way, and the defenders did not hesitate to contend that if the traffic were despatched from different parts of the same station to the same destination the statute would not apply. I cannot adopt an argument which would deprive the statute of all its power, and which is supported neither by reason nor authority.

The pursuers urged that the traffic in question was to be regarded as having been carried between Hurlford Station and Troon, and therefore that it was carried over the same portion of the railway. It is true that it was not received at Hurlford Station. As I have said, the Wellington pit coal was invariably despatched from that station, and though in some cases the Bellfield coal was carried on to Troon from the siding at which it reached the railway, it was usual so to marshal it that it was despatched from Hurlford Station. Consequently if the Wellington coal be considered as despatched from Hurlford it passed over the same distance as the pursuers' coal, or in some cases over a longer distance. This is a reasonable view, for it cannot be doubted that the two classes of coal were, in the fair sense of the phrase, traffic between Hurlford and Troon.

There is, however, another argument which was advanced by the pursuers, which in my opinion furnishes a safer ground of judgment. The coal from each pit reached the railway within the same mile from Troon, and apart from any favour shown to the one over the other, the charge for carriage would be the same. For the defenders charge a certain rate per mile, and every part of a mile counts as a mile. The 83rd section of the Railway Clauses Act is intended to provide for equality of charge. It enacts that all tolls shall be charged equally to all persons. and after the same rate for all goods of the same description passing over the same portion of the line. As every part of a mile may be charged for as a mile, I think that I may hold that every mile and every part of it is, within the meaning of the section, one and the same portion of the railway whether the traffic passes over a larger or smaller part of it. In short, each mile is to be considered as a unit in determining the portion of the railway over which the traffic passes just as it is considered as a unit in fixing the charges which the railway company are entitled to make. Such a construction, which I think does no violence to the language of the statute, is consistent with its purpose, and preserves its efficiency. I prefer it to that maintained by the defenders, which in my opinion would make the statute a dead letter in regard to traffic of the kind with which we are here concerned. In this view, both classes of coal were carried over the same portion of the railway, and therefore the complaint of the pursuers is well founded.

Lord Young and the Lord Justice-Clerk concurred.

Lord Lee was absent.

The Court pronounced the following interlocutor:—

"Find in fact and in law in terms of the findings of the Sheriff-Substitute contained in his interlocutor of 29th June 1887, which are held as herein repeated: Therefore dismiss the appeal and affirm the said interlocutor except in so far as the sum concluded for in the petition and decerned for is erroneously stated to be £190, 0s. 3d. instead of £178, 16s. 9d., and to that extent and effect alter the said interlocutor: Of new repel the defences and ordain the defenders to make payment to the pursuers of the said sum of £178, 16s. 9d., with interest thereon at the rate of five per cent. per annum from the 1st day of September 1885 till paid: Find the pursuers entitled to expenses in the Inferior Courts and in this Court.

Counsel for the Appellants—Balfour, Q.C.—Guthrie. Agents—John Clerk Brodie & Sons, W.S.

Counsel for the Respondents—Asher, Q.C.—Low. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Tuesday, February 26.

FIRST DIVISION.

STEWART *v.* KENNEDY.

(*Supra*, p. 338).

Process—Petition for Leave to Appeal to the House of Lords.

In an action against an heir of entail in possession, the pursuer sought to have it declared that the defender had entered into a valid contract for sale of the estate, and to have the defender ordained to implement that contract. The Court unanimously found that a valid contract of sale had been entered into between the pursuer and defender, and appointed the pursuer to lodge in process a draft disposition by the defender of the estate in favour of the pursuer. Petition for leave to appeal against these judgments to the House of Lords *refused* on the ground that further questions of importance might arise between the parties, and that the pursuer had an interest to have the case finally disposed of before appeal was taken.

This was a petition by Sir Archibald Douglas Stewart, the defender in the above case, for leave to appeal to the House of Lords against the interlocutor of Lord Trayner of 21st December 1888, and the interlocutor of the First Division of 8th February 1889.

As the judgment of the Court had been unanimous, and as the conclusions of the summons were not exhausted, the petition was presented in terms of the Act 48 Geo. III. cap. 151, sec. 15.

The pursuer in the action had lodged the draft disposition in accordance with the interlocutor of 8th February. He appeared and opposed the petition.

Argued for the petitioner—The Court had decided what was the main question between the parties, and the petitioner desired leave to appeal against that decision. Till it was finally settled that there was a valid contract entered into between the parties, it would be premature to compel the petitioner to implement the contract. There would be no ground for an appeal in the later stages of the case.

