[HIGH COURT OF AUSTRALIA.]

CROWLEY . . . . . APPELLANT;
DEFENDANT,

AND

GLISSAN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *May* 9.

Griffith C.J., and Barton J.

Practice—Leave to appeal—Interlocutory order—Right of appellant to question interlocutory order on appeal from final judgment.

On an appeal from a final judgment of the Supreme Court of a State, it is open to the appellant, without obtaining leave, to question any interlocutory or other order, which was a step in the procedure leading up to the final judgment.

A defendant, against whom a verdict for £500 had been obtained in an action at *nisi prius* in the Supreme Court of New South Wales, applied to the Full Court of the State for a rule *nisi* for a new trial on several grounds. A rule was refused on certain grounds, and granted on others; but on the motion to make the rule absolute, it was discharged.

The defendant, being desirous of appealing to the High Court from the final judgment of the Supreme Court and of raising on the appeal the grounds as to which that Court had decided against him on the application for a rule *nisi*, moved the High Court for leave to appeal from the order of the Supreme Court refusing to grant a rule *nisi* on those grounds.

Held, that leave was not necessary.

MOTION for leave to appeal.

In this case a verdict for £500 had been obtained by the respondent against the appellant in an action for malicious prosecution in the Supreme Court of New South Wales. The appellant then on 25th October, 1904, moved the Full Court for a rule *nisi* for

a new trial on a number of grounds. The rule *nisi* was granted on certain grounds, and refused as to others: *Glissan* v. *Crowley* (1).

On 4th May, 1905, the Full Court, on motion by the appellant to have the rule made absolute for a new trial, discharged the rule with costs (2).

The appellant, intending to appeal from the order of the Supreme Court of 4th May, 1905, and wishing to raise, on the hearing of the appeal, the grounds as to which the Supreme Court had decided against him on the motion for a rule *nisi*, now moved for leave to appeal from the order of the Supreme Court of 25th October, 1904, in so far as it refused to grant a rule *nisi* upon the grounds mentioned.

The facts of the case and the nature of the grounds in question, are not material to this report.

Edmunds for the appellant, moved for leave to appeal, and referred to *Nolan* v. *Clifford* (3); *Smith* v. *Neild* (4); and *High Court Procedure Act*, Appeal Rules, sec. I., r. 16.

GRIFFITH C.J. In this case an appeal is proposed to be brought from a decision of the Supreme Court of New South Wales refusing to grant a rule *nisi* for a new trial upon certain grounds. According to the practice of that Court an application for a new trial is made in two stages. The first is a motion for a rule *nisi* for a new trial. If that is granted the matter is further considered upon a motion to have the rule *nisi* made absolute. If the application for the rule *nisi* is refused, or the rule is granted but discharged on motion to make it absolute, the matter is at an end. On the other hand, if the rule *nisi* is made absolute, there is a new trial. These two steps are, in our opinion, two stages in one proceeding. There is only one judgment of the Court appealed from, viz., that which grants or refuses a new trial, and on the appeal all grounds that were taken by the appellant in the course of the proceedings are open to him. That position is clearly supported by the decision in *Maharajah Moheshur Sing* v. *Bengal*

(1) 21 N.S.W. W.N., 220
(2) (1905) 5 S.R. (N.S.W.), 219.
(3) 1 C.L.R., 429, at p. 431.
(4) 6 N.S.W. W.N., 71.

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Government (1) which was referred to in the case of *Nolan* v. *Clifford* (2), and was followed in a later case: *Sheonath* v. *Ramnath* (3). The latter case was an appeal to the Privy Council from the decision of a Judicial Commissioner upholding the award of certain arbitrators, on an application to set aside the award. The Privy Council said, "The appeal is, in effect, to set aside an award which the appellant contends is not binding upon him. And in order to do this he was not bound to appeal against every interlocutory order which was a step in the procedure that led up to the award." The same principle has been applied by the Privy Council in many other cases. The appeal is from the judgment of the Court, which in this case consists partly of an order refusing to grant a rule *nisi* for a new trial upon certain grounds, and partly of an order discharging a rule *nisi* granted on certain other grounds.

There is an appeal as of right from the final judgment, and we think therefore that the leave asked for as from an interlocutory judgment, is unnecessary.

Solicitor for appellant, *T. J. Purcell.*

C. A. W.

(1) 7 Moo. Ind. App., 283.
(2) 1 C.L.R., 429, at p. 431.
(3) 10 Moo. Ind. App., 413, at p. 423.