

PURCELL ET AL. V. GREAT NORTH-WESTERN TELEGRAPH CO.—BOYLE ET AL. V. G. T. RY. CO.

duplicate the message, and that this is done without charge and as a matter of favour; and it is sworn that it was so done in the present case, and that no charge was ever made or intended to be made for the repeating the message.

Mr. Fenton does not say that he ever paid for having a message repeated in this way, nor does he show that any other person ever did so, or bring any evidence to contradict Mr. Dudley's evidence as to the custom of the defendants in this particular, and I am of opinion on the evidence that the company in having the message repeated did so gratuitously and without consideration.

Then what responsibility does the law impose upon the defendants, in respect of this gratuitous act? I have been unable to find any express decision on the point. In England the management of telegraphs is now under the control of the Government, and consequently no such point could arise there, and during the period in which telegraphs were managed by private companies, I cannot find any case in which the case came up, nor can I find any in our own reports. In the United States the question would not arise, because there the defendant would be held liable in respect of negligence in transmitting the original message—See Gray on "Communication by Telegraph" pages, 115, 116, and cases there cited. The American law differs widely from the English in this particular. The English cases I have previously referred to deny there being any analogy between the consignment of goods through a carrier, and the transmission of a telegram—See *per* COCKBURN, C.J. in *Playford v. U. K. Tel. Co.*, L. R. 4 Q. B. at page 714, and *per* BRAMWELL, L.J. in *Dickson v. Reuter's Telegram Co.*, 3 C. P. D. at page 7.

Upon principle I do not see how the liability of the defendants can at most be placed higher than that of an ordinary mandatory without reward, viz.: "That they would only be liable for gross negligence." I cannot see how the question of skill comes in; there is no question as to the skill of defendants' employees in working the telegraph; what is complained of is the carelessness of the operator in reading the message.

According to the dictum of MARTIN, B. in *Mills v. Holton*, 2 H. & N. at page 18, the defendants, by merely doing an act of kindness, would not incur any responsibility. But assuming that they would be liable for gross negligence, is that proved?

In those cases in which a person is liable for gross negligence, he is bound to exercise something less than ordinary care. This statement of law is easier made than applied to the circumstances of any particular case. It is probable that the word in respect of which the difficulty has arisen in this case, was so written that at a first glance it might be

taken for either "two" or "five." Judging from its appearance in Ex. 3 (a copy made by Nairn in the telegraph office at Aylmer on the morning of the 29th September), I should say that it was so; still on examination it would, at least, be doubtful if it was "five" under these circumstances, I should consider it the duty of a person bound to exercise ordinary care, to make inquiries, but I find a difficulty in saying that a person would be guilty of gross negligence if he did not do so. I am of opinion, therefore, that the plaintiffs have not shown that the defendants were guilty of gross negligence. I have considered the question of defendants' liability, on the supposition that they would be liable for gross negligence. This liability for gross negligence is general, found in cases where there has been a gratuitous bailment of goods or a gratuitous service done for a person, and through the negligence of the bailee or person doing the service some physical injury has been suffered by the goods or person. The bailee has possession or charge of the goods or person, and, while this is the case, they are injured by his negligence. In the present case these facts do not exist, and I doubt very much whether the principle I have referred to applies to it. It seems to me that this is more like a case of misrepresentation, and no action will lie for misrepresentation of facts, simply because made carelessly—it must be fraudulent—(*per* BRAMWELL, L.J. in *Dickson v. Reuter's Telegram Co.*, 3 C. P. D., at page 6).

I am of the opinion that the action must be dismissed with costs.

DIVISION COURT.

BOYLE ET AL. V. GRAND TRUNK RY. CO.

Snow fence—Damages arising therefrom—Limitation of right of action.

In an action against a railway company for damages occasioned by a large accumulation of snow upon the plaintiffs' lands, caused by the defendants' snow fence, whereby, on the melting thereof in spring, it became unworkable, and the crop sown thereon deficient.

Held, that the damages were continuous during the whole growth of the crop, and that, therefore, the statutory six months within which to commence the action is to be counted from the date of harvesting.

(Whitby, February, 1886.)

The plaintiffs proved damages to the extent of at least \$40. After the removal of the snow fence, in the spring of 1886, a large body of snow, which had accumulated upon the plaintiffs' land by the action of the defendants' snow fence, remained thereon for some weeks, melting gradually, and rendering a considerable portion of a twenty acre field wet, sour and difficult to work. The grain