[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

THE COMPTROLLER-GENERAL OF CUSTOMS AND ANOTHER;

EX PARTE WOOLWORTHS LIMITED AND ANOTHER.

H. C. OF A. 1935.

SYDNEY, *March* 28; *June* 4.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Customs—Ad valorem duties—Imported goods—Dutiable value—Ascertainment—Inclusion of buying commission—Proof—"Protection of the revenue of the Customs"—Security required by department—Form—Authority—Conditions—Forfeiture to the Commonwealth—Payment under protest—Customs Act 1901-1930 (*No.* 6 *of* 1901—*No.* 6 *of* 1930), *secs.* 42, 167, 216*.

The Collector of Customs, not being satisfied of the genuineness of a buying commission which appeared upon an invoice but was not included in the calculation of the value for duty shewn upon the entry, refused to pass the entry unless the importer deposited an amount equal to the additional duty upon the terms of a departmental form of security, the condition of which

* The *Customs Act* 1901-1930, provides by sec. 42: "The Customs shall have the right to require and take securities for compliance with this Act and generally for the protection of the revenue of the Customs, and pending the giving of the required security in relation to any goods subject to the control of the Customs may refuse to deliver the goods or to pass any entry relating thereto." By sec. 167:—"(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. (2) The owner may, within the times limited in this section, bring an action against the Collector, in any Commonwealth or State Court of competent jurisdiction, for the recovery of the whole or any part of the sum so paid. (3) A protest in pursuance of this section shall be made by writing on the entry of the goods the words 'Paid under protest' and adding a statement of the grounds

was that if proof should within a limited time be produced to and to the satisfaction of the Collector that the goods were in the entry properly described and valued for duty, the deposit should be returned, otherwise it should be the property of the Commonwealth. The Collector declined to accept an entry at the increased amount of duty tendered under protest pursuant to sec. 167, but claimed to retain the goods unless and until the cash security was given. In taking this course the Collector relied on secs. 216 and 42 of the *Customs Act* 1901-1930.

Held that the Collector could not refuse to assess the duty and to pass an entry. It is not open to him to refrain from demanding duty and at the same time to demand a deposit against that duty in case it should be demanded, and then to forfeit the deposit, still without demanding duty. Sec. 216 enables the Collector to retain goods pending proof, that is, during the adduction of evidence and possibly during any time reasonably required for an investigation, but it does not entitle him to defer for ever the levying of duty. Sec. 42 enables him to require any security for the ultimate payment of duty found to be due, and to obtain money upon a condition that it shall be applied to satisfy duty if and when levied, but it does not entitle the Collector to obtain it upon a condition that it shall belong to the Crown if the importer fails to prove to the satisfaction, not of a Court but of the Department, that he has correctly valued the goods.

RULE NISI for mandamus.

Upon a motion taken out in the High Court on behalf of Woolworths Ltd., a company incorporated in New South Wales, and Cedric Roy Hart its secretary, *Evatt* J. ordered Edwin Abbott, Comptroller-General of Customs, and George Finlay Ashton Mitchell, Collector of Customs for the State of New South Wales, to show cause before the Full Court of the High Court why a writ of mandamus should not be issued out of the Court directing and ordering them and each of them (1) in respect of three cases of enamel bowls imported from Japan by Woolworths Ltd. in December 1934, in

upon which the protest is made, and, if the entry relates to more than one description of goods, the goods to which the protest applies, followed by the signature of the owner of the goods or his agent. (4) No action shall lie for the recovery of any sum paid to the Customs as the duty payable in respect of any goods, unless the payment is made under protest in pursuance of this section and the action is commenced within the following times:—(*a*) In case the sum is paid as the duty payable under any Customs Tariff, within six months after the date of the payment; or (*b*) In case the sum is paid as the duty payable under a proposed Tariff or Tariff alteration, within six months after the Act, by which the proposed Tariff or Tariff alteration is made law, is assented to." By sec. 216: "The Collector may require from the owner of any goods proof by declaration or the production of documents that the goods are owned as claimed and are properly described valued or rated for duty and the Collector may refuse to deliver the goods or to pass any entry relating thereto pending such proof."

