BAIRD AND OTHERS, . . . APPELLANTS.
ROSS AND OTHERS, . . . RESPONDENTS.

1856.
16*th*, 19*th*, *and* 22*nd March*.

Railway Deposits: Committee's Power to reimburse themselves.—A number of persons meaning to join in a common undertaking, and raising a fund, eventually to be increased, for the purpose of forwarding that common undertaking, but commencing by deposits, put such deposits into the hands of a committee with directions to do certain acts;—it is not afterwards competent for any one of them, or for any other number of them, to withdraw, and say to such committee, "I, or we, think you ought not to go on any further with the undertaking."

In such a case, a single dissenter may insist on the committee proceeding, however inexpedient it may appear to do so, and however contrary to the opinions and wishes of the rest.

The discretionary power originally vested in the committee can be taken away only by the power that gave it. *Walstab* v. *Spottiswoode* commented upon.

THE circumstances of this case are very fully stated in the *Lord Chancellor's* (*a*) opinion. The decision appealed from had been pronounced by the first division of the Court of Session.

The *Solicitor General* and Mr. *Roundell Palmer* for the Appellants.

Sir *Fitzroy Kelly* and Mr. *Anderson* for the Respondents.

The LORD CHANCELLOR:

Lord Chancellor's opinion.

My Lords, this is an action which was instituted in the Court of Session by William Baird and several other gentlemen, who constituted a committee of

(*a*) Lord Cranworth.

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management for carrying through Parliament a Bill for enabling a company to form a railway from Kilmarnock to Ayr, to be called "The Kilmarnock and Ayr Direct Railway;" and the summons states the facts, which are scarcely, if at all, in dispute, viz., that in the month of April 1845, a contract was entered into, to which these gentlemen and others were parties, whereby it was agreed that a fund should be raised for the purpose of carrying this railway forward. There were several other contracts, according to the Scotch form, one in one name, and another in another name, but it may be treated as one contract, whereby a certain number of persons agreed to take shares of 25*l.* each—a deposit of 2*l.* 10*s.* to be paid upon each share—for the purpose of making this, which was a small railway; the whole capital being 130,000*l.* Subscriptions were entered into to the amount of 15,000*l.*; the deposits being 2*l.* 10*s.* on each share. The summons states, that the Pursuers, together with a gentleman of the name of Buntine, who afterwards died, and four other persons, were constituted a committee of management. And they state, that, under the powers that were given to them, they caused plans to be made, and introduced a Bill into Parliament in the Session of 1846; that, for reasons stated, the Bill was withdrawn, and in the following year, in the spring of 1847, the application was renewed, but that it again failed; and that after paying the expenses of both those abortive attempts there still remained a fund in their hands; and they instituted this suit, which is a multiple poinding, for the purpose of having the rights of the different persons claiming that fund decided by the Court, in order that the Pursuers might be exonerated.

The Pursuers said that they held in hand this fund *in medio*, viz., the 15,000*l.* that had been subscribed,

less the expenses incurred with reference to the Bill introduced in 1846 and the Bill introduced in 1847. On the other hand, the Defenders said that the fund *in medio* ought not to be treated as that balance only, but that the real fund *in medio* was the whole 15,000*l.*; or, if not the whole 15,000*l.*, the Defenders said that the fund held *in medio* was 15,000*l.*, less the expenses of the first application only.

That being the state of the cause, Lord *Wood*, the *Lord Ordinary*, pronounced an interlocutor on the 17th of March 1848, by which he directed the Pursuers to state what did really constitute the fund *in medio*, in order to have the question decided whether the expenses of the first application, and the expenses of the second application, or either of these expenses, were expenses in respect of which the committee of management were entitled to take credit before they called upon the Court to adjudicate upon the balance which remained. Condescendences and answers were lodged, and ultimately there were these pleas in law put in. The pleas for the Pursuers state, that they "are only bound to account for the deposits received by them, under deduction of the proper and necessary disbursements and expenses of the undertaking. The Pursuers have, on this footing, rightly accounted; and the deductions from the fund *in medio*, claimed by them, are right deductions;" that is, the deductions of the expenses of *both* applications. That was disputed by the present Respondents, the then Defenders, and the matter so coming before the *Lord Ordinary*, he, on the 30th of May 1850, found that the Pursuers were entitled to take credit for the expenses of the first application, but that they were not entitled to take credit for the expenses of the second application; and, consequently, that the fund *in medio* was made up of the 15,000*l.*, less the first class of expenses, but

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not making any deduction in respect to the second class of expenses.

