

BETWEEN:

HIS MAJESTY THE KING, on the information
of the Attorney General of Canada,

PLAINTIFF,

AND

WEDDEL LIMITED,

DEFENDANT.

1944
May 31,
June 1, 2
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1945
June 29
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Revenue—Customs Duty—Customs Act, R.S.C. 1927, chap. 42, and amendments, secs. 2 (2), 4, 35, 38, 41, 48, 52 and 112—Functions of appraisers—Right of Minister to determine value for duty—Minister's determination an administrative act, not subject to review by the Court.

The defendant during 1940, 1941 and 1942 imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duty based on the values at which the goods were entered for customs. It being considered that the goods had been undervalued, the Chief Dominion Customs appraiser made fresh appraisals and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to \$50,415.12. Protests being made against these appraisals, the matter was referred to the Minister of National Revenue who, on August 19, 1943, determined the value for duty of the canned corned beef imported by the defendant during 1940 to 1942, showing \$49,312.03 payable by the defendant as additional customs duty and tax. Action was brought to recover this amount or, in the alternative, the additional amount resulting from the appraisal made by the Chief Dominion Customs appraiser.

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Held: That when goods are imported into Canada, the Minister has power to find that it is difficult to determine their value for duty for any one or more of the causes or reasons specified in paragraphs (a) to (e) of section 41 of the Customs Act; that his findings thereon, even if erroneous, are not subject to review by the Court; that, having made such findings, the Minister may determine the value for duty of such goods; that such determination is an administrative act; that it is conclusive of the value upon which the duty on such goods is to be computed and levied; and that it is not subject to review by the Court.

- 2 That, when the Minister makes a valid determination under section 41, his determination is not prospective in effect but is referable to the specific goods whose importation and subsequent disposition caused him to make his inquiry and determination. *The King v. Nozzema Company of Canada, Ltd.* (1942) S.C.R. 178 followed.

INFORMATION exhibited by the Attorney General of Canada to recover from the defendant the additional amount of customs duty and taxes resulting from the determination by the Minister of National Revenue of the values for duty of certain goods imported into Canada in excess of those at which they had been entered for duty.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

J. C. McRuer, K.C. and *Robert Forsyth, K.C.* for plaintiff.

Aimé Geoffrion, K.C. for defendant.

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

THE PRESIDENT now (June 29, 1945) delivered the following judgment:

During 1940, 1941 and 1942 the defendant imported into Canada large quantities of canned corned beef from Argentine, Uruguay and Brazil and paid customs duties based on the values at which the goods were entered for customs. On December 16, 1942, the Commissioner of Customs of the Department of National Revenue notified the defendant that the importations appeared to have been undervalued and that he proposed to instruct the collectors at the various ports where its entries had been passed to call for amending entries accounting for additional duty on appraised values on all entries passed by it since January 1, 1940. After correspondence between the Depart-

ment and the defendant or its Ottawa representative, the Chief Dominion Customs appraiser made appraisals of the values of the imported goods at \$104,031 in excess of those at which they had been entered for duty and directed the defendant to make amended entries and pay additional customs duty and taxes amounting to \$50,415.12, and, on April 6, 1943, sent the defendant a statement showing such appraised values and the amount of underpaid duty and taxes. No appeal from the appraisals was taken, but representations protesting against them were made to the Department by the defendant and its Ottawa representative. Subsequently the matter was referred to the Minister of National Revenue, and, on June 29, 1943, the Minister advised the defendant's Ottawa representative by letter that it appeared that this might be a proper case in which to determine the value for duty under section 41 of the Customs Act, but that, before he decided what determinations should be made, he would be glad to arrange an appointment to hear any further representations or to receive any further statement in writing. An appointment was then arranged with the Minister on July 14, 1943, at which time he heard oral representations both by the defendant's Ottawa representative and by its counsel. Further written representations were also made. Finally, on August 19, 1943, the Minister made his determination as follows:

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19th August, 1943.

Memorandum for:

DAVID SIM, Esq.,
 Deputy Minister of National Revenue,
 Customs Excise.

WHEREAS MESSRS. Weddel Limited, Montreal, imported into Canada a quantity of Canned Beef during the calendar years 1940, 1941 and 1942,

AND WHEREAS, on reviewing the circumstances and conditions of importation, it appears to me and I find that such circumstances and conditions render it difficult to determine the value of the goods in question for duty, because—

- (1) Such goods are not sold for use or consumption in the country of production;
- (2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption,

ACTING under the provisions of The Customs Act, I determine that the value for duty of the Canned Beef imported into Canada from Brazil,

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Argentine and Uruguay during the calendar years 1940, 1941 and 1942, by Messrs. Weddel Limited, shall be as set forth in the statement attached as Schedule "A" hereto.

