

[PRIVY COUNCIL.]

FALKINER APPELLANT;
PLAINTIFF,

AND

WHITTON (COLLECTOR OF CUSTOMS FOR VICTORIA) RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE HIGH COURT.

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Customs Duties—Tariff—Classification of goods—Trade usage—Evidence—“Chassis of motor cars lorries and waggons”—Customs Tariff 1908-1911 (No. 7 of 1908—No. 19 of 1911), Sched. A, Items 161, 380.

The plaintiff imported several chassis of vehicles into the Commonwealth. The vehicles for which the chassis were intended to be used were intended to form a road train. For that purpose each chassis carried an electro-motor which, when supplied with electricity, would move the particular vehicle. One of the chassis also carried a petrol engine and machinery which would generate sufficient electricity to supply all the electro-motors, and on that chassis were the means of steering the other vehicles. The vehicles were sold to the plaintiff in Europe as motor-waggons, and for the purposes of transit were taken to pieces and the parts were packed in separate cases, to be assembled on arrival at their destination.

Held, that none of the chassis was a chassis of a motor-car, motor-lorry or motor-waggon within the meaning of Item No. 380 (E) of Schedule A to the *Customs Tariff 1908-1911*; that the chassis carrying the engine and machinery was not a motor-car, motor-lorry or motor-waggon within the meaning of Item 380 (D), or a locomotive, traction or portable engine within the meaning of Item 161; and that each of the articles was liable to duty as being a “vehicle n.e.i.” within the meaning of Item 380 (A).

Decision of the High Court : *Whitton v. Falkiner*, 20 C.L.R., 118, affirmed.

* Present—Lord Buckmaster L.C., Lord Atkinson, Lord Parker of Waddington, Lord Sumner and Lord Wrenbury.

APPEAL from the High Court.

This was an appeal by the plaintiff to the Privy Council from the decision of the High Court: *Whitton v. Falkiner* (1).

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The judgment of their Lordships was delivered by

LORD ATKINSON. This is an appeal from a judgment of the High Court of Australia reversing a judgment of His Honor Mr. Justice Hood in the Supreme Court of Victoria, whereby he ordered that the appellant should recover from the respondent the sum of £3,932 10s. 9d. and costs.

The action out of which this appeal arises was brought by the appellant under the provisions of sec. 167 of the *Federal Customs Act* of 1901-1910 to recover from the respondent, the Collector of Customs of the State of Victoria, the sum of £3,917 8s. 9d., alleged to be the excess of the import duty levied by the respondent as such officer, on certain goods imported by the appellant into Victoria, and paid by him under protest.

The section runs as follows:—“(1) If any dispute arises as to the amount or rate of duty payable in respect of any goods, or as to the liability of any goods to duty, under any Customs Tariff, or under any proposed Tariff or Tariff alteration, the owner of the goods may pay under protest the sum demanded by the Collector as the duty payable in respect of the goods, and thereupon the sum so paid shall, as against the owner of the goods, be deemed to be the proper duty payable in respect of the goods, unless the contrary is determined in an action brought in pursuance of this section.”

It was held by Hood J. and by the High Court of Australia, and, as their Lordships understood, was not contested upon the hearing of this appeal, that under this section the burden of proving that the appellant has been overcharged to any, and, if so, to what extent rests upon him. To discharge that burden, it has been contended that the goods imported were merely “chassis of motor-cars, or motor-lorries, or motor-waggons” within the meaning of Division XIV., item 380, sub-head (E) of Schedule A of the *Customs Tariff* 1908-1911, and are therefore only liable to an *ad valorem* duty of 5 per cent. instead of the duty actually

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levied, which, in every instance save one, was in fact, 40 per cent. *ad valorem*, and in that instance 25 per cent. *ad valorem*. By the second section of the last-mentioned Statute, Schedule A of the *Customs Tariff* 1908-1911 is amended as set out in the Schedule attached to it, and duties are imposed which after the 1st December 1911 are to be collected in accordance with said Schedule A as so amended. The said Schedule is, moreover, to be taken as specially amended by inserting in its heading the words following: "Whenever any goods are composed of two or more separate parts any part though imported by itself shall, if so directed by the Minister, be dealt with under the item applicable to the complete goods." Schedule A is divided into certain portions, styled Divisions, with appropriate headings; but by sec. 3, sub-sec. 2, of the *Customs Tariff* 1908 it is expressly enacted that these headings are only introduced for convenience of classification, and are not to affect the interpretation of the Customs Tariff. The XIVth of these divisions is headed "Vehicles."

