hold that the evidence so received was, although admissible, insufficient in point of law to constitute any obligation against the defenders, which was not expressed in or proved by the terms of the documents referred to in the second issue," then the verdict shall be entered for the defenders.

Now, supposing it were doubtful, whether the evidence could be received or not, (I rather think I am right in saying that it ought to have been received,) still I am clearly of opinion, that this is a case in which it should have been left to the Court to say, whether there was evidence sufficient in point of law to constitute an obligation against the defenders not expressed in the terms of the document. I am clearly of opinion that there was no such evidence—that there was nothing to entitle the pursuer to more than what is expressed in the terms of his note. It is not disputed that they were ready to deliver. But they contended that they were not bound to deliver any other iron than that which is described as pig iron on the face of the document, and which they are therefore ready to deliver. That was all that they were bound to do. Consequently, I think the interlocutor was properly given against the pursuer, and in favour of the defenders. I shall therefore move your Lordships that this appeal be dismissed with costs.

Interlocutors affirmed, with costs.

Gibson Craig, Dalziel, and Brodie, W.S. *Appellant's Agents.*—Walker and Melville, W.S. *Respondents' Agents.*

FEBRUARY 19, 1857.

WILLIAM M'EWAN, *Appellant, v.* SIR JAMES CAMPBELL and Others, *Respondents.*

Railway—Copartnery—Provisional Committee—Obligation, Presumed—Summons—Relevancy HELD (affirming judgment), *in an action brought against members of a provisional committee of the projectors of a railway, which was never carried into effect, by the secretary who was also law agent, for payment of his accounts, that, in order to render a committee man liable, it is not enough that he acted as such, but it is necessary to aver and prove a separate and special contract of employment on his part, in regard to the pieces of business sued for.*[1]

This was an action brought against the members of a Provisional Committee appointed for promoting an undertaking called the Lanark, Stirling, and Clackmannan Counties Junction Railway, to recover payment of advances and of accounts incurred by the appellant as secretary and law agent.

The revised condescendence merely alleged, that the pursuer was appointed by the defenders, who were the members of the provisional committee, to be secretary and law agents, and that he acted as law agent with the knowledge and consent of the defenders as members of the said committee.

The Lord Ordinary and the First Division held the averments not relevant, and dismissed the action.

The pursuer appealed, pleading, that the judgment ought to be reversed—Because, having reference to the nature of the appellant's claim, the summons and record contained statements relevant and sufficient to support the conclusions of the action.

The respondents maintained that the judgment ought to be adhered to—1. Because the condescendence annexed to, and forming part of, the summons, did not contain any statements of facts relevant or sufficient to support the conclusions of the summons. *Hutton* v. *Bright*, 3 H. L. C. 341; *Campbell* v. *Dick Lauder*, 15 D. 117; 6 Geo. IV. c. 120, § 2. 2. Even the revised condescendence for the appellant, on which the record was closed, did not relevantly, and with sufficient specification, aver either employment of the appellant by the respondents, or any agreement on their part with him, whereby they individually, or conjunctly and severally, became bound or liable, as libelled.

Rolt Q.C., and *Roxburgh*, for the appellant.—It is admitted that the law is now settled on the subject of the liability of provisional committee men, and that there is no partnership between them; but that in order to fix an individual with liability, he must be shewn to have entered into some special contract to pay—in other words, each is liable only on his own contract, and binds himself only.—*Bright* v. *Hutton*, 3 H. L. C. 341; *Upfill's Case*, 2 H. L. C. 674. Here, however,

[1] See previous report 16 D. 117; 26 Sc. Jur. 87. S. C. 2 Macq. Ap. 499; 29 Sc. Jur. 222.

there are ample materials alleged in the summons and revised condescendence to make up a special contract. The pursuer first alleges distinctly an employment by the defenders, or some of them, and that is one ground of action. Further, that the defenders knowing that their names had been published, and held out to the world as committee men, came into the scheme, and knowingly adopted the acts of the pursuer as the general agent. If a person, knowing that certain liabilities have been already incurred in the prosecution of an undertaking, come into the management and attend the meetings, &c., it is an irresistible conclusion, that he adopts these liabilities as his own.—*Spottiswoode's case* and *Amsink's case*, 6 De G. M. & G. 345; *Pearson's Executor's case*, 3 De G. M. & G. 241; *Carrick's case*, 1 Sim. N. S. 509.

