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LIABILITY OF TELEGRAPH COMPANIES FOR FRAUD, ACCIDENT, DELAY AND MISTAKES IN THE TRANS- MISSION AND DELIVERY OF MESSAGES.

(Continued from May No., page 294.)

PART III.—LIMITATION OF LIABILITY.

§ 13. *General Principles.*—The power of telegraph companies to make business regulations is recognised in most states by statute, but it is not dependant upon any statute, for it is a power inherent in all business corporations; it is subject, however, to certain limitations. The only limitations with which we are here concerned are that all regulations must be reasonable and in harmony with the law of the land. All regulations which attempt to excuse telegraph companies from the performance of any duty which they owe to the public are considered unreasonable. Where such regulations are embodied in contracts in the form of conditions they are held to be contrary to public policy and invalid. Individuals and telegraph companies do not stand on an equal footing. Such companies are entrusted with great privileges and powers, but they will not be permitted to use them like tyrants: *Sweetland v. Ill. & Miss. Tel. Co.*, 27 Ia. 433; *Tyler et al. v. W. U. Tel. Co.*, 74 Ill. 168.

§ 14. *Liability for Negligence, Fraud and Misconduct.*—In order to prevent oppression the courts have uniformly held, that telegraph companies can neither exempt themselves entirely from liability,

nor limit their liability to the amount paid for transmission, or any other nominal sum, for gross negligence, fraud or misconduct, either by regulations or conditions in contracts: *Candee v. W. U. Tel. Co.*, 34 Wis. 471; *Passmore v. Same*, 78 Penn. St. 238; *Bartlett v. Same*, 62 Me. 211; *Tyler v. Same*, 60 Ill. 421; s. c. 74 Id. 168; *Grinnell v. Same*, 113 Mass. 299; *Wann v. Same*, 37 Mo. 472; *White et al. v. Same*, 14 Fed. Rep. 710; *Becker v. Same*, 11 Neb. 87; *Sprague v. Same*, Daly 200; *Breeze v. U. S. Tel. Co.*, 45 Barb. 274; *Aiken v. Tel. Co.*, 5 S. C. 358; *Birney v. N. Y. & W. Tel. Co.*, 18 Md. 342; *Schwartz v. A. & P. Tel. Co.*, 18 Hun (N. Y.) 157; *W. U. Tel. Co. v. Fontaine*, 58 Geo. 433; *Ellis v. Am. Tel. Co.*, 13 Allen 226. And the better, and more numerous authorities, hold that neither regulations, nor conditions in contracts, as to either night or unrepeatd messages, attempting to limit liability to the amount paid for transmission, or any other nominal sum, for all errors or delays in transmission, or delivery, or for non-delivery, from whatever cause, can be permitted to affect the liability of such companies, for negligence, even where it is not gross. It is contrary to public policy to permit telegraph companies to exempt themselves from liability for any failure to use that degree of care and skill, which their business calls for: *W. U. Tel. Co. v. Graham*, 1 Col. 230; *Same v. Fenton*, 52 Ind. 1; *Same v. Neil*, 57 Tex. 283; *Same v. Brown*, 58 Id. 170; *Same v. Weiting*, 1 Tex. App. (Cir. Cas.), sect. 801; *Same v. Catchpole*, Id. sect. 268; *Womack v. W. U. Tel. Co.*, 58 Tex. 176; *Bartlett v. Same*, 62 Me. 211; *Tyler v. Same*, 60 Ill. 421; s. c. 74 Id. 168; *Pope v. Same*, 9 Brad. (Ill.) 283; *Manville v. Same*, 37 Ia. 214; *Hibbard et al. v. Same*, 33 Wis. 558; *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Ia. 433; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *Western Union Tel. Co. v. Shotter*, (S. C. La.) 18 Cent. La. J. 230.

