and ordain the trustees acting under his father's trust-disposition and settlement to make payment to the petitioner, for the suitable maintenance and education of his children, out of the free annual income of the trust-estate under their charge, other than that portion of the income which was payable to the petitioner, of the sum of £650 yearly.

The purposes for which the respondents held the trust-estate had been determined by an agreement entered into between them and the petitioner as the settlement of a litigation. Under that agreement the trustees were to pay the petitioner yearly one-half of the nett revenue derivable from the trust-funds, and the remainder of the revenue was to be accumulated by the trustees for behoof of the petitioner's children until they reached the age of twenty-five, or, in the case of daughters, until they attained that age or were married.

At the date of the petition the petitioner had eight children, seven of whom were being educated. He averred that the income derived from the trust-estate had seriously diminished; that his family had been increasing and growing up, and that the expenses connected with their education had become a serious item in his expenditure; that accordingly he found it necessary, in order that he might maintain and educate his children in a manner suitable to their future prospects, to have at his disposal a larger income than he could command. He further averred that the nett income of the trust-estate for the year ending 30th May was £4623, 12s. 4d., and that the trustees were thus accumulating income on behalf of the children to the extent of more than £2300 a-year.

The trustees lodged answers, in which they "expressed themselves willing, if authorised by the Court, to meet the petitioner's wishes to the extent of defraying one-half of the expense of the education of the children."

At advising—

Lord President—In all such cases as the present the first consideration always is, what arrangement is most beneficial to the children, and what I look at here is the entire income of the estate and the proportion thereof enjoyed by the petitioner. The total amount of the income of the trust-estate is £4623. Of that the petitioner is getting a sum of £2323 per annum, and the trustees are accumulating for the children the balance of £2300. The first question in this case is, whether it will be for the advantage of the children that any part of the accumulated income should be applied for the education of the children? In determining that question, of course we take into consideration the fact that the petitioner is in receipt of an income from the estate, and I am not prepared to advise that he should be relieved entirely from the duty of educating his children. On the other hand, although he has a good income—it might be called a handsome income—from the estate, still, if he desires for his children a superior education, it is a fair subject for consideration whether it is just to lay upon him the whole burden, while the remaining part of the income from the estate is being accumulated for the children. It appears to me that the trustees made a very fair proposal when they suggested that they should pay a half of the required amount, and that the petitioner should pay the other half. The principle of our judgment is, that the petitioner and the trustees should each contribute one-half of any sum which may be necessary to give the children a first-rate education.

Lord Mure and Lord Adam concurred

Lord Shand was absent from illness.

The Court pronounced the following interlocutor:—

"The Lords authorise and ordain the respondents, the trustees of the late William Muir of Inistrynich, to make payment to the petitioner, at the 31st of January and the 31st July of each year, of an amount equal to one-half of the sum expended by the petitioner in each year on the education of his children, whether mentioned in the petition or not, including board when from home and travelling expenses, as the same shall be vouched to the satisfaction of the said trustees, said amount payable by the said trustees not to exceed the sum of £500 in any one year, beginning the first half-year's payment of said amount at 31st January 1888 for the half-year preceding that date, and the next half-year's payment at 31st July 1888, and so forth half-yearly thereafter during the education of the said children, and until they become respectively entitled to their shares of the said trust-estate: Authorise and direct the said trustees to make said payment, and also payment of the expenses incurred by the petitioner and respondents in this application, as the same may be taxed by the Auditor of Court as between agent and client, out of the share of the revenue of the said trust-estate pertaining to the children of the petitioner, and to charge the same as a general payment against the said income account, declaring that the present arrangement shall take effect till the further orders of the Court; and decern."

Counsel for the Petitioner—Sol.-Gen. Robertson—Omond. Agents—Murray, Beith, & Murray, W.S.

Counsel for the Respondents — Jameson. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, December 7.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

STEVENSON v. PONTIFEX & WOOD.

Contract—Breach of Contract—Damages—Second Action Proceeding upon Same Breach of Contract.