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the s.s. *Kyokkoh Maru*, (*a*) to pass and enter those goods so as to enable the applicants to pay under protest and in accordance with sec. 167 of the *Customs Act* 1901-1930 any additional duty which might be payable in relation to the buying commission on those goods, or (*b*) to pass and enter those goods at a value which did not include the amount of the buying commission; (2) in respect of shipments of goods arriving at Sydney since March 1934, and in respect of which deposits had been made under sec. 42 of the *Customs Act*, (*a*) to indicate to the applicants what further proof they, Abbott and Mitchell, required under sec. 216 of the Act that the goods had been properly valued for duty, and (*b*) to indicate in what respects and for what reasons the goods were alleged by them, Abbott and Mitchell, not to have been properly valued for duty. In an affidavit filed on behalf of the applicants the deponent stated that in the course of carrying on its business as a vendor of miscellaneous goods throughout the Commonwealth, Woolworths Ltd. imported goods into the Commonwealth, and since the beginning of 1933 had imported and still imported certain goods from Japan through its agent, Strong & Co., of Kobe, Japan. In respect of some of the goods so imported at Sydney a dispute arose between Woolworths Ltd. and the Collector of Customs for New South Wales, in respect of certain payments described as a "buying commission," made by the company to its agent. The company claimed that the buying commission did not form part of the price of the goods, and therefore should not be included in the price for the purpose of determining the amount of customs duty payable upon the goods. The claim was rejected by the Collector. Up to 12th March 1934, a portion of the goods so imported from Japan had been passed and entered for duty under protest in accordance with the provisions of sec. 167 of the *Customs Act*; the amount of the buying commission was included in the price of the goods for the purpose of assessment of customs duty thereon. The residue of the goods up to that date were passed and entered subject only, however, to security being given by the company in accordance with the provisions of secs. 42 and 43 of the Act. The form of security required by the Collector was by way of cash deposit of various sums of money deposited by the company for the protection of the revenue of the

customs in connection with the importation of the goods pending proof by the production by the company of documents that the goods were properly described and valued for duty. The form concluded with the statement that " Pending such proof as aforesaid or the giving of the security hereby required I refuse to deliver the . . . goods or to pass any entry relating thereto." There was also required a memorandum of cash deposit headed " Memorandum of cash deposit under sec. 42 pending production of evidence under sec. 216 " in which it was set out that pursuant to the requirement of the Collector of Customs for New South Wales, the sum stated was thereby deposited with the Collector as security for the protection of the revenue of the customs in respect of the goods referred to therein, and the condition of the security was that if proof should within six months from the date thereof or of such further period as the Collector should in writing allow be produced to and to the satisfaction of the Collector that the goods were in the entry properly described and valued for duty, then the amount of the deposit should be returned to the depositor, otherwise it should be the property of the Commonwealth. The security was lodged by the company's customs agent at Sydney with each payment. On 22nd May 1933 the Collector made a demand upon the company for additional duty in respect of the buying commission for shipments anterior to that date. The amount so claimed was not paid by the company nor were proceedings for its recovery taken by the Collector against the company. Goods imported between that date and 12th March 1934 were delivered to the company under the machinery provided in sec. 167, or secs. 42 and 43 of the Act. The agency agreement, dated 15th January 1932, between the company and Strong & Co. was produced to the Collector in respect of the deposits of money under sec. 42. On 11th August 1933 the Collector held an inquiry, at the conclusion of which the papers were forwarded to the Comptroller-General of Customs. Correspondence then ensued, and finally, on 11th June 1934, the company was informed by the Commonwealth Crown Solicitor that the Comptroller-General of Customs had decided to allow a refund of the duty paid under protest under sec. 167. Subsequently a writ was issued by the company against the Commonwealth for the

