

WAUCHOPE, OF NIDDRIE MARISCHALL, APPELLANT.
NORTH BRITISH RAILWAY COMPANY, RESPONDENTS.

FIRST APPEAL.

1862.
March 6th.

Refusal to conjoin Actions—Appeal.—An Interlocutor was pronounced by the Court below, refusing to conjoin certain actions. Held, by the House, that the refusal involved a question of mere practice arising in the course of procedure, upon which the Court below had exercised a judicial discretion, not properly reviewable by the House of Lords on appeal.

The House, *ex proprio motu*, declined to go into the case, even although the Court below had granted leave to appeal.

Per the Lord Chancellor (*b*): This is one of those matters in which faith ought to be given to the judicial discretion of the Court below ; p. 350.

The *Solicitor-General* (*a*) and Mr. *Rolt* appeared for Mr. Wauchope.

Mr. *Anderson* and Sir *Hugh Cairns* for the Company.

The sole question which decided the fate of this Appeal cannot be more distinctly and succinctly stated than by the following judicial exposition :—

Lord Chancellor's
opinion.

The LORD CHANCELLOR :

An action was brought by Mr. Wauchope 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 ; 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 on “ in

(*a*) Sir Roundell Palmer.

(*b*) Lord Westbury.

time coming ;” a form of expression, which, though technical, 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 ; and then 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 of 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 a supplementary action (*a*), which proceeds upon the hypothesis that the accounts could not be carried on beyond the 12th of October 1848 (*b*), and it seeks to continue that account.

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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 two actions. The effect of that, I apprehend, would be 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

(*a*) The summons in this second action was dated and signeted the 2nd February 1859.

(*b*) The date of the first summons.

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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 procedure entirely depending upon the judicial discretion of the Court. The *Lord Ordinary* exercised that discretion by refusing that application, being apprehensive that he might, by acceding to the application, 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 left 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 this House, 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 whether he was 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 the latter ground, namely, 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 before your Lordships, that I advise your Lordships to dismiss the 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 the House.

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Lord CRANWORTH :

Lord Cranworth's
opinion.

My Lords, 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 (a), and we shall then be better able to dispose of the question of costs.

Lord CHELMSFORD :

Lord Chelmsford's
opinion.

My Lords, I entirely concur.

The LORD CHANCELLOR : Let the drawing up of the order be suspended till the hearing of the other Appeal. 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 (a).

LOCH & MACLAURIN—DOBIE.

(a) See the next case.