claim be amended in manner proposed by the plaintiffs and assented to by the defendants in the agreement above mentioned and to enable the said Supreme Court to make such order as to such amendments and upon the counterclaim if amended and as to any further pleadings (including demurrer) in reply to the proposed amended defence thereto as to the said Court shall seem proper.

(3) *Declare that in the event of the defendants being finally held to be entitled to recover damages upon the counterclaim this appeal shall be taken to have failed within the meaning of the order of this Court dated 1st September last past.*

(4) *That the costs of the suit and the costs of the counterclaim incurred up to the date of this order shall be paid by the plaintiffs to the defendants and that the future costs of and incidental to the counterclaim and of all further proceedings in connection therewith be paid as may be directed by the said Supreme Court.*

(5) *That the appellants pay to the respondents the costs of this appeal including the extra costs as ordered by this Court on 1st September last past.*

Solicitor, for the appellants, *J. R. Edwards*, Broken Hill, by *Minter, Simpson & Co.*

Solicitor, for the respondents, *W. A. Freeman*, by *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

NORTON . . . . . APPELLANT;
DEFENDANT,

AND

HOARE . . . . . RESPONDENT.
PLAINTIFF,

[No. 2].

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1913.

SYDNEY, *Nov.* 24.

Barton A.C.J., Isaacs and Gavan Duffy JJ.

Practice—High Court—Appeal from Supreme Court of State—Leave to appeal—Interlocutory order—Grounds for refusal.

Practice — Discovery — Interrogatories—Libel action—Application of defamatory words—Matters of public interest—Amended interrogatories—Contents of document.

The High Court will refuse leave to appeal from an interlocutory order of the Supreme Court of a State, where, if the appeal were an appeal as of right, it would be hopeless.

In an action for libel the plaintiff interrogated the defendant as to whether the words of the alleged libel were intended by the defendant to refer or apply to the plaintiff:

Held, that the interrogatory was admissible, as it was relevant to the question of express malice.

One of the defences to the action was that the statement complained of was made with regard to matters of public interest:

Held, that the defendant might properly be interrogated as to what were those matters of public interest.

Under an order made by the Supreme Court of Victoria giving leave to amend interrogatories, other interrogatories were administered:

Held, that the High Court could not pronounce upon the admissibility of the amended interrogatories in the first instance.

The Supreme Court of Victoria having refused to order a party to answer an interrogatory as to the contents of a document in regard to which it was not shown either that the party interrogated had possession of it, or that the party interrogating had not the means of obtaining its production,

Held, that leave to appeal to the High Court should be refused.

Leave to appeal from the decisions of the Supreme Court of Victoria (*Hood* J. and *Madden* C.J.), refused.

APPLICATIONS for leave to appeal from the Supreme Court of Victoria.

An action for libel was brought in the Supreme Court by Benjamin Hoare against John Norton in respect of an article which appeared in the defendant's newspaper *Truth*. One of the defences was that the defendant published the article complained of in reply to an article alleged by the defendant to have been written and published by the plaintiff in a newspaper called *The Tribune*, attacking the defendant's newspaper *Truth*, and in reasonable and necessary defence of his property and interest in the newspaper *Truth*. Another defence was (par. 9) that so far as the article complained of consisted of comments they were fair and *bonâ fide* comments upon matters of public interest.

In the article in *Truth* it was stated that the article in *The Tribune* came to be published in the following manner:—That the plaintiff wrote an article for *The Tribune* attacking the defendant which was so scurrilous and libellous that the printer of *The Tribune* refused to take the risk of publishing it as it stood; that the editor then altered the article to such an extent that the plaintiff refused to acknowledge it as his, and demanded that his signature should be removed from it; and that in its altered form it was then published in *The Tribune*, but without the plaintiff's signature being attached to it.

The plaintiff administered certain interrogatories, among which were the following:—

"3 (*b*) Were not the said words" (that is, the words of the alleged libel) "or some and which of them intended by you to refer or apply to the plaintiff?"

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"7. What are 'the matters of public interest' referred to in paragraph 9 of the said defence?"

The defendant objected to answer interrogatory 3 (*b*) on the ground that it was irrelevant, unnecessary, vexatious, embarrassing and oppressive; and interrogatory 7 on the grounds (1) that it inquired after matters which are not properly the subject of interrogatories; (2) that it involved the construction of written documents and the determination of matters of law; and (3) that it was embarrassing, oppressive and fishing.

