

**SUPREME COURT OF NIGERIA**

4TH JUNE 1999, SC. 115/1991

**CORAM:- M. L. UWAIS CJN, A. B. WALI, E. O. OGWUEGBU,  
A. I. IGUH, E. O. AYOOLA, JJSC**

EMMANUEL IRHABOR & ANOR. .... APPELLANT  
AND  
E. U. OGAIAMEN ..... RESPONDENT

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***APPEALS** - Grounds of appeal - Leave - Where some of the grounds are of law and others are either of facts or mixed law and facts - And leave was not obtained - Only the grounds of law are competent.*

***APPEALS** - Jurisdiction - Leave to appeal - On a ground of fact or mixed law and fact - Where not sought and obtained - The Supreme Court lacked jurisdiction to entertain the appeal.*

***CONSTITUTIONAL LAW** - Appeals - Leave - Ground - Which complained against interference with findings of fact - Is a ground of fact - For which leave is required under s. 213(3) of the constitution.*

***LAND LAW** - Title - Documents - Where there is no evidence that the documents relate to the land in dispute - The appeal fails.*

***LEGAL PRACTITIONERS** - Prudence of counsel - Ground of appeal - Where there is doubt whether it is of law or mixed law and fact - It is prudent for counsel to seek and obtain the requisite leave.*

**FACTS**

The plaintiffs/appellants at the Benin High Court claimed against the defendant/respondent a declaration for possessory title to the parcel of land in dispute and an order for injunction. It is the case of the plaintiffs that the land in dispute was acquired by the 1st plaintiff by virtue of an application dated 15-12-56 through Ward 18/H Allotment Committee, Benin -

City. The Oba of Benin endorsed his approval on the application in accordance with Bini Native Law and Custom on 4-2-57 (Exhibit "B"). After taking possession of the land, the 1st plaintiff sold it to the 2nd plaintiff on 10-3-63 for the sum of #100.00 (One hundred pounds) the receipt of which sum was tendered as Exhibit "C". The 2nd plaintiff took possession of the land, cleared and maintained it without interference from anybody until 1971 when the defendant became a member of a new ward 18/H Allotment Committee which replaced the old one and the defendant informed the 2nd plaintiff that the said plot of land had been re-allocated to him. From then the defendant started to harass him and his workers on the land. The plaintiffs filed a survey plan of the plot of land in dispute (Exhibit "A"). The defendant on the other hand stated that he was a member of the plot Allotment Committee of Ward 18/H between 1959 and 1978. He applied for a plot of land and the plot of land in dispute was granted to him with the Oba's approval endorsed on his application dated 29-1-72 in accordance with Bini Native Law and Custom (Exhibit "D"). He took possession of the land in 1978 challenged a trespasser thereon whom he successfully sued in the Customary Court for a declaration of title in 1979. The proceedings and judgment of the customary court was tendered as Exhibit "F". He denied seeing the plaintiffs on the land or destroying any cement blocks on the said land.

At the conclusion of trial, the trial court entered judgment in favour of the plaintiffs. Dissatisfied the defendant appealed to the Court of Appeal, Benin Division. The Court of Appeal reversed the decision of the trial court. The plaintiffs have now appealed to the Supreme Court raising three issues. But the appeal was determined mainly on the issue of competence of the appeal raised by the respondent.

**ISSUE FOR DETERMINATION**

*"(a) Whether this appeal is properly before this Honourable Court having regard to the condition precedent to the filing of this appeal- vide section 213 (3) of the 1979 Nigerian Constitution as Amended by Constitution (Suspension and Modification) Decree No.1 of 1984.*

**HELD** (Unanimously dismissing the appeal per lead judgment of **OGWUEGBU JSC**)

***Appeals - Jurisdiction***

1. This court lacks jurisdiction to entertain an appeal on a ground of fact or mixed law and fact unless leave is sought and obtained from the Court of Appeal or this court. It is a constitutional requirement which is provided in section 213(3) of the 1979 constitution and it reads:

*"Subject to the provisions of sub-section (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court."*

