[HIGH COURT OF AUSTRALIA.]

GREEN AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

WORLEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE *Sept.* 20.

Griffith C.J., Gavan Duffy and Rich JJ.

Practice—High Court—Special leave to appeal—Rescission—Question of fact—Estoppel—Evidence.

The defendant agreed in writing to pay to the plaintiffs the sum of £70 19s. 8d. "out of moneys due to" R., who was a contractor and was building a house for the defendant. In an action in a County Court on the agreement judgment was given for the plaintiffs on the ground that the defendant was estopped by verbal admissions made by him that he was indebted to R. from denying that any money was due by him to R. The Supreme Court reversed the decision. On appeal by special leave to the High Court,

Held, that no question of law was involved, and that the leave should be rescinded.

Special leave to appeal from the Supreme Court of Victoria rescinded.

APPEAL from the Supreme Court of Victoria.

An action was brought by E. A. & D. Green, a firm of timber merchants, against William Worley in the County Court at Melbourne, to recover the sum of £70 19s. 8d. alleged to be due and payable under a written guarantee dated 24th October 1914 given by the defendant to the plaintiffs, or alternatively for money due under that document, or alternatively for money had and received by the defendant to the use of the plaintiffs. It appeared that one Rosenfeldt, who was indebted to the plaintiffs and was being hard pressed by them for payment, had entered into a contract with the defendant to build a house. Under the contract a certain sum had, on 24th October 1914, been paid, and a sum of £100 would become due upon the certificate of the

architect after completion of the work. On 24th October 1914 the document sued upon was executed, which was to the following effect:—"I Alfred J. Rosenfeldt do authorize Mr. Worley to pay Messrs. E. A. & D. Green, timber merchants, Geelong Road, Footscray, the sum of £70 19s. 8d. out of moneys due to me.—(Signed) A. J. Rosenfeldt. And I the said Mr. William Worley do hereby agree to same.—(Signed) William Worley." Subsequently Rosenfeldt abandoned the contract and no money became payable under it. One of the plaintiffs in his evidence stated that in a conversation at the time the document was executed the defendant acknowledged that more than £70 19s. 8d. was then due to Rosenfeldt, but admitted that in answer to interrogatories he had sworn that at that time the defendant had said that there was money coming to Rosenfeldt under the contract. Judgment having been given for the plaintiffs for the amount claimed, the defendant appealed to the Supreme Court, which allowed the appeal and ordered the judgment for the plaintiffs to be set aside and judgment entered for the defendant, holding that the document was an assignment of the amount specified out of the moneys due to Rosenfeldt by the defendant under the contract between them, and that the defendant was not estopped from denying that sufficient money was due by him to Rosenfeldt.

From that decision the plaintiffs now, by special leave, appealed to the High Court.

J. R. Macfarlan (with him *Owen Dixon*), for the appellants. The respondent represented that the money was actually due by him to Rosenfeldt, and he is estopped from denying it: *Low* v. *Bouverie* (1); *Bloomenthal* v. *Ford* (2). The County Court Judge accepted the evidence for the appellants, and found that there was such a representation, and the Supreme Court was not entitled to set aside that finding.

Pigott (with him *Power*), for the respondent. Leave to appeal should be rescinded. There is no question of law, but, at most, a well-known rule of law has been wrongly applied. [Counsel referred to *In re Lewis*; *Lewis* v. *Lewis* (3).]

(1) (1891) 3 Ch., 82. (2) (1897) A.C., 156.
(3) (1904) 2 Ch., 656.

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Macfarlan, in reply.

GRIFFITH C.J. From the reasons given by the learned Judges of the Supreme Court it appears that they were of opinion that the evidence given for the plaintiffs did not establish the estoppel which was necessary to the success of their case. *Cussen* J. appears to have had in his mind what *Bowen* L.J. said in *Low* v. *Bouverie* (1):—"An estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed." The learned Judges were of opinion that the language upon which the appellants now rely did not establish an estoppel, especially having in view the fact that the plaintiff, who gave evidence, did not commit himself to it in the witness-box.

But, even if the learned Judges were wrong in their conclusion on the facts, no question of law is raised. At most, the question is what is the proper inference to be drawn from the evidence, which is itself a question of fact. I cannot help thinking that special leave to appeal must have been granted by this Court *per incuriam*, and I think that it should be rescinded. I should like to add that I entirely agree with the decision of the Supreme Court upon the merits.

GAVAN DUFFY J. I agree that in the circumstances the special leave to appeal should be rescinded.

RICH J. I agree.

Special leave to appeal rescinded. Appellants to pay costs of appeal.

Solicitors, for the appellants, *Gillott, Moir & Ahern.*
Solicitors, for the respondent, *Scheele & Scheele.*

B. L.

(1) (1891) 3 Ch., 82, at p. 106.