Duquesne University
School of Law

Contracts I Fall 2019
Professor Oranburg

Readings for Week 1
Chapter 1.

Meaning of Terms

Introductory Note

A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this Restatement are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum.

In the Restatement, an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as “contract” or “promise.” The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters.
§ 1 Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

a. Other meanings.
The word “contract” is often used with meanings different from that given here. It is sometimes used as a synonym for “agreement” or “bargain.” It may refer to legally ineffective agreements, or to wholly executed transactions such as conveyances; it may refer indifferently to the acts of the parties, to a document which evidences those acts, or to the resulting legal relations. In a statute the word may be given still other meanings by context or explicit definition. As is indicated in the Introductory Note to the Restatement of this Subject, definition in terms of “promise” excludes wholly executed transactions in which no promises are made; such a definition also excludes analogous obligations imposed by law rather than by virtue of a promise.

b. Act and resulting legal relations.
As the term is used in the Restatement of this Subject, “contract,” like “promise,” denotes the act or acts of promising. But, unlike the term “promise,” “contract” applies only to those acts which have legal effect as stated in the definition given. Thus the word “contract” is commonly and quite properly also used to refer to the resulting legal obligation, or to the entire resulting complex of legal relations. Compare Uniform Commercial Code § 1-201(11), defining “contract” in terms of “the total legal obligation which results from the parties’ agreement.”

c. Set of promises.
A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a “set,” promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

d. Operative acts other than promise.
The definition does not attempt to state what acts are essential to create a legal duty to perform a promise. In many situations other acts in addition to the making of a promise are essential, and the formation of the contract is not completed until those acts take place. For example, an act may be done as the consideration for a contract (see § 71), and may be essential to the creation of a legal duty to perform the promise (see § 17). Similarly, delivery is required for the formation of a contract under seal (see § 95). Such acts are not part of the promise, and are not specifically included in the brief definition of contract adopted here.

e. Remedies.
The legal remedies available when a promise is broken are of various kinds. Direct remedies of damages, restitution and specific performance are the subject of Chapter 16. Whether or not such direct remedies are available, the law may recognize the
existence of legal duty in some other way such as recognizing or denying a right, privilege or power created or terminated by the promise.

1. A orally agrees to sell land to B; B orally agrees to buy the land and pays $1000 to A. The agreement is unenforceable under the Statute of Frauds. B’s right to restitution of the $1000, however, is governed by the same rules as if the agreement were enforceable. B has a right to recover the $1000 paid if A refuses to convey the land, but not if A is ready and willing to convey. See § 140 and the provisions on restitution in § 375. By virtue of this indirect recognition of the duty to convey, the agreement is a contract.

f. Varieties of contracts.
The term contract is generic. As commonly used, and as here defined, it includes varieties described as voidable, unenforceable, formal, informal, express, implied (see Comment a to § 4), unilateral, bilateral. In these varieties neither the operative acts of the parties nor the resulting relations are identical.

g. “Binding promise.”
A promise which is a contract is said to be “binding.” As the term “contract” is defined, a statement that a promise is binding does not necessarily mean that any particular remedy is available in the event of breach, or indeed that any remedy is available. Because of the limitations inherent in stating or illustrating rules for the legal relations resulting from promises, it frequently becomes necessary to indicate that a legal duty to perform arises from the facts stated, assuming the absence of other facts. In order to avoid the connotation that the duty stated exists under all circumstances, the word “binding” or a statement that the promisor is “bound” is used to indicate that the duty arises if the promisor has full capacity, if there is no illegality or fraud in the transaction, if the duty has not been discharged, and if there are no other similar facts which would defeat the prima facie duty which is stated.
§ 2 Promise; Promisor; Promisee; Beneficiary

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.

(2) The person manifesting the intention is the promisor.

(3) The person to whom the manifestation is addressed is the promisee.

(4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

a. Acts and resulting relations.

“Promise” as used in the Restatement of this Subject denotes the act of the promisor. If by virtue of other operative facts there is a legal duty to perform, the promise is a contract; but the word “promise” is not limited to acts having legal effect. Like “contract,” however, the word “promise” is commonly and quite properly also used to refer to the complex of human relations which results from the promisor’s words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance. The performance may be specified either in terms describing the action of the promisor or in terms of the result which that action or inaction is to bring about.

b. Manifestation of intention.

Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase “manifestation of intention” adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct. Rules governing cases where the promisee could reasonably draw more than one inference as to the promisor’s intention are stated in connection with the acceptance of offers (see §§ 19 and 20), and the scope of contractual obligations (see §§ 201, 219).

c. Promise of action by third person; guaranty.