Sub-section (2) sets out five categories of cases in which an appeal lies as of right from the decisions of the Court of Appeal to the Supreme Court. See Ojemen & Or. v. H. N. Momodu 11 & Ors. (1983) 1 SCNLR 183 at 203. (p. 1638 A)

***Appeals - Grounds of appeal***

2. Where the grounds of appeal are only of facts or mixed law and facts, the grounds, and consequently the appeal must be struck out as incompetent unless leave was obtained. Where, however, some of the grounds are of law and others are either of facts or mixed law and facts and leave was not obtained, only those grounds which are of law are competent. All grounds of facts or mixed law and facts must be struck out. (p. 1638 D)

***Appeals - Leave***

3. The complaint in ground (1) is not that the court below misconstrued Exhibit "B" or "D" in which case it would be a ground of law. Ground (1) is a complaint against the interference with the findings of fact made by the trial judge simpliciter. In my view, it is a ground of fact or at best of mixed law and fact for which leave is required under section 213(3) of the constitution. See Ogbechie & Ors. v. Onochie & Ors (supra). (p. 1639 E)

***Legal practitioners - Prudence of counsel***

4. I have noted the belated attempt made in the reply brief for leave " to argue and rely" on the incompetent grounds of appeal. Where counsel is not sure whether a ground of appeal is that of the law or mixed law B and fact, it is prudent for counsel to seek and obtain the requisite leave to obviate the unpleasant consequences of the ground being found to be incompetent as in this case. Having found that grounds (1) and (2) are incompetent, Issues (2) and (3) distilled from them are equally incompetent and struck out. (p. 1640 B)

***Land law - Title***

5. "..... I therefore agree with the appellant's submission that the issue in this case is not one of priority of interest but rather which one of D the two documents - Exhibits B and D - relates to the land in dispute and whether the respondents have succeeded in establishing their claim for the declaration of title sought. .... On both counts the respondents have failed i.e. to show that exhibit B relates to the land in dispute E and also by preponderance of evidence to establish their claims."

I am in complete agreement with the court below on these findings so that even if grounds (1) and (2) were competent grounds of appeal, the appellants' appeal would still have failed. The appellants failed F to establish by evidence that the land described in Exhibits "B" and "C" is the same parcel of land verged red in Exhibit "A" (the dispute plan filed by them). In the result, the appeal fails and I hereby dismiss it. (p. 1641 A)

**REPRESENTATION**

G Parties absent and unrepresented

**CASES REFERRED TO**

- Nwadike v. Ibekwe (1987) 4 N.W.L.R. (pt. 67) 718 at 744  
 H Ogbechie v. Onochie (1986) 3 S.C. 54  
 Kalu v. Mbuko (1988) 3 N.W.L.R. (Pt. 80) 96  
 Ojemen v. H. N. Momodu 11 (1983) 1 SCNLR 183 at 203.  
 Obijuru v. Ozims (1985) 2 NWLR (pt. 6) 167 at 176-188

**STATUTE REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1979; s. 213

**LEAD JUDGMENT BY OGWUEGBU JSC**

This is an appeal against the judgment of the Court of Appeal, Benin Division allowing the appeal of the defendant against the judgment of Akpovi, J. (as he then was) sitting in the Benin Judicial Division of the High Court of the then Bendel State. The trial court granted the plaintiffs' claims for a declaration of entitlement to a Certificate of Occupancy and an injunction restraining the defendant, his servants and/or agents from further acts of trespass on the land in dispute. The Court of Appeal reversed the decision of the learned trial judge. The plaintiffs who were the respondents in the court below have now appealed to this court.

Counsel on both sides filed briefs of argument.

The plaintiffs formulated the following issues in their brief :-

*"1. Whether the lower court was right in setting aside the findings of fact of the trial court considering the totality of the evidence and thus dismissing the appellants' claim?"*

*2. Whether Exhibits "B" and "D" relate to the same land as to make Exhibit "F" relevant as an act of possession/ownership on the respondent?"*

*3. Whether the lower court was right when it held that Exhibit "C" could not create a legal title in the 2nd appellant whereas what the 2nd appellant claimed was a declaration for possession or possessory title?"*

The defendant identified the following issues in his own brief:

*"(a) Whether this appeal is properly before this Honourable Court having regard to the condition precedent to the filing of this appeal- vide section 213 (3) of the 1979 Nigerian constitution as Amended by Constitution (Suspension and Modification) Decree No.1 of 1984.*

*(b) Whether from the evidence on the record, the learned justices of the Court of Appeal were right in holding that Respondent's (Defendant) Oba's approval, Exh. 'D' relates to the land in dispute as against the trial judge's perverse finding that it relates to another land?"*

(c) *Whether Exh. 'C' (Purchase Receipt) is capable of transferring any legal interest from the first Appellant to the 2nd Appellant.*"

I will in this judgment refer to the plaintiffs as appellants and the defendant as the respondent. When the appeal was called for hearing on B 8-3-99, the parties were absent and not represented by counsel. Briefs of argument were filed by both parties and the court was informed that hearing notices were sent to them as far back as 7-7-97. Having regard to Order 6 rule 8(6) of the rules of this court, the appeal was treated as argued and I will consider the briefs in this judgment.

C The appellants' claims in the High Court are:

"(a) *Declaration for possession or possessory title and that the 2nd plaintiff is the person entitled to a Certificate of Occupancy to the parcel of land situate in ward 18/H Benin City, the said parcel of land D measuring 100 ft by 200 ft. and to be delineated in a plan to be filed in court. Annual value of land is N1,000.00.*

(b) *Possession of the said parcel of land.*

(c) *An order for perpetual injunction against the Defendant and E his servants or agents from further acts of trespass on plaintiff's (sic) land."*

A brief statement of the facts of this case as averred by the 1st plaintiff is that the land in dispute was acquired by him by an application F dated 15-12-56 through ward 18/H Allotment committee, Benin City and that the Oba of Benin endorsed his approval on the application in accordance with Bini Native Law and Custom on 4-2-57 (Exhibit "B"). That after taking possession of the land, he cleared it. He later sold it to the 2nd appellant on 10-3-63 for the sum of #100.00. The receipt for the G payment of the #100 was tendered as Exhibit "C". According to the 2nd appellant, he took possession of the land, cleared and maintained it without interference from anybody until 1971 when the defendant became a member of a new ward 18/H Allotment Committee which replaced the H old one and the respondent informed him that the said plot of land had been re-allocated to him. From then the respondent started to harass him and his workers on the land. He filed a survey plan of the plot of land in dispute and it was admitted in evidence as Exhibit "A".

The respondent on the other hand averred that he was a member of the plot Allotment Committee of Ward 18/H between 1959 and 1978. He applied for a plot of land measuring 100 ft by 200 ft. in the area between Iquodala School and the Moat in Uhunmwundunmun Quarters, Benin City and the plot of land in dispute was granted to him with the Oba's approval endorsed on his application dated 29-1-72 in accordance with Bini Native Law and Custom (Exhibit "D"). He took possession of the land and in 1978 challenged a trespasser thereon (one Peter Aikhionbare) whom he successfully sued in the Customary Court of Bendel State for a declaration of title in 1979. He tendered Exhibit "F" - the proceedings and judgment of the Customary Court. He denied seeing the appellants on the land or destroying any cement blocks on the said land.

Before I go into the merits of the appeal I will at this stage dispose of the notice of preliminary objection given in paragraph 3.03 to 3.07 of the respondent's brief. It was submitted on behalf of the respondent that the appellants did not comply with the provisions of section 213 of the constitution of the Federal Republic of Nigeria, 1979 in that they failed first to seek and obtain the leave of the court below or of this court before filing this appeal whose grounds are predicated on issues of mixed law and/or facts. The grounds of appeal are also attacked on the ground that they did not comply with order 8, rule 2(2) - (4) of the Supreme Court Rules, 1985 in that they are vague and general in terms and not disclosing reasonable grounds of appeal. It was further submitted that the appeal is against the findings made by the Court of Appeal which raised issues of facts and that leave is required for further appeal to this court.

The following decided cases were cited by counsel for the respondents:- Nwadike & Ors. v. Ibekwe & Ors. (1987) 4 N.W.L.R. (pt. 67) 718 at 744, Ogbechie & Ors. v. Onochie & Ors. (1986) 3 S.C. 54 and Kalu v. Mbuko (1988) 3 N.W.L.R. (Pt. 80) 96. The court was urged to strike out the three grounds of appeal for not being properly before us.