That interlocutor was brought by reclaiming note before the Court of Session, and the Court of Session appeared *in omnibus* of that which had been done by the *Lord Ordinary*.

Against that interlocutor of the Court of Session the present Pursuers first of all appealed to your Lordships, claiming that they ought to have had credit for the expenses of the second application to Parliament. And, on the other hand, the Defenders instituted a cross appeal, saying that the whole sum subscribed ought to have been accounted for, and that the Pursuers ought not to have had credit for the expenses even of the first application; or, if they were to have credit for those expenses, then, they said, they ought to have been charged with a certain sum of 1,500*l.*, which the Defenders alleged the Pursuers might have obtained in reduction of them. To explain this, it is necessary to state that, just previously to the withdrawal of the first Bill, a rival Railway Company had offered the Pursuers 1,500*l.* if they would withdraw. The Appellants in the cross appeal alleged that they did withdraw, and ought, therefore, to have withdrawn upon the terms of receiving the 1,500*l.*; and that, consequently, the 1,500*l.* ought to be treated as a fund in their hands.

The first question to which I think the attention of your Lordships should be directed is this, What authority was given by the original contract to that committee of management? When I say that this is the first matter to which your Lordships' attention ought to be directed, I ought, perhaps, rather to say, it is the whole question. What, then, was the authority conferred by that document? I call it that document, I believe I should be more accurate in saying those

documents, for there were, in the Scotch form, several documents executed one after another, but they all constituted what may be considered as one instrument. I say that is the only question; because I take it to be clear that if a number of persons meaning to join in a common undertaking, and for that purpose raising a common fund eventually to be increased, but commencing by a deposit, put those deposits for a common object into the hands of a committee, with directions to them to do certain acts, it is not competent for any one, or for any ten of them, afterwards to withdraw and say, "I think, or we think you ought not to go any further." I, who am not of that opinion, have a right to say, I gave my money upon the faith that we were all embarked in one common undertaking, and till that has been done which we agreed should be done, no one or no ten have a right to withdraw and say, You shall not go any further.

The first question then is, What were the powers that were given to this Committee of Management? It is plain that they had power to apply for an Act of Parliament. The terms of the original contract are these: "The persons following shall be a Committee of Management for promoting and carrying into effect the objects of the said undertaking until an Act of Parliament shall be obtained for carrying the same into execution." Now, I have given much consideration to this case. My opinion, I confess, at times has fluctuated about it; but looking at that language coupled with what follows, I cannot come to the opinion that the Committee of Management were confined to an Act of Parliament in the Session of 1846. I think that all parties clearly contemplated the possibility that they might not during that Session obtain an Act, but that they might do so in a subsequent Session. This conclusion I deduce from

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several circumstances; not only from the conduct of the parties, but from the language of the contract deed. The Committee of Management were, in the first place, to "enter into contracts and agreements for or in anywise relating to the undertaking; and for all matters incident to the obtaining of the proposed Act or Acts of Parliament." "And in the event of an application or applications being made to Parliament in the next or any subsequent Session, and not being successful, or in the event of no such application being made," and so on, such things shall be done. Then again, further on in the deed, the parties stipulate, that they "will when required, from time to time, subscribe, execute, seal, and deliver all such further contracts or agreements as might be required by the Standing Orders or other Orders of Parliament."

Now it would seem to me reasoning *à priori*, that if you have persons subscribing to a fund, authorizing a committee to get an Act of Parliament if they can, the fair presumption would be that that committee was to take the best steps, and to take the best and most favourable opportunity, whether in the then present or in any subsequent Session of Parliament, for carrying that scheme into effect; and the conduct of the parties clearly shows that, with regard at least to a great number of them, such was their understanding; and the language of the original contract is difficult, I might almost say impossible to reconcile with any other construction; for there was to be an application to Parliament in the present or in any subsequent Session of Parliament. The only way in which that can be explained consistently with the hypothesis of the Respondents is this, that it must mean in the present Session, or, if you do not apply in the present Session, in any subsequent Session. But why are you

to introduce these words? They are appointed a committee until they have obtained an Act of Parliament, and they are to take certain steps, there pointed out, and to make application, or applications, in the present, or any succeeding Session of Parliament. Therefore, I come to the conclusion, that according to the true construction of the contract entered into, the Committee of Management had a discretion given to them. Of course, I assume that they are to be acting in all these transactions *bonâ fide*, and for the purpose of best furthering the objects of the subscribers; but they had a discretion to apply for an Act and prosecute it in that Session, or if for any reason it appeared to them after they had applied that it was not a favourable opportunity, and that it would best promote the objects of the undertaking to withdraw then and apply in a subsequent Session, they had authority so to do.

