oleographs, oil paintings, photographs, photogravures, and water colours."

I think it is plain that the Tariff was intended to include all kinds of articles made of paper not mentioned in the exemptions. It follows that pictures painted or printed on paper are dutiable unless expressly exempted.

It is common ground that the goods with respect to which the question arises are pictures and that the material of which they are made is paper. They are of two kinds, one being chromolithographs, which, it is admitted, fall within the term "chromographs" in exemption (*k*), and which are not mounted, and contain no printing upon them except the name of the publisher. One of them is a pretty picture representing two young people in a canoe. The other kind consists of black and white work mounted on cardboard with a wide margin. They are all unframed.

It appears that pictures of both kinds are often used for advertising purposes, that is to say, some advertisement is printed upon the face of the picture itself or on the mount, and there is evidence that they are more largely used for this purpose than for merely decorative purposes. The Collector contends that under these circumstances they fall within Item 122, as being "unframed manufactures of paper for advertising purposes," and do not fall within exemption (*k*) as "Pictures (not being advertising)," because, he says, the words "not being advertising" mean the same as "not being for advertising purposes." If they do not fall within the exemption, it is to the appellants' interest to contend that they fall within Item 122, as was held by *Hodges* J. For they would otherwise fall within the words "manufactures of paper n.e.i." in Item 123, on which a higher rate of duty is imposed.

In my opinion, this case turns upon the meaning of the words "not being advertising" in exemption (*k*). In a tariff one does not expect the same verbal precision that is looked for in an enacting clause of a Statute. Regard must, however, be paid to ordinary rules of construction. Now a change in language *primâ facie* indicates an intention to say something different. It may be evident from the context that there was no such intention, but the *primâ facie* inference is as I have said. I will assume for

the present that the pictures in question are manufactures of paper for advertising purposes. Are they then pictures "not being advertising?" The ordinary meaning of these words is either "which do not advertise" or "which are not advertising pictures." If the former meaning is assigned to them, the pictures in question fall within the exception, for they do not advertise. If the latter, I think that the term "advertising picture" means in ordinary English a picture which advertises some person or some thing. These pictures do neither. I will deal later with the suggestion that the term "advertising pictures" may have a recognized sense in commerce different from its ordinary meaning.

This being the *primâ facie* meaning of the words, why should they be regarded as synonymous with "for advertising purposes?" It is said that unless they are so read the exception is of a thing specifically enumerated as taxable, because a picture which advertises is an advertisement, and advertisements are specifically mentioned in Item 123. This argument is based upon the common fallacy involved in using a word ("advertisement") in two senses. It is obvious that, although the word "advertisement" is capable of including such things, it is not used in Item 123 in that sense, but in a sense which treats them as something different from the things denoted by the following words, "Pictures (framed) for advertising purposes."

I cannot find any sure ground for departing from the ordinary English meaning of the words, or for holding the two phrases to be synonymous. I think, therefore, that the pictures in question are *primâ facie* within the exemption, and that there is nothing in the context to take them out of it. We have nothing to guide us as to the intention of the legislature beyond their language, which to my mind expresses that pictures made of paper which do not advertise shall be admitted free of duty.

If, however, the words are synonymous with "for advertising purposes," I am unable to see my way to the conclusion that the pictures in question fall within the definition. The words "for advertising purposes" do not relate to the intention or state of mind of the importer. Such words are words of differentiation, denoting some quality apparent in the article itself to persons who know its character, and which shows that it is specially fit

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

Griffith C.J.

for the particular purpose specified rather than for any other. Item 72 of the Tariff, which comprises "Blowers for smelting furnaces," Item 83, which comprises "solid or viscous compounds for lubricating," Item 111, which comprises "wood cut into shape and dressed or partly dressed for making boxes," Item 121, which comprises "Greenhide for belting purposes," and Item 126D, "Omnibuses and Coaches for carrying mails or passengers," all afford instances of articles which have some quality apparent in themselves and showing them to be specially fit for the purpose indicated rather than for any other, although they can be used for some other purpose.

There is nothing apparent on the face of these pictures to show that they are specially fit for advertising rather than for decorative purposes, except the fact that, being made of paper, they can readily receive the imprint of an advertisement. But so could a picture painted or engraved on any other material. I do not think that the probable use to which they will be put constitutes such a differentiation as to bring these articles within the tariff. Suppose that the pretty picture I have mentioned had been framed by an admirer of it, and had been imported with his other furniture, it would, according to the respondent's contention, be liable to duty, because it might, although it almost certainly would not, be used for advertising purposes. I do not think that the word "used" can be interpolated, as suggested by Mr. *Starke*.

