[HIGH COURT OF AUSTRALIA.]

HERBERT ADAMS PROPRIETARY LIMITED Appellant;
Defendant,

AND

THE FEDERAL COMMISSIONER OF TAXATION Respondent.
Plaintiff,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. of A. 1932.

Melbourne, *May* 23, 24.

Sydney, *Aug.* 4.

Rich, Starke, Dixon, Evatt and McTiernan, JJ.

Sales Tax—Sponge—"Pastry but not including cakes or biscuits"—Sales Tax Assessment Act (No. 1) 1930 (*No.* 25 *of* 1930), *sec.* 20, *First Schedule.*

Sec. 20 and the First Schedule of the *Sales Tax Assessment Act (No.* 1) 1930 expressed an exemption from sales tax of "pastry but not including cakes or biscuits." The appellant company manufactured and sold a class of goods described in its return to the Commissioner of Taxation as "sponge."

Held, that "sponge" came within the description of "cakes" in the Schedule, and accordingly that the appellant was liable to pay sales tax.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

Appeal from the Supreme Court of Victoria.

The Federal Commissioner of Taxation brought an action in the Supreme Court of Victoria against Herbert Adams Pty. Ltd. claiming £838 for sales tax alleged to be due by the defendant pursuant to the *Sales Tax Assessment Act* (*No.* 1) 1930 and the *Sales Tax Act* (*No.* 1) 1930 upon the sale value as declared by the *Sales Tax Assessment Act* 1930 of goods manufactured in Australia by the defendant and sold by it or treated by it as stock for sale by retail during the months of August to December 1930 and January 1931.

The plaintiff also claimed payment of additional tax at the rate of ten per cent per annum in consequence of the defendant's failure to pay such sales tax within the time specified in sec. 29 of the Act. The defendant by its defence in substance alleged that the goods upon the sale of which tax was claimed were " pastry " within the meaning of that word as used in the First Schedule to the *Sales Tax Assessment Act* (*No.* 1) 1930, and were not " cakes or biscuits " within the meaning of those words as used in such Schedule. Sec. 20 (*h*) of the *Sales Tax Assessment Act* (*No.* 1) 1930 exempted from sales tax " the goods specified in the First Schedule to this Act." The First Schedule specified " The following goods manufactured in Australia : . . . Pastry but not including cakes or biscuits."

The sole question in the action was whether " sponge " was " pastry " and was not " cake " within the meaning of those terms as used in the First Schedule to the Act. It was common ground that the defendant was liable to pay tax on " sponge," unless " sponge " was " pastry " and was not " cake." *Mann* J., after hearing evidence, held that " sponge " was not " pastry " within the meaning of that term in the First Schedule, and gave judgment for the plaintiff, but made no finding as to whether the articles were " cakes."

From that decision the defendant now appealed to the High Court.

Wilbur Ham K.C. (with him *Robert Menzies*, A.-G. for Vict., and *Herring*), for the appellant. The question is whether pastry is used in a generic sense or in a more limited sense as used by housewives. Pastry has two meanings, one wide enough to include sponge, &c., the other in which it is used to mean puff-paste, &c. The trade meaning of the word " pastry " is the only fixed meaning, and includes " sponge." This is an Act addressed to traders, and it imposes a tax on traders, and the trade meaning is the one intended by the Schedule. The evidence for the defendant showed that " sponge " falls within the trade definition of the word " pastry." The evidence is undisputed that wherever the trade uses the word " pastry " it is used in the generic sense ; and in the case of a taxing Act expressed in ambiguous language the taxpayer is to be given the

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benefit of the ambiguity (*Burt* v. *Commissioner of Taxation* (1)). Where the Legislature imposes taxation the words should be clear and unambiguous (*Greenwood* v. *F. L. Smidth & Co.* (2)). The proper method of construing this Act is to read the Act as a whole and find out what its sense and purpose is (*The "Lion"* (3); *Edinburgh Street Tramways Co.* v. *Torbain* (4); *Craies* on *Statute Law*, 2nd ed., pp. 154-156). The distinction between the specific and generic sense is not a departure from the ordinary meaning of the word "pastry"—one is the trader's meaning and the other is the householder's (*Taylor* on *Evidence*, 12th ed., p. 762, par. 1188; *Juggomohun Ghose* v. *Manickchund* (5); *Vallance* v. *Dewar* (6); *Whitton* v. *Falkiner* (7); *Markell* v. *Wollaston* (8); *Chandler & Co.* v. *Collector of Customs* (9)).