On a summons by the plaintiff, *Hood* J. on 26th September 1913 ordered further and better answers to be given to interrogatories 3 (*b*) and 7, that the plaintiff should be at liberty to amend certain other interrogatories as he might be advised, and that the defendant should answer the amended interrogatories within ten days from their delivery.

The defendant administered certain interrogatories which included the following:—

"1 (*e*) Were the words contained in the said original manuscript or document" (that is, the original of the article in *The Tribune*) "altered in any and what way by you or by any and what person and persons on your behalf or with your authority knowledge or consent or how otherwise? State fully the circumstances under which the said words were altered. Did you at any and what time or times have any and what conversation or conversations with any and what person or persons with reference to altering the said words?

"1 (*f*) Do the words in the document hereto annexed and marked A" (that is, the article published in *The Tribune*) "differ in any and what respect from the words which were or are on the said original manuscript or document?

"1 (*g*) If the words in the said document annexed hereto and marked A differ in any respect from the words which were or are on the said original manuscript or document state fully how and under what circumstances the difference was brought about? Was such difference brought about by you or any and what person and persons on your behalf or with your authority knowledge or consent or how otherwise? Did you at any and what time or times have any and what conversation or conversations with any and

what person and persons with reference to making or causing the said words to differ?

"2. Was any and if so what article (identifying same) written by you subsequently altered in any and if so what respect or respects by any and if so what person or persons so as to become in fact the article published in *The Tribune* newspaper dated 25th January 1913 under the heading 'Under the Limelight: With the Genial Alchemist?' . . . State when and under what circumstances such alterations were made."

On a summons taken out by the defendant, *Madden* C.J. on 8th October 1913 refused to order the plaintiff to answer interrogatories 1 (*e*), 1 (*f*), 1 (*g*) and 2.

On a summons taken out by the plaintiff, *Madden* C.J. on 13th November 1913 ordered that upon the plaintiff answering certain interrogatories within forty-eight hours the hearing of the action should be postponed until 20th November.

The defendant now applied for leave to appeal from each of the three orders above mentioned.

Loxton K.C. (with him *E. M. Mitchell*), for the defendant. On an application for leave to appeal from an interlocutory order this Court will grant it unless it appears to be so vexatious and harassing as to show that it is only made for the purpose of delay. As to the order of *Hood* J., interrogatory 3 (*b*) is too wide. The intention of the defendant to refer in the libel to the plaintiff is immaterial. The plaintiff is only entitled to have himself identified with the person mentioned by name in the libel. [He referred to *Gibson* v. *Evans* (1); *Heaton* v. *Goldney* (2).] The answer to interrogatory 7 involves a question of law as to whether certain matters are matters of public interest or not, and the defendant is not bound to answer it: *South Hetton Coal Co. Ltd.* v. *North-Eastern News Association Ltd.* (3). As to the first order of *Madden* C.J., the interrogatories in question should be answered. They are relevant and are within the knowledge of the plaintiff. [Counsel also referred to *Maas* v. *Gas Light and Coke Co.* (4); *Parnell* v. *Walter* (5); *Hennessy* v. *Wright* [*No.* 2] (6).]

(1) 23 Q.B.D., 384.
(2) (1910) 1 K.B., 754.
(3) (1894) 1 Q.B., 133, at p. 143.
(4) (1911) 2 K.B., 543.
(5) 24 Q.B.D., 441.
(6) 24 Q.B.D., 445*n*.

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The judgment of the Court was delivered by

BARTON A.C.J. In this matter leave to appeal is sought as to three orders, the first of which was made by *Hood* J. and the other two by *Madden* C.J. While this Court will not examine an application for leave to appeal from an interlocutory order, in a suit involving an appealable right, as closely as it will an application for special leave to appeal, still, as we have laid down on a previous occasion, it will not grant leave to appeal where, if the matter were remitted to the ordinary position of an appeal as of right, the appeal would be hopeless. We think that is the position in this case.

