at the termination of the contract the contractor left the road in disrepair in many respects; and he 'sustains the petition, as having been competently and relevantly brought.' He then 'finds that as the respondents (advocators) were bound to have left the said road and whole works "in perfect repair," as at 1st May 1863, when the contract terminated, or to pay for the same if held to have been defective, *as there is room for presuming it was*, a warrant would in ordinary circumstances have now been granted to the petitioner for enforcing his rights, but as such cannot now be done in respect the state of disrepair of the road, &c., existing as at 1st May 1863, is now mixed up with defects and disrepair which must have arisen in the subsequent two years, for which the respondents cannot be responsible, and though there may be elements in the process for so far determining the money value of the disrepair as existing at the termination of the contract, yet, as the form of the prayer of the petition precludes the possibility of extricating matters here, by making any relevant findings under it to fix such money value, finds it therefore incompetent to proceed further in the cause; but in respect such a result might have been prevented by the respondents consenting at the outset, as they ought to have done, to the judicial remit to ascertain the state of the road at the termination of the contract, finds them liable for such result. Therefore repels the defences, finds the respondent liable in payment to the petitioner of the expenses of process (above sustained), allows an account thereof to be lodged, and remits the same, when given in, to the auditor of Court to tax and report; reserves to the petitioner his right to further action, if so advised, and to the respondents their defences as accords, and decerns.'

"The Lord Ordinary cannot affirm this interlocutor. He cannot punish the advocator as the Sheriff has done for exercising his legal right of not consenting to a remit to a man of skill, more especially where it does not appear what would have been the result of such remit, and whether it would or would not have been unfavourable to the advocator. He cannot 'repel the defences,' where the case of the pursuer is found not proved, nor find the defender liable in expenses, where he cannot pronounce judgment against him. He thinks that any delay to be complained of is far more attributable to the petitioner than to the advocators. He views the case as presenting the simple everyday aspect of an action which the party who brought it has failed to sustain by sufficient evidence. The action must be dismissed, and in the view of the Lord Ordinary, dismissed with expenses to the defenders.

(Initd.) "W. P."

Henderson reclaimed, but subsequently lodged a minute stating that it was not his intention farther to insist in his reclaiming note. The Court accordingly refused the prayer of the reclaiming note and adhered to the interlocutor of the Lord Ordinary.

Counsel for Advocators—The Lord Advocate (Gordon) and C. G. Spittal. Wm. Mitchell, S.S.C., Agent.

Counsel for Respondent—The Solicitor-General (Millar) and J. Marshall. G. L. Sinclair, W.S., Agent.

HOUSE OF LORDS.

Monday, May 20.

WESTERN BANK *v.* ADDIE.

Et è contra.

(In Court of Session, 3 Macph., 899.)

Fraud—Restitution—Damages—Partnership—Bank.

A party who had been a shareholder in a joint-stock banking company for sometime, bought 135 additional shares from the bank in 1855. In November 1857 the bank stopped payment, and was subsequently registered and wound-up voluntarily. In 1859 the purchaser brought an action against the bank, concluding for *restitutio in integrum*, or otherwise for damages, on the grounds of essential error and fraudulent misrepresentation by the bank directors. Held (rev. C. S.) that the pursuer had not averred a relevant case entitling him to go to trial. Opinion—(1) That the respondent could not have relief by way of *restitutio in integrum* unless he was in a position to restore the very thing he purchased, and that, he having been a party to proceedings whereby the company from whom he purchased was put an end to, the remedy of restitution was no longer open to him. (2) That an incorporated company cannot, in its corporate character, be called on to answer in an action on fraud; but if, by the fault of its agent, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by the fraud. Opinion (*per* Lord Chancellor), that in a Court of equity it is not a valid objection to a suit to set aside a contract for fraud that the complainant was a member of the company by the fraud of whose agent, technically imputed to the company, he was drawn into the contract.

These were appeals against certain interlocutors of the First Division of the Court of Session pronounced in an action in which Mr Addie, the respondent in the first appeal, was pursuer, and the appellants, the Western Bank of Scotland, were defenders.

The action in question was raised in November 1859, at the instance of Mr Robert Addie of Viewpark against the Western Bank, and concluded for reduction of certain transfers by which 135 shares of the capital stock of the Bank were made over to the respondent; for repetition of £27,188, 10s. 2d., being the amount of the price and of certain calls which had been paid by him, with interest, but under deduction of dividends and interest thereon; or otherwise for payment of £26,000 in name of damages. The ground of the demand on the part of the respondent was, that he had been induced to purchase the shares by the fraudulent misrepresentations of the directors of the Western Bank at the date of the purchase. It appeared that, prior to 1855, Mr Addie had been proprietor of 15 shares, and that, in the months of November and December 1855, he had made those purchases of which he now sought to be relieved.

The respondent proposed the following issues:—"It being admitted," &c. (Here followed admission of the sale of the shares by the Bank at the price stated, and of the payment by the respondent of the price and calls.)

"1. Whether the pursuer was induced to make the said purchase under essential error as to the affairs of the Bank, caused by the misrepresentations of the said Bank, or of parties acting or entitled to act therefor; and whether, in respect thereof, the defenders are resting-owing to the pursuer the sums contained in the schedule hereunto annexed?

"2. Whether the pursuer was induced to make the said purchase by the false and fraudulent misrepresentations made by the said Bank, or by its authority, as to the state of its affairs; and whether, in respect thereof, the defenders are resting-owing to the pursuer the sums contained in the schedule hereunto annexed?

"3. Whether the pursuer was induced to make the said purchase under essential error as to the affairs of the Bank, or parties acting and entitled to act therefor, to the loss, injury, and damage of the pursuer?

"4. Whether the pursuer was induced to make the said purchase by the false and fraudulent representations made by the said Bank, or by its authority, as to the state of its affairs, to the loss, injury, and damage of the pursuer?"

Damages laid at £26,000.

Then followed a schedule of the sums claimed by the pursuer under the first and second issues.

The appellants gave in the following counter issue:—

"Whether the pursuer has barred himself from repudiating the said purchase?"