As to ground (1) of the grounds of appeal it was submitted in the appellants' reply brief that:

*"Ground 1 is an appeal against the findings of the Court of*

*Appeal which reversed the findings of the trial court relating to Exhibit "D" - respondent's root of title. In other words, a complaint against the findings of a lower appeal court to a higher appeal court which reversed those of the trial court is a ground of law. We rely for this submission on the view of Eso, J.S.C. in Board of Custom & Excise v. Barau (1982) 10 S.C. 48 at 137 adopted and relied on by this court in:*

*J. B. Ogbechie & Ors. v. Gabriel Onochie & Ors. (1986) 3 S.C. 54 at 61 to 64 ..... We therefore submit that a ground of appeal against the findings of the Court of Appeal to a higher court of appeal (i.e the Supreme Court of Nigeria) is a ground of law and therefore within section 213(2) of the 1979 constitution as amended."*

It was conceded in the appellants' reply brief that ground (2) of the grounds of appeal is one of mixed law and fact for which leave ought to have been sought and obtained as provided in section 213(3) of the constitution. We were however urged to grant the appellants leave to argue and rely on ground (2) and Issue (2) at the hearing of the appeal. As to ground (3), it was submitted that the complaint is against the application of the law to Exhibit "C" and that it is a ground of law alone. He relied on Ogbechie & Ors. v. Onochie & Ors. (supra) at pages 59-61.

The grounds of appeal filed by Mr. Airenakho in this appeal are as follows:-

*"(1) The learned Justices of the Court of Appeal erred in law and misdirected themselves on the facts when they held that Exhibit "D" -respondent's title, relates to the land in dispute and thereby erroneously allowed the respondent's appeal.*

Particulars of Error

a. When there are no averments in the pleadings of both parties to support this conclusion.

b. Whereas on close examination of Exhibits "A" and "F", the ward beacons are different on the issue of identity.

c. Whereas the ward beacons/blocks on Exhibits "B" and "D" are different, the customary titles of the parties are also different for all intents and purpose.

d. That the resultant effect of (b) and (c) above, is that Exhibit



"D", *prima facie*, must relate to another piece of land and not the land in dispute.

(2) That the learned Justices of the Court of Appeal having rightly held that the evidence of P.W. 2, and the judgment in Exhibit "E" do not affect the determination of this appeal, the learned justices misdirected themselves in law and on the facts in allowing the respondent's appeal and thereby dismissed the appellants' claim. B

Particulars of Error

a. Whereas the learned Justices of the Court of Appeal after exhaustively appraising the case of the parties held that both of them (parties), having ostensibly acquired legal interests from the Oba, the issue resolved itself into which of them had a better title. C

b. Exhibits "B" and "D" differ as to their respective dates of approval, ward beacons or block and the situs of the land in dispute. D

c. The issue of estoppel canvassed by the respondent was rightly rejected by the court below.

d. The emergence of survey beacons do not per se establish title to land granted under customary law whereas ward beacons are relevant and decisive in respect of disputes between parties over the same piece of land. E

(3) The learned Justices of the Court of Appeal erred in law when they held that the 1st appellant's interest evidenced by Exhibit "C" (sic) was not enough to create a legal title in the 2nd appellant, such transfer not having received the approval of the Oba of Benin. F

Particulars of Error

a. That the Supreme Court of Nigeria cases of Arase v. Arase (1981) 5 SC 33, and Bello v. Eweka (1981) 1 SC 101, inter alia, did not say that a subsequent grantee of land under Benin Customary law cannot acquire a legal title without the approval of the Oba of Benin. G

b. When all that is necessary under customary law, including Benin customary law, is for a legal owner like the 1st appellant (per Exhibit "B") in this appeal to transfer title to the 2nd appellant and put him in possession. H

c. When the Oba of Benin per Exhibit "B" made a valid grant to

*the 1st appellant, the 1st appellant became the owner for all purposes and without any encumbrances."*

