

## ESTOPPEL AND FRAUD AS DEFENCES TO A STATUTORY CLAIM.

*Walsh v. Commercial Travellers' Association of Victoria.*<sup>1</sup>

This decision illustrates the present tendency of the courts to enforce strictly privileges and immunities given by statute to persons thought by the Legislature to be in need of special protection.

The plaintiff, having represented that he was only nineteen years of age was employed by the defendant and paid wages in accordance with the rates prescribed for junior employees by the relevant Wages Board's determination. Having been employed for some time he was dismissed. He then announced that he had been over the age of twenty-one years at all times during his employment and brought an action to recover the difference between the wages that he had been paid and the sum that he should have received as an adult worker. Section 232 of the Factories and Shops Act 1928, on which the plaintiff's case was based, provides:—

"Where any employer employs any person who does work for him for which a Wages Board . . . has determined the lowest prices or rates, then such employer shall be liable to pay and shall pay . . . the rate so determined and such person . . . may . . . recover from the employer the full amount of any balance of such sum so determined due in accordance with the determination, any smaller payment or any express or implied agreement or contract to the contrary notwithstanding."

The defendant relied on two special defences: firstly, that the plaintiff was estopped from alleging that his age was other than that stated by him, and, secondly, that, if there was no estoppel, it was entitled to recover on a counterclaim the sum which it would be liable to pay under the claim as damages resulting from the plaintiff's fraudulent misrepresentation of his age.

In support of the estoppel counsel for the defendant relied on the decision of the Supreme Court of South Australia in *Gerloff v. Edwards*<sup>2</sup> where the defendant was held to be estopped by his own representations from denying his ownership of certain land so that he was bound, in accordance with statutory requirements, to share with the plaintiff the cost of renovating a boundary fence. There it was said by Murray C.J. that "the Legislature must be taken to have been aware that a man may under certain circumstances be estopped from denying that he is an owner or occupier by his own representations. If the rule is not expressly or impliedly excluded by provisions which are inconsistent with its application, the proper inference is that Parliament did not intend to interfere with it."<sup>3</sup> This argument, however, was rejected by all the Judges<sup>4</sup> who held that the words "the employer shall be liable to pay and shall pay" and the concluding words of the section imposed an absolute duty on employers and were conclusive against a plea of estoppel. Just as an employee cannot give legal force to a contract to accept wages lower than those prescribed by a Wages Board determination so he cannot abandon the protection given to him by the statute by agreeing that he is not a member of a class to which a determination applies. The Court also rejected the further argument that in the present case the plea of estoppel

1. [1940] V.L.R. 259. (Supreme Court of Victoria).

2. [1917] S.A.L.R. 93.

3. *ibid.*, at p. 106.

4. Mann C.J., Lowe and Gavan Duffy JJ

ought to be allowed because the misrepresentation as to his age was the means employed by the plaintiff to bring about the contract of employment on the ground that such an interpretation would impair the operation of the statute and defeat its purpose which was to protect workmen against themselves.

Dealing with the counterclaim the Court held that to allow it would be to allow the defendant "to indirectly avoid the absolute duty to pay which section 232 imposes on it" and that a complete analogy existed between the present case and *R. Leslie Ltd. v. Sheill*.<sup>5</sup> There an action in tort brought against an infant for fraudulently obtaining a loan of money by misrepresenting his age was dismissed on the ground that "it is impossible to enforce in a roundabout way an unenforceable contract." Just as the Infants' Relief Act<sup>6</sup> makes void an infant's contract to repay a loan of money so s. 232 of the Factories and Shops Act takes away an employee's capacity to contract himself out of the right to sue for the full rate of wages determined under the Act. But if an action in tort could be brought against him for inducing the making of such a contract this would put the employee in the position of being bound by its terms.

In deciding that s. 232 imposes an absolute duty on employers to pay the full rate of wages prescribed the Court also found support in the decision of the High Court in *Duncan v. Ellis*<sup>7</sup> which concerned the prosecution of an employer under s. 233 of the Factories and Shops Act for paying an employee less than the prescribed rate. There also the employment was induced by a misrepresentation by the employee as to his age but it was held that the duty imposed on the employer by s. 233 not to pay less than the minimum wage was absolute and was independent of the defendant's knowledge that he was breaking the law, the Legislature having dispensed with the requirement of *mens rea* on the ground of public expediency. Similarly to allow the plaintiff's misrepresentation to be set up in the present case, either as an estoppel or as a counterclaim for fraud, would defeat the intention of the Legislature which had declared it to be a matter of public interest that there should be a minimum wage.

Lowe J. suggested that once it was held that the duty imposed by s. 232 was absolute the counterclaim might fail for two further reasons, firstly, that as a matter of causation the proximate cause of the defendant's liability was its own failure to perform the duty, not the plaintiff's fraud, and secondly, that "to compel the defendant to pay what the statute commands cannot in the eyes of the law amount to legal damage." It should be noted, however, that, as Mann C. J. pointed out, the Factories and Shops Act does not confer on employees a general immunity from the ordinary legal consequences of fraud and that an employer convicted under s. 233 might recover the amount of his fine from an employee whose fraud had brought about the conviction.

On a restricted reading *Walsh's* case merely decides the extent of the duty imposed by a particular statute but it is submitted that the reasoning adopted by the Court is of general application to the construction of "social" legislation of the type there in question.

—B. SHER.

5. [1914] 3 K.B. 607.

6. In *Victoria, Supreme Court Act 1928*, s. 69.

7. (1916) 21 C.L.R. 379.