On 2d February 1864 the Judges of the First Division, on the report of the Lord Ordinary, pronounced the following interlocutor:—"Find that the pursuer has stated on record matter relevant to entitle him to go to trial: Find that, as the pursuer insists in his conclusions for reduction, and for restitution or repetition, the case, as regards these primary conclusions, should be now tried and disposed of: Find that of the several issues proposed by the pursuer in the print, No. 49 of process, for the trial of the cause, as regards the conclusions other than the conclusion for damages, the issue No. 2, as now amended by the pursuer at the bar, is the appropriate and suitable issue, and is sufficient for the trial of the cause as regards the said conclusions: Therefore disallow the other or alternative issues proposed for the trial of the same conclusions, and appoint a fresh print of the said issue, No. 2, to be lodged, with a view to its being authenticated as the issue for the trial of the cause as regards the conclusions other than the conclusion for damages: Find that the defenders are entitled to the counter issue proposed by them, No. 50 of process; appoint the same to be comprehended in the print to be lodged by the pursuer, and, *hoc statu*, supersede farther consideration of the conclusion for damages."

The issues, as finally adjusted, were:—"It being admitted" (here followed admissions *ut supra*).

"Whether the pursuer was induced to make the said purchase by false and fraudulent representations made by the said Bank as to the state of its affairs; and whether the defenders are resting-owing to the pursuer the sums contained in the schedule hereunto annexed, or any part thereof? Or,

"Whether the pursuer has barred himself from repudiating the said purchase?"

The Court, on the 9th February 1864, pronounced this interlocutor:—"The Lords approve of the issues, No. 51 of process, and appoint the same to be the issues for the trial of the cause as regards the conclusions other than the conclusion for damages: Farther, they remit the cause to the Lord Ordinary."

After various procedure, the case went to trial in the end of December 1864 and beginning of January 1865, and resulted in a verdict for Mr Addie.

Various exceptions were taken by the defenders at the trial.

The Lord President, in charging the jury, said —"That in submitting to the shareholders a report on the affairs of the Bank, and the result of its business for the past year, the directors have a duty to perform, and it is part of their duty not to put forth any statement as to the affairs or prosperity of the Bank which they have not reasonable ground to believe to be true. There is implied in their report a representation to the effect that they have reasonable ground to believe in the truth of what they assert, and those to whom it is addressed or circulated are entitled so to understand it. This does not mean that it is incumbent on the directors personally to go through the books and test the accuracy of them, or of the results brought out in them. It is not to be expected or supposed that the directors have done so, and their report is not to be taken as importing or implying that they have done so. They are entitled to rely on the information furnished to them by the officials, to whom the details of the business are committed, and in whom confidence is placed. That affords reasonable ground for the directors believing in the truth of the results so brought out, and of the inferences reasonably deducible from them. And if it should unfortunately turn out that the information so furnished to the directors was false, by reason of the negligence or fault of those whose duty it was to furnish correct information, the directors who honestly believed it, and were themselves deceived by it, cannot be held to have practised any fraud on the shareholders or the public. But if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the Bank, false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, then, inasmuch as the embodying of such statements in the report imports a representation by the directors that they had reasonable ground to believe them to be true, that would be a misrepresentation and deceit, and, in the estimation of law, would amount to a fraud practised on those persons, if any, to whom the report may have been communicated officially by the Bank, or its manager acting as the agent and in the interests of the Bank, he being cognizant of the untruths, with a view to induce the purchase of shares from the Bank, if such persons shall have been thereby deceived and induced to make such purchase."

The defenders excepted to the direction, and asked the judge to direct the jury:—

1. That the pursuer was not entitled to repudiate the purchase referred to in the issues on the ground that he was induced to make it by false and fraudulent representations as to the state of the Bank's affairs made by the directors to the shareholders, of whom he was at the time one.

2. That if the representations which induced the pursuer to make the purchase were made in pursuance of the contract of partnership, and without fraud by the directors to the shareholders, of whom the pursuer was at the time one, the pursuer was not entitled to repudiate the purchase, although the

said representations were untrue in fact, and were fraudulent on the part of the manager.

3. That upon the evidence before the jury, the action is not maintainable in law, and the defenders are entitled to a verdict on the pursuer's issue.

4. That upon the evidence before the jury, the pursuer had in law barred himself from repudiating the purchase, and the defenders are entitled to a verdict on the counter-issue.

The judge declined to give these directions, and the defenders excepted. Counsel were thereafter heard on the bill of exceptions, and also on a motion by the appellants to have the verdict set aside as contrary to evidence. The Court, on 9th June 1855, disallowed the exceptions, but set aside the verdict, and granted a new trial.

The appellants, the Western Bank, on 23d June 1865, brought an appeal against the interlocutor disallowing the exceptions, because, although they had been relieved from the verdict against them, they were of opinion that the decision in their favour of the questions raised by the exceptions would prevent a new trial altogether. In support of this appeal they stated the following reasons :—

1. Because the direction given by the presiding judge to the jury was erroneous, inasmuch as it imported that if the jury were of opinion that the directors of the Western Bank put forth in their report statements of importance in regard to the affairs of the Bank, false in themselves, and which they had no reasonable ground to believe to be true, though they did, in fact, believe such statements to be true, that would be deceit, and in the estimation of law would amount to a fraud; and because what was said by the learned judge amounted to a direction that the jury might affirm the respondent's issue if they thought that the directors had committed gross error in judgment, though they were not of opinion that the directors had committed fraud in making such statements.

2. Because the respondent was not entitled to a verdict, in respect he was himself a shareholder at the date of the purchase of the said shares, and because the fraud of the directors could not be imputed to the company or the shareholders in a question with him; and therefore the presiding judge should have given the first direction asked.

3. Because it was not sufficient for the respondent's case to prove that the representations of the directors were untrue in point of fact, and fraudulent on the part of the manager, and because the respondent was not entitled to a verdict unless fraud on the part of the directors was proved; and therefore the presiding judge should have given the second direction asked.

