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THE KING v. LYON.

O'Connor J.

Judgment for the plaintiff. Case remitted to the learned Judge of first instance on the question of penalties and as to costs.

Solicitor, for the plaintiff, *The Crown Solicitor of the Commonwealth.*

Solicitor, for the defendant, *Mark Mitchell.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

MURRAY . . . . . APPELLANT;
DEFENDANT,

AND

MUNRO . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 2, 3, 4.

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

Appeal to High Court — Special leave — Rescission — Question of fact involved — Estoppel by delay—Reference of cause to arbitration by Judge—Directions to arbitrator—Mode of taking exception to rulings of law—Time for taking objection.

An action at *nisi prius* was referred by the Judge to an arbitrator. By the order of reference the Judge directed that a plea of the defendant should be treated by the arbitrator as a plea of payment of part. The arbitrator entered upon the reference, and no objection was taken by the defendant to the Judge's direction. The arbitrator having made an award in favour of the plaintiff, a verdict was entered accordingly. The defendant then moved for a new trial, upon the ground that the rulings and directions in the order of reference were wrong. The Supreme Court held that the defendant was estopped by his delay from taking objection to the Judge's rulings, and refused to grant a new trial.

Special leave to appeal to the High Court from this decision was granted, but was rescinded on the hearing of the appeal on the ground that the inference to be drawn from the conduct of the defendant was one of fact to be drawn from the circumstances, and that having been decided against the defendant by the Supreme Court, the only matter involved in their decision was a question of fact, and the case was not one in which special leave to appeal should be given.

Semble, that the proper course for the defendant to have adopted under the circumstances, if he complained of the Judge's direction to the arbitrator, was to have objected to the direction at the time, and, if his objection was overruled, to have moved summarily to have the judgment upon the award set aside, or to have moved for a new trial on the ground of misdirection. If the order of reference was by inadvertence wrongly drawn up without the defendant having an opportunity of objecting at the time, he should have applied to the Judge to have it amended. If a party, when he has the opportunity of objecting, lies by and thereby puts the other party in a worse position, the Court in the exercise of its discretion may properly refuse to allow him to take the objection afterwards.

Special leave to appeal from the decision of the Supreme Court, *Munro* v. *Murray*, 22 N.S.W. W.N., 113, rescinded.

APPEAL from a decision of the Supreme Court of New South Wales.

The issues in this action were referred by the Judge at *nisi prius* to an arbitrator with certain directions as to the effect to be given to the pleadings. No objection was taken by the defendant at the trial to the Judge's direction. The arbitrator entered upon the reference and made an award in favour of the plaintiff. Upon this judgment was signed in the ordinary way as upon the verdict of a jury. The defendant obtained a rule *nisi* for a new trial on the ground that the Judge's directions to the arbitrator were erroneous in law. The Full Court, however, after argument, discharged the rule *nisi* with costs, on the ground that the defendant had estopped himself by his conduct from taking objection to the Judge's rulings: *Munro* v. *Murray* (1).

On 28th July 1905, special leave to appeal from this decision was granted, on the ground, as was represented on behalf of the appellant, that it involved an important question of law as to the proper procedure to be adopted for the purpose of calling in question the directions of a Judge at *nisi prius* on a compulsory

(1) 22 N.S.W. W.N., 113.

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reference to arbitration, and on the ground that the directions of the Judge in this case were erroneous in point of law, and the decision of the Supreme Court amounted to a denial of justice.

The nature of the pleadings, the Judge's rulings, and the facts appear in the judgments.

Garland, (with him *Ferguson*), for the appellant. The Judge directed the arbitrator that the second plea was merely a plea of payment of £50, and that no evidence should be admitted under that plea, except as to that payment. The result was that the arbitration was altogether one-sided, and could only have one result. The second plea was a plea of accord and satisfaction, and the defendant should have been allowed to call evidence to support it as such. If he had been allowed he could have given evidence that would have answered the whole claim, except as to £70, for £35 of which judgment was suffered by default. The defendant has therefore been denied the right to make good his defence, which was that, whatever the original state of affairs was, the parties had come together and arrived at an agreement that only £70 was owing by the defendant, and an account was stated to that effect. Payment could not be pleaded. The plea is an allegation that not only this but other claims were the subject of the settlement.

