IN THE COURT OF APPEAL 99.103

SUPREME COURT OF QUEENSLAND

Appeal No. 4704 of 1998

Brisbane

[Royds v Norcross Press P/L]

BETWEEN:

KARL DUNCAN ROYDS
(Plaintiff) Appellant

AND:

NORCROSS PRESS PTY LTD
ACN 009 658 253
(Defendant) Respondent

McMurdo P
McPherson JA
Shepherdson J

Judgment delivered 7 April 1999

Separate reasons for judgment of each member of the Court; each concurring as to the order made.

APPEAL DISMISSED WITH COSTS TO BE TAXED.

CATCHWORDS: **PRACTICE - Pleadings - plaintiff claimed back injury caused while working - defendant led evidence of plaintiff stating injury not work related - whether the defendant was required to plead allegation of prior inconsistent statement - whether trial judge erred in allowing questions relating to prior inconsistent statement of plaintiff - whether these questions amounted to an allegation of fraud.**

***Ghazal v Government Insurance Officer of New South Wales* (1992) 29 NSWLR 336 - *Campbell v Commissioner of Railways* (1902) *Brisbane Courier Reports* Aug 21, 1902 applied.**

s18 *Evidence Act* 1977 applied - *District Court Rules*, r 92.

Counsel: Mr MG Grant-Taylor for the appellant
Mr RC Morton for the respondent

Solicitors: Smith and Stanton for the appellant
Corrs Chambers Westgarth for the respondent

Hearing Date: 9 March 1999

IN THE COURT OF APPEAL

SUPREME COURT OF QUEENSLAND

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Before McMurdo P
McPherson JA
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BETWEEN:

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(Plaintiff) Appellant

AND:

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ACN 009 658 253
(Defendant) Respondent

REASONS FOR JUDGMENT - McMURDO P

Judgment delivered 7 April 1999

1 I have read the reasons for judgment of McPherson JA and Shepherdson J and I agree with them as to the proposed orders , generally for the reasons given by them.

2 Rule 92 of the *District Court Rules* requires that:

> "(2) The defence shall state specifically which of the allegations in the plaint the defendant admits and which such allegations the defendant denies or does not admit, and all matters of fact which show that the plaintiff's claim is not maintainable or that the transaction relied upon by the plaintiff is void or voidable in point of law and all grounds of defence which if not raised would be likely to take the plaintiff by surprise as, for instance, infancy, bankruptcy, justification if the claim is for tort, a defence upon equitable grounds, fraud, release, payment, performance, facts showing illegality either by statute or common law or the statute of frauds and limitations or any other statute providing for a limitation."

3 The respondent's defence left in issue the appellant's claim that he injured his back at the respondent's premises.

4 The respondent sought to cross-examine the appellant about a conversation he had with a fellow worker in which the appellant said he had hurt his back moving soil on the weekend. This was relevant to the appellant's credit and was an admission against his interest. Rule 92 of the *District Court Rules* does not require the respondent to specifically plead such a conversation before embarking upon that line of cross-examination. Such an approach seems elementary, but I am indebted to McPherson JA for locating the decision of Griffith CJ in *Campbell v Commissioner of Railways*[1] which is authority for that proposition.

5 The learned trial judge raised the possibility of an adjournment with the appellant's counsel but no application was made.

6 As the appellant denied the conversation, under s 18 of the *Evidence Act* 1977 the respondent was then entitled to prove that the conversation occurred. The learned trial judge was entitled to accept that prior inconsistent statement as relevant to the appellant's credit. His Honour was also entitled under s 101 of the *Evidence Act* 1977 to accept the truth of the appellant's statement to his co-worker, which, together with other evidence referred to by His Honour, clearly entitled him to reject the appellant's evidence as to how his back injury occurred. *Ghazal v Government Insurance Office of New South Wales*[2] has no application on the facts of this case, for the reasons given by Shepherdson J.

7 There is nothing of substance in the initial attractiveness of the appellant's submissions. I, too, would dismiss the appeal with costs.

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1 (1902) Brisbane Courier Report Aug 21, 1902; vol. 35 Courier Mail cuttings, Supreme Court Library.

