[HIGH COURT OF AUSTRALIA.]

WHITTON (COLLECTOR OF CUSTOMS FOR VICTORIA) . . . . . DEFENDANT, } APPELLANT;

AND

FALKINER . . . . . PLAINTIFF, RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 14, 17, 18; *June* 11.

Griffith C.J., Isaacs, Higgins, Gavan Duffy and Rich JJ.

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), *Schedule A*, *Items* 161, 380.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. dissenting), that the words "motor cars lorries and waggons" in Item 380 (E) of Schedule A of the *Customs Tariff* 1908-1911 do not include all kinds of motor vehicles, but mean three different species of motor vehicles.

The plaintiff imported several chassis of vehicles into the Commonwealth. The vehicles for which the chassis were adapted were intended for use as 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.

Held, by *Isaacs*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. dissenting), that none of the chassis was a chassis of a motor car, lorry or waggon within the meaning of Item 380 (E) of Schedule A of the above-mentioned Act.

Where an article of a kind which has never before been imported into Australia is imported, evidence as to what that article would be called in the trade is not admissible for the purpose of establishing a name by trade usage, and so bringing the article within a particular item of such Schedule.

Decision of the Supreme Court of Victoria (*Hood* J.) reversed.

APPEAL from the Supreme Court of Victoria.

One Ralph Sadleir Falkiner, trading as the Falkiner Electric Co., brought an action in the Supreme Court against Percy Whitton, Collector of Customs for Victoria, alleging that in November 1913 he imported into Victoria "a motor car with two benzine motors each 100 to 120 horse-power capacity and one double-dynamo chassis" and "ten electric motor waggons chassis"; that a dispute arose between the plaintiff and the defendant as to the amount and rate of duty payable in respect of the goods, the defendant contending that the motor car chassis was dutiable under Item 161 of Schedule A of the *Customs Tariff* 1908-1911 as a "locomotive, traction or portable engine," and that the waggons chassis were dutiable under Item 380 (A) as "vehicles n.e.i.," and the plaintiff contending that the motor car chassis and the waggons chassis were dutiable under Item 380 (E) as "chassis of motor cars, lorries or waggons"; and that the plaintiff paid under protest the amount of duty based on the contention of the defendant. The plaintiff claimed the difference between that amount and the amount payable if the goods were dutiable under Item 380 (E). By his defence the defendant contended that portion of the goods were dutiable under Item 161 and the remaining portion under either Item 380 (A) or Item 380 (B).

The action was heard by *Hood* J., who gave judgment for the plaintiff for the amount claimed.

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

The material facts are stated in the judgments hereunder.

J. Macfarlan, for the appellant.

Starke (with him *Carse*), for the respondent.

During argument reference was made to *Chandler & Co.* v. *Collector of Customs* (1).

Cur. adv. vult.

The following judgments were read :—

June 11.

GRIFFITH C.J. The respondent imported into the Commonwealth certain goods known as "chassis," a word which has of

(1) 4 C.L.R., 1719.

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late years been added to the English language to denote the under-frames of motor vehicles, including the frame, wheels, axles, engines and all accessories. Essential qualities of such frames are, of course, strength, lightness and rigidity. The chassis were eleven in number. It is a fact, which for reasons I will give I regard as quite irrelevant, but upon which all the argument for the appellant has been based, that these chassis were intended by the respondent to be used as parts of motor vehicles to be connected together in manner of a train, the motive power being electricity, to be generated in one of them and transmitted to the others by wires. The complete apparatus will, therefore, when in use, in some respects resemble a train of waggons drawn by a traction engine, but will be unlike it in that the leading vehicle will not pull the others by means of draw-bars or chains, but will transmit to each of them the electric current by which it will be put in motion.

There are in general use four modes of propulsion of four-wheeled automobiles, known respectively as petrol, petrol-electric, electric, and steam. In petrol cars the power is generated by the explosion of petrol and applied directly to the motor. In electric cars the electric power has until recently been usually transmitted to the motor from a storage battery carried in the car, but not forming part of the chassis. In petrol-electric cars the power is generated by petrol, as in a petrol car, but, instead of being directly applied to the motor, is used to generate an electric current which is transmitted to the motor as in the electric car.

