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THE LAW OF TELEGRAPHS AND TELEGRAMS.

This branch of jurisprudence is an excellent instance of the flexibility of the common law in adapting itself to new subjects as they are brought from time to time within the range of judicial action. The right to reason by analogy from things which are settled in order to establish principles to govern things which are unsettled, can never be abandoned in any well-sustained system of law. Lord BACON, in one of his essays, mentions this analogical method of reasoning as one of the striking peculiarities of the jurist, and as worthy of attention by the general scholar as a means of education. He says:—"If a man's wit be wandering, let him study the mathematics; if his wit be not apt to distinguish or find differences, let him study the schoolmen; if he be not apt to beat over matters, and to *call upon one thing to prove and illustrate another*, let him study the lawyer's cases:" Essay 50; Of Studies. The greatest care is to be taken in these new subjects not to press the argument from analogy too far. Lord MANSFIELD'S caution is to be continually borne in mind—*nullum simile est idem*. Illustrations of both these principles will be furnished in the examination of telegraph law. In a subject so entirely new, the analogies must necessarily be remote and difficult of apprehension. There will thus be large opportunities for differences of opinion among judges. Thus, if the question be whether a telegraph company is a com-

mon carrier, on the one hand it may be urged that as a leading characteristic of a common carrier is to take and have possession of *goods*, and as the telegraph line does not have goods, therefore it is not a common carrier; on the other hand, it may be said, that as a telegraph company is bound by its advertisements or by statute to carry for all persons a commodity (intelligence) which may be bought and sold in the market, the public nature of its employment likens it to a common carrier. It would be urged that if there were no postal laws, and a person should for all the public carry letters containing intelligence, he would clearly be a common carrier; but as the letter is only a vehicle for the idea or information which it contains, and is only carried for the purpose of transferring information, why not hold, that an association which transports for all persons the information without the letter, is a common carrier?

Again, the question has arisen whether, if parties use telegraphic communication as the medium of a contract, the same rules should apply as when the United States mail is resorted to. Here it may be urged that an analogy does not exist, for the mail is under governmental management, while the telegraph is controlled by private enterprise.

The subject may be discussed under the following divisions:—

- I. The relations of telegraph proprietors and their employees to the senders and receivers of messages.
- II. The use of telegraph lines as a medium of contract.
- III. The relation of the telegraph to third persons.
- IV. Penalties imposed by law upon telegraph owners.
- V. Legislation upon telegraphs.

The first topic admits of several subordinate considerations.

1. The nature of the engagement of a telegraph line.
2. The duty of the line to treat all customers equally, and without discrimination.
3. The measure of damages for failing to send the message or for an incorrect transmission.
4. Duty of employees concerning disclosure of communications.

1. *The nature of the engagement of a telegraph line.*—The principal cases in which the nature of telegraph service has been discussed are referred to in a note.¹

¹ *McAndrew vs. Electric Telegraph Co.*, 17 Com. Bench R. 3 (A. D. 1855); *Camp vs. Western Telegraph Co.*, 6 Am. Law Reg. 443; s. c. on Appeal, 1 Met-

To understand these decisions, it will be necessary to set forth the statute law of the country or state in which the case was decided. Notwithstanding the fact that statute law enters largely into these adjudications; still general principles may be extracted, both because the statutes upon telegraphs in the various states are strikingly similar (having been apparently derived from the same source); and because they furnish an occasion for the application of the rules and principles of the common law. The cases will be examined in chronological order.

In *McAndrew vs. The Electric Telegraph Co.*, 17 Com. B. R. 3, it appeared that the plaintiff sent his telegram subject to the following conditions, of which he had due notice:—"The public are informed that in order to provide against mistakes in the transmission of messages by the electric telegraph, every message of consequence ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged for repeating the message. The company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise."

The message in question was an "unrepeated message;" and in its transmission by the company, in consequence of the similarity of the characters representing the two words, the word "Southampton" was read by the clerk at the terminal station instead of "Hull." The plaintiff's ship went in accordance with the supposed advice to Southampton, and sustained a considerable loss upon the cargo. An action for damages was consequently brought against the telegraph company.

It further appeared, among other things, by the various English legislative acts regulating telegraphs, it had been provided, "that the use of any telegraph erected or formed for the purpose of receiving or sending messages * * should, *subject to such reasonable regulations as may be from time to time made or entered into by the company*, be open for the sending and receiving of messages by all persons alike, without favor or preference."