2 (1992) 29 NSWLR 336.

IN THE COURT OF APPEAL

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McPherson J.A.
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BETWEEN:

KARL DUNCAN ROYDS
(Plaintiff) Appellant

AND:

NORCROSS PRESS PTY. LTD.
ACN 009 658 253
(Defendant) Respondent

REASONS FOR JUDGMENT - McPHERSON J.A.

Judgment delivered 7 April 1999

1 I have read what has been written by Shepherdson J., and in substance I agree with it. The appeal should be dismissed.

2 The matter is really quite simple, perhaps to the point of meriting the description elementary. The plaintiff alleged that he was injured in an incident at work. The defendant did not admit the allegation. At the trial, the plaintiff gave evidence and was cross-examined with a view to showing that his testimony about the incident was not credible.

3 Counsel for the defendant at the trial evidently had it in mind to adduce evidence, as he later did, from the plaintiff's fellow-employee Sizeland that the plaintiff had on an earlier occasion complained about hurting his back while shifting soil at home. It was not

the purpose of that evidence to prove that that was how his back injury, if any, had taken place. A statement to the effect that he had hurt his back in that way was, however, a prior statement or admission that was inconsistent with the plaintiff's present testimony at the trial. If proved to have been made by the plaintiff, it went to his credit or reliability as a witness of truth because it contradicted what he was saying in the witness box at the trial. It is one of the exceptions to the rule that evidence about matters collateral to the issue are final.

4 Before counsel for the defendant was entitled to adduce Sizeland's evidence to prove what the plaintiff had said on the earlier occasion, he was bound to comply with the requirements of s.18 of the *Evidence Act 1977*:

> "**Proof of previous inconsistent statement of witness.** If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the proceeding and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it:
>
> Provided that, before such proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness and he must be asked whether or not he has made such statement."

It was therefore incumbent on counsel for the defendant in cross-examining the plaintiff to identify the occasion on which the plaintiff was alleged to have made the statement; and to ask him whether or not he had made it. Only then, if the plaintiff did not "distinctly admit" that he had made the prior inconsistent statement, was it open to the defendant under s.18 of the Act to prove through Sizeland that the plaintiff had in fact made it.

5 It was while this groundwork was being laid that counsel for the plaintiff objected that none of this had been pleaded. The rule is that what must be pleaded are "the material facts on which the party pleading relies to support his claim or defence ... but not the

evidence by which they are to be proved ...". See O.22, r.1. of the *Rules of the Supreme Court*. A prior inconsistent statement of the kind being put forward here is evidence and not a material fact within the meaning of that rule. To defeat the claim in this action, the defendant had no need to make out a case that the plaintiff had hurt his back shifting soil at home or anywhere else. All it needed to do was to undermine the case that the plaintiff was setting up, which was that he had hurt his back at work on a particular occasion and in a particular way. The cross-examination of the plaintiff and the evidence of Sizeland were directed to that end.

6 I agree with Shepherdson J. that the matter is covered by what was said by Mahoney J.A. in *Ghazal v. Government Insurance Office* (1992) 29 N.S.W.L.R. 336, 347. However, I think that the decision in *Campbell v. Commissioner of Railways* (1902) *Brisbane Courier Reports* Aug. 21, 1902, which is in volume 35 of the bound volumes of those newspaper cuttings in the Supreme Court Library, is perhaps an even clearer example. I suspect that the rule that Mr Feez of counsel for the plaintiff was referring to there was not O.25, r.1 as reported in the *Courier*, but O.22, r.1 of the *Rules of the Supreme Court* mentioned above. The plaintiff (whose name was really Gleeson) claimed to have been injured when he fell out of the defendant's train through the negligence of the defendant in maintaining a defective carriage door. The Attorney-General, who appeared for the defendant opened that evidence would be called in the defence case to prove a conspiracy between the plaintiff and another to defraud the defendant by making a claim that was false. As the defendant's evidence later showed, the plaintiff and others had previously made similar claims against Railway Commissioners in two or three other Australian States or colonies. As it happens, he was later prosecuted and convicted in Queensland for perjury arising out of his evidence at the civil trial before Griffith C.J. Some time later, while still serving his sentence, he made what the press described as a "miraculous" recovery from his previously disabling injuries. He had given his evidence both at the civil trial and at the criminal trial recumbent on a stretcher on the floor of the court; but, after some months in prison, he was suddenly able to walk again.