Of the eleven chassis now in question that which is intended to be used as the chassis of the leading vehicle (spoken of as the "engine car") is of the petrol-electric type, the others are of the ordinary electric type, the only difference being that the current is intended to be transmitted to the motors by wires from the engine-car instead of from storage batteries placed in the cars of which they will form the chassis. The engine of the engine-car is therefore made capable of developing much greater power than would be required for the propulsion of the car alone.

The appellant, relying upon the use intended to be made of the whole apparatus, claimed Customs duty under the head of Item No. 161 of the *Customs Tariff* 1908-1911, "locomotives, traction

and portable engines," under which the rate of duty is 25 per cent. *ad valorem*. The claim was *primâ facie* plausible. The respondent claimed that they were dutiable under Item 380 (E) "chassis of motor cars lorries and waggons," under which the rate was 5 per cent. only.

The amount claimed by the Collector was paid under protest, and the action was brought under sec. 167 of the *Customs Act* to recover the amount of the difference. The two contentions, as I have stated them, were distinctly raised by the pleadings. It is now, however, contended by the appellant that he is entitled to retain the amount paid, if an equal or greater amount could have been claimed under any other item of the tariff.

The first Commonwealth Customs Tariff was adopted in the year 1902, when motor vehicles were comparatively rare in Australia, and little was known about them. They were only mentioned in that tariff under the head of "motor vehicles," with an *ad valorem* duty of 20 per cent. In the succeeding years many new kinds of motor vehicles were devised, as well as new forms. The original uncouth and inconvenient pattern of passenger vehicle was modified and improved, and it had come to be recognized not only that the patterns of the carriage bodies of motor cars were capable of as much variety as those of any other carriages, but that the carriage builders of Australia were able to build bodies for them as well as for horse-drawn vehicles, although there were not yet any factories in Australia which could manufacture the engines or the elaborate mechanical structures to which they were affixed. By this time the word "chassis" had come into use, with the meaning already stated. Bicycles and tricycles propelled by motors had also come into use.

The Tariff of 1908 dealt separately with motor cycles, tricycles and similar vehicles, on the one hand, and other vehicles propelled by motors, on the other. With regard to the latter class, it distinguished between "bodies for motor lorries and waggons" and "chassis for motor waggons and lorries," and also between "bodies for motor cars" and "chassis for motor cars." In the Tariff, as amended in 1911, Item 380 (D) is "bodies of motor cars lorries and waggons," upon which a fixed duty is imposed. Item

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380 (E) is "chassis of motor cars lorries and waggons," which are admitted free if the produce or manufacture of the United Kingdom, and at an *ad valorem* duty of 5 per cent. in other cases.

It is plain from the distinction between bodies and chassis that in the phrases "bodies of motor cars, &c.," and "chassis of motor cars, &c.," the word "of" does not signify that the things intended by the words "bodies" and "chassis" are when imported parts of complete vehicles, but signifies that the things denoted are separate and distinct things, complete in themselves, either of which may be imported alone without the other. In other words, the words "chassis of motor cars, &c.," are words of description denoting the kind of thing designated, that is, chassis designed and adapted for use as the chassis of such vehicles.

The collocation of the words "locomotives, traction and portable engines" in Item 161 in Division VI. of the Schedule, which deals with Metals and Machinery, and of the words in Item 380 in Division XIV., which deals with Vehicles, is sufficient to show that the contention of the Collector on which the duty was claimed and paid, although at first sight plausible, cannot be sustained. It was not, indeed, seriously supported at the Bar. But a new contention is now set up, namely, that the words "motor cars lorries and waggons" were used to denote three specific kinds of motor vehicles regarded as species of a supposed genus that might possibly come to include other species, and that the particular kinds of vehicles for which the chassis in question are intended to be used do not fall within either of the three enumerated species. This contention assumes that in determining the character of the chassis it is to be regarded as part of some other and larger thing of which it is actually intended to be a part, instead of as a thing in itself—a test which I have shown to be erroneous. Even if it were sound, I am of opinion that, just as the term "vehicle" as ordinarily used includes every sort of moving contrivance used for carrying or transporting persons and things, so, conversely, the words "motor cars lorries and waggons" as used in the Tariff include all possible species of four-wheeled motor vehicles. I think, further, that the term "motor cars" is itself a generic term, to which the

words "lorries and waggons" are only added by way of explanation, or perhaps *ex abundanti cautelâ*.

