McEWAN, ... APPELLANT.
CAMPBELL ET AL. . . . . RESPONDENTS.

1857. 17th and 19th February.

Pleading—Railway—Provisional Committee—Obligation—Relevancy of Allegation (*a*).—Merely to have been a member of a provisional committee will not make a person liable for every thing that was done in the course of carrying the business of that provisional committee into execution. The claim of a person alleging employment *qua* secretary and law agent by the provisional committee of a railway company must specifically and distinctly set forth the facts on which he relies with reasonable precision. He must aver not only employment, but the manner in which it took place.

Bright v. *Hutton*, 3 H. of L. Ca. 341., commented upon, and treated as having settled the law as well in Scotland as in England.

What is stated in a summons is the basis of the action, and what is averred subsequently is but matter of illustration; unless on a special application leave be given by the Court to vary the substance of the allegations.

The condescendence and pleas in law are under the 13 & 14 Vict. c. 36. held to constitute part of the summons.

THE Pursuer, a solicitor in Glasgow, brought his Action against the Provisional Committee nominated by the promoters of an intended but unexecuted railway, called the Lanark, Stirling, and Clackmannan Counties Junction Railway, claiming 458*l.* 19*s.* 10*d.*

(*a*) "The usual test of relevancy is to assume the truth of the facts averred; and if the Defenders admit the truth of the facts averred, they admit themselves out of Court;" *per* Lord Robertson, one of the Judges in the Court below, who decided *McEwan* v. *Campbell.*

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in respect of his bill of costs, subject to certain deductions; and also claiming 182*l.* 13*s.* 11*d.* in respect of alleged cash advances and other disbursements.

The Defenders stated that the proposed railway was "one of the absurd schemes of 1845." They further alleged, that it had been "got up by the Pursuer himself and his friends." His office of "secretary and law agent" was averred to be self-assumed. The Defenders denied employment.

The *Lord Ordinary* (Marshall), on the 20th July 1853, found that the averments of the Pursuer were not sufficient to support the prayer of the Summons, and he therefore dismissed the Action, annexing to his Interlocutor the following note:—

I. According to the principle recognised in the recent English decisions, and also the case of *Campbell* v. *Dick Lauder*, 27th November 1852, in this Court, it is not sufficient to aver, merely that the Defenders were members of a Provisional Committee of a projected railway company. The members of such a Provisional Committee do not, *qua* such, form a partnership, and are not liable merely in virtue of their appointment to that office for services done, or advances made to, or on behalf of, the projected undertaking; nor has each of the members of such a Provisional Committee a mandate, *ipso jure*, to bind the other members, as is the case in proper partnerships. This rule is peculiarly applicable to the present case, inasmuch as the Pursuer does not even allege that the Defenders were among the persons who are stated to have been the projectors of the proposed undertaking. To make out a relevant case, therefore, a liability on the ground of *employment* by the members of a Provisional Committee, there must be a distinct allegation of actual employment by each of the persons against whom such liability is alleged. Such employment may, no doubt, take place in many different ways; but there must be an allegation of actual employment in one way or another by the parties sought to be so made liable; and such an allegation must be made in reference *to each of these parties individually*, because, as already stated, they are not united as partners, and none of them has, by law, a mandate to bind the others.

Moreover, the *manner* in which the alleged employment by the different members is said to have taken place must be set forth with a reasonable degree of precision and specification, so as to

enable the parties against whom such liability is alleged to prepare to defend themselves against the demand. The import of such an allegation is, that by some transaction the parties have become connected *as principal and agent;* or, in other words, that they have entered into a contract of mandate; and the party against whom such an allegation is made cannot be called upon to defend himself against it, unless he receive reasonable information as to the time and the manner in which he is said to have entered into such a proceeding, or become a party to such a contract.

It is peculiarly necessary to enforce these rules of pleading in cases of the present description, because it cannot be stated that, in proceedings for promoting the formation of joint-stock companies, it has been the invariable, or even the general practice, that the men of business, who have acted as secretaries or law agents, have derived their employment from provisional committees. It is notorious that such has not been always the case, and that, on the contrary, the persons originally acting as secretaries or law agents of such projects have often derived their employment from the projectors, before any provisional committees were appointed, and, indeed, have sometimes themselves been the most active projectors of the projects.

