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PASSMORE V. WESTERN UNION TELEGRAPH CO.

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wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bonds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule, which, in marking out the path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents, may be a reasonable rule, and as such, upheld by the courts.

Applying this test to the case in hand, does the evidence disclose any sufficient ground for overruling a defence which is *prima facie* valid? The burden of proof is on the plaintiff. It is for him to show in what respect a regulation which he tacitly accepted, is so far hostile to the interest of the community, or of that portion of it which uses telegraphy as a means of communication, that the law should not suffer it to stand. Unless this is so clear as to be legally indisputable, the judiciary should obviously refrain from interfering with the contract as framed by the parties, and refer the subject to the legislature, who can at any time regulate the whole by statute.

We are fully aware of the importance of the question, and have no desire to relax the just measure of accountability in cases of this description. Telegraphy, like the other powerful instruments which science has placed at the disposal of man, is capable of being a source of injury instead of benefit. That the intelligence which it conveys is prompt, will serve no good purpose, if mistakes occur during the process of transmission. The difficulty of avoiding them is, notwithstanding, greater than might at first appear. The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different, with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph

operator is separated by a distance of many miles from the paper on which he writes, so that his eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication is liable to perturbations arising from thunder-storms, and other natural causes. It is, therefore, obvious, that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or in other words, that the operator to whom the message is sent should telegraph it back to the station whence it came.

So far the inquiry is plain; but here a question of some difficulty presents itself. Should every message be repeated, or only those which are of sufficient importance to make such a precaution requisite. In answering this question it must be remembered that the repetition of a message necessarily involves delay and expense. The mail may transmit any number of letters simultaneously, but a telegram has exclusive possession of the wires during its passage over the line. While one message is repeated, others are delayed, which at times may be of serious consequence. There is, moreover, an increase of cost, which, though trivial in each instance, would be formidable in the aggregate, and necessarily augment the rate of charging in a ratio which has been roughly calculated at one-half. Such must be the result, if every one who wishes to engage rooms at an hotel or put a question of friendly interest, must submit to the expense and possible delay of repetition.

On the other hand, the convenience of the opposite course is not less manifest. Instead of passing every message twice over the line, those only are to be repeated which from their importance demand peculiar care. And as the company cannot know what telegrams fall within this category, the question is referred to the person chiefly interested. Obviously he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of a precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition. If it were not, the