It was further contended that the pictures are "advertising pictures" in a commercial sense. It is, no doubt, competent for the Customs authorities to prove that a term used in a tariff had, at the time when the tariff was passed, acquired in commerce a definite, general, and uniform meaning, different from the ordinary English meaning of the word. But I am disposed to think that this rule only applies to terms actually used, and not to terms obtained by filling up elliptical sentences. Assuming that this difficulty is out of the way, I do not think that the Collector has established his contention.

The rule followed by the Supreme Court of America and by this Court in previous cases is thus laid down by *Waite* C.J., in the case of *Swan* v. *Arthur* (1):—"While tariff Acts are generally

(1) 103 U.S., 597, at p. 598.

to be construed according to the commercial understanding of the terms employed, language will be presumed to have the same meaning in commerce that it has in ordinary use, unless the contrary is shown."

In *Maddock* v. *Magone* (1), *Fuller* C.J., after quoting the passage just cited, said:—"The inquiry was whether, in a commercial sense, the articles were so known, trafficked in, and used, under the denomination of 'toys,' that Congress, in the use of the particular word, should be presumed to have had that designation in mind as covering such articles."

It is moreover quite clear that no such question was raised at the trial. Indeed, such a contention would have been quite inconsistent with the case made by the Collector, which was that the words "not being advertising" were synonymous with "not being for advertising purposes," and not that they had a distinct meaning from those words. The learned Judge was not asked to give, and did not give, any finding on the subject. It is true that a witness for the defendant said:—"They are used almost exclusively for advertising purposes. We call them advertising pictures." On the other hand the plaintiff said:—"In the trade they are known as 'pictures unframed.' I do import what are known as advertising pictures." He then produced a picture which was obviously an advertising picture, having the words "Rowntree's Elect Cocoa" printed upon it in large letters, with other references to cocoa in the body of the picture, and added:—"That is an advertising picture." There was no other evidence on the subject. To use the words of *Fuller* C.J., in the case of *Berbecker* v. *Robertson* (2), decided immediately after *Maddock* v. *Magone* (3):—"The evidence of a definite, general, and uniform usage was so slight, if any at all, that a verdict based upon it would be set aside."

In my opinion the appeal should be allowed.

BARTON J. This is an action brought by the appellants against the Collector under sec. 167 of the *Customs Act* 1901. A dispute arose as to whether certain pictures imported by the appellants

(1) 152 U.S., 368, at p. 371. (2) 152 U.S., 373, at p. 377.
(3) 152 U.S., 368.

H. C. OF A. 1907.

CHANDLER & Co. v. COLLECTOR OF CUSTOMS.

Barton J.

were dutiable, and if so at what rate. The owners, having deposited the amount demanded, obtained their goods, and now sue for the recovery of the sum deposited, less a small sum in respect of part of the goods which it is admitted were liable to duty, and with which we are not concerned. The action was tried by *Hodges* J. without pleadings, and without a jury, and that learned Judge decided that the pictures were dutiable. Hence this appeal.

In the *Customs Tariff* 1902 there are under Division XIII. "Paper and Stationery," two items of taxation and a "special exemption" relating to "pictures" of some kinds, and the Collector's endeavour is to bring the goods within one or other of these taxing items, while the appellants contend that the articles are "not included among dutiable goods" and are therefore duty-free, (see opening words of Tariff Schedule) or that at any rate they are free because they are within the special exemption alluded to.

The Chief Justice has set out the items, 122 and 123, and also the special exemption, and has described the goods the subject of the dispute.

Tariff schedules are often very awkward in their phraseology, but we are none the less obliged to construe them by the rules which govern the legal interpretation of Statutes. Their clumsiness does not justify us in abandoning any of those rules, the wisdom of which has been tested under every kind of difficulty. The chief of them is that we are to treat Parliament in good faith, as saying what it means and as meaning what it says. If in so treating it I find that it has said something which does not commend itself to me as quite reasonable, I, as a judicial interpreter, am to remember that the legislature is the real judge of what is reasonable. My duty of interpretation does not extend to correction, and I am not to mould the words or to torture their meaning so that they may consort with my notions of right and reason. On the other hand, if the words are ambiguous there are at least two constructions to choose from, and I may accept that one which appears the most reasonable.