4. Because the respondent was not entitled to the remedy of reduction and of *restitutio in integrum*, and therefore was not entitled to a verdict, in respect—(1) The transaction sought to be reduced had been completed; (2) the respondent could recover no more than the amount by which the Company had been benefited by the transaction; (3) the respondent was not in a position to give restitution; and (4) because of the time which had elapsed since the date of the purchase, during which time the respondent was a shareholder, and because facts were established before the jury, about which there neither was nor could be dispute, in respect of which the action was not maintainable in law; and therefore the presiding judge should have given the third direction asked.

5. Because facts were established before the jury about which there neither was nor could be dispute, in respect of which the respondent had in law barred himself from repudiating the purchase; and therefore the presiding judge should have given the fourth direction asked.

The respondent, Mr Addie, submitted that the interlocutor appealed against ought to be affirmed:—

1. Because the law is correctly laid down in the portion of the Lord President's charge, to which the first exception relates, in respect that statements made in the reports by the directors to the shareholders imported a representation that the directors had reasonable ground for believing the said statements to be true, and that they had used reasonable means for obtaining information in regard to the matters to which the said statements related.

2. Because the failure of persons in the situation of the directors of the Western Bank to have reasonable ground for their belief as to the affairs of the Bank, respecting which it falls within their province to report, and respecting which they do report, implies gross negligence, equivalent to fraud.

3. Because none of the directions asked by the appellants could be given consistently with the previous judgments in the cause.

4. Because the first direction asked was unsound in law, in respect that the fraud alleged by the respondent, being a fraud by the Company or persons representing the Company in its separate *persona*, it is immaterial that the respondent was at the date of the fraud a shareholder in the company.

5. Because the second direction asked was erroneous, in respect that representations made by the manager in regard to matters, and in transactions in which he was authorised to represent, and did represent the Bank, were in law representations by the Bank, and, if fraudulent on the part of the manager, infer liability as for fraud on the part of the Bank.

6. Because the third and fourth directions were rightly refused, in respect that a contract induced by fraud is null, as in a question with the party defrauded.

7. Because it is not a condition precedent that the party defrauded, claiming restitution, shall be able to give restitution, and because the inability of the respondent to restore the shares in the condition in which he obtained them, if such inability exists, is not attributable to the fault of the respondent.

8. Because the respondent cannot be debarred from obtaining the remedy of restitution by any acts done by him while he remained in ignorance of the fraud.

9. Because the acts founded on by the appellants, as constituting bar, were induced by, and flowed as consequences from, the same fraud whereby the respondent was led to purchase the shares in question.

10. Because no right or interest of the Bank, or of the shareholders, was prejudiced or injuriously affected by any act of the respondent.

11. Because there were disputed facts material to the issues, with reference to which evidence was adduced at the trial, proper for the determination of the jury, and which would have been withdrawn from the consideration of the jury had the presiding judge given the third and fourth directions asked by the appellants.

After this appeal was presented, the appellants asked leave of the First Division of the Court to appeal against the interlocutors of 2d and 9th February 1864, on the ground that it was for the in-

terest of both parties that the judgment of the House of Lords should be forthwith obtained upon the questions of law and relevancy involved in the action. The Court granted leave as craved, and an appeal against the said interlocutors was accordingly presented by the appellants on 8th February 1866.

Under this second appeal they contended that no issue should have been allowed to the respondent, and that they ought to have been assoilzied from the conclusions of the summons in respect of the facts and circumstances alleged and admitted on record.

A cross appeal was, on 19th February 1866, presented by the respondent, Mr Addie, against the said interlocutors of 2d and 9th February 1864,—(1) In so far as the issues of essential error, proposed by him, were thereby disallowed; (2) in so far as he was thereby compelled to go to trial upon a single issue, applicable to the conclusions for reduction and restitution or repetition, instead of being allowed to go to trial at the same time upon an issue or issues applicable to that conclusion, and also upon an issue or issues applicable to the conclusion for damages; and (3) in so far as the counter issue above set forth was thereby allowed to the defenders in the action.

The argument in support of all these appeals was embodied in the cases lodged for the parties in the first appeal against the interlocutor disallowing the exceptions.

Attorney-General (Rolt), Sir Roundell Palmer, Q.C., and Shand, for Western Bank, appellants.

Dean of Faculty (Moncreiff), Gifford, and Balfour, for Mr Addie, respondent.

Lord Chancellor—My Lords, this is an appeal against interlocutors of the First Division of the Court of Session, in an action instituted by the respondent against the Western Bank of Scotland and the Official Liquidator appointed to wind up the affairs of the Bank.

The summons in the action demands a reduction and restitution *in integrum* against two deeds of transference of 135 shares in the Bank, and the repayment of the sum of £10,313, 10s. 2d., being the price of the said shares, and also of the sums of £1685, £1686, and £13,500, being the amounts respectively of three calls made upon such shares; and, alternately, it demands damages in respect of the transaction.

The following are the facts stated by the pursuer in his condescendence, and admitted by him in answers to the defenders' statement. The defenders are a Joint-Stock Banking Company established in 1832, which carried on business at Glasgow and elsewhere down to November 1857, when it stopped payment.

The paid up capital amounted to £1,500,000, divided into 30,000 shares of £50 each. By the deed of co-partnership, the business and affairs of the Company were to be regulated, conducted, and carried on by a governor and deputy-governor, six extraordinary and six ordinary directors, who were constituted the representatives of the Company, and to whom the whole management of the business and affairs of the Company were intrusted; and the ordinary directors, together with the manager, or failing him or in his absence, the cashier of the Company, were to constitute the ordinary board of directors and committee of management of the Company; and by one of the articles of the deed it is declared that it shall be lawful for the directors to purchase, for behoof of the Company, any of the shares of the capital stock which may either be offered for sale, or by private bargain, or shall come to be publicly sold.

Prior to the year 1855, the pursuer was proprietor of 15 shares in the Bank, and interested to the extent of one-half in 30 shares belonging to a dissolved firm of Addie & Company.

