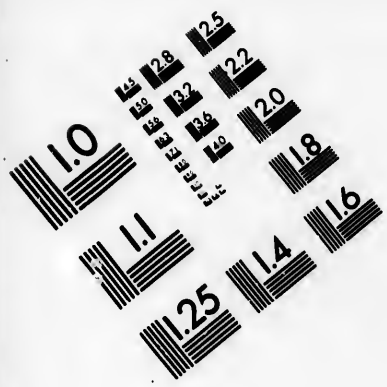


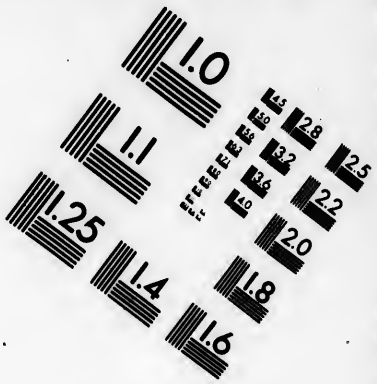
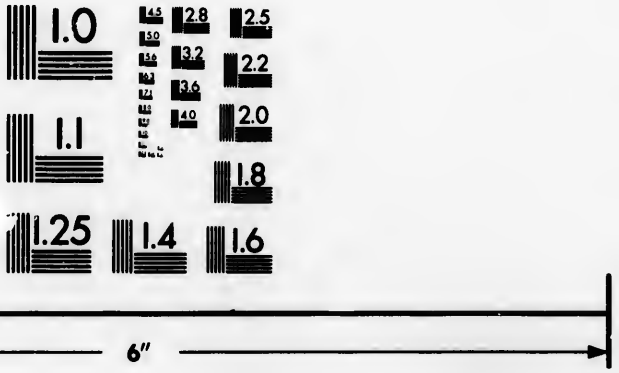
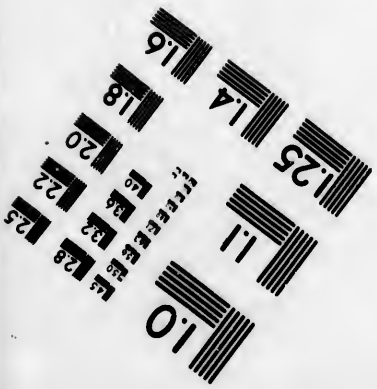


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

Technical and Bibliographic Notes/Notes techniques et bibliographiques

The Institute has attempted to obtain the best original copy available for filming. Features of this copy which may be bibliographically unique, which may alter any of the images in the reproduction, or which may significantly change the usual method of filming, are checked below.

L'Institut a microfilmé le meilleur exemplaire qu'il lui a été possible de se procurer. Les détails de cet exemplaire qui sont peut-être uniques du point de vue bibliographique, qui peuvent modifier une image reproduite, ou qui peuvent exiger une modification dans la méthode normale de filmage sont indiqués ci-dessous.

- ☐ Coloured covers/ Couverture de couleur
- ☐ Covers damaged/ Couverture endommagée
- ☐ Covers restored and/or laminated/ Couverture restaurée et/ou pelliculée
- ☐ Cover title missing/ Le titre de couverture manque
- ☐ Coloured maps/ Cartes géographiques en couleur
- ☐ Coloured ink (i.e. other than blue or black)/ Encre de couleur (i.e. autre que bleue ou noire)
- ☐ Coloured plates and/or illustrations/ Planches et/ou illustrations en couleur
- ☐ Bound with other material/ Relié avec d'autres documents
- ☐ Tight binding may cause shadows or distortion along interior margin/ La reliure serrée peut causer de l'ombre ou de la distortion le long de la marge intérieure
- ☐ Blank leaves added during restoration may appear within the text. Whenever possible, these have been omitted from filming/ Il se peut que certaines pages blanches ajoutées lors d'une restauration apparaissent dans le texte, mais, lorsque cela était possible, ces pages n'ont pas été filmées.
- ☐ Additional comments:/ Commentaires supplémentaires:

- ☐ Coloured pages/ Pages de couleur
- ☐ Pages damaged/ Pages endommagées
- ☐ Pages restored and/or laminated/ Pages restaurées et/ou pelliculées
- ☑ Pages discoloured, stained or foxed/ Pages décolorées, tachetées ou piquées
- ☐ Pages detached/ Pages détachées
- ☑ Showthrough/ Transparence
- ☐ Quality of print varies/ Qualité inégale de l'impression
- ☐ Includes supplementary material/ Comprend du matériel supplémentaire
- ☐ Only edition available/ Seule édition disponible
- ☐ Pages wholly or partially obscured by errata slips, tissues, etc.. have been refilmed to ensure the best possible image/ Les pages totalement ou partiellement obscurcies par un feuillet d'errata, une pelure, etc., ont été filmées à nouveau de façon à obtenir la meilleure image possible.

This item is filmed at the reduction ratio checked below/
Ce document est filmé au taux de réduction indiqué ci-dessous.

10X	12X	14X	16X	18X	20X	22X	24X	26X	28X	30X	32X
						✓					

The copy filmed here has been reproduced thanks to the generosity of:

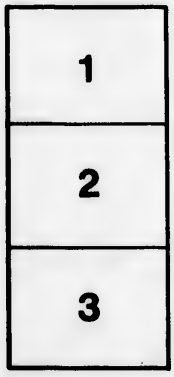
Université de Montréal

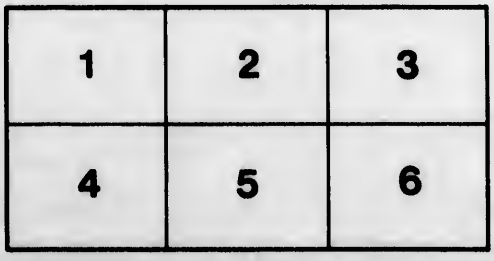
The images appearing here are the best quality possible considering the condition and legibility of the original copy and in keeping with the filming contract specifications.

Original copies in printed paper covers are filmed beginning with the front cover and ending on the last page with a printed or illustrated impression, or the back cover when appropriate. All other original copies are filmed beginning on the first page with a printed or illustrated impression, and ending on the last page with a printed or illustrated impression.

The last recorded frame on each microfiche shall contain the symbol → (meaning "CONTINUED"), or the symbol ▽ (meaning "END"), whichever applies.

Maps, plates, charts, etc., may be filmed at different reduction ratios. Those too large to be entirely included in one exposure are filmed beginning in the upper left hand corner, left to right and top to bottom, as many frames as required. The following diagrams illustrate the method:





L'exemplaire filmé fut reproduit grâce à la générosité de:

Université de Montréal

Les images suivantes ont été reproduites avec le plus grand soin, compte tenu de la condition et de la netteté de l'exemplaire filmé, et en conformité avec les conditions du contrat de filmage.

Les exemplaires originaux dont la couverture en papier est imprimée sont filmés en commençant par le premier plat et en terminant soit par la dernière page qui comporte une empreinte d'impression ou d'illustration, soit par le second plat, selon le cas. Tous les autres exemplaires originaux sont filmés en commençant par la première page qui comporte une empreinte d'impression ou d'illustration et en terminant par la dernière page qui comporte une telle empreinte.

Un des symboles suivants apparaîtra sur la dernière image de chaque microfiche, selon le cas: le symbole → signifie "A SUIVRE", le symbole ▽ signifie "FIN".

Les cartes, planches, tableaux, etc., peuvent être filmés à des taux de réduction différents. Lorsque le document est trop grand pour être reproduit en un seul cliché, il est filmé à partir de l'angle supérieur gauche, de gauche à droite, et de haut en bas, en prenant le nombre d'images nécessaire. Les diagrammes suivants illustrent la méthode.

32X

LA

CONTAI

LA

WIL

A TREATISE

UPON THE

LAW OF TELEGRAPHS;

WITH AN APPENDIX,

CONTAINING THE GENERAL STATUTORY PROVISIONS OF ENGLAND, CANADA, THE UNITED STATES, AND THE STATES OF THE UNION, UPON THE SUBJECT OF TELEGRAPHS.

BY

WILLIAM L. SCOTT AND MILTON P. JARNAGIN,

MEMPHIS, TENNESSEE.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1868.

CAMBRIDGE:
PRESS OF JOHN WILSON AND SON.

PREFACE.

THE rapid extension of the Telegraph, and its growing importance in commercial transactions and in private correspondence, induced the belief that a treatise upon the Law of Telegraphs would be acceptable to the Profession.

Numerous cases in England and America have already come before the Courts for adjudication, involving rights and liabilities growing out of the use of the Telegraph; and the cases steadily multiply, as this agency becomes more extended. The wonderful perfection of the instruments and appliances now used, as also the improvements constantly being made, plainly indicate that the Telegraph has a capacity for serving the public, not dreamed of by its first inventors. Its adoption into the postal systems of the world is only a question of time.

It will be seen that there is much conflict of judicial opinion upon important questions connected with this subject, in the cases already reported. They are scattered through so many series of reports, that they

are not accessible by those who have not very large libraries. A mere compilation of decisions would be useful; but that would still impose upon the reader the necessity of sifting and comparing the whole mass, in order to find the weight of authority in a given case. Manifestly a treatise only can meet the wants of the Profession; and we have written one. Believing a satisfactory solution of these questions could, in most instances, be found in the analogies of legal principles already established, we have traced the resemblance wherever deemed apposite. Our expression of dissent from the conclusions of several Courts may be proof of our temerity; but we imply no disrespect for the learned Judges by whom the cases were decided.

Whether the same extraordinary responsibility rests upon Telegraph Companies in relation to the transmission of messages, as is applied to common carriers in the carriage of goods, is a very interesting, and, perhaps, the most important, branch of Telegraph Law, and about which there is the greatest diversity of opinion.

We have adopted the following order of arrangement: Part I. relates to things common to Telegraph Companies and other corporations; and Part II. to things peculiar to Telegraph Companies.

It is believed that we have referred to all the cases reported upon this subject which possess any interest, and the important points they contain have been exhibited, either in the text or in the notes.

We offer this work to the Profession with diffidence; and that diffidence is increased by the fact that we have had no precursor in this field of investigation. It may fail to meet the wants of the Profession; still we offer it in the hope that its defects may incite, and its merits assist, those who may be willing to undergo the labor of a more satisfactory and thorough presentation of this important subject.

Memphis, Tennessee, September, 1868

TABLE

OF TH

Telegra

Organiz

Right of

Powers

Construc

Liability
ries to

Remedies

CONTENTS.

PAGE

TABLE OF CASES CITED xi

PART I.

OF THINGS COMMON TO TELEGRAPH COMPANIES AND OTHER CORPORATIONS.

CHAPTER I.

SECTION

Telegraph Companies in their Relation to the State . . 1–13

CHAPTER II.

Organization 14–22

CHAPTER III.

Right of Way by Purchase and Condemnation . . . 23–35

CHAPTER IV.

Powers under the Charter 36–48

CHAPTER V.

Construction of Telegraph Lines 49–60

CHAPTER VI.

Liability *ex delicto* of Telegraph Companies; and Injuries to Telegraphs made Criminal by Statute . . . 61–75

CHAPTER VII.

Remedies 76–94

PART II.

Of Things Peculiar to Telegraph Companies.

CHAPTER I.

SECTION

The Nature of the Engagement of Telegraph Companies in Respect to Messages 95–102

CHAPTER II.

Rights and Duties of Telegraph Companies . . . . 103–138 *a*

Rights: —

First, To make reasonable Rules and Regulations 104–118 *b*

Second, To decline sending certain Messages . . 119

Third, To withhold certain Messages 120

Fourth, None to require Messages sent, etc. . . . 121

Duties: —

To the Public and to Individuals . . . . . 123–138 *a*

CHAPTER III.

Contracts in Relation to Messages 139–197

Power to limit Liability by Contract 141–147

How and to what extent Notices affect Contracts . 148–161

How Implied Contracts are affected by them . . 162

Construction of Contracts, and Rights and Duties under them, express and implied 163–197

CHAPTER IV.

Extent of Responsibility in Relation to Messages . . 198–269

Authorities holding Telegraph Companies to be Carriers, or in the Nature of Carriers 199–206

Authorities holding them to a more limited Responsibility 207–229

Observations upon the Weight of Authority . . . 230

The Authors' Views as to their Responsibility . . 231–256

Modes of Restricting 257–269

CHAPTER V.

Responsibility for Messages beyond the Company's Line 270–294 *a*

CHAPTER VI.

SECTION
The Telegraph as a Medium of Contract . . . . . 295–339 *a*

CHAPTER VII.

Evidence 340–386

CHAPTER VIII.

Measure of Damages 387–418

CHAPTER IX.

Penalties and Indictment by Statute in Relation to Messages 419–446

PAGE
APPENDIX 420–507

INDEX 511–535

Adams
Alder v.
Aldrich
Allen v.
v.
v.
America
Fletch
Ammant
Pittsbu
Amory v
Angle &
R.R. C
Armingt
Arthur v
of Vic
Asahel E
berlain
Atty. Ge
Elec. T
Atty. Ge
Baron
United
Teleg.
Aurora v.
Austin v.
& L. R

Backus v.
Bain v. Mc
Baldwin v.
Baltimore
Rathbon
Bangor & I
v. Harris
Bank of A
Bank U.S.

TABLE OF CASES CITED.

A.

Section

Adams v. Lindsell 310, 320
Alder v. Keighley 390
Aldrich v. Press Printing Co. 138 a
Allen v. Farnsworth 26
v. Montgomery R.R. Co. 37, 41
v. Sewall 87, 167
American Ex. Co. v. Calvin Fletcher 193
Ammant v. New Alexandria & Pittsburg Turnpike 41
Amory v. Hamilton 399
Angle & Co. v. Miss. & Mo. R.R. Co. 272, 278, 283
Armington v. Barnet 5
Arthur v. Com. & R.R. Bank of Vicksburg 39
Asahel Emigh v. Selah Chamberlain 40
Atty. Gen. v. United Kingdom Elec. Teleg. Co. 2, 81
Atty. Gen. at the relation of Baron Rothschild v. The United Kingdom Electric Teleg. Co. 81
Aurora v. West 8
Austin v. The Manchester S. & L. Railway 146

B.

Backus v. Lebanon 27
Bain v. Morse 71
Baldwin v. Collins 146, 148, 167
Baltimore & O. R.R. Co. v. Rathbone 266
Bangor & Piscataquis R.R. Co. v. Harris 11
Bank of Augusta v. Earle 36
Bank U.S. v. Dandridge 6, 36
v. Planters' Bank of Ga. 4
Bank of Cape Fear v. Edwards 11
Barber v. Lane 138 a
Barker v. Midland Railway 106
Batson v. Donovan 146
Beardslee v. Richardson 229
Beckwith v. Sydebotham 386
Bell v. Cunningham 401
Beman v. Rufford 40
Benford v. Sanner 381
Bennett v. Filyaw 272, 275
Bigelow v. Cong. Society of Middleton 41
Birney v. N.Y. & Wash. Printing Teleg. Co. 69, 99, 112, 114, 117, 118 a, 147, 155, 207, 237, 372, 383
Bissell v. N.Y. Cent. R.R. Co. 140, 149
Blakemore v. Glamorganshire Canal Co. 42, 59
Blake v. Great Western R.R. Co. 271
Blanchard v. Isaacs 159
Blin v. Mayo 187
Bloodgood v. M. & H. R.R. Co. 138
Bodenham v. Bennett 146
Bonaparte v. Cam. & Amb. R.R. 80
Boston & Lowell R.R. Corp. v. Salem & Lowell R.R. Co. 5, 9, 27, 34
Boston Water Power Co. v. Boston & Worcester R.R. Co. 9, 26, 27
Boulton & Watt v. Bull 71
Bowen & McNamee v. Lake Erie Teleg. Co. 120, 166, 203, 409
Bradford v. S.C. R.R. Co. 272, 293
Bradley v. N.Y. & N.H. R.R. Co. 26
Breese & Mumford v. U.S. Teleg. Co. 104, 114, 118 b, 143, 149, 207, 214, 245
Bridge v. Mason 399
Bridges v. Stickney 339
Broadwell v. Butler 188
Brown v. Arrott 399

Section

Briggs v. Boston & Lowell R.R. Co. 272
Brown v. Eastern R.R. Co. 148
Bryant v. Am. Teleg. Co. 180, 263, 399
Bryant v. Biddeford 51
Bunn's Case 20, 21
Byron v. N.Y. State Teleg. Co. 66

C.

California State Teleg. Co. v. Alta Teleg. Co. 5, 8, 36, 37
Calvit v. McFadden 389
Camden & Amboy R.R. Co. v. Baladauf 146
Camp v. The Western Union Teleg. Co. 104, 113, 115, 117, 230
Canal Co. v. Blakemore 42
Candee v. Penn. R.R. Co. 272
Carpenter v. County Com. of Bristol 78
Carr v. Ga. R.R. & Banking Co. 30
Carter v. Peck 272
Central Bridge Corporation v. The City of Lowell 27
C. P. & A. R.R. Co. v. City Erie 8
C.W. & Z. R.R. Co. v. Com's Clinton Co. 19
Chapman v. Morton 412
Chard v. Stone 8
Charles River Bridge v. Warren Bridge Co. 7, 8, 37
Chesapeake & O. Canal Co. v. Baltimore & O. R.R. Co. 8
Chesley v. Pierce 87
Chestnut Hill Turnpike Co. v. Rutter 138
Chippendale v. Lan. & Yorkshire R.R. Co. 146
Cin., Ham., & Dayton R.R. Co. v. Spratt 272
City of Aurora v. West 8
Clark v. Monongahela Nav. Co. 18
Clark v. Boston, Concord, & M. R.R. Co. 91
Clark v. Faxton 146
Clarke v. L. & N. Union Canal 78
Coats v. Clarence 79
Coggs v. Bernard 213
Cohen v. Wright 8
Coleman v. Eastern Counties R.R. Co. 21
Collins v. The Bristol & Exeter Railway Co. 271, 282
Commonwealth v. Power 106
v. Worcester 104
v. Edward P. Jeffries, 380

Section

Commonwealth v. Easton Bank 12
v. Fitchburg R. R. Co. 57
Convoy's Wheat 301
Cookney's Case 21
Copper Mines Co. v. Fox 48
Corey v. Buffalo, Corning, & N. Y. R.R. Co. 34
Cornwal v. Wilson 412
Cory v. Norwich & Yar. R. 80
Cother v. Midland Railway 58
Couch v. Steel 431
Covington Plank Road Co. v. Moore 17
Coxon v. Great Western R.R. Co. 271
Crawfordsville & Wabash R.R. Co. v. Wright 70
Croft v. Allison 69
Crouch v. London & N.W. R.R. Co. 128, 271, 293
Crouch v. Great N. Railway Co. 393
Cruger v. Hudson River R.R. Co. 94
Curtis v. Harlow 87

D.

Danes v. Peck 179
Dartmouth College v. Woodward 5
Davidson v. Graham 383
Davis v. London & Blackwall R.R. Co. 70
Day v. Owen 104
Dayton & Mich. R.R. Co. v. Spratt 272
Dean v. Sullivan Railway 24
Dearborn v. Boston, Con., & Montreal R.R. Co. 70, 92
Deere v. Guest 81
Demming v. Bull 87
De Rutte v. N.Y., Alb., & Buff. Teleg. Co. 101, 102, 116, 120, 123, 143, 147, 158, 170, 177, 213, 284, 411, 414
Detroit Daily Post Co. v. McArthur 138 *a*
Dickey v. Maine Teleg. Co. 50, 54, 63
Dickey & Wife v. Maine Teleg. Co. 64, 385
Dorr v. N.J. Steam Nav. Co. 146, 149
Draper v. Worcester & Norwich R.R. Co. 370, 372
Dryburg v. N.Y. & W. Printing Teleg. Co. 69, 107, 120
Dunning v. Smith & Roberts, 69, 333, 339, 358

Section

Durkee *v.* Vermont Cent. R.R. Co. 97, 107, 183, 341, 360
Dutton *v.* Solomonson 179

E.

Elec. Teleg. Co. of Ireland *v.* Bunn 21
Elec. Teleg. Co. *v.* Overseers, etc., of Salford 11, 23
Eliason *v.* Henshaw 320
Elkins *v.* Boston & Maine R.R. Co. 159
Ellis *v.* The American Teleg. Co. 101, 104, 113, 114, 116, 149, 197, 209, 224, 248, 416
Elmore *v.* Naugatuck R.R. Co. 272, 273, 293
Enders *v.* Board Public Works 37
Everett *v.* Saltus 179
Eyre *v.* Higbee 179

F.

Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 184, 272, 293
Fenwick *v.* Bell 386
Field *v.* Fleld 21
Fish *v.* Chapman 144
v. Ross 260
Fisk *v.* Newton 194
Fletcher *v.* Peck 5
v. Tayleur 390, 397
F. O. J. Smith *v.* J. W. Clark 71, 386
Fox *v.* Harding 389, 401
Freeman *v.* Birch 179
Furniss *v.* Hudson River R.R. Co. 92

G.

Garnett *v.* Willan 205
Gee *v.* L. & Y. Railway 390, 401
v. Pritchard 97
Gibson *v.* Culver 184
Gifford *v.* N.J. R.R. Co. 8
Gildersleeve *v.* U.S. Teleg. Co. 118, 155, 229, 397
Gillespie *v.* Edmonston 310
Gleaves *v.* Brick Church Turnpike Co. 6, 17
Gordon *v.* Preston 37
Gordon's Executors *v.* Mayor of Baltimore 11
Gould *v.* Hudson River R.R. Co. 34
Graham & Co. *v.* Davis 146

Section

Great Western Railway *v.* Reg. 78
Green *v.* Seymour 6
Griffin *v.* Colver 390, 392, 394, 397
v. House 42
Griffith *v.* Ingledew 179

H.

Hadley *v.* Baxendale 390, 394, 397, 401
Hall *v.* Sullivan R.R. Co. 39
v. Power 106
Hamilton & Deansville Plank R. Co. *v.* Rice 17
Hamlin *v.* Great Northern R.R. Co. 393
Hanson *v.* Webb 8
Hartford & N.H. R.R. Co. *v.* Croswell 18
Harvey *v.* Turner 399
Hay *v.* Cohoes Co. 138
Head & Armory *v.* The Providence Ins. Co. 36
Hearn *v.* London & S.W. Railway 167
Hegeman *v.* Western R.R. Corp. 124, 127
Henderson *v.* Australian Royal Mail Nav. Co. 48
Henisler *v.* Freedman 137, 375
Hentz *v.* Long Island R.R. Co. 57
Hightower *v.* Thornton 80
Hinton *v.* Dibbin 146
Hoare's Case, *in re* Elec. Teleg. Co. of Ireland 20
Hood *v.* N.Y. & N.H. R.R. Co. 273, 293
Hopkins *v.* Atlantic & St. Louis R.R. Co. 138 *a*
v. Gallatin Turnpike Co. 37
Hornblower *v.* Boulton 71
Howe *v.* Freeman 37
Hudson R.R. Co. *v.* Outwater 32
Hueston *v.* Eaton & Hamilton R.R. Co. 92
Hyde *v.* The Great Western Railway 84

I.

Illinois Central R.R. Co. *v.* Copeland 272
Illinois Central R.R. Co. *v.* County of McLean 11
Illinois Central R.R. Co. *v.* Downey 69
Illinois Central R.R. Co. *v.* Rucker 78

Section

Illinois & Miss. Teleg. Co. *v.* Kennedy 77
Indian Cañon Road Co. *v.* Robinson 8
Ingalls *v.* Bills 124
Inge *v.* Birmingham W. & S. V. Railway 85
Inhabitants of Springfield *v.* Conn. River R.R. Co. 9, 58
In re Waddell 379
Irvine & Others, Trustees of the Alleghany & Erie Teleg. Co. *v.* Forbes 17, 21
Izett *v.* Mountain 143, 205

J.

Jackson *v.* Brown 37
James Johnson *v.* Churchwell 79
Jenks *v.* Coleman 104
Jenneson *v.* Cam. & Amb. Railway 293
Jerome *v.* Ross 80
Johnson *v.* Midland Railway 128, 140
Johnson *v.* Whitefield 51
Judson *v.* Western R.R. 149
Justices of Clark *v.* P. W. & River Turnpike Co. 78

K.

Keegan *v.* The Western R.R. Co. 66, 67
Kemp *v.* Pryor 412
Kennard *v.* Burton 385
Kennebec & Portland R.R. Co. *v.* Palmer 17
Kimble *v.* White Water Valley Canal 30
Kinghorn *v.* Montreal Teleg. Co. 335, 355, 372, 393
Kyle *v.* The Lawrence R.R. Co. 272

L.

Laing *v.* Colder 64, 146
Lamb *v.* Lane 91
Landsberger *v.* The Magnetic Teleg. Co. 392, 394, 397 *b*, 408
Lane *v.* Cotton 207
Lawrence *v.* Wardwell 401
Lee & Others *v.* Marsh, Receiver 146
Leeson *v.* Holt 146
Leland *v.* Stone 390
Leonard & Burton *v.* The N.Y., Alb., & Buf. Teleg. Co. 102

Section

Le Roy *v.* Tatham 71
Lewis *v.* The Great Western Railway Co. 149
Little Miami R.R. Co. *v.* Naylor 38, 42
Livingston *v.* Lynch 21
Locke *v.* Middlesex Turn. Co. 18
London & Brighton Railway *v.* Blake 13
London & Brighton R.R. Co. *v.* Wilson 18
Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Ky. Turnpike Co. 42, 59
Louisville & Nashville R.R. Co. *v.* The County Court of Davidson 19, 78
Louisville & Portland Canal Co. *v.* Commonwealth 11
Lowell *v.* Boston & Lowell R.R. Corp. 69
Lowell Wire Fence Co. *v.* Sargent & Another 293

M.

Mactier *v.* Frith 310, 314, 319, 321, 327
Mann *v.* Currie 80
Marr *v.* Bank West. Tenn. 80
Mason *v.* Kennebec & Portland R.R. Co. 70
Matteson *v.* Noyes 353
Maxwell's Case 21
Mayor, etc., of Alleghany *v.* Ohio & Pa. R.R. Co. 34
Mayor, etc., Norwich *v.* Norfolk R.R. Co. 40
McAndrew *v.* The Elec. Teleg. Co. 104, 117, 118 *b*, 143, 146, 149, 205, 229, 246
McCallie *v.* Mayor & Ald. of Chattanooga 12
McCulloch *v.* Eagle Ins. Co. 310, 320, 321
McDowell *v.* Oyer 390
McManus *v.* Crickett 69
McMillan *v.* M. S. & N.J. R.R. Co. 149, 161
Mechanics' Bank *v.* N.Y. & N. H. R.R. Co. 69
Merrill *v.* Ithaca & Oswego R. R. Co. 372
Michigan Cent. R.R. Co. *v.* Ward 144
Michigan *v.* Hale 144
Middlesex Turnpike Co. *v.* Locke 18

Section

Midland Railway *v.* Bromley 374
Miller *v.* N.Y. & Erie R.R. Co. 10
Mitchell *v.* Franklin & Col. Turnpike Co. 30
Morehead *v.* Little Miami R.R. Co. 38, 42, 59
Morison *v.* Moat 137, 378
Morrill *v.* Noyes 37
Morris & Essex R.R. Co. *v.* Ayres 104
Morris *v.* Summerl 399
Morse *v.* O'Reilly 71
Moses *v.* Boston & Maine R.R. Co. 148
Moss *v.* Oakley 87
Muschamp *v.* The Lan. & Preston Railway 271, 279, 282, 285, 293
Mytton *v.* Midland Railway 271

N.

Nashville & Chattanooga R.R. Co. *v.* Cowardin 26
Nashville & Chattanooga R.R. Co. *v.* Messino 65, 67, 113, 127
Natoma Water & Mining Co. *v.* Clarkin 8
Naugatuck R.R. Co. *v.* Waterbury Button Co. 273
Nettles *v.* S. Car. R.R. Co. 188
New Albany & Salem R.R. Co. *v.* Connelly 92
Newcastle & Richmond Railway *v.* P. & I. Railway 9, 57
N.J. Steam Navigation Co. *v.* Merchants' Bank 128, 140, 146, 229, 260
N.J. R.R. Co. *v.* Kennard 124
New Orleans & G. N. R.R. Co. *v.* Hurst, J. 138 *a*
N.Y. & Sharon Canal Co. *v.* Fulton Bank 44
N.Y. & Wash. Print. Teleg. Co. *v.* Dryburg 102, 107, 120, 165, 167, 179, 197, 210, 333, 367, 411
Niagara Falls & Lake Ontario Railway *v.* Hotchkiss 28
Nicholls *v.* Webb 371
Norris *v.* Farmers' & Teamsters' Co. 8
Northern R.R. Co. *v.* Fitchburg R.R. Co. 293
Nova Scotia Teleg. Co. *v.* Am. Teleg. Co. 37
Noyes *v.* Rut. & Bur. R.R. Co. 69, 293
Nutting *v.* Conn. River R.R. Co. 272, 293

O.

Section

Ohio & Miss. R.R. Co. *v.* McPherson 20
Ohio & Miss. R.R. *v.* Wheeler 77
Ohio Trust Co. *v.* Debolt 12
Oliver & Williams *v.* Robert Piatt 12
O'Reilly *v.* Morse 71
Orange Co. Bank *v.* Brown 149, 167
Oswego Falls Bridge *v.* Fish 7

P.

Pacific R.R. Co. *v.* Renshaw 10
Parks *v.* Alta. Cal. Teleg. Co. 100, 102, 199, 205, 398
Parsons *v.* Monteath 383
Peet *v.* Chicago & N.W. R.R. Co. 272
Penn. Railway *v.* McCloskey 146
R.R. Co. *v.* Heister 93
v. Aspell 64
Penn. & Ohio Canal Co. *v.* Webb 18
Penobscot B. Corporation *v.* Lamson 6
People *v.* Miss. & Atlantic R.R. Co. 79
Perkins *v.* Portland, Saco, & P. R.R. Co. 272
Perrine *v.* Chesapeake & Delaware Canal Co. 36
Perry *v.* Marsh 67
Phil. & Reading R.R. Co. *v.* Derby 69
Phil. R.R. Co. *v.* Wilt 69
Phil., Wilm., & Balt. R.R. Co. *v.* Howard 89
Phil. & Wilm. R.R. Co. *v.* The State of Maryland 38, 89
Pierce *v.* Emery 37, 39
Pope *v.* Brandon 97
Powell *v.* Myers 193
Prince Albert *v.* Strange 137, 378
Pritt *v.* Fairclough 371
Proprietors of Union Locks & Canals *v.* Towne 18
Prosser *v.* The Montreal Teleg. Co. 400
v. Henderson 295
Proudfoot *v.* Montefiore 300
Providence Bank *v.* Billings 10

R.

Railroad Co. *v.* Winans 41
Radcliff *v.* Mayor of Brooklyn 34
Reg. *v.* Inhabitants of Denton 11
v. York & North Midland Railway 78

	Section
Reid's Case, *in re* Elec. Teleg. Co. of Ireland	21
Reno *v.* Hogan	146
Reuter *v.* The Elec. Teleg. Co.	20, 46, 128, 133
Rex *v.* Nottingham Old Water Works	78
v. United Kingdom Teleg. Co.	13, 51
Reynolds *v.* Dunkirk, etc.	25
Richmond, Fred., & Potomac R.R. Co. *v.* Louisa R.R. Co.	27
Riley *v.* Hearne	213
Rittenhouse *v.* The Independent Line of Telegraph	166, 407, 411
River Dun Navigation Co. *v.* North Midland Railway	84
Robert Dickey & Wife *v.* The Maine Teleg. Co.	64, 385
Robins *v.* Embry	39
Rodgers *v.* Bradshaw	9
Rothschild *v.* United Kingdom Elec. Teleg. Co.	81
Rudd's Case, *in re* Elec. Teleg. Co. of Ireland	21

S.

Sands & Crump *v.* Taylor & Lovett	412
Sanford *v.* Housatonic R.R. Co.	148
Sarah Dickey *v.* Maine Teleg. Co.	50, 54, 63
Scotthorn *v.* South Staffordshire R.	271, 282
Seneca Road Co. *v.* Auburn & Rochester R.R. Co.	34
S. & B. R.R. Co. *v.* L. & N.W. R.R. Co.	40
Sheldon & Wife *v.* Sill	41
Shields *v.* The Washington & N. O. Teleg. Co.	97, 143, 167, 212, 402
Sills *v.* Brown	413
Skip *v.* Eastern Counties R.R. Co.	67
Slack & Co. *v.* Maysville & Lex. R.R. Co.	19
Smith *v.* Clark	71
Smith & Randolph *v.* Ind. Line of Telegraph	412
South Carolina R.R. Co. *v.* Blake	42
Spooner *v.* McConnell	80
Springfield *v.* Conn. River Railway	27, 58
Stacey *v.* Vermont Central Railway	28
State *v.* Gould	106
v. Kittery	51
v. Norwalk & Dan. Turnpike Co.	42
State *v.* Overton	104, 106
v. Rives	39, 41
Stephen *v.* Smith	106
St. John *v.* Van Santvoord	278, 293
Stevenson *v.* The Montreal Teleg. Co.	174, 280, 393
Stinson *v.* Gardiner	51
Storer *v.* Great Western Railway	85
Submarine Teleg. Co. *v.* Dickens	78
Swindler *v.* Hilliard	383
Syracuse City Bank *v.* Davis	8

T.

Taft *v.* Wildman	390
Tayloe *v.* Merchants' Ins. Co.	310, 321
Taylor *v.* Steamboat Robt. Campbell	326, 369
Telegraph Co. *v.* Wilt	13, 53
The American Express Co. *v.* Calvin Fletcher	193
The Bank of U.S. *v.* Planters' Bank of Ga.	4
The Boston & Roxbury Mill Corp. *v.* James Newman	25
The City of Halifax *v.* The Nova Scotia Elec. Teleg. Co.	81
The Elec. Teleg. Co. *v.* Brett	71
The Elec. Teleg. Co. *v.* Nott & Others	71, 82
The European & Am. Submarine Teleg. Co. *v.* Elliott	81
The Huntress	140
The Illinois Cent. R.R. Co. *v.* County of McLean	11
The Illinois & Miss. Teleg. Co. *v.* Kennedy	77
The King *v.* Whitaker	21
The Newbury Turnpike Co. *v.* Eastern R.R. Co.	22
The Phil. & Wilm. R.R. Co. *v.* State of Maryland	12
The Phil., Wilm., & Balt. R.R. Co. *v.* Quigley	138
The Piqua Branch of the State Bank of Ohio *v.* Jacob Knoop	12
The Providence Bank *v.* Billings	12
The South Eastern Railway Co. *v.* The European & Am. Elec. Teleg. Co. & Friend	3[illegible], 70
The State of New Jersey *v.* Wilson	12
The State (Cam. & Amb. R.R. Co.) *v.* Com'rs of Mansfield	26
The U.S. Teleg. Co. *v.* Wenger	397 *a*
The Western Teleg. Co. *v.* Penniman & King	83, 121

Section

The Western Teleg. Co. *v.* The Magnetic Teleg. Co. & Others 121
The Western Union Teleg. Co. *v.* Carew 102, 104, 124, 149
Thomas *v.* Boston & Prov. R.R. Co. 185, 213
Thorpe *v.* Rutland & Burlington Railway 10
Tipping *v.* Clarke 137, 378
Thurn *v.* Alta Cal. Teleg. Co. 288, 432
Trevor & Colgate *v.* Wood 311, 328, 330, 347, 359
Troup's Case, *in re* Elec. Teleg. Co. of Ireland 20
Troy *v.* The Cheshire Railway 30
Troy & Boston R.R. Co. *v.* Lee 93
Troy & Boston R.R. Co. *v.* Tibbits 17
Troy & Boston R.R. Co. *v.* Warren 17
Troy & Canada Teleg. Co. *v.* Connell 17
Tuckahoe Canal Co. *v.* Tuckahoe R.R. Co. 8
Turner *v.* Sheffield, etc., R.R. Co. 70
Turnpike Co. *v.* Hosmer 42, 59

U.

Union Bank *v.* U.S. Bank 37
Locks & Canals *v.* Towne 18
Water Co. *v.* Murphy's Flat Fluming Co. 8
United States *v.* Harris 24
U.S. Teleg. Co. *v.* Wenger 397 *a*

V.

Vanderbilt *v.* Richmond Turnpike Co. 69
Van Santvoord *v.* St. John 293
Varick *v.* Smith 26
Vasser *v.* Camp 314
Vedder *v.* Fellows 104
Vermont Central R.R. Co. *v.* Baxter 91
Vermont Central R.R. Co. *v.* Town of Burlington 26
Vicksburg & J. R.R. Co. *v.* Patten 138 *a*
Visscher *v.* Hudson River R.R. Co. 32

W.

Waddell, in the matter of 379
Walker *v.* Jackson 241
Wann *v.* Western Union Teleg. Co. 142
Washington & N.O. Teleg. Co. *v.* Hobson & Sons 412
Watkins *v.* The Great Northern Railway Co. 30
Watson *v.* The Ambergate, Nottingham, & Boston Railway Co. 282
Webb *v.* Manchester & Leeds R.R. Co. 80, 386
Weed *v.* Sar. & S. R.R. Co. 275
Welsh *v.* Barrett 371
West River Bridge Co. *v.* Dix 5, 7, 9, 27
Western Union Teleg. Co. *v.* Carew 113, 114, 149, 217, 243, 252
Western Union Teleg. Co. *v.* Ward 168, 188, 215, 434
White River Turnpike Co. *v.* Vt. Central R.R. Co. 9, 58
White *v.* Syracuse & Utica R.R. Co. 10
White *v.* Nichols 138 *a*
Whitwell, Bond, *et al. v.* Warner 20
Wibert *v.* N.Y. & Erie R.R. Co. 129
Williams *v.* Barton 389
v. Bicknell 337, 360
v. Hartford & New Haven R.R. Co. 28
v. N.Y. Central R.R. Co. 2
v. Reynolds 390
v. Williams 137, 378
Willink *v.* Morris Canal & Banking Co. 37
Wilson *v.* York N. & B. Railway 271, 292
Winch *v.* Railway Co. 40
Woolsey *v.* Dodge 12
v. Judd 97
Worcester *v.* Western R.R. Corp. 26
Works, Saml., *v.* Junction R. R. Co. 77
Wright *v.* Boughton 293
v. Wilcox 69
Wyld *v.* Pickford 146

Y.

Yarborough *v.* Bank of England 138
York, Newcastle, & Bernwick Railway *v.* Crisp 146
Young *v.* The Inhabitants of Yarmouth 51, 55
Yovatt *v.* Winyard 137, 378

OF TH

PART I.

OF THINGS COMMON TO TELEGRAPH COMPANIES AND OTHER CORPORATIONS.

T

OF TE

TELEGRA

§ 1.
porated

§ 2. I
would n
and to c
over suc
the State
by purc
to his en
hire, and
obligatio

He wo
posts, an
way, wit
cross nav
over the

[1] Attorn
Beav. 292.

THE LAW OF TELEGRAPHS.

PART I.

OF THINGS COMMON TO TELEGRAPH COMPANIES AND OTHER CORPORATIONS.

CHAPTER I.

TELEGRAPH COMPANIES IN THEIR RELATION TO THE STATE.

§ 1. The Law of Telegraphs as operated by incorporated companies is the subject of this volume.

§ 2. No reason is perceived why a private person would not have the right to construct telegraph lines, and to carry on the business of transmitting messages over such lines for a reward, without authority from the State, provided he had procured the right of way by purchase. The relation in which he would stand to his employer would be similar to that of bailee for hire, and he would be under the same character of obligation as other bailees.

He would not, however, have the right to erect his posts, and construct his lines, upon the public highway, without authority from the State.[1] He might cross navigable streams, if he had the right of way over the lands on each side of the stream, provided

[1] Attorney-General *v.* The United Kingdom Elec. Teleg. Co. 30 Beav. 292.

the lines were sunk under the stream, or placed above the stream, so as not to interfere with navigation. He might, also, construct telegraph lines along the route of a railroad, with the consent of the railroad company to the use of its bed, unless such use of the land might be considered an additional servitude upon the land, requiring the consent of the owner of the fee.[1]

§ 3. All telegraph lines in England, Canada, and the United States are operated by companies, either under the authority of general laws applicable alike to all companies,[2] or by express charter.

These general laws provide that the organization may be made by compliance with the terms prescribed; and with a provision authorizing their construction along and upon highways and across navigable streams, so as not to interfere with travel, or obstruct navigation; and, in some of the American States, authorizing towns to regulate the erection of posts, lines, etc., and to change their location on the streets as the interest of the town may require. These general laws also allow the company to make reasonable rules and regulations for conducting its business; and they require messages to be transmitted with impartiality and good faith, and in the order of time in which they are received, with a preference, however, by the Statutes of some of the States, to messages conveying intelligence public, or essential to public justice; a uniform rate of charges; secrecy on the part of the company's operator, and other agents and servants, in reference to the contents of all messages.

[1] Williams *v.* N.Y. Central R.R. Co. 16 N.Y. R. 97.

[2] See Appendix.

They prescribe penalties for the violation of these requirements; and, in some of the States, subject the company to indictment for violation of certain duties, and also make it an indictable offence on the part of individuals to injure the posts or lines of the company, or to interrupt the message in the course of its transmission.[1] Provision is also made by statute in England, Canada, and by act of Congress in the United States, authorizing the Government to take possession and control of telegraph lines for the public service whenever the exigencies of the State may require, upon making compensation to the companies for such use of their line.[2]

[1] See Appendix.

[2] 26 & 27 Vict. (1863), c. 112, § 52; consolidated Statutes of Canada, c. lxvii. § 17, 18; Thirty-seventh Congress, Sess. 2, c. 15 (1862).

