The defence was that the documents were got up by the deceased in July 1862, from her agent, John Galletly, S.S.C., for the purpose of destroying them, and were accordingly destroyed by her or by her orders; and that at that time she was of sound mind and perfectly capable of managing her own affairs. The defender also pleaded that the statements of the pursuers were not sufficiently specific.

The Lord Ordinary (Kinloch) made great avizandum to the First Division.

JOHN M'LAREN and W. MACINTOSH were heard for the pursuers, and cited Laing *v.* Bruce, 20th November 1838, 1 D. 59.

FRASER and SCOTT for the defender supported their plea of insufficient specification. They did not dispute the relevancy.

The Court closed the record, and (Lord Curriehill, *dubitante*) allowed the parties a proof before answer of their respective averments.

Agent for Pursuers—J. D. Wormald, W.S.
Agent for Defender—John Galletly, S.S.C.

SECOND DIVISION.

WESTERN BANK OF SCOTLAND AND LIQUIDATOR *v.* BAIRDS.

Bank—Negligence—Enumeated Causes—Issues—Jury Trial. In an action of damages at the instance of a bank and its liquidator against two former directors of the bank, concluding for payment of two specific sums, being the amount of loss sustained by the bank through their malversation of office, and in which the Lord Ordinary had appointed the pursuers to lodge issues—Held that the action was not one of damages and was not one of the enumerated causes, and a remit made to an accountant to report on the books of the bank before sending to the jury the question of the defenders' negligence.

These were two actions at the instance of the Western Bank and its liquidator against the defenders, who were for some time directors of the bank, concluding for the sums of £299,736, 7s. 6d. and £863,618, 9s. 2d. respectively, being the amounts alleged to have been lost in the period of their management as directors, through fault upon their part. The losses were said to have mainly arisen—(1) by improper and imprudent advances on current accounts; (2) by the reckless discounting of bills; and (3) by the establishment of an unauthorised bank agency in America, and through policies of insurance, improperly effected on the lives of debtors of the bank. A compromise between the bank and other directors was entered into in 1861. Upon this compromise the defenders pleaded that it was a bar to the action, and that it was so separately, on the ground that the pursuers, by accepting it, had excluded the defenders from their claim of relief. It was further maintained that there was no relevant allegation of negligence on the part of the defenders.

The following are the pleas in law for the defenders in the action against Mr William Baird's representatives :—

1. The pursuers have no title to sue.

2. Having regard to the character and nature of the former action raised at the instance of the Western Bank and the liquidators of the said bank, and the grounds thereof, the compromises, or settlements, discharges, and decree of absolvitor, referred to in the preceding statement, amount in law to a compromise or settlement and discharge of the whole claims made in the present action, and the same cannot now be insisted in or maintained to any extent or effect against the defenders. *Separatim*, The action cannot be maintained, because by the said compromises, or settlements, discharges, and decree of absolvitor, the pursuer, have extinguished or prejudiced the claims of relief otherwise competent to the defender.

3. The late William Baird was never legally elected a director of the bank, nor entitled to hold office as such during any part of the period libelled, and his representatives are not responsible for any transactions, except those of which he was personally cognisant, and in which he took part.

4. The said William Baird was not responsible for any transactions which took place subsequently to May 1848, nor for any losses which arose on those transactions.

5. The claim made in the present action is excluded by the 31st section of the Contract of Copartnery.

6. The claims of the pursuers under the present action are excluded (1) by *mora*, and (2) by acquiescence and adoption.

7. The averments made by the pursuers are irrelevant and insufficient in law to support the conclusions of the summons.

8. The averments of the pursuers are not sufficiently specific to entitle the pursuers to have these remitted to probation.

9. The defenders are entitled to *absolvitor*, or the action should be dismissed, in respect—(1) That there is no specification of the advances through which loss is said to have been sustained; (2) that there is no allegation that such advances were made by the late Mr Baird or with his know ledge; (3) that there is no specification, or at least no sufficient specification, of the alleged losses, or of the cause of these losses; (4) that there is on relevant allegation of any gross negligence on the part of the late Mr Baird; and (5) that there is no relevant allegation that the alleged losses were caused by any such negligence.

10. The defenders are entitled to *absolvitor*, or the action ought to be dismissed, in respect the loss and damage alleged were not occasioned, and are not by the pursuers relevantly or sufficiently averred to have been occasioned, by the late Mr Baird, or by any person for whom he was in law responsible.

