[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . APPELLANT;

AND

THOMAS PURCELL . . . . . RESPONDENT.

H. C. OF A. 1920-1921.

BRISBANE, *June* 16-19, 22, 1920.

SYDNEY, *Aug.* 24, 26, 1920.

Knox C.J.

BRISBANE, *June* 24-26, 1921.

SYDNEY, *Aug.* 12, 1921.

Gavan Duffy, Rich and Starke JJ.

Income Tax — Assessment — Trustee — Declaration of Trust — Validity — Bonâ fide disposition of property — Lessening burden of taxation — Arrangements to evade tax—Evidence—Onus of proof—Finding of fact—Statute—Construction —Income Tax Assessment Act 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *secs.* 10, 26 (1), 27 (2), 35 (1) (*b*), 53.

By secs. 26 (1) and 27 (2) of the *Income Tax Assessment Act* 1915-1916 it is provided that any person who derives income as a trustee shall be assessed and liable in respect of income tax as if he were beneficially entitled to the income, and that in the assessment of a trustee there shall be deducted from the tax assessable to him so much of the total tax as bears to the total tax the proportion which that part (if any) of the whole income which is distributed to the beneficiaries bears to the whole income. Sec. 53 provides that every written or verbal contract, agreement or arrangement shall be absolutely void as against the Commissioner of Taxation so far as it has or purports to have the purpose or effect of in any way, directly or indirectly, altering the incidence of any income tax, or relieving any person from liability to pay any income tax, or defeating or evading or avoiding any duty or liability imposed on any person by the Act.

The owner of certain property declared himself a trustee of it for himself, his wife and his daughter equally. In declaring the trust he reserved to himself wide and unusual powers of management, control and investment.

Knox C.J. having found on the evidence that, although influenced to some extent by a desire to lessen the burden of taxation, the settlor did in fact at the time of executing the document intend that his wife and daughter should, by virtue of the declaration of trust, become the beneficial owners of two thirds of the property comprised in it,

Held, that the declaration created a trust which was valid and binding on the settlor, and was not affected by the provisions of sec. 53 of the *Income Tax Assessment Act* 1915-1916; and that, therefore, the assessment of the settlor to income tax should be made in accordance with secs. 26 (1) and 27 (2) of the Act.

By *Knox* C.J.: (1) Under sec. 53 the onus is on the Commissioner of Taxation to establish facts from which the Court may, and should, conclude that the transaction is within the class struck at by that section; (2) that section is intended, and does extend, only to cover cases in which the transaction, if recognized as valid, would enable the taxpayer to avoid payment of income tax on what is in reality his income; (3) that section does not extend to the case of a *bonâ fide* disposition by virtue of which the right to receive income arising from a source theretofore belonging to the taxpayer is transferred to and vested in some other person.

By *Gavan Duffy* and *Starke* JJ.: Sec. 53 does not prohibit the disposition of property; its office is to avoid contracts, agreements and arrangements which place the incidence of the tax upon some person other than the person contemplated by the Act.

Decision of *Knox* C.J. varied and, as varied, affirmed.

APPEAL from *Knox* C.J.

An appeal was brought to the High Court by Thomas Purcell against an assessment of him to income tax for the year 1916-1917 by the Deputy Federal Commissioner of Taxation. Purcell was a grazier in Queensland, and early in 1916 was the owner of a certain station and other pastoral holdings, and live-stock depasturing thereon. On 20th May 1916 he had executed a declaration of trust in favour of himself, his wife and his daughter, in terms which (so far as material) are set out in the judgments in *Purcell* v. *Deputy Federal Commissioner of Taxation* (1). Purcell was assessed by the Deputy Federal Commissioner of Taxation to income tax in respect of £35,129 as income derived from the grazing business during the year 1st July 1916 to 30th June 1917. It was claimed on Purcell's behalf that this income was received by him as trustee for himself, his wife and his daughter in equal shares, and that each beneficiary should be assessed in respect of one third share of that amount.

KNOX C.J., by whom the appeal from the assessment was heard, on 22nd June 1920 delivered judgment upon part of the case, in

(1) 28 C.L.R., 77.

