stances the pursuer would have no right to damages against the Company, therefore the Court of Session was right in not directing any issue to be tried with regard to the claim of damages. Therefore, upon that ground, I consider that the interlocutor is right; but, of course, if my noble and learned friend is of a different opinion, the consequence will be that it will be reversed.

Lord Westbury—My Lords, if I may venture for a moment to interpose, we had this matter very much discussed in a case which occurred some years ago, and which, after numerous proceedings, was brought to the bar of this House, and it was found that there was no relevant matter in the suit. The effect was, that a decree of absolvitor was pronounced which discharged the whole action; and it would be highly inconsistent and contrary to that decree if, after having pronounced it, you were to go on and give an opinion upon any subsequent interlocutory proceedings that have taken place in the cause. They fall at once to the ground. There is no room for the interlocutor. There is no room for an appeal against it; and there is no room for your Lordships to give any opinion upon that appeal; because the decree of absolvitor puts an end to the whole action; and every interlocutor pronounced subsequently to that, which ought to have been originally pronounced, at once falls to the ground.

Lord Chancellor—Already, upon the other appeal, we have reversed the interlocutor directing issues, and therefore we can only follow the same course in the case of Addie's appeal, that is, to dispose of the appeal by reversing the interlocutor.

Sir Roundell Palmer—Perhaps I may be permitted to observe that Mr Addie comes with an independent cross appeal, saying that another issue ought to have been directed which was not directed. It seems to be the necessary consequence of your Lordships' judgment that that was wrong.

Lord Chancellor—My noble and learned friend and I differ in opinion upon one point. My noble and learned friend thinks there ought to have been an issue directed in regard to damages. If so, that the interlocutor must be reversed, because, as we are equally divided, that consequence necessarily follows.

Lord Cranworth—My Lords, I wish to set myself right. I do not say that issues ought to have been directed as to damages, but that, if a relevant case had been stated upon both points, both as to *restitutio in integrum* and also as to fraud, then I think the Court would have been wrong in not directing such issues as should have exhausted both these points.

Dean of Faculty (Moncreiff)—That was the main subject of our contention upon that cross appeal, assuming that an issue ought to have been directed.

Sir Roundell Palmer—But the plaintiff failing altogether, one would suppose that he fails as to costs.

Lord Cranworth—Both parties fail altogether.

Lord Chancellor—I have no other course than to put the question, That the interlocutors appealed from be reversed.

Interlocutors appealed from reversed.

Agents for Western Bank—Davidson & Syme, and Loch & Maclaurin, Westminster.

Agents for Mr Addie—Gibson, Craig, Dalziel, & Brodies, and Grahames & Wardlaw, Westminster.

Tuesday, June 4.

WESTERN BANK *v.* BAIRD'S TRUSTEES.
WESTERN BANK *v.* BAIRD.

(In Court of Session, 4 Macph., 1071.)

*Appeal—House of Lords—Interlocutory Judgment—Competency—*48 *Geo. III., c.* 151, § 15. An appeal against an interlocutory judgment of the Court of Session dismissed as incompetent, the judgment appealed against having been unanimous, and leave to appeal having been refused by the Court below.

In 1863, the Western Bank brought an action against William Baird, who had been a director of the Bank from 1846 to 1852, concluding for payment of a sum of £299,736, as the amount of loss and damage due by the defender to the Bank,—the grounds of action being (1) gross neglect of duty on the part of Baird as an ordinary director of the Bank; (2) gross neglect of duty on the part of Baird and his co-directors. William Baird having died, the action was continued against his trustees. A similar action was brought against James Baird, in which the procedure was the same. The Lord Ordinary (Kinloch) sustained the title to sue; repelled a defence founded on a compromise by the Bank with the other directors; sustained the relevancy of the action so far as founded on the second ground of action, and appointed the pursuers to lodge an issue. The Second Division of the Court unanimously adhered to that interlocutor, in so far as it sustained the pursuers' title; *quoad ultra* recalled the interlocutor in *hoc statu;* found that the compromise pleaded by the defenders did not bar the action; and, before farther answer, remitted to an accountant to investigate the Bank books, and report upon the alleged losses sustained by the Bank. The Lord Justice-Clerk, who delivered the judgment of the Court, stated that the Court were clearly of opinion that the action was not, in any proper sense, an action of damages; that it was not one of the enumerated causes, and need not immediately or necessarily be sent to a jury; and that it was expedient, in the meantime, to simplify the subject-matter of the action by remitting to an accountant; giving no opinion, in the meantime, that the question as to Mr Baird's alleged gross negligence was not a proper question to be tried by a jury.

