WANN, JOHN V THE WESTERN TELEGRAPH COMPANY 1886 COUNTY OF ST. LOUIS 558/1

OLD 469/8

REVERSED AND THE CAUSE REMANDED

INVOLVED: - AN ACTION INSTITUTED TO RECOVER DAMAGES
- BAILMENTS
- CARRIERS

State of Missouri } ss: Be it remembered
County of St Louis } that heretofore to wit:
on the first day of Nov
ember eighteen hundred and sixty two there was
filed in the office of the Clerk of the St Louis Court
of Common Pleas within and for the County aforesaid
a petition which is in the words and figures following
to wit:

John Wann plaintiff

vs.

The Western Union Telegraph Company
defendant

The State of
Missouri
St Louis County } ss:

In the St Louis Court of Common Pleas
Term of November A D 1862.

Petition

Plaintiff States that defendant is a Telegraph Company
duly incorporated by law, engaged in transmitting
telegraph dispatches for hire and having a principal
office and agent in the City of St Louis in said County
and State aforesaid; at which office it receives and
from which it sends forward dispatches to wit: by
telegraph for hire

That on the 18th day of September A D 1862 he caused
to be delivered to deft and its agent in their said office
in said City of St Louis for transmission by said deft by
telegraph to McAndrew and Wann, a forwarding
house in the City of New York in the State of New
York, a dispatch in the words and figures following

2.

to wit: 18th Sept. 62

Mc Andrews & Wann New York — Ship by said immediately — take five thousand (5000) Liverpool three thousand (3000) Turks Island &c — signed "John Wann."

which on the day of the date aforesaid thereof said deft & its said agent received at its said office in St Louis and undertook for a reasonable reward to transmit by telegraph from said City of St Louis and to deliver to the said Mc Andrew & Wann, in the words and figures thereof at said City of New York with reasonable diligence and dispatch

That the object of said dispatch was to direct and procure the said Mc Andrews & Wann to procure for plff at said City of New York (said Mc Andrews & Wann then & there being forwarding and commission merchants) and ship to him to wit: at the city of Chicago, in the State of Illinois by water conveyance, to wit: from said City of New York to the City of Buffalo in said State of New York by Canal and thence to said City of Chicago by said five thousand Sacks of Liverpool Salt and three thousand Sacks of Turks Island Salt, at plffs costs, charges and expenses

That said defendant transmitted said dispatch and caused the same to be delivered to the said Mc Andrew & Wann in the said City of New York so negligently and carelessly that on being delivered to and received by the said Mc Andrew & Wann as aforesaid at said city, it read as follows:

3. "St Louis Sept 18th 1862 Mc Andrew & Wann—
Ship by rail immediately—take five thousand Liverpool
three thousand Tusks Blend." Signed "John Wann".
That said defendant delivered and caused to be delivered
to said Mc Andrew & Wann the said dispatch first afore-
said in the words and figures last aforesaid, so carelessly
and negligently as aforesaid, on the 19th day of September
1862 to wit; at said City of New York.
The said Mc Andrews and Wann, having received said
dispatch on said 19th September 186 in the words and
figures last aforesaid and understanding the same accord-
ing to the import of said words and figures, immediately, to wit;
on or about the 20th & 21st days of September 1862 procured
for plaintiff, to wit; at said City of New York and forwarded
to him at said City of Chicago in the State of Illinois to wit;
by rail road from said city of New York to the City of Buffalo
in said city of New York (being a distance by rail road
of some four hundred and fifty five miles) and thence by
rail to said City of Chicago, one thousand sacks of Liverpool
Salt and two thousand nine hundred and sixty eight
sacks of Tusks Blend Salt at plff.s cost, charge and
expence, in pursuance of said dispatch so delivered
to them as aforesaid by defts and of the instructions therein
and immediately wrote plff at St Louis in said State of Missouri
informing him thereof; which letter so written plff. after-
wards on the 24th day of the same month of September
received at St Louis by due Course of mail; and thereupon
immediately on the same day last aforesaid telegraphed

Said McAndrew & Wann at New York not to Ship any more of Said Salt by rail

Plaintiff Says the legitimate and reasonable charges upon Said Salt So Shipped as aforesaid, to wit from Said City of New York to Chicago, to wit; by rail road from New York to Buffalo and by Sail from Buffalo to Chicago for Shipping the Same amounted to and Cost him and he was compelled to pay & did pay the Sum of two thousand five hundred and five dollars and twenty nine cents; whereas but for the aforesaid carelessness of Said defendant in transmitting and delivering Said dispatch and Substituting therein the word rail for the word Sail, as aforesaid, Said McAndrews & Wann could and would have Shipped Said Salt by Canal to Buffalo aforesaid and thence by sail to Chicago, aforesaid, at and for an expense, cost, charge and outlay of one thousand two hundred and Sixty Seven dollars and two cents, and not more.

Plaintiff Says that by reason of the above alleged Carelessness and mistake of deft. in transmitting his Said dispatch as aforesaid the Said lots of Salt Secondly above mentioned were Shipped by rail as above Set forth instead of being Shipped by water conveyance to wit between the points of New York & Buffalo above mentioned - whereby he was put to an unnecessary expense, charge and outlay of $1024.57 and to his damages in that Sum, which Sum and damages he Says he is entitled to recover

5 and have of from said defts and for which sum he asks judgment against them R. S. Hart
atty for plff.

The said John Wann plff makes oath and says that the foregoing petition and the matters therein as stated he believes to be true John Wann
State of Missouri } Sworn to and subscribed before me
County of St Louis } this 1st day of November A.D. 1862
Henry S Lasar
Notary Public

L. S.

Summons Thereupon the following summons issued to wit:
County of St Louis, ss: The State of Missouri
To the Sheriff of St Louis County ..... Greeting.
We command you to summon the Western Union Telegraph Company to appear before the judge of our Court of Common Pleas on the first day of the next term thereof, to be held in the City of St Louis, within and for the county of St Louis on the third Monday in November 1862, then and there to answer the complaint of John Wann as set forth in the annexed petition and have you then and there this writ.

Witness Lem J Papin, clerk of our said court with the seal thereof hereto affixed, at office in the city of St Louis this 1st day of Nov in the year of our Lord eighteen hundred and sixty two Lem J. Papin
Clerk.

L. S.

6

To the foregoing Summons the Sheriff made the following return, to wit:

Sh'ffs Return

Executed this writ in the County of St Louis on the 1st day of November 1862 by delivering a copy of the writ and petition as furnished by the clerk to Edwin C Bush, treasurer of the Western Union Telegraph Company.

John H Anderson Sheff.
by O. S. Fuller
Dep'ty.

On the 21st day of November 1862 the following Answer was filed, to Wit:

Answer

The defendant for answer to plaintiffs petition admits that defendant is a duly incorporated Company engaged in the business of transmitting dispatches or messages; but denies that defendant undertook to transmit the dispatch or message described in said petition in the manner and form as alleged. Defendant denies having carelessly or negligently transmitted said dispatch or message and denies having negligently or carelessly delivered or caused the same to be delivered as alleged. Whether or not said McAndrew & Wann understood said dispatch as alleged or whether or not the charges and expenses on the Salt alleged to have been shipped by said McAndrew & Wann, amounted to the sum stated defendant has no knowledge or information sufficient to form a belief. Defendant denies that plaintiff is entitled to recover the sum of one thousand

7

and twenty four 57/100 dollars as alleged or any sum whatever.