If these views be correct, the Pursuer has failed to state such a case against the eighteen Defenders who are parties to the record. In the first article of his condescendence, he has a general allegation, that he "was *invited* by the Defender William Hunter, or by one or more of the Defenders, with the sanction of the Defenders, or by their said law agents, as authorized by them, and acting as their authorized law agents, to undertake and perform the duties of *secretary of the said undertaking*, and of and under the said Provisional Committee; and also of a law agent in their affairs." He states, in the fifth article of his condescendence, that, "on the employment of the Defenders, or with their knowledge and approbation, and for their behoof," he performed various matters of law business, therein referred to. And in the twelfth article he sets forth "that he was, by the act of said Committee, and with their knowledge and approbation, *or of those acting under their authority*, employed as their secretary and as agent in the matters and to the effect foresaid; *at least, he acted as such, and performed* the various business, and made the various payments and disbursements above mentioned *as such*, with the knowledge of the Defenders, *and was acknowledged and recognised* by the Defenders as their secretary and agent," &c.

II. The second ground of liability maintained by the Pursuer is founded on what he calls *adoption*. Of course, this plea of adoption means something different from employment. It assumes that the Pursuer's alleged employment as secretary or agent of

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the undertaking, either had been conferred upon him by other parties, or had been undertaken by him at his own hand, without any employment whatever. This, therefore, appears necessarily to import that the Defenders did, by some *ex post facto* transaction with the Pursuer, undertake a liability which was not previously incumbent upon them. And if this be the case, surely it was incumbent on the Pursuer to state, with reasonable precision and specification, what the alleged transaction was, when it took place, and how it was entered into.

On the 9th December 1853, the First Division of the Court of Session, on a reclaiming note of the Pursuer, affirmed the *Lord Ordinary's* decision; whereupon the present Appeal was tendered.

Mr. *Rolt* and Mr. *Roxburgh* were for the Appeal, and cited *Bright* v. *Hutton* (*a*), *Spottiswoode's* case (*b*), *Pearson's Executors* (*c*), *Carrick's* case (*d*), *Macdonald* v. *Mackay* (*e*).

The *Attorney-General* (*f*) and Mr. *Anderson* for the Respondents. To allow this Appeal would be to encourage obscurity, uncertainity, and indefiniteness in pleadings. The Acts of 6 Geo. 4. c. 120., and the 13 & 14 Vict. c. 36., regulate this matter. *Dallas* v. *Mann* (*g*).

Lord Chancellor's opinion.

The Lord Chancellor (*h*):

My Lords, this is an Appeal which has been brought to your Lordships' House from several interlocutors of the Court of Session, in which they assoilzied the Defenders, who are Defenders upon a record in which Mr. McEwan, who is a writer in Glasgow, was Pursuer, and Sir James Campbell and a great number of other gentlemen were Defenders.

(*a*) 3 House of Lords Ca. 341.
(*b*) 6 De Gex, M'N., & G. 345.
(*c*) 3 De Gex, M'N., & G. 253. (*d*) Simon, N. S. 509.
(*e*) 21 Sept. 1831; 5 Wils. & Sh. 462.
(*f*) Sir R. Bethell. (*g*) 15 New Ser. 746.
(*h*) Lord Cranworth.

The case was heard and disposed of by the *Lord Ordinary* in the month of July in the year 1853, and it was brought by a reclaiming note before the First Division of the Court of Session, when the decision of the *Lord Ordinary*, who dismissed the action, and found the Defenders entitled to their expenses, was affirmed.

The question is, whether your Lordships are prepared to reverse that decision? Now, as far as I am concerned, I am clearly of opinion that your Lordships ought not to do so, and that the decision below is founded in perfectly good sense.

The proceeding was commenced after the passing of the Act of 1849 (*a*), which amended the proceedings in the Court of Session. By that Act of Parliament it is enacted, that the Pursuer in his summons shall set forth "the name and designation of the Defender and the conclusions of the action, without any statement whatever of the grounds of action." Your Lordships are perfectly aware that the old course of proceeding was to state in the summons all the grounds of action, and then the conclusion. And that was followed—not, I think, then accompanied, but according to the old practice followed—by an articulate condescendence, which stated the matter more in detail, and there was an answer, and the proceedings were unnecessarily voluminous. Whether they have been cut down now as much as they might be, will be a matter for your Lordships to consider in your legislative capacity. But the Legislature thought proper in the year 1849, the 13th and 14th of Victoria, to enact, that the summons shall not state the grounds of action, but shall merely contain the conclusions, and that it shall be

(*a*) 13 & 14 Vict. c. 36.

