GENERAL DAIRIES, LIMITED (DEFENDANT) ..... APPELLANT;

AND

MARITIME ELECTRIC COMPANY, LIMITED (PLAINTIFF) ..... RESPONDENT.

1935
*Feb. 26, 27.
*June 28.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Estoppel—Accounts for supply of electric current—Accounts rendered for too small amounts—Action for balance—Acts by defendant as result of accounts rendered—Whether defence of estoppel precluded by Public Utilities Act, R.S.N.B. 1927, c. 127—Applicability of estoppel on general principles.

Plaintiff, a public utility within the *Public Utilities Act*, R.S.N.B. 1927, c. 127, sold and delivered electric current to the defendant dairy company, which (as known to plaintiff) used it in the manufacture of its products. Through mistake by plaintiff's employees, the amount of current supplied to defendant was wrongly determined on the meter dial readings, so that plaintiff rendered monthly accounts (which were paid) for only one-tenth of the current actually supplied. Defendant bought its cream at prices based on the difference between the market prices of its products and the cost of manufacturing

*PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. (*ad hoc*).

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them, and, believing in the correctness of plaintiff's accounts as rendered, relied upon them in reckoning up its cost of manufacture, and consequently paid for cream amounts substantially larger than it would have paid had plaintiff's accounts been correct. Plaintiff was not charged with negligence, nor with knowledge of defendant's method of fixing cream prices. After discovering its error, plaintiff sued for balance of account, and defendant pleaded estoppel. The said *Public Utilities Act*, s. 16, requires that no public utility shall charge a greater or less compensation for any service than is prescribed in established schedules, and the Act provides penalties for "unjust discrimination" or for charging "by any device" more or less than full compensation at scheduled rates.

Held: (1) The defence of estoppel was not precluded by the Act (*Burkinshaw* v. *Nicolls*, 3 App. Cas. 1004, and other cases, cited). (2) Estoppel was applicable to the case and afforded an effective defence. Plaintiff must be taken to have intended and expected that defendant would act upon plaintiff's representations in the ordinary course of defendant's business; and defendant did so act, reasonably and in a way that should not be taken as unusual, in the ordinary course of its business, to its detriment, in paying larger amounts for cream than it would otherwise have paid. (Principles of estoppel discussed, and cases referred to).

Judgment of the Supreme Court of New Brunswick, Appeal Division, 8 M.P.R. 67, reversed.

APPEAL by the defendant from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), dismissing its appeal from the judgment of Richards J. (2) in favour of the plaintiff for $1,931.82, being the amount by which the total of certain accounts, as rendered by plaintiff to defendant and paid by defendant, for electric energy supplied by plaintiff to defendant and used (as known to plaintiff) by defendant in its manufacture of dairy products, fell short of the total of the accounts that, according to the amount of electric energy actually supplied, should have been rendered. The further material facts and circumstances of the case are sufficiently stated in the judgment now reported, and are indicated in the above headnote.

Special leave to appeal to this Court was granted to the defendant by the Appeal Division of the Supreme Court of New Brunswick.

The appeal to this Court was allowed and the action dismissed with costs throughout.

P. J. Hughes, K.C., for the appellant.

J. J. F. Winslow, K.C., for the respondent.

(1) 8 M.P.R. 67; [1934] 4 D.L.R. 436.

(2) 8 M.P.R. 67, at 67-82.

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The judgment of the court was delivered by

DYSART, J. (*ad hoc*)—The question to be decided here is whether, in the circumstances of this case, a public utility company is entitled to collect a balance of accounts for electricity which it sold and delivered to a customer, or whether it is to be estopped from so collecting because of a mistake it made when, in rendering the accounts in the first instance, it understated the quantity of electricity, upon which mistake the customer relied and acted to its detriment.

