MARCH 6, 1862.

THE NORTH BRITISH RAILWAY COMPANY, *Appellants*, *v.* ANDREW WAUCHOPE, *Respondent.*

ANDREW WAUCHOPE, *Appellant*, *v.* THE NORTH BRITISH RAILWAY COMPANY, *Respondents.*

Process—Conjunction—Appeal to House of Lords—Competency—Statute 48 Geo. III. c. 151—Refusal of House of Lords to interfere with a matter of practice—*The pursuer of a cause, in which a record was closed and various interlocutors pronounced, thereafter brought a supplementary action, which he moved the Lord Ordinary to conjoin with the first. The motion was refused in the circumstances* "in hoc statu" *both by the Lord Ordinary and by the Court.*

HELD (affirming judgment), *That it was a matter entirely for the discretion of the Court.*

Appeal to House of Lords—Competency—Mutual Consent—48 Geo. III. c. 151—*The Court of Session having given leave to appeal to the House of Lords, and parties having consented also, the appellant included in his petition various interlocutors not appealable. The respondent thereon by cross appeal included the same interlocutors so far as adverse to him.*

HELD, *Though all parties consented, and the Court approved, both appeals must be dismissed or withdrawn by consent.*

Appeal to House of Lords—Competency—Leave to Appeal—48 Geo. III. c. 151, § 15.

HELD, *That where an interlocutory judgment (which is not on the merits) is appealed to the House of Lords by leave of the Court of Session, this does not entitle the parties to submit at the same time to review of the House of Lords all the preceding interlocutors in the cause.*[1]

On 12th October 1848, Mr. Wauchope of Niddrie Marischall instituted an action in the Court of Session against the North British Railway Company for payment of certain dues, as statutory compensation for "way leaves" on goods and passengers carried by their railway over certain portions of his property in the county of Mid Lothian. A record was made up and closed, and various interlocutors were, in the course of a protracted litigation and accounting, pronounced in the cause down to 1860. It appeared from the proceedings, that, as to the account due to Mr. Wauchope in 1859, the accountant, in the accounting which had been going on before the Lord Ordinary for several years, had reported a particular sum as being due by the railway company.

At that time the railway company objected to the accountant's report in so far as it held them liable in sums which they alleged were not covered by the conclusions of the summons, or not due when the action was raised. In consequence, Mr. Wauchope raised a supplementary (and second) action on 2d February 1859, concluding for payment of dues from and after the date of the first action (12th October 1848) and down to and including the dependence of the second action. The railway company maintained, in defence to this second action, all their former pleas, and also stated some additional ones. After some procedure, Mr. Wauchope moved the Lord Ordinary to conjoin the second action with the first; but this was objected to by the railway company as prejudicing their defence in the other action.

On 24th December 1859 the Lord Ordinary pronounced an interlocutor refusing to conjoin the two actions *in hoc statu*, and making certain findings on the merits adverse to the railway company. On a reclaiming note for the railway company, the First Division of the Court adhered to the Lord Ordinary's interlocutor on 20th December 1860.

The railway company then appealed to the House of Lords against the interlocutors pronounced in the second action by the Lord Ordinary on 13th December 1859 and by the Court on 20th December 1860, maintaining, in their case, that they ought to be reversed for a variety of reasons.

Mr. Wauchope also lodged an appeal to the House of Lords. In March 1861 he presented a petition to the Court of Session, in which, after setting forth the institution of his first action, and the raising of his second, in consequence of the objection taken, as above stated, by the railway company, and narrating the interlocutor of the Lord Ordinary (Ardmillan) of 24th December 1859, and of the Court of 20th December 1860, refusing to conjoin the actions, he stated, that the appeal in the first action proposed to include interlocutors made more than two years before. And he relied upon the Act 48 Geo. III. c. 151, § 15, whereby it is enacted, "That hereafter no appeal to the House of Lords shall be allowed from interlocutory judgments; but such appeals

[1] See previous reports 23 D. 191; 33 Sc. Jur. 99. S. C. 4 Macq. Ap. 384; 34 Sc. Jur. 362.

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, or except in cases where there is a difference of opinion among the Judges of the said Division." The Court, on parties consenting thereto, granted the leave to appeal.

