

SCOTS MINES COMPANY AND ANOTHER, APPELLANTS.  
LEADHILLS MINING COMPANY, . . . RESPONDENTS.

*Competency of Appeal under 48 Geo. 3. c. 151. s. 15, and 55 Geo. 3. c. 42. s. 4 (a).*—Per the Lord Chancellor (*b*): The statutes divide cases into three classes; first, cases in which an Appeal is absolutely forbidden; secondly, cases in which an Appeal is competent with the leave of the Court; and thirdly, cases in which, without the leave of the Court, and even after the refusal of leave by the Court, the parties may appeal *de jure*; p. 745.

'1859.  
June 27th, 28th,  
and 30th.

Per Lord Brougham: There are three classes of cases; first, cases in which an Appeal is peremptorily excluded; secondly, cases in which an Appeal is peremptorily admitted; and thirdly, where an Appeal may be had by leave of the Court below; p. 750.

Per the Lord Chancellor: Although the decree need not technically dispose of every point which may have been raised upon the record, it must substantially decide all the questions in controversy between the parties; p. 746.

Per Lord Cranworth: When there are two defences; first, that the Pursuer has no title to sue; and secondly, that the Defender is not accountable,—a decision against the Pursuer upon the first ground may, in one sense, be said to go to the whole merits of the case; p. 752.

Per the Lord Chancellor: If the true principle has not been properly applied in any particular case, the decision cannot lay down a rule by which the House is now bound; p. 748.

Per Lord Brougham: There is no doubt some little discrepancy in the decisions on this subject; p. 750.

Per Lord Chelmsford: Authorities upon this subject are of little use. The question in each case must be whether the Interlocutor is on the whole merits of the cause; p. 752.

(*a*) See also 59 Geo. 3. c. 35. s. 15, and 6 Geo. 4. c. 120. s. 33.

(*b*) Lord Campbell.

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Per Lord Brougham : Whether the judgment is upon the whole merits, or is an interlocutory judgment, must depend upon the circumstances of the case (*a*); p. 750.

Per the Lord Chancellor : If the Court below should occasionally make a mistake in refusing leave to appeal, the inconvenience would be small compared with that which must arise, if either party might appeal against every interlocutory judgment, whereby all proceedings in the Court below would be suspended : p. 748.

Per the Lord Chancellor : The law assumes that the Judges will wisely and discreetly exercise the discretion under which they refuse liberty to appeal ; p. 748.

Per Lord Brougham : We must assume that the Court will exercise a sound discretion ; p. 751.

THIS case is reported in the Court of Session cases (*b*).

On the 19th July 1855 the Second Division approved of an issue for trial between these parties ; but on the 13th of the ensuing December the Appellants presented a petition for leave to appeal, alleging that, if they succeeded in their Appeal, it would be unnecessary to go to a jury at all, inasmuch as the case would be finally disposed of on the preliminary points raised by the pleadings. The Court below refused to grant leave to appeal.

Notwithstanding this refusal the Appellants ventured to present an Appeal to the House ; and the question was, whether it was a competent Appeal under the statutes.

The *Attorney-General* (*c*) and Mr. *Anderson* objected to the competency, chiefly on the ground that an Appeal from the Scotch Court has the effect of suspending all the proceedings until the Appeal is finally disposed of by the House. This was the reason

(*a*) In the late case of the Marquis of Bute's Guardianship (Vol. iv. p. 1 of these Reports) it was held that an Interlocutor postponing judicial interposition for four months was appealable.

(*b*) 18 Sec. Ser. 594.

(*c*) Sir Richard Bethell.

why appeals were excluded upon interlocutory judgments, except by leave of the Court, which leave the Court would always grant wherever in the exercise of its discretion it appeared expedient or consonant with justice to do so. They cited *Montgomery v. Boswell* (a), *Fraser v. Fraser* (b), *Ferrier v. Mowbray* (c), *Irvine v. Kirkpatrick* (d).