The articles in question are visibly made of paper, are admittedly pictures, and come under the various descriptions of chromo-

graphs and photogravures. Some were worth 6d. each, some only 6d. per lb. It was possible to print advertisements on the mounts or margins of any of them, but in that respect they do not appear to differ from any kind of picture with a cardboard mount or made of paper and having a margin. If for that reason they are "for advertising purposes," then it is hard to imagine any inexpensive picture that is not so, and the purpose will be proved simply by the cheapness of the picture, as one that will not be spoiled by having words printed on its mount or margin. If one of these pictures were imported with a frame on it, I do not see how any one could justly call it a "picture, framed for advertising purposes" (Item 123), nor do I see that advertising purposes, analogous for instance to those of a price list or a catalogue, could be predicated of one of them so as to bring it within Item 122 if imported as it is without a frame. The reasoning of such cases as *Worthington* v. *Robbins* (1) shows that the dutiable classification of an imported article must be ascertained by an examination of the article itself, in the condition in which it is imported. I cannot agree that these pictures bear marks of *present* adaptation for advertisement. Until they go through some further process they bear no such marks whatever.

Still it does not follow that the pictures are free of duty as not being included among dutiable goods—see the first line of the Schedule. They may be "manufactures of paper n.e.i.," and I think would be, unless specially exempted. This brings one to the question whether they are within special exemption (*k*) as "Pictures (not being advertising)." Now, as I can see no reason for reading this expression otherwise than in its plain English meaning, I read it so. Like many other phrases, it is not the less plain for being elliptic. The ellipse is, to my mind, obviously the omission of a needless repetition of the word "pictures." The phrase is as intelligible without the repetition, as if it stood thus: —"Pictures, not being advertising pictures." The *primary* meaning of an advertising picture is a picture that advertises, unless there is some context to give it a secondary meaning; but we must beware of assuming secondary meanings when, as here, we lack a context to produce that effect. The words of the

(1) 139 U.S., 337.

H. C. OF A. 1907.

CHANDLER & Co. v. COLLECTOR OF CUSTOMS.

Barton J.

exemption following the word "advertising" cannot any of them be accused of having such an effect. Then do these pictures advertise, that is to say in their present form and condition, for it is thus that they are to be judged? In construing the exemption, we are not at first concerned with the words "for advertising purposes" used not there but in the two taxing items. To apply again, by a slight paraphrase, the reasoning of *Worthington* v. *Robbins* (1) which to me is cogent, the fact that such pictures can *by the addition of advertisements* be made to advertise, has no relation to the condition of the articles as imported, but relates only to what the importer may afterwards do with them by the application of a further process of which they bear no mark, nor even a hint, as yet. I come then to the conclusion, taking the exemption by itself, that it applies to all pictures in the category stated, which as imported do not advertise, and as these pictures as imported do not advertise, they must be judged by their condition when imported, and are within the exemption.

Reverting to the taxing items for a moment, though I have expressed the opinion that the goods are not for "advertising purposes" within their meaning, I desire to point out that, even if I were wrong there, the pictures would not necessarily become dutiable, unless Mr. *Starke* were right in his argument that the words "being advertising" in the exemption mean the same thing as "for advertising purposes" in the two items. There clearly the respondent plies the labouring oar. Parliament has used the expression "for advertising purposes" in both the taxing items. In the exemption it uses the expression "not being advertising." If the one expression is a mere negative of the other it is very strange that it is not so couched. Nothing was easier than to exempt "Pictures (not for advertising purposes)." Why is the other expression used, different as it is in form and different as it apparently is in meaning? There is an obvious *primâ facie* difference in the meaning of pictures for advertising purposes (*i.e.*, of which the predominant purpose in the sense of use is advertising)—even if that meaning were not, in its application, restricted to their condition as and when imported—and pictures which are not, as they stand, advertising pictures. That differ-

(1) 139 U.S., 337.

ence must be reconciled by the respondent in order to sustain his claim, and he has not succeeded in reconciling it. It is not to be supposed that Parliament, in using these different phrases, intended them to have identical meanings, nor do they bear them unless there is that in the context which establishes that intention, so as to bring the articles within the embrace of the tax. The respondent Collector has not in argument given us a sound reason to believe that things differentiated in description are in fact the same thing, and the clumsiness of tariff phraseology is far from being a reason in law either for the difference which appears or for the identity which is claimed.

Something was made at the bar of some evidence given at the trial as to what was an advertising picture. No reason was given why a commercial meaning should be found for "a picture that advertises." But letting that pass, the evidence was altogether too shadowy to be relied on, nor did it even appear whether the picture of which the witness spoke was considered an advertising picture by people other than his own firm. On the whole case I am of opinion that the imports in question are exempt from duty, and that the appeal ought to be allowed.

