1960
Apr. 21
June 16

BETWEEN:

THE DENTISTS' SUPPLY COMPANY OF NEW YORK ..... APPELLANT;

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE (CUSTOMS AND EXCISE) ..... RESPONDENT.

Revenue—Customs Duty—Customs Act, R.S.C. 1952, c. 58, s. 45—Customs Tariff, R.S.C. 1952, c. 60, Items 688, 476—Words in Customs Tariff to receive ordinary meaning unless context requires special technical or particular meaning—Meaning of words in Customs Tariff a question of fact—Court not to substitute its conclusion for finding of Tariff Board if reasonably made.

The appellant imported certain articles called shade guides. These were of various types, some having plastic teeth and others porcelain teeth. They came in small boxes, each having a holder containing twelve blades, each having a tooth fastened to its top by a base metal pin. The teeth on the blades were of different shades. Shade guides were produced by manufacturers of artificial teeth and given to dentists to enable them to select and order an artificial tooth or artificial teeth of a shade that would match the patient's own or other artificial teeth. The dentist put a blade with its attached tooth against the patient's teeth and repeated the process until a matching shade was found.

The Minister decided that the shade guides were dutiable according to the material of which they were made. The appellant appealed from this decision to the Tariff Board contending that the shade guides were "artificial teeth, not mounted" under Item 688 of the *Customs Tariff* or, in the alternative, that they were "dental instruments" under Item 476 and, therefore, in either event entitled to entry free from duty. The Tariff Board held that the shade guides were not artificial teeth and were not dental instruments within the ordinary understanding of the words and dismissed the appeal. The appellant then, having obtained leave under section 45 of the *Customs Act*, appealed to this Court from the decision of the Tariff Board on the question of law whether the Tariff Board erred as a matter of law in holding as it did.

Held: That the right of appeal conferred by section 45 of the *Customs Act* is confined to an appeal, upon leave being obtained from this Court or a judge thereof, upon a question that in the opinion of the Court or judge is a question of law.

2. That it is not within the competence of this Court to draw its own conclusion from the evidence adduced before the Tariff Board, its jurisdiction being restricted to determining whether the Tariff Board erred as a matter of law in holding as it did.

3. That there is no right of appeal from the decision of the Tariff Board on findings of fact and this Court has no right to substitute its own conclusion for the finding of the Tariff Board if there was material before it from which it could reasonably have found as it did.

4. That the construction of a statutory enactment is a matter of law.

5. That if the decision in *The Deputy Minister of National Revenue for Customs and Excise v. Rediffusion Inc.* [1953] Ex. C.R. 221 purports to state as a principle of general application that the meaning of words in a statute is a matter of law only the statement is too broad.
6. That, in the absence of a clear expression to the contrary, words in the *Customs Tariff* should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical or particular meaning they should be read with such meaning and that the ordinary meaning or special technical or particular meaning of such words is a question of fact. *Girls' Public Day School Trust v. Ereaut* [1931] A.C. 12 applied.
7. That the terms "artificial teeth, not mounted" and "dental instruments", as used in Items 688 and 476 of the *Customs Tariff* respectively, are not defined and should receive their ordinary meaning.
8. That there was plenty of material before the Tariff Board on which it could reasonably declare that the shade guides imported by the appellant were not "artificial teeth, not mounted", and, therefore, not classifiable under Tariff Item 688.
9. That there was ample material before the Tariff Board to warrant the finding that the shade guides imported by the appellant were not "dental instruments" within the meaning of the term in Tariff Item 476.
10. That there was no error as a matter of law in the declaration of the Tariff Board and that the appellant's appeal must be dismissed.

APPEAL, pursuant to leave, from decision of the Tariff Board.

The appeal was heard before the President of the Court at Ottawa.

M. B. K. Gordon, Q. C., and *J. D. Kokonis* for appellant.

C. R. O. Munro for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (June 16, 1960) delivered the following judgment:

This is an appeal, pursuant to leave, under section 45 of the *Customs Act*, R.S.C. 1952, Chapter 58, from the declaration of the Tariff Board, dated May 14, 1957, in Appeal No. 415, dismissing the appellant's appeal from the decision of the respondent, dated November 5, 1956, that certain articles, called shade guides, imported by it under Montreal Customs Entry No. Y53704, dated July 30, 1956, were dutiable according to the material of which they were made.

