16.1937

In the Privy Council.

No. 9 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARITIME ELECTRIC COMPANY LIMITED (*Plaintiff*) *Appellant*

AND

GENERAL DAIRIES LIMITED - - - (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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In the Privy Council.

No. 9 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARITIME ELECTRIC COMPANY LIMITED (*Plaintiff*) *Appellant*

AND

GENERAL DAIRIES LIMITED - - - (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 1. Specially Indorsed Writ, 4th May, 1933.

No. 1.

Specially Indorsed Writ.

IN THE SUPREME COURT

KING'S BENCH DIVISION

BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

(L.S.) GENERAL DAIRIES, LIMITED - - - *Defendant.*

GEORGE THE FIFTH by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India :

To : General Dairies, Limited, of the City of Saint John in the City and County of Saint John.

GREETING :

WE COMMAND YOU that within ten days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Maritime Electric Company, Limited;

In the Supreme Court of New Brunswick, King's Bench Division.

No. 1. Specially Indorsed Writ, 4th May, 1933—*continued.*

AND TAKE NOTICE that in default of your so doing, the plaintiff may proceed therein and judgment may be given in your absence.

WITNESS the Honorable Sir J. Douglas Hazen, K.C.M.G., Chief Justice, the 4th day of May, in the year of our Lord one thousand nine hundred and thirty-three.

(Sgd.) HARTLEY.

WINSLOW AND McNAIR,

Plaintiff's Solicitor.

N.B.—This writ is to be served within twelve calendar months from the date thereof, or if renewed, within six calendar months from the date of the last renewal, including the day of such date and not afterwards.

Venue York

STATEMENT OF CLAIM

The plaintiff claims :

1. The plaintiff is a company duly incorporated under the laws of the Dominion of Canada, having its head office at Fredericton, N.B., and is authorized to manufacture and sell electric energy in Fredericton.

2. The defendant is a company duly incorporated under the laws of the Province of New Brunswick having its head office at the City of Saint John and carrying on business in Fredericton.

3. The defendant company is indebted to the plaintiff company for money payable by the defendant to the plaintiff for electric energy supplied by the plaintiff to the defendant at its place of business on King Street in the City of Fredericton.

PARTICULARS

1929					
Dec.	18	To 1060 KWH	$ 44.80	$	
1930					
Jan.	10	By cash		15.00	
	17	To 940 KWH	41.20		
Feb.	10	By cash		15.00	
	17	To 1050 KWH	44.50		
Mar.	10	By cash		15.00	
	18	To 1020 KWH	43.60		
Apr.	10	By cash		15.00	
	17	To 1030 KWH	43.90		
May	10	By cash		15.00	
	15	To 1990 KWH	72.70		
June	10	By cash		15.00	
	18	To 2290 KWH	81.70		
July	10	By cash		15.00	
	17	To 4310 KWH	142.30		
Aug.	10	By cash		24.55	
	18	To 4550 KWH	149.50		

1930					
Sept.	10	By cash		25.75	
	16	To 4050 KWH	134.50		
Oct.	10	By cash		23.25	
	16	To 3310 KWH	112.30		
Nov.	10	By cash		19.55	
	14	To 2390 KWH	84.70		
Dec.	10	By cash		18.00	
	16	To 1840 KWH	68.20		
1931					
Jan.	10	By cash		18.00	
	17	To 1340 KWH	53.20		
Feb.	10	By cash		18.00	
	16	To 1330 KWH	52.90		
Mar.	10	By cash		18.00	
	16	To 1110 KWH	46.30		
Apr.	10	By cash		18.00	
	16	To 1510 KWH	58.30		
May	10	By cash		18.00	
	15	To 1710 KWH	70.00		
June	10	By cash		18.00	
	16	To 3720 KWH	124.60		
July	10	By cash		21.60	
	16	To 5150 KWH	167.50		
Aug.	10	By cash		28.45	
	15	To 5170 KWH	168.10		
Sept.	10	By cash		28.51	
	16	To 5620 KWH	181.60		
Oct.	10	By cash		29.86	
	16	To 3780 KWH	126.40		
Nov.	10	By cash		21.90	
	16	To 3310 KWH	112.30		
Dec.	10	By cash		19.86	
	15	To 1830 KWH	67.90		
1932					
Jan.	10	By cash		18.00	
	16	To 2590 KWH	90.70		
Feb.	10	By cash		15.54	
	16	To 1060 KWH	44.80		
Mar.	10	By cash		20.46	
	16	To 1220 KWH	49.60		
Apr.	10	By cash		18.00	
		By balance		1931.82	
			$2478.10	$2478.10	
		To balance	$1931.82		

In the Supreme Court of New Brunswick, King's Bench Division.

No. 1. Specially Indorsed Writ, 4th May, 1933—*continued.*

And the plaintiff claims the sum of $1931.82 and the sum of $30. for costs and in case the plaintiff obtains an order for substituted service, the further sum of $5.00. If the amount claimed is paid to the plaintiff or its solicitor within six days from the service hereof, further proceedings will be stayed.

(Sgd) WINSLOW & MCNAIR
Plaintiff's Solicitor.

This writ was issued by Winslow & McNair of Fredericton, N.B., whose place of business and address for service is 556 Queen Street, Fredericton, N.B., solicitor for the plaintiff whose head office is at Fredericton, N.B.

(Sgd.) WINSLOW & MCNAIR
Solicitor of Plaintiff.

No. 2. Defence, 12th May, 1933.

No. 2.

Defence.

IN THE SUPREME COURT
KING'S BENCH DIVISION

BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

GENERAL DAIRIES, LIMITED - - - *Defendant.*

DEFENCE

1. The Defendant admits the statements contained in the first and second paragraphs of the Statement of Claim.

2. The Defendant denies that the Plaintiff supplied the electric energy to the Defendant as alleged or at all.

3. The Defendant before action brought satisfied and discharged the Plaintiff's claim by payment as follows :

The Plaintiff during all the time mentioned in the Statement of Claim during which electric energy was supplied to the Defendant delivered to the Defendant each month a statement of the amount of electric energy supplied by the Plaintiff to the Defendant during the month preceding the rendering of said statement, and the Defendant each month paid the amount thereof in full satisfaction therefor the said amounts so paid being the several sums credited to the Defendant in the particulars set out in paragraph 3 of the Statement of Claim.

4. The Defendant says that the Plaintiff is estopped from saying that the Plaintiff supplied to the Defendant at its place of business on King Street in the City of Fredericton the electric energy mentioned in the

particulars of the Plaintiff's Statement of Claim, or any amount of energy in addition to the amounts mentioned in the monthly statements rendered to the Defendant and for which payment was made by the Defendant as mentioned in the 3rd paragraph of this Defence, because the Defendant at all material times carried on business at the said place of business mentioned in the Statement of Claim in buying cream from farmers and others and using same in the manufacture of butter, ice cream and other milk products therefrom, and the Defendant paid to the said farmers and others from whom the said cream was bought a price for said cream depending in amount, amongst other things, on the cost of manufacture of said butter, ice cream and other milk products, and the Defendant used the electric energy supplied by the Plaintiff for power and other purposes in connection therewith in the manufacture of said butter, ice cream and other milk products, and the cost of said energy entered into the said cost of manufacture and directly affected the price which the Defendant paid to said farmers and others for the said cream so bought from said farmers and others, and the Plaintiff well knowing that the Defendant was using electric energy in said manufacture rendered to the Defendant each month a statement of the amount of electric energy supplied to the Defendant at its said place of business purporting to be based on the reading of a meter placed by the Plaintiff on the Defendant's said premises for the purpose of registering said energy so supplied, and the Defendant believing the said statement so rendered to be true and in accordance with the reading of said meter paid the Plaintiff the amount as shown by said statement and used said amount so paid as part of its costs of manufacture of said butter, ice cream and other milk products in determining the said cost of manufacture for the purpose of determining the price to be so paid for said cream and the Defendant did base thereon the amount which the Defendant paid to the farmers and others for said cream; and if the amount mentioned in the said several statements so rendered by the plaintiff for said electric energy was incorrect, which the Defendant does not admit, the mistake was the mistake of the Plaintiff and the Defendant acted upon said statements so rendered believing same to be true to the damage of the Defendant and the Defendant by reason of said statements and by reason of believing same to be true paid to the said farmers and others from whom said cream was bought large sums of money more than the Defendant would or could have paid for said cream so bought if the amounts now claimed for electric energy had been rendered to and claimed from the Defendant at the several times when said statements were so rendered by the Plaintiff.

(Sgd.) PETER J. HUGHES,
Defendant's Solicitor.

Delivered the Twelfth day of MAY A.D. 1933.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Statement of Facts, 27th October, 1933.

No. 3.

Statement of Facts.

IN THE SUPREME COURT
KING'S BENCH DIVISION

BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

GENERAL DAIRIES, LIMITED - - - *Defendant.*

Statement of Facts agreed upon by Counsel in addition to facts admitted by Pleadings.

1. The plaintiff company supplied to the defendant at its place of business in Fredericton the electric energy as set out in the statement of claim as follows :—

1929					
Dec.	18	To	1060 KWH	$	44.80
1930					
Jan.	17	To	940 KWH		41.20
Feb.	17	To	1050 KWH		44.50
Mar.	18	To	1020 KWH		43.60
Apr.	17	To	1030 KWH		43.90
May	15	To	1990 KWH		72.70
June	18	To	2290 KWH		81.70
July	17	To	4310 KWH		142.30
Aug.	18	To	4550 KWH		149.50
Sept.	16	To	4050 KWH		134.50
Oct.	16	To	3310 KWH		112.30
Nov.	14	To	2390 KWH		84.70
Dec.	16	To	1840 KWH		68.20
1931					
Jan.	17	To	1340 KWH		53.20
Feb.	16	To	1330 KWH		52.90
Mar.	16	To	1110 KWH		46.30
Apr.	16	To	1510 KWH		58.30
May	15	To	1910 KWH		70.00
June	16	To	3720 KWH		124.60
July	16	To	5150 KWH		167.50
Aug.	15	To	5170 KWH		168.10
Sept.	16	To	5620 KWH		181.60
Oct.	16	To	3780 KWH		126.40
Nov.	16	To	3310 KWH		112.30
Dec.	15	To	1830 KWH		67.90
1932					
Jan.	16	To	2590 KWH		90.70
Feb.	16	To	1060 KWH		44.80
Mar.	16	To	1220 KWH		49.60
					$2478.10

2. The plaintiff delivered to the defendant each month a statement purporting to show the amount of electric energy supplied by the plaintiff to the defendant during the month preceding the rendering of said statement as follows :

1929					
Dec.	18	To	106 KWH		$15.00
1930					
Jan.	17	To	94 KWH		15.00
Feb.	17	To	105 KWH		15.00
Mar.	18	To	102 KWH		15.00
Apr.	17	To	103 KWH		15.00
May	15	To	199 KWH		15.00
June	18	To	229 KWH		15.00
July	17	To	431 KWH		24.55
Aug.	18	To	455 KWH		25.75
Sept.	16	To	405 KWH		23.25
Oct.	16	To	331 KWH		19.55
Nov.	14	To	239 KWH		18.00
Dec.	16	To	184 KWH		18.00
1931					
Jan.	17	To	134 KWH		18.00
Feb.	16	To	133 KWH		18.00
Mar.	16	To	111 KWH		18.00
Apr.	16	To	151 KWH		18.00
May	15	To	190 KWH		18.00
June	16	To	372 KWH		21.60
July	16	To	515 KWH		28.45
Aug.	15	To	517 KWH		28.51
Sept.	16	To	562 KWH		29.86
Oct.	16	To	378 KWH		21.90
Nov.	16	To	331 KWH		19.86
Dec.	15	To	183 KWH		18.00
1932					
Jan.	16	To	259 KWH		15.54
Feb.	16	To	106 KWH		20.46
Mar.	16	To	122 KWH		18.00
					$546.28

3. The defendant paid the amounts of money set out in paragraph 2 hereof believing the same to be in full satisfaction of the moneys due by the defendant to the plaintiff from time to time for electric energy supplied by the plaintiff to the defendant.

4. Following is a schedule showing the rates applicable to the plaintiff as fixed by the Board of Public Utilities and in force at all material times.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Statement of Facts, 27th October, 1933— *continued.*

General Power Service

Applicable to use of Service for
Power, heating, cooking and refrigeration.

Rate

6c (net) per K. W. H. for the first 300 K. W. H. used per month.
5c (net) per K. W. H. for the next 200 K. W. H. used per month.
3c (net) per K. W. H. for all over 500 K. W. H. used per month.

Minimum Charge

$1.00 per month per horse power of installed capacity.

The order of the Board of Public Utilities Commissioners affecting rates and charges under which plaintiff operated are hereunto annexed marked " A " and " B."

5. The defendant company during the months of November and December, 1929, and January, February, March, April, May and June, July, August, September and October, 1930, had fifteen horse-power of installed capacity and in all other months subsequently to October, 1930, an installed capacity of eighteen horse-power.

6. The meter installed and used at all material times by the plaintiff to measure the electricity complied in all respects with the requirements of the Electricity Inspection Act, 1928, and was inspected by the district inspector on December 23rd, 1927, and March 31st, 1932, and on both occasions it was found to be within the limits tolerated by law.

7. The meter reading upon which the monthly statements were rendered was a correct reading of the dials of the meters but in order to arrive at the amount of electric energy used through said meter it was necessary to multiply the dial reading by ten. Through error this was not done and consequently the defendant was only charged in said monthly statements with one tenth of the electric energy actually supplied by the plaintiff to the defendant.

8. The defendant company at all material times carried on business at the City of Fredericton in buying cream from farmers and others and using same in the manufacture of butter, ice cream and other milk products therefrom and the defendant paid to the farmers and others from whom the said cream was bought a price for said cream depending in amount amongst other things, on the cost of manufacture of said butter, ice cream and other milk products, and the defendant used the electric energy supplied by the plaintiff to the defendant for power and other purposes in connection therewith in the manufacture of said butter, ice cream and other milk products and the cost of said energy entered into the said cost of manufacture and directly affected the price which the defendant paid to the farmers and others for the said cream so bought from said farmers and others. The plaintiff at all material times knew that the defendant was using said electric energy in said manufacture and

rendered to the defendant each month a statement purporting to show the amount of electric energy supplied by the plaintiff to the defendant at its said place of business and purporting to be based on the reading of the meter placed by the plaintiff on the defendant's said premises for the purpose of registering the energy so supplied. The defendant believed the said statements so rendered to be true and in accordance with the reading of the said meter and the defendant from time to time paid to the plaintiff the amounts shown by the said statements from time to time and used said amounts so paid as part of its cost of manufacture of said butter, ice cream and other milk products in determining the said cost of manufacture for the purpose of determining the price to be so paid for said cream and the defendant did base thereon the amount which the defendant paid to the farmers and others for said cream. The mistake in rendering said statements showing incorrect amounts to be due was the mistake of the plaintiff. The defendant acted upon said statements so rendered believing the same to be true. By reason of such belief the defendant paid to the farmers and others large sums of money more than the defendant would or could have paid for said cream so bought if the amounts now claimed for electricity had been rendered to and claimed from the defendant at the several times when said statements were rendered by the plaintiff.

Dated this 27th day of October, A.D. 1933.

(Sgd.) J. J. F. WINSLOW
Of counsel with plaintiff.

(Sgd.) PETER J. HUGHES
Of counsel with defendant.

"A"

Document "A" annexed to Statement of Facts.

MARITIME ELECTRIC COMPANY, LIMITED
Fredericton Branch

Schedule of Electric Rates
Together with
Rules and Regulations Governing the Same as Approved by Board of Public Utilities In Order Dated October 22, 1924.

Schedule of Rates

Domestic and Commercial lighting :

1st	30 Kilo-watt hours per month	10.0c per	K.W.H.
Next	70 „ „ „ „ „	9.0c „	„
Next	150 „ „ „ „ „	8.0c „	„
Next	250 „ „ „ „ „	7.0c „	„
All over	500 „ „ „ „ „	6.0c „	„

Minimum Monthly Charge—$1.00 (See Par. 4 of Rules and Regulations)

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "A" annexed to Statement of Facts—*continued.*

Power Day and Night Service :

1st	100	Kilo-watt hours per month	8.0c per K.W.H.
Next	100	,, ,, ,, ,, ,, ...	7.0c ,, ,,
Next	100	,, ,, ,, ,, ,, ...	6.0c ,, ,,
Next	100	,, ,, ,, ,, ,, ...	5.0c ,, ,,
Next	100	,, ,, ,, ,, ,, ...	4.0c ,, ,,
All over	500	,, ,, ,, ,, ,, ...	3.5c ,, ,,

Minimum Monthly Charge—$1.00 per Horse Power of Connected Load (See Par. 4 of Rules and Regulations).

Municipal Street Lighting :

City of Fredericton	4.0c per K.W.H.
Town of Devon.....	5.0c ,, ,,

Where the word "Month" appears in the Schedule of Rates it is to be construed as meaning the meter reading period.

RULES AND REGULATIONS.

(1) Application for Service :

Each applicant for Electric Service will be required to sign an application and contract blank, a copy of which is appended to these Rules and regulations.

(2) Description of Service Required :

The consumer should submit to the Company a detailed description of the service desired, with a list of devices which are to be connected to such service together with the location of the premises to be served, and the Company will advise the style, voltage and description of the current to be furnished and the point at which the service will be brought in.

(3) Consumers' Deposits.

Applicants for service may be required to deposit with the Company a sum sufficient to insure the payment of bills for a period of sixty days. Interest upon the deposit will be paid annually or credited to the consumers' account at the rate of four (4) per cent. per annum. No interest, however, will be allowed on the deposit for a period of less than six months. Upon the discontinuance of service and payment of all charges due for service, the amount of the deposit made plus any accrued interest will be refunded to the consumer.

(4) Minimum Charge :

A minimum charge of $1.00 per month will be made to all Domestic and Commercial consumers. The minimum charge to Power Consumers will be $1.00 per Horse Power of connected load per month, as shown by the following schedule. When the minimum charge is made, Consumers will be allowed credit for the current registered by the meter, at the tariff rates.