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recovery of the moneys paid under sec. 167, and as a result the sum of £767 18s. 1d. was paid on 16th August 1934 to the company. A demand was made by the Collector re-demanding this sum as having been erroneously refunded. The company refused to comply with the demand or to admit that the sum had been erroneously refunded. No proceedings were taken by the Collector to enforce the demand. No refund was made by the Collector in respect to moneys paid under sec. 42, and on 25th July 1934, the company was advised by the Comptroller-General that the intimation by the Collector that buying commission would be regarded as not liable to duty was not intended to have a retrospective effect but applied only to present and future shipments. Subsequent to this the Collector demanded security under sec. 42, in the form referred to above, and refused to deliver the goods without it. Also he refused to allow duty to be paid under protest under sec. 167 and insisted upon security under sec. 42. The company asserted that the same considerations applied in respect of the buying commission to all goods imported at Sydney from Japan since 22nd May 1933. Proceedings against the Commonwealth were commenced by the company on 27th September 1934, by way of statement of claim for the recovery of the sum of £2,059 8s. 5d., being the amount which had been deposited by the company under sec. 42, but the matter had not been set down for hearing as questions arose as to whether certain allegations were properly included. Reference was made by the company to an official memorandum dated 8th December 1927 issued by the Department of Trade and Customs " for the guidance of exporters of goods to Australia in the use of the form of invoice and certificate of value," in which it was stated, *inter alia*, that buying or indent commission is not included in value for duty. The company contended that it should be allowed to enter the goods under sec. 167. It further contended that the Collector should indicate what evidence was required under sec. 216, and that if the evidence was not indicated then the goods should be entered without including buying commission in the dutiable amount of the goods, and payment under sec. 167 should be accepted. The foregoing was corroborated in another affidavit filed on behalf of the company by a representative of its customs

agent at Sydney. In this affidavit it was stated, *inter alia*, that on 10th December 1934 the customs agent prepared import entries in regard to the buying commission payable on three cases of enamel bowls, imported by the company from Japan by the s.s. *Kyokkoh Maru*, in respect of which all the necessary documents, including the declarations required by the Collector, had been produced to the Customs Department, which, on 7th December, had issued a detention order calling for a cash security under sec. 42. The Collector refused to allow the deponent to pay under protest under sec. 167 the sum of 6s. 8d., the amount of the duty charged on the buying commission payable on the three cases of enamel bowls. The deponent stated that throughout his dealings with the Department in respect of these and other goods imported by the company from Japan, his firm, on behalf of the company, had complied with every requirement of the Department, and had furnished all the documents and evidence which the Collector had required to be furnished.

Spender K.C. (with him *Curlewis*), for the applicants. The *Customs Act* casts upon the Collector the duty of determining whether or not goods are dutiable, and, if dutiable, of determining the value and assessing duty thereon. The Collector cannot escape that responsibility by having recourse to sec. 42. He is not entitled to defer indefinitely an assessment of the goods, otherwise the right expressly given to owners of goods by the Legislature in sec. 167 to test the matter by litigation would be denied and rendered completely inoperative by this departmental practice. The Collector should indicate the nature of the documents required by him under sec. 216; unless he does so the applicants are not bound to furnish further evidence. The duty of the Collector was dealt with in *Baume* v. *The Commonwealth* (1). Here the Collector has not, and does not suggest that he desires to make further inquiries; he maintains complete silence. The correspondence which passed between the parties and the evidence of the deponents establish that there was a demand for duty. The matter thus comes within sec. 167. The applicants are entitled to have the entry passed so that payment

(1) (1906) 4 C.L.R. 97, at pp. 120 et seq.

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of the amount under protest may be made. Assuming that there is not sufficient evidence of demand, the Collector should state in respect of these goods at what price they shall be dutiable, and whether the buying commission is to be included in the valuation for the purpose of assessing the duty. That commission should not be so included. The Collector cannot, under the guise of insisting that payment should be made under sec. 42, prevent the applicants from exercising the rights conferred by sec. 167. By the terms of the memorandum of cash deposit the applicants are concerned only with the production of documents. The paramount necessity of the Collector at some stage determining the amount which should be paid for duty overrides the provisions of sec. 216. If the Collector doubts the accuracy of the declared value of dutiable goods, he has a remedy under sec. 158. The Collector is seeking to avoid the necessity of performing his duty to assess the value. In any action taken by him under sec. 216, the duty is upon the Collector to act judicially. In any event, the applicants are entitled to know what evidence is required by the Collector. The Collector is under a duty to act in good faith, and failure to do so renders him liable to mandamus (*Local Government Board* v. *Arlidge* (1); *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (2)).

