SUPREME COURT OF QUEENSLAND

CITATION:	*Metway Leasing Ltd v Commissioner of State Revenue* [2004] QCA 54
PARTIES:	**METWAY LEASING LIMITED** ACN 002 977 237 (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	Appeal No 8139 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Case Stated
DELIVERED ON:	5 March 2004
DELIVERED AT:	Brisbane
HEARING DATE:	23 February 2004
JUDGES:	McMurdo P, McPherson JA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**The appeal is allowed and the questions in the Stated Case are answered as follows:** **(a) Is the true copy of the original of the offer (Attachment "A" to the Case) lodged with the Commissioner on 5 September 1994 chargeable with duty?** **No** **(b) If "yes" to (a), is the duty with which that instrument is so chargeable in the sum of $2,133,817.50 or some other, and if so what, amount?** **Unnecessary to answer** **(c) If "yes" to (b), is the assessment of the Commissioner contained in the Assessment Notice issued 5 January 1999 correct and if not, what duty, if any, is payable?** **Unnecessary to answer** **(d) How should the costs of and incidental to the stating of this case and of the appeal be borne and paid?** **By the respondent**
CATCHWORDS	TAX AND DUTIES – STAMP DUTIES – WHAT TRANSACTIONS OR INSTRUMENTS ARE LIABLE – CONVEYANCE OR TRANSFER ON SALE –

QUEENSLAND – where written offer made by NatWest to appellant to assign leases, and hire or hire purchase property – where appellant accepted offer by delivering a bank cheque in the amount of $100 to NatWest, which was the only authorised mode of acceptance under the terms of the offer – whether the written offer was an agreement or memorandum of an agreement for the purposes of the *Stamp Act* 1894 – whether the parties had done or said anything to specifically adopt the written offer or integrate it into the contract – whether the written offer should be treated as an instrument of conveyance under s 54(1) of the *Stamp Act* 1894 – whether s 25(1) of the *Stamp Act* 1894 provided evidence of a concluded agreement

Acts Interpretation Act 1954 (Qld), s 36
Stamp Act 1894 (Qld), s 25(1), s 25(2)(a), s 54(1), Sch 1

Beeching v Westbrook (1841) 8 M & W 411; 151 ER 1099, referred to
Carlill v Carbolic Smoke Ball Co [1892] 2 QB 484, considered
Chaplin v Clarke (1849) 4 Ex 403; 154 ER 1269, referred to
Knight v Barber (1846) 16 M & W 66; 153 ER 1101, referred to
MacRobertson-Miller Airline Services v Commissioner of State Taxation (WA) (1975) 133 CLR 125, considered
State Rail Authority (NSW) v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170, referred to

COUNSEL: D G Russell QC with R C Schulte for the appellant
K D Dorney QC with D Marks for the respondent

SOLICITORS: Clayton Utz for the appellant
Crown Law for the respondent

[1] **McMURDO P:** I agree with McPherson JA's reasons for concluding that the appeal should be allowed; that question (a): "Is the true copy of the original of the offer (attachment 'A' to the Case) lodged with the Commissioner on 5 September 1994 chargeable with duty?" should be answered "No"; that it is unnecessary to answer questions (b) and (c) and that the respondent is to pay the appellant's costs of and incidental to stating the Case and of the appeal.

[2] **McPHERSON JA**: The respondent is the Commissioner of State Revenue who on 5 January 1999 assessed to duty under the *Stamp Act 1894* a document describing itself as Offer to Assign Leases Queensland. The offer was addressed by NatWest Australia Bank Limited to and in favour of Metway Leasing Limited and was dated 30 November 1993. The notice of assessment identified the category of duty under which the instrument was assessed as Conveyance or Transfer; the amount or value of the consideration as $56,975,717.72; and the duty payable apart from penalties as $2,133,817.50.

[3] The taxpayer Metway appealed against the assessment and the parties have stated a case to this Court. The question is whether the document was properly assessed or assessable to duty under the Act.