Three questions arose upon this state of facts: (1.) Whether the notice given by the company was a *regulation* within the

calf (Ky.) 164, 6 Am. Law Reg. 734; *Parks vs. Alta California Teleg. Co.*, 13 Cal. 422 (A. D. 1859); *Dryburg vs. New York and Washington Printing Teleg. Co.*, 35 Penn. St. R. 298 (A. D. 1860); s. c. 8 Am. Law Reg. 490; *Birney vs. New York and Wash. Teleg. Co.*, 18 Md. 341 (A. D. 1862).

language of the statute. (2.) Whether it was reasonable. (3.) Whether the company were common carriers. The third point was established without serious opposition on the argument of Byles, of counsel for the plaintiff, who argued that as the company was bound by the act to transmit all messages for the public, it stood in the same position as carriers or innkeepers. The first point was deemed unimportant, as, if the notice was not a "regulation" within the statute, then the company would be in the situation of carriers at common law. The question under either aspect would be whether the regulation or condition was a reasonable one. The stress of the discussion was upon the question whether the condition was reasonable, so far as it provided "that the company would not be responsible for mistakes in the transmission of *unrepeated* messages, from whatever cause they may arise." This was held to be reasonable, as the public had an opportunity to transmit unimportant messages for a small charge, and might secure accuracy in an important message at a moderate additional expense. The case of *Izett vs. Mountain*, 4 East 371, was cited by a member of the court, as showing an acquiescence of eminent counsel in the proposition that such a condition would be valid at common law if imposed by carriers.

In *Camp vs. Western Telegraph Co.*, 6 Am. Law Reg. 443, s. c. on appeal, Id. 734, 1 Metcalfe (Ky.) 164, the telegraph company had published a notice almost in the precise language of that which has been quoted in the English case just cited. The plaintiff having information of the conditions, sent the message subject to them, but did not require it to be repeated. A mistake was made in an offer to contract, whereby he lost \$100. The court held that the condition was reasonable. The line of argument adopted was much the same as in the English case, and the decision was powerfully influenced by the reasoning of the English judges. The court below was of opinion that a telegraph company was not a common carrier. The Court of Appeals expressed no direct opinion on this point, but seems to have assumed that the company was a common carrier by its close adoption of the line of argument resorted to in the English case. In *Parks vs. Alta California Telegraph Co.*, 13 Cal. 422, it appeared that the law of California (Laws of 1850, p. 370) provided, "That it should be the duty of the owner of a telegraph line to receive despatches from and for other telegraph lines and associations, and from and for any individual, and, on payment

of their usual charges for individuals for transmitting despatches, as established by the rules and regulations of such telegraph lines, to transmit the same with impartiality and good faith."

The defendant had contracted with the plaintiff for the immediate despatch of a message from his residence to Stockton, directed to the plaintiff's agent, and requiring him to attach the property of the plaintiff's debtor. There was a delay occasioned by the gross neglect of one of the telegraphic operators, so that other creditors obtained prior attachments on the debtor's property. The debtor having become insolvent, and totally unable to pay the plaintiff's claim, the telegraph company was held liable. The plaintiff gave evidence at the trial tending to show that an attachment could have been obtained in his behalf if the message had been transmitted in due time, or if he had been told that it could not be transmitted, he would have secured the debt by visiting Stockton in person. The language of the court is very clear and precise to the point, that telegraph companies are common carriers. It says:—"The rules of law which govern the liability of telegraph companies, are not new. They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference in the general nature of the legal obligation of the contract between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different, but the essential nature of the contract is the same. The breach of contract, in one case or the other, is or may be attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it, in both respects, is the same. In both cases the contract is binding, and the responsibility of the parties for the breach of duty is governed by the same general rules. * * * The process of ascertainment is the same as in other cases of carriers."

Thus far the action has been brought by the sender of the message who received it in several of the instances under express conditions. The next instance presents a new aspect. This action is brought by the receiver of the message for its inaccurate transmission, causing him injury. It is evident that a new class of considerations is presented. Assuming that the sender

