1950
Oct. 23
Nov. 21

BETWEEN:

BERT W. WOON,.....APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Income—Income War Tax Act R.S.C., 1927, c. 97, s. 19, ss. 1—"Undistributed income" on hand "in any form" at time of winding up of company—Minister and officials do not have discretionary power to settle or limit taxation other than according to the statute—Change in form of assets does not cause them to lose quality of undistributed income—Appeal dismissed.

By s. 19, ss. 1 of the Income War Tax Act it is provided that the payment received by a taxpayer under the circumstances there mentioned shall be a dividend and, therefore, part of a taxpayer's assessable income. Appellant sought to avoid such assessable income by obtaining a ruling of the Commissioner of Income Tax approving an arrangement entered into by appellant and others adjusting the distribution of its property on the winding up of an incorporated company in which appellant held shares.

Appellant was assessed for income tax on such payment to him and that assessment was affirmed by the Minister of National Revenue, and appealed to this Court.

Held: That the assessment here under appeal was made pursuant to the terms of a statute and is not open to the appellant to set up an estoppel to prevent its operation.

2. That the Commissioner of Income Tax has no power to bind the Crown by a ruling or declaration settling or limiting taxation other than according to the statute itself since the section of the Income War Tax Act referred to does not confer any discretionary power on the Minister or his officials.

3. That the undistributed income of an incorporated company on hand at the time of its winding up does not lose the quality of being undistributed income by the conversion of the assets of which it is made up into another form of assets such as cash or stock in a new company.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Toronto.

W. Judson, K.C. for appellant.

J. D. Arnup, K.C. and *Miss Helen Currie* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

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CAMERON J. now (November 21, 1950) delivered the following judgment:

This is an appeal from an assessment to income tax dated May 17, 1946, in respect of the taxation year 1944.

The appellant declared his income at $7,800, but the respondent added thereto an item of $78,165.87 said to be made up of undistributed income received from Arrow Bedding Limited in that year and assessable to the appellant under section 19. -1. of The Income War Tax Act. The taxpayer appealed and by his decision the respondent affirmed his assessment; notice of dissatisfaction was given and in his reply the respondent affirmed his assessment as levied. By order of this Court pleadings were delivered.

Woon and one F. J. Mackie were the beneficial owners of all the issued stock of Arrow Bedding Limited, which company carried on business until January 31, 1944. By agreement in writing, dated June 2, 1933 (Ex. 1), Woon and Mackie entered into an agreement with themselves and with the Toronto General Trusts Corporation, as trustee, the effect of which was that upon the death of either Woon or Mackie, the personal representatives of the deceased should sell and the survivor should purchase all the shares of the deceased party in the capital stock of Arrow Bedding Limited, at a valuation to be arrived at as set forth in the agreement. Mackie died early in 1943 and, pursuant to the agreement, Woon was called upon to purchase Mackie's shares in the company. Certain insurance moneys on the life of Mackie had been provided for the purpose of paying for his stock, but were insufficient to the extent of about $35,000 to complete the full payment. Woon's only available assets consisted of his shares in the company. After a consultation between Woon, his solicitor, and an official of the Toronto General Trusts Corporation (which was also one of the executors of Mackie's will), and following certain interviews and correspondence with the Commissioner of Taxation (which will later be referred to), the following plan was arranged and carried out by or on behalf of the appellant.

A new company—Arrow Bedding (Eastern) Ltd. (hereinafter to be called "the new company")—was incorporated on January 19, 1944, one of its purposes being to