Minimum Charge for Power

$1.00 per Horse Power of connected load per month in accordance with the following :

Installations	up to 10 H.P. (irrespective of number of motors)	100% of H.P. connected.
,,	of between 11 to 20 H.P. consisting of 2 or more motors...	90% ,, ,, ,,
,,	of between 21 to 30 H.P. consisting of 2 or more motors...	80% ,, ,, ,,
,,	of between 31 to 50 H.P. consisting of 2 or more motors...	70% ,, ,, ,,
,,	of between 51 to 100 H.P. consisting of 2 or more motors...	60% ,, ,, ,,
,,	of between 101 or more H.P. consisting of 2 or more motors	50% ,, ,, ,,

In installations of one motor only, the full rated H.P. will be taken. In no event will the minimum charge rating in installations of two or more motors be less than the H.P. of the largest Motor.

Power Contract Term.

The Company may require any or all power consumers to contract for such service for a period of one year or more.

In case of residences, which are to be closed for thirty or more consecutive days, upon written notice to the Company, service may be discontinued, and the guaranteed minimum monthly charge will be waived. Under such circumstances, when the service is re-established, a charge of $1.00 will be made for reconnection.

(5) Penalty Charge.

All bills will be rendered monthly and are payable at the office of the Company within twelve days of date of bill. An additional charge of 10 per cent. of the amount due for electric energy will be made to all accounts not paid on or before the 12th day of the month following period of consumption, or the 13th when the 12th falls upon Sunday or a legal holiday.

(6) Disconnection for Non-payment.

Consumers whose payments are in arrears may be disconnected for non-payment after three days' written notice. When service has been so disconnected a charge of One Dollar ($1.00) per meter will be collected before the service is re-established.

Any person so indebted to the Company may be deprived of service until such indebtedness is paid in full.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "A" annexed to Statement of Facts—*continued.*

(7) Provisions for Furnishing and Maintaining Meters.

For the purpose of determining the amount of electricity used, a meter, or meters, will be installed by the Company upon the Consumer's premises, at a point most convenient for the rendering of the service. The reading of such meter, or meters, shall be the basis of determining all charges for current consumed. Permission is given the Company to enter the Consumer's premises, at all reasonable hours, for the purpose of installing, reading, inspecting, or removing any or all of its apparatus used in connection with the supply of electricity. The consumer will be responsible for all damage to, or loss of, the Company's property located upon his premises which may be occasioned by his own acts or negligence.

(8) Meter Testing.

Any Consumer may have the meter or meters upon his premises tested upon application, in writing, to the Company. Any meter found by test to be registering more than three (3) per cent. either too fast or too slow will be corrected before being allowed to continue in service. Whenever it is discovered by test that a meter has been registering fast beyond the above limitations, a rebate of charges shall be made to the Consumer based upon the determination obtained from the meter test; any such rebate, however, not to be for a greater period than the three months immediately preceding the test. When a Consumer makes application to have his meter tested he shall deposit One Dollar ($1.00) with the Company. If any meter upon test is found to have been registering correctly within the above limitations, the Consumer shall forfeit the money deposited. If, on the other hand, the meter is found to have been registering incorrectly, either too fast or too slow, beyond the three (3) per cent. limit mentioned above, the Company will return the deposit to the Consumer.

If from natural or any other cause or causes, any Consumer's meter, or meters, shall become clogged or broken, allowing electricity to pass without registration upon the said meter, and the said Consumer shall have had the benefit and use of electricity passed without such registration, then the Company shall have the right to estimate the amount of such current passed without registration, equitably, based upon known conditions governing the use and supply, and the Consumer hereby agrees to pay such estimated bill.

(9) Service Interruptions.

The Company shall not be responsible for any failure to supply electricity or for interruption of reversal of the supply, if such failure, interruption or reversal is without wilful default or neglect on its part.

(10) Increasing Connected Load.

The service connections, transformers, meters and appliances supplied by the Company for each consumer have a definite capacity, and no additions to the equipment or load connected thereto shall be made without first securing the consent of the Company. The Company reserves the right to install a circuit breaker, so arranged as to disconnect the service to the premises if the Consumer's demand exceeds the Company's

capacity at that point. No consumer shall allow any other person to use current through his service without the written consent of the Company.

(11) Promises not Binding.

No agent has power to make, modify or alter this agreement, or waive any of its provisions, or to bind the Company by making any promise or by accepting any representation or information not contained in the agreement.

(12) Right-of-Way Over Consumer's Property.

The Consumer shall grant to the Company free right of way over his property for the erection and maintenance of the necessary poles, wires and appurtenances, and also space in buildings, if required, for the installation of the transformers, meters and other equipment necessary to furnish the Consumer with service.

(13) Consumer May Be Required to Bear Cost of Construction.

When the guaranteed revenue under a proposed contract appears to be insufficient to justify the investment necessary to furnish the service, the Company may require the Consumer to bear a portion or all of the cost of the necessary construction. In case of a disagreement as to this assessment, an appeal may be made to the Board of Public Utilities whose decision shall be binding on all parties concerned.

(14) Municipal Street Lighting.

The Company shall furnish electric current for street lighting in the City of Fredericton at a rate of 4 cents per kilo-watt hour, the amount of current consumed to be determined from meter readings at the switch-board installed at the City's sub-station on Carleton Street. The Company shall operate and maintain the Street Lighting System in accordance with the terms and conditions contained in the agreements now existing between the Company and the City.

The Company shall continue to furnish electric current for Street Lighting in the Town of Devon at a rate of 5 cents. per kilo-watt hour, in accordance with the terms and conditions of the existing contract.

(15) Changes in Tariff.

The rates, rules and regulations governing electric service, as herein contained, are subject to termination, change or modification by posting, filing and publishing any subsequent schedule or supplement in accordance with the Public Utility Act, or under order after hearing by the Board of Commissioners of Public Utilities, of the Province of New Brunswick.

MARITIME ELECTRIC COMPANY, LIMITED

Fredericton, Branch
Fredericton, New Brunswick

Application and Contract for Electric Service

The undersigned ..... hereby applies for electric service in the premises occupied as ....

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "A" annexed to Statement of Facts—*continued.*

..... at No. ..... Street, and agrees to use and pay for such service in accordance with the Schedule of Rates as they exist from time to time, and are filed with, and approved by the Board of Commissioners of Public Utilities of the Province of New Brunswick. The Rules and Regulations governing the administering of this contract are attached to, and form a part of the contract. This contract may be terminated by either party upon thirty days' notice, mailed or delivered in person to last known address.

Dated ..... 192... .....

Customer's full name.

The foregoing application is hereby accepted.

Maritime Electric Company, Limited.

By .....

Document "B" annexed to Statement of Facts.

"B."

RULES AND REGULATIONS.

(1) All bills will be rendered monthly and are payable at the office of the Company within ten days of date of bill.

(2) An additional charge of 10 per cent. of the amount due for electric energy will be made to all accounts not paid on or before the 10th day of the month following period of consumption, or the 11th when the 10th falls upon Sunday or a legal holiday.

(3) The Company reserves the right after two (2) days to discontinue service to consumers in arrears.

(4) The Company reserves the right to make a charge of One ($1.00) Dollar for reconnecting a consumer whose service was discontinued for arrears.

(5) Meters must be accessible for reading at all times and should be installed in convenient places.

(6) Make application at the Company's office for the use of Electricity before using.

(7) Give notice when you intend to move or cease burning, thereby avoiding all liability for electricity consumed by other parties.

(8) In case wherein the consumer is a tenant occupying a residence or store owned by another party, except where the rightful owner agrees to become security for the payment of all bills the consumer shall be called upon to pay a deposit to safeguard such bills. This deposit shall be the sum of Five (5.00) Dollars in the case of residential consumers; and in the case of store consumers, shall be the sum of Ten ($10.00) Dollars or greater as fixed by the Company, provided that such estimated amount does not exceed the amount of an estimated 90 days bill for such consumer.

Refund of this deposit will be made upon the termination of electric service provided all bills have been paid in full. Six per cent. will be

allowed on deposit, to be paid annually on demand. Payment for each calendar year ending December 31st to be made on or after the next succeeding February 1st on demand.

(9) All entrance locations should be approved of by a representative of the Company before connection is made.

(10) The Company reserves the right at any time to cut off the supply of electricity if it finds it necessary to protect itself against abuse or fraud.

Effective Jan. 23rd, 1929.

ELECTRIC RATE SCHEDULES AS AMENDED MARCH 11TH, 1927

MARITIME ELECTRIC COMPANY LTD.

FREDERICTON BRANCH

GENERAL SERVICE RATE

Applicable to Use of Service for :

Lighting, heating, cooking, refrigeration, incidental appliances, and power for motors under one horse power all service to be rendered through one meter.

Character of Service :

Approximately 110 volts or 110/220 volts, 60 cycle, single phase.

Rates :

This consists of two charges, an energy charge, which is based upon measured consumption, plus a service charge, which is based upon the estimated demand.

Service Charge :

$0.90	per month	for the first		500	watts	of	demand
$1.00	„ „	„ 1000 watts	for the next	9500	„	„	„
$0.50	„ „	„ 1000 watts	for all over	10000	„	„	„

—plus—

Energy Charge :

5c (net) per K.W.H. for the first 30 k.w.h. used per month per 500 watts of demand.

4c (net) per K.W.H. for next 30 k.w.h. used per month per 500 watts of demand.

3c (net) K.W.H. for all over 60 k.w.h. used per month per 500 watts of demand.

Determination of Demand :

For each residence customer the demand shall be taken as 500 watts.

For all other customers the demand shall be taken as the rated capacity of the lamps installed plus 25% of the rated capacity of ranges, heaters or other appliances having individual capacities, in excess of 1000 watts and in no case shall the demand be taken as less than 500 watts.

For schools, churches, hospitals and charitable Institutions 60% of the Connected Load as determined in the preceding paragraph shall be taken as the rated capacity.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "B" annexed to Statement of Facts—*continued.*

Minimum Charge :

The minimum charge shall be the service charge except where ranges, heaters or other appliances having individual capacities in excess of 1000 watts are installed in residences in which case the total charge for each calendar year for all services furnished shall be not less than 60c per 100 watts of total capacity of such appliances.

Terms of payment :

All bills will be rendered monthly and are payable at the office of the Company within ten days of date of bill. An additional charge of 10 per cent. of the amount due for electric energy will be made of all accounts not paid on or before the 10th day of the month following period of consumption or the 11th when the 10th falls upon Sunday or a legal holiday.

Terms :

Service may be discontinued on 48 hours notice except where ranges, heaters or other appliances in excess of 1000 watts of individual capacity are used, in which case the term shall be for a period of one year and thereafter until terminated by 48 hours written notice.

Special Provision :

Where living quarters are occupied by a customer in the same building where he takes general service for other purposes all of the service may be taken through one meter under this classification if the wiring is suitably arranged. In such cases the demand of the living quarters shall be taken as 500 watts and the remainder of the demand determined in the manner provided for other customers.

(This schedule is not intended to apply to temporary or seasonal service. Special arrangements will be required for such short term service.)

MARITIME ELECTRIC COMPANY, LTD.
GENERAL POWER SERVICE

Applicable to Use of Service for

Power, heating, cooking and refrigeration.

Character of Service :

Approximately 110/220 volts or 440 volts 60 cycles, single phase or two phase.

(Voltage at the option of the Company.)

Rate :

6c (net) k.w.h. for the first 300 KWH used per month.
5c „ „ „ „ next 200 „ „ „ „
3c „ „ „ all over 500 „ „ „ „

Minimum Charge :

$1.00 per month per horse power of installed capacity.

Terms of payment :

All bills will be rendered monthly and are payable at the office of the Company within ten days of date of bill. An additional charge of 10 per

cent. of the amount due for electric energy will be made to all accounts not paid on or before the 10th day of the month following period of consumption or the 11th when the 10th falls on Sunday or a legal holiday.

Terms :

One year and thereafter until terminated by 48 hours written notice.

MARITIME ELECTRIC COMPANY LTD.
WHOLESALE POWER SCHEDULE

Applicable to use of service for :

Power and heating with incidental lighting not exceeding 20% of the total connected load.

Character of Service :

Approximately 2200 volts, 60 cycle, 2 phase.

Rate :

This consists of two charges, a demand charge plus an energy charge.

Demand Charge :

$3.00 (net) per kilowatt for the first 10 K.W. of demand per month.
$2.50 „ „ „ „ „ next 15 K.W. „ „ „ „
$2.00 „ „ „ „ all over 25 K.W. „ „ „ „

—plus—

Energy Charge :

3c (net) per k.w.h. for the first 5000 k.w.h. used per month
2.5c (net) per k.w.h. for the next 10000 k.w.h. used per month
2c (net) per k.w.h. for the next 35000 k.w.h. used per month
1.9c (net) per k.w.h. for all over 50000 k.w.h. used per month

Determination of Demand :

Where the installed capacity exceeds 25 kilowatts the demand shall be determined from demand measuring instruments and shall be taken as the highest average demand recorded in any fifteen minute interval during the month, but shall not be less than 75% of the highest momentary demand during the month nor less than 75% of the highest demand established during the preceding eleven months.

Where the installed capacity does not exceed 25 kilowatts the demand shall be taken as the installed capacity provided however, that if the customer pays for the cost of suitable demand measuring instruments, the demand will be determined as above.

In no case shall the demand be taken as less than 10 kilowatts.

Minimum Charge :

The minimum charge shall be the demand charge.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "B" annexed to Statement of Facts—*continued.*

Additions and Deductions :

1—This rate is based upon the service being taken at lagging power factor of not less than 80% at the time of maximum demand and not less than 70% average.

If the power factor is less than specified above, the demand in lieu of the measured demand shall be taken as the product of the measured demand and the quotient resulting from dividing the specified power factor by the actual power factor expressed in per cent.

If the average power factor is more than 85% lagging, the demand, in lieu of the measured demand, shall be taken as the product of the measured demand and the quotient resulting from dividing 85% by the actual average lagging power factor, expressed in per cent.

2—If desired by the customer service will be furnished under this rate at 220 or 440 volts in which case the demand charge will be increased as follows :—

15c (net) per kilowatt per month for any part of the first 100 killowatt demand

10c (net) per killowatt per month for all over 100 killowatts of demand.

—and—

5% will be added to the measured kilowatt hours before computing the energy charge.

Terms of Payment :

All bills will be rendered monthly and are payable at the office of the Company within ten days of date of bills. An additional charge of 2 per cent. of the amount due for electric energy will be made to all accounts not paid on or before the 10th day of the month following period of consumption or the 11th when the 10th falls upon Sunday or a legal holiday.

Terms :

One year and thereafter until terminated by 90 days written notice.

FLAT RATE WINDOW LIGHTING RATE FOR

Flat Rate Window Lighting Rate
For window lighting each night
365 nights in the year.

The following rates shall be applicable to all commercial lighting consumers having a minimum of six window lights installed in one location, such lights to be of the sizes set forth in the following schedule :

The following Rates are net and not subject to discount :

Size of Lamp	Dusk to 10 p.m. Charge per month	Dusk to 11 p.m. Charge per month	Dusk to 12 p.m. Charge per month
100-Watt — each.....	.85	1.00	1.10
150-Watt — each.....	1.10	1.25	1.35
200-Watt — each.....	1.50	1.65	1.75
300-Watt — each.....	2.00	2.30	2.55
500-Watt — each.....	3.00	3.40	3.75

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "B" annexed to Statement of Facts—*continued.*

RULES AND REGULATIONS APPLICABLE TO FLAT RATE WINDOW LIGHTING RATE

This rate shall be applicable to any commercial lighting consumer at the option of such consumer, provided such consumer executes a one-year contract for a minimum of six lights. The lights may be of any of the wattages set forth in the schedule and the contract entered into between the company and the consumer shall set forth the number and sizes of lights and the lighting period desired by the customer, it being understood that the lighting period as set forth in the contract shall not be altered during the period of the contract, except by mutual agreement between the Company and the consumer.

The Company will install one suitable time switch to control the lights called for in the contract. The lighting period shall initiate fifteen minutes before sunset each night and terminate each night at the hour specified in the contract. The time switch is installed at the Company's expense.

The consumer shall arrange at his own expense the electric wiring in his establishment so as to supply the window lighting so contracted, on a separate circuit, which circuit shall be tapped into the lines entering his building on the street side of the meter so that the power consumed by the window lights set forth in the contract shall not pass through any meter used to register power consumed for any other purpose. The consumer shall further arrange his window lighting circuit so as to have all the window lights contracted for supplied from one feeder and in such a manner as to permit the current to be connected and disconnected by a time switch and such wiring is to be done in such manner as to permit of the installation of the time switch in a manner to meet the approval of the Company.

The Company will furnish without additional charge, one lamp for each lamp contracted for during each twelve month period. If additional lamps are required through burning out or breakage such additional lamps shall be paid for by the consumer it being understood that the same type, kind, and size of lamp shall be used on such additional renewals as are specified in the contract between the Company and the consumer.

The Company shall maintain at its own expense a time clock and shall wind and keep such time clock in operation without charge to the consumer. The period at which the lights shall be determined on shall be determined by adjustments made to the time clock by the Company twice each month and this period of lighting the lamps shall be determined as near as may be practicable from any standard almanac setting forth the time of sunset.

The rates set forth in this schedule are net and are not subject to discount for prompt payment.

Bills will be rendered on or about the 1st day of each month and are payable within ten days after the date rendered.

When a consumer is purchasing electric current for lighting purposes under the commercial lighting rate and contracts with the Company for window lighting under this schedule, then the connected load of the lamps

In the Supreme Court of New Brunswick, King's Bench Division.

No. 3. Document "B" annexed to Statement of Facts—*continued.*

contracted for under this schedule shall not be included in determining the service charge under the commercial lighting schedule.
Effective January 23rd 1929.

NEW BRUNSWICK BOARD OF COMMISSIONERS OF PUBLIC UTILITIES

IN THE MATTER OF the application of the Maritime Electric Company Limited to amend the schedule of rates approved by the Board for the City of Fredericton on March 16, 1927.

UPON HEARING Mr. T. J. Coleman, General Manager of the Company, and it appearing to the Board that the amendment to the said schedule is in the nature of a reduction of rates to industrial users of power.

IT IS ORDERED that the following be made an addition to the said schedule, and that any part of the said schedule inconsistent therewith is repealed.

LIGHTING SERVICE.

Lighting service will be rendered under this rate to industrial power consumers, provided such service is supplied from the same power service lines and through the same power service meter as is the power service and further provided that the consumer furnishes his own facilities to make the power service supplied available for lighting and expressly provided that the connected load in lighting does not exceed 25% of the total connected load of both light and power. For the purpose of this paragraph each horse power of rated capacity of motors shall be considered as equalling 750 Watts.