The summons and revised condescendence contain these grounds specifically set forth; at all events, they are sufficiently precise, according to the practice in Scotland, so as to enable us to have an opportunity of proving them before a jury. What the Judges in the Court below said was, that we had not stated how, when, and by whom we were engaged. But such particularity is not necessary. We have made the general allegation of employment and of adoption, and the circumstances in detail are mere matter of evidence to be proved at the trial, but do not require to be set forth in the condescendence. To require such particularity is inconsistent with the very notion of pleading, whether in Scotland or England. LORD BROUGHAM strongly reprobated the practice sometimes sought to be enforced in Scotland, of requiring the evidence or mode of proof to be alleged in the pleadings.—*Macdonald* v. *Mackie*, 5 W. S. 462; *Gillon* v. *Mackinlay*, *ibid.* 474. The Courts below have already gone too far in this direction, and ought not to be encouraged, for the practice puts a pursuer under great disadvantages, by compelling him to disclose the mode in which his case is to be proved.

Attorney-General (Bethell), and *Anderson* Q.C., for the respondents.—The law of provisional committee men, after much confusion, is now settled. At first, the notion was, that a partnership existed among these persons, and each was thought to be liable for all the debts contracted by the others; and hence all a plaintiff had to do was to make out that the defendant was *de facto* a committee man. The present summons was raised shortly before the law was declared to be otherwise by *Bright* v. *Hutton*, and hence it was framed on the old theory. There is, in fact, no substantial allegation in the present summons, which does not resolve itself into the bare allegation that the defenders were provisional committee men. That is not enough. It is said that the revised condescendence corrected the defects of the summons, and set out fully the special contract. But even assuming that there is enough in the revised condescendence to shew a special contract, it is incompetent by the law and practice in Scotland to introduce into it a ground of action not stated in the summons and original condescendence, which are now one pleading. The summons must, by statute, set forth the nature, extent, and grounds of the action.—6 Geo. IV. c. 120, § 7; 13 and 14 Vict. c. 36. And it must state all the grounds of action.—*Kerr* v. *Kerr*, 9 S. 204. And an irrelevant summons cannot be cured by the revised condescendence.—*Dallas* v. *Mann*, 15 D. 746. The pursuer was allowed an opportunity to amend this summons, which was the only way in which the defect could be supplied; but he refused to amend. As the summons now stands, the action must be dismissed, there being no specific allegations of liability.—*Ferguson* v. *M'Gachen*, 7 S. 580; *Burnes* v. *Pennell*, 6 Bell's App. 541, and after the record is closed, it being too late to amend.—*A* v. *B*, 7 D. 595; *Baird's Trustees*, *ibid.*, p. 1001; *Boswell* v. *Ogilvy*, 11 D. 185. Even if the revised condescendence were held to be only an amplification of the same substantial grounds of action as those contained in the summons and condescendence, the allegations are not sufficiently specific, for none of them import an individual liability against any one defender. It is well settled in Scotland, that not only must there be a general allegation of employment or of adoption, but it must be shewn specifically when, how, and by whom the contract was made or adopted. The practice differs from that prevailing in English Courts of law, which are not so strict in this respect. The observations of LORD BROUGHAM in *Macdonald* v. *Mackie* were made inadvertently, and are not recognized in Scotland as sound law.

Rolt replied.

LORD CHANCELLOR CRANWORTH.—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 upon a record in which Mr. M'Ewan, who is a writer in Glasgow, was pursuer, and Sir James Campbell and others were defenders. The case was heard and disposed of by the Lord Ordinary in July 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, 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 conclusions; and that was 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, may be a matter for your Lordships to consider in your legislative capacity. But the legislature thought proper, in the year 1849, by 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 accompanied with an articulate condescendence stating the grounds of the action. 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 shews 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 Tennents, 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 one or more of the defenders, 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 acknowleged and recognized 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 the provisional committee," and that what he did was "known to, and recognized, 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 matters, 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 in law. I quite admit what has been stated at the bar, that the pleas in 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 those 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 shew 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; but 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. 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 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 these 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 twelfth condescendence, 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 recognized 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 in the fourteenth and fifteenth, 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 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 the true construction of the act of 1849, the original condescendence so entirely 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 recommend your Lordships to adopt, and consequently, to advise your Lordships that this appeal should be dismissed, with costs.