§ 15. *Cases supporting Limitations.*—In Missouri, Massachusetts, Nebraska, New York and Pennsylvania, the power of telegraph companies to limit their liability for slight negligence in the transmission of unrepeatd messages, has been upheld; but in the New York cases: *Schwartz v. A. & P. Tel. Co.* 18 Hun 157; *Breeze v. U. S. Tel. Co.*, 45 Barb. 274, the limitation was by contract, and in New York it is well settled that all carriers can limit their liability for negligence in that way. The only evidence of negligence introduced in the other cases was evidence that mis-

takes had been made in transmission, and there is some conflict of authority as to whether such evidence is sufficient by itself to make out a *prima facie* case of negligence, as will appear hereafter under the head of Burden of Proof, sect. 21.

In the case of *Wann v. W. U. Tel. Co.*, 37 Mo. 472, the only evidence of negligence introduced was that "r" had been substituted for "s" in transmitting or transcribing the word "sail." The message had been received subject to printed regulations providing that the company would not be responsible for mistakes * * * in the transmission of un-repeated messages * * * from whatever cause they might arise, and fixing the charge for repeating at half the usual rates, and the limit of liability for repeated messages at five hundred times the amount paid for transmission. The message was not ordered repeated, and the court held that the regulation as to repeating was reasonable.

In *Becker v. W. U. Tel. Co.*, 11 Neb. 87, the only evidence of negligence was the fact of the substitution of "sixty" for "fifty" in an un-repeated message. The company's regulations provided that it would "not be liable for mistakes * * * of any un-repeated message beyond the amount received for sending the same," and the provision was held reasonable.

In the case of *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299, the only evidence of negligence was the omission of the word "answer." Evidence was offered to show that the omission resulted from ordinary negligence but was not admitted; in the case of *Ellis v. Am. Tel. Co.*, 13 Allen (Mass.) 226, the only evidence of negligence was the fact of the substitution of "one hundred seventy-five (175)" for "one hundred twenty-five." Both messages were written on contract blanks, such as are now used by the Western Union, which provided that the company would not be responsible "for mistakes * * * in the transmission of any un-repeated message" beyond the amount received for sending it, unless it was insured. Neither message was either repeated or insured, and in both cases the regulation was held to exempt from liability for ordinary negligence beyond the limit fixed.

In the case of *White et al. v. W. U. Tel. Co.*, 14 Fed. Rep. 710 (Kas.), the message was written on a contract blank as in the Massachusetts cases, and was not repeated. The only evidence of negligence was the substitution of "fifty" for "fifteen." The

court instructed the jury that the regulation as to repeating was valid so far as it concerned liability for ordinary negligence.

In the case of *Passmore v. W. U. Tel. Co.*, 78 Penn. St. 238, regulations similar to those in the Massachusetts cases, though not it seems embodied in a contract, were held reasonable. The message was not repeated. The only evidence of negligence was the substitution of "s" for "h."

§ 16. *Regulations conflicting with Statutes.*—In those states where telegraph companies are made liable by statute in a penalty for any failure, through negligence to receive, transmit or deliver a message, all regulations, whether embodied in contracts or not, attempting to exempt them from liability (*Marvin et al. v. W. U. Tel. Co.*, Dist. Ct. N. Y. City, 15 Chic. L. N. 416), or limit their liability to a smaller sum than the statutory penalty, are void: *W. U. Tel. Co. v. Adams*, 87 Ind. 598; *Same v. Buchanan*, 35 Id. 430; *Same v. Meek*, 49 Id. 53.

§ 17. *Regulations which have been held valid.*—The following regulations have been held reasonable and valid:

1. Regulations exempting telegraph companies from liability, or limiting their liability, for errors, delays and failures to transmit or deliver, occurring without fault or negligence on their part: *Breese v. U. S. Tel. Co.*, 45 Barb. 274; *White et al. v. W. U. Tel. Co.*, 14 Fed. Rep. 710; *McAndrew v. The Ele. Tel. Co.*, 17 C. B. 3; *Aiken v. Tel. Co.*, 5 S. C. 358; *Tel. Co. v. Griswold*, 37 Ohio St. 301; *Becker v. W. U. Tel. Co.*, 11 Neb. 87; *W. U. Tel. Co. v. Catchpole*, 1 Tex. App. (Cir. Cas.) sect. 268; *Camp v. W. U. Tel. Co.*, 1 Met. (Ky.) 164; *Passmore v. Same*, 78 Penn. St. 238; *Ellis v. Am. Tel. Co.*, 13 Allen (Mass.) 226.