Dated at the City of Saint John this twenty-second day of January A. D. 1930.

By the Board

(Sgd.) G. EARLE LOGAN
Secretary.

No. 4.

Reasons for Judgment of Richards J.

IN THE SUPREME COURT
KING'S BENCH DIVISION

BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

GENERAL DAIRIES, LIMITED - - - *Defendant.*

AND BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

FREDERICTON DAIRIES, LIMITED - - *Defendant.*

Judgment, Richards, J., 27th February, 1934.

These are two separate and distinct actions but the facts in each are practically the same and the points of law involved are identical. Moreover, it was agreed between Counsel Mr. J. J. F. Winslow, K.C., for the plaintiff, and Mr. P. J. Hughes, K.C., for the defendant in each case, that the decision in the first named case, with the necessary and appropriate modifications in respect of quantities, would be accepted as the decision in the second case.

Turning then to a consideration of the first case,

Maritime Electric Company, Limited - *Plaintiff,*

vs.

General Dairies, Limited - - - *Defendant.*

After consultation between Counsel the relevant facts in the case were agreed upon and no viva voce evidence was taken. The statement of facts as agreed upon by Counsel was put in writing, executed by counsel and submitted to the Court. This statement is Marked " A " and is as follows :—

EXHIBIT " A " 27th Oct. 1933

IN THE SUPREME COURT
KING'S BENCH DIVISION

BETWEEN—

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

GENERAL DAIRIES, LIMITED - - - - *Defendant.*

Statement of Facts agreed upon by Counsel in addition to facts admitted to Pleadings.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

1. The plaintiff company supplied to the defendant at its place of business in Fredericton the electric energy as set out in the statement of claim as follows :

1929					
Dec.	18	To	1060 KWH	$	44.80
1930					
Jan.	17	To	940 KWH		41.20
Feb.	17	To	1050 KWH		44.50
Mar.	18	To	1020 KWH		43.60
Apr.	17	To	1030 KWH		43.90
May	15	To	1990 KWH		72.70
June	18	To	2290 KWH		81.70
July	17	To	4310 KWH		142.30
Aug.	18	To	4550 KWH		149.50
Sept.	16	To	4050 KWH		134.50
Oct.	16	To	3310 KWH		112.30
Nov.	14	To	2390 KWH		84.70
Dec.	16	To	1840 KWH		68.20
1931					
Jan.	17	To	1340 KWH		53.20
Feb.	16	To	1330 KWH		52.90
Mar.	16	To	1110 KWH		46.30
Apr.	16	To	1510 KWH		58.30
May	15	To	1910 KWH		70.00
June	16	To	3720 KWH		124.60
July	16	To	5150 KWH		167.50
Aug.	15	To	5170 KWH		168.10
Sept.	16	To	5620 KWH		181.60
Oct.	16	To	3780 KWH		126.40
Nov.	16	To	3310 KWH		112.30
Dec.	15	To	1830 KWH		67.90
1932					
Jan.	16	To	2590 KWH		90.70
Feb.	16	To	1060 KWH		44.80
Mar.	16	To	1220 KWH		49.60
					$2478.10

2. The plaintiff delivered to the defendant each month a statement purporting to show the amount of electric energy supplied by the plaintiff to the defendant during the month preceding the rendering of said statement as follows :

1929					
Dec.	18	To	106 KWH	$	15.00
1930					
Jan.	17	To	94 KWH		15.00
Feb.	17	To	105 KWH		15.00

1930					
Mar.	18	To	102 KWH		$15.00
Apr.	17	To	103 KWH		15.00
May	15	To	199 KWH		15.00
June	18	To	229 KWH		15.00
July	17	To	431 KWH		24.55
Aug.	18	To	455 KWH		25.75
Sept.	16	To	405 KWH		23.25
Oct.	16	To	331 KWH		19.55
Nov.	14	To	239 KWH		18.00
Dec.	16	To	184 KWH		18.00
1931					
Jan.	17	To	134 KWH		18.00
Feb.	16	To	133 KWH		18.00
Mar.	16	To	111 KWH		18.00
Apr.	16	To	151 KWH		18.00
May	15	To	190 KWH		18.00
June	16	To	372 KWH		21.60
July	16	To	515 KWH		28.45
Aug.	15	To	517 KWH		28.51
Sept.	16	To	562 KWH		29.86
Oct.	16	To	378 KWH		21.90
Nov.	16	To	331 KWH		19.86
Dec.	15	To	183 KWH		18.60
1932					
Jan.	16	To	259 KWH		15.54
Feb.	16	To	106 KWH		20.46
Mar.	16	To	122 KWH		18.00
					$546.28

3. The defendant paid the amounts of money set out in paragraph 2 hereof believing the same to be in full satisfaction of the moneys due by the defendant to the plaintiff from time to time for electric energy supplied by the plaintiff to the defendant.

4. Following is a schedule showing the rates applicable to the plaintiff as fixed by the Board of Public Utilities and in force at all material times.

GENERAL POWER SERVICE

Applicable to use of Service for
Power, heating, cooking and refrigeration.

Rate

6c (net) K.W.H. for the first 300 K.W.H. used per month.
5c (net) per K.W.H. for the next 200 K.W.H. used per month.
3c (net) per K.W.H. for all over 500 K.W.H. used per month.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

Minimum Charge

$1.00 per month per horsepower of installed capacity. The order of the Board of Public Utilities Commissioners affecting rates and charges under which plaintiff operated are hereunto annexed marked A and B.

5. The defendant company during the months of November and December, 1929, and January, February, March, April, May, June, July, August, September and October 1930 had fifteen horsepower of installed capacity and in all other months subsequently to October, 1930, an installed capacity of eighteen horsepower.

6. The meter installed and used at all material times by the plaintiff to measure the electricity complied in all respects with the requirements of the Electricity Inspection Act, 1928, and was inspected by the District Inspector on December 23rd, 1927, and March 31st, 1932, and on both occasions it was found to be within the limits tolerated by Law.

7. The meter reading upon which the monthly statements were rendered was a correct reading of the dials of the meters but in order to arrive at the amount of electric energy used through said meter it was necessary to multiply the dial reading by ten. Through error this was not done and consequently the defendant was only charged in said monthly statements with one-tenth of the electric energy actually supplied by the plaintiff to the defendant.

8. The defendant Company at all material times carried on business at the City of Fredericton in buying cream from farmers and others and using same in the manufacture of butter, ice cream and other milk products therefrom and the defendant paid to the farmers and others from whom the said cream was bought a price for said cream depending in amount amongst other things, on the cost of manufacture of said butter, ice cream and other milk products, and the defendant used the electric energy supplied by the plaintiff to the defendant for power and other purposes in connection therewith in the manufacture of said butter, ice cream and other milk products and the cost of said energy entered into the said cost of manufacture and directly affected the price which the defendant paid to the farmers and others for the said cream so bought from the said farmers and others. The plaintiff at all material times knew that the defendant was using said electrical energy in said manufacture and rendered to the defendant each month a statement purporting to show the amount of electric energy supplied by the plaintiff to the defendant at its said place of business and purporting to be based on the reading of the meter placed by the plaintiff on the defendant's said premises for the purpose of registering the energy so supplied. The defendant believed the said statements so rendered to be true and in accordance with the reading of the said meter and the defendant from time to time paid to the plaintiff the amounts shown by the said statements from time to time and used said amounts so paid as part of its cost of manufacture of said butter, ice cream and other milk products in determining the said cost of manufacture for the purpose of determining the price to be so

paid for said cream and the defendant did base thereon the amount which the defendant paid to the farmers and others for said cream. The mistake in rendering said statements showing incorrect amounts to be due was the mistake of the plaintiff. The defendant acted upon said statements so rendered believing the same to be true. By reason of such belief the defendant paid to the farmers and others large sums of money more than the defendant would or could have paid for said cream so bought if the amounts now claimed for electricity had been rendered to and claimed from the defendant at the several times when said statements were rendered by the plaintiff.

Dated this 27th day of October, A.D. 1933.

(Sgd.) J. J. F. WINSLOW,
Of Counsel with Plaintiff.

(Sgd.) PETER J. HUGHES,
Of Counsel with Defendant.

The only other papers or documents put in evidence or submitted to the Court were: First, " A Schedule of Electric Rates, together with Rules and Regulations Governing the same as Approved by The Board of Public Utilities in Order dated October 22, 1924." This document is initialled by both Counsel. It is marked " B," Second, A document entitled " General Service Rate," as applicable to the plaintiff company. This also is initialled by Counsel. This is marked " C."

Upon the pleadings and these submissions the case was argued before me at Fredericton on the 27th day of October last.

It appears from the Statement of Facts, as agreed upon by Counsel, that the plaintiff installed a meter to measure the amount of electric energy used by the defendant. This meter conformed with the statutory requirements. Each month the meter was read and a statement rendered to the defendant purporting to show the quantity of electric energy used during the preceding month. But in order to arrive at the correct amount of electric energy it was necessary to multiply the dial reading by ten. Through error this was not done and as a result the defendant was charged with only one-tenth of the electric energy actually supplied by the plaintiff to the defendant. For example: The statement rendered December 18, 1929, showed 106 k.w.h. This was a correct reading of the dial, but to obtain the actual amount of energy used that reading should be multiplied by ten, making 1060 k.w.h. When the appropriate rate is applied to this quantity, the correct charge for the month covered by that statement would be $44.80 instead of $15.00. (See first items in paragraphs 1 and 2 of the Statement of Facts.) The same error was made for each reading from December 18, 1929, to March 16, 1932. The result is that instead of a total amount being due from the defendant to the plaintiff for that period of $546.28, the amount actually paid, the total amount due should be $2478.10 a difference of $1931.82. It may be advisable to point out that

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

while the amount of electric energy shown in the various statements rendered was only one-tenth of the amount of energy actually used it does not follow that the same relative difference would result in the cost of the energy. Varying rates are applied to varying quantities used and the cost would not necessarily be ten times as great when the quantity was increased ten times. As I have pointed out the actual difference between the total of the accounts as rendered, and paid, and the total of the accounts that should have been charged is $1931.82. It is this amount which the plaintiff now seeks to recover from the defendant.

Mr. Winslow for the plaintiff admits that the defendant paid all the accounts as rendered, but contends that the accounts were rendered under a mistake of fact and that it is now entitled to recover the balance.

Obviously a plea of payment, or of accord and satisfaction will not lie, and in fact neither of such defences is pleaded. The only plea raised by the defence is that of estoppel and that is, admittedly, the only question for consideration.

It is agreed (see paragraph 8 of the Statement of Facts) that the defendant paid to the farmers and others for cream used in the manufacture of butter and other products a price depending in amount, inter alia, upon the cost of manufacturing of said butter and other products and the defendant used the electric energy supplied by the plaintiff for power in connection with the manufacture of said butter and other products and the cost of said electric energy entered into the cost of said manufacture and directly affected the price which the defendant paid to the farmers and others for the cream bought from them and the plaintiff knew that the defendant was using said electric energy in said manufacture. Mr. Hughes, for the defendant, contends that these facts, as thus agreed upon establish an estoppel against the plaintiff.

Lord Denman in 1837, in the well-known case of *Pickard* vs *Sears* 6 Ad. and El. 469 at p. 474, laid down the principle of estoppel in these words: " the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

This definition was commented and enlarged upon and particularly the term " Wilfully " by Parke, B., in *Freeman* vs *Cooke* (1848) 2 Exch. 654. He says: (p. 663).

" By the term ' wilfully ' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue at least that he means his representation to be acted upon, and that it is acted upon accordingly: and 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."

Later, in 1875, Brett, J., in delivering the judgment of the Court, in *Carr* vs. *London & North Western Railway Co.*, L. R. 10 C.P. 307, at p. 316 lays down four "recognized propositions of an estoppel in pais," as follows :—

"(1) One such proposition is, that if a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such a state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

(2) Another recognized proposition seems to be, that if a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

(3) 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.

(4) There is yet another proposition as to estoppel if in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards as against the first to show that the state of facts referred to did not exist."

These propositions seem to be recognized to-day, as in 1875 as a complete and comprehensive statement of the law of estoppel in pais. It is necessary, then, to enquire whether or not the facts of the present case bring it within any one, or more than one, of these propositions.

It is obvious, I think, that neither the first nor the last proposition can apply to the present case. There is no suggestion of any false statement such as would be necessary for the first proposition to apply; and there is no allegation of negligence which would be essential to bring the case within the fourth proposition.

The question then is : Do the facts of the present case bring it within either the second or the third proposition? As to the second, what are the facts which must be considered in relation to the creating of an estoppel within its terms? The plaintiff made certain representations (the rendering of the monthly statements) to the defendant, which, while actually untrue, were believed by the plaintiff at the time to be true; these statements were accepted as true by the defendant and it acted upon them to its damage, or its position was altered to its prejudice (by paying a higher

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

price for cream than it would have done had it received correct statements). This is, I think a fair summary, in the terms of the second proposition, of what took place. It is evident, then, that one very important element is missing, namely: the intention that the representations, or statements, shall be acted upon in a certain way. There is no evidence that the plaintiff intended that the defendant should act upon the statements in a certain way. There is no evidence of any intention whatever on the part of the plaintiff as to any action by the defendant. It is true that the plaintiff knew that the defendant was using the electric energy in the manufacture of its products (See Statement of Facts, paragraph 8); but that is very far from any evidence of intention on the part of the plaintiff that the defendant should use the electric energy so as to affect the price paid for the cream purchased, or even of evidence of intention of any kind whatever. To come within this proposition there must be positive evidence that the plaintiff intended that the representations made by it should be acted upon in a certain way—the way they were in fact acted upon; and such evidence is completely lacking. Proposition two, therefore, cannot apply.

Finally, let us consider the third proposition. In this case it is not an essential feature, as in the second proposition, that there should be a specific intention on the part of the party making the representation. As Brett, J. says: "If a man, whatever his real meaning may be, so conducts himself &c." Parke, B., in *Freeman* vs. *Cooke*, supra, uses the expression "and if, whatever a man's real intention may be, he so conducts himself &c." The essential feature in this proposition is, not a specific intention on the part of the representor that the representation be acted upon in a certain way, but such conduct on the part of the representor, that a reasonable man would believe (1) that the representation was true and (2) that he (the representee) was intended to act upon it in a particular way; and then, as in the second case, he does act upon it, to his damage.

To apply this analysis of proposition three to the facts of the present case; was the conduct of the plaintiff (the statements submitted) of such a character and made under such circumstances that the defendant would be justified on reasonable grounds in believing (1) that the representations were true, and (2) that the defendant was intended to act upon the representations in a particular way (that is, in the way in which they were in fact acted upon)? As to the first point there can, I think, be no doubt. The defendant would be justified in believing the representations were true. The plaintiff itself believed they were true. But as to the second point, there would not, in my opinion, be reasonable ground for the defendant to believe that it was intended to act upon the representations in the way it actually did act upon them, that is, in making them a factor in determining the price to be paid for cream purchased from the farmers and others.

The plaintiff knew that the defendant was using the electric energy in the manufacture of its products. But that is as far as the knowledge of the plaintiff went. It did not know (at least there is no evidence of the

fact) that the defendant was paying a price for cream dependant, in part, upon the cost of manufacture. How then could the defendant reasonably believe that the plaintiff intended the representations as to the cost of the current should ultimately be taken into account by the defendant in the purchase price of its raw product? The defendant would no doubt be justified in believing that the plaintiff knew the cost of the current would be an element in the cost of manufacture of its products. That seems rather obvious. But that surely is as far as the defendant would be entitled to go; and that is far from providing a reasonable ground for the belief of intention that is necessary. Even assuming it to be true that the plaintiff knew that the defendant used the current in the manufacture of its products it would not follow that the plaintiff would have any knowledge whatever as to the basis upon which the price of its raw products were ascertained. In the absence of any evidence on this point the rather natural thought would be that the plaintiff would assume that the defendant was paying the regular market price. The cost of current would of course enter into the cost of manufacture. As I have said, that would be obvious. Ordinary business practice would suggest that the defendant would pay the market price for its raw products, irrespective of the cost of manufacture. In the absence of some positive evidence to the contrary (and there is none) this would be the natural conclusion.

In *Swan* vs. *North British Australasian Co.* (1863) 2 H. and C. 175, Cockburn, C.J., says (p. 188) "To bring a case within the principles established by the decisions in *Pickard* vs. *Sears*, and *Freeman* vs. *Cooke*, it is in my opinion, essentially necessary that the representation or conduct complained of, whether active or passive in its character, should have been intended to bring about the result whereby loss has arisen to the other party, or his position has been altered." This comment may, perhaps, apply more directly to the second proposition but it indicates at least that the intention whether actually in the mind of the representor, or believed by the representee to be in his mind, in accord with the third proposition, must have relation to the act "whereby the loss has arisen." In the present case that must be the purchase of the raw products from the farmers. In my opinion the defendant would not, on reasonable grounds, be justified in believing that it was intended by the representations of the plaintiff to act in the particular way it did, and the case does not, therefore, come within the third proposition.

Mr. Hughes cited the following cases: *Skyring* vs. *Greenwood*, 4 B & C 281; *Holt* vs. *Markham* (1923) 1 K.B. 504; and *Freeman* vs. *Jeffries*, L.R. 4 Exch. 189.

No one of these cases seems to be in line with the present case. In *Skyring* vs. *Greenwood* the defendants were estopped from retaining as against the plaintiffs overpayment in an account, not because of payments in mistake of fact but because of delay. Abbott, C.J., says (p. 288): "It is not necessary to decide in this case, whether the defendants by reason of their character of paymasters are estopped by the account

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

which they have rendered, from saying that there was a mistake in it." And also (p. 289): "The particular fact in this case upon which my judgment proceeds is that the defendants were informed in 1816 that the Board of Ordinance would not allow these payments to persons in the situation of Major Skyring, but they never communicated to him that fact until 1821, having in the meantime given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordinance, but they forebore to do so, and they suffered him to suppose during all the intervening time that he was entitled to the increased allowances."