And for further answer defendant states that at the times mentioned in said petition and for a long time previous thereto, the Western Union Telegraph Company had published and publicly made known the terms and conditions on which messages would be received by said Company for transmission and on which terms alone defendant would undertake to transmit messages over the telegraph line of said Company. Said public notice is in the words and figures following to wit:

Western Union Telegraph Company.

Terms and Conditions on which messages are received

No 1.] by this Company for transmission.

The public are notified that in order to guard against mistakes in the transmission of messages, every message of importance 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 for transmission will be charged for repeating the message; and while this Company will, as heretofore, use every precaution to insure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages beyond an amount exceeding five hundred times the amount paid for sending the message Nor will it be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise, nor for delays

arising from interruptions in the working of its telegraphs, nor for any mistake or omission of any other company over whose lines a message is to be sent to reach the place of destination. All messages will hereafter be received by this company for transmission subject to the above conditions.

A. Stager Gen. Sup't
Cleveland Ohio

J. R. Elwood, Secy. Rochester
N. Y.

that said notice was printed on the bulletin paper kept in the office of said Company and visable to every person who entered the office of said Company; that plaintiff had full knowledge of said notice and publication and the terms and conditions therein contained at the times mentioned in said petition that said plaintiff expressly assented to said terms and conditions and the defendants undertaking to transmit the said dispatch was upon said terms and conditions; that there was no stipulation for the repeating of said dispatch or message, nor did said plaintiff pay or stipulate to pay the extra charge mentioned in said notice for repeating said dispatch or message. Wherefore defendant prays to be dismissed hence with costs.

J. K. Knight
Atty for Deft.

State of Missouri } ss.
County of St Louis }

Edwin C. Buck agent of defendant being duly sworn on his oath says that the foregoing answer and the matters and things

9

as therein stated he believes to be true.

Subscribed and sworn to before me — Edwin C. Bush

this 20th day of November 1863

(L S)

James Taussig

Notary Public St Louis Cmty Missouri

Afterwards at the November Term 1863 the following further proceedings were had, to wit:

Friday December 18th 1863

Jury sworn &c

Now at this day come the said parties by their respective attorneys and thereupon come also a jury, to wit: Isaac Frank, Fred Englebach, C. Beck, Ferdinand Krayshe, C Mortland, Peter Farley, Frank Burner, Henry Hackman, Henry Heidermann, Charles Stuever, John Keller, and James Weber, twelve good and lawful men, who being duly elected, tried and sworn the matters in controversy well and truly try, the trial of this cause progressed, but not being finished is laid over until to-morrow morning.

On Saturday December 19th 1863 the following further proceedings were had, to wit:

Trial & verdict for plaintiff

Now at this day come again said parties by their respective attorneys and the jury empannelled and sworn herein also come; and the trial of this cause being finished, the jurors aforesaid upon their oaths aforesaid, find the issue herein joined in favor of said plaintiff and assess his damages at the sum of one thousand and eighty five dollars and forty four cents. It is therefore considered by the Court that said plaintiff recover of

10

said defendant the sum aforesaid in form aforesaid as assessed by the jury and his costs and charges herein expended and have thereof execution.

Motion for new trial filed.

Afterwards at the November Term 1863 the following further proceedings were had to wit:

Saturday April 2. 1864.

Motion for new trial & time extended to file Bill of Exceptions

The defendants motion for a new trial herein being heard and fully considered by the Court, it is ordered that the same be overruled. Thereupon the following agreement was filed, to wit:

It is hereby agreed by and between the parties that the bill of exceptions, the appeal bond and affidavits of appeal may be made out and filed within the first twenty days of next term of this Court with the same effect in all respects as if made out and filed at this term

April 2 1864.

J K Knight
atty for dft.

Hill & Jewett
atty for plff.

Afterwards at the April Term 1864 the following further proceedings were had to wit:

Time further extended for filing Bill of Exceptions

Wednesday April 20th 1864.

By consent of parties leave is given the defendant to file his bill of exceptions, affidavit for appeal and appeal bond on or before the fourteenth day of May next

On Friday May 6. 1864 the following further proceedings were had, to wit:

11

Bill of exceptions filed & appeal allowed

Now at this day comes the defendant by its attorney and files a bill of exceptions and an affidavit for appeal: and on his motion an appeal is allowed it to the Supreme Court from the judgment rendered herein

Bond filed & approved

Whereupon said defendant files an appeal bond with Edwin C. Bush as principal and Silas R. Boardman and Samuel A. Gaylord as securities which bond is approved by the Court.

Affidavit for appeal

Which affidavit for appeal and appeal bond are in the words and figures following, to wit:

The above defendant comes and prays an appeal from the judgment in this case and Edwin C Bush agent for said defendant makes oath and says that said appeal is not made for vexation or delay but because affiant believes the appellant is aggrieved by the judgment or decision of the Court.

Sworn to and Subscribed before me this 6th day of May 1864 — Edwin C. Bush

L. J. Papin Clk

Appeal Bond

Know all men by these presents that we Edwin C. Bush as principal and Silas R. Boardman and Samuel A. Gaylord, as securities, are indebted to John Wann in the sum of two thousand five hundred dollars, for the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at St Louis this 6th day of May one thousand eight hundred and Sixty four. The condition of this obligation is

that whereas the Western Union Telegraph Company has appealed from the judgment rendered against them and in favor of John Wann in the St Louis Court of Common Pleas for the sum of one thousand and eighty five dollars and forty four cents together with costs. Now if the said appellants shall prosecute their appeal with due diligence to a decision in the Supreme Court and shall perform such judgment as shall be given by the Supreme Court or such as the Supreme Court may direct the St Louis Court of Common Pleas to give, and if the judgment of such Court or any part thereof be affirmed, that they will comply with and perform the same as far as it may be affirmed, and will pay all damages and costs which may be awarded against them by the Supreme Court, then this obligation to be void; otherwise to remain in full force

approved by Court this 6th day of May 1864
attest: Leon J Papin Clk.

Edwin C. Buck (Seal)
S R Boardman (Seal)
Saml A. Gaylord (Seal)

The said Bill of Exceptions is as follows, to wit;

Be it remembered that when this case was called for trial the parties by their respective Counsel announced themselves ready and the following proceedings were had.

Deposition of Jonathon K. Dobbe.

The plaintiff read in evidence the following depositions to wit;

Direct Interrogatories.

Interrogatory 1. What is your name, age, occupation, residence

Answer 1. Jonathan W. Pottle, forty four years, Commission merchant Chicago. I am managing the business in Chicago of R. M. Funkhouser & Co. I am acquainted with John Wann of St Louis

Interogatory 2. Do you Know of any Shipment of Salt made by any house in New York to John Wann. at St Louis, and if so please State the name of the house Shipping said Salt, how it was Shipped, the quantities and the cost of freight and what your house, R M Funkhouser & Co, had to do with it: please also, if you know, give the difference in the cost at the time of the Shipment of said Salt between the cost of freight by Canal & Sail and that by rail and Steam on lakes and if there was any difference from New York to Chicago?

Answer 2. I do. Mc Andrew & Wann, the Salt was Shipped by rail and Steam from New York to Chicago one thousand Sacks of ground alum, twenty nine hundred and Sixty eight of Funks & Land, the cost of freight was thirty Six cents per hundred pounds from New York to Chicago. We received the Salt and paid the freight and forwarded the Salt according to the instructions of Mr Wann, the difference in the cost between freight by Canal and Sail and that by rail and Steam on lake was Sixteen cents per hundred pounds; the freight by rail and Steam on lake being Sixteen cents per hundred pounds, the highest.