7 Griffith C.J. rejected the submission by Feez for the plaintiff that there was an obligation on the defendant to plead the alleged conspiracy. His Honour ridiculed the suggestion that the defendant could not allege the plaintiff was a liar without pleading it. "You do not plead evidence", he said. He added that, under the old system of pre-

Judicature pleading, the defence in such a case could and would have been raised under the terse plea of "not guilty". That, in an action in tort, formerly raised the general issue, and so put the plaintiff to proof of the whole of his case, just as a plea of not guilty still does so today in criminal proceedings unless reliance is being placed on an alibi.

8 The present case is, if anything, even clearer than *Campbell's* case. The defendant did not admit anything, but simply put the plaintiff to proof of the allegations in his statement of claim, and then set about showing, by cross-examination of the plaintiff at the trial and through Sizeland's evidence, that the plaintiff was not worthy of belief. That course did not require, or even permit, the pleading of any affirmative defence because no such defence was being raised. The plaintiff's case at trial was simply challenged on the basis of the weakness in its proof.

9 The learned trial judge was plainly correct, and the appeal must be dismissed with costs.

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BETWEEN:

KARL DUNCAN ROYDS
(Plaintiff) Appellant

AND:

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ACN 009 658 253
(Defendant) Respondent

REASONS FOR JUDGMENT - SHEPHERDSON J.

Judgment delivered 7 April 1999

1 This appeal raises a short point - in a case where the defendant proposes to challenge the credit of a plaintiff on issue joined, is the defendant required to plead a prior inconsistent statement made by the plaintiff on that issue?

2 The appeal is by a plaintiff whose claim for damages for personal injuries was dismissed after trial in the District Court held at Brisbane.

3 The defendant's defence showed:

(a) That the defendant relevantly admitted the plaintiff's allegations that he was at all material times employed by it as a printer, and that on or about Monday 26 June

1995, was carrying out duties in the course of his employment at the defendant's Eagle Farm premises.

(b) That the defendant did not admit the following specific allegations in the plaint:

> "**8** At or about 5.00pm on the date above, [26 June 1995] the plaintiff was more particularly engaged in the task of removing a reel of paper from a Drent Gazelle printing machine so as to place the reel of paper on the floor.
>
> **9** Whilst attempting the task aforesaid, the plaintiff sustained an injury to his low back constituted by an intervertebral disc protrusion at the L5/S1 level."

(c) That the defendant denied that the incident alleged and the plaintiff's injury allegedly sustained consequent thereupon were occasioned by the negligence of the defendant its servants or agents.

4 It is unnecessary to refer further to the pleadings.

5 At trial the appellant's evidence was that on Monday 26 June 1995, he was working on the Gazelle Drent machine which was a one person machine. He said:

> "I was doing a normal reel to reel job, as in I was printing on a reel and it was going on a reel and after I finished the reel I went to disengage it from the spindle in the rewind and lower it to the floor like I have always done and that's when I had a very sharp pain in the back." (T10/50)

6 When the plaintiff was cross-examined he agreed with defence counsel that he, the plaintiff, was quite friendly with a work mate named Sizeland who operated a collating machine not far away from the printing press he operated. (T23)

7 I now set out part of the transcript of cross-examination.

> "Q. I suggest to you that on a Monday morning in about July of 1995 shortly before you went off on Workers' Compensation benefits you were lifting or removing a reel of paper from the Drent machine when you said something about your back and held your back; do you remember that?
>
> A. July?
>
> Q. Yes, well, in about July 1995?
>
> A. No, I don't remember that at all.

Q. Shortly before you went off work on compensation you were removing a reel of paper and you said something about your back and held your back. Mr Sizeland asked you, in effect, what the matter was; do you remember that?