Holt vs. *Markham* was a case somewhat similar to *Skyring* vs. *Greenwood*. Overpayments to an officer had been made and action was taken to recover as money paid under a mistake of fact. The plaintiffs were estopped, but as in the *Skyring* case on the ground of delay. Banks, L.J. (p. 510 of the report) states: "The plaintiff's mistake, if any, was one of law, it resulted from a failure to apply what was now said to be the true construction of the orders relating to gratuities to the defendant's case," and also (p. 511): "I need not go into the authorities, but the judgment of Bayley, J., in *Skyring* vs. *Greenwood* to which we have referred is, I think, directly applicable to the present defendant's case, for it appears that for a considerable time he was left under the impression that, although there had been at one time a doubt about his title to the money, that doubt had been removed and in consequence he parted with his war savings certificates. Having done that it seems to me that he altered his position for the worse and consequently the plaintiffs are estopped from alleging that payment was made under a mistake of fact." It is true that Warrington, L.J. (p. 511) says payment was not made under a mistake of fact, but also (p. 513) "if it was they (the plaintiffs) are estopped from setting it up."

In *Freeman* vs. *Jeffries* (to quote the Head Note). "By agreement between the outgoing tenant of a farm (the defendant) and the incoming tenant (the plaintiff) the amount to be paid by the plaintiff to the defendant was referred to valuers, who made their valuation. A promissory note for the amount of the valuation (after deducting £3000 paid on account) was given by the plaintiff to the defendant, and the plaintiff entered into possession. On the occasion of his selling his interest in the farm to a third person, the plaintiff discovered that errors had been made in the former valuation, by including items that ought not by custom of the county to have been valued to him and items that did not exist. He, nevertheless, paid the promissory note at maturity without objection. Afterwards, without giving the defendant any information as to the nature of his complaint of the valuation, and without having made any demands, he brought this action for money had and received." It was held that the plaintiff could not recover. The plaintiff was held to be estopped by his conduct. It was not payment under a mistake of fact as payment had been made with knowledge of all the facts.

In my opinion estoppel will not apply to the facts of the present case; the accounts were rendered by the plaintiff under a mistake of fact and it is now entitled to recover the balance.

During the course of the argument Mr. Winslow put forth the further ground that even if under the facts of the present case, estoppel would apply as between individuals or as against a private individual, it would not lie in the present case as the plaintiff company was a corporate body and it was bound by its corporate powers.

It was required to furnish electricity within the territory in which it operates at certain rates fixed and regulated by statute, or by the Board of Commissioners of Public Utilities under the authority of Statute, that it was prohibited by law from charging less or more than the fixed rates and that it could not now be estopped when it attempts to do what it is by law directed to do. He cited Chapter 127 of R.S.N.B. 1927, Section 16 and 10. These sections are as follows :—

" 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 times established, or demand, collect or receive any rates, tolls or charges not specified in such schedule.

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."

Mr. Winslow also cited 13 Halsbury, pp. 378, 380, and the following cases : *British Mutual Banking Company* vs. *Charnwood Forest Railway Company* (1887) 18 Q.B.D. 714; *Islington Vestry* vs. *Hornsey Urban Council* (1900) 1 C.D. 695; *Fairtitle* vs. *Gilbert et al* 2 Term R. 169. I shall refer to these cases later.

The plaintiff company is not a public corporation. It is a private corporation, with certain corporate powers and its acts are further directed and controlled by the Board of Commissioners of Public Utilities under the authority of statute. It is what is commonly known as a public utility company. Its powers are definitely limited, either directly by statute or through the regulations of the Board of Commissioners of Public Utilities. When the Board prescribes certain rates to be charged by the Company in certain areas the company is bound to charge that rate, neither more nor less. To do so would clearly be beyond its powers. It is the duty of the Company to collect the prescribed rate from every customer, in the interest of the public generally.

In my opinion the Company cannot now be estopped from carrying out the duty which the law puts upon it to charge certain prescribed rates. Were the acts with respect to which the estoppel relates of a discretionary character, acts with respect to which the Company had some choice of conduct, the situation would be entirely different. It would then be in the position of a private individual and estoppel, if otherwise applicable, would lie.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 4. Reasons for Judgment of Richards J., 27th February, 1934 —*continued.*

In the *British Banking Company* vs. *Charnwood Forest Railway Company* (1887) 18 Q.B.D. 714, the secretary of a company (defendant) answered questions which were put to him as secretary as to the validity of certain debenture stock of the company. The answers were untrue and were fraudulently made by the secretary for his own benefit. In an action against the company for loss arising from the representations the jury found that the secretary was held out by the company as a person to answer such enquiries on their behalf. On appeal to the Court of Appeal, reversing the decision of the Queen's Bench, it was held that the company was not liable. At page 718 of the judgment, Bowen, L.J., says: "It is not that the Secretary was clothed ostensibly with a real or apparent authority to make representations as to the genuineness of the debentures in question; but no action of contract lies for a false representation unless the maker of it or his principal has either contracted that the representation is true, or is estopped from denying that he has done so. In the present case the defendant company could not in law have so contracted for any such contract would have been beyond their corporate powers. And if they cannot contract, how can they be estopped from denying that they have done so?" And Fry, L. J. (p. 719) says: "It is plain that the action cannot succeed on any ground of estoppel, for otherwise the defendants would be estopped from denying that the stock was good. *No corporate body can be bound by estoppel to do something beyond their corporate powers.* (The italics are mine.) The action cannot be supported, therefore on that ground."

In *Fairtitle* vs. *Gilbert* (1787) 2 Term R. 169 the trustees of a public turnpike act, which empowered them to erect toll houses and to mortgage the tolls, and which declared that there should be no priority among the creditors, had no power to mortgage the toll houses or gates. They did in fact mortgage the toll houses and in an action of ejection brought against them by the mortgagee it was held that they were not estopped by their deed from insisting that the act gave them no power to mortgage the toll houses.

Ashurst, J. (at p. 171) says: "as then the trustees had no power to mortgage the toll houses the next question is, whether they are estopped to say so? In general the party granting is estopped by his deed to say he had no interest, but that general principle does not apply to this case, where the trustees were not acting for their own benefit but for the benefit of the public; and it would be hard that other creditors who are not parties to the deed should lose the benefit which the act has given them. Besides, there is a still further reason why the trustees should not be estopped; for this is a public act of parliament, and the Court are bound to take notice that the trustees under this Act had no power to mortgage the toll houses. This deed therefore cannot operate in direct opposition to an act of parliament, which negatives the estoppel."

So in the present case, while the plaintiff company is a private company, and is operated for private gain, it is at the same time a public utility. As such its rates are fixed by statutory authority and one of the

factors entering into the ascertaining of the proper rate is the revenue or income of the Company. The loss of the revenue which would result from one instance such as gives rise to the present action might not appreciably affect the general rate. But obviously if such cases were multiplied a point must sometime be reached where the general rate would be increased and as a result the public as a whole would be prejudicially affected. It is of course, inter alia, the purpose of the statutory control to prevent any preference, to provide for reasonable rates which shall be uniformly applied with respect to their appropriate classes. The plaintiff company ought not, therefore, to be estopped from carrying out the duty which the statute imposes upon it.

It is important to note the latter part of the statement of Ashurst, J., quoted above in which particular emphasis is placed upon the " act of parliament " which he states " negative the estoppel."

Islington Vestry vs. *Hornsey Urban Council* (1900) 1 C.D. 695 was a case in which a principle somewhat similar to that in *Fairtitle* vs. *Gilbert* was applied. In fact Lindley, M.R., in giving judgment, at page 106, refers with approval to the principle adopted in the latter case.

In re *Companies Act, Ex parte Watson* (1888) 21 Q.B.D. 301, Cave, J., at page 302 citing *Fairtitle* vs. *Gilbert*, says : " It is well established that a corporate body cannot be estopped by deed or otherwise from showing that it had not power to do that which it purports to have done."

It is perhaps advisable to distinguish between the acts of a corporate body which are irregular only and those which are ultra vires. With respect to the former the general rules of estoppel will apply. See re *Romford Canal Co., Pocock's Claim, Prickett's claim, Carews claim* (1883) 24 C.D. 85; *Shaw* v. *Port Philip Gold Mining Co.* (1884) 13 Q.B.D. 103; *Montreal & St. Lawrence L. & P. Co.* v. *Robert.* (1906) A.C. 196.

There will be judgment for the plaintiff for the amount of its claim, $1931.82, with costs.

In the Supreme Court of New Brunswick, King's Bench Division.

No. 5.
Formal, Judgment 16th March, 1934.

No. 5.

Formal Judgment.

IN THE SUPREME COURT.

KING'S BENCH DIVISION.

BETWEEN :

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff*

and

GENERAL DAIRIES, LIMITED - - - - *Defendant.*

Dated and entered the 16th day of March, 1934.

This action having on the 27th day of October, 1933, been tried before Mr. Justice C. D. Richards and the said Mr. Justice C. D. Richards on the 8th day of March, 1934, having ordered that judgment be entered for the plaintiff for the sum of $1931.82.

IT IS THIS DAY ADJUDGED that the plaintiff recover from the defendant $1931.82 and costs to be taxed.

The above costs have been taxed and allowed at $280.10 and judgment signed this 16th day of March, 1934, for the sum of $2211.92.

R. P. HARTLEY,
Registrar.

No. 6.
Notice of Appeal to Appeal Division, 20th March, 1934.

No. 6.

Notice of Appeal to Appeal Division.

IN THE SUPREME COURT.

KING'S BENCH DIVISION.

BETWEEN :

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff*

and

GENERAL DAIRIES, LIMITED - - - - *Defendant.*

TAKE NOTICE that the Defendant will appeal and DOES HEREBY APPEAL to the Supreme Court Appeal Division against the whole of the judgment or order made in this cause on the Eighth day of March instant in which judgment was directed to be entered in favor of the Plaintiff for the sum of NINETEEN HUNDRED THIRTY-ONE DOLLARS and EIGHTY-TWO CENTS ($1931.82) and costs.

AND FURTHER TAKE NOTICE that a motion will be made at the sittings of the Supreme Court Appeal Division to be held at the City of Fredericton in the County of York, on Tuesday the Tenth day of April next that the said judgment may be reversed and judgment entered for the Defendant with costs.

DATED this TWENTIETH day of MARCH A.D. 1934.

(Sgd.) PETER J. HUGHES,
Defendant's Solicitor.

TO MESSRS. WINSLOW & MCNAIR,
Plaintiff's Solicitor.

No. 7.

Reasons for Judgment.

No. 7. Reasons for Judgment. (*a*) Baxter J. (concurred in by Grimmer Acting C.J.).

SUPREME COURT.

APPEAL DIVISION.

MARITIME ELECTRIC COMPANY LTD. - - *Plaintiff;*

and

GENERAL DAIRIES LTD. - - - - - *Defendant.*

and

MARITIME ELECTRIC COMPANY LTD. - - *Plaintiff;*

and

FREDERICTON DAIRIES, LIMITED - - *Defendant.*

(*a*) BAXTER J. (*Concurred in by* GRIMMER, ACTING C.J.)

These are two cases, identical in principle, which were submitted to Richards, J., upon an agreed statement of facts fully set out in his judgment. He found for the plaintiff in both cases upon two points, the first being that there was no estoppel and the other that the plaintiff could not lawfully charge either more or less than the rate prescribed by the Public Utilities Commission. The facts are these: the plaintiff supplied electricity to the defendants who were carrying on the business of buying cream from farmers and others and using the same in the manufacture of butter, ice cream and other milk products and the plaintiffs knew that the defendants were using the electrical energy supplied by them in such manufacture. Accounts were rendered monthly by the plaintiffs to the defendants and these accounts were incorrect as they were based upon actual meter readings of the energy consumed, whereas such readings should have been multiplied by 10 to show the quantity of energy actually supplied. Obviously the error was that of some person in the plaintiff's employ but there is no allegation of negligence, culpable or otherwise. The actions were brought to recover the difference between the amounts for which the defendants had already been billed and paid and the amounts which should have been charged to them had there been no error. The learned judge held that there was no estoppel and gave judgment to the plaintiffs. In doing so he relied upon the case of *Carr* v. *London & Northwestern Ry. Co.* 44 L.J.C. P. 109; L.R. 10 C.P. 307 where Brett, J., laid down "four recognized propositions of an estoppel in pais." They are set out in the learned judge's judgment and need not be repeated here. It is obvious that there did not exist the "wilful endeavor" which characterizes the first of these propositions and though the word "intentionally" seems to have been substituted for "wilfully" (*Sarat Chunder Dey* v. *Gopal Chunder Lala* 8 T.L.R. 732 at p. 734) yet there is not in the present case even an intentional endeavor to cause the defendants to believe in a state of things which the plaintiffs knew to be

In the Supreme Court of New Brunswick, Appeal Division.

No. 7. Reasons for Judgment. (*a*) Baxter J. (concurred in by Grimmer Acting C.J.)—*continued.*

false. The plaintiffs believed their original statements to be true and correct. Nor within the second of the propositions was there a representation of a state of facts which the plaintiffs intended " to be acted upon in a certain way." There was no action intended or desired except that the defendants should pay to the plaintiffs the amount of the original account which account now turns out to have been incorrect. It was not the payment which caused any damage to the defendants and the obtaining of payment is the only possible inference which can be drawn from what the plaintiffs did. The case does not fall within the third proposition for precisely the same reason. The fourth proposition must be read in the light of *Swan* v. *The North British Australian Co.* 2 H. & C. 175; 32 L.J. Ex. 273 and *Seton Laing & Co.* v. *Lafone* 56 L.J.Q.B. 415. It follows that even if negligence were established or inferred, it must be neglect in the transaction itself in which one party has led the other into the belief of a state of facts and upon which the misled party has acted to his prejudice in that transaction. But here it is the action of the defendants in respect to a wholly different set of transactions which is put forward as the ground for relief.

We have the statement of Lord Macnaghten in *Whitechurch Ltd.* v *Cavanagh* 1902 A.C. 117 at p. 130 that he doubts " whether any great advantage is to be gained by endeavoring to reduce it " (The doctrine of estoppel) " to rules such as those which have been formulated in the case of *Carr* v. *London & North-western Ry. Co.*" and in *Greenwood* v. *Martins Bank Ltd.* 1933 A.C. 51 there is at p. 57 a restatement of the principles of estoppel in a more simplified form. It is there laid down that the essential factors giving rise to an estoppel are :—

(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.

Now it is evident that the representation by the plaintiffs to the defendants that the latter were indebted to them in a certain sum of money for electric energy supplied was not intended to induce any course of conduct on the part of the person to whom the representation was made except of course to make payment of the account if that can be termed a ' course of conduct.' It was not intended to induce any particular course of conduct towards third parties. In *Martins Bank* case it was held that there was a duty upon the customer of a bank who knows that the bank has paid cheques to which his name has been forged to disclose to the bank his knowledge of such forgery but I know of no duty upon a creditor to render at his peril to his debtor an absolutely accurate account of the dealings between them, beyond the possibility of mistake. It follows that the appeals must be dismissed with costs on this ground which is

sufficient to dispose of the matters and it is therefore unnecessary to express any opinion upon the other ground upon which the learned judge also relied.

Saint John, N.B.

May 8, 1934.

GRIMMER, ACTING C.J. agreed with Baxter J.

(b) LE BLANC J.

I agree entirely with the judgment of my brother Baxter that these cases do not fall within the first three propositions of the *Carr* case. It would put me far more at ease if the admitted facts throughly convinced me that they do not fall within the fourth.

The rendering of these erroneous statements by the respondents surely ceased to be mistakes long before it was discovered. It could be attributed only to ignorance or absolute indifference to duty on the part of the respondent's employee, who kept up the mistakes for two years and five months.

Negligence has been defined as the absence of care according to the circumstances. That seems to fit here. Whilst the admitted facts do not expressly admit negligence, they spell nothing else. This Court can make its own deduction. *Davidson* vs. *Mitton*, 52 N.B.R., p. 295. Is not the respondent saddling upon an innocent party the damages caused by its own wrong? " Nobody ought to be estopped from averring the truth or asserting a just demand, unless, by his acts or words or neglect, his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done or omitted to say or do." James, L.J., in *Ex parte Adamson, In re Collie*, 8 Ch.D. 817, 26 W.R., page 892.

My dissent would not alter the result. In agreeing to dismiss the appeals I do so with great reluctance.

Moncton, N.B.,

June 1st, 1934.

(Sgd.) ARTHUR T. LEBLANC,
J.S.C.

In the Supreme Court of New Brunswick, Appeal Division.

No. 8.
Formal Judgment, 5th June, 1934.

No. 8.

Formal Judgment.

IN THE SUPREME COURT.

APPEAL DIVISION. June Session, 25 George V.
Tuesday, June 5th, 1934.

ON APPEAL FROM THE KING'S BENCH DIVISION.

BETWEEN :

MARITIME ELECTRIC COMPANY LTD. - - *Plaintiff;*

and

GENERAL DAIRIES, LIMITED - - - *Defendant.*

Upon hearing, in April Session last Mr. P. J. Hughes one of His Majesty's Counsel, of counsel for the defendant, in support of an appeal to set aside the verdict entered for the plaintiff and to enter a verdict for the defendant, and upon hearing Mr. J. J. F. Winslow, one of His Majesty's Counsel, of counsel for the plaintiff, contra, and Mr. Hughes in reply, the Court, having taken time to consider, DOTH NOW ORDER that the said appeal be and the same is hereby dismissed, with costs, to be taxed by the Registrar and paid by the said defendant (appellant herein) to the said plaintiff (respondent herein), or its solicitor, forthwith.

By the Court,

(Sgd.) R. P. HARTLEY,
Registrar.

No. 9.
Order granting special leave to appeal to the Supreme Court of Canada, 16th June, 1934.

No. 9.

Order granting special leave to appeal to the Supreme Court of Canada.

IN THE SUPREME COURT.

APPEAL DIVISION. June Session, 25 George V.
Friday, June 16th, 1934.

BETWEEN

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff*

and

GENERAL DAIRIES, LIMITED - - - *Defendant.*

Upon hearing, on the fifteenth day of June instant, Mr. P. J. Hughes, one of His Majesty's Counsel, of counsel for the defendant, in support of a motion for a rule granting special leave to the said defendant to appeal to the Supreme Court of Canada from the decision and judgment of this Court delivered and pronounced on a former day of this session, dismissing, with costs, the appeal of the said defendant to set aside the verdict entered

for the plaintiff in the King's Bench Division, and to enter a verdict for the defendant, and upon hearing Mr. J. B. McNair, of counsel for the plaintiff, contra, and Mr. Hughes in reply, and upon hearing read the affidavit of Peter J. Hughes, in support of the said motion, and the affidavit of J. J. Fraser Winslow, contra, and time having been taken for consideration, THE COURT DOTH ORDER that special leave be granted to the said defendant to appeal to the Supreme Court of Canada from the said decision and judgment of this Court the costs of this motion to be costs on appeal to the Supreme Court of Canada.