The pursuers petitioned the Court for leave to appeal against this interlocutor. The Court refused the petition.

The pursuers then presented an appeal to the House of Lords. The respondents, Baird's Trustees, craved the House to refuse to receive the petition of appeal, or make any order of service thereon, on the ground that the appeal was incompetent. The Appeal Committee, on 6th August 1866, ordered that the appeal be received, and that the question of the competency of the appeal be reserved to the hearing of the appeal at the Bar.

An appeal was, accordingly, presented by the Bank, and the following reasons were stated in support:—

1. Because the action, which is the subject of the remit complained of, being an action founded on "delinquency, or *quasi*-delinquency," and its conclusions being for "damages only and expenses," is a cause "appropriate to the Jury Court," and the matter of fact to be ascertained between the parties must accordingly be tried by jury.

2. Because the remit appealed against is inexpedient, not being calculated to facilitate a just and speedy decision of the cause, and involving the loss of much time, and labour, and expense, which otherwise would be saved.

The respondents stated the following reasons:—

1. The interlocutor appealed against being merely an interlocutory judgment, not disposing of the merits of the cause, or of any part thereof, and having been a unanimous judgment without any difference of opinion among the judges of the Second Division, by whom it was pronounced, no appeal thereagainst, without the leave of the Court below, is competent, and such leave having been refused, the present appeal should be dismissed as incompetent.

2. The interlocutor appealed against should be affirmed, because it relates merely to the conduct and preparation of the cause in the Court below; and, as such, was within the discretion of the judges by whom it was pronounced.

3. The interlocutor appealed against should be affirmed, because the remit made therein is reasonable and proper, regard being had to the circumstances of the case.

4. The interlocutor appealed against should be affirmed, because the remit thereby made is absolutely essential to enable the Court to dispose of the pleas of the respondents.

Attorney-General (Rolt), Sir Roundell Palmer, Q.C., Brown, Q.C., and Shand, for Appellants.

Dean of Faculty (Moncreiff), Anderson, Q.C., Selwyn, Q.C., Mellish, Q.C., Keane, Q.C., and Young, for Respondents.

Lord Chancellor—My Lords, this is an appeal from an interlocutor of the Court of Session, "in so far as it recals that part of the Lord Ordinary's interlocutor whereby he appointed the appellants to lodge the issue or issues for the trial of the cause, and in so far as, before further answer as to the whole other pleas of the parties, it remits the cause to an accountant that he may make the investigation, and report thereon."

Against this appeal a preliminary objection has been urged—which objection, it appears to me, ought to prevail.

By the 15th section of the 48th of Geo. III., cap. 151, it is enacted that thereafter "no appeal to the House of Lords shall be allowed from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the judges of the Court pronouncing such interlocutory judgments," with a proviso, "that when a judgment on decree is appealed from, it shall be competent to either party to appeal to the House of Lords from all or any of the interlocutors that may have been pronounced in the cause, so that the whole, as far as it is necessary, may be brought under the review of the House of Lords."

The appellants in this cause, admitting that the judgment appealed from is interlocutory, and that it does not go to the full merits of the cause, contend that the Act does not apply, because the Court has no jurisdiction to pronounce the interlocutor. They say that the action is founded on delinquency or quasi-delinquency, with a conclusion for damages only and expenses; and that, therefore, being one of the enumerated cases in the 28th section of the 6 Geo. IV., c. 120, it ought to have been remitted *at once* for trial by jury.

