[HIGH COURT OF AUSTRALIA.]

HOBBS AND ANOTHER . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1957.

SYDNEY, *Sept.* 4.

Dixon C.J., Williams, Webb, Kitto and Taylor JJ.

Income Tax (Cth.)—Creation of trust—Income from trust property—Beneficiaries of income—Unmarried infant children of person creating trust—Income "payable to or accumulated for, or applicable for the benefit of" such children—Contingent entitlement only to income—Accumulation pending happening of contingency—Whether such income within description—Income Tax and Social Services Contribution Assessment Act 1936-1952 (*No.* 27 *of* 1936—*No.* 4 *of* 1952), *s.* 102 (1) (*b*).

Section 102 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 provides: "(1) Where a person has created a trust in respect of any income or property (including money) and— . . . (*b*) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of twenty-one years and unmarried, the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed."

Under a deed of settlement a trustee held shares for an unmarried infant subject to his attaining twenty-five years or marrying. There was a power to apply income for his benefit, coupled with a direction to accumulate and invest the unapplied income, and there was a gift over on failure of the trust. The trustee was assessed in respect of unapplied income.

Held, that s. 102 (1) (*b*) is a provision which is directed to the case where there is income which under the trust deed in the year of income is either payable to or accumulated for or applicable for the benefit of the child or children of that person in the sense that the fate of the income must be determined under one or other of those expressions and inasmuch as this trust is not of such a character that the income must be payable to or accumulated for or applicable for the benefit of the child it was not assessable under s. 102 (1) (*b*).

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CASE STATED by *Kitto* J.

This was a case stated by *Kitto* J. for the opinion of a Full Court of the High Court pursuant to s. 198 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. The case was substantially in the following terms:—

1. This case is stated in an appeal by Alfred Robey Hobbs and Clifford Heathcote England who are the trustees of the indenture hereinafter referred to against an assessment of income tax and social services contribution in respect of income derived by them as such trustees from the parcel of two thousand shares directed by the said indenture to be allocated to Geoffrey Robert Hobbs during the year ended 30th June 1952.

2. By indenture made 9th March 1951 between Grace Muriel Hobbs, wife of Alfred Robey Hobbs, of 65 Fiddens Wharf Road, Killara near Sydney in the State of New South Wales (therein referred to as " the settlor ") of the one part and the said Alfred Robey Hobbs and the said Clifford Heathcote England (therein referred to as " the trustees ") of the other part after reciting that the settlor desired to settle certain property in favour of her children and that the trustees had agreed to act as the trustees of such settlement it was witnessed (*inter alia*) that the settlor thereby agreed to assign and transfer to the trustees five thousand (5,000) preference shares (therein called " the trust estate ") in the capital of F. J. Walker Pty. Limited, a company registered and carrying on business in the State of New South Wales and that the trustees agreed to hold the same upon and subject to the trusts and provisions therein contained.

3. The said indenture provided (*inter alia*) that the trustees should hold the said shares in F. J. Walker Pty. Limited upon trust to allocate in the books of the trust a parcel of two thousand (2,000) shares to each of Dudley Alfred Hobbs and Geoffrey Robert Hobbs (sons of the settlor) and to allocate in the books of the trust a parcel comprising the remaining one thousand (1,000) shares to Elizabeth Muriel Hobbs (a daughter of the settlor).

4. The said indenture further provided that the trustees should hold the said respective parcels of shares upon the trusts therein declared and in particular it provided that the trustees should hold the parcel of two thousand (2,000) shares so allocated to the said Geoffrey Robert Hobbs Upon Trust for the said Geoffrey Robert Hobbs subject to and upon his attaining the age of twenty-five (25) years or marrying under that age Provided that if the said Geoffrey Robert Hobbs shall die before attaining the age of twenty-five (25) years and before marrying under that age the said parcel

shall be divided equally between the other two parcels and devolve accordingly.

5. The said indenture further provided (*inter alia*) that failing the trusts thereinbefore declared or to the extent to which any of such trusts should fail the trustees should hold the trust estate upon trust for the said Alfred Robey Hobbs if he be then living and if he should not be then living upon such trusts as the said Alfred Robey Hobbs should by will appoint.