[GRIFFITH C.J. referred to *Wallace* v. *Kelsall* (1).]

The only method of taking exception to the Judge's direction to the arbitrator was to move for a rule *nisi* for a new trial on the ground of misdirection. In *O'Donoghue* v. *Oliphant* (2), similar steps were taken for the purpose of setting aside a verdict entered upon an arbitrator's award. The award, by virtue of the order of reference and sec. 16 of the *Arbitration Act* 1902, was equivalent to a verdict of a jury. The defendant was not complaining of the award, but was appealing from the order of reference. The rule of Court providing for the setting aside of an award (r. 295) is inapplicable, and therefore under rule 296 the practice of the Supreme Court in its common law jurisdiction is to be followed. [He referred to rules 287-294 of the Supreme Court; *Robin & Innes, Sup. Ct. Prac.*, pp. 414, 415.] There is

(1) 7 M. & W., 264.

(2) (1903) 3 S.R. (N.S.W.), 47.

nothing in the rules under the *Arbitration Act* which binds the defendant to take any particular course, and he was entitled to adopt the general practice in appeals from *nisi prius* rulings. The trial continued until the award was entered. It is as if the Judge by a misdirection had prevented the jury from considering the whole of the issues which should have gone to them.

The defendant has done nothing to disentitle him to call the ruling in question. [He then referred to the notes of evidence and the pleadings.]

Armstrong and *Coyle* for the respondent. This is not a case in which special leave to appeal should have been given. Even if it was open to the defendant to take exception to the Judge's ruling at the time and in the manner in which he sought to do so, there was no important question of law involved: *Dalgarno* v. *Hannah* (1). There was, if the defendant's contention is taken to be correct, an erroneous ruling by the Judge as to a sum of £100. No principle of general application was involved. The only question was the construction of the pleadings in the particular case.

The Supreme Court did not base their decision upon any mistake on the part of the defendant as to procedure. They held that, by his conduct at the trial and afterwards, he had estopped himself from taking objection to the Judge's ruling. There was therefore no question of the rights of the parties to the litigation, but merely a question of fact involved. Even if a question of procedure had been involved, this Court would not have granted special leave to appeal on that ground: *Ferris* v. *Martin* (2). But the facts were not fully put before this Court on the application for special leave to appeal. If they had been, it would have appeared that nothing but a question of fact was involved. The special leave should therefore be rescinded.

The decision of the Supreme Court on the question of estoppel was right. The defendant had been guilty of laches. He should have taken objection to the order of reference promptly, as he must be taken to have known its contents: *Rogers* v. *Kearns* (3). By not doing so he allowed the plaintiff to incur the costs of the

(1) 1 C.L.R., 1. (2) 2 C.L.R., 525. (3) 29 L.J. Ex., 328.

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arbitration and alter his position for the worse. It is as if there had been a misdirection by the Judge and the defendant had acquiesced in it and allowed the proceedings to continue on that basis. [They referred to *Wilson* v. *McIntosh* (1); *Tyerman* v. *Smith* (2); *Andrews* v. *Elliott* (3); *Matson* v. *Trower* (4); *Hallett* v. *Hallett* (5); *Gravatt* v. *Attwood* (6); *Longman* v. *East* (7); *Chitty's Archbold*, 12th ed., vol. 2, p. 1609.]

The defendant adopted the wrong procedure. The order of the Judge was not a ruling at *nisi prius*. It was made under the power given to the Judge by the *Arbitration Act* 1902. As soon as the Judge decides to refer the matter to arbitration the action ends and the jury are discharged. If some of the issues only are referred, those issues cease to be part of the cause. The power to refer is conferred upon the Court or a Judge by secs. 15, 16, 17, and therefore this order was one which might have been made by the Court or the Judge, by virtue of the powers conferred by those sections, not as a *nisi prius* ruling. As it was such an order, the defendant should have taken the procedure indicated by the Act and rules to have the award set aside or a case stated under sec. 19.