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 6 Geo. IV. the summons is to express the cause of action. That afterwards was changed by the act of the 13th and 14th Vict. 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 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 Geo. IV. 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, 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. 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 that 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 if 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. Now, 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.

Then 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 shew, 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.

Appellant's Agent, James Bell, S.S.C.—*Respondents' Agents*, Webster and Renny, W.S.

FEBRUARY 23, 1857.

THE EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, *Appellants*, *v.* ROBERT PHILIP, *Respondent.*

Agreement—Contingent Obligation—Construction—Railway—*A party entered into an agreement with a railway company, in which he assented to a bill then before parliament, for making a branch, which, if carried into effect, would touch his property, the company binding themselves to pay £11,500 for his property at the first term "after the said company, on obtaining their act, shall have begun to execute any part of the said railway." The company obtained their act, and borrowed money under the powers; but they did not execute any part of the works.*

HELD (reversing judgment), *That the obligation to pay was contingent on the company beginning to execute any part of the railway; and as that condition had never been purified, the company were not bound to implement their agreement.*[1]

In 1846 the company then incorporated under the name of the Edinburgh, Leith, and Granton Railway Company, (now amalgamated with the Edinburgh, Perth, and Dundee Railway Company,) published the usual notices that an act of parliament would be applied for in the ensuing session, for authority to make a branch railway from the line of the then existing Leith branch to the upper drawbridge in the town of Leith. The property situated at Old Church Wharf, in the parish of North Leith, belonging to the pursuer Robert Philip, merchant in Leith, as heritable proprietor, was included in the notices as required for the purposes of the undertaking. In December 1846 the agents of the railway company informed the pursuer, that, as the intended line would run through the middle of his property, it was the wish of the company to acquire the whole of his property; and, with the pursuer's permission, the company procured a survey and valuation of his property. After some negotiation, an agreement was entered into, whereby the Company agreed to pay Mr. Philip £11,500 in full of all claims on account of the intended operations of the company. The pursuer, Mr. Philip, then assented to the bill, and it was passed in 1847. But the railway was never made.

The Court of Session held that the obligation became absolute to pay the £11,500, and the defenders were liable to pay that sum.

The defenders appealed, maintaining that the interlocutors of the Court of Session should be reversed, because,—1. According to the sound construction of the minute of agreement of 21st and 22d January 1847, the sale of the respondent's property, or the agreement on the part of the appellants to acquire the same, was conditional, *first*, upon the passing of the act therein referred to; and, *second*, upon the appellants beginning to execute the railway under the powers of the said act; and the appellants were not bound to pay the stipulated price until the first term of Whitsunday or Martinmas after beginning to execute the railway. 2. The respondent having in his first action against the appellants founded on the said agreement as conditional upon their beginning to execute the railway, and joined issue with them upon the question, whether the said condition had been purified; and the said issue having been tried by the Lord Ordinary, under the act 13 and 14 Vict. cap. 36, § 48, and decided by his Lordship against the respondent, the second action, libelling upon the agreement as absolute and unconditional, was incompetent. 3. Having regard to the facts conclusively found by the Lord Ordinary in his interlocutor of 11th February 1852, the subsequent interlocutor of the 6th March 1852 was well founded, and ought to have been affirmed by the Court. 4. The respondent is barred, by his judicial statements in the first action, and the whole proceedings in that action, from maintaining that the minute of agreement in question was absolute, and not dependent upon the appellants beginning to execute the railway. 5. In any view, a decree for specific performance is not warranted by the facts and circumstances of the case, the respondent's proper remedy being an action of damages for breach of contract.

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[1] See previous report 10 D. 1065; 26 Sc. Jur. 580. S. C. 2 Macq. Ap. 514: 29 Sc. Jur. 242.