that the interlocutor of the 9th of June 1865 must be reversed. But my noble and learned friend is of a different opinion, and I readily yield to him.

It is hardly necessary to advert to the cross appeal, but it is due to Mr. Addie to say, that if a relevant case had been stated on the record on both heads on which relief is asked, and it had been necessary to direct issues, I think he is right in his contention, that those issues ought to have been so framed as to exhaust the whole case, so as to make it impossible that it should be necessary at a future time to frame further issues and incur the delay and expenses of another trial.

LORD COLONSAY.—My Lords, as I did not hear the whole of the arguments for the appellants in this case, I take no part in the deliberations upon it and the judgment which is about to be given, but as an appeal has been made to me on the point of the form of the proceedings, I may say, if the interlocutor of relevancy is reversed it will follow from that, that the cause will be dismissed, and then all that followed after that interlocutor falls to the ground. There will be no occasion for dealing with the matter of the new trial or the exception or anything else, for the whole will fall. Perhaps the form of the judgment should be, that the interlocutor should be reversed, with a declaration, that the Court should have sustained the objection to the relevancy, and dismissed the action, or some such direction so as to make it clear that nothing which followed from the interlocutor of relevancy is to stand.

Interlocutors reversed with declaration.

Appellants' Agents, Davidson and Syme, W.S.; Loch and Maclaurin, Westminster.—*Respondent's Agents*, Gibson Craig, Dalziel, and Brodies, W.S.; Grahames and Wardlaw, Westminster.

JUNE 4, 1867.

THE WESTERN BANK OF SCOTLAND and LIQUIDATORS, *Appellants*, *v.* JOHN BAIRD and Others, *Respondents*.

Same Appellants, *v.* JAMES BAIRD, *Respondent*.

Process—Appeal—Interlocutory Judgment—Action for Negligence—Enumerated Cases—Jury—48 Geo. III. c. 151, § 15—*The liquidator of a bank, which was in course of being wound up, raised an action against B., alleging that B., while director, had grossly neglected his duties, and caused a loss to the bank of large sums, and concluding for payment of those sums. The Court before answer remitted to an accountant to report what sums had been lost in the way alleged. B. at once appealed without leave:*

HELD, *This being an interlocutory judgment not on the whole merits of the case, it was not appealable to the House of Lords at that stage.*[1]

These were two appeals against judgments of the Second Division. Two actions involved the same facts. The liquidator of the Western Bank in January 1863, raised an action against James Baird, concluding for payment of a sum of £863,618, the amount of loss and damage due by him to the bank as at June 1856, with interest and expenses. The condescendence set forth the history and stoppage of the bank. The main facts alleged were, that the bank was established in 1837 as a joint stock company, and in 1857 was registered under the Joint-Stock Banking Companies Act. The defendant, James Baird, became a shareholder in 1837, and in 1852 was elected a director, and acted till 1856, and during that period he grossly neglected his duties by failing to make proper inquiries, and by allowing the managers, without control, systematically to make advances at their own discretion, on insufficient security; that by such reckless advances, which it was the duty of the directors to prevent, the shareholders had lost sums amounting to £863,618, and it was for this sum the action was brought.

The other action concluded for a sum of about £263,000 from the trustees of the late William Baird, another director, under similar circumstances.

The defenders set up, among other pleas, that there was no title to sue, and that the averments of the pursuer were irrelevant. The Lord Ordinary held, that the action was relevantly

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[1] See previous report 4 Macph. 1071; 38 Sc. Jur. 557. S. C. L. R. 1 Sc. Ap. 170; 5 Macph. H. L. 93; 39 Sc. Jur. 453.

laid, so far as it charged negligence against the whole of the directors, but not in so far as it charged personal negligence against James Baird. On reclaiming petition, the Second Division sustained the title of the pursuers to maintain the action, but altered the interlocutor in other respects, and also remitted to an accountant to report what sums had been lost on the accounts by way of alleged reckless advances; and the Court refused to send the case to be tried by a jury. The pursuer now appealed against the interlocutors, and there was a preliminary objection to the competency of the appeal.

The appellants in their *printed cases* gave the following reasons for reversing the interlocutors:—1. Because the action which is the subject of the remit complained of being an action founded on "delinquency or *quasi* delinquency," and its conclusion 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 in their *printed case* gave the following reasons for affirming the interlocutors:—1. The interlocutor being merely an interlocutory judgment, not disposing of the merits of the cause or of any part thereof, and having been an unanimous judgment without any difference of opinion among the Judges of the Second Division by whom it was pronounced, no appeal therefrom against 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. Because the remit made it reasonable and proper, regard being had to the circumstances of the case. 4. Because the remit is absolutely essential to enable the Court to dispose of the pleas of the respondents.