6. The said indenture further provided that the trustees might from time to time exercise in respect of the trust estate (*inter alia*) the following powers: (i) To pay or to apply from time to time the whole or any part of the income from that part of the trust estate in which any infant may have a vested or presumptive share for the maintenance, support, education, advancement or for the general benefit of such infant in such manner as the trustees might in their absolute discretion think fit but during the existence or contingency of any prior life only with the writen consent of the person entitled thereto. (ii) At any time or times at their discretion but not otherwise to advance or to pay or transfer to any beneficiary or to a child of any deceased beneficiary any part or parts not exceeding (in the aggregate) one one-half of the then presumptive share of such beneficiary or child in the trust estate or the investments representing the same either absolutely or by way of loan and upon such terms and in such manner as the trustees should think fit but that the power might be exercised subject always to the consent in writing of the said Alfred Robey Hobbs if he be living. (iii) To accumulate and invest all income derived from the corpus of the trust estate or so much thereof as might not be applied for any of the purposes therein expressed. All income so accumulated and invested should be treated as capital provided that recourse might be had to such accumulations from time to time for any of the purposes and to the extent to which the trustees would be empowered to have recourse were such accumulations retained in the hands of the trustees as income. [A true copy of the said indenture was annexed as part of the case.]

7. On 9th March 1951 the said Grace Muriel Hobbs transferred to the trustees named in the said indenture of settlement five thousand (5,000) preference shares in the capital of F. J. Walker Pty. Limited.

8. At all material times the trustees held in their joint names as one parcel the 5,000 shares so transferred. From the time of the transfer of the said shares the trustees have kept one account by a bank pass sheet wherein was recorded the income and expenditure

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for the whole of the trusts under the said indenture of settlement. As at 30th June 1952 the trustees prepared one balance sheet and one income and expenditure account in respect of the whole of the said trusts. In the balance sheet and income and expenditure account for the said year there was allocated to Geoffrey Robert Hobbs two-fifths of the total number of shares held by the trustees at that date, and two-fifths of the net income received by the trustees up to that date, being two-fifths of the balance of the total amount received by way of dividends in respect of the total number of shares held after deducting all expenses paid by the trustees in respect of the whole of the said trusts. The said expenses for the said year comprised bank and cheque book charges only.

9. The trustees paid all dividends received in respect of the shares held by them as aforesaid to the credit of one account, namely a current account in the Royal Exchange Branch of the Bank of New South Wales at Sydney styled " A. R. Hobbs and C. H. England No. 2 Account ". All expenses paid by the trustees as aforesaid have been paid out of the said account. The whole amount of the said dividends less only the amount of the said expenses has at all times material to this case remained standing to the credit of the said account, no part thereof having been paid to or applied for the benefit of the said Geoffrey Robert Hobbs. No moneys other than those referred to above have been at any time paid into the said bank account.

10. The said Geoffrey Robert Hobbs was at all material times under the age of twenty-one years and unmarried.

11. In return of income for the twelve months ended 30th June 1952 lodged by the appellants in respect of the trust for the said Geoffrey Robert Hobbs, the appellants disclosed, as the fact was, that in the said year they derived income consisting of a proportion of the dividends declared upon the shares held by them as aforesaid equal to the proportion of the shares directed by the said indenture of settlement to be allocated to the said Geoffrey Robert Hobbs, amounting to six hundred and fifty pounds (£650 0s. 0d.) of which two hundred and fifty pounds (£250 0s. 0d.) was assessable income, the balance being excluded from the assessable income under the provisions of s. 107 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 (hereinafter referred to as " the Act ").

12. In respect of the said assessable income the commissioner assessed the trustees to income tax and social services contribution totalling three hundred and fifty-seven pounds three shillings (£357 3s. 0d.) comprising: (a) One hundred and eighty-seven pounds

three shillings (£187 3s. 0d.) tax and contribution assessed for the year ended 30th June 1952 under s. 102 (1) (*b*) of the Act, that being the amount by which the tax and contribution actually payable on her own taxable income by the said Grace Muriel Hobbs was less than the tax and contribution which would have been payable by her if she had received the said dividends in addition to any other income derived by her; and (b) One hundred and seventy pounds (£170 0s. 0d.) provisional tax and contribution assessed for the year ended 30th June 1953 under s. 221YC of the Act. Notice of the said assessment was given to the trustees on 30th April 1953.