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Mr. Roundell Palmer, Mr. Young, and Mr. Webster; in support of the competency, insisted that the Appellants had a right to appeal. They relied on *Downe Bell & Co. v. Edinburgh and Leith Shipping Company* (e) in support of the rule that an Appeal may be competent although it may not exhaust the merits of the case. They also cited *Clyne's Trustees v. Clyne* (f), *Warrender v. Warrender* (g), *North British Bank v. Collins* (h), and *The Marquis of Breadalbane v. McGregor* (i); this last establishing the proposition that an Interlocutor remitting for trial by jury an issue in a cause not appropriated by statute to that mode of investigation, may be appealed from without leave obtained from the Court below.

The LORD CHANCELLOR (j):

Lord Chancellor's  
opinion.

My Lords, I am of opinion that this Appeal ought to be dismissed as incompetent.

The statutes on this subject, by which we must be governed, seem to me to divide cases in the Court of Session with respect to Appeal to the House of Lords into three classes; first, cases in which an Appeal is expressly and absolutely forbidden; second, cases in which an Appeal is competent, with the leave of the Court, and not otherwise; third, cases in which, with-

- (a) Maclean & Robinson, 136.      (b) 14 Shaw & Dunlop, 89.  
 (c) 7 Wils. & Sh. 147.              (d) 7 Bell App. Ca. 186.  
 (e) Macqueen's Practice of House of Lords, 303.  
 (f) Macl. & R. 72.                      (g) 1 Macq. Rep. 43.  
 (h) 1 Macq. Rep. 369.                  (i) 7 Bell App. Ca. 43.  
 (j) Lord Campbell.

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out the leave of the Court, and even after the refusal of leave by the Court, the parties may appeal *de jure*. The question is, whether this Appeal is to be referred to the second or third class?

As the Interlocutors appealed against were pronounced by the Court without any difference of opinion among the Judges, they can be referred to the third class only, on the ground that they are not "interlocutory judgments," and that they are "judgments or decrees on the whole merits of the cause."

It has been said that a decree against which there may be a right to appeal need not necessarily exhaust the merits of the cause; neither is it necessary that it should be an extractable decree. I assent to this if the decree be "on the whole merits of the cause." Although it need not technically dispose of every point which may have been raised upon the record, it must substantially decide all the questions in controversy between the parties.

A most ample opportunity is given to bring before the House of Lords every Interlocutor pronounced in every cause, except Interlocutors with respect to which there is an express and absolute prohibition to appeal, such as Interlocutors directing or refusing a trial by jury, or Interlocutors granting or refusing a new trial on the facts. With these exceptions, there is an immediate right of appeal where the Court is divided; the Court, although unanimous, may give leave to appeal immediately; and when a final judgment or decree is appealed from, in the words of the Act of Parliament, "it is competent to either party to appeal to the House of Lords from all or any of the Interlocutors that may have been pronounced in the cause, so that the whole, so far as it is necessary, may be brought under the review of the House of Lords." (a)

(a) 48 Geo. 3. c. 151. s. 15.

. In some of the discussions on this subject the Counsel have argued as if the question had been, whether *any* Appeal was competent against the Interlocutors complained of; forgetting that with leave of the Court, the Appeal would be competent as soon as the Interlocutor complained of has been pronounced, and that, at all events, after the final decree, this Interlocutor may be brought before the House of Lords, and if erroneous will be reversed. The only question is as to the time when the Appeal shall be taken. The Legislature, vesting an ample discretion in the Court to give leave for an immediate Appeal against what is only "an interlocutory judgment," has considered that if this leave is refused, it would, upon the whole, be for the ends of justice and the good of the suitors to forbid an Appeal till the cause has been substantially decided.

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In this case, I am of opinion that the Interlocutors appealed from are interlocutory judgments, and are not "judgments or decrees on the whole merits of the cause." The fifth plea in law has not been touched by the Interlocutors, except as to directing an issue to try the truth of the allegations which it contains, "that the agreement of 1817 never having been fully acted on, and having been broken and at an end for many years, in consequence of the violation or non-implementation thereof by the Leadhills Mining Company, cannot now be founded on as giving any right to the Pursuers as alleged to be in room of that Company." I agree with the *Lord Justice-Clerk*, and the other Judges concurring with him who, expressed an opinion that the truth of these allegations may be most material; and I think that the fifth plea, on which no judgment has been given, is part of the merits of the cause, so that no judgment has yet been given "on the whole merits

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of the cause." The Court, might, nevertheless, have granted leave to appeal. It is not for me now to say whether I think they were right or wrong in refusing leave; but they, in the exercise of the discretion vested in them, having refused leave, I am of opinion that the Appeal is incompetent.