COLIN GIBSON,
 Minister of National Revenue.

Encl.

The schedule showed that the amount of additional customs duty and taxes payable by the defendant amounted to \$49,312.03. On August 21, 1943, the Deputy Minister of National Revenue (Customs and Excise) notified the defendant's Ottawa representative of the Minister's determination, sent him a copy of the schedule and required the entries to be amended not later than September 2, 1943.

On the defendant's refusal to pay any additional duty or taxes this action was brought. The plaintiff claims the additional amount of customs duty and taxes resulting from the determination of the Minister purporting to act under section 41 of the Customs Act, R.S.C. 1927, chap. 42, and amendments, and, in the alternative, the additional amount resulting from the appraisal by the Chief Dominion Customs appraiser purporting to act under section 48.

It is not necessary to outline the scheme of customs administration in Canada for this was done by Rinfret J., as he then was, in delivering the judgment of the Supreme Court of Canada in *Reference Concerning the Jurisdiction of the Tariff Board of Canada* (1). In this action we are concerned mainly with the sections of the Customs Act dealing with the valuation of goods for duty and the respective functions and duties relating thereto of the Dominion Customs appraisers and the Minister.

The basic section is section 35, which reads as follows:

35. Whenever any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

This section presupposes not only that the goods are sold for home consumption in the country of export but also that there are principal markets in such country in which the goods are so sold. Isolated sales in the country of export do not, of themselves, satisfy the conditions of the section.

The function of valuing goods for duty is primarily performed by appraisers, whose appointment is provided for by section 4, and the manner in which the Dominion Customs appraisers shall perform their duties is specified by section 38 as follows:

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38. The Dominion Customs appraisers and every one of them and every person who acts as such appraiser, or the collector, as the case may be, shall, by all reasonable ways and means in his or their power, ascertain, estimate and appraise the true and fair market value, any invoice or affidavit thereto to the contrary notwithstanding, of the goods at the time of exportation and in the principal markets of the country whence the same have been imported into Canada, and the proper weights, measures or other quantities, and the fair market value thereof, as the case requires.

While the appraiser is not bound by the value at which the goods are entered or by any affidavit as to their value but is given wide powers to ascertain, estimate and appraise the true and fair market value "by all reasonable ways and means", he is governed by section 35 for it lays down the basis for the value he is to find and such basis rests upon the assumption that goods are sold for home consumption in the principal markets of the country of export. He cannot make a valid appraisal except in cases where he can use the basis laid down by section 35 and where the conditions presupposed by it in fact exist.

There are several sections in the Act providing for review of the action of an appraiser. Under section 38 (4) there may be a review by the Board of Customs, now succeeded by the Tariff Board, but such Board is confined to a review of the appraiser's decision and is bound by the same limitations of jurisdiction as the appraiser.

A second provision for reviewing an appraisal appears in section 48. This is an important section for consideration since it was under it that the Chief Dominion Customs appraiser purported to make his appraisal. It provides as follows:

48. If, upon any entry or in connection with any entry, it appears to any Dominion appraiser or to the Board of Customs that any goods have been erroneously appraised, or allowed entry at an erroneous valuation by any appraiser or collector acting as such, or that any of the foregoing provisions of this Act respecting the value at which goods shall be entered for duty have not been complied with, such Dominion appraiser or such Board may make a fresh appraisement or valuation, and may direct, under the valuation or appraisement so made, an amended entry and payment of the additional duty, if any, on such goods, or a refund

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of a part of the duty paid, as the case requires, subject, in case of dissatisfaction on the part of the importer, to such further inquiry and appraisement as in such case hereinafter provided for.

The Dominion appraiser's jurisdiction under section 48 is confined to making a "fresh appraisement or valuation", but he is also governed by section 35 and may act only in those cases where the basis laid down by it can be used.

Then it is further provided by section 52 that an appeal may be taken from the decision of the appraiser under section 48 to a board of three valuers who are to examine and appraise the goods in accordance with the provisions of the Act.