Words are often used which in terms promise action or inaction by a third person, or which promise a result obtainable only by such action. Such words are commonly understood as a promise of conduct by the promisor which will be sufficient to bring about the action or inaction or result, or to answer for harm caused by failure. An example is a guaranty that a third person will perform his promise. Such words constitute a promise as here defined only if they justify a promisee in an expectation of some action or inaction on the part of the promisor.

d. Promise of event beyond human control; warranty.

Words which in terms promise that an event not within human control will occur may be interpreted to include a promise to answer for harm caused by the failure of the event to occur. An example is a warranty of an existing or past fact, such as a warranty that a horse is sound, or that a ship arrived in a foreign port some days previously. Such promises are often made when the parties are ignorant of the actual facts regarding which they bargain, and may be dealt with as if the warrantor could cause the fact to be as he asserted. It is then immaterial that the actual condition of affairs may be irrevocably fixed before the promise is made.
Words of warranty, like other conduct, must be interpreted in the light of the circumstances and the reasonable expectations of the parties. In an insurance contract, a “warranty” by the insured is usually not a promise at all; it may be merely a representation of fact, or, more commonly, the fact warranted is a condition of the insurer’s duty to pay (see § 225(3)). In the sale of goods, on the other hand, a similar warranty normally also includes a promise to answer for damages (see Uniform Commercial Code § 2-715).

1. A, the builder of a house, or the inventor of the material used in part of its construction, says to B, the owner of the house, “I warrant that this house will never burn down.” This includes a promise to pay for harm if the house should burn down.

2. A, by a charter-party, undertakes that the “good ship Dove,” having sailed from Marseilles a week ago for New York, shall take on a cargo for B on her arrival in New York. The statement of the quality of the ship and the statement of her time of sailing from Marseilles include promises to pay for harm if the statement is untrue.

e. Illusory promises; mere statements of intention.

Words of promise which by their terms make performance entirely optional with the “promisor” whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise. Although such words are often referred to as forming an illusory promise, they do not fall within the present definition of promise. They may not even manifest any intention on the part of the promisor. Even if a present intention is manifested, the reservation of an option to change that intention means that there can be no promisee who is justified in an expectation of performance.

On the other hand, a promise may be made even though no duty of performance can arise unless some event occurs (see §§ 224, 225(1)). Such a conditional promise is no less a promise because there is small likelihood that any duty of performance will arise, as in the case of a promise to insure against fire a thoroughly fireproof building. There may be a promise in such a case even though the duty to perform depends on a state of mind of the promisor other than his own unfettered wish (see § 228), or on an event within the promisor’s control.

3. A says to B, “I will employ you for a year at a salary of $5,000 if I go into business.” This is a promise, even though it is wholly optional with A to go into business or not.

f. Opinions and predictions.

A promise must be distinguished from a statement of opinion or a mere prediction of future events. The distinction is not usually difficult in the case of an informal gratuitous opinion, since there is often no manifestation of intention to act or refrain from acting or to bring about a result, no expectation of performance and no consideration. The problem is frequently presented, however, whether words of a seller of goods amount to a warranty. Under Uniform Commercial Code § 2-313(2) a statement purporting to be merely the seller’s opinion does not create a warranty, but the buyer’s reliance on the seller’s skill and judgment may create an implied warranty that the goods are fit for a particular purpose under Uniform Commercial Code § 2-315. In any case where an expert opinion is paid for, there is likely to be an implied promise that the expert will act with reasonable care and skill.
A promise often refers to future events which are predicted or assumed rather than promised. Thus a promise to render personal service at a particular future time commonly rests on an assumption that the promisor will be alive and well at that time; a promise to paint a building may similarly rest on an assumption that the building will be in existence. Such cases are the subject of Chapter 11. The promisor may of course promise to answer for harm caused by the failure of the future event to occur; if he does not, such a failure may discharge any duty of performance.

4. A, on seeing a house of thoroughly fireproof construction, says to B, the owner, “This house will never burn down.” This is not a promise but merely an opinion or prediction. If A had been paid for his opinion as an expert, there might be an implied promise that he would employ reasonable care and skill in forming and giving his opinion.

g. Promisee and beneficiary.

The word promisee is used repeatedly in discussion of the law of contracts, and it cannot be avoided here. In common usage the promisee is the person to whom the promise is made; as promise is defined here, the promisee might be the person to whom the manifestation of the promisor’s intention is communicated. In many situations, however, a promise is complete and binding before the communication is received (see, for example, §§ 63 and 104(1)). To cover such cases, the promisee is defined here as the addressee. As to agents or purported agents of the addressee, see § 52 Comment c.