By the Court,

(Sgd.) R. P. HARTLEY,
Registrar.

No. 9. Order granting special leave to appeal to the Supreme Court of Canada, 16th June, 1934—*continued.*

No. 10.

Notice of Appeal to Supreme Court of Canada.

No. 10. Notice of Appeal to Supreme Court of Canada, 18th June, 1934.

IN THE SUPREME COURT.

APPEAL DIVISION.

APPEAL FROM THE KING'S BENCH DIVISION.

BETWEEN :

MARITIME ELECTRIC COMPANY, LIMITED
(*Plaintiff*) *Respondent,*

and

GENERAL DAIRIES, LIMITED - - (*Defendant*) *Appellant.*

TAKE NOTICE that the above named (Defendant) Appellant hereby appeals to the Supreme Court of Canada from the whole of the judgment or decision pronounced and entered in this cause by this Court on the Fifth day of June A.D. 1934 whereby it was ordered that the appeal of the Defendant herein be dismissed with costs.

Dated the EIGHTEENTH day of JUNE A.D. 1934.

(Sgd.) PETER J. HUGHES,
(Defendant) *Appellant's Solicitor.*

To : Messrs. Winslow & McNair,
(Plaintiff's) *Respondent's Solicitor.*

In the Supreme Court of New Brunswick, Appeal Division.

No. 11. Bond on Appeal, 9th July, 1934.

No. 11.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS that General Dairies, Limited, a Company duly incorporated under the laws of the Province of New Brunswick, having its chief place of business at the City of Fredericton, in the County of York, in the Province of New Brunswick, Walter W. Boyce of the City of Fredericton aforesaid, Merchant, and Frank T. Pridham of the same place, Photographer, are jointly and severally held and firmly bound unto The Maritime Electric Company, Limited, a Company incorporated by Charter of the Dominion of Canada in the penal sum of FIVE HUNDRED DOLLARS ($500.00) good and lawful money of Canada to be paid to the said Maritime Electric Company, Limited, its attorney, successors or assigns, for which payment well and truly to be made they bind themselves and each of them binds itself and himself and each of their heirs, executors, administrators and successors by these Presents.

SEALED with their seals and dated this ninth day of July in the year of our Lord one thousand nine hundred and thirty-four.

WHEREAS a certain action was brought in the Supreme Court of New Brunswick, King's Bench Division, by the said Maritime Electric Company, Limited, against the said General Dairies, Limited;

AND WHEREAS judgment was given in the said Court against the said General Dairies, Limited, which appealed from the said judgment to the Appeal Division of the Supreme Court;

AND WHEREAS judgment was given in the said action in the last mentioned Court on the Fifth day of June A.D. 1934 dismissing the appeal of the said General Dairies, Limited;

AND WHEREAS the said General Dairies, Limited, complains that in giving of the said last mentioned judgment in the said action upon the said appeal manifest error has intervened wherefore the said General Dairies, Limited, desires to appeal from the said judgment of the Appeal Division of the Supreme Court of New Brunswick to the Supreme Court of Canada.

NOW THEREFORE the condition of this obligation is such that if the said General Dairies, Limited, shall effectually prosecute its said appeal and pay such costs and damages as may be awarded against it by the Supreme Court of Canada then this obligation shall be void, otherwise to remain in full force and effect.

SIGNED, SEALED AND DELIVERED, in the presence of

(Sgd.) PETER J. HUGHES

GENERAL DAIRIES LIMITED.
(Sgd.) F. T. PRIDHAM, President.
(Sgd.) C. W. JOHNSTON, Secretary (Seal)
(Sgd.) W. W. BOYCE (Seal)
(Sgd.) F. T. PRIDHAM (Seal)

In the Supreme Court of Canada.

No. 12. Agreement as to Contents of Case on Appeal, 9th July, 1934.

No. 12.

Agreement as to Contents of Case on Appeal.

IN THE SUPREME COURT OF CANADA

APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

BETWEEN :

GENERAL DAIRIES, LIMITED - (*Defendant*) *Appellant.*

and

MARITIME ELECTRIC COMPANY, LIMITED (*Plaintiff*) *Respondent.*

It is hereby agreed that the following shall constitute and form the case on appeal to the Supreme Court of Canada :

1. The Writ of Summons.
2. Defence.
3. Statement of agreed facts.
4. Reasons for Judgment of Richards, J.
5. Judgment.
6. Notice of Appeal.
7. Reasons for Judgment on Appeal.
8. Rule of Court of Appeal disallowing the appeal.
9. Rule allowing Appeal to Supreme Court of Canada.
10. Notice of Appeal to Supreme Court of Canada.
11. The agreement settling case on appeal.
12. Bond on Appeal.
13. Certificate of Registrar.
14. Certificate of Solicitor.

Dated the ninth day of JULY A.D. 1934.

(Sgd.) PETER J. HUGHES,
Appellant's Solicitor.

(Sgd.) WINSLOW & MCNAIR,
Respondent's Solicitor.

In the Supreme Court of New Brunswick, Appeal Division.

No. 13. Agreement as to Satisfaction of Bond, 17th July, 1934.

No. 13.

Agreement as to Satisfaction of Bond.

IN THE SUPREME COURT

APPEAL DIVISION.

APPEAL FROM THE KING'S BENCH DIVISION

BETWEEN :

MARITIME ELECTRIC COMPANY, LIMITED (*Plaintiff*) *Respondent*,

and

GENERAL DAIRIES, LIMITED (*Defendant*) *Appellant*.

IT IS HEREBY AGREED that the Bond of the General Dairies, Limited, Walter W. Boyce and Frank T. Pridham, for security for payment of the costs of appeal to the Supreme Court of Canada in this case and dated the NINTH day of JULY A.D. 1934, and hereto annexed, is satisfactory to the parties hereto and that an order may be made approving of the said Bond as security for the costs on said appeal.

DATED the Seventeenth day of JULY A.D. 1934.

(Sgd.) WINSLOW & MCNAIR,
Solicitor for the Respondent.

(Sgd.) PETER J. HUGHES,
Solicitor for the Appellant.

No. 14.

In the Supreme Court of New Brunswick, Appeal Division.

No. 14. Order approving Security, 19th July, 1934.

Order approving Security.

IN THE SUPREME COURT.

APPEAL DIVISION.

APPEAL FROM THE KING'S BENCH DIVISION.

BETWEEN :

MARITIME ELECTRIC COMPANY, LIMITED (*Plaintiff*) *Respondent*,

and

GENERAL DAIRIES, LIMITED - (*Defendant*) *Appellant*.

With the consent of the Solicitors for both parties IT IS HEREBY ORDERED that the Bond of General Dairies, Limited, Walter W. Boyce and Frank T. Pridham, in the sum of FIVE HUNDRED DOLLARS ($500.00) for security of payment of the costs of appeal to the Supreme Court of Canada in this cause and dated the Ninth day of July A.D. 1934, and hereto annexed, be approved as proper security for the payment of the costs of appeal to Supreme Court of Canada and damages in this cause.

DATED the 19th day of JULY A.D. 1934.

(Sgd.) J. D. HAZEN,
Judge of the Supreme Court.

No. 15.

No. 15.

Registrar's Certificate as to Contents of Case on Appeal, 27th August, 1934.

(*Not printed.*)

No. 16.

In the Supreme Court of Canada.

No. 16.

Solicitor's Certificate as to Correctness of Case on Appeal.

(*Not printed.*)

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935.

No. 17.

Factum of General Dairies Limited.

PART 1. STATEMENT OF FACTS

The Appellant carries on business in the City of Fredericton in the manufacture and sale of butter, ice-cream and other milk products. The Respondent sells and distributes electricity in the said City.

The Appellant at all material times purchased electricity from the Respondent and used same for power purposes in the manufacture of said products. The Appellant for said manufacture purchased cream from farmers and paid said farmers for said cream a price based on the difference between the market price of Appellant's products and the cost of manufacture. One item in said cost of manufacture was the cost of said power.

The Respondent had installed on Appellant's premises a meter for the purpose of measuring the amount of electrical current consumed, and the Respondent's employees read this meter each month and delivered to the Appellant a statement of the amount due for the electricity supplied. The Appellant believed this to be a true statement and used the said amount in making up its costs of manufacture and in determining the amount which should be paid to the farmers for the cream purchased: and said amount so determined was then paid for the cream.

After this had been continued in this way for twenty-nine months in so far as the Appellant was concerned the Respondent claimed that its employees had been making a mistake in respect to the rendering of these statements: that in order to give a true statement the meter reading should have been multiplied by ten and that the Respondent's employees neglected to do this and that as a result the bills rendered were too small and Respondent claimed a difference resulting from this mistake amounting to $1931.82.

The Appellant refused to pay this on the ground that as a result of rendering these statements the Appellant had been misled and had acted upon them in good faith and by reason thereof had paid out large sums of money to the farmers over and above what would have been paid if the larger amounts now claimed had been claimed in the statements rendered, and that to now require Appellant to pay this amount would be to compel the Appellant to assume a loss which was due solely to the negligence of the Respondent.

This action was brought to recover this amount. The Appellant among other defences pleaded estoppel. The parties agreed on a statement of facts and the case came for trial before Mr. Justice Richards without a jury upon that statement.

The agreed statement contained the following admissions of fact,—(p. 10, l. 30 to p. 11, l. 20):—

"The defendant Company at all material times carried on business at the City of Fredericton in buying cream from farmers and others and using same in the manufacture of butter, ice-cream and other milk products

therefrom and the defendant paid to the farmers and others from whom the said cream was bought a price for said cream depending in amount amongst other things, on the cost of manufacture of said butter, ice-cream and other milk products, and the defendant used the electric energy supplied by the plaintiff to the defendant for power and other purposes in connection therewith in the manufacture of said butter, ice cream and other milk products and the cost of said energy entered into the said cost of manufacture and directly affected the price which the defendant paid to the farmers and others for the said cream so bought from said farmers and others. The plaintiff at all material times knew that the defendant was using said electrical energy in said manufacture and rendered to the defendant each month a statement purporting to show the amount of electric energy supplied by the plaintiff to the defendant at its said place of business and purporting to be based on the reading of the meter placed by the plaintiff on the defendant's said premises for the purpose of registering the energy so supplied. The defendant believed the said statement so rendered to be true and in accordance with the reading of the said meter and the defendant from time to time paid to the plaintiff the amounts shown by the said statements from time to time and used said amounts so paid as part of its cost of manufacture of said butter, ice cream and other milk products in determining the said cost of manufacture for the purpose of determining the price to be so paid for said cream and the defendant did base thereon the amount which the defendant paid to the farmers and others for said cream. The mistake in rendering said statements showing incorrect amounts to be due was the mistake of the plaintiff. The defendant acted upon said statements so rendered believing the same to be true. By reason of such belief the defendant paid to the farmers and others large sums of money more than the defendant would or could have paid for said cream so bought if the amounts now claimed for electricity had been rendered to and claimed from the defendant at the several times when said statements were rendered by the plaintiff."

A similar case against Fredericton Dairies Limited on identical facts, except as to the time of the service and the amounts claimed, was tried at the same time.

Mr. Justice Richards held that the agreed facts did not bring the case within the rules of estoppel and therefore there was no estoppel in law; and he directed that judgment be entered in favor of the Respondent and against the Appellant for the said sum of $1931.82 and costs. Against this judgment the Appellant appealed to the Appeal Division of the Supreme Court of New Brunswick which dismissed the appeal, but granted leave to appeal to the Supreme Court of Canada.

The Appellant now appeals against the judgment of the Court of Appeal.

PART II. GROUNDS

1. The judgment is against the law as the admitted facts constitute an estoppel.

2. The judgment is against the facts.

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935 —*continued.*

PART III. ARGUMENT

The Respondent each month for twenty-nine months according to the admitted facts sent to the Appellant an incorrect statement of the amount of electricity consumed and by reason of believing those statements to be true the Appellant paid out to the farmers from whom it purchased cream large sums of money which would not have been paid out if the Respondent had not misled the Appellant (p. 9, l. 1 to 41; p. 10, l. 42 to p. 11, l. 20). The result of the judgment in this case is that the Respondent notwithstanding its negligence will recover the full amount of its claim and the Appellant will suffer serious loss resulting from the Respondent's negligence although the Appellant has done no wrong and has not been guilty of any negligence. It is to meet such a state of facts that the doctrine of estoppel has been developed.

In 13 Halsbury 322 we have this statement—

" There is said to be an estoppel where a party is not allowed to say that a certain statement of fact is untrue whether in fact it be true or not."

The rule thus stated it is submitted is based on the well recognized principle that it would be inequitable for one man to state to another that a certain fact existed in connection with a matter in which he knew that other was likely to act, thus causing that other to act upon the information so given, and afterward to come into Court and try to set up for his own benefit a state of facts contrary to the information so given.

The Courts below thought themselves obliged to decide this case according to certain complicated rules of estoppel and held that the facts did not bring this case within those rules. It is submitted that the rule of estoppel is very simple. Lord Birkenhead in *Maclaine* v. *Gatty* (1921) 1 A.C. 376, declared the rule in the following passage (p. 386)—

" The learned counsel cited various authorities in which these doctrines have been discussed but the rule of estoppel or bar as I have always understood it is capable of extremely simple statement. When A. has by his words or conduct justified B. in believing that a certain state of facts exists and B. has acted upon such belief to his prejudice A. is not permitted to affirm against B. that a different state of facts existed at the same time. Whether one reads the case of *Pickard* v. *Sears* or the later classic authorities which have illustrated the topic one will not I think greatly vary or extend this simple definition of the doctrine."

In *Greenwood* v. *Martins Bank* (1933) A.C. 51, the House of Lords again laid down the law of estoppel in very simple terms. Lord Tomlin delivering the unanimous opinion of the House and speaking generally with respect to estoppel said (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 was made.

(3) Detriment to such person as a consequence of the act or omission."

It is submitted that these simple statements have placed estoppel on a basis where equity can be done without the entanglements of the old rules and that much of the complication involved in the old rules has thus been done away with.

Re *National Benefit Association Co., Ltd.*, 48 T.L.R. 612, Eve, J., p. 613.

The Respondent has the duty of reading the meters and supplying the monthly statement of the amount to be paid by the consumers.

The Respondent Company knowing that the Appellant was using in its manufactory power which was supplied by the Respondent and which would enter into the cost of its operations sent the Appellant month after month a statement of the amount of current which the Appellant was consuming and of the amount which the Appellant was required to pay. That is surely a representation " intended to induce a course of conduct on the part of the " Appellant, which is Factor No. 1. The Appellant believing this representation to be true did an act resulting therefrom (thus making up Factor No. 2), namely, used said figures in its cost accounting and paid out to farmers large sums of money which would not and could not otherwise have been paid and thus caused loss and detriment to the Appellant (Factor No. 3).

The learned trial judge held there was no estoppel because he thought it was impossible to fit the facts of this case into the propositions laid down in *Carr* v. *The London & North Western Railway Co.*, 44 L.J.C.P., p. 109.

Mr. Justice Baxter in the Appeal Division took the same view (p. 37), Mr. Justice LeBlanc's reasons (p. 39) are to the effect that the Respondent ought to be estopped because of its negligence but as his dissent would not alter the result he agreed to the dismissal of the appeal—but with great reluctance. Mr. Justice Grimmer agreed with Baxter, J.

It is submitted that since the decisions in *Maclaine* v. *Gatty*, and in *Greenwood* v. *Martins Bank* it is no longer necessary to try to fit a case into the framework of *Carr's* case.

But even if the House of Lords had not spoken in this way, it is submitted, that according to the propositions in *Carr's* case as modified and explained by latter cases the Respondent would be estopped in this case.

In order to understand fully the rules in *Carr's* case it is necessary to look at certain other cases preceding and also following it.

In *Freeman* v. *Cooke*, 2 Ex 654 (1848) 154 E.R. 652, Parke B., delivering the judgment of a Court consisting of Anderson, Rolfe, Platt and himself, stated the rule of estoppel as follows :

Page 663—4.

" It is contended that it was (an estoppel) upon the authority of the rule laid down in *Pickard* v. *Sears*, (6 A. & E. 474). That rule is, " that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief,

or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That was founded on previous authorities, in the cases *Greaves* v. *Key* (2 B. & A. 318), *Hearne* v. *Rogers* (9 B. & C. 586), and has been acted upon in some cases since. The principle is stated more broadly by Lord Denman in the case of *Gregg* v. *Wells* (10 A. & E. 98) where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears*, must be considered as established. By the term " wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly and 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 conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect."

The result of that decision would therefore, it is submitted, leave the rule just as since stated by Lord Birkenhead and already quoted.

Pollock C. B. in *Cornish* v. *Abington* (4 H & N 549) observes that the word " wilfully " in the rule means nothing more than " voluntarily " (p. 555).

In the present case it was the duty of the Respondent to read the meter and deliver a bill of the amount due; by negligence or omission that was not done correctly as mentioned by Parke B.

In 1875 in the Court of Common Pleas in *Carr* v. *The London and Northwestern Railway Company*, 44 L.J.C.P. 109, Brett J. attempted to collect and lay down certain rules on the subject. He broke the statement of Parke B. into four (4) propositions as follows :

1. That if a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

2. That if a man either in express terms or by conduct makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and if it be acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

3. 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 he 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.

4. That if in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the first cannot be heard afterwards as against the second to show that the state of facts referred to did not exist.

It will be noted that these propositions, if taken literally, would narrow the proposition of Parke, B. previously quoted, which was practically as broad as the statement of the law as laid down in the House of Lords in the cases already mentioned, and Brett as Lord Esher M.R. found it necessary to explain these propositions when sitting in the Court of Appeal in *Seton Laing & Company* v. *Lafone*, 56 L.J.Q.B. 415. In that case he pointed out that mistake may be the foundation of estoppel. At page 416 he said :

" Estoppels are not always caused by the same series of events, and of those laid down in *Carr's* case no one was intended to include any other. Each was meant to be independent of the others, and there may be cases in which there was no fraud and no negligence, but there was mistake. The present case turns on that one of the propositions in *Carr's* case in which it is laid down that there is an estoppel " if in the transaction itself which is in dispute one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice." "Calculated " means reasonably calculated.....