The Customs entry showed the importation of nine cartons of shade guides as "Mfg of Synthetic Resin N O P", and the invoice showed that the nine cartons consisted of 1,000 Bioform Shade Guides, 1,000 New Hue Shade Guides,

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1,100 Biotone Shade Guides and 1,000 New Solila Shade Guides. The invoice carried a notation that the shade guides were dutiable under Item 908 of the *Customs Tariff*, R.S.C. 1952, Chapter 60, as amended in 1954, which reads as follows:

> 908. Manufactures of synthetic resins including floor and wall tile containing synthetic resin, n.o.p. . . .

which item carries a duty of 20 per cent under the most-favoured-nation tariff. But only one kind of shade guides had plastic teeth, namely, the Biotone Shade Guides, the teeth in the other shade guides being made of porcelain, and the Minister finally decided that the shade guides were dutiable according to the material of which they were made.

Before setting out the issues in the appeal I should give a brief description of a shade guide and explain the purpose for which it is used. A sample of the kind of shade guide imported by the appellant was filed as Exhibit A2. This is contained in a small box carrying the description "Shade Guide for Trubyte Bioform Teeth" on its top and sides. In the box there is a thermoplastic holder containing twelve plastic blades, each having a tooth fastened to its top by a base metal pin. The teeth on the blades are of different shades. Shade guides are produced by manufacturers of artificial teeth and are given to dentists to enable them to select and order an artificial tooth or artificial teeth of a shade that will match the patient's own or other artificial teeth. The dentist puts a blade with its attached tooth against the patient's teeth and repeats the process until a matching shade is found. Each blade carries a number on it so that when the dentist has selected the proper shade he can order an artificial tooth or artificial teeth of such shade by reference to the number on the blade. Thus, in a sense, the shade guide, in addition to being an aid to the dentist, serves as a catalogue of the manufacturer's artificial teeth so far as color is concerned.

It was contended before the Tariff Board that the shade guides imported by the appellant were, in fact, "artificial teeth, not mounted", under Item 688 of the *Customs Tariff* or, in the alternative, that they were "dental instruments" under Item 476 and, therefore, in either event, entitled to entry free of duty. Item 688 reads as follows:

> 688. Artificial teeth, not mounted, and materials for use only in the manufacture thereof.

And Item 476 is in the following terms:

476. Surgical and dental instruments of any material; surgical needles, clinical thermometers and cases thereof; X-ray apparatus; microscopes valued at not less than fifty dollars each, retail; complete parts of all the foregoing.

The Tariff Board, after hearing the evidence of the witnesses called for the appellant, held that the shade guides were not artificial teeth and were not dental instruments within the ordinary understanding of the words and dismissed the appeal.

The appellant then obtained leave under section 45 of the *Customs Act* to appeal to this Court from the decision of the Tariff Board on the following question of law:

Did the Tariff Board err as a matter of law in holding that the articles referred to in the said appeal as shade guides were not "artificial teeth, not mounted" and therefore not classifiable under Item 688 of the Customs Tariff and, alternatively, that such articles are not "dental instruments" and therefore not classifiable under Item 476 of the Customs Tariff.

Counsel for the appellant contended that since no question of the credibility of any witness was involved this Court is in as good a position to assess the evidence before the Tariff Board and to draw the right inference from it as the Board was, that the Board had not arrived at the proper conclusion on the evidence before it and that this Court should make the finding that the Board should have made. In support of his contention counsel relied upon the following decisions, namely, *Coghlan v. Cumberland*[1]; *Montgomerie & Co., Limited v. Wallace James*[2] in which the Earl of Halsbury L.C. said, at page 75:

Where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

Annable v. Coventry[3]; *Dominion Trust Company v. New York Life Insurance Co.*[4]; *Mersey Docks and Harbour Board v. Procter*[5]; *Wilson v. Kinnear et al.*[6]; *Borrowman v. The Permutit Company*[7]; *Powell and Wife v. Streatham Manor Nursing Home*[8]; and, finally, *Benmax v. Austin Motor Co. Ld.*[9]

[1] [1898] 1 Ch. D. 704.
[2] [1904] A.C. 73.
[3] (1912) 46 Can. S.C.R. 573.
[4] [1919] A.C. 254.
[5] [1923] A.C. 253.
[6] [1923] 2 D.L.R. 641.
[7] [1925] S.C.R. 685.
[8] [1935] A.C. 243.
[9] [1955] A.C. 370.

