[HIGH COURT OF AUSTRALIA.]

ZIMPEL . . . . . APPELLANT;
DEFENDANT,

AND

ALLARD . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1904.

PERTH, *Oct.* 11, 13.

Griffith C.J., Barton and O'Connor JJ.

Practice—Special leave to appeal—Jurisdiction of inferior Court—Objection not taken in that Court—Lying-by—Smallness of amount.

In an action of ejectment in the Local Court the respondent obtained an order under the *Small Debts Act* of Western Australia (27 Vict., No. 21), for recovery of possession of certain premises of the annual value of not more than £20. The appellant made no objection to the jurisdiction of the Court. The time for issuing execution was allowed to expire. Afterwards the respondent brought an action in the Supreme Court founded on the judgment of the Local Court. The Chief Justice at Nisi Prius *held* that the judgment of the Local Court was conclusive, and rejected evidence tendered by the appellant to show that the case was not within its jurisdiction. The Supreme Court of Western Australia affirmed his decision. On an application for special leave to appeal from the judgment of the Supreme Court:—

Held, that, even if the Supreme Court was in error in holding that the judgment of an inferior Court could not be disputed unless it had been disputed in the Local Court itself, the discretion of this Court to grant special leave to appeal should not be exercised where so small an amount was involved, and when the appellant had lain by in the Local Court and taken the chance of a judgment in his favour.

Rule in *Mayor of London* v. *Cox* (1), applied.

THIS was an application for special leave to appeal from a judgment of the Supreme Court of Western Australia of the 29th August, 1904, affirming the judgment of the Chief Justice at Nisi Prius in an ejectment action, ordering possession to be given

(1) L.R., 2 H.L., 239.

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the respondent. In an action in the Local Court in May, 1903, the respondent had obtained an order for the possession of the premises under the *Small Debts Act* of Western Australia. The time for issuing execution on the Local Court judgment having been allowed to expire, he brought an action of ejectment in the Supreme Court. At the trial before the Chief Justice the respondent proved the judgment of the Local Court. The appellant tendered evidence to show that the case was not within the jurisdiction of the Local Court, but the evidence was rejected, and judgment was given for the respondent. On appeal, the Full Court affirmed the decision of the Chief Justice.

Alcock, for the appellant. The Supreme Court was in error on three grounds:—

1. The judgment of the Local Court was only *primâ facie* evidence. It was not conclusive, and did not amount to an estoppel.

2. The section of the *Small Debts Act* only applies to yearly tenancies. Here the plaint merely set up a weekly tenure.

3. The Local Court, whose judgment was relied on by the plaintiff in the ejectment action, had no jurisdiction to try a question of title to land.

The ground rent is £19 10s. per year, but the appellant bought out the previous tenant, and paid £290 for the tenancy. The Court has jurisdiction only in cases coming within the section: *Friend* v. *Shaw* (1). In this case a premium had been paid, and the section confers jurisdiction only where there is no such fine or premium. This tenancy, also, was a weekly one, and did not come within the section.

[GRIFFITH C.J.—Why was not this point raised in the Local Court?]

The order of a Local Court is never final and conclusive in ejectment: *Campbell* v. *Loader* (2); *Hudson* v. *Walker* (3). The evidence was tendered to show that, as there was no relationship of landlord and tenant, the plaintiff was not entitled to succeed in ejectment.

(1) 20 Q.B.D., 374. (2) 3 H. & C., 520. (3) 41 L.J. (Ex.), 51.

[GRIFFITH C.J.—On what grounds can this be said to be a question of public importance ?]

On the question of the jurisdiction of the Local Court, *Chew* v. *Holroyd* (1) was also cited.

Per Curiam.—We think that this application should not be decided *ex parte*. Notice of motion must be given to the plaintiff.

The case came before the Court again on 13th October.

Alcock, continuing :

Where the judgment of an inferior Court is in question, the plea must allege that it was a Court of competent jurisdiction : *Read* v. *Pope* (2) ; *Mayor of London* v. *Cox* (3).