.....

What does " proximate cause " mean ? The expression was taken from the case of *Swan* v. *The North British Australian Company* where it was first used by Mr. Justice Mellor. He says, " I proceed to inquire what is the culpable negligence which has been the proximate cause that the defendants have registered a forged transfer as a genuine one so as to estop the plaintiff." " Proximate " in that passage means real. Further on Mr. Justice Blackburn said : " What I consider the fallacy of my brother Wilde's judgment in the present case is that he lays down the rule in general terms that if one has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards as against such persons to show that state of facts did not exist." This is very nearly right, but in my opinion not quite, as he omits to qualify it by saying that the neglect must be in the transaction itself and be the proximate cause of leading the party into that mistake." The fifth proposition in *Carr's* case is taken from the judgment of

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935 —*continued.*

Baron Wilde but I put in the words " proximate cause " which has been left out by Baron Wilde and supplied by Mr. Justice Blackburn."

And at page 417—

" It is not necessary that he should have intended the plaintiff to act upon it if in fact he acted on it."

Lord Justices Fry and Lopes agree that " real cause " should be substituted for " proximate cause " in the propositions. (p. 417).

These propositions have been used in a number of cases since 1875 but it has been recognized that they do not cover the whole field of estoppel. Take for example, a mortgage by deposit of the title deeds which seems to be quite common in England. A. borrows money from B. on the security of certain lands of A. and A. gives B. his title deeds by way of mortgage. If for some purpose B. later lets A. have the title deeds in his possession and by means of this A. borrows from C. another sum of money by fraudulently depositing the title deeds with C., B. would be estopped as against C. from setting up his first mortgage on the property. Yet when B. allowed A. to get possession of the title deeds he did not intend to represent to C. that he (B) had no claim upon the property. In fact he made no statement to C. at all. He is estopped because by his conduct he has enabled A. to mislead C.

It is probable that the present case may fall within the second proposition in *Carr's* case because when the Respondent rendered the statement each month to the Appellant it knew that the amount was going into the Appellant's costs of operation and therefore intended that it should be so used or is presumed to have so intended. Whether the amount of the bill might actually affect the business by increasing the amount to be paid to the farmers or in what particular way it might be used or affect the Appellant the Respondent might not know, but that it would be used for some purpose in the Appellant's business the Respondent did know and that seems sufficient under the cases.

But in any event, it is submitted, the case falls within the third proposition in *Carr's* case.

It seems settled that the words " in a particular way " and " in that way " should be eliminated from the proposition because Lord Esher said in *Seton* v. *Lafone* (p. 417)—

" It is not necessary that he should have intended the plaintiff to act upon it, if, in fact he acted on it."

and Fry L. J. said—(p. 417)—

" It is not the less the proximate cause because the defendant did not anticipate it. The question does not depend upon the state of the mind of the maker, but of the recipient."

Therefore, it is submitted, the proposition as so modified should read thus :

" If a person 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 he was intended to act

upon it and if he with such belief does act to his damage, such person is estopped from denying that the facts were as represented."

In *Dunn* v. *Shanks* (1932) N.I. 66, the Supreme Court of Northern Ireland held there was estoppel although the jury had found that the Defendant did not intend that the Plaintiff should believe the fact that he was found to have represented.

It is submitted therefore that Mr. Justice Baxter was in error in holding that it was necessary to show that the Respondent intended that the Appellant should act in a particular way or knew that the Appellant was going to act in a particular way in order to succeed.

Sarat Chunder Dey v. *Gopal Chunder Lala* (1892) 8 T.L.R. 732 P.C., Lord Shand 733.

But in any event it is submitted that the case at bar distinctly falls within the fourth proposition as explained in *Seton* v. *Lafone.*—which may be stated thus :

" If in the transaction itself which is in dispute A. has led B. into the belief of a certain state of facts by conduct of culpable negligence reasonably calculated to have that result and such culpable negligence has been the real cause of leading and has led B. to act by mistake upon such belief to his prejudice A. cannot be heard afterwards as against B. to show that the state of facts referred to did not exist."

In this case the Respondent placed a meter on Appellant's premises to measure the current supplied. The Respondent read this meter and submitted its account. This was Respondent's duty. Respondent now claims that Respondent's employees made a mistake month after month and did not submit the correct bill; that it was the employees' duty to multiply the meter reading by ten and that they failed to do so. That cannot be anything but negligence. The Respondent owes the duty to the Appellant to read the meter and submit a correct statement. It submitted an incorrect one. Mr. Justice Baxter said there was no allegation of negligence and therefore thought this proposition not applicable. The facts are admitted. If there had been no negligence on the part of the Respondent this trouble could not have arisen. The Appellant would not have paid out the money it did as the result of the statement rendered; it would probably have refused to take the current at the price the Plaintiff is now claiming the right to charge and the account never would have been contracted.

Therefore we have this situation : In the transaction with respect to selling electric current the Respondent has led the Appellant into the belief that the monthly charges for same were as stated in the bills rendered by negligently rendering incorrect bills and such conduct has been the real cause of leading Appellant and did lead Appellant to act by mistake on such statements to its prejudice.

If Mr. Justice Baxter when he says that there was no allegation of negligence means that negligence was not specifically pleaded, it is submitted that that was not necessary as estoppel was pleaded and that defence included all that is necessary to constitute estoppel whether it involves

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935 —*continued.*

fraud or negligence. The exact form of the pleadings is immaterial so long as the facts are before the Court. See statement of Vaughan Williams, L. J. in *Keith* v. *Gancia & Co.*, 73 L.J. Ch. 411, at p. 416. In this case all the facts were agreed upon.

It is submitted therefore that there can be no doubt that the present case falls within the propositions laid down in *Carr's* case if those are still to be relied upon.

Eminent judges have doubted the wisdom of trying to confine the benefits of estoppel within set rules. Lord Macnaghten in *George Whitechurch, Ltd.*, v. *Cavanaugh* (1902) A.C. 117 at p. 130; Luxmoore J. in *DeTchihatchef* v. *The Salerni Coupling Co.* (1932) 1 Ch. 330 at p. 342.

But as already stated it is submitted that the decisions of the House of Lords in *Maclaine* v. *Gatty* and *Greenwood* v. *Martin's Bank* have done away with this and remove the necessity of all this particular examination which the learned judges below have followed in this case. The law has been brought back by these cases to the simple proposition that a man who has misled another in a business transaction by his word or conduct or by his silence when he ought to speak, and has injured that other thereby will not be permitted to set up a different state of facts for his own advantage. In the second of these cases Greenwood's wife by means of forged cheques withdrew Greenwood's money from the defendant bank. When he discovered this he did not tell the bank at once as he thought the money would be paid back. When he found that this would not be done he announced his intention of informing the bank, whereupon his wife committed suicide. He then told the bank of the forgery and when the bank refused to restore the money to his account brought action against the bank to have the money replaced to his credit. The House of Lords held that he was estopped.

In that case Greenwood did not make any statement; he was merely silent when he should have spoken. All the money had been withdrawn before Greenwood knew about it: so the bank did not take any steps to its detriment as a result of his silence. But the Court held that if he had spoken the bank might have brought an action against his wife and this right was lost by her suicide before the information was given them. Greenwood did not know when he refrained from informing the bank of the forgery that his wife was going to commit suicide : so his silence could not have been with the intention of causing the bank to lose its right of action in this particular way, or in fact to lose a right of action in any way. Yet Mr. Justice Baxter held that unless the Respondents intended their false statement " to be acted upon in a particular way " they were not estopped (p. 38, l. 3). It is submitted therefore that the elaborate rules which for a time were thought to be necessary in estoppel have been overruled and that we have to consider only the three simple factors laid down by the House of Lords, and which will cover all cases; and the admitted facts in the present case clearly bring this case within the principle of that decision.

In 2 Smith's Leading Cases 13th Ed. p. 812 there is the following statement :

" The truth is, that the Courts have been for sometime favorable to the utility of the doctrine of estoppel, hostile to its technicality. Perceiving how essential it is to the quiet and easy transaction of business that one man should be able to put faith in the conduct and representations of his fellow, they have inclined to hold such conduct and such representations binding in cases where a mischief or injustice would be caused by treating their effect as revocable."

Then it was argued in the Courts below that the Court has no power to relieve against this injustice and that the Appellant must bear the loss arising from the Respondent's negligence, because of Section 16 of The Public Utilities Act (Chapter 127 R. S. 1927). That section is as follows :

" 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."

In the first place when taken literally, it is submitted that there is no breach of this section in the present case. There are two different things mentioned in the section " service " and " rates, tolls and charges." These must refer to different things. The Company makes a charge for the service of standing by and being prepared to serve when called upon. It has a charge for this service called a " service charge." The Respondent always charged the Appellant the regular charge for this in the form of a minimum charge. The Respondent also always charged the Appellant the regular rates, tolls and charges in the bills rendered. So there was no breach of the Statute. What the Respondent did was to make a mistake in the amount of energy supplied in rendering the bill, and the Statute does not when construed literally cover such a mistake. Therefore the Court would not be obliged to decide this case so as to enable the respondent to commit this injustice.

But in any event, it is submitted this Statute should not be construed to deprive the Appellant of its ordinary legal rights including the right to set up an ordinary ground of defence. For instance: would it be reasonable to hold that because of the wording of this section a defendant could not successfully plead the Statute of Limitations ?

Or if the Respondent, knowing that the Appellant would refuse to take energy at the high price charged in its schedules had deliberately sent wrong bills with intent to deceive the Appellant and had thereby induced the Appellant to continue using the current, and then before the claim became barred by the Statute of Limitations had set up a claim for the difference : is it conceivable that any Court would allow the Respondent to take advantage of its fraud and recover the difference ? It is submitted, it would not. But the statute would be equally as applicable in the suggested cases as in the present case.

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935 —*continued.*

It is submitted, therefore, that these examples show that a statutory provision such as we have here will not deprive a defendant of his ordinary rights of defence and therefore will not deprive a defendant of the right to set up a defence of estoppel in a proper case.

Statutes must be read in the light of the purpose for which they were passed. For instance : Courts will not enforce the provisions of the Statute of Frauds requiring an agreement concerning the sale of land to be in writing if there has been part performance, although that seems to be directly against the provisions of the Statute. The Court will not allow the Statute to be used as a means of perpetrating a fraud.

This section of The Public Utilities Act is directed against a public utility entering into a contract which was intended to prefer one consumer in a class over another consumer in the same class. There is not a word in the section purporting to bind the consumer or to take away his ordinary rights. A plea of estoppel would not, it is submitted, be against the provisions of this Statute.

Under the Canada Temperance Act the sale of intoxicating liquor was forbidden. No provision was made to forbid the purchase of liquor. It was therefore held not to be an offence to purchase liquor, as this was not specifically mentioned in the Act.

Ex pàrte Barker 30 N.B.R. 409;

Ex parte Armstrong, 30 N.B.R. 423.

Similarly it would seem that so far as the consumer is concerned the only thing that is forbidden is to " knowingly " receive a preference (Sec. 19).

" Expressio unius est exclusio alterius." *Attorney General* v. *Bradlaugh*, 14 Q.B.D. 667, 54 L.J.Q.B. 205.

Sections 18 and 19 of the said Act are as follows :—

" 18.—(1) Every public utility which, directly or indirectly by any device whatsoever, charges, demands, collects or receives from any person, firm or corporation, a greater or less compensation for any service rendered or to be rendered by it, than that prescribed as provided herein, or than it charges, demands, collects or receives from any other person firm or corporation for a like and contemporaneous service, is guilty of unjust discrimination, which is hereby prohibited and liable to a penalty of not less than fifty dollars nor more than five hundred dollars, which may be imposed by the board; and if the same is not paid within fifteen days after the imposition thereof, the non-payment of the same shall be ground (after public notice thereof in The Royal Gazette) for proceedings to be taken by the Attorney-General to dissolve the public utility so in default.

(2) This section shall not apply to any contract which was current on the 26th day of March, 1900.

19.—(1) No person, firm or corporation shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified.

(2) Any person, firm or corporation violating the provisions of this section is liable to a penalty of not less than fifty dollars nor more than five hundred dollars, for each offence, which may be imposed by the board, and if said penalty is not paid within fifteen days after the imposition thereof, the chairman of the board may transmit a statement, under his hand, to the Registrar of the Supreme Court, of the imposition of such penalty.

(3) On receipt of such statement, such Registrar shall issue execution against the person, firm or corporation on whom the penalty was imposed, directed to the sheriff of the county in which the head office or principal place of business of the said person, firm or corporation is situate, directing him to levy on the goods and chattels, lands and tenements of the said person, firm or corporation, for the amount of the said penalty, with costs of execution, sheriff's fees and poundage."

Estoppel has been allowed against a statutory provision when justice required it. In *London Life* v. *Wright*, 5 S.C.R. 466 the Supreme Court allowed an estoppel against the statutory provisions which required the Company's contract to be executed under seal.

In *Wilson* v. *McIntosh*, 63 L.J.P.C. 49 the Judicial Committee quote with approval at page 52 the following :—

" It is to my mind a clear principle of equity, and I have no doubt there are abundant authorities on the point, that equity will interfere to prevent the machinery of an Act of Parliament being used by a person to defeat equities which he has himself raised, and to get rid of a waiver created by his own acts."

Section 16 of The Public Utilities Act may be viewed from two aspects. If the Respondent undertook by agreement to favor one consumer over another the section would provide authority by which it might be restrained from doing so by action in the name of The Attorney General. The other is when a public utility invokes the statute for its own benefit as in the present case. In such case the party can waive the benefit of the statute and can surely be estopped from saying that it did not do so.

In *Attorney General of Victoria* v. *Ettershank* (1875) 44 L.J.P.C. 65 and *Devenport* v. *The Queen* 47 L.J.P.C. 8 it was held that certain provisions required by statutes could be waived.

Barrow Ship Ins. Co. 54 L.J.Q.B. 377, Brett M.R., p. 375.

Again : let us suppose that the condition of affairs now complained of had been brought about intentionally by a contract made between the parties; that the Respondent had made an agreement with the Appellant to deliver to it electricity at the price which was actually charged

In the Supreme Court of Canada.

No. 17. Factum of General Dairies Limited, 2nd January, 1935 —*continued.*

during the time covered by the account sued for in this suit and that the Appellant had paid nothing and the Respondent had brought action for the amount due under the said contract, or in the alternative for the amount due under the established rates. It is submitted the Respondent could not recover under either claim. By said Section 16 the Respondent should charge schedule rates. As the company had actually contracted for a non-schedule rate it could not establish a contract for the schedule rates. And as by Section 18 every public utility is prohibited from using any devise whatever to discriminate between consumers and is liable to a penalty for doing so, and as by Section 19 any consumer who " knowingly " accepts any discrimination is liable to a penalty for doing so, the utility could not collect on the actual contract.

The word " device " in the 18th Section imports a trick or stratagem and therefore an intent and purpose to grant discrimination; and the word " knowingly " in the 19th Section requires that there should be an intention to receive a benefit from the discrimination. The contract suggested would be illegal therefore and if the Defendant pleaded the illegality the Plaintiff could not recover.

Taylor v. *Chester*, 38 L.J.Q.B. 225–227;
Leake on Contracts, 7 Ed. page 579;
Wilkins v. *Wallace*, 38 N.B.R. 80;
Vanbuskirk v. *McNaughton*, 34 N.B.R. 125.

Section 16 would not deprive a defendant of his defence in such a case where there had been a wilful preference; a fortiori it cannot deprive him of his rights of defence when discrimination was not knowingly received.

The penalties provided by the Public Utilities Act are applicable only to preferences knowingly and intentionally made and therefore did not cover the facts of the case at bar.

In *Skyring* v. *Greenwood* (4 B & C 281; 107 E.R. 1064) paymasters had rendered accounts to Major Skyring by which they gave him credit for larger amounts than he was legally entitled to and thus led him to draw and spend larger sums than he would have been legally entitled to. The paymasters were held estopped from claiming repayment. Abbott, C.J., said at p. 289:

" Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here the defendants have not merely made an error in account but they have been guilty of a breach of duty by not communicating to Major Skyring the instruction they received from the Board of Ordnance in 1816; and I think therefor that justice requires that they shall not be permitted either to recover back or retain by way of set-off the money which they had once allowed him in account."

And Bayley, J., says at page 290—

" It would have been a good defence to that action to say that the defendants had voluntarily advanced money to the deceased when he asked no credit and that they had told him that they had received the money for his use, and that on the faith of their representation he had drawn it out of their hands as his own money and had been induced to spend it as such."

The principle of the above case is approved by Lord Sumner in the House of Lords in *Jones & Co.* v. *Waring & Gillow*, 95 L.J.K.B. 913.

Holt v. *Markam*, 1923, 1 K.B. 504, 92 L.J.K.B. 406;

Freeman v. *Jeffries* (1869) L.R. 4 Exch. 189–195, 38 L.J. Ex 116.

It is submitted therefore that the appeal should be allowed and judgment entered for the Appellant with costs.

PETER J. HUGHES,
Appellant's Solicitor.

DATED the Second day of January A.D. 1935.

No. 18.

Factum of Maritime Electric Company Limited.

PART 1.

STATEMENT OF FACTS

In this action the plaintiff company sued the defendant for $1931.82 balance due for electric current supplied by the plaintiff to the defendant from December 1929 to April, 1932 as per detailed statement set out in the Statement of Claim. (p. 4 of Record.)

The plea upon which the appellant relies is as follows:

" The defendant before action brought satisfied and discharged the Plaintiff's claim by payment as follows:

" The Plaintiff during all the time mentioned in the Statement of " Claim during which electric energy was supplied to the Defendant " delivered to the Defendant each month a statement of the amount of " electric energy supplied by the Plaintiff to the Defendant during the " month preceding the rendering of said Statement, and the Defendant " each month paid the amount thereof in full satisfaction therefor the " said amounts so paid being the several sums credited to the Defendant " in the particulars set out in paragraph 3 of the Statement of Claim.

" The Defendant says that the Plaintiff is estopped from saying that " the Plaintiff supplied to the Defendant at its place of business on King " Street in the City of Fredericton the electric energy mentioned in the " particulars of the Plaintiff's Statement of Claim, or any amount of " energy in addition to the amounts mentioned in the monthly statements

In the Supreme Court of Canada.