Now, what force the words *at once* in the statute would have, supposing the Jury Court to have continued to exist, and whether it might not have directed a previous inquiry in order to clear the way to a trial by jury, it is immaterial to consider, because the Jury Court having been abolished, it is enacted, by the 13th and 14th of the Queen, cap. 36, sec. 36, that "in *all* causes appropriated for trial by jury, or in the course of preparation for trial by jury before the Court of Session, the procedure both before and after the closing of the record shall be in all respects the same, so far as applicable, as in other Court of Session causes, for the time being, except in so far as it may be otherwise provided by this Act, or by any Act of Sederunt to be passed by the said Court under the powers by this Act conferred."

Now, I apprehend it is quite clear that in other causes the Court might remit the matter to an accountant for necessary investigation; and undoubtedly this is procedure. What may be the use of that inquiry afterwards, and whether, if any improper use is made of it in the cause, it may not be a subject of appeal, is a matter for future consideration. But, at all events, as this 36th section applies to all causes, there can be no reason at all why, if there is this mode of procedure with regard to other causes, it should not have been adopted on the present occasion.

But then it is said that in a case founded on delinquency, the Court has no power to remit to an accountant; and on the part of the respondent it has been denied that this case is one of delinquency. But admitting it to be so, What is there to prevent that course being adopted? The Lord Ordinary had found this action to be relevantly laid. The Inner-House recalled *in hoc statu* the interlocutor reclamed against, and remitted to the accountant to examine the books and relative documents of the Western Bank. Nothing was determined by this interlocutor; but a preliminary inquiry was directed to enable (as it is said) the Court to determine this question of relevancy, and also to frame proper issues for the trial by jury. Now, suppose the Court was wrong in the course they pursued in looking out of the record upon the question of relevancy, and that they had no power to direct the inquiry into the accounts, How can we enter into the question? The moment it is admitted to be an interlocutory judgment, not going to the whole merits, the question of the right to appeal is concluded, and we are not at liberty to inquire under what circumstances it proceeded, and whether the Court had jurisdiction to pronounce it or not. In other words, we are not at liberty in this stage to go behind the interlocutor, though it may thereafter be subjected to question upon being brought up with any other intermediate interlocutor, upon an appeal against the final judgment in this cause.

Supposing, however, that the course taken by the Court was inadmissible, How can it be said to be an excess of jurisdiction? At the utmost, it would only be an irregularity in the proceedings, and it would be strange that the House should be called upon by an interlocutory appeal to correct the practice of the Court of Session in the progress of the cause before them. It is not at all like these cases that have been mentioned in the argument, when the *certiorari* having been taken away by Act of Parliament, an inferior court or a magistrate has committed an excess of jurisdiction, and it has been held that the proceedings might be removed into the Queen's Bench and there quashed. That is a final proceeding, and to shut out inquiry in the

only manner in which the proceeding can be questioned, would be a denial of justice. Even if the Court had exceeded its jurisdiction in directing the inquiry, it was, after all, in an interlocutory matter, a mere step in the cause, and (as it was truly said in the argument) if there had been a plea to the jurisdiction, and the Court had decided against it, it would not have been competent to appeal at that, the earliest stage of the cause. I am satisfied that it was competent to the Court to take the course it did, and that it was expedient for the thorough determination of the cause, to enable the Court to frame proper issues, and the jury to deal more easily with the matter to be submitted to them.

I am therefore of opinion that the appeal is incompetent, and that it ought to be dismissed, with costs.

Lord Cranworth—My Lords, this matter lies in so very narrow a compass, that I do not think I should be justified in troubling your Lordships at any length after what has fallen from my noble and learned friend. This appeal is in my opinion clearly incompetent, because it is an appeal from an interlocutor not disposing of the whole merits of the cause. Upon that the question is founded. An appeal to the House is regulated by statute, and it can only be competent when it is an appeal against an interlocutor disposing of the whole merits of the case, or when the decision appealed against being of a temporary or interlocutory nature, the appeal has been sanctioned by the Court below, or there has been a division of opinion among the judges. Under neither of these categories does the present appeal range itself. That appears to me to be the whole question now before us. Whether the Court has taken the most proper course, will have to be decided if there should be an appeal upon the whole merits eventually. But the attempt to sustain this appeal, on the ground of its being an appeal against an excess of jurisdiction, or against an erroneous excess of jurisdiction, seems to me to be a confusion of terms. Of course the Court has no jurisdiction to decide anything that is contrary to law; but if it wrongly decides anything in the cause, that can be set right upon appeal only at the time when the Court has authorised that to be done.