A single act amounting either to a delict or a breach of contract cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but caused by the same act.

A firm of engineers supplied a merchant with a refrigerating machine, and undertook that they would not supply any similar machine which to their knowledge was to be erected within prescribed limits. The sellers subsequently sold a similar machine which was erected within the prescribed limits. On 16th July 1886 the merchant raised an action of damages for this breach of their obligation. The defenders made a tender of a sum in full of the pursuer's claims under the conclusions of the summons, which was accepted. On 26th March 1887 the pursuer raised a second action to recover the damages arising during the period from 16th July 1886 to 26th March 1887 from the same breach of contract. *Held* that the pursuer's claims were satisfied by the payment made in settlement of the first action, and defenders *assoilzied*.

By contract dated 2d February 1884 Messrs Pontifex & Wood, engineers, Farringdon Works, Shoe Lane, London, sold to Duncan Stevenson, bleacher and ice merchant, Millerston, near Glasgow, a refrigerating machine, and undertook that they would not, without Stevenson's consent, supply any such machine which to their knowledge was to be erected within ten miles of the Cross of Glasgow, and which was to be used for the purpose of making ice for sale, for a period of five years from the date of the contract.

On 16th July 1886, an action was raised in the Court of Session at the instance of Stevenson against Pontifex & Wood, arrestments having been used to found jurisdiction, concluding for the sum of £4983, 18s. 3d., of which £3000 was claimed as damages for breach of contract. The pursuer averred in that action—"(Cond. 9.) Notwithstanding the obligations undertaken by them in the above mentioned article of the contract, the defenders in or about the beginning of the year 1885 supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, icemaking machinery similar to that supplied to the pursuer. Messrs Verel & Company have thus been enabled to manufacture ice in competition with the pursuer, have undersold the pursuer in the market, and have thus to a very great extent injured his trade and reduced his profits. Cathcart is within the prescribed limit of ten miles from Glasgow. The defenders have thus violated the terms of the said contract. The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000." This action was compromised by the pursuer accepting a tender of £250 in full of his claims under the conclusions of the action, and a discharge of his liability for the sum of £290, 12s. 4d., being the balance of the contract price of the machine sold to the pursuer.

The present action was brought on 26th March 1887 by the same pursuer against the same defenders. The conclusion was for £650 as damages, which the pursuer averred he had sustained between 16th July 1886, the date of the first action, and 26th March 1887, the date of the second action, arising from the same breach of contract, viz., the sale to Verel & Company previously mentioned.

The pursuer averred—"(Cond. 7) Since 16th July 1886 and down to the present date the said F. W. Verel & Company have continued to manufacture ice with the machinery supplied to them by the defenders, in competition with the pursuer, have undersold the pursuer in the market, and have thus, by the defenders' said breach of contract, injured the pursuer's trade to a very great extent, and have reduced his profits. The loss sustained by the pursuer between the two dates last mentioned amounts to a sum of not less than £650, being the sum sued for." Also in Cond. 8 ". . . The sum tendered and accepted in the action above mentioned included, and was intended by both parties to include, only the damages therein sued for, viz., damage suffered prior to the date of the action."

The defenders denied these statements, and stated in Ans. 8—" . . . The whole claim now made was included in and settled by the former action and settlement thereof."

The pursuer pleaded—"The pursuer having, through the defenders' breach of contract condescended on, suffered loss and damage to the extent sued for, he is entitled to decree in terms of the conclusions of the summons, with expenses."

The defender pleaded—"(1) In respect of the proceedings in the former action and the settlement thereof the defenders should be assoilzied. (2) It is incompetent to sue, as the pursuer claims right to do, for partial damages for one alleged breach of contract. (3) The pursuer's averments are irrelevant."