In the usual situation the promisee also bears other relations to the promisor, and the word promisee is sometimes used to refer to one or more of those relations. Thus, in the simple case of a loan of money, the lender is not only the addressee of the promise but also the person to whom performance is to be rendered, the person who will receive economic benefit, the person who furnished the consideration, and the person to whom the legal duty of the promisor runs. As the word promisee is here defined, none of these relations is essential.

Contractual rights of persons not parties to the contract are the subject of Chapter 14. The promisor and promisee are the “parties” to a promise; a third person who will benefit from performance is a “beneficiary.” A beneficiary may or may not have a legal right to performance; like “promisee”, the term is neutral with respect to rights and duties. A person who is entitled under the terms of a letter of credit to draw or demand payment is commonly called a beneficiary, but such a person is ordinarily a promisee under the present definition. See Uniform Commercial Code § 5-103.
§ 3 Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

a. Agreement distinguished from bargain.
Agreement has in some respects a wider meaning than contract, bargain or promise. On the other hand, there are contracts which do not require agreement. See, e.g., §§ 82-90, 94, 104. The word “agreement” contains no implication that legal consequences are or are not produced. It applies to transactions executed on one or both sides, and also to those that are wholly executory. The word contains no implication of mental agreement. Such agreement usually but not always exists where the parties manifest assent to a transaction.

b. Manifestation of assent.
Manifestation of assent may be made by words or by any other conduct (see § 19). Even silence in some circumstances is such a manifestation (see § 69). Compare the definition of “agreement” in Uniform Commercial Code § 1-201(3).

c. Bargain distinguished from agreement.
Bargain has a narrower meaning than agreement, since it is applicable only to a particular class of agreements. It includes agreements which are not contracts, such as transactions where one party makes a promise and the other gives something in exchange which is not consideration, or transactions where what would otherwise be a contract is invalidated by illegality. As here defined, it includes completely executed transactions, such as exchanges of goods (barters) or of services, or sales where goods have been transferred and the price paid for them, although such transactions are not within the scope of this Restatement unless a promise is made.

d. Offer.
A bargain is ordinarily made by an offer by one party and an acceptance by the other party or parties, the offer specifying the two subjects of exchange to which the offeror is manifesting assent (see §§ 22 and 24).

e. Contract distinguished from bargain.
A contract is not necessarily a bargain. Thus, a promise to make a gift, if made under seal, may be a contract (see § 95), but it is not a bargain. Other contracts which are not bargains are the subject of §§ 82-94. Such contracts do not require manifestations of mutual assent in the form of offer and acceptance.
§ 4 How a Promise May Be Made

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

a. Express and implied contracts.

Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent. Just as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance. See Uniform Commercial Code § 1-201(3), defining “agreement.”

A telephones to his grocer, “Send me a ten-pound bag of flour.” The grocer sends it. A has thereby promised to pay the grocer’s current price therefor.

A, on passing a market, where he has an account, sees a box of apples marked “25 cts. each.” A picks up an apple, holds it up so that a clerk of the establishment sees the act. The clerk nods, and A passes on. A has promised to pay twenty-five cents for the apple.

b. Quasi-contracts.

Implied contracts are different from quasi-contracts, although in some cases the line between the two is indistinct. See Comment a to § 19. Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice. Such obligations were ordinarily enforced at common law in the same form of action (assumpsit) that was appropriate to true contracts, and some confusion with reference to the nature of quasi-contracts has been caused thereby. They are dealt with in the Restatement of Restitution. See also §§ 141, 158, 197-99, 272, 370-77.

A’s wife, B, separates from A for justifiable cause, and, in order to secure necessary clothing and supplies, buys them from C and charges their cost to A. A is bound to pay for them, though he has directed C not to furnish his wife with such supplies; but A’s duty is quasi-contractual, not contractual. See Restatement of Restitution § 113.
Supreme Court of Pennsylvania.

L. Francis MURPHY and Robert E. Slota, Individually and as co-partners t/a Murphy & Slota, Appellants,

v.

Thomas J. BURKE et al., Appellees.