13. Within the time prescribed by s. 185 of the Act namely by letter dated 26th June 1953 the appellants objected to the assessment upon the grounds stated therein as follows: 1. The provisions of the settlement do not fall within s. 102 of the *Income Tax Assessment Act* because: (a) The trust of the settlement is not revocable. (b) The trust property allocated to the infant is not payable to or accumulated for the relative infant because the infant takes no vested interest in the fund unless and until the infant attains the age of twenty-five years by which time he ceased to be an infant. (c) The infant takes only a contingent interest and the trust property is held upon trust for other beneficiaries if the infant to whom the trust is notionally allocated fails to attain the age of twenty-five years. (d) The income is not applicable for the benefit of the infant within the meaning of the section. (e) There is nothing in the trust deed directing the trustees to pay or apply any income to or for the benefit of the infant nor in fact is there anything in the trust deed directing the trustees to accumulate the income for the benefit of the infant beneficiary. 2. The assessment is excessive and erroneous in fact and in law.

14. The objection was disallowed by the Deputy Commissioner of Taxation and notice of such disallowance was given to the appellants by letter dated 20th August 1953.

15. Within the time prescribed by s. 187 of the Act namely by letter dated 13th October 1953 the appellants, being dissatisfied with the decision of the deputy commissioner, duly requested him to treat such objection as an appeal and to forward it to the High Court of Australia.

16. The said appeal coming on to be heard before me the following questions of law arose, and at the request of the parties I state this case for the opinion of a Full Court of the High Court thereon namely —1. Was the said income under the trusts of the said indenture in the said year of income payable to or applicable for the benefit of the said Geoffrey Robert Hobbs within the meaning of s. 102 (1) (*b*)

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of the Act? 2. Upon the facts herein stated (a) is it open to me and (b) am I bound, to hold that the said income, under the said trusts in the said year of income was accumulated for the said Geoffrey Robert Hobbs within the meaning of the said s. 102 (1) (*b*) ?

Sir *Garfield Barwick* Q.C. (with him *B. P. Macfarlan* Q.C. and *K. J. Holland*), for the appellants. None of the income in the year of income was payable to or applicable for the unmarried infant son. In s. 102 (1) (*b*) the words " payable " or " applicable " both refer to the payment or application of income where there is a present entitlement. The words " income payable to " embrace income in fact paid and the same is true of the word " applicable" in that it covers income in fact applied. [He referred to Div. 6, ss. 95-102, of the *Assessment Act* and to *Federal Commissioner of Taxation* v. *Belford* (1).] The general thread running through the division is to look to present entitlement, and the policy of s. 102 is to allow the commissioner to deprive a parent settlor of the advantage which he might otherwise gain either by settling with power of revocation or by settling with income payable to the infant so as to relieve himself of the burden of maintenance, using that word in a wide sense. If that be so, the words " payable to or accumulated for, or applicable for " must thus be limited to sums which must be applied for the infant. If there is no obligation so to apply them, then the main spring of the section is not satisfied. Sections 101 and 102 (1) (*b*) conform to the same broad plan if the words " payable to or accumulated for, or applicable for " are read as referring to payment as of right, application as of right and accumulation in the sense that the child will obtain the money which is being accumulated, he having a vested interest therein. To read the words in any wider sense would cut across the idea which is very plain in s. 101. Section 102 emphasises the year of income, and this fact tends to support the view that the section is concerned not with a power but with entitlement or a right operative in the year of income. If " payable" and " applicable " are to be read as " might be paid " or " might be applied " then a person entitled to be paid or to have the income applied would so far as s. 102 (1) (*b*) is concerned escape both in the year of income and the year of payment or application of the income. [He referred to the *Income Tax Act* 1952 (Imp.), s. 450 (2) and to *Glyn* v. *Inland Revenue Commissioners* (2) and *Vestey's Executors* v. *Inland Revenue Commissioners* (3).] There is a decision of the

(1) (1952) 88 C.L.R. 589, at pp. 596-598, 606.
(2) (1948) L.J.R. 1813, at pp. 1815, 1816 ; 30 Tax. Cas. 321, at p. 328.
(3) (1949) 31 Tax. Cas. 1 (H.L.), at p. 1, 2, 87, 88, 113, 114.