O'CONNOR J. This was an action brought under sec. 167 of the *Customs Act* 1901 to determine the proper duty to be paid on certain goods of which the plaintiffs were the importers. The goods consisted of two lots of coloured lithographs, one lot valued for duty at a little under six pence a pound, the other at six pence each. They had no advertisements upon them, but it appeared that the business people who bought them for advertising purposes put their own advertisements on them. The Collector of Customs claimed that the goods were dutiable under Item 122 of the tariff as "manufactures of paper imported for advertising purposes," or as "lithographed matter for such purposes," or in the alternative that they were dutiable under Item 123 as "manufactures of paper n.e.i." The appellants denied that the goods were dutiable under either Item, and also contended that, if they were within the general words of either, they came within the express language of the special exemption as "pictures (not being advertising)," and were thus free of duty.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

O'Connor J.

The learned Judge at the trial found that the goods were dutiable under Item 122 but not under Item 123, and, further, that they did not come within the special exemption as claimed by the appellants. It is, I think, clear that the finding against the Collector as to Item 123 cannot be disturbed. The sole question therefore to be determined is whether the learned Judge was right in finding that the goods were dutiable under Item 122, and in finding that they did not come within the special exemption.

The evidence showed that pictures of the class in question were sometimes imported with advertisements on them. It was admitted that, if such pictures were not within the exemption, they would be taxable under Item 122 or Item 123 according as they were unframed or framed. It was proved that the larger proportion were imported without any advertisement on them, and that the business people to whom they were sold by the importers put their own advertisements on them, and, although it appeared that goods of that class were sometimes used as works of art and ornament, there was abundant evidence that the principal or dominant use was for advertising purposes. A long line of cases in America, following *Meyer* v. *Cadwalader* (1), have laid down the law that it is the principal or predominant use which determines the classification where goods are made dutiable as being "used for" some particular purpose. In my opinion, therefore, there was abundant evidence to justify the finding of the learned Judge that the goods were "for advertising purposes" within the meaning of Item 122.

The appellants' first objection was that the goods were not dutiable at all, the argument being that pictures were not mentioned in Item 122 but were specifically dealt with in Item 123, and that, taking 122 and 123 together, it was the evident intention of the legislature to tax pictures for advertising purposes only when they were framed.

The material words of Item 122 are as follows:—"Paper viz., "Manufactures of, unframed, for advertising purposes, . . ., all printed or lithographed matter for such purposes." These pictures were all mechanical reproductions printed on paper or cardboard, and certainly came within the description of "printed

(1) 89 Fed. Rep., 963.

or lithographed matter." *Arthur* v. *Moller* (1), is a direct authority on the point, if authority were needed. They are dutiable therefore under that Item unless "pictures" have been specifically dealt with in Item 123 in such a way as to show that it was not intended to include them in the general words of Item 122. But Item 123 deals only with "framed pictures," not with pictures generally, and it imposes a duty of 25% *ad valorem* as against the duty of three pence per pound payable under Item 122, thus following the principle adopted in many cases throughout the tariff of increasing the duty in proportion to the labour expended on the article before its importation. Item 123 specifically mentions framed pictures, not for the purpose of indicating that they are the only pictures to be taxed, but for the purpose of imposing on them a higher and a different kind of duty from that imposed on pictures of the same class unframed, a special duty based on the value of the picture and the frame. I have no doubt, therefore, that the pictures in question are taxable as manufactures of paper under Item 122, unless they come within the special exemption. That brings me to the real difficulty of the case, the proper interpretation of the exemption, which is as follows:—

"(*k*) Pictures (not being advertising), viz.:—

autotypes, chromographs, engravings etchings, oleographs, oil paintings, photographs, photogravures, and water colours."

In interpreting any item of the tariff it must be remembered that it is, as other tariffs are, a Schedule in the form of a list or catalogue. The form of expression throughout is elliptical, and it is frequently necessary to transpose or add words if one would express in ordinary English the full meaning of the phrases used. Both parties find it necessarry to read the first line of the exemption as meaning "pictures which are not advertising pictures." So far they may be taken to be in agreement. But what is an "advertising picture?" There they differ.