has not submitted to the conditions, and has sent an unrepeatable message, is the receiver bound by the acts of the sender? Is the telegraph company the agent of the sender, so that the rule of *respondeat superior* applies, and the only person liable to the receiver is the sender? These and other questions were presented in the case of the *New York and Washington Printing Telegraph Co. vs. Dryburg*, 35 Penn. State R. 298. A Mr. LeRoy of New York had transmitted, subject to the usual conditions, to a florist in Philadelphia, a message for two hand bouquets. The operator reading the word "hand" as hund, added the letters "red," so that the message read "two hundred bouquets." The florist having procured a large quantity of expensive flowers, which LeRoy refused to take, brought an action against the company for damages sustained. The company was held liable. The propositions decided were that the rule of the company concerning repeated messages, did not excuse them from negligence and especially from liability for loss occasioned by sending a different message from the one ordered; that if it did excuse them in an action by the sender, it was no defence to an action brought by the receiver; that if the telegraph company was an agent for the sender, it was still liable for misfeasance to the receiver, and that in the case of misfeasance, the action of *respondeat superior* was not applicable. The court was further of the opinion that the obligations of the company, like those of common carriers, spring from the same sources—the public nature of their employment and the contract under which the particular duty is assumed. There appears to be no general statute in Pennsylvania concerning telegraph companies, so that these conclusions were arrived at upon general or common law principles. See, also, *Bowen & McNamee vs. The Lake Erie Telegraph Co.*, in the Court of Common Pleas of Ohio, coram STARKWEATHER, J., with a jury: 1 Am. Law Reg. 685 (A. D. 1853).

The only case further to be cited on this branch of the subject is *Birney vs. New York and Washington Telegraph Co.*, 18 Maryland R. 341. The Maryland Code provides that "any person or association owning any telegraph line doing business within this state, shall receive despatches from and for other telegraph lines and associations, and from and for any individual for transmitting despatches *as established by the rules and regulations of such telegraph line*, and shall transmit the same with impartiality and good faith," &c., &c. The language italicised in this statute

is quite peculiar, and would seem to permit the company to exercise a power which is not usually conferred upon common carriers, who, as is well known, cannot modify their common law liability by a mere rule of their own.

In the case in question, the company had established the rule, so often referred to, concerning unrepeated messages. No repeating price or insurance was paid by the plaintiff. He delivered to the agent of the company a message to be transmitted, which was never sent, but was wholly *forgotten* by the agent. It was held, notwithstanding the statute and the notice, that the company was liable. The notice did not apply to the case where no effort was made by the company or its agents to put a message on its transit.

The court, in the course of its decision, expressed the opinion that a telegraph company could not be under the same liabilities as a common carrier, for the reason elaborated by the defendant's counsel on the argument. The common carrier could go with the goods and inspect the condition of his vehicles, the safety of the roads, and had the exclusive custody of the goods. None of these facts were true of the telegraph company, whose business is liable to casualties and delays which it has no power to foresee or to avoid. This view, however, is rather ingenious than solid. The great reason for the common carrier's responsibility is the public nature of his employment and the fact that he is unreservedly intrusted with the interests and property of the bailor. Public policy demands the application of a stern rule of responsibility in the one case as much as in the other.

The propositions which may be deduced from these cases appear to be these:—

(1.) If a telegraph company holds itself out to carry messages in the ordinary way, it takes upon itself a public employment analogous to that of a common carrier. Although it may not be in all respects an insurer, it is bound to exercise the utmost diligence and good faith. When a statute requires it to transmit messages for all who may send them, the case is still more clear.

(2.) The company may, on the like analogy, make reasonable conditions. It may require important messages to be repeated at an additional charge as a condition to its liability. This is but little more than providing that an unimportant message may be sent for a small price, and one that is important may be safely transmitted for a larger sum. This increased sum must be

intended as an equivalent for the additional labor required and risk run, and must therefore be reasonable in amount. The same result is reached if a statute permits the company to establish rules and regulations, for it is implied that such regulations should be reasonable.

(3.) The condition referred to in the second proposition does not cover cases where negligence has been established, as where the agent negligently fails altogether to transmit the message, or where he of his own volition substitutes another message in room of the one sent, on the erroneous supposition that such was the sender's intention.

(4.) The receiver of the message is in a different position from the sender. Assuming that the company could stipulate with the sender not to be responsible for the acts of its agents, such a stipulation would not bind the receiver, who could not know whether the message had been repeated or not. The company cannot shield itself from an action by the receiver on the ground that it is the agent of the sender, for the maxim *respondet superior* does not apply to the case of misfeasance.