Board of Review (1) which is contrary to our submissions. What is here sought to be brought to tax is something which is truly income of the child in the year of income as either payable or applicable as of right or accumulated for his ultimate benefit. [He referred to *Stanley* v. *Inland Revenue Commissioners* (2).] Where there is only a contingent interest in the child it cannot be said that income has been accumulated in the year of income for the benefit of the child in any relevant sense.

Dr. *F. Louat* Q.C. (with him *J. B. Kearney*), for the respondent. "Applicable" means capable of being applied and not that it must be applied. The aim of s. 102 is to prevent a taxpayer from effectively dividing his income amongst his family and thereby attracting tax at a reduced rate. "Applicable" is not synonymous with "payable" but is part of a composite phrase "applicable for the benefit" which contemplates the interposition of a trustee's discretion. "Payable" on the other hand involves the notion of a right to insist upon payment. Thus it is proper to read "applicable" as "capable of being applied" and this is so in the instant case under the provisions of the trust deed. The word "accumulated" shows that the intention of the section is that if there is income either payable or applicable for the benefit or being stored up for the infant then that is in effect income of the settlor which has been alienated and which is to attract the same rate of tax as if it were still in his hands. The provisions of Div. 6 do not support the construction contended for by the appellants. Sections 97-99 do not require present entitlement before tax is attracted. The present trust is governed by the principle in *Fox* v. *Fox* (3). If the gift is vested subject to divesting, as is contended, then, notwithstanding that it may ultimately be divested, the accumulation in the year of income is one for the person in whom it is then vested, namely the child, and the section applies. [He referred to *Theobald* on *Wills*, 11th ed. (1954), p. 480.] If there is a power to apply income the position is as if it were a direction to apply, provided in each case the application is to be of the whole or a part. Section 36B (2) of the *Conveyancing Act* 1919 is here relevant and there is nothing in the deed expressly disposing of the income. Thus if the contingent gift carries with it the gift of intermediate income then it is correct to say within s. 102 (1) (*b*) that the income is applicable for the benefit of the child or alternatively is accumulated for him.

(1) Case No. C. 61 (1952) 3 T.B.R.D. (N.S.) 317.

(2) (1944) K.B. 255, at pp. 259, 260, 261, 262.

(3) (1875) L.R. 19 Eq. 286, at p. 290.

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"Applicable" is an objective word of description. The answer to the question whether income is applicable can only be found from the trust instrument and here there is a power to pay or apply. It is true that the income is not applied for the benefit of the infant until the trustees have made a decision and a payment but it is unquestionably applicable within s. 102. Applicability is to be tested by reference to the trust instrument and in no other way.

Sir *Garfield Barwick* Q.C., in reply.

DIXON C.J. delivered the judgment of the Court:—

This is a case stated under s. 198 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. The appeal in which the case is stated is an appeal against an assessment that was made under s. 102 of the *Assessment Act* 1936-1952. The appeal is by trustees of a settlement who had been assessed in pursuance of the provisions of that section. Sub-section (3) of s. 102 excludes the operation of the previous sections of Div. 6, that is to say ss. 95 to 101, when the commissioner is of the opinion that he should act under s. 102 which gives him a particular power. The tax which is assessed when s. 102 is applied is of a special character. It is expressed in s. 102, sub-s. (2) as follows: "The amount of the tax payable in pursuance of this section shall be the amount by which the tax actually payable on his own taxable income by the person who created the trust is less than the tax which would have been payable by him if he had received, in addition to any other income derived by him", so much of the net income of the trust estate as falls within the paragraphs which re-state the conditions which attract the operation of s. 102. Those conditions are expressed in sub-s. (1) of the section and they fall into two paragraphs, (*a*) and (*b*). It is with the second, par. (*b*), that this case is concerned, but it is convenient to state the effect of both paragraphs.