In my opinion, the true test is whether the things in question, which are admitted to be chassis, are things which, upon examination at the time of importation, appear to be designed and adapted for use as chassis for motor cars, lorries or waggons, or are substantially the same thing as such chassis, notwithstanding novelty of form or immaterial variations from forms previously in use, and entirely irrespective of the form of body intended to be placed upon them or the use intended to be made of the completed vehicles.

I will deal first with the article which is intended to be used as chassis of the "engine car." It is not disputed that it is a chassis, or that it is adapted for use as the chassis either of a motor car or motor lorry or motor waggon. But it is said that the facts that the petrol engine which forms part of it can develop more power than is required for the propulsion of the vehicle of which it is intended to form part, and that part of such power is intended by the importer to be applied outside the vehicle, so differentiate the chassis that it cannot be described as the chassis of a motor car, lorry or waggon. When an article imported is of such a character that it can be used for more purposes than one, and the purpose to which it is intended to be put is regarded as material, that purpose is made part of the description in the Tariff, as, for instance, in Items 414, 417, 481. In the present case the words used are words descriptive only of the thing itself, which is a matter to be determined upon examination. It is not disputed that the engine of this chassis may be used so as to develop no more power than is needed for the propulsion of the vehicle itself, although the use of its full power for that purpose would be wasteful and perhaps dangerous. Nor is it contended that a motor car loses its character of motor car merely because it may be used for the traction of another vehicle, or because the power generated by its engine may be used for other purposes, or that the electrical power generated by the engine of a petrol-electric car may not be used for the purpose of lighting or any other purpose when not wanted for propulsion. In any case the electrical power generated by the

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dynamo must be transmitted by suitable connections to the motor to be actuated, or to the other appliances to be put into operation, by it. But these connections, which are no part of the structure of the chassis, cannot alter its essential character.

For these reasons I am of opinion that this chassis, which is identical in type and design with chassis commonly used either for motor cars, motor lorries or motor waggons, is not the less a chassis of a "motor car, lorry or waggon" because it can develop more power than will be required for the propulsion of the vehicle of which it will form part. I can well understand that Parliament might in such a case differentiate between different chassis according to the power which their engines are capable of developing—as they have done (*e.g.*) in Item 177 of the Tariff,—but I can find no indication in Items 380 (D), (E), of such a differentiation.

The learned Judge found as a fact, upon very clear evidence, that the chassis was the chassis of a motor waggon. In my opinion his judgment was manifestly right, and I think that any other conclusion would be regarded with amazement wherever motor vehicles are known and understood.

With regard to the other ten chassis the case is, if possible, even clearer. Their construction is, as I have already said, identical with that of the chassis of motor vehicles intended to be propelled by electric motors fed from storage batteries carried in the vehicle. It passes my power of comprehension to understand how the essential character of a chassis, which is a rigid metallic structure, can, *quâ* chassis, be affected by the fact that the present intention of the importer, which he can change at any time, is that the wires by which the electric current is to be transmitted to the motor shall be connected with a moving vehicle instead of with a movable storage battery carried on the waggon itself. I am myself mentally incapable of apprehending the relevancy of the distinction.

In my judgment these chassis also are chassis of motor waggons, and the appeal should be dismissed.

ISAACS J. This action is brought under sec. 167 of the *Customs*

Act 1901-1910 to recover £3,917 8s. 9d. as overpayment of duty paid under protest.

That section provides in such a case that the sum 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."

The burden, therefore, lies on the plaintiff to prove "the contrary," that is, that the sum claimed was not legally claimable. Whatever the grounds upon which, during the course of the dispute, the Collector on the one hand, or the importer on the other, sought to support their respective views of the duty payable, there is no estoppel, and the one question is the substantial one: Has more money been paid into the public revenue in respect of the goods than the law requires?

The plaintiff's case is that the articles are within Item 380 (E), which reads: "Chassis of motor cars lorries and waggons (but not including rubber tyres) *ad val.* 5 per cent." If they are, he succeeds. If not, he fails, because they are either within Item 161 and taxable at 25 per cent., or within Item 380 (A), namely, "vehicles n.e.i.," or 380 (B), "vehicle parts n.e.i.," and taxable at 40 per cent. According to the strict construction of the plaintiff's pleading, we should have to regard each of the vehicles as a whole, that is, without considering the frame as a separate article from the body. And in my view, that is the way in which the learned primary Judge treated the case.