11. The sums credited in the accounts of the respective persons or companies and firms mentioned in the condescendence and schedules fall to be imputed in extinction of sums debited therein in order of their dates.

12. The averments of the pursuers being contradicted by the books of the bank, the defenders are entitled to *absolvitor*.

13. The averments of the pursuers being unfounded in fact, the defenders are entitled to *absolvitor*.

14. No losses having been sustained by the bank during the period during which the late Mr Baird is alleged to have been a director of the bank, his trustees and executors are entitled to *absolvitor*.

15. The conclusion for interest is untenable, in respect interest is not due upon damages from any date prior to their being found due, and the amount assessed and fixed.

The pursuer's pleas were stated as follows :—

1. The pursuers having sustained loss and damage to the extent concluded for, through gross neglect of duty on the part of the said William Baird, as an ordinary director of the bank, under

the circumstances condescended on, are entitled to decree against the defenders as representing him, in terms of the conclusions of the summons.

2. The pursuers having sustained loss and damage to the extent concluded for, through gross neglect of duty on the part of the said William Baird, and of his co-directors, under the circumstances condescended on, are entitled to decree against his representatives as concluded for.

3. The defences being unfounded in fact and in law ought to be repelled.

The pleas in the case against James Baird were substantially the same as the preceding.

The Lord Ordinary (Kinloch) held that the compromise of 1861 was not a bar to the pursuers' claims, that the action was not relevant, so far as laid on the individual negligence of the defenders, but was relevant so far as it averred negligence on the part of the defenders in conjunction with that of the other directors. His Lordship then appointed the pursuers to lodge issues.

The defenders reclaimed.

The LORD ADVOCATE (MONCREIFF), the SOLICITOR-GENERAL (YOUNG), A. R. CLARK, GIFFORD, and LEE, for them, argued that the compromise was a bar to the action, and against the relevancy of the action generally.

PATTON, MILLAR and SHAND answered for the pursuers.

At advising—

The LORD JUSTICE-CLERK—In the case of the Western Bank of Scotland against the trustees of the deceased William Baird, the Court have very carefully considered the questions raised by the reclaiming notes of the parties and the arguments on both sides, and I am now to announce the conclusion at which they have arrived upon these different questions. The first part of the Lord Ordinary's interlocutor repels the objection to the title to sue set forth in the first plea in defence stated in the closed record. No argument was addressed to us in support of that plea, nor was any notice taken of it at all in the course of the long arguments that we heard. We are therefore quite in the dark as to what the meaning of that plea is; but in the circumstances, all that we can do is to adhere to that part of the interlocutor of the Lord Ordinary. The next part of the Lord Ordinary's interlocutor repels the defence founded on the compromise and discharge engaged in with the other directors, as set forth in the second plea in defence. Now, we all agree with the Lord Ordinary entirely as regards that part of his interlocutor, viewing the plea which he has there disposed of as a plea in bar of the action; but looking to the way in which the plea is stated, it may perhaps be considered as presenting itself in two aspects. And while we are clearly of opinion that the plea does not afford a good answer to the claim of the pursuers of this action, as stated in the summons and record, it is quite possible that the case may disclose itself hereafter in such a shape as to be within the summons and record, and yet to render this plea an available defence against the claim as so disclosed; and we should not wish at the present stage to prejudice any question of that kind which may hereafter arise. We shall, therefore, vary the terms of the Lord Ordinary's interlocutor in that part of it, so as to save the possibility of any injustice being done in that way. In the next place, the Lord Ordinary deals with the relevancy of the action. He finds the action relevantly laid in so far as founded on an allegation of gross neglect of duty on the part of the late William Baird and the other directors of the Western Bank in office along with him, and "repels the objection to relevancy in so far as directed against the case stated under the second plea-in-law for the pursuers set forth in the closed record; but finds the action not relevantly laid in so far as founded on an allegation of individual negligence on Mr Baird's part, giving rise to the loss complained of; and sustains the objection to the relevancy in so far as directed against the case stated under the first plea for the pursuers in the said closed record." Now, it is certainly not surprising that the Lord Ordinary should have been led to deal with the question of relevancy in this way, in consequence of the manner in which the pleas of the pursuer are stated; because they certainly suggest the idea that it is intended to make two separate and distinct cases — one founded exclusively upon what is called joint negligence upon the part of Mr Baird and the other gentlemen who were in the direction of the bank along with him, and the other upon the sole and individual negligence of Mr Baird himself, upon the footing and assumption, of course, that everybody else did his duty. But the Court are satisfied, upon a full examination of the averments of the pursuers, that that is not the nature of the case which they intend to make; but that, on the contrary, their case, and their only case, is a case of negligence upon the part of Mr Baird, which, combined with negligence at the same time on the part of all the other directors of the bank, produced the disasters and losses complained of. And, therefore, while we cannot approve of the manner in which the pleas-in-law have been stated for the pursuers, we think it would be unsafe to hold, as the Lord Ordinary has done, that the case embodied in the first plea-in-law is, as a separate and independent case, irrelevant, and for this reason chiefly. Negligence upon the part of Mr Baird, or upon the part of any gentleman acting as a director of the bank, must in one, and a very proper, sense of the term, be his individual negligence; and it would be very difficult to say that, in every omission or act which constitutes the negligence of Mr Baird, there is a conjunction of everybody else along with him that happened then to be in the direction. It would be very unsafe, certainly, at this stage of the cause to pronounce any judgment involving such a proposition as that. There may be omissions of various kinds occurring at the same time, and all conducing to the same end, upon the part of the different directors in office for the time, and all constituting that joint negligence upon which this action is intended to be founded. We desire to give no opinion at present at all upon any nice question of that kind; but we cannot see our way at present to say that any part of this record is irrelevant; and, therefore, to that effect we shall alter the interlocutor of the Lord Ordinary. The last thing which the Lord Ordinary does is to appoint the pursuers to lodge, within six days, the issue or issues which they propose for the trial of the case. Now, that is a very important step; and the question which presents itself for our consideration is whether the case is ripe for such an order, or whether that is the best way in which to put the case in shape for inquiry. We are all very clearly of opinion that this is not in any proper sense an action of damages. The summons concludes for payment of a sum of £297,736, 7s. 6d., being a very precise, definite, liquid amount. It is not, therefore, a claim of damages in the ordinary sense; and when we come to analyse this large sum, and see of what it is composed, it becomes still more clear that