The first matter in respect of which leave to appeal is sought is an order of *Hood* J., by the first part of which it is ordered that further and sufficient answer should be made by the defendant to the then existing interrogatories administered by the plaintiff. We may at this stage draw attention to the fact that the first part of the order is quite distinct from the second part, which gives the plaintiff liberty to amend certain of his interrogatories as he may be advised, and requires the defendant to answer the amended interrogatories within ten days from their delivery. As to the first part of the order the interrogatories dealt with are 3 (*b*) and 7. As to 3 (*b*) we do not offer an opinion upon the reason given by *Hood* J. for his order, because there is a ground upon which the interrogatory is plainly admissible, namely, that it is clearly relevant to the matter of express malice. No. 7 is a question as to what were the matters of public interest referred to by the defendant in his defence. As the defendant has put forward as part of his defence that his statements were made with regard to matters of public interest, it is obviously for him, when interrogated, to say what those matters of public interest are. It is objected that to say what are matters of public interest involves conclusions of law. It may be that conclusions of law will have to be drawn in determining whether certain facts amount to matters of public interest, but that is no reason why the facts should not be stated. We think that the defendant must answer this interrogatory.

The remainder of the order, as we have pointed out, is entirely separate from the first portion of it, and deals with the question

of amending the interrogatories. This general leave to amend has resulted, so we are told, in other interrogatories being administered. But the position put by Mr. *Loxton* would involve this Court in an inquiry as to the admissibility of the particular questions put by the amended interrogatories. Any answers given by the defendant to such questions would in the first instance necessarily come before a Judge of the Court in which the action was instituted, and the question whether a particular interrogatory should be answered could come before us by way of appeal only. We are practically asked to settle in advance the propriety of certain interrogatories, and we cannot make ourselves a Court of first instance for that purpose. The defendant could have taken a different course. He could either have applied to the Supreme Court of Victoria to have the new interrogatories struck out, or he could have refused to answer them and have left the other side to apply. We are not in a position to deal with the matter as if one of those courses had been taken, and as it has not come before us on appeal we cannot pronounce upon it at this stage.

The first of the orders of *Madden* C.J. is as to certain interrogatories administered by the defendant which deal with two or three paragraphs in the alleged libel. It is there stated by the defendant that the plaintiff submitted an article to the editor of what the defendant calls a "pictistic print" and that the article was of such a character that the printer refused to take the risk of publishing it in that form; that the editor then altered the article and that his alterations were of such an extensive nature that the plaintiff refused to father it. Now, so far as there is evidence before us, all this was done without any permission or request from the plaintiff. In fact it appears according to the defendant's statement in the alleged libel to have been against the plaintiff's will, for it is said that he got his signature removed from the article before it was published. Upon this matter there are interrogatories 1 (*e*), 1 (*f*), 1 (*g*) and 2. Interrogatory 1 (*e*) is as follows:—[His Honor read that interrogatory.] The question whether the plaintiff had altered, or authorized, or knew of, or consented to, the alteration of the original article appears clearly to be inadmissible for the reason

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that it has already been answered in the alleged libel, which asserts that the original article was altered by the editor without the authority or consent of the plaintiff. That portion of the interrogatory which follows, and which demands that the plaintiff should state fully the circumstances under which the alterations were made, becomes purely a fishing inquiry. Then as to the question whether the plaintiff had any conversation in reference to the alterations, that also is answered in the alleged libel and is beside the mark.

Interrogatory 1 (*f*) asks: [His Honor read the interrogatory.] That is a question as to the contents of a written document, as to which it is said in *Halsbury's Laws of England*, vol. XI., par. 169, p. 102, "Interrogatories as to the contents of a lost document are permissible, but not, as a rule, of those of an existing document." In the *Yearly Practice* for 1914, at p. 397, there is a passage to the same effect:—"Interrogatories as to the contents of an existing document will not as a rule be allowed (*Herschfeld* v. *Clarke* (1)), but interrogatories as to the contents of a lost document may be."

It is enough to say that there is no contention that there is anything in the document inquired about to take it out of the general rule stated.

The same remarks apply to interrogatory 1 (*g*), which I will read. [His Honor read 1 (*g*).] That is open to the objection already stated as to interrogatory 1 (*f*), and also to a similar objection to that stated as to the prior interrogatories. It is clear that the differences between the document marked A and the original document are, according to the defendant's own statement in the alleged libel, not chargeable to the plaintiff.

Then we come to interrogatory 2. [His Honor read the interrogatory.] That interrogatory is open to the objection embodied in the passage from *Halsbury's Laws of England*. We should add that it does not appear that the plaintiff has the original article or that the defendant has not the means of obtaining production of it. There is nothing to show that the document is under the control of the plaintiff. There is the further position, which seems to make the task of the defendant

(1) 11 Ex., 712.