The plaintiff's argument before us, besides claiming the vehicles themselves as a car and waggons, has also treated each frame as a separate integer, and as if the particular body with which it came were detachable legally as well as mechanically.

In the view I take, it is immaterial which view is adopted so long as the real issue set out by sec. 167 is preserved.

Lest, however, the decision should be misunderstood, I think it right to say that, if it were necessary to decide the point, I should not be prepared to accept the plaintiff's right to separate the composite and complete article actually imported into its various constituent parts so as to secure piecemeal reductions on each of those several parts as if they were in fact imported separately.

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If parts are in fact and reality separately imported, so that they may not, according to circumstances, form when assembled with each other, or with other parts of a like character, a complete whole, the possibility of future combination is not a matter which the Customs can insist on. But, on the other hand, if in truth a complete machine is imported by the same person, at the same time, though its parts are disconnected for convenience of transport or otherwise, and need only unpacking and assembling to constitute the complete machine, I am disposed to the view that the Crown can properly regard the importation in its integrity as that of the one machine, and claim duty as upon that machine.

If that principle be correct, and if it were to be applied here to each vehicle, the argument of separate integer, however applicable to cases of separate importation, would be inadmissible. Such a question has been considered in several American cases—notably *Isaacs* v. *Jonas* (1) and *United States* v. *Citroen* (2). It must be added that both parties in the present instance have deliberately abstained from treating the whole importation, namely, the train, as a unit. What the result, therefore, of considering the whole train as a unit would be, I do not stop to inquire.

The question is: Has the respondent here succeeded in establishing that the goods fall within Item 380 (E)?

The learned Judge from whom this appeal comes thought he had so succeeded. The ground of his Honor's opinion was that the vehicles were not "cars" but were "waggons," and were all "self-propelled" by means of the electric current generated in the first vehicle. His Honor also considered that there was no substantial difference between the chassis of these articles and the chassis of ordinary motor waggons, and that the fact of non-independence in generating power was immaterial.

In considering whether the articles were not cars or waggons, and self-propelled, *Hood* J., correctly, in my opinion, stated the problem ultimately appropriate for this case. Where I am constrained to differ from the conclusion reached by the learned

(1) 148 U.S., 648.

(2) 223 U.S., 407, at p. 416.

Judge is in the interpretation of the terms "waggon" and "self-propelled."

It should be mentioned that his Honor said also he accepted the evidence given on behalf of the plaintiff as to the trade meaning of the words. Now, there was absolutely no evidence given as to the trade meaning of "motor car, lorry or waggon." Some witnesses gave evidence as to what they individually "would" call the article in question. This was objected to, and properly so. It is not for a witness, but for the Court, to say whether the articles should be properly included under the statutory designation. It is not a matter of scientific or trade opinion whether they ought to be so included. Trade usage and commercial appellation are matters of actual fact, and the evidence properly admissible on such a head is as to what merchants and others did at the date of the Act in fact call such articles. If the articles were at that date unknown, or not known by that name, then merchants cannot, by merely appropriating a particular tariff designation and attaching that to an article, bring it into the country at the rate fixed for the true article of that name unless it be such true article.

The language of a Tariff Act, like that of every other Act, is to be taken in its ordinary signification, unless some secondary meaning is proved. The only appropriate secondary meaning in a Customs Act is that of commerce. If a commercial designation of an article is established, that should prevail from the nature of the operations which such an enactment is mainly intended to control. And the commercial designation that is to govern must be one which exists at the time the Legislature spoke, and must be, as the Act is, general and definite, and not local or limited to particular traders.

In the absence of evidence as to definite commercial designation different from their ordinary meaning, the interpretation of the words used as ordinary words is within the judicial knowledge.

This branch of the subject has received great attention in America, and reference may usefully be made to such cases as *Swan* v. *Arthur* (1), *Schmieder* v. *Barney* (2), *Rossman* v.

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

(2) 113 U.S., 645, at p. 648.

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Hedden (1), *Sonn* v. *Magone* (2), and *United States* v. *Buffalo Gas Fuel Co.* (3).

These principles make it plain that for more than one reason the evidence referred to was not properly admissible, and should not now be considered. There is one further observation necessary with respect to the interpretation of a tariff schedule. If neither by commercial designation nor by common designation can an article be brought within any of the species of a given genus, it falls of necessity within an item comprising the genus "n.e.i." to which it in common with the named species belongs.