Section 102 (1) says: "Where a person has created a trust in respect of any income or property (including money) and—(*a*) he has power, whenever exercisable, to revoke or alter the trusts so as to acquire a beneficial interest in the income derived by the trustee during the year of income, or the property producing that income, or any part of that income or property; or (*b*) income is, under that trust, in the year of income, payable to or accumulated for, or applicable for the benefit of a child or children of that person who is or are under the age of twenty-one years and unmarried, the Commissioner may assess the trustee to pay income tax, under this section, and the trustee shall be liable to pay the tax so assessed."

In the present case the trust deed forms a settlement in favour of her infant children by a lady, Grace Muriel Hobbs, wife of Alfred Robey Hobbs. She was the party of the first part and the trustees were the parties of the second part. Certain shares were the subject matter of the trust. The indenture, after appointing the trustees, set out certain trusts in favour of infant children. Apparently there are three children still infants, although that does not appear expressly from the case stated. The child with whom we are concerned is Geoffrey Robert Hobbs of whom it is said explicitly in the case stated that he was at all material times an infant.

The material trusts of the deed are set out in cl. 3. The clause directs that the trustees should hold the shares upon trust to allocate a parcel of 2,000 shares to each of two infants, Dudley Alfred Hobbs and Geoffrey Robert Hobbs, and 1,000 shares to an infant daughter, Elizabeth Muriel Hobbs. They are all children, two sons and a daughter, of the settlor and of her husband, who is afterwards mentioned in the deed.

The trusts are all in the same form and I shall read only the material trust, which is that relating to Geoffrey Robert Hobbs. After directing that the shares, 2,000 in the case of the sons and 1,000 in the case of the daughter, are to be allocated in the books of the trust to the three children, the deed proceeds to direct, in the case of Geoffrey Robert Hobbs, that the trustee shall hold the parcel of 2,000 shares so allocated to the said Geoffrey Robert Hobbs upon trust for the said Geoffrey Robert Hobbs subject to and upon his attaining the age of twenty-five years or marrying under that age provided that if the said Geoffrey Robert Hobbs shall die before attaining the age of twenty-five years and before marrying under that age the said parcel shall be divided equally between the other two parcels and devolve accordingly. That is to say, the direction in the event mentioned is to divide the parcel between the parcel relating to the other son and the parcel relating to the daughter. There are therefore cross gifts over. After the clauses stating the trusts in favour of the two sons and the daughter the deed proceeds: " Failing the trusts hereinbefore declared or to the extent to which any such trusts shall fail the Trustees shall hold the Trust Estate upon trust for the said Alfred Robey Hobbs if he be then living and if he shall not be then living then upon such trusts as the said Alfred Robey Hobbs shall by Will appoint ".

Pausing there, it will be seen that the gift to Geoffrey Robert Hobbs is subject to and upon his attaining the age of twenty-five. Notwithstanding the contention to the contrary based on the provisions of the deed relating to the application of income, it

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appears to be quite clear that that is a contingent gift, contingent upon the beneficiary attaining the age of twenty-five or marrying.

The deed then contains quite a number of not unfamiliar clauses with reference to the administration of the trusts. Of these, it is perhaps important to note that there is a power " to pay or to apply from time to time the whole or any part of the income from that part of my Trust Estate in which any infant may have a vested or presumptive share for the maintenance support education advancement or for the general benefit of such infant in such manner as my Trustees may in their absolute discretion think fit ".

There is, too, finally, a clause directing the trustees to accumulate and invest all income derived from the corpus of the trust estate or so much thereof as is not applied for any of the purposes therein expressed. The provision goes on: " All income so accumulated and invested shall be treated as capital provided that recourse may be had to such accumulations from time to time for any of the purposes and to the extent to which the Trustees would be empowered to have recourse were such accumulations retained in the hands of the Trustees as income."