A. No.

Q. You told him that you'd hurt your back moving a lot of soil on the weekend?"

At this stage plaintiff's counsel objected on the basis that "none of this is pleaded". Counsel referred His Honour to rule 92 of the District Court Rules saying the plaintiff was taken by surprise.

8 During this exchange, I note His Honour said to plaintiff's counsel:

> "At least you know now. You can get an adjournment to prove they didn't have any soil to move."
>
> [No adjournment was sought]

9 His Honour ruled that the defendant's counsel could ask the questions. The following further questions and answers then appeared:

"Q. Mr Royds, what you told Mr Sizeland on that Monday morning in July or shortly before you went off work on compensation was that you hurt your back moving soil on the weekend, didn't you?

A. Has he got a date, actual date down there that he said I was actually moving soil?

Q. Why, do you think you were moving soil on a particular date about then, do you?

A. No, I'm just asking a question.

Q. Don't ask me questions, please, answer mine. Now, answer what I'm putting to you. You told Mr Sizeland, didn't you, that you hurt your back moving soil?

A. No, I don't recall saying that at all because there was no soil around the house to move."

10 Graham Alexander Sizeland gave evidence in the defence case. He recalled in 1995 the plaintiff had ceased to come to work for a while - he understood he had a bad

back. He went on to say that prior to the plaintiff stopping work in 1995, he had a discussion with him about his back. The following questions and answers appeared (T68):

"Q. Do you recall when it was?

A. It was a Monday morning, I couldn't give you times or dates. It was early Monday morning.

Q. What time did your shift start on a Monday?

A. 7 o'clock.

Q. What time did the Drent printer operator's shift start?

A. Used to be 5 o'clock, yeah.

Q. Tell us what happened on that Monday morning, take it slowly, what you saw and what you heard?

A. Well, Karl was taking a reel off the back of the press and put his hand to his side and said - are you allowed to swear?

Q. Yes, say what he said?

A. "Shit me back, got a bad back." So I went over and asked him what he'd done and he said, Oh, I've done me back in." I said, "How have you done your back?" "Oh, probably shifting soil yesterday"."

It appears that the plaintiff continued at work from 26 June to about 7 July 1995.

11 When giving his reserved reasons for judgment, the learned trial judge expressly relied on Sizeland's evidence saying:

> "A much more significant statement, the precise terms of which the defendant could not prove, was made to Mr Sizeland, the plaintiff's fellow employee for eight and a half years (his time with the defendant extended even further back), to the effect that the plaintiff said he had a bad back, 'probably' attributable to 'shifting soil yesterday.' Mr Sizeland said this happened early on a Monday morning and not long before the plaintiff went off on compensation (his last day at work appears to have been 7 July 1995) - in the context of the plaintiff taking a reel off the back of his printing press, putting his hand to his side in a way that might indicate pain and saying, 'Shit, me back'. No plausible reason why Mr Sizeland (who

> still works for the defendant) might make this up, or be mistaken about the effect of it, was suggested by Mr Grant-Taylor. The plaintiff had ample opportunity to explain away his statement, if it had been made. If he did make it, as I find, in the absence of some explanation, it is very difficult to reconcile with the plaintiff's evidence regarding an incident at 5p.m. on 26 June 1995. The way the case was conducted, the plaintiff deliberately nailed his colours to that mast."

12 It is unnecessary to discuss further His Honour's reasons because Mr Grant-Taylor counsel for the appellant, conceded at the outset of the hearing of this appeal that "this appeal gets nowhere unless your Honours are persuaded that the matters to which exception was taken during cross-examination of the plaintiff are matters in respect of which an obligation rested upon the defendant to plead in the first instance".

13 The appellant's argument both below and in this Court is that:

1. The respondent's case was that the appellant's claim was fraudulent and therefore was required to be pleaded and particularized.
2. Because it was not pleaded, the respondent should not have been permitted to advance such a case and Sizeland's evidence should not have been admitted.

14 In support of his argument, Mr Grant-Taylor has relied on a decision of the New South Wales Court of Appeal, *Ghazal v Government Insurance Office of New South Wales* (1992) 29 NSWLR 336.