Interogatory 3 Please give the weight of said Salt, the time of its

14. Shipment, the time you received said Salt in Chicago

Answer 3. The weight of said Salt as per bills of lading which I now hand to you, was six hundred and forty three thousand three hundred and twenty eight pounds. The said bills of lading are dated the twenty fifth of September 1862. Said bills of lading referred to I now hand to you; they are marked No 1 & No 2. I do not remember the date of its receipt.

Interrogatory 4. What is meant be understood by the term forwarded by Sail?

Answer 4. by Sailing vessel on the Lakes.

Jonathan H. Pottle (Seal)

Deposition Sam[l] Wann. Samuel Wann, of lawful age, being produced, sworn and examined on the part of the plaintiff, deposeth and saith My name is Samuel Wann. My age is 43 years. I know the plaintiff, John ~~Samuel~~ Wann. I remember purchasing Salt for plaintiff about the month of September 1862. the Salt was to be forwarded to Chicago, I asked him by telegraph as to the mode of transportation. I have a copy of the dispatch which bears date September 17th 1863 and reads as follows: "Shall we forward Salt by Steam or Sail" or Lake - Can buy Same quantity of each in time. not much change in freight since you were here Reply at once."

I received a telegraphic reply to this communication - it was dated 18th September 1862 and was received September 19th 1862. I forwarded the original telegram received by me to John Wann at St Louis Missouri. I have a copy of

15 it which reads as follows:

St Louis 18th Sept 1862

Mc Andrews & Vann,

Ship by rail immediately take five thousand Liverpool, three thousand Turks Island 2d

John Vann.

In conformity with this dispatch I purchased the Salt ordered therein and advised Mr John Vann by telegraph of the purchase on the 19th September. The telegram thus sent correctly stated the quantity of Salt purchased and is as follows: a copy having been made in our books to which I now refer 19 Sept 1862

19 Sept 1862. John Vann Esq St Louis

"Have bought five thousand Liverpool. one twelve half & three thousand Turks - abnt seventy five, four months forwarding by rail to Chicago." "Mc Andrew & Vann"

The Salt referred to was bought abnt September 19th and the Shipment commenced abnt that time - it was shipped by rail - it was shipped according to the instructions as per telegraph before mentioned. There are three modes of transportation to Chicago - rail, Steam and Sail; these three words expressing three different modes known and used among forwarders. I understood the telegram from John Vann of 18th September, as copied above to be, send by rail, thinking he wanted it by the quickest route, the transportation by rail is the most expensive that by sail, is the cheapest. I notified Mr John Vann on the 19th September

of the Shipment by said - the dispatch is given above. I do not know the different rates from here to Chicago and cannot state the cost of transportation. I received instructions from Mr Wann to Ship the Shipment by said - they came by telegraph received September 24th This is a copy of the dispatch: St Louis 24" 1862.
"To Mc Andrew & Wann. Dont Ship any salt by R.R. and Steam only canal & lake "John Wann"
At the time of receiving the last dispatch a good portion of the Salt had been forwarded. The copies of the dispatches given above sent by me to John Wann, are taken from our books. the copies of the dispatches from him are taken from those dispatches, omitting the formal printed matter and headings and instructions to collect costs. Without express instructions to forward by said, we should have forwarded by Steam or Sail. I had charge of the Salt department of our business and all the matters testified to by me came under my personal supervision. I am one of the firm of Mc Andrew & Wann. But Mr Mc Andrew had no personal connection with the transaction of this business
The telegrams mentioned in this deposition as received by us from John Wann were paid by us; those sent to him were paid by him Sam. Wann
Subscribed and Sworn to before me on the day and at the place and within the hours first aforesaid
Wm Henry Arthur
Commissioner for Missouri
in New York

17

Plff also read the following copy of a dispatch which was admitted to be a true fac Simile copy of the original dispatch described in the petition and delivered to the deft. to wit:

18th Sept 62

Fac simile of original dispatch

"Mc Andrew & Wann

New York

Ship by Sail immediately- Take five thousand (5000) Liverpool - three thousand (3000) Inks & land

John Wann."

Plff also proved that the ordinary price for said dispatch to New York was paid on delivery but not the price for repeating the dispatch.

Testimony of Edwin C. Bush

The defendant produced Edwin C. Bush, who testified that he is and has been since the first November 1861, the general agent of the defendant at St Louis, and have been a practical operator for several years; that deft is a telegraph company engaged in transmitting dispatches with a chief office in St Louis; that said defendant had at the date of the dispatch in question a complete apparatus for carrying on said business. It is known as the Morse system of telegraphing and the best in use. It is the system most generally used and considered the most perfect Known. The employees of deft. at that time were skilful and experienced operators and were selected for their superiority in that respect.

Notwithstanding the completeness of the system of telegraphing used by deft. yet it is seriously affected by atmospheric causes which are uncontrolable and often interrupt said

business for days at a time

At other times by reason of Storms or atmospheric electricity communications are partially interrupted and it is almost impossible to transmit dispatches over the line with any degree of certainty. The line of the dft extends from St Louis to Pittsburgh and a Storm at one end of the line would affect the transmission of dispatches without the extent of the derangement being known at the other end of the line. When there is a derangement from atmospheric causes the operator at either end of the line will know that there is some derangement. He ascertains this by touching the instrument. But whether the derangement is so great as to interfere with the transmission of the dispatch, he is not always able to tell.

The defendant has always had a notice of regulations posted in their office. I hold in my hand one of those notices; here it is;

No 2 Western Union Telegraph Company!

Terms and Conditions on which messages are received by this Company for transmission!

The public are notified that in order to guard against mistakes in the transmission of messages, every message of importance 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; and while this company will as heretofore, use every precaution to insure Correctness, it will not be responsible for mistakes

or delays in the transmission or delivery of repeated messages beyond an amount exceeding five hundred times the amount paid for sending the message. Nor will it be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise, nor for delays arising from interruptions in the working of its telegraphs, nor for any mistakes or omission of any other Company over whose line a message is to be sent to reach the place of distination. All messages will hereafter be received by this Company for transmission subject to the above conditions.

This notice is on the blanks prepared for the writing of dispatches and is always kept on the counter at the office of defendant. The deft. has also had blank books with these notices printed at the caption for the use of their customers. The plaintiff had one of these books prior to the sending of the dispatch in question, and I have no doubt had full knowledge of the regulations contained in said notice. Plaintiff did not pay for repeating the message as required by the regulations. He gave no directions to have it repeated and did not to my knowledge disclose the nature or importance of the dispatch.

On Cross examination, witness explained to the jury the difference in the Sounds made by the telegraph in writing S. and in writing R. and said that the operator determines and writes down the message sent by telegraph from the Sounds made by the machine; and that no marks are made on paper or any other material by

the machine. He said that a good operator could always tell as soon as he touched his machine whether it was in good order or not or whether any disturbing causes were acting on it. Did not remember that on the day this message was sent the telegraph was out of order or that any disturbing causes affected it — Said that if no disturbing influences were affecting it and it was in good order — if it was touched correctly at this end, it would make the required sound at the other end of the line, Said the average number of daily messages was abut three hundred and he did not remember that there was any other complaint of error in any other message sent on the day this was. Said that for a week before the day he testified the number of messages had been daily abut 300 and he did not remember as any mistake had been complained of.