The appraiser has no power to decide whether goods are sold for home consumption in the country of export. The power to make this decision and other decisions in special cases of difficulty is vested exclusively in the Minister by section 41. This section is of such importance as to warrant its citation in full. It provides as follows:

41. Whenever goods are imported into Canada under such circumstances or conditions as render it difficult to determine the value thereof for duty because

- (a) such goods are not sold for use or consumption in the country of production; or
- (b) a lease of such goods or the right of using the same but not the right of property therein is sold or given; or
- (c) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or
- (d) such goods are usually or exclusively sold by or to agents or by subscription; or
- (e) such goods by reason of the fact that the circumstances of the trade render it necessary or desirable are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption; or such goods are sold or imported in or under any other unusual or peculiar manner or conditions;

the Minister may determine the value for duty of such goods, and the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied.

2. The Minister shall be the sole judge as to the existence of all or any of the causes or reasons aforesaid.

Section 41 sets out two conditions for the exercise of the Minister's jurisdiction to determine the value for duty of goods. In the first place the goods must be imported. The fact of such importation is an essential condition of a valid determination by the Minister, and without it his act

would be a nullity. The second condition is of a different nature. While the Minister may determine the value for duty when goods are imported under such circumstances or conditions as render it difficult to determine their value for duty for the causes or reasons set out in paragraphs (a) to (e), it does not seem to be essential to the exercise of his jurisdiction that any of these causes or reasons should in fact exist, for by subsection 2 the Minister is made the sole judge as to the existence of all or any of them. Parliament has clearly given the Minister the power to find the facts of this second condition, upon which the exercise of his jurisdiction to determine value for duty depends, and has made him the sole judge of their existence. The case falls squarely within the second class of cases referred to by Lord Esher M.R. in his well known discussion of jurisdiction in *The Queen v. Commissioners for Special Purposes of the Income Tax* (1) where he said:

When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may intrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more.

In this case one condition of the valid exercise of jurisdiction by the Minister, namely, an importation of goods, does exist in fact, for the importations of canned corned beef by the defendant during 1940 to 1942 are proved. As to the other condition, namely, the existence of circumstances or conditions rendering it difficult to determine the value for duty of the goods for one or more of the causes or reasons specified in paragraphs (a) to (e), the Minister in his determination of value, dated August 19, 1943, found the existence of two such causes or reasons, namely,

(1) Such goods are not sold for use or consumption in the country of production; and

(1) (1888) 21 Q.B.D. 313 at 319.

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(2) Such goods, by reason of the fact that the circumstances of the trade render it necessary or desirable, are sold under conditions or to a class of purchaser under or to which similar goods are not sold by the exporter for home consumption.

There is, I think, evidence to support these findings but, even if there were not, it is not for the Court to question them, for Parliament has made the Minister the sole judge in the matter. His findings as to the existence of any of the causes or reasons specified in paragraphs (a) to (e), even if erroneous, are not open to review by the Court. The goods in the present case having been imported, and the Minister having found the existence of reasons (a) and (e) for rendering it difficult to value them for duty, the two conditions for the exercise of his jurisdiction to determine their value for duty were satisfied and he could validly make his determination.

The Minister's determination was, I think, purely an administrative act within the jurisdiction vested in him by Parliament and, there being no provisions for appeal from it, it is not subject to review by the Court. This was settled by the Supreme Court of Canada in *The King v. Noxzema Chemical Company of Canada, Ltd.* (1). There the Court had to consider similar powers of the Minister of National Revenue under section 98 of the Special War Revenue Act, R.S.C. 1927, chap. 179, as amended by 23-24 Geo. V, chap. 50, section 20, which reads as follows:

98. Where goods subject to tax under this Part or under XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The Minister had found that the prices obtained by the respondent from sales to a distributor were less than the fair prices on which sales tax and excise tax should be imposed and had determined the fair price on which the taxes payable by the respondent should be imposed. In this Court Maclean J. held that the determination by the Minister was not conclusive, but the Supreme Court of Canada unanimously took a different view. Davis J., speaking of the Minister's duty, said at page 180:

My own view is that it is a purely administrative function that was given to the Minister by Parliament in the new sec. 98;

(1) (1942) S.C.R. 178.

If that be the correct interpretation, in point of law, of the section in question, then the administrative act of the Minister is not open to review by the Court. It is to be observed that no statutory right of appeal is given.

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Kerwin J. was more specific and definite in his statement. At page 185, he said:

We cannot be aware of all the reasons that moved the Minister and, in any event, his jurisdiction under section 98 was dependent only upon his judgment that the goods were sold at a price which was less,—not, be it noted, less than what would be a fair price commercially or in view of competition or the lack of it,—but less than what he considered was the fair price on which the taxes should be imposed. The legislature has left the determination of that matter and also of the fair prices on which the taxes should be imposed to the Minister and not to the Court. In my view, section 98 confers upon the Minister an administrative duty which he exercised and as to which there is no appeal.