In many cases, the question of the liability of telegraph proprietors is presented in more complicated forms than those which have been already discussed. The message, before its destination is reached, is passed over more than a single line, and an attempt is made to hold the receiving company responsible for the misconduct or negligence of the other companies composing the continuous route. This point was presented in *Stevenson vs. The Montreal Telegraph Co.*, 16 Upper Can. R. 530. The defendants owned a telegraph extending to Buffalo, but advertised their line as "connecting with all the principal cities and towns in Canada and the United States." They received payment for transmission to places beyond their line. A message was sent by the plaintiff from Montreal to New York, paying the entire charge. It was held by a divided court, that the only duty of the defendants was to deliver the message at Buffalo to the connecting American line. A dissenting judge was of opinion that the defendants were liable, upon an undertaking to transmit the message to New York and deliver it there. The majority of the court thought that the announcement that the Montreal telegraph line "connected" with the cities in the United States, only meant that such arrangements were made as would insure to the public the convenience of their messages being taken up and forwarded

to cities to which the operations of the Canada line do not extend. It was also thought that a contract to deliver the message at New York could not be implied from the receipt of the whole charge, as this arrangement was for the convenience of the plaintiff, and relieved him from the employment of an agent at the commencement of the American line. The case of *De Rutte vs. The New York, Albany and Buffalo Telegraph Co.*, now pending before the Court of Common Pleas in the city of New York, presents the same question. The sender of the message paid the entire price of its transmission from New York to California to the defendants. There was a number of distinct companies forming a continuous line, but having no connection with each other, except that each received the tariff for all the lines over which messages were to be sent, at a rate fixed by each company for itself. Each company accounted and settled with its connecting line. Important mistakes in transmitting the message having been made by one of the western lines, the receiver, who sustained damage, brought his action against the defendants. The jury, under the direction of the presiding judge, found a verdict for the plaintiff. In the case of *Leonard vs. Burton*, in the Supreme Court of New York, at General Term, 5th District, the message was correctly delivered by the company which received it, but a mistake was made by the proprietors of the connecting line. An action was brought against the latter, and was sustained, apparently on the ground that the first company was an agent of the second. This case has been appealed. In this contrariety of opinion further adjudication is necessary. In New York and other states a statutory duty is imposed upon each telegraph company to receive telegrams for other companies as well as for individuals. It would seem that there is no sufficient reason why the same principle should not be applied to telegraph associations as has been already adopted in the case of railroad companies which sell tickets for a point beyond their route,¹² receiving the entire fare.

2. *The duty of the line to treat all customers equally and without discrimination.*—If the telegraph owners are common carriers, it follows as a matter of course that they must act with impartiality towards their customers: 2 Pars. on Contracts, p. 206, 5th ed. This obligation is, however, often imposed by express statute: See Laws of New York, 1848, p. 392, and similar acts in other states. In an English statute it was provided that

“a telegraph line should be open for the sending and receiving of messages by all persons alike, without favor or preference, and subject to such equitable charges and to such reasonable regulations as may from time to time be made by the said company.”

An agreement was made between the plaintiff and the telegraph company governed by this statute, that he would collect public intelligence and send it over their line exclusively. Fifty per cent. was to be returned to him, or in other words, his messages were to be sent for half-price. The court was of opinion that this allowance was not in violation of the statute, for the arrangement was rather a remuneration for services in collecting public intelligence and bringing custom to the company than any preference or partiality to the plaintiff in the use of the telegraph: *Reuter vs. Electric Telegraph Co.*, 6 E. & B. 341 (A. D. 1856).

3. *The measure of damages for failing to send the message.*—In order to determine this point accurately, it will be useful to state the rules which are now settled respecting damages in cases of contract and tort respectively. When an action is brought on a contract, the rule is laid down by the Court of Appeals in New York in these terms: *Griffin vs. Colver*, 16 N. Y. (2 Smith) 489:—“The broad general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained, and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.”

The rule was enunciated in nearly similar terms in England: *Hadley vs. Baxendale* (Co. Exch.), 9 Exch. R. 341:—“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive should be either such as may fairly and substantially be considered as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.” This rule, though having the merit of precision

in terms, is confessedly difficult of application. The English courts uniformly profess to follow it, although recognising the shadowy distinctions to which they are sometimes driven.

In a recent instructive case, *Gee vs. Lancashire and Yorkshire Railway Co.*, 6 H. & N. R. 210 (A. D. 1860), the plaintiffs were possessed of a cotton-mill, and engaged the defendants to transport to them, from Liverpool, cotton to be manufactured. The cotton was not delivered in accordance with the contract, and the plaintiffs claimed damages for the loss of wages of workmen whom they had employed, and of profits that they would have made by working the mill. It appeared that the plaintiffs had no other cotton which they could manufacture, and that the attention of the railway company was from time to time called to the fact that the mill was at a stand-still for want of cotton, although this was only done after the contract for transportation was made, and during the delay in the delivery. The judge at the trial ruled, as a *matter of law*, that the plaintiff was entitled to recover for loss of profits and wages, but the court of review held that the question should have been left to the jury to determine from the evidence whether the stoppage of the mill was the natural consequence of the nondelivery of the cotton. It was intimated that the result was right, although it was not reached in the correct manner. Baron WILDE appeared to be dissatisfied with *Hadley vs. Baxendale*, making these remarks:—"For my own part I think that, although an excellent attempt was made in *Hadley vs. Baxendale* to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and when the matter comes to be further considered, it will probably turn out that there is no such thing as a rule, as to the legal measure of damages, applicable to all cases:" p. 221.