Testimony S. B. Palmer

S. Belvin B. Palmer was introduced on part of defendant and testified in substance that he was delivery Clerk for deft. at the date of the dispatch in question that he had previous to that time delivered messages to plff. on paper having the regulations of the Company printed on the caption: that is having these notices printed on them Plff frequently wrote dispatches on paper having these captions on them. I also delivered a blank book of deft with these headings printed on them to plff for his use in writing and sending dispatches This was prior to the date of said dispatch

Deft then read the notice described by witnesses

21

Notice of terms & conditions of sending dispatches

Western Union Telegraph Company

Terms and conditions on which messages are received by this Company for transmission.

The public are notified that in order to guard against mistakes in the transmission of messages, every message of importance 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 of transmission will be charged for repeating the message; and while this Company will as heretofore, use every precaution to ensure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages beyond an amount exceeding five hundred times the amount paid for sending the message; nor will it be responsible for mistakes or delays of unrepeated messages from whatever cause they may arise, nor for delays arising from interruptions in the working of its telegraphs, nor for any mistake or omission of any other Company over whose lines a message is to be sent to reach the place of destination. All messages will hereafter be received by this Company for transmission subject to the above conditions.

Send the following message subject to the above conditions: _____ 186

To _____

The above is all the evidence in the Case

Instructions for plaintiff given.

Plff then asked the following instructions which the Court gave, to wit:

The jury are instructed that the defendants are responsible

as common Carriers for any negligence or carelessness in Copying or transmitting the plaintiffs message and are responsible for such damages as the plaintiff may have suffered, if any, by reason of defendants having carelessly or negligently transmitted such message; and the defendants are not excused from their said responsibility though the plaintiff may had notice of the terms claimed by the defendants as set forth on the tops of the papers used by them in the writing and sending of dispatches.

To which the defendant by his Counsel then and there duly excepted.

Defendants' instructions refused.

The defendant then moved the Court to give the following instructions:

1. The jury are instructed that the Western Union Telegraph Company, being engaged in transmitting messages by electrick telegraph for hire, may limit its responsibility by prescribing reasonable conditions to those who employ said Company to transmit messages by said electrick telegraph

refused.

2. If the jury believe from the evidence that the plaintiff or his agents at New York were guilty of carelessness which carelessness occasioned the loss complained of by plaintiff then the plaintiff cannot recover.

3 If the jury believe from the evidence that the plaintiff had Knowledge of the terms and conditions upon which messages were received by the defendant for transmission when he employed the defendant to transmit the message in question, then the law presumes that the plaintiff

23 accepted said terms and conditions as a part of his Contract with defendant for the transmission of the same and became bound thereby; unless he objected to said terms and Conditions at the time he employed said defendant.

refused 4. If the jury believe from the evidence that the plaintiff knew at the time he employed defendant to transmit the message in question, that one of the regulations of defendant was, that a higher rate is charged for repeated messages and that the company will not be responsible for unrepeated messages, and if the plaintiff did not order the defendant to repeat said message or pay the price for repeating the same, or disclose the nature and importance of said message, then the law presumes that he had said message transmitted without being repeated at his own risk

refused 5 If the jury believe from the evidence that the nature of the defendants' business is so affected by atmospheric and other influences as not always to be under the control of the agents of the defendants, and that plaintiff had Knowledge of said infirmity in defendants business then it was the plaintiff to inform defendant of the importance of the message in question or to pay the additional price required by the rules of said Company, if he intended to hold said Company liable for mistakes.

refused 6, If the jury believe from the evidence that the plaintiff did not pay for the message in question and did not assume any liability to pay for the same then

the plaintiff cannot recover; unless he shows that the mistake in transmitting the message in question occurred by the gross negligence of the defendant or some of its agents which the Court refused. To which the deft then and there duly excepted.

Deft also asked the following instructions which were given, to wit;

Deft's Instns Given

1. To recover in this case the plaintiff must prove affirmatively to the satisfaction of the jury that the mistake in the petition complained of, occurred by the negligence or carelessness of the defendant or of some of its agents or servants.

Given

2 If the jury believe from the evidence that the Western Union Telegraph Company had published and kept publicly exposed at their place of business the following notice, to wit; "Western Union Telegraph Company No 1, Terms and conditions on which messages are received by this Company for transmission

The public are notified that in order to guard against mistakes in the transmission of messages, every message of importance 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, and while this Company will, as heretofore, use every precaution to insure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages, beyond an amount exceeding five hundred times the

25

amount paid for sending; nor will it be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise nor for delays arising from interruptions in the working of its telegraphs nor for any mistake or omission of any other Company over whose lines a message is to be sent to reach the place of destination All messages will hereafter be received by this Company for transmission subject to the above conditions.
A. Stager Gen. Supt. Cleveland, Ohio. J.R. Elwood Secy, Rochester N.Y.
And that the plaintiff had Knowledge of said notice so published at and before he employed said Company to transmit the message in question and that the conditions expressed in said notice are reasonable and that plaintiff failed to Comply with said Conditions, they should find for defendant; unless the further find that defendant or its agents failed to exercise ordinary care and diligence in transmitting said message.
After argument the jury found for plff.
In due time deft filed his motion to set aside said verdict and for a new trial, to wit:

Motion for New trial

And now Comes said defendant and moves the Court to set aside the judgment in this Case and grant a new trial for the following reasons;
First. Because said judgment and the verdict of the jury are against the law
Second. Because said judgment and verdict are against the evidence

Third. Because the Court erred in refusing instructions asked by deft.

Fourth. Because the Court erred in giving instructions against the objection of deft.

Fifth. Because the Court erred in giving instructions to the jury.

J. K. Knight
for Deft.

which the Court overruled, to which ruling of the Court the defendant then and there duly excepted, and now comes and prays the Court to sign his bill of exceptions and make all the above proceedings, rulings &c. a part of the record, which is accordingly done.

Saml. Reber
judge &c.

State of Missouri }
County of St Louis } ss. I Leon Jr Papin clerk of the St Louis Court of Common Pleas within and for the County aforesaid do certify the above and foregoing to be a full true and Complete transcript of the record, proceedings in the above entitled Cause as fully as the same remains in my office

In witness whereof I hereto set my hand and affix the seal of said Court at office in City of St Louis this 5th day of July A.D. 1864.

Leon Papin
Clk

Index

	Page
Petition	1.
Summons	5.
Sheriffs Return and Answer	6.
Jury Sworn, trial & verdict for plff	9
Motion for new trial, time extended to file bill of exceptions	10
Bill of Exceptions filed & appeal allowed, bond filed & approved	11
affidavit for appeal & appeal bond	11
Deposition of Jonathan H Pottle	12
Deposition of Samuel Hann	14
Testimony of Edwin G. Bush	17
Testimony of S. B. Fallen	20
Plaintiffs instructions given	21
Defts instructions refused	22-3-4
Defts " given	24
Motion for new trial	25
certificate &	26

(8) 50

March Term, 1866.

John Wann

Respondent

vs. Transcript

The Western Telegraph Company

Appellant

Appeal from the St Louis Court of Common Pleas

Filed July 15th 1864

A. W. Mead Jr

Hill & Jewett

attorney for respondent

J. K. Knight

attorney for appellant

$8.00/100 paid by appellant

10$ paid by appellant

Mch 5 Oct 24 Assignment of Errors filed

Nov 17 Appellants brief "

1866 Apr 4 Res "

" " 9 Arg. & Sub.

" May 14. R.R.

John Wann Respondent
vs
Western Union Telegraph Company Appellant

IN SUPREME COURT,
Oct TERM, 1865

AND now come the said Appellant and say, that in the record and proceedings of the Court below, in the above entitled cause, there is manifest error, and for error said Appellant assign the following, to wit:

~~1. That said Court admitted improper and illegal testimony offered by~~

~~2. That said Court rejected proper and legal testimony offered by~~

First ~~3.~~ That the Court gave to the Jury improper and illegal instructions.