I do not consider it necessary to examine or to comment on the cases cited on either side during the argument at the Bar. They all profess to proceed upon the same *ratio decidendi*, and the question was how that applied in each particular case. If it should not have been properly applied in any particular case, that decision cannot lay down a rule by which the House is now bound. In most of the cases relied upon by the Appellants' Counsel it will be found that the Interlocutors appealed against substantially disposed of all the questions in controversy between the parties. In the Marquis of Breadalbane's case (a), for example, the decision that the usage established the right for all cattle travelling on the road to pasture on the stances, if correct, finished the controversy; and when this House held that such a right could not be acquired by usage, the cause was at an end, as it would have been had the Interlocutor been affirmed.

Allusion was made during the argument to the inconvenient consequences which may arise from the improper exercise of the discretion of the Judges, if in such cases they may effectually refuse leave immediately to appeal against their decisions. But the law assumed that the Judges will exercise this discretion wisely and discreetly; and if they should occasionally make a mistake, the inconvenience produced would be infinitesimally small, compared with that which must arise if either party might appeal to the

(a) *Marquis of Breadalbane v. McGregor*, 7 Bell, 43.

House of Lords against every interlocutory judgment, whereby all proceedings in the Court below would be suspended till the Appeal was disposed of, and litigation might be seriously protracted. To avoid a great and certain evil a discretion is often vested in public functionaries, although it may be liable to be abused. In England no writ of error can be brought in a criminal case without the *fiat* of the Queen's Attorney-General; because if a writ of error, delaying the execution of the sentence, might be brought by every man convicted of a crime, an end would be put to the administration of the criminal justice of the country; and if the Attorney-General were to refuse his *fiat* where there is any reasonable ground for alleging error, although a *mandamus* does not lie to compel him to grant his *fiat*, he might be questioned and punished for his misconduct.

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By the Act of Parliament (11 & 12 Vict. c. 78.) establishing the Court of Criminal Appeal in England, the presiding Judge, or Judges, "may *in his or their discretion* reserve any question of law for the consideration of the Court of Appeal;" but no Appeal is given to this Court without the consent of the Judge or Judges, and since the Court was established I have never heard a single complaint of any Judge having refused to reserve any question for the consideration of the Court of Appeal which was fit to be reserved.

It would be casting a most undeserved slur upon the Judges of the Court of Session, to suppose that they would not permit an Appeal against their decisions to be prosecuted with as much celerity as is consistent with the proper conduct of the suit and the attainment of justice between the parties.

For these reasons, my Lords, I must advise your Lordships to dismiss this Appeal as incompetent; but as considerable laxity seems to have been introduced

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into the practice on this subject, and the question was by no means free from doubt, I think the Appeal should be dismissed without costs.

Lord BROUGHAM :

My Lords, I entirely agree with my noble and learned friend in the conclusion at which he has arrived, for the reasons which have been so clearly and luminously stated by him as the ground of that opinion. As to the right of appeal, there are three classes of cases ; first, cases in which an Appeal is absolutely and peremptorily excluded ; second, cases in which an Appeal is absolutely and peremptorily admitted ; and a third class of cases in which a discretion is reserved to the Court, and in which an Appeal, though otherwise incompetent, may be had by leave of the Court. Of those three classes of cases, in my clear opinion, this comes within the last. It is not a case in which an Appeal is excluded, as in the instance of a refusal to grant an issue, or of the granting of an issue. It is not a case in which, as in the event of a difference of opinion, an Appeal is absolutely of right ; but it is a case in which it is excluded as of right because the judgment is not upon the whole merits of the cause, but still power is reserved to the party of appealing with the leave of the Court.