(1.) *Actions by senders of messages.*—The rule in *Hadley vs. Baxendale* is very severe in its application to the senders of telegraphic messages. It is almost impossible, in many instances, to communicate the result of a neglect to despatch the message. Since it has been settled that the condition requiring an important message to be repeated for an additional price is valid, it is worthy of consideration whether the telegraph company should not be held responsible for all the direct consequences following its neglect of duty, without reference to the question whether they were contemplated by the parties or not. But few cases have yet been decided in which the measure of damages was discussed. One of these is *Wash-*

ington Telegraph Co. vs. Hodson, 15 Grattan (Va.) 122. An order to purchase 5000 bales of cotton was altered by the company so as to read 25,000. As soon as the mistake was discovered, the plaintiff's factors were notified by the telegraph company. It was held if the company was liable at all, the damages were the loss on an immediate resale of the surplus, with all charges and factor's commissions. The plaintiffs were bound to give immediate notice to the telegraph proprietors that they must either take and pay for the surplus or it would be sold on their account, and the loss charged to them. Another authority is *Landsberger vs. Magnetic Telegraph Co.*, 32 Barb. 530 (A. D. 1860), s. p. *Shields vs. Washington Telegraph Co.*, 5th Dist. Court, New Orleans, 9 West. Law Jour. 283, in which an action was brought for damages for neglecting to deliver a despatch from New Orleans to New York, according to agreement. The plaintiff having contracted with a third person to buy goods for him, and to receive a commission for his services, bound himself to carry out the contract in a specific sum as liquidated damages. He forwarded money to New York to fulfil the agreement. Through the neglect of the telegraph company he failed to accomplish his intention, so that he was deprived of his commissions, was obliged to pay the liquidated damages, and lost the use of his money for a specified time. It was held that he could only recover the cost of the telegraphic despatch and the interest of his money while it lay idle. The loss of the commissions and the payment of the liquidated damages were not regarded as having "entered into the contemplation of the parties when the contract was made," within the rule of *Griffin vs. Colver* and *Hadley vs. Bazendale*. In *Parks vs. Alta California Telegraph Co.*, 13 California R. 422, the court below had rendered judgment for the plaintiff for the cost of the despatch (\$2.50). The facts were that the plaintiff had sent a message to his agent in another city, directing him to procure an attachment against a debtor. There was evidence tending to show that if the message had been properly sent, the attachment would have been secured, or that if the plaintiff had been informed that it would not be sent, he could have secured the debt by his personal exertions. In consequence of a failure to obtain the attachment, the debt was entirely lost. The court, in sending the case back for a new trial, was of opinion that the entire damage sustained by the plaintiff should be recovered. This case can only be reconciled

with *Landsberger vs. Magnetic Telegraph Co.*, by the supposition that there was enough in the California case to give the company notice of the object of the message, and thus that the damages were such as might naturally be expected to be derived from the company's neglect. Assuming that the rule of law is correctly enunciated in *Landsberger vs. Magnetic Telegraph Co.*, where the action is on contract, the sender might desire to frame his action in tort, in order to obtain a different rule of damages. This brings us to an examination of the rule of damages prevailing in an action of tort. The inquiry here is whether the damage complained of is the direct and reasonable result of the defendant's act, without reference to the question whether it was contemplated by the parties. In order to determine whether an action of tort may be brought, it may be necessary to examine the statutes to see if some statutory duty is cast upon the company, on failure of whose performance an action on the case may lie, without any reference to the contract. Thus in New York, by the Laws of 1848, chap. 265, it is made the duty of the telegraph company to transmit despatches in the order in which they are received, under a penalty to be recovered by the person whose despatch is postponed out of its order. On general principles, the injured party might bring an action on the case for the damages sustained by a failure to comply with the statute, although, under the New York act, a specific penalty having been given to the party aggrieved, no more than the penalty can be recovered. See this topic fully explained in *Couch vs. Steel*, 3 Ellis & Blackburn 402.