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accompanied with an articulate condescendence stating the grounds. Then the Act proceeds to say, that "the allegations in fact which form the grounds of action shall be set forth in an articulate condescendence, together with a note of the Pursuer's pleas in law, which condescendence and pleas in law shall be annexed to such summons, and shall be held to constitute part thereof." Then there is a provision that there may be, just as there might have been under the old system, a revised condescendence, if the parties wish to obtain any further evidence, or to state anything which they think may make their case more clear; but still it was under the old system, and under the new system it continued to be, viewed merely as a proceeding for better illustrating that which they had before stated in the summons, and now in the condescendence annexed to the summons, as constituting the grounds of action.

Now in this case the question is, whether in the pleas and the condescendence annexed to this summons any relevant ground of action is stated. The real demand of this Pursuer against the Defenders was a demand of a nature which has been canvassed over and over again in all the Courts of Westminster Hall, and canvassed upon principles which are applicable just as much to the law of Scotland as to the law of England, and which, in fact, have been adopted by the law of Scotland, and as to which, therefore, there can be no doubt now on either side of the Tweed. It is quite obvious that the original ground of the action was the supposed liability of the Defenders, as having been members of a provisional committee which had been appointed for the purpose of constructing a railway, the particulars of which it is not necessary to enter into. Now, that they were not liable in respect

of their having so been members of the provisional committee is quite clear. The question is, whether there is anything in the condescendence which shows that the Pursuer states a liability arising from some other ground than that of these parties having been members of the provisional committee? Now, the original condescendence states in the first article, that "in order to promote this undertaking" (that is, the railway undertaking) "a provisional committee was appointed, consisting *inter alios* of the Defenders." Then, that "Messrs. Campbell and Tennants, writers, Glasgow, were appointed by or under the special direction of the Defenders, as members of the committee, general law agents of the undertaking, and the Pursuer was invited by or with the sanction of the Defenders, or by their said law agents as authorized by them." This must, of course, be taken most strongly against the pleader, therefore it must be taken as alleging that the Pursuer was invited by the law agents who had been appointed to act as law agents by the committee, "as authorized by them;" what that means, "as authorized by them," I do not know; it does not state distinctly that they were authorized, but "as authorized by them to undertake and did in consequence undertake and perform the duties of secretary." Then it states in the further condescendence that as such secretary he framed advertisements, and so on, and then "at least he acted as such, and performed the various business, and made the various payments and disbursements above mentioned as such, with the knowledge of the Defenders, and was acknowledged and recognised by the Defenders as their said secretary and agent." The words "secretary and agent" must refer to what is mentioned before, namely, "secretary and agent of

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the Provisional Committee," and that what he did was "known to and recognised, adopted, and acknowledged by the Provisional Committee and the Defenders as members thereof."

Now what is the meaning of that? It is very loosely and very obscurely worded. This House is always extremely reluctant to let any matter that can be disposed of on the merits go off upon any subtleties and inaccuracy of pleading. But it appears to me that what is meant is put beyond all doubt by looking at the way in which this is explained in the pleas of law. I quite admit what has been stated at the bar, that the pleas of law cannot state any new fact, but they must all be read together in order to construe the meaning of each and every part of it. Now, the pleas in law are these:—"That the Defenders, as members of the Provisional Committee, and as having allowed themselves to be publicly held out and advertised as such, without objecting to or repudiating the said character, are in the circumstances above set forth,"—there are no circumstances set forth except that they assented to what was done by the Provisional Committee,—"liable conjunctly and severally to the Pursuer for the account of business" done by him. That is the first plea in law, and the other pleas do not at all vary it.

It is perfectly clear, therefore, that the ground of action, as stated in the original summons and the original condescendence, was distinctly meant to be an allegation that these gentlemen, with a number of others, constituted the Provisional Committee; that the Provisional Committee, or their law agents, as authorized by them (whatever that means), employed the Pursuer as their secretary, and that as their secretary (that is, the secretary of the Provisional Committee) he did certain work,

and consequently that these Provisional Committee-men whom the Pursuer has thought fit to select were conjunctly and severally liable for all the work he so did.