By the 26 & 27 Vict. c. 112, § 52, it is provided: "Where, in the opinion of one of Her Majesty's principal Secretaries of State, an emergency has arisen in which it is expedient for the public service that Her Majesty's Government should have control over the transmission of messages by the company's telegraph, the Secretary of State, by warrant under his hand, may direct and cause the company's works, or any part thereof, to be taken possession of in the name and in behalf of Her Majesty, and to be used for Her Majesty's service, and, subject thereto, for such ordinary service as may seem fit, or may direct and authorize such persons as he thinks fit, to assume the control of the transmission of messages by the company's telegraph, either wholly or in part, and in such manner as he directs;" and provision is made for compensation to the company for any loss of profit sustained by reason of such appropriation to the public use.

The Consolidated Statutes of Canada, c. 67, §§ 17, 18, provide:—

Her Majesty may at any time assume, and for any length of time retain, possession of any such telegraph line, and of all things necessary to the sufficient working thereof, and may for the same time require the exclusive service of the operators and other persons employed in working such line, and the company shall give up possession thereof, and the operator and other persons shall, during the time of such possession, diligently and faithfully obey such orders, and transmit and receive such despatches

§ 4. When companies or individuals organize under such general laws, the same rights are conferred, and the same obligations imposed, as if the terms and pro-

as they may be required to transmit and receive by any duly authorized officer of the Provisional Government, under a penalty, &c. Sec. 18 provides that Her Majesty may, at any time after the commencement of a telegraph line under this act, and after two months' notice to the company, assume the possession and property thereof, and upon such assumption, such line and all the property, real or personal, essential to the working thereof, and all the rights and privileges of the company as regards such line, shall be vested in the Crown.

The Act of Congress of January 31, 1862, c. 15, provides as follows: That the President of the United States, when in his judgment the public safety may require it, be, and he is hereby authorized to take possession of any or all the telegraph lines in the United States, their offices and appurtenances; to take possession of any or all the railroad lines in the United States, their rolling stock, their offices, shops, buildings, and all their appendages and appurtenances; to prescribe rules and regulations for the holding, using, and maintaining of the aforesaid telegraph and railroad lines, and to extend, repair, and complete the same in the manner most conducive to the safety and interest of the Government, to place under military control all the officers, agents, and employees belonging to the telegraph and railroad lines thus taken possession of by the President, so that they shall be considered as a post road and a part of the military establishment of the United States, subject to all the restrictions imposed by the rules and articles of war. Sec. 2 provides for the punishment of those who attempt to obstruct the Government in the use of the same, or who may attempt to injure or destroy the property of such telegraph or railroad companies.

Sec. 3 provides for the appointment of Commissioners to determine the damages suffered, or the compensation to which any telegraph or railroad company may be entitled by reason of such use by the Government. The 5th section of this act provides that it shall not be in force any longer than is necessary for the suppression of the rebellion.

The Act of Congress, 24 July, 1866, looks to the ultimate absorption of the telegraph by the Government. After giving the right of way over and along public domains, military or post roads of the United States, and over, under, or across navigable streams, so as not to obstruct; and also leave to take and use materials for construction and maintenance, and a right to pre-empt and use unoccupied lands for stations, not exceeding forty acres to each station, the stations to be fifteen miles apart; the act then provides that the Postmaster-General shall fix rates for despatches

visions of such general laws were embraced in a special act of incorporation.

Whether organized under general laws, or special acts of incorporation, telegraph companies are private corporations; and this would be so, although the State were the principal or sole owner of the stock.[1]

They have such powers as are expressly granted, or such as are necessary to carry into effect the powers expressly granted, and none other; and when organized under such general law, or special act, the privilege of operating its line is a franchise.

§ 5. The legislature, then, having the power to grant, either by special act of incorporation, or by general law, the privilege to individuals or associations, of operating a telegraph line, when it is ac-

between different departments of the Government, which shall have priority.

Sec. 3 is most important, and provides "That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; *provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies, at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected."

Sec. 4 provides that the company shall file with the Postmaster-General a written acceptance of these restrictions and obligations, before exercising any of the powers and privileges. See Appendix.

In Louisiana and Tennessee, it is provided, that in case of war or insurrection, or civil commotion, the operator, upon application of an officer of the State or the United States, must give his communication immediate transmission, and for failure so to do, is guilty of a misdemeanor. See Appendix.

[1] The Bank of The United States *v.* The Planters' Bank of Georgia, 9 Wheat. 904.

cepted by the individual or association, in the manner designated, it becomes a contract between the State on the one part, and the individual or company on the other.[1]

The subject-matter of this contract is a franchise; and this franchise is private property.[2]

§ 6. It is not essential that there should be any formal act of acceptance, unless there be a mode of acceptance prescribed by the charter or general law under which the organization is made; but when such is the case, the requirement must be complied with.[3]

Ordinarily, the acceptance is sufficiently signified by the subscription of stock. It may be inferred from acts done in pursuance of the provisions of the charter.[4] Indeed, it frequently happens, that the acceptance is to be inferred from the course of conduct of the company, rather than from any distinct act of acceptance.[5]

§ 7. When such acceptance is made by the individual or association, the contract between the State and

[1] Dartmouth College *v.* Woodward, 4 Wheat. 518; Fletcher *v.* Peck, 6 Cranch, 87; Boston & Lowell R.R. Corp. *v.* Salem & Lowell R.R. Co. 2 Gray, 1.

[2] West River Bridge Co. *v.* Dix, 6 How. U.S. 507, 534; Armington *v.* Barnet, 15 Vt. 745; Cal. State Teleg. Co. *v.* Alta Teleg. Co. 22 Cal. 398.

[3] Green *v.* Seymour, 3 Sandf. N.Y. Ch. 285.

[4] Penobscot B. Corporation *v.* Lamson, 16 Maine, 224; Bank of U. S. *v.* Dandridge, 12 Wheat. 71; Gleaves *v.* Brick Church Turnpike Co. 1 Sneed, 491.

[5] Redfield on Railways, p. 10, ed. 1858. Since writing the text, the new and greatly enlarged edition (3d) has come to hand, causing a necessity for a change in noting our citations. For this reference see 1 Redfield on Railways, § 19, subd. 2.

the party incorporated is complete. This contract the legislature cannot impair. The constitutional prohibition upon impairing the obligation of contracts, as applied to the power of legislatures over charters or general laws of incorporation, is clearly settled and accurately defined; and has become a fixed and well-recognized principle of American jurisprudence.[1]

§ 8. The terms used in the act of incorporation determine that the grant is, or is not, exclusive. An exclusive franchise is, however, not to be implied.[2] The legislature has undoubtedly the right to grant exclusive franchises; and the exercise of this right is solely within the province of the legislature to determine. Exclusive franchises may be granted to individuals as well as to corporations; and incorporated companies have the right to purchase such exclusive franchises from individuals, and to succeed to all the rights and privileges which the franchises confer. As where the legislature of California had granted to certain individuals the exclusive privilege and right to construct and put in operation a telegraph line from the city of San Francisco to the city of Marysville, by the way of the cities of San José, Stockton, and Sacramento, with a proviso, "that no person shall be allowed to locate or construct or run any telegraph line, or any portion thereof, within a half a mile of the line or route selected by the indi-

[1] Oswego Falls Bridge Co. *v.* Fish, 1 Barb. Ch. 547; Charles River Bridge Co. *v.* Warren Bridge Co. 11 Pet. 420; West River Bridge Co. *v.* Dix, 6 How. U.S. 507–534.

[2] Charles River Bridge Co. *v.* Warren Bridge Co. 11 Peters, 420; s.c. 6 Pick. 376.

viduals to whom the right was given," authorizing the construction of local side lines; but "not to be constructed, nor offices established so as to do business directly or indirectly between the cities aforesaid," and the said individuals upon whom this exclusive franchise was conferred, sold and assigned the same to The State Telegraph Company, — a company organized under the general corporation law of the State, and which company constructed and put in operation this line of telegraph, and complied in all respects with the conditions of the act granting the exclusive privilege. And The Alta Telegraph Company, incorporated under the act of 1850, had, subsequent to the purchase by The State Telegraph Company established a line of telegraph between San Francisco, San José, and Sacramento, and within less than half a mile of the line established by The State Telegraph Company. The Alta Telegraph Company was enjoined from operating its line, at the suit of The State Telegraph Company.

The Court held, that the legislature had the power to grant the exclusive franchise to the individuals; that The State Telegraph Company had the right to purchase and enjoy such exclusive franchise, and to exercise the exclusive right of operating its line between these cities, and were entitled to an injunction upon any interference with such exclusive privilege. It was further held, that The Alta Telegraph Company could not question the right of The State Telegraph Company to purchase such exclusive franchise; that it could only be a question between The State Telegraph Company and the State, to be

determined in a proceeding by the latter for a forfeiture.[1]

[1] California State Telegraph Co. *v.* Alta Telegraph Co. 22 Cal. 398.

The act granting the exclusive franchise was as follows:—

"The right and privilege is hereby granted to Oliver E. Allen and Clark Burnham, or their assigns, to construct and put in operation an electro-magnetic telegraph line from the city of San Francisco to the city of Marysville, by the way of the cities of San José, Stockton, and Sacramento, with the right of way over any lands belonging to this State, and on or along any streets, roads, or highways, or across any stream or streams, *provided*, they do not obstruct the same; and no person or persons shall be allowed to locate or construct or run any telegraph line, or any portion thereof, within a half a mile of the line or route selected by the said Allen, Burnham, or their assigns, except that when within a half a mile of any incorporated city, the proprietors of any similar line of telegraph may enter said city and depart therefrom, making their station therein within twenty yards of the station of said Allen & Burnham, or their successors, for the term of fifteen years; *provided*, that the said above-named parties or their assigns shall, within eighteen months from the passage of this act, construct, and put in operation, a telegraph line from the city of San Francisco to the city of Marysville, by the way of San José, Stockton, and Sacramento; *provided*, also, that this act shall not prohibit the construction of local side lines. But lines shall not be constructed, nor offices established, so as to do business directly or indirectly between the cities aforesaid; but side lines may establish officer in said cities for the transmission of communications to and from the main line. This line shall be bound to do the business of said line, and to transmit all dispatches in the order in which they are received, under the penalty of one hundred dollars, to be recovered with costs of suit by the person or persons whose despatch is postponed out of its order as herein prescribed. . . .

"Sec. 2. No existing law shall be so construed as to conflict or interfere with the provisions of this act; *provided*, that the owners of this line shall at all times conform to the present law of this State concerning telegraph companies, so far as it relates to the transmission of messages."

Crocker, J., said, "This is an appeal from an order dissolving a temporary injunction, which was granted and dissolved upon the complaint alone. The complaint alleges, that on the first day of June, 1853, the plaintiff was duly incorporated under the general corporation law of this State, passed April 22, 1860, for the purpose of constructing and operating an electro-magnetic telegraph line from the city of San Francisco to the city of Marysville, by the way of San José, Stockton, and Sacramento;

Unless the grant is exclusive, there is no prohibition upon the legislature from granting similar

that, immediately thereafter, Allen & Burnham assigned to them all the rights and privileges granted to them by the act of May 3, 1852 (Statutes of 1852, 169); that they afterwards constructed and put in operation the said line of telegraph at an expense of $250,000, and have in all respects complied with the conditions of said act; that the said Alta California Telegraph Company is a corporation formed under the Act of 1850, and has, in concert with the other defendants, constructed a telegraph line between San Francisco, San José, and Sacramento; have established offices in said cities, and are transacting a telegraph business therein; that defendant's line runs in a large part of its course within less than half a mile of plaintiff's line; that they have suffered great injury thereby, in the sum of $250; that the defendants intend to continue the business; that it is utterly impossible for the plaintiff to ascertain and prove the amount of business done by the defendants, and the injury would therefore be irreparable; and pray for a perpetual injunction against the defendants, restraining them from doing any telegraph business between said cities.

"The case presents the following questions for our adjudication: 1st. Is the act of May 3, 1852, granting certain exclusive privileges to Allen & Burnham, constitutional? 2d. Have the plaintiffs the power or right to purchase, hold, and enjoy this exclusive privilege?

"The determination of these matters involves some important constitutional questions which have received very little judicial consideration, and we must therefore mainly rely upon those general rules of constitutional construction which are applicable to questions of this character. One rule is, that it is competent for the legislature to exercise all legislative powers not forbidden by the Constitution, or delegated to the National Government, or prohibited by the Constitution of the United States; and that an act of the legislature is to be held as void only when its repugnance to the State or National Constitution is clear beyond a reasonable doubt. (Cohen *v.* Wright, 22 Cal. 295, and cases there cited.)

"1. The first point is, whether the act of May 3, 1852, is repugnant to the Constitution. . . .

"This act confers certain special privileges, in the nature of a franchise, upon Allen & Burnham.

"Franchises are privileges derived from the government, vested either in individuals or private or public corporations, and are of various kinds; such as the privilege of exercising the powers of a corporation, of having waifs, wrecks, estrays; the right to collect tolls on a road, bridge, ferry, or wharf; the privilege of fishing, or taking game; and numerous others which might be referred to. In England, a large class of franchises exists

franchises to another corporation, although it may materially injure the emoluments of the first. Such

which are unknown to our law; but some are of more extensive use here than there, especially corporate franchises.

"The grant of a franchise is in the nature of a vested right of property; subject, however, in most cases, to the performance of conditions or duties on the part of the grantees.

"They generally involve important duties of a public character, often onerous upon the grantees. They are necessarily exclusive in their character; otherwise, their value would be liable to be destroyed or seriously impaired. So long as the grantee fulfils the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right which cannot be taken away, or otherwise impaired by the government, any more than any other property. And even though the grant does not declare the privilege to be exclusive, yet that is necessarily implied from its nature. In the grant of a bridge, ferry, turnpike, or railroad, it is implied that the government will not, either directly or indirectly, interfere with it so as to destroy or injure it. Franchises are derived entirely under grants from the legislature, either by general or special laws. There is a large class of special privileges conferred upon public bodies or private individuals, for numerous purposes relating to the public interest, which are franchises. The most numerous known to American law are those of corporate and banking privileges; and they have multiplied beyond all precedent under the system of general incorporation laws, by which these privileges, instead of being conferred on a few, are open to all. . . .

"The law of this State regulating ferries and toll bridges gives the owners an exclusive privilege, by prohibiting the establishment of any other ferry or bridge within one mile. (Wood's Dig. 460.) And this court has always protected the parties in the enjoyment of these exclusive privileges. (Hanson *v.* Webb, 3 Cal. 137; Norris *v.* Farmers & Teamsters Co. 6 ib. 594; Chard *v.* Stone, 7 ib. 117.) In many cases, however, the law conferring franchises, such as turnpike roads, does not confer any exclusive privileges, and they are then open to competition. (Indian Cañon Road Co. *v.* Robinson, 13 ib. 519.) This question, whether the privilege shall be exclusive or not, depends entirely upon the wise discretion of the legislature. The granting of franchises, whether exclusive in their character or not, is one of the ordinary powers of legislation, and as such can be exercised by the legislature of the State, controlled, however, by the restrictions imposed by the Constitution. . . .

"2. The next and most important question is, whether the plaintiffs, a corporation, had the power to purchase and hold the special privileges granted by the act to Allen & Burnham. It is not disputed that those grantees had the power to sell and convey, for the act specially makes

subsequent charter can be granted, unless the first charter by express terms, or by natural and proper

the grant to them 'or their assigns;' thus clearly making the privilege assignable. But it is urged that the clause in the Constitution which prohibits the legislature from creating a private corporation by special act, equally prohibits them from conferring any powers or privileges of a corporate character by special law, and that all the powers and privileges which a corporation can exercise or hold must be derived from a general law, applicable alike to all corporations.

"It is clear that the Constitution prohibits the legislature from 'creating' corporations by special act, except for municipal purposes; and it is clear that this prohibition extends only to their 'creation.' There is nothing in the language used which directly or impliedly prohibits the legislature from directly granting to a corporation, already in existence, and created under the general law, special privileges in the nature of a franchise, by a special act, or prohibiting a corporation from purchasing or holding such franchises which may have been granted to others. To give the Constitution any such effect, we would be compelled to interpolate terms not used, and which cannot be implied, without a perversion of the language employed. . . . .

"As we have already seen, a franchise is in the nature of property; it is a vested right, a subject of purchase and enjoyment by all who are capable of purchasing, holding, and enjoying property, by individuals, partnerships, joint-stock associations, and also by corporations when it is of such a character as to be reasonably included in or useful in carrying out the objects and purposes for which the corporation was created. . . . .

"As a general rule, a corporation has power to make all such contracts as are necessary and usual in the course of its business, as means to enable it to attain the object for which it was created. The creation of a corporation for a specific purpose, implies a power to use the necessary and usual means to effect that purpose. (Angell & Ames on Corp. § 271; Union Water Co. *v.* Murphy's Flat Fluming Co., decided at the present term.)

"I hold, then, that the plaintiffs, as a corporation, were capable of receiving a grant of these special privileges directly from the legislature, and of purchasing them from the grantees.

"It is argued, however, that the provision in the Act of May 3, 1852, that 'no existing law shall be so construed as to conflict or interfere with the provisions of this act,' operates as a repeal of the general Corporation Law, so far as that law permits the formation of telegraph companies to construct lines between the cities named in the Act of 1852; and therefore the plaintiffs, being organized to construct such a line, are not a corporation, and have no power to purchase or hold the privilege granted

construction, is exclusive of the enjoyment of such

to Allen & Burnham. This clause has more the effect of a rule of construction than of a repeal of any existing law. The evident meaning is, that the privilege of the right of way, &c., granted to telegraph companies formed under the general law, shall not conflict or interfere with the special privileges granted by the act. There is nothing in it prohibiting or taking away the right of forming corporations to build lines between those cities; but, if formed, they must take subject to the prior exclusive privileges of the grantees, who might waive their right, or abandon or forfeit them, or transfer the whole, or a part, to such corporations. To give it the effect claimed would require a more clear and explicit expression of legislative intention than is contained in this clause. The Constitution of Indiana ordains that 'corporations other than banking, shall not be created by special act, but may be formed under general laws;' and it was held that 'the Constitution of the State authorizes the legislature to create corporations, and imposes no limit as to the powers to be conferred on them; no clause confining their action to objects entirely disconnected with any thing outside the corporate limits.' (City of Aurora *v.* West, 9 Ind. 85.) The legislature may give additional powers, from time to time, to corporations; and acts of the corporation, in pursuance of such authority, are binding. . (Gifford *v.* New Jersey R.R. Co. 2 Stock., c. 171.) And special powers and privileges may be conferred on existing corporations. The words 'create a charter,' used in the Constitution, mean to make a charter which never existed before. (C. P. & A. R.R. Co. *v.* Erie, 37 Pa. St. 380.

"Under a similar clause in the Constitution of New York relating to banks, it was held, that an act declaring that a certain bank should be deemed to be a valid corporation, and to have been duly organized, notwithstanding any error, irregularity, or insufficiency in the proceedings organizing it under the general law, did not *create* a corporation, but only remedied defects in the organization of one already created, and it was therefore constitutional. (Syracuse City Bank *v.* Davis, 16 Barb. S.C. 188.)

"The Constitutions of Michigan, Iowa, Indiana, and Ohio contain similar limitations upon the mode of creating corporations, and the statutes of those States, as well as our own, afford numerous instances of the grants by special acts of particular rights, powers, and privileges, to corporations formed under general laws." . . .

Cope, C.J., said, "As to the power of the legislature to grant the franchise in question, I have no doubt; but as to the capacity of the corporation to purchase, the defendant is not the party to object. If the corporation, in making the purchase, has acquired property which, under the law of its incorporation, it had no right to acquire, all that can be

franchise; and the charter granting the exclusive franchise is to be construed strictly.[1]

§ 9. While it is well settled that the legislature of a State cannot impair the obligation of a contract, and that a charter of incorporation is a contract between the State and the persons incorporated; yet this doctrine does not interfere with the right of eminent domain, by which the legislature may authorize a subsequently incorporated company to take the franchises of a company already incorporated, upon making just compensation. This is now well settled. A franchise, is no higher species of property than any other; and it is within the competency of the leg-

said is, that it has exceeded its powers, and may be deprived of the property by a judgment of forfeiture. This question is one which the State alone can raise. A purchase by a corporation in the face of a positive prohibition would be void; but that is not this case. There was no provision of law forbidding the purchase; and admitting that the corporation had no power to make it, the want of power, in the absence of express prohibition, is not sufficient to avoid it as to third persons. The rule in such cases was laid down by this Court, in Natoma Water & Mining Co. *v.* Clarkin, 14 Cal. 544. In that case the corporation was empowered to purchase such property as the purposes of the corporation should require, and it was objected that the property in controversy was not of that description, and that the corporation had no power to purchase it. The Court overruled the objection, saying 'Whether or not the premises in controversy are necessary for those purposes it is not material to inquire; that is a matter between the government and the corporation, and it is no concern of the defendant.' The reason of the rule is obvious. As between the parties the purchase is valid, and it must be so as to third persons, until, by a proper proceeding, a forfeiture has been declared. It is well settled that a cause of forfeiture cannot be inquired into collaterally. As mere matter of opinion, it is proper for me to state that I regard the purchase in this case as valid; but in any view of the case, the question is an immaterial one."

[1] Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Tuckahoe Canal Co. *v.* Tuckahoe R.R. Co. 11 Leigh, 42; Chesapeake & Ohio Canal Co. *v.* Baltimore & Ohio R.R. Co. 4 G. & Johns. 1.

islature to take all property of every description, whenever the public interests may require, upon just compensation being made; and franchises, in this respect, stand exactly upon the same footing with all other property. Nor does it make any difference that the grant may be exclusive in its character, and that there is an absolute prohibition upon every other individual or company, constructing a line, or other thing, that will interfere with it; the legislature may subsequently incorporate another company, authorizing it to take the franchises of the first company, upon making just compensation.[1]

"Such appropriation is not regarded as impairing the right of property, or the obligation of any contract; on the contrary, it freely admits such right; and in all just governments, provision is made for an adequate compensation, which recognizes the owner's right."[2]

But the franchises of one company could not be condemned for another company incorporated for precisely the same public purpose; this would be taking the property of one company, and giving it to another, which does not belong to the right of eminent domain; and such a law would be oppressive and void.[3]

[1] Boston & Lowell R.R. Co. *v.* Salem & Lowell R.R. Co. 2 Gray, 1; West River Bridge Co. *v.* Dix, 6 How. 507, 534; White River Turnpike Co. *v.* Vt. Central R.R. Co. 21 Vt. 590; Inhabitants of Springfield *v.* Conn. River R.R. Co. 4 Cush. 63; Rodgers *v.* Bradshaw, 20 Johns. 735; The Newcastle & Richmond R.R. Co. *v.* The Peru & Indianapolis R.R. Co. 3 Ind. 464.

[2] West River Bridge Co. *v.* Dix, 6 How. U.S. 507, 534.

[3] Boston Water Power Co. *v.* Boston and Worcester R.R. Corp. 23 Pick. 393.

§ 10. It may also be considered as well settled, that the legislature has power to impose restrictions or additional burdens upon existing corporations, without annulling their corporate existence, and without infringing the constitutional inhibition against impairing the obligation of contracts. In Providence Bank *v.* Billings (4 Pet. 514), Chief-Justice Marshall says, "The great object of an incorporation is, to bestow the character and properties of individuality on a collected and changing body of men. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist." [1]

The power to modify, and even repeal, is frequently inserted in the charter, or is contained in a general law existing at the time of the act of incorporation; and, in such cases, becomes a part of the contract. The legislature could not, however, in such case, take the private property of the corporation without compensation.[2]

§ 11. The property of a telegraph company, like that of an individual, is subject to taxation by the State.[3]

[1] See the whole subject discussed in Thorpe *v.* Rutland & Burlington R.R. Co. 27 Vt. 140.

[2] Miller *v.* N.Y. & Erie R.R. Co. 21 Barb. 513; Pacific R.R. Co. *v.* Renshaw, 18 Misso. 210–216; White *v.* Syracuse & Utica R.R. Co. 14 Barb. 560.

[3] Regina *v.* Inhabitants of Denton, 14 Eng. Law & Eq. 124; Illinois Central R.R. Co. *v.* The County of McLean, and others, 17 Ill. 291; Louisville & Portland Canal Co. *v.* Commonwealth, 7 B. Monroe (Ky.), 160; Elec. Teleg. Co. *v.* Overseers, &c., of Salford, 24 Law J. (N.S.) Magistrates' Cases, 146.

The question in the last case was upon the ratability of the Electric Tele-

The capital stock of a corporation may be taxed, or the individual owner of stock in the company is liable to be taxed on his stock. The capital stock of the corporation may be taxed, as an aggregate to the

graph, under the 43 Eliz. c. 2: this statute enacts that "occupiers of land, houses, tithes impropriate, propriation of tithes, coal mines, or salable underwood," are to be taxed to the relief of the poor. This company, incorporated by act of Parliament, constructed, with the consent of a railway company, posts, wires, and apparatus, along the line of railway; and, in consideration of the privilege of locating them on the lands of the railway company, the telegraph company worked two of the wires for the exclusive benefit of the railway company. The posts upon which the wires rested were fixed in the ground, but were subject to removal at the option of the railway company, if found inconvenient, to some unobjectionable spot. The authorities upon the construction of this statute had been uniform to the effect that it did not apply to a mere tenement or easement. It was held, however, that this telegraph company was liable to be rated to the relief of the poor, in respect of the wires, posts, and land on which the same was fixed.

Pollock, C.B.: "The only question before us is, whether the Electric Telegraph Company are liable to be rated to the relief of the poor in respects of their posts and wires. I am of opinion that they are liable. It is conceded that, if the electric wires were carried underground, the company would be liable to be rated. So, if, instead of passing under the earth, the wires passed under water, would they be liable? To this the same answer must be returned — they are liable. The passage read by my brother Martin from 4 Burn's Just. 190, is decisive of the point; and it shows that there is no distinction between a possession obtained by passing things from fixed points in space and air, and in passing them under earth and water. The land is equally occupied in all these cases, because the estate in it extends indefinitely upwards and downwards, and consequently, whether the wires pass up or down, the proprietors of them exclusively occupy a certain portion of space over which they have complete control, and may exclude every one else from it. Now, that is the case here, with the sole difference, that if the places whereon the posts supporting the wires are fixed are found inconvenient, they may be removed on an intimation to that effect given to the Electric Telegraph Company by the railway company. No point can be made of that circumstance in favor of exemption from rating. That the company are ratable therefore appears to me free from doubt. . . .

"But here it appears to me that the Electric Telegraph Company

corporation, or to the stockholders on account of their separate ownership of it; but, it seems, cannot be taxed at the same time in both modes.[1]

Where the telegraph company owns the ground upon which its offices and other necessary buildings or apparatus are located, of course it would be liable

have an exclusive right to the soil where these posts and wires are, so long as the railway company does not desire them to remove the posts to another spot."

Platt, B., said, "The case is assimilated to that of an easement, but when the matter comes to be examined, the difference is manifest. If this were an easement, the case would be like that I threw out in the argument; namely, of a man having the right to pass over a wet meadow where bricks are placed to keep people's feet out of the water. He only occupies the space there so long as his passage is concerned, and if the Electric Telegraph Company here were identified with the messages they send, the argument would be well founded. But the wires remain, like an arch or a bridge over a field. The case of a bridge comes very near the present, for we may look upon the posts as the abutments of the bridge, and the wires as houses on the abutments, and therefore ratable as much as a house on the centre arch of that bridge, even though at a distance from the abutment. Then it was suggested, that, if posts were so fastened that they could be removed, they would not be ratable, and that here they might be removed at the will of the railway company. But that does not appear to me to make any difference; for still there would be occupation by consent of the company; for I may let a field to a man for various purposes; *e.g.* a stand for carriages, deposit for goods, &c., and surely the restriction I impose does not make him less a tenant; for though he holds under a qualified tenancy, he is not the less a tenant, and if so, is ratable. So here, the Electric Telegraph Co. have an occupation, with the consent of the railway company, by fixing posts in the earth, and attaching to them wires passing from post to post; and the railway company having the liberty of removing these posts, is precisely like the case of the field."

[1] Bank Cape Fear *v.* Edwards, 5 N. C. (Iredell, Law), 516; Gordon's Executors *v.* Mayor of Baltimore, 5 Gill, 231.

But where the charter authorizes the company to hold real estate, and provides that the capital stock shall be divided into shares to be held as personal estate, it has been held, that such real estate was not subject to taxation, except as personal estate, and that as each shareholder was taxed, the company could not be. Bangor & Piscataquis R.R. Co. *v.* Harris, 21 Me. 533.

to taxation in the same way as the property of an individual.

The income of a telegraph company is taxed under the revenue laws of the United States.[1]

§ 12. The legislature has the power to exempt the company from taxation:[2] this may be either expressly provided in the charter, or it may be by a general law relating to all companies authorized to construct and operate lines, upon complying with the conditions prescribed in such general law.[3]

When such exemption is granted, it becomes a contract between the State and the company, which the legislature cannot impair by the subsequent imposition of a tax;[4] but if the clause exempting the corporation from taxation will bear the construction that it is a temporary exemption only, then a subsequent tax may be imposed.[5] An exemption from taxation is not to be presumed; and when it is granted, it must be by clear and express terms.[6]

[1] See Appendix, D.

[2] The State of New Jersey *v.* Wilson, 7 Cranch, 164; The Piqua Branch of the State Bank of Ohio *v.* Jacob Knoop, Treasurer, &c. 16 How. U.S. 369; Oliver & Williams *v.* Robert Piatt, 3 How. U.S. 333; Angell & Ames on Corp. §§ 472–476. But such exemption in charter would not control the right of another State, through which the lines passed by its consent, to impose tax. Angell & Ames on Corp. § 486 *a*.

[3] The legislature may surrender the power of taxation in respect to particular lands, but such surrender is not to be presumed. McCallie *v.* The Mayor & Ald. of Chattanooga. 3 Head, 317.

[4] The State of New Jersey *v.* Wilson, 7 Cranch, 164; McCallie *v.* Mayor & Ald. of Chattanooga, 3 Head, 317; Woolsey *v.* Dodge, 6 McLean, 142.

[5] Ohio Trust Co. *v.* Debolt, 16 How. U.S. 416; Commonwealth *v.* The Easton Bank, 10 Pa. St. 442.

[6] The Providence Bank *v.* Billings & Pitman, 4 Pet. 514; The Philadelphia & Wilmington R.R. Co. *v.* The State of Maryland, 10 How. U.S. 376.

§ 13. When a telegraph company fails to perform a duty imposed upon it by law, it may be compelled to do so by *mandamus*. In case of usurpation, non-user, or abuse of franchise, the company may be proceeded against by information in the nature of a *quo warranto*, or *scire facias*, and in some States by bill in equity under statutory provision.

Telegraph companies, like other corporations, are liable to indictment at common law.

The subject of their liability to indictment by statute will be considered in a subsequent chapter.

A corporation is indictable for non-feasance or misfeasance, when it becomes a nuisance.[1]

It was held in the case of Rex *v.* The United Kingdom Telegraph Company,[2] that a telegraph company

[1] London & Brighton R.R. *v.* Blake, 2 Railway (Eng.) Cases, 322.

[2] Rex *v.* United Kingdom Teleg. Co. 9 Cox, C.C. 137. The United Kingdom Telegraph Company obtained a provisional registration in 1861. In 1850, a company, bearing the same title, was formed under the existing law applicable to joint-stock companies, and an act of Parliament was obtained (14 & 15 Vict. c. 107, a private act). Sec. 15 of that act gave power to lay down, under, along, or across a street, wires, &c., for the purpose of electric telegraph communication; but all this was conditional, upon the company, which was *provisionally* registered, being *completely* registered. Never having been completely registered, this company of 1850 became defunct, as far as being able to avail themselves of the present Joint-Stock Company's Act (19 & 20 Vict.) was concerned; but the company that was provisionally registered in July, 1861, took upon themselves the title of the company of 1850, adding the word "limited," and advertised themselves as in possession of the powers of the company of 1850. Applications to Parliament were made, and were unsuccessful; but the company, notwithstanding this ill success, assuming parliamentary rights, proceeded with their work, and erected lines of wire and posts in various counties. Proceedings in chancery were instituted, and were stayed, in order that the right of the company to do what they were doing should be determined at law.

Martin, B., to the jury: "There has been a long examination, and a long cross-examination; and the cross-examination was directed to whether

may be indicted for putting up its posts upon the highway so as to obstruct the public in its use.

the posts were, or were not, erected upon what was called a formed footpath, which was understood to be the artificial footpath you see upon roads. Now I tell you, First, In the case of an ordinary highway, although it may be of varying and unequal width, running between fences, one on each side, the right of passage or way *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot-passengers.

"Secondly, That a permanent obstruction erected on a highway, and placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law, and that if the jury believed that the defendants placed, for the purpose of profit to themselves, posts, with the object and intention of keeping them permanently there in order to make a telegraphic communication between distant places, and did permanently keep them there, and the posts were of such size and dimensions and solidity, as to obstruct and prevent the passage of carriages and horses, or foot-passengers, upon the part of the highway where they stood, the jury ought to find the defendants guilty upon the indictment, and that the circumstance that the posts were not placed upon the hard or metallic part of the highway, or upon the footpath artificially formed upon it, or that the jury might think that sufficient space for the public traffic remained, are immaterial circumstances as regards the legal right, and do not affect the right of the Crown to the verdict."

The reporter makes this note: The posts in question were, in all cases, erected with the assent of the authorities, who were the guardians of the highway, and though some were erected on the highway, the majority were on the side of the highway and, in some instances, on spots where the sides were so rough as to be practically impassable.

A full statement of the case may be found at page 174 of "Cox's Criminal Cases," where it will be found that the charge to the jury, above set forth, was sustained by the Court of Queen's Bench.

If the assent of the proper authorities had been obtained for erecting the posts, it may well be questioned whether the indictment would be sustained in this country. A district court in Philadelphia, in a case cited as Telegraph Co. *v.* Wilt (11 Am. Law Journal, 374), went nearly to this length; but we have noted its severity against the company, which had vested rights under its charter. Post, § 53, first note.

An indictment was found against the company, for placing its posts upon the highway so as to obstruct its use by the public. The company having been convicted, upon a motion for a new trial, the Court of Queen's Bench laid down the following propositions:

That in case of an ordinary highway running between fences, one on each side, the right of passage extends to the entire space between the fences; and the public are entitled to the use of the whole of it as a highway, and are not confined to the part of it which may be kept in order for the more convenient use of carriages and foot-passengers.

That a permanent obstruction erected on a highway, placed there without lawful authority, and which renders the way less commodious than it was before, is an unlawful act, and a public nuisance at common law; and that if this telegraph company placed permanent posts on the highway, of such a character as to obstruct the passage of the public, it is guilty, although the posts were not placed upon the highway on the hard part of the road, and although sufficient space for the public travel remained.

CHAPTER II.

ORGANIZATION.

§ 14. WHENEVER a company operates its line under a special act of incorporation, the mode of organization directed by the charter must be pursued; and, when under a general statute, applicable alike to all telegraph companies and other corporations, the mode required by such general law must be adopted.

§ 15. The mode of organization of telegraph companies, in most of the American States, and also in Canada, is provided by a general law applicable alike to all corporations, including telegraph companies. The particular provisions in the different States, regulating the organization of telegraph companies, will be found in the Appendix to this volume.

In several of the States it is provided, that any number of persons may associate themselves for the purpose of constructing and operating lines of telegraph, by making a certificate under their hands and seals, showing the name adopted by the association, by which it is to sue and be sued, and which is to be the name used by it in its business; the general route of its line; its capital stock; the number of shares into which it is divided; the names and places of residence of the shareholders, and the number of shares

held by each; the periods at which the association shall commence and terminate: this certificate to be acknowledged and recorded, and a copy filed in the office of the Secretary of State; and that, upon compliance with these conditions, the association shall become a body corporate.

Provision is also made for an increase of capital stock, and of the number of shareholders; and, in some of the States, for consolidation of companies. Such are the general features of the Statutes of New York, Ohio, Maryland, Virginia, Wisconsin, Michigan, and California, except as to the consolidation of companies, which is only provided for specially in New York and Ohio.

In some States, also, special provision is made for the meeting of stockholders; the election and qualification of officers; the mode of subscription for stock; the manner of voting, and the qualification of voters; the mode of assessments, and of selling shares for non-payment of stock, etc.[1]

These general laws supersede the necessity of a special charter. In those States where the laws are more general, if a charter should be necessary, its provisions need contain little more than the names of the corporators; the *termini* and general route of the line; the amount of the capital stock; and the time within which the line should be constructed, or, perhaps, the organization be completed. In many of the States these general laws are of such a character that telegraph companies can be organized without

[1] Statutes of New Jersey, Wisconsin, Ohio, and Virginia. See Appendix Z, CC, KK, LL.

applying to the legislature for a charter; although there are many companies that have not availed themselves of the provisions of these general laws, but have obtained special acts of incorporation.

It is not intended here to make more than a very general reference to the rules of law governing the organization of telegraph companies, as drawn from analogous cases; as a more detailed presentation of the law relating to the organization and powers of incorporated companies would be but a repetition of what has been already collected and presented in works more especially devoted to this subject.[1]

§ 16. As a general thing, the route of the company's line, the mode of acceptance of the charter, the subscription and distribution of stock, the election and qualification of directors, the amount of stock to be paid in, and the general provisions in relation to the necessary steps to be taken to complete the organization, are conditions precedent, and must be strictly complied with.

Such acts as the charter contemplates being performed after the organization has been completed are conditions subsequent; and a failure to comply with them does not work a forfeiture of the charter, but gives the individual injured thereby a right of action against the company.[2]

§ 17. If the charter prescribe an exclusive mode of becoming a stockholder, either by express provision, or by fair construction, a person does not subject

[1] See Angell & Ames on Corporations, § 111, *et seq.*; and the excellent treatise of C.J. Redfield on Railways, vol. i. § 18, subd. 1.

[2] 2 Kent, Com. 305, & notes; 1 Redfield on Railways, § 18, subd. 5.

himself to the liabilities, nor entitle himself to the privileges, of a shareholder, unless he follow the designated mode.[1]

A promise to take shares, if made after acceptance of charter, but before organization under it, would, it is believed, be binding.[2] Any subsequent ratification after organization would, of course, make the promise binding.[3]

In determining the liability for stock in any particular case, it will be necessary to examine the provisions of the act of incorporation; and whatever conditions precedent to the personal liability of the stockholder are imposed by the charter, must be complied with, before his liability is fixed.[4]

§ 18. When stock is subscribed, a contract is thereby created between the company and the stockholder;

[1] Troy & Boston R.R. Co. *v.* Tibbits, 18 Barb. 297; Troy & Boston R.R. Co. *v.* Warren, ib. 310.

[2] Gleaves *v.* Brick Church Turnpike Co. 1 Sneed, 491; Hamilton & Deansville Plank Road Co. *v.* Rice, 7 Barb. 157; Covington Plank Road Co. *v.* Moore, 3 Ind. 510.

[3] Kennebec & Portland R.R. Co. *v.* Palmer, 34 Maine, 366.

Where an association enter into stipulations in the form of a tripartite indenture, one party to furnish the capital, one to build a line of telegraph, and the other to convey the patent to be used by the line, and all of the parties own stock in the company, and it is further agreed that an act of incorporation shall be obtained, and all rights growing out of the association shall vest in the corporation, and an act of incorporation is obtained, wherein it is provided that the corporation shall be invested with all rights and interests of the association, — it would seem that such corporation can maintain an action against all of the parties to such association upon contracts existing before the act of incorporation, and even when the defendant was a member of the association in more than one part, so that no action at law could have been maintained upon the original action. Troy & Canada Teleg. Co. *v.* Connell, 17 Law Rep. 591.

[4] Irvine and others, Trustees of the Alleghany & Erie Teleg. Co. *v.* Forbes, 11 Barb. S.C. 587.

and any subsequent alteration of the charter by legislative enactment which will have the effect of impairing the obligation of the contract between him and the company, if such amendment of the charter were accepted by the company, would release him from liability for the stock already subscribed. He would have the right, however, if he chose so to do, to seek the interposition of a Court of Equity, to restrain the company from appropriating the funds already subscribed before the alteration or amendment to the new purpose or enterprise contemplated by the amendment. The legislature, however, could authorize modifications of the enterprise, so that the general purpose and object of the charter were not encroached upon. The cases on this subject discussing the extent to which such modifications are authorized, will be found referred to in the note.[1]

§ 19. Municipal corporations have the power to take stock in telegraph companies, when so authorized by the legislature; and when so authorized, may raise money for this purpose by the issuance of bonds or the levying of a tax.

This would be so, we should say, in analogy to the rule in cases of railroads;[2] for telegraphs, equally with railways, are public improvements, designed and

[1] Middlesex Turnpike Co. *v.* Locke, 8 Mass. 268; Proprietors of the Union Locks and Canals *v.* Towne, 1 N.H. 44; Hartford & New Haven R.R. Co. *v.* Croswell, 5 Hill, 383; Penn. & Ohio Canal Co. *v.* Webb, 9 Ohio (Hammond), 136; Clark *v.* Monongahela Nav. Co. 10 Watts, 364; London & Brighton R.R. Co. *v.* Wilson, 6 Bing. N.C. 135.

[2] C. W. & Z. R.R. Co. *v.* Com's of Clinton County, 1 Ohio St. 77; Slack & Co. *v.* Maysville & Lexington R.R. Co. 13 B. Monroe, 22; Louisville & Nashville R.R. Co. *v.* The County Court of Davidson, 1 Sneed, 637.

calculated to promote the general convenience and public good.