2. Regulations providing that the company will only be responsible to the limit of its lines for messages destined beyond: *Baldwin et al. v. U. S. Tel. Co.*, 45 N. Y. 744; *Stevenson v. The Montreal Tel. Co.*, 16 Up. Can. 530. But in the absence of such a regulation, a telegraph company which receives pay for the transmission of a message to a place beyond the limit of its line, with which it is in communication by the agency of other companies, is regarded as undertaking that the message will be transmitted and delivered at that place: *DeRutte v. N. Y., A. & B. E. Tel. Co.*, 30 How. Pr. 403.

And where a company restricts its liability to the limits of its

own line, and does not expressly provide by its regulations that they shall apply to connecting lines, connecting lines over which a message received by it may be transmitted, cannot take advantage of such regulations: *Squire v. W. U. Tel. Co.*, 98 Mass. 232.

3. Regulations restricting liability for mistakes in the transmission of obscure messages and cipher dispatches: sects. 9 and 10 *supra*, and cases there cited.

4. Regulations providing that the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message: *Wolf v. W. U. Tel. Co.*, 62 Penn. St. 84; *Young v. W. U. Tel. Co.*, 65 N. Y. 163; and so, also, it has been held, are regulations limiting the time to twenty days: *Hermann et al. v. W. U. Tel. Co.*, 57 Wis. 562.

§ 18. *Upon whom Regulations are Binding—Notice.*—No regulation is binding upon either the sender or receiver of a message, unless he has either actual or constructive notice of it: *DeRutte v. Tel. Co.*, 1 Daly 547. But if the sender of a message fills up and signs a blank, upon the face of which there is a printed reference to conditions and regulations of the company upon the back of the blank (*W. U. Tel. Co. v. Carew*, 15 Mich. 525); or signs a printed contract setting forth the company's regulations, and the conditions upon which the message is accepted, he is bound by such regulations and conditions, if reasonable, whether he reads them or not: *Grinnell v. W. U. Tel. Co.*, 113 Mass. 299; *Redpath et al. v. Same*, 112 Id. 71.

But notice to the sender is not notice to the person to whom the message is sent, and the rights of the latter are not affected by regulations and conditions in the company's contracts with the former: *DeLa Grange v. Tel. Co.*, 25 La. Ann. 383; *Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Harris v. W. U. Tel. Co.*, 9 Phila. 88; *contra Ellis v. Am. Tel. Co.*, 13 Allen 226.

In the case of *Harris v. W. U. Tel. Co.*, *supra*, the message was delivered by the company on a blank, with the following printed heading, viz.:

"Western Union Telegraph Co. The rules of the company require that all messages received for transmission shall be written on the message-blanks of the company, under and subject to the conditions printed thereon, which conditions have been agreed to by the sender of the following message;" but it was held, that the

heading could not be considered to have given notice of a condition as to repeating agreed to by the sender of the messages.

§ 19. *Regulations construed.*—The following are cases in which regulations have been construed :

In *Bryant v. Am. Tel. Co.*, 1 Daly 575, a regulation providing that the company should not be *responsible* for mistakes or delays in “transmission,” was held not to apply to delays after the message had safely arrived at the place to which it was to be sent.

In *Aiken v. Tel. Co.*, 5 S. C. 358, regulations substantially the same as those on the night message-blanks now used by the Western Union, were held not to include negligence within their terms.

