

## Eng. Rep.]      PLAYFORD V. THE UNITED KINGDOM ELECTRIC TELEGRAPH CO.      [Eng. Rep.]

The 2nd count charged that, by the negligence of the defendants in working the telegraph, an untrue message was sent, causing the damage specified in the 1st count.

The 3rd count alleged a contract on the part of the defendants, and its breach, causing the damages alleged in the 1st count.

The 4th count alleged a retainer of the defendants by the plaintiff, creating a duty on their part, and its breach causing the damages alleged.

The defendants pleaded—

1st. That they did not undertake to transmit the said message to the plaintiff, as alleged.

2nd. As to the 1st count, that they undertook to transmit the said message upon and subject to a certain condition, and not otherwise, that is to say, "In order to provide against mistakes, and more effectually to insure delivery, every message of consequence 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 in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of un-repeated messages, from whatever cause arising, either upon its own lines or those of any other company or government which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of, nor for the non-delivery of a repeated message to any extent above £5, unless it be insured at the rate of £1 per cent."

Averments:—That the said message was not repeated, and that the alleged grievance was a mistake in the transmission of an un-repeated message.

3. That they were not employed to send and transmit the said message to the plaintiff by the plaintiff.

4. As to the 2nd count, that they undertook to send and transmit the said message to the plaintiff, subject to the condition mentioned in the 2nd plea, and not otherwise (averments as in 2nd plea).

5. As to the 3rd count, that the plaintiff did not become, nor was he a sender of messages, as alleged.

6. As to the same count, that the said message was sent by the plaintiff, and received and transmitted by the defendants subject to the condition in the 2nd plea mentioned, and not otherwise (averments as in the 2nd plea).

7. That they were not retained or employed as alleged.

8. That they were retained and employed subject to the condition in 2nd plea mentioned, and not otherwise (averments as in 2nd plea.)

There was also a demurrer to 1st, 2nd, and 4th counts.

1. Issue taken on the defendants' pleas.

2. Replication as to 2nd and 4th pleas that plaintiff was not privy to the alleged condition, nor did he assent thereto, and as to 2nd, 4th, 6th and 8th pleas that the negligence complained of was gross negligence, and was such that the condition in these pleas set forth did not exonerate nor in any wise protect the defendants from liability in respect thereof.

3. Demurrer to 2nd and 4th pleas as not shewing that the agreement and condition was with the plaintiff.

The defendants demurred to the replications to 2nd and 4th pleas on the ground that it was immaterial whether the plaintiff was privy or assented to the condition; and to the replication to the 2nd, 4th, 6th and 8th pleas, on the ground that the conditions set forth in these pleas exonerated and protected the defendants from liability in respect of gross negligence.

*Littler*, for the plaintiff.—Though there may be no contract with the plaintiff, yet he has an action for the damage done to him in consequence of the defendants' negligence. There is a public duty cast on the defendants, by the Act of Parliament by which they are incorporated, to convey messages, and a person injured by a breach of that duty sustains both a *damnum* and *injuria*. One section of the Act provides that any telegraphic apparatus erected under its provisions for receiving or sending messages shall be open for the sending and receiving of messages by all persons alike, without favour or preference. This imposes the statutable duty of sending messages with reasonable care, and a person who suffers by a breach of that duty may maintain an action. I contend that, under this Act, the duties of a telegraph company are very like the duties of a railway company. [*Cockburn, C. J.*—Any one paying the company a reasonable price for sending a telegram can maintain an action in case of mistake; but the duty is only owing to the sender, not to the person to whom it is sent. Suppose a person takes a document to be copied by a stationer, who makes a mistake in copying it, could any one else except the person who engages the stationer maintain an action in case his mistake caused him some damage?] There are many cases where the party injured can maintain an action even in a case arising out of contract, though the contract is not with him, as in the case of a surgical operation. [*Lush, J.*—In that case there is a consideration on the part of the patient (independently of any consideration moving from some one else) binding the surgeon to show reasonable care and skill. That consideration is the patient's consenting to allow the surgeon to operate on him.] But here there is a duty created by statute to send messages with reasonable care. [*Cockburn, C. J.*—A duty towards the sender only.] [*Mellor, J.*—Suppose you send a letter by the mail-train, and it misses its destination, can the person to whom it is sent maintain an action against the railway company?] There a public department intervenes, which complicates the case. As to the condition, it is inconsistent with the statutable obligation and the duty arising out of it. It is, moreover, unreasonable. He cited the following cases:—*Peak, v. The North Staffordshire Railway Company*, 10 H. of L. cas. 473; 11 W. R. 1023, 32 L. J. Q. B. 24; *Williams v. The Lancashire and Yorkshire Railway Company*, 23 L. J., Ex. 353; *MacAndrew v. The Electric Telegraph Company*, 17 C. B. 93; *Butt v. The Great Western Railway Company*, 1 C. B. 132; *Alton v. The Midland Railway Company*, 13 W. R. 918, 34 L. J. C. P. 299; *Allday v. The Great Western Railway Company*, 5 B. & S.; *Godsell v. Sieggall*, 5 B. N. C.