In his case Mr. Wauchope maintained, that the interlocutors of the Lord Ordinary of 24th December 1859 and of the Court of 20th December 1860 should be reversed, and the two cases conjoined.

The railway company, following up Mr. Wauchope's appeal, presented in their turn a cross appeal against such of the interlocutors in the first action as were adverse to them, and in this way the principal, if not the whole, of the interlocutors pronounced in the first action by the Court of Session were brought up to the review of the House of Lords, though these interlocutors were not (as in the usual case) appealable, in consequence of either the time for appealing having elapsed, or from being interlocutory.

The parties, in their respective cases, set forth various reasons in support of their appeals.

Anderson Q.C., and *Sir H. Cairns* Q.C., for the respondents, proceeded to open the case of the North British Railway, when they were stopped so far as regarded the appeal against the interlocutor refusing to conjoin the actions.

The *Solicitor General* (Palmer), and *Rolt* Q.C., for the appellant, then contended, that the Court ought to have conjoined the actions, so as to save expense to the parties, and enable that part of the first action which was material to the second to be available.

LORD CHANCELLOR WESTBURY.—The short point involved in this appeal upon the 2d action which is now before your Lordships may be thus stated: There was originally an action brought in the month of October 1848, against the North British Railway Company, for an account of certain tonnage duties incurred in respect of traffic over the railway, which was partly constructed on the estate of the appellant, Mr. Wauchope; and the conclusions of the summons were, that an account might be taken not only of monies then due from the company, but also of monies that might become due in respect of traffic carried in time coming—a form of expression which, though somewhat of a short and technical character, is nevertheless, I think, perfectly distinct, implying, that it was an account to be carried on for a future time. Accordingly, this interpretation of the meaning of the summons is adopted in all the orders, and in all the proceedings under the orders, until the month of January 1859. Then, however, an objection was intimated for the first time by the railway company, the defenders in that action, that the account could not be taken beyond the date of the summons, namely, the 12th October 1848. No judicial determination has been given upon that point; and nothing that will now be said in this House must be considered as in any manner affecting the judicial determination of that question. But the present appellant, Mr. Wauchope, instead of submitting that objection to the Court for judicial determination, brought another or supplementary action. That supplementary action proceeds upon the hypothesis, that the accounts could not be carried on beyond the 12th of October 1848, and it seeks to continue that account. To the second action thus instituted, the defenders, the railway company, put in several pleas, and, before any judicial determination was come to upon their defences, an application was made by the appellant, Mr. Wauchope, to conjoin the actions. The effect of that, I apprehend, would be this, to make the matter which was *res judicata* in the first action, become also *res judicata* in the second action. That application for the conjunction of the two actions was opposed by the railway company, and the Lord Ordinary was of opinion, that the conjunction ought not to be made, inasmuch as he was told by the defenders, that it would prejudice their defence, and that the time had not arrived for deciding upon that defence.

It was, therefore, an interlocutory proceeding in the course of the cause, and one upon which the discretion of the Court was above all to be exercised; it was a matter of practice, and practice entirely depending upon the judicial discretion of the Court. The Lord Ordinary exercised that discretion by refusing that application, on the ground, that it might prejudice the merits of the cause. I think, that was a wise and prudent exercise of that judicial discretion. The Inner House concurred with the Lord Ordinary in that view of the subject. But the appellant was desirous to bring that interlocutor by way of appeal before your Lordships, and he made an application for leave to do so; and in consequence of the consent of his antagonist, who desired, for some purpose of his own, to give facility to the application of the present appellant, the Court of Session made an interlocutor giving leave to the appellant to appeal. But that leaves the question to be determined upon the appeal precisely where it was. It is for your Lordships, notwithstanding that leave, still to exercise your judgment whether it was or was not a sufficient answer to the application, or whether it be a matter proper to be brought by way of appeal before your Lordships, seeing that it was one entirely of judicial discretion, it being a matter arising in the course of procedure.

I must humbly submit to your Lordships, that the Lord Ordinary was decidedly right; but whether he was right or wrong, it is one of those matters in which faith ought to be given entirely to the judicial discretion of the Court, and no encouragement ought to be given to

bringing these matters, which are easily determined by the exercise of that judicial discretion, as matters of appeal before your Lordships.