It does not appear that the vehicles in question here were known in Australia in 1911, when the Customs Tariff was passed, and certainly it does not appear that they were known here by the name of cars, lorries or waggons, and so it is a question whether they truly answer the description of "motor cars lorries and waggons"; if they do, the chassis are chassis of such articles and, as it appears to me, not otherwise.

The chassis, which on the evidence include the generators and transmission apparatus, are not, as they stand on importation, chassis of what are ordinarily known as "motor cars, motor lorries and motor waggons."

Looking at each of them as an independent importation, none could be truly said to be constructed for the purpose of any motor car, or any motor lorry, or any motor waggon. By the purpose of the chassis is meant, not the special and individual purpose of the person who imports, but the general purpose or use to which the article is put in the ordinary course of events and is specially adapted.

Unaltered, these chassis, and each and every of them, are not constructed or specially adapted for the purpose of carrying motor cars, lorries or waggons, as those terms are ordinarily understood, or any other vehicles except the vehicles with which they were actually imported, and for these they are specially adapted. It is probably true that by means of some alterations, more or less extensive and costly, but in any case substantial, these chassis could be converted into chassis the purpose of which

(1) 145 U.S., 561, at p. 570. (2) 159 U.S., 417.
(3) 172 U.S., 339, at p. 341.

might be rightly said to be or include the suggested purpose, but as they stand on importation it is not the case, and that is the determining factor. The reasons for holding the chassis not within the Item 380 (E) when treated as separate integers are so little distinguishable from those for considering the vehicles themselves not motor cars or waggons, that they are conveniently stated in the latter connection.

The leading vehicle, as *Hood* J. held, is not a car. Except the driver who operates the mechanism, and has no object in so operating it other than to move and guide the whole combined train, the vehicle is not intended or adapted to convey persons or goods, or any burden whatever. It is truly, as *Hood* J. described it, "a travelling power-house" and, it may be added, "a general steering apparatus."

The power it generates is so distributed as to leave just enough for the vehicle itself to move along, the rest of the power being transmitted to the trailers.

The leading vehicle, therefore, also cannot be properly called a "waggon." It is certainly self-propelled, and so comes within the term "motor," but the other element necessary, namely, "waggon," being absent, the first car is excluded from Item 380 (E). It was argued that excess of power does not deprive it of the character of "motor waggon." I entirely agree, if, without the excess, it possesses that characteristic. If, for instance, the first vehicle, called for convenience "the engine car," could, together with the first trailer, be considered as one vehicle, the argument would have application, because the combination would include self-propulsion and a waggon. Any excess power transmissible to other trailers, or, as suggested, utilized for racing purposes, would not deprive the combination of its true character. But the combination aspect was expressly rejected by learned counsel, and discreetly. Unless the whole train be one unit, the two vehicles are separate, and have two distinct chassis.

But the result is to leave the first not a waggon, and the second not self-propelled.

The essence of "self-propulsion" is that, at the moment of moving, the vehicle is independent of and unconnected with external objects. Its moving force may be generated within

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itself, or may be simply stored there, the source of the power having been utilized elsewhere, and it is still self-propelling; but unless the power as well as the mechanism for exerting it be within the vehicle itself when motion is desired, it is not self-propelling. The first trailer—and every other trailer—is entirely dependent for its moving force upon the travelling power-house.

It is not sufficient to say that with some alteration the vehicle could be made self-propelling. That mere statement is a denial of its present capacity to answer the required description. Nor is it sufficient to say of the trailers that a storage battery could be placed on the platform. That is manifestly a purpose which the structure contradicts. The platform is the place for carrying goods, every inch of it, and to apply the platform to bearing a storage battery is not merely a change of purpose in respect of the platform. It involves also a change of structure in respect of the trailer, if it is to have complete independence of action, inasmuch as steering apparatus would be required and the connection with the engine car would be useless, and when that was done, and the trailer used alone, the chassis would be substantially a different chassis and the trailer as a whole a substantially different article, practically and commercially. Much argument was addressed to us as to similarity of design; but the language of the tariff is chiefly addressed to merchants and importers as commercial men dealing in the article as imported, and not as engineers capable perhaps of making alterations in structure which, though comparatively slight, would essentially alter a feature adopted as a specific classification by the Tariff.

The contention of the respondent therefore fails.