That being so, what are they to do in respect of the deposits placed in their hands? They are to get surveys made and to incur all the necessary expenses of promoting the ultimate object they have in view; and then in the event of their making an application, or in the event of its not being successful, or in the event of its not being made at all, "all the costs, charges, and expenses of every description, already incurred or thereafter to be incurred in respect of such application to Parliament, or in any manner incident to the undertaking or to any of the matters aforesaid, should be borne and paid by the several subscribers to the said undertaking, rateably in proportion to the number of shares taken by each subscriber." Now, my Lords, I cannot think it is a matter which admits of a moment's doubt that any expenses that were incurred in pursuance of the authority given by that contract were expenses which the Committee

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of Management were authorized to deduct out of the deposits in their hands.

Therefore I entirely concur in the first proposition of the Conrt of Session, that out of those deposits, before the fund *in medio* was to be ascertained the committee had the right of deducting all the expenses properly incurred in the *first* application to Parliament.

It was argued by the Respondents, however, that inasmuch as no Act of Parliament was ever ultimately obtained, the object of the subscription had, according to the language common in our Courts, and probably in the Courts of Scotland also, wholly failed; and, consequently, the subscribers had a right to recover back the money; in short that they were entitled to have the whole sum recouped to them. And for that proposition they cited several well-known cases; *Nockells* v. *Crosby* (*d*), an early case, and a much more recent one *Walstab* v. *Spottiswoode* (*b*), which was decided when I had the honour of being in the Court of Exchequer, when the subject was very much considered; and when, undoubtedly, though at first sight the proposition sometimes startles one, yet when considered, it is seen to be founded in perfect good sense. The proposition that was there recognized and established was this; that if I put my money into the hands of a person who says to me, "I am forming a company, would you like to have so many shares in it," and he fail in forming the company, he must give me back the money that I have given to him; for I only put the money into his hands, because he told me that he was going to form a company. In doing that, I placed the money in his hands, he undertaking

(*a*) 3 B. & C. 814; 5 D. & R. 751.

(*b*) 15 Mee. & Wel. 505; and see *Hutton* v, *Thompson*, 3 House of Lords Cas. 190.

to do something which he has failed to do, and he must therefore give me the money back. It is no answer to me that he has been endeavouring to do it, and has thereby incurred expense. That was his business, not mine; I never entered into any engagement authorizing him to do anything of the sort. But that reasoning wholly fails as applied to the case now before your Lordships. In several cases in the Court of Exchequer this was held; namely, where persons put money into the hands of agents who are to form a company, and they stipulate that those agents shall be at liberty, out of that fund, to reimburse themselves; you cannot then say, the object has failed. The object was that the agents should employ the money in an attempt, which means a *bonâ fide* attempt, to form a company; and when they have so applied it, they have applied it in the mode in which they were directed. I think there can be no doubt as to the correctness of the decision of the Court of Session, that the Committee of Management had a perfect right so to apply a proper portion of the funds in indemnifying themselves for the expenses which they had so incurred.

Then the Appellants in the Cross Appeal say,—that may be so, but you might have had in your pocket towards those expenses 1,500*l.*, and we are entitled to treat that 1,500*l.* as if it had got into your pocket, because it was offered to you, and it was your own folly not to receive it. You were bound to do the best you could for your constituents, and though you have failed to do so, you must be charged as if you had done so.