E. M. Mitchell K.C. (with him *Betts*), for the respondents. It is a condition precedent under sec. 167 to the granting of mandamus that the Collector shall have demanded duty. On the information before him the Collector was unable to assess the amount of duty payable. In those circumstances, and following the practice adopted by the Department as a consequence of *Baume* v. *The Commonwealth* (3), the onus was upon the applicants to furnish proof of value, particularly as relating to the buying commission, as required by the Collector under sec. 216. That section is not overridden by any other provisions of the Act, nor by any other considerations. There is no duty cast on the Collector by the Act to determine the value of goods and assess duty thereon on insufficient information. The Collector was entitled to refuse to pass the entry pending such

(1) (1915) A.C. 120, at p. 133. (2) (1932) 47 C.L.R. 621, at p. 632.
(3) (1906) 4 C.L.R. 97.

proof being furnished by the applicants, even though the applicants declined to furnish that proof. It is not unreasonable that the onus should be upon the applicants, who, alone, are in possession of the information required. The provisions of sec. 158 are alternative and do not in any way cut down the specific powers of sec. 216. The provisions of sec. 160 are not applicable. In cases of this description the rule followed by the Department is that laid down in *Baume* v. *The Commonwealth* (1). If the position is that the applicants are unable to furnish the proof required, there may be some remedy, but not by way of mandamus to seek to compel the Collector to do something that he cannot do. [Council also referred to *The Commonwealth* v. *Melbourne Harbour Trust Commissioners* (2) and *Zachariassen* v. *The Commonwealth* (3).]

Spender K.C., in reply. Sec. 216 does not empower the Collector to insist upon conclusive proof as to value.

Cur. adv. vult.

June 4.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND MCTIERNAN JJ. *Ad valorem* duties of customs are calculated upon the sum of the following items, viz., (*a*) either the actual price paid for the goods by the importer with any special deduction added, or the current domestic value of the goods in the country of export if that be higher; (*b*) the charges payable at the port of export to place the goods free on board; and (*c*) an additional ten per cent (sec. 154 (1) of the *Customs Act* 1901-1930). In thus ascertaining the value for duty, it is the established practice to exclude a buying or indent commission if it is a charge made to the importer by a buying agent for services rendered, and not an allowance made by a manufacturer to the buying agent.

In the case of goods imported from the East, the Customs Department appears to fear that the buying commission may be used as a means of reducing the true price paid for the goods. The merchant, who really occupies the position of seller to the importer,

(1) (1906) 4 C.L.R., at p. 121.
(2) (1922) 31 C.L.R. 1.
(3) (1917) 24 C.L.R. 166; (1920) 27 C.L.R. 552.

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may assume the guise of a buying agent charging a buying commission. What, in substance, is his profit upon the purchase by him of the goods from the manufacturer and their resale to the importer, the supposed buying agent may charge as a commission payable to him by the importer on the price that he paid to the manufacturer.

In calculating the value for duty of goods imported from the East, it is the practice of the Customs Department before excluding a charge for buying commission shown on the invoice to require the production of satisfactory evidence that it is a buying commission, including statutory declarations by the agent and the importer. According to an announcement of this practice made by the Customs Department, if the evidence submitted is not acceptable, cash securities under secs. 216 and 42 of the *Customs Act* will be required as a condition of delivery of the goods pending production of conclusive evidence as to the genuineness of the charge for buying commission.

Sec. 216 provides that the Collector may require from the owner of any goods proof by declaration or the production of documents that the goods are owned as claimed, and are properly described, valued, or rated for duty, and the Collector may refuse to deliver the goods or to pass any entry relating thereto pending such proof.

Sec. 42 provides that the customs shall have the right to require and take securities for compliance with this Act and generally for the protection of the revenue of the customs, and, pending the giving of the required security in relation to any goods subject to the control of the customs, may refuse to deliver the goods or to pass any entry relating thereto.