§ 20. The requirements of the charter in respect of the directors must be strictly followed. As a general rule, when the charter provides for a board of directors, they have the power to act for the corporation to the full extent that the company is empowered to act under its charter, and are only restricted by the charter itself, and the by-laws of the corporation; and contracts made in behalf of the company with third persons, and for purposes within the scope of the business of the company, although not made in the mode prescribed, if acted upon and recognized by the officers of the company, have been held binding upon it.[1] As where, by the deed of settlement, the directors were to manage the business of the company, but all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company, under the authority of a special meeting. Plaintiff sued the company on an agreement above the prescribed value, and it was recognized in correspondence by the secretary, and plaintiff received payments from time to time in checks for services performed under this agreement, and which were entered up in the accounts of the company, and were allowed; but the contract had

[1] Whitwell, Bond, *et al. v.* Warner, 20 Vt. 425; Hoare's Case, *in re* Electric Telegraph Co. of Ireland, 30 Beav. 225; Troup's Case, *in re* Elec. Teleg. Co. of Ireland, 29 Beav. 353; Bunn's Case, 6 Jur. 1225 (Chancery).

It has been held, that, although directors meet outside of the limits of the State, their proceedings will be binding upon the corporation. Ohio & Miss. R.R. Co. *v.* McPherson, 4 Am. Law Register, 562.

never been signed by the three directors, nor was it under the seal of the company. The contract was held binding upon the company.[1]

§ 21. If, however, the directors should presume to act beyond the proper scope of their agency, and to direct the funds of the corporation into new enterprises, or to different purposes from those contem-

[1] Reuter *v.* The Electric Telegraph Co. 6 Ellis & Blackburn, Q.B., 88 Eng. Com. Law, 341.

Lord Campbell, C.J., said that the objection was made that "at all events, according to the deed of settlement, the contract ought to have been 'signed by at least three individual directors.' We do not think it necessary to decide whether the consideration-money here must be taken to exceed £50, for, assuming that the contract was originally *ultra vires* of the chairman, we think that it has been adopted and ratified by the company so as to render them liable upon it. We must first observe, that this contract, which was entered into on the 12th of January, 1854, does not appear to us to be at variance, or at all inconsistent with the prior agreement of 14 September, 1853. . . . Might not the contract entered into by the chairman, although originally without authority, and not binding, be ratified by the company? The deed of settlement declares that 'the directors shall conduct and manage the affairs of the company, and shall exercise all the powers which may be exercised by the company at large.' Then the documents set out in the supplemental case afford abundant evidence that the directors were made acquainted with the new contract, approved of it, and acted upon it. The entry in the minute-book by the chairman was for their information, and we, having power to draw inferences from the evidence, do infer that they saw it, and sanctioned it. The plaintiff acted under it for many months; during this period the correspondence respecting it with the secretary, the proper functionary of the company for carrying on such correspondence, &c., and he took credit by checks which the directors must have drawn. We are bound to suppose that the directors, before they drew the checks, examined the accounts, and approved of what the plaintiff had done."

See also Troup's Case, *in re* The Elec. Teleg. Co. of Ireland, 29 Beav. 353 (Chancery), — that a person lending money to the directors, where they have no power to borrow money, can enforce payment of it against the company, if it has been *bona fide* applied to the purposes of the company. Hoare's Case, *in re* Elec. Teleg. Co. of Ireland, 30 Beav. 225 (Chancery).

plated by the charter, any stockholder might restrain them in equity.[1]

The right of a majority of the directors to control the minority would exist in all cases of acts to be performed within the legitimate scope of the organic law; and this would be so, whether such provision as to the control of a majority is to be found in the charter or not: it would be implied.[2]

But where the organization has not been completed, and the company remains but a private association of individuals, the majority cannot bind the minority, unless by special agreement.[3]

§ 22. The provisions by statute in reference to the organization of telegraph companies in England, Canada, and the different American States, will be found in the Appendix.

[1] Coleman *v.* The Eastern Counties R.R. Co. 4 Railway Cases, 513; where the subject is elaborately discussed by Lord Langdale.

[2] The King *v.* Whitaker, 9 B. & C. 648; Field *v.* Field, 9 Wend. 394. By the Code of Tennessee, sec. 1478, a majority is sufficient to act, whenever any corporate powers are directed to be exercised by any particular body or number of persons.

[3] Irvine and others, Trustees of the Alleghany & Erie Teleg. Co. *v.* Forbes, 11 Barb. S.C. 587; Livingston *v.* Lynch, 4 Johns. Ch. 573. Under 7 & 8 Vict. c. 110, the Joint-Stock Company's Registration Act; 16 & 17 Vict. c. 123; 9 & 10 Vict. c. 44, "An act for incorporating and regulating the Elec. Teleg. Co. of Ireland;" and the 11 & 12 Vict. c. 45, the Winding-up Act, — there have been a number of decisions with reference to taking shares; the transfer of shares; what constitutes a party a contributory, &c., in cases of telegraph companies organized under these acts. But they are of such a local character that only a citation of the cases need be given here. Rudd's Case, *in re* Elec. Teleg. Co. of Ireland, 30 Beav. 143; Reid's Case, *in re* Elec. Teleg. Co. of Ireland, 24 Beav. 318; Maxwell's Case, 24 Beav. 321; Cookney's Case, 26 Beav. 6; s.c. 28 Law J. 12; Bunn's Case, 6 Jur. N.S. 1175; Elec. Teleg. Co. of Ireland *v.* Bunn, 6 Jur. 1225 (Chancery).

CHAPTER III.

RIGHT OF WAY BY PURCHASE AND CONDEMNATION.

§ 23. Most of the telegraph lines which are operated in the United States, Canada, and Great Britain, and probably also in other countries, are along public roads and highways, either upon or under them, or along the line of railroads; and but few cases are likely to come before the courts, between private persons and telegraph companies, in relation to the appropriation of lands, either by purchase or condemnation, for the purpose of constructing telegraph lines.

Still the principles of law governing such cases may be considered as well settled; and they would in all material respects have the same application as in cases of railways, and such like works of public improvement.

In The Electric Telegraph Company *v.* The Overseers of the Poor of Salford,[1] Pollock, C.B., said, "There is no distinction between a possession obtained by passing things from fixed points in space and air, and passing them under land or water. The land is equally occupied in all three cases, because the estate in it extends indefinitely upwards and downwards; and, consequently, whether the wires pass

[1] 24 Law Journal (N.S.) Magistrates' Cases, 146.

up or down, the proprietors of them exclusively occupy a certain portion of space over which they have complete control, and may exclude every one else from it."

§ 24. The power to purchase real estate for the purpose of constructing lines, may be conferred by express provision in the charter under which the line is operated, or under general law applicable to all telegraph companies; or, in the absence of such express provision, may exist as one of the implied powers of the company, which it may exercise as a means necessary to the end to be accomplished.

Upon a purchase of lands by the company from an individual, the same principles governing the construction of the contract would be applied, as in the case of purchase by one individual from another, and need not be further considered.[1] Having acquired it, the company may use it for all purposes necessary and proper for the construction and operation of its line.

Whether an incorporated company would, under such purchase, acquire the absolute fee to the land,

[1] Where a telegraph company has the right, under its charter, to purchase lands for the construction of its line, would a railroad company have the power, by contract with the telegraph company, to give it the use of the bed of its track upon which to erect its posts and construct its line? Would it not be *ultra vires* in the railroad company? This would seem to be so where the railroad company held its bed under process of condemnation; the erection of the telegraph posts being an additional servitude upon the land, requiring the consent of the owner of the fee; or a condemnation for that use. It may be considered as a question of little practical importance, however; for in such case the action of trespass, *quare clausum fregit*, would entitle the owner to only nominal damages; nor would a Court of Equity restrain by injunction the erection of the posts, where no damage would accrue to the owner of the soil.

is not clear from the authorities; the doubt as to such right seems to be upon the principle, that the company could only acquire such title to or interest in the property as was necessary for the purpose for which it was obtained. It has been held in some cases, that a railroad company, taking lands even by deed in fee-simple, only have the right of way, that being all that such a corporation was capable of taking,[1] according to the reasoning in those opinions.

§ 25. Whatever may be the interest taken, such land would not only be subject to appropriation to all the ordinary and necessary uses of the company in the construction and operation of its line, but it would also be held liable for the satisfaction of its debts; and could be assigned or mortgaged by the company for that purpose, or taken in execution, or, in equity, upon the appointment of a receiver, would be administered as a part of the assets of the company. The modes of proceeding vary in the different States, for subjecting corporation assets to the payment of debts. Upon a forfeiture of the company's charter, and the consequent destruction of its legal existence, or in case of its voluntary dissolution, after the satisfaction of all its liabilities, whether the land would go to the members of the corporation in their individual capacity as tenants in common, or revert to the grantor, when the conveyance was in fee, is still an unsettled question. The question in such case would probably be, whether the company were

[1] Dean *v.* Sullivan R.R. Co. 2 Foster, 316; United States *v.* Harris, 1 Sumner, 21. Redfield (vol. i. § 69, subd. 3) thinks there is some question as to the precise effect of a deed in fee-simple to a railroad company.

capable of taking the fee; and if so, the grantor would be estopped from asserting a claim to it, or indicating the direction it should take.

A Court of Equity would decree a specific performance of a contract to convey land to a telegraph company, as it would in a case between individuals.[1]

§ 26. The right of a telegraph company to take lands necessary for the construction and operation of its line, by compulsory process, exists by virtue of the right of eminent domain, which is an inherent prerogative of sovereignty.

This can only be done, however, upon making just compensation to the owner.

This right may be exercised by the State for all objects of public improvement, convenience, or safety. It may be exercised in the construction of turnpikes, plank roads, ferries,[2] canals, railroads, etc,[3] and unquestionably can be exercised in the construction of telegraph lines, as they are works of public utility and convenience.

The power to take lands may be delegated in general terms to the company, and there is no necessity that the particular lands be designated.[4]

The company would not only have the right to appropriate "*in invitum*" so much land as was neces-

[1] Reynolds *v.* Dunkirk & State Line R.R. Co. 17 Barb. 613.

[2] Allen *v.* Farnsworth, 5 Yerg. 199.

[3] Bradly *v.* N.Y. & N.H. R.R. Co. 21 Conn. 294; Varick *v.* Smith, 5 Page, 137; The Newbury Turnpike Co. *v.* The Eastern R.R. Co. 23 Pick. 326; The Boston & Roxbury Mill Corp. *v.* James Newman, 12 Pick. 467, 468; 2 Kent, 339, and notes.

[4] Boston Water Power Co. *v.* Boston and Worcester R.R. Co. 23 Pick. 360.

sary for the construction of its line, but also so much as would be required for all necessary buildings, stations, offices, etc.[1]

§ 27. It may not only take land, but it may take the franchises and other property, of other corporations, if it should be found necessary for the construction of its line. The State may authorize the telegraph line to be constructed across or along any turnpike or other road owned by a private corporation so as to injure or entirely destroy its use, provided just compensation be made.[2] This principle, placing corporate franchises in the same category with all other property, in the exercise of the right of eminent domain, is now well settled.[3] And the power to interfere with, or even destroy, the value of a previous grant may result from express words, or necessary implication from the language of the charter; as also in cases where it appears that the line cannot by reasonable intendment be constructed in any other way.[4]

Telegraph companies frequently construct their lines along the route of railways, and upon the bed of the road. The right may be expressly conferred

[1] Worcester *v.* Western R.R. Corp. 4 Met. (Mass.) 564; Nashville & Chattanooga R.R. Co. *v.* Cowardin, 11 Hum. 348; Vt. Central R.R. Co. *v.* The Town of Burlington, 28 Vt. 193; The State (Cam. & Amb. R.R. & Trans. Co.) *v.* Com'rs of Mansfield, 3 N.J. (Zab.) R. 510.

[2] Central Bridge Corporation *v.* City of Lowell, 4 Gray, 474.

[3] Backus *v.* Lebanon, 11 N.H. 19; West River Bridge *v.* Dix, 6 How. U.S. 507; Richmond, Fredericksburg, & Potomac R.R. Co. *v.* Louisa R.R. 13 How. U.S. 83; Boston & Lowell R.R. *v.* Salem & Lowell R.R. 2 Gray, 35; Springfield *v.* Connecticut River R.R. 4 Cush. 63.

[4] Boston Water Power Co. *v.* Boston & Worcester R.R. Co. 23 Pick. 360.

in the charter of the company, or by general law applicable to all telegraph companies, with a stipulation that the railroad company may have its claim for damages for such use of its bed; and the right would thus be conferred by virtue of the law of eminent domain.

§ 28. Whatever conditions precedent are imposed by the charter or the general law under which the company becomes incorporated, must be complied with, before the company can take lands or franchises by compulsory process;[1] but when it has complied with such conditions, and the right of the company to appropriate the land is perfected under the statute, it has the right to enter upon and appropriate the lands without any process or other warrant than its charter.[2]

§ 29. The power to construct its line between specified *termini* would authorize it to take, *in invitum*, sufficient land at the terminal stations, and at such intermediate points as might be requisite, for the purpose of the necessary buildings for offices to operate its instruments, and such other purposes as might be found essential for properly conducting its business. This would seem to be so in analogy to the right of railroad companies to take land, not only for the purposes of its track, but also for its toll-houses, offices, warehouses, etc.[3]

§ 30. The mode of estimating the damages to land-

[1] Stacey *v.* Vermont Central R.R. Co. 27 Vt. R. 39; Williams *v.* Hartford & New Haven R.R. Co. 13 Conn. 110 — construing the charter.

[2] Niagara Falls & Lake Ontario R.R. Co. *v.* Hotchkiss, 16 Barb. 270.

[3] 1 Redfield on Railways, § 68, subd. 2.

owners is, in many of the States, designated by general laws applicable alike to all telegraph companies; in other States, there are no such general provisions; and where this is the case, the charter under which the line is operated would have to be consulted, to ascertain the mode of estimating the damages.[1] And it seems to be now well settled that the remedy given in such cases by statute, is exclusive, and not cumulative.[2]

[1] See Appendix. By the 26 & 27 Vict. (1863) c. 112, § 6, it is provided, that telegraph companies "may place and maintain a telegraph over, along, or across any street or public road, and place and maintain posts in or upon any street or public road, and may alter and remove the same.

"They may, for the purposes aforesaid, open or break up any street or public road, and alter the position thereunder of any pipe (not being a main) for the supply of water or gas.

"They may place and maintain a telegraph and posts, under, in, upon, over, along, or across, any land or building, or any railway or canal, or any estuary, or branch of the sea, or the shore or bed of any tidal water, and may alter or remove the same. Provided, always, that the company shall not be deemed to acquire any right other than that of user only in the soil of any street or public road, under, in, upon, over, along, or across which they place any work.

"Sec. 7. In the exercise of the powers given by the last foregoing section, the company shall do as little damage as may be, and shall make full compensation to all bodies and persons interested, for all damages sustained by them by reason or in consequence of the exercise of such powers; the amount and application of such compensation to be determined in manner provided by the Lands Clauses Consolidation Act, 1845, and the Lands Clauses Consolidation (*Scotland*) Act, 1845, respectively, and any act amending those acts, for the determination of the amount, and application of compensation for lands taken or injuriously affected."

For the further provisions on this subject, see Appendix A.

[2] 1 Am. Railway Cases, 162–171; Mitchell *v.* Franklin & Col. Turnpike Co. 3 Humph. (Tenn.) 456; Watkins *v.* Great Northern Railway Co. 6 Eng. Law & Eq. 179; Kimble *v.* White Water Valley Canal, 1 Carter, 285; Troy *v.* The Cheshire Railway, 2 Foster, 83: but see, contra, Carr *v.* The Georgia Railroad & Banking Co. 1 Geo. (Kelly) 524.

Where the company have been guilty of negligence or want of skill in

§ 31. If the telegraph company has assumed to appropriate lands or the franchises of other companies in violation of the provisions of its charter, it is liable to an action at common law, at the suit of the individual or company injured. So in the case of the South Eastern Railway Company *v.* The European and American Electric Telegraph Company,[1] the act of 14 & 15 Vict. c. 135, § 37, provided that the company might lay down and place their pipes under any public roads, streets, and highways, and along and across such places, for the purpose of the telegraph, and break up the pavement or soil for that purpose; but that nothing in the provision contained, shall extend to any railway or canal, except that it should be lawful for the company to carry their wires, pipes, etc., directly, but not otherwise, across any railway or canal. The South Eastern Railway Company, in pursuance of the provisions of their act, had carried their railway on a level across a part of the public highway in the city of Canterbury, the public having the full use of the highway, except when the trains were passing. The telegraph company had dug and bored under the railway, for the purpose of carrying the telegraph under the spot where the railway crossed the highway: it was held, that this was

the exercise of their legal rights, or have omitted some duty imposed by statute, they make themselves liable to an action on the case at common law. See authorities cited in 1 Redfield on Railways, § 75, subd. 3, 4, and notes.

[1] The South Eastern Railway Co. *v.* The European and Am. Elec. Print. Teleg. Co. and Friend, 24 Eng. Law & Eq. 513, Court of Exchequer; s.c. 22 Law J. (N.S.) Exch. 113; 3 Exch. 363; 2 Com. Law Rep. 467.

an act of trespass in the telegraph company, for which an action would lie at the suit of the railway company. Park, B., in delivering the opinion of the Court, said, that, as to railways, the telegraph company, under the above section of its act, could only carry their wires, pipes, and tubes directly "*across*" a railway, and it seems therefore different from "*under;*" and the power to carry "across" did not enable them to go "under;" but it might be that such prohibition would not apply if the railway were carried over the highway at a great height, for then the highway and railway might be considered independent of each other. The Telegraph Company's Act further provided, that, in carrying their wires, tubes, and pipes across any railway and canal, it should be constructed "in such manner and at such place and time, as not in any wise to damage or be likely to damage the railway or canal, or any of the works connected therewith." It was held, that even if "across" could be construed as equivalent to "under," the above condition must be complied with; whereas it was clear, in the present instance, these conditions had not been complied with, for the defendants had done what was a damage to the railway.

§ 32. Where the charter of a telegraph company previously granted, prescribed a different mode of assessing damages from that prescribed by the general law, it would seem that the mode prescribed by such charter would not be affected by the general law. It has been so held in New York in case of railways.[1]

[1] Hudson River R.R. Co. *v.* Outwater, 3 Sandf. 689; Visscher *v.* Hudson River R.R. Co. 15 Barb. 37.

§ 33. It is supposed that few cases are likely to arise of claims for consequential damages in the construction of telegraph lines; the principles governing such cases, should they arise, would be similar to those of railways, and will be found fully discussed in the treatises and authorities cited in the note.[1]

§ 34. The provision authorizing the construction of telegraph lines along and upon or under public roads and highways, so as not to incommode the public in the use thereof, is to be found in the general statutes relating to telegraph companies in England, Canada, and all of the American States which have general laws on the subject of telegraphs.[2]

The question may arise as to whether the legislature has the power to authorize the construction of telegraph lines along the public highways, and along and upon or under the streets of a town, without requiring the owner's consent, or directing that just compensation shall be made to the owner of the fee. Upon this point there seems to have been much con-

[1] 1 Redfield on Railways, § 71; Pierce on Am. Railroad Law, pp. 173–175.

[2] See Appendix A, B, F, G, I, J, K, M, N, P, R, S, T, U, W, X, Z, AA, CC, DD, II, JJ, KK, LL, MM.

The laws of Connecticut are stringent, and a little peculiar. No line is allowed to be erected in or upon any highway, without the consent of the proprietors of the land adjoining such highway, or, in case such consent cannot be obtained, without the approbation of one of the county commissioners, etc.; then providing for condemnation. See § 563, Gen. Stat. Rev. 1866.

Sec. 565 authorizes the lines already constructed to remain, but provides for their removal if they become at any time an annoyance to the public use of any such highway, or to an individual in the use of his property; but no compensation to the company is provided for.

Sec. 569 permits new lines to be constructed in accordance with the general provisions of this act.

flict of opinion where the question has been considered in reference to railroads; the ground assumed being that the highway is an easement in the public for the specific purpose of passing and repassing, and that the owner of the soil only yielded this right, and any thing more is an additional servitude for which the owner of the soil is entitled to compensation. But, although there has been much conflict of authority as to railways, it may now be considered as the better and more generally received opinion in the American States, that the owner of the fee in land over which a highway or street passes, has no claim for compensation against railroad companies who construct their line along the same under statutory authority;[1] the reason assigned being that railroads are but improved highways. How this may be upon principle, and whether or not the railway track should be considered an additional burthen and servitude upon the land, there can be little doubt, that in case of telegraph companies, the erection of posts upon the highway, or locating pipes under the highway, for the wires, under legislative authority, without provision for compensation to the owner, would give such owner the technical right to damages, although such damages would in most cases be only nominal.

He would have the right to his action of trespass at law,[2] and though the maxim *de minimis non*

[1] Mayor, etc., of Alleghany *v.* Ohio & Penn. Railroad Co. 26 Penn. 355; Corey *v.* Buffalo, Corning, & New York R.R. Co. 23 Barb. 482; Radcliff *v.* Mayor of Brooklyn, 4 Comst. 195; Gould *v.* Hudson River Railway, 2 Seld. 522. See also Am. Law Reg. vol. i. p. 196, 197.

[2] Seneca Road Co. *v.* Auburn & Rochester R.R. Co. 5 Hill, 170; Boston & Lowell R.R. Corp. *v.* Salem & Lowell R.R. Co. 2 Gray, 36, 37.

curat lex, might not apply in case of plain violation of right, there can be but little doubt that a Court of Equity would refuse to entertain a bill by the owner of the soil, to enjoin the company from making such erections, when acting under authority conferred by statute without provision for compensation; and it may be considered as a question of little or no practical importance.

§ 35. For the provisions by statute in reference to the mode of assessing land damages in England, Canada, and the several American States, see the appendix, and chapter on *Remedies*.[1]

[1] By the 26 & 27 Vict. c. 112, known as the Telegraph Act of 1863, no private property can be taken by compulsory process for the construction of telegraph lines. The previous consent of the owner, lessee, and occupier of the land is required in every case. The consent as to lands belonging to the Crown may be given by the Commissioner of Woods, Forest, and Land Revenues; and in cities and large towns, by the bodies having control of such cities and towns. See Appendix A.

CHAPTER IV.

POWERS UNDER THE CHARTER.

§ 36. TELEGRAPH companies, like all other corporations, have such powers as are expressly conferred by their charter, and all such incidental or implied powers as are necessary to carry into effect the express powers.[1]

They act through such officers and agents, and in such manner, as the charter directs.

§ 37. Among their ordinary powers are, to sue and be sued; perpetual succession; power to contract within the scope of the objects for which they were incorporated; to make their own by-laws; and to hold real estate for the purpose for which they were incorporated.[2]

Incorporated telegraph companies have the incidental power to dispose of their property real and personal; they may exercise this power to secure or discharge a debt lawfully created by them through

[1] Cal. State Teleg. Co. *v.* Alta Teleg. Co. 22 Cal. 398; Head & Armory *v.* The Providence Insurance Co. 2 Cranch, 127; Bank U.S. *v.* Dandridge, 12 Wheat. 71; Bank of Augusta *v.* Earle, 13 Pet. 519; Perrine *v.* Chesapeake & Delaware Canal Co. 9 How. U.S. 172.

[2] As to whether, in any particular case, the telegraph company has the power, under its charter, to hold certain property, is a question alone between the State and the company, and third persons cannot call it in question. Cal. State Teleg. Co. *v.* Alta Teleg. Co. 22 Cal. 398.

their agents; they might lawfully create a debt in the first instance, by stipulating for a pledge or mortgage of their property; they would have the right to dispose of their posts, wires, operating apparatus, buildings, and, in short, whatever property they may have acquired under their charter, either by sale absolutely, or by assignment for the benefit of their creditors, or by mortgage to secure a particular debt.[1]

They have also the right to become the purchasers, from individuals, of exclusive franchises,[2] or to become the lessees of another telegraph company.[3]

§ 38. While it may be considered as the settled rule of the courts to adopt a strict construction of the powers of a corporation, yet this must be understood in a fair and reasonable sense, and such a construction would be given in all cases as would be in furtherance of the real objects to be accomplished by the incorporation of the company. The rule of strict

[1] Pope *v.* Brandon, 2 Stewart (Ala. R.) 401; Union Bank *v.* U.S. Bank, 4 Hum. 369; Hopkins *v.* Gallatin Turnpike Co. 4 Hum. 403; Allen *v.* Mont. R.R. Co. 11 Ala. 437; Angell & Ames on Corp. c. 5, §§ 187–190; Jackson *v.* Brown, 5 Wend. 590; Enders *v.* Board of Public Works, 1 Grattan, 364; Gordon *v.* Preston, 1 Watts, 385; Morrill *v.* Noyes, 3 Am. Law Reg. (N.S.) 18.

Where the company has executed a mortgage of all its property, after-acquired property would pass to the mortgagee; Willink *v.* Morris Canal and Banking Co. 3 Green's Ch. 377; Pierce *v.* Emery, 32 N.H. 484; Howe *v.* Freeman, 14 Gray, 566; Morrill *v.* Noyes, Receiver, 3 Am. Law. Reg. (N.S.) 18; Charles River Bridge Co. *v.* Warren Bridge Co. 11 Pet. 420.

[2] Cal. State Teleg. Co. *v.* Alta Teleg. Co. 22 Cal. 398.

[3] Nova Scotia Teleg. Co. *v.* Am. Teleg. Co., 13 Am. Law Reg. 365. By the 26 & 27 Vict. c. 112 (1863), § 43, Telegraph act, — it is provided that the company shall not sell, transfer, or lease its undertaking or works to any other company or person, except with the assent of the Board of Trade. Appendix A.

construction would be applied with more stringency in all matters trenching upon and abridging important legislative functions · as, exemption from taxation; the exclusive power to operate the telegraph line within given limits; also, in all cases interfering with private rights; as, taking lands by compulsory process, interfering with previously granted franchises, etc.[1] So, also, as to the power to change the location of the route for the telegraph line.[2]

In all such cases, if there should be any ambiguity or doubt as to the extent of the power conferred, or the mode of its exercise, it would be construed most strongly against the company. In England, the case would be sent from the equity to the law courts to settle the right.

§ 39. It seems that the weight of the American authorities recognizes the right in railroad companies, without being authorized so to do by statute, to sell, lease, mortgage, or assign for the benefit of creditors, all their property, real and personal, including the road track, rolling stock, machine shops, depots, etc., to the extent of vesting in the assignee the right to run the trains, collect the tolls, and generally to take the entire management and control of the road, and keep it in active operation, as it was prior to the assignment [3] and the same principles and reasoning

[1] 2 Greenleaf's Cruise, tit. 27, § 29, in note pp. 67, 68; 1 Redfield on Railways, c. 11 — Eminent Domain; Phila. & W. R.R. Co. *v.* Maryland, 10 How. U.S. 376.

[2] Morehead *v.* Little Miami R.R. Co., 17 Ohio, 340; Little Miami R.R. Co. *v.* Naylor, 3 Ohio (N.S.) 235; and Redfield on Railways.

[3] Hall *v.* Sullivan R.R. Co. (U.S. Cir. Ct. for District of N. Hampshire); Arthur *v.* Commercial and R.R. Bank of Vicksburg, 9 Smedes &

adopted to support this view would undoubtedly apply to telegraph companies; but the better opinion seems to be that it cannot mortgage or otherwise dispose of the franchise of being a corporation, and of taking property under the law of eminent domain. Such an artificial being can only be created by the State, and it cannot delegate this artificial existence unless it is expressly authorized so to do by statute;[1] but whatever of its franchises are of a character to be exercised and enjoyed by a natural person, have the incidents of property, and may be assigned by the company in the same manner and to the same extent as its other property.[2]

Marsh. 394, 432; State *v.* Rives, 5 Iredell, 297. But see, *contra*, Pierce *v.* Emery, 32 N.H. 484.

[1] State *v.* Rives, 5 Iredell, 306; Robins *v.* Embry, 1 Smedes & M. Ch. 269.

[2] In the valuable work of Mr. Pierce on American Railroad Law, pp. 528, 529, it is said: "The question as to the power of a railroad company to mortgage its road has been much complicated, from the circumstance that, as railroads are usually owned and operated by corporations, the franchise of being a corporation, which is from its nature not assignable, has been considered in connection with the power to use the road, and enjoy its revenues, which differs essentially from existing and acting as an artificial body. But there is no reason why a railroad may not be owned by a private individual, who has obtained from the legislature a grant of power to exercise its right of eminent domain for that purpose, and to receive tolls for persons and goods carried over the same; the same public duties being imposed upon him as upon a corporate body receiving the same grant. It would be difficult to maintain that the individual grantee of such a power could not, after he had appropriated his right of way, like the owner of a ferry franchise, transfer the right to use it and enjoy the tolls; and it is conceived that the same power in this respect exists in a corporation, as in an individual. Neither could bestow the franchise of being a corporation, which would be in effect creating a new one; while both are under public duties, and upon general principles their powers and obligations would be the same.

"It is objected to the power of the company to mortgage its road, that it

But such transfer, or other disposition of its property, must be in furtherance of some purpose authorized by its charter.

§ 40. In England, on the contrary, it is held, that a railroad company cannot mortgage its track, or transfer the management of its road; that such acts are *ultra vires;* nor could it lease its road to another company, or form a partnership arrangement with another company for a share of the profits made by both companies; such transfer and such agreement being, as there considered, against public policy, and are held to be void, even if assented to by all the stockholders.[1]

But such disposition of its property, or such agreements, when authorized by act of Parliament, are held valid.[2]

The power of a telegraph company to mortgage or otherwise dispose of its line, and the accessories thereto, would, undoubtedly, be determined in the respective countries, by these decisions in England and America in reference to railroads.

is a public highway. The right of the State to condemn private property for the road rests on the ground that it is to be used for public purposes. The State, it has been held, may intervene to prevent the road from being used for other purposes than a public highway, and to compel the company to use it for that purpose. But the proposition that the road is a public highway, if admitted, would not require the admission of its disability to transfer the right to use the same. The right of the State to have it used for public travel and transportation does not interfere with its management by other parties than the original corporation and their enjoyment of the tolls; and if it did, it would seem to be the right of the State to assert or waive it at its pleasure, and not to be taken advantage of collaterally."

[1] Winch *v.* The Birkenhead, Lancashire, & Cheshire Junction Railway Co. 13 Eng. L. & Eq. R. 506; S. & B. R.R. Co. *v.* L. & N. W. R.R. Co. 21 ib. 319; Mayor, &c., Norwich *v.* Norfolk R.R. Co. 30 ib. 143.

[2] Beman *v.* Rufford, 6 Eng. L. & Eq. R. 106.

Would a general assignment, or a mortgage, by a telegraph company, of its line and other property, to trustees or mortgagees, together with the power to them to continue the active management of the line in the transmission of messages, authorize such trustees or mortgagees to use the operating instruments which had been patented, when the exclusive right to use such patent had been conveyed to the company by the patentee, but no express authority in the instrument vesting the company with the right to transfer the same? Would such use by the mortgagee or trustee be an infringement of the patent right? It has been held, where a railroad company had used a patented improvement for their brakes, licensed to the company by the patentee, who conveyed "the full and exclusive right and liberty of using the said improvement," and the company had assigned the revenues of the railroad, and the use of the rolling stock to a preferred creditor, that the use, by the assignee, of the cars having the attached patented brakes did not render him liable to account for infringement upon the patent right, and was no infringement of the patent; that the assignee was to be viewed in the light of an agent of the company, and his use of the cars was the same as that of the company, and exclusive as to third persons, or other interests, within the meaning of the license from the patentee to the company.[1]

[1] Asahel Emigh *v.* Selah Chamberlain. In the District Court of the United States for the District of Wisconsin, in Equity. Am. Law Reg. (N. S.) vol. i. p. 207. Miller, J., said, "The complainant, as the assignee, for the State of Wisconsin, of a patent right to Francis A. Stevens, for a combina-

§ 41. A telegr[illegible] line might be taken in execution

tion and arrangement of levers, link-rods, and shoes or rubbers, whereby each wheel of both trucks of a car on a railway is retarded with uniform force when the brake is put in operation, brings this bill against the defendant, for operating, or causing to be operated, the La Crosse & Milwaukee Railroad in this State, by the use of cars with the improved brakes. The defendant sets up a deed from the patentee, Francis A. Stevens, given previous to complainant's assignment to the said railroad company, whereby, in consideration of six hundred dollars to him paid in full satisfaction, he licensed and conveyed to the company the full and exclusive right and liberty of using the said improvement on any or all their own cars, over any part of their road. Defendant further shows that, by an instrument of writing, called by him a lease or mortgage, the company granted to him for an indefinite time its entire railroad and road route, together with right of way and depot grounds, and all buildings and property of every description, including the rolling stock. He to operate the road, and to receive all the revenues, and out of them defray all expenses of operating the road, purchasing additional rolling stock, paying interest of liens, and the residue to apply towards a claim of his own against the company. And when his claim should be paid, either by the company or out of the revenues of the road, the property to revert to the company. The company was using the patented improvement upon the cars that passed to Chamberlain, and which he continued to use. Chamberlain, after operating the road for some time, under the deed of the company, was superseded by an order of this Court appointing a receiver.

"The assignment to complainant excepts the license to the company. Whether Stevens would be the proper person to claim damages is not made a question by the pleadings. Can the complainant require the defendant to account to him? — is the only question submitted.

"The deed of Stevens to the company, licenses and conveys the full and exclusive right of using the improvement on their own cars. There is no power granted to the company to vest the right in any person, by conveyance or otherwise. It is simply a license.

"In order to test the right set up by defendant, we must bear in mind that the railroad company is incorporated by a law of the State, and to such Stevens made the license, and as such the company made the assignment to the defendant. The duties imposed upon the company by its charter were not fulfilled by the construction of the road. Important franchises were granted the company to enable it to provide the facilities to communication and intercourse required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency was provided, as a re-

against the company, although the franchise of being

muneration to the community for the legislative grant. The corporation cannot absolve itself from the performance of its obligation, without the consent of the legislature. Defendant could only operate the road under and subordinate to the charter of the company; and not he, but the company, was liable for the performance of all the corporate duties to the public. He only could perform these duties in the name of the company. The franchises of the company were not, and could not be, vested in him. He was nominally substituted for the company in the active use of the road and property.

"The corporation, as a creature of the law, must use the franchises granted it by means of officers of its own appointment, either directly or indirectly. Railroad Company *v.* Winans, 17 How. U.S. 30–39, and cases cited.

"It is contended, on the part of the complainant, that defendant was a mortgagee in possession, and as such he held under a title, in the nature of a conveyance from the company. This Court has uniformly considered the rolling stock of a railroad company as a fixture not liable to levy and sale apart from the realty. And we have placed liens by mortgage of these companies on the same footing as of individuals. In this State the mortgagor is the owner of the premises, until a sale is made in pursuance of a decree of Court. The note and mortgage are choses in action. Sheldon *v.* Sill, 8 How. U.S. 441. The mortgagor may put the mortgagee in possession of the mortgaged premises until the debt is paid by the receipt of rents and issues; but the mortgagee would not hold adversely to, but under, the mortgagor.

"Technically, the deed under which the defendant held possession of the road was not a mortgage. The defeasance does not make it a mortgage; as, without it, the company would have the equitable right to regain possession upon discharging its debts to defendant, and to require him to account. The deed is an assignment of the revenues of the road to a preferred creditor, with the privilege of using the road and property of the company for the mutual interest of the debtor and creditor. The rolling stock and the road, at the date of the assignment to the defendant, were subject to mortgages, whose accruing interests he became obliged to pay out of the revenues of the road. If he replenished the stock, he did so from the same source. The company, being insolvent, devised the scheme of placing their property in the hands of defendant, for the purpose of completing the road to La Crosse, of paying the annual interest of liens, and of satisfying his claim.

"Although this Court pronounced the arrangement fraudulent and void as to creditors, it was valid between the parties, and this suit can be defended under it. The deed to defendant is not a conveyance of the

a corporation could not be. It has been so held in case of railways.[1]

§ 42. When once the company has located the route, in the sense of the English statutes, upon the location of railroads, canals, etc., or has had lands condemned, under American statutes, or has entered upon streets, highways, etc., in such manner as to indicate the precise line for the wires, that should be regarded as a final election, binding on all parties. The public have a right to adjust business in view of changes wrought by this exercise of the right of eminent domain; and the company should not be permitted to change the route without the consent of the legislature. This power to alter the route should be strictly construed, whether contained in the original charter, or in subsequent enactments.[2] We think

property. The rolling stock was the property of the company in defendant's hands. It might as well be claimed that the receiver appointed by this Court should account for the use of the patented improvement, which I presume will not be pretended.

"The receiver holds the property of the company for the benefit of its creditors. Defendant did so with consent of the company for the same purpose. In both cases the company is the owner of the cars, with the patented improvement attached. The company did not divest itself, by its deed to defendant, of its corporate entity or property.

"Defendant is to be viewed in the light of an agent and trustee. He was a mere substitute for the company, and his use of the cars was the same as that of the company, and exclusive as to third persons or other interests, in the meaning of the license."

[1] State v. Rives, 5 Iredell, 297; but see, contra, Ammant v. New Alexandria & Pittsburg Turnpike, 13 Sergt. & R. 210. Where satisfaction by execution at law cannot be had, the tolls may be reached in equity. Allen v. Montgomery R.R. Co. 11 Ala. 437; Bigelow v. Cong. Society of Middleton, 11 Vt. 283.

[2] An authority to change the location of the line during the progress of the work does not imply power to change it after the work has been completed. Morehead v. The Little Miami R.R. Co. 17 Ohio, 340.

this is the true doctrine in all cases where the franchise has been asserted, and the right exhausted by election. It has been applied to railroads, whether the case be that of an attempt to relocate on the property of an individual, or that of using a street or highway for the purpose.[1]

[1] The case of the Little Miami R.R. Co. *v.* Naylor, 2 Ohio (N. S.) R. 235, re-affirms the case of Morehead, and declares that when the railroad company have once located their road, their power to relocate, and for that purpose to appropriate the property of an individual, has ceased; and that the same rule obtains where the attempt is made to appropriate a street or highway. In Naylor's case the company had built their road upon a street, and afterwards changed the track, and located the road off the street, merely using the street for the purpose of passing from the south to the north side thereof. In thus crossing the street, the track ran within a few feet of the premises of Naylor, which were much injured by the relocation. The Court said, "The railroad company had no right to use the street at all, except by the permission of the legislature; the grant to use the street for a track did not give them the property in it to the exclusion of the public; they could only lay their track and run it, doing as little damage to the road, as a highway for general travel, as possible. The property bounding on it would be used and improved in reference to the railroad as located, which every person would be authorized in supposing to be permanently fixed."

It was provided in this charter, that, if said corporation, after having selected a route for said railway, find any obstacle to continuing said location, either by the difficulty of construction, or procuring right of way at reasonable cost, or whenever a better or cheaper route can be had, it shall have authority to vary the route, and change the location. In construing this, the Court said (p. 240), "It is evident that the change of location provided for is before the road is made, and is in fact only a change of selection."

In further support of the text, see Canal Co. *v.* Blakemore, 1 Cl. & Fin. 262; State *v.* Norwalk & Danbury Turnpike Co. 10 Conn. 157; Turnpike Co. *v.* Hosmer, 12 Conn. 364; Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Ky. Turnpike Co. 2 Swan, 282; Griffin *v.* House, 18 John. 397; Blakemore *v.* Glamorganshire Canal Co. 1 M. & K. 154.

The case of The South Carolina R.R. Co. *v.* Blake, 9 Rich. 228, does not militate against the principle announced in the text. It rests upon a construction of a charter. Wardlaw, J., said (p. 233), "An ex-

§ 43. By the general statutory laws of England, Canada, and such of the American States as have general laws on the subject of telegraphs, it is provided, that they may construct their lines along the public highways, and across navigable streams, so as not to incommode the public in the use of the one, or the navigation of the other; without any such express restrictions, they would have no power to construct their lines so as to interfere with such public use, unless it should be made clearly to appear that it was impossible, or wholly impracticable, to construct the line otherwise.

§ 44. It would be within the legitimate scope of the powers of a telegraph company to make an arrangement with another telegraph company for

amination of these charters will show that the right to keep up and employ the railroad is given in the same breath as the right to make it; and that the powers of acquiring lands, by purchase or otherwise, extend not less to the purpose of varying and altering plans, and of obtaining materials for repairing and sustaining the road and its appurtenances, than to the purposes of an original location and construction, and embrace accommodations for all agents, those subsequent as well as those first employed. 1828, sec. 1, 9, 10, 14; 1835, sec. 32." The company wished to acquire a certain parcel of ground, for uses arising subsequent to the construction of the road; the land-owner resisted the application for commissioners to value, upon the ground that the right and authority granted to the said company, to have the lands of individual citizens assessed and vested in them, was conferred to enable them to locate and construct a track within the limits prescribed, and that it had long since fully exercised and exhausted this right, by the completion of the said track. The Court said, that, "by the act of 1828, the right of taking is co-extensive with the right of purchasing, and, like the latter, is limited by the uses and purposes specified" (p. 236); and therefore it was held, that an issue should be made, and the Court should determine whether the demand made was within the province of the charter, upon a traverse, if one was desired by the land-owner. See also 1 Redfield on Railways, § 105.

connecting the lines of the two companies for the purpose of transmitting messages over each other's wires; and this might be justly regarded as one of the implied or incidental powers of the company, as being important, if not essential, to carrying into effect the purposes for which it was incorporated.