On 15th June 1887 the Lord Ordinary (M'Laren) pronounced this interlocutor—"Finds that the pursuer's claims under the cause of action libelled are satisfied and discharged by the payment founded on in defence: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the defenders entitled to expenses, &c

"*Opinion.*—The defenders are makers of 'refrigerating machines,' or machines for making ice in commercial quantities, one of which they sold to the pursuer on 2d February 1884, giving at the same time an obligation not to sell any other machine which to their knowledge was to be erected within ten miles of the Cross of Glasgow, and which was intended to be used for the purpose of making ice for sale. In the year 1885 the defenders (apparently through inadvertence) supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, an ice-making machine in breach of this obligation.

"On 16th July 1886 the pursuer raised in the Court of Session an action of damages against the defenders, concluding for payment to him of £4983, 18s. 3d., whereof £3000 is stated to be damages for breach of contract, consisting in the supplying an ice machine to Messrs Verel. This action was compromised by the defenders paying £250, and also discharging a claim of £290, 12s. 4d., being the balance of the contract price of the machine supplied to the pursuer.

"The pursuer now sues the defenders for £650, being damages accrued from the date of the institution of the former action, 16th July 1886, to the date of the institution of the present action, 26th March 1887; and the question is, whether such a claim can be successfully maintained after the compromise of the first action, or whether that compromise does not amount to a discharge of all claims arising out of the sale of an ice-making machine to Messrs Verel.

"The compromise was in general terms for a

payment of a sum of money in full of the conclusions of the action, and the question whether this compromise covers emerging damages will depend apparently on the terms of the first summons, the amount of the claim made in that summons, and the probabilities of the case.

"In the first summons the averments are consistent with the supposition that the conclusions were intended to embrace the whole claims arising out of this breach of contract, except that in claiming damages this expression is used—'The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000.' It is said on the one side that where a claim is made for damages past and future it is usual to state the claim as being for damage 'sustained and to be sustained.' It is observed on the other side that there is here no reservation of a right to sue for further damages.

"There is nothing in the first summons that would suggest to the defenders that the pursuer had not brought forward all his claims against them, unless this is to be implied from the use of the expression 'loss occasioned.' I think that the defenders were entitled to insist that the pursuer should bring forward his whole claim, and that if it had been explained that the summons was not meant to cover future damage, the Judge would most probably have amended the record, or would have sisted process in order that a supplementary action might be brought. But I am not convinced that the pursuer by the use of the words 'loss occasioned' meant anything different from damage sustained and to be sustained. I cannot be sure that 'occasioned' is a limitation of the claim to past damage, because the expression is not grammatical. It is a case of a substantive used as a verb, without, as I think, any definite relation to tense or time, and the meaning is—The loss to the pursuer *on this occasion*, or on the occasion of this breach of contract, is £3000.

"I am confirmed in this opinion by the consideration that the sum claimed, £3000, is much larger than anyone could reasonably claim for the actual loss of profit consequent on the competition of another firm during the period of a few months. I am also of opinion that it is very improbable that the defenders would have agreed to a compromise if it had been understood that the pursuer was entitled to bring forward fresh claims of damage in respect of the same breach of contract. This is, indeed, so clear that the compromise cannot possibly stand if the present action is to proceed. But it is in my opinion more accordant with the meaning of the parties and with the justice of the case that the compromise should be sustained as a compromise of all claims of damage arising out of the sale of the ice-making machine to Messrs Verel."

The pursuer reclaimed, and argued—When the first action was raised the future loss from competition could not be estimated. The pursuer could not in the former action tell to what extent his customers had been dealing with Verel & Company, but having now found that out he was entitled to bring a second action—*Jackson* v. *Cowie & Sons*, July 13, 1872, 9 S.L.R. 617. If the damage was the necessary result of the wrong done, then the whole claim must be made at once, but when it could not be seen whether the damage would continue or not, as in the present case, then subsequent actions could be brought when the future damage arose—*Bruce*, Hume's Decisions, 596. The cases of *Jackson* and *Bruce* were the only two Scotch cases on the subject. The English authorities supported the same view—Mayne on Damages (2d ed.), pp. 93 and 96, and cases there cited—*Hambleton* v. *Veere*, 2 Saunder's Reports, 171; *Hodsoll* v. *Stallebrass*, January 11, 1840, 11 Adolph. & Ellis, 301; *Tricklin and Others* v. *Williams*, July, 3, 1854, 23 L.J., Exch. 335, Parke, B., at p. 337; *Whitehouse* v. *Fellowes*, February 12, 1861, 10 C.B. (N.S.) 765, Williams, J., at p. 783; *Roberts* v. *Read*, November 10, 1812, 16 East, 215; *Shadwell* v. *Hutchinson*, 2 B. & A. 297.