The appellants contend that to be an advertising picture the picture must be then actually advertising, and that, until the advertisement is on it, it cannot be an advertising picture. The

(1) 97 U.S., 365.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

O'Connor J.

respondent, following and upholding the interpretation of the learned Judge at the trial, contends that the meaning of the expression cannot be so restricted, that it must be read in connection with the context, and that a picture, belonging to a class of pictures which are imported and sold principally for the purpose of having advertisements placed upon them, is as much an advertising picture as the same picture with the advertisement actually on it, that the words of the exemption must be interpreted with due regard to the expression "for advertising purposes" found in the taxing portions of the same Division, that it is not the advertisement but the picture that is taxed, and that, if it is once shown that the picture is of the class generally used for purposes of advertisement, it can make no difference whether the advertisement is put on before or after importation, therefore, that "advertising pictures" within the meaning of the exemption include all pictures of the class generally used for advertising purposes, as well those which have, as those which have not, an advertisement on them at the time of importation. Before further examining these contentions it will be well to say something as to the principles to be applied in the interpretation of enactments of this nature.

It has been urged by the appellants that a special rule of interpretation is to be applied in the case of penal or taxing Statutes. Stated in that broad way the proposition is not maintainable. At the present day, as is pointed out in all the text books on the interpretation of Statutes, the distinction between a strict and a liberal construction has almost disappeared with regard to all classes of Statutes, so that all Statutes whether penal or not are now construed substantially by the same rules. It is difficult to state any principle on which a distinction can be drawn between the rules of interpretation to be applied to one class of Statutes and to others. But undoubtedly the Courts do recognize some shade of difference in the application of rules of interpretation in the case of penal and taxing Acts and other Acts. The judgment of *Pollock* C.B., in *Nicholson* v. *Fields* (1) states as definitely as it can be stated the limits of the distinction. "Now, I freely admit," he says, "that though the

(1) 31 L.J. Ex., 233, at p. 235.

common distinction taken between penal Acts and remedial Acts, that the former are to be construed strictly and the other are to be construed liberally, is not a distinction, perhaps, that ought to be erased from the mind of a Judge, yet I think that we ought always to look, whatever be the Act, be it penal or be it remedial, for the true construction of the Act by its language, and in that respect I think that there ought to be no distinction between a penal Statute and a remedial Statute. If the remedial Statute does not extend to a particular case where we think that it ought to have extended, we have no power to legislate so far as to extend it. We are, I think, bound, undoubtedly, to this sort of strict construction in a penal Statute, that if there be a fair and reasonable doubt, we must do that which we always do in revenue cases—not to charge the subject with a tax unless the language by which the tax is imposed is perfectly clear and free from doubt; still more, perhaps, are we bound to do so in the case of a penalty."

The existence of an ambiguity in the words to be construed does not necessarily create a doubt. It is a reason for an examination of the context, the scope and object of the enactment. But that examination may satisfy the Court beyond all doubt as to the meaning to be placed on an expression which is on its face ambiguous. I take it, therefore, that in the interpretation of a penal or a taxing Statute mere ambiguity of expression or loose or inaccurate language will not prevent a Court from giving effect to the meaning of the legislature if, by the application of the ordinary rules of construction applicable to all other Statutes, that meaning can be ascertained. If, notwithstanding a careful examination by the aid of these rules of the words to be interpreted, a doubt still remains as to their meaning, the Court is not at liberty to resolve the doubt against the accused or the taxpayer by the application of any principle of public policy or general intent of the enactment, but in such a case must give him the benefit of the doubt.

Turning now to the special exemption, it is to be observed that it extends only to pictures which would otherwise be taxable under one or other of the Items of the Division "Paper and Stationery." The exemption from taxation of pictures as works

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

O'Connor J.

of art is to be found in the miscellaneous exemptions (*a-e*). The "oil paintings" mentioned in the special exemption under consideration are no doubt paintings in oils on some of the many manufactures of paper used for that purpose, and thus every word in the exemption covers some article which would otherwise be taxable under one or other Items of the Division.

The Division must be read as a whole, and it must be assumed, in the absence of some indication to the contrary, that the legislature intended it to be, as a whole, consistent. In order, therefore, to ascertain what has been exempted it may be useful to ascertain what has been taxed. Item 122 in its first sub-heading imposes a duty of three pence per pound on manufactures of paper unframed "for advertising purposes." "For advertising purposes" is one of those elliptical expressions to which I have before referred in which a word or words must be supplied if we would turn the catalogue form of the Item into ordinary English. In numerous instances throughout the Tariff "for" is used to convey the idea "used for." It seems to be necessary that that word should be supplied here, and I can see no other word that could be supplied. The expression must therefore be read "used for advertising purposes." In order to bring goods under the Item it is unnecessary to show that they have advertisements on them when imported. If they are printed or lithographed on some manufacture of paper, and are used for advertising purposes, they are subject to taxation.