The security, which is required before the goods are released, is the deposit of a sum equivalent to the increase in duty which would be payable if the disputed buying commission is included in the value for duty.

The conditions upon which this security is given are expressed in a departmental form entitled "Memorandum of Cash Deposit under sec. 42 pending production of evidence under sec. 216."

The departmental form states that, pursuant to the requirement of the Collector, the sum is thereby deposited with the Collector as security for the protection of the revenue of the customs in respect

of the goods in question, and that the condition of such security is that, if proof shall within six months or such further period as the Collector allows be produced to and to the satisfaction of the Collector that the goods are in the entry properly described and valued for duty, then the amount of the deposit shall be returned, otherwise it shall be the property of the Commonwealth.

It will be observed that by this form of security an attempt is made to bring two independent powers into conjunction. Under one section the goods may be retained until proof of value is furnished; under the other, until a security for the protection of the revenue is given. Under the conditions of the security the Collector takes the money instead of the goods and retains it if the proof of value is not forthcoming. The terms of the security do not suggest that the deposit, if in default of the required proof it becomes the property of the Commonwealth, constitutes a payment of the duty which would have been underpaid if in fact the buying commission ought to have been included in the price. It is framed as if it was the forfeiture of a penal sum like that of a bond. If the security took the form of a bond and it was lawfully obtained, the Crown might recover the penalty, although no loss of revenue was suffered. If it be lawful for the customs to exact the deposit upon such terms, there appears to be nothing to prevent the Crown from forfeiting the deposit and proceeding to recover the duty.

For some time Woolworths Ltd., who are the prosecutors, have been importing goods from Japan. The invoices show a buying commission. A long controversy has taken place with the Customs upon the question whether it ought or ought not to be included in ascertaining the value for duty. Woolworths Ltd. have consistently maintained that it represents an ordinary and genuine buying commission which forms no part of the price paid for the goods. In support of this contention they have laid much evidence before the Department of Customs. That Department has exhibited great fluctuation of opinion upon the matter. In the course of the controversy, Woolworths Ltd., in order to obtain their goods, have paid under protest the extra duty involved pursuant to sec. 167 of the *Customs Act* and then have sued to recover the amount. When that was done the Customs Department has refunded the amount

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sued for. But next, having presumably repented of the refund, the Department has claimed repayment of the amount refunded. It is not to the purpose to recount the inconsistent decisions given by the Customs Department which appear to have arisen from a reluctance to take a decided course of action. It is reasonably plain, however, that while the Department was not satisfied that the buying commission was a genuine remuneration for services and did not represent part of the price paid by the importer for the goods, it was at the same time unwilling to submit the question for decision in a Court of law. On the other hand, great anxiety has been displayed throughout by Woolworths Ltd. to obtain an opportunity of establishing their case by evidence in open Court. Precisely why the Customs Department feared the consequences of a judicial investigation of the bona fides of the agency arrangement does not appear. But it is clear that the Department of Customs set out to avoid such a method of determining the controversy.

If Woolworths Ltd. were able to avail themselves of the machinery provided by sec. 167 of the Act, no means existed of preventing them bringing the matter before the Court. But if the Department definitely demanded duty calculated on a value which included the buying commission, Woolworths Ltd. would become entitled to pay the duty under protest and then sue for its recovery.

No doubt in such an action it would be incumbent upon Woolworths Ltd. affirmatively to prove the genuineness of the buying commission, but apparently the Customs Department was unwilling to incur the risk of their succeeding in doing so. In this dilemma the Department resorted to the course of requiring a deposit of the difference in the amount of duty upon the terms contained in the form of security already quoted. Woolworths Ltd., in order to obtain their goods, repeatedly deposited such sums upon the terms required. They have been quite unable to obtain from the Department anything but an expression of dissatisfaction with the evidence they have produced in order to comply with the condition expressed in the security; and they have been unable to obtain any indication of what further evidence or proof is required. The Department has refused to value the goods at any greater amount than that shown upon the entry, but it has refused to deliver the goods until a deposit

of the extra duty has been made, not, it is true, as duty, but as security. The result is that Woolworths Ltd. cannot obtain the goods without paying more than the amount of duty which they contend is payable, an amount which is indeed that actually levied as duty. They cannot obtain repayment of the excess because they can never satisfy the Department, and they cannot avail themselves of sec. 167 because the Department will never demand the excess as duty.