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which, after stating the facts, he proceeded as follows :—The respondent (the Deputy Federal Commissioner of Taxation) puts forward three contentions, namely, (1) that the declaration of trust is within the terms of sec. 53 of the *Income Tax Assessment Act* 1915-1916, and must consequently be disregarded for the purpose of the assessment of income tax ; (2) that the declaration of trust is a bill of sale within the meaning of the *Bills of Sale Act of* 1891 (Qd.), and, not having been registered in the manner prescribed by that Act, is void and of no effect ; (3) that in any event no portion of the income derived from the trust property has been distributed to any beneficiary within the meaning of sec. 27 (2) of the *Income Tax Assessment Act* 1915-1916. I proceed to deal with these points. (1) On this point it is clear that the onus is on the respondent to establish facts from which the Court may, and should, conclude that the transaction is within the class struck at by the section. The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer ; but, in my opinion, its provisions are intended to and do extend to cover cases in which the transaction in question, if recognized as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth *his* income. It does not extend to the case of a *bonâ fide* disposition by virtue of which the right to receive income arising from a source which theretofore belonged to the taxpayer is transferred to and vested in some other person. The section is intended to protect the revenue against any attempted evasions of the liability to income tax imposed by the Act—that liability is imposed on the taxpayer in respect only of *his* income (sec. 10 (1)) ; and the *bonâ fide* gift or sale by a taxpayer of assets producing income is therefore in no sense an attempt to evade his liability to income tax. As was said by *Griffith* C.J. in *Waterhouse* v. *Deputy Federal Commissioner of Land Tax* (*S.A.*) (1), " it is hardly necessary to point out that a *bonâ fide* alienation of land for the purpose of escaping the liability to taxation incident to its ownership is not an evasion of land tax." On this construction of the section it is necessary for the respondent, in order that he may succeed on this objection, to establish affirmatively to the

(1) 17 C.L.R., 665, at p. 671.

satisfaction of the Court that the apparent object of the transaction evidenced by the declaration of trust was not its real object; or, in effect, that while by the declaration of trust the appellant purported to relinquish in favour of his wife and daughter his beneficial interest in two thirds of the property comprised therein, he really and in truth retained for his own benefit the income of the property so apparently disposed of. I am satisfied on a careful consideration of the whole of the evidence, not only that the respondent has failed to establish this, but that the proper inference to be drawn from the facts proved is that the appellant really did intend at the time of executing the declaration of trust that his wife and daughter should become the beneficial owners of two thirds of the property comprised in it. I have no doubt that in forming this intention he was influenced to some extent by a desire to lessen the burden of taxation; but the existence of this motive, assuming the existence concurrently of the intention to part with the beneficial ownership of the property transferred, in no way vitiates the transaction (see *Attorney-General* v. *Duke of Richmond* (1) and in *Re Moore* (2)). I am therefore of opinion that as to this point respondent fails. (2) Having decided that the declaration of trust is not affected by the provisions of sec. 53 of the *Income Tax Assessment Act*, the next question in order is whether that document required registration under the *Bills of Sale Act*. As this question is one of general importance and a very large amount of property is involved, I think the proper course is to direct, under sec. 18 of the *Judiciary Act* 1903-1910, that this question be argued before the Full Court. When that point has been determined I shall be in a position to deal with the rest of the case.

His Honor having stated a case asking the question last mentioned, the Full Court, on 14th August 1920, held that the declaration of trust was valid and binding upon the settlor, on the ground that it was not a declaration of trust of chattels within the meaning of the *Bills of Sale Act of* 1891 (*Purcell* v. *Deputy Federal Commissioner of Taxation* (3)).

KNOX C.J., on 26th August 1920, dealt with the third contention of the Deputy Federal Commissioner of Taxation, namely, that in

(1) (1908) 2 K.B., 729, at p. 741; (1909) A.C., 466, at p. 475.
(2) 27 N.Z.L.R., 261.
(3) 28 C.L.R., 77.