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purchase as a going concern the business assets and all the undertaking of Arrow Bedding Limited (hereinafter to be called "the old company") and to pay therefor by the issue of its fully paid up shares. The capital of the new company was divided into 1,000 redeemable preference shares of a par value of $100 each and 3,000 common shares without any nominal or par value. On January 31, 1944, by deed and bill of sale, the realty and all other assets of the old company were conveyed to the new company, the consideration therefor being 800 redeemable preference and fully paid up shares and 3,000 shares without nominal or par value of the new company, to be allotted to the old company or its nominees. Thereupon, the only assets of the old company then remaining consisted of stock in the new company. On March 27, 1944, the old company passed a by-law providing for the distribution of its assets rateably among its shareholders and thereafter for the surrender of its charter. By direction of the old company, the new company issued to the appellant or his nominees 800 preference shares and 3,000 common shares. The next step taken was that on or about March 31, 1944, the new company passed a by-law providing for the redemption of 315 shares of its preference stock at $100 per share, all of which shares were to be taken from the shares held by the appellant. The by-law further provided for payment to the Receiver General for Canada of $1,260, being the tax payable under section 19A of The Income War Tax Act and being 4 per cent of the par value of the shares so redeemed. The tax was paid on or about April 1, 1944.

315 preferred shares of the new company which were held by the appellant were then redeemed by the new company and $31,500, paid to him. The agreement (Ex. 1) provided that after applying the net proceeds of the life insurance on the purchase price, the balance would be paid to the Mackie estate within five years of Mr. Mackie's death, in half-yearly instalments and with interest. Woon, however, with the cash available from the redemption of the shares, was able to negotiate a cash settlement, and instead of spreading his payments over five years secured a 10 per cent discount on the ascertained value by payment of the whole in cash.

These facts which I have just enumerated are not in any way disputed. It is also admitted that as of January 31, 1944, and just prior to the sale of its assets to the new company, the books of the old company showed a surplus of undistributed income of $75,444.08. As shown by the evidence of Mr. McLachlin, an assessor in the Toronto branch of the National Revenue Department, that figure was adjusted by certain additions and deductions and as a result the amount of such surplus of undistributed income was finally ascertained to be $78,165.87 as of January 31, 1944. No objection is now taken to that computation.

The respondent, being of the opinion that the receipt by the appellant in 1944 of the shares of the new company, upon the winding up of the old company, brought him within the provisions of section 19.1. of The Income War Tax Act, assessed him accordingly. That section then was as follows:

> 19.1. On the winding-up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

The appeal is based on two grounds: (1) That the provisions of section 19.1. have here no application because at the time of the winding up of the old company it had no undistributed income on hand; (2) That the respondent is estopped from alleging that section 19.1. is applicable to the appellant because of a "ruling" made by the Commissioner of Taxation that, if the procedure which was in fact followed, was carried out, the only tax which would result would be that arising under section 19A, and that that tax has in fact been paid.

At the trial, counsel for the respondent made a general objection to the admissibility of any evidence as to any statements or rulings, either verbal or in writing, made by the Commissioner of Taxation or the Deputy Minister of National Revenue (Taxation) in regard to the incidence of tax which might result from any step proposed by or on behalf of the appellant, on the ground that such statement or ruling was irrelevant to the issues here raised. Upon his statement that the presentation of his case

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would not in any way depend on my ruling on that objection, I thought it advisable to reserve my opinion until later.

The objection is based on the submission that the evidence is led for the purpose of establishing an estoppel, and that, as the doctrine of estoppel does not apply as against the Crown, the evidence is therefore irrelevant and for that reason inadmissible.

In the pleadings the appellant has set out the facts on which he relied as giving rise to the application of the doctrine of estoppel and has pleaded estoppel. Those facts are therefore in issue. Later herein I shall have occasion to refer to certain cases in which the question of the applicability of estoppel in pais as against the Crown has been considered. It is sufficient to say at this point that the decisions are somewhat conflicting. The point is not sufficiently clear to justify a categorical finding that it can never apply as against the Crown. If that were the case then the evidence proposed might be considered irrelevant and therefore inadmissible. Under the circumstances, however, the issue being clearly raised in the pleadings, I think the evidence is in this case admissible.