The rights and liabilities of the company in relation to the sender of the message, growing out of such an arrangement with another line, will be considered in a subsequent chapter.[1]

But such power to form connections with other lines would not authorize a consolidation of two companies, or allow them to consolidate their funds, or to form a partnership in reference to their funds. To do this would require express authority by statute.[2]

§ 45. It is the well-settled rule in America, that a contract is binding upon an incorporated company although not under seal; and it has the same power to contract by parol, and by writing not under seal, where the nature of the contract requires it to be in writing, as a natural person; and a seal may now be considered as no more necessary in contracts to which incorporated companies are parties, than when made between individuals. And there seems to be a growing disposition in the English courts to relax the rule that the contracts of corporations must be under seal.

§ 46. A company will be bound by a contract or

[1] See post, Part II. c. 5.

[2] N.Y. & Sharon Canal Co. *v.* Fulton Bank, 7 Wend. 412. By general law on the subject of Telegraphs in Ohio and New York, provision is made for the consolidation of companies. See Appendix, AA, CC.

deed of settlement, which is beneficial, or under which it has taken profit, although not made in the mode prescribed by the charter. In the case of Reuter *v.* The Electric Telegraph Co.,[1] it appeared that the defendant was incorporated by Royal Charter for the purpose of establishing telegraphic communication between Great Britain and other countries by means of a submarine telegraph to Holland. The charter required that the business of the company should be conducted according to the provisions of a deed of settlement to be prepared and executed by the company. This deed of settlement provided for the appointment of directors; and also contained the following stipulation: "The directors shall conduct and manage the affairs of the company, and shall exercise all the powers that may be exercised by the company at large, and shall fulfil all the duties of the company, except such powers and duties as are reserved to general meetings." The secretary, by its provisions, was to have the custody of the seal of the corporation, and of the books; and to act under the control of the directors. It further provided that "contracts other than bills of exchange or promissory notes, for the purchase of any article the consideration of which does not exceed £50, or for any labor or service the duration or period of which does not exceed six months, nor the consideration-money £50, may be entered into on behalf of the company by any officer authorized by the directors. Contracts for the purchase or sale of any article, or the hire of any labor or services, or in respect of any arrangement

[1] 37 Eng. Law & Eq. R. 189.

with another company, for the exercise of the powers and privileges of the said company, or of any such other company, or otherwise, in any of the matters incidental to the carrying on the affairs of the said company, may be entered into on behalf of the said company by the directors; but such contract shall be signed by at least three individual directors, or shall be sealed with the seal of the company under the authority of the special meeting, or the resolution of the directors," and with the further stipulation that "all contracts, whether under seal or not, shall be immediately reported to the secretary." There was no express provision that the contract should not be binding on the company unless made in the stipulated manner.

§ 47. It appeared that the telegraph company had, under their corporate seal, entered into an agreement with the plaintiff for the collection and transmission of messages by its line; the company agreeing to allow him seven per cent on the amount it should receive, for his services; while this agreement was still continuing, the chairman of the company made a parol agreement with the said plaintiff, by which he agreed, on the representations of the plaintiff that he was about to establish a new line of business, that plaintiff should be allowed fifty per cent upon all messages sent or received by him through the company's line, containing public intelligence; and the chairman wrote down the terms of the agreement in the minute-book of the company. Under this agreement the plaintiff's accounts for a part of the service rendered, were sent in from time to time, based upon the principle of this

agreement of fifty per cent, and were paid, and the amounts passed into the company's books and credited. The arbitrator to whom the case was referred found that the services rendered by plaintiff under this parol agreement were beneficial to the company. This was a contract which exceeded £50, and the deed of settlement required that it should be signed by three directors.

§ 48. It was held, that, the parol agreement having been acted upon and ratified by the company, the defendants were bound.

Lord Campbell, C.J., said, that "no reliance could be placed upon the objection that the defendants were a corporation, and that the agreement on which they were sued was not under seal. They were a corporation for the purpose of carrying on a particular business, and the services rendered were in the direct course of the business which the charter authorized. The case of Copper Mines Co. *v.* Fox,[1] and Henderson *v.* Australia Royal Mail Nav. Co.,[2] were referred to and approved. Upon the objection that the contract was not signed by three of the directors, his Lordship said, "Assuming that the contract was originally *ultra vires* of the chairman, we think that it has been adopted and ratified by the company, so as to render them liable for it;" and that "this contract was not at variance, nor at all inconsistent with the previous contract, which was under seal. Might not the contract entered into by the chairman, although originally without authority, and

[1] 16 Q.B. 229 (Eng. Com. Law Rep. vol. 71).
[2] 5 E. & B. 409.

not binding, be ratified by the company? The deed of settlement declares that the directors shall conduct and manage the affairs of the company, and shall exercise all the powers that may be exercised by the company at large. And it appeared that the directors were made acquainted with the new contract, and approved and acted upon it. The entry in the minute-book was for their information, and must have been seen and sanctioned by them. The directors must have examined and approved the accounts, otherwise the payment which was made to plaintiff by checks, and which the directors were required to draw, would not have been so made. It appeared that the company profited by the services thus rendered, and they must be considered as requesting the plaintiff to continue them." And the company was accordingly held liable to the plaintiff for the services rendered.

CHAPTER V.

CONSTRUCTION OF TELEGRAPH LINES.

§ 49. By general statutes, in England, Canada, and most of the States in the United States, telegraph companies are authorized to construct their lines along and upon — and in England, also under — any public road or highway, and across navigable streams, so as not to interfere with the public use of the one, or the navigation of the other.[1]

[1] See Appendix.

By the 26 & 27 Vict. (1863) c. 112, sec. 9, it is provided, that telegraph companies shall not place a telegraph under any street in the metropolis, and large towns of a population of thirty thousand inhabitants or more, without the consent of the bodies having control of the streets. The depth, course, etc., of the telegraph lines under the street must be agreed upon between street or road authority and company, or else to be determined by justices or sheriff.

Sec. 12 provides that the company shall not place a telegraph over, along, or across a street or public road, except with the consent of the body having the control of such street or public road; and where a public road passes through or by the side of any park or pleasure ground, and where a public road crosses by means of a bridge or viaduct, or abuts on any ornamental water belonging to any park or pleasure ground, and where a public road crosses or abuts on a private drive through any park or pleasure grounds, or to any mansion, the company shall not, without, or otherwise than in accordance with, the consent of the owner, lessee, and occupier of such park, pleasure grounds, or mansion, place any work above ground on such public road.

Sec. 13 provides, where any land-owner or other person is liable for the repair of any street or public road (notwithstanding that the same is dedicated to the public), the company shall not place any work under, in, upon,

By far the greater number of telegraph lines in these countries are along and upon or under public highways and railroads; and, probably, from the very nature of their construction, they will seek these routes in all countries which have become populous; and questions between the owners of the soil and telegraph companies, in reference to the construction of telegraph lines, have been, and, it may be expected, will continue to be, of rare occurrence.

§ 50. A very interesting case,[1] however, was before the Supreme Judicial Court of Maine, in 1859, involving the construction to be placed upon a charter authorizing the erection of telegraph lines upon the public highway, yet so as not to incommode the public. It was an action to recover damages for an alleged injury to the person of the plaintiff. The main facts were as follows: The stage running between Belfast and Northport, in which the plaintiff was at the time of the accident a passenger, on arriving at the latter town, turned off from the usually travelled part of the highway towards the post-office, to exchange letter-bags. A telegraph wire of the defendant corporation, hanging too low, caught the upper part of the stage, and was the cause of its being upset, whereby the plaintiff was injured.

over, along, or across such street or public road, except with the consent of such land-owner or other person, in addition to the consent of the body having the control of such street or public road, where, under the act, such last-mentioned consent is required. Provided, that where the company places a telegraph across or over any street or public road, they shall not place it so low as to stop, hinder, or interfere with the passage, for any purpose whatever, along the street or public road.

[1] Sarah Dickey *v.* Maine Telegraph Co. 46 Me. 483.

The judge presiding instructed the jury that highways are made to accommodate the public travel, and any person having occasion to travel upon them is not necessarily confined to the usually travelled path, but may rightfully travel upon any part of a highway which is within its limits or side lines, for the purpose of calling at post-offices, stores, or dwelling-houses, along the line of the road, as convenience or necessity may require, whenever such person can do so without any want of ordinary care, and without interfering with the rights of other persons in and upon the highway.

Also that the defendants had no right by their charter to incommode the public travel by their erections; and if they did so, or if having made erections within the limits of the highway, in conformity with their charter, they suffered the same to get down or out of repair, and to remain so after reasonable notice and opportunity to repair them, so as to obstruct the public travel, and endanger the safety of travellers rightfully travelling within the limits of the highway, and thereby rendered such highway unsafe and inconvenient, then, if the plaintiff, while rightfully travelling within any portion of the highway, sustained injury to her person in manner as alleged, solely by reason of such obstruction being within the highway, the defendants were liable for the damages occasioned thereby; provided she has shown affirmatively all the other facts which are necessary to entitle her to recover.

§ 51. A verdict was rendered for the plaintiff, and on appeal, the Court said (Kent, J.), "The application

of a few well-established principles to the facts in this case, will aid in testing the correctness of the rulings to which exceptions are taken.

"When a highway is laid out and opened, all persons have a right to pass upon it. By the legal laying out, and after all the requirements of the statute have been complied with, the public acquires an easement as against the owners of the land, which extends to every portion of the road, and any person has a right to pass or repass, at his own risk, over any part, after it is opened, and before any work is done, or any travelled path made, and before the liability of the town to make it exists. When laid out and accepted, it becomes a public highway.[1]

"The duties of the town in relation to preparing the way for travel are distinct from and subsequent to the laying out. The law requires the town to make and keep in repair a travelled path, of suitable and sufficient width. It does not require the town ordinarily to make that travelled path the whole width of the road, and towns will not be liable for obstructions on the portion of the highway not constituting the travelled path, and not so connected with it as to affect the safety of the travelled portion.[2]

"But the right of travellers to use any part of a highway, if they see fit, is not restricted by the limitation of the liability of the town in case of accident. A person may go out of the beaten track at his own risk as between himself and the town, and yet be entitled to protection against the unlawful acts of other per-

[1] State v. Kittery, 5 Greenl. 254; Johnson v. Whitefield, 18 Me. 286.
[2] Bryant v. Biddeford, 39 Me. 193.

sons or corporations. Any part of the highway may be used by the traveller, and in such direction as may suit his convenience or taste.[1]

"No person has a right to place or cause any obstruction which interferes with this right on any part of the highway within its exterior limits. The extent of the liability of the town is no measure for such private person's liability. If the owner of the fee in the land, or any other person, should dig a pit or stretch a cord or place a pile of stones on the highway near the outer limit, and at a considerable distance from the travelled way, and a traveller passing, using due care, should be injured thereby, it would be no sufficient answer to his claim for damages, to aver and prove that, under the circumstances, the town was not liable. The duty of the town is to perform a positive act in the preparation and preservation of a sufficient travelled way. The duty of others is to abstain from doing any act by which any part of the highway would become more dangerous to the traveller than in a state of nature, or than in the state in which the town has left it.

"It may be true that in many cases the same principles will be applied both to towns and individuals, in determining whether a given state of facts, in relation to a particular incumbrance, constitutes a defect within the meaning of the law. But, admitting the defect, the question of liability, for creating or allowing it, may require for its solution the application of very different principles in a case against a private person from those which would apply to a town.

[1] Stinson v. Gardiner, 42 Maine, 254.

"We think that the instructions of the presiding Judge, in relation to the rights of all persons to travel on any part of the highway, and to leave the usually travelled path, for the purpose indicated, were entirely correct, as applied to this case between an individual and a corporation other than a town. Any other construction would deprive a traveller of a legal right to turn out of the beaten track, to avoid defects, or to call at houses, stores, or fields. If he has not such legal right, then, as against the owner of the fee in the land over which the highway is located, he would be a trespasser. The only right which the public has, is to pass and repass. A horseman cannot stop to allow his horse to graze, without being a trespasser.[1] If, when he has turned from the usual travelled path, he is not rightfully travelling over the spot, he can claim no damages against an individual who has wilfully placed obstructions or impediments on that part of the highway. If he has a legal right to be there, then the individual wrong-doer may be responsible, though the town may not be.

"The defendants invoke the provisions of their charter, and contend that, by its terms, they are exempted from all liability for any defect or neglect outside of the travelled way, and that they stand in the same condition as the town. The charter, § 2, authorizes the company to 'locate and construct its line along and upon any highway . . . by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the wires or conductors of such line, but the same shall not be so constructed

[1] Stinson v. Gardiner, 42 Maine, 254.

as to incommode the public use of said roads or highways.'

"The defendants contend that the 'public use of the highway is the right which the great public owns, in distinction from the private rights which individuals have of passing out of the travelled path.' We cannot concur in this view. The public use of the highway is the right which has been before defined; viz., the right of any and all persons to use the highway, to pass and repass, at their pleasure, on any part. It is not confined to that portion which the town is by law compelled to make and keep in repair.

"It is very clear that this company could not legally erect posts a foot only in height, and extend the wires at that distance from the ground, on the exterior limits and outside of the travelled path, if, by so doing, the use of any part of the highway was obstructed, or rendered inconvenient and dangerous, or the traveller incommoded. If any injury should arise to any such legal traveller by such erection, he using due care, the company would be liable to him. The same rule will apply, when, after erections properly made, they suffer the same to fall down, or to be out of repair, and to remain so after reasonable notice, so as to obstruct the traveller, and endanger his safety."

The same doctrine is enunciated here as in the case of Rex *v.* United Kingdom Telegraph Co., to which we have heretofore made reference.[1]

The same principle is announced in the case of

[1] Ante, c. 1, § 13, n. 2.

Young *v.* Inhabitants of Yarmouth,[1] although that case was upon the liability of the town. The Cape Cod Telegraph Company operated its line under a similar restriction upon constructing its line so as not to incommode the public in the use of the highway.

The posts were placed within the limits of the highway, between the sidewalk and the travelled part of the highway, which was in good repair: the plaintiff was thrown from his carriage against one of the posts; and he brought this action against the town.

The line of posts was erected at the place on the street prescribed by the selectmen of the town under the statute. It was held, that the action of the selectmen relieved the town from liability.[2]

The Court held, that if the provision, that "the same" (the telegraph line) "shall be so constructed as not to incommode the public use of the highway" had been the entire provision contained in the statute, it might have warranted the instruction, that if the telegraph posts were erected in such a manner as to be an obstruction, the town would be liable; and adds, "The authority given the telegraph companies thus to operate upon the public highways would have been strictly limited to the cases provided in the statute; and whether the posts were improperly placed, might have been a question for the jury."

§ 52. It seems, therefore, that in questions arising upon a case of alleged interference with the right of the public to the use of the highway, either as affect-

[1] 9 Gray, 386.

[2] This was subsequently changed by statute. See Appendix S.

ing the public or an individual, it is no defence for the company that its posts are placed outside of the beaten track or travelled way; that the public, and each individual composing that public, have the right to the use of the highway to its exterior limits, and the company is liable for any defective construction of the line which would amount to an obstruction of its use, upon any part of it, to the same extent, to which they would be liable for an obstruction upon the travelled part of the highway.

§ 53. In the case of Telegraph Co. *v.* Wilt,[1] the company was authorized by the act of incorporation to construct works along and across any road, etc.; the said works to be so placed as not to interfere with the common use of such roads. There was a section in the act which authorized the recovery of a penalty of one hundred dollars "against any person who shall wilfully and knowingly break the wire," together with all damages which may be sustained in repairing the injury, and from the interruption of their business, to be recovered in an action of trespass. One of the company's wires crossed Broad Street, and the defendant, having occasion to move a house along this street struck the wire and broke it.

It was held, that the act of the defendant in moving the house was lawful; that he had the right to the use of the highway for his lawful business *usque ad cœlum*. It would not be held that the legislature intended to restrict this common right unless very express words were used to that effect.

[1] 11 American Law Journal, 374. Decision by Philadelphia District Court.

The company therefore were subject to the contingency of such use of the highway, if care had not been taken to place their wires so as to avoid it.[1]

§ 54. The right of municipal corporations to control the location of telegraph lines and posts upon and along the streets is expressly conferred by the Telegraph Act of 1863, 26 & 27 Vict. c. 112 (which provides, however, for the ultimate action of the Board of Trade), and also by general statutes in several of the American States.

Under the provisions of these various statutes, the telegraph companies must be governed by such regulations and rules as these municipal bodies may prescribe; and they are authorized to direct any alteration in the location of the lines, position of the posts, etc., and the height at which the wires shall run.[2]

Independent of express statutory authority, we think municipal corporations would have the right to regulate the construction of telegraph lines along and upon or under its streets; determining the place where the posts should be erected, and the height at which the wires should be placed; and to

[1] This seems to be a severe ruling against telegraph companies; and there might be some plausibility in the argument, that the use of the highway mentioned in the statute was the ordinary and usual mode of passing and repassing on foot, and on horseback, and in vehicles, and was not intended to embrace such extraordinary use of the same as that in the case given in the text; but still, the question would recur, was the moving of the house along the highway a *lawful* use of the same? If so, the company could have no redress for an injury to its wires, but would be liable for the obstruction; and, more especially, as the construction of the statute must be made most strongly against the company in all cases of interference with what had, before the granting of the franchise to the company, been a right in the individual or the public.

[2] See Appendix A, G, S, CC.

direct at any time any alteration in the same as the public necessity or convenience might require.

This right they could exercise under their general police power; and it would be their duty so to do. They would be liable to any party injured for any obstruction of the streets by individuals or incorporated companies.[1]

§ 55. But where the statute provided that selectmen should specify in writing where the posts were to be located, and that the company in constructing its line shall follow the route indicated by such writing, and that, "after the erection of said lines, the selectmen shall have power to direct any alteration in the location or erection of said posts," it is held, that in such case the selectmen are not the agents of the town, but of the public generally; and the town is not liable for any damage sustained by the erection of the posts in the place prescribed by the selectmen, but the location of the telegraph posts by the selectmen was conclusive upon all parties. "The town cannot interfere and remove them; and their existence upon the highway if in exact conformity with the regulations prescribed by the selectmen, does not constitute any defect or want of repair in the highway for which the town can be held responsible in case of any injury thereby occasioned to any person travelling on such highway. If an improper location of the telegraph posts has been allowed by the selectmen of the town, the power is fully vested in these selectmen to direct an alteration in such location, and thus obviate any inconvenience that may be found to exist

[1] See, on this subject, Sarah Dickey *v.* Maine Teleg. Co. 46 Me. 483.

to the traveller, or the public generally. But this is not a matter which the town in its corporate capacity can regulate, or for which the town is responsible." [1]

§ 56. There seems to be no provision made in the general laws on the subject of telegraphs in Canada or any of the American States, except in the State of Michigan,[2] for laying telegraph wires under streets, roads, etc.; and it may be doubted whether telegraph companies would possess such right in the construction of their lines, without statutory authority, either ex-

[1] Young *v.* Inhabitants of Yarmouth, 9 Gray, 386.

This decision led to the passage of an act by the legislature of Massachusetts, fixing the liability of towns in such cases. The act is as follows: —

Towns which may be otherwise liable in damages to any person for injury to his person or property occasioned by telegraph posts or other fixtures erected on highways or townways, shall not be deemed to be discharged from such liability by reason of the place of erection of said posts, or other fixtures, having been designated by the selectmen of such towns, in virtue of the act to which this is an addition, or by reason of any thing in said act contained.

The companies or persons erecting such telegraph posts or fixtures, or to whom they may belong, shall be held to re-imburse and repay to said towns the full amount of damages and costs recovered as aforesaid, by any party injured. Act of April 6, 1859, General Statutes of Massachusetts, c. 260, §§ 1, 2. Appendix S.

[2] The statute provides that "such association is authorized to enter upon and construct and maintain lines of telegraph through, along, and upon any of the public roads and highways, or across or under any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords or wires of such line. . . . The association, instead of running or placing their wires or posts, may, if they choose, run or place the same under ground, with a suitable or proper covering for the protection of the same; and any part of this act, or any law made or to be made providing for the appraisement of damages to any person, injured by the construction or maintenance of such line or lines, shall be construed to include damages occasioned by the construction of said lines under ground, as provided by this act." Laws of Michigan, 1863 (No. 240), § 5. Appendix T.

pressly given, or necessarily implied in the language employed designating the mode of construction.

In England, the right is expressly given by statute, subject to the conditions and limitations therein provided. The act is known as the Telegraph Act of 1863, 26 & 27 Vict. c. 112.[1]

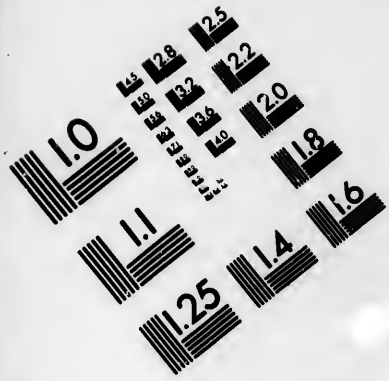
[1] This act provides that for the purpose of laying the wires under the soil, the telegraph company may open or break up any street or public road, and alter the position of any pipe (not being a main) for the supply of water or gas.

They may also place their telegraph under, along, and across any land or building, railway, canal, or any estuary or branch of the sea, or shore or bed of any tide water, and may alter or remove the same; and shall construct their lines so as to do as little damage as may be; and shall make compensation for all damage.

The act gives in detail the mode of proceeding when the company propose to make any alteration in their works; they must also obtain the consent of the bodies having control of the streets, in order to construct their lines under such street; and shall also obtain the consent of the bodies having control of the sewerage and drainage. In case the consent is not given, the act provides how the differences shall be settled between such bodies and the company. The company is required to give notice of their intention to break up the street or public road for the purpose of constructing their line.

In laying such underground work, the company is required with all convenient speed to restore the street or road to its former condition; and while the work is progressing, they must have that part of the road fenced and guarded, and pay all expenses occasioned by such underground construction for six months after completion of the work; and, for failure to comply, are liable to penalties. Provision is also made with reference to non-interference with the traffic and travel on said road while the work is progressing.

Where the company has constructed any work along, upon, or over any lands or buildings, or on or along any street or road adjoining such land or building, and any person having an interest in the land or building desires to use such land or building in any manner different from the mode in which it was used when the line was constructed, and with which the line of the company will interfere, he may require the company to remove or alter their work so that it will not interfere with the new use intended to be made of the land or building; but this alteration or removal cannot be required where a grant or consent in writing had been pre-



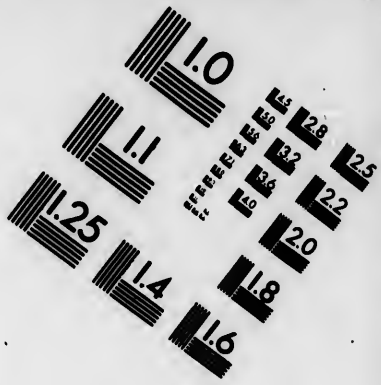
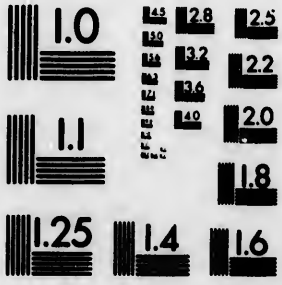
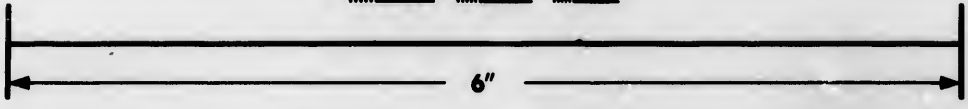
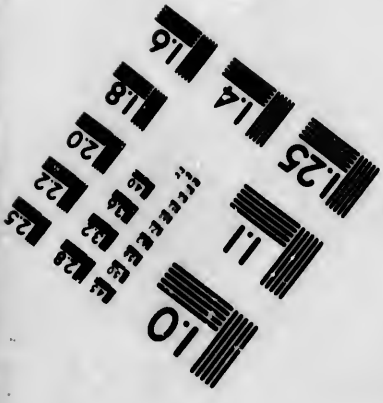
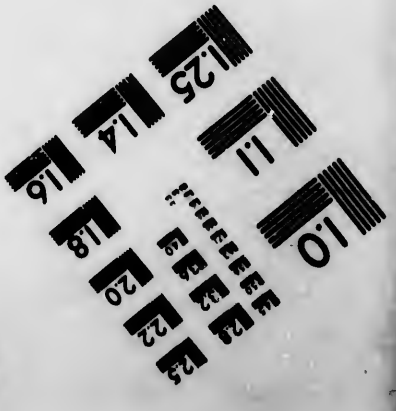


IMAGE EVALUATION
TEST TARGET (MT-3)









Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

§ 57. The construction of the line must be between the terminal stations specified in the charter, or, if operated under the provisions of general law, such as may be specified in the articles of association, or such other mode of organization as may be required by the general law.

It would seem, if there be no express provision fixing the terminus, that a reasonable discretion may be exercised by the company in selecting it.

And so as to intermediate points along the route, when they are not definitely designated.[1]

§ 58. Where the charter provides for the construction of the telegraph line between certain termini, the line might be constructed along a highway be-

viously given to the company, by the owner, lessee, or occupier, or the person under whom they claimed, to construct the line.

Where the owner of the land adjoining the street or road considers his land to be prejudicially affected by the construction of telegraph lines under or upon or along the street or road, he may give the company notice, requiring it to alter or remove the work in accordance with the notice; then the company must either alter or remove the work, or give the owner a counter-notice, and the matter thereupon comes before the Board of Trade for adjustment.

The Board is required to order its removal if prejudicial to the owner, provided such removal or alteration can be effected so as not to interfere with the efficient working of the line. Such alteration or removal cannot be claimed where the owner, or the assignee of the owner, demanding the alteration or removal, has granted the right to construct the line, or given his consent in writing.

In the construction of lines under or along or upon or across canals or railroads, it requires the consent of the parties having the control of the same. There is also special provision with reference to interference with stocks, basins, or other works adjoining or connected with canals, etc.

In matters to be determined by the Board of Trade, the Board may have a reference to arbitrators. See Appendix A.

[1] Hentz *v.* Long Island R.R. Co. 18 Barb. 646; Newcastle & Richmond R.R. Co. *v.* Penn. & Ind. R.R. Co. 3 Ind. 464; Commonwealth *v.* Fitchburg R.R. Co. 8 Cush. 240.

tween the termini, although no express authority was given so to do; provided it appeared that no other location of the line was practicable; such authority would be claimed by necessary implication in applying the act to the subject-matter.[1]

The authority to construct lines between two distant points would carry with it the right to establish intermediate stations, where the establishment of such stations was conducive to the main purpose contemplated by the charter.[2]

§ 59. It is a general rule applicable to all works of this character, in which private property may be taken for public use, that the work shall be constructed with the least damage that the nature of the case will admit of.

As we have seen, where the termini and the intermediate points have not been definitely fixed by the charter, a reasonable discretion will be allowed to the company in selecting them;[3] but, having once made

[1] Springfield *v.* Conn. River R.R. Co. 4 Cush. 63; White River Turnpike Co. *v.* Ver. Cen. R.R. Co. 21 Vt. R. 590.

[2] Cother *v.* Midland Railway Co. 2 Phillips, 469. The Lord Chancellor construed the Railway Clauses Construction Act, and observed, "The term 'railway' by itself includes all works authorized to be constructed; and for the purpose of constructing the railway, the company are authorized to construct such stations and other works as they may think proper; and assuming that the lands authorized to be compulsorily taken would be taken and used for all ordinary stations and works, the act provides, that, for certain extraordinary purposes, such as additional stations and conveniences, this railway may purchase certain additional quantities of land. I consider that all land authorized to be taken as necessary, in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be taken, whether for the actual line of the railway, or for stations or other conveniences necessary for the working of the railway."

[3] Ante, § 57.

the selection, and located their line, there is no power to re-locate, and for that purpose to occupy the land of another, or the public highway.[1]

Where the right of deviation, or of changing the location, is given, as we have seen, it must be strictly construed.[2]

[1] Morehead *v.* Little Miami R.R., 17 Ohio, 340; Louisville & Nashville Branch Turnpike Co. *v.* Nashville & Kentucky Turnpike Co. 2 Swan, 282; Blackmore *v.* Glamorganshire Canal Co. 1 My. & K. 154; Turnpike Co. *v.* Hosmer, 12 Conn. P. 364. See authorities cited ante, § 42, note 1.

[2] Ante, c. 4, §§ 42, 43.

The Revised Code of Mississippi (1857), c. 35, art. 3, provides that "Charters for telegraph companies shall describe the line they propose building and constructing, and the localities it is intended to traverse." Appendix V. The California act of April 22, 1850, concerning corporations, c. 6, § 147, provides that the association shall specify in their certificate "the general route of the line or lines of telegraph, designating the points to be connected." There is a similar provision in the statutes of Connecticut, New Jersey, Ohio, Virginia, Wisconsin, New York, Maryland, Illinois, Kansas, Nevada, and Colorado. By the Florida statute the certificate shall specify "the points in the State from and to and through which the said lines are to be extended." Laws of Florida, c. 781, § 1. By statute of Massachusetts, selectmen are to designate the locality of the lines. Supplement of 1854 to the Revised Statutes, c. 93, § 3. There is a similar provision in the statute of Vermont.

By the Revised Statutes of Missouri, the power to designate the locality of the lines, and to direct any change or alteration of the same, is vested in the Mayor and Aldermen of any city, or the trustees of any incorporated town. R.S. c. 156, § 3.

By the Consolidated Statutes of Canada, c. 67, § 8, the association is authorized to construct the line designated in the certificate upon any land purchased by the association, or when the right has been conceded to them, and upon the highways and across the waters of the Province, so as not to incommode the public, or impede the free access to any house or building erected in the vicinity of the same, or to interrupt, injuriously, the navigation of such waters; and that nothing contained in the act should confer on the association the right of building a bridge over any navigable stream. Appendix S.

This last provision is embodied in the statutes of many of the American States.

§ 60. In some of the States, express authority is given to telegraph companies to erect their posts and establish their lines along and upon the bed of railways, but in such manner as not to prejudice the rights of railway companies.[1]

In many of the States, telegraph companies are authorized to construct their lines across navigable

By act of Congress, U.S., of July 24, 1866, it is provided that any telegraph company then organized, or thereafter to be organized, under the laws of any State in the Union, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which had already been, or might thereafter be, declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States, but to be so constructed as not to obstruct the navigation of such streams or waters, or interfere with the ordinary travel on such roads; with the right to take and use from such public lands all necessary material for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of its line, and might pre-empt and use such portion of the unoccupied public lands, subject to pre-emption, as may be necessary for its stations, not exceeding forty acres for each station, but such stations not to be within fifteen miles of each other.

It is provided that before any telegraph company can exercise any of the powers or privileges contained in the act, they shall file their written acceptance with the Postmaster-General, of the certain restrictions and obligations contained therein. See Appendix D.

[1] Statutes of Ohio, 1852, § 3, with the proviso that nothing in the act shall be so construed as to authorize any telegraph company to condemn the use of the track or rolling stock of any road, for the purpose of transporting poles, materials, or employees of such telegraph company, or for any purpose whatever.

Statutes of Vermont, Revision of 1863, c. 88, § 7, which requires, however, that license to erect the posts shall first be had of such railroad company, by vote of the board of directors, or consent of the Superintendent. Sec. 8 protects the telegraph line from liability to seizure upon execution or attachment process against the railroad company; nor shall it be deemed to pass by any sale, transfer, or mortgage, which the railroad company may have made before, or might make after, the erection of the line.

streams, but with the express exclusion of any right to erect bridges over such streams.[1]

[1] Such is the provision in Michigan, California, Massachusetts, Connecticut, Wisconsin, Maryland, Missouri, and probably other States. See Appendix F, G, R, S, T, W, LL.

CHAPTER VI.

LIABILITY EX DELICTO OF TELEGRAPH COMPANIES; AND INJURIES TO TELEGRAPHS MADE CRIMINAL BY STATUTE.

§ 61. INCORPORATED telegraph companies are liable for torts, upon the same principle which determines the liability of individuals.

This liability may be enlarged by statute. Such enlarged liability may be imposed by the charter under which the company operates its line, or by general statute applicable alike to all telegraph companies.

In most of the American States, and also in England, penalties are imposed for the violation of many of the statutory requirements, as we shall hereafter see.[1]

§ 62. The obligations which rest upon telegraph companies in their relation to the public, springing, as they do, out of the public nature of their employment, are co-extensive with the objects and purposes of the work which they propose to do.

They are liable for all breaches of a general public duty, whereby special damage has accrued to an individual, and it is not necessary that any privity of contract should exist between the company and the

[1] See post, part 2, c. 9.

individual, in order to authorize an action for the injury.

To sustain such action, however, the individual must in all cases show special damage sustained by him; and it is not sufficient that the injury complained of is suffered by him in common with all other persons.

§ 63. Telegraph companies are under the obligations of a public duty, even where there is no special requirement by statute to that effect, to keep their lines in proper state of repair, and to have them so constructed as not to interfere with the rights of others; and are liable for all injuries caused by the bad or unsafe condition of their lines; as, where the plaintiff being a passenger in a stage-coach, and the coach coming in contact with the wire of defendants' line, which was hanging too low, by reason of which the coach was overturned, causing bodily injury to the plaintiff, she was held entitled to recover, in an action for damages against the telegraph company; it appearing that she was rightfully travelling upon the highway where the injury occurred.[1]

The statute, in this case, under which the telegraph company operated its line, required that the same should be so constructed upon the public highway as not to incommode the public in its use; but, without doubt, the same obligation would have rested upon the company, and the same liability, *ex delicto*, to the individual, had there been no such provision in the statute.

§ 64. But whenever it appears that the negligence of the plaintiff contributed to the injury complained of,

[1] Sarah Dickey *v.* Maine Telegraph Co. 46 Maine R. 483.

the company would not be liable, and the burden of proof is upon the plaintiff to show due care and vigilance on his part.

Thus, where the wires of a telegraph company "became slack and drooped so low" that the carriage in which the plaintiff was riding could not pass under it, whereby the carriage was overturned and the plaintiff injured, it was held, that it was not sufficient for a recovery that the plaintiff had proved the defendant, the telegraph company, were at fault. If the negligence or rashness or want of ordinary care, on the part of the plaintiff, concurred in producing the injury, there could be no recovery, and the burden of proof was on the plaintiff to show, affirmatively, the exercise of proper care and vigilance.[1]

[1] Robert Dickey & Wife *v.* Maine Telegraph Company, 43 Maine, 492. The following is the opinion of the Court: "In May, A.D. 1854, a stage-coach in which the female plaintiff was travelling on a highway in Northport, in the County of Waldo, came in contact with a telegraph wire extending across the way, and was overset, and she was injured thereby.

"The wire was owned and placed there by the defendants' company, and 'became slack, and drooped so low' that the carriage could not pass under it.

"The plaintiffs brought this action to recover pay for the damages sustained.

"The case is presented on the defendants' motion for a new trial, on the ground that the verdict against them was against the evidence, and also upon exceptions.

"It was not sufficient for the plaintiffs to prove that the defendants were in fault. To entitle themselves to a verdict the plaintiffs were bound to show that there was no negligence or want of ordinary care, contributing to the injury, on the part of the female plaintiff. She was required to exercise due and proper care to protect herself from injury. If her own negligence or rashness or want of ordinary care concurred in producing the injury of which they complain, the plaintiffs ought not to have recovered damages for it, against the defendant company.

"The burden of proof was on the plaintiffs to show, affirmatively, the

§ 65. It is the duty of telegraph companies to provide suitable instruments, posts, wires, etc., for the proper construction and efficient working of their line; and for failure in this respect they would be liable in damages to third persons[1] having no privity with the company, and also to those in privity of contract with it; but a greater degree of care and diligence would be required of the company, in case of one not in privity of contract with it who had suffered injury by such neglect of duty, than where the injury was suffered by one of its own agents or servants.

But in case of injury to its servants or agents, caused by any defect in the machinery connected with the construction of its line, the company would be

exercise of such due and proper care or vigilance on her part; and the defendant company allege that the verdict was against the evidence on this point. If the driver was guilty of neglect or want of ordinary care, the plaintiffs would be equally affected thereby, as if the female plaintiff were the driver.

"To prove the manner in which the accident, causing the injury, happened, the plaintiff introduced as a witness the driver of the carriage, David Harding, and the deposition of Henry Brown. The testimony of Harding, *as reported* in the case, not only fails to show that he used ordinary care and prudence, as a driver, at the time of the accident, but it contains plenary evidence of gross carelessness or rashness on his part, which manifestly contributed to the accident and the injury; and the deposition of Brown in no manner relieves the case from the effect of Harding's testimony. We think the verdict is very plainly against the evidence." See also Penn. R.R. Co. *v.* Aspell, 23 Pa. St. R. 147; Laing Colder, 8 Pa. St. R. 479.

[1] The duties of common carriers are, by the Supreme Court of Tennessee, expressed thus: They undertake that the road is in good travelling order, and fit for use; and that the engines and carriages employed are road-worthy, and properly constructed and furnished according to the present state of the art. Nashville & Chat. R.R. Co. *v.* John Messino, 1 Sneed (Tenn.) R. 220.

liable if it had failed to exercise reasonable care in providing proper machinery.

§ 66. It has been held, that it is not necessary to allege actual knowledge in the company of such defect, in an action against it by one of its servants for injuries sustained thereby: it is sufficient to allege the negligence of the company, and that the injury resulted therefrom, and under such allegation, the knowledge on the part of the company may be shown.

In the case of Byron *v.* The New York State Printing Telegraph Company,[1] the plaintiff, who was a servant of the company, was engaged in the duties of his employment in adjusting the wires and insulators upon one of the poles of defendants' line, and while he was fastened to the top of the pole for that purpose, the pole broke, and he was cast to the ground and injured; and the accident was caused by a defect in the pole not visible to the plaintiff, and of which he had no knowledge: the allegations were that the injury was suffered "by and through the carelessness, negligence, unskilfulness, and default of the defendants and their servants in providing, using, and suffering to be used a bad, insufficient, unsound, and unsafe telegraph pole." Upon demurrer to the declaration it was held, that it was unnecessary to allege knowledge of the defect in the pole on the part of the company, and that the allegation of negligence would be sustained by proving the danger from the defect in the pole, and that it was known to the defendants.

[1] 26 Barb. R. 39. See also Keegan *v.* The Western R.R. Co. 4 Seld. 175.

§ 67. The principle which determines the liability of the company to its agents and servants, is the same as in the relation of master and servant.

The duty rests upon the master, in his relation to his servant, to use reasonable care and diligence in providing all things necessary and essential in the scope of the work which the servant has to do, whether it be in the employment of fellow-servants,[1] or in providing suitable and proper instruments and machinery for the work which the servant has to perform.[2]

There is no warranty, however, of the absolute sufficiency of the machinery, and it would not be liable for injuries arising from latent defects, nor indeed from such patent defects as the servant was himself cognizant of. If the servant remained in the employ of the company with full knowledge of such defects, without informing the company thereof, or taking other precautions to have them remedied, he would be presumed to take upon himself the risks incident thereto.[3]

[1] The rule of liability of the company for injury by one employee to another, may be stated as follows: Where two persons are acting in a common employment under the same principal, if one should be injured by the negligence, unskilfulness, or rashness of the other, the principal is not liable to the injured party in an action grounded alone upon such negligence in the employee. Story on Agency, § 453 and notes, 2 Kent, 281, top page, and notes, 3 Mees. & Wels. 1.

[2] Nashville & Chatt. R.R. Co. *v.* Messino, 1 Sneed, 220; Keegan *v.* Western R.R. Co. 4 Seld. 175.

[3] In the case of Perry *v.* Marsh, 25 Ala. (N.S.) R. 659, the rule is thus stated: "Where a workman is employed to do a dangerous job, or to work in a service of peril, if the danger belongs to the work which he undertakes, or the service in which he engages, he will be held to all the risks which belong either to the one or the other; but where

§ 68. The obligation to provide suitable instruments, posts, wires, etc., is, in some of the States, expressly imposed by statute, and penalties inflicted for non-compliance.

By statute of Alabama of Feb. 10, 1862, it is made the duty of every telegraph company, at each and every point that the wires of any line of telegraph may cross any private or public road, to erect substantial, durable, and permanent posts or piers, to prevent the falling of the wires so as to obstruct or interfere with the travel on such road, and for failure so to do, and upon the falling of the wires, a penalty is imposed.[1]

By Revised Code of Delaware, 1852, c. 128, sec. 2884, it is provided that telegraph wires shall be attached to the poles at least twelve feet above the ground, except where they enter a house; and if any agent of the company having supervision of the line

there is no danger in the work or service by itself, and the peril grows out of extrinsic causes or circumstances, which cannot be discovered by the use of ordinary precaution and prudence, the employer would be answerable, precisely as a third person, if the injury or loss was occasioned by his neglect or want of care. In such a case the injury would be outside of the employment, and the employer would, as to such injury, be in fact a third person, and fall within the same rule as to responsibility."

In accordance with this doctrine, we would say that telegraphic operators take all the risk upon themselves of injury resulting from excessive charges of electricity derived from the atmosphere. They know the danger, and yet damage done by the fluid upon the wires could hardly be called the act of God, for the force is applied through artificial means, put into operation by the company.

Also see Skip *v.* Eastern Counties Railway Co. 24 Eng. Law & Eq. R. p. 396, where the plaintiff voluntarily undertook the dangerous duty of attaching certain cars to the engine, and was injured: held, that he was not entitled to recover, the company not being in fault.

[1] Appendix D.

shall suffer this provision to be violated, he shall suffer the penalties therein imposed.

By statute of Nevada, February 9, 1866, sec. 7, the owners of telegraph lines availing themselves of the provisions of the act shall at all times keep their line in as good condition and repair as may be practicable, and if they fail so to do, such failure shall work a forfeiture of all rights, privileges, and franchises belonging to such owner, or any person having an interest in the line.[1]

§ 69. A telegraph company is liable *ex delicto* for an injury done by its agents or servants to third persons; for misfeasance as well as non-feasance.[2]

In the discordant state of the authorities, it might be unsafe for us to lay down a general rule touching the superior's liability for wilful and injurious acts of agents. A full discussion of the subject in its general bearings is foreign to our purpose. In some cases the liability is denied.[3] Other authorities maintain the affirmative.[4] Whether the act was or was not done in

[1] See Appendix H, X.