Lord Colonsay—My Lords, it has not appeared to me, from almost the commencement of the argument, that there is any difficulty in this case. It appears to me that the provision of the Act of 1808 is quite conclusive upon the question. The only attempt to get out of this provision of the Act of 1808 has been by the endeavour to assimilate this to the case of an inferior court having exceeded its jurisdiction, and being now to be corrected by a Supreme Court in regard to such excess of jurisdiction. But this case is not of that character. There can be no doubt at all that the Court of Session had jurisdiction to deal with this case. But the argument is, that in a step of the procedure they have not followed the statutory regulation, which has been referred to; or, in other words, the argument is, that in every case in which there can be found in any statute anything of a directing nature as to the course which is to be followed in the preparation of a cause, if the Court of Session commits an error in the application of that direction, an appeal is competent, although the order of the Court may not deal with any part of the merits of the cause, or be the result of divided opinion, and there be no leave given by the Court. That is an extravagant proposition; it is contrary to the interpretation that has been put upon the Act for nearly sixty years. There is no precedent for it, and I can see no principle for it. I am therefore clearly of opinion that the appeal is incompetent.

With regard to the step itself that was taken, it may not be necessary at this stage to say anything, but I cannot refrain from expressing my opinion that the procedure which was adopted by the Court was not in contravention of any statute. I think it was a competent procedure. What may be the benefit of it hereafter remains to be seen, but it was not out of the ordinary course of procedure, nor does it appear to me to interfere in any way with any direction in any of the statutes. The provisions contained in the earlier statutes, as to sending the case at once to the Jury Court, were provisions to enable the Jury Court, not the Court of Session, to proceed with the preparation of the cause as well as to try the cause. But those very statutes contained provisions that if questions arose, either of law or of relevancy, which the parties denied to be disposed of, the case was to be sent back to the Court of Session in order that that Court might deal with those matters, and might send the case again for trial by a jury. But these things have been swept away, because now there is no Jury Court; but the procedure of preparing the cause throughout remains with the Court of Session, and it is not imperative on them to send a cause before a jury until they see whether or not there is a relevant and proper case presented to them for consideration. Now, when I look at this record, I see that there may be great difficulty in regard to that matter. There may be difficulty in regard even to the relevancy in the strict sense of the word; but in regard to a wider and perhaps more inaccurate use of the word "relevancy,"—I mean as to the sufficiency and perspicuity of the statements of the parties—there was great occasion, I think, for something to aid the Court in dealing with the case, and the course taken by the Court, of having the books examined by an accountant, so as to enable them to read all these volumes through the eyes of an accountant selected by themselves, and whose report, when it is made, the parties will have an opportunity of observing upon, was, I think, a very prudent step to take in reference to such a case as this. But that is not necessary to the decision of the point now before us, which really turns upon the competency of the appeal, and I have no doubt that the appeal is incompetent.

Lord Advocate—My Lords, there are two appeals before your Lordships' House; of course your Lordships' judgment will apply to both?

Lord Chancellor—Yes.

Appeals dismissed as incompetent, with costs.

Agents for Appellant—Morton, Whitehead, & Greig, W.S., and Loch & Maclaurin, Westminster.

Agent for Respondent—James Webster, S.S.C., and John Graham, Westminster.

COURT OF TEINDS.

Wednesday, June 19.

JAMIESON AND OTHERS *v.* MINISTER OF ORWELL AND OTHERS.

Teinds—Valuation—Approbation. A report by Sub-Commissioners for valuing teinds in 1630, bore that certain lands were "worth of yearly rent,