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any event no portion of the income derived from the trust property had been distributed to any beneficiary within the meaning of sec. 27 (2) of the *Income Tax Assessment Act* 1915-1916; and he made an order declaring that the declaration of trust was not within the terms of sec. 53 of the *Income Tax Assessment Act* 1915-1916, and, although not registered under the *Bills of Sale Act of* 1891, was valid and binding on the appellant (Thomas Purcell): and also declaring that the income derived by the appellant during the period 1st July 1916 to 30th June 1917 from the property comprised in the declaration of trust was derived by him as trustee under the said declaration of trust; that there should be deducted from the tax assessable to the appellant in respect of such income so much of the total tax as bears to the total tax the proportion which that part of the whole income which was distributed to the beneficiaries during the period in question bears to the whole income; that three several sums of £100 each paid into the bank account of Mrs. Purcell out of the account of the appellant were to be treated as income distributed to her as a beneficiary during the period in question; by consent, that the sum of £12,510 15s. paid on the purchase of the assets of a certain business should be treated as income distributed to the beneficiaries during the period in question. And he ordered that the assessment be amended accordingly.

From this decision the Deputy Federal Commissioner of Taxation now appealed to the Full High Court.

Woolcock and *Hart*, for the appellant. On the true construction of the document the settlor retained for himself the business and the profits. If the beneficial ownership is retained by the settlor in property which he purports to hold in trust, then that property is his property; the income from it is his income, and he is liable to pay income tax on it. [Counsel referred to *Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (1); *Osborne* v. *The Commonwealth* (2).]

[RICH J. But the decision of the Full Court is against you: the declaration of trust is valid apart from sec. 53 (*Purcell* v. *Deputy Federal Commissioner of Taxation* (3)).]

(1) 15 C.L.R., 661, at pp. 668-669. (2) 12 C.L.R., 321, at p. 366.
(3) 28 C.L.R., 77.

The only point submitted there was whether it was invalid by reason of non-registration as a bill of sale (1). The clause numbered 1 in the document gives the settlor in the widest possible terms full power of management and disposition, just as if the document had not been executed: as *Isaacs* J. put it (2), "his ownership seems unimpaired." Sec. 53 of the Act, which is in the widest terms, is designed to cover any attempt at evasion or avoidance. (See *Simms* v. *Registrar of Probates* (3); *Bullivant* v. *Attorney-General for Victoria* (4); *Payne* v. *The King* (5); *Attorney-General* v. *Duke of Richmond* (6); *Commissioner of Stamp Duties* v. *Byrnes* (7).) The Chief Justice himself viewed the document with grave suspicion. The predominant motive in executing the document was to avoid taxation. This, in effect, has been found by the Chief Justice. The provisions in the legislation of the Australian States as to persons making agreements altering the incidence of taxation are taken from New Zealand legislation (see sec. 162 of the New Zealand consolidated *Land and Income Tax Act* of 1916. The provisions are practically the same in every State and in the Commonwealth. By analogy the principles laid down in *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (8) and in *Harding* v. *Federal Commissioner of Taxation* (9) should be applied here. The document is clearly colourable. The Chief Justice should not have found that the three sums of £100 paid by the husband into his wife's household account were paid to his wife out of the profits. The document is a sham apart from sec. 53. [Counsel also referred to *Land and Income Taxation Act* 1910 (Tas.), sec. 126; *Land and Income Tax Assessment Act* 1907 (W.A.), sec. 70; *Land and Income Tax Assessment Act* 1895 (N.S.W.), sec. 63.]

Feez K.C., *Ryan* K.C. and *Douglas*, for the respondent. A Court of appeal will not reverse the decision of a Judge of first instance unless it sees that the decision is manifestly wrong (*Dearman* v. *Dearman* (10)).

(1) 28 C.L.R., at p. 85.
(2) 28 C.L.R., at p. 92.
(3) (1900) A.C., 323.
(4) (1901) A.C., 196.
(5) (1902) A.C., 552.
(6) (1909) A.C., at p. 475.
(7) (1911) A.C., 386.
(8) 22 C.L.R., 367.
(9) 23 C.L.R., 119.
(10) 7 C.L.R., 549, at pp. 553, 559.

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[PER CURIAM. We all think that the opinion of the Chief Justice as to trustworthiness of witnesses should be maintained by us; we also think that the document is a sufficient declaration of trust.]