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The principle laid down by these decisions would be applicable if the appeal to this Court from the declaration of the Tariff Board were an appeal *de pleno* but such is not the case. The right of appeal conferred by section 45 of the *Customs Act* is confined to an appeal, upon leave being obtained from this Court or a judge thereof, upon a question that in the opinion of the Court or judge is a question of law and in the present case it is limited to the question stated. Consequently, the decisions relied upon by counsel for the appellant are not applicable. It is not within the competence of this Court to draw its own conclusion from the evidence adduced before the Tariff Board. Its jurisdiction is restricted to determining whether the Tariff Board erred as a matter of law in holding as it did.

The nature of the limited right of appeal conferred by section 45 of the *Customs Act* was considered by this Court in *Deputy Minister of National Revenue for Customs and Excise v. Parke Davis & Company Limited*[1]. This was the first decision of this Court in an appeal under the *Customs Act* from a decision of the Tariff Board. In that case the issue before the Tariff Board had been whether a certain substance called Penicilin S-R, the subject of the importations in question, was a biological product within the meaning of Item 206*a* of the *Customs Tariff* and exempt from duty by virtue of it. The Item read as follows:

> 206*a*. Biological products, animal or vegetable, N.O.P., for parenteral administration in the diagnosis or treatment of diseases of man, when manufactured under license of the Department of Pensions and National Health under regulations prescribed by the Food and Drugs Act; . . .

The issue was a difficult one. The meaning of the term "biological products" was in question and there was controversy over whether Penicillin S-R was a biological product within the meaning of the term as used in Tariff Item 206*a*. The Tariff Board concluded that it was and the Deputy Minister, having obtained leave to do so, appealed on the question whether the Tariff Board had erred as a matter of law in so deciding. At page 20, I expressed the limitation of the Court's jurisdiction in the following terms:

> The issue in this appeal is not whether Penicillin S-R was actually a biological product within the meaning of Tariff Item 206*a* but whether the Tariff Board erred as a matter of law in deciding that it was and, therefore, exempt from duty by virtue of it. If there was material before the

[1] [1954] Ex. C.R. 1.

Board from which it could reasonably decide as it did this Court should not interfere with its decisions even if it might have reached a different conclusion if the matter had been originally before it.

The limitation thus expressed should have been stated more precisely. If the decision of the Tariff Board was a finding of fact and there was material before it on which it could reasonably have based its finding it is not within the competence of this Court to interfere with it, no matter what its conclusion might have been if a right of appeal *de pleno* from the decision had been conferred by the *Customs Act*. There is no right of appeal from the decision of the Tariff Board on findings of fact and it seems to me that the same is true in respect of findings of mixed law and fact. The only right of appeal conferred by section 45 of the *Customs Act* is an appeal upon a question that in the opinion of this Court or a judge thereof is a question of law and, even in such a case, only after leave to appeal on such question has been obtained. Thus, to the extent that the declaration of the Tariff Board in the present case was a finding of fact, this Court has no right to interfere with it unless it was so unreasonable as to amount to error as a matter of law. But it cannot be too strongly stressed that this does not mean that there was error in the finding of fact merely because the Court might have found otherwise if a full right of appeal had been conferred. Thus, this Court has no right to substitute its own conclusion for the finding of the Tariff Board if there was material before it from which it could reasonably have found as it did.

There is also the fact that on an appeal to the Tariff Board the onus of proof necessary to establish the appellant's appeal so far as it is based on matters of fact lies on the appellant and it would be within the competence of the Board to dismiss an appeal on the ground that such onus has not been discharged.