The Attorney General (Rolt), *Sir R. Palmer* Q.C., *Brown* Q.C., and *A. B. Shand*, for the appellant.—The main question is, whether the Court below had any power to remit this case to an accountant, instead of sending it to be tried by a jury. If it were one of the enumerated cases, then it is imperative on the Court to send the case to a jury. The Statute 6 Geo. IV. c. 120, § 28, mentions among these enumerated cases, "all actions founded on delinquency or *quasi* delinquency of any kind when the conclusion shall be for damages only and expenses." It cannot be disputed this is an action falling under that description. The Act 11 Geo. IV. and 1 Will. IV. c. 69, did not alter that enactment—*Bald* v. *Kerr*, 3 Sh. & M'L. 1. The details as to figures in the condescendence are only given as materials to guide the jury to the right amount of the damages; but the basis of the liability is delinquency or *quasi* delict—Bell's Prin. § 553; Stair, i. 9, 3; i. 9, 6; Ersk. iii. 1, 12-14; Bankton, i. 10, 1-4; *Crauford* v. *Dixon*, 2 W. S. 354; *Goldie* v. *Goldie*, 4 D. 1489; *Cooke* v. *Falconer*, 13 D. 157.

2. It is said, that this appeal is incompetent because the judgment is interlocutory—48 Geo. III. c. 151, § 15. But if the judgment was altogether *ultra vires*, the case is taken out of that enactment, which was intended only to apply to judgments within the powers of the Court—*Guthrie* v. *Cowan*, 10th Dec. 1807, F. C.; *Heritors of Corstorphine* v. *Ramsay*, 10th Mar. 1812, F. C.; *Young* v. *Milne*, 28th June, 1814, F. C.; *Shand* v. *Henderson*, 2 Dow, 519; *Goldie* v. *Oswald*, 2 Dow, 534. Nor is this appeal prevented by 55 Geo. III. c. 42; 59 Geo. III. c. 35; 6 Geo. IV. c. 120. The cases of *Melrose* v. *Hastie*, 1 Macq. Ap. Ca. 698, *ante*, p. 315; *Bald* v. *Kerr*, 3 Sh. & M'L. 1; *Scots Mines Co.* v. *Leadhills Mining Co.*, 3 Macq. Ap. Ca. 743, *ante*, p. 852; *North British Bank* v. *Collins*, 1 Macq. Ap. Ca. 369, *ante*, p. 186; all referred to actions where the Court had not exceeded its jurisdiction.

Even if the power to remit the case belonged to the Court, it was highly inexpedient, because these remits are proverbially costly, tedious, and unsatisfactory.

Dean of Faculty (Moncreiff), *Anderson* Q.C., *Selwyn* Q.C., *Mellish* Q.C., *Keane* Q.C., and *G. Young*, for the respondents.—This appeal is incompetent, because the interlocutor is only an interlocutory judgment, and no leave has been obtained to appeal—48 Geo. III. c. 151, § 15. All that it does is to remit to an accountant to arrange for the Court the various figures and details which the Court itself could get at by the mere expenditure of time, and to report to the Court. It decides neither questions of law nor of fact, but expressly reserves them. In all cases hitherto, appeals have only been sustained where the interlocutor was on the merits, as in *North British Bank* v. *Collins*, 1 Macq. Ap. Ca. 369, *ante*, p. 186. The present is a stronger case than *Scots Mining Co.* v. *Leadhills Mining Co.*, 3 Macq. Ap. Ca. 743, *ante*, p. 852. Examples of interlocutory judgments are to be found in *Drew* v. *National Exchange Co.*, *ante*, p. 953; 2 Macq. Ap.; 32 Sc. Jur. 482; *Ferrier* v. *Howden*, 4 Cl. & F. 25; 7 W. S. 147; *Clyne's Trustees* v. *Dunnet*, M'L. & R. 72; *Mag. of Annan* v. *Fairish*, 2 Sh. & M'L. 930; *North British Railway Co.* v. *Wauchope*, 4 Macq. Ap. Ca. 348, *ante*, p. 1121. The propriety of the interlocutor may perhaps ultimately come before the House, bnt the stage for that has not yet arrived. 2. But it is said this interlocutor was *ultra vires*, because the action was one of the enumerated cases. The Court had jurisdiction to decide the case, and to make this remit, whether it be an

enumerated case or not—13 & 14 Vict. c. 36, § 36. But this is not one of the enumerated cases. It is substantially an action for debt, and it is not the less so because one of the conclusions of the action is for "the amount of loss and damage." The remit was not only competent but highly judicious and proper.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal from an interlocutor of the Court of Session, in so far as it recalls 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. c. 151, it is enacted, that "hereafter 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 pronouncing such interlocutory judgments," with a proviso, that when a judgment or 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 case, 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 had 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 6th Geo. IV. c. 120, it ought to have been remitted at once for trial by jury.