[2] Drybury *v.* N.Y. & Wash. Print. Teleg. Co. 35 Pa. St. R. 298; Dunning & Smith *v.* Roberts, 35 Barb. 463; Birney *v.* N.Y. & Wash. Printing Teleg. Co. 18 Md. 341.

[3] Wright *v.* Wilcox, 19 Wend. 343; Croft *v.* Allison, 4 B. & Ald. 590. McManus *v.* Crickett, 1 East, 106, is usually cited as a leading case; also, see Lowell *v.* Boston & Lowell R.R. Corp. 23 Pick. 31.

The 26 & 27 Vict. c. 112, § 42, provides "that the telegraph company shall be answerable for all accidents, damages, and injuries happening through the act or default of the company, or of any person in their employment, by reason or in consequence of any of the company's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents or injuries."

[4] Phil. & Reading R.R. Co. *v.* Derby, 14 How. U.S. 468; Noyes *v.*

the actual discharge of duty, has been the turning-point in many instances; and in others, the form of action has controlled the decision.[1] We think that in this respect the analogy between telegraph companies and common carriers is so strong — indeed we assume that they are carriers — that these differences may be pretermitted for the present; because they are always held responsible for wilful acts of their servants in respect of goods.[2] The custody, sending, and delivery of messages are the chief, if not the only, occasions for an application of the doctrine to telegraph companies. We therefore say that they are liable for wilful and injurious acts of their agents in these respects. We will, however, observe further, that it has been held that a corporation is not liable for a wilful act of trespass on the part of its servant, even when authorized by the president and general agent of the company.[3]

And on the other hand the company would be liable for the acts of its servants or agents done in the legitimate course of their employment, even although they may have violated the instructions of the company in the particular act, if it be not an act of wilful trespass;[4] nor is it liable for their fraudulent representations made outside of the scope of their employment.[5]

Rut. & Bur. R.R. Co. 27 Vt. 110; 1 Red. on Railways, § 130, and notes, late edition.

[1] McManus *v.* Crickett, 1 East, 106; Phil. R.R. Co. *v.* Wilt, 4 Whart. 143; Ill. Cent. R.R. Co. *v.* Downey, 18 Ill. 259.

[2] See post, § 138.

[3] Vanderbilt *v.* Richmond Turnpike, 2 Comst. 479.

[4] Phil. & Reading R.R. Co. *v.* Derby, 14 How. U.S. 468.

[5] Mechanics' Bank *v.* N.Y. & N.H. R.R. Co. 3 Kernan, 599.

§ 70. Where the company, in the construction of its line, pursues the mode pointed out by its charter, or general statute authorizing its existence, and does only such acts as are proper and necessary to the construction and completion of its line, it is not answerable for injuries occasioned thereby to third persons, beyond the remedy given them by statute; but if it execute its work in a manner different from that authorized by its charter or general statute, as the case may be; or if, in pursuing the required mode, it executes its work in so negligent or wanton a manner, as to cause unnecessary damage, it is liable to an action *ex delicto* at the suit of the injured party.[1]

Wherever the statute gives a remedy, as a general thing, that remedy must be pursued; but the company would be liable to be sued at common law for any abuse of the power which the statute confers upon it.[2]

Where, in the construction of its line, it transcends the power given it by the statute under which it operates, as we have seen, a telegraph company may be sued in trespass, and at the suit of another corporation.[3]

§ 71. A telegraph company would be liable for the infraction of a patent right, and would have its right of action against third persons for any infringement of a patent to which it had the legal right.

[1] Dearborn *v.* Boston, Concord, & Montreal R.R. Co. 4 Foster, 187; Davis *v.* London & Blackwall R.R. Co. 1 Man. & Gr. 799.

[2] Crawfordsville & Wabash R.R. Co. *v.* Wright, 5 Ind. 252; Mason *v.* Kennebec & Portland R.R. Co. 31 Maine, 215; Turner *v.* Sheffield, &c. R.R. Co. 10 Mees. & Welsb. 425.

[3] The South Eastern Railway Co. *v.* The European & American Electric Printing Telegraph Co. & Friend, 24 Eng. Law & Eq. R. 513; ante, c. 3, § 31.

Several cases have come before the courts upon the question of interference with patent rights in relation to inventions in telegraphing.

A general discussion of the merits of the different inventions, and the principles which must govern the courts in deciding the respective rights of the parties, will be found in the cases referred to in the note.[1]

Only a mere reference to them need be made in the text, as to do more would require a statement at length of the facts presented in each case.

It would seem to be settled that there cannot be a patent for a principle,[2] nor for an effect. Two persons may use the same principle, or produce the same effect by different means, without interference or infringement, and each would be entitled to a patent for his own invention.

An interference, to amount to an infraction of a patent, must be an interference with patentable matter.[3]

§ 72. Any interference with the line of a telegraph company, or its other property, by third persons, would give the company a right of action for the injury. When it has established its line in accordance with the requirements of the law under which it

[1] Morse *v.* O'Reilly, 6 West. Law Journ. 102; Bain *v.* Morse, 6 West. Law Journ. 372; F. O. J. Smith *v.* J. W. Clark, 10 Am. Law Register, 185; O'Reilly *v.* Morse, 15 How. U.S. 62–142; The Electric Telegraph Co. *v.* Nott, 11 Jurist (O.S.), 157; ib. 590; The Electric Telegraph Co. *v.* Brett, 15 Jurist, 579.

[2] Boulton & Watt *v.* Bull, 2 H. B. 463; Hornblower *v.* Boulton, 8 T. R. 99; Le Roy *v.* Tatham, 14 How. U.S. 156; O'Reilly *v.* Morse, 15 How. U.S. 62.

[3] Bain *v.* Morse, 6 West. Law Journ. 372.

operates, it will be protected in the undisturbed use and enjoyment of the same.

The statutory provisions upon this subject are very severe, and a criminal liability is in most of the States imposed upon third persons, as we shall see;[1] they will afford an ample guarantee to telegraph companies for the undisturbed enjoyment of their rights in the operation of their line.

The general principle is clear that the law will afford its protection to the telegraph company in the enjoyment of its property of every description. When it has organized, and put its line into operation in the manner required by its charter, any injury to its line will give the company the right to recover damages against the party in a civil action, independent of statutory fines and penalties.

§ 73. In the recent case of Submarine Telegraph Company *v.* Dickens,[2] the question of liability for injury to a telegraph line was brought before the court, in England.

The plaintiff, the Submarine Telegraph Company, was the owner of a telegraph line between England and France; its cable extending from Dover to Calais.

The defendant was the owner of a Swedish vessel, and out upon the high seas its anchor became entangled in the plaintiff's cable, which was lying at the bottom of the sea. The plaintiff alleged in the declaration that the defendants so negligently and carelessly navigated their vessel and tackle, that the

[1] See post, c. 9.

[2] 15 C. B. (N.S.) 759. See The Jurist for 1864, vol. 10, p. 311.

anchor of the defendants' ship came in contact with the cable of the plaintiff and damaged it. The defendants pleaded that the cable was more than three miles from the English shore at the place where it was injured, and that they, the defendants, were aliens, and that the damage was committed in the act of drawing up their anchor, and in the ordinary course of navigation, and without knowledge of the position of the plaintiff's cable.

The case came before the court on demurrer to the pleas, and it was held that the declaration was good; and that the defendants would be liable in an English court if negligence were established, and that the court had jurisdiction if the injury occurred on the high seas, and if the defendants were aliens, provided they had been guilty of negligence in navigating their ship. Upon the question of negligence, the Court say, if the defendants had no knowledge of the situation of the cable, but had the means of knowledge, that would be sufficient proof of negligence.

§ 74. A telegraph company has a right of action, *ex delicto*, against any person, who, in any way, has injured it in the enjoyment or use of its property, or who has violated any of the reasonable rules and regulations which the law authorized it to adopt for the proper discharge of the duties connected with its public employment, as well as for injuring its posts, wires, operating apparatus, or other material used by it in its business; or for intercepting or in any way interfering with the messages transmitted over its line.

§ 75. Injury to the works of telegraph companies,

or obstruction or disturbance of their lines, is made criminal by statute, in Canada and in most of the States of the United States.

By the Consolidated Statutes of Canada, c. 67, sec. 21, "any person who wilfully and maliciously cuts, breaks, molests, injures or destroys any instrument, cap, wires, post, line, pier, or abutment, or the material or property belonging thereunto, or any other erections used for or by any line of electro-magnetic wires in operation in this Province, under any act in force herein, or maliciously or wilfully obstructs, disturbs, or impedes the action, operation, or working of the telegraph line, shall be guilty of a misdemeanor, and be punished by fine and imprisonment."

Similar provisions to the Canada statute are to be found in the statute regulations on the subject of telegraphs, in the States of Pennsylvania, Ohio, Virginia, Wisconsin, California, Maryland, Tennessee, Alabama, Connecticut, Illinois, Indiana, Massachusetts, and Florida.

By the New Jersey statute of March 5, 1853, sec. 6, "if any person or persons shall wilfully and unlawfully injure, destroy, or obstruct the use of any telegraph line constructed by virtue of this act, such person or persons so offending shall, for the first offence, pay to the said company the sum of one hundred dollars, to be recovered as debts of like amounts are by law recoverable, and be liable for all damages; and shall, for the second offence, on conviction thereof, be liable to imprisonment in the county jail not to exceed one year."

By General Statutes of Vermont, Revision of 1863,

c. 88, sec. 6, "if any person shall in any wise wilfully or intentionally cut, break, injure, or despoil any such telegraph wire or post, or other fixture so erected within this State, so as directly or indirectly to interrupt or impede the transmission of intelligence by said telegraph by means of cutting, breaking, or in any manner injuring such wire, post, or fixture, as aforesaid, or by wilfully interposing any other thing or material, or doing any act that shall injure, divert, impede, or interrupt the free passage of the galvanic fluid or influence along said line, or prevent the transmission of intelligence along the same, or do any act to impair the value, safety, or security of the same, each and every person so offending, or aiding or assisting in such offence, shall forfeit the sum of one hundred dollars, to be recovered by an action of debt founded on this chapter, in the name of the superintendent of such line of telegraph for the time being, in any court proper to try the same, for the use and benefit of the owner or owners of such telegraph; and shall also be liable to be tried and punished by fine and imprisonment, as is provided by law in other cases of malicious acts."

By act of February 3, 1860, General Laws of Minnesota, c. 12, sec. 2, "if any person or persons shall unlawfully and wilfully injure, destroy, or obstruct the use of any telegraph line constructed by virtue of the law of this State, such person or persons so offending shall for the first offence, on conviction thereof, pay to the company the sum of one hundred dollars, to be recovered as debts of like amount are recoverable by law, or be imprisoned in the county jail not exceeding

three months, and shall also be liable for all damages; and shall for the second offence, on conviction thereof, be liable to imprisonment in the county jail not to exceed one year, and be subject to pay to said company a sum not exceeding two hundred dollars, and shall be liable for all damages.

By statute in Delaware for such wilful and malicious injury, by cutting down or injuring any pole, or cutting, breaking, or displacing any wire of any telegraph company of the State so as to obstruct telegraphic communication, the person offending "shall forfeit and pay to such company, or to any one who will sue for the same, twenty-five dollars for the first offence, and fifty dollars for every subsequent offence; and when such penalty is sued for and recovered by any other than the agent of such company, one-half of the same shall be for the use of such informer;" there shall be no stay of execution, and if the plaintiff makes affidavit that the defendant has not sufficient property in the county to satisfy the judgment, the defendant shall be committed to prison for one month.[1]

By the Compiled Statutes of New Hampshire of 1853, c. 229, sec. 3, 4, the punishment provided for such offences is "by solitary imprisonment not exceeding six months, and by confinement to hard labor for life, or for a term not less than two years."

The Revised Statutes of Kentucky, 1860, c. 28, art. 14, sec. 5, provides that if "any person shall wilfully or maliciously injure, obstruct, or destroy a telegraph line, post, or pier, or the material or property belonging to or attached to a telegraph, he shall be

[1] Revised Code of 1852, c. 128, § 19.

confined in the penitentiary not less than two nor more than ten years."

The Revised Code of Louisiana, 1856, § 104, provides that for such offences, the party offending "shall on conviction be punished by fine not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding one year, or both, at the discretion of the Court."

By statute of Georgia, Act of 1854, February 15, sec. 1, "if any person shall wilfully destroy, damage, or in any way injure said telegraph wires, posts, or fixtures, he, she, or they shall be guilty of a high misdemeanor, and may be indicted in the Superior Court of the county where such damage may be done; and upon conviction shall be imprisoned at hard labor in the penitentiary for a time not exceeding three nor less than one year, at the discretion of the Court."

By the statutes of the province of New Brunswick, Revision of 1854, c. 153, sec. 7, it is enacted that "whoever shall maliciously cut, injure, or destroy the posts, wires, or other apparatus or property connected with or belonging to any line of electric telegraph, now or hereafter to be established, shall be guilty of felony, and be imprisoned for any term not exceeding seven years."

CHAPTER VII.

REMEDIES.

§ 76. The same remedies which exist in favor of, or against, other corporations, may be had in case of telegraph companies.

A general discussion of this subject will be found in works on corporations. This chapter will be confined to a general reference to the ordinary remedies in Courts of Law and Equity, with a more particular and detailed statement of the remedies provided by statute pertinent to telegraph companies.

§ 77. A company may be sued in the place where it has its usual place of business.[1]

Jurisdiction of Federal courts over telegraph companies, considered as citizens within the meaning of the Constitution of the United States, depends upon considerations and conditions applicable alike to all corporations.[2]

The person upon whom process must be served, in order to bring the company before the Court, is usually designated by general statute on the subject of corporations or telegraph companies, or in the char-

[1] The place of business of a corporation for the purposes of a suit is the same as the residence of a natural person. 1 American Railway Cases, p. 142, n. 1.

[2] Ohio & Miss. R.R. Co. *v.* Wheeler, 1 Black. 296, and the cases there cited; Saml. Works *v.* Junction R.R. Co. 5 McLean, 425.

ter when the company is organized under special act of incorporation.

Generally, service is to be made on the president[1] or one of the directors; but in some States it may be upon any clerk or agent of the company.[2]

§ 78. Wherever a specific duty is imposed upon the company by law, it may be compelled to perform that duty by *mandamus;* this is the appropriate remedy in case of the non-performance of duties imposed by statute.[3] It may be issued at the suit of the company against the officers of a municipal corporation, or others, to compel them to perform the duties enjoined by statute, with reference to the organization, or the successful operation of the company.[4]

If the act under which the company claimed its legal existence was imperative upon the company to complete its line, this duty may be enforced by *mandamus:* it has been so held in case of railways.[5]

[1] In the case of The Illinois & Mississippi Telegraph Company *v.* Kennedy, 24 Ill. R. 319, it was held, that where the statute provided that the service should be on the president, a return showing service on A. B., "*as* president" of the company, is not sufficient to bring the company into court."

[2] By Revised Statutes of Missouri, c. 156, § 10, process or notice served upon any clerk or agent of any telegraph company, at any of the offices of such company, shall be sufficient service for all purposes whatsoever. Appendix W.

[3] Angell & Ames on Corp. c. 20; Great Western Railway *v.* Reg., Excheq. Ch. 18 Law & Eq. R. 211.

[4] Justices of Clark *v.* P. W. & River Turnpike Co. 11 B. Monroe, 154; Louisville and Nashville R.R. Co. *v.* County Court of Davidson County, 1 Sneed, 637; Carpenter *v.* County Com. of Bristol, 21 Pick. 258.

[5] Hodges on Railways, 536, 540, and cases cited; Great Western Railway Co. *v.* Reg., Excheq. Ch. 1853, 18 Eng. Law & Eq. R. 211; Reg. *v.* York & North Midland Railway, 16 Eng. Law & Eq. R. 299.

So it may be compelled to establish a uniform rate of charges in the transmission of messages.[1]

It is also the appropriate remedy, at the instance of either the company or the land-owner, to compel commissioners to assess damages, or an inferior tribunal to appoint the commissioners, where this is the mode required by statute.[2]

We may state, generally, that wherever a specific duty is enjoined by statute, and no specific remedy is provided, *mandamus* is the proper remedy to compel a performance of that duty; but if any other specific and adequate remedy is provided, it must be pursued.[3]

This remedy is regulated by statute in England and most of the American States.

§ 79. The remedy by information in the nature of a *quo warranto*, at the instance or on behalf of the Government, is the appropriate remedy in a proceeding against a corporation for usurpation of a franchise, or for non-user or misuser of franchises; of the same character is the remedy by *scire facias*.

The State alone can insist upon a forfeiture, and may waive it;[4] and a forfeiture can never be declared in a collateral proceeding.[5]

Proceedings in case of insolvency of corporations; non-user or abuse of franchises; the mode of disposing of the assets in case of insolvency, or other

[1] Clarke *v.* L. & N. Union Canal, 6 A. & E. (Q.B.) R. 898.

[2] Illinois Central R.R. Co. *v.* Rucker, 14 Ill. 353; Carpenter *v.* County Commissioners of Bristol, 21 Pick. 258.

[3] Rex *v.* Nottingham Old Water Works, 6 A. & E. (Eng. K.B.) 355.

[4] Angell & Ames on Corp. c. 22, § 777.

[5] James Johnson *v.* Churchwell, 3 Head, 146; People *v.* Miss. & Atlantic R.R. Co. 14 Ill. 440.

cause, authorizing the winding-up of the affairs of a corporation, are now as a general thing specially regulated by statute in England and most of the American States.

But these statutory provisions would not defeat the jurisdiction of Courts of Equity, where they would otherwise have jurisdiction.[1]

§ 80. Courts of Equity now exercise a very enlarged jurisdiction over corporations, both of an injunctive and remedial character.

They will wind up the affairs of an insolvent corporation at the suit of its creditors; and the unpaid stock, as well as the other indebtedness of a general character due to the corporation, will be subjected to the creditors' claims.[2]

They will grant relief by injunction where the company exceeds the powers granted by its charter;[3] or restrain one company from interfering with the franchises of another;[4] or restrain the company from doing irreparable damage to an individual;[5] or in case of a nuisance where the act appears *per se* to be a nuisance.

§ 81. When it is manifest that the act complained of is a nuisance, and the right of the party complain-

[1] Coats *v.* Clarence R.R. 1 Russ. & M., Eng. Ch. 181.

[2] Mann *v.* Currie, 2 Barb. 294; Hightower *v.* Thornton, 8 Geo. 486; Marr *v.* Bank of West Tennessee, to be reported in 4 Coldwell, Tenn. R.

[3] Webb *v.* The Manchester & Leeds Railway Co. 1 Railw. Cases (Eng.) 576.

[4] Cory *v.* Norwich & Yarmouth Railway, 3 Railway Cases (Eng.) 524.

[5] Jerome *v.* Ross, 7 John. Ch. R. 315; Spooner *v.* McConnell, 1 McLean, C.C. R. 337; Bonaparte *v.* Camden & Amboy R.R. 1 Baldwin (N.J.) 205.

ing is clear, Courts of Equity will interfere at once, without waiting for a trial at law; but where the thing complained of is not a nuisance, but only capable of becoming such; or it does not clearly appear in what way it is a nuisance or that the injury to private property is irreparable, they will not, as a general thing, grant the injunction until the matter has been determined at law.[1]

[1] Attorney-General at the relation of Baron Rothschild *v.* United Kingdom Electric Telegraph Co. 30 Beav. 287; Attorney-General *v.* The United Kingdom Electric Telegraph Company, 30 Beav. 292; Cases in Chancery.

The first of these cases was an information and bill by the Attorney General at the relation of the Baron de Rothschild, and by the Baron himself as plaintiff, against the company, to prevent them interfering with the public highway in the construction of their lines of telegraph. This company, without any parliamentary powers, though they professed to have them, had commenced to construct their line along many of the public roads, and, amongst them, along the public highway at Acton, opposite the property of which Baron Rothschild was the owner in fee. They effected the purpose, first, by erecting posts from fifteen to forty feet high along the footpath; but they had removed them, and had then placed their wires in troughs underneath the surface of the roads. The information also stated that the company had also dug a trench of about a foot and three-quarters in depth, and a foot and a quarter in width, along the whole or greater part of the frontage of the plaintiff's land, and about five feet from the plaintiff's boundary fence in the footpath adjoining the same, along which plaintiff and her Majesty's subjects were entitled and authorized to travel, etc., and were laying their troughs therein, and were proceeding to complete their works, and this without authority; it was stated that this was a public nuisance: and the Baron stated, the company were constructing their works contrary to his will, and in spite of his remonstrance, and were attempting to obtain proprietary rights and easements in the soil of the footpaths, in derogation of his proprietary right in such soil. It was also stated, they were constructing similar works along other highways, so as to create nuisances to the public.

The information prayed for an injunction to restrain the company from digging up or disturbing the public road, or the footpath abutting upon and adjoining the plaintiff's land; an injunction against the company to restrain them from making, issuing, circulating, any statement or repre-

§ 82. Where it appeared that the legal right of the plaintiff as against the defendant was open to doubt,

sentation, that they had parliamentary powers; and also from digging upon or disturbing all other public highways.

The Master of the Rolls said, "I cannot grant an injunction in the present state of the case.

"This is an information and bill, by which the plaintiff complains of an injury done to his own property, and the Attorney-General complains of an injury done to the public. It is necessary to consider these matters of complaint separately.

"With respect to the private property of the plaintiff, the evidence does not show that it is injuriously affected. Assume the fact to be as argued, that the soil in the road belongs to the plaintiff, there is nothing at present which affects him with any injury whatever. There might have been originally some inconvenience produced by the erection of the posts in December, 1860, but these have been taken down, except that some pipes or wires have been placed in the soil underneath the public highway. I do not, at this moment, intend to express any opinion whether it is an invasion of his private rights or not; but I am clear that there is no irreparable injury to him which requires the interposition of this Court, prior to the hearing of the cause. Whether this Court will then do any thing is another matter, but this Court only interferes by interlocutory injunction to prevent property from injury about to be done to it; and even where the injury is unquestionable, as was laid down in Deere *v.* Guest (1 Myl. & Cr. 516), if it has been already completed, as it is in this case, the Court does not interfere by way of interlocutory judgment, but waits until after some proceedings at law have been taken, before it will interfere." The Court stated, that what the company proposed to do would not injuriously affect the Baron's property, nor would the work already done interfere with the beneficial enjoyment of his property. "I have read the affidavits of the other persons, who say that their property is injured, but nothing is more clear than this (I am keeping distinct the questions of injury to private property, and the injury to the public), that one man cannot come into this Court and complain of any injury affecting the property of another person. That other person, if his property is injuriously affected, must come to this Court, and bring forward his own case, and request the interposition of this Court to protect him from having his property injured, or injuriously affected by the acts of the defendant. So far, therefore, as the information and bill relates to private property, I am compelled to confine it exclusively to the property of the plaintiff, and say that he has not shown that any such injury is inflicted on him as will entitle him to an injunction.

the Court would not grant the injunction, but the plaintiff must first establish his right at law. Thus,

"As regards the public, the case resolves itself into a question of nuisance, and upon the evidence of the plaintiff, it seems very doubtful whether there is any nuisance or not. There may be to a private person *damnum absque injuria*, which will support an action and get nominal damages, without entitling the plaintiff to any injunction; but, with respect to a nuisance, there must be some injury to the public shown to exist before any injunction can be granted. Whether it be shown here, I express no opinion further than this, that the Court does not interfere to abate, or to prevent the continuance of, a nuisance, unless it is clearly shown that there is an injury to the public, which is not done here; and in that case, the Court leaves the party complaining to establish the fact that the act done is a nuisance at law before it gives its aid by way of injunction.

"I cannot, therefore, make any other order than that I give the plaintiff and the informant leave to take such proceedings at law as they may be advised; and I allow the rest to stand over."

In the case reported in 30 Beav. 292, the cause came on upon a motion for a decree.

The Master of the Rolls said, "The case depends upon a legal right, which must be established to the satisfaction of the Court, before the equity can be administered; without it, it would be impossible to say that either the acts of the company or the works amounted to a nuisance. The information and the bill must therefore stand over, in order that the Attorney-General, as the informant, may take such proceedings at law as shall be thought fit; and also in order to enable the plaintiff to bring such action as he may be advised. I shall therefore retain the information and bill for a year, and reserve the costs, until the result of the proceedings at law be known."

In the case of The City of Halifax *v.* The Nova Scotia Elec. Teleg. Co., Cochran's Rep. vol. 3, part 1st, Supreme Court of Nova Scotia, Michaelmas Term, 1859, it appeared that, by the local act of the Province, the company, the defendant, had the right to erect lines along the streets and highways, so as not to interfere with the right to travel thereon. The defendant had erected the posts along the streets of the city of Halifax.

Two actions had been brought in the lower court for breaking the soil of the street without permission; one by the City of Halifax, and the other by the Street Commissioners against one Quinn, who had contracted with the defendants to erect the posts.

Judgment was given for the plaintiffs in both cases, and an appeal was taken, and a writ of injunction was moved for, the motion being based

in The Electric Telegraph Co. *v.* Nott,[1] the question was, whether the patent right of the plaintiff had been infringed by the patent right of the defendant. The plaintiff had filed a bill for injunction to restrain the defendant from exercising the right he claimed under his patent. The question was not, Has the plaintiff the right to what he claims? — this was assumed to be so; but, whether or not the defendant's claim infringed upon the plaintiff's; and the parties were left to settle this question at law.

§ 83. An injunction will not be granted, upon the application of a telegraph company, to prevent an individual from transmitting messages over a rival line, the company making the application alleging that its own line was the more direct of the two. "There is no obligation upon a person sending a message, to select the shortest or the longest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to any one, unless he has entered into a contract to forward all such messages on a particular line. No such allegation is made in the bill, and there is no charge that the Western Telegraph Company has been molested in the exercise

upon affidavits, to restrain the defendants from erecting the posts until the right to do so was adjudicated upon by the full Bench. The affidavits, however, not disclosing that the streets were obstructed by the erection of the posts, the application was refused; the Court holding that an absolute necessity must be shown to exist for an injunction of the Court, otherwise the injunction could not be granted. The affidavits disclosed the fact that the public peace was endangered by the erection of the posts, a number of the poles having been cut down by the citizens; but the Court held this was not sufficient to authorize the issuance of the injunction.

See The European & American Submarine Telegraph Company *v.* Elliott, 12 Law Times (N.S.), 416.

[1] 11 Jurist (O.S.) p. 157.

of its patent rights, except by the transfer of its business to other lines; and it is not alleged that these lines are prohibited from carrying messages by reason of their contiguity to the plaintiff's lines."[1]

§ 84. Injunction may be granted against the company, to restrain it, where it is proceeding to take lands *in invitum*, contrary to the mode provided by statute, or without complying with whatever conditions precedent are provided by statute, or the charter if specially incorporated.[2]

§ 85. Courts of Equity will decree specific performance of contracts between individuals and telegraph companies, or between different companies, as they would in cases between individuals.[3]

§ 86. The statutes on the subject of telegraphs, in several of the American States, make the stockholders personally liable for the debts of the company.

By the statutes of Michigan it is provided in reference to telegraph companies, "that the stockholders of every association organized in pursuance of this act shall be jointly and severally liable for the payment of all debts and demands against such association which shall be contracted, or which shall be, or shall become, due during the time of their holding such stock; and no stockholder shall be proceeded against for the collection of any debt or demand

[1] The Western Telegraph Company *v.* Penniman & King, 21 How. U.S. 460.

[2] River Dun Navigation Co. *v.* North Midland Railway Co. 1 Railway Cases (Eng.), 135; Hyde *v.* The Great Western Railway Co. 1 Railway Cases (Eng.), 277.

[3] Storer *v.* Great Western Railway, 3 Railway Cases (Eng.), 106; Ingo *v.* Birmingham W. & S. V. Railway Co. 23 Eng. Law & Eq. R. 601.

against such association, until judgment thereon shall have been obtained against the association, and an execution on such judgment shall have been returned unsatisfied in whole or in part, or unless such association shall be dissolved."[1] The Virginia statute is the same.[2] There is a similar provision in the New York statutes, but with the further stipulation that "the liability of the stockholder shall not exceed twenty-five per cent in amount the amount of stock held by him."[3] So in Maryland.[4]

It is provided by the New Jersey[5] and Florida[6] statutes, that the subscribers to the capital stock of the company shall not, in any event, be responsible for any amount beyond their subscriptions.

The statute of Wisconsin provides for the personal liability of the stockholder to the extent of his stock, after the corporate property shall have been sold, and execution returned unsatisfied in whole or in part; but this liability does not exist for debts contracted after he has transferred his stock; and, that no person holding the stock in the character of executor, administrator, guardian, or trustee, or as collateral security, shall be personally liable as a stockholder, but the person pledging the stock shall be considered as the holder of the stock, and personally liable accordingly.[7]

§ 87. Where the statute makes the stockholder

[1] Compiled Statutes of Michigan, 1857, c. 70 (Sec. 2056), § 8. Appendix T.

[2] General Acts, c. 149 (May 26, 1852), § 9. Appendix A.

[3] Rev. Stat. N.Y., edition of 1859, c. 18, title 17, § 10. Appendix AA.

[4] Code of 1860, art. 26, § 114. Appendix R.

[5] Nixon's Digest, 1861, Telegraphs, 8. Appendix Z.

[6] Laws of Florida, c. 781, § 7. Appendix I.

[7] Revised Statutes 1858, c. 76, §§ 12, 13. Appendix LL.

personally liable, without in terms confining his liability to debts created during the time he was a stockholder, it seems to be an unsettled question whether his liability would extend to debts created after he ceased to be a stockholder.[1]

§ 88. In some of the States the consolidation of telegraph companies is provided for by statute.

In Ohio it is provided that where two or more telegraph companies desire to consolidate themselves into a single corporation, they may do so in the same manner, and subject to the same rules, as provided in case of railroad companies. The statute in relation to railroad companies, after giving the details of the mode of organization required, provides, that the new company shall have all the rights, privileges, and franchises of the original companies, and be subject to their liabilities, and "all the debts, liabilities, and duties of either company shall thenceforth attach to such new corporation, and be enforced from the same, to the same extent, and in the same manner, as if such debts, liabilities, and duties had been originally incurred by it."[2]

The New York[3] statute provides that any tele-

[1] Chesley *v.* Pierce & Sawyer, 32 N.H. 388; where it is held, under the statutes of New Hampshire, that the liability is confined to the time of being a stockholder. See on this subject Moss *v.* Oakley, 2 Hill, 265; Curtis *v.* Harlow, 12 Met. (Mass.), 3; Allen *v.* Sewall, Sup. Ct., New York, reported in 2 Wend. 327; but reversed in 6 Wend. 335, by Court of Errors & Appeals.

In Deming *v.* Bull, it was held, under the charter, that those who were stockholders at the date of the note, and those who were so at commencement of suit, were jointly liable. 10 Conn. 409.

[2] Revised Statutes of Ohio (1860), § 48. Appendix CC.

[3] New York Revised Statutes, 5th edition (1859), vol. 2, title 16, § 15, Ch. Corporations. Appendix AA.

graph company formed or incorporated under the telegraph act of 1848, "may unite with any other telegraph company."

It appears that there is no provision in the New York statute, as there is in the Ohio statute, providing expressly that the consolidated company shall be liable for the debts of the original companies; but only authorizing the original companies to "unite."

§ 89. The English authorities hold that the consolidated company would be bound for the obligations of the original companies, without any special provision.[1]

The provision that the new company shall have the powers and privileges of the original companies, confers on the new company the privileges of either of the original companies to the extent of the line they occupied before the consolidation: so held in case of railroads.[2]

§ 90. In some of the American States a special remedy is provided by statute for the ascertainment of the damages to parties who may be injured by the construction of telegraphs.

In a majority of the States, however, there seems to be no provision on the subject, probably for the reason that actual damage sustained by the construction of telegraph lines is of so rare occurrence.

In the States which have this matter regulated by

[1] See cases cited in 1 Am. Railway Cases, 96; Phil., Wilm., & Balt. R.R. Co. *v.* Howard, 13 How. U.S. 307, where it is held that in an action against the consolidated company upon a contract made by one of the original companies, the admission or act of such original company will bind the consolidated company by way of estoppel *in pais*.

[2] Phil. & Wil. R.R. Co. *v.* State of Maryland, 10 How. U.S. 376.

statute, appraisers, or commissioners, or juries of view. are designated for the purpose of appraising the damage sustained.

§ 91. The New York statute provides that if any person over whose lands the telegraph line shall pass, upon which the posts, piers, or abutments shall be placed, shall consider himself aggrieved or damaged thereby, the County Court of the county within which the lands are, on application by such person, and on notice to the company, shall appoint five discreet and disinterested persons as commissioners, who shall be sworn, and they, or a majority of them, shall make a just and equitable appraisal of all the loss or damage sustained by the applicant, duplicates of the appraisement to be reduced to writing, and signed by them, or a majority of them, one copy to be delivered to the applicant, and the other to the company on demand; and in case any damage shall be assessed to the applicant, the company shall pay it, with costs of appraisement, which are to be ascertained in the award.[1]

The Missouri statute is similar, except it provides for three instead of five commissioners.[2] The statute of Michigan[3] is the same as in Missouri, except it provides that the application shall be made to the Circuit Court of the district in which the lands lie.

The statute of Virginia is the same as in New York, except it provides the application to be made

[1] Revised Statutes, edition of 1859, c. 18, title 17, § 6. Appendix AA.

[2] Revised Statutes 1855, c. 156, Telegraph Companies, § 4. Appendix W.

[3] Compiled Laws of Michigan, 1857, c. 70, § 6. Appendix T.

"in the County Court, or Corporation Court of the county."[1]

The statute of California[2] is also the same, except that the application is to the County Court, who shall appoint three commissioners, and with the further stipulation that in no case shall the applicant have damages when application is not made within three months after the erection of the line.

The Connecticut statute[3] requires the appraisal to be approved by the Court, and also that a person entitled to nominal compensation, who will not yield the same, may demand it by leaving a written notice at some telegraph office connected with the line; and, if the parties cannot agree, the owners of the line shall make application for appraisal, which shall be made in the same manner as in the other case.

The Illinois statute[4] is substantially the same as the Michigan statute.

By the statute of Massachusetts[5] the application is to be made to the selectmen of the town, or mayor and aldermen of the city, within three months after construction of the line; the selectmen shall appoint appraisers, who shall proceed as in New York statute, and also, if they find the party has suffered no damage, he shall pay the costs; it is further pro-

[1] General Acts, 1852, c. 149, § 6. Appendix KK.

[2] Wood's Digest of 1861, 92. Telegraph Companies, article 3365, § 151. Appendix F.

[3] Revision of 1866, title 7, c. 7, §§ 567, 568. Appendix G.

[4] Revision of 1858 (Sess. Laws, Feb. 12, 1853, p. 35), § 6. Appendix K.

[5] Supplement of 1854 to Revised Statutes, c. 93, § 4. Appendix S.

vided that the party may have the question submitted to a jury, to be determined as in case of town and private ways. If the jury increase the damages, the company shall pay them and costs; otherwise the charges to be paid by the party.

The Vermont statute[1] provides for the appraisement of damages by the selectmen of a town, or mayor and aldermen of a city; the same to be paid by the company before any erections are made; the decision of the selectmen or mayor and aldermen to be final.

The Iowa statute[2] provides for the empanelling of a jury, who shall submit their report, and shall set apart, by metes and bounds, the lands to be taken, and assess the damages occasioned thereby; and no deduction shall be made for any supposed benefit to the owner from the erection of the works. A writ of inquiry may issue in vacation to ascertain damages. When the damages are paid in the mode pointed out, the Court shall decree a conveyance of the land to the company.

The Maryland statute[3] provides that a jury shall be summoned before a magistrate, who shall make their appraisal, and return it to court for confirmation, which shall be done unless cause shown.

The company must pay the damages before proceeding to erect its line.

In Ohio,[4] the proceeding to determine damages, and for condemnation of land, may be instituted in any

[1] Revision of 1863, c. 88, § 5. Appendix RR.

[2] Revision of 1860, c. 55 (Code, c. 46), § 1282 (763), 1294 (775). Appendix M.

[3] Code of 1860, art. 26, §§ 109–112. Appendix R.

[4] Acts of 1852 (passed May 1, 1852), § 4. Appendix CC.

county where the land lies; and this proceeding may embrace other lands, although lying out of the county.

In Oregon,[1] the party and the telegraph company each select an appraiser, and they shall select a third, all of them to view the land and assess the damages, which shall be final; the award, sworn to, must be filed in the Clerk's office of the county where made.[2] Damages must be claimed within twelve months after erection of line. The Nevada[3] statute provides for the selection of appraisers in the same way; and if the company tenders the amount appraised, it may proceed with its line, with right of appeal to the party, any time within three months after the appraisement, to the District Court of the district where the lands lie.

In Ohio, it has been held, that where it is provided that damages shall be assessed by a jury (and this is guaranteed by the Constitution of that State), a jury of twelve persons is presumed to be intended.[4]

§ 92. Such special remedy provided by statute is exclusive, and an action at common law for injuries which should have been properly embraced in the appraisement cannot be maintained, nor would the party be allowed to show that such injuries were not in fact included in the assessment, as it will be conclusively presumed the appraisers did their duty, and

[1] Compilation of 1866, c. 54, § 3. Appendix DD.

[2] The award is a judicial act, and unless appealed from, becomes *res adjudicata;* Vermont Cent. R.R. Co. *v.* Baxter, 22 Vt. 365; Clark *v.* Boston, Concord, & Montreal R.R. Co. 4 Foster, 114.

[3] Laws of Nevada, c. 17 (act of Feb. 9, 1866), § 6. Appendix X.

[4] Lamb *v.* Lane, 4 Ohio State, 167.

it can only be made to appear that they did not do so, in a direct proceeding to set aside the award.[1]

If there were fraud in the proceedings, however, it would be different.

The fair market value of the land taken — if land be absolutely and exclusively appropriated by the company in constructing its line — is the measure of damages to be estimated in the appraisement.

§ 93. The same general principles which will determine questions of consequential damages in case of railways, would be applicable to telegraph companies; but cases will be of such rare occurrence that they will not be considered here; the reader will find them treated of in the standard works on railroad law.

If there be fraud in the proceedings upon which the award of the appraisers is based, or if their assessment is excessive, or improper evidence be admitted, or the award is based upon a mistaken view of the law, it will be set aside.[2]

§ 94. In those States where the statute does not expressly provide that notice must be given to the company, notice should nevertheless be given to make the proceedings valid, unless the company by its appearance waives it.[3]

[1] New Albany & Salem R.R. Co. *v.* Connelly, 7 Indiana, 35; Furniss *v.* Hudson River R.R. Co. 5 Sandf. 551; Dearborn *v.* Boston, Concord, & Montreal R.R. Co. 4 Foster, 179; Hueston *v.* Eaton & Hamilton R.R. Co. 4 Ohio State, 685.

[2] Troy & Boston R.R. Co. *v.* Lee, 13 Barb. 169; Penn. R.R. Co. *v.* Heister, 8 Pa. St. R. 445.

[3] Cruger *v.* Hudson River R.R. Co. 2 Kernan, 190.

PART II.

OF THINGS PECULIAR TO TELEGRAPH COMPANIES.

PART II.

OF THINGS PECULIAR TO TELEGRAPH COMPANIES.

CHAPTER I.

THE NATURE OF THE ENGAGEMENT OF TELEGRAPH COMPANIES IN RESPECT TO MESSAGES.

§ 95. Prompt and speedy communication between different localities is one of the most urgent wants of the present age. The art of telegraphing has attained such perfection that time and space are no longer estimated as barriers to an interchange of ideas. Telegraphing has become alike necessary in war and peace; in diplomacy, commerce, and private negotiations. It has become important in the dissemination of public intelligence. It will doubtless become one of the most valuable auxiliaries in the administration of justice.

To meet this demand, telegraph companies are chartered, and they engage to subserve the public interests by transmitting intelligence.

They receive written messages at one place, and undertake to deliver the same words or symbols to the party addressed, at another place.

This is a bailment. All other persons or corporations who render similar services in the discharge of a duty to the public, are common carriers.

In considering the nature of this engagement, it is proper to leave out of view the appliances used in its performance. The message is to be delivered with literal accuracy. Nothing is to be changed; no additional value is to be imparted by the bailee. There is no occasion for care, skill, and labor upon the message, except as to the transmission, because it is the entire and finished work of the sender.

Locatio operis faciendi has no place in a correct definition of the nature of this engagement. The company is not even bound to accept a message, written in any other than the national or statutory alphabet, although they have no right to require that it should be written in the national or statutory language. The employer may combine letters as he wishes, and the company is not at liberty to translate, change the collocation, or correct the orthography.

The engagement, then, is to receive, transmit, and deliver, according to directions, a prescribed form of letters and words, commonly called a message.

§ 96. This work is accomplished with marvellous rapidity by means of electricity, operated and controlled through the instrumentality of batteries, wires, etc. Acting under the authority of the State, they are secured in certain rights, and are burthened with the performance of corresponding duties.

The subsequent chapters will be devoted to the discussion of their rights and duties in their relations to the public; the extent of their responsibility in

respect to messages; the use of their lines by third persons as a medium of contract; their responsibility for messages transmitted over connecting lines; the rules of evidence affecting them and their business; the rule of compensation in case of damage incurred; and the extent of their responsibility criminally, in respect to messages.