It is established law that the construction of a statutory enactment is a matter of law. It was so held by Cameron J. in *General Supply Co. Ltd. v. Deputy Minister of National Revenue, Customs and Excise, et al.*[1], but in *The Deputy Minister of National Revenue for Customs and Excise v. Rediffusion Inc.*[2], he extended the application of the principle and held that the meaning of certain words in Item 6

[1] [1953] Ex. C.R. 185.

[2] [1953] Ex. C.R. 221.

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of Schedule 1 of the *Excise Tax Act*, R.S.C. 1927, Chapter 179, was a matter of law only. *Vide* also *W. T. Hawkins Ltd. v. Deputy Minister of National Revenue for Customs and Excise*[1].

If the decision in the *Rediffusion Inc.* case (*supra*) purports to state as a principle of general application that the meaning of words in a statute is a matter of law only I am unable to agree with it. In my opinion, such a statement would be too broad. In the *Parke Davis & Company Limited* case (*supra*), at page 15, I stated:

> It is, I think, sound to say that, in the absence of a clear expression to the contrary, words in the Customs Tariff should receive their ordinary meaning but if it appears from the context in which they are used that they have a special technical meaning they should be read with such meaning.

I am not aware of any decision contrary to this statement. In that particular case I expressed the opinion that Tariff Item 206*a* was concerned with substances of a pharmaceutical nature, that, consequently, the term "biological products" must be regarded as a technical term and read with the meaning it would have to persons in the pharmaceutical industry, that in that field it had in 1936, and for some time previously, a generally known meaning of wide import, namely, the dictionary meaning which I had cited, and that that was the meaning that should be given to it in Tariff Item 206*a*. The statement in the *Parke Davis & Company Limited* case (*supra*) was, of course, a conclusion of law based on the construction of the *Customs Act* and the meaning to be given to the words used in it. But once it has been decided that, in the absence of a clear expression to the contrary, words in a statute should receive their ordinary meaning but that if it appears from the context in which they are used that they have a special technical meaning and should be read with such meaning, then it seems clear that what the ordinary meaning of the words is or what their special technical meaning is, if they have one, is a question of fact.

The ordinary meaning of a word is the meaning with which it is ordinarily used by persons having a knowledge of the language in which it is used. It is unrealistic, in my opinion, to say that such meaning is a matter of law. When

[1] [1957] Ex. C.R. 206.

it is sought to ascertain the ordinary meaning of a word resort is had to recognized dictionaries, not to judicial decisions, for it is in the dictionaries that the ordinary meaning of a word is to be found. It is the lexicographer, not the judge, who is consulted. Thus it may properly be stated that when it has been held that the words in a statute should be read with their ordinary meaning then what such ordinary meaning is should be considered a matter of fact, and not a matter of law. Moreover, the ordinary meaning of a word may not be the same when used under one set of circumstances as when used under another set, or in one country or locality as in another. All of the factors bearing on the meaning with which a word is ordinarily used should be taken into account.

And similarly, when it has been held that, in view of its context or for any other reason, a word has a special technical meaning and should be read with such meaning then what such special technical meaning is should be considered a matter of fact. The same is true in the case of words which have a particular meaning by reason of the circumstances under which or the persons by whom they are generally used. For example, if a word is used in a profession or trade with a particular meaning then the particular meaning which such word has when used by persons in such profession or trade is a question of fact.

The cases in which resort is had to standard dictionaries in order to ascertain the meaning of words in a statute, whether ordinary, specially technical or particular, are so numerous that they need not be cited.

There is support for the opinion thus expressed in the decision of the House of Lords in *Girls' Public Day School Trust v. Ereaut*[1]. In that case the question for consideration was whether a certain day school for girls owned by the appellant was a "public school" within the meaning of rule 1(*c*) of No. VI of Schedule A of the *Income Tax Act*, 1918 and that the appellant was, therefore, exempt from income tax in respect of the annual value of the premises. The Commissions for the General Purposes of the Income Tax Acts held that the school was a public school and allowed the appellant's claim but their determination was reversed by Rowlatt J. and his decision was affirmed by the Court of

[1] [1931] A.C. 12.