Now, it cannot be contended, and has not been argued, and would not be argued, that as members of the Provisional Committee any such liability existed upon them. Then, if the Pursuer had a case against these parties, but which the course he took leads one very strongly to suspect he had not, the course for him to have taken would have been this: This proceeding having occurred shortly after the decision of this House in *Bright* v. *Hutton*, establishing the non-liability of Provisional Committee-men merely as such, the regular course for him to take would have been to obtain leave to amend his condescendence—in other words, to amend his summons, and, if he had a case, to have stated it so as to show what that case was. He does not take that course, but obtains leave to put in a revised condescendence, and he does in that revised condescendence somewhat dilate upon what he had stated in his original condescendence.

I made a note during the argument of what the revised condescendence states; and I am reluctant to say that no case is stated relevantly in the revised condescendence, because I do not collect that to have been the opinion of the Court of Session. I am not quite sure how that was. I rather think the Court of Session proceeded upon another ground; but I confess, looking at the revised condescendence, coupled with the revised pleas in law, I doubt whether a relevant case is stated there, because what is stated is, first, that the Pursuer was invited. I am stating it very shortly, but in the way most against the Pursuer, which is the way in which it must be taken, that "the Pursuer was invited by the law agents of the Defenders, as authorized by them" (whatever that

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means), "and acting as their authorized law agents, to undertake, and did in consequence undertake, the duties of secretary." What "secretary?" Why, looking at the whole of it, it is "secretary to the Provisional Committee." Then, "secondly, that prospectuses were published, in which the Defenders were stated to be members of the Provisional Committee, and that the same were approved by the Defenders and sanctioned by them." Then "fourthly, that the line of railway was afterwards changed, and that this was reported to and unanimously approved by the Provisional Committee, and that a sub-committee was appointed." Fifthly, "that the Pursuer, with the sanction of the Defenders, and for their behoof, performed various matters of law in respect of actions brought against them, for which he refers to the accounts, which are therefore embodied in the condescendence. And when you look at the accounts you find that they are accounts, not for work done for the Defenders, except so far as they were members of the Provisional Committee, but for work done for the Provisional Committee generally. Then the condescendence goes into detail, referring to the accounts, which I need not go into. Then the allegation, which is the one mainly relied upon, is, "that the Defenders allowed themselves to be held forth as members of the Provisional Committee, and the Pursuer was by the act of the said Provisional Committee employed as their secretary." That explains what had gone before: "*their* secretary,"—that is, the secretary of the Provisional Committee,—"and was so recognised by the Defenders, and settled claims made against them as members of the Provisional Committee; and his acts were adopted by the Provisional Committee, and by the Defenders as members thereof, who took the benefit thereof." That is pleaded again

in another form, but it does not materially vary the case.

Then in the revised condescendence this is the statement of the pleas in law in the revised form: "The Pursuer having been appointed and employed by, and having acted as secretary and law agent for the Defenders, and performed the duties and business set forth and detailed in the accounts,"—that is, having done work for the Provisional Committee, of which according to this article in the revised condescendence, the Defenders were members,—"and made the payments and disbursements above set forth, on the employment of, and by direction of and for the Provisional Committee, of which the Defenders were members, and on account and for behoof of the Defenders," they are liable.

That is repeated in another form in one or two of the other pleas in law, but the substance appears to me clearly to be merely what had been stated in the previous condescendence and pleas, namely, that some of these gentlemen had consented to be members of the Provisional Committee, and that the Pursuer had acted as their secretary and agent, and that therefore these Defenders as members of the Provisional Committee are liable. That is clearly not maintainable. I have already stated that I have very grave doubts whether the revised condescendence is sufficient. But even if I thought it was sufficient, I should have had very great reluctance indeed in advising your Lordships to question in this case the accuracy of that point of practice, which is entirely consistent with the Act of Parliament, (and which is not merely a decision in this particular case, but a decision of which we have had many instances in the law of Scotland,) a practice very usefully adopted upon the consultation of all the Judges, all of them being clearly of opinion that upon