The respondents argued—The averments in the first action were identical with those in the second. There was no suggestion that the defenders had committed any fresh breach of contract. *Bruce, supra cit.*, was a much stronger case than the present. The circumstances in *Tricklin, supra cit.*, were very special. *Hambleton* and *Hodsoll, supra cit.*, could be distinguished from the present case. They showed that the question was not whether fresh damage had arisen, but whether a new wrong had been done—*Lamb* v. *Walker*, May 13, 1878, 3 Q.B.D. 389; *Gibbs* v. *Cruickshanks*, May 27, 1873, 8 L.R., C.P. 454, Bovill, C.-J., at p. 460. Here the cause of action was the same, viz., the one breach of contract—Guthrie Smith on Reparation, p. 15. In cases of personal injury the jury took into account the probability of the injury causing future damage—*Young* v. *Glasgow Tramway and Omnibus Company*, November 29, 1882, 10 R. 242; *Shields* v. *North British Railway Company*, November 24, 1874, 2 R. 126. It was incompetent for the pursuer to raise a new action, because there was no new wrong done.

At advising—

Lord President—The defenders, who are manufacturers of refrigerating machines, sold one such machine to the pursuer in February 1884 under a written contract, which provided as one of its conditions that for five years from the date of the contract the defenders should not supply any of their machines to be erected within a ten miles' radius of Glasgow for the purpose of making ice for sale. This condition was violated in the beginning of 1885 by the defenders supplying one such machine to be used at Cathcart, within the prescribed limit, to a firm named Verel & Company, by whom the machine was used for manufacturing ice for sale in competition with the pursuer.

On 16th July 1886 the pursuer raised an action of damages against the defenders, in which the cause of action and claim of damages is thus stated on record—"Notwithstanding the obligations undertaken by them in the above mentioned article of the contract, the defenders in or about the beginning of the year 1885 supplied to Messrs F. W. Verel & Company, Cathcart, near Glasgow, ice-making machinery similar to that supplied to the pursuer. Messrs Verel & Company have thus been enabled to manufacture ice in competition with the pursuer, have undersold the pursuer in the market, and have thus to a very great extent injured his trade and reduced his profits. Cathcart is within the prescribed limit of ten miles

from Glasgow. The defenders have thus violated the terms of the said contract. The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000." In that action the defenders tendered to the pursuer £250 in full of his claims under the conclusions of the summons, and a discharge of their counter claim for the balance of the price of the machine furnished to the pursuer, amounting to £290, 12s. 4d., being in all a sum of £540, 12s. 4d. The tender was accepted, and judgment pronounced accordingly on 6th January 1887.

The pursuer raised the present action on the 26th of March 1887. This claim is thus stated in the 7th article of the condescendence—"Since said 16th July 1886" (the date of the former action), "and down to the present date, the said F. W. Verel & Company have continued to manufacture ice with the machinery supplied to them by the defenders, in competition with the pursuer, have undersold the pursuer in the market, and have thus by the defenders' said breach of contract injured the pursuer's trade to a very great extent, and have reduced his profits. The loss sustained by the pursuer between the two dates last mentioned amounts to a sum of not less than £650, being the sum sued for."

The defence is in substance that the claim now made is satisfied and discharged by the interlocutor of Lord Lee in the former action giving effect to the tender and acceptance. I am of opinion that this defence must be sustained.