[4] The Case in para 5 states that the original documentary or written offer was executed by NatWest in Canberra at 4.40 pm on 30 November 1993 by the action of NatWest's attorney Mr Emery in signing it and noting upon it in his handwriting at the foot of the document the figures "4.40"; by striking out "am" from am/pm where those abbreviations were printed ahead of the words "on 30 November 1993"; and by signing his name Timothy Emery as attorney for NatWest. Above that signature appear the words "Signed as an offer at Canberra at …" the time and date mentioned. Then or thereafter, but before 5 pm on 30 November 1993, the offer was accepted by Metway by its duly authorised attorney James Grant in Canberra.

[5] The acceptance took the form prescribed by the offer of delivering a bank cheque drawn by Metway in the amount of $100. It was the method stipulated for in cl 3.2 of the offer, which, according to cl 3.3, was the only authorised mode of acceptance. By the terms of the offer, acceptance by any other method would have been ineffective, and would have created no obligation or rights between NatWest and Metway as purchaser. Once accepted in that way, Mr Emery indorsed a record of such acceptance in the space provided on the original of the documentary offer as having taken place in Canberra at 4.40 pm on 30 November 1993 (Case stated, para 7). The written offer was in fact also signed by Mr Grant, although not as attorney for Metway, but only in his personal capacity as witness to Emery's signature on behalf of NatWest as the maker of the offer.

[6] The offer made by NatWest was, by cl 2.1 of its terms, to assign to Metway its interest as beneficial owner in property consisting of certain identified agreements for lease, hire or hire purchase of chattels ("the property") situated in Queensland. By force of its acceptance Metway was to be treated as having undertaken to NatWest on completion date that it would pay the purchase price calculated in accordance with cl 4 of the offer; but the consideration for the assignment was expressed to be the giving of that undertaking and not the making of any payment under it: cl 2.2(a). By the definition in cl 1.1 when read with cl 5.1, completion was to take place on 1 December 1993 at NatWest's Sydney office, followed by payment (cl 1.1) on 31 December 1993. Matters appear to have so proceeded, although, in consequence of deficiencies in parts of some of the property assigned, some adjustments in the amounts paid were later carried out in accordance with the provisions of the offer.

[7] Metway's claim that the written offer executed by NatWest in Canberra on 30 November 1993 was not dutiable as a conveyance or transfer takes as its starting point the decision of Hawkins J, well known to students of law, in *Carlill v Carbolic Smoke Ball Co* [1892] 2 QB 484. Among the many unsuccessful objections raised by the future Prime Minister who represented the defendants at the trial in that case was that the advertisement or written instrument of offer was not admissible in evidence to prove the contract because it was not stamped as required by the Stamp Act 1891 (54 & 55 Vict, c 39). As to this, Hawkins J said (at 490):

> "Whether a written or printed document falls within this requirement depends upon its character at the time it was committed to writing, or print, and issued. If at the time no concluded contract had been arrived at by the contracting parties, it certainly could not in any

> sense be treated as an agreement, nor could it be treated as a memorandum of an agreement, for there could be no memorandum of an agreement which had no existence. No document requires an agreement stamp unless it amounts to an agreement, or a memorandum of an agreement. The mere fact that a document may assist in proving a contract does not render it chargeable with stamp duty; it is only so chargeable when the document amounts to an agreement of itself or to a memorandum of an agreement already made. A mere proposal or offer until accepted amounts to nothing. If accepted in writing, the offer and acceptance together amount to an agreement; but, if accepted by parol, such acceptance does not convert the offer into an agreement nor into a memorandum of an agreement, unless, indeed, after the acceptance, something is said or done by the parties to indicate that in the future it is to be so considered: see *Edgar v Black*[1]*; Chaplin v Clarke*[2]; *Hudspeth v Yarnold*[3]; *Clay v Crofts.*[4]

The defendant's advertisement in that case, being an offer accepted not in writing, but only by conduct on the part of the plaintiff, was therefore neither an agreement nor a memorandum of agreement within the meaning of the Stamp Act.