Item 123, the other Item of the Division, taxes manufactured stationery and places advertisements at the head of the list. Then follows "pictures framed for advertising purposes," the rate being higher for the framed than for the unframed as I have already pointed out. Under both Items, therefore, pictures unframed or framed are taxable when they are of the class which is generally used for advertising purposes, whether advertisements are actually on them at the time of importation or not. There are imported, as is well known, an infinite variety of pictures reproduced by printing or lithography on different forms of manufactured paper, and it would appear to be the intention of the legislature, as expressed in these two Items, to select out of all these pictures one class only for taxation—that class whose

predominant use is not for purposes of art or ornament but for purposes of business—the business of advertisement. Thus they are when unframed grouped for taxation with illustrated price lists and catalogues, and when framed they are grouped with advertisements and carry an *ad valorem* duty. To make it clear, however, that pictures other than these are not to be dutiable under the general words of the two Items, it becomes necessary to define in the form of a special exemption the class of pictures intended to be exempted.

Now the respondent's reading, giving to the word "advertising" in the special exemption the same meaning as the words "for advertising purposes" in Items 122 and 123, is entirely consistent with and carries out the intention expressed on the face of those Items. Having regard to the many different classes of production named in the special exemption, that reading in the result exempts from taxation practically all pictures except those used for purposes of advertising, either as having advertisements on them or as being of the class of pictures generally used for the purpose of having advertisements placed upon them.

Taking, on the other hand, the appellants' reading, which restricts the meaning of "advertising pictures" to those pictures only which have advertisements on them at the time of importation, the result would be that the large class of pictures used for advertising purposes, and on which the advertisements are placed after instead of before importation, would come in free of duty. No doubt, even under that interpretation, Items 122 and 123 would still include pictures having advertisements on them at the time of importation. But, if the tax was intended to have that restricted operation, it is difficult to see why the legislature should have imposed the duty in language so much wider than was necessary. It is, no doubt, the office of an exemption to narrow the effect of general taxing words. But where the taxing words are not general, but special, where they select a special class of goods for taxation, the Court will be disinclined to hold, unless forced by plain words to that conclusion, that the legislature has in the exemption freed from duty the greater proportion of the class of goods which it has specially made liable to duty in the taxing Item.

H. C. OF A. 1907.

CHANDLER & Co. v. COLLECTOR OF CUSTOMS.

O'Connor J.

There is nothing in the language of the Division to show that the legislature had any such intention, or that its object in using the words "not being advertising" was any other than to make a limitation in the exemption which would cover the class of goods specially defined for taxation in the Items, or that its intention in the exemption was other than to free from taxation all classes of pictures produced on manufactures of paper except those expressly described in the Items fixing the duty. In my view, the words of the exemption can be read either with the meaning for which the appellants contend or with that which the respondent has put forward, and that the well known rule of interpretation should be applied reading the words in that sense which will best carry out the expressed intention of the legislature.

For the reasons given I have come to the conclusion that the interpretation for which the respondent is contending, and which the learned Judge at the trial adopted, is that which will best carry out the intention of the legislature as that intention is to be gathered from the words of the exemption taken in connection with the context in which they stand. It follows that in my judgment the words of the exemption do not include the goods in respect of which the appellants' claim has been made, that the learned Judge in the Court below arrived at a right conclusion, and that the appeal must be dismissed.

ISAACS J. By Division XIII., Item 122 (A) of the Customs Tariff Schedule 1902 a duty of 3d. per lb. is imposed on "Paper, viz.:—Manufactures of, unframed, for advertising purposes"; and by Item 123 in the same Division a duty of 25% *ad valorem* is imposed on "Stationery manufactured viz. advertisements and pictures, framed for advertising purposes," and also, after many articles enumerated, on "Manufactures of paper n.e.i."

In the list of exemptions from dutiable goods in this Division we find—"(*k*) Pictures (not being advertising) viz. autotypes, chromographs, engravings, etchings, oleographs, oil paintings, photographs, photogravures and water colours."

The appellants claim that their pictures fall within the words

"not being advertising" in exemption (*k*) because no actual advertisement appears on the face.

I shall first consider the meaning of Items 122 (A) and 123 apart from the exemption.