(2.) *Damages in actions by the receiver of the message.*—In this class of cases, the action must be purely in tort, and the rule of damages will follow principles applicable to that kind of actions. *Dryburg vs. New York and Washington Printing Telegraph Co.*, 35 Penn. State R. 298, is illustrative of this principle. The plaintiff having wasted, in consequence of the defendant's erroneous message, flowers for two hundred bouquets, was allowed to recover for the entire damage sustained: *Bowen & McNamee vs. The Lake Erie Telegraph Co.*, 1 Am. Law Reg. 685.

4. *The duty of telegraph employees as to disclosure of communications.*—There is no doubt that the employees of telegraph companies are bound by the very nature of their business not to disclose such communications as were intended by the parties to

be confidential. This proposition is established by such cases as *Tipping vs. Clark*, 2 Hare 393, where Vice-Chancellor WIGRAM said that every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. See, also, *Morrison vs. Moat*, 9 Hare 241; *Williams vs. Williams*, 3 Merivale 157; *Yovatt vs. Wingard*, 1 Jac. & W. 394; *Prince Albert vs. Strange*, 2 De G. & S. 652, 697. This unwarranted disclosure is, however, often prohibited by statute.

The remedy for a wilful breach of this duty must be sought against the employees and not against the telegraph association. A statute prohibiting a wilful disclosure of confidential communications would not prevent a telegraph operator from being examined concerning the communication in a court of justice. A Pennsylvania act declared that it should not be lawful for any person concerned in any line of telegraph to use or make known, or cause to be used or made known, the contents of any despatch, of whatever nature, which might be sent or received over any line of telegraph, without the consent or direction of either the party sending or receiving the same; * * * and it was further provided, that if any person should use, or make known, or in any other way unlawfully expose another's business, or acts, he should be punishable with fine and imprisonment. It was held that this statute did not apply to cases where it is material to have such disclosures on a judicial trial. The act only makes the offender liable where he *unlawfully exposes* the secrets of the telegraph office, or where it is done wantonly or voluntarily: *Hemsler vs. Freeman*, 2 Parsons' (Penn.) Cases 274 (A. D. 1851).

II. THE USE OF TELEGRAPH LINES AS A MEDIUM OF CONTRACT.

(1.) It has now become a settled rule of law, that where the United States mail is used as a medium of contract, and a proposal is made by letter, and an answer of acceptance is deposited in the mail, the contract is complete, though the answer altogether fails to reach the proposer. The minds of the parties are supposed to have met, when the acceptance is mailed: *Mactier vs. Frith*, 6 Wend. 103; *Vassar vs. Camp*, 1 Kern. 141; *Taylor vs. Merchants' Ins. Co.*, 9 How. (U. S.) 390.

The question has recently arisen in New York whether this prin-

ciple is applicable to telegraphs. The parties, residing respectively at New York and New Orleans, agreed that their communications should be made by telegraph. A proposal was made accordingly, and an answer requested. The acceptance was regularly delivered to the telegraph company, but was not transmitted, owing to their lines being down. It was held that there was no contract or *aggregatio mentium*, for the plaintiffs undertook, in point of law, to bring home to the defendants knowledge of the acceptance. The communication is only initiated when it is delivered to the telegraphic operator. It is completed when it comes to the possession of the party for whom it is designed. The court was of opinion that the rule laid down by the authorities in reference to communications by mail, was not applicable, for the reason, among others, that the action of the post-office is governed by law, while the telegraph is controlled by private enterprise: *Trevor vs. Wood*, 41 Barb. 255 (A. D. 1864).

(2.) The telegraph operator may be deemed the agent of the party who sends the message, so as to bind him to the opposite party. Thus, if he should make an oral communication to the operator, and the operator should by mistake send one of a different tenor, on which the other party acted in good faith, the sender of the message would be bound on the ordinary principle that the operator is an agent acting within the scope of his apparent authority: *Dunning vs. Roberts*, 35 Barb. 463; see, also, *Washington Telegraph Co. vs. Hodson*, 15 Grattan (Va.) 122. It follows from this principle, that if the contract be one requiring signature or subscription by the Statute of Frauds, the manipulations of the operator, whereby the sender's name becomes appended to the despatch, are equivalent to an actual personal signature with pen and ink: *Id.* If, however, the message is in writing, and the operator voluntarily makes a material change in its terms, the sender is not liable, and the remedy of the receiver is against the company. Such appears to be the result of *Dryburg vs. The New York and Washington Telegraph Co.*, for if the florist in that case acquired a claim against the sender, there would have been no wrong done to him by the operator, and the action should have been brought by the sender against the telegraph company as his agent, for transgressing his instructions and occasioning damage by making him liable to the receiver.