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Appeal. The House of Lords unanimously reversed the decision of the Court of Appeal and held, according to the head note:

> that the term "public" school, as used in this rule, was not a term of art, and that the question what was the common understanding of the term was a question of fact for the Commissioners; and that, there being ample evidence to support their conclusion, it could not be reviewed.

A careful reading of the speeches delivered in the House of Lords confirms me in the view that the reported head note is correct. The principle laid down in that case is, in my opinion, applicable in the case at bar.

The terms "artificial teeth, not mounted" and "dental instruments", as used in Items 688 and 476 of the *Customs Tariff* respectively, are not defined and they should, therefore, receive their ordinary meaning. It seems obvious to me that what the term "artificial teeth, not mounted" means is a question of fact and, as such, a matter for the Tariff Board. There was some suggestion that the term "dental instruments" had a special technical meaning or a particular meaning to persons in the dental profession. But even if that should be conceded, and it is not clear that it should be, such special technical meaning or such particular meaning is a question of fact and, as such, a matter for the Tariff Board.

I am also clearly of the opinion that the question whether the shade guides imported by the appellant are "artificial teeth, not mounted", within the meaning of Item 688 of the *Customs Tariff*, or "dental instruments", within the meaning of Item 476, is a question of fact for the Tariff Board, and that if there was material before it on which it could reasonably base its finding this Court has no right to disturb it.

I find support for this opinion in the decisions of the House of Lords in *Levene v. Inland Revenue Commissioners*[1] and *Commissioners of Inland Revenue v. Lysaght*[2]. In the former case it was held that the conclusions of the Special Commissioners that the appellant was "resident" and "ordinarily resident" in the United Kingdom for the years in question were findings of fact and that, there being evidence to support them, they could not be disturbed. And in the latter case it was held that the conclusion of the

[1] [1928] A.C. 217. [2] [1928] A.C. 234.

Special Commissioners that the respondent was both "ordinarily resident" and "resident" in the United Kingdom for each of the two years in question was a finding of fact and that there was evidence upon which they could properly arrive at that conclusion.

At the hearing before the Tariff Board eleven witnesses were called on behalf of the appellant. These were Mr. J. K. MacNeill, the appellant's divisional sales manager for the Northeastern States and all of Canada and Mr. R. Wainright, the appellant's assistant-treasurer; Dr. A. H. Crowson, Dr. L. E. MacLachlan and Dr. M. Heit, all practising dentists at Ottawa; Major H. W. Hart, an officer of the Royal Canadian Dental Corps; Mr. P. Hannaford, the manager of Allen and Rollaston Laboratories, and Mr. E. Vowles, the owner of Vowles Dental Laboratories, both of which companies make prosthetic appliances for the dental profession; Mr. C. Saunders of Dentcraft Laboratories Limited, a dental technician, Mr. C. T. Hunt, the Ottawa manager of Ash Temple Limited, and Mr. L. Akeson, the Ottawa manager of a Toronto Company, both of which companies sell dental supplies and equipment to the dental profession, laboratories and dental technicians. These witnesses were carefully examined and cross-examined. Counsel for the respondent did not call any witnesses.

I shall deal first with the declaration of the Tariff Board that the shade guides imported by the appellant were not "artificial teeth, not mounted" and, therefore, not classifiable under Item 688 of the *Customs Tariff*. The Shorter Oxford English Dictionary defines "artificial" as follows:

> A. adj. 1. Opp. to *natural*. 1. made by or resulting from art or artifice; not natural. 2. made by art in imitation of, or as substitute for, what is natural or real 1577. 3. Factitious; *hence*, feigned, fictitious, 1650. 4 Affected 1598.

And Webster's New International Dictionary (Second Edition) gives the following definition of "artificial".

> 1. a. Made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature;—opposed to natural; as, artificial heat or light, gems, salts, minerals, fountains, flowers, breeding. b. Made, esp. by a chemical process, to resemble a raw material, or something derived from it; synthetic; as, artificial cotton or wool.
>
> 2. Feigned; fictitious, assumed; not genuine.
>
> 3. Affected in manners.