Second ~~4.~~ That the Court refused to give to the Jury proper and legal instructions offered by Appellant

Third ~~5.~~ That the verdict was against the evidence.

Fourth ~~6.~~ That the verdict was against law.

Fifth ~~7.~~ That the verdict was against both law and evidence, and against the law under the evidence.

Sixth ~~8.~~ That the verdict was against the weight of evidence.

Seventh ~~9.~~ That the judgment was rendered in favor of the Plaintiff when it should have been rendered for the Defendant

Eighth ~~10.~~ That said Court overruled the motion for a new trial, made by Appellant

J. K Knight Atty for Appellant

And now come the ..... and for joinder in error say, that there is no error in the record and proceedings of said ..... in said cause, as assigned by said .....

167

John Warren
Rec
vs
The Western Union
Telegraph Co
Appellant

Assignment of
Errors

Filed Oct 24, 1865
J. A. Willis
Clerk

John Warren
Resp
vs
W. Un. Telegraph Co
Appt

In the Supreme Court St Louis Co. March 1866

Appeal from Ct. Com. Pleas St. Louis Co.

The Plff respondent in this case alledges that the Defts ~~negligently & carelessly~~ was guilty of negligence & carelessness in transmitting a message sent by him to New York, whereby he suffered a loss of one thousand dollars. as follows. On the 17th of Sept. 1862 Messrs McAndrew & Mann, telegraphed to the Plff thus — "Shall we forward salt by steam or sail on Lake? Can buy same quantity of each in time. Not much change in freight since you were here. Reply at once."

The Plff in reply sent the following
St Louis Sept 18th 1862
"Ship by said immediately; Take 5000 Liverpool, three thousand Turks Island."

When this dispatch reached New York, it read "sail" instead of "said"

The Plffs correspondents in New York, McAndrew & Mann, answered as follows on the 19th Sept. 1862
"Have bought 5000 Liverpool

. one twelve half, and three thousand Tubs, About 75 four months, forwarding by rail to Chicago."

On the 24th of Sept 1861, Jeff telegraphed to McAndrew & Wann at New York as follows —

"Dont ship any salt by railroad steam, only by canal & Lake."

(Signed) John Wann

There is no evidence in the case to show whether or not the telegraph of McAndrew & Wann of the 19th of Sept reached Jeff before the 24th of Sept - but the deposition of Samuel Wann of New York, as well as the telegram of Sept 19th shows that the salt was wholly on its way before the order not to ship by rail-road, reached New York. The deposition of Jonathan W Scott of Chicago shows that the amount of salt so shipped by railroad from N. Y. to Chicago was 43,628 lbs & that the difference in the cost of shipping salt from New York to Chicago by canal & sail on the lakes, or by rail road & steam on the lakes, was sixteen cents per 100 lbs in favor of the former. & that the former was what was understood by "sail" & the latter mode as understood by "rail" - thus making over a thousand dollars difference in the expense to the Govt in the shipping

the salt by "rail" instead of by "sail."

The testimony of Samuel Mann of New York - (vide record page 14) proves the receipt of the telegraph as set forth - "ship by rail" & that the salt was bought & shipped before the mode of shipment was countermanded on the 24th of Sept, but the cause of delay between the telegrams of Sept 19th & 24 is not explained by either party & was not made a point at the trial.

The Pffs also proved the delivery of the message of Sept 18th & the Defts that it was plainly written, a letter press copy being exhibited to the jury & that the usual fees were paid, but not the double fee for insurance.

The above was the Pffs case & the Defts called Mr Buck, whose testimony is fully set forth in the record as to the difficulties, & the facilities of operating the machine by which the message was sent, but as the Defts do not rely upon the verdict being against the weight of evidence, but only upon the instructions given & refused, his testimony is not here set out.

The only instruction given for the Pffs was as follows

"The jury are instructed

that the defendants are responsible as common carriers, for any negligence or carelessness in copying or transmitting the Plaintiffs message, and are responsible for such damages as Plff may have suffered, if any, by reason of Defts having carelessly or negligently transmitted such message, and the Defts are not excused from their said responsibility, though the Plff may have had notice of the terms claimed by the Defts as set forth in the tops of the papers used by them in the writing & sending of dispatches."

It was proved that the Plff must have had knowledge of the printed terms" in the head of the blanks used for writing dispatches, as he was a customer at the Defts office & had a book of blanks for writing despatches. Those terms" are set forth in the record (page 7)

Besides the above instruction given at the request of the Plff, the Court also gave the two following instructions at the request of Defts

1st - To recover in this case the Plff must prove affirmatively, to the satisfaction of the jury, that the mistake complained of in the petition, occurred by the negligence or carelessness of the Defts, or of

"If the jury believe from the evidence that the Plff or his agents at New York were guilty of carelessness, which carelessness occasioned the loss complained of by Plff, then the Plff cannot recover"

Brief
by Hill & Jewett for respondent

The petition in this case charges carelessness & negligence in transmitting the message delivered & paid for, in consequence of which Plff suffered loss amounting to the 16 cts per 100 lbs which it cost him more to have his salt shipped to Chicago by "rail" than it would have cost if shipped by "sail" as directed. From the three instructions given to the jury, it appears that the question was put distinctly to the jury upon the ground that the Defts were guilty of negligence and carelessness, or want of ordinary care & diligence, in transmitting the message. There is no question of "limitation of liability" or "terms" in the case. In their "terms" the Defts do not undertake to exempt themselves from the responsibility of want of "ordinary care". They only say

they will not be responsible for "mistakes".
— That is, such mistakes as ordinary care & diligence cannot guard against.
The law does not allow these Defts, (if they would) to protect themselves from the consequences of negligence in transmitting messages — They case finds that the Defts are a corporation under the Statutes of this State — Rev. Statutes of 1855 page 519.
Sec. 6th of this Act "Such associations corporations, companies or owners shall be liable for special damages occasioned by the failure or negligence, of their operators or servants, in receiving, copying, transmitting or delivering dispatches".

This is the whole case —
Negligence is charged & proved to the satisfaction of the jury & of the judge at Nisi, who refused to set aside the verdict.
At the time of the argument for on the motion for new trial before the Com. Pleas, all the cases upon the liability of Telegraph companies, were looked into & referred to by counsel on both sides. & the cases are all referred to in some part of the printed brief for Defts — & they are all again referred & elaborately discussed in the article on this subject in the

American Law Register for Feb. 1865
to which the court is referred.
New Series Vol 4, p 193

Though there is some difference in the authorities as to whether these companies are subject to all the liabilities of common carriers, we think the weight of authority is, that they are, & that the reason of the thing is to the same effect.

But there is no intimation in any of them that they are not responsible when guilty of negligence, & many of them lay down that point as too plain to be talked about.

In the Maryland & Kentucky cases cited on the brief in this case, neither negligence or carelessness was charged or proved & the Ky case assumes that the mistake was one that could not be guarded against by the utmost care & skill.

In the Penna case the question was mainly whether the Co. was responsible to the P.O. because he was the party to whom the message was sent & the latter it is not contested that the Co would be liable to the party sending the message.

In the English case, it seems to be assumed that they are common carriers

But in conclusion on this point of the case, we again say that the whole matter here is settled

by the fact that the jury were instructed not to find for Pff unless they found negligence in Defts - that they have found negligence, & the statute under which this bo. is chartered makes them responsible in special damages for negligence.