The facts of the case are not in dispute. Most of them are set forth in a statement signed by counsel and filed at the trial. Both companies carry on business at Fredericton, N.B. The Dairy Company (appellant) buys cream and manufactures it into various dairy products. These products it sells at market prices, and buys its cream at prices based on the difference between the market prices of the manufactured products and the cost of manufacturing them. The manufacturing costs include the cost of motive power which is derived from electric current. The Electric Company (respondent) is a public utility, under the control and supervision of the Board of Commissioners of Public Utilities of the Province, and sells and distributes electric current to customers including the Dairy Company. To measure the quantity of electric current so supplied, the Electric Company installed on the premises of the Dairy Company an electric meter which, while satisfying in every respect the requirements of the *Electricity Inspection Act* of the Province, was one of a type which records on its dials only part of the current passing through it—a type in common use with this and other such electric companies. In order to determine the exact amount of current passing through this meter, the dial readings should have been multiplied by ten. By some unexplained oversight or mistake on the part of the Electric Company's employees, the monthly readings of the meter dials were not so multiplied, and in consequence of that omission monthly accounts were rendered for only one-tenth the amount of current actually

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sold and delivered. This mistake in accounts continued for twenty-nine consecutive months, until, in April, 1932, the company discovered its error, and demanded payment of the remaining nine-tenths of the electric current, the price of which at the scheduled rates totalled $1,931.82.

Before the mistake was discovered, the Dairy Company, believing in the correctness of the accounts as rendered, relied upon them in reckoning up the costs of manufacture, and consequently in fixing the price of cream, and paying for cream amounts substantially larger than it would have paid had the electric bills been correctly stated. The good faith of the Dairy Company in so believing and acting is not impugned. The responsibility for the mistake admittedly rests solely on the Electric Company, but the company is not charged with negligence in committing the error nor with knowledge of the Dairy Company's method of fixing cream prices.

In the action for the balance of account, the foregoing facts were admitted, and the defence of estoppel was set up. The learned trial judge, Richards J., in a considered judgment (1) held that the principles of estoppel as enunciated in *Carr* v. *London & N.W. Ry. Co.* (2) could not properly be applied to this case because the Electric Company could not reasonably be deemed to have intended that the Dairy Company should act upon the misrepresentations in the particular way in which the latter company did act. This judgment in favour of the Electric Company was on appeal to the Appeal Division of the Supreme Court of the Province (3) upheld on much the same reasoning.

To meet the defence of estoppel in this Court, the Electric Company, (1) adopts the reasons of the trial judge, that on general principles estoppel is not applicable to the case, and, (2) that even if estoppel were applicable apart from statute, it is barred or precluded by the *Public Utilities Act*. It will be convenient to deal with the second of these grounds first.

In order to get a clear view of the effect of the immediately relevant sections of the *Public Utilities Act* (R.S.

(1) 8 M.P.R. 67, at 67-82.
(2) (1875) 44 L.J.C.P. 109.
(3) 8 M.P.R. 67; [1934] 4 D.L.R. 436.

N.B. 1927, ch. 127), it will be helpful to sketch briefly the general scope of the whole enactment. The Act authorizes the creation of a "Board of Commissioners of Public Utilities" which is to "have general supervision of all public utilities and shall make all necessary examinations and inquiries and keep itself informed as to the compliance by public utilities with the provisions" of the Act (s. 5). All public utilities, including by definition such companies as the Electric Company (s. 2), are on their part required to make annual and other reports or returns to the Board giving such information as to their operation and conduct and otherwise as may be required of them by the Board. (s. 11). By section 10:—

> 10. Every public utility shall furnish reasonably adequate service and facilities. All charges made by a public utility shall be reasonable and just, and every unjust or unreasonable charge is prohibited and declared unlawful.

The rates, tolls and charges, to be lawful, must be such as are filed in schedules with the Board where they are open to public inspection (s. 14), and are subject to such changes therein as may be from time to time authorized by the Board. Section 16 is of vital importance. It reads:—

> 16. No public utility shall charge, demand, collect or receive a greater or less compensation for any service, than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules.

For "unjust discrimination," and for charging "by any device" more or less than full compensation at scheduled rates, penalties are provided against utility companies and their customers (ss. 18 and 19).

The Act seems, therefore, to seek to control all public utilities for the general benefit of the public, expressly declaring that fair and reasonable service shall be rendered by the utilities, at rates, tolls and charges that are approved by the Board and are known or notified to the public. Section 16 in particular *commands* that the company *shall charge* full compensation at scheduled rates for all its service, and expressly *prohibits* any deviation from charging the full amount of compensation. By "compensation" is surely meant, that the whole amount of service rendered is to be charged for and paid at the scheduled rates. Applied to the present case, the Act imposes a duty on the Electric Company to charge, and on the Dairy Company to pay, at

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scheduled rates, for *all* the electric current supplied by the one and used by the other, during the twenty-nine months in question.