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Counsel for the appellant put two standard questions to almost all of his witnesses, one being whether the article at the end of the blade, which he took from one of the shade guides, was an artificial tooth and the other whether it was mounted. All of the witnesses to whom these questions were put answered that the article was an artificial tooth and that it was not mounted in the sense that it was not processed and finished in a prosthetic appliance or denture to be used in the mouth. Counsel relied upon these answers in support of his contention that the teeth at the ends of the shade guide blades were "artificial teeth, not mounted" within the meaning of Tariff Item 688 and were simply packaged in the form of shade guides for the convenience of the dentists to whom the shade guides were given.

The evidence thus relied upon was not the only evidence before the Board. It was recognized that the function of artificial teeth was to replace lost natural teeth and that artificial teeth were designed for that purpose and it was established beyond dispute that a shade guide tooth, being the tooth attached to the plastic shade guide blade, was not suitable to replace a natural tooth and could not be used for that purpose. It would not be used for mounting in a prosthetic appliance or denture. One reason for this was that it was equipped with a base metal pin by which it was attached to the plastic blade, whereas an artificial tooth to be used in the mouth would either have a precious metal gold plated pin or no pin at all, and the base metal pin in the shade guide tooth would be dissolved by the saliva in the mouth. Indeed, the evidence was overwhelming that the shade guide tooth was unusable as an artificial tooth. It was suggested that it might be used if the base metal pin in it were taken out and replaced by a precious metal pin but it was admitted that this was impracticable and that if it were done the article would be different from what was imported.

It was also proved that the shade guide teeth were never intended to be used as artificial teeth to replace natural teeth. Their purpose was restricted to that of enabling the dentist to select and order an artificial tooth or artificial teeth of a shade that would match his patient's other teeth. From the very beginning of the operation in making shade guides there was a difference between shade guide teeth and artificial teeth in spite of the fact that they were made of

the same material. In the case of artificial teeth where it was necessary to equip them with pins the pins were either square or round and in either case the pins were of precious gold plated metal and were designed to hold the teeth securely in place, whereas the shade guide teeth, since the shade guides were to be given away, were equipped with base metal pins and these were round so that the teeth could swivel on the plastic blade to which they were attached. Thus, although the shade guide teeth had been made from the same material as the artificial teeth they had become different from the artificial teeth because of the different purpose for which they were to be used. There was also evidence that shade guides were given to dentists in Canada by the manufacturers of artificial teeth whereas artificial teeth were sold and several witnesses stated that if they ordered artificial teeth they would not accept shade guides or shade guide teeth as a delivery of their order.

Finally, there is the fact, notwithstanding the answers of the witnesses to counsel for the appellant, that the tooth at the end of the plastic blade of the shade guide was only part of the shade guide imported by the appellant. In addition to the tooth, there was the plastic blade, to which the tooth was permanently attached by a base metal pin, with its designated number so that the shade guide was, in effect, the appellant's catalogue of its artificial teeth, and the holder in which the plastic blades were kept. What the appellant imported was, not the teeth at the ends of the plastic blades, but the shade guides as a whole. And, certainly, the shade guides, as such, although they included twelve teeth, each permanently attached to a plastic blade, were not the same thing as "artificial teeth, not mounted."

In view of this evidence there was plenty of material before the Tariff Board on which it could reasonably declare that the shade guides imported by the appellant were not "artificial teeth, not mounted", and, therefore, not classifiable under Tariff Item 688. Indeed, I do not see how it could have reasonably declared otherwise. Far from there being any error as a matter of law in this part of the Tariff Board's declaration it was plainly right.

The question whether the shade guides imported by the appellant are "dental instruments" within the meaning of

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the term "surgical and dental instruments" in Item 476 of the *Customs Tariff* is not quite as simple. Here again, since there is no definition of the term "dental instruments" in the *Customs Tariff*, resort may properly be had to the recognized dictionaries for such assistance as they afford in determining its meaning. The Shorter Oxford English Dictionary defines "instrument" as follows:

1. A thing with or through which something is done or affected; a means.

b. A person made use of by another person or being, for the accomplishment of a purpose (cf. *tool*) ME.