He was also a customer, and kept his private account with a branch of the Bank at Coatbridge. In November 1855 the directors sold to the pursuer 135 shares belonging to the Bank at the price of £76 per share, amounting in all to the sum of £10,200, which were transferred by two separate deeds of transference, dated respectively the 30th November and 4th December 1855.

The transaction of the sale of those shares was conducted through Mr John Taylor, the manager of the Bank.

In the June of each year meetings were held, when the directors submitted to the shareholders reports as to the state of the affairs of the Bank for the year ending in the previous month of May.

By the terms of the co-partnership deed, no partners except the ordinary board of directors were entitled to examine the books of the Company.

The reports submitted by the directors to the different meetings of the shareholders held from the years 1851 to 1855, both inclusive, represented the business of the Bank as highly prosperous, and that its affairs were in a satisfactory and flourishing condition.

In particular, the report for the year 1855 stated, that for the year ending May 1855, the business of the Bank had been eminently successful, and that its affairs were in a sound and satisfactory condition; that after providing for bad and doubtful debts, the profits for the year available for dividend were upwards of £153,000.

These reports were untrue. Not long after its institution the Bank sustained heavy losses through bad debts, and in 1851 had lost half its capital. In May and June 1855 the bad debts had reached the amount of £1,360,000, and the Bank had at that time lost £1,000,000 of its capital, or more than one-half thereof. The result brought out in the report for the year 1855 was obtained by taking as good assets of the Bank, the whole of the bad and irrecoverable debts. The reports were prepared by Taylor, the manager; and, as the pursuer alleges in his condescendence, were submitted to the shareholders for the fraudulent purpose of concealing from them the actual condition of the Bank, and inducing a belief that it was in a sound and prosperous state, and of keeping up the price of the shares, and inducing the shareholders and others to purchase the shares belonging to the Bank.

The pursuer farther alleges in his condescendence that in November 1855, Taylor, for the fraudulent purpose of effecting a sale of part of the shares belonging to the Bank, caused Thomas Torrance, the agent for the Bank at Coatbridge, falsely to represent to the pursuer that a purchase of shares in the Bank would be a good investment, Taylor well knowing that it would not. That the pursuer had no means of knowing the true state of the Bank, except from the information communicated to the shareholders at the annual meetings by the reports of the directors and by the declarations and payments of dividends; and that, relying on the truth of these reports, and in particular on the report of 1855, and on the fraudulent representations made to him by Taylor through Torrance, the pursuer purchased and paid for the 135 shares, and

accepted the transference thereof. That instead of the shares being worth £76 per share they were worthless, or at least of inconsiderable value.

Subsequently to his purchase of the shares, the pursuer received the following dividends upon them —£270 on the 27th December 1855; £283, 10s. on 12th July 1856; £283, 10s. on the 24th December 1856; and £294, 17s. 9d. on the 10th July 1857; amounting in the whole to £1131, 17s. 9d.

During the period of the Bank's carrying on business, it was not an incorporated company; but, having stopped payment on the 9th November, it was resolved by the shareholders to wind up voluntarily under the Joint Stock Companies Act 1856, and on the 8th December 1857 the Company was registered and incorporated under the Joint Stock Companies Act 1857. In the course of the liquidation, in which the pursuer took part as one of a committee to assist the liquidators, it was found that losses to the extent of £3,000,000 had been incurred; and, in consequence, two calls were made upon the shareholders, which the pursuer paid to the amount of £16,875, under protest.

Upon this state of facts the pursuer, by two of his pleas in law, alleged that he was entitled to the decree of reduction and payment as concluded for—1. In respect that the directors and managers of the Bank made false misrepresentations to him as to the condition of the Bank, and that he was thereby induced to buy the shares in question. 2. That essential error was produced by the misrepresentation of the bank. The defenders by their pleas in law alleged that the pursuer's averments were not relevant or sufficient in law. That the statements and representations of the directors or agents of the Company were unauthorised by the Company. That the pursuer being a shareholder, the representations complained of were made by the directors on behalf of himself and the other shareholders. That restitution *in integrum* being impossible, the pursuer could not maintain the action, and that he was bound by acquiescence.

The record having been closed and the defenders having been heard before the Lord Ordinary on their objections to the relevancy, his Lordship appointed the pursuer to give in issues. Issues having been lodged, the Lord Ordinary reported the cause to the First Division of the Court of Session. After hearing counsel, their Lordships pronounced an interlocutor appointing the parties mutually to lodge cases on the whole questions of law and relevancy involved. Cases for both parties were accordingly lodged, and the pursuer having proposed certain issues and the defenders a counter issue, the Lords pronounced an interlocutor that the pursuer has stated on record matter relevant to entitle him to go to trial; and that, as the pursuer insisted in the conclusions for reduction and for restitution or repetition, the case, as regarded those primary conclusions, should be tried and disposed of, and that the issue proposed by the pursuer was the appropriate and suitable issue.

Against this interlocutor the defenders have appealed; and the first question that your Lordships have to consider is, whether the case stated by the pursuer is a relevant case or not?

In determining the relevancy of a pursuer's case, the Court must look not only to the cause of action stated in his condescendence, but also to any admissions made by him upon the defenders' statement of facts, which are thereby adopted by him and become part of his own case.

Upon the statements and admissions of the pursuer two questions arose—first, Whether he was entitled originally to rescind the contract for the purchase of the shares in question? and secondly, Whether he was debarred of his right by the change which had taken place in the condition of the Company at the time when his action was brought?

Upon the first question the Court had to determine how far a company is bound by the misrepresentations of its managing body; upon which there are numerous irreconcileable decisions.