In *Birney v. N. Y. & W. Tel. Co.*, 18 Md. 342, regulations as to delay in transmission or delivery or non-delivery, were held not to include within their terms a failure to attempt to transmit.

And in *W. U. Tel. Co. v. Graham*, 1 Col. 230, a regulation as to repeating, was held not to affect the liability of the company for a failure to deliver, but only its liability for mistakes in transmission.

In the case of *Young et al. v. W. U. Tel. Co.*, 65 N. Y. 163, the message was sent subject to the following condition, viz. : “The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message ;” and the court held that it was not a sufficient compliance with the condition, to exhibit a written statement of the claim to an operator and take it back after he has read it. The claim should be presented in writing to an officer of the company and left in his possession.

PART IV.—MISCELLANEOUS.

§ 20. *Contributory Negligence.*—Where a dispatch is so altered through the negligence of a telegraph company as to make it unintelligible, the person to whom it is sent should at least have it repeated before attempting to act upon it, and if he fails to do so, and suffers loss in consequence of acting upon what he erroneously supposes the sender meant, he will be guilty of contributory negligence, and cannot hold the company liable : *Hart v. Direct Cable U. S. Co.*, 1 N. Y. (Car. R.) 93 ; *W. U. Tel. Co. v. Neill*, 57 Tex. 292 ; but it is not contributory negligence to act upon a message without having it repeated, if the only words which appear to have been altered are understood in their original sense, and taking them in

that sense the whole message appears clear and intelligible: *De Rutte v. N. Y. &c., Tel. Co.*, 30 How. Pr. 403.

The case of *Koons v. W. U. Tel. Co.*, 12 W. N. C. 49; 16 Reporter 472, bears upon the subject of contributory negligence on the part of senders of messages in writing illegibly. In that case, however, the negligence was wholly on the part of the sender of the message.

§ 21. *Burden of Proof.*—In the absence of any valid limitation of liability for negligence, the plaintiff in an action against a telegraph company, makes out a *prima facie* case by proving, 1. The undertaking to transmit and deliver. 2. Unreasonable delay: *W. U. Tel. Co. v. Gougar et al.*, 84 Ind. 176; *Same v. Bertram*, 1 Tex. App. (Cir. Cas.), sect. 1151; *Same v. Weiting*, Id., sect. 801; *Behm v. W. U. Tel. Co.*, 8 Biss. (Cir. Ct.) 131; or, 3. Failure to deliver: *W. U. Tel. Co. v. Fontaine*, 58 Geo. 433; *Same v. Wenger*, 55 Penn. St. 262; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *W. U. Tel. Co. v. Graham*, 1 Colo. 230; *Same v. Fenton*, 52 Ind. 1; *Pope v. W. U. Tel. Co.*, 9 Brad. (Ill.) 283; or, 4. That the dispatch delivered differs materially from the one sent: *W. U. Tel. Co. v. Carew*, 15 Mich. 525; *Same v. Meek*, 49 Ind. 53; *Telegraph Co. v. Griswold*, 37 Ohio St. 313; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *Rittenhouse v. Ind. Line of Tel.*, 44 Id. 263; *Turner v. Hawkeye Tel. Co.*, 41 Ia. 458; *Bartlett v. W. U. Tel. Co.*, 62 Me. 221; and 5. Damages.

The sufficiency of evidence of error to prove negligence, is not entirely settled however. Some authorities hold that it is necessary to prove that the error occurred through negligence where the company is exempted by its regulations from liability for errors occurring without negligence: *Sweatland v. Ill. & Miss. Tel. Co.*, 27 Ia. 433; *Aiken v. Tel. Co.*, 5 S. C. 358; *Womack v. W. U. Tel. Co.*, 58 Tex. 176.

And all the cases cited in Part III., which hold that telegraph companies may limit their liability for ordinary negligence, hold also, with the exception of *Schwartz v. A. & P. Tel. Co.*, that proof of a mistake is not sufficient to make out a *prima facie* case of gross negligence.

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