Mr. Woon, faced with the problem of raising money to pay for the shares held by the Mackie estate, consulted his solicitor, Mr. John Jennings, K.C. On April 28, 1943, Mr. Jennings had an interview with the then Commissioner of Taxation in Ottawa and discussed with him the possibility of the old company redeeming its shares to such an extent as might seem desirable, and the resulting tax that would be payable by Mr. Woon upon the receipt of the old company's undistributed income in that fashion. Ex. 2 is a copy of a letter sent by Mr. Jennings to the Commissioner on the following day and attached thereto is the Commissioner's reply of May 1, 1943, confirming Mr. Jenning's opinion as to the effect of the interview on April 28, 1943. While it was thought advisable to proceed under the plan proposed in the letter of April 29, 1943, it was decided to submit a further proposition to the Commissioner as to the tax effect of proceeding under section 19A.-1. of The Income War Tax Act, which section then was as follows:

19A. 1. Where the assets of a company, which had on hand undistributed income at the end of its 1929 taxation period, have been received

by another company, either directly or through an intermediary, and whether by the sale of the assets of such first mentioned company to such other company, or through the sale by the shareholders of the shares of such first mentioned company to such other company, and such other company issues or has issued redeemable shares, bonds, notes, or other like instruments in an amount which in whole or in part absorbs the said undistributed income, then on any redemption of such instruments the company redeeming shall pay a tax of four per centum on the amount of such instruments redeemed to the extent of the said undistributed income.

Mr. Jennings states that on September 10, 1943, he had a further interview with the Commissioner of Taxation at Ottawa, the particulars of which may be found on pp. 17-18 of the evidence. He outlined to the Commissioner a proposal to proceed under section 19A in the same manner as was eventually carried out and which I have above set forth. He asked for a ruling as to whether under the suggested proposal there would be any incidence of taxation other than the 4 per cent tax mentioned in section 19A. He states that thereupon the Commissioner gave him "a clear unequivocal 'ruling' that if the procedure outlined in section 19A were carried out in detail the only incident of taxation which would result would be the 4 per cent on the redemption of the securities of the new company." The Commissioner also stated that he thought it unfair that the tax in this case should be only 4 per cent when others were paying a much higher rate and that he proposed to have section 19A removed from the Act at the then session of Parliament. Accordingly, he advised Mr. Jennings to do nothing further until that section was removed. Mr. Jennings delayed proceedings until the end of the Parliamentary session and, as section 19A still remained in the Act, he considered it proper to proceed thereunder and in accordance with the Commissioner's ruling.

Mr. Jenning's evidence as to this interview is not denied. No letters were exchanged as had been done in respect to the original proposition. Mr. Jennings then proceeded with the matter in the manner which has been outlined. Under these circumstances, it is submitted by counsel for the appellant that the respondent is now estopped from alleging that Mr. Woon is subject to the taxes imposed by section 19.1. and from assessing him accordingly.

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The question as to the applicability of the rule of estoppel in pais as against the Crown has been raised in many reported cases and the opinions expressed therein are not at all uniform. In the following cases it was held that it did apply. In *Queen Victoria Niagara Falls Park Commissioners* v. *International Railway Company* (1), Grant, J. stated that it is well established that the doctrine of estoppel in pais operates as against the Crown. In *Attorney-General to the Prince of Wales* v. *Collom* (2), Atkin, J. found that the defendant had established a good equitable defence based on estoppel and that such equitable defence was good against the Crown. Reference may also be made to *Attorney-General of Victoria* v. *Ettershank* (3), *Plimmer* v. *Mayor of Wellington* (4), and *Attorney-General for Trinidad* v. *Bourne* (5); and *The King* v. *Canadian Pacific Railways* (6).

For cases in which the opposite view was held, reference may be made to the following: *Western Vinegars Ltd.* v. *The Minister of National Revenue* (7); *Bank of Montreal* v. *The King* (8); and to *Attorney-General for Canada* v. *C. C. Fields & Company* (9), and the cases therein cited.

It is not necessary in this case, however, to consider the effect of the cases to which reference has just been made. It is sufficient to state that the assessment here under appeal was made pursuant to the terms of a statute and that, therefore, it is not open to the appellant to set up an estoppel to prevent its operation.

In Phipson on Evidence, 8th Ed., 667, it is stated that:

> Estoppels of all kinds, however, are subject to one general rule: they cannot override the law of the land. Thus, where a particular formality is required by statute, no estoppel will cure the defect.