The cause of action in the previous summons was breach of contract and consequent damage. The breach consisted in the single act of supplying one machine to Verel & Company, and I am of opinion that a single act, amounting either to a delict or a breach of contract, cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods, but caused by the same act. On the contrary, I hold the true rule of practice, based on sound principle, to be, that though the delict or breach of contract be of such a nature that it will necessarily be followed by injurious consequences in the future, and though it may for this reason be impossible to ascertain with precise accuracy at the date of the action or of the verdict the amount of loss which will result, yet the whole damage must be recovered in one action, because there is but one cause of action. The most familiar illustration of this rule is to be found in actions for injury to the person, in which the practice is invariable.

Where the breach of contract or delict complained of consists not of one but of a series of acts, the rule is different. Thus, if one contracts to deliver a certain quantity of goods during each month in the ensuing year, and fails to perform in the first or second month, that is in itself a distinct breach of contract, and if the purchaser sues for damages for that breach, he cannot in the same action claim for an apprehended breach in subsequent months, for the obligant may perform his contract for the future, and if he fails in any subsequent month that is a fresh breach of contract for which a separate action will lie.

So, also, an operation *in suo*, which creates a nuisance to one's neighbour, may be followed by long-continued loss and damage to that neighbour, and yet it may not be necessary to recover the whole damage in one action, because he who commits the nuisance is under a constant legal obligation to abate it, and so long as he fails in performing that legal obligation he is every day committing a fresh nuisance.

I should hardly have thought it necessary to state these rules and principles, which are somewhat elementary, were it not that the present is the first example, so far as I know, of any attempt, at least in modern times, to recover by instalments in successive actions the continuing damage resulting from one delict or one breach of contract.

The Lord Ordinary has assoilzied the defenders, and to that interlocutor I think we ought to adhere.

Lord Mure— I am of the same opinion, and I think this case is peculiar for the reason pointed out by your Lordship. There is only one breach of contract, founded on one single act, viz., the sale of one of these refrigerating machines in violation of the undertaking entered into between the pursuer and defenders. That breach of contract commenced the moment the sale took place. Now, that having taken place, an action was raised by the pursuer founded on that breach, in which a sum of £3000 was claimed as damages in general terms as loss which the pursuer estimated at that sum.

Now, it appears to me that under that action it was competent for the pursuer to prove that he would sustain certain damage in the future from the wrongous act complained of. The case was compromised, the pursuer accepting a much smaller sum than he claimed in the action. Now, I am of opinion that all the damage sustained, or to be sustained, should have been claimed in that action. It might not necessarily be an exact estimate, but it would be a probable one. I do not think it is competent to raise another action founding on the same delict for which damages have already been obtained.

Lord Adam—In this case the defenders undertook not to supply any refrigerating machines which to their knowledge were to be erected within ten miles of the Cross of Glasgow. Now, notwithstanding that obligation, they did in the beginning of the year 1885 sell to Messrs Verel & Company such a machine, although it is not said that the defenders knew that the machine was to be used for the purpose of making ice for sale. That sale was a breach of contract, and accordingly an action of damages was raised by the pursuer against the defenders for loss occasioned by that breach. The claim was thus stated in the 9th article of the condescendence—"The loss occasioned to the pursuer by this breach of contract he estimates at not less than £3000." Thereupon a tender was made and accepted in full of the claim made in the action.

The question in this case is, whether the conclusions of the first summons included all damages, past as well as future? As your Lordships have pointed out, there is only one act which constitutes the breach of contract. Now, in my opinion, as soon as that act was committed a right of action arose to the pursuer to recover all the damage arising from that breach. I agree with your Lordships that a pursuer is bound to recover all his damage in one action. It is maintained on the

other hand by the pursuer here that he is entitled to bring successive actions for damages arising from time to time. It is quite true you cannot tell the exact amount of damage you may have caused, but the same thing occurs daily in all actions relating to personal injuries. Although no doubt the amount is to a certain extent a matter of speculation, the evil resulting from the claim embracing both past and future damage is in my opinion far less than if we were to allow successive actions to be brought. How many actions would the pursuer bring? Would he bring an action every month or every year, arising from the one wrongous act? This would be an intolerable state of affairs. We have had one action, which covered the damage to July 1886. Then there is this second action for the same wrong, which includes the damage from the last mentioned date to March 1887, or a period of about nine months. I see the obligation runs to 1890, and therefore the pursuer if he is right could raise actions up to that date. This is a thing totally unheard of in the practice of this Court, and I think that such a view of the matter should receive no encouragement, the justice and practice being quite against it.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Sol.-Gen. Robertson — Ure. Agents — Campbell & Smith, S.S.C.

