

Eng. Rep.] HENKEL AND ANOTHER V. PARK—HERRICK V. WOOLVERTON. [U. S. Rep.]

the trees, and afterwards applied to the Court, the case became one for damages only, and the sole question was how far the inheritance was actually damaged by the felling of the trees. If Mr. Hastings had applied during the felling of the trees, the Court would have granted an injunction, assuming that the cutting of the same was not beneficial to the adjoining trees. But Mr. Hastings had not done so, and the position resolved itself into whether the reversioner had suffered any damage. His Lordship was of opinion upon the evidence that he had not, except, perhaps to one large ash, which, it was said broke the sky line, and was ornamental where it stood. But upon the whole, he was of opinion that the acts of the Marquis had decidedly not been injurious to the property, and he therefore dismissed the summons.

EXCHEQUER CHAMBER.

HENKEL AND ANOTHER V. PAPE.

Liability for mistake in telegram—Telegraph clerk—Sender of message.

The defendant, by letter, desired plaintiffs to send him a sample Snider rifle, and added that he could probably fix an order for fifty. A few days afterwards he telegraphed to plaintiffs to send him "three" rifles, but the telegraph clerk, by mistake, telegraphed for "The" instead of for "Three" rifles, and the plaintiffs sent fifty rifles to the defendant, who refused to accept more than three of them.

In an action to recover the price of the forty-seven rifles from the defendant,

Held, that the defendant was not responsible for the mistake of the telegraph clerk, and was not liable,

[Ex., 19 W. R. 106.]

This was an action for goods bargained and sold, and for goods sold and delivered by the plaintiffs to the defendant; the defendant, except as to £7 which he paid into court, pleaded that he never was indebted.

The plaintiffs are gun manufacturers, having offices in London and a manufactory in Birmingham; the defendant is a gun-maker at Newcastle.

On the 2d of June the defendant wrote to the plaintiffs asking them to "send sample Snider, and forward it immediately, as he thought he could fix an order for fifty." The rifle was accordingly immediately sent from Birmingham to the defendant. On the 7th of June the plaintiffs received the following telegram:—"Pape, Newcastle, to Henkel: Send by mail 'the' Snider rifles same as pattern; must be here in the morning; ship sails then."

The plaintiffs accordingly sent off fifty rifles to the defendant. On the 9th they received the following letter from him:—"I am surprised that you sent fifty instead of three rifles; my telegram was to send 'three.'" The fact was that the telegraph clerk had by mistake telegraphed the word "the" instead of "three." The plaintiffs insisted on the defendant's taking and paying for all the rifles, but he declined to take or pay for more than three. The plaintiffs brought this action. The defendant paid £7 into court as the price of the three rifles, and contended that he was not bound to take or pay for the other rifles, and that he was not responsible for the mistake made by the telegraph clerk.

The case was tried at the last summer assizes at Guildford, before Blackburn, J., when the above facts were proved and a verdict was directed for the defendant, with leave to the plaintiffs to move to enter the verdict for them for £90 15s. less the sum of £7 paid into court.

Chitty moved accordingly.—He contended that the telegraph clerk was the agent of the defendant for the transmission of the message, and that the defendant was therefore liable for the mistake; and urged that the defendant had not taken the best means in his power to prevent mistakes, as he might have had the telegraph repeated, as appeared from a notice on the back of the telegraph form in these words—

"Telegrams may be repeated at the request of the sender, if he desires to adopt this extra security against risk of error, by being sent back from the office at which they are received to the office from which they are forwarded. The charge for repetition is one-half the ordinary tariff."

And he also urged that as the Post-office authorities were not liable for the mistake, it followed that the loss must fall on either the plaintiffs or the defendant, and that the latter ought to suffer because he as the sender of the message had entered into a contract with the Post-office authorities, whereas there was no privity between the plaintiffs as the receivers of the message and the Post-office authorities: *Playford v. The United Kingdom Electric Telegraph Company, Limited*, 17 W. R. 968, L. R. 4 Q. B. 706.

The COURT (KELLY, C.B., BRAMWELL, PIGOTT, and CLEASBY, B.) held that it was clear that the defendant had not entered into a contract for the purchase of the fifty rifles, but had only contracted to purchase three rifles, that the Post-office authorities were only defendant's agents to transmit messages in the terms in which he as the sender had delivered them, and that they had no authority to do more, and that therefore the defendant could not be made responsible because the telegraph clerk had made a mistake in transmitting the message; they accordingly

Refused the rule.

UNITED STATES REPORTS.

COURT OF APPEALS OF N. Y.

HERRICK V. WOOLVERTON.

A note payable on demand with interest is not a continuing security which becomes due only on demand; it is a debt in present, and a third party taking it ninety days after its date takes it subject to all the original defences. *Merritt v. Todd*, 23 N. Y., construed.

[2 L. G. 34.]

Appeal from an order of the General Term, Third District, granting a new trial on a verdict rendered at the Circuit, in favor of the defendant.

The action was brought on a promissory note made by the defendant, on the 9th day of February, 1861, for \$1,500 on demand, with interest, to the order of H. D. Hawkins, and immediately on the same day endorsed by him, and delivered to Jonathan R. Herrick, who was the original holder of endorse; who continued to hold it un-