Argued for the respondent—An appeal at the present stage would merely cause delay, and that might be most prejudicial to the respondent. There might in that case be several appeals as there were various matters still to be decided, about which disputes might arise between the parties.

At advising—

Lord President—The case in which this application has been presented was an action for enforcement of a contract of sale contained in missive letters—the subject being the estate of Murtly—and the pursuer concluded for specific implement, and alternatively for damages. The defender resisted the action upon two grounds—the first resting upon a construction of the personal contract of sale, and the second being that it was not a case in which specific implement was the appropriate remedy. We repelled both pleas and appointed the pursuer to lodge in process, within 14 days, the draft of a disposition by the defender of the estate of Murtly and others in favour of the pursuer, in fulfilment of the contract of sale constituted by the missives of sale, dated 19th and 20th September 1888, founded on by the pursuer.

The disposition so appointed to be prepared has been lodged and accordingly the case is now in such a position that the draft disposition may be adjusted. But there is a great deal to follow upon that, because when the deed has been granted and executed, it will be necessary to apply to the Court to have the sale confirmed under the Entail Amendment Act of 1853. There may then arise questions of very great importance, particularly as regards the manner in which the compensation to the next heir will fall to be adjusted, and its amount. There is therefore a good deal to be done before specific implement can be carried into effect.

In a question of this kind the Court is bound to consider the interests of both parties, and in the exercise of their discretion to say where the balance lies. It has been suggested that the whole merits of the case are substantially exhausted, but I can hardly assent to that. No doubt the case has been finally decided up to this point that the defender is bound by the missives to give specific implement of the contract therein contained. But there may be an appeal hereafter to the House of Lords in regard to other questions, and accordingly we must take into consideration the disadvantage to both parties if there should be more than one appeal. Mr Asher says that there is no ground for an appeal at a later stage. I cannot agree to that. There may be a very fair ground for appeal in the future, and, besides, the pursuer is quite entitled to suggest in a case like this that an appeal may be taken with the object of delay. There is therefore no protection or assurance against the prospect of there being three appeals. That is a very serious consideration.

The alternative of granting or refusing leave to appeal generally depends on a variety of considerations affecting the case in point. It has been a common thing to present an application for leave to appeal against a judgment sustaining a plea of relevancy—the object being to avoid the expense which would have attended an inquiry by proof or by jury trial if it should be held by the House of Lords that there was no relevant case. We have not seen many of these cases lately, but I can recall two of them in which petitions for leave to appeal to the House of Lords was refused, and in both there was ultimately a verdict for the defender. That seems to be a very good practical justification of the refusal of the application. I do not say that they are precisely applicable, but I cannot help thinking that the likelihood of there being more than one appeal is a sufficient reason for refusing this petition.

Lord Adam—There is a good deal of contentious matter still to be disposed of in this case. Your Lordship has said that there may quite well be a *bona fide* appeal at a future stage, and there was the case of General Macdonald in the Dunalastair disentail—*M'Donalds* v. *M'Donald*, March 12, 1880, 7 R. (H. of L.) 41—which was appealed to the House of Lords on the very question of the amount of compensation to be paid to the next heir. I do not think it is at all desirable that there should be a possibility of two appeals—and I think the respondent has a legitimate interest that the case should be disposed of here before an appeal is taken. I accordingly concur with your Lordship.

Lord Lee concurred.

Lord Mure and Lord Shand were absent.

The Court refused the petition.

Counsel for the Petitioner—Asher, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Respondent—D.-F. Mackintosh—C. S. Dickson. Agents—Tods, Murray, & Jamieson, W.S.

Tuesday, February 26.

SECOND DIVISION.

CHEYNE AND STUART *v.* IRVING SMITH AND OTHERS.

Succession—Vesting Subject to Defeasance.

A testator left his whole personal means and estate to trustees to be held in trust for the equal use and behoof of all his children, and the respective heirs of their bodies, and failing any of his said children without lawful issue to the survivors and survivor of them and their lawful issue, share and share alike, "subject always to the uses, control, and disposal hereinafter directed, and declaring that the said shares shall not become vested interests in my children respectively until their respective majorities or marriages." The children upon reaching 25 were to become trustees, and upon the youngest child reaching 21 the trustees other than his children were to cease to act. There was power given to the trustees in certain cases, none of which occurred, to restrict the rights of daughters to a liferent, and to settle the fee of their shares of capital upon their children. At the close of the deed it was