**This court lacks jurisdiction to entertain an appeal on a ground of fact or mixed law and fact unless leave is sought and obtained from the Court of Appeal or this court. It is a constitutional requirement which is provided in section 213(3) of the 1979 constitution and it reads:**

*"Subject to the provisions of sub-section (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court."*

**Sub-section (2) sets out five categories of cases in which an appeal lies as of right from the decisions of the Court of Appeal to the Supreme Court. See Ojemen & Or. v. H. N. Momodu 11 & Ors. D (1983) 1 SCNLR 183 at 203; Obijuru v. Ozims (1985) 2 NWLR (pt. 6) 167 at 176-188 and OGBECHIE & Ors. v. Onochie & Ors. (supra). Where the grounds of appeal are only of facts or mixed law and facts, the grounds, and consequently the appeal must be struck out as incompetent unless leave was obtained. Where, however, some of the grounds are of law and others are either of facts or mixed law and facts and leave was not obtained, only those grounds which are of law are competent. All grounds of facts or mixed law and facts must be struck out.**

I have considered all the grounds of appeal with their particulars. The complaint in ground (1) stems for the conclusion of the court below which reads:

*"For all these reasons stated hereinbefore therefore the weight of evidence, as to which of the two documents - Exhibits B and D - relate (sic) to and transfers interest in the land in dispute tilts in favour of Exhibit D. In coming to a conclusion that Exhibit B relates to the land in dispute and that by virtue of its being made earlier it takes priority over Exhibit D, the learned trial judge appeared to rely uncritically on the evidence of P.W. 2, (See page 38 line 19 - page 39 line 16). I have already held that the gravely erred in doing so. I therefore agree with the appellant's submission that the issue in this case is not one of priority of*

*interest but rather which one of the two documents - Exhibits B and D - relates to the land in dispute, and also whether the respondents have succeeded in establishing their claim for the declaration of title sought. .... On both counts the respondents have failed i.e. to show that Exhibit B relates to the land in dispute and also by preponderance of evidence to establish their claims."* B

The above is the conclusion of the court below which gave rise to the complaint in ground (1). Contrary to the assertion of the appellants in paragraph (a) of the particulars of error, there are pleadings on both sides to support the above conclusion. See paragraph 15 of the Statement of Claim and paragraph 10 of the Statement of Defence. These notwithstanding, the issue in ground (1) is to that the learned trial judge failed to apply the facts which he found correctly to the circumstances of the case before it and there is an appeal to the Court of Appeal alleging misdirection in the exercise of the application by the trial court. The facts found by the trial judge were in support of Exhibit "B" containing the approval of the Oba of Benin as the land in dispute. There was no finding of fact by the trial judge in respect of Exhibit "D" which he incorrectly applied. The court below after evaluating the evidence made its own finding of fact which supported its conclusion that Exhibit "D" relates to the land in dispute. **The complaint in ground (1) is not that the court below misconstrued Exhibit "B" or "D" in which case it would be a ground of law. Ground (1) is a complaint against the interference with the findings of fact made by the trial judge simpliciter. In my view, it is a ground of fact or at best of mixed law and fact for which leave is required under section 213(3) of the constitution. See Ogbechie & Ors. v. Onochie & Ors (supra) and Nwadike & Ors. v. Ibekwe & Ors. (supra) and Ojemen & Or. v. Momodu II & Ors (1983)13 NSCC 135.** F

I appreciate and agree with the ready concession made by the learned appellants' counsel at page 3 paragraph 3.01 of the appellants' reply brief to the effect that ground (2) raised a question of mixed law and fact for which leave is required, as provided by section 213(3) of the constitution. I agree also with the submission that ground (3) raises an H

issue of law alone. The objection in respect of ground (3) is over-ruled. The objection in respect of ground (1) and (2) of the grounds of appeal was well founded. Those grounds are incompetent and are struck out. Leave of the court below or this court was not sought and obtained  
 B before they were filed. **I have noted the belated attempt made in the reply brief for leave " to argue and rely" on the incompetent grounds of appeal. Where counsel is not sure whether a ground of appeal is that of the law or mixed law and fact, it is prudent for counsel to seek and obtain the requisite leave to obviate the unpleasant consequences of the ground being found to be incompetent as in this case. Having found that grounds (1) and (2) are incompetent, Issues (2) and (3) distilled from them are equally incompetent and struck out.** The objection to ground (3) is not well founded. It is a  
 C competent ground of law which required no leave.  
 D