In *Dodgson's* case (3 De. G. and Sur., 85), Vice-Chancellor Knight Bruce held, that "Directors cannot be the agents of the body of shareholders to commit a fraud, and that the directors only were liable for their conduct." This opinion was adopted by Vice-Chancellor Parker in *Bernard's* case (5 De. G. and Sur., 289), where he said *Dodgson's* case shows that the directors cannot be the agents of the company to commit a fraud, and therefore, even if Mr Bernard had been induced to take shares by the misrepresentations of the directors, that was no reason why he should be a contributory. But in *Brockwell's* case (4 Drewry, 205), where the directors of the Royal British Bank, in their published reports, misrepresented the state of the Company, and Brockwell, relying upon the truth of the reports, purchased some new shares which were issued by the Company, upon which it was sought to make him a contributory, Vice-Chancellor Kindersley held (principally upon the authority of the case of the *National Exchange Company* v. *Drew*, decided in this House), that reports made by directors to a company, if they got into circulation, must be considered as reports of the company, and Brockwell was removed from the list of contributories. The words "if they get into circulation" must mean "if they are designedly published," for the Vice-Chancellor could never have intended to hold that, if reports addressed to the shareholders, and to them alone, get into the hands of third persons by private and unauthorised circulation, they must be taken to be reports for which the company are responsible.

This case of *Brockwell* was overruled by Lord Campbell (Lord Chancellor) and the Lords Justices in *Mixer's* case (4 De. G. and Jo. 575), which was also a case connected with the British Bank. The Lord Chancellor in his judgment said—"Clearly there was fraud, and gross fraud, on the part of the directors, and I have no doubt that Mixer was induced by fraud to take his shares. I think, however, that it was a fraud on the part of the directors which cannot be attributed to the company," and the appellant was continued upon the list of contributories.

In that case the true reason was given why, even if the purchase of shares was induced by the fraud of the company, the person defrauded could not resist his liability to contribute as a shareholder. "It is a settled rule," the Lord Chancellor said, "that a contract obtained by fraud is not void, but that the party defrauded has a right to avoid it if he does so while matters remain in their former position." If, therefore, a person who has been induced by fraud to become a shareholder in a company has not relieved himself from the contract at the time when it is being wound up, he cannot afterwards divest himself of his liability.

In the case of the *National Exchange Company of Glasgow* v. *Drew*, opinions were expressed as to the responsibility of a company for the fraudulent misrepresentations of its directors, which are entitled to the highest consideration. My noble and learned

friend Lord Cranworth said, "What is the consequence of the company receiving a report and publishing it to the world? I confess that, in my opinion, from the nature of things, and from the exigencies of society, that must be taken as between the company and third persons to be a representation by the company. The company as an abstract being can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently, for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company;" and Lord St Leonards said—"I have certainly come to this conclusion, that, if representations are made by a company fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations, so made by them for that purpose, do bind the company. I consider representations by the directors of a company as representations by the company—although they may be representations made to the company it is their own representation."

These opinions received the sanction of Lord Westbury (Lord Chancellor) in the case of the *New Brunswick and Canada Railway Company* v. *Conybeare* (9 House of Lords, p. 725), where he said—"I certainly am not at all disposed to advise your Lordships to throw any doubt upon this doctrine, that if reports are made to the shareholders of a company by their directors, and the reports are adopted by the shareholders at one of the appointed meetings of the company, and these reports are afterwards industriously circulated, misrepresentations must undoubtedly be taken after their adoption to be representations and statements made with the authority of the company, and therefore binding upon the company."

My noble and learned friend Lord Cranworth, in this last case, adhering to the opinion which he had expressed in the cases of *Ranger* v. *The Great Western Railway Company*, and *The National Exchange Company* v. *Drew*, suggested a distinction as to the effect upon the company of misrepresentations by the directors, which seems to me to explain the expressions of "misrepresentations of directors being misrepresentations of a company," and "misrepresentations of directors being binding upon a company;" and, to place the question upon its true ground, my noble and learned friend said, "The principle (of making a company responsible for the misrepresentations of the directors) cannot be carried to the wild length that I have heard suggested, namely, that you can bring an action against the company upon the ground of deceit because the directors have done an act which might render them liable to such an action. That I take not to be the law of the land, nor do I believe that it would be the law of the land if the directors were the agents of some person not a company. The fraud must be a fraud that is either personal on the part of the individual making it, or some fraud which another person has impliedly authorised him to be guilty of.

"The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this:—Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract; or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract, prefers to bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally."

The action of Mr Addie is for the reduction of the deeds of transference of the shares, and alternatively for damages. But, as it is brought against the company, it will follow, from what has been said, that he cannot recover unless he is entitled to rescind the contract. The question then arises, Does he show, upon the statement of his case, that the false reports of the directors, and particularly the report of 1855, were the proximate and immediate cause of the purchase of the shares by the pursuer? I do not think that it is necessary that they should be the sole cause, for, to repeat what I said in *Nicol's* case,—"Supposing that the reports of the directors formed a material part of the inducement to take the shares, without which the purchase would never have been made, I cannot think that the effect of them is destroyed because other influences were at the same time at work which contributed to the success of these false representations." But where fraudulent reports are made the ground for rescinding a contract for the purchase of shares, the fraud is not to be established by impressions received from these reports at some former period, however distant, but they should be clearly shown to be in the mind of the person at the time of the negotiations for the purchase, and to have been one of the causes leading to the contract. Apart from these reports, there is no statement of any representations made to the pursuer by the directors, or by their authority. That the directors knew of Taylor's endeavours to induce the pursuer to take shares in the Bank, is nowhere alleged. Although merely agents of the Company themselves, and therefore, according to the well-known rule, they could not depute any other person to act for them, yet if they had employed Taylor to make false representations of the stability of the Bank to the pursuer, it would, in my opinion, have been of the same effect as if they had been made by themselves. But not only is there no statement in the case of any such delegation of authority to Taylor, but it is not even shown upon the record that Taylor had any personal communication with the pursuer. Taylor, it is stated, employed Torrance, the agent of the Bank at Coatbridge, where the pursuer kept his account, to endeavour to get him to take shares. But it is not alleged that Taylor instructed Torrance to speak of the prosperity of the Bank, and to tell the pursuer that he considered it to be a good investment for his money, nor that Torrance did not at the time believe in the stability of the Bank.