Keating (with him *Coppel*), for the respondent. "Sponge" is not "pastry" within the meaning of the First Schedule, and tax was payable on sales. The Act is not directed to the trade of the pastry-maker. "Pastry" must have the same meaning in all these Acts, and in some of them it clearly does not relate to the trade meaning. The Act is directed to the public generally, and is not confined to traders; therefore, there is no force in giving the trade, as distinguished from the popular, meaning to the word "pastry." The Court should take the natural meaning of the word and should not speculate as to its meaning. The onus of proving that these articles are pastry and not cakes is on the appellant. The trial Judge found as a fact that this was not pastry.

Robert Menzies A.-G., in reply. In ascertaining what "pastry" means the article as sold should be looked at, and not merely a constituent in the article sold. The appellant's witnesses gave a meaning to pastry as a commodity sold across the counter, and that differed from the domestic meaning given by the respondent's witnesses. The latter describes something used in producing something sold. The words in the exception show that these articles

(1) (1912) 15 C.L.R. 469, at p. 482.
(2) (1922) 1 A.C. 417, at p. 423.
(3) (1869) L.R. 2 P.C. 525, at p. 530.
(4) (1877) 3 App. Cas. 58, at p. 68.
(5) (1859) 7 Moo. Ind. App. 263, at p. 282.
(6) (1808) 1 Camp. 503; 170 E.R. 1036.
(7) (1915) 20 C.L.R. 118, at p. 127.
(8) (1906) 4 C.L.R. 141, at pp. 147, 150.
(9) (1907) 4 C.L.R. 1719, at p. 1735.

would have been included in the general words save for the exception. The test which has been applied is as to the ingredient used in the goods sold, and does not deal with the actual goods sold to the public.

Cur. adv. vult.

The following written judgments were delivered :—

RICH J. I think that *Mann* J. arrived at the right conclusion. I adopt the reasons contained in the judgment of my brother *Dixon*. The appeal should be dismissed.

STARKE J. Sales tax is imposed upon the sale value of goods manufactured in Australia by a taxpayer and sold by him or applied to his own use, and the tax is payable by the manufacturer of the goods (*Sales Tax Acts*, No. 25 and No. 26 of 1930). By sec. 20 of the Act No. 25, the tax is not payable upon the sale value of goods manufactured in Australia specified in the First Schedule. One of these items is : " Pastry but not including cakes or biscuits." The appellant manufactured a class of goods described in its return to the Commissioner of Taxation as " sponge." In the main, it is a mixture of eggs, sugar, flour, and water, and is baked either in round tins or as oblong blocks. The Commissioner assessed the appellant to sales tax in respect of the goods so manufactured. But the appellant claims that the sponge is " pastry " within the exemption contained in the Schedule, and is not cake or biscuits. The learned Judge in the Court below (*Mann* J.) was of opinion that the sponge was not pastry within the commonly accepted meaning of that term, and he gave judgment for the Commissioner. Hence this appeal.

Words of common speech are, or are supposed to be, within the judicial knowledge, and should be " interpreted according to their common and ordinary meaning, namely, that which they bear in ordinary colloquial speech " (*Falkiner* v. *Whitton* (1)). But unfortunately the words in question here have no clearly defined meaning in ordinary speech. Indeed, the exemption itself—" pastry but not including cakes or biscuits "—indicates that the word

(1) (1917) A.C. 106, at p. 110.

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"pastry" cannot be confined to articles of food made from paste or of which paste forms the essential part. Further, it is beyond doubt that the business of a pastry-cook is not confined to such articles: he manufactures and sells a large variety of small dainty goods, such as buns, cakes (plain and fruit), sponge slices, eclairs, &c., all of which pass in common speech under the denomination "pastry," but are not articles made from paste or of which paste forms an essential part. Again, the commercial understanding of the terms used in the Act confirms their use in common speech. It is often said that the denomination of articles enumerated in the revenue laws should be construed according to the commercial understanding of the terms because the law is addressed to persons engaged in trade or business. But I do not think the commercial understanding in this case differs, or is proved to differ, from that used in common speech. The trades of bread-making, pastry-cooking, and cake and biscuit-making overlap a good deal, and we find no clear line of demarcation between them. It is not surprising, therefore, that precise and mutually exclusive definitions of the terms bread, pastry, cake, and biscuits, do not exist. But it is beyond all doubt, from the trade evidence—including the books, catalogues, advertisements, &c., to which our attention has been called—that the manufacture of sponge falls within the range of the art of the pastry-cook, and that sponge is commonly denominated as pastry. Is it, however, in the form in which it is manufactured in the present case, within the description of pastry that is commonly and ordinarily known as cake? That question must be answered in the affirmative. The word "cake" is used to describe a small mass of various constituents such as flour, butter, sugar and other ingredients, baked or cooked in different shapes, e.g., round, in blocks, &c. Butter or fatty substances are largely used, but a light cake is made without the use of fatty substances, or at all events with but little use of such substances. The sponge-cake is a well-known representative of this last class of cake. The sponges in the present case, which were baked in round tins, are quite ordinary forms of cakes and are rightly described in the evidence as sponge-cakes. Those which were baked in blocks differ only in form, and the term "sponge-cakes" describes them more accurately than any

other: they are an instance of a class of greater extent called cakes; the form depends upon the requirements of the customers of the trade, but is otherwise unimportant for the purposes of classification.