In the year of income in question, that ended 30th June 1952, a sum of money became available as income under those trusts for the infant Geoffrey Robert Hobbs. It was in fact not applied for his benefit or paid to him or otherwise disposed of. Certain expenses were deducted from it, but it must be taken, we think, that it fell otherwise within the accumulation clause. It is therefore said to come within the provision of par. (*b*) of s. 102 (1) on the ground, among others, that it was " accumulated ".

The question for decison is whether s. 102 (1) (*b*) applies, in the circumstances we have stated, in respect of the year of income, to the income arising from the parcel of shares allocated to Geoffrey Robert Hobbs and governed by the trust relating to that infant. The question depends on the construction or interpretation of par. (*b*) of s. 102 (1). It will be seen that there was a sum of money available, that it stood as a sum of income arising from the 2,000 shares which were set aside and appropriated in the books of the trust to Geoffrey Robert Hobbs, an infant. The question is whether that sum of money can be described as income which was, under the trust, in the year of income, payable to or accumulated for, or applicable for the benefit of the child of the settlor, that child being a person who was under the age of twenty-one years and unmarried.

We think the answer to the question should be that the sum of money does not come within that description. Paragraph (*b*) appears to us to be a provision which is directed to a case where there is

income which, under the trust deed, in the year of income, is either payable to or accumulated for or applicable for the benefit of the child or children of that person in the sense that the fate of the income must be determined under one or other of those expressions. To state it in other words, the trust must be of such a character that the income must be payable to or accumulated for or applicable for the benefit of the child or children in the year of income. That is to say, it cannot be dealt with otherwise than under these alternatives.

In the present case that condition cannot be satisfied. It cannot be stated with certainty that the accumulation is for a particular child or that the income is applicable for the benefit of that child. The trust is contingent, and although it is true that the contingencies are of a kind that make it probable that the child will enjoy the benefit of the accumulation, yet as a matter of law, it is not correct that the income which belongs to the 2,000 shares for that year must be payable to or accumulated for or applicable for the benefit of that child. Geoffrey Robert Hobbs may not attain twenty-five or marry.

Considerable discussion has taken place as to the possibility of the word " applicable " bearing the meaning of " may be applied " or the meaning of " must be applied ". The view which we take of the clause is hardly expressed by a choice between those two alternatives. We think that the whole clause requires that the disposal of the income in the year in question must be by payment to, accumulation for or application for the benefit of, the child. If you have a case of payment to the child authorised by the trust deed, that of course satisfies the provision. If you have the case of an accumulation for a child that in turn satisfies the provision; if you have neither of these things and a case where the money must be applied for that child, that in turn satisfies the provision. But they are alternatives together covering the ground which the legislature has selected as the test of the special liability. The alternatives together state an entire condition which must be fulfilled in one way or another before the provision is applied to expose the settlor, who has created the trust, to the consequence of having imposed upon his trustee the tax which is stated in sub-s. (2).

To fulfil the condition it must be possible to say of the income that under the trust it must in the year of income be payable to or accumulated for or applicable for the child or children and to deal with it otherwise is not within the trust. The fact that the infant is only contingently entitled makes this impossible.

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In the present case, as we have said, on the failure of the contingent gifts there are cross gifts over, with an ultimate gift to the husband of the settlor or as he may by will appoint under a general power of appointment. That means the conditions which we think are necessary to the application of s. 102 (1) (*b*) are not fulfilled.

The first question in the case stated is as follows: "Was the said income under the trusts of the said indenture in the said year of income payable to or applicable for the benefit of the said Geoffrey Robert Hobbs within the meaning of s. 102 (1) (*b*) of the Act?" That should be answered No. The second question asks: "Upon the facts herein stated (a) is it open to me and (b) am I bound, to hold that the said income, under the said trusts in the said year of income was accumulated for the said Geoffrey Robert Hobbs within the meaning of the said s. 102 (1) (*b*)?" The answer is "It is not open to the learned judge so to hold".

The order will be that the questions are answered as stated and the costs reserved for the judge.

Question (1) *answered No. Question* (2) *answered that it is not open to the learned judge so to hold. Costs reserved for the judge disposing of appeal.*

Solicitors for the appellants, *Minter, Simpson & Co.*

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. A. H.