Therefore, though this was a case in which the pursuer was seeking to rescind a contract from which the Company had derived benefit, his action was maintainable; yet I entertain considerable doubt whether in his statement he connected

the directors sufficiently with the alleged misrepresentations to make them imputable to the Company, and whether he did not fail to state a relevant case upon the record on this ground.

But on the question, Whether the pursuer was not deprived of his right to rescind the contract by the change in the character and condition of the Company? which appears from his condescendence and admissions, I have no doubt that the relevancy of his case altogether failed.

Whether the change of the Company from an unincorporated to an incorporated Banking Company, for the purpose of more conveniently winding up its affairs under the Joint-Stock Companies Act 1856, so changed the nature and character of the shares purchased by the pursuer as to render a *restitutio in integrum* impracticable, is a question, if it were necessary to determine, I should wish to consider more carefully.

It was undoubtedly one of the grounds upon which the case of *Clarke* v. *Dickson* was decided. In that case a mining company was, with the plaintiff's assent, registered as a company with limited liability, and was wound up under the Winding-up Act. In an action for money had and received to recover back the amount paid for the purchase of the shares, the Court held that the action was not maintainable. Mr Justice Erle said, "He has changed the nature of the article; the shares he received were shares in a company on the cost-book principle; the plaintiff offers to restore them after he has converted them into shares in a joint-stock corporation;" and in this opinion Mr Justice Crompton agreed.

It is clear, however, upon the authorities, that, after the crisis had arrived of the failure of the Company, and the order for winding it up had been made, the time for rescinding the contract was gone. This, as I have already shown, was the ground of the decision in *Mixer's* case. That was a case between an alleged shareholder and the creditors of the company, and it may be thought that different considerations will apply where the question arises between a company and the person who has been fraudulently induced to become a shareholder, but the case of *Clarke* v. *Dickson* shows that there is no distinction between the cases. There the action was against three directors of a company to recover back money paid by the plaintiff for shares which he was induced to purchase by the false and fraudulent representations of the defendants. In that case the company was being wound up under the Winding-up Act; and it was during the process of winding up that (as in this case) the plaintiff, for the first time, discovered that the representations by which he was led to make the purchase were false. The Court held that the plaintiff was not entitled to recover. Mr Justice Crompton, after adverting to the rule of law, that "a contract induced by fraud is not void, but voidable at the option of the party defrauded," said, "It seems to me to follow, that when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

It may seem to be a hardship on the pursuer that he should be so compelled to keep the shares, because, in ignorance of the fraud practised upon him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares he may still have his action for damages against the directors—supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible. But, in his present action, the pursuer could not have recovered damages against the Company; and therefore, both on the claim in his summons for restitution and repayment, and also for damages, the pursuer stated no relevant case upon the record; and the first interlocutor, "finding that the pursuer has stated on record matter relevant to entitle him to go to trial," ought not to have been made, and no issues ought to have been directed.

But the case can hardly be left here, considering the proceedings which have since taken place. The issues approved by the Court were afterwards tried by the Lord President and a jury, and a verdict was found for the pursuer. A bill of exceptions was tendered to their Lordships, summing up both on the ground of mis-direction and non-direction. A rule was afterwards granted to set aside the verdict as contrary to evidence, and for a new trial. This rule and the bill of exceptions came on for argument at the same time, when the Court of the First Division pronounced two interlocutors of the same date, one of them disallowing the exceptions, which is appealed from, and the other setting aside the verdict and granting a new trial, which, by the 8th section of the 55 Geo. III., chap. 42, is "final and conclusive, and not liable to be questioned anywhere."

But it would not be right to pass by the other parts of the case which were brought before us in the argument.

The issues ultimately approved of by the Court were:—

"1. Whether the pursuer was induced to make the purchase by false and fraudulent representations made by the Bank as to the state of its affairs, and whether the defenders are resting owing to the pursuer the sums contained in the schedule hereunto annexed, or any part thereof; or,

"2. Whether the pursuer has barred himself from repudiating the said purchase."

In his charge to the jury, the Lord President told them, that if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the Bank, false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit. The counsel for the defenders excepted to this direction so far as it related to the directors having no reasonable ground to believe the truth of the statements in the reports, and they also called upon the Lord President to direct the jury that, upon the evidence before them, the action was not maintainable in law, and that the defenders were entitled to a verdict upon the first issue, and that upon the evidence the pursuer had in law barred himself from repudiating the purchase, and the defenders were entitled to a verdict on the second issue.

The Lord President declined to give these directions, and the bill of exceptions was tendered. The interlocutor, as already mentioned, disallowed all these exceptions.

I agree in the propriety of this interlocutor so far as it relates to the exception on the ground of misdirection. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury, upon this direction,

would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a *bona fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit.

The other exceptions, upon the refusal of the Lord President to direct the jury to find for the defenders on both the issues, may be disposed of by reference to what I have already said upon the appeal against the first interlocutor on the subject of relevancy. I expressed a doubt whether, upon the record, there were proper allegations to connect the directors with the representations which induced the pursuer to purchase the shares. At the trial the evidence upon this point was equally deficient. Taylor was not called, and no authority was shown to have been given to him by the directors for the employment of Torrance to persuade the pursuer to purchase shares. The pursuer himself did not prove that he had any communication with Taylor. But as he swore that he "purchased on the faith of the reports and what Torrance told him," I do not think that the Lord President could have withdrawn the case from the jury upon this first issue; because, if the reports formed a material part of the inducement to the purchase, then, whether Torrance's representations were brought home to the directors or not, there were sufficient misrepresentations proceeding directly from themselves, which were proper for the consideration of the jury.

But it will be collected from what I have already said, that the exception on the ground of the Lord President having refused to direct the jury that the pursuer had in law barred himself from repudiating his purchase was a good exception. The exception is not, perhaps, worded with exact precision, but I think it is sufficiently so to have required the judge to give the proper direction to the jury. The defenders evidently pointed to some act of the pursuer by which he had barred himself from rescinding the purchase of the shares, referring, probably, to his receipt of dividends, and to the part he took in assisting the liquidators in the winding up. But without any of these acts the pursuer would have been barred by the mere fact of the winding up of the Company having found him with the shares in his possession; and it would not be incorrect to say that he had barred himself by retaining the shares until the Company was brought into this condition.