[8] The reasoning of Hawkins J was approved by the High Court in *MacRobertson-Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125, 135, in which Stephen J referred to a description of his Lordship's judgment as "the classic statement". In doing so, his Honour said he disregarded "as presently irrelevant", the special case of a written offer, which, after the conclusion of the contract by oral acceptance, is "specifically adopted" as a memorandum of the contract, by "something ... said or done by the parties to indicate that in the future it is to be so considered", per Hawkins J at [1892] 2 QB 484, 490. Likewise, Jacobs J before quoting the passage from Hawkins J that is set out above, explained (133 CLR 125, 144):

> "It has been established by a long line of authority that an offer in writing which is accepted orally or by conduct does not thereupon become an agreement or memorandum of agreement within the meaning of the *Stamp Act.* The words which appear in the schedule to the *Stamp Act* go back unchanged to the language of the English *Stamp Act*: 55 Geo III c 184, and it has been consistently held that no document can require a stamp unless it be an agreement or memorandum of agreement at the time when it comes into existence unless thereafter it is acknowledged by the parties thereto to be the agreement between them. In this respect, the law which developed in respect of a memorandum of agreement under the *Stamp Act* diverged from the law which had developed in respect of an agreement or memorandum of agreement sufficient to satisfy the Statute of Frauds. I do not think that it is necessary to go through the various cases to this effect. I shall do no more than mention some of

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1. 1 Stark 464.
2. 4 Ex 407, per Maule, J.
3. 9 CB 625.
4. 20 LJ (Ex) 361.

them: *Edgar v Blick*[5]; *R v Inhabitants of St Martin's, Leicester*;[6] *Drant v Brown*;[7] *Hudspeth v Yarnold*;[8] *Vollans v Fletcher*.[9]

Barwick CJ decided the appeal on other grounds, while adding that he did not cast doubt on the authorities cited by the appellant, which included *Carlill v Carbolic Smoke Ball Co*.

[9] In the present case the respondent Commissioner fastens on the final passage in the extract quoted from the reasons of Hawkins J, and the approval it received in the reasons of Jacobs J in the High Court case. The respondent submits that here both the provisions of the written offer itself and what the parties (and especially the appellant) did and said about it after its acceptance indicated that it was to be considered as an agreement or a memorandum of their agreement. For its part, the appellant stresses what was said in *MacRobertson-Miller* by Stephen J in respect of the final qualification stated by Hawkins J, as requiring something in the nature of "specific adoption" of the written offer to make it a memorandum of the contract.

[10] If the only matter at issue in this appeal was whether the written instrument of offer had been so accepted as to produce a contract between the parties, there would be no doubt at all about what the outcome would be. The offer when it was made by NatWest was, as offers almost invariably are, intended to solicit acceptance by the offeree Metway and so create a contract between them. If that was not the intention, there was no point in making the offer at all. As para 6 of the Case itself plainly states, "the Offer was accepted … by Metway … on 30 November 1993 … Metway thereby becoming a party to the Agreement arising from such acceptance and becoming legally bound thereby". Nothing is therefore to be gained by dissecting the written offer itself, as the respondent invited us to do, to try to discover whether it, or the form of its execution, or its terms, contemplated that upon acceptance by Metway a contract would come about between it and NatWest. The fact that the provisions of the offer are many and detailed demonstrates no more than that, when accepted, the contract would, like the offer itself, be one that contained many detailed provisions.

[11] The point at issue between the parties is not whether there was an acceptance by Metway which resulted in a contract, but whether NatWest's offer in writing, when accepted by the conduct of Metway in delivering its bank cheque for $100 in accordance with the specifications of the offer, thereupon became an agreement or a memorandum of agreement for the purposes of the *Stamp Act*. As Jacobs J said in the passage from *MacRobertson-Miller*, a long line of authority establishes that it did not. One of the most concise statements comes characteristically from Maule J, who in *Chaplin v Clarke* (1849) 4 Ex 403, 407; 154 ER 1269, 1271, said, "an offer in writing accepted by parol does not require a stamp". See also the remarks of the same learned Judge in *Hudspeth v Yarnold* (1850) 9 CB 625, 631; 137 ER 1036, 1039. Both of these are among the decisions cited in the reasons of Jacobs J in *MacRobertson-Miller* as forming part of the line of authority his Honour was referring to.

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5. (1816) 1 Stark. 464 [171 ER 531.
6. (1834) 2 Ad & E 210 [111 ER 81].
7. (1825) 3 B & C 665 [107 ER 879].
8. (1850) 9 CB 625 [137 ER 1036].
9. (1847) 1 Ex 20 [154 ER 9].