In these circumstances Woolworths Ltd. at length took the course of refusing to make a cash deposit in respect of certain goods imported and of tendering under sec. 167 the duty which would be chargeable if the buying commission upon these goods were included in the value for duty, and tendering at the same time an entry marked "Paid under protest" in conformity with sec. 167. The entry was rejected and the goods retained by the Customs Department. Thereupon Woolworths Ltd. obtained a rule nisi for a writ of mandamus which is now returnable before us.

In our opinion the fallacy in the position taken up by the Customs Department lies in supposing that by the machinery the Department has devised for the purpose of combining the powers conferred by sec. 216 and sec. 42, it may obtain money without taking the responsibility of levying it in the form of duty. The revenue which is to be protected by means of sec. 42 is the revenue from customs duty. That duty cannot be collected except by the means prescribed for the purpose. To refrain from demanding duty and at the same time to demand a deposit against that duty in case it should be demanded and then to forfeit the deposit, still without demanding the duty, is not a course open to those required to administer the Act.

In our opinion the departmental form of security is one which the Act does not authorize.

Sec. 42 enables the Department to require any security for the ultimate payment of duty found to be due. Sec. 216 enables the Collector to retain the goods pending proof, that is, during the adduction of evidence, and possibly to retain them for such a length of time as is reasonably required to make an investigation. (See

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per *O'Connor* J., *Baume* v. *The Commonwealth* (1).) But it does not entitle him to defer forever the levying of duty. Sec. 42 does entitle him to obtain money upon a condition that it shall be applied to satisfy duty if and when levied, but it does not entitle him to obtain money upon a condition that it shall belong to the Crown if the importer fails to prove to the satisfaction, not of a Court, but of the Department, that he has correctly stated the value. Such a procedure is an indirect means of imposing a tax other than that authorized by the statute.

In refusing to accept entry or duty under sec. 167, the Department was actuated not by a desire to consider further the assessment of duty, but by a desire to pursue the course it had adopted of attempting by means of exacting a cash deposit to avoid the assessment of duty at the disputed amount.

In our opinion a mandamus should issue commanding the Collector to assess the value of the goods for duty and calculate the duty thereon, and to demand such duty when calculated according to law.

The rule nisi should be made absolute with costs, for a writ of mandamus commanding the Collector to determine the value for duty of the three cases of enamel bowls imported by the prosecutor in December 1934 in the ship *Kyokkoh Maru* and to demand the duty therefor, and to accept payment of such duty under protest pursuant to sec. 167 of the *Customs Act* 1901-1930 if payment of any part thereof is so tendered, and to pass an entry of the goods accordingly.

STARKE J. Rule nisi for mandamus.

The rule involves the same considerations as are dealt with in *R.* v. *Collector of Customs (Vict.); Ex parte Berliner* (2), and the facts are indistinguishable. The directions sought by this rule are also inadmissible, but the Court can mould them. The rule should be absolute for a mandamus to the Collector to consider and examine the entry of the goods ex the *Kyokkoh Maru* which is in contest in this case, and to ascertain and claim the duty payable in respect of such goods.

(1) (1906) 4 C.L.R., at pp. 120-123.

(2) *Post*, p. 322.

Rule nisi absolute with costs for a writ of mandamus commanding the Collector to determine the value for duty of the three cases of enamel bowls imported by the prosecutor in December 1934 *in the ship "Kyokkoh Maru" and to demand duty therefor and to accept payment of such duty under protest pursuant to sec.* 167 *of the Customs Act* 1901-1930 *if payment of any part thereof is so tendered and to pass an entry of the goods accordingly. Respondent to be given thirty days within which to comply with the order with liberty to make application to a single Justice in Chambers for directions in case of difficulty in applying the judgment to any particular case.*

Solicitors for the applicants, *Ernest Cohen & Linton.*

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

J. B.