(3.) It has been held that a contract, when made by telegrams, must be proved in the first instance by the original despatch.

That which is received by the person to whom it is sent, is only a copy. If the despatch is sought to be used in evidence, the original must be produced, and its execution proved precisely as any other instrument, or its absence accounted for in the same mode, before a copy can be received: *Matteson vs. Noyes*, 25 Ill. 591 (A. D. 1861). With due submission, it would seem that the contract was made by the telegrams *which are received*, and not by the messages communicated to the operator. At least, such is the deduction from the New York cases already cited: *Trevor vs. Wood*, 41 Barb. 255; *Dunning vs. Roberts*, *supra*. At all events, if the message was oral, and the telegram was signed by the receiving operator with the sender's name, the evidence to take the case out of the Statute of Frauds would be furnished by the receiving and not by the sending operator.

III. THE RELATION OF THE TELEGRAPH LINE TO THIRD PERSONS, WITHOUT REFERENCE TO MESSAGES.

1. *Claims by third persons against the telegraph company.*—There are two cases which may be presented in this connection.

(1.) *The laying down of telegraph lines without statutory authority.*—No cases of that kind have yet been presented in this country. They may be, however, in those states where general statutory powers have not been conferred upon owners of telegraph lines to erect posts upon highways, or to lay wires along roads or across streams. The question has arisen in England: *Attorney-General vs. United Kingdom Electric Telegraph Co.*, 30 Beavan 287 (A. D. 1863). The defendant was a corporation under the English Joint Stock Company Act, and without statutory powers proceeded to lay down telegraph wires under highways, and among others over the land of Baron Rothschild, who, with the Attorney-General, applied to a court of equity for an injunction. It was held that there was no such irreparable injury to the highway and to the plaintiff Rothschild, as to justify an injunction. The question was whether there was a public nuisance or a right of private action. These points must be established at law to the satisfaction of the court before the equity can be administered. The court, however, retained the bill until the proceedings at law were terminated.

The case was subsequently tried at a criminal court. An indictment was found against the defendants for putting up their

posts on a highroad, so as to obstruct the public in its use. The defendants having been convicted, on a motion for a new trial the Court of Queen's Bench laid down the following propositions: First, That in the case of an ordinary highway running between fences one on each side, the right of passage extends to the whole space between the fences, and the public are entitled to the use of the whole of it as the highway, and are not confined to the part which may be kept in order for the more convenient use of carriages and foot-passengers; Second, That a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before, is an unlawful act, and a public nuisance at common law; and that if the defendant placed permanent posts in the highway of such a character as to obstruct the passage of the public, they were guilty, although the posts were not placed on the hard part of the road, or although sufficient space for the public traffic remained: 31 L. J. N. S., Magistrates' Cases 166.

(2.) Though statutory authority is conferred upon telegraph proprietors to lay down their lines along a highway, they are still bound to see that no injury happens to passengers on the road from the bad or unsafe condition of their instruments, whether posts or wires: *Dickey vs. Maine Telegraph Co.*, 46 Maine 483 (A. D. 1859); s. c., 8 Am. Law Reg. 358. The plaintiff in this case was a passenger on a stage running between two towns. On arriving at the place of destination, the stage turned off, in the ordinary course of business, from the usual travelled part of the highway. A telegraph wire of the defendant, hanging too low, caught the upper part of the stage, and was the cause of its being upset, whereby the plaintiff was damaged. The charter authorized the company to locate and construct its lines along and upon any highway, * * * by the erection of necessary fixtures, &c., "but the same shall not be so constructed as to incommode the public use of said road or highway." The court said:—"It is very clear that this company could not legally erect posts only a foot in height, and extend the wires at that distance from the ground on the exterior limits and outside of the travelled path, if by so doing the use of any part of the highway was obstructed, or rendered inconvenient or dangerous, or the traveller incommoded. If any injury should arise to any such legal traveller by such erection, he using due care, the company would be liable to him. The same rule will apply when,

after erections properly made, they suffer the same to fall down or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveller and endanger his safety.”

2. *Injuries to telegraph lines by third persons.*—The law protects the telegraph proprietor in the enjoyment of his property, and when his line is properly established, any injury to it may be redressed by action. These general principles cannot be disputed. They have recently received a novel application in the case of a submarine telegraph line between England and France. A Swedish vessel caused its anchor to become entangled with the telegraph cable extending from Dover to Calais. It was held on demurrer, that the owners of the vessel would be liable in an English court, if negligence was established, even though the injury occurred on the high seas, beyond three miles from the English shore: *Submarine Telegraph Co. vs. Dickson*, 15 C. B. N. S. 759 (A. D. 1864).