this is not properly an action of damages. It consists of three parts. There is, first of all, a sum of £132,670, 3s. 2d., which consists of losses alleged to have been sustained in consequence of advances made upon accounts-current to customers of the bank during the time that Mr Baird was in office; in the second place, there is the sum of £151,574, 11s. 8d., which consists of discounts said to have been given while Mr Baird was in office, and lost to the bank; and, in the third place, there is the sum of £15,491, 12s. 8d., which is the amount of premiums of insurance that are said to have been paid during Mr Baird's directorship upon policies of insurance effected upon the lives of debtors to the bank, recklessly and imprudently, and against all the ordinary rules of good banking. Now, these are very definite and precise sums, which make up together the amount concluded for in the summons. But when we look a little farther, we find that each one of these principal divisions of the main sum in the conclusion comes to be separated again into its component parts in this record, and we find that as regards the advances upon accounts-current, there is a precise specification of the loss that is sustained upon each individual current account—a precise specification of the loss which is sustained by the discounts which are given to each particular firm of the several particular firms that were customers of the bank; and so with the advances for premiums of insurance. This, then, is in truth and substance an action against Mr Baird for malversation or gross negligence in a fiduciary capacity as a director of this bank; and the remedy sought is, that he shall replace funds belonging to the bank which have been lost by his fault. It is in that respect precisely in the same position as an action against trustees who either by their own intromissions or negligence have allowed a portion of the trust-estate to be dilapidated and lost, and are called upon to replace that part of the trust-estate in the hands of the proper manager. That being the nature of the action, it is not one of the enumerated cases, and we are under no obligation immediately or necessarily to send it to be tried by a jury. But in saying this it must not be understood that I am giving any opinion upon the part of the Court that the question as to Mr Baird's alleged gross negligence is not a proper question to be tried by a jury. That is another affair altogether. But the question at present is, whether this case, as it stands, is to be sent *per aversionem* to be tried by a jury without any attempt, in the first place, to simplify the issue which is to be submitted to the jury, and to reduce the subject-matter of the action into something like a form in which it can be handled, with a prospect of reasonable success, in the course of one trial. It must be perfectly obvious to everybody that has studied the case hitherto, that if the case were sent now upon a general issue of gross negligence, as if it were an ordinary action of damages, the trial would be one of a most embarrassing kind. Every one of these alleged losses —I do not mean the losses upon current accounts taken in the aggregate, but I mean the loss upon each one of the current accounts—must form the subject of a separate inquiry and examination before the jury; and the attention of the Court and the jury at the trial would require to be directed and confined to that one account while it was under examination, just as much as if it formed the subject of a separate issue. Now, a trial conducted in such a manner as that, and involving such a great variety and extent of inquiry, it must be obvious, would be altogether unmanageable, and would almost certainly result in some miscarriage. For the purpose of avoiding any such risk, and of reducing the case into a more manageable condition, we propose in the meantime to have an inquiry by means of an accountant; and we are induced to take this course, not merely by the considerations that I have already urged as to the nature of the pursuers' case, but also in consequence of the defences which are stated upon the part of the defender, which raise questions of pure accounting, and which being solved in one way would reduce the dimensions of this case very considerably. We shall therefore recal the order for issues, as well as those other parts of the interlocutor that I have already adverted to; and we shall pronounce an interlocutor in the following terms :—