If in truth these persons were right in their proposition, possibly there might be some foundation for their argument; but when the facts are looked at there is nothing to warrant such a proposition. There

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was a rival line going on to Ayr; I assume that it appeared to the managers of this 15,000*l.* fund, early in the Session of 1846, to be almost hopeless to carry their Bill in that Session; and a proposal was made by the rival company that they would pay a certain amount of the expenses to be incurred, 1,500*l.*, if the Committee of Management would abandon their line. The committee thinking that this was a project that would not succeed, that they would not get the sanction of Parliament, jumped at this proposal; and accordingly they met on the 14th of March 1846, and in the minute of the meeting the committee state as follows: Mr. Morris, one of the shareholders, dissenting "That if the Ayr Company," (that is the rival company) "shall agree to pay one half of the expenses of the company, but so as not to exceed in all 1,500*l.*, they would call a meeting of the shareholders to authorize the withdrawal of the Bill, and winding-up of the company;" the other company makinga certain line. That was on the 14th of March. It was necessary to have this point immediately decided; consequently on the 16th, they issue a notice for a meeting, and on the 18th, a meeting of some fifteen of the shareholders takes place, and then they say that they approve of this. That is all done within three or four days. The first suggestion had been on the Saturday, and this meeting was on the following Wednesday; and no doubt that meeting approved of the proposal that the line should be abandoned, and that the 1,500*l.* should be accepted.

I think that the Committee of Management, if they had thought that that was the best thing to be done for the company, would have been authorized in taking that course; because a very complete discretion seems to have been entrusted to them, but I suppose they felt themselves in difficulty and embarrassment,

and thought that a meeting of shareholders, called at two days' notice, if they were not taking the best course for the company, could hardly be considered very satisfactory authority to them; and, therefore, though they got this sanction, they did not choose to act upon it. Now, the question is, whether merely because a meeting called in that way had sanctioned the committee in doing this if they thought fit, they not thinking fit to do it, are to be held responsible for the money which it is suggested they might have thus received. I cannot think that such a conclusion would be at all legitimate; and it appears certainly not to have been the view taken of it by the great majority of the shareholders; because they did not think that it was expedient to abandon the line altogether, for they anticipated that a more favourable opportunity might occur in the ensuing Session, when they might gain their object. First of all, the Committee of Management might think it was not a sufficient sanction, the meeting being called in such a hurry; and even if it were a sufficient sanction, they might have thought it was not the best and most expedient course to pursue. Accordingly they let the matter stand over; and, in my opinion, they were remitted to their former rights.

On the 30th of September, another meeting of the shareholders takes place, and at that meeting the committee report all that had been done about this 1,500*l.* and the withdrawal of the Bill. They reported that on the 7th of April, not thinking there was any reasonable hope of succeeding in that Session, they withdrew the Bill; and upon that occasion, one of the gentlemen present moved, "That the meeting having heard the report now read, approve thereof, and especially approve of the conduct of the directors in not pressing forward the Bill last Session, and thereby en-

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dangering its rejection, and insuring a large increase to the expenses incurred if they had gone on;" and then it was moved, "That it be remitted to the committee of management to resume the negociation," as to the 1,500*l.* They did resume the negociation, but the rival company, though they had been willing in March to give the 1,500*l.*, seem afterwards to have said that they would not give it; and in consequence, another meeting was called upon due notice on the 4th of November, at which the committee stated that they could not get this 1,500*l*; and then it was resolved, "That in the circumstances of the case, the Committee of Management be authorized to proceed or not, as they shall think fit, and if they resolve to proceed, that they have power to make calls, deposit plans, and apply for a Bill for a railway;" and they express their great disapprobation of the conduct of the rival railway company in withdrawing from their offer of 1,500*l.*

Now, my Lords, that was, as far as that meeting could go, an express sanction to the committee to proceed in the ensuing Session of Parliament. I do not rely upon that as the sole ground upon which I think they were justified in proceeding; because, if the original contract only authorized them to proceed in one Session of Parliament, it would be no answer to any shareholder who was not a party to the proceedings of this meeting, that a meeting of some other parties had authorized them to do something which the subscribers to the original contract had not authorized them to do; but the proceedings of that meeting, and all the subsequent proceedings are cogent evidence to show that no person was misled, and that these managers, if they had authority, (as I have already stated I think they had) to proceed under the original contract, were acting *bonâ fide* in endeavouring in the best mode they could

to discharge their duty; and having called a meeeting, and the meeting having authorized them, as far as they could give authority, to proceed, I think it is impossible to say that they were not perfectly justified in proceeding in the way in which they thought best for the interests of those whom they were serving.