It is upon that latter ground, that this is not strictly and properly a matter, that ought to be made the subject of appeal, although technically there has been power granted to bring the matter by way of appeal. Whether you shall dismiss it with costs or not it will be for your Lordships to consider, seeing that both parties must be regarded as concurrent in the desire to bring this matter before your Lordships; but upon that I shall not by any means particularly insist, if it should appear to your Lordships, that the usual rule should be followed.

LORD CRANWORTH.—The only observation I shall make in addition to what my noble and learned friend has said, is this, that I would suggest to my noble and learned friend, that perhaps it would be better to suspend the final drawing up of this order till to-morrow, when we shall have heard the argument upon the other appeal, and we shall then be better able to dispose of the question of costs.

LORD CHELMSFORD.—I entirely concur.

LORD CHANCELLOR.—Let the drawing up of the order be suspended till the hearing of the other appeal. The House will proceed to hear Mr. Anderson upon the question of the competency of the appeal to-morrow morning.

LORD CRANWORTH.—You are not ready now, I suppose?

Mr. Anderson.—I should be glad to have time to look into the cases upon the subject. There are authorities upon it which I am not prepared with, not expecting that the case would take this turn. Do I rightly understand, that your Lordships wish me to address myself to the competency of both appeals?

LORD CHANCELLOR.—The appeals by which you have brought up the interlocutor of December 1854, and the prior interlocutors in the first action.

Mr. Anderson.—There is no doubt about the competency of the appeal in the second action.

LORD CHANCELLOR.—All that the House has decided at present is, that the appeal from the interlocutor refusing to conjoin the two actions must be dismissed, and the order that will be made upon it will be an integral part of one order to be made on both appeals.

As to conjoining actions, appeals dismissed.

Anderson Q.C., and *Sir H. Cairns* Q.C., for the appellants.—This appeal was competent. Whenever one party got leave to appeal, it then became competent to both parties to bring up all the preceding interlocutors. The 48 Geo. III. c. 151, § 15, says, that interlocutory judgments may be appealed from with leave of the Court, and here leave was given; and it also says, that, when once an appeal is brought, all prior interlocutors may then be brought up.

[LORD CHELMSFORD.—The proviso at the end of the 15th section means only that, when an interlocutor on the merits is appealed from, all prior interlocutors may be brought up with it; but this is not so as to interlocutory judgments appealed from.]

It has always been understood in Scotland, that it is immaterial whether the judgment appealed from be on the merits or not, for in either case all the preceding interlocutors can be brought up. And the difficulty which existed in this case has been got over before in a similar way.—*Horne* v. *Breadalbane*, 1 D. 436; *Kerr* v. *Keith*, 1 Bell's App. 386; *Bartonshill Coal Co.* v. *Reid*, 3 Macq. 300; 30 Sc. Jur. 597; *ante*, vol. i. p. 785.

[LORD CHANCELLOR.—I think it is quite clear, that the proviso in the 15th section applies only to judgments on the merits. It looks here as if the parties had joined in an attempt to evade the Statute and the standing orders of the House.]

There was no attempt to evade the Statute. The parties acted *bonâ fide* throughout. If the House should dismiss the appeals on this ground, this should be done without prejudice.

LORD CHANCELLOR WESTBURY.—I understand the matter thus: It was agreed between you that, for the purpose of a full and ample discussion, the appeal presented against the interlocutors pronounced in the second action should open the door to the North British Railway Co. to bring before this House all the interlocutors pronounced in the first action. Now, Sir Hugh Cairns concluded with this request, that if the House should be of opinion, that the policy and words of the Statute do not permit the House to open the door to receive appeals which are out of time, then, inasmuch as these two appeals are out of time, and have been presented upon that understanding and that common misapprehension, the parties should be allowed to withdraw the appeals; and that the cause should not be embarrassed by any adverse decision of the House. It stands thus: if that be agreed to, the House will give its assent, and permit both parties to withdraw their petitions of appeal. It will be therefore for the Solicitor General to tell the House whether he accedes to the proposal, that the appeal of the North British Railway Co. from the two interlocutors pronounced by the Court in the second action should now be withdrawn without any order of the House being pronounced thereon. If he accedes to that, then it is probable, that my noble and learned friends might agree with me in thinking, that leave should be given to Mr. Wauchope to withdraw his appeal also from the same two orders —I mean the appeal on which we gave our opinion yesterday. It was with a view to some such

arrangement as that, that my noble and learned friend (LORD CRANWORTH) proposed to the House yesterday, that we should not draw up the final order made by the House, till we had heard this appeal to-day.