The specific question for determination here is, can the duty so cast by statute upon both parties to this action, be defeated or avoided by a mere mistake in the computation of accounts?

We have not been referred to any English or Canadian cases, and we know of none, dealing directly with a case like the present. There are various decisions, especially in England, on varying aspects of the problem of how far duties imposed by public or private statutes on persons or corporations may be avoided. The general trend of the decisions seems to be that such duty cannot be avoided by a contract between the parties nor by any course of action that does not, at least squarely, raise estoppel. Each decision must be studied with reference to the particular statute on which it turns, and the circumstances with which it deals.

In *Ayr Harbour Trustees* v. *Oswald* (1), it was held that public trustees, on whom a statute imposed a duty to take land for public harbour purposes, could not fetter the freedom of themselves or their successors in dealing with such land so taken, by any resolution or purpose of their own, however commendable. In *Islington Vestry* v. *Hornsey Urban Council* (2), a municipal corporation was held not to be prevented from exercising its full powers by any arrangement or acquiescence on its part respecting the exercise of those powers. Again in *York Corporation* v. *Leetham* (3), the Commissioners empowered by statute to manage navigation and collect on the tonnage of cargoes "the tolls and rates by this Act directed to be taken, and no others" was held not prevented by a contract from collecting tolls. *The Queen* v. *Blenkinsop* (4) was a case in which a municipal corporation under a mistake of law omitted to demand from a railway company the full amount of taxes owing. After several years' omission, it was held that the municipal corporation was not prevented or estopped from collecting the arrears. In none of these

(1) (1883) 8 App. Cas. 623.
(2) [1900] 1 Ch. 695.
(3) [1924] 1 Ch. 557.
(4) [1892] 1 Q.B. 43.

cases do the elements of estoppel appear. In the last mentioned case there was neither a representation nor change of position.

The English *Companies Act, 1867,* imposed a duty or obligation on companies to collect in cash the full face amount of the shares issued and a correlative duty on the holder of the shares to pay in full. It specifically provided that

> Every Share in any Company shall be deemed and taken to have been issued and to be held subject to the Payment of the whole Amount thereof in Cash, unless the same shall have been otherwise determined by a Contract duly made in Writing, and filed with the Registrar of Joint Stock Companies at or before the Issue of such Shares. (s. 25).

Every share certificate is *prima facie* evidence of title, and is transferable but not negotiable. It amounts to a representation to all the world that the person who is named in it is the registered holder of the shares mentioned therein, and that the shares are paid-up to the extent therein mentioned; and it is given with the intention that it may be used as such a declaration: 5 Halsbury, 2nd Ed., s. 459.

Notwithstanding the statutory duties and obligations so imposed by the said Act in reference to share certificates, companies were frequently estopped from showing that the statements contained in their certificates were not true. In *Burkinshaw* v. *Nicolls* (1), certificates of shares of the company were issued as "fully paid-up" and transferred to a holder for value without notice that the shares were not in fact fully paid. The company was held estopped from collecting the unpaid balances. At pages 1026 and 1027 Lord Blackburn used this language:—

> Now in the present case the company has issued under the seal of the company a certificate in the form which is set out in the case, in which the company has asserted that these shares have been fully paid up. These certificates are issued under the directions of the Act of Parliament, and are made *prima facie* evidence of all that they state; only *prima facie* evidence.

In *Bloomenthal* v. *Ford* (2) certificates for "fully paid-up" shares were issued to the allottee by a company as security for a loan from him, he believing that they were "fully paid-up." In a winding up, the liquidator was estopped from denying these certificates. *Parbury's* case (3) was another case of certificates issued for "fully paid-

(1) (1878) 3 App. Cas. 1004. (2) [1897] A.C. 156 (H.L.)
(3) [1896] 1 Ch. 100.

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up" shares to an allottee, and again the company was estopped. The allottee had given the money to a third person to pay for the shares and believed that the money had been so applied. Where, however, the allottee had notice the shares were not fully paid, the company was not estopped. *In re London Celluloid Co.* (1).