It is unnecessary to say whether the article falls under Item 161 or Item 380 (A). Motor cars are treated in England as "locomotives," so that it is by no means far-fetched to regard even the engine car of this road train when considered as a locomotive; and it may be that the trailers would follow as accessories. What the effect of that would be, in view of sec. 138, it is unnecessary to say.

This appeal ought to be allowed, and judgment entered for the defendant.

HIGGINS J. The question is as to the proper Customs duty to be paid on the importation of the several chassis (I am putting the question in the form which the importer desires) of a "Miller patent petrol-electric railless road train"; and we have to consider separately the leading vehicle and the ten "trailers." The question ultimately is reduced to this:—Does the chassis of the leading vehicle, and does the chassis of each of the trailers, come within Item 380 (E) of the *Customs Tariff* 1908-1911—"chassis of motor cars lorries and waggons"? First impressions are not conclusive; but any observer at all familiar with motor vehicles, on looking for the first time at the chassis of the leading vehicle as landed on the wharf, would be struck with the fact that it is not designed to carry anything except the driver and accessories, and that it includes two engines capable of 250 horse-power, adapted evidently for purposes other than the purposes of the engine itself. The first impression would be, I think, "this is not the chassis of a car at all—or of a lorry, or of a waggon; this is the chassis of a motor-something-else." On looking then at the chassis of the trailer, the observer would see that this, at all events, is capable of being used as a lorry or waggon; but that, as it has no provision for self-propulsion or for steering, it would seem to be nonsense to apply the term "motor" to it.

I quite agree—we all agree—with the view that the actual intention of the importer as to the use to which he will put the chassis is irrelevant; and that we are simply to look at the character of the chassis as it stands, and to consider the purpose only so far as it indicates the character. A fair test is, if an order were sent for the chassis of a motor waggon to cost (say) £500, without restriction as to make or style, would the purchaser be entitled to refuse to take delivery? It is, to my mind, beyond doubt that he could refuse to take the leading vehicle chassis because it is not that of a waggon, and that he could refuse to take the trailer chassis because it has no power plant or means for steering. The fact—if it is a fact—that in the leading vehicle chassis alterations could be made which would enable it to carry goods, or that in the trailer chassis a storage engine could be placed which would supply the power, does not affect the question as to the character of the chassis as imported. We

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are not concerned with the degree of resemblance of the article in question to the article specified in the tariff; we must ask ourselves—Is it that article? If it is not, it falls, under this Tariff, within the item "vehicles n.e.i.," or "vehicle parts n.e.i." (Item 380 (A) and (B)).

I concur with the learned Judge of first instance in his view that Parliament, in drawing a distinction between "motor cars lorries and waggons" meant to restrict "motor cars" to motor cars ordinarily so called; and he adhered to this view although it was urged that by omitting one of the six-cylinder internal combustion engines, and by making changes in some details, the leading vehicle could be fitted to carry an ordinary motor car body. But, in my opinion, the same principle excludes that vehicle, and the trailers also, from the categories of "motor lorries" and "motor waggons." I concur with the learned Judge also in accepting the description given of the leading vehicle by one of the witnesses for the importer, as a "travelling power-house"; and it fulfils, indeed, the double purpose of generating power for the trailers, and of guiding their movements. Such is not the function of a motor waggon.

But the learned Judge has seen the witnesses, and we have not; and he says that, "so far as the evidence as to the trade meaning of the word is relevant," he accepts that given on behalf of the plaintiff. This finding, of course, merits full attention. The plaintiff's witness de Fraga—who was in the plaintiff's employment until he recently joined the Army Service Corps—says (of the leading vehicle chassis), "I would say that this is the petrol-electric chassis of a motor lorry or waggon." This evidence was admitted, the Judge having previously ruled that he would allow the following question to be put to experts:—"In your opinion, how would the under-carriage of the engines and generators be described in the motor trade?" Now, in my opinion, this is not proper evidence of trade usage at all, and the objection to the question ought to have been allowed. The point as to the objection is again taken in the notice of appeal. This road train is quite new to Australia; no such train had been imported before; and no "well-known uniform and universally accepted trade usage" of calling the vehicles "motor waggons"

can have grown up, or is alleged to have grown up, in Australia before 1908 or 1911. It is not proper evidence of trade usage to ask an expert to look at a vehicle of a kind that he has not seen before, and to ask him what it ought to be called. I understand that in Fiji the natives, when a cow was imported for the first time, called it a "big pig"—for they had previously known pigs and not cows. To prove a trade meaning by trade usage, the usage must rest on actual instances of use, and not on mere opinion (*Lewis* v. *Marshall* (1); and see *Curtis* v. *Peek* (2)).