Sec. 53 is intended to hit collusive and fraudulent arrangements (see *Payne* v. *The King* (1); *Commissioner of Stamp Duties* v. *Byrnes* (2)).

[GAVAN DUFFY J. As a matter of form, we think that the document does impose a trust. Then, was it real; and, further, does sec. 53 not affect it?]

The settlor genuinely intended to create the trust. The Chief Justice believed that he did. The onus is on the Commissioner to show that the document is a sham. Further, as to sec. 53, a declaration of trust does not come within the meaning of "contract, agreement, or arrangement." The last word suggests something bilateral. This declaration of trust does not alter the incidence of the tax.

Woolcock, in reply, referred to *London Bank of Australia Ltd.* v. *Kendall* (3).

Cur. adv. vult.

Aug. 12, 1921. The following written judgments were delivered:—

GAVAN DUFFY AND STARKE JJ. The Commissioner of Taxation assessed the taxable income of the respondent under the *Income Assessment Act* 1915-1916 for the financial year 1917-1918 at the sum of £35,129, and the respondent brought an appeal against the assessment to the High Court. The appeal was heard before the learned Chief Justice, who ordered the amendment of the assessment, and declared that the income derived by the respondent during the period 1916-1917 was derived by him as trustee, and that certain sums amounting to about £12,810 should be treated as income distributed to beneficiaries. The matter comes before us on appeal by the Commissioner from the judgment of the Chief Justice.

According to the provisions of sec. 10 of the *Income Tax Assessment Act*, coupled with the definition in sec. 3, every person who in

(1) (1902) A.C., 552. (2) (1911) A.C., 386.
(3) 28 C.L.R., 401, at p. 406.

any financial year derives any taxable income from sources within Australia is liable to income tax; and, if such person derives it as trustee, he is liable in respect of the tax as if he were beneficially entitled to the income, subject to the provision that in the assessment of a trustee there shall be deducted from the tax assessable to him so much of the total tax as bears to the total tax the proportion which that part (if any) of the whole income which is distributed to the beneficiaries bears to the whole income (*Income Tax Assessment Act* 1915-1916, secs. 26, 27 (2)).

The respondent Purcell was, prior to 20th May 1916, possessed of pastoral interests in Queensland from which the income in question in this case was substantially derived. On this day Purcell, by a document in writing, declared that he held the interests in trust as to one equal undivided third part for his wife, and another equal undivided third part to pay the income to his daughter until she attained the age of twenty-one years and, when she attained that age, as to both capital and income for his daughter absolutely, and as to the remaining equal undivided third part for himself. The declaration contained some very wide and unusual powers of management, control and investment, which are set forth at large in the report of the case *Purcell* v. *Deputy Federal Commissioner of Taxation* (1), and need not be repeated here. At the time the declaration was executed the daughter was about sixteen years of age, and she is still alive.

The learned counsel who appeared for the Commissioner contended that the declaration created no obligations such as a Court of equity could enforce, and left Purcell as the owner both at law and in equity of the interests set forth in the declaration. Substantially, the observations of our brother *Isaacs* in his judgment in *Purcell* v. *Deputy Federal Commissioner of Taxation* (2) were relied upon in support of this contention. It is unnecessary to consider whether this question was determined against the Commissioner by the majority of the Court in *Purcell's Case*, for we are of opinion that the argument is not well founded.

Assuming, for the purpose of the argument, that the declaration evidenced a real and genuine transaction, then it creates, in our

(1) 28 C.L.R., 77.

(2) 28 C.L.R., at pp. 85 *et seqq.*

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opinion, an equitable obligation binding the settlor to deal with certain property, over which he has control, for the benefit of certain persons of whom he is one, or, in other words, a trust. The large and unusual powers of management, control and investment given to the trustee are not contrary to any rule of law or equity. No doubt, effective control of the trustee is very much reduced, but the clauses do not destroy or render null and void the obligation to stand possessed of the property or its proceeds for the benefit of the persons named in the declaration.