I am also of opinion, that if the committee had thought the contrary, or if in the teeth of the meeting they had said, you have given us a discretion, and we see that it is idle going on, you will only be wasting your money; if they had chosen not to proceed, they would have been perfectly warranted in taking that course. The committee were authorized to do either the one thing or the other. I think that they had an authority to do one or the other under the terms of the original deed, and therefore, with all deference to the Court of Session, I cannot concur in the view which the learned Judges seem to take of the case, viz., that because the state of things was altered, and there was then a repugnance on the part of the great body of the subscribers to proceed, therefore this money so expended, is not money for which the committee of management are entitled to take credit. I go this length, (and it is very often that an extreme case is the only satisfactory way of testing a principle,) I hold that if every subscriber but one had said I disapprove of your going on; I forbid your going on; but that one had said, I do not forbid you to go on, and I say act upon the original deed; if the committee had acted upon the original deed, and proceeded, they would, in my opinion have been perfectly safe. It might have been a very indiscreet act. If there had been an almost unanimous resolution of the shareholders against their proceeding, it would have afforded cogent evidence of something like *mala fides*, if they had acted in the

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teeth of that resolution. But strictly I do not think that the authority of any subsequent meeting was binding upon them, or that any subsequent meeting, unless absolutely universal, could have taken away the right originally given to the committee of management. But in the present instance, this meeting of the shareholders gave to them, so far as they could, authority to act exactly in the mode in which they have acted, viz., according to the best of their judgment, in executing the trusts of the original deed.

Lord Chancellor's opinion.

In these circumstances, I think the Court of Session were right in saying that the committee of managers were entitled to have credit for the whole of the expenses of the first application to Parliament; and that they were wrong in saying that they were not entitled to take credit for the expenses of the second application; the result of that will be, that the first appeal succeeds, and the cross appeal fails; therefore I move your Lordships that the Interlocutors may be varied, by declaring that the fund *in medio*, consists of the whole of the 15,000*l*., minus the expenses of both the first and the second applications to Parliament.

Mr. *Solicitor General:* I will give your Lordship the words in a moment, if you will allow me. Reverse so much of the Interlocutor of the *Lord Ordinary*, &c. [Here the learned *Solicitor General* furnished their Lordships with the heads and terms of the judgment which he proposed for the adoption of the House.]

Lord Brougham's opinion.

The Lord BROUGHAM:

I had originally, I do not say an opinion, but, a doubt amounting certainly to an inclination of opinion the other way; but upon fully discussing the matter with my noble and learned friend, and having had the great benefit of his statement (which he had reduced to

writing) of his view of the case, and again consulting with my noble and learned friend, my doubts have been removed; and I entirely agree in the view which he has taken upon both points; that is to say, that the Interlocutor should be reversed, with alterations to the extent which is stated very distinctly in the minute read by the *Solicitor General.*

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Ordered and *Adjudged*, That so much of the said interlocutor of the Lord Ordinary, of the 30th of May 1850, complained of in the said original appeal, as finds that the Raisers (Appellants in the original appeal) are not entitled to take credit for, or deduct, any portion of the expenses attending or incident to or created by the second application made to Parliament, founded on in the record, be, and the same is hereby reversed; and that so much of the said interlocutor of the Lords of Session of the First Division, of the 8th of July 1852, also complained of in the said original appeal, as refuses the reclaiming note for the Pursuers (Appellants in the original appeal), and finds no expenses due to them, and as adheres to so much of the said interlocutor of the said Lord Ordinary as is hereby reversed, be, and the same is hereby also reversed. And it is further ordered and directed, that the reclaiming note for the Defenders (Respondents in the original appeal), against the said interlocutor of the Lord Ordinary, be refused with expenses to the Pursuers (Appellants in the original appeal) of both reclaiming notes. And it is declared, that in accounting for the deposits received by the Raisers (Appellants in the original appeal) the said Raisers are entitled to be allowed the expenses properly incurred of and attending both applications to Parliament, and that without any Reduction in respect of the 1,500*l.* alleged to be payable by the Glasgow, Paisley, Kilmarnock, and Ayr Railway Company. And it is further ordered, that, with this direction and declaration, the cause be and the same is hereby remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with such direction and declaration, and this judgment. And it is further ordered and adjudged, that the said cross appeal be, and is hereby dismissed the House. And it is further ordered, that the said Appellants in the said cross appeal do pay or cause to be paid to the said Respondents therein, the costs incurred by them in respect of the said cross appeal.

DEAN & ROGERS.