In default of a meaning conferred by trade usage, we have to fall back on the ordinary vernacular meaning. In the *Standard Dictionary* I find "waggon" defined as "a four-wheeled vehicle strongly constructed and used to carry heavy loads"; also, "a conveyance less solidly made for express and merchandise delivery, or a similar vehicle of yet lighter build for passengers." De Fraga, plaintiff's witness, says: "The whole object of a waggon or lorry is to carry something. This engine car (speaking of the leading vehicle) is built merely to provide power for the propulsion of the engine car itself and the carriage of the driver mechanics (?) and accessories—the apparatus necessary for working. Apart from that, *it is not built for carrying goods or passengers.*"

Speaking generally, I suppose we may say that a car carries passengers, a lorry carries goods, and a waggon carries either goods or passengers. At all events the leading vehicle chassis is not that of a "waggon." Nor is the chassis of the trailer that of a *motor*-waggon or of a *motor*-car or of a *motor*-lorry. According to the dictionary, a "motor" is "one who or that which produces or imparts motion or mechanical power. . . . A machine for producing or causing motion"; and under the word "locomotive," I find "electric locomotive" defined as a locomotive driven by electricity and carrying no passengers—"as distinguished from a motor car, *which carries passengers and is self-propelling.*" In the chassis of the trailers as imported, this power of self-propulsion is lacking; there is no mechanical or other provision for petrol or for generation of power; it cannot move unless some outside force move it; and, in my opinion, it cannot be treated as

(1) 7 M. & Gr., 729, at p. 744. (2) 13 W.R., 230.

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the chassis of a motor waggon. If a motor waggon chassis were ordered, and this chassis came from the vendor, the purchaser could reject it is as wanting in the essential mechanism for self-movement as well as for steering. The differences to which I have referred are not differences of degree, or trifling differences; they are differences of what the schoolmen would call "the essence."

But it is argued that the expression "motor cars lorries and waggons" was meant to cover and include exhaustively all kinds of motor vehicles. Possibly it covered all the kinds of motor vehicles *then known* in 1908 or 1911, with the exception of "motor cycles, tricycles and similar vehicles, n.e.i." (Item 374); but it does not follow that Parliament, in framing a tariff for this rapidly developing industry, meant to include all further and unforeseen developments of motor vehicles under the expression. If it had so intended, it would have been easy to retain the expression "motor vehicles," which had been used in the tariff of 1902 (Item 124), and (having regard to the special tariff for motor cycles, &c.) to make the Item 380 (E) read "chassis of motor vehicles n.e.i.," and the Item 380 (D) "bodies of motor vehicles n.e.i." If we are to conjecture, it is quite as reasonable to conjecture that Parliament was willing to give the benefit of the lower duties to the chassis of such motor vehicles as were then known, and to leave any new development to the higher duty of "vehicles n.e.i." until it could be fully considered by Parliament.

As regards the leading vehicle chassis, the Collector treated it as a "locomotive" within the meaning of Item 161 in Division VI., "Metals and Machinery"—"locomotives, traction and portable engines; steam road rollers &c."—and, as such, liable to 25 per cent. duty. I think we are all agreed in the view that this was a mistake. But then the leading vehicle chassis comes within Item 380 (A) "vehicles n.e.i.," or Item 380 (B) "vehicle parts n.e.i."; and as such it is liable to 40 per cent. duty. On this view, there can be no sum repayable to the plaintiff—the Collector has not received money to which the plaintiff is entitled as of right. The defendant—the Collector—is entitled to judgment unless the plaintiff satisfy the Court that these vehicles

come within the meaning of Item 380 (E) (*Cf. Fisk* v. *Seeberger* (1)).

For these reasons I am of opinion that the appeal should be allowed.

Gavan Duffy J. Rich J.