By Item 122 (A) the legislature were placing the lower duty on the articles in a less advanced stage of preparation for use or sale, and therefore included only such manufactures of paper as were unframed, although "for advertising purposes." If the pictures actually advertised, they would be advertisements, and would fall under the term "advertisements" in Item 123. Consequently the words "for advertising purposes" in Item 122 (A) must mean manufactures of paper suitable for framing, but yet unframed, and of a character that their predominant or chiefly recognized use is for the purpose of advertising, but which are still short of being actual advertisements.

Item 123 imposes the higher duty on both actual advertisements and on pictures which are not only "for advertising purposes" but are also framed. The word "framed" cannot apply to "advertisements," because if it did, so also would the following phrase "for advertising purposes," and it would be absurd to imagine any advertisements that were not "for advertising purposes." Indeed, if the appellants' interpretation of the words "for advertising purposes," namely, those which actually advertise, be correct, the absurdity is, if possible, still more obvious, for one would have to suppose advertisements which were not advertisements.

It is plain, so far, that Parliament had a clear and definite purpose in view in specifically enumerating the precise articles they intended to tax, and in moreover differentiating between those precise articles according as they were more or less advanced in preparation for the market.

So far, there would have been no need for exemption (*k*) if the legislature desired merely to tax articles of the nature I have described.

But once the drag-net provision "Manufactures of paper n.e.i." was inserted, unframed pictures that neither actually advertised, nor were of a character ordinarily or chiefly used for purposes of advertising, would be not merely subject to duty, but

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

Isaacs J.

would be liable to the higher duty of 25% *ad valorem*, that is to a duty greater than if they were for advertising purposes. Then exemption (*k*) was inserted, not for the purpose of departing from the intention manifested with respect to the specific goods already definitely considered and expressly enumerated, but for the very purpose of adhering to that intention. Pictures had been deliberately considered, and those not intended for taxation were excluded by definition. The wording of the exemption appears to me to preserve the intention. It begins with "Pictures," so that no other manufactures of paper are included. Then pictures are limited to those "not being advertising." The phrase is inserted in parenthesis. The word "being" is of force. The legislature is not using the word "advertising" as indicating an act or effect, but rather as meaning a class or character. It assumes the phrase will be understood in that sense, and the only reason for that must be the previous employment of the expression "for advertising purposes." Consequently, to be entitled to exemption, pictures must not be "for advertising purposes." But lastly, they must also be autotypes &c., that is, they must not be ordinary birthday cards and other articles of that kind, which in one sense may be regarded as pictures, but which are also specifically dealt with and made dutiable.

Therefore pictures are exempt which are autotypes, &c., and not of the character recognized by commercial men dealing in such articles as pictures of which the chief and predominant use is for advertising purposes. Otherwise, if falling under the general designation of manufactures of paper, they are dutiable under one or other of Items 122 and 123.

Consequently on the finding of *Hodges* J., which is amply supported by the evidence, the appellants' goods are not covered by the exemption, and are within the list of dutiable goods.

I do not stop to consider in detail the argument as to whether the word "used" or its equivalent is to be implied before the words "for advertising purposes." The appellants contest such implication. I think they are wrong, but, even if they were right, that would not help them to clear the matter of difficulties of interpretation. On the contrary, it seems to increase them. Their view would still leave "advertising" and "for advertising

purposes" as synonymous terms, but they would make "advertisement" in Item 123 unnecessary, while giving a strained meaning to advertising purposes, and would attribute to the legislature an unusual and unnecessary method of expressing an intention which could have been easily done in simpler and shorter language.

I am, therefore, of opinion that the appeal should be dismissed.

I have not dealt with the question of whether the word "advertising" in the exemption has acquired a special trade signification. I do not think it is open to the Collector at this stage. That issue was not presented to the learned Judge below, nor determined by him. Lord *Halsbury* said in the House of Lords in 1894 in *Browne* v. *Dunn* (1):—"You cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you on the evidence, if you have deliberately elected to fight another question, and have fought it, and have been beaten upon it." In *Nevill* v. *Fine Art and General Insurance Company* (2), the same principle was acted on.