No. 18. Factum of Maritime Electric Company Limited, 14th January, 1935—*continued.*

" rendered to the Defendant and for which payment was made by the " Defendant as mentioned in the 3rd paragraph of this Defence, because " the Defendant at all material times carried on business at the said " place of business mentioned in the Statement of Claim in buying cream " from farmers and others and using same in the manufacture of butter, " ice cream and other milk products therefrom and the Defendant paid " to the said farmers and others from whom the said cream was bought a " price for said cream depending in amount, amongst other things, on " the cost of manufacture of said butter, ice cream and other milk " products, and the Defendant used the electric energy supplied by the " Plaintiff for power and other purposes in connection therewith in the " manufacture of said butter, ice cream and other milk products, and the " cost of said energy entered into the said cost of manufacture and " directly affected the price which the Defendant paid to said farmers " and others for the said cream so bought from said farmers and others " and the Plaintiff well knowing that the Defendant was using said electric " energy in said manufacture rendered to the Defendant each month a " statement of the amount of electric energy supplied to the Defendant at " its said place of business purporting to be based on the reading of a " meter placed by the Plaintiff on the Defendant's said premises for the " purpose of registering said energy so supplied, and the Defendant " believing the said statement so rendered to be true and in accordance " with the reading of said meter paid the Plaintiff the amount as shown " by said statement and used said amount so paid as part of its costs of " manufacture of said butter, ice cream and other milk products in " determining the said cost of manufacture for the purpose of determining " the price to be so paid for said cream and the Defendant did base " thereon the amount which the Defendant paid to the farmers and others " for said cream and if the amount mentioned in the said several statements " so rendered by the plaintiff for said electric energy was incorrect, which " the Defendant does not admit, the mistake was the mistake of the " Plaintiff and the Defendant acted upon said statements so rendered " believing same to be true to the damage of the Defendant and the " Defendant by reason of said statements and by reason of believing same " to be true paid to the said farmers and others from whom said cream " was bought large sums of money more than the Defendant would or " could have paid for said cream so bought if the amounts now claimed " for electric energy had been rendered to and claimed from the Defendant " at the several times when said statements were so rendered by the " Plaintiff." (See Pages 6 and 7 of Record.)

The defendant also denied that the plaintiff supplied the amount of electric energy claimed for but at the hearing this was admitted.

The Plaintiff admitted all the above allegations and it was also admitted that the meter reading upon which the monthly statements were rendered was a correct reading of the dials of the meter but in order to arrive at the amount of electric energy used through said meter it was necessary to multiply the dial reading by ten. Through error this was not

done and consequently the defendant was only charged in said monthly statements with one tenth of the electric energy actually supplied by the plaintiff to the defendant.

See admissions of facts agreed upon between counsel pp. 8 & 9 of Record.

The rates fixed by the Board of Public Utilities Commissioners of the Province of New Brunswick were also admitted by agreement.

By the Public Utilities Act, R.S.N.B. 1927, Cap. 127, a public utility is required to charge the rates fixed by the Board of Public Utilities Commissioners. See Section 16.

" 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 times established, or demand, collect or receive " any rates, tolls or charges not specified in such schedules."

The plaintiff was at all material times a " public utility " within the meaning of the said Act.

At the trial no evidence was offered other than admissions above referred to and after hearing argument and having taken time to consider the learned trial judge gave judgment allowing the plaintiff's claim in full.

It is to be noted that in the statement of defence (pp. 6 & 7) there is no plea or allegation of fraud or negligence. See Judgment of Richards J. at p. 29, lines 36 and 37.

It was alleged in the defence and admitted by the plaintiff that the plaintiff knew that the defendant was using the electric energy supplied by the plaintiff, in the defendant's business but it was not alleged or admitted that the plaintiff knew that the defendant based the price that was paid by defendant for cream upon the cost of manufacturing.

The defendant appealed to the Appeal Division of the Supreme Court of New Brunswick and the appeal was dismissed. See Judgment of Baxter J. 37 to 39 and of LeBlanc J., page 39.

Special leave to appeal to the Supreme Court of Canada was granted by the Appeal Division.

PART II.

The Respondent contends that the appeal should be dismissed for the following reasons :—

1. The principle of estoppel is not applicable in any event.

2. No estoppel lies because the plaintiff being a public utility is obliged by statute to charge, demand, collect and receive no more and no less than the rates fixed by the Board of Public Utilities Commissioners and it would be ultra vires of the Board to collect or receive less than the amount so fixed or to agree to do so.

In the Supreme Court of Canada.

No. 18. Factum of Maritime Electric Company Limited, 14th January, 1935—*continued.*

PART III.

ARGUMENT.

In the case before the Court the facts are simple.

The plaintiff respondent supplied electric current to the appellant over a period of about two and a half years and sent monthly statements. These statements were based on a misreading of the meter whereby only one-tenth of the amount supplied was charged to the defendant. The defendant had the use of the electric current that was supplied but only paid on the basis of having received a tenth of the amount actually supplied.

The mistake was the mistake of the respondent. It was equally the mistake of the appellant. There was no fraud and no negligence.

The defendant in the Court of Appeal argued that there was negligence and LeBlanc J. in the Court of Appeal while not dissenting from the judgment of the Court said " negligence has been defined as the absence " of care according to the circumstances. That seems to fit here. While " the admitted facts do not expressly admit negligence, they spell nothing " else."

Negligence however was not alleged in the pleadings nor admitted in the admitted statement of facts nor referred to in the argument at the trial. The learned Trial Judge said (Record, p. 29, lines 36 & 37): " There is no allegation of negligence."

In order to clear the issues the plaintiff went a long way in making certain admissions which would not have been made if negligence had been alleged.

It is too late now and it was too late in the Court of Appeal to charge the plaintiff with negligence.

In order to charge a party with negligence, negligence must not only be alleged in the pleadings but particulars of negligence must be given.

In the White Book under Order 19, rule 6, which is the same as the rule in the New Brunswick Supreme Court Rules and under the sub-title " Negligence " it is stated " Particulars must always be given in the " pleadings showing in what respect the defendant was negligent. The " statement of claim ought to set out facts, upon which the supposed duty " is founded and the duty to the plaintiff with the breach of which the " defendant is charged. Then should follow an allegation of the precise " breach of that duty of which the plaintiff complains." Citing *Gautret* v. *Egerton* (1867) L.R. 2 C.P. 371. This case was cited with approval by Lord Alverstone C.J. in *West Rand Central Gold Mining Co.* v. *Rex* (1905) 2 K.B., at p. 400.

The plaintiff was in a position to prove many facts that would have shown that the defendant was quite as much, if not more to blame than was the defendant. For instance, the plaintiff having many hundreds of customers cannot have a particular eye on any one customer to note whether the amount of electricity used is out of proportion to the amount charged in the plaintiff's books. On the other hand it could have been shown that

the defendant had other plants where electric power was used in the defendant's business and that the officials at the Fredericton plant must have known that they were not paying for what they were getting. See particulars in statement of claim (page 4 of Record). In August 1930 the defendant was billed for 455 K.W.H. whereas the correct quantity was 4550 K.W.H. The amount of the account as rendered was $25.75 whereas it should have been $149.50.

Where a point not taken in the Court below is put forward by an appellant for the first time in a Court of Appeal, that Court ought not to decide in his favour on such point unless it is satisfied beyond doubt: (1) That it has before it all the facts bearing upon the new contention as completely as if it had been raised in the Court of first instance: (2) that no satisfactory explanation could have been given if so raised. *The Tasmania* (1890) 15 A.C. 225. See also *Connecticut Fire Insurance Company* v. *Kavanagh* 1892 A.C. 473. Judgment of Lord Watson at p. 478 *Banbury* v. *Bank of Montreal* 1918 A.C. 626, 661.

It is important to clear up this point, which is not a mere technicality, before proceeding with the argument, though the respondent will contend that even if there was negligence by the respondent and none by the appellant, nevertheless no estoppel lies.

The general principles upon which estoppel is based are set out very fully in the judgment of the learned trial judge to which this Court is respectfully referred.

Never have the principles of estoppel been applied in such a case as the one before the Court.

It is an undisputed principle of law that where a liquidated amount is undisputedly due, payment of a smaller amount cannot be relied upon as a satisfaction unless the payment is made at an earlier date or in a different manner than the creditor is legally entitled to insist on, because there is no consideration for the relinquishment of the residue. *Cumber* v. *Wane* (1721) 1 Stra. 426.

In that well known case Wane owed Cumber £15 and Cumber agreed to accept £5 as full settlement for which Wane gave his note. Cumber afterwards sued for the whole £15. Wane pleaded that the plaintiff had agreed to accept £5 in full satisfaction for the debt of £15 and that he had paid the £5. Though perfectly true, this was not considered a satisfactory plea and Wane was ordered to pay the remaining £10.

The principle on which *Cumber* v. *Wane* proceeds is that there is no consideration for the relinquishment of the residue.

It is submitted that no plea of estoppel could have been set up against Cumber, that would estop him from claiming that there was no consideration.

In the case of *Reg* v. *Blenkinsop* (1892) 1 Q.B. 43 the expenses of carrying the Public Libraries Act into execution in any parish were to be made and recovered in like manner as a poor rate except that persons occupying certain specified kinds of land, not including land used for the purpose of a railway, were to be rated in respect of one-third of the net

In the Supreme Court of Canada.

No. 18. Factum of Maritime Electric Company Limited, 14th January, 1935—*continued.*

annual value. Under a mistaken belief as to the effect of the Act only one-third was demanded and collected from a Railway Company who only paid the amount demanded. This went on over a period of four successive years but in the fifth year the mistake was discovered by the overseers who sought to recover from the Company the unpaid two-thirds for each of the preceding four years.

It was contended on behalf of the Railway Company that the case came within *Skyring* v. *Greenwood* (4 B. & C. 281) that money allowed in an account under a mistake of law stands in the same footing as money paid under a mistake of law and cannot be recovered back and that what had happened was equivalent to an allowance in account and it was contended that the reason of the estoppel in *Skyring* v. *Greenwood* applied with equal force in the case of the Company. There was the same hardship on the Company for the Company had long since distributed the money in dividends.

A. L. Smith, J., at p. 47 said " Then it was said that the case came within the " rule of *Skyring* v. *Greenwood*, that money allowed in an account " under a mistake of law cannot be recovered back and that the non- " demand of the two-thirds was equivalent to an allowance in account " but I do not think this could in any sense be treated as an allowance " in account. The money was not allowed, it was merely not claimed. " I can see no reason why the money should not be paid."

See also judgment of Mathew, J.

In the case before the Court there was no allowance or credit as in *Skyring* v. *Greenwood* or in *Holt* v. *Markham* (1923) 1 K.B. 504, both of which cases were relied on by the appellant in the Courts below. Furthermore this is a mistake of fact and not a mistake of law.

This is an action for balance due for goods sold and delivered, the others were for money had and received.

In *Perry* v. *Attwood* 6 E & B 691 the declaration alleged that the plaintiff let certain mines to the defendant upon a rent payable on a tonnage basis on the quantity of ore raised. Covenant by defendant to pay the rent; breach, non-payment of tonnage rent upon the quantity of ore raised. Plea: that the defendant annually accounted with the plaintiff each year concerning all the ore raised in that year and the amount of the tonnage rent; and on each accounting a certain sum was agreed by defendant and plaintiff to be the balance due, and the balances were paid by the defendant to plaintiff and accepted by plaintiff in full satisfaction and discharge of the tonnage rent payable. Replication; that the accountings were not correct, but ore was omitted, which ought to have been included, by mistake and through ignorance of facts on the part of the plaintiff; and the balances were paid and accepted on such accountings. On demurrer to plea and replication held :—That the plea, showing only a statement of accounts on one side, did not show a statement binding plaintiff at any rate not conclusively, and was at any rate answered by the replication showing error in the account though not fraud.

Lord Campbell, C.J., said " I am sorry that several successive yearly " settlements should be disturbed; but we must decide upon the legal " effect of what has passed. It seems to me that the plea is insufficient, " the account on one side only having been stated, which brings the case " within the authority of *Smith* v. *Page* (15 M. & W 683). The proceeding " shown is not in the nature of an accord and satisfaction nor does it bind " the parties; all that is said is that there was a settlement on the account " of claims on one side, a balance stated and payment of that balance. " No weight is to be attached to the allegation that payment was given " and accepted in satisfaction of the tonnage rent due; there appears no " consideration for a waiver of the debt actually due."

And so in the case before the Court if the appellant's plea be analysed the effect of it will be found to be that the plaintiff is estopped from saying that there was no valid agreement to relinquish the residue.

Even where the parties got together each year as in *Perry* v. *Attwood* and settled and agreed upon the accounts it was held not to bind the parties.

But even though no cases such as the present could be produced where a plea of estoppel could be successfully set up, cases somewhat similar were presented and in which estoppel had been pleaded successfully.

Mr. Justice Richards in his judgment (p. 23 of Record at p. 33 et seq) went very fully into the principles of estoppel. Dealing with the four propositions laid down by Brett J. in *Carr* v. *London and N.W. Railway Co.*, L.R. 10 C.P., at p. 316, he held that none of them could apply in this case.

As to the first and fourth propositions in *Carr's* case neither can apply. " There is no suggestion of any false statement such as would be necessary " for the first proposition to apply and there is no allegation of negligence " which would be essential to bring the case within the fourth proposition."

Even if negligence had been alleged in the pleadings and proven or admitted at the trial it is submitted that it would not affect the respondent's right to recover herein.

In the case of *R. E. Jones Ltd.* v. *Waring & Gillow, Limited* (1926) A. C. 670 which was an action to recover money paid under a mistake of fact it was argued that the mistake was one with which the defendant payee had nothing to do and it was contended at p. 675 that: For repayment of money paid under a mistake of fact either (1) the mistake must be common to both parties or (2) the defendant must have contributed to the mistake or been aware of it or (3) the defendant's position must not have been altered to his detriment in consequence of the repayment. Counsel also quoted and relied upon the following from the notes to *Marriot* v. *Hampton* in Smith's Leading Cases 12th ed., Vol ii, p. 430: " It may also be laid " down as a general rule usually applicable to this action that the person " who received the money must not, through the neglect or misconduct " of the person who has paid it be placed in a worse position than if it " had not been paid."

The House of Lords, however, did not accept these arguments.

In the Supreme Court of Canada.

No. 18. Factum of Maritime Electric Company Limited, 14th January, 1935—*continued.*

Lord Shaw in delivering one of the majority judgments at p. 688 quoted with approval from the judgment of Parke B. in *Kelly* v. *Solari* (9 M. &. W. 54, 58): "I think that where money is paid to another under "the influence of a mistake, that is, upon the supposition that a specific "fact is true, which would entitle the other to the money, but which fact "is untrue, and the money would not have been paid if it had been known "to the payer that the fact was untrue, an action will lie to recover it "back and it is against conscience to retain it.....The position "that a person so paying is precluded from recovering by laches, in not "availing himself of the means of knowledge in his power, seems,..... "to have been founded on the dictum of Mr. Justice Bayley in the case "of *Milnes* v. *Duncan* (1827) 6 B & C 671; and with all respect to that "authority I do not think it can be sustained in point of law. If..... "the money.....is paid under the impression of the truth of a "fact which is untrue, it may, generally speaking, be recovered back, "however careless the party paying may have been, in omitting to use "due diligence to inquire into the fact. In such a case the receiver was "not entitled to it, nor intended to have it."

Lord Shaw also quoted from the speech of Lord Lindley in *Imperial Bank of Canada* v. *Bank of Hamilton* (1903 A.C. 49, 56): "As regards "negligence in paying the cheque: It cannot be denied that when the "Bank of Hamilton paid the cheque on January 27, it had the means of "ascertaining from its own books that the cheque had been altered. But "means of knowledge and actual knowledge are not the same; and it "was long ago decided in *Kelly* v. *Solari* that money honestly paid by a "mistake of fact could be recovered back, although the person paying it "did not avail himself of means of knowledge which he possessed."

Lord Sumner, at p. 695, said "The real grievance of the respondents is, "that it is hard to make them suffer because Jones, Ltd., made a mistake. "If it is any satisfaction to them I am willing to say that I think it is, "but such is the law."

In the case before the Court the mistake was mutual. The plaintiff did not know of the mistake at the times of rendering the statements nor did the defendant. And furthermore there was no negligence alleged and none was proved. Nor is it correct to say as was said by LeBlanc J. (p. 39 of Record) that "the rendering of these erroneous statements by the "respondents surely ceased to be mistakes long before it was discovered. "".....While the admitted facts do not expressly admit negligence, "they spell nothing else."

Then as to the third and fourth propositions in *Carr's* case. These are very fully dealt with in the judgment of the learned trial Judge and it is not intended to repeat his Lordship's reasoning which, however, the respondent relies on.

The appellant, it is admitted, relied on these statements as being true and paid them. They did something else. They used the figures as a basis for arriving at the price that they paid for milk. That is to say: they estimated the total cost of manufacture of cream into butter, etc.;

to arrive at that cost they included among other things the cost of the power supplied by the plaintiff and presumably a profit and the difference between this estimated cost and the sale price of butter was the amount that was paid to farmers and others for the cream.

That is the only thing that appellant said was done to their prejudice.

The plaintiff did not know nor could they suspect that one company could so fix the price of cream. One would suppose that the price of cream would be the ordinary market price. It is not alleged and it is not the fact that this was a co-operative company nor that the plaintiff knew that the price that the defendant paid to farmers would be fixed as it was.

This thing that the appellant did to its prejudice was not a natural consequence of the representation made by the respondent.

In *Swan* v. *North British Australasian Co.* (1863) 2 H. & C. 175, at p. 191, Cockburn C. J. quoted with approval from the judgment of Parke B. in *The Bank of Ireland* v. *The Trustees of Evans Charities* (5 H.L. Cas 410) " If there was negligence in the custody of the seal it was very remotely " connected with the Act of transfer. The transfer was not the necessary " or ordinary or likely result of that negligence." And there was no estoppel.

The learned Trial Judge has fully distinguished the cases of *Freeman* v. *Jeffries* (L.R. 4 Ex. 189), *Skyring* v. *Greenwood* (4 B. & C. 281, 107 E.R. 1064) and *Holt* v. *Markham* (1923, 1 K.B. 504).