My Lords, there is no doubt some little discrepancy in the cases upon this subject, but I think it is not a discrepancy upon principle, but upon the particular circumstances of the case. Whether the judgment in any case is upon the whole merits of the case, or an interlocutory judgment, must depend upon the circumstances of the case. There are one or two as to which I might, perhaps, entertain a doubt whether it was a judgment upon the whole merits or interlocutory ; but as to others I have no doubt whatever—



as, for instance, in the case of *Lord Breadalbane v. McGregor (a)*, the case respecting the right of feeding cattle by the sides of the roads—which I well remember here—and where really the judgment was substantially upon the whole merits of the case.

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As to the exercise of this discretion I entirely agree with my noble and learned friend that there is no risk whatever in leaving it to the Court. We must assume that the Court will exercise a sound discretion. The two instances that have been given by my noble and learned friend of the discretionary power vested in the Attorney-General and the discretionary power vested in the Court of Appeal in criminal cases are really satisfactory illustrations of the little risk which you run in such case. I may remind your Lordships of another instance, the refusal of a Court to grant a new trial in matters of fact ; that is no subject of Appeal, it is not matter of error. The consequence of which is, that the Court may no doubt by erroneous decision subject parties to very great inconvenience and to no little expense. Nevertheless, that is a discretion which is exercised by all Courts of common law, and exercised without any risk of gross injustice between the parties. Upon the whole, I am of opinion with my noble and learned friend that this Appeal must be dismissed as incompetent.

Lord CRANWORTH :

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opinion.*

My Lords, my noble and learned friend on the woolsack has stated the view which he has taken of this case so clearly that I should hardly feel it necessary to add a word, were it not that a simple acquiescence by silence might lead to an impression that one at least of your Lordships doubted the propriety of that decision. Now to exclude that suppo-

(a) 7 Bell, 43.

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sition, I rise for the purpose of saying that I entirely concur in the conclusion at which he has arrived. The sole question is this, whether or not this is an appeal against an Interlocutor on the whole merits of the cause.

Now I felt very much the truth of the position that was put before us by the *Attorney-General*, when this matter was last under discussion, namely, that in all these questions we are put to a choice of difficulties. When there are two defences to any claim, first, that the Pursuer has no title to sue, and, secondly, that if he has, the Defender for some reason is not accountable, a decision against the Pursuer upon the first ground may in one sense be said to go to the whole merits of the case; and that is the course which is adhered to in the Court of Chancery in England.

Now the Acts of Parliament which regulate the course of Appeals in Scotland were framed either by Lord *Eldon*, or at all events in the time of Lord *Eldon*, and I cannot help thinking that this provision excluding the right to appeal upon interlocutory proceedings may have originated from that very learned Judge being of opinion that the course in England was attended with very great difficulty. No doubt sometimes an Appeal immediately after a decision upon a point which, if decided one way, goes to the whole merits of the case, may be extremely convenient; but it may be extremely inconvenient, and in order therefore to meet the case, and to give an opportunity of such Appeal in cases where it is likely to be expedient, and at the same time to refuse it as a matter that the party might insist upon *ex debito justitiæ*, an intermediate state of things is introduced by the enactment in question, namely, that there may be an immediate proceeding where the Court sanctions it.

I confess that I was surprised at some expressions that were read from some cases, which fell from the learned Judges in Scotland, from which the inference seemed to be that they thought they ought not to allow the Appeal when the proceeding was not final. The truth is, that that is the only case in which they ought to allow it, not that they ought always to allow it in those cases, but the circumstance that the proceeding is not final is the very reason why they ought to exercise a discretion as to whether the Appeal should be allowed or not. I dare say that that observation might have been inaccurately reported, because it was open to this remark upon the surface, that if you only wait till the proceeding is final, then their consent is not necessary.

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My Lords, upon the whole, I entirely concur in the judgment which has been delivered by my noble and learned friend on the woolsack. As to the costs, it would have been a matter of doubt in my mind whether they might not be reserved in the suit. But upon the whole, I think that sufficient doubt has been thrown upon the question by the cases to make it very reasonable that this decision should be, independently of the rest of the case, a decision without costs on either side.