If the order was within the power of the Judge, an appeal will not lie from it to the Full Court, because it was made in the exercise of co-ordinate jurisdiction. If it was *ultra vires* it was acquiesced in by the defendant, and it is not open to him to object to it now. There is nothing peculiar about this case to make the rules under the *Arbitration Act* inapplicable. The special procedure therefore ought to have been followed.

The direction to the arbitrator was correct. The plea was really an informal plea of payment of part, as the Judge ruled, and evidence of an accord and satisfaction was inadmissible: *Callander* v. *Howard* (8).

May 4.

GRIFFITH C.J. This was an action for work and labour done. The plaintiff claimed £196 16s. 9d., and the defendant by his first plea said that, except as to £120 parcel of the moneys claimed, he

(1) (1894) A.C., 129.
(2) 6 El. & Bl., 719.
(3) 6 El. & Bl., 338.
(4) R. & M., 17.
(5) 5 M & W., 25.
(6) 1 L.M. & P., 392.
(7) 3 C.P.D., 142.
(8) 10 C.B., 290; 19 L.J.C.P., 312.

never was indebted as alleged, and by his second plea, except as to £70 parcel of the moneys claimed, which was also parcel of the £120 excepted in the first plea, that is to say, as to £126 16s. 9d., he pleaded a settlement of account by set off of mutual claims, on which a balance was arrived at, "which the defendant thereupon satisfied, except as to £70 to which this plea does not extend, by payment of £50." If that plea were established, the maximum amount recoverable in the action would be the £70 not dealt with by this plea. At the trial before Mr. Acting Justice *Heydon* a suggestion was made that the case should be referred to arbitration. Some discussion arose as to the meaning of the second plea, and the learned Judge, according to his notes, said: "I examine plea and state that it appears to be only a plea of payment of £50 in satisfaction of £50, that is, a plea of payment, though in form a plea of accord and satisfaction, and that therefore no difficulty can arise."

I pause to remark that the plea should, probably, be regarded as an informal plea of payment of the whole amount of £126 16s. 9d., as to which it was pleaded. (See *Callander* v. *Howard* (1)). The learned Judge then referred the action to an arbitrator agreed upon by the parties. A formal order of reference was drawn up, which contained the following passage: "I rule that the second plea of the defendant shall be treated by the arbitrator as a plea of payment of £50 of the said one hundred and twenty pounds;" that is to say the £120 excepted in the first plea. That was drawn up after the Court had adjourned, but, of course, before the arbitrator entered upon the reference. When the matter came before the arbitrator the defendant sought to give evidence in proof of his second plea. He was met with the answer that the Judge had directed the arbitrator to consider the plea as one of payment of £50, and therefore that he was not at liberty to prove the settlement and striking of a balance which the plea set up in answer to the £126 16s. 9d. The arbitrator accordingly made an award awarding to the plaintiff the total amount claimed. On that award, judgment was signed, as upon the verdict of a jury. The defendant then, treating the case as in the nature of a misdirection by the Judge at the trial, or as a mis-trial, moved the

(1) 10 C.B., 290; 19 L.J.C.P., 312.

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Supreme Court for a rule *nisi* for a new trial. The rule *nisi* was granted, but was discharged by the Supreme Court, who were of opinion that the defendant had by his conduct deprived himself of the right to take advantage of any irregularities or mistakes made at the trial. This Court granted special leave to appeal from that decision on the ground that the defendant had been denied justice, and also that the question involved was one of general importance, both as to the effect of the *Arbitration Act*, and as to the remedies available to parties in the case of a reference to arbitration. For the plaintiff it is now contended that there is no matter of general importance involved, but that the only question is whether the defendant, under the particular circumstance of this case, has, by his conduct, estopped himself from taking advantage of the objection that *primâ facie* exists to the ruling of the learned Judge embodied in the order of reference, and on that basis we were asked to rescind the order granting special leave to appeal. Now if, as is probably the correct view, —I assume that the plea was pleaded to the whole £126 16s. 9d. —this was an informal plea of payment, setting up facts amounting to a discharge of the whole amount of that debt by payment, it is no doubt a fact that the defendant has never had an opportunity of establishing the truth of that defence, and the question is whether he should be allowed to raise that question now.