The most recent case that I am aware of is *Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (10), in which it was:

> *Held,* that the appellants were not estopped from recovering the sum claimed. The duty imposed by the Public Utilities Act on the appellants to charge, and on the respondents to pay, at scheduled rates, for all the electric current supplied by the one and used by the other could not be defeated or avoided by a mere mistake in the computation of accounts.

(1) (1928-29) 63 O.L.R. 49.
(2) (1916) 2 K.B. 193 at 204.
(3) (1875) L.R. 6 P.C. 354.
(4) (1883-84) 9 A.C. 699.
(5) (1895) A.C. 83.
(6) (1930) Ex. C.R. 26.
(7) (1938) Ex C.R. 39.
(8) (1907) 38 S.C.R. 258.
(9) (1943) O.R. 120 at 129.
(10) (1937) A.C. 610.

The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to the respondents to set up an estoppel to prevent it.

An estoppel is only a rule of evidence, and could not avail to release the appellants from an obligation to obey the statute, nor could it enable the respondents to escape from the statutory obligation to pay at the scheduled rates. The duty of each party was to obey the law.

The judgment in that case was delivered by Lord Maugham. At p. 620 he said:

> The Court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppel would nullify the statutory provision.

And at p. 621:

> If we now turn to the authorities it must be admitted that reported cases in which the precise point now under consideration has been raised are rare. It is, however, to be observed that there is not a single case in which an estoppel has been allowed in such a case to defeat a statutory obligation of an unconditional character. The textbooks have regarded the case as one closely analogous to the cases of high authority where it has been decided that a corporation could not be estopped from contending that a particular act was *ultra vires*.

He referred also to In re *A Bankruptcy Notice* (1), in which Atkin, L.J. stated:

> Whatever the principle may be (referring to a contention as regards approbation and reprobation) it appears to me that it does not apply to this case, for it seems to me well established that it is impossible in law for a person to allege any kind of principle which precludes him from alleging the invalidity of that which the statute has, on grounds of general public policy, enacted shall be invalid.

In the instant case, section 19.1. of the statute expressly provides that the payment received by a taxpayer under the circumstances there mentioned shall be a dividend and therefore part of a taxpayer's assessable income. It was therefore the duty of the taxing authorities to apply the provisions of the section to the case of any taxpayer falling within its terms and it was the duty of such taxpayer to pay such tax as might properly be payable thereunder. It was the duty of both to obey the law.

I think it is quite clear that the "ruling" said to have been made in this case, was made without authority and was not in any way binding upon the Crown. There is nothing in the section itself which confers any sort of discretionary powers on the Minister or his officials. Parliament has said that under certain circumstances

(1) (1924) 2 Ch. 76.

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certain things are deemed to be dividends and manifestly the Commissioner of Taxation had no power to declare otherwise or to settle the limit of taxation thereunder, other than according to the statute itself. In that connection, reference may be made to *Carling Export* v. *The King* (1), in which at p. 438 Lord Thankerton said:

> In their Lordships' opinion it is not to be readily assumed, in a Taxing Act, that Parliament has delegated to a Minister the power to settle the limits of taxation, and such intention must be clearly shown by the terms of the statutory provision.

In *Liberty & Company Ltd.* v. *C.I.R.* (2) a somewhat similar case arose. There the Commissioners of Inland Revenue had issued an official notice regarding the effect of subscriptions to certain war loans on the liability to excess profits duty. Rowlatt, J., in referring to the power to issue such a notice said at p. 638:

> But thereupon two difficulties are raised by Mr. Konstam, and they arise out of the circulars that were sent by the Inland Revenue when it was desired to attract as much money as possible into War Loan. The Solicitor-General, quite correctly and quite properly, and I think in the performance of his manifest public duty, takes the point that he is here to argue the real question of law and to get a determination of what the law is, and that he cannot be prevented from doing that and must not allow himself to neglect to do it. I think that is absolutely right, and it must be pointed out that the Commissioners of Inland Revenue have no power to bind the Crown by a general declaration of what the law is in particular circumstances beforehand. They make a statement for the information of those who like to act upon it in perfect faith and having great skill, and the parties to whom it is addressed may say "The Commissioners say this, it is probably right," and they are justified in acting upon it from that point of view in the same sense as they are justified in acting on the view of any person who advises them with knowledge and to the best of his ability. But the Commissioners cannot bind the Crown. It used to be said in the old cases there was no estoppel against the Crown. It used to be said in the old cases that employment under the Crown was by law at will only. Both those sounded arbitrary principles in favour of monarchical rights, but as at present expressed and as rarely understood it means this, that no servant of the Crown has authority in a case of service to create a freehold office by a promise on behalf of the Crown when there is not one by law, and no servant of the Crown is entitled to lay down principles of law for the future which will bind the Crown. Looked at from that point of view they are not principles which support an autocratic Government, they are principles which protect the public from being fettered in the future by the acts of persons who for the time being are occupying important positions. Therefore I think that is an answer to it, although I can understand Mr. Konstam's clients, if the case really turned on that, feeling a little soreness about it in the circumstances, they themselves, of course, not being constitutional lawyers, but I ought to say that I think any soreness of that kind is

(1) (1931) A.C. 435. (2) (1917-30) 12 T.C. 630.

quite ill-founded because really on the substance of the case it is perfectly clear in my judgment, for the reasons I have already expressed, that on the facts looked at in the broadest possible way the Crown are right in this case.

That judgment was affirmed by the Court of Appeal, (1).

In the case of *Anderton & Halstead Ld.* v. *Birrell* (2), the Inspector of Taxes after full disclosure of all the facts had agreed, in writing, to the writing down for two years successively of a doubtful debt. Subsequently, by an assessment, the writing down of the doubtful debt was disallowed on certain grounds. In considering an appeal from the Commissioners of Inland Revenue, Rowlatt, J. said at p. 279:

> In order to clear the ground, I may point out at once that there is no question of the Crown having been bound by the first action of the inspector by way of mere contract. No officer has power to do that.

On the principles laid down in these cases I have reached the conclusion that the so-called "ruling" of the Commissioner was nothing more than his personal opinion as to the meaning of the statute, or, at the most, that the department in assessing the appellant would carry into effect the "ruling" so made. In either event it was made without authority and was not binding on the Crown. I find, also, that it cannot be invoked by the appellant as a ground for raising estoppel in this case, as to do so would be to nullify the requirement of the statute itself.

The only other ground of appeal is that under the circumstances mentioned the old company, at the time of its winding up or discontinuance, had no undistributed income on hand. It is submitted that when on January 31, 1944, it transferred its whole undertaking to the new company in return for preferred and common shares in the latter, the undistributed income was absorbed in the shares of the new company and that therefore, so far as the old company was concerned, it had thereafter—and on the date when it distributed the shares of the new company rateably amongst its own shareholders and was wound up—no undistributed income on hand.

It is submitted that as the undistributed income of the old company was "absorbed" in the issue of the redeemable shares by the new company, within the meaning of

(1) (1917-30) 12 T.C. 640 (2) (1932) 1 K.B.D. 271.

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"absorb" as contained in section 19A, that having been so "absorbed" it became non-existent in so far as the old company was concerned and that, therefore, the old company did not have it "on hand" at the time of its winding up or discontinuance.

In support of this contention there is cited the case of *Stewart and Company, Ltd.* v. *M.N.R.* (1). In that case, O'Connor, J. did determine that in the situation there arising under section 19A, the undistributed income of a vendor company could be absorbed by the issue of redeemable shares of the purchasing company. But he decided also that "to absorb" meant "to incorporate," although it had at times another meaning—"to swallow up." He did not suggest that in any such transaction the undistributed income disappeared or became non-existent so far as the vendor company was concerned; in fact, he was of the contrary opinion. At p. 672-3 he said:

> Does an issue of redeemable shares in a transaction of this kind incorporate the undistributed income of the vendor company?
>
> I reach the conclusion that it does so, and that this can be best shown by the position after the sale and on the winding up of the vendor company.
>
> The asset side of the balance sheet of the vendor company would show the redeemable shares of the purchaser company in lieu of the assets which it sold. *Both before and after the sale the liability side would show the paid up capital and the undistributed income. The undistributed income of the vendor company is then in the form of redeemable shares of the purchaser company and on the winding up when such shares are distributed among its shareholders, the undistributed income is distributed in the form of such shares.* So to that extent and in that sense the issue of redeemable shares has incorporated the undistributed income of the vendor company.