The appeal should be dismissed.

DIXON J. Sec. 20 (*h*) of the *Sales Tax Assessment Act* (*No.* 1) 1930-1931 provides that sales tax shall not be payable under that Act upon the sale value of the goods specified in the First Schedule. Under the heading of goods manufactured in Australia that Schedule specifies "Pastry but not including cakes or biscuits." The phrase sounds odd because, according to present usage, the description "pastry" is not commonly applied either to cakes or biscuits. It appears, however, both from the evidence of witnesses and from trade manuals and text-books that among pastry-cooks the word "pastry" is used as a general expression describing most of the products of their art. *Mann* J., from whom this appeal comes, found on the evidence "that the word is quite commonly used in the trade in a much wider sense, usually along with a qualifying word such as 'mixed' or 'fancy,' to include all or nearly all classes of flour goods other than bread, commonly made and sold by pastry-cooks, confectioners, bakers or caterers."

The popular meaning of "pastry" appears to have been reached by a process of specialization, and perhaps the wider trade meaning is a survival. But, whether the usage is to be explained as a persistence of an older meaning or as an extension by trade custom of that now prevailing, the Legislature has expressed itself in a manner which amounts to a recognition, if not an adoption, of the trade meaning. Such a recognition might be expected, because the tax is levied by the various statutes upon persons who sell commodities in the common course of distribution, whether they manufacture or produce the goods they sell or acquire them by purchase. A revenue law directed to commerce usually employs the descriptions and adopts the meanings in use among those who exercise the trade concerned. In *Marquis Camden* v. *Commissioners of Inland Revenue* (1) *Phillimore* L.J. says: "In construing a modern statute, not dealing with the particular customs of a particular locality, or

(1) (1914) 1 K.B. 641, at p. 650.

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the practice of a particular trade, but of general application, evidence such as is sought to be adduced in this case is inadmissible"; that evidence being tendered to prove that among land agents an ordinary English expression possessed a special meaning and should be so understood in a statute of general application. But, whatever may be covered by the phrase "practice of a particular trade," it has been considered permissible in applying a customs tariff to resort to evidence to ascertain what according to mercantile understanding are the characteristics connoted by the descriptive names used in the items as well as to identify the articles of commerce which possess them. See *Markell v. Wollaston* (1); *Chandler & Co.* v. *Collector of Customs* (2); *Robertson* v. *Salomon* (3). In the case of the Schedule of exemptions to the *Sales Tax Assessment Act* it is only upon proof of the general meaning prevailing in the trade that an explanation appears of the use of the strange expression "pastry . . . not including cakes or biscuits." In the present case the appellant, the taxpayer, contends that the preparation which pastry-cooks and consumers alike call "sponge" falls within this exemption. In the trade "sponge" is included under the head "Pastry." It is said that "pastry not including cakes" means "pastry except cakes," and that "sponge" is "pastry" and is not "cake." To my mind it is in this last step that the appellant's greatest difficulty lies. It cannot be doubted that in common speech pieces of sponge, with or without filling, icing or other addition, would be denominated "cakes." But again trade usage is relied upon. It appears that among pastry-cooks the word "cake" has obtained a specialized meaning, and is often applied to distinguish articles in which some form of fat is a substantial or basic ingredient from other things, such as sponge, which consumers might call cakes. To establish that the Schedule of exemptions has adopted this limited or restricted meaning is no easy undertaking. In the first place, there is nothing in the form of expression "pastry not including cakes or biscuits" to suggest an unusual signification of "cake" as there is in the case of "pastry." In the next place, it is always less difficult to show that a word has a wider meaning than

(1) (1906) 4 C.L.R. 141.
(2) (1907) 4 C.L.R. 1719.
(3) (1889) 130 U.S. 412, at p. 415; 32 Law. Ed. 995, at p. 996.

it is to establish a specialized use. For an extension of meaning involves no abandonment of the use in respect of things to which it would in any case apply; but a uniformly restricted application among any class of persons is necessary in order to establish that it has among them a narrower meaning and that meaning only. In this case a consideration of the trade evidence and of the manuals and technical books has failed to satisfy me that among pastry-cooks the word " cake " is not used for the purpose of their trade as often as not in a sense which includes " sponge." I think that, whenever occasion arises to distinguish between articles such as " sponge " in which fat is not a substantial ingredient and other products, the word " cake " is used for the purpose in the specialized sense claimed, but, when there is no occasion for doing so, it is used in the trade in the generic sense of common speech and includes sponge. There is no sufficient reason for attaching to the word " cakes " in the Schedule a special sense which would exclude " sponge."