Next, the Commissioner insisted that the declaration, if in form it created a trust, was in fact a mere sham—a device whereby property belonging to the settlor is made to appear to belong in equity to someone else in order to escape taxation. Undoubtedly, if the Commissioner could establish this position, the respondent would be assessable as the absolute owner pursuant to sec. 10 of the Act, and not merely as a trustee. The question is one of fact. The Chief Justice found that the declaration was not a sham, and that the respondent did in fact intend by the document to benefit his wife and daughter, although he had present in his mind and was to some extent influenced by the fact that the disposition would reduce the burden of taxation. The learned counsel for the Commissioner stressed this latter part of the finding; but the right of every man to dispose of his property, if he can, in a way which will relieve him of taxation, and for that purpose, has been recognized by the highest authority (*Simms* v. *Registrar of Probates* (1)). No doubt it is our duty to determine for ourselves the true effect of the evidence so far as the circumstances of the case enable us to do so; but when the conclusion of the trial Judge depends on materials which give him a better opportunity than an appeal Court for discerning the true state of the facts, such Court ought not in ordinary circumstances to interfere. The Chief Justice approached the case with suspicion, and gave a considered judgment discussing all the relevant facts from both points of view. He heard the testimony of those persons who took part in the transactions culminating in the execution of the document relied on as a declaration of trust, and on that testimony he was satisfied that the settlor intended to make his wife

(1) (1900) A.C., at p. 333.

and daughter owners of two thirds of the property comprised in the document. We think the testimony justified him in arriving at that conclusion if he believed the testimony, and we are not prepared to say that any facts disclosed in the evidence justify us in saying that he should not have believed it.

The Commissioner next contended that, even if the declaration evidenced a real, genuine and valid transaction, yet it was struck by sec. 53 of the *Income Tax Assessment Act* 1915-1916. If the argument be sound the assessment is of course unimpeachable. It is therefore essential to consider the true construction of sec. 53. The section, as the Chief Justice says, does not prohibit the disposition of property. Its office is to avoid contracts, &c., which place the incidence of the tax or the burden of tax upon some person or body other than the person or body contemplated by the Act. If a person actually disposed of income-producing property to another so as to reduce the burden of taxation, the Act contemplates that the new owner should pay the tax. The incidence of the tax and the burden of the tax fall precisely as the Act intends, namely, upon the new owner. But any agreement which directly or indirectly throws the burden of the tax upon a person who is not liable to pay it, is within the ambit of sec. 53. It follows, from what we have said, that there is no contravention of sec. 53 in the present case. The Act, by sec. 26, provides that any person who derives income as a trustee shall be assessed and liable in respect of income tax as if he were beneficially entitled to the income. The respondent is so liable in precise accordance with the terms of the Act. The incidence of the tax as regulated by the Act is not altered, the respondent is not relieved from tax which he should pay, and he does not defeat, evade or avoid duty or liability imposed upon him by the Act, nor does he prevent the operation of the Act in any respect.

The only other question is the application of sec. 27 (2) to the facts proved in this case—in other words, what deduction is the respondent as trustee entitled to claim ? As to a sum of £12,510 15s. part of the total income assessed by the Commissioner, the parties agreed before the Chief Justice that it has been distributed to the beneficiaries if the respondent was taxable as a trustee. We do not know the reason for this agreement, nor does it concern us. The

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agreement was made, and must be adhered to. As to three several sums of £100 each paid into the bank account of Mrs. Purcell, the Chief Justice declared that these sums must be treated as income distributed to a beneficiary within the meaning of sec. 27 (2). Before the declaration of trust it was the custom of the respondent to pay into Mrs. Purcell's banking account from time to time small sums of money for household expenses. These sums were paid out of his general banking account. This practice was followed after the execution of the declaration, and each of the sums of £100 was so paid into Mrs. Purcell's account and was used by her for household expenses. But it was said that the payments to Mrs. Purcell must, since the declaration of trust, be treated as income accruing to her under that document. The assessment is *primâ facie* evidence of its correctness (see sec. 35 (1) (*b*)), and we think that the evidence is more consistent with the conclusion that these three sums of £100 were personal contributions of the respondent to household expenses than a distribution of trust income. The declaration made by the Chief Justice as to these three sums must be deleted, but otherwise the judgment is affirmed.