It is suggested that the sentences which I have underlined are obiter; but even if that be so I am satisfied that they correctly state the true situation. The undistributed income of the old company prior to the sale of its assets to the new company was represented by buildings, stock on hand, equipment and the like; upon the sale, its form was changed and thereafter it was represented by the preference redeemable shares of the new company into which it had been incorporated. It did not thereby become non existent although it was represented in a new form.

These shares were the ones received by the appellant. I do not think that it is of any importance that he received

(1) (1946) Ex. C.R. 669.

them direct from the purchasing company. (*Merritt* v. *M.N.R.* (1) affirmed on this point by (1942) S.C.R. 259.) Actually, it is not clear that he did receive them directly from the new company. The oral evidence indicated that such was the case but the minute book of the old company (Ex. 3) contains a record of the directors' meeting of March 27, 1944, in which it is recited that the shares had been received by it, and a by-law was passed authorizing their distribution rateably among its shareholders. I am of the opinion, also, that notwithstanding the fact that the appellant received the shares before the charter of the old company was surrendered, that they were distributed during the process of winding up or discontinuing the business and that, therefore, they fell within the opening words of section 19.1. (see *MacLaren* v. *M.N.R.* (2)).

It is to be kept in mind that the assessment now under appeal was made under section 19.1. That section is quite distinct from section 19A, the latter being concerned only with payment of a specified tax by a purchasing company under the conditions therein mentioned; while the former declares to be dividends (and therefore taxable profits or gain), what is distributed to a taxpayer upon the winding up, discontinuance or reorganization of a company, to the extent that such distribution includes undistributed income of that company. Payment of the tax under section 19A does not in any way affect the question as to what constitutes dividends under section 19.1., or the liability of a taxpayer receiving dividends thereunder to pay income tax thereon.

I think that the Arrow Bedding Company, Ltd. did have undistributed income on hand at the time of its winding up. It is admitted that it was on hand on January 31, 1944, and at least from a taxation point of view it could not lose the quality of being "undistributed income" by the conversion of the assets of which it was made up into another form of assets, such as cash or stock in a new company. It may be conceded, I think, that such undistributed income was here incorporated in the preferred shares of the new company but these were the shares which became the property of the old company and were distributed to the appellant. The form in which the undis-

(1) (1941) Ex. C.R. 175. (2) (1934) Ex. C.R. 13.

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tributed income is distributed is quite immaterial because of the words "in any form" contained in the section. I agree, also, with the opinion of O'Connor, J. in the *Stewart* case that from an accounting point of view the old company's balance sheet following the receipt of the shares in the new company should show on the liability side the paid up capital and the surplus of undistributed income. That was not done by the accountant of the company, the liability side of the balance sheet (Ex. 8) comprising only the same items as on the asset side, namely, the preferred and common shares of the new company.

My conclusion, therefore, must be that the shares which the appellant received in 1944 were so received upon the winding up or discontinuance of the business of Arrow Bedding Company, Ltd. and constituted a distribution of the property of that company; and that to the extent that the company had on hand undistributed income, they constituted dividends in his hand. The amount, as I have said, is not in dispute. Such receipts, therefore, fall squarely within the provisions of section 19.1. and they were properly added to the income of the appellant.

The Income War Tax Act levies taxes on profits, and it is the clear intention of section 19 that the undistributed income of a corporation (which is composed of corporate profits remaining undistributed for the time being) should, at the time it is distributed upon the winding up, discontinuance or reorganization of the company, constitute dividends in the hands of the recipients and therefore be subject to taxation in the year in which they are so received.

For the reasons which I have stated, the appeal will be dismissed with costs to be taxed.

Judgment accordingly.