GAVAN DUFFY and RICH JJ. In order to succeed in this case, the plaintiff must show that the duty paid by him under the provisions of sec. 167 of the *Customs Act* 1901-1910, is greater than the duty properly payable, and he has endeavoured to do so by urging that the articles on which duty was payable were "chassis of motor cars, lorries or waggons." This expression may mean chassis actually forming part of, or to form part of, such vehicles, or it may mean chassis suitable for, or such as are ordinarily used in, these vehicles. A comparison of the language of Division XIV. of the Tariff of 1908 with that of Division XIV. of the Tariff of 1911 affords some reason for thinking that the former is the meaning to be attributed to these words in the Tariff of 1911, but we shall assume that the latter is their true meaning there, and in considering whether the dutiable articles are "chassis of motor cars, lorries or waggons," we shall not take into consideration the structures which were in fact superimposed or intended to be superimposed on them. The plaintiff first contends that the word "motor cars" in Division XIV. of the Tariff of 1911 is a generic word which includes all motor vehicles, or, in the alternative, that the words "motor cars lorries or waggons" were intended to include, and do include, every conceivable species of the genus "motor vehicle." We cannot accept either of these contentions. The names "motor cars," "motor lorries" and "motor waggons" were used in the Tariff of 1908 as indicating different and distinct vehicles, apparently species of the genus "motor vehicle" mentioned in Division XIV., Item 124 of the Tariff of 1902. This is what these names would convey to us, and, we suppose, to others who do not pretend to any special technical knowledge on the subject, and there is no evidence that a different meaning would be conveyed to persons in the trade. We disregard the testimony offered by the plaintiff, not with

(1) 38 Fed. Rep., 718.

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respect to existing trade names of the dutiable articles and the vehicles for which they were designed, but with respect to the names by which they would be known in the trade when they became known there, for we agree with what has been said of that testimony by our brothers *Isaacs* and *Higgins*. It is possible that when the Tariff of 1911 was passed, Parliament considered that the species enumerated were, in fact, all the species of the genus "motor vehicle," but if Parliament chose to proceed by an enumeration of species and omitted one which either then existed or afterwards came into existence, the omitted species not being included in the enumeration is not affected by it. Are the dutiable articles chassis of any of the enumerated species? It is said that they are chassis suitable for, or such as are ordinarily used in, motor lorries and motor waggons, and are therefore chassis of motor lorries or waggons within the meaning of Division XIV. of the Tariff of 1911. The dutiable articles are, we think, properly called "chassis"; and every chassis must of course bear a strong family likeness to every other chassis forming part of a motor vehicle or of any structure designed to be moved along a road by means of a motor engine which it carries. In every case there must be wheels, and machinery for applying the power to the wheels, and a rigid frame to carry the superimposed weight and to bind the whole apparatus securely together, but the question here is not one of likeness but of identity. In our opinion the chassis of the leading vehicle or "engine car" is not a chassis of a motor lorry or waggon because it is not adapted for use as part of such a lorry or waggon. The power generated is enormously larger than would be required for that purpose, and, after provision is made for sufficient power to drive the chassis, is disposed so as to be available for quite another purpose, namely, the supply of power to trailers. The chassis of the trailers are similar to the chassis of motor lorries and waggons, but they lack something which is necessary for the chassis of a motor lorry or waggon, namely, the capability of being moved and steered without assistance from without. It is not enough that with alterations and additions great or small they might be made into chassis of motor lorries and waggons: they are not, and have never been, such chassis. The result is that the plaintiff fails in

sustaining the burden he has undertaken, and there must be judgment for the defendant.

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Appeal allowed. Judgment appealed from discharged. Judgment for the defendant with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the respondent, *Weigall & Crowther.*

B. L.

[HIGH COURT OF AUSTRALIA.]

W. & J. SHARP . . . . . APPELLANTS;
PLAINTIFFS,

AND

THOMSON AND ANOTHER. . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contract—Sale of goods—Sale by description—Sale by sample—Evidence—Production of specimen—Sale of Goods Act 1896 (*Vict.*) (*No.* 1422), *sec.* 20.

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MELBOURNE, *June* 9.

Griffith C.J. Isaacs and Powers JJ.

In a written contract for the sale of goods, the goods were described by words and letters which were unintelligible to an ordinary person with an ordinary knowledge of the English language. There was no mention in the contract of any sample, but at the time when the contract was made specimens of the goods were exhibited to the purchasers.

By *Griffith* C.J.—The evidence of the exhibitions of the specimens was admissible to show the kind of things denoted by the words of description used by the parties.