The reasons or principles upon which these cases proceed is well stated by Bowen L.J. in *In re London Celluloid Co.* (1), *supra,* at pp. 204 and 205, where he discusses the Act and the *Burkinshaw* v. *Nicolls* case (2) *supra:*

> Nothing can be clearer than this, there is a statutory liability to pay the whole amount in cash, which can only be avoided under the statute in one way—by a registered contract. Can there be any other way of escape? Only this, that if the company has so acted as to preclude itself from denying that the Act has been complied with, that is conclusive evidence that the Act has been complied with. The company may represent to third persons, and induce them to act on the faith of the representation, that the shares have been paid up in cash. If such a representation is made by the company, and acted on by third parties, who have no notice that it is untrue, the company cannot afterwards say that the shares have not been fully paid up. An estoppel of that kind operates against the liquidator as well as against the company, and in such a case the holders of the shares are not liable for calls. *Burkinshaw* v. *Nicolls* (3) shews that such an estoppel may arise. The Act is not thereby evaded, but there is evidence, which must be taken as conclusive, that its requisitions have been complied with. The decision in that case was a ruling on a point of evidence, and it is dangerous to turn a ruling on a point of evidence into a rule of law. The company had issued certificates stating that the shares in question were fully paid up, they were sold in the ordinary course of business, and the House of Lords held that the purchasers were entitled to rely on the certificates as sufficient evidence that the shares were fully paid up.

In the cases of debentures issued by companies without authority or power to make the issue, companies issuing them may be estopped, as against innocent holders for value without notice, from denying the truth of the representations contained on the face of the bonds: *Webb* v. *The Commissioners of Herne Bay* (4). And the same result has been reached where the representations, on which the purchaser of bonds relied to his detriment, are contained in the recitals of the bond: *Horton* v. *Westminster Improvement Commissioners* (5).

(1) (1888) 39 Ch. D. 190.
(2) (1878) 3 App. Cas. 1004.
(3) 3 App. Cas. 1004.
(4) (1870) L.R. 5 Q.B. 642
(5) (1852) 7 Ex. 780.

In cases of annuities and gratuities authorized or prescribed by statute to be paid to certain classes of annuitants or beneficiaries, it has been held that where, through a mistake in classification or otherwise, compensation has been made in excess of the authorized amounts, the excess cannot be recovered, if there has been delay on the part of the officials, and change of position on the part of the recipients of the fund: *Skyring* v. *Greenwood* (1); *Holt* v. *Markham* (2). In this latter case there was a delay of only a few months but it was sufficient, in the opinion of Warrington L.J. (p. 512), to entitle the recipient to conclude that payment was authorized "and that he was at liberty to deal with the money as he pleased." The gratuitant had "availed himself of that liberty and spent the whole or a large part of the gratuity which had been paid him, and [was now no longer] in a position to repay it."

The foregoing cases show that, however imperative may be a statutory duty, the proof of any alleged violation thereof must be made in accordance with the established rules of evidence, and that by one of these rules—that is, estoppel—claims, otherwise sound, may not be susceptible to proof at all. As Bowen, L.J., said in *In re London Celluloid Co.* (3) *supra* at page 205 already quoted, "if the company has so acted as to preclude itself from denying that the Act has been complied with, that is conclusive evidence that the Act has been complied with"; and again on the same page, "the Act is not thereby evaded, but there is evidence, which must be taken as conclusive, that its requisitions have been complied with." The same learned judge in *Low* v. *Bouverie* (4), says at page 105:

> But we must be guarded in the way in which we understand the remedy where there is an estoppel. Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

And at page 106:

> Now, 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

(1) (1825) 4 B. & C. 281.
(2) [1923] 1 K.B. 504.
(3) (1888) 39 Ch. D. 190.
(4) [1891] 3 Ch. 82.

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reasonably understood in a particular sense by the person to whom it is addressed.

There are, so far as we know, no decisions of Canadian courts bearing on directly the point in issue here. The few indirect decisions that are reported are based on tort for misrepresentation or misquotation by the railway companies of freight rates, and consequently are of little or no assistance to us.

In the United States there are many decisions, some of which have been strongly pressed upon us in argument. These decisions, of the Supreme Court of the United States and of several State Courts, deal with section 6 of the *Interstate Commerce Act* relating to the carriage of freight and passengers. Section 6 of that Act is, in effect, the same as section 16 of the *Public Utilities Act* of New Brunswick, but descends into more particularity. It reads in part:

> * * * nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; * * *

The decisions need not be referred to in detail. Most of them are conveniently assembled in 83 Am. Law Rep. (annotated), pp. 245-268, and show that the duty to charge and collect full compensation under the Act is absolute, and is not subject to any relaxation or variation in any circumstance whatsoever. They deny that estoppel or other rules of evidence can affect the statutory obligation, and that no amount of harshness in consequences can affect this result. The underlying principles of the construction so placed upon that statute are well stated by Rugg, Chief Justice of Massachusetts, in the case of *New York, New Haven, & Hartford Railroad Co.* v. *York & Whitney Co.* (1). The learned Chief Justice says:

> The reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the

(1) (1913) 215 Mass. Reports 36, at 40.

dominant purpose of the Act. It does not permit that inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the Act to suppress directly.