He then quoted with approval the principle laid down by the House of Lords in *Spackman v. Plumstead District Board of Works* (1), where the Earl of Selborne L.C. said:

And if the legislature says that a certain authority is to decide, and makes no provision for a repetition of the inquiry into the same matter, or for a review of the decision by another tribunal, prima facie, especially when it forms, as here, part of the definition of the case provided for, that would be binding.

I am, therefore, of the view that, when goods are imported into Canada, the Minister has power to find that it is difficult to determine their value for duty for any one or more of the causes or reasons specified in paragraphs (a) to (e) of section 41 of the Customs Act; that his findings thereon, even if erroneous, are not subject to review by the Court; that, having made such findings, the Minister may determine the value for duty of such goods; that such determination is an administrative act; that it is conclusive of the value upon which the duty on such goods is to be computed and levied; and that it is not subject to review by the Court.

It was contended for the defendant that the Minister's determination was a reversal of the appraisal by the Chief Dominion Customs appraiser and that effect should not be given to it unless it could be shown that Parliament had conferred upon the Minister power to reverse an existing appraisal. I am unable to accept this view. Clearly, of course, the determination under

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section 41 and the appraisal under 48 cannot both stand. If the Minister's determination is valid and referable to the goods imported by the defendant, the appraisal may be disregarded. The question is which valuation is valid, the appraisal or the determination; if the latter is valid the former is not. The question is not whether a power of reversing an existing appraisal has been conferred upon the Minister at all, but rather whether the Minister has validly exercised the jurisdiction conferred upon him by Parliament. If he has, he need not concern himself with whether there has been an appraisal or not, for it is, I think, obvious that if the Minister has validly determined the value for duty of specific goods under section 41, no appraiser has any right to make an appraisal in respect of the same goods. In the field of jurisdiction assigned to the Minister there is no place for the appraiser. If the Minister finds, for example, that the goods are not sold for home consumption in the country of export, of which he is the sole judge, the jurisdiction to determine their value for duty belongs to him and not to the appraiser.

It was also contended that section 41 did not apply when an appraisal had been made and the duty on the goods had been paid, but was applicable only when the appraiser found that he could not make an appraisal because there was no home market in the country of export. Related to this contention, but not entirely consistent with it, was the argument that the determination by the Minister does not affect goods already imported but is applicable only to goods to be imported in the future. It was argued that the words "are imported" in section 41, when used with regard to goods, cannot refer to goods that have been imported but must refer only to goods that are being imported, and that the words "the value so determined shall, until otherwise provided, be the value upon which the duty on such goods shall be computed and levied" clearly contemplate future use of the determination. The contention generally was that section 41 was not retrospective in effect but prospective only. There are a number of reasons why this view cannot be adopted. Whether section 41 has retrospective effect is not really involved at all. The section gives the Minister jurisdiction to deal with a

specific matter, namely a specific importation of goods when such goods are imported into Canada under the circumstances and conditions specified. That is to say, there must have been an importation of goods before he can exercise any jurisdiction. An analysis of the various causes or reasons specified in paragraphs (a) to (e) shows that a number of them relate to matters that must be subsequent to the importation of the goods. We are concerned only with reasons (a) and (e). Reason (a) is one that must exist before or at the time of importation but reason (e) relates to a condition that can exist only after the time of importation. The Minister must apply his mind to the specific goods that have been imported and the circumstances and conditions which render it difficult to determine their value for duty and in order to make his findings in respect thereto he must consider not only the state of things in the country of export but also what has happened in Canada with reference to the said goods. Then, when he has made his findings, he may determine the value for duty of "such" goods, that is to say, the very goods whose importation and subsequent disposition gave him his jurisdiction to determine their value for duty. Similarly, when it is provided that the value determined by the Minister shall be the value upon which the duty shall be computed and levied it is the duty on "such" goods that is specified, that is, the specific goods whose importation and subsequent disposition caused him to make his enquiries, his findings and his determination. I think it is clear, on the grammatical construction of the section, that the Minister's determination was referable to the canned corned beef imported by the defendant during 1940 to 1942.

Section 41 should be read in the light of section 2, subsection 2, which provides as follows:

2. 2. All the expressions and provisions of this Act, or of any law relating to the Customs, shall receive such fair and liberal construction and interpretation as will best ensure the protection of the revenue and the attainment of the purpose for which this Act or such law was made according to its true intent, meaning and spirit.