Counsel for the Defenders (Respondents)—Asher, Q.C.—Dickson. Agents—Davidson & Syme, W.S.

Wednesday, December 7.

SECOND DIVISION.

[Lord Trayner, Ordinary.

MITCHELL *v.* DUNNETT.

(*Ante*, vol. xxii. p. 298; 12 R. 400.)

Title to Sue—Public Company—Individual Shareholder—Fraudulent Misrepresentation.

In 1877 a number of persons registered themselves under the Companies Acts as a joint-stock company for the purpose of purchasing and working an estate which was represented to them to contain a specified quantity of valuable timber and iron ore. They bought the estate from the person who made these representations, upon certain terms which were set forth in a memorandum, and appointed him their manager. He continued to act as such till October 1878, when in consequence of disputes which arose between him and the company as to the construction to be put upon the above-mentioned memorandum he ceased to be manager. By an agreement entered into between him and the company in November 1879, his appointment as manager was cancelled, and all claims at the instance of either party were mutually discharged. In 1878 the company became aware that the representations regarding the estate were to a great extent inaccurate, and by 1880 they were fully aware of the extent of the inaccuracy. They continued, however, to work the estate till 1884, when they sold it by public auction. Thereafter the company went into liquidation, and in 1885 it was dissolved. In 1883 certain individual shareholders of the company raised an action of damages against the seller, on the ground that his representations, made before the formation of the company and purchase of the estate, as to the size of the estate and extent and value of the timber and minerals, were false and fraudulent, and that they had become shareholders of the company in reliance on the truth of these representations. In this action decree in absence was pronounced. The defender then brought a suspension as of a threatened charge on this decree. The Court *suspended* the decree, holding that the individual shareholders of the company had no title to sue, the title to sue being in the company, who had barred themselves by their actings in retaining, working, and selling the estate after they were aware that the representations of the seller were inaccurate.

Opinions that the mutual agreement was a discharge by the company of all claims against the complainer.

On 8th November 1883 Alexander Mitchell, timber merchant, Glasgow, in his own right, and as assignee of Robert Robinson, timber merchant, Partick, John Donald, iron merchant, Glasgow, and James Lockhart Mitchell, timber merchant there, raised an action of damages against Matthew Dunnett, then residing at Molde in Norway. The summons was served edictally, and no appearance having been entered, decree in absence was pronounced on 8th December 1883. On 10th February 1884 Dunnett presented this note of suspension as of a threatened charge on this decree. The Lord Ordinary on the Bills passed the note, and a record was made up in the suspension. The averments in the original summons were to all intents the same as those now made in the answers for the respondent.

He set forth that the complainer, who, though a Scotsman, had been for some years resident in Norway, came to Glasgow in 1877 to promote the formation of a small limited company to purchase the estate of Vaagsoeter in Romsdal County, Norway, in which he professed to have discovered a valuable bed of iron ore, together with the forest of valuable timber growing thereon; that he waited on the respondent and on other friends, including the respondent's cedents Robinson and J. L. Mitchell, in order to interest them in the proposed company, and drew up a prospectus of the proposed company, and special descriptive reports of its forests and minerals; that he represented the estate to contain within his own knowledge 1000 English acres, and to be five miles in length, and from one-third to one-half a mile in breadth; that he represented the forest to contain trees of number and dimension according to a classified inventory which he guaranteed, and which were valued by him at £25,303; that he made similar representations as to the iron ore on the