The circumstances of the case, as I have stated them, are somewhat peculiar. If we assume that the learned Judge was mistaken in his construction of the second plea, the matter may be regarded as a reference, not of the whole case, as the parties contemplated, but of only one issue. The authority of the arbitrator was no greater than that conferred upon him by the order of reference. He had no power to deal with any matters outside the issue referred to him. When, therefore, he made his award, it should appear on the face of it that he had determined only one of the issues raised by the pleadings, and that the other had never been decided, and if upon the record drawn up on that award the plaintiff signed judgment as upon the verdict of a jury, the defendant, in my opinion, would be entitled to apply summarily to have the judgment set aside on the ground that the award did not warrant it, or to make an application for a new trial on the

ground that there had been a mis-trial, the matters in issue between the parties never having been determined; or perhaps, on the ground that the findings of the arbitrator had not disposed finally of the case, he might have moved for what under the old practice was called a *venire de novo*. I am disposed to think that either of these courses, if there were no more in the case, would have been open to the defendant. At any rate, one or other of them was open to him; and where a party has more than one remedy open to him he is entitled to make his election which he will pursue. But the case may be regarded from another point of view. The nearest analogy to the circumstances of this case is the case where a Judge leaves only one issue to the jury, and, by mistake that issue is treated as if it included the whole matter in dispute. That is not exactly this case, but it is very like it. The attention of the learned Judge was drawn to the construction of this plea, and in effect he intimated his opinion that the plea was no more than a plea of payment as to £50. In substance, therefore, it is very much as if, before appointing an arbitrator and referring to him the issue as to the amount of the indebtedness, he had directed the jury to find a verdict for the plaintiff. If he had done that, and referred the amount to the arbitrator incorrectly, what would the remedy of the defendant have been? I think he could clearly have moved for a new trial on the ground of misdirection, if he had not estopped himself from objecting to the Judge's direction. It was said by Lord *Halsbury* L.C., in a case which was not cited in the present case, but which is familiar to us, *Nevill* v. *Fine Art and General Insurance Co.* (1): "That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordship's competence to give him; but what puts him out of Court in that respect is this, that where you are complaining of non-direction of the Judge, or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no Court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all

(1) (1897) A.C., 68, at p. 76.

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the expense be incurred and a new trial ordered simply because of your own neglect."

Regarding the case then according to the analogy of a misdirection of the Judge in refusing to leave to the arbitrator the issue raised by that plea, the defendant is in the same position as if the case had been tried by the jury, and the learned Judge had refused to leave that question to them. The defendant, in answer to that, says: "I did not know that the Judge had withdrawn it from the jury. If I had known, I would have taken objection to his ruling at once. I did not know until afterwards, when the order of reference was formally drawn up, and the arbitrator had entered upon the hearing." I am not at all sure that under those circumstances the defendant had not a remedy. If the order had been by inadvertence wrongly drawn up, the defendant might have applied to the Judge to have it amended, or if the Judge had ceased to be a Judge, he might have applied to another for that purpose. But it is clear that in any case where a party, who is entitled to take objection to a Judge's misdirection, shows by his conduct that he does not intend to do so, but lies by and thereby puts the other party in a worse position, the Court in the exercise of its discretion will not allow him to take the objection afterwards. I express no opinion as to the conclusion to which I should have come as to the conduct of the defendant. Whether in my opinion he by his conduct estopped himself from taking objection to what is alleged to be a misdirection or a non-direction, I do not say. The inference to be drawn from his conduct is, I think, an inference of fact to be drawn from all the circumstances, and it was decided by the Supreme Court against him. The only matter involved in their decision being, therefore, a question of fact, I think that the case is not one in which special leave to appeal should be given. On that ground I think that the leave to appeal should be rescinded.