HIGGINS J. This is an action brought by importers for an alleged excess of duty demanded by the Customs, and paid to the Collector under sec. 167 of the *Customs Act* 1901. The learned Judge who tried the issues in the cause—Mr. Justice *Hodges*—has found in favour of the Customs. He has found that the goods in question—pictures on cardboard—are within the list of goods described in Division XIII., Paper and Stationery, Item 122 (A), of the *Customs Tariff*, on which 3d. per pound is payable; that they are not within exemption (*k*) of that division; and that they do not come under Item 123 of dutiable goods. The coloured pictures are produced by a lithographic process, and they are called chromo-lithographs; and they are used "chiefly" or "almost exclusively" for advertising purposes. Some of the pictures might be called "photogravures" (as one witness says), or according to another witness, "mechanical etchings"; and these also are used chiefly for advertising purposes. Some of these pictures leave a sufficient space for advertisements; some would have to be mounted. The Judge has found, on the evidence, that all these pictures are "really paper manufactured

(1) 6 R., 67, at p. 76. (2) (1897) A.C., 68.

H. C. OF A. 1907.

CHANDLER & CO. v. COLLECTOR OF CUSTOMS.

Higgins J.

for advertising purposes." It is not disputed that these pictures are used chiefly for advertising purposes; but it is urged that pictures are not within "Manufactures of paper" in Item 122 (A), and that these pictures are within exemption (*k*)—"Pictures (not being advertising)"—because they do not actually contain any advertisement.

In the first place, I concur with the finding that these pictures are within Item 122 (A), "Paper: manufactures of, unframed, for advertising purposes, including price lists, catalogues, and all printed or lithographed matter for such purposes." Where a Tariff Act imposes duty on goods imported for a stated purpose, it is proper to look for the predominant use to which such goods will be put in the country of entry, and evidence will not be admitted of the actual purpose of each particular importer: *Meyer* v. *Cadwalader* (1). That this first heading was meant to apply to pictures on paper, and not to mere printed words, is apparent from the first exemption (*a*):—"fashion plates," and from exemption (*k*):—"Pictures (not being advertising) viz., autotypes, chromographs," &c. The character of the exemptions throws a light on the character of the class of dutiable goods from which they are exemptions. Strictly speaking "to exempt" is to take out, that is to say, to take out goods from the class to which, but for the exemptions, they would belong. If there were any doubt that Item 122 (A), (although it includes all printed or lithographed matter for advertising purposes), includes pictures, the doubt seems to be met by the exemptions. It cannot be said that Item 123 is the only place for pictures on paper; for in Item 122 (L) we find "cards, playing, in sheet or cut." Item 123 seems to relate to pictures in a more advanced stage—framed; to actual advertisements; and to general stationery. In this condition, there would be an *ad valorem duty* of 25%, which would, if applied to these pictures, fall heavier on the importer. I cannot accept the argument—an argument which, by the way, would involve a heavier burden on the importer—that these pictures come under Item 123 "Manufactured stationery." It is evident that under this head the legislature includes similar articles which have advanced a further stage; "advertisements" (that is, actual advertisements), and "pictures *framed* for adver-

(1) 89 Fed. Rep., 963.

tising purposes." It is true that Item 123 mentions "manufactures of papers (not elsewhere included)"; but the phrase is added "including printers' matrices"—and there is no reference (except as aforesaid) to pictures on paper. I cannot find any indication of an intention to limit the plain meaning of Item 122.

In the second place, I concur with the finding that these pictures do not come within exemption (*k*). The exemptions should be read with the list of dutiable goods so as to "dovetail" with it as far as possible; and in the latter list the only reference to "advertising" is in the expression, used on two or three occasions, "for advertising purposes." It is urged that no pictures are dutiable if they do not actually advertise, in their condition as imported. If this were the meaning, the phraseology of the exemption "not being advertising" would not be apt to express it. "Not advertising" would be sufficient without the word "being." The plaintiffs' argument does not allow any force or meaning to the word "being." Moreover, it is not true that the plaintiffs' interpretation of "advertising," as meaning "containing an advertisement," gives the ordinary meaning to that word. "Advertising" is actually commending some commodity, &c.; and there is no advertising in this sense at the moment of importation. I prefer to rest my judgment on these grounds, and not on the ground that the phrase "advertising pictures" has acquired a trade meaning, although there seems to be here some evidence, meagre, but, as I think, uncontradicted, of a trade name for such pictures:—"We call them advertising pictures." If the Customs once establish that goods come within the list of dutiable goods, it is for the importer to satisfy the Court that they come within the exemptions; and he has not done so. The amount deposited with the Collector must be "deemed the proper duty," if and so far as no sufficient ground has been shown to determine the contrary (sec. 167).

Appeal dismissed with costs.

Solicitor, for appellants, *A. R. Daley*, Melbourne.

Solicitor, for respondent, *Powers*, Commonwealth Crown Solicitor.

B. L.

END OF VOL. IV.