§ 97. We have called the delivery of the message to the company for transmission, a bailment.[1] It is possible to suppose a case where the message is dictated orally in the hearing of an operator, and he may communicate it to another operator at a distant station, who might deliver it to the party addressed, without the communication ever having been reduced to writing.[2]

But this is not the mode in which telegraph companies undertake to transmit messages, and, so far as we know, all their rules and regulations are in reference to written messages. Indeed, in the United States, under the provisions of the Stamp Act, they had no right to transmit an oral message.

Their undertaking, therefore, is in relation to written messages. Such messages have a distinct, legal entity. If the original idea of bailment was predicated upon things tangible, — things of inherent

[1] Mr. Justice Story gives the following definition of bailment: It is "a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust." Story on Bailments, § 2.

[2] In Durkee *v.* Vermont Central R.R. Co. 29 Vt. R. 127, it is said, "A telegraph communication ordinarily is in writing in the vernacular at both ends of the line, and must of necessity be so at the last end, unless the person to whom it is addressed is in the office at the time."

value, — then, we think it may be safely assumed, that written messages have such a tangible existence as will make them susceptible of actual bailment.

They have all the distinctive traits or qualities of unpublished manuscripts and private letters, and rest upon the same foundation as that which sustains every other species or description of property; namely, "the right which every man has to the exclusive possession and control of the products of his own labor."[1]

But outside of all design of authorship or publication or literary property, writers of private letters possess such a right of property in them, that they can never be published without their consent, unless required by purposes of justice.[2] Literary compositions and ordinary letters of friendship or business, have in them precisely the same elements of property;[3] and the protection which they receive from the courts is founded upon natural justice, and "a right of property in them." Telegraphic messages are letters forwarded in part by electricity. They are the subject of a variety of valid contracts, and are recognized as chattels to all intents and purposes, by the statutes authorizing and regulating telegraph companies, as well as by the parties contracting about them. They are received into corporal and exclusive possession, and held by the company for transmission, and also as instruments of evidence for various purposes. They were stamped as other documents, and are frequently copyrighted. They may be destroyed or

[1] Curtis on Copyright, 84.
[2] Gee *v.* Pritchard, 2 Swanst. 418.
[3] Woolsey *v.* Judd, 11 How. Pract. R. 49.

stolen,[1] and the trespasser will incur civil and criminal responsibility. When transmitted over the wires, and reduced to writing again at the office of destination, that message, by contract, has the same legal entity as the first; and the rights of the respective parties in relation to it are the same. It is as susceptible of loss or destruction then, as the original or any other chattel. By a faithful performance of its engagement in reference to messages, the company may acquire profits, and incur liability in damages in case of failure.

§ 98 It superinduces no hardship or injustice for the courts to enforce obligations predicated upon the idea that they are the subject-matter of bailment. If it could be denied that this engagement of telegraph companies was in reference to things having a tangible existence and value, yet the company would enter into the same engagement in reference to them, as that which we say is applicable to written messages. In either view, the company is bound to the same care, diligence, and skill; and would be alike responsible for losses occasioned by default. Error in transmitting a message is loss. Changing a letter or a symbol may destroy the meaning of the writer, so that the

[1] But see Ellis v. Am. Teleg. Co. 13 Allen, 226, where it is said, "No property is committed to his hands. He has no opportunity to violate his trust by his own acts of embezzlement," etc.; which follows Johnson, J., who said, in 45 Barb. 274, that there "is nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation."

In Shields v. The Wash. & N. O. Teleg. Co. it was held, that in that particular case the message had no appreciable value. We do not remember any other authorities sustaining this view.

person addressed may be actually misinformed and misled.

The loss of the message may be as complete by error in the transmission, as loss of goods in the hands of the carrier caused by fire.

The engagement of telegraph companies is to receive and to transmit and to deliver, according to directions, a prescribed form of letters and words. This engagement is in the nature of the bailment *locatio operis mercium vehendarum*, and belongs more properly to this head than to any other class of bailments.

§ 99. The nature of their engagement has been considered in several cases in the American courts.

In Birney *v.* N. Y. & Wash. Printing Teleg. Co.[1] it is said, "What does a telegraph company do? It receives a written message for transmission. It uses machinery to reproduce the words of that message at a distant point, either by direct copying of it, under some alphabetical system, or by translating the message into certain symbols, which, marked upon paper at a distant point, are then translated into our ordinary language. It cannot be said to be even in the manual charge of the message so transmitted, during its transmission. It relies on machinery, and upon threads of communication, which are liable to break or interruption, through accident, influence of the climate, wantonness, or malice. These circumstances make it impossible for the company to remain in actual practical custody of its line. . . .

"This telegraph company is not a common carrier,

[1] 18 Md. R. 341.

but a bailee, performing, through its agents, a work for its employer, according to certain rules and regulations, which, under the law, it has a right to make for its government."[1]

§ 100. In Parks *v.* Alta Cal. Teleg. Co.,[2] it is said that the rules which govern the liability of telegraph companies are not new. "They are old rules applied to new circumstances. Such companies hold themselves out to the public as engaged in a particular branch of business in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire, and carrying goods or a package along a route. The physical agency may be different; but the essential nature of the contract is the same."

§ 101. In De Rutte *v.* N.Y., Albany, & Buf. Teleg. Co.,[3] the Court say, "The business of transmitting messages by means of the electric telegraph is, like that of common carriers, in the nature of a public employment; for those who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any one, upon the payment of their charges, and when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefited by, the intelligence conveyed.

[1] But see the discussion as to the extent of their responsibility, post, c. 4, § 199 *et seq.*

[2] 13 Cal. R. 422.

[3] Court of Common Pleas, New York, 1 Daly, 547.

That becomes material only where there has been a delay or a mistake in the transmission of a message."

And again: "Like the business of common carriers, the interests of the public are so largely incorporated with it, that it differs from ordinary bailments, which parties are at liberty to enter into or not, as they please. In this State it is made the duty of telegraph companies by statute to transmit despatches from and for any individuals with impartiality and good faith, upon the payment of their usual charges;[1] a duty which would arise from the nature of the business, even if there were no statute upon the subject."

The Supreme Judicial Court of Massachusetts, in the case of Ellis *v.* American Tel. Co.,[2] rests the public nature of their employment upon the statute.

§ 102. In Leonard & Burton *v.* N.Y., Alb., & Buf. Teleg. Co.,[3] the Court say, "It must be assumed that the liability of telegraph companies in respect to the accurate transmission and faithful delivery of messages rests entirely upon contract, and that they are not in the situation of innkeepers, common carriers, and the like, upon whom legal duties rest, resulting from their occupation and profession, and who owe a duty to the public, irrespective of their engagements in particular instances." The statement in this case, that telegraph companies owe no duties to the public, does not seem to have been well considered, and is not sustained by either principle or authority.[4]

[1] Laws of New York, 1848, p. 395.
[2] 13 Allen, 226.
[3] In Supreme Court of New York. Not yet reported.
[4] The contrary doctrine has been expressly announced in Parks *v.*

As we shall hereafter see, there is an obligation resting upon them irrespective of contract, and which arises from the public nature of their employment.[1]

We will consider in a subsequent chapter to what extent there is analogy between telegraph companies, in respect to the transmission and delivery of messages, and common carriers of goods.[2]

Alta Cal. Teleg. Co. 13 Cal. R. 422; De Rutte *v.* N. Y., Alb., & Buffalo Teleg. Co., Court of Common Pleas, New York, 1866, 1 Daly, 547; N. Y. & Wash. Prin. Teleg. Co. *v.* Dryburg, 35 Pa. St. R. 298; The Western Union Teleg. Co. *v.* Carew, 15 Mich. R. 525.

[1] See post, c. 2, § 123, *et seq.*

[2] See post, c. 4, § 199, *et seq.*

CHAPTER II.

RIGHTS AND DUTIES OF TELEGRAPH COMPANIES.

§ 103. The rights and obligations of telegraph companies arising out of their relation to the sender of the message, will be considered in the succeeding chapter. In this one we propose to consider that class of rights and duties which attach to them, unconnected with specific contracts between them and third persons, or, rather, those which do not necessarily depend upon the existence of such contracts.

§ 104. Rights. — And, first, we may state that a telegraph company has the right to make reasonable rules and regulations for the proper conducting of its ordinary telegraphing business.

This power is conferred directly by statute in England, Canada, and in many of the American States which have general laws on the subject of telegraphs;[1] and a similar provision will probably be found in all private acts of incorporation.[2] But independent of express statutory authority, they have this right[3] within the limits of their charters, and subject to the constitution and public laws of the land. There is a

[1] See Appendix B, F, G, I, K, R, T, V, KK, LL.

[2] The Elec. Teleg. Co.'s Act, 16 & 17 Vict. c. 203, § 66.

[3] McAndrew *v.* The Elec. Teleg. Co. 33 Eng. Law & Eq. R. 180; Angell & Ames on Corp. § 325.

class of rules, however, denominated by-laws, which are usually reduced to proper form, adopted by the corporate authorities, and published to all the world as governing the property and affairs of the corporation. There are other rules and regulations peculiar to telegraph companies, intended to be restrictive of their responsibility to third parties in respect of messages, which are designed to become terms of their contracts. These by-laws, and such rules as those just mentioned, are not valid, if they conflict with the constitution and statutes of the country or state where the corporation exists; nor if they violate common law or public policy.[1]

Whether such by-laws and rules as these are reasonable or not, is a question for the Court only;[2] and

[1] Angell & Ames on Corp. § 332.

[2] The question of reasonableness was raised in the McAndrew case in the pleadings, the replication denying that it was a reasonable regulation within the meaning of the act; and the Court said, "The question will be aye or no, is this particular regulation or condition reasonable?" Thus it was treated and decided as a question of law for the Court. It was further observed that in no event could the company protect itself against gross negligence, by means of this rule. Thus the jury would pass upon or apply the rule to the facts in the case.

In Birney's case the question was not raised in the pleadings, but the company defended in evidence under its rules. The Court said, "While we give full force and effect to the rules and regulations of the appellee in a legal construction of them, we deem it," etc.

The Court, in Ellis *v.* Am. Teleg. Co. 13 Allen, 226, say, "We are then brought to the real question on which the decision of this case must depend, and that is, *whether the rule on which the defendants relied in defence of the plaintiff's claims is a just and reasonable one, such as they had a right to prescribe*, and by which the plaintiff was bound in the reception of the message which they transmitted to him. Upon this point we can entertain no doubt. We are not called on in this case to determine *whether all the conditions and stipulations are valid and binding*, which were set forth in the printed paper on which the message was written by the sender," etc. This seems to dispose of the whole matter as a question of law.

how far they may serve to limit the company's liability, depends upon the extent to which they are incor-

In the case of The Western Union Teleg. Co. *v.* Carew, 15 Mich. R. 525, the Court say that such a rule "must be considered highly reasonable;" and even further, that "the natural inference would be, that the employer knew and assented, or intended to assent, to the rule, whatever it might be."

It is said in Camp *v.* Western Union Teleg. Co. 1 Met. (Ky.) R. 164, "This regulation, considering the accidents to which the business is liable, is obviously just and reasonable." This was on petition in the Chancery Court.

This and McAndrew's case are cited approvingly in Breese & Mumford *v.* United States Teleg. Co. 45 Barb. 274, which was a controversy without action, submitted under the N.Y. Code.

In all these cases the question is disposed of without reference to the province of the jury.

Vedder *v.* Fellows, 20 N.Y. R. 126, was upon the reasonableness of a regulation requiring a passenger to surrender his ticket, etc. The judge charged the jury that in his opinion the rule was unreasonable; yet he should leave that question to them, and they were at liberty to differ from him. The Court of Appeals said, "There being, then, no proof of any actual inconvenience to passengers, from compliance with the regulation, the question as to its reasonableness and consequent validity must depend upon its intrinsic character. That is generally a question of law. . . . . There are strong reasons why the reasonableness of railroad regulations should, in the absence of any positive proof as to their effect, be submitted to the Court as a question of law, rather than to the jury as one of fact. . . . What one jury might deem an inconvenient rule, another might approve as judicious and proper. There would be no uniformity."

Day *v.* Owen, 5 Mich. R. 520, was an action against a carrier for refusing to allow plaintiff cabin passage. The notice or regulation excluded colored persons from the steamboat cabin, and on that account alone, the plaintiff was excluded. The Court said, "The right to be carried is one thing: the privileges of a passenger on board of the boat, what part of it may be occupied by him, or he have the right to use, is another thing. The two rights are very different. . . . (A.D. 1858).

"The refusal to allow plaintiff the privilege of the cabin, on his tendering cabin fare, was nothing more or less than denying him certain accommodations, while being transported, from which he was excluded by the rules and regulations of the boat. . . .

"But the reasonableness of a rule or regulation is a mixed question of law and fact, to be found by the jury on the trial, under the instructions of

porated in the particular contract. But most of the minor regulations now to be treated of are usually

the Court. It may depend on a great variety of circumstances, and may not improperly be said to be in itself a fact to be deduced from other facts. It is not to be inferred from the rule or regulation itself, but must be shown positively."

What was denominated a by-law of the city of Boston, prohibited fast driving on the streets, and affixed a penalty in pursuance of a power in the charter. Under indictment it was held (Commonwealth *v.* Worcester, 3 Pick. 462), that "evidence adduced to prove the by-law unreasonable was clearly inadmissible. It was for the Court to decide whether the by-law was reasonable or not." This is the general doctrine as to by-laws; but this decision also rests upon the ground that the rule was intended to prevent a nuisance.

The State *v.* Overton, 4 New Jersey R. 435, seems to favor the idea that the jury alone must pass on the reasonableness of such regulations as are not properly called by-laws. The passenger bought a ticket from Newark to Morristown; got off the train before reaching Morristown, without the conductor's knowledge or consent; got on another train an hour afterwards; presented the first conductor's check to the second conductor, which he refused to recognize, and put the passenger off the car. The company had given notice that conductors' checks were not transferable from one train to another. The company was ready to take the passenger through to Morristown. The Supreme Court said, "The question is obviously a question of contract between the passenger and the company. . . . The check was therefore valueless: the right, of which it was the evidence, the passenger had voluntarily relinquished."

The Court below submitted the reasonableness and validity of this rule, as to the non-transferability of the conductor's check, to the jury. The Supreme Court held this to be error, and said, "Here was no evidence of any by-law, or of any regulation made by the company, affecting the rights of passengers, upon the reasonableness or validity of which either Court or jury were called upon to decide. The right of the passenger rested upon his contract." This decides the case; but the Chief Justice went further, and answered arguments of counsel. He remarked upon the difference between by-laws and a regulation made for the comfort and convenience of travellers, or to protect the rights of the company, and said, from the very nature of the latter, it is a question of fact, and "the reasonableness and unreasonableness of the regulation is properly for the consideration, not of the Court, but of the jury." He then cites Jenks *v.* Coleman, 2 Sumner, 221, which we do not think sustains his abstract proposition. The opinion is followed, however, in Morris & Essex R.R.

adopted by the superintendent or business manager of the company, and can hardly be regarded as by-laws of the corporation, nor do they belong to that class described as offered terms of a contract. Yet they are of great importance, necessary to the convenience of all concerned in the practical workings of the telegraph. It has been held, that the validity of such rules depends upon their reasonableness, and is a question of fact for the jury;[1] but we think this statement is too broad. Where the rule is a mere restriction upon the enjoyment of an admitted right, and its application gives rise to litigation, the Court will declare in what cases and to what intent the company may establish rules, and instruct the jury to ascertain from the proof what is the rule, and whether it is reasonable within the definitions given by the Court, and whether its enforcement was just and proper in the given case. Thus the reasonableness of the rule is hypothetically declared by the Court; and its actual reasonableness or unreasonableness ascertained and declared by the jury, in the light of the instructions given. The Court must pass upon them in the first instance; for if they

Co. *v.* Ayres, 5 Dutcher's R. 393, which involved the right of a railroad company to demand a receipt for all of the employer's goods in the warehouse before any should be removed.

Whether these New Jersey cases be correct as applied to the facts, we shall not discuss, but express the belief that reason and the weight of the authorities sustain our proposition, that where rules and regulations are in derogation of common right, or are intended to restrict and limit liabilities to which the company would otherwise be subject, by reason of the duties imposed upon it by law, or the nature of its engagement, the validity of all such rules and regulations is a question of law.

[1] State *v.* Overton, 4 N.J. (Zab.) 435; Morris & Essex R.R. Co. *v.* Ayres, 5 Dutcher, 393.

contravene constitutions, laws, good morals, or public policy, that objection would be as fatal to them as to a by-law.

These regulations are analogous to those adopted by railroad companies to secure the safety and convenience of their agents and of passengers. In Vedder *v.* Fellows, the right of a conductor to take up a ticket before arriving at the passenger's destination was decided to be a question of law. Such corporations owe a paramount duty to the public, which they may not neglect or disregard. Their rules and regulations must not be violative of statutory or common law. In every case submitted, the jury must decide whether the facts justified an enforcement of the rule; but the validity of the rule itself must be first passed upon by the Court. Were it otherwise, uniformity would never be attained.[1] This distinction should be carefully observed when passing upon the reasonableness of rules respecting repeated and unrepeated messages. So far as the rules operate as a tariff of charges, they become an element in the contract, if there be one, or their reasonableness is considered by the jury in making their award for services rendered, in the absence of a contract. But when such rules are interposed as a defence against the company's own negligence, fraud, or misfeasance, or as a specific limitation upon the extent of its responsibility, either as to delays or mistakes, their validity is a pure question of law, in deciding which the courts should not encumber themselves with the *infirmities of the business*, or the mysteriousness of agencies employed, any further than

[1] 20 N.Y. 126.

may be necessary in making an intelligible application of the law in a given case.

§ 105. In enumerating rules and regulations lawful for them to establish, we confine ourselves to such as have more particular application to the ordinary business of telegraph companies.

We say, then, they have the right to establish rules and regulations which would protect the operator and other employés from interference or annoyance while engaged in their duties in the office.

§ 106. They would also have the right to establish rules in the office to insure secrecy in reference to all private despatches. As a general thing, this duty of secrecy is enjoined by statute. Independent of such express requirement, the very nature of their employment would require this. Such rules would therefore be reasonable and proper; and this may be stated as being clearly one of the rights of telegraph companies.

In enforcing these rules they would be justifiable in ejecting from the office — using only such force as should be necessary for that purpose — any person infringing them, either by reading or hearing, or attempting to read or hear, messages; by disturbing or distracting the attention of operators, clerks, or other employés of the company, in the performance of their appropriate duties, or by meddling with the wires, batteries, instruments, or other things, whereby business should be impeded.[1]

[1] Barker *v.* Midland Railway, 36 Eng. Law & Eq. R. 253; Commonwealth *v.* Power, 7 Met. 596; State *v.* Gould, Am. Law Register, Jan. 1866, p. 143; State *v.* Overton, 4 N.J. (Zab.) 435; Hall *v.* Power, 12 Met. 482; 1 Am. Railway Cases, 389; Stephen *v.* Smith, 29 Vt. R. 160.

But if a person should be removed for an alleged violation of the rules of the company, and it should appear that in fact he did not violate them, the operators or other servants removing him would be liable to such person in damages, although they may have acted in good faith.[1]

§ 107. They have the right to require that all messages offered for transmission over their lines should be plainly written, and might refuse to send any message delivered to them orally, or in an illegible handwriting.

This is so, from various considerations; it insures the greater despatch of business in the office; there will be less liability to mistakes; and the written message may become important in any litigation between the company and the sender of the message that might occur. In fact, it is of the utmost consequence that the message should be plainly legible. The operator is not required to know the meaning of the message, and will not be safe in deciphering words, or attempting to discover the meaning by the context. Witnesses, jurors, and courts may differ on these points, even where the original draft of the message is submitted to inspection as an instrument of evidence. It is not a question for experts. As the employer has a right to have the message telegraphed as written, so the company may refuse to attempt it, unless relieved from all uncertainty as to the words and letters of which it is composed. If orally delivered, it could only be proved, like other matters resting in parol, by the recollection of witnesses, in whose hearing it might

[1] 1 Am. Railway Cases, 410.

be repeated,[1] whose corruption or failure of memory might operate to the prejudice of the company.[2]

§ 108. They may reasonably require that numerals should not be used in stating sums or amounts, in messages, but that the same should be written out in full. This regulation is highly important in guarding against mistakes; for the company is justly entitled to the clearest and most certain characters in which a message can be written. The letters and syllables usually may be more certainly read and understood than figures. Thus unnecessary loss of time is avoided, as well as annoyance and liability upon the ground of alleged mistake. It attains another element of certainty and self-verification in the future uses to which the message may be subjected. Whatever advantage there may be in using full written words, rather than figures, will inure to the benefit of the sender and receiver in their relations to each other in all respects, especially in case the telegraph is used as a medium of contract.[3] In addition to these considerations, we may add that the charge for transmit-

[1] Durkee *v.* Vt. Cent. R.R. 29 Vt. R. 127.

[2] The company might refuse to send the message if so obscurely written as that the operator had doubts as to its exact meaning. N.Y. & Wash. Prin. Teleg. Co. *v.* Dryburg, 35 Pa. St. R. 298.

[3] A case is referred to in 7 Western Law Journal, p. 449, where a land speculator sent a message instructing his agent to give a certain amount for a piece of land. The operator, mistaking the figures, increased the sum named, so that the agent purchased the land at three times the sum he was instructed to pay for it, and the action was brought to hold the telegraph company liable. We can find no other report of this case. The editor adds, commenting on the above case, "For the information of those who send by telegraph, it may be well to state that, as figures are always reduced to words by the operator, and charged accordingly, the safer plan is to use words instead of numericals."

ting is usually based upon the number of words, and the company has a right to have them written out, that the message itself will verify the justness of the claim. They have the right to fix the ratio of compensation for the transmission of messages, and these rates must be reasonable and uniform, and without discriminations as to individuals or classes.

§ 109. So also, they could require that all messages should be prepaid.

§ 110. They may classify their charges; demanding certain rates for a direct transmission of messages; another rate for repeating them back and forth; and a still higher rate for such messages as are known or admitted to involve an amount of labor or risk greater than ordinary. This rule, like any other element of a contract, must be fixed beforehand, must be reasonable, and uniform as to rates and mode of application. It is to be observed that the risk here spoken of is not predicated upon the value of the message, as mere property under an ordinary insurance. The rule for repeating the message disposes of the question of increased labor; and by this increased labor, accuracy is to be attained. Accuracy in the transmission, and promptness in delivery, show full compliance with the undertaking. Fidelity will secure prompt delivery, and to this the company is bound in all messages: so we have nothing left to consider in the way of risk, except imperfection of instruments and agencies in the matter of transmission, causing "the risk of the message not going rightly," as expressed by Willes, J., in the McAndrew case. The damages that may ensue in some cases might be very great; so ruinous,

that the company should be allowed to protect itself by special contract.

§ 111. As errors may be caused by imperfections of instruments and appliances, by electrical changes, and negligence of operators, it frequently becomes important to know at once whether the message has been affected by any of these incidents. The party sending may satisfy himself, to a great extent, by having the message relaid or returned from its ultimate destination, and then comparing it with his own manuscript. If correct, the office of delivery is notified of the fact. This is a repeated message. More time and labor are required, but no more skill. We fail to perceive that there is any greater risk; for if the message is fully verified by this repetition, the element of uncertainty is gone; there is nothing to insure.[1] If there be causes of delay, they affect either kind of message alike. The company is bound to remove the obstacle promptly, if possible; and if caused by the act of God or the public enemy, the consequent delay involves no risk. So that it is manifest that messages are repeated for the purpose of correcting errors, and not to avoid delay. After transmission, an incorrect message could be sent out and delivered as speedily as if it had been verified and proved to be perfectly accurate. Whether it be a repeated or unrepeated message, the two operators must be engaged at the same time upon the same message; and the presence of disturbing forces is known to both alike.

§ 112. The argument of counsel in the case of

[1] See post, c. 4, for the reasoning.

Birney *v.* N.Y. & Wash. Prin. Teleg. Co.[1] is worthy of attention. There it is said, "We state a fact of science, which we may use in this argument without it appearing of record, when we say the operating apparatus of the telegraph leaves no record of the *work done*, at the place from which it is transmitted, and that therefore there is a peculiar liability to error, in the non-transmission and transmission of despatches. So plain is the risk created by this circumstance, that we may assume it is impossible to know with certainty that a message has been transmitted at all, or transmitted in the very words of the despatch, unless the operator at the other terminus of the stipulated route informs the operator transmitting the despatch, of the fact of its reception, and of the very form in which it has been received. . . . And it seems that such a repetition is necessary to the safe transmission of any despatch." If this be the correct view, the risk grows out of imperfections in the agencies used; and repetition is necessary in order that the company may know assuredly that its duty has been performed. To secure this result the right to make needful rules and regulations is undeniable; and as guides for the agents of the company, they are lawful and binding. As applicable to employers, they afford a rule and measure of compensation to be paid.[2]

§ 113. By the Electric Telegraph Company's Act, 16 & 17 Vict. c. 203, § 66, it is provided that the public, without preference, shall have the use of the company's telegraph, "subject to reasonable regulations, to be made by the company." Substantially the same

[1] 18 Md. 341.

[2] Vide post, c. 4, § 212.

provision is to be found in the statutes of many of the American States,[1] and it has been held, that it is competent under the statutes for a company to protect itself against all responsibility arising from mistakes or delays in unrepeated messages, however produced.[2] We think this goes too far, because it operates as a stipulation against negligence both in sending and delivering messages, and it cannot bind employers of the company in any event, unless embraced in a special contract. Delays in delivery of a message result from causes altogether different from those which produce mistakes in transmission; and it is reasonable that rules of limitation or exemption should be adapted to the nature of the case. It is obvious that the Court in the McAndrew case was greatly influenced by what is declared to be "an infirmity in the business," which makes it important that messages be repeated. The weight of that argument has been greatly diminished by improvements in the art since the year 1855. But we feel confident that the company is not entitled to protection against defects in its appliances. Common carriers are compelled to furnish suitable and safe modes of transportation, according to the improved state of the art;[3] and telegraph companies are bound by a rule equally as rigid.[4] In point of fact they assert their ability to send messages with absolute certainty if not prevented by dis-

[1] Ante, § 104, note 1.

[2] See the various printed regulations which have been declared in general terms to be in all things reasonable, especially Camp's case, 1 Met. (Ky.), 164.

[3] Nash. & Chat. R.R. Co. *v.* Messino, 1 Sneed (Tenn.), 220.

[4] Western Union Teleg. Co. *v.* Carew, 15 Michigan R. 525.

turbing forces. But these forces do not affect the ability of the company to deliver the message to the party addressed, after it has been taken off the wires and reduced to writing. In the case of McAndrew, the Court saw the unreasonableness of that part of the rule claiming exemption from diligence in the delivery of messages.[1] They are careful in saying, "We are not called upon to say whether the whole and every portion of the conditions at the back of the contract is or is not reasonable." The precise point in the plea was that by mistake of defendants' operator, "Southampton" was changed into "Hull" in an unrepeated message; "a mistake within the meaning" of the condition against any liability "for mistakes in the transmission of unrepeated messages, from whatever causes they may arise." The Court declared broadly that the company was not responsible for the mistake in this message, sent under the special contract.

§ 114. These observations are rendered necessary by the fact that this case has been regarded by several

[1] The case of Ellis *v.* Am. Teleg. Co. 13 Allen, 266, was upon error in transmitting the despatch. The Court entered a similar disclaimer as to other terms in the notice; but the disclaimer itself is not perfectly accurate, as we suppose. They say, "The sole question here is, whether that portion of the terms and conditions prescribed by the defendants is reasonable and valid, which provides that the defendants will not hold themselves responsible for errors and delays in the transmission and delivery of messages, unless they be repeated; that is, sent back from the station," etc. The reasoning and the spirit of the opinion exclude the idea that the Court would allow the notice to exempt the company from damages for unnecessary delays, either in transmitting or delivering messages; for, at the last, it is added, "Of course, the defendants would be liable for any negligence causing damage, which would not have been prevented by a compliance with these rules."

courts,[1] as a leading authority for holding that regulations are reasonable, which provide that the company will not be liable for mistakes or delays either in sending or *delivering* messages, etc. The Court do not so hold; but, on the contrary, say that the company may not stipulate against its own negligence. Take this general principle, in connection with the statement above, that they were not passing upon all the conditions in the printed regulation, and the ruling of the Court is only this: Under the Electric Telegraph Company's Act of 1853, c. 203, § 66, this company had the power to adopt regulations for the use of their wires; that the amount charged by the company, by way of difference between the unrepeated and the repeated message, or the uninsured and the insured message, was no greater than fairly represented "the difference of labor or the amount of risk" (see Willes' opinion); and that therefore the rule was reasonable in respect of this mistake.

In the telegraphic alphabet used at that time, the character signifying *Southampton* also signified *Hull*, and this seems to be the "infirmity in the business." If it had not been for the importance given to this circumstance, it seems almost certain that the Court would have held, that the sole question was, How far may such a company protect itself against negligence by express contract?

§ 115. The next case in which this question was considered, arose in the State of Kentucky, in 1858, —

[1] Teleg. Co. *v.* Carew, 15 Mich. R. 525; Birney *v.* Wash. Print. Teleg. Co. 18 Md. R. 341; Breese & Mumford *v.* U.S. Teleg. Co. 45 Barb. 274; Ellis *v.* Am. Teleg. Co. 13 Allen (Mass.), 226.

Camp *v.* The Western Union Telegraph Co.[1] The

[1] 1 Metcalfe, R. 164. Simpson, J., delivered the opinion of the Court. "This action was brought against the Western Union Telegraph Co., for failing to transmit correctly a communication from the appellant, at Louisville, to David Gibson & Co., at Cincinnati. The plaintiff alleged in his petition that the defendant undertook, for compensation then paid, to transmit from Louisville, Kentucky, to David Gibson & Co., of Cincinnati, Ohio, a proposition to purchase two hundred barrels of whiskey at fifteen cents per gallon; and that, instead of transmitting the proposition correctly, the communication as made represented him as offering sixteen cents per gallon for the whiskey. He also alleged that Gibson & Co. advised him that they accepted his proposition, and immediately forwarded to him two hundred barrels of whiskey, under the belief that he had offered them sixteen cents per gallon for it, which was received by him under the belief that it had been sold to him at fifteen cents per gallon. He further alleged, that, in consequence of the failure of the defendant to transmit the message intrusted to it, and the transmission by it of a message of a different import, he was compelled to pay sixteen cents per gallon for the whiskey, and had thereby sustained a loss to the amount of one hundred dollars.

"The telegraph company, by way of defence, relied upon a notice of the terms and conditions on which messages were received by it for transmission, which, so far as they are applicable to the present case, are as follows: —

"'The public are notified, that, in order to guard against mistakes in the transmission of messages, every message of importance 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 for repeating the message. This company will not be responsible for mistakes or delays in the transmission or delivery of unrepeated messages, from whatever cause they may arise.'

"It was alleged in the answer that the plaintiff had notice of the aforesaid terms and conditions, and sent the message subject to them, but did not require the message to be repeated, nor pay, nor agree to pay, for its repetition.

"There is no allegation in plaintiff's petition that the mistake was occasioned by negligence, or was the result of incompetency or want of proper skill on the part of the agents who were employed by the company to act as operators in the sending and receiving of despatches; but the failure of the company to comply with its contract to transmit the message correctly, is alone relied upon as the foundation of the plaintiff's right to a recovery in the action.

"The proof shows that it is impracticable to transmit telegraphic communications with absolute accuracy at all times, and that such communi-

notice was the same as in the case of McAndrew. The message was sent as an unrepeated message.

cations, from the very nature of the medium through which they are made, are subject not only to occasional interruptions and delays, but also to inaccuracies in words and expressions. It may be, therefore, reasonably presumed, that the failure to deliver this message correctly was the result of a mistake to which such communications are liable, and which will sometimes occur, even where the utmost skill and care are exercised.

"The question, then, is, was the company bound at all events to transmit the despatch accurately, or had it the legal right to modify its liability by giving a public notice, and bringing it home to the plaintiff, of the terms and conditions on which alone it would be bound for mistakes in the transmission of messages?

"It is contended that the responsibility of the company is fixed and defined by law, and cannot be changed or modified by any terms or conditions that the company may think proper to prescribe.

"It can hardly be doubted that the company and the person sending a message might, by *express* contract, regulate the extent of the liability of the former for any mistake that might occur. Here, however, there was no express contract between the parties, but the company gave notice of the terms and conditions upon which it was willing to be responsible, and the plaintiff acted under that notice in sending the message.

"We do not deem it necessary to decide, in this case, to what extent a telegraph company has a right to limit its liability by a notice to those for whom it undertakes to transmit messages. All that we are now required to decide is, whether the condition which the company relied on in this case is reasonable, and such a one as it had a right to prescribe.

"The public are admonished by the notice, that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important, and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that

The plaintiff sent the message with knowledge of the regulation. The Court held that it was a reasonable regulation, and adopt much the same course of reasoning as the English judges.

§ 116. The case of De Rutte *v.* The New York, Albany, & Buffalo Telegraph Co.[1] recognizes the same doctrine, and for the same reason.

It is not admitted that the company can absolve itself from responsibility; but the liability to mistakes and delays is so great that it has the right to make an additional charge, over its regular charges, as a compensation for the risk it incurs. The sender of the message has the option either to send the message at his own risk for the regular charge, or to fix the responsibility of the company by paying a reasonable additional amount, which it is considered is but an equivalent for the service thereby rendered by the company. This amount is usually half the original charge in addition. Even then the compensation is small in proportion to the risk assumed. But if, in the transmission of unrepeated messages under such regulations, the company are guilty of negligence, they

responsibility, and allows the person who sends the message, either to transmit it at his own risk, at the usual price, or by paying, in addition thereto, half the usual price, to have it repeated, and thus render the company liable for any mistake that may occur.

"The plaintiff must, therefore, be regarded as having sent the message in this case at his own risk, inasmuch as he failed to have it repeated, and consequently the company was not liable for the mistake. It is unnecessary, therefore, to decide whether the plaintiff was legally responsible for the sixteen cents per gallon for the whiskey, or only for the price which he actually offered.

"Wherefore the judgment of the Chancellor, dismissing the plaintiff's petition, is affirmed."

[1] Court of Common Pleas, N.Y., 1 Daly, 547.

would be liable; they have no right to provide against their own negligence.[1]

§ 117. So in the case of Birney *v.* New York & Washington Telegraph Co.,[2] the Maryland Code provided that "any person or association owning any telegraph line doing business within this State, shall receive despatches from and for other telegraph lines and associations, and from and for any individual for transmitting despatches as established by the rules and regulations of such telegraph line, and shall transmit the same with impartiality and good faith," etc.

The company had established this same regulation as to repeated messages. The message delivered by the plaintiff for transmission was not paid for as a repeated message, and consequently must have been considered as delivered for transmission as an *unrepeated* message. The company claimed complete immunity by force of the rule, and relied upon McAndrew's and Camp's cases.

But it appeared that the message delivered to the operator for transmission was never sent, but was entirely overlooked and forgotten.

The company was held liable notwithstanding this provision of the Code, and the regulations adopted under it, by the company. It was held that the notice did not apply to cases where *no effort* was made to put the message on its transit.[3]

[1] See cases cited in the text. See also the late case of Ellis *v.* The Am. Teleg. Co. 13 Allen, R. 226. [2] 18 Md. R. 341.

[3] Goldsborough, J., in delivering the opinion of the Court, said, "Conceding that the notice read in evidence contained the terms on which the appellee would receive and transmit messages, and its exemption from liability, as stated in the prayer, and, also, that this notice was displayed in

§ 118. A decision was recently made by the Court of Appeals of Maryland (not yet reported), Gildersleeve, appellee, *v.* The United States Tel. Co., appellant (MS.), in which the power of the company to restrict its liability by printed notices is stated in stronger terms than we have elsewhere observed. The facts were as follows: —

"This was an action, *ex contractu*, instituted by the appellee against the appellant to recover of the latter damages resulting from its failure to transmit and deliver a telegraphic despatch to certain stock-brokers in New York. The despatch directed to be transmitted was as follows: 'No. 15, Brokers' Telegram Line, 4. People's Telegram Lines, No. 23 South Street, and Barnum's City Hotel, Baltimore. Send the following message, without repeating it, subject to the conditions indorsed on the back. Dated Baltimore, March 9, 1865. To Dibble & Cambloss, N.Y.

the office of the company, so that the appellant saw or might have seen it, still it is manifest that the terms of the notice neither embrace nor declare an exemption from liability in a case where no effort is made by the company or its agents to put a message on its transit. The exemption from liability for the non-transmission and non-delivery of unrepeated messages provided for by the rules, contained in its notice, does not, in our opinion, in any way embrace or affect this case.

"The terms of the notice in which exemption from liability is declared, clearly imply an obligation on the part of the company to attempt the transmission and delivery of a message received by it for that purpose, and it would be most unreasonable to permit it to have the benefit of an exemption from liability without first bringing itself within the scope of the exemption provided for, by a full and faithful performance of its implied duties.

"While we give full force and effect to the rules and regulations of the appellee, in a legal construction of them, we deem it unjust to the appellant, to extend that *effect* beyond the *actual terms* adopted by the appellee to secure its exemption."

Sell fifty (50) gold. Words 3; col. 70. Geo. Gildersleeve.' It is alleged that this despatch was an order to the brokers in New York to sell for the appellee fifty thousand dollars of gold, which order the brokers would have obeyed; but the appellant neglected to telegraph such despatch, whereby the appellee was greatly damaged by reason of the decline in the market price of gold. The appellant pleaded, not indebted as alleged, with an agreement that such plea should be received, and that all errors in pleading should be mutually waived, and that either party might rely on any claim or defence to which he or it would be entitled if specially declared on or pleaded. At the trial below, the appellee offered one prayer to the Court, which was granted, and the appellant offered six prayers, of which the first five were rejected and the sixth was granted. And it was to the granting of the appellee's prayer and the refusal of those on the part of the appellant, that the first exception was taken. On this exception four questions arise: 1. Whether the appellee can maintain this action, and recover more than nominal damages for the default of the appellant. 2. Whether the contract for transmission of the message was subject to the terms and conditions printed on the back of the despatch, or to other similar terms and conditions prescribed by the rules and regulations of the appellant's office. 3. To what extent, if the contract be subject to such terms and conditions, can the appellant claim to be exonerated from liability thereunder. 4. To what measure of damage is the appellant subject, if the contract be broken. First. It appears that

he appellant was a broker in Baltimore, and that Dibble & Cambloss were his correspondents and agents in New York, through whom he was in the habit of buying and selling stocks and gold in the latter city. That A. B. Patterson, also a broker in Baltimore, was appellee's customer, for whom the appellee was in the habit, as broker, of buying and selling gold and stock in New York through the agency of Dibble & Cambloss. That by arrangement previously made between appellee and Patterson, for the purpose of saving trouble to them both, instead of Patterson's being required to give orders to the appellee for such purchases and sales, and the appellee's being required to send them to his correspondents, Patterson was authorized to send orders in the appellee's name, and on his responsibility and account, to Dibble & Cambloss, for the purchase or sale of stock or gold, and that by this arrangement the appellee was entitled to his commissions on purchases and sales made in compliance with such orders, and the right and liabilities of the appellee and Patterson respectively in reference to the orders so sent, were in all respects the same as if Patterson had given the orders to the appellee, and the latter had transmitted, or undertaken to transmit them to Dibble & Cambloss in his own name; Patterson not being known to and having no connection with Dibble & Cambloss except through the appellee. That under said arrangement, on the 9th of March, 1865, at about 3:40 P.M., the message in question, addressed to Dibble & Cambloss, was left by Patterson's direction at appellant's office in Baltimore, and that the appellant, by its agents, undertook to send and

deliver it to the parties to whom it was addressed. That the message was sent to the office without the knowledge or special direction of the appellee, but that he was soon after informed of it and fully sanctioned it; the appellee also testified that he was not interested in this transaction, and had not paid any loss to Patterson, and did not consider himself liable to Patterson unless he recovered in this suit, in which event any thing that was recovered was to be paid over to Patterson. It was also proved that appellee had, on the day of the date of the message, two hundred thousand dollars of gold to his credit with Dibble & Cambloss, and of that sum, as between appellee and Patterson, ninety-five thousand dollars belonged to the latter."

§ 118 *a*. As to the power of the company to impose terms by a printed notice, so as to incorporate them in the contract, the Court said, —

"The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for the purpose. It would be manifestly unreasonable to hold these telegraph companies liable for every mistake, miscarriage, or accidental delay that may occur in the operation of their lines. From the very nature of the service, while due diligence and good faith may be required at the hands of the company and its agents, accidents, delays, and miscarriages may occur that the greatest amount of caution cannot avoid. Hence, in England, and in many of the American States, provision has been made by statute, authorizing these companies to prescribe rules and regulations

whereby they may be protected against extraordinary liability. In this State, by article 26, section 117, of the Code, while impartiality and good faith are to be observed, the despatches are to be received and transmitted under such rules and regulations as may be established by the companies. And the appellant, availing itself of this power, appears to have adopted rules and regulations for its protection. This appears from the evidence offered by both appellee and appellant. And the appellant having adopted rules and regulations as authorized by law, according to the decision of this Court in the case of Birney *v.* The New York & Washington Telegraph Company, 18 Md. 341, the appellee was bound to know that the engagements of the company were controlled by them, and did himself in law engraft them in his contract, and is bound by them. This would be the case whether the despatch offered for transmission be expressly declared to be subject to the terms and conditions prescribed or not. Those dealing with the company must be supposed to know its rules and regulations, and their contracts must be taken to have reference to them, unless otherwise provided by special contract. In this case, however, the appellee proffered with the despatch his own terms. The despatch was written on the blank of another company, which happened to be in the possession of Patterson, but the terms and conditions printed on the back of it, and to which the despatch was expressly made subject, so far as the question in this case is concerned, were substantially the same, though differing in words, as those of the appellant. And even in the absence of rules and

regulations of the appellant's office, it was certainly competent for it to accept the terms and conditions proffered with the message. As, however, the terms and conditions of the appellant, and those printed on the back of the despatch of the appellee, were, so far as the present question is concerned, substantially the same, it is immaterial in what manner the contract became subject to such terms and conditions. It is enough that they were incorporated in it, and are to be taken as forming part of it."