As to the question of damages - that is also fully discussed in the article in the Law Register, & we insist - that under the strictest rule as to damages, the verdict is right in that respect - It is for the difference in the cost of the two modes of transportation & the interest in that from the date of the writ - There was sufficient in the message to point out to the Defts the probable consequences of the mistake such as they made. - That is the difference in expense of shipping salt from N.Y. to Chicago by "sail" or by "rail"

The instruction asked for Defts refused, as to negligence the carelessness of Pff & his agents, was properly refused because there was no evidence in the case to found it upon - There was no evidence that Pff received the telegraph of the

19th of Sept before the 24th of Sept when he ordered by telegraph that the salt should not be shipped by rail. There was very probably another negligence of the Co in not transmitting or delivering that message in season - At any rate they did not see fit to investigate the subject before the jury & the Pltff had no occasion to do it. But suppose the Pltff did receive the message of the 19th on the same day or the next, still he did not know that the change of the mode of transportation was in consequence of a blunder by the Defts in transmitting his orders, but would naturally infer that the change was made by his agents for some good reasons of their own, & until he did know that a blunder had been made in his message, the Defts cannot claim that he should sooner have corrected what he did not know was caused by a blunder of theirs

The instruction asked by Defts refused as to the right to limit their liability was proper, refused because it was an immaterial issue & was not before the jury in that shape, as the whole question was just upon the ground of negligence, & all the advantage the Defts could have from the knowledge

~~In consideration of four thousand dollars~~

the Teff had of their "terms" was given to them by the last instruction given to the jury at Defts request

Common Carriers cannot limit their liabilities by notice but may by special contract

11 New York R p 484

Door vs N. J. & N. Y. S. N. Co.

Hill & Jewett
pr Res.

C

John Mann
vs Res.
W. Un. Tel. Co.
No 63 Supreme Ct
March T.
1866

Brief by
Hall & Jewett
for Res.

Filed April 4. 1866
C. J. Filback
Clk

John Hann
v.
The Western Telegraph Co

In the Sup Ct Mo
March T. 1866.

Opinion of the Court.

This was an action instituted to recover damages for alleged carelessness of the Western Union Telegraph Company, in transmitting a dispatch for Plaintiff, from St Louis to New York City. The dispatch as sent by Plaintiff to his correspondents in New York, ordered them to ship to him at St Louis certain quantities of salt by "rail" when it reaches New York and was delivered, it read, ~~rail~~ ship by "rail". That is, the word "rail" was substituted for the word "sail" in the original dispatch. Accordingly a large proportion of the salt was forwarded by railroad instead of by Canal and lake as was originally intended by the dispatch.

The shipping by railroad was much more expensive, than by water, and the action was brought

to recover the difference between the two modes of transportation. A judgment was rendered in the Court below, for the plaintiff for the sum of one thousand, one eighty four dollars. 44 cents. and to reverse this judgment the case is brought here by appeal.

The defendant resists the recovery on the ground that all dispatches were sent over its lines on the following conditions, which it appears plaintiff had knowledge of. "Terms and conditions on which messages are received by this Company for transmission.

The public are notified that, in order to guard against mistakes in the transmission of messages, every message of importance 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; and while the Company will, as heretofore, use

every precaution to insure correct lines, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages, beyond an amount exceeding five hundred times the amount paid for sending the message; nor will it be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise, nor for delays arising from interruptions in the working of its Telegraphs, nor for any mistake or omission of any other Company, over whose lines a message is to be sent to reach the place of destination. All messages will hereafter be received by this Company for transmission, subject to the above conditions." The message was not ordered to be repeated.

Our Statute under which the Company is incorporated, declares that it shall be the duty of the Company, "on payment or tender of the usual charge, according to the regulations of the Company" to transmit all dispatches with

impartiality and good faith, in the order of time in which they are received &c. And such companies are never liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting, or delivering dispatches, (2 Rev Stat 1855 p 1521, §§ 5-6) The Court has never before been called on to construe this statute, and the transmitting and communicating intelligence by means of the electric telegraph being of comparatively recent invention, but few adjudications have been made in respect to the liabilities of telegraph companies. In California, the Court seems to have applied the doctrine governing the liability of common carriers to telegraph companies. But in the California, case as well as the Maryland case, to which reference has been made, there was not merely negligence, but an entire omission on the part of the operators of the companies to keep

some their duties. In the former this dispatch was not sent till the day after it was received, in consequence of which delay the plaintiff lost a debt; and in the latter the dispatch was forgotten and not sent at all. But the Montana Court repudiates the doctrine that a telegraph company is a common carrier, and assumes that it is a bailee, and that a party sending messages by telegraph, knowing that the engagements of the company are controlled by certain rules and regulations, engrafts them in his contract of bailment, and is bound by them, and that rule exempting the company from liability for the non-transmission and non-delivery of unrepeated messages, do not apply to a case where no effort is made by the company, or its agents, to put a message on its transit. In the Kentucky case the telegraph company has published notice in the printed language used by the defendants here, and copies in

this obligation, the plaintiff sent a message over its lines without ordering it to be repeated, or paying for having the same done. A mistake occurred in its transmission whereby he lost one hundred dollars. The Court held that the condition was reasonable and the defendant was not liable. The case of McAndrew v The Electric Telegraph Co (17 Com Bench 3) is in point and is ably reasoned. The statute 16 & 17 Victoria embodies a provision similar to ours with regard to telegraph companies, and the Company there has given notice of which the one here is almost an identical transcript. The plaintiff delivered an unrepeated message to be transmitted over the companies lines, directing a certain ship to proceed to "Hull" by mistake when it was received, it directed the ship to proceed to "Southampton" On account of this mistake the plaintiff was injured in disposing of his cargo, and

brought his action to recover damages. but the court said the condition was reasonable, and there was no objection to the company availing itself of the same protection that other persons in a similar position ~~are~~ entitled to do by law, by limiting its liability by fair and reasonable conditions, notice of which is duly brought home to the parties contracting with it.

Whether we regard telegraph companies as common carriers or as bailees, we see no reason why they may not thus limit their liability, subject to the qualification however, that they will not be protected from the consequences of gross negligence. Deny them this right and they will be utterly unable to protect themselves against the hazards and risks which are incident to the business in which they are engaged.

We see nothing unreasonable in their declaring they will not be responsible for unrepeated

messages; we think this restriction of liability, comes within the intention of the regulations provides for in the statutes. The system of telegraphing however perfect it may be, is seriously affected by atmospheric causes which are uncontrollable, and if a man wants to send a message of an important character prudence and wisdom would seem to dictate that he should know it repeated, in order to be assured of its correct transmission. And as the repetition involves additional labour it is surely just & that an extra sum should be paid. If the Company undertakes to insure the accuracy of the message and assumes additional risk, it should be paid accordingly.

The message sent by the Plaintiff was one of importance, he could have demonstrated its perfect correctness, by having it repeated at a trifling sum, and he was fully cognizant

-ant of the regulations of the company. The first, third, and fourth instructions prayed for by defendant should have been given, and the last paragraph of the instruction given for the plaintiff should have been refused.

The judgment is reversed and the cause remanded. Judge Holmes concurs, Judge Lovelace absent.

David Haguer

John Wann
v
The Western Tel.
Co.