"*Edinburgh, 6th July* 1866.—The Lords having heard counsel on the reclaiming notes for both parties against Lord Kinloch's interlocutor of 1st December 1865, adhere to the said interlocutor in so far as it repels the objection to the title to sue stated in the first plea for the defenders, and to that extent and effect refuse the prayer of the reclaiming note for the defenders: *Quoad ultra* recal *in hoc statu* the interlocutor reclaimed against: Find that the compromises, discharges, and decree of absolvitor referred to in the second plea for the defenders do not preclude the pursuers from insisting in their claim against the defenders, as stated in the summons and record: Therefore repel the said second plea for the defenders in both its branches, in so far as it isstated *in limine* as a bar to the action: Before further answer as to the whole other pleas of the parties *hinc inde*, remit to to examine the books and relative documents of the Western Bank; and (1) to report the commencement, progress, and final termination of each of the accounts mentioned in the schedule A, appended to the record; what securities, if any, the bank held at any time for the advances made on the said account; what was the balance, if any, at the debit of each of said accounts, as at 23d June 1852; what payments were after that date received to the credit of each of the said accounts, and (so far as the books show) from what sources these payments were received by the bank, or made by the customers-debtors in the said accounts, or any persons on their behalf; and further, what was the lowest balance at the debit of each of the said accounts at any time after 23d June 1852, and whether after said date the balances were ever shifted, and to what extent, to the credit side of any of the said accounts; (2) to report what was the amount of bills which had been discounted to each of the firms mentioned in the 35th article of the condescendence, and were unretired at the 24th June 1846; to prepare and report a descriptive list of the bills discounted to each of the said firms between 24th June 1846 and 23d June 1852, showing whether, when, and how these bills were retired at or after maturity, what bills discounted to each of the said firm were unretired at 23d June 1852, and whether, when, and how the said last-mentioned bills were retired; (3) to report what policies, if any, the bank held on the lives of debtors to the bank at or prior to 1846; what policies on lives of the bank's debtors were subsequently opened by the bank; what were the premiums payable and paid on each of said policies; and what was the ultimate result of each of such insurances: Further, authorise the accountant to report any other matter appearing in the

books of the bank fairly falling within the general scope of this remit which either party may request him to report."

Now, a very important matter for consideration is the accountant to whom this remit is to be made; and we shall very willingly name any gentleman that the parties can agree upon. If they can agree upon a person, we should consider it a great relief to the Court; but otherwise, of course, we must name some one ourselves.

SOLICITOR-GENERAL—Probably your Lordships will give us time to confer upon that.

Mr MILLAR—On the part of the pursuers, I should very much prefer that your Lordships should take the appointment into your own hands. I am not prepared to do anything which may be regarded as a recognition or adoption of the course which your Lordships have thought fit to take in regard to this matter. But I don't object to the proposal to continue the case for a day.

LORD JUSTICE-CLERK—Do you think that because the counsel suggest to the Court a good man to appoint under this remit your clients would thereby be prejudiced?

Mr MILLAR—I am warned by a case which occurred in the First Division of the Court, in which, because one of the parties took part in the adjustment of the issues, it was held elsewhere that he was precluded from taking any objection to the issues afterwards.