§ 118 *b*. We submit that individuals dealing with a private corporation are not bound to know its rules and regulations; nor can it be the law that all contracts with it are to be construed as incorporating these rules, "unless otherwise provided by special contract." If this were so, there would be no mode of resisting an unreasonable or illegal rule, where a despatch had been actually sent; for, if by sending the despatch, the employer thereby engrafts these rules into his contract, "and is bound by them," it will become wholly immaterial with the Court whether they are reasonable or unreasonable. This is not in accordance with the case of McAndrew, which merely asserts the right of the company to make reasonable rules and regulations, leaving the question of their being so always open for the decision of the Court. In the case of Breese & Mumford *v.* The United States Telegraph Company,[1] the Court said, "Before the message was written under it [the printed notice], and signed and delivered to the defendant, it was a general proposition to all persons desiring to send messages

[1] 45 Barb. 274.

by the defendant's peculiar means of transmission or conveyance, of the terms and conditions upon which such messages would be sent, and the defendant became liable in case of error or accident in the transmission or conveyance. By writing the message under it, and signing and delivering the same for transmission, the party accepted the proposition, and it became an agreement, binding upon the defendant only according to the terms and conditions specified in its proposition." Here the message was written upon the printed blank, and under an agreement that it should be sent according to its terms. The Court say this is sufficient evidence upon which to bind the parties interested to a knowledge of the proposed limitations. Of course this would be a question for the jury. It was not, however, so definitely declared by the Court, because it was an agreed case, in which the Court was passing upon the facts. This decision plainly implies that the question would, in an ordinary trial, be left to the jury upon facts proved, and does not hold that knowledge of these private rules is a presumption of law, binding in all cases, "unless otherwise provided by special contract."

§ 119. Second. A telegraph company would have the right to decline the transmission of all messages of an illegal or immoral character, or such as were in furtherance of fraud, or against public policy; or where the message was for the purpose of aiding or concealing crime, or would in any other way tend to thwart the course of public justice.

If this were not so, the agents of the company would, in some cases, become *particeps criminis;* and

would, in all such cases, be lending their aid, for a reward, to purposes not sanctioned by the law. The same moral and legal obligation rests upon the company as upon individuals, in reference to their contracts and dealings with each other; and whatever the law would not compel it to perform, it has the right to refuse.

In some of the American States the transmission of such messages is expressly prohibited by statute, and in some of them it is made a criminal offence so to do.[1]

[1] By the California statute it is provided: "If any agent or operator in any telegraph office shall knowingly send by telegraph any false or forged message, purporting to be from such officer" (of the telegraph company), "or any other person, or if any other person or persons shall furnish, or conspire to furnish, to such agent or operator to be so sent, any such message, knowing the same to be false or forged, with the intent to deceive and injure or defraud any individual or corporation, or the public, such agent, operator, or person shall be deemed guilty of a misdemeanor, and shall be punished by fine not exceeding five hundred dollars, or imprisonment not to exceed six months, or both such fine and imprisonment, in the discretion of the Court." Appendix F.

There is a similar provision in Pennsylvania. Purdon's Digest, 1861, crimes, 185 · and in Oregon, Compilation of 1866, c. 54, sec. 9. Appendix EE.

In Ohio, Act of March 31, 1865, sec. 11, it is provided that, if any agent, officer, or manager of any telegraph line, operating in this State, or any other person, shall knowingly transmit, by such telegraph line, any false communication or intelligence, with intent to injure any one, or to speculate in any article of merchandise, commerce, or trade, or with intent that another may do so, or shall knowingly send or deliver any despatch that is forged or not authorized by the person whose name purports to be signed thereto, he shall, on conviction, pay a fine not exceeding five hundred dollars. Appendix CC.

By the California Act of April 18, 1862, sec. 4, it is provided, that nothing in the act contained shall require the sending, receiving, or delivering of any message, counselling, aiding, abetting, or encouraging treason against the Government of the United States, or of this State, or other resistance to the lawful authority, or any message calculated to fur-

§ 120. Third. The company would have the right to withhold the delivery of any message transmitted over its line, when the party to whom it is sent refuses to pay the price of its transmission, in all cases where the message had not been prepaid.

This right does not depend, in any degree, upon the existence of the relation of principal and agent between the company and the person to whom the message is sent, or upon the existence of any contract between them. There is no privity of contract between the company and such person necessarily.[1]

If it undertakes to send a message over its wires, the charge to be collected from the person to whom sent, there is nothing in the contract with the sender of the message that will prevent it from making the payment of the charge a condition precedent to the delivery of the message; and it would have the right

ther any fraudulent plan or purpose, or to instigate or encourage the perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime. Appendix F.

By the Revised Statutes of Kentucky, 1860, vol. i. pp. 394, 395: "If any agent, officer, or manager of a telegraph line constructed in this State, or other person, shall knowingly transmit, on or through the same, any false communication or intelligence with intention to injure any one, or to speculate on any article of merchandise, commerce, or trade, or with intent that another may do so; or if any agent, officer, or manager of a telegraph line, from corrupt or improper motives, or wilful negligence, shall withhold the transmission of messages or intelligence for which the customary charges have been paid or tendered, he shall be fined not less than ten, nor more than five hundred dollars." Appendix O.

[1] De Rutte *v.* N.Y., Alb., & Buf. Teleg. Co., Court of Common Pleas, N.Y. 1 Daly, 547; N.Y. & Wash. Prin. Teleg. Co. *v.* Dryburg, 35 Pa. St. R. 298; Bowen & McNames *v.* The Lake Erie Teleg. Co. 1 Am. Law Reg. 685 (Sept. No. 1853). In the case of N.Y. & Wash. Teleg. Co. *v.* Dryburg, it is intimated that the telegraph company is the agent of both parties; but it would seem that there is not necessarily privity of contract between the company and the person to whom the message is sent.

to withhold the message. This right would be somewhat analogous to the lien for freight. Whether or not there would be an obligation upon the company in such case to notify the sender of the non-delivery of the message, will be hereafter considered.

§ 121. I ɔurth. The company has no right to require persons to send messages by its line. There is no obligation resting upon any one to send communications by telegraph in the absence of any special contract on the subject; and all persons have the right to choose which of two or more different lines they will engage to transmit their messages for them; and in case they should select the longest or most circuitous of two routes, the company owning the line on the shortest route has no right of action against them therefor, unless there were a special contract with such person.[1]

[1] This principle seems to be too clear for discussion; yet this very question has been brought before the courts. The Western Teleg. Co., appellants, *v.* George C. Penniman & John King, 21 How. U.S. 460; and the Western Teleg. Co. *v.* The Magnetic Teleg. Co. ib. 456. The point decided is the same in both cases.

In the Western Teleg. Co. *v.* George C. Penniman & John King, Mr. Justice McLean, in delivering the opinion of the Court, said, "This case is before us by an appeal from the Circuit Court of the United States for the district of Maryland.

"The Western Union Telegraph Company, a corporation incorporated by the statutes of Maryland, Virginia, and Pennsylvania, have filed their bill against George C. Penniman and John King, citizens of Maryland, and charged them with the violation of patented rights of the Western Telegraph Company, under a contract made with Morse, Vail, & Smith, dated the 18th of March, 1840. The above-named persons are alleged to be the sole proprietors of the right to construct and use Morse's electromagnetic telegraph, by him invented and patented, on the route between Baltimore in the State of Maryland, and New York, and Harrisburg in the State of Pennsylvania, for and in consideration of thirty dollars per mile, by the route on which the telegraph has been, or may be, constructed

§ 122. We have already considered the rights of

between the points and places aforesaid. And said right, through their agent, Amos Kendall, was conveyed unto Joseph Penniman and his assignee, to construct, between the points and places aforesaid, the said telegraph, with one or more wires, with the apparatus for working the same, and the improvements thereon. And the said Morse & Co. covenant not to grant to any other person or persons the right to construct any other line of telegraph under the patent aforesaid, within the aforesaid limits, either in a direct or indirect line.

"The contract between Kendall, as attorney of Morse & Vail, with the Western Telegraph Company, granted to it in due form the privilege of said letters patent for lines of telegraph belonging to it, between Baltimore and Wheeling, with a branch therefrom to Washington city, and a branch from Brownsville to the city of Pittsburg, etc.; and the right of Francis O. J. Smith, which was also conveyed, was limited to the Western Telegraph Company's existing lines from Baltimore in the State of Maryland, to Wheeling in the State of Virginia; and in branches to Washington and Pittsburg cities; the right herein conveyed and so limited by said territorial termini, being one-fourth part of said invention and letters patent, etc.

"The complainants pray for an injunction, and that an account may be taken, for a breach of its patent privileges.

"The defendant procured an assignment of Morse's patented electro telegraph between the cities of Baltimore and Harrisburg, and afterwards a like assignment from him between Baltimore and Wheeling, with the right of a branch to Pittsburg and Washington; and it is alleged that complainants claim the right to telegraphic business on the Morse plan between these points; not only all that commence and end at these several points, but all that, starting at remote points, have to reach either of these points by coming through either of the others.

"There can be no doubt that the right of transmitting on the lines conveyed to the Western Telegraph Company, are as full and complete as would have been the rights of the patentee, had he never assigned them.

"The assignment of Morse's to a company from Pittsburg to Philadelphia, and from Washington to Baltimore, Philadelphia, and New York, it is alleged, has enabled the defendant to take messages at Harrisburg from Wheeling, directed to Baltimore and Washington, and other Southern points; and has also, in like manner, taken messages from the Magnetic Company between Washington and New York at Baltimore, and transmitted them to Pittsburg, and to points west through Pittsburg.

"And this was done, it is said, in conjunction with the said companies, in order to get the business, which, but for said combination, would and ought to have come by complainants' line.

"The charges against Penniman and King are substantially the same

the company with reference to its powers under the charter, and the construction of its line.[1]

§ 123. Duties. — There are duties which rest upon telegraph companies that are entirely independent of particular contracts with individuals. These duties they owe to the public, which are incumbent upon them, because of the public nature of their employment, undertaking as they do the discharge of a service, in the proper performance of which all persons may be alike interested.[2]

combinations as are charged against the Magnetic Telegraph Company; and we can only say, as we said in the other case, that assignees may claim a protection in all that was assigned to them; and if, in any respect, their patent has been infringed, a remedy is open for them. But it does not appear that the defendants were limited as to the use of the lines owned by the Western Telegraph Company, although the points on their lines were shortest.

"Each person, in using a telegraph line, is free to select his own conveyance. There are several things which recommend telegraph lines. The machinery should be kept in proper order; strict attention should be given to the transmission of messages, and competent persons engaged in the office. When there is much competition, great energy is required, and if this be wanting, success may not be expected.

"The principal ground of complaint in the bill is, that the business of the Western Telegraph Company has been diverted from it, and thrown upon other lines, greatly to its injury; and it would seem that circuitous routes have been selected, rather than the more direct ones. If this be so, does it afford a ground for relief? There is no obligation on a person sending a telegraphic message to select the shortest or the nearest line. He may consult his own interest or choice in such a matter, and he incurs no responsibility to any one, unless he has entered into a contract to forward all such messages on a particular line. No such allegation is contained in the bill, and there is no charge that the Western Telegraph Company has been molested in the exercise of its patented rights, except by the transfer of its business to other lines; and it is not alleged that these lines are prohibited from carrying messages by reason of their contiguity to the plaintiffs' line."

[1] Ante, cc. 4, 5, Part I.

[2] In De Rutte v. N.Y., Alb., & Buf. Teleg. Co. (N.Y. 1866), 1 Daly, 547, it is said that the business of transmitting messages by means of the

§ 124. Among these duties may be mentioned the obligation to keep the telegraph line in proper working order for the transmission of messages. The degree of care and diligence which the company must exercise in reference to this matter has never been discussed in any of the cases which have come before the courts.[1] Whether they would be bound to use only reasonable care and diligence; or whether, in their relations to the sender of the message, the rigorous rules which are applied to common carriers would be applied to them, when there was any derangement of their line, or instruments for operating, will perhaps depend in a great degree upon the determination of the question as to what is the true character of the engagement of the company in the transmission of messages, and whether the severe rule of common carriers is to attach to them; and upon this point, as we shall hereafter see, there is much diversity of opinion.[2]

The rule as to railroad companies is, that they are bound to use the utmost care and diligence in providing the proper and necessary machinery for conducting their business; and if a defect might have been obviated by the most careful and thorough examination, the company is liable.[3]

electric telegraph, is, like that of common carriers, in the nature of a public employment; for those who engage in it do not undertake to transmit messages for particular persons, but for the public generally.

[1] Mentioned incidentally in a late case in the Supreme Court of Michigan; Western Union Teleg. Co. *v.* Carew, 15 Mich. 525.

[2] See infra, c. 4, § 188, *et seq.*

[3] New Jersey R.R. Co. *v.* Kennard, 21 Pa. St. R. 203; Ingalls *v.* Bills, 9 Met. (Mass.), 1. The rule laid down in New York is very severe in this respect as to railroad companies, where it was held that a defect

§ 125. Considering the public nature of the employment of telegraph companies, the great importance of guarding against delays in the transmission of messages, and the number of contingencies that may be met by attention, we see no reason why telegraph companies should not be held to the same degree of care and diligence in providing suitable machinery, and preserving in proper condition and working order their lines and all necessary appliances.

We might suppose a case where the consideration of this question would arise. Let us suppose that the company is in the act of transmitting a message, and that the time at which it is to be received by the other party is of the greatest importance; as, for instance, the object of the message being to enable the person to whom it is sent to act upon some sudden rise or decline in the market; and while so in the act of transmitting it, the operating instrument gets out of order and will not work, and this, because of some defect which by the utmost care and diligence could have been corrected; and by reason thereof the company fails to send the message, or to send it in time, by which damage is suffered. Here it would seem that there should be the same duty resting upon telegraph companies, in this respect,

which might have been discovered by the manufacturer in the progress of the work, by the application of tests known to persons skilled in the business, would render the company liable. Hegeman *v.* Western R.R. Corp. 3 Kernan, 9. The cases in other States do not go to this extent, and the company is not liable where the defect could not have been detected by the utmost care and diligence, although it might have been detected by the manufacturer. See Ingalls *v.* Bills, supra.

as upon railroad companies, and the same degree of care and diligence should be required.

§ 126. It would also be the duty of the telegraph company to provide competent and skilful operators; and other agents and servants in all respects competent for the discharge of their particular duties. And the company is responsible, not only for their possessing such skill, but for the continued application of it in the particular business in which they are engaged. This would be especially so in the case of the operator, whose duties require the exercise of great skill and care, as well as of that peculiar knowledge which is necessary to the ready comprehension and use of the telegraphic symbols, the want of which is a fruitful source of mistakes and delays. For failure in these respects, upon the part of the operator or other agents, their employers would be liable.

§ 127. They should keep their lines at all times in working order, so far as it is possible, in the employment of human agencies, to accomplish this object. They must have their posts firmly and securely erected, their wires of the proper material and size, and properly adjusted upon the poles, with all necessary fixtures, insulators, etc.

And we think it would be their duty to avail themselves of any new improvement in the construction of their line which had been sufficiently tested to justify the conviction that it was superior to the mode of construction already adopted.[1]

[1] So held in case of railways. See Pierce, Am. Railroad Law, pp. 474, 475; Hegeman *v.* Western R.R. Corp. 16 Barb. 353; s.c. 3 Kernan, 9; Nash. & Chattanooga R.R. *v.* Messino, 1 Sneed R. 220.

§ 128. It is their duty to transmit messages for all who apply, without discrimination, except in those cases where they are permitted to give preferences by express statutory provisions; provided compliance be made with the rules and regulations which the company may legally adopt. This is a duty arising out of the public nature of their employment, and independent of contract with individuals.[1]

It is enjoined by statute in England, Canada, and all the American States which have general statutes on the subject of telegraphs.

The provision in all these statutes is substantially as follows: That it shall be the duty of the owner, or the association owning the telegraph line, to receive despatches from and for other telegraph lines and associations, and from and for any individual, and, on payment of their usual charges against individuals for transmission, as established by their rules and regulations, to transmit the same with impartiality and good faith; and in many of the statutes a penalty is imposed for a violation of this provision.[2]

§ 129. It is also their duty to transmit messages in the order of time in which they are received. This would be their duty in the absence of any requirement so to do by statute;[3] although this duty is also enjoined by the English and American general statutes on the subject.

[1] Crouch *v.* London & N.W. R.R. Co. 14 C.B. 255, 25 Eng. Law & Eq. R. 287; Johnson *v.* Midland R. Co. 4 Exch. 367; N.J. Steam Nav. Co. *v.* Merchants' Bank, 6 How. U.S. 344.

[2] See Appendix. See case of Reuter *v.* Elec. Teleg. Co. quoted, post, § 133 in note 1.

[3] Wibert *v.* N.Y. & Erie R.R. Co. 2 Kernan, 245; s.c. 19 Barb. 36.

§ 130. It is made their duty by statute in England, Canada, The United States, and in many of the States, to give preference to government despatches, in the transmission over their lines.[1]

[1] By the 26 & 27 Vict. c. 112, sec. 48, it is provided that messages on her Majesty's service shall have priority over all other messages, and the company shall, as soon as reasonably may be, transmit the same, and shall, until transmission thereof, suspend the transmission of all other messages. Appendix A.

By the Consolidated Statutes of Canada, c. 67, sec. 15, it is provided, that any message in relation to the administration of justice, arrest of criminals, the discovery or prevention of crime, and government messages or despatches, shall always be transmitted in preference to any other message or despatch, if required by persons connected with the administration of justice, or any person thereunto authorized by the Provincial Secretary. Appendix B.

By the act of Congress of July 24, 1866, — entitled, "An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," and which has reference to "any telegraph company now organized, or which may hereafter be organized, under the laws of any State of this Union," — sec. 2, it is provided, that telegraph communication between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General. Appendix C.

The California act of 1861, c. 104, sec. 6, requires that communications to and from Government and State officers, on official business, shall be entitled to priority over all other communications. Appendix F.

In Connecticut the requirement is, that communications from officers of justice shall take precedence over all others. Revision of 1866, sec. 573. Similar provisions in Indiana, Missouri, and Ohio. Appendix G, L, W, CC.

The Laws of Tennessee, Code of 1858, sec. 1320, enact, "In consideration of the right of way over public property herein conceded, every telegraph company shall, in case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate despatch, at the usual rate of charges, to any message connected therewith, of any officer of this State, or of the United States. Appendix H.

There is the same provision in the laws of Oregon, Compilation of 1866, c. 54, sec. 6; and in Louisiana, Revised Statutes, 1856, 116, 152. Appendix DD, P.

§ 131. A preference has also been given, by the provisions of the statutes of many of the American States, to intelligence of general and public interest, such as "press despatches," over private messages; these statutes provide that an arrangement may be made with the proprietors or publishers of newspapers, for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its order.[1]

§ 132. In the absence of any provision by statute, there can be little doubt but that it would be the duty of telegraph companies to postpone private despatches for those connected with the operations of government, or for the furtherance or protection of public justice.

Whether they would have the right, when not expressly authorized, to make arrangements with individuals or associations, for the transmission of what is known as "press despatches," or despatches conveying intelligence in reference to political, commercial, or other affairs of general interest, with a view to their publication at the place of destination, and in so doing to give such despatches preference in the time of transmission over those of a private character, is not free from difficulty or doubt. And the doubt would be increased in those cases where they are required by statute to send for all alike, and in the order of time in which they are received for transmission.

It might be urged in the support of the right that

[1] They are so authorized by statute in New York, Missouri, Wisconsin, California. Appendix AA, W, LL, F.

the public at large are deeply interested in despatches of this character; that they exert a vast and controlling influence over the commercial and monetary affairs of the world; and those of a political character are not only of public interest, but frequently affect the social and industrial interests of society; that it is essentially in this respect that the telegraph becomes an instrument of great public benefit; and that if such communications must await their turn, its public utility would be much curtailed. Still the question would recur, must not all these considerations yield to the express requirements of the statute?

§ 133. As before stated, it is the duty of telegraph companies to treat all their customers impartially and without discrimination, in the transmission of their messages. By the charter of the International Telegraph Company in England, it was provided that its lines "should be open for the sending and receiving of messages by all persons alike, without favor or preference, and subject to such equitable charges and such reasonable regulations as may from time to time be made by the said company."

A case came before the Court of Queen's Bench, of Reuter *v.* The Electric Telegraph Company,[1] in

[1] 6 Ellis & Blackburn, Q.B., 88 Eng. Com. Law R. 341, Easter Term, 1856.

The facts, so far as they are material to this point in the case, were as follows: The defendant, the International Telegraph Company, was incorporated by Royal Charter, bearing date 29th July, 1853, for the purpose of establishing telegraphic communication between Great Britain and other countries, by means of a submarine telegraph to Hel-

which a construction was given to this clause of the charter. An agreement was made between the plain-

land. The charter contained provisions for securing to her Majesty's government the use of the telegraph for State purposes, and the following proviso: "Provided always, and this our Royal Charter is upon the express condition, that subject to the aforesaid provisions given us and our aforesaid officers on our behalf as aforesaid for our service, such telegraph shall be open for the sending and receiving of messages by all persons alike, without favor or preference, and subject to such equitable charges, and to such reasonable regulations, as may from time to time be made by the said company." The case set out an agreement, dated the 14th September, 1853, between the plaintiff and the company, by which the plaintiff, who had been in business on the continent as a collector and transmitter of messages, agreed for a year, and from thence, or so long as the parties pleased, to send all messages through the company's telegraph, except where the sender of the message had specially directed it should be sent in some other way. The company agreed to allow him seven per cent on the amount they should receive; and the plaintiff bound himself not to enter into any contract with any other telegraph company during the continuance of this agreement. This instrument was under the seal of the company.

It appeared that after making this agreement, and while the same was in force, there was a parol agreement made with the plaintiff by the company, through its chairman, by which it was agreed, on the representation of the plaintiff, that he was about to establish a new class of business, that plaintiff should be allowed 50 per cent on all messages sent or received by him through the company's lines, containing public intelligence: this agreement was as follows: "12th January, 1854. That during pleasure, 50 per cent be returned to Mr. Reuter on all messages transmitted by him containing public intelligence." This was the entry on the company's books.

The case also set out a previous correspondence, comprising, amongst other documents, the prospectus of the plaintiff's new undertaking, by which it appeared that he proposed that, in addition to his business of collecter and transmitter of messages for persons who desired to send them, the plaintiff was to become collector of public, political, and commercial news, which he proposed to transmit to this country, and communicate to subscribers. The following letter was sent by the plaintiff to the secretary of the company: "London, 31st December, 1853. Dear Sir, — By the enclosed circular you will observe that my new undertaking will commence on 1st of January, 1854; and as, according to an arrangement with your chairman, 50 per cent will be returned to me of all charges

tiff and the company, by which the plaintiff was to collect public intelligence and transmit it exclusively

of despatches which I may receive or send through your lines, I beg to ask which way you desire our accounts to be kept: if I am to pay you the whole amount for the messages, or whether I am only to pay you half of the usual charge each time." He was answered, that the company preferred as a matter of convenience that he should pay in the whole charge for the messages, and receive back his percentage subsequently. After this, accounts were, from time to time, sent in on this principle, in which the company were charged 50 per cent on such messages; and these accounts were paid. Afterwards, certain amounts remaining unpaid, the plaintiff sued the company upon this agreement.

The case was argued before Lord Campbell, C.J., Wightman, Earle, and Crompton.

Sir Fitzroy Kelly, who was for the company, among other objections to the recovery, said, that the contract was altogether *ultra vires* of the directors, who made it on behalf of the company; that it was not a part of the business of the company to collect particular news; and the plaintiff was already bound to transmit all his messages by the company's line; and, besides, that the effect of the agreement was to give the plaintiff 50 per cent advantage over his competitors, and so to frustrate the provision in the charter providing for equal charges.

Lord Campbell, C.J., in delivering the opinion of the Court, after holding that the company was bound by the contract, said, "We have only further to dispose of Sir Fitzroy Kelly's last objection, founded on the provision in the charter, that the telegraph of the company 'shall be open for the sending and receiving of messages by all persons alike, without favor or preference, subject to such equitable charges and such reasonable regulations as may from time to time be made by the said company.' It is urged that this agreement gives a preference to the plaintiff by allowing him to send his messages at half price. Grave doubts may be entertained whether the proviso, although it may be made the foundation of complaint against the company, can be rendered available to them in resisting a demand under a contract into which they have entered. But the allowance to the plaintiff seems rather a remuneration to him for his services in collecting public intelligence and bringing custom to the company, than any preference or partiality to him in the use of the telegraph; and there is nothing to show that their dealings with him, which they now contend to be illegal, are not according to 'equitable charges' and 'reasonable regulations.'"

Judgment was accordingly given for the plaintiff.

This holding may be considered the more important from the fact that

over the defendants' line. Fifty per cent on all messages sent or received by him through the company's line containing public intelligence, should be allowed to the plaintiff; in other words, his messages were to be sent for half price. The Court held that this was not in violation of the statute; for this arrangement must be considered rather in the light of a remuneration to the plaintiff for his services in collecting the public intelligence and in bringing custom to the company than any preference or partiality to the plaintiff in the use of the telegraph line.

The Court further express a doubt whether, even if this arrangement had been in violation of the provision of the statute above quoted, the company, having entered into it, would be allowed to avail itself of such defence in resisting a demand against it arising out of the contract.

§ 134. It is the duty of the company to fix its rate of charges, and to make them certain and uniform. And it is their duty to transmit all messages according to the rates which they advertise. This duty is in many States imposed by statute.

§ 135. Under the revenue laws of the United States, it was the duty of the company to require all messages to be stamped before they are transmitted over their lines. By Act of Congress, 1862, sec. 104, it was made illegal for telegraph operators to receive unstamped messages from the writers. The stamp was to be affixed and cancelled before the message was transmitted.

this provision for the sending of messages for all persons alike, is to be found in nearly all the general statutory provisions on the subject of telegraphs.

But it was provided that "messages transmitted by telegraph and railroad companies over their own wires, on their own business, for which they receive no pay, do not require stamps."[1]

§ 136. It is also the duty of the company to require its agents and servants to observe secrecy in reference to all private messages. This is, as a general thing, provided for by statute, and a penalty inflicted for its violation; in some States it is made a criminal offence.[2] But, in the absence of such requirement by statute, it is manifest that this would be their duty.

§ 137. From the very nature of the bailment, if it may be called such, it is incumbent on the company to preserve secrecy in regard to the communication with which it is intrusted. Not only is the telegraph used as the medium for the transmission of communications between individuals in relation to contracts, where secrecy is essential to the full enjoyment of the benefits which the contract contemplates, but in a larger number of cases, perhaps, the telegraph is used to transmit communications of a strictly private and personal character, in which all the sacredness of confidential relationship is involved, and which, if they could be exposed by the agents and operators of telegraph companies with impunity, would destroy much of their public usefulness. If such were not their duty, there would be "an impossibility of maintaining the confidence necessary to the existence of private

[1] For the rulings and decisions in regard to stamping messages, taken from Boutwell's Direct and Excise Tax System of the United States, 1863, see Appendix D. The law has been changed.

[2] Post, c. 9.

correspondence."[1] This is a general principle, applicable to all cases of confidential relations between the parties; as said by Vice-Chancellor Wigram in Tipping *v.* Clarke, every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk.[2]

§ 138. But, as we shall see hereafter, this obligation of secrecy does not extend to cases where the agent or operator is called upon to make disclosures in courts of justice in reference to the contents of messages, or when made to public authorities for the prevention of crime, or for the purpose of leading to the detection or punishment of crime.[3]

For a wilful breach of this duty of secrecy in relation to messages, the tortfeasor is of course liable; but there are cases in which the company would be also liable. If an operator, in receiving a message, or taking it off the wires, as it is sometimes called, should read it aloud, in order that strangers should hear and understand, we think it would be in accordance with the authorities and sound law, that the company should be held answerable for the injury. The company can only perform the duty of sending and receiving a message through the intervention of an agent; and if he may wilfully and corruptly interfere with commercial transactions, or malignantly expose family affairs, and not involve the company, such a ruling

[1] Henisler *v.* Freedman, 2 Par. (Penn.) Cases, 274.

[2] Tipping *v.* Clarke, 2 Hare, 383; Morison *v.* Moat, 9 Hare, 241; Williams *v.* Williams, 3 Merrivale, 157; Yovatt *v.* Winyard, 1 Jac. & W. 394; Prince Albert *v.* Strange, 2 DeG. & S. 652, 697.

[3] Post, c. 7, evidence, § 380.

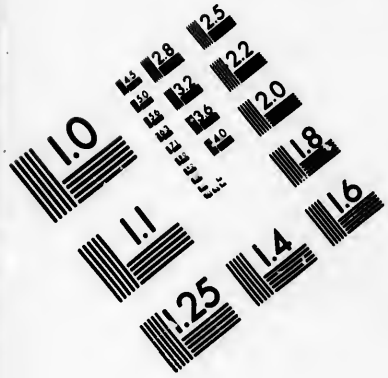
would stimulate the wicked; whilst, at the same time, good men would be convinced that their chances for indemnity rested alone upon the solvency of treacherous agents. We have seen no instance in the litigated cases where telegraph companies have claimed such immunity.

But still there are two opinions, two classes of cases, as to the general responsibility of the superior for the torts of agents. As already indicated,[1] however, the authorities are numerous and highly respectable, and conclusive except where controlled by binding local decisions, which hold the former liable for the wilful acts of the latter, when done in the performance of duties assigned;[2] and, if there be cases proper for the enforcement of the doctrine, this is one of them. But we place it also upon the ground that the common carrier is answerable for torts of his agents in respect to articles or commodities bailed to him in the line of his business.

§ 138 *a*. Aside from the statutory and common law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for *mala fides* and malicious use of its franchises. A libel is any false, malicious, and personal imputation, effected by any writings, pictures, or signs, tending to alter the party's situation in society or business, for the worse;

[1] Ante, § 69.

[2] Phila., Wilm., & Balt. R.R. Co. *v.* Quigley, 21 How. U.S. 202; Yarborough *v.* The Bank of Eng. 16 East, 6; Hay *v.* Cohoes Co. 3 Barb. 42; Bloodgood *v.* M. & H. R.R. Co. 18 Wend. 9; Chestnut Hill Turnpike Co. *v.* Rutter, 4 Serg. & R. 6; Pierce, Am. Railroad Law, 232; Story, Agency, § 308; and also 1 Red. Law of Railways, § 130.



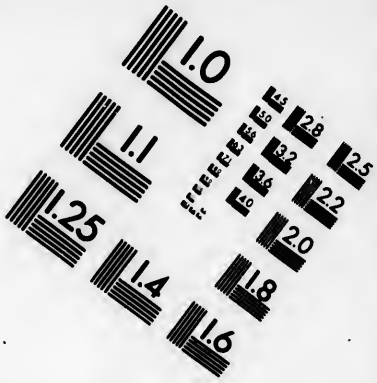
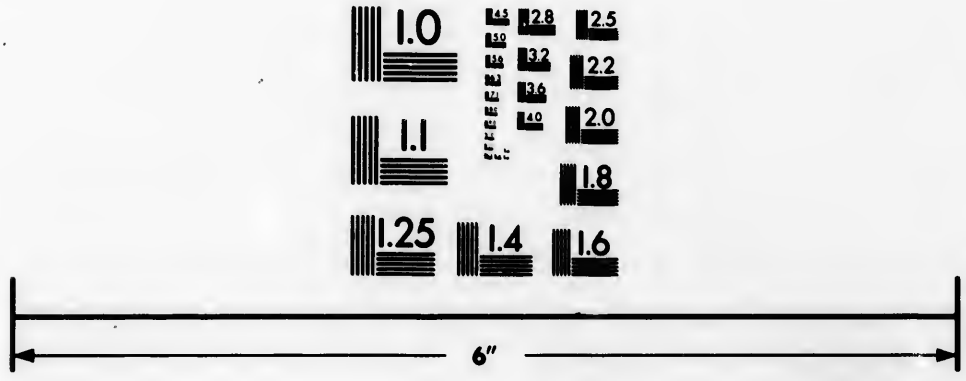


IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic Sciences Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

and a corporation may become responsible for its publication, even in punitive damages.[1]

In the transmission of messages for publication, especially letters and news for the public newspapers, it would seem that telegraph companies assume a responsibility similar to that of the publishers. By their agency libellous matter would be necessarily brought to the knowledge of operators, who otherwise would not have cognizance of it. By their immediate and indispensable agency, "press despatches" and the like are brought before the public. In communications specially designed for the press, we see no reason why they should not stand upon the same footing with publishers. But in strictly private messages the reason for so stringent a rule does not obtain; perhaps should not be applied at all.[2] Although agents do thus learn the contents of messages that might be held libellous, and that they could not otherwise know, yet they only do so from the necessity of the case, and under statutory permission to do this very thing; and if the libellous matter should be sacredly kept secret, the company should not be answerable for a subsequent publication by the receivers of the message. Their duties in this respect are quite like those of carriers who transport packages of handbills, newspapers, or any written or printed matter, or other things, indifferently and alike, not

[1] Barber *v.* Lane, 3 Met. (Ky.) 311; Vicksburg & J. R.R. Co. *v.* Patten, 31 Miss. 156; New Orleans J. & G.N. R.R. Co. *v.* Hurst, 36 Miss. 660; Hopkins *v.* Atlantic & St. L. R.R. Co. 36 N.H. 9; Aldrich *v.* The Press Printing Co. 9 Minn. 133; Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

[2] White *v.* Nichols, 3 How. U.S. 286.

regarding them otherwise than as commodities to be used as consignees may determine. The use of the telegraph by the proprietors, for private and corporation purposes, outside of all agency, alone or conjointly with others in interest, must carry with it the responsibility that rests upon other corporations in respect to libellous matter.

CHAPTER III.

CONTRACTS IN RELATION TO MESSAGES.

§ 139. We come now to consider the relation in which the sender and the receiver of the message stand to the telegraph company in reference to its transmission and delivery, and the reciprocal rights and obligations of the parties arising out of this contract.

§ 140. The view which we have taken of the nature of the engagement of telegraph companies in respect to messages is, that it is similar to that of bailment, but differing from the obligation of ordinary bailees, who have the option to undertake the labor or not; whereas, because of the public nature of the employment of telegraph companies, they are bound, in good faith, without favor or preference, to perform the service for all persons who may apply, or submit to an action for damages if they refuse.[1]

§ 141. Whatever may be the character and extent of the responsibility which the law imposes upon telegraph companies, — whether it be that extraordinary responsibility which will make them the insurers of the safe and correct transmission of the message

[1] N.J. Steam Navigation Co. *v.* Merchants' Bank, 6 How. U.S. 344; The Huntress, Daveis' C.C. R. 86; Johnson *v.* Midland R.R. Co. 4 Exch. 372; Bissell *v.* N.Y. Central R.R. Co. 25 N.Y. 442.

intrusted to them, or a less severe responsibility, — still there can be no doubt but that telegraph companies have the right to limit that responsibility, whatever it may be, by express contract, as common carriers may do. We think that both are governed by the same rules in this respect, both as to law and evidence.

§ 142. In Wann *v.* Western Union Telegraph Co.[1] it was held, that telegraph companies, whether regarded as common carriers or bailees, may specially limit their liabilities, subject to the qualification that they will not be protected from the consequences of gross carelessness.

§ 143. In McAndrew *v.* The Electric Telegraph Company,[2] Jervis, C.J., said, "The company would be in the nature of a carrier who would have a certain liability imposed upon him at common law; but they might limit their liability by special notice, as a carrier could, subject to the condition or qualification that they could not limit . . to the extent of protecting themselves against the consequences of gross negligence."

In the same case, Willes, J., said, "Now, so far back as the year 1803, it appears by the case of Izett *v.* Mountain,[3] to have been considered so clear that counsel declined to argue that a carrier, upon whom is imposed the liability of an insurer by the common law, could not protect himself by such a notice as was equivalent to this condition" (*i.e.*, that the com-

[1] 37 Missouri R. 472.
[2] 33 Eng. Law & Eq. 180, 17 C.B. (84 E. C.L. R.) 3.
[3] 4 East, 371.

pany would not be responsible for unrepeated messages); "the carrier's notices being nothing more than conditions imported into the contracts between them and their customers. If, therefore, at common law, such a condition might have been imposed on the plaintiffs, it is clear that under this statute there is nothing to prevent the company from imposing this condition."

In De Rutte *v.* N.Y., Alb., & Buf. Teleg. Co.,[1] it is said that telegraph companies "may limit their liability by a special acceptance when the message is delivered to them."

§ 144. This doctrine in relation to the right of common carriers to limit their liability by express contract, may now be considered as fully established both in the English and American courts.[2] They have the right to diminish their liability by contract, but not to restrict it by their own will, in the absence of contract. The same reasoning which supports this doctrine as to railroad companies and other common carriers will apply with equal force to telegraph companies. The responsibility of the company is imposed for the protection of the owner of the goods, or the sender of the message. The safe transmission

[1] Court of Common Pleas, N.Y. 1 Daly, 547. In Breese & Mumford *v.* The United States Telegraph Co. 45 Barb. 274, it is said that "even if the defendant is held to be an ordinary common carrier, it had the right to limit its liability by express contract." See also Shields *v.* The Washington Teleg. Co. 9 Western Law Journal, 283.

[2] The contrary doctrine has been held in Georgia. Fish *v.* Chapman, 2 Ga. 349, which follows some of the earlier New York cases that have now been entirely overruled. And see, also, Michigan Central R.R. Co. *v.* Ward, 2 Mich. R. 538, overruled in Michigan Cen. R.R. Co. *v.* Hale, 6 Mich. R. 243.

of the particular message is a matter in which the public have no concern.

§ 145. If, therefore, the responsibility is imposed for the benefit of the person contracting with the company, he has the legal right to renounce the benefit which the law gives him. The parties have the capacity to contract, and such contracts will be governed by the same principles as in case of contracts between individuals. The owner of the goods, or the sender of the message, may insist upon the liabilities of the company which the law imposes; if he chooses, by express contract, to fix a less liability upon the company, it is his own voluntary act; and there is no public policy that will prevent this. But how far public policy will permit a contract between the parties, by which the company exonerates itself from negligence, is not everywhere well settled.

§ 146. The courts of England recognize this right, and some cases seem to go the length of holding that a common carrier may stipulate for exemption from all liability, even for gross negligence or misfeasance.[1] But in the case of McAndrew *v.* The Electric Telegraph Co., it is held that the company could not

[1] In Leeson *v.* Holt, 1 Starkie, 186, the Court seem to have gone very far in this direction. Lord Ellenborough, C.J., said, "In the present case they [the carriers] seem to have excluded all responsibility whatsoever, so that, under the terms of the present notice, if a servant of the carrier had, in the most wilful and wanton manner, destroyed the furniture intrusted to him, the principal would not have been liable." He adds, however, that "the question in these cases always is, whether the delivery was upon special contract." See also Hinton *v.* Dibbin, 2 Q.B. 646. But this last case was decided upon the construction of the English statutes upon the subject of carriers.

stipulate for exemption from the consequences of gross negligence.[1]

The current of American authorities is against the right of the carrier to stipulate for exemption from the consequences of his malfeasance, misfeasance, or negligence.[2]

§ 147. This doctrine has been fully recognized in case of telegraph companies. In the case of De Rutte *v.* N.Y., Alb., & Buf. Teleg. Co., the Court, in recognizing their right to limit the responsibility imposed upon them by law, say, that such limitation of responsibility, although brought home to the sender of the message, will not excuse the company for negligence. And so also in Birney *v.* N.Y. & Wash. Prin. Telegraph Co.,[3] although the company had a rule that they would not be responsible for

[1] Many of the earlier and best-considered English cases hold the carrier liable for ordinary negligence, and that he cannot exempt himself therefrom. Wyld *v.* Pickford, 8 M. & W. 443; Batson *v.* Donovan, 4 Barn. & Ald. 21; Bodenham *v.* Bennett, 4 Price R. 31. But the later cases have departed very considerably from this rule, and go to the extent of holding that the carrier may relieve himself from liability for gross negligence. See Austin *v.* The Manchester S. & L. Railway, 11 Eng. Law & Eq. R. 506; Chippendale *v.* The Lan. & Yorkshire Railway, 7 Eng. Law & Eq. 395; York, Newcastle, & Bernwick Railway *v.* Crisp, 25 Eng. Law &. Eq. 396.

[2] Story on Bailments, § 545 *a*, note 5, § 570; 2 Greenleaf on Evidence, § 215; Reno *v.* Hogan, 12 B. Monroe, 63; Camden & Amboy R.R. Co. *v.* Baladauf, 16 Pa. St. 67. See opinion of Mr. Justice Nelson in N.J. Steam Navigation Co. *v.* Merchants' Bank, that the company cannot stipulate against "wilful misconduct, gross negligence, or want of ordinary care." Clark *v.* Faxton, 21 Wend. 153; Dorr *v.* N.J. Steam Navigation Co. 4 Sand. 136; Laing *v.* Calder, 8 Penn. 479; Penn. Railway *v.* McCloskey, 23 Penn. 532; Graham & Co. *v.* Davis, 4 Ohio St. 362; Baldwin *v.* Collins, 9 Rob. (La.), 468. But see Lee *v.* Marsh, receiver, 43 Barb. (N.Y.) R. 102, contra.