15 In that case a District Court judge had dismissed the plaintiff's claim for damages for personal injuries suffered in a car accident because he was not satisfied that the plaintiff was involved in the accident.

16 The issue was whether evidence that he was a passenger in the car should have been acted on. The learned trial judge had said:

> "... neither am I in a position to accept the account of the plaintiff as to what happened that night. It was put to the plaintiff that he was not in the vehicle ... ."

17 One ground of appeal in the Court of Appeal was that "The appellant's presence was not properly put in issue by the respondent in its defence or in accordance with the District Court Rules".

18 Kirby P, on examination of the transcript concluded that the finding of the learned trial judge that "It was put to the plaintiff that he was not in the vehicle" rather overstated what was put to the plaintiff. The President referred to the actual questions asked of the plaintiff and (at p.344) said:

> "The question does not direct the witness' attention expressly to whether he had really been in the motor vehicle at the time of the accident. It does not put to him in clear terms that:
>
> (a) He was not in the motor vehicle at all; and
> (b) (by inference) that his claim was a false one."

19 Kirby P, at p.344-5 said:

> "The duty to confront a person fairly with a suggestion that a case is false, even fraudulent, cannot be doubted. The duty arises from 'common fairness and the proper administration of justice'."

20 His Honour cited authority and went on:

> "In a trial, the duty arises most clearly when what is being suggested is fraudulent and false testimony on the part of a witness. It is a well-established rule of our legal procedure that such contentions must be clearly identified and not raised accidentally, peripherally and nonchalantly in the course of litigation."

21 His Honour did not consider the aspect of pleading.

22 Mahoney JA the second member of the Court of Appeal did consider the aspect of pleading. He said (at p.347):

> "If the plaintiff's presence in the car was a real issue at the trial, that issue raised questions as to fraud, perjury and

> crime. The plaintiff had claimed that he was there and had sought to recover money because he was. If he was not there, his claim was fraudulent, he lied in saying that he was, and that could constitute a crime.
>
> There are principles which in general regulate what should be done when issues of this kind are to be raised. These principles regulate both the raising of the issue and the proof of it."

23 Mahoney JA then went on:

> "If such a matter is pleadable then ordinarily it may not be raised unless pleaded. There is a distinction between issues which are formally pleadable and those which, though not formally pleadable, may arise as real issues at the trial. If an issue is formally pleadable, for example, if fraud is an element in the claim or in a defence, a party will ordinarily not be allowed to raise it unless it is properly pleaded. Pleas which do not raise fraud are not to be 'used as a screen behind which one man is to be at liberty to charge another with fraud or dishonesty without assuming the responsibility of making that charge in plain terms': *re: R Deceased* (1951) (p.10 at 19) *re: Stott deceased; Klouda v Lloyds Bank Ltd* (1980) 1 WLR 246 at 252; (1980) 1 All ER 259 at 264.
>
> If the allegation, for example, of fraud is in this sense not pleadable - <u>the present is such a case</u> - it is necessary that the fact that an allegation is to be made which is of this nature is, in my opinion to be made clear: it is to be clear that that is, in the sense to which I have referred a real issue at the trial ... ."
> (emphasis is mine)

24 In my view, the decision in *Ghazal* is against Mr Grant-Taylor. The allegations which should have been clearly put to *Ghazal* and which were not clearly put were regarded by Mahoney JA as non-pleadable, but they did raise a real issue at the trial and therefore had to be put clearly to *Ghazal*.

25 As Mahoney JA said (at p.349):

> "Where fraud is not pleadable, the fact that it will be alleged should be clearly raised as a real issue at the trial. The time and manner of doing

> this may be affected by the way in which, in order to establish the fraud or to elicit evidence in cross-examination, it is necessary that the matter be approached. In addition, it sometimes occurs that an issue of this kind is not recognised before the trial but emerges during the course of it. What must be done is to be accommodated to situations of this kind. But, in the end, the fact that such an issue is a real issue must be made clear."

26 I add that the third member of the court, Clarke JA agreed with the judgment of Kirby P and agreed with Mahoney JA's "statement of the principles which should be applied by legal practitioners in determining whether to raise a case of fraud."