Solicitor General.—I fully understand what your Lordship has said. I must submit to your Lordships, that really it is not a reasonable proposition, that my learned friend has made upon this point. Surely Mr. Wauchope ought not to suffer in his appeal by reason of what has been done.

LORD CHANCELLOR.—The House do not desire, that you should give any reasons for dissenting. If you refuse the proposition, it is only for you to say that you do so. The state of things will then be this: The House will determine, whether it is at all competent to the railway company in this proceeding to bring by way of appeal before this House the interlocutors in the first action; but it will be still open to the railway company to have their appeal heard upon the points decided in the interlocutor in the second action. You have appealed from that interlocutor, so far as it refused to conjoin the two actions. I do not think, that any judgment upon this point will have the character and effect of a judgment with regard to the ulterior proceedings. As you have come here upon a common understanding which is abundantly manifest, I should have thought, that you would consider the proposition of Sir Hugh Cairns a fair proposition.

Solicitor General.—Your Lordships will pardon me, because I should be sorry, that my client should be placed in a false position. Your Lordships will permit me to state in a few words the reasons why I am not disposed to agree to that. We are anxious, that the judgments which we have obtained in the first action should be the subject of appeal, but we are most willing and anxious not to introduce, as an element in the decision of the question raised in the appeal upon the second action, any formal argument arising from the fact, that to a certain extent the same points have been involved in the interlocutor upon the first action. We are therefore quite willing to do anything that we properly can to assist them to place the appeal from the interlocutors in the second action in a position, in which it might be argued and dealt with without being taken, as concluded by the interlocutors in the first action, upon the first points common to both. We are still anxious, that it should be argued upon that footing, and we should undertake not to plead the interlocutors in the first action against them as adjudging any points raised in the second. But having been brought here not voluntarily upon the second appeal, it appears to us, that we cannot be expected to consent to a simple withdrawal of an appeal, as to which we have great confidence of the result of an argument upon the merits.

LORD CHANCELLOR.—I think it is impossible to accede to that. First of all, both parties desire, that this House should treat, as appealable, interlocutors forbidden by the Statute to be appealed against. Now, you gravely propose to the House, that the House hear a discussion ignoring and putting out of sight all the interlocutors pronounced in the first action.

Solicitor General.—I said, that we were willing, and still are willing, that they should be so dealt with; but if that is impossible through causes over which we have no control, then I must observe, that we did not in any way invite this appeal from the interlocutor in the second action. All that we did was this, that after they had determined upon appealing, we said we will do anything we properly can to prevent your appeal from being affected by anything that has passed in the first action; but we did not invite the appeal upon which they must fail. We must ask your Lordships, that it should fail with the usual consequence.

LORD CHANCELLOR.—There has been an understanding between you to which the House can be no party. Sir Hugh Cairns contends, the House will probably adopt this course to dismiss both of these ill judged appeals, and without prejudice.

Sir Hugh Cairns.—That would quite answer, and, so far as Mr. Anderson and myself are concerned, we should yield to that course.

LORD CHANCELLOR.—That being so, I think that will be the right course.

Mr. Rolt.—It is all that we should ask, except the costs.

Sir Hugh Cairns.—It will be without prejudice.

Mr. Rolt.—To dismiss it without prejudice would greatly prejudice us. The uncertainty we shall be in in the Court below will greatly prejudice us. The question raised by the railway company in these appeals, to the bringing of which we were no parties, will after the final decree in the cause be brought up again.

LORD CHANCELLOR.—It is impossible to say, that you are not parties to the bringing of the appeals.