Pilkington, for the respondent. The amount involved is only 7s. 6d. per week, and no question of public importance arises.

[He was stopped.]

Alcock, in reply. The amount of the ground rent is immaterial. The defendant gave £290 in 1898 for the lease. Although the ground rent may be small, the premises may be very valuable. The actual market value is the test. *Elston* v. *Rose* (4) ; *Hodson* v. *Walker* (5). On the question of the validity of a magistrate's decision where he has jurisdiction over the subject-matter, he cited *Thompson* v. *Ingham* (6).

GRIFFITH C.J. This is an application for special leave to appeal from a decision of the Full Court. The case, according to the evidence, is one involving property worth, according to the most favourable valuation, about £20 a year, the difference between the annual value and the rent. The question of law which Mr. Alcock desires to raise is whether the judgment of the Local Court is conclusive for the purpose of founding an action of ejectment. Of course, there is no doubt that the judgment of the Local Court

(1) 8 Exch., 249.
(2) 1 Cr. M. & R., 302.
(3) L.R., 2 H.L., 239, *per Willes*, J., at p. 262.
(4) L.R., 4 Q.B., 4.
(5) L.R., 7 Ex., 55.
(6) 19 L.J., Q.B., 189.

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is not conclusive, except in matters within its jurisdiction. The learned Judges of the Supreme Court seem to have thought that the jurisdiction of the Local Court could not be disputed unless it had been disputed in that Court. It is not quite clear that that was their view, but if it was, it is inconsistent with the case of *Mayor of London* v. *Cox* (1). In the present case it appears that, before the Local Court itself, the jurisdiction of that Court was not disputed. A purely technical point was taken upon which the present appellant failed. He appealed to the Supreme Court, and failed there; and, in consequence of the delay which had occurred, the order made by the Local Court could not be enforced. Proceedings were then taken in the Supreme Court. The question for us is whether, supposing the Supreme Court to have made a mistake in regard to the law governing the effect of judgments of inferior Courts, this Court should give leave to appeal in a case where so small an amount is involved. The application is, in effect, to be allowed to impeach the verdict of the Local Court on the ground of want of jurisdiction. True, the appellant was, at one time, entitled to impeach the judgment on that ground. So any party is entitled to impeach a judgment of an inferior Court by way of prohibition if it exceeds its jurisdiction. But this right may be lost. In the case of the *Mayor of London* v. *Cox*, which embodies the whole law of prohibition, the rule was stated by Mr. Justice *Willes* as follows (2):— "Where, however, the defect is not apparent, and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition in respect of the right of the Crown is not taken away, for mere acquiescence does not give jurisdiction, yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to

(1) L.R., 2 H.L., 239.

(2) L.R., 2 H.L., at p. 283.

the knowledge of the applicant. The objection in such cases is, that the applicant comes too late; not, as here, that he comes too soon; and the cases cited at the bar as to applications after sentence are therefore inapplicable." That is the rule that applies to taking objection to jurisdiction by way of prohibition. Applications to this Court for special leave to appeal are not granted as of course. We think that the analogy of the rule just stated may very well be applied when special leave is asked for the purpose of raising an objection which would not have been allowed to be taken by way of prohibition, especially when the value of the property involved is so small. For these reasons we think the application should be refused.

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Leave refused.

Solicitor, for appellant, *F. Morley Alcock.*

Solicitor, for respondent, *J. M. Speed.*

H. E. M.

[HIGH COURT OF AUSTRALIA.]

GOODE . . . . . APPELLANT;
PLAINTIFF,

AND

BECHTEL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Arbitration—Jurisdiction of arbitrator—Setting aside award—Grounds for setting aside.

As a general rule an arbitrator is a judge of law as well as of fact, and his decision cannot be objected to on the ground that he misconceived the law, or possibly that the law was unjust.

Judgment of the Full Court of Western Australia (6 W.A. L.R., 86) reversed, and the award of the arbitrator restored.

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PERTH, *Oct.* 12.

Griffith C.J. Barton and O'Connor JJ.