In it are enumerated vehicles of almost every kind and description, such as bicycles, tricycles, perambulators, waggons, buggies, gigs, chassis, hansom cabs, omnibuses, and the like, with the appropriate duty set opposite to each. These duties, however, are under the 4th section of the Statute of 1908 to be taken to have been imposed and brought into operation at 4 o'clock on the afternoon of 8th August 1907.

Among the vehicles enumerated under item No. 380 of this XIVth Division are, first, "(J) motor lorries and waggons *ad valorem* 35 per cent.," with a note "and on and after 11th December 1907 (in lieu of (J) above)—(a) bodies for motor lorries and waggons and parts thereof 'n.e.i.' " (meaning "not elsewhere included") "*ad valorem* 35 per cent.," and "(b) chassis for motor waggons and lorries *ad valorem* 5 per cent.;" and, second, "(K) motor cars, and parts thereof, including tyres when accompanying vehicles *ad valorem* 35 per cent.," with a similar note added, "and on and after 11th December 1907 (in lieu of (K) above)—(a) bodies for motor cars and parts thereof n.e.i. *ad valorem* 35 per cent.; (b) chassis for motor cars and rubber tyres for one car *ad valorem* 5 per cent.," with a note "and on

and after 15th May 1908 (in lieu of (b) above)—(b) chassis for motor cars, but not including rubber tyres, *ad valorem* 5 per cent.”

By Division XIV. of the Schedule to the *Customs Tariff* 1911 the Schedule of the Statute of 1908 is amended by omitting therefrom the whole of the item No. 380, and substituting therefor a new item bearing the same number. This latter contains the following sub-heads :—(A) “Vehicles n.e.i.” *ad valorem* 35 per cent. ; and on and after 21st December 1911, 40 per cent. *ad valorem*. (B) “Vehicle parts, n.e.i., including undergear (inclusive of axles, springs, and arms), axles n.e.i., springs, hoods, and bodies n.e.i.” (C) (D) “Motor cars lorries and waggons.” But immediately opposite these words no entry is to be found in the columns headed General Tariff, in which the duties respectively leviable are set forth. The words are merely a heading. The vehicles so described are not taxed under these names as complete machines at all. The things connected with them which are taxed are described as follows :—(1) “Bodies, including dashboards, footboards and mudguards, *ad valorem*,” opposite which 35 per cent. is stated in the Tariff column. The last-quoted words are immediately followed by the words “and on and after 15th December 1911 —(D) Bodies of motor cars lorries and waggons,” certain duties being named, and then (E) “Chassis of motor cars lorries and waggons,” 5 per cent.

From this examination it is abundantly clear that at the time the plaintiff's goods were imported, complete motor-cars were not mentioned *eo nomine* in the Schedule of the Act of 1911, or treated under that description as a taxable entity. The powers conferred upon the Minister by the clause already referred to are of a synthetical rather than a disintegrating character. He can deal with a component part imported separately under an item applicable to the complete thing of which it forms a part ; but neither the Minister nor any other authority is empowered to resolve a complete machine or vehicle, such as a motor-car, into its constituent parts, and levy a duty on each or any of the parts. As the complete vehicle, a motor-car, is not under that name included in the Schedule, it necessarily follows that it must, if it is to be taxed as it stands,

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be taxed under 380A as a vehicle n.e.i. The same remark applies to motor lorries and waggons.

It also appears clear from an examination of these enactments that the words "motor cars, waggons, and lorries," are not treated as terms of art, and are not used in them in any technical sense or with any special meaning. They must therefore be interpreted according to their common and ordinary meaning, namely, that which they bear in ordinary colloquial speech.