Mr. Rolt.—My Lord, with great deference, I say it is a misapprehension of my learned friends, if they suggest, that we were directly or indirectly parties consenting.

LORD CHANCELLOR.—Undoubtedly I thought, that the Solicitor General had agreed, that the question upon which he and Mr. Rolt desired to be heard is the suggestion, that has been thrown out, that the appeal of the North British Railway Company should be dismissed without costs and without prejudice. Your own appeal was dismissed yesterday. The question whether it should be dismissed with costs or not has been reserved until to-day. It appears to be incompetent with regard to the antecedent order. It is quite clear, upon your own statement, that the

present appeal of the railway company before the House to-day assumed its present shape by an agreement with Mr. Wauchope. That is Mr. Wauchope's own statement. That being so, as it is an impossible thing to effect the purpose that the parties have in view, the House, in mercy to both, suggested a course which perhaps would occasion you hereafter as little embarrassment as is possible under the circumstances; and in dismissing both appeals without costs, and without prejudice, we consider that no advantage will be given to either party. The thing to be done, and which the interests of justice require to be done, is, that this House should defeat every description of ingenious device or collusive arrangement to baffle the salutary provisions contained in the Statute, which have been laid down as peremptory rules for the general benefit of the community.

Solicitor General.—I am sure your Lordships will do the parties the justice to believe, that they were not at all under the impression, that they were taking a course open to a censure of that description. The course they had taken is very plainly and openly stated in the most distinct manner upon the face of the case.

LORD CHANCELLOR.—There has been no concealment—nothing of the kind, and therefore, in that sense, there is no censure whatever.

Solicitor General.—I thank your Lordships for that. The case, which my learned friend referred to, shews the views which have been entertained in Scotland upon the subject, which may account for parties having supposed, that it was perfectly proper for them to take the course that has been taken here. I do not like placing my client in a position in which it may appear possible to your Lordships, that he acts in a manner inconsistent with any understanding to which he is a party. Therefore, I must leave your Lordships to judge of the facts in that respect from the statement that was read to you in our case, which is this: "The respondents state, that Mr. Wauchope proposed at once to go on with the accounting in both actions, but the appellants, that is, the North British Railway Company, applied to the Judges of the First Division for leave to appeal against the judgments which had been pronounced in the second action." Therefore they could not appeal against those judgments without leave. That application was opposed by Mr. Wauchope. He said, that he would object to it, unless the appellants, at the same time, appealed against the judgments unfavourable to them in the first action. The appellants were willing to do this, and then the Court gave liberty to appeal, which, if it had been acted upon in due time, might have had the effect of making the appeal competent in both actions; but the time had elapsed, and then this happened, and it was the only assistance that was afterwards given by Mr. Wauchope. He brought up the interlocutor refusing to concur the two actions, so that they should have such opportunity, and only such, as that course would give of fulfilling the condition on which alone Mr. Wauchope had said, that he was willing to waive opposition to the application for leave to appeal against the interlocutors in the second action. What I would venture to submit to your Lordships on behalf of Mr. Wauchope is this, that the whole point seems to turn upon one single consideration. Did Mr. Wauchope originally propose to the company that they should appeal, or invite them to appeal, from the interlocutors in the second action? He did not. They were anxious to appeal, and all that he did was this:—He waived the objection to their application to the Court for leave to appeal, provided they would d› a thing which it turns out in the end, partly through their own neglect as to time, and partly through causes over which neither party has any control, they cannot do.

LORD CHANCELLOR.—If this appeal had proceeded, would you have thought it right upon your part to have objected, that these interlocutors were not now appealable by reason of lapse of time?

Solicitor General.—I should not have been anxious to rest the case of the defender upon that.

LORD CHANCELLOR.—You would not have said anything about it.

Solicitor General.—The Lord Ordinary, in the second action, went into the merits, and did not proceed, simply upon the ground, that the merits were concluded by what had been done in the first action; but he expressed his opinion upon a particular point, as to which he repeated the findings made in the first action.

LORD CHANCELLOR.—It is quite clear from your own statement, that the honourable understanding between you was, that the second appeal should form the arena upon which the merits of the first sixteen interlocutors in the first action should be discussed.