IV. PENALTIES IMPOSED ON TELEGRAPH COMPANIES BY STATUTE.

It is quite common in the statutes of this country to impose penalties upon telegraph companies for failing to perform statutory obligations. Some of these are quite heavy. But little adjudication has yet been had upon them. Like other penal statutes, they will doubtless be construed strictly. A single instance may be cited. The California statute of 1850 imposed a penalty of \$500 upon a telegraph company for a neglect or refusal to transmit despatches, to be recovered in the name and for the benefit of the person or persons sending or desiring to send such despatch. A person offered a message to a company (the State Telegraph) whose line extended only a part of the distance to which the message was to be transmitted. Having been transmitted over its line, the message was tendered by the State Telegraph Company to another company (the Alta California Telegraph) for further transmission, which was refused. It was held that the plaintiff, who was the original sender of the message, was not “the person sending or desiring to send the despatch” within the meaning of the statute, but that the State Telegraph Company was the “sender,” as far as the Alta California Company was concerned. The plaintiff consequently failed to recover the penalty: *Thurn vs. Alta Telegraph Co.*, 15 Cal. 472 (A. D. 1860).

V. LEGISLATION UPON TELEGRAPHS.

This article has already become so extended that telegraph legislation can only be alluded to in general terms. Special acts of incorporation are resorted to in some of the states, while in others, telegraph proprietors are allowed to carry on their enterprises under general laws. The substance of these statutes is, that the organization may take place under prescribed terms, and that the proprietors of the line may erect their posts along highways without essentially interfering with public travel. The proprietors are commonly required to transmit messages for the public with impartiality and in good faith, and to send them in their regular order. There is usually imposed upon employees a duty not to make disclosures of the communications intrusted to them. Obedience to these provisions is often secured by penalties. Reference to the principal statutes is found in a note.¹ By a recent law of Congress, telegraph lines may be taken possession of for military purposes: 12 U. S. at Large 334. Under the internal revenue law, it is necessary that despatches be stamped: 12 U. S. S. 475, &c.

The propositions which have been set forth in this discussion

¹No reference is made to special acts incorporating particular organizations in this country, but only to provisions of a general nature. ENGLAND: 16 & 17 Vict. c. 103; 25 & 26 Vict. c. 39; 26 & 27 Vict. c. 112. NEW YORK: Laws of 1848, ch. 265, p. 392; Laws of 1845, ch. 243, p. 264; Laws of 1862, ch. 425, p. 761. MAINE: Rev. Stat., Title 4, ch. 53, revising Laws of 1852, ch. 237. NEW HAMPSHIRE: Compiled Statutes, p. 548, § 4. VERMONT: Laws of 1854, No. 33. RHODE ISLAND: Rev. Stat., Ed. 1857, p. 538. MASSACHUSETTS: Rev. Stat. 1860, ch. 64. CONNECTICUT: Compiled Laws, 1854, 210-3, 316. NEW JERSEY: Laws of 1855, ch. 194; Laws of 1862, ch. 49. DELAWARE: Rev. Stat. Ed. 1852, p. 480. MARYLAND: Code 1860, vol. 1, p. 169-172, 252. VIRGINIA: Rev. Stat., Ed. 1849, Title 16, ch. 65; Laws of 1852, ch. 149; Laws of 1853, ch. 27; Laws of 1854, ch. 45. LOUISIANA: Rev. Stat., Ed. 1856, 116 and 152. In this state there is a somewhat uncommon provision to the effect that in case of war, insurrection, or civil commotion, the telegraph operator, on application of an officer of the state or of the United States, is bound to give his communication immediate despatch, on penalty of being held guilty of a misdemeanor. The same provision is found in the Laws of Tennessee. MICHIGAN: Compiled Laws 1857, vol. 2, 672-8; 421-3. OHIO: Swan's Rev. Stat., Ed. 1854, ch. 29, p. 220; Laws of 1861, p. 104. ILLINOIS: Statutes (D. B. Cooke's Ed., 1858), 1175-6-7. TENNESSEE: Code of 1858, Title 8, ch. 9. IOWA: Code of 1860, Title 11, ch. 56. MISSOURI: Rev. Stat. of 1855, vol. 2, ch. 156. INDIANA: Rev. Stat. 1852, vol. 2, 422. WISCONSIN: Rev. Stat. 1858, ch. 76, 497; KANSAS: Compiled Laws 1862, 365, 768.