Their Lordships do not propose to attempt to give an exhaustive definition of any one of these terms, but they think that each of them, as commonly understood, connotes certain ideas. The term "motor-car" they think suggests to the mind of anyone the idea of a vehicle that is mounted on wheels upon which it runs over the surface of land; a vehicle which is guided and controlled by a person riding upon or in it, is designed and intended to carry one or more persons, and is propelled by power, not supplied from any source external to itself, but which is for the time being stored or generated within it. It is a self-moving vehicle. Its French name, automobile, denotes this quality. The terms "motor-waggon" and "motor-lorry" connote vehicles of much the same character, save that both are specially designed, intended, and fashioned for the carriage of goods, the latter for the carriage of very heavy goods, and the former for that of goods of a lighter description; each of the three having this characteristic, that it is designed and intended to carry as a load something in addition to its own equipment. It becomes essential, therefore, to ascertain what is the true nature and character of the goods imported in this case. They have been described verbally and pictorially. They were purchased between 20th March and 13th September 1913, by the appellant from W. A. Th. Muelier, in Germany, and are described in the two invoices thus: "One motor-car with two benzine motors each of 100 to 120 h.p. and one double-dynamo chassis with two bogies and iron-shod wheels." It is stated in the invoice, dated 18th September, to have been delivered f.o.b. at Hamburg packed in four cases, bearing given numbers as per the vendor's offer of 20th March. So that it is quite clear the different parts composing this machine or vehicle were not imported as separate

and independent things having no connection with or relation to each other, but that the whole machine was imported as a completed thing, though for convenience of transit its parts were taken asunder, and would require to be assembled at its destination. The article imported was, in their Lordships' view, quite as truly the machine itself as if its parts had never been taken asunder and it had been placed complete upon the ship's deck. It would be as rational, they think, to treat the importation of a fowling-piece in a gun-case as two separate importations, the one of the barrel and the other of the stock, as to treat the chassis of this machine as a subject of import, separate from and unconnected with the rest of the vehicle. The second invoice, dated 13th September 1913, describes the goods with which it deals as "ten electric motor-waggons, chassis with steel-shod wheels as per our offer of 20th March 1913." In this, as in the first invoice, the vehicles or machines are first described, and then it is stated that the chassis are furnished with steel-shod wheels.

In this case, as in the first, the articles stated to be shipped are the ten vehicles; they are stated to be packed in cases. For that purpose, their parts must have been taken asunder and would require to be reassembled; but in this case, as in the other, it is impossible to treat each of the separated parts of each vehicle or machine as a separate and independent subject of import.

In the pamphlet put in evidence these several waggons with the so-called motor-car in front are described as "The Mueller Patent Petrol Electric Railless Road Train." The waggons have in the pictures all the appearance of ordinary waggons, and the first car, called in the invoice a motor-car, is (p. 5) stated to be "conspicuous by its different appearance from the others." It is stated to be the vehicle "carrying the power plant and controlling the gear of the train, and is therefore called the engine car; that mounted on its steel frame are two 6-cylinder combustion engines placed one on each end of the car, and developing together 150 to 180 horse-power, if for a 30-ton train, and 200 to 250 horse-power for a 50." The train consisted of a motor-car or waggon carrying the driver, and ten motor-waggons. The driver's car carried two petrol-driven engines of the standard motor-car type and a double electric generator

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from which electric power was taken to two electric motors by which the said driver's car was driven. From this generator electric power was also conducted by cables to electric motors carried by each of the ten motor-waggons, the waggons being driven along the road each by its own electric motor, and not being drawn by the driver's car. The engine car does not pull any of the others. These latter are moved entirely by electric power supplied from a source external to themselves. They are not, in any proper sense of the term, automobile vehicles, that is, vehicles which at any time store or generate within themselves the power which propels them. Judging from the picture of the engine car at p. 6 it appears to their Lordships to resemble a traction engine infinitely more closely than an ordinary motor-car. It is sworn by its importer to be about 8 tons in weight. Its chassis is stated to consist of a straight steel-plate frame resting on two single-axle bogies, each bogie consisting of a pair of wheels 4 feet in diameter and iron shod, with 10 to 12 inch tyres. The train is stated (p. 10) to form one unit, and its great merit is stated to consist in this, that all the wheels of each vehicle become driving wheels; so that "in case of a 50-ton train it has forty-four driving wheels with an average, when fully loaded, of 2 tons per wheel." Mr. de Fraga, one of the appellant's witnesses, proved that the heaviest motor-buses were only 5 tons weight. But this engine car, though nearly of twice that weight, is not, according to the same witness, built for the carriage of either goods or passengers. It is built merely, first, to provide power for the propulsion of the car itself and of the other vehicles forming this train, and, second, to carry its mechanics and accessories. Mr. James George Coleman, another of the appellant's witnesses, admitted that he had never seen a motor-car which had no provision for the carriage of passengers or goods. In ordinary use, each vehicle steers the vehicle which immediately follows it, but it is argued that, in case of need, each waggon could be detached and simply steered by the apparatus which it carries. This mode of steering the vehicles other than the engine car is unusual, if not somewhat grotesque. It is thus described by the witness de Fraga: "The steering-gear is a rod out at the back; we did steer them with that rod out at the back; you could steer them at any pace