Solicitor General.—We were anxious that it should be so; at all events, so far as related to ground common to both actions. What I take the liberty to submit is, that we did not put them in motion to appeal. All that we did was, to say, that if that could be done we would not object to their appeal. Then, are we, in those circumstances, responsible for the failure to do that? Will your Lordships permit me to add, that the position in which we should all be placed, if the order which had been suggested were made, would be one of extreme embarrassment and difficulty. Which action are we to go on with, and what are we to consider the proper form?

LORD CHANCELLOR.—Things are *in statu quo*. If you prefer it, I dare say the House will accede, supposing you were to apply to withdraw the appeals.

LORD CHELMSFORD.—Would the North British Railway Company have been here at all upon their appeal, without your concurrence to their appealing in the first action?

Solicitor General.—Yes, my Lord, that matter stands in this way: They applied to the Court for leave to appeal, and that application was quite an independent one of their own.

LORD CHELMSFORD.—That elapsed by time, they could not have proceeded but with your concurrence.

Solicitor General.—Then, with your Lordship's permission, what took place after that was merely this: We did all we could, which turns out to have been nothing, to put them in the situation in which they would have been, if they had not lost the time.

LORD CHELMSFORD.—You intended to place them in a position in which they could appeal in the first case. Without that they would not have done it on account of lapse of time. The time had gone by for appealing, and you said, We will facilitate your object of appealing in the first cause by appealing ourselves. So that, according to your expression, practically speaking, the two cases are now before the House as one upon the whole matter.

Mr. Anderson.—In their petition of appeal, they state, that it is desirable for both parties, that the two actions should be before your Lordships' House together for discussion.

Solicitor General.—I entirely agree in that, but what I wish your Lordships to understand is, that we did not put them in motion to appeal in the second action in which they have the power of appealing. They did not, in the first instance, make their proposal to appeal in the second action conditional upon any appeal in the first. They went in the ordinary way to the Court, who might have granted, notwithstanding our opposition, leave to appeal in the second action. If we had not opposed, they would have got the leave in the ordinary way, and your Lordships would have had the appeal in the second action by itself, but we appeared and opposed—our opposition, of course, not being at all binding upon the Court, and we said, that if they would appeal from the interlocutors in the first action also, we would not oppose their having leave to appeal in the second action. All that followed was in consequence of that; but if their original application had been granted *simpliciter*, they then would have been in the situation of being appellants in the second action only, and not in the first. They did not, in the first instance, of themselves propose to appeal in the first action. If we can only elicit from your Lordships any expression of opinion as to what is the course that we ought to follow, and the action that we should go on with—

LORD CHANCELLOR.—I should be extremely sorry that you should do so.

LORD CHELMSFORD.—And so should I.

Solicitor General.—The result will be, that we shall have a separate accounting in both actions, and be exposed to great inconvenience and uncertainty.

LORD CHANCELLOR.—My Lords, I submit to your Lordships, that, under the circumstances which have been so much discussed, and which are perfectly well known to your Lordships, it may be desirable to abstain from saying more upon this matter than this, that these appeals, being incompetent by consent of the parties, the appeals should be dismissed without costs and without prejudice.

Dismissed without prejudice to either party.

For North British Railway, Alexander Dobie, Solicitor, London.—*For Mr. Wauchope*, Loch and Maclaurin, Solicitors, Westminster.

MAY 15, 1862.

ARCHIBALD BUCHANAN, *Appellant*, *v.* ALEXANDER ANGUS and D. SIMPSON, *Respondents.*

Heritable and Movable—Trust—Succession—Vesting—Clause—Conversion—*A trust deed conveyed the truster's whole property, real and personal, to trustees, and it directed them to "pay over" the residue or price thereof to a brother and sister equally, who both survived the testator, with power if necessary to convert the same into money.*

HELD (reversing judgment), *That as the trustees were not bound to sell, the* jus crediti *of the brother in the heritable estate was heritable, and did not pass to his sister as next of kin.*[1]

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[1] See previous report 22 D. 979; 32 Sc. Jur. 418. S. C. 4 Macq. Ap. 374; 34 Sc. Jur. 502.