Synopsis

Action by former employees of law firm against law firm, a professional corporation, and against lawyers practicing in that firm to obtain files of clients who had personally retained plaintiffs or who regarded either or both of them as their own attorneys and also for distribution of assets of the firm. The Court of Common Pleas, County of Montgomery, September 27, 1972, at Nos. 71—7453 and 71—12116, Carleton T. Woodring, J., entered judgment adverse to plaintiffs, and they appealed. The Supreme Court, Pomeroy, J., held that a partnership agreement can be implied from conduct and circumstances of parties, that determination that no theory of estoppel could serve to bind defendants was erroneous, but not prejudicial for plaintiffs, and that evidence supported conclusions that prior to certain date there was no partnership and that thereafter there was neither an agreement under which plaintiffs acquired a proprietary interest, conduct from which such an agreement could be implied, or a misrepresentation by one of defendants upon which plaintiffs relied to their detriment.

Affirmed.

Procedural Posture(s): On Appeal.

OPINION OF THE COURT

POMEROY, Justice

The appellants, L. Francis Murphy and Robert E. Slota, are attorneys and members of the Bar of Montgomery County. They brought an action in equity against the Norristown, Pennsylvania law firm of Haws & Burke, a professional corporation, and against Thomas J. Burke, James S. Kilpatrick, Jr. and Ralph L. Hose, the three lawyers practicing in that firm. In their complaint plaintiffs recited that ‘for some period up until June of 1971, (they) were associated with the individual defendants in the practice of law’ and that ‘plaintiffs and entitled to the possession of all the files, both active and closed, of the clients who have personally retained plaintiffs or either or both of them or who regard either or both of them as their own attorneys.’ Consequently, plaintiffs prayed, Inter alia, that the defendants be directed to deliver all files of clients listed in an appendix of the complaint. Defendants denied that Messrs. Murphy and Slota were associated with the firm of Haws & Burke in any capacity other than as employees. The appellants thereafter filed a companion suit in which they alleged alternatively (a) that they had been General partners of the firm of Haws & Burke either pursuant to an express oral agreement or pursuant to an
agreement to be implied from the conduct of the parties or pursuant to a partnership
the existence of which the named individual defendants were estopped to deny; (b)
that they had been Shareholders in the professional corporation of Haws & Burke; or
(c) that they had been Mere employees but were entitled under an employment
agreement to certain unpaid monies. In the event plaintiffs were to be found general
partners or shareholders, they demanded a distribution of the assets of the firm. The
two complaints were consolidated for trial.

After eight days of testimony, the chancellor found that both Murphy and Slota were
Employees of Haws & Burke at all times, that they had agreed to devote their sole
efforts to the affairs of that firm, and hence were entitled neither to a distribution of
that corporation’s assets nor to possession of its business records. Extensive
exceptions by plaintiffs to the chancellor’s adjudication were dismissed by a
unanimous court En banc and the two decrees denying relief were made final. This
appeal followed.

Appellants urge that the decrees below must be reversed because the chancellor
erred in applying the law of partnerships and so wrongly decided that no partnership
existed. While we agree that some of the legal reasoning of the court was faulty, the
findings of fact are nevertheless entirely sufficient to enable us to conclude that
under correct legal principles no relief was warranted. We will therefore affirm the
decrees.

I. Partnership Implied from Conduct

A partnership is created by contract; it comes into being, as do all contracts, through
agreement. A contract is ‘a manifestation of mutual assent on the part of two or more
persons.’ American Law Institute, Restatement (Second) of Contracts s 3, at 20 (Tent.
Draft No. 1, April 13, 1964). The verb ‘to manifest’, as the word is used in the above
Restatement quotation, means ‘to Show plainly.’ Random House Dictionary of the
English Language (1967). Like all contracts, partnership contracts may be either
express or implied. ‘The distinction involves, however, no difference in legal effect,
but lies merely in the mode of manifesting assent. (A)ssent may be manifested by
words or other conduct, sometimes including silence . . . or by other circumstances,
including course of dealing or usage of trade or course of performance.’ Restatement
(Second) of Contracts s 5, at 24 (Comment).

There is no requirement that partnership agreements be in writing. Gohen v.
Cravelle, 411 Pa. 520, 192 A.2d 414 (1963); Pappas v. Klutinoty, 383 Pa. 184, 118 A.2d
202 (1955). They may be made orally or may be found to exist by implication from all
attending circumstances (i.e., the manner in which the alleged partners actually
conducted their business, etc.). Gohen v. Cravelle, Supra; O’Donnell v. McLoughlin,

As to this latter method (partnership implied from conduct), the chancellor held that
a ‘course of conduct between the parties can only be considered as it might establish
a partnership between the parties as to the claims of third persons. Such a course of
conduct does not establish a partnership between themselves in the absence of an
agreement, either express or implied.’ In so concluding we are of the opinion that the
chancellor fell into error. As will be seen, however, (see part III, Infra), this limitation
on partnership implied from conduct did not lead to a wrong result.
II. Partnership by Estoppel

Appellants further contend that the appellees, by their conduct, can be held estopped to deny the existence of a partnership agreement, and that the chancellor erred in holding to the contrary. There are two strains of estoppel involved in the argument: (i) equitable estoppel, and (ii) promissory estoppel.