As this exception ought to have prevailed, the interlocutor disallowing all the exceptions cannot be maintained.

There are one or two other points which were raised in the course of the argument which deserve a short notice. It was said, if the fraud is imputable to the Company from the representations of the directors, as the pursuer was a shareholder at the time, the representations are his own, as one of the Company, to himself through his agent. I think the fallacy of the argument lies in this:—in a suit instituted against a company to rescind a contract to purchase shares, which the purchaser was induced to enter into by the misrepresentations of directors, the misrepresentations are not regarded as actually made by the company, but they are not permitted to retain the benefit of a contract which has been fraudulently obtained for them by their agent. And although, according to the strict rules of the common law, a man cannot be plaintiff and defendant at the same time, yet in a court of equity (and equity as well as law is administered in the Scotch Courts) it could not, in my opinion, be a valid objection to a suit to set aside a contract for fraud, that the complainant was a member of the company by the fraud of whose agents, technically imputed to the company, he was drawn into the contract.

Another objection which was urged against the right of the pursuer to be relieved from his contract was, that it would prejudice the interests of other innocent shareholders who had acquired shares after the pursuer became possessed of those in question. In answer to this argument, I would only observe, that these subsequent shareholders either bought their shares under circumstances which compel them to hold them, or they also were induced to join the Company by false representations. If they are bound to continue to be shareholders, I do not see upon what principle they can contend that their purchase of shares prevents the contract of the pursuer being impeached for fraud; and if they, like the pursuer, have been deceived into the purchase of their shares, and abstain from taking proceedings to exonerate themselves from liability, there is no reason why their forbearance should bind the pursuer from taking steps to rid himself of a contract into which he has been drawn by a similar fraud.

It only remains to observe, that although the interlocutors directing the issues ought to be reversed, on the ground that the defenders were entitled to judgment on the question of relevancy, yet, upon the pursuer's cross appeal, it appears to me that upon the record there ought to have been no issue with respect to his claim to damages. His action being against the Company for the fraud of the directors, the pursuer could only recover in such action if he were entitled to rescind the contract. If his claim rested in damages, he ought to have proceeded against the directors, who would alone have been liable to him in that form of action.

Upon a review of the whole case, I must advise your Lordships that all the interlocutors appealed from ought to be reversed.

Lord Cranworth—Perhaps my noble and learned friend will allow me to call his attention to this, that "all the interlocutors appealed from" will include the interlocutor as to the new trial.

Lord Chancellor—I think that is not appealed from.

Sir Roundell Palmer—The interlocutors appealed from are the interlocutor which affirmed the relevancy of the directed issues and the interlocutor which overruled the exceptions. The reversal of those two interlocutors will practically dispose of the whole thing.

Lord Chancellor—My Lords, there is great difficulty with regard to the interlocutor directing a new trial to take place. How that may be disposed of I cannot say. Your Lordships will observe that no interlocutor granting a new trial can be matter of appeal under the 48th of Geo. III. For, of course, all the subsequent proceedings give way when the preceding interlocutors upon which they are founded are reversed. How the Court of Session will deal with the interlocutor ordering a new trial, probably my noble and learned friend, who is better acquainted with matters of this description, will inform your Lordships.

Lord Colonsay—There is no difficulty about it.

I will explain it to your Lordships after my noble and learned friend has given his opinion.

Lord Cranworth—My Lords, the respondent, who is pursuer in this action, sought relief on one of two grounds. *First*, he claimed the right of repudiating altogether the contract for the price of 135 shares, on the ground that he was induced to enter into that contract by the fraud of the directors, which he alleged ought to be treated as the fraud of the Company. Or, *secondly*, If from lapse of time, or from the mode in which he had after the purchase dealt with the shares, he is precluded from that relief, then he claimed to recover from the appellants compensation to the full extent to which he had been damaged by having been fraudulently led to enter into the contract. The extent of relief would in fact be the same on whichever ground it might be made to rest.

Relief under the first head, which is what in Scotland is designated *restitutio in integrum*, can only be had where the party seeking it is able to put those against whom it is asked in the same situation in which they stood when the contract was entered into. Indeed, this is necessarily to be inferred from the very expression *restitutio in integrum;* and the same doctrine is well understood and constantly acted on in England.

The question, therefore, on this head of relief is, Whether, assuming the existence of the fraud alleged by the respondent, and that it was a fraud which he was warranted in imputing to the Company, for whom the directors were acting, the facts alleged are such as entitle him to relief by way of "*restitutio in integrum*," whether a relevant case is stated warranting that relief? The learned judges below were of opinion that they ought not to pronounce any judgment on this point until the facts had been investigated by a jury trial, and they accordingly framed issues for that purpose. But, with all deference to them, I think no such trial was necessary; because, on the facts stated and admitted on the record, no relevant case is stated entitling the pursuer to relief against the appellants.

The Company, by whose directors the fraud is alleged to have been committed, was an unincorporated Banking Company, carrying on business under the provisions of the 7th of George IV., c. 67, with a capital of £1,500,000, divided into 30,000 shares of £50 each. Assuming that this Company, by its directors, fraudulently induced the respondent to purchase 135 of these shares, so as to entitle him to relief against the Company, he cannot insist on *restitutio in integrum* unless he is in a condition to restore the shares which he so purchased. But this is impossible. The purchase was made by him in 1855, and in 1857 he was party to a proceeding whereby the company from which the purchase was made was put an end to. It ceased to be an unincorporated and became an incorporated company, with many statutable incidents connected with it which did not exist before the incorporation. This new company is now in course of being wound-up; but even if that were not so, if it still were carrying on the business of bankers, *restitutio in integrum* would have been impossible. The respondent might in that case have given up 135 shares of the new company, and these shares might have been as valuable as, or even more valuable than, the shares which he was induced to purchase; but they would not have been shares in the same company; and unless he was in a position to restore the very thing which he was fraudulently induced to purchase, he cannot have relief by way of *restitutio in integrum*. The time had gone by during which the respondent could repudiate the contract. The circumstances were so changed that he could not put the appellants in the condition in which they were before the fraudulent sale to him. I agree with the learned judges below, that the circumstances that the shares, from mismanagement or otherwise, had become depreciated in value subsequently to the purchase by the pursuer, would of itself have been of no importance. He might still have been able to restore that which he was fraudulently induced to purchase. But what in fact took place was not a depreciation, but a destruction of the thing purchased; the unincorporated company in which he had been induced to purchase shares no longer existed. The view which I thus take of this case makes it unnecessary to consider whether there are not other grounds excluding this particular relief.