[12] What has proved less easy to elucidate are judicial statements like that of Hawkins J in the *Smoke Ball* case about something being said or done by the parties after acceptance to indicate that the written offer was in future to be considered an agreement or a memorandum of an agreement. It is this that the respondent relies on here. The question cannot be considered in isolation from the statutory provisions which gave rise to those judicial statements. At the time when that line of authority was being established, the relevant statute in England was, as Jacobs J pointed out, the Stamp Act 1815; 55 Geo 2, c 184. Part 1 of Schedule 1 to that Act contained among the duty-charging provisions the following heading:

> "AGREEMENT or any Minute or Memorandum of an Agreement made … under Hand only .. whether the same shall be only Evidence of a Contract, or obligatory upon the parties from its being a written Instrument …".

[13] As can be seen from decisions such as *Beeching v Westbrook* (1841) 8 M & W 411; 151 ER 1099, and *Knight v Barber* (1846) 16 M & W 66; 153 ER 1101, there was more than one view of what those words encompassed and why they had been inserted in the statutory provision. A contract signed by both parties was within the scope of the provision as being an "agreement under hand"; so was a memorandum made afterwards of an agreement already concluded if it was intended to be binding on them as (we would now say) constituting the sole repository of their contractual rights and obligations. In *Beeching v Westbrook*, Parke B considered that to come within the statutory description the written instrument must have been made with the intention of containing within itself the terms of the agreement between the parties. In effect, the parties must have intended the parol evidence rule to apply to that record or expression of their agreement or, in modern terminology, to "integrate" their contract in a written document or documents. Mere letters or correspondence passing between them might sometimes attain that status, as they did in *Chaplin v Clarke* (1849) 4 Ex 403, but only if the parties said or did something to show that they were so intended. This is what was being referred to by Hawkins J at the end of the passage in his judgment in *Carlill v Carbolic Smoke Ball Co* that was considered by Stephen J and Jacobs J in *MacRobertson-Miller Airline Services v Commissioner of Taxation*.

[14] In seeking to determine whether, after acceptance, the parties here did something to "integrate" their agreement in or with the written instrument of offer made to Metway on 30 November 1993, the answer must surely be in the negative. The agreement arose from the acceptance by conduct by Metway of NatWest's written offer. If the document had in fact been signed by both parties, the standard presumption or inference might have been compelling that they intended it to contain the whole of the agreement between them. Even then, on one view, it would have been "no more than an evidentiary foundation for a conclusion that their agreement is wholly in writing": *State Rail Authority (NSW) v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170, 191 (McHugh JA). In this instance it would, I think, have been legitimate afterwards for either party to have proved, if it were so, that there was some other agreed term that was not reflected in the written offer. By making their contract in the form they did, rather than in writing, they deliberately chose to forego the benefits, such as they are, of the parol evidence rule.

[15] No such other term has been put forward by anyone in relation to the instrument of offer or agreement in this case. What is, however, submitted by the respondent is that there are internal memoranda passing between officers of

Metway, and correspondence between it and NatWest during and after February 1994 to September 1994, which in some instances refer to the "accepted offer to assign" or to "the purchase agreement", as well as to particular clauses or provisions of the instrument of the offer as if they had binding force. That, however, is of no significance in the present context. Metway's argument is not and has never been that there was never any binding contract or agreement between it and NatWest incorporating the terms of the offer; but simply that its acceptance of the written offer made by NatWest was effected by conduct, so that no contract or agreement in writing or memorandum of agreement or "instrument" requiring a stamp was brought into existence. At the risk of repetition, para 6 of the Case unambiguously states that on 30 November 1993 the written offer was accepted by Metway, which became legally bound by the agreement that resulted from its doing so. Given a binding agreement, the parties were legally obliged to act in accordance with it, as they evidently did in resolving the difference about adjustments arising from the disputed account or leasing agreement or agreements assigned. Whether there was a dutiable instrument is a different question entirely, which turns on the terms of the relevant provisions of the *Stamp Act.*