(i) Equitable Estoppel. The principle of equitable estoppel to deny the existence of a partnership is set forth in the Uniform Partnership Act. This section, as the chancellor held, is applicable by its terms only where a third party attempts to hold liable on a theory of partnership some person who has ‘represented(ed) himself, or consent(ed) to another (having) represented him . . . as a partner . . .’. This statutory estoppel contains all the elements of a traditional equitable estoppel:

‘Equitable estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.’


Appellants contend, however, that this Court has applied an estoppel as between alleged partners, and not merely as between an alleged partner and a relying but misled third person. See, e.g., Gibboney v. Derrick, 338 Pa. 317, 12 A.2d 111 (1940); Kennedy’s Estate, 321 Pa. 225, 183 A. 798 (1936). We think those cases correctly decided, but that upon close reading, while estoppel language was used, the cases stand for the proposition already discussed, viz., that a partnership agreement can be implied from the conduct and circumstances of the parties, that is to say, their manifestations of assent to the existence of a partnership relationship. The gist of estoppel, on the other hand, is a misrepresentation.

Promissory Estoppel. Appellants further argue that a partnership could be found under the theory of promissory estoppel, see Restatement (Second) of Contracts §90 (Tent. Draft No. 2, April 30, 1965). This doctrine, that promises will be enforced where the promisee reasonably relied and injustice can be avoided only by enforcement, is the law in Pennsylvania. See, e.g., Fried v. Fisher, 328 Pa. 497, 196 A. 39 (1938); Berlinger v. Bee Em Manufacturing Co., 383 Pa. 458, 119 A.2d 65 (1956).

Thus we think that the lower court was mistaken in holding that No theory of estoppel could serve to bind the appellees. That error, however, was not prejudicial to these appellants under the facts of the case.

III. Applying the Law to the Chancellor’s Facts.

Appellant Murphy joined the firm of Haws & Burke in July 1966. By his own admission he was from that date until January, 1971 merely an employee of the firm. Similarly, appellant Slota, who became associated with the firm in June, 1967, was also by his own admission an employee until January, 1971. There is therefore no point in reviewing the evidence pertaining to any earlier period to determine whether Murphy and Slota were then general partners; they agree they were not.
In December, 1970, appellee Thomas J. Burke, who until that month had operated Haws & Burke as a sole proprietorship, incorporated the firm as a professional business corporation, listing himself on the papers of incorporation as the sole promoter and causing all stock to be issued in his name. In November of 1970, the month previous to incorporation, Burke had individually and privately broached with his attorney-employees the subject of future employment as employees of the contemplated professional corporation. Although both Murphy and Slota testified that at this time Burke offered to accepted them as ‘partners’, but to operate under corporate form, the other two lawyer-appellees testified that no such offer had been made to them. The chancellor found in favor of the appellees.

In January, 1971 a meeting was held at which the professional corporation’s accountant reviewed the deferred compensation possibilities open to the employees of the corporation. Although appellant Slota testified that the subject of the meeting was ‘partnership,’ appellant Murphy testified that he did not recall that the word was ever used, and all other participants testified that the meeting never touched on the subject of Proprietary interest of the employees. The accountant was quite certain that nothing was said on the subject of ‘partners’ because the tax consequences would be altogether different. Suffice it to say that the chancellor disbelieved appellant’s version and credited that of the appellees. In May, 1971 appellee Burke delivered to the appellants drafts of agreements under which they might acquire interests in the professional corporation of Haws & Burke, provided they first execute a written employment agreement, a stock repurchase agreement, and an application for life insurance to be used to finance stock repurchase. The interests offered would have been about 15% Each. Dissatisfied by what they viewed as onerous terms of the stock repurchase and a covenant not to compete contained in the employment agreement, appellants terminated their relationship with Haws & Burke without ever having ‘alleg(ed), aver(red), suggest(ed), or otherwise claim(ed) that they were partners of the individual defendants or shareholders in the Professional Corporation of Haws & Burke.’

It is clear that the evidence supports the conclusions that (a) prior to January, 1971 there was no partnership, and that (b) after January, 1971 there was neither an agreement under which appellants acquired a proprietary interest, conduct from which such an agreement could be implied, or a representation by Burke upon which appellants relied to their detriment. We therefore affirm the decrees of the court below.

It is so ordered. Costs on appellants.

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