The respondent has substantially succeeded in this appeal, and the appellant's small success as to £300 cannot alter the costs of the appeal, which the appellant must pay.

RICH J. This case originally came before *Knox* C.J. The learned Chief Justice decided certain questions of fact and law, but referred to the Full Court the question "whether the declaration of trust dated 20th May 1916 executed by the appellant, not having been registered in the manner prescribed by the *Bills of Sale Act of* 1891, is a valid declaration of trust binding on the appellant, or is of no effect with respect to the chattels comprised therein." The majority of the Court held that the declaration of trust was valid and binding on the settlor, notwithstanding the nature of its terms and notwithstanding the provisions of the *Bills of Sale Act of* 1891 (*Purcell* v. *Deputy Federal Commissioner of Taxation* (1)). The Court had not to decide whether the declaration of trust was a sham—*i.e.*, an unreal or colourable transaction intended to throw

(1) 28 C.L.R., 77.

dust in the eyes of the Commissioner of Taxation, and not intended to confer benefits on the settlor's wife and daughter. Nor had the Court to decide whether the declaration of trust was obnoxious to sec. 53 of the *Income Tax Assessment Act* 1915-1916.

The case now comes before the Court by way of appeal from *Knox* C.J. on the questions decided by him. The first is a question of fact. The essential point is whether the settlor did actually give his wife and daughter certain beneficial interests in the business and property as he purports by the declaration of trust to do. His motives for giving those interests are immaterial. "The question whether an apparent transfer is also a real one is a question which occurs not very rarely, and on which the evidence of actual dealings by the parties can usually be brought to bear. But if we are to dive into the motives of a person acting by himself, and to find out whether a desire to avoid a tax, which probably everybody thinks desirable *per se*, was, when he gave away property, a dominant motive with him, or a substantial motive, or a minor motive, or any motive at all, that is an inquiry of a vague and indefinite kind" (*Simms* v. *Registrar of Probates* (1)). The Chief Justice has expressly accepted the evidence of Mr. Smith without qualification, treating him as a truthful, accurate and intelligent witness. He also accepts the evidence of Purcell and MacGregor, and sums up his finding thus:—"I am satisfied on a careful consideration of the whole of the evidence . . . that the proper inference to be drawn from the facts proved is that the appellant really did intend at the time of executing the declaration of trust that his wife and daughter should become the beneficial owners of two thirds of the property comprised in it. I have no doubt that in forming this intention he was influenced to some extent by a desire to lessen the burden of taxation, but the existence of this motive, assuming the existence concurrently of the intention to part with the beneficial ownership of the property transferred, in no way vitiates the transaction." In view of the evidence given by Smith and MacGregor, and the acceptance by the Chief Justice of that evidence as true, I think that the proper inferences have been drawn from it that the declaration of trust was not a sham, but was genuinely

(1) (1900) A.C., at pp. 335-336.

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intended to confer beneficial interests on the settlor's wife and daughter.

The next question is as to the true construction of sec. 53 of the *Income Tax Assessment Act* 1915-1916. It is difficult to say what is its precise scope and effect; but, whatever its meaning, it would be unreasonable to construe it so as to include a genuine gift which had the incidental effect of diminishing the donor's assets and income. In my judgment the document in question is not within the section.

In the opinion I have expressed it becomes unnecessary to deal with the question of onus decided by the Chief Justice. I am not, however, to be taken to concur with his decision on that point.

Having regard to the Chief Justice's finding of facts, I think that the trustee is entitled to the deduction of the three sums of £100 each as being payments made under the obligation of the deed rather than as voluntary payments in respect of pin-money. The trustee is also entitled under the agreement of the parties to the deduction of the sum of £12,510 15s.

For these reasons I think that the order of the Chief Justice should be affirmed, and the appeal dismissed with costs.

Appeal allowed as to the declaration with respect to the three several sums of £100 *contained in the judgment herein of 26th August* 1920 *and the same is hereby set aside and deleted therefrom. Appeal otherwise dismissed and the said judgment otherwise affirmed. Appellant to pay the costs of this appeal.*

Solicitors for the appellant, *Chambers, McNab & McNab*, for *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Atthow & McGregor*.