[HIGH COURT OF AUSTRALIA.]

RUBIN . . . . . APPELLANT;
DEFENDANT,

AND

EACOTT . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

SYDNEY, *Aug.* 23.

Barton and Isaacs JJ.

Practice—High Court—Appeal from Supreme Court of State—Leave to appeal—Interlocutory judgment—Grounds for refusal—Application to set aside judgment—Affidavit of merits.

Where an interlocutory judgment is regular, an application to set it aside should be supported by an affidavit of merits.

Although leave to appeal to the High Court from an interlocutory judgment of the Supreme Court of a State is granted almost as a matter of course, it will be refused where the proposed appeal is, on the material presented to the High Court, hopeless.

Leave to appeal from the Supreme Court of Western Australia refused.

APPLICATION for leave to appeal.

By writ dated 15th November 1911 Joseph John Eacott brought an action in the Supreme Court of Western Australia against Mark Rubin to recover damages for illegal seizure of property. The defendant was out of the jurisdiction of the Court but he had an attorney under power, Abraham Davis, residing at Broome in Western Australia, who was conversant with the matters out of which the action arises. On 12th January 1912 a conditional appearance was entered for the

defendant, and on 2nd February 1912 a summons to set aside the service of the writ was dismissed, and there was no appeal against that dismissal. On 23rd March the statement of claim was delivered, and was amended on 16th April. Before the time for delivering the defence had expired Davis was drowned. Interlocutory judgment was signed by the plaintiff on 9th July, and a summons by the defendant to set aside the interlocutory judgment was dismissed, no affidavit that the defendant had a good defence on the merits having been filed. From the order dismissing that summons the defendant appealed to the Full Court, and on 25th July the appeal was dismissed.

From that decision the defendant now asked for leave to appeal to the High Court.

Loxton K.C. (with him *Pilcher*), for the appellant. The questions of law sought to be raised are whether an affidavit of merits is necessary on an application to set aside an interlocutory judgment, and, if such an affidavit is ordinarily necessary, whether it is necessary where the defendant is out of the jurisdiction, his principal witness is dead, and there is no one in the jurisdiction in a position to make an affidavit of merits. [He referred to *Watt* v. *Barnett* (1).]

BARTON J. This is an application for leave to appeal. Ordinarily speaking an application of that sort is not dealt with strictly, because, as an appeal might at a later stage be brought as of right, and as the application is for leave to appeal from an interlocutory judgment and not a final one, in many cases the question whether leave is to be granted at the stage at which it is sought only affects the convenient administration of justice; for example, by the avoidance of delay, or expense, or both. In the present case there is before us a judgment of the Supreme Court of Western Australia from which it is sought to appeal. I do not say that on an application of this kind it is necessary to show a *primâ facie* case that the judgment sought to be appealed from is erroneous. But, on the other hand, this Court in the exercise of its discretion will look at the judgment, the materials

(1) 3 Q.B.D., 183 363.

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before the Court which delivered it and the reasons for the judgment, and if this Court sees that the appeal would be absolutely hopeless it does not feel itself impelled to grant leave to appeal. That is precisely the case here. The Supreme Court of Western Australia was obviously right in refusing the motion to set aside the interlocutory judgment for the plaintiff without the customary evidence that a good defence on the merits existed. Such an affidavit could easily have been obtained if there had been facts to warrant it. To grant leave now would be to grant leave to prosecute an appeal which, on the face of it, is wholly without a prospect of success. This is not a case in which the Court merely thinks that on the whole the judgment sought to be appealed from is right. That might not by itself be a sufficient reason to refuse leave. It is a case in which the leave of the Court is asked to do something which on the face of the case presented is hopeless. On that ground I think that leave to appeal should be refused.

ISAACS J. I quite agree. It is the practice of this Court to exercise with very great latitude its jurisdiction to grant leave to appeal from an interlocutory judgment, where the granting of such leave may intercept the waste of money. In some instances when an interlocutory judgment has been signed and the matter then has to go to an assessment of damages, the expenses in connection with that assessment in the end might be thrown away if leave to appeal were not granted. This Court in such a case would not scrutinize very closely whether the appeal would ultimately succeed or not. But it is also to be borne in mind that by granting leave to appeal there is interposed an extra expense in the appeal, and some discretion must be exercised.

A consistent line of authority extending over a very long period and supported by a very high Court, recognizes, without exception, the rule that an application to set aside a judgment must be supported by an affidavit of merits, and there is no suggestion of any weight that that rule should have been departed from in this instance. To grant leave to appeal would, in my opinion, be simply throwing away money on both sides and would probably cause great injustice in delaying the assess-

ment of damages. According to *Burnside* J. the defendant has for a very long period been in possession of the plaintiff's property and no reason or excuse is given. Further, an inconsistent position is taken up at the bar—not improperly by counsel, but very improperly from the standpoint of seeing that injustice is not done to the plaintiff. It is said that the defendant ought to be allowed to show that he did not authorize the acts complained of, and yet when asked whether he is prepared to disavow them, counsel says that he is not. I think that a defence on the merits ought to be shown where the judgment is regular. That is a position which ought to weigh very strongly with this Court when asked to grant leave to appeal. I therefore agree that leave should be refused.

Leave to appeal refused.

Solicitors, for the appellant, *Leibius & Black* for *W. Clarke-Hill*, Broome, W.A.

B. L.

[HIGH COURT OF AUSTRALIA.]

CRAINE . . . . . APPELLANT;
DEFENDANT,

AND

THE AUSTRALIAN DEPOSIT AND MORTGAGE BANK LIMITED . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Practice—Appeal to High Court—Decision on question of fact—Reversing finding of fact—Weight of evidence—Action for possession of land—Adverse possession.

Where a Judge in deciding between witnesses has given credence to verbal testimony which turns out, on more careful analysis, to be substantially incon-