27 In the case before this Court, I have no doubt that the matters raised in cross-examination of the appellant were not pleadable - nevertheless, the allegations made were required to be made quite clearly to the plaintiff and they were. The allegation which was at issue at the trial was whether or not the plaintiff had told Sizeland that he had hurt his back shifting soil; this was the prior inconsistent statement.

28 Apart from *Ghazal*, the learned trial judge's ruling can be supported from an old decision reported in the Courier Reports Vol.35 at p. 192 et.seq. - a decision of which I have been made aware by the industry of McPherson J.A. and to whom I am indebted for knowledge of the case.

29 In that case John Robert Campbell, sued the Commissioner for Railways to recover damages alleged to have been received while travelling on the railway between Toowoomba and Warwick.

30 On 20 August 1902, the action came on for trial before the Chief Justice Sir Samuel Griffith, and a jury.

31 The report shows that on 22 August, the defence opened that it was prepared to adduce evidence that would justify the jury in coming to the conclusion that "in this case there had been one of the most audacious attempts to perpetrate a swindle by means of

conspiracy that had ever occurred."

32 The trial was without pleadings and during the defence opening, Campbell's counsel Mr Feez, submitted that in accordance with Order 25 rule 1, if a defendant intended to allege fraud he must plead it. Order 25 rule 1 then in force read:

> "In actions for a debt or liquidated demand in money a mere denial of the debt is not sufficient."

33 Whether the reference by Mr Feez to the rule was correctly recorded by the Courier Report may be doubted but the thrust of Mr Feez' submission is readily seen. The report of proceedings on 22 August 1902 shows the following exchange:

> "The Chief Justice: The defendant's answer to the plaintiff's story is that he is a liar and his whole story a deliberate concoction and you say defendant must plead that specifically?
>
> Mr Feez: Certainly.
>
> The Chief Justice: I have never heard that suggestion before in my life. Do you mean to say that you cannot allege the plaintiff is a liar without pleading it.
>
> Mr Feez: I do not say that, I say that if my friend opens a deliberate case of fraud he must plead it; and I submit that this rule was made for the purpose of allowing the plaintiff when a case of fraud is alleged to meet it.
>
> The Chief Justice: Well kindly suggest how such a defence could be pleaded.
>
> Mr Feez: That Henderson and the plaintiff conspired together to defraud the Railway Department by pretending that an accident occurred which never happened.
>
> The Chief Justice: What does that amount to but denying that the accident happened, you do not plead evidence.
> [Mr Henderson did not give evidence in the plaintiff's case and had apparently disappeared]."

34 The report shortly afterwards shows:

> "Mr Feez: I submit that they cannot allege fraud without pleading it specifically.

> The Chief Justice: Surely the defendant can always say the plaintiff is a liar.
>
> Mr Feez: Certainly."

35 The report shows further discussion and at p.203 the following:

> "The Chief Justice said: The rule which Mr Feez quotes has no application whatever to the case. It is a rule which has been in force as long as there have been any rules of pleading in British dominions. So far as my reading goes, it has been in force for centuries and I have never heard of it being suggested that it had any application to a case where the defendant met the plaintiff's case by alleging that his story was false. In my opinion the defendant is entitled to bring in evidence that plaintiff's story is false, and if incidentally it turns out that he has been guilty of conspiracy with someone else it makes no difference to the real fact that his story is false. The amount of the conspiracy cannot make any difference to the rules of pleading and I confess I do not understand the objection being made."

36 It was some 90 years later that in *Ghazal*, Mahoney JA made the statements which have been set out earlier in these reasons. These statements are consistent with the view of Sir Samuel Griffith. The respondent in the present case was concerned to show that the plaintiff/appellant's claim in the plaint and at trial in court as to the circumstances in which he alleged he injured his back was inconsistent with a statement made to Sizeland at about the time the appellant ceased employment and thereby damaged his credit on the vital issue of when and how his back was injured. The fact that there is no conspiracy in the present case is a point of distinction with Campbell's case but the principle stated by the learned Chief Justice was undeniably correct and applicable to the present appeal.

37 For the foregoing reasons the appeal should be dismissed with costs to be taxed.