Opinion of the Court.
Wagner

Filed May 14 1866
O. F. Fishback
Clk

Reversed & Remanded

Warren vs Telegraph Co

N. Y. Tel. Co. vs Dryburg 35 Penn. State R. 298
liable as com. carriers

Parks vs Alta & Tel Co, 13 Cal. 422
are com. carriers

Camp vs West Tel Co. 1 Met. (Ky). 164
Want of care - & negligence
not covered

Birney vs N Y & W Tel Co
18 Maryland 355
Tel. not insurer - not com carrier

Tel. Cos. Vide Statutes of Mo p 1521 - Sec 6
liable for negligence &c

Eng. Law & Eq Rep Vol 33 p 184
Situation of com. carriers
conditions under the
Statute of Vic

Notice does not excuse negligence
Doss vs N J & N Y S N Co
11 N Y R. 484
Wells vs N Y Cen R R Co 24 N Y R. 183

Memo
of
Tel. Co.

Judge Wagner

IN SUPREME COURT

OF THE

STATE OF MISSOURI.

JOHN WANN, *Respondent*,

vs.

THE WESTERN UNION TELEGRAPH COMPANY, *Appellant*.

No. 167—*October Term*, 1865.

APPELLANT'S BRIEF.

Statement of Case.

This action was instituted to recover damages for alleged carelessness of the Western Union Telegraph Company, in transmitting a dispatch for plaintiff, from St. Louis to New York City. It was admitted on the record that the defendant was a duly incorporated Company, doing business under the Act concerning telegraph companies (Rev. Stat. of 1855, Vol. 2, ch. 156). The answer denies carelessness on the part of defendant, and sets up a failure of the plaintiff in complying with the published regulations of the Company, which, among other things, require the sender of an important message to pay an *additional* price of *one-half* the usual rates, for *repeating* the same. The answer also sets out the published regulations of the Company, and charges that the plaintiff had full knowledge of said regulations, and contracted with reference to the same.

The published regulations of the Company, printed on the heading of the message paper kept in their office for the purpose of writing dispatches is as follows:

No. 2.] WESTERN UNION TELEGRAPH COMPANY.

Terms and conditions on which Messages are received by this Company for transmission.

The public are notified that, in order to guard against mistakes in the transmission of messages, every message of importance 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; and while this Company will, as heretofore, use every precaution to ensure correctness, it will not be responsible for mistakes or delays in the transmission or delivery of repeated messages, beyond an amount exceeding five hundred times the amount paid for sending the message; nor will it be responsible for mistakes or delays in the transmission of unrepeated messages from whatever cause they may arise, nor for delays arising from interruptions in the working of its Telegraphs, nor for any mistake or omission of any other Company, over whose lines a message is to be sent to reach the place of destination. All messages will hereafter be received by this Company for transmission, subject to the above conditions.

Send the following message subject to the above conditions.

———— 186 .

To————

Plaintiff's knowledge of these regulations was admitted on the trial.

On the day previous to the transmission of the message in question, Messrs. McAndrew and Wann, of New York, telegraphed the plaintiff as follows:

"September 17, 1862.

"Shall we forward salt by steam or sail on Lake? Can buy same quantity of each in time. Not much change in freight since you were here. Reply at once. (Signed) McANDREW & WANN."

In reply, the plaintiff sent the dispatch in question, to-wit:

"St. Louis, September 18, 1862.

"Ship by sail immediately. Take 5,000 Liverpool, three thousand Turk's Island. (Signed) JOHN WANN."

When this dispatch reached McAndrew & Wann in New York, it read: "Ship by rail immediately, etc." That is, the word "rail" was substituted for the word "sail" in the original dispatch.

On the following day, McAndrew and Wann telegraphed plaintiff as follows:

"September 19, 1862.

"Have bought 5,000 Liverpool, one twelve half and three thousand Turk's. About 75 four months, forwarding by rail to Chicago.
(Signed) McANDREW & WANN."

Five days after this last dispatch, plaintiff telegraphed McAndrew & Wann as follows:

"St. Louis, September 24, 1862.

"Don't ship any salt by railroad and steam, only canal and lake.
(Signed) JOHN WANN."

The only evidence introduced, on the trial, to sustain the charge of carelessness of the Company, was that, in the message as delivered in New York, the word "rail" was subsituted in the place of the word "sail" in the original one. On the other hand, it was in evidence that plaintiff did not reply to the dispatch of McAndrew & Wann of the 19th September, advising him of the shipment "*by rail to Chicago*," until the 24th September, and that plaintiff's dispatch of the 18th September (the one in question,) was not properly responsive to the question of his correspondents in New York: "Shall we forward by *steam* or *sail on Lake?*" The defendant proved by experts that the telegraphic apparatus used by the Company in transmitting the dispatch, was in complete order; that the system used by said Company was the one known as Morse's system, and the most perfect in use, and that the employees of the Company who acted as operators were skillful and experienced.

It was admitted as proved that the ordinary price for said dispatch to New York, ($1.92,) was paid on delivery, but not the additional price for repeating the dispatch (which would be 96 cents additional).

The main question in the case arose on instructions given and refused.

The one given at the instance of the plaintiff is as follows:

"The jury are instructed that defendants are responsible as common carriers, for any negligence or carelessness in copying or transmitting the plaintiff's message, and are responsible for such damages as plaintiff may have suffered, if any, by reason of defendants having carelessly or negligently transmitted such message, and the defendants are not excused from their said responsibility, though the plaintiff may have had notice of the terms claimed by the defendants as set forth on the tops of the papers used by them in the writing and sending of dispatches."

The defendants' instructions, being the converse of this, were refused.

The jury found for the plaintiff, and judgment was rendered against defendants for $1,085 $\frac{44}{100}$.

Argument.

I. The Court below clearly erred in declaring the law. The defendant was not a common carrier, or liable as such. Telegraph companies come neither within the *terms* or meaning of the rule. They carry no *goods*. They have no lien for freight; they have possession of nothing which they can convert to their own use. They have no means of ascertaining the value of the dispatch, or whether it have any value or not. It may have no general value, and still have great value to the parties interested. It may be in cypher and unintelligible to the employees of the Company, and yet be worth a million to the parties. They have no right to demand a disclosure of its nature or importance. They have none of the *general* rights of carriers. (Jones on Bailments, Appendix p. 24 *et seq.;* Edwards on Bailments, page 353; Story on Bailments, § 15, 566–7.)

They are not *eo nomine* classed among bailees of that description. The contract *locatio operis mercium vehendarum* cannot in the nature of the case appertain to them. (2 Kent, 599.)

The language of all the books unite in describing the common carrier as one who carries *goods*, and has the *custody* of *goods;* has a *special interest* in the *goods* carried; has a lien on the *goods* for *freight*, and may sell the *goods* to satisfy his lien. (Chitty on Carriers, p. 15, side p. *et seq.*)

In consideration of these peculiar rights, he was originally held to the strictest account, even as an *insurer* against inevitable accident. (1 Term [D. & E.] R. 33; 4 Dougl. R. 287; 3 Esp. [N. P.] R. 131.)

More modern cases have relaxed the rule so far, that it has been said they have unsetted the law on the subject. (Walker's Am. Law, 453 and note; 1 American L. Reg., 65 *et seq.;* 4 Sandf. R. 136.)

Courts have not only *relaxed* the rule, but have *restricted* it in its application. Hence the better opinion seems to be "that the strict rule of the common law liability being harsh, Courts will not extend the rule when the reason for it has failed." (2 Peters, S. C. R. 150.)

Hence it does not extend to carrying passengers. (*Ibid.*) Nor to carrying baggage beyond an ordinary amount. (9 Wend. 85.) Nor to express companies. (19 Barb. 577; 5 Sandf. R. 180; 18 Barb. 500; 24 Barb. 533; 2 Duer 471.) Nor to wharfingers.