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the true construction of the Act of 1849, the original condescendence so clearly stands in the place of the original grounds of action as stated in the writ of summons, that if that original condescendence does not state a valid ground of action, you cannot eke it out by the revised condescendence, but what you must then do is, to amend your original condescendence. And in this case, if an application had been made in proper time, no doubt, in the circumstances of this case, or in any case in which justice required it, it would have been allowed almost as a matter of course. That, however, is a course which the Pursuer did not choose to take; he chose to rely upon his revised condescendence, and whether, if it had been the original condescendence, it would have been sufficient or not, is a question which I need not stop to speculate upon. It is not the condescendence to which we must refer, to see whether there was a relevant ground of action or not. We must refer to the original condescendence. That was the view taken in the Court below, and it is the view which I am prepared to recommended your Lordships to adopt, and consequently to advise your Lordships, that this Appeal should be dismissed with costs.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

My Lords, I am entirely of the same opinion with my noble and learned friend who has just addressed your Lordships, and I concur without any difficulty in recommending your Lordships to affirm the judgment of the Court below. The rules upon which we are to proceed, so far as they affect the practice of the Courts of Scotland are for the most part defined by Statute. It is perfectly clear that by the Statute of the 6th of George the Fourth, the summons is to express the cause of action. That afterwards was

changed by the Act of the 13th and 14th of Victoria, which was passed in the year 1849, and which requires now that the Pursuer in the summons shall only state "the name and designation of the Defender, and the conclusions of the action, without any statement whatever of the grounds of action ; but the allegations in fact, which form the grounds of action, shall be set forth in an articulate condescendence, together with a a note of the Pursuer's pleas in law, which condescendence and pleas in law shall be annexed to such summons, and shall be held to constitute part thereof."

By the Act of 6th George the Fourth, it was required that the summons (that is to say, now, the condescendence) shall "set forth in explicit terms the nature, extent, and grounds of the complaint or cause of action." The question in this case is, whether it does state "in explicit terms the nature, extent, and grounds of the complaint or cause of action."

Now, my Lords, having perused the arguments in the Court below, and the opinions of the Judges in the Court below, very ably stated, which are appended to the proceedings in this case, I must say that I concur entirely in the view which they have taken of this matter. If we look at the state of the law at the time this suit was commenced, and look at the frame of the original condescendence, it is perfectly clear that it was framed under the supposition that it was quite enough for persons to be members of a provisional committee, to become liable for everything that was done in the course of carrying the business of that provisional committee into execution. It was supposed that a provisional committee constituted a partnership in which each individual member of that committee gave a mandate to the other members of that committee to act in all affairs concerning that committee, and that they were liable as copartners,

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And it is perfectly clear that that was supposed to be the law in the earlier stages of this matter, before this suit was instituted, and it continued to be acted upon in some of the Courts of Westminster Hall, and thereby, no doubt, great loss was inflicted upon a great number of individuals. I may observe, in passing, that looking back upon my judicial life, it certainly does not lie upon my conscience that I was ever a party to maintaining that doctrine; I uniformly, from the first, held the doctrine which was afterwards decided by this House to be the true doctrine.

Now, if we look at the frame of the original condescendence throughout, it is impossible to doubt that it was framed by the Pursuer upon the supposition that it he made out that the Defender was a member of the Provisional Committee, either that he was so in point of fact or that he was held out with his sanction as being a member of that committee, it could not be disputed that he was liable for everything done in the ordinary course of carrying the scheme into effect. It appears to me that the whole frame of this condescendence is in order to support that view of the case, and to make out the proposition that he had become a member of that Committee, either in point of fact or by representation, and that he is therefore responsible for all the acts of that Committee.

If we look at the case in that point of view, it is perfectly clear that there is no relevant cause of action against the other members of the Provisional Committee.

It is said, however, that though that is not a cause of action, enough can be discovered here to make these parties clearly liable upon the ground of individual contract. Now it does not appear to me, looking at the whole of the condescendence, and taking it in conjunction with the other condescendence,

that there is enough to make out a case of liability upon the ground of individual employment. The whole is left in uncertainty; the facts are not sufficiently averred to show that the employment took place by order of the defenders. Therefore, my Lords, the case resolves itself into this, either that the condescendence is irrelevant, or that it does not state with that certainty, which the nature of the case requires, the cause of action against the Defenders for their liability, either conjunctly or severally to any individual demand. Upon that ground, it appears to me that the judgment of the Court below is perfectly right, and that it ought to be affirmed.

Interlocutors affirmed, and Appeal dismissed with Costs.

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