Now what force the words "at once" in this Statute would have, supposing the Jury Court to have continued to exist, and whether the Court 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 & 14th Vict. c. 36, § 36, that "in all causes appropriated 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 an 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. 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 the action to be relevantly laid. The Inner House recalled *in hoc statu* the interlocutor reclaimed 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 the 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 be hereafter subjected to question upon being brought up with any other intermediate interlocutors upon an appeal against the final judgment in the 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 proceeding, and it would be strange, that this House should be called upon by an interlocutory appeal to correct the practice of the Court of Session in the progress of a cause before them. It is not at all like the cases which have been mentioned in the argument, where, the *certiorari* having been taken away by Act of Parliament, an inferior Court or a Magistrate has committed an excess of jurisdiction, and it is 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 slip 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 matters 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 whole question is founded. An appeal to this 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 against the whole merits eventually. But the attempt to sustain the appeal on the ground of its being an appeal against an excess of jurisdiction, or against an erroneous exercise 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 decide anything in the cause, that can be set right upon appeal only at the time when the Court has authorized 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. The provision of the Act of 1808 is quite conclusive upon the question. The only attempt to get out of that 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 superior 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 cause. But the argument is, that in a step of the procedure they have not followed the statutory regulations which have 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 directory 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, then 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 60 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 earliest 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 desired 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 when it had dealt with those matters, it 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 statement 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 the 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 this appeal, and I have no doubt, that the appeal is incompetent.

Mr. Moncreiff.—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.

Appellants' Agents, Morton, Whitehead, and Greig, W.S.; Loch and MacLaurin, Westminster. —*Respondents' Agents*, James Webster, S.S.C.; John Graham, Westminster.

JUNE 7, 1867.

THE LORD ADVOCATE, on behalf of COMMISSIONERS OF WOODS AND FORESTS, *Appellant*, *v.* JAMES SINCLAIR, Esq. of Forss, *Respondent*.

Salmon Fishing—Prescription—Part and Pertinent—Tenendas Clause explaining Dispositive Clause—*S. had been in immemorial possession of salmon fishings, and on a view of his titles, it was proved, that S. and his predecessors had exercised the right as far back as* 1700, *when there was a disposition of "lands and fishings." From* 1700 *to* 1761 *the lands were held in base blench tenure, and the dispositions mentioned "fishings." A Crown charter of* 1761, *which was followed by infeftment, mentioned "lands and pertinents" only in the dispositive clause, but mentioned "fishings" in the* tenendas *clause.*

HELD (affirming judgment), *That, though the* tenendas *clause is not a conveying clause, yet it may be used to explain the meaning of the dispositive clause, and as the charter of* 1761 *in the* quæquidem *clause connected the subject matter of the charter with the former titles, the charter impliedly included "fishings."* [1]

This was an appeal from two interlocutors of the First Division. An action of declarator was raised by the Lord Advocate for the Crown against Mr. Sinclair of Forss, concluding to have it declared, that he had no right or title to fish for salmon *ex adverso* of the lands of Holburnhead, or on any part of the Bay of Scrabster, or the sea coast adjoining. The Lord Ordinary (Mackenzie) found, that the defender had no right or title to the salmon fishings, but the First Division altered the interlocutor, and assoilzied the defenders from the conclusions of the action. The Lord Advocate appealed against the interlocutors of the First Division.

The appellant in his *printed case* stated the following reasons for reversing the interlocutors :— 1. Because fishings are not included among the subjects disponed by John Sinclair of Brims to his third son James by the disposition of 1712, and therefore the respondent, who is confessedly in right of such subjects only as were conveyed by that deed of 1712, has no base title on which a right to salmon fishings could be acquired by possession for any length of time. 2. Because, even supposing that the respondent's grandfather had, at the time he applied for the Crown charter of 1761, a base right to "fishings" under his titles, that right was then resigned by him into the hands of the Crown, and so was extinguished, and the Crown charter of 1761 became thenceforth the sole measure of the rights of all claiming title under it. 3. Because the charter of 1761, which is the earliest Crown charter on which the respondent founds as giving a title on which to prescribe salmon fishings, does not contain in its dispositive clause a grant of salmon fishings or even of "fishings," but simply a grant of "pertinents," and because their charter is therefore not a *habile* Crown title on which a right of salmon fishing could be prescribed. 4. Because it being clear from the titles, that John Sinclair of Dunbeath, who granted the disposition and assignation of 30th November 1700, had no right in himself to the salmon fishings in question, no possession had on the grant of fishings contained in that deed by James Sinclair of Brims, the disponee, or by any one claiming through him on a mere base title, could operate to deprive the Crown of the salmon fishings in question which is never granted out.

The respondent in his *printed case* stated the following reasons for affirming the interlocutors :— 1. That the respondent and his predecessors, for time immemorial by themselves and others

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[1] See previous reports 3 Macph. 981; 37 Sc. Jur. 530. S. C. L. R. 1 Sc. Ap. 174; 5 Macph. H. L. 97; 39 Sc. Jur. 459.