For these reasons I think the appeal should be dismissed.

EVATT J. During the relevant period the appellant manufactured 40,692 " boards of sponge " and 7,082 dozens of " daisy and almond sponges." The ingredients of these articles included eggs, sugar and flour. After baking, such flavourings, icings, jams, and creams were added " as may be desired to produce the finished article." The appellant claimed that these goods came within the description of " pastry but not including cakes or biscuits " (First Schedule to Act No. 25 of 1930) and were thereby exempt from sales tax. The appeal fails if the goods are " cakes."

The appellant says that the goods are " sponges," which is true enough. The witness Camille Richoux said of such " sponge " that " it is nothing else but a light cake . . . In any shape or form you call it sponge. It is a cake. You can mould it to any shape you like but it is a ' sponge.' "

Samples of the appellant's manufacture were produced, and in my opinion the goods made were undoubtedly " cakes." According to the *Oxford Dictionary* a " sponge " is " a very light sweet cake made with flour, milk, eggs, and sugar." A dictionary reference

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McTiernan J.

may not be necessary. Perhaps this is one of the few things that every schoolboy knows.

The appeal should be dismissed with costs.

McTIERNAN J. The learned Judge who tried the action found that the word "pastry," as a commercial term, was used in two senses. He said:—"I find on the evidence that the word is quite commonly used in the trade in a much wider sense, usually along with a qualifying word such as 'mixed' or 'fancy,' to include all or nearly all classes of flour goods other than bread, commonly made and sold by pastry-cooks, confectioners, bakers or caterers. In the absence of any generic word applicable to so many different varieties of food, those engaged in the trade frequently use the word 'pastry' in a very wide sense, certainly extending to include the sponge which is the subject of this case. This is no doubt due, to a large extent, to what is usually implied in the word 'pastry-cook,' but I also find that those engaged in the trade continue to use the word 'pastry' in its more limited sense where it is necessary or convenient to differentiate between different classes of goods made and sold by pastry-cooks and the like." Referring to the context in which the word "pastry" occurs in the Schedule to the Act, I think that the view which is probably correct is that the Legislature did not use the term in the limited sense. In this view the term is wide enough to include "sponge." The context is as follows: "Pastry but not including cakes or biscuits." The question now arises whether "cakes" include sponge. His Honor, having come to the conclusion that "sponge" was not "pastry," did not make any finding on the question whether "cake" is a commercial term which embraces "sponge" or not. Upon the evidence—all of which the learned Judge accepted as sincere testimony—there is a conflict as to whether the substance denoted by the word "sponge" is known as "cake" in the trade. Turning to its ordinary meaning, the word "cakes" describes numerous classes of goods, including of course light cakes. The term "sponge-cake" in its ordinary meaning denotes a light cake. This view is confirmed by a reference to the *Oxford Dictionary*, where "sponge" is defined to include "sponge-biscuit, a flour biscuit of a similar composition to sponge-cake." Sponge-cake is

there defined as "A very light sweet cake made with flour, milk, eggs, and sugar." I think that the goods described by the appellant as "sponge" are covered by the term "cakes."

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hedderwick, Fookes & Alston.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

KESSELL . . . . . APPELLANT;
NOMINAL DEFENDANT,

AND

LEECH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Lien on Crop—Landlord and Tenant—Agricultural land—Advances by department of State to lessee—Crown's lien—Undertaking by lessor—Claim for one year's rent—Effect of undertaking—Waiver of statutory rights—Liens on Crops and Wool and Stock Mortgages Act 1898 (*N.S.W.*) (*No.* 7 *of* 1898), *sec.* 6.*

In order to obtain an advance of money from the Department of Agriculture the lessee of certain agricultural land gave to the Minister a preferable lien

* The *Liens on Crops and Wool and Stock Mortgages Act* 1898 (N.S.W.) provides, by sec. 6, as follows: "If the lienor be a leaseholder then the lienee shall, before selling any . . . crop" which is the subject of a lien registered under the Act "pay to the landlord of the land whereon such crop is growing such sum of money not exceeding one year's rent as may be due to him for rent at the time of carrying away such crop, and the lienee may repay himself the sum so paid out of the proceeds of the sale of such crop before paying over the balance to the lienor."