I will just add, as my noble and learned friend Lord *Wensleydale* is not now in his place, that I had an opportunity of speaking to him yesterday, and he desired me to state that he entirely concurred in the view which we have taken of this case.

Lord CHELMSFORD :

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My Lords, after very full argument, I have no difficulty in agreeing in the opinion expressed by all my noble and learned friends who have preceded me. It appears to me to be most desirable that the

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House should adhere closely to the words of the Act of Parliament, which express the intention of the Legislature. The meaning of the 48 Geo. 3. c. 151. s. 15. seems to me to be very clear. It is that no Appeal shall be allowed from interlocutory judgments except with leave of the Judges, or where there is a difference of opinion amongst them, unless the judgments or decrees are on the whole merits of the cause. Are then the Interlocutors appealed from of this description? They are judgments upon pleas which involve the whole merits of the cause, but they are not judgments *on* the merits. If the pleas in law for the Defenders, and especially the two first, had been decided in their favour, there would have been a judgment on the merits, for it would have put an end to the cause by negating the Pursuers' right to maintain it. But the Interlocutors being in favour of the Pursuers, only established their title to sue, and the cause thereupon proceeded. An issue has been approved by the Court of Session, and has been appointed to be the issue for trying the cause. I say nothing as to the terms in which that issue is framed, or as to the effect which will be produced on the ultimate result of the cause by the finding of this issue one way or the other; but as the matter stands upon the Interlocutors previously pronounced, it is impossible to say that it does not raise a question which may be of great importance, or that the whole merits of the case will be exhausted while it remains undecided.

I cannot help expressing a wish that the Judges of the Court of Session had given leave to appeal against these Interlocutors, because a decision upon them one way would have prevented the necessity of trying the issue, by rendering the question it involves immaterial. But as they have refused to allow an

Appeal, your Lordships are bound to give effect to the Act of Parliament, which was intended to protect parties from harassing and vexatious Appeals, which might otherwise have been interposed in every step in the cause, leaving at the same time to the discretion of the Judges the power of permitting them where it is in their judgment just and right that they should be permitted; and that no erroneous judgment which might be given in the progress of a cause should go uncorrected, the Legislature has provided that when a judgment or decree is appealed from, it shall be competent to either party to appeal from all or any of the Interlocutors that may have been pronounced in the cause.

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Authorities upon this subject are of little use, as the question to be determined in each case must be whether the Interlocutor is "on the whole merits of the cause." It is therefore unnecessary to consider the cases which were most pressed upon your Lordships by the Appellants,—I mean those of *Clynes' Trustees* and of the *North British Bank v. Collins*,—further than to remark that in the former case Lord *Cottenham*, admitting that there was not an adjudication exhausting the whole merits, uses the expression "merits of the whole case," instead of the words of the Act, "whole merits of the case." and that in the latter the reference to the accountant seems to have been preliminary to all discussion upon the merits of the case, and for the purpose of enabling the Court of Session to ascertain whether the Company had sustained a loss of a certain declared amount. The summons was not for an account but for a declaration that the Company had ceased to exist in consequence of their having suffered a loss exceeding that specified in their deed; and the order of reference to the accountant was to obtain evidence upon which

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the merits might be ultimately decided. This case, however, must be determined upon its own circumstances and not upon these authorities. The Appellants' attention was directed to the competency of the Appeal by their application to the Court of Session, and the refusal of the Court to grant the requisite leave, and I should have thought that if they afterwards chose to take the premature step of appealing, it ought to be at their own peril with respect to the costs; but as my noble and learned friends think that there should be no costs in this case I must acquiesce in their view of the matter.

The LORD CHANCELLOR: I proposed that there should be no costs because the question appeared to have been considered as by no means free from doubt, but if your Lordships are of a different opinion as to the costs I will not press it.

Lord CHELMSFORD: I withdraw any doubt I entertain, in deference to the opinion expressed by my noble and learned friend.

*Appeal dismissed as incompetent.*

RICHARDSON, LOCH, & MACLAURIN—HOLMES, ANTON,  
& TURNBULL.