2. A tool, implement, weapon (now usu. dist. from a *tool*, as being used for more delicate work or for artistic or scientific purposes.) M.E.

3. *spec.* A contrivance for producing musical sounds M.E. (in early 19th cent. *spec.* the pianoforte).

4. A part of the body having a special function; an organ—1718.

5. *Law.* A formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form 1483.

It is obvious that the word "instrument" has such a wide meaning that it would be ridiculous to think that such wide meaning was intended by the use of the word in the term "surgical and dental instruments" in Tariff Item 476. The term "dental instruments" has plainly a much narrower meaning than that of the word "instrument". The Shorter Oxford English Dictionary defines "dental" as follows:

A. adj. 1. Of or pertaining to the teeth, or to dentistry; of the nature of a tooth 1599.

2. *Phonology,* Pronounced by applying the tip of the tongue to the front upper teeth, as t, d, n, etc. 1594.

The definitions of "instrument" and "dental" in Webster's New International Dictionary (Second Edition), and in Funk & Wagnalls' New Standard Dictionary of the English Language are to the same effect.

I have not been able to find a definition of the term "dental instruments" in any dictionary.

Counsel for the appellant sought to establish that the term had a particular meaning in the dental profession, including therein dentists, dental technicians and suppliers of dental supplies and equipment, but his witnesses expressed varying opinions about its ambit and what was included in it. Some took a very wide view of the term and

others a more restricted one. For example, Dr. Crowson expressed the opinion that a dental instrument was something that would be used in a patient's mouth to enable the dentist to do his work and obtain a finished dental restoration, that the color of a replacement tooth was of vital importance to the desired aesthetic result and that since a guide was a means to obtain such result it was thereby a dental instrument. Dr. MacLachlan took both a wide and restricted view. When he was asked what sort of articles the term "dental instruments" would suggest to his mind he replied that it would suggest especially instruments that were used in a patient's mouth and in the preparation of, strictly, dental operations or techniques and everything that was used in the operative or restorative part of dentistry and also that the trade would call tools for making dentures, but then he included in the term such things as the dentist's finger, cotton gauze, mixing bowls and electrical or hot water sterilizers. Dr. Heit considered that the term included anything that was used as a means to obtain a desired result in connection with dental work. He would think specifically of mouth mirrors, scalers and explorers and things that were connected with his work and were used in the patient's mouth, but he included the dentist's finger, paper cups, x-ray cards, rubber masking and cellophane strips. But he admitted that he would not expect that a set of dental instruments would include such things as cellophane strips, rubber dams or the aprons put on the patient, and that when dentists used the term they talked about scalers or forceps or instruments of that kind and that in catalogues describing dental instruments such things as mouth mirrors and explorers were included but not shade guides or plastic or cellophane strips. These things were dental supplies or dental materials. Major Hart was an equivocal witness. He stated that a dental instrument was any instrument or means by which a dentist performed or fulfilled a dental requirement and that it was a much wider term than "surgical instrument", which also is included in Tariff Item 476, and he admitted that the dentist's finger was an aid rather than a dental instrument. And he would call such things as cleansing material, cotton gauze, cellophane and paper cups, dental supplies rather than dental

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instruments. In his view, a dental instrument was an instrument that was actually employed in the mouth to do something, such as drilling or cleaning teeth, and it would include an instrument for doing something, such as making a denture. Then he made the generalization that dental instruments covered all the instruments that are accessory to the performance of the dental profession.

Thus there were conflicting opinions on what the term "dental instruments" included. Some of the witnesses included, in addition to the tools used by the dentist in his dental operations such as drills, forceps, scalers and explorers and tools used by dental technicians in making dentures such as chisels and files, other things, namely, such articles as mouth mirrors, tongue depressors, rubber masks and dams, appliances such as electrical sterilizers, containers for mixing materials, including a mortar and pestle, pieces of furniture such as the table in the dentist's office, articles for the patient's convenience or comfort such as paper drinking cups or glasses and substances such as cotton gauze, dental floss, cellophane and plastic strips. Some witnesses included x-ray cards, artificial teeth and even the dentist's finger as dental instruments.