(7 Cowan, 497.) Nor to forwarders. (6 Hill, N. Y. R. 158; 4 Dumf. & East R. 583, 8 Cowan, 223; 2 Smithe [E. D.] R. 195; 12 Johns R. 232.)

We ask then, what does a telegraph company do? It receives a written message for tansmission. It uses delicate machinery to reproduce the words of the message at a distant point, either by directly copying the words under some alphabetical system, *or* (as explained by Mr. Bush in his testimony in this case,) by translating the words into sounds, and, by means of the electrical current, communicating those sounds to the operator at the other end of the line, who in turn translates those sounds into words again. It cannot be said that while the electric current is thrilling these symbolic sounds along the wire in mid-heaven, or perchance in mid-ocean, that the Company has manual possession of the thing transmitted.

It must rely on delicate machinery—mere threads of communication, which are liable to interruption by the varying winds or inevitable accident. These circumstances make it impossible for the Company to have the actual custody or control of the message during its transmission.

So we find so far as this subject has undergone direct judicial investigation, the weight of authority is largely against applying the common carrier liability to telegraph companies. (Birney *vs.* N. Y. & W. P. Tel. Co., 18 Md. R. 341, [1862]; Camp *vs.* W. U. Tel. Co., 1 Metcalf, R. 164; Shields *vs.* Wash. Tel. Co., 9 W. Law Jour. 283; McAndrew *vs.* Electric Tel. Co., 33 Eng. L. & Eq. R. 180; Drybuy *vs.* N. Y. & W. P. Tel. Co., 35 Penn. R. 298.)

This last case was one based on the *misfeasance* of an agent of the Company and not strictly in point, but Judge Woodward, in delivering the opinion, cites the *Camp* case (1 Metcf. R. 164), and distinguishes it from the case before him, and without dissenting from the doctrine of that case, holds this language: "Though telegraph companies are not, like *carriers*, *insurers* for the safe

delivery of what is intrusted to them, their obligations, *so far as they reach*, spring from the same sources—the public nature of their employment, and the contract under which the particular duty is assumed."

[A.] The only adjudicated case directly holding telegraph companies liable as common carriers, it is believed, is the case of Parks *vs.* Alta Cal. Tel. Co. (13 Cal. R. 422.) This case was decided in 1859, and has no references to previous adjudications—nor does it seem to be well considered. No reference appears to have been made to the Cal. statute on the subject, either by counsel or Court.

On the other hand, both the *Birney* (Md.) and the *Camp* (Ky.) cases appear to have been ably argued by counsel, and well considered by the Courts. The English authority above cited (33 Eng. L. and Eq. R. 180), has reference mainly to the construction of the statute (16 and 17 Vic. C. 103), which required the Telegraph Company to "receive and send messages subject to *reasonable* regulations to be adopted by the Company;" and the question in that case was, whether the regulations of the Company were *reasonable*. The Court decided in the affirmative. In arriving at that conclusion, the several Judges *compared* the liability of telegraph companies to that of common carriers, and asserted that even common carriers might limit their liability by *reasonable* regulations. Our statute is *in terms* more favorable to the Company than the English statute. It requires the Company "to receive and transmit" only upon payment or tender of the usual charge *according to the regulations of the Company.*" (Rev. Stat. 1855, Vol. 2 ch. 156.)

[B.] In a recent Canadian case, it was held that a telegraph company was not liable for transmission of a message beyond their line although they had received payment therefor, on the ground that they had limited their liability by notice. (Stevenson *vs.* Montreal Tel. Co., 16 Upper Can. R. 530.)

[C.] In another case, it was held that the same Company were not liable for damages, for failure to deliver a message to another Company to be forwarded, for the purpose of accepting a proposed contract, on the ground that no legal contract could be created in that way. (Kuyshome *vs.* Montreal Tel. Co., 18 U. C. R.) If

18 (28) p 60

contracts can be created in this way, they are certainly distinguishable from those made by mail. (Trevor *vs.* Wood, 41 Barb. 255.)

[D.] It has long since been held that the carrier of the mails is not liable as a common carrier. And as it was said by the eminent Judges in the celebrated post office case of Lane *vs.* Cotton (1 Salk. R. p. 17), that "its office is for intelligence and not for insurance," so we say of the telegraph, "its office is for *intelligence* and not for *insurance.*"

(E) There was no evidence of negligence upon which to base the 3rd instruction. The burden of proof when the notice is brought home is on the sender Story on Bails § 557 § 560 Angel § 247

II. But the Court below clearly erred in assuming, in the instruction given, that the defendant could not limit its liability, and by refusing the instructions moved by the defendant on this point. The law is now well settled that even a carrier may limit his liability, either by express contract or by notice brought home to the party. (3 How 344; Angel's Com. Carriers, 223 *et seq.;* Edwards on Bailments, 472–483; 4 Sandf. 136; 6 Barb. 344; 9 Wend. 85; 23 Vt. R. 206; Walker's Am. Law, § 182 p. 453 and note [3d ed.]; 2 Comstock 210; 9 Barb 191.) The doctrine of these cases can no longer be successfully controverted.

† See also following recent English Cases
5 Hurlstone & Norman's (Exch) R 867-
875 (1860)
1 Ellis Black & Ellis R 958 (1858)

III. The Court below erred in assessing the damages at $1,085 $\frac{44}{100}$.

The proper rule of damages in such cases, is "that only such damages are recoverable as may reasonably be supposed to have been in contemplation of the parties, at the time they made the contract, as a probable result of the breach of it." (Hadley *vs.* Baxendale, 9 Exch. R. 341; Griffin *vs.* Colver, 2 Smith 16 N. Y. R. 489.) As there was no disclosure in this case of the *nature* or *importance* of

< See 4 Am L Reg. New Series p 193

the message, the only damages that could reasonably have entered into the contemplation of both parties at the time of the contract, was the amount paid for its transmission. (Landsberger *vs.* Magnetic Tel. Co., 32 Barb. 532; Shields *vs.* Wash. Tel. Co., 9 W. Law Jour. 283.)

IV. The Court below erred in refusing the second instruction moved by defendant. There was evidence of *laches* on the part of the plaintiff: *First*, in not sending an intelligible reply, *responsive* to the inquiry of his correspondents at New York. *Second*, in not replying at once to the telegram of his correspondents, dated September 19th, advising him of their "having forwarded by rail to Chicago." This he failed to do until September 24th. There is no law better settled than that if the plaintiff's negligences contributed to the injury complained of, he cannot recover. (2 Taunt. R. 314; 4 Car & Payne 554; 34 Mo. R. 55.)

V. The Court below erred in not granting a new trial, as it appeared clearly that the jury had been misled by the instructions, and that the verdict was against both law and evidence.

In conclusion we say, that the amount involved in this case is of little importance, but as the principle to be settled affects not only the appellant, but all other telegraph companies in this State and elsewhere, as well as the public at large, we crave a careful consideration of the propositions of law herein submitted.

If the appellant is to be held as an *insurer*, as is contended by the opposing counsel, the Company will of course be forced, in self-defense, to charge the *additional rate of insurance* in *all* cases, whether the message be one of *importance* or *not*. This burden, then, will fall on the public at large, instead of falling where it should, *to-wit*, on *him who sends* an *important message*. While, therefore, the settling of the question involved, on sound principles of law is important to the appellant, it is of still greater importance to the general public.

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No 167

John Warn
Respondent

vs

The Western Union Telegraph
Company Appellant

Appellants Brief

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