Lord COWAN—All risk of that may be entirely prevented by a saving clause inserted in the interlocutor, or by a minute. The object of the Court is, that the person to whom the remit shall be made for this preliminary inquiry should be one in whom both parties have confidence.

SOLICITOR-GENERAL—The parties must necessarily take some part in it, because on both sides we have been largely in consultation with accountants.

Lord NEAVES—It cannot in the least compromise the pursuers. In the case to which Mr Millar refers, the party who was held to be compromised had truly given in an issue.

Mr MILLAR—He objected to the issue of the other party, but he made certain suggestions for the improvement of it in point of expression.

Lord NEAVES—Did he not make these in writing? Nothing here is going in writing.

SOLICITOR-GENERAL—I would suggest that the inquiry should not be limited to the books of the bank, as is done in the interlocutor as read by your Lordship, but that it should extend to the relative accounts and documents.

LORD JUSTICE-CLERK—Surely; we will make it "books and relative documents."

Mr SHAND—I think anything beyond the books would be going into proof.

Lord NEAVES—Surely the bills referred to in the bill-book must be looked to.

LORD JUSTICE-CLERK—It seems to me unnecessary to say in the interlocutor anything more than the books, because what the accountant is directed to report could not be reported without examining the documents that the books refer to, and which are referred to in the books. Then we will let the case stand over till next week, that you may consider as to the person to whom the remit should be made.

Mr MILLAR—Perhaps your Lordships will allow us to see the draft of the interlocutor.

LORD JUSTICE-CLERK—Certainly; and we have no objection to the parties suggesting any error in figures or dates that may occur to them, but the substance of the interlocutor we will not touch.

Lord JUSTICE-CLERK—Then, in the case of the Western Bank against James Baird, the course which the Court intend to follow is substantially the same as in the case of William Baird's trustees, and the interlocutors to be pronounced will be the same down to the remit, and the remit will be in these terms—[Reads.]

Mr MILLAR asked for expenses, on the ground that the pursuers had substantially succeeded.

Expenses reserved.

On a subsequent day the Court made the remit to Mr Charles Pearson, C.A., Edinburgh.

Agents for Pursuers—Morton, Whitehead, & Greig, W.S.

Agents for Defenders—Webster & Sprott, S.S.C.

HEWAT *v.* HUNTER.

Poor—Settlement—Residence. Held that absences from a parish for several months at a time in the course of the year by a person engaged in service, even although he had a house and a wife and children resident in the parish, interrupted the continuity of his residence so as to prevent him acquiring a settlement by residence under the 76th section of the Poor Law Amendment Act.

This is an advocation from the Sheriff Court of Kirkcudbright. The advocator, inspector of the parish of Kelton, sued the respondent, inspector of the parish of Tongland, for the sum of £12, 5s., being the amount of aliment advanced to a pauper who had become chargeable on the parish of Kelton, and for future sums to be expended on his maintenance. The pauper was born in the parish of Tongland. In 1856 he removed to the parish of Kelton with his wife and family, and they resided there continuously until 1864, when he became chargeable upon Kelton. Between these dates the pauper had been absent for considerable periods at a time from the parish of Kelton. In Martinmas 1856, the date of his removal to Kelton, he went to service in Buittle parish, and after residing there for about a year he returned to Kelton. In 1858 he went to the parish of Kirkgunzeon, where he was engaged from March to August, and was employed until the 1st of May at any farm work he was told to do. Between March 1858 and August 1862 he entered into and fulfilled several separate contracts of service for periods of three, four, or five months duration in different parishes. During the currency of these contracts he never visited or resided in the parish of Kelton, except for a day or a night occasionally, and with his master's permission. In these circumstances, the question was, whether the continuity of the pauper's residence in the parish of Kelton for the five years subsequent to Martinmas 1857 was effectually interrupted by his residence in these other parishes? The Steward-Substitute held that it was, whether as regards the nature or duration of the absences, and accordingly found Tongland, as the parish of his birth, liable. The Sheriff altered, holding that the pauper must be held to have resided for five years continuously inthe parish of Kelton prior to becoming chargeable in the sense and meaning of the 76th clause of the Poor Law Act. The inspector of Kelton advocated.

A. R. CLARK and GUTHRIE SMITH for him argued—By residence the statute means personal presence in the parish—not the tenancy of a house by one's wife and family when he is living elsewhere. The doctrine of constructive residence