In *Skyring* v. *Greenwood* the mistake was a mistake of law. Here, however, we have a plain mistake of fact. In that case there was an allowance made to Major Skyring. In a case similar on this point to the present *Reg.* v. *Blenkinsop* (supra) A. L. Smith J. held that an omission to demand the full amount due was not equivalent to an allowance on an account. In *Skyring* v. *Greenwood* the defendants knew of the mistake for six years before the plaintiff was informed of the error and it was held in that case and in *Holt* v. *Markham* that the parties subject to the estoppel owed a duty as bankers to keep correct accounts.

In *Holt* v. *Markham* it was a mistake of law. Kerr on Fraud & Mistake 6th Ed. p. 584 in dealing with *Holt* v. *Markham* says, " Where a " payment was made under a mistake as to the effect of certain rules &c."

The Solicitors Journal (Vol. 67 p. 161) commenting on this case says : " The Court of Appeal takes the simpler view, that, as a matter of fact, " the ascertainment of the officer's legal right under the orders is an " exceedingly difficult one and that the original closing of the officer's " account must be treated as in substance a settlement by agreement of " all disputes that might arise as to the interpretation of the Orders, and " as to his rights under them. The payment, then, was made in settlement " of a complex situation and not under a mistake, either of fact or law. " At least this would appear to be the correct reading of the somewhat " varied judgment delivered in the Court of Appeal."

Suppose the electric company had rendered only one incorrect account for only one month and charged $15.00 though actually $150 was due, and that the customer had paid it believing it to be a correct statement and

In the Supreme Court of Canada.

No. 18. Factum of Maritime Electric Company Limited, 14th January, 1935—*continued.*

before learning of the mistake the customer had done the same thing that the defendant did in this case, can it be said that the electric company would be estopped from collecting the residue? That is the exact situation here, except that the error was made monthly over a period of two and one half years before either the plaintiff or defendant discovered it.

As to the second point.

The respondent company is governed as to the rates that it is to charge by section 16 of the Public Utilities Act above cited.

By virtue of that Act it is ultra vires of the respondent company to charge, demand, collect or receive more or less than the rates fixed by the Board of Public Utilities Commissioners.

As already pointed out the effect of the plea of the defendant is that the plaintiff is estopped from saying that there was an agreement to relinquish the residue of the claim.

It would be ultra vires of the defendant to make such an agreement.

The respondent cannot be so estopped.

" A party cannot by representation, any more than by other means " raise against himself an estoppel so as to create a state of affairs which " he is under a legal disability of creating. Thus a corporate body cannot " be estopped from denying that they have entered into a contract which " it was ultra vires for them to make. No corporate body can be " bound by estoppel to do something beyond its powers or to refrain from " doing what it is its duty to do." 13 Hals. 2nd ed. p. 474 Sec. 542.

See also *British Mutual Banking Company* v. *Charnwood Forest Railway Company* (1887) 18 Q.B.D. 714: *St. Mary, Islington Vestry* v. *Hornsey Urban Council* (1900) 1 Ch. 695: *Fairtitle* v. *Gilbert* 2 Term Reports 169: *Sunderland* v. *Priestman* (1927) 2 Ch. 107. In *re Companies Act, Ex parte Watson* (1888) 21 Q.B.D. 301, *York Corporation* v. *Leetham H. & Sons, Ltd.* (1924) 1 Ch. 557.

In the last cited case the plaintiffs were by statute entrusted with the control and management of part of the navigation of rivers O. and F. with power to charge such tolls, within limits, as the Corporation deemed necessary to carry on the two navigations in which the public had an interest. In 1888 the Corporation entered into two agreements with the firm of H. L. & Sons. By the O. agreement the corporation covenanted to allow the firm, their successors and assigns, the right to carry cargoes on the O. in consideration of the annual payment of £600 in place of the authorized dues and charges, with a proviso that there should each year be refunded to the firm, the difference between the £600 and the amount ordinarily charged on the traffic actually carried. By the F. agreement the firm covenanted to pay the Corporation £200 per annum for twenty years as a composition for the ordinary tolls and the corporation covenanted to allow the firm, their successors and assigns, the free use of the F. navigation, on payment of £200 per annum in lieu of tolls, for such further term or terms as the firm, their successors or assigns might from time to time desire. Defendants were the successors of H. L. & Sons: Held: The agreements were ultra vires, because during their currency which

depended on the wishes of defendants the Corporation no matter what emergency might arise, had disabled itself from exercising its statutory powers to increase the tolls so far as might be necessary; and being ultra vires at the date of their execution, the agreements did not become intra vires by reason of estoppel, lapse of time, ratification, acquiescence or delay.

In *Regina* v. *Blenkinsop* (1892) 1 Q.B. 43 above referred to the overseers by mistake sent demands to a Railway Company for only one-third of the amount due by the Company for a certain statutory charge. The error continued for four successive years. In the fifth year the overseers on learning of their mistake took steps to collect the remaining two-thirds for each of the four years. It was contended by the Company that the overseers were estopped as the Company had acted on the statements and had paid out the money in dividends.

Mathew, J., p. 46, said " the debt is a public one which the overseers have no power to remit." See also judgment of Mathew, J.

True the respondent herein is not a public corporation, but it is governed as to its rates by Statute and must not take less.

See judgment of Richards, J. (p. 33-35 of Record).

In *London Life* v. *Wright* 5 S.C.R. 466 the omission to affix the seal was merely an irregularity. It did not and could not affect the public in any way. In fact Gwynne, J., at p. 505, gives it as his opinion that the object and intent of the Legislature, in inserting in the Act the clause under consideration, was not so much to impose the conditions of the affixing of a seal to a contract of insurance as essential to its validity (for that was already sufficiently provided by the common law) as it was to provide that though having a seal and so valid by the Common Law, such contracts should not be valid under the Statute even though sealed, unless they should also be signed by the president or Vice-president or one of the directors and countersigned by the manager, which were provisions not required by the Common Law.

Furthermore the Act considered in that case was a private Act prepared by the Company. It was not a public Statute that governed it.

For these reasons the respondent submits that the judgment appealed from should stand and this appeal dismissed with costs.

J. J. F. WINSLOW,
Of counsel with Respondent.

FREDERICTON, N. B.,
January 14th, 1935.

In the Supreme Court of Canada.

No. 19. Formal Judgment, 28th June, 1935.

No. 19.

Formal Judgment.

SUPREME COURT OF CANADA.

Friday, the 28th day of June, A.D. 1935.

PRESENT :

The Right Honourable Sir LYMAN P. DUFF, P.C., G.C.M.G. & C.J.C.
The Honourable Mr. Justice LAMONT,
The Honourable Mr. Justice CANNON,
The Honourable Mr. Justice DAVIS,
The Honourable Mr. Justice DYSART (*ad hoc*).

BETWEEN :

GENERAL DAIRIES, LIMITED (*Defendant*) *Appellant,*

and

MARITIME ELECTRIC COMPANY, LIMITED (*Plaintiff*) *Respondent.*

The appeal of the above-named Appellant from the Judgment of the Supreme Court of New Brunswick, Appeal Division, pronounced in the above cause on the 5th day of June, A.D. 1934, dismissing the appeal of the Defendant Appellant from the Judgment of the Supreme Court of New Brunswick, King's Bench Division, rendered in the said cause on the 8th day of March and dated and entered the 16th day of March A.D. 1934, having come on to be heard before this Court on the 26th and 27th days of February, in the year of Our Lord, 1935, in the presence of Counsel as well for the Appellant as the Respondent whereupon and upon hearing what was alleged by counsel aforesaid this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court DID ORDER AND ADJUDGE that the said appeal should be and the same was allowed, that the said Judgment of the Supreme Court of New Brunswick, Appeal Division, should be and the same was reversed and set aside and that the said Judgment of the Supreme Court of New Brunswick, King's Bench Division should be and the same was also reversed and set aside and the action dismissed.

THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said Respondent should and do pay to the said Appellant the costs incurred by the said Appellant as well in the said Supreme Court of New Brunswick, King's Bench Division, and in the Supreme Court of New Brinswick, Appeal Division as in this Court.

(Sgd.) J. F. SMELLIE,
Registrar.

In the Supreme Court of Canada.

No. 20.

Reasons for Judgment.

No. 20. Reasons for Judgment. Dysart J. (ad hoc) (concurred in by Duff C.J., Lamont, Cannon and Davis JJ.).

DYSART, J. (ad hoc) (Concurred in by The CHIEF JUSTICE and LAMONT, CANNON and DAVIS, JJ.).

The question to be decided here is, whether in the circumstances of this case, a public utility company is entitled to collect the 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 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

In the Supreme Court of Canada.

No. 20.
Reasons for Judgment, Dysart J. (ad hoc) (concurred in by Duff C.J., Lamont, Cannon and Davis JJ.) —*continued.*

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 held that the principles of estoppel as enunciated in *Carr* v. *London & N.W. Rly. Co.* (1875) 44 L.J.C.P. 109, 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 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.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 (sections 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 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* (1883) 8 A.C. 623, 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*, 1900, 1 Ch. 695, 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*, 1924, 1 Ch. 557, 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*, 1892, 1 Q.B. 43, 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

In the Supreme Court of Canada.

No. 20. Reasons for Judgment, Dysart J. (ad hoc) (concurred in by Duff C.J., Lamont, Cannon and Davis JJ.) —*continued.*

arrears. In none of these 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* (1878), 3 A.C., 1004, 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* 1897 App. Cas. 156 H.L. 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*, 1896, 1 Ch., page 100, was another case of certificates issued for " fully paid-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 : *Re London Celluloid Co.* (1888), 39 Ch. Div. 190.

The reasons or principles upon which these cases proceed is well stated by Bowen L. J. in *London Celluloid Co.* supra., at pp. 204 and 205, where he discusses the Act and the *Burkinshaw* v. *Nicolls* case 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 App. Cas. 1004) 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* (1870), L.R. 5 Q.B. 642. 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* 1852, 7 Ex., page 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* (1825) 4 B. & C. 281: *Holt* v. *Markham*, 1923, 1 K.B. 504. 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

In the Supreme Court of Canada.

No. 20. Reasons for Judgment, Dysart J. (ad hoc) (concurred in by Duff C.J., Lamont, Cannon and Davis JJ.) —*continued.*

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 *London Celluloid Co.* 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* (1891) 3 Ch. 82, 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 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*

Rly. v. *York & Whitney Co.*, reported in (1913) 215 Mass. Reports 36, at p. 40. 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 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 & Northwestern Rly.* (1875), L.R. 10 C.P. 307, at 317) 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."

In the Supreme Court of Canada.

No. 20. Reasons for Judgment, Dysart J. (ad hoc) (concurred in by Duff C.J., Lamont, Cannon and Davis JJ.) —*continued.*

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 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* ((1848), 2 Ex. 654, at pp. 663–4), 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. *Martin's Bank* (1933, A.C. 51) 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.'s statement " intended to act upon it in a particular way," and is wide enough to include I think, 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 misrepresentation 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*, *Horton* v. *Westminster Improvement Commissioners*.

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.

No. 21.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE

The 20th day of December, 1935.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT	SIR LANCELOT SANDERSON
LORD COLEBROOKE	SIR KINGSLEY WOOD

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 6th day of December 1935 in the words following viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Maritime Electric Company Limited in the matter of an Appeal from the Supreme Court of Canada between the Petitioners Appellants and General Dairies Limited Respondents setting forth (amongst other matters) that this is a Petition for special leave to appeal from a Judgment of the Supreme Court of Canada dated the 28th June 1935 reversing a Judgment of the Appeal Division of the Supreme Court of New Brunswick which upheld a Judgment in the King's Bench Division whereby the Petitioners were awarded Judgment against the Respondents for $1931.82 : that the facts are not in dispute and the question raised is whether the Respondents are liable to pay for electricity supplied to and consumed by them the contract price (being the only price which under the relevant statute the Petitioners were authorised to charge or could charge) or whether the statutory and contractual obligations can be over-ridden by an estoppel arising from the rendering of accounts in which by mistake

In the Privy Council.

No. 21. Order in Council granting special leave to appeal to His Majesty in Council, 20th December, 1935—*continued.*

the Petitioners showed that the Respondents' consumption of electricity was less than in fact it was: that the Petitioners are a company incorporated under the Companies' Act of Canada with head office at Fredericton in the Province of New Brunswick and carry on the business of generating and supplying electricity for light heat refrigeration and power in Fredericton and its vicinity: that the Petitioners are a " Public Utility " within the meaning of the Public Utilities Act (being Chapter 127 of the Revised Statutes of New Brunswick, 1927) and operate and carry on their business under that Act by Section 10 of which every public utility is required to furnish reasonably adequate service and facilities and all charges shall be reasonable and just: that the charges to be made by the Petitioners were set out in a schedule of the rates and charges to be collected by the Petitioners in respect of their business in the City of Fredericton and vicinity: that the schedule was established by an Order dated the 22nd October 1924 by the Board of Commissioners set up under the authority of that Act: that the Respondents at all material times carried on a dairy business in the city of Fredericton manufacturing and selling butter ice cream and other milk products their plant being operated by electricity purchased from the Petitioners: that the quantity of electricity supplied to and used by the Respondents in their business was measured by a meter installed by the Petitioners on the Respondents' premises: that such meter complied in all respects with the requirements of the Electricity Inspection Act 1928 and was inspected on the 23rd December 1927 and the 31st March 1932 and on both occasions its measurement of electricity was found to be within the limits permitted by law: that the Respondents during the months of November and December 1929 and January February March April May June July August September and October 1930 had a plant with an installed capacity of fifteen horse power and in all subsequent months an installed capacity of eighteen horse power: that the Petitioners delivered to the Respondents each month a statement purporting to show the amount of electric energy supplied by the Petitioners to the Respondents during the month preceding the rendering of such statement: that the meter reading upon which the monthly statements were rendered was a correct reading of the dials of the meter but in order to arrive at the amount of electric energy used in the terms of kilowatt hours it was necessary to multiply the dial reading by ten: that by mistake the dial reading was not so multiplied and consequently the Respondents were only charged for one-tenth of the electric energy supplied to and used by the Respondents in their business: that this mistake ran through all the accounts rendered from December 1929 to March 1932 a period of 29 months: that the Respondents paid the account each month as rendered and believed the accounts to be correct: that the Petitioners having discovered the mistake requested the

In the Privy Council.

No. 21.
Order in Council granting special leave to appeal to His Majesty in Council, 20th December, 1935—*continued.*

Respondents to pay the statutory charge for the full amount of electricity supplied and used and on the Respondents' refusal issued on the 4th May 1933 a specially endorsed writ of summons out of the King's Bench Division of the Supreme Court of New Brunswick claiming the sum of $1931.82: that the Respondents in their defence set up against the Petitioners an estoppel: that the Action came on for trial before Richards J.: that no evidence was taken other than an agreed statement of facts signed by counsel for both parties, containing admissions; a schedule of the statutory rates; and a document headed 'General Service Rate': that another Action by the Petitioners against Fredericton Dairies Limited a predecessor of the Respondents came on for trial at the same time in which the amount claimed by the Plaintiffs was $753.51 and it was agreed by counsel that the decision in the present case with the necessary modifications in respect of quantities would be accepted as the decision in the Fredericton Dairies case: that on the 27th February 1934 the learned trial Judge gave a considered Judgment awarding the full amount of the Petitioners' claim in both Actions: that the Respondents appeal to the Appeal Division of the Supreme Court of New Brunswick: that the Appeal Division dismissed the Appeal: that the decision also applied to the Appeal of Fredericton Dairies Limited: that the Respondents applied to the Appeal Division for special leave to appeal to the Supreme Court of Canada on the ground that important questions of law were involved namely (1) whether in the circumstances (apart from the Statute) estoppel would lie; and (2) a question of the interpretation and effect of a provincial statute which was granted: that Judgment was delivered by the Supreme Court on the 28th June 1935 by Dysart J. (*ad hoc*) with the concurrence of Duff C.J., Lamont, Cannon and Davis JJ. allowing the Appeal and dismissing the Petitioners' Action: that the Petitioners submit that the Supreme Court of Canada were in error (1) in refusing to construe Section 16 of the Public Utilities Act in accordance with the settled interpretation of similar words by the Supreme Court of the United States of America; (2) in holding that Section 16 does not preclude the setting up of the estoppel pleaded against the Petitioners; (3) in applying the cases which establish the principles on which estoppel by conduct may be set up and in holding that the conditions in which an estoppel can be set up are satisfied in the present case; and (4) in holding that the Petitioners can and did raise against themselves an estoppel which in the Petitioners' humble submission the Petitioners are under a legal disability from creating or can and were bound by estoppel to do something beyond the Petitioners' powers: that the decision of the Supreme Court affects public utilities companies throughout Canada in as much as Statutes containing provisions similar to Sections 16, 18 and 19 have been passed in other provinces; and is also of far reaching importance

In the Privy Council.

No. 21. Order in Council granting special leave to appeal to His Majesty in Council, 20th December, 1935—*continued.*

in affecting the legal position of any person rendering an inaccurate account under a mistake of fact: that the Petitioners humbly submit that the questions raised are important questions of law of great public interest fit to be determined by Your Majesty in Council: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the Supreme Court dated the 28th June 1935 or for such further or other Order as to Your Majesty in Council may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 28th day of June 1935 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

No. 22.

Formal Judgment of King's Bench Division in Action Maritime Electric Company Limited *v.* Fredericton Dairies Limited.

IN THE SUPREME COURT

KING'S BENCH DIVISION

BETWEEN

MARITIME ELECTRIC COMPANY, LIMITED - *Plaintiff,*

and

FREDERICTON DAIRIES, LIMITED - - *Defendant.*

Judgment, Richards, J., 27th February 1934.

It was agreed between Mr. J. J. F. Winslow, K.C., Counsel for the plaintiff, and Mr. P. J. Hughes, K.C., Counsel for the defendant, that the decision in the case of *Maritime Electric Company, Limited,* vs *General Dairies, Limited,* with the necessary modifications in respect of quantities would be accepted as the decision in this case. The claim in this case is for the amount of $753.51.

There will, therefore, be judgment for the plaintiff for the sum of $753.51 with costs.

In the Privy Council.

No. 9 of 1936.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

MARITIME ELECTRIC COMPANY LIMITED - - - (*Plaintiff*) *Appellant*

AND

GENERAL DAIRIES LIMITED (*Defendant*) *Respondent.*

RECORD OF PROCEEDINGS.

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