It seems obvious, notwithstanding the opinions of some of the witnesses, that the term "dental instruments" in the context in which it appears in Tariff Item 476 could not reasonably be held to include all of the things referred to. Some of the witnesses recognized this and sought to draw a distinction between dental instruments and dental supplies or dental materials. They would not consider such substances or things as cellophane or plastic strips, cotton gauze, cleansing materials, and paper cups as dental instruments, but rather as dental supplies or dental materials. But the distinction was not clearly drawn. It seems clear to me that some of the articles included by some of the witnesses in their opinions of the ambit of the term "dental instruments" would more properly be described as dental accessories or supplies or dental equipment than as dental instruments, and that, consequently, such opinions of the ambit of the term "dental instruments" as included the dentist's finger and articles that were plainly only dental supplies were valueless and ought to be discarded, quite apart from the question whether they were admissible as evidence at all.

The evidence of Mr. Hunt and Mr. Akeson was different. Mr. Hunt said that his company supplied dental instruments but just called them dental supplies. They all came under one head of dental supplies. The following statements before the Tariff Board are important:

Mr. Buchanan: Have you ever seen these shade guides referred to in literature anywhere as instruments?

Mr. Hunt—Not that I can recall.

Mr. Buchanan: Have you ever used, or have heard anyone use, the words dental instruments with reference to them?

Mr. Hunt: Not until this morning.

Then Mr. Hunt stated that every manufacturer of dental supplies had his own catalogue of equipment and his supplies were all listed therein. He had never seen shade guides listed in a catalogue. There were references to the term "dental instruments" in catalogues relating to such things as explorers, excavators. On his cross-examination, Mr. Hunt was shown a catalogue of Hu-Friedly Inc., called Dental Art, which was filed as Exhibit D-3. On page 1 the following appears:

Immunity Steel

Authentic Instruments for Oral Surgery Exodontia Pyorrhea and General Dentistry.

Mr. Hunt agreed that the articles indicated on the page were properly referred to as dental instruments. He was also shown the catalogue of The Cleveland Dental Mfg. Co. called Cleve-Dent, which was filed as Exhibit D-4, and agreed that the instruments shown in it were very similar to those shown in Exhibit D-3. He drew a distinction between instruments and equipment. Mr. Akeson's evidence was to the same effect as Mr. Hunt's. He had first heard a shade guide referred to as an instrument that morning. In reply to a question from a member of the Board whether in the dental profession there was a general understanding of what the term "dental instrument" meant, he stated that in their business it was an expression that was in common use and covered a wide scope but that until that morning he had never heard it used to cover this particular product. And he further stated that the catalogue, Exhibit D-3, showed numerous things that he had heard referred to as

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dental instruments: ninety per cent of the listings in the catalogue were dental instruments and the remaining ten per cent were sundry items.

Thus counsel for the appellant failed in his attempt to show that the term "dental instrument" had a particular meaning in the dental profession wide enough to include the appellant's shade guides.

Even if it be conceded that there may be some difficulty in determining whether a particular article, such as a shade guide is a dental instrument or a dental accessory or a dental supply the line must be drawn somewhere. The Tariff Board drew the line so as to exclude shade guides from the ambit of the term "dental instruments". In my judgment, there was ample material before it to warrant the finding that the shade guides imported by the appellant were not "dental instruments" within the meaning of the term in Tariff Item 476, quite apart from the fact that the appellant has not discharged the onus of showing that its shade guides were "dental instruments" within the meaning of Tariff Item 476.

On the evidence before me, I would have had no hesitation in dismissing the appeal from the declaration of the Tariff Board, if a right of appeal *de pleno* had been conferred by the *Customs Act*. It follows, *a fortiori*, that I find that there was no error as a matter of law in the declaration of the Tariff Board in the present case.

The question of law on which leave to appeal to this Court was granted must, therefore, be answered in the negative and the appeal herein must be dismissed with costs.

Judgment accordingly.