

him for the natural consequences of acts done in the employer's service, we do not dispute. There is no doubt about that proposition of law at all; but the case apparently made out in the pleadings for the plaintiff is that there was an express agreement, and that also is supported by the evidence of Mr. Scott. My learned friend apparently relied, in opening, upon an implied undertaking to indemnify, and the plaintiff also apparently relies upon an implied undertaking to indemnify him. We dispute the liability of the defendants, or either of them, either upon an express or implied agreement. The defence, your Honour, is this: The National Mortgage Company had, upon a Run 93A, in the Lake Ohau District, some eight hundred head of cattle and some five thousand five hundred head of sheep. It was necessary, for the purposes of their business, that some time should be given them in order to dispose of these cattle and sheep. They did not wish to get the run itself; and Mr. Ritchie expressly told the defendant that he would under no circumstances saddle the National Mortgage Company with it.

*Sir R. Stout*: I think this is the proper time now to take the objection. If it is meant to go upon what was hinted at in the end of the cross-examination of Mr. Scott, I submit they cannot do that under the pleadings.

*Mr. Solomon*: Upon what grounds?

*Sir R. Stout*: If you are going upon any agreement of any sort you cannot do that under the pleadings. It has not been pleaded, and I submit that, under the rules, it ought to have been pleaded, and that that point has been sufficiently decided. There is no agreement alleged between the plaintiff and the defendants; no facts are set up; the only thing is in the fifth paragraph of the statement of defence, and that has no bearing on the defence sought to be elicited. Of course, we could not object to that, because that would have been admissible on the ground of credibility; but I submit there is no statement whatever in the defence set up of any agreement whatever between the company or any of the defendants and Mr. Scott, except this, which is referred to in the fifth paragraph, and that is not at all what was put to Scott in the witness-box, namely: "That the defendants admit that they paid the first half-yearly instalment of rent for the said run, but say that they paid the same for and on behalf of the plaintiff, and as his agents." Of course, that was not what was put to Scott at all. "And the defendants also admit that some stock, the property of the defendants—the National Mortgage and Agency Company of New Zealand (Limited)—were depastured upon the said run with the consent of the plaintiff, and by arrangement with him, for a short time after the plaintiff purchased the said run; but, save as herein admitted, they deny all the allegations." So that your Honour will see there was nothing whatever in the statement of defence alleging any agreement between the plaintiff and the defendants; and they, I submit, cannot now be permitted to set up some arrangement different from what we allege in our claim as having been made, because our rule is explicit that the grounds of defence must be set out.

*Mr. Haggitt*: My learned friend is arguing against nothing at all. My learned friend Mr. Solomon has not set up an agreement. He is merely going to state what took place.

*Sir R. Stout*: Pardon me, my learned friend cannot get in what he calls the actual facts without pleading them.

*His Honour*: But really Mr. Solomon is opening nothing improper. You set up this agency; they deny agency. In proof of your case you brought out your client's account of what took place between him and the two defendants. Well, in answer to that, certainly it is admissible for the defendants to show what did take place. If what did take place amounted to an agreement, then it may be open to you to object that, as it was not pleaded, they cannot succeed upon it.

*Sir R. Stout*: That is the only point I wish to make.

*His Honour*: The evidence, certainly, cannot be excluded.

*Sir R. Stout*: I understand my friend is opening that an agreement was made.

*His Honour*: He may not be able to rely upon it. I do not say whether he can or cannot, but certainly he can open all that took place between the parties.

*Sir R. Stout*: I do not care for their version so long as they cannot rely upon it. That is my argument, if your Honour will kindly note it.

*His Honour*: I think the argument may be premature at this stage.

*Sir R. Stout*: If I did not object now I might have been estopped.

*His Honour*: Hardly.

*Mr. Solomon*: I have listened carefully, but I cannot see what my friend objects to.

*Sir R. Stout*: If you cannot you are very dull; I am sure Mr. Haggitt sees.

*Mr. Solomon*: I do not propose to open anything except what is distinctly brought before the notice of the parties, and what I say distinctly is shown on the pleadings. Our defence is that there was no agency whatever between Mr. Scott and the defendants: that, at the request of the defendants, Mr. Scott purchased the run himself, and that there was no agency at all. The position of the matter from our point of view is this: that the National Mortgage and Agency Company had some eight hundred head of cattle and some five thousand five hundred head of sheep depasturing upon this run; and that it was necessary for the purpose of their business that they should have the use of this run for a short time—some months—but they were unwilling to take upon themselves the responsibility both of the rent and the rabbits for the usual term of the lease. Mr. Ritchie expressly told Mr. Scott this, and made him aware that the company required the use of the run for a short time, but that they were unwilling to take upon themselves the responsibility of taking it up for themselves: that Mr. Scott was thereupon told, both by Mr. Ritchie and by Mr. Henderson, that if he was willing to take up this run in his own name that they would pay the first half-year's rent, and that they would pay him such a sum as he might think fair for the service that he was rendering for them; but Mr. Ritchie and Mr. Henderson will both flatly contradict Mr. Scott's statement that they ever told him that "they would see him through it," or that "it was all right," and that he was to look to them. Mr. Ritchie will tell the Court quite distinctly that he made Mr. Scott aware he had to take the whole responsibility of the transaction, and could not