you liked with that ; we steered them at 5 miles an hour over the Benalla Bridge ; we steered two or three at the time and shifted them ; we did it three or four times ; we steered them at 10 miles an hour running behind ; we did that with the bar at the back ; we did it for about 150 yards." Their Lordships think it safe to say that such a mode of steerage would never be suggested to the mind of anyone by the use according to the ordinary meaning of language of the words "motor" or "motor-waggon" or "motor-lorry." In this respect, therefore, the waggons are not automobile and are not motor-waggons. The appellant, Ralph Sadlier Falkiner, admits that he purchased and imported this unit, the "Mueller Road Train," from Germany. For some reason not apparent the case was fought as if the question was not what was the true character of the vehicles composing this train, but whether the chassis of those vehicles were chassis of motor-cars, motor-waggons, or motor-lorries within the meaning of the above-mentioned Schedule, and, in consequence, much evidence was adduced as to the purposes for which these chassis might, with more or less important alterations, be adapted. In their Lordships' view, these considerations are wholly beside the point. The chassis must be treated as designed and imported for the purpose of helping to form the units of this train. And that being so, the main question is, Do they as they stand answer the description not merely of chassis for vehicles, but of chassis for "motor-cars" or "motor-waggons" or "motor-lorries" within the meaning of item 380, Division XIV., of the Schedule ? The character of the vehicles of which they were respectively to form part is decisive on this point. One of the meanings of the French word chassis is a *frame*, and one finds the expression *chassis de fenêtre* (a "window frame") ; and the evidence in this case establishes that the word "chassis," when applied to a motor-car or motor-waggon, includes everything but the *body* placed upon this frame. The nature of the body so imposed may in many cases determine the character of the completed vehicle, though, of course, in most cases the frame of a waggon or lorry is stronger and the engines more powerful, owing to the greater load to be carried, than in the case of an ordinary motor-car designed to carry four or five passengers.

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Their Lordships are, for the above reasons, clearly of opinion that the so-called engine car was not a motor-car or a motor-lorry or a motor-waggon as those words are commonly understood, and that the chassis which formed part of it was not the chassis of a vehicle of any one of these kinds. They are equally of opinion that no one of the ten vehicles composing, with the engine car, the entire train was a "motor-waggon" or a "motor-lorry" as those words are commonly understood, mainly because it was not a self-moving vehicle, but derived its motive power entirely from a source external to itself. It necessarily follows, in their view, that the chassis which formed part of each of these vehicles was not the chassis of a motor-waggon or of a motor-lorry within the meaning of the Statute of 1911. They think, therefore, that the contention of the appellant fails. In addition, they are of opinion that, as neither ordinary motors in their complete form, nor ordinary lorries or waggons in their complete form, nor vehicles such as those composing this train in their complete form are included in the Schedule A of the Act of 1908, as amended, in September 1913, these vehicles should have been taxed under Division XIV., 380A, of the schedule to the Act of 1911 as vehicles n.e.i. This was, in fact, done with reference to all but the engine car, and 40 per cent. *ad valorem* demanded and paid in respect of them. The engine car was taxed under Division VI., item 161, of the same Schedule, which deals with "locomotives, traction and portable engines," and a duty of 25 per cent. *ad valorem* was exacted in respect of it. Their Lordships concur in opinion with the High Court that the engine car was not a locomotive, nor a traction engine, nor a portable engine, within the meaning of this item, and that it, like the other vehicles composing this train, should have been made liable to 40 per cent. *ad valorem* duty. They think, therefore, that the appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs here and below.