[16] The "instrument" in the present case was not assessed to duty under the heading in the Schedule "Agreement … under hand only ..", but, as I have said, under the heading "Conveyance or Transfer". That particular heading of duty does not (and at the relevant time did not) contain the expanded reference in the former to a "Memorandum of Agreement … whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument …". The Schedule to the Queensland *Stamp Act 1894* formerly contained a heading and description in that form; as did the British Stamp Act 1891; 54 & 55 Vict, c 39, from which it was copied. It was the provision considered by Hawkins J in *Carlill v Carbolic Smoke Ball Co*; and it was also a provision in these terms in the Western Australian *Stamp Act* 1921-1971 that was considered by the High Court in *MacRobertson-Miller Airline Services v Commissioner of State Taxation*. Those decisions, or what was said in them about the parties saying or doing something afterwards to indicate that they intended the document to be a memorandum of their contract, have no obvious application or reference to another heading in the schedule, which does not or did not use those words, and which describes and imposes a different kind and rate of duty.

[17] In 1993 the heading Conveyance or Transfer in para 4 of Schedule 1 of the Queensland Act imposed a fixed duty calculated at a specified rate per $100 on the value of the consideration on the sale of any property. Section 49(1) of the Act, like the corresponding s 54 of the British Act, defines "conveyance" and "transfer" to include "every instrument ... (a) whereby property is conveyed, transferred or assigned to … a person". The property the subject of the offer in this case was personal property in the form of choses in action. As such, they were assignable at law by the statutory procedure introduced in Queensland by the *Judicature Act* 1876 or equivalent provisions in New South Wales and the Capital Territory.

[18] The agreement here involved, not a present assignment taking effect immediately, but an agreement to assign to take effect under cl 2.2(b) in future on the completion date, which was the following day 1 December 1993. An agreement to assign in the future, if supported by valuable consideration, as this one was under cl 2.2(a), is capable of taking effect as an assignment in equity. As such, it fell within the ambit of s 54(1) of the Act, corresponding to s 59 of the British Act of

1891, which was introduced after *IRC v Angus* (1889) 23 QBD 579. Section 54 provides:

> "**(1)** Any contract or agreement for sale of any property or any contract or agreement whereby a person becomes entitled or may, provided the terms and conditions thereof are met, become entitled to the conveyance or transfer of any property shall be charged with the same duty as if it were an instrument of conveyance of the property."

In such a case, it is the contract or agreement that is stamped, payment of the duty then being denoted on the subsequent conveyance or transfer if any: s 54(6). The word "property" is defined in s 36 of the *Acts Interpretation Act 1954* to include any legal or equitable interest in real or personal property, and so covers the choses in action which were the subject of the offer to assign in this case.

[19] The agreement to assign constituted by offer and acceptance in Canberra on 30 November 1993 therefore involved a conveyance or transfer within the meaning of the relevant heading in the Schedule to the Act. There was on that date, however, no instrument or document capable of being stamped as a contract or agreement of sale operating within s 54(1) as a Conveyance or Transfer in terms of that head of duty in Schedule 1 of the Act. The documentary offer was not itself a contract or agreement to sell, but, as its terms and its description show, no more than an offer to sell and assign the subject leases. Its acceptance by conduct on 30 November 1993 brought an agreement to sell and assign into existence; but, because the offer was accepted by conduct, it was not an "instrument of conveyance" within s 54(1). The conveyance or assignment of the property took place in Sydney on the following day 1 December 1993 by force of cl 5.3 of the agreement to assign, and without any further act being required of NatWest as provided in cl 5.1 of the agreement for sale and purchase of the property. If (which I doubt), it is possible to regard the specific provisions of the Schedule with respect to an Agreement "under hand only" as being applicable to "any contract or agreement for sale" as defined or described in s 54(1) of the Act, the subsequent conduct of the parties shows no more than that they were conforming to the terms of their admitted contract, and not that they had *ex post facto* adopted the written offer as a memorandum or complete record of their agreement.

