

land's Trustees and Others, the comparing defenders, named and designed in the minute No. 356 of process, liable to the pursuer in expenses since the date of their comparance on 15th December 1871: Find no other expenses hitherto incurred due to or by any of the parties; remit to the Lord Ordinary to proceed with the accounting, with power to his Lordship to decern for the expenses now found due."

Agents for Pursuer—Watt & Anderson, S.S.C.
Agents for original Defenders—Millar, Allardice, & Robson, W.S.
Agent for comparing Defenders—T. J. Gordon, W.S.

Saturday, July 13.

JACKSON v. COWIE & SONS.

Reparation—Breach of Contract—Competency of Second Action.

In an action of damages for breach of contract, the pursuer founded on a contract to give a daily supply of coals for a period not expired at the date of the action, reserving all claim for damages to be sustained in the event of the defenders failing to implement the contract during the period yet to elapse, and subsequently raised a second action for the damages alleged to have been sustained from the date of the first action till the expiry of the contract. *Held* that this was a competent course.

Process—Damages—Jury.

Circumstances in which it was held that sufficient cause had been shown why an action of damages for breach of contract should not be sent to a jury.

On 29th January 1872 Thomas Jackson, iron-master, Coatbridge, raised an action against George Cowie & Sons, coal-masters, near Coatbridge, for breach of contract, on the allegation that the defenders had contracted to supply him with a certain quantity of coal and shale daily for six months from 4th September 1871, and that from about the beginning of October the supplies furnished by the defenders fell short of the contract amount, and on 7th December ceased altogether. The pursuer reserved all claim for damages sustained or to be sustained in the event of the defenders failing to implement the contract for the period from 26th January to the end of February 1872.

On 1st April 1872 the pursuer raised a second action for the damages alleged to have been sustained by him in consequence of the defenders failing to implement their contract for the period from 26th January to end of February 1872.

On 5th February 1872 the defenders raised a counter-action against the pursuer, for payment of the price of coals furnished by them to the pursuer in November and the beginning of December 1871.

Messrs Cowie & Sons objected to the form of the first action at the instance of Jackson, as containing a reservation of the claim for loss sustained between the date of the action and the expiry of the contract, and to the competency of the second action.

The Lord Ordinary (MURE) pronounced an interlocutor in both actions at the instance of Jackson, repelling the objections for the defender, and al-

lowing the parties a proof, to be taken before his Lordship; and pronounced the same order in the counter-action.

"*Note.*—This action resolves substantially into one of damages for breach of contract, and may be said to fall within the class of causes enumerated for jury trial, which cannot be tried otherwise except by consent of parties or on special cause shown. But the Lord Ordinary, upon examining the records in the various actions between the parties, has come to the conclusion that the pursuer has shown sufficient cause why the cases should not be sent to a jury, for the leading question at issue, viz., whether there had been a breach of contract or not, depends mainly upon the construction of the letters founded upon, as to which parties materially differ, and which would be matter for direction, in point of law, to the jury; while, in the event of a breach of contract being made out, as alleged by the pursuer, the measure of damage claimed will turn almost entirely upon an account as to the difference between the contract price of the coal and shale and the price at which the pursuer had to supply himself with these articles in the market,—a species of damage which does not appear to be in any peculiar respect more proper for disposal by a jury than before any other tribunal.

"With reference to the objection taken to the form of the action, as containing a reservation of the pursuer's claim for the loss sustained between the date of the action and the expiry of the contract, and to the competency of the second action, it appears to the Lord Ordinary that there is no absolute incompetency, in a case of continuous accruing loss, in so proceeding to constitute the amount of that loss. The more correct and least expensive course, seeing that the defenders have ceased to make a partial delivery of coal on the 7th of December 1871, might perhaps have been to have inserted in the first action conclusions for implement of the contract during the remaining period of its duration, with an alternative conclusion for damages for the loss that might be sustained through non-implementation. But, as the Lord Ordinary sees no actual incompetency in the course which the pursuer has adopted in bringing a second action to constitute the amount of loss sustained during the remaining period of the contract, and which could not very well be estimated till the expiry of the six months during which the contract has to run, he has pronounced a similar order for proof in the second action, as well as in the counter action at the instance of the defenders, in order that the whole questions at issue may at once be disposed of."

Messrs Cowie & Sons reclaimed.

SOLICITOR-GENERAL and GUTHRIE SMITH, for them, supported the objection taken in the Outer House, and also maintained that the case should be sent to a jury.

WATSON and GLOAG for Jackson.

The Court adhered.

Agent for Thomas Jackson—William Ellis, W.S.
Agent for Cowie & Sons—William B. Glen, S.S.C.