The adoption of the defendant's contention would run counter to this guide to the interpretation of the Act in that it would lead to anomalous results and permit the importation of goods at values for duty not contemplated

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by the Act. If section 41 did not apply to the importation of goods that had been appraised and the determination by the Minister were referable only to goods being imported but not appraised or to goods to be imported in the future it would mean that when goods have been imported and appraised by the original appraiser at the port of entry and the duty has been paid, and it is then shown that the goods were not sold for home consumption in the country of export, the original appraisal would have to stand, for, under the contention put forward, no one would be able to review it if the Minister should make a determination under section 41 as he did in the present case. The Minister's finding that the goods were not sold for home consumption in the country of export would make it impossible for the Chief Dominion Customs appraiser to act under section 48, for the case would then fall outside of section 35 and he could not find the fair market value in accordance with the basis laid down by such section. Likewise, if the Minister's determination were not referable to the goods already imported, he also would be powerless to act. This would mean that the appraisal would stand without review and that the goods would have been imported at a value for duty not in accord with section 35, which is a governing section. Such a result is so anomalous as to warrant the rejection of an interpretation that will lead to it. Moreover, if the original appraisal were to stand under the circumstances mentioned, it would be tantamount to saying that the appraisal was conclusive, even if the goods were not sold for home consumption in the country of export. Not only would this run counter to section 35, but it would also involve a right on the part of the original appraiser to decide whether the case falls within section 35 or not. He has no power to make such a decision, for only the Minister is empowered to make it. The adoption of the defendant's contention would also run counter to section 41, for it would imply a right in the original appraiser to make a decision which he has no power to make and thus oust the Minister's jurisdiction in a matter of which he is the sole judge.

A reference to section 43 will also show that the defendant's contention is untenable. Section 43 is clearly

prospective in effect. It provides for the fixing of values for duty for the future in respect of certain classes or kinds of goods where the conditions specified by the section appear to exist. Section 41 does not deal with classes or kind of goods but with specific goods imported under specified circumstances and conditions and the Minister is given power to determine the value for duty of "such" goods. If it had been intended to make the Minister's determination referable only to goods to be imported in the future similar to the goods already imported, Parliament would have made such intention clear by the use of words other than those used. Section 41 would then more properly have been incorporated in section 43. It is not meant to cover a future situation but an existing one. It was designed to fill a gap which the appraisers have no power to fill and for which section 43 makes no provision.

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There is further authority for rejecting the defendant's contention. In the *Nozzema Case* (*supra*), section 98 of the Special War Revenue Act gave the Minister power to act.

Where goods subject to tax under this Part or under Part XI of this Act are sold at a price. . . .

In that case the sales were made during a period prior to the Minister's determination. There was no question there of the Minister's determination being referable only to sales in the future; it was clearly applicable to specific sales already made by the respondent. The words used in section 98 of the Special War Revenue Act are "are sold". In section 41 of the Customs Act the words used are "are imported". In both cases the Minister is given power to make a determination in respect of specific goods, in the one case in respect of goods already sold, and in the other in respect of goods already imported.

It is, in my opinion, quite clear that, when the Minister makes a valid determination under section 41, his determination is not prospective in effect but is referable to the specific goods whose importation and subsequent disposition caused him to make his enquiry and determination.

The determination by the Minister in the present case is, therefore, the value upon which the duty on the canned

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corned beef imported by the defendant during the years 1940 to 1942 is to be computed and levied. The additional amount found payable by the defendant as the result of such determination is, under section 112 of the Act, a debt due and payable to His Majesty, and the plaintiff is entitled to recover it from the defendant.

Under these circumstances it is unnecessary to deal further than I have done with the contentions of the parties relating to the appraisal made by the Chief Dominion Customs appraiser.

The powers of the Minister under section 41 of the Act are very wide and might conceivably be abused without any power on the part of the Court to intervene. While the exercise of the powers in the present case seems to bear harshly upon the defendant, it must be borne in mind that the Court is not aware of all the facts that may have caused the Minister to make his determination. In any event, the Court cannot concern itself with the wisdom of the policy or the harshness of its effects in any given case, for these are matters for Parliament to determine. The Court must confine itself strictly to interpretation of the law as laid down by Parliament. In my opinion, the Minister acted within his jurisdiction in his determination of value for duty, dated August 19, 1943, the determination is referable to the canned corned beef imported by the defendant during 1940, 1941 and 1942 and the defendant is liable for the amount of additional customs duty and taxes found by the Minister to be payable. There will, therefore, be judgment for the plaintiff for \$49,312.03. and costs.

Judgment accordingly.