But although the respondent is excluded from redress in this form, it remains to consider whether he may not recover compensation in damages, and so obtain relief as beneficial as that from which he is thus barred. But here, too, I am of opinion that the respondent must fail. My noble and learned friend has explained the ground on which, and the extent to which, an incorporated company may be made responsible for the frauds of its agents. An incorporated company cannot in its corporate character be called on to answer in an action for deceit. But if, by the frauds of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by these frauds.

If it is supposed that in what I said when the case of *Ranger* v. *Great Western Railway Company* was decided in this House, I meant to give it as my opinion that the company could, in that case, have been made to answer as for a tort in an action of deceit, I can only say I had no such meaning. In that case I came to the conclusion, without hesitation, that no fraud had been committed; and therefore the question of the liability of the company on account of the suggested fraud did not arise. The allegation of Ranger was, that by the fraud of Mr Brimel, the company's engineer, he had been induced to contract to do, and had done, works for them at a price grossly below their real cost—say for £20,000, instead of £40,000. The company got the full benefit of what he had so done; and in what I said I merely wished to guard against its being supposed that I assented to the arguments that there would be no means of reaching the company if the fact of the fraud had been established. By what particular proceeding relief could have been obtained, is a matter on which I did not intend to express, and, indeed, had not formed, any opinion. It was unnecessary that I should do so.

An attentive consideration of the cases has convinced me that the true principle is, that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; but that they cannot be sued as wrongdoers by imputing to them the misconduct of those whom they have employed. A person defrauded by directors, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally.

It is not out of place here to point out that the principles insisted on for the respondent would, if adopted by your Lordships, lead to great injustice. Here the fraud is alleged to have been committed, not by the incorporated company now in process of being wound up, but by the persons who were trading in November 1855 as an unincorporated company under the Banking Act of 7 Geo. IV., c. 67. It is true that many, I suppose most, of the persons who were responsible, so far as they were responsible, for the acts of the directors in 1855, became members of the new incorporated company; but they did not thereby transfer to the new company the liability to be sued in consequence of frauds previously committed by the agents of the unincorporated company—still less could they make other persons, who were not members of the unincorporated partnership when the fraud was committed, liable to be sued because they joined with them in procuring an incorporation under the Joint-Stock Companies Act.

On these short grounds, I have come to the conclusion that no relevant case is stated on this record entitling the respondent to relief against the appellants, either by way of *restitutio in integrum* or by way of damages; the consequence is, that no issues ought to have been directed; and, therefore, the interlocutors of the 2d February 1864 and the 9th February 1864 must be reversed.

This being so, the trial, and all connected with it, necessarily falls to the ground. We are, however, bound to dispose of the interlocutor of the 9th of June 1865, disallowing the exceptions to the ruling of the Lord President at the trial, and against which the appellants have appealed. His Lordship told the jury that if the directors put forth in their report important statements which they had no reasonable ground to believe to be true, that would be misrepresentation and deceit, and, in the estimation of the law, would amount to fraud. I confess that my opinion was that in what his Lordship thus stated he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bona fide* believe to be true, I cannot think they can be represented as guilty of fraud because other persons think, or the Court thinks, or your Lordship thinks, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true. On this ground, I should have thought that the exceptions ought to have been allowed, so 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 expense of another trial.

Lord Colonsay—My Lords, as I did not hear the whole of the argument 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 is to stand.

Sir Roundell Palmer—Your Lordship has not put the question as to the cross appeal—I presume that that will be dismissed, with costs. The cross appeal related to an issue which your Lordships thought was properly not directed.

Lord Chancellor—We did not dispose of the cross appeal; it escaped me because there was scarcely any argument upon it, but it must be disposed of. I apprehend that the cross appeal must be dismissed.

Lord Cranworth—I think there ought to be a declaration that no relevant case is stated on the record, and that, therefore, the interlocutor should be reversed; and there should be a decree of absolvitor. With regard to the appeal of Mr Addie as to the issues, I think he is right in saying that, if there had been a relevant case stated in both issues, the issues ought to have been so framed as to exhaust the whole case.

Dean of Faculty (Moncreiff)—Upon that footing we were entitled to have redress.

Lord Chancellor—It appears to me that an issue with regard to damages could not have been framed, because Mr Addie was not entitled to damages; he was only entitled to rescind the contract with the Company, as I have expressed in the observations I made to your Lordships. It appears to me, therefore, that that interlocutor ought to be affirmed.

Dean of Faculty (Moncreiff)—Your Lordships can hardly affirm that interlocutor, because your Lordships' judgment on the relevancy implies that it ought not to have been pronounced.

Lord Cranworth—If there be a declaration that no relevant case was stated, and that, consequently, there ought to have been a decree of absolvitor, everything else follows. All the issues which are directed upon the footing of there having been a relevant case stated fall to the ground. If you say that there was no relevant case stated upon the record, and that there ought to have been an absolvitor, it seems to me that that brings it all to an end.

Lord Chancellor—My noble and learned friend will forgive me, but we must in some way dispose of that appeal of Mr Addie's. Mr Addie appeals, complaining that proper issues were not directed. I am afraid my noble and learned friend and myself differ in some degree with regard to the issues. My noble and learned friend seems to have thought that the issues ought to have covered the whole case, and that they ought to have been sent to a jury. I think that, inasmuch as under the circum-

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.