[20] It follows in my opinion that according to ordinary legal conceptions prevailing under the *Stamp Act*, the offer to assign leases was not an instrument liable to duty as a Conveyance or transfer under the Act, and its acceptance by conduct did not convert it into one. To that extent at least, the ratio of *Carlill v Carbolic Smoke Ball Co* applies to a contract or agreement under s 54. The respondent nevertheless submits that the appellant is liable to duty "indirectly" under s 25 of the Act. It provides:

> "**25. Evidence of parties to instrument**
>
> (1) In every case where 1 or more instruments evidence a concluded agreement or comprise a memorandum of a concluded agreement, the same shall be deemed to have been signed or executed by or on behalf of each and every party to such agreement who is legally bound thereby.
>
> (2) For the purposes of this Act and unless the contrary intention appears, where an instrument is not the original instrument it is to be deemed: -

(a) to have been signed or executed by or on behalf of every party to the original instrument who is legally bound thereby;

(b) to be signed or executed on the same date and in the same manner as the original instrument."

It was said that the effect of s 25(1), which was introduced into the Act by amendment in 1968, was "evidence" of a concluded agreement in the terms of the written offer to assign made in Canberra on 30 November 1993. For that purpose, Mr Dorney QC for the Commissioner limited his submission on this point to the words "evidence a concluded agreement" in s 25(1), and did not rely on the words "comprise a memorandum of a concluded agreement". There are good reasons why he should not have wished to resort to the latter alternative. To adopt the words of Hawkins J in *Carlill v Carbolic Smoke Ball Co*, "there could be no memorandum of an agreement which had no existence". But the problems for the respondent inherent in s 25(1) are not capable of being avoided here in so simple a way.

[21] The purpose of s 25(1), as disclosed in s 26, is to ensure that parties, who are bound by a contract, sign it or are deemed to have done so, and so become personally liable to pay the duty assessable on it. Its limited impact is more readily apparent if s 25(1) is read, so to speak, from the bottom up. Approached in this way, it says no more than that each and every party to a concluded agreement who is bound by it is deemed to have signed or executed an instrument by which it is evidenced. But even if that has the consequence that Metway is deemed to have signed the written offer to assign made to it by NatWest in Canberra on 30 November 1993, it does not follow that Metway thereby accepted the offer contained in it. Such a conclusion would no doubt ordinarily follow from the act of placing one's signature on a written contract; and doing so is in practice generally nearly impossible to displace short of proof of some extraordinary defence such as *non est factum*. Whether the same inference or conclusion would be applied to a case where someone has not in fact signed the document, but the legislature says that he or she has done so, is a different question altogether.

[22] Here the simple fact is that the mere signing of the documentary offer made by NatWest would not and did not constitute an acceptance of it by Metway. The sole method of acceptance authorised by cl 3.2 of the offer was by Metway's attorney delivering a bank cheque for $100 to NatWest's attorney before 5.00 pm on 30 November 1993. Metway's signing the instrument of offer would not have fulfilled this requirement, and so would not have resulted in a contract even if by s 25(1) Metway is deemed to have signed it. For the same reason, the provision in s 25(2)(a) that the original instrument is deemed to have been signed or executed by every party legally bound thereby adds nothing to the provision in s 25(1). It is only if a party signing or executing the original document "*is* legally bound thereby" that that person is deemed to have signed or executed it. Metway was not "legally bound" by the offer, or any contract that would otherwise arise from it, until it was accepted in the manner prescribed by the contract. Merely signing or "executing" the offer did not have that consequence or effect. It was not the authorised mode of acceptance and under cl 3.3 it would not have created rights or obligations between Metway and NatWest.

[23] The respondent's submission that s 25 "indirectly" makes the appellant liable for duty on the offer to assign, viewing it as a Conveyance or transfer on sale, is unsustainable and in my opinion does not assist the respondent. In my view, the appeal should be allowed.

[24] By para 18 of the Case Stated the first question for determination by the Court is as follows:

(a) is the true copy of the original of the offer (Attachment "A" to the Case) lodged with the Commissioner on 5 September 1994 chargeable with duty?

Consistently with the reasons, that question in (a) is answered "No". That being so, it becomes unnecessary to answer the other questions (b) and (c). The costs of and incidental to stating the Case and of the appeal must be paid by the respondent Commissioner.

[25] **WHITE J**: I have read the reasons for judgment of McPherson JA and agree with them and with the answers which he gives to the questions in the Case Stated and the order as to costs which he proposes.