We know of no reason why public policy in New Brunswick should demand so rigid a rule of construction of the *Public Utilities Act* of that province. We see no reason why section 16 of that Act should not be construed in the spirit in which the *Companies Act* and other such Acts in England are construed. The section in conjunction with others of the Act, imposes a duty which cannot be avoided "by contract" nor "by any device." It aims, we think, to prevent all "unjust discrimination" and all *dishonest* evasion. At the same time, there is nothing to suggest that it ought not to be construed in the light of the law of the land, and enforced in courts according to the prevailing law as to evidence and procedure. When viewed in this way, it does not preclude estoppel which, as we have seen, is only a rule of evidence available in courts, and when applied may assist in ascertaining that the statute has been not evaded but fully met in its requirements.

Our conclusion then, on the second ground of the respondent's argument, is that the Dairy Company is not precluded by the *Public Utilities Act* from raising estoppel.

We shall now turn to the first ground and inquire whether or not on general principles estoppel is applicable to this case.

The learned trial judge thought the case governed by the third proposition laid down by Brett J. in *Carr* v. *London & North Western Ry. Co.* (1) where, discussing the principles of estoppel, he states:

> And another proposition is, that, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

The trial judge in the case at bar applied that proposition in a rigid literal sense, holding that, although the plaintiff made the representations, no reasonable man would understand from them that the Electric Company intended the Dairy Company to act *in the particular way* in which it did

(1) (1875) L.R. 10 C.P. 307, at 317.

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act, that is, in using them as a basis for fixing cream prices. In my opinion, this construction is too narrow and rigid. It was enough, I think, that the Electric Company must be taken to have intended and expected the Dairy Company to act upon the representations in the ordinary course of its business, such as to devote the uncollected electric money to profits or dividends, or to building up reserves, or improving its plant; or to devote the money to increasing its business by advertising or by lowering the selling price of its products. If the money might be used for these things, or any of them, why may it not be used to increase the price of raw materials, and so, perhaps, in a competitive field, increase the volume of business, with beneficial results that might follow therefrom. Such a use of the moneys does not appear to me to be so unusual as to cause surprise in the minds of business men familiar with the management of such businesses. This broader construction is not inconsistent with the language employed by Brett J. in his third proposition, rather it is a fair interpretation of that language. And it is in harmony with the language used by Baron Parke in *Freeman* v. *Cooke* (1), where he says that,

> if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth;

and with Lord Tomlin's language in *Greenwood* v. *Martins Bank* (2) where, delivering the unanimous opinion of the House of Lords, he said, speaking generally in respect to estoppel, at p. 57:

> The essential factors giving rise to an estoppel are, I think:—
>
> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made.
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made.
>
> (3) Detriment to such person as a consequence of the act or omission.

The clause "intended to induce a course of conduct," used by Lord Tomlin, is broader, as well as more authoritative, than the statement of Brett J., " intended to act upon it in a particular way," and is wide enough to include, I think,

(1) (1848) 2 Ex. 654, at 663-4. (2) [1933] A.C. 51.

the course of conduct followed by the Dairy Company in reliance upon the representations made in this case.

Moreover, the Dairy Company did act upon these representations by paying the electric bills, and if for any reason the moneys it saved through the misrepresentations were distributed among the farmers or customers of the company as gratuities or bonuses so that the Dairy Company could not recover them, it seems to me that the case would be covered by estoppel as in such cases as *Skyring* v. *Greenwood* (1), *Horton* v. *Westminster Improvement Commissioners* (2).

For these reasons, I think that estoppel is applicable in this case and that the appeal should be allowed and judgment entered dismissing the action with costs.

Appeal allowed with costs.

Solicitor for the appellant: *P. J. Hughes.*

Solicitors for the respondent: *Winslow & McNair.*