BARTON J. I agree with my brother the Chief Justice that the special leave to appeal should be rescinded on the ground that the case is one which comes within the rule which we have laid down for ourselves for the refusal of special leave to appeal. No doubt this Court, in granting special leave, was largely influ-

enced by the contention that was then put forward that the decision of the Supreme Court amounted, under the circumstances, to a denial of justice to the defendant, and if that had been confirmed on the argument of the appeal, we should probably have refused to rescind the special leave.

I have nothing to add to what the Chief Justice has said except this, lest anything I have said in the course of the argument as to the decision of the learned Judge at the trial should be misunderstood; after carefully considering the second plea in the light of the case of *Callander* v. *Howard* (1), I am not prepared to express an opinion different from that of His Honor, that the plea is in reality an informal plea of payment. I say this lest anything I have said during the argument might be thought to be in conflict with the conclusion at which His Honor arrived, and which he embodied in his ruling at the trial.

O'CONNOR J. I am also of opinion that this is not a case for the granting of special leave to appeal. The view put before us, on the application for special leave, was that the judgment of the Supreme Court was a decision on a very important matter of procedure, that is, whether or not it is open to an unsuccessful party, after a compulsory reference, to move the Supreme Court for a new trial, and whether that Court was not bound to set aside the order of reference on that motion under the circumstances of this case. These, no doubt, are very important questions of practice, and if, on our reading of the judgment it appeared that that really was the decision of the Court, it would have been necessary to go into the whole of the matters urged on both sides as to the propriety of the Judge's decision. But, on looking at the judgment of the Supreme Court, we find that it is not put on that ground, but on the ground that the defendant by his conduct must be taken to have waived the objection that he is now taking. Whether he waived it or not is a question of fact on which the Supreme Court has pronounced its opinion. Certainly under those circumstances this cannot be said to be a case which comes within the meaning of the rule laid down in *Dalgarno* v. *Hannah* (2), following *Prince* v. *Gagnon* (3), which

(1) 10 C.B., 290; 19 L.J. C.P., 312.
(2) 1 C.L.R., 1.
(3) 8 App. Cas., 103.

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has been acted upon in many cases since, as being a case in which this Court should grant special leave to appeal. Under those circumstances it appears to me clear that the leave should be rescinded. It is not necessary to say very much with regard to the matters brought before the Court during the argument, but I should like to say this, that it is impossible to see how justice can be done in these cases sent compulsorily to arbitration, if when the Judge by the order of reference puts a wrong issue before the arbitrator, or sends a case to arbitration where the circumstances have not arisen which give him the right to do so, there is not some way of setting aside the order. I have very little doubt, though it is not necessary to express an opinion on that point, that there may be two opportunities of taking objection to the order. One, as soon as the order is made, if the party taking the objection has not done anything to debar himself from taking a step of that kind. It may also be that it is impossible for some reason or other to take that step, and the case goes down for trial and is tried. The position is then that the arbitrator must decide the matter according to the issue put before him by the order of reference. He is, therefore, bound by the issues as submitted to him by the Judge. No application to set aside the award could raise the question of the correctness of the Judge's order. The only way to do that would be by an application in the nature of a motion for a new trial. All, therefore, that I consider it necessary to say with reference to this condition of things is this, that it appears to me that both remedies are open. Which should be adopted depends upon the circumstances of each case. It is quite possible, of course, that the party who is dissatisfied may by his conduct, as in this case, debar himself from the right to insist upon the point, either under one form of remedy or the other.

I am of opinion therefore that the leave should be rescinded.

Special leave to appeal rescinded. Appellant to pay the costs of the appeal.

Solicitor, for appellant, *W. H. Drew.*

Solicitor, for respondent, *A. J. McDonald.*

C.A.W.