The appellants are left with Issue (3) which arose from ground (3) of the grounds of appeal. Issue (3) cannot in any way advance the case of the appellants in the face of the crucial findings of facts made by  
 E the court below part of which reads:

*"Secondly, on the evidence of allocation of the land in dispute, the onus is on the respondents to show that exhibits B and C relate to the land in dispute. .... The only evidence produced besides their testimonies is that of P.W. 2 - P.O. Iyamu, whose testimony must now be accepted as discredited. This is much more so with full weight being given to Exhibit F. One aspect of the testimony of P.W. which calls for comment is his insistence that the land actually allocated to the appellant is still lying fallow in Iguodala School area. Since he was involved in the allocation, on his testimony of both piece of land, he should have been able to identify both parcels of land. This he did not do. .... As against this, appellant's Exhibit D specially describes the location of the land applied for to be "in a area between Iguodala School and the Moat  
 F  
 G in Uhunawundunwun Quarters Benin City."*

*Exhibit B also bears no address of the appellant whilst Exhibit D sets out the applicant's name and address. .... For all these reasons stated hereinbefore therefore the weight of evidence as to which*

*of the two documents - Exhibits B and D - relate (sic) to and transfers interest in the land in dispute tilts in favour of Exhibit D. .... I therefore agree with the appellant's submission that the issue in this case is not one of priority of interest but rather which one of the two documents - Exhibits B and D - relates to the land in dispute and whether the respondents have succeeded in establishing their claim for the declaration of title sought. .... On both counts the respondents have failed i.e. to show that exhibit B relates to the land in dispute and also by preponderance of evidence to establish their claims."*

I am in complete agreement with the court below on these findings so that even if grounds (1) and (2) were competent grounds of appeal, the appellants' appeal would still have failed. The appellants failed to establish by evidence that the land described in Exhibits "B" and "C" is the same parcel of land verged red in Exhibit "A" (the dispute plan filed by them.

In the result, the appeal fails and I hereby dismiss it. There is no order as to costs since the parties were absent at the hearing and were not represented by counsel.

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#### UWAIS CJN

I have had the opportunity of reading in draft the judgment read by my learned brother Ogwuegbu, J.S.C. I entirely agree with him.

I too hereby dismiss the appeal for the reasons given by him and I make no order as to costs.

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#### WALL JSC

I have read in advance a copy of the lead judgment of my learned brother Ogwuegbu, JSC and I entirely agree with his reasoning and conclusion for dismissing the appeal and I adopt them as mine.

As concluded by my learned brother Ogwuegbu, JSC, ground 1 of the grounds of appeal is obviously a ground of fact or at best of mixed law and fact while ground 2 also falls in the same category of ground of

fact or at best of mixed law and fact as ground 1. Learned counsel for the appellants had conceded to the preliminary objection as it affects ground 2 only.

Both grounds 1 and 2 having been filed contrary to section 213(3) of the 1979 constitution, they are manifestly incompetent and are accordingly struck out. Ground 3 is purely a ground of law. The preliminary objection against it fails and it is sustained as a valid ground.

The evidence adduced by the appellants failed to prove that the land shown in Exhibits "B" and "C" is the same land verged red in Exhibit "A".

The appeal lacks merit. It is accordingly dismissed with no order as to costs as none of the parties appeared to advance oral argument to elaborate his brief.

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#### **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogwuegbu, J.S.C. and I agree entirely that this appeal is without substance and ought to be dismissed.

Accordingly I, too, dismiss this appeal and abide by the order as to costs contained in the leading judgment.

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#### **AYOOLA JSC**

This appeal lacks substance and should be dismissed. I agree entirely with the reasoning by which my learned brother, Ogwuegbu JSC, has arrived at the same conclusion as contained in his judgment which I have had the privilege of reading in advance. I adopt his opinion. In the result I dismiss the appeal and make no order as to the costs.

H