

PURCELL ET AL. V. GREAT NORTH-WESTERN TELEGRAPH CO.

REPORTS.

COUNTY COURT OF LINCOLN.

PURCELL ET AL. V. GREAT NORTH-WESTERN TELEGRAPH COMPANY.

Telegraph company—Repeating message—Misrepresentation—Gross negligence.

The plaintiffs received at St. Catharines on defendant's line, a message from Aylmer, in which they suspected there was an error (as in fact there was, the word "Five" having been substituted for "Two" by the operator at Aylmer), and requested the defendant's manager at St. Catharines to have the message repeated. He telegraphed the Aylmer office to repeat the message, and it was repeated with the same mistake as before. Defendants made no charge for repeating the message.

The plaintiffs having acted upon the message, and sustained loss thereby,

Held, that the defendants were not liable to the plaintiffs for the mistake.

[St Catharines.

This action was brought to recover damages sustained by the plaintiffs in consequence of the negligence of the defendants in the transmission of a telegraphic message over their line, sent by the Aylmer Canning Co. to the plaintiffs, and which was subsequently repeated at the instance of the plaintiffs, the word "five" being erroneously used in the message as delivered (both in the original and the repeated message), instead of "two" as the word was on the message handed in for transmission to defendants' office at Aylmer.

The question arose as to whether an action could be brought by the receiver of a message to recover damages for negligence in its transmission, and it was held by the learned judge, in accordance with the English and Ontario authorities, that it could not.

The plaintiffs also contended that they entered into a contract with the defendants to have the message repeated, and that there was negligence again on the part of the defendants in the repeating of the message, and that they were entitled to recover for the loss sustained by them in consequence of this negligence.

SENKLER, Co.J.—There is no doubt that the plaintiffs' manager asked the defendants to have the message repeated, and that the defendants agreed to do this, and did have it repeated, and I should have no hesitation in finding that the defendants' operator at Aylmer was guilty of negli-

gence in sending the message again with the third word "five" instead of "two."

The question remains to be decided whether the repetition was done under a contract or as a gratuitous act, and if the latter whether any liability attaches to the defendants in respect of any negligence on their part in performing it.

The plaintiffs' agent swears positively that when he asked to have the message repeated he told Dudley to charge to them, and Dudley replied "all right." Dudley is equally positive that nothing of the kind was said. As the conversation took place over a telephone, the words may have been used by Fenton, and not heard by Dudley. Fenton intimated in his evidence that the item had been charged, and subsequently abandoned when the mistake was discovered. He was unable, however, to produce any proof of this assertion, which was positively denied by Dudley. While I do not doubt Mr. Fenton's good faith in alleging that he used the words "charge to us," I do not see how I can, in the face of Dudley's denial, hold that they came to his ears, unless there is something in the surrounding circumstances to make his statement the more probable, and I must say I do not see anything. Then assuming that Fenton simply told Dudley to have the message repeated, and Dudley answered that he would, is that a contract? That would depend upon whether it was to be paid for. Ordinarily when a person who is engaged in any business or calling is told to do something in that business or calling, the presumption will be that he is to be paid for it, and if he does what he is told to do, he can collect its value. It is urged on behalf of the plaintiffs that the term "to repeat a message" is well understood in the business of telegraphing, and that it is regularly charged and paid for, and that the order to repeat the message must be understood in this way.

To this it is answered that in one sense to repeat a message is a well understood term, but not in a sense that applies to the message in question. That any person about to send a message can, if he chooses to pay a further sum equal to half the price charged for the message itself being forwarded, have the message repeated back from the office to which it is sent, and in this way he can be certain that the message is received in the office to which it is sent in the same words as he has sent it. That this mode of repetition does not apply to parties receiving messages, that so far as they are concerned there is no recognized system of having messages repeated, but, that as a matter of fact, when a person does not understand a message he has received, it is the custom for the receiving office to ask the transmitting office to repeat or