[3] 18 Md. R. 341.

unrepeated messages, and this rule was brought home to the knowledge of the sender of the message, who nevertheless delivered it to be sent as an unrepeated message, and the company made no effort to put the message on its transit, yet they were held liable.

§ 148. We have seen that the company may make rules and regulations in reference to the transmission of messages, so that they be reasonable.[1] A general notice of such rules and regulations has the effect of restricting the general liability of the company, if brought home to the knowledge of the party contracting with the company, in cases where his assent is shown; but it has been held that it is sufficient to show that the notice is brought to the knowledge of the sender of the message, and his assent thereto will be presumed.[2] Whether or not such notice was so

[1] Ante, part 2, c. 2, § 104, *et seq.*

[2] Moses *v.* Boston & Maine R.R. 4 Foster, 71; Baldwin *v.* Collins, 9 Rob. (La.) R. 468; Sanford *v.* Housatonic R.R. Co. 11 Cush. 155; Brown *v.* Eastern R.R. Co. 11 Cush. 97.

But Chief-Justice Redfield, in his treatise on Railways, says (p. 266), "The mere fact of such a notice, restricting the carrier's liability, being brought home to the knowledge of the owner of the goods, before or at the time of depositing them with the carrier, is no certain ground of inferring whether the carrier consented to recede from his notice and perform the duty which the law imposes on him, or the owner of the goods consented to waive some portion of his legal rights. Perhaps, upon general grounds of inference, it might be regarded as more logical, and more reasonable, to infer that the carrier receded from an illegal pretension, than the owner of the goods from a legal one. At all events, to exonerate the carrier from the general liability, he must show, at the least, it would seem, that the owner assented to the demands of the notice, or acquiesced in it by making no remonstrance. It will be found that the decided cases mainly coincide with these general propositions." See vol. 2, § 159, ed. 1867.

made public, or otherwise brought to his attention as to fix knowledge upon him, would be a question of fact for the jury.[1]

§ 149. Telegraph companies furnish printed forms to their customers, convenient in point of size for writing and for preservation; but they answer the further purpose of calling attention to the best mode of avoiding error and delay, and are worded with a view to becoming the contract when the blank shall be used. Repetition of the message upon the wires back to the sender is, in point of fact, the mode of ascertaining the correctness of the first transmission; but these forms usually make it applicable to delivery also. They provide that half the first charge will be required for having the message returned and compared with the first draft, and that, unless thus repeated, the company will not be responsible for errors or delays in transmission or delivery, for more than the amount paid for single transmission, or other sum mentioned. If special indemnity be desired, a separate contract may be made, either upon rates proposed, as in the McAndrew case, or upon a special agreement, as in Carew's case.

It has been held, that such printed blanks, before being filled up, are general propositions to the public of the terms and conditions upon which the message will be transmitted, and that by writing a message under such heading, signing and delivering it for transmission, the sender accepts the proposition, and the company is bound only in the mode and according to the terms stated in the heading; and, further, that,

[1] Brown *v.* Eastern R.R. Co. 11 Cush. 97.

if it should appear that the sender had not in fact read the heading, but had acted himself and allowed the company to act under it, an acceptance may be presumed;[1] and that his omitting to read it would be gross negligence which he would not be allowed to set up, to establish a liability against the company which it had expressly stipulated against; the principle of estoppel *in pais* would prevent him from so doing. The case is given in full in the note.[2]

[1] See McMillan *v.* The M. S. & N.J. R.R. Co. 16 Mich. R. 79.

The late case of Ellis *v.* Am. Teleg. Co. 13 Allen, 226, cites a railroad case, Judson *v.* Western R.R. 6 Allen 486, as establishing the doctrine, that a common carrier "may regulate the extent of his liability by a notice, brought home to his employer, and assented to by him, either directly or by implication," and applies it to the telegraph company.

In 15 Mich. 525, W. U. Teleg. Co. *v.* Carew, reference is made to the case of McMillan *v.* M. S. & N.J. R.R. Co., above cited, as containing the views of the court, as to the power of a carrier in exempting itself from liability, by contract; they then say, persons sending messages should acquaint themselves with the regulations, and "the natural inference would seem to be, either that he already knew and assented to such rules, regulations, or usages, or that he intended to assent to them, whatever they might be." But Campbell, J, in referring to this point in McMillan's case, said, "I agree with my brother Cooley, that the liability of a common carrier can only be varied by contract, and that no notice, unless it has been so given as to authorize the implication of a contract, can avail." This is much more accurate in language, and consonant with reason and authority.

[2] Breese & Mumford *v.* The United States Teleg. Co. 45 Barb. (N.Y.) 274.

"On the 16th March, 1865, George W. Cuyler, President of the First National Bank of Palmyra, acting for the plaintiffs, presented to the defendant, a corporation duly incorporated, and engaged in the business of transmitting messages and despatches by electric telegraph for hire over its line of wires, extending from the city of New York northwardly and westwardly, at its office in Palmyra, a certain despatch, written upon the ordinary blank of defendant, and requested the same to be transmitted

§ 150. A notice by the company, restricting the liability which the law imposes upon it, brought home to the knowledge of the sender of the message, and assented to by him, is but another mode of stating and showing the existence of an express contract between the parties; for the notice is but a proposition made by the company; and the sender of the

to the parties to whom the same was addressed, and paid for such transmission the fee charged by the defendant, but did not pay for nor request to have the same repeated. The blank and message thereon written were as follows: —

"'No. ——. To all points in the United States and British Provinces. REG'D.

"'United States Telegraph Company. E. C. Fellows, Gen'l. Supt. Syracuse, N.Y.; W. H. Kirtland, Asst. Supt. Rochester, N.Y.; N. Randall, President, Syracuse, N.Y.; S. C. Hay, Secretary, N.Y.

"'In order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated, by being sent back from the station to which it is directed, to the station from which it is sent, and compared with the original message. Half the tariff price will be charged for thus repeating and comparing. And it is hereby *agreed between the signer or signers of the message and this company*, that this company shall not be held responsible for errors or delays in the transmission or delivery of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made, and paid for at the time of sending the message, and the amount of risk specified, in the agreement; and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of the same, beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified in the agreement at the time; nor shall this company be held liable for errors in ciphers, or obscure messages; nor for any error or neglect by any other company, over whose lines this message must be sent, to reach its destination; and this company is hereby made the agent of the signer of this message to forward it over the lines of other companies when necessary. No agent or employé is authorized or allowed to vary the terms of this agreement, or make any other or verbal agreement, and no one but the Superintendent is authorized to make a special agreement for insurance. This

message, by acting under it without objection, or by manifesting his assent thereto in any other mode,

agreement shall apply through the whole course of this message on all lines by which it may be transmitted.

"'Palmyra, March 16th, 1865.

"'Send the following message subject to the above conditions and agreement:

"'To CAMMANN & Co., No. 56, WALL STREET, NEW YORK.

"'Buy us Seven (700) Hundred Dollars in Gold.

"'GEO. W. CUYLER, Pt.

"'No. 2. Please write your address under your signature.'

"Cuyler had on hand at his office a lot of these blanks, which the defendant had left there to secure business, and took the blank in question from amongst the others and wrote the despatch upon it. But neither Cuyler nor the plaintiffs had ever read the printed portion of the blanks. The message thus delivered was duly transmitted from the office at Palmyra, as written; but, by some error of some of defendants' operators working between Palmyra and New York, the precise cause of which is unknown, it was received in New York, and sent and delivered to Cammann & Co. in the following form: 'To Cammann & Co., No. 56 Wall Street, New York. Buy us seven thousand dollars in gold. GEO. W. CUYLER, Pt.' In consequence of the receipt of this message, Cammann & Co. immediately, on the same day, purchased, on account of the plaintiffs, $7,000 in gold coin, and paid for the same the then market price, $1.71 in legal-tender notes for each dollar in gold. As soon as possible, after the discovery of the error, the plaintiffs notified the defendant of the same, and of the purchase, and tendered to the defendant the gold so purchased at the price which had been paid, and gave notice that unless defendant elected to accept said gold at the price paid, the same would be sold in the public market for the highest price, and defendant held liable for the loss. Defendant refused the tender, and the gold was accordingly sold at the best market price, which was $1.51¾ in legal-tender notes, by which a loss was sustained of $1,244.25. The plaintiffs seek to recover the amount of this loss with interest.

"By the Court, Johnson, J.: 'It must be held, I think, that the printed heading to the paper on which the message delivered to the defendant for transmission was written, was, under the circumstances, something more than a mere notice to the plaintiff's assignor, by whom such message was written, signed, and delivered.

"'Before the message was written under it, and signed, and delivered to

accepts the proposition, and it thereby possesses all the ingredients of an express contract.

§ 151. Very different from these is that other

the defendant, it was a general proposition to all persons desiring to send messages by the defendant's peculiar means of transmission or conveyance, of the terms and conditions upon which such messages would be sent, and the defendant became liable in case of error or accident in the transmission or conveyance. By writing the message under it, and signing and delivering the same for transmission, the party accepted the proposition, and it became an agreement, binding upon the defendant, only according to the terms and conditions specified in its proposition. That such is the legal effect of the arrangement under which the message in this case was received for transmission by the defendant, seems to me extremely clear.

"'Under the date of the message, and the name of the place from which it was sent, was printed in large, clear type, "*Send the following message, subject to the above conditions and agreement.*"

"'Directly under this the message was written and signed by the plaintiff's assignor. There is no pretence that the "conditions and agreement" there referred to were not plainly printed, or that there was the least difficulty in reading and understanding the terms proposed by the defendant. There they stood, in clear, plain print. First, a general statement, that "in order to guard against errors or delays in the transmission or delivery of messages, every message of importance ought to be repeated, by being sent back from the station to which it is directed, to the station from which it is sent, and compared with the original message." Following this is the tariff or rate charged for such repetition and comparison, as follows: "Half the tariff price will be charged for thus repeating and comparing." Then follow the terms and conditions, in this language: "And it is hereby agreed between the signer or signers of this message and this comp y, that this company shall not be held responsible for errors or delays in the transmission or delivery of this message, if repeated, beyond the amount of fifty dollars, unless a special agreement for insurance be made and paid for at the time of sending the message, and the amount of risk specified in this agreement; and that in case this message is not repeated, this company shall not be held responsible for any error or delay in the transmission or delivery of the same, beyond the amount paid for transmission, unless specially insured, and the amount of risk paid for and specified in this agreement at the time." Here is no ambiguity whatever, but, on the contrary, the language is well chosen, and the meaning and import perfectly clear and obvious to the most indifferent or careless reader. The price for transmission only was paid. There was no request to have the message repeated, and nothing was paid or offered therefor, and no insurance.

class of rules, which involve no element of contract, but are intended to facilitate business. We consider them now in the light of accesses in making and

The defendant is therefore exempt from all liability for the mistake or error complained of, by the express terms of the agreement.

"'It is stated, in the case made, that neither the person who signed the message, nor the plaintiffs, ever read the printed "conditions and agreement" thus subscribed. But it does not follow from this, by any means, that they are not bound by the conditions. They might and should have been read. It was very gross carelessness and negligence not to read them before signing and delivering the message. No notice was given to the agents of the defendant, that the conditions and agreement, to which the author and signer of the message had in terms agreed the same should be subject, he had in fact neglected to read, and inform himself as to their import. The presumption, in the absence of any notice, was, that he had read and understood the proposition he had thus accepted; and the defendant's agents had the right to take it for granted that he had, and will be presumed to have done so, and to have sent in good faith the message upon the terms thus proposed and apparently accepted. The plaintiffs should not now be permitted to allege that their assignor either wilfully shut his eyes and refused to see what was so plainly before him, or that he negligently omitted to use them for that purpose. To allow them now to do this, would operate as a fraud upon the defendant. It would enable one party, through his own gross negligence and inattention, to create a liability against another in his own favor, where none was bargained for, or would have been, and which was expressly stipulated against. The principle of estoppel *in pais* applies in full force against the plaintiffs' claim. [If the matter was printed in a language unknown to the sender, the principle would be different. Orange Co. Bank *v.* Brown, 9 Wend. 85.] Their assignor, by his conduct, led the agents of the defendant to suppose and believe, that he had agreed to the defendant's propositions, and they cannot now gainsay the apparent agreement.

"'In Lewis *v.* The Great Western R.R. Co. 5 H. & N. 867, which was a case where the person, delivering goods to a carrier, filled up and signed a receiving note under a printed head of "Conditions," under which were certain printed conditions, and which the party afterwards, in an action for the loss of the goods, claimed not to have read, Baron Bramwell said, "It would be absurd to say that this document, which is partly in writing and partly in print, and which was filled up, signed, and made sensible by the plaintiff, was not binding upon him. A person who signs a paper like this, must know that he signs it for some purpose, and, when he gives it

executing contracts. It would seem upon principle that where the company has the right of establishing regulations for the proper conducting of its

to the company, must understand that it is to regulate the rights which it explains."

"'I cannot refrain from observing here, that the business in which the defendant is engaged, of transmitting ideas only, from one point to another, by means of electricity, operating upon an extended and insulated wire, and giving them expression at the remote point of delivery, by certain mechanical sounds, or by marks or signs, indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter are controlled and regulated can have very little just and proper application to the former; and all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities, will, in my judgment, sooner or later, have to be abandoned as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and at best but a loose or mere fanciful resemblance. The bearer of written or printed documents and messages, from one to another, if such was his business or employment, might very properly be called and held a common carrier, while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs or speech, to be communicated in like manner. The former would have something which is, or might be the subject of property, capable of being lost, stolen, and wrongfully appropriated; while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny, or of tortious caption and appropriation, even by the "king's enemies." But even if the defendant is held to be an ordinary common carrier, it had the right to limit its liability by express contract, as is now well settled. (Bissell *v.* New York Central Railroad Company, 25 N.Y. 442; Dorr *v.* N.J. Steam Navigation Company, 1 Kern. 485.)

"'In McAndrew *v.* The Electric Telegraph Company (17 Com. B. 3; 84 E. C.L. R.), it was held that a mere regulation of the corporation, similar to the one here in question, was a reasonable regulation under the Act 16 & 17 Vict., and shielded the corporation from liability for the mistake of sending the message to Southampton instead of Hull; and so in Camp *v.* The Western Union Telegraph Company (1 Metcalfe, Ky. 164), it was held that a printed notice similar to the conditions here, not in the form of an agreement, was a reasonable regulation in behalf of the company, and

business, if reasonable, there is a corresponding obligation on the public to conform to them; otherwise the company may decline the service. Now that saving time is a leading object in the use of the telegraph, it is incumbent on the company to give sufficient publicity to these regulations, in order that those wishing to use it may do so intelligently and

binding upon the person delivering the message to be transmitted. Our statute providing "for the incorporation and regulation of telegraph companies" (Sess. Laws of 1848, c. 265, § 11) makes it the duty of the owner of any telegraph line doing business within this State, to receive despatches, and on payment of their usual charges for transmitting despatches, "as established by the rules and regulations of such telegraph line, to transmit the same with impartiality and good faith," under a certain prescribed penalty. Thus the statute, it will be seen, recognizes the right of the owners of these lines of communication, to "establish rules and regulations" for the transmission of communications, delivered to be forwarded in nearly the same terms as the Act of 16 & 17 Vict. The legislature obviously never intended that these corporations or persons engaged in this novel, interesting, and extraordinary business should be placed upon the same footing in respect to liability with ordinary carriers of goods.

"'There is no question here of gross negligence, against which the defendant could not, as carrier even, shield himself by contract. The case states that the message was duly transmitted from the office at Palmyra, as written and delivered, "but by error of some of defendant's operators, working between Palmyra and New York, the precise cause of which is unknown," it was received in New York, and delivered as an order to purchase $7,000 in gold, instead of $700, according to the message delivered and duly transmitted at Palmyra. In view of the nature of this business, and of the peculiarly delicate and subtile agencies and forces employed in carrying it on, it is impossible for the Court to say, from this statement, that the error complained of was the result of any negligence or inattention whatever on the part of the agents employed by the defendant. For aught we can see, it may have been produced by causes over which no person had any control. And these considerations show most forcibly the importance and necessity of allowing those carrying on this business the right to make rules and regulations and contracts limiting and controlling to a reasonable extent the grounds and measure of their liability.

"'For the foregoing reasons I am of opinion that the facts stated in the case made, do not entitle the plaintiffs to any recovery.

"'The defendant must, therefore, have judgment for its costs.'"

without delay; or, on the other hand, that they may decline, if the modes of transacting business do not suit their convenience.

§ 152. This necessity of knowledge on the part of the public is not, however, upon the principle of a contract between the company and the sender, where his assent to the terms of the regulations is presumed from his knowledge, and that, therefore, if by their terms they impose a restricted liability, he has yielded to them by becoming a party to the contract; but it is upon the principle of a legal right in the company to make reasonable rules and regulations, and the corresponding legal duty to make due publication of them, so that all persons may act advisedly in their transactions with them.

§ 153. The principle we are now contending for is not that the company has the right to restrict the responsibilities which it has assumed by undertaking a public employment, except to the extent that may be necessary to enable it fairly and faithfully to discharge this public duty, by throwing such checks and safeguards around its operations as the peculiar character of its undertaking may make necessary for its own protection, and for the more perfect accommodation of the public.

§ 154. There is a variety of rules that may be lawfully enforced by the company, which do not affect the question of ultimate responsibility. For instance, it may be required, as already stated, that messages shall be in writing; that they be legible; that they be paid for in advance; and that no one shall enter the private rooms and read or hear de-

spatches, or interrupt operators. These and other rules, proper as mere business regulations, depend upon the will of the company.

In the matter of compensation the company is bound by law to make the tariff uniform and equal upon all employers, at the same date. A certain amount may be charged for sending a message once; and for a repetition a certain additional rate may be exacted; and, aside from these restrictions, these regulations also emanate from the company, and do not derive their force from any contract with the employer.

§ 155. We have said that we think it is the duty of the company to apprise all persons of such rules and regulations, or at least so to publish them, that all persons may have a fair opportunity of knowing them; but a contrary opinion seems to be expressed in the case of Birney *v.* New York & Washington Telegraph Co.[1] Here the company had this oft-mentioned rule as to repeated messages; the message was delivered for transmission as an unrepeated message, and the company made *no effort* to transmit it, although they had accepted it for transmission; and they were held liable; but on the point we are now considering, the Court say, "Though the default and neglect of which the plaintiff complains may be embraced within the rules and regulations exempting the appellee from liability, it is not necessary that these rules and regulations shall be brought home to

[1] 18 Md. R. 341; and so in the case of Gildersleeve *v.* The United States Teleg. Co., not yet reported. See ante, § 118, decided by the same court, following 18 Md.

the knowledge of the appellant. In our opinion the converse of the proposition is true,— the appellant was bound in law to know them."

We should say the sender was bound in law to know that the company had the right to make reasonable rules and regulations, but not to know what they in fact were.

§ 156. The interests of the public, however, prompt them to diligence in all matters of this kind; and it may even be true, now that these minor business regulations are understood by all who are likely to be affected by them. The most important aspect in which the question of notice presents itself, is where the attempt is made to use a rule or regulation as an element in construing contracts.

§ 157. It should be constantly borne in mind, that the company owes a duty to the public, and it must send the message, even though the sender should refuse to contract under the rules and regulations. It is therefore plain that these rules are offered as terms of a contract, and assent, express or implied, must in some way be shown. If the sender refuse to write his message upon the printed blank, because of its terms, that implies knowledge, and raises the question as to their reasonableness. Still the message must be sent; and afterwards, in case of litigation, the courts would give the company the benefit of their rules, notwithstanding their rejection as terms of the contract in the first instance; thus affording full and complete protection against captious and unreasonable objections, and at the same time holding them to a prompt discharge of a public duty.

If, on the other hand, the message should be offered and sent, without any thing having been said or done in reference to regulations, printed or otherwise, it could not be properly held, in consequent litigation, that the company would be entitled, as a matter of law, to have the benefit and protection of these rules and regulations, by reason of their antecedent existence and inherent force. If so, they would have imparted to them the quality of *the law of the land.*

§ 158. In De Rutte *v.* N. Y., Alb., & Buf. Teleg. Co., the Court, in speaking of the rule in reference to repeated messages, say, —

"It may be that in the course of time this practice will become so universally established among telegraph companies, that all doing business with them will be presumed to have a knowledge of it, and that the omission to secure a repetition of the message will be at the risk or peril of the party to whom it is sent."

The Court probably meant that the omission to repeat would exonerate the company, and devolve the risk upon the parties interested in the particular message.

§ 159. The liability of the company commences when the message is delivered to the agent of the company authorized to receive it, for transmission; and in order to bind the company it must be delivered to such agent.[1]

§ 160. It is not necessary that the sender of the message should be actually present in the office of the company when the message is delivered for transmis-

[1] Blanchard *v.* Isaacs, 3 Barb. 388; Elkins *v.* The Boston & Maine R.R. Co. 3 Foster, 275.

sion; it may be written out, signed, and delivered by an agent. Nor is it necessary that the message should be in writing, in the absence of a rule of the company requiring it; the contract would be just as effectual and binding between the parties as if it were in writing, the difficulty in such cases being only as to the proof; whether or not a message transmitted in this way, would be considered as being in writing, under the Statute of Frauds, will be considered hereafter.

§ 161. As we have seen, it is sometimes the case, that the terms and conditions upon which the message is sent, are stated in printed headings, and when the message is written thereon, according to some of the decisions,[1] it becomes an express contract; or, if the terms and conditions of the transmission are expressly agreed upon before or at the time the sender delivers the message to the company, in any other manner, it is an express contract; and would be governed by the same principles of law and rules of construction applicable to other simple contracts, which are express between individuals.

In such cases the written or verbal agreement of the parties must be looked to, in order to determine their respective rights and obligations; the character of the message sent, whether unrepeated, repeated, or insured, if the company have the usual conditions imposed as to such messages; the terms and conditions of the transmission, etc.

[1] McMillan *v.* The M. S. & N.J. R.R. Co. 16 Mich. R., where it is said, "The condition must be presumed to have been assented to by the party for sufficient consideration; and proof that he did not read it is immaterial."

§ 162. But in many cases there is no express contract between the parties, and the message is simply written out and delivered to the agent of the company, and the charges are paid, and the sender does nothing more in relation to the message. Here the contract between the parties is an implied contract.

In determining the rights and obligations of the parties under this implied contract, the reasonable rules and regulations of the company, if the sender had a fair opportunity of knowing them, would be incorporated into the contract, and the sender would be bound by them.

§ 163. Where the message was not prepaid, and no express agreement in reference to it, whether or not credit would thereby be given to the sender, or whether it would be understood that the company must look to the person to whom the message was addressed for its charges, would depend upon the custom of telegraph companies in such cases; but in the absence of any custom in relation thereto, the presumption would be that credit was given to the sender, as the labor was performed at his request.

§ 164. The sender would have the right to demand a receipt from the company, we think, for the message and also for the charges paid. This he may do for his own protection, as otherwise he might be unable to prove that he delivered the message for transmission, and he should not be compelled to depend upon the possible recollection of the company's agent that such a message was delivered and the charges paid. The case seems to be analogous to the sending of a package by express. If the express company

refused to give a receipt, and the party was unwilling to send it without such receipt, we should say it would be liable in damages for failing to receive and carry the package; and it would be no defence to the company that it was ready and willing to carry the package, provided no receipt were demanded therefor.

§ 165. When the message is delivered to the company, there is an implied promise on its part to transmit it correctly. It must be sent exactly as it is written: the operator has no right to change or alter in any respect the message so as to make it mean what he understands it to mean; even, if without such alteration it be wholly unintelligible to him. He has no right to insist on understanding its meaning; it may be wholly meaningless to him, and yet intelligible to the person to whom it is addressed. If it be changed by the operator to mean what he understands the sender to intend, and loss thereby accrue, the company is responsible in damages.

As, where the message delivered for transmission read, "Send me, for Wednesday evening, two hand bouquets, very handsome, one of five and one of ten dollars;" and the operator reading the word "hand" as hund, added the letters "red," so that the message transmitted read "two hundred bouquets,"— the company was held liable for the loss sustained.[1]

[1] New York & Washington Printing Telegraph Co. *v.* Dryburg, 35 Pa. St. R. 298. The Court say, "The telegraph company did not send Le Roy's message as he wrote it. If written as the company's agent read it, the word *hand* was written *hund*, and if the company had sent the word *hund* to Dryburg, they would have been in no fault. Their agent, however, assumed that *hundred* was meant, and accordingly added the three letters, r–e–d, which did all the mischief. We do not understand that

§ 166. The company is under no obligation to accept messages in cipher of arbitrary characters, or in a foreign alphabet; but, if designedly accepted, they must be rendered or reproduced according to contract. If the message be in the proper alphabet, and yet illegible, the operator could not know what words or letters to transmit, and he should therefore decline it. These preliminary points must be settled at the outset, for, when once received in due course of business, the obligation is perfect. When for want of this diligence a message has been accepted, which in point of fact the agent cannot read, he should relieve the company by a diligent attempt to ascertain from the sender or otherwise the letters or words intended. If, however, it had been sent or deposited in such way as to preclude a preliminary inspection, it might safely be sent according to the best judgment of the agent, and the sender would be held to have assumed the risk. But if a message be plainly written, and error occur, the company is liable.[1]

there was any dot after the letters *hund* to indicate a contraction, so that the agent's inference that hundred was meant, was entirely gratuitous.

"The wrong, then, of which the plaintiff complains, consists in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong is as certain as that it was their duty to transmit the message for which they were paid. . . . One of the plainest of their obligations is to transmit the very message prescribed. To follow copy, an imperative law of the printing office, is equally applicable to the telegraph office."

[1] In Bowen & McNamee *v.* The Lake Erie Telegraph Co. 1 American Law Reg. 685, which was an action brought by the plaintiffs to recover damages sustained because of a mistake in the transmission of the following message sent over the line of the defendants: —

"Send one handsome eight dollar, blue and orange, and twenty-four

§ 167. In N.Y. & Washington Printing Telegraph Co. *v.* Dryburg, it is said that it is plainly the duty of the telegraph operator to send what is written.

red and green, three twenty-fives, Bay State. Fill former orders with best high colors you can.

(Signed) "BIDWELL & Co.,
"Adrian, Michigan.

"To BOWEN & MCNAMEE, New York."

The proof was, that the despatch, when it reached New York, read "one hundred," instead of "one handsome," and that the mistake complained of occurred in some office upon the defendants' line. That the plaintiff after having had the despatch repeated (how far back did not appear), and receiving it a second time, "one hundred," shipped to Bidwell & Co. "one hundred eight-dollar blue and orange Bay State" shawls; and the shawls were returned, and reached New York after the shawl season had closed; by reason of which they were depreciated in value.

The plaintiff claimed the right to recover charges for freight and the depreciation in value.

The defendants denied the commission of the error, and claimed that the despatch was so obscure as to be inappreciable, and not, therefore, the subject-matter of damages, even if the error had been committed; that telegraph companies were not held to the same accountability as common carriers and that such error as the one complained of might occur without gross negligence.

Starkweather, J., charged, in substance, that "telegraph companies holding themselves out to transmit despatches correctly, are under obligations so to do, unless prevented by causes over which they have no control; that the defendant was bound to send the message in question correctly; and that if it failed in this duty, whereby damage had occurred to the plaintiffs, the plaintiffs must recover. That if the message was originally so obscure as to be inappreciable, that then the error complained of could not have increased its obscurity, and the plaintiff could not recover; but if it was sufficiently plain to be understood by Bowen & McNamee, the plaintiffs in the action, the merchants to whom it was addressed, though not intelligible to others, that it was appreciable; and if changed, to the injury of the plaintiffs, such a change was a proper subject of damages."

So in the case of Rittenhouse *v.* Independent Line of Telegraph, Jurist Digest for March 10, 1866, p. 197 (S.C. 1 U.C., L.J., N.S. 247. — C.P. New York), 1 Daly, 474, it was held that a telegraph company was not excused from liability for an erroneous transmission of a message by

It is no affair of his that the message would have been unintelligible. Messages are often sent alon the wire that are unintelligible to the operator, and

the fact that its meaning was unintelligible to the company, so long as the words were plain.

But the correctness of this view is denied in the case of Shields *v.* The Washington & New Orleans Telegraph Co. (1 Livingston's Law Magazine, 69; 4 American Law Journ. N.S. 311), where the plaintiff sued for $164 damages, arising from the incorrect transmission of a telegraph despatch, in which the word sixty-six was substituted, in the price of oats, for fifty-six, the correct number.

The company refunded the cost of the despatch, but resisted any liability incurred by the mistake of the operator.

The Court said, "What is the test of appreciation of a despatch like that which the plaintiff received in this instance from his correspondent? The despatch read or said, 'oats fifty-six, bran one ten, corn seventy-three, hay twenty-five.'

"The person who sent the despatch made no explanation to the operator, and without explanation how could the operator know whether the numbers in question referred to dollars and cents, or to bushels and bales? Again, how could the operator know whether the said despatch conveyed an order to purchase, or an account of sales? And if he was bound to infer the former, what information did the despatch convey to his mind of the extent of the orders?

"The meaning of the despatch was a secret to all but the parties corresponding.

"Under these circumstances the value of the message was inappreciable, and the telegraph company had no means of knowing the extent of the responsibility which ought to be involved in its correct transmission, upon the principles contended for by the counsel for the plaintiff." The judgment was for the plaintiff to the amount of three dollars and fifty cents, — the cost of the message, — and costs of the court.

We have been unable to discover that there was any appeal in this case.

We submit that the view here taken is not the correct one.

Why has the operator any right to know what the message refers to? Or why the necessity of drawing inferences or conjectures in reference thereto? How will such knowledge aid him in the discharge of his obligation to send the message correctly? What difference does it make, in this respect, whether the message "conveyed an order to purchase, or an account of sales"? Would such knowledge aid him in the correct transmission of the message?

As we have seen, the company had the right to avail themselves of all

when he presumes to conjecture the writer's meaning, and to add words which were confessedly not there, he makes the company responsible.

facilities and safeguards which the peculiar agency they employ may make necessary, to protect themselves from the danger of error or delay in the transmission of messages; and they may make rules and regulations in reference thereto, and may require the persons who engage their services to conform to them, and to pay such increased charges as may be reasonable, in order to compensate for the additional trouble and expense incident to the adoption of such safeguards. And if an explanation by the sender to the operator, of the meaning of the message, would contribute to the safety or the accuracy of its transmission, there would be an obligation resting on him to make such explanation. Now when we come to consider the *degree* of responsibility of telegraph companies in the transmission of messages, and whether they are the *insurers* thereof, as carriers are of goods, the question as to their ignorance of the value of the message may be a very proper subject of inquiry, in the same way as all other questions connected with the infirmities of this peculiar business may be; as, for example, the impossibility of accompanying the message on its transit, and the like; for in many instances it is impossible for the sender himself to communicate the value of the message, or of the matters connected therewith; or by an explanation of its meaning to acquaint the operator with its value, or the consequence of mistake or delay. And in looking to these considerations as establishing the inherent infirmity of this mode of conveyance, and as manifesting its want of analogy to common carriers, the view taken in the above case may be pertinent.

And so, the question may be properly considered in reference to damages, in the rule in case of contracts, which authorizes the jury to look to what was in contemplation of the parties at the time of entering into the contract; we mean, in this connection, where it is sought to look beyond the damages which are the natural and proximate result of the failure, to such other damages as may appear to have been in contemplation of the parties from their knowledge of the subject-matter of the contract, and its incidents.

But as to the liability of the company for the natural and proximate loss arising from its failure to comply with its implied contract to transmit the message correctly, we take it, the understanding of the meaning of the message by the operator has nothing to do with it; and that, in all inquiries as to the negligence of the company in the transmission of the message, in respect of either accuracy or promptness, such considerations are out of place. The duty of the sender of the package or other goods, to inform the express company or railroad company of its character and value, is

§ 168. There is also an implied promise, on the part of the company, that they will send the message immediately; that is to say, in the order of time, in reference to other messages, in which it is received. We have already considered the question of their right to show preferences in this respect, and to send messages of a certain character out of their order.[1]

in order that the carrier may take the additional precautions to protect it; as, for example, glass or money, that they may adopt such precautions as will protect them from being broken or stolen, etc.; but the mode of the conveyance of the message is the same, the same agencies being used, whatever be the character of the message, whether it involve a penny, or ten thousand pounds; and the knowledge of the character of the message has nothing to do with its protection: it is transmitted in the same way and by the same process, in all cases.

In the case of railroad companies under the English Carriers' Act, which requires the owner of the goods to disclose the contents of the article delivered for shipment, it has been held that the exemption of the carrier from loss under the act, had reference, exclusively, to losses such as by the abstraction of a stranger, or by his own servants, not amounting to a felonious taking, or by the carrier or his servants losing them from vehicles in the course of their transit, or by mislaying them, so that they could not be found at the time they ought to be delivered; and that it does not extend to any loss of any description whatever, occasioned to the owner, by the non-delivery, or by the delay of the delivery of the article, occasioned by the neglect of the carrier or his servants. Hearn *v.* London & S.W. Railway, 29 Eng. Law & Eq. R. 494.

But if the responsibility of the telegraph company for damages, resulting from the incorrect transmission, could be excused from the fact of the character and importance of the message being unknown to them, this would be so only where they have made the inquiries of the sender, to inform themselves in this respect, and a failure or refusal by the sender, to make the desired explanation. Orange Co. Bank *v.* Brown, 9 Wend. 85; Baldwin *v.* Collins, 9 Rob. (La.) 468; Allen *v.* Sewall, 2 Wend. 340. But in the case of Shields *v.* Washington & New Orleans Telegraph Co., it is not assumed in the opinion that any effort was made by the operator to obtain this information from the sender, nor the necessity of such disclosure made known to the sender in any other manner.

[1] Ante, part 2, c. 2, § 131. In all such cases the company may legally excuse itself for delay, by showing some one of the exceptional cases provided by statute. West. Union Teleg. Co. *v.* Ward, 23 Ind. 377.

Where there is a statutory requirement to send messages in the order of their reception, it is clear that it is a part of the implied contract to conform to the obligation prescribed by the statute. But in the absence of such provision, there is an implied promise to do so.

§ 169. Immediate transmission is a controlling consideration in communicating through this medium. The great inducement which is held out to the public in the transmission of messages is the saving of time; and parties seek this mode of communication mainly from this consideration.

§ 170. So, also, that they will transmit the message with impartiality and in good faith; and this is an implied agreement even where there is no statute requiring it.[1]

§ 171. And that they will preserve secrecy in reference to the messages. They impliedly stipulate that the agents at both ends of the line will do so, not only up to the time of delivery of the message to the party for whom it is intended, but for all time thereafter. The relation in which the company, through its agents, stand to the parties, is one of confidence; and they impliedly contract that this confidence will be kept inviolate. This obligation, as we have seen, is imposed by statute, in England and the American States.

§ 172. There is no obligation, on the part of the company, under an implied contract with the sender of the message, to ascertain whether the message has

[1] De Rutte *v.* N.Y., Alb., & Buf. Elec. Teleg. Co., Court of Common Pleas, N.Y., 1866, 1 Daly, 547.

been received at the other end of the line, and delivered to the proper person, and to convey this information to the sender. The contract is to transmit and deliver the message, but not to inform the sender of the fact. If it has not been done, the company are liable in damages. If the sender desires this information, he should make a special contract with the company.

§ 173. If, at the time the message is delivered for transmission, the lines are down, or any other cause exists which would prevent its immediate transmission, it is the duty of the company to inform the sender; and if they fail to do so, and he suffer loss by the delay, the company must respond in damages. For, if the company accept the message for transmission, they impliedly contract to send it in the order of time of its reception, and that they are prepared to perform this service; if not so prepared, the sender should know it, in order that he may determine whether to engage their services or make other arrangements. They cannot disappoint his reasonable expectation with impunity.

§ 174. The correctness of this view has, however, been denied. In Stevenson *v.* The Montreal Telegraph Co.,[1] Burns, J., says, "It may be asked, was there any obligation on the part of the defendants to inform him, on the 23d of November, that their line was then, at the receipt of the message, out of order? I do not see that any such obligation existed. The company were bound only to transmit as soon as it could be done. We know, as was conceded in the

[1] 16 Upper Canada R. 530.

argument, that the telegraph is a means of communication extremely liable to be deranged or affected by atmospheric influences; that a communication may be prevented one minute, and yet be fully established the next; that interruptions innumerable, and that cannot be accounted for, may and do occur; and therefore it appears to me it is not reasonable to expect that the company is bound, on every occasion when a person desires a communication to be forwarded, to inform him that possibly the message may not be forwarded for some minutes or some hours. It is more reasonable, I think, to cast the burthen or responsibility upon the person presenting the messages to be forwarded, of inquiring whether they can be sent within any particular time, or of giving information of the particular importance it may be to the party that the message should be forwarded without delay."

§ 175. A distinction must be taken between those momentary interruptions, or those caused by atmospheric influences which cannot be foreseen, and which any moment may be removed, and those cases of derangement of the wires which the operator must know will cause unusual delay; by which we mean, more than may be ordinarily expected to occur by transient interruptions. And where the interruptions to the proper working of the lines are such as to cause a suspension of the power to transmit for some hours, surely it is incumbent upon the company's agent, who has knowledge of the fact, to inform the person presenting the message, and who, it must be presumed, seeks this mode of communication, with the well-

authorized expectation that it will be immediate; and we cannot perceive by what principle of law it is incumbent upon the sender of the message to inquire of the company whether they are *at that time* prepared to do what they hold themselves out to the public as prepared at *all* times to do. If circumstances or influences beyond their control do, for a time, render them incapable of fulfilling this public promise, — and which would certainly excuse them, — it is clearly their duty to give due notice of the fact to those who seek to engage their services; and a failure so to do would be as much a breach of the contract on the part of the company, where the message was received by them for transmission, as would be a neglect to deliver the message at the other end of the line, after it had been forwarded.[1]

§ 176. Where the entire price for transmission to the place of destination is paid to the company, and there are intermediate, independent lines with which its line connects, whether the company thereby impliedly agree to be responsible for the correct transmission of the message over all these lines, or only obligate themselves to convey the message over their own line, and safely and without delay to deliver it for transmission to the next succeeding line, will be considered in the chapter on Responsibility for Messages beyond the Company's Line.

§ 177. The contracting parties, in relation to the

[1] This obligation is imposed by statute in Ohio: The operator must inform the sender that the line is out of order, or that the message cannot, for other cause, be sent in its regular order, and for failure, the company are subject to a penalty. Act May 1, 1852. Appendix CC.

transmission of the message, are generally the person who delivers the message for transmission, and the telegraph company; and usually there is no privity of contract between the company and the person to whom the message is sent. But this is not always so. The contract is not necessarily with the party whose name is signed to the message. A case presenting this question has been recently decided in the State of New York.[1]

Edward De Rutte was a commission merchant in San Francisco, California. He had a brother, Theophilus De Rutte, who was his agent and correspondent at Bordeaux, in France, but otherwise had no interest in Edward De Rutte's business. Theophilus De Rutte procured from Callarden & Labourdette, bankers in Bordeaux, an order for Edward De Rutte to purchase for them a cargo of wheat in California, at the extreme limit of twenty-two francs the *hectolitre*, which is the French official measure for grain. Edward De Rutte was to purchase and ship the grain to them immediately; his commissions and the mode of his re-imbursement to be the same as in a previous order received by him from another Bordeaux firm, one of the partners in which was named Monod. Upon receiving this order, Theophilus De Rutte prepared a telegraphic message as follows: "Edward De Rutte, San Francisco. Buy for Callarden & Labourdette, bankers, a shipload of five to six hundred tons white wheat, first quality, extreme limit twenty-two francs the *hectolitre*, landed at Bordeaux; same conditions

[1] De Rutte *v.* N.Y., Alb., & Buf. Teleg. Co., Court Com. Pleas, N.Y., 1866, 1 Daly, 547.

as the Monod contract. Th. De Rutte;" and enclosed it in a letter to a merchant at New York, with instructions to send it to Edward De Rutte in the quickest manner, and to debit Edward with the charges. The merchant's clerk took it to the office of the N.Y., Albany, & Buffalo Telegraph Company, and paid for its transmission to San Francisco. It was transmitted and delivered, and several mistakes had occurred, the principal one, and the one which caused the loss, being the change of the word "twenty-two" to twenty-*five*" francs. Edward De Rutte sued this telegraph company for the loss occasioned by the mistake. One objection of the defendants was, that they entered into no contract with the plaintiff; that they made their contract with Theophilus De Rutte, who sent the message, acting as the agent of Callarden & Labourdette.

§ 178. In answering this objection the Court say, "It does not necessarily follow that the contract is made with the person by whom, or in whose name, a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct and diligent transmission; and when this is the case, he is the one, in reality, with whom the contract is made. The business of transmitting messages by means of the electric telegraph is, like that of common carriers, in the nature of a public employment; for those who engage in it do not undertake to transmit messages only for particular persons, but for the public generally. They hold out to the public that they are ready and willing to transmit intelligence for any

one, upon the payment of their charges; and, when paid for sending it, it forms no part of their business to inquire who is interested in, or who is to be benefited by, the intelligence conveyed. That becomes material only where there has been a delay or mistake in the transmission of a message which has been productive of injury or damage to the person by whom, or for whom, they were employed; and to that person they are responsible, whether he was the one who sent, or the one who was to receive, the message.

§ 179. "It is somewhat analogous to the question which arises, when goods are lost upon their carriage, whether the action against the carrier is to be brought by the consignor or the consignee; and the general rule upon the subject is, that the one in whom the legal right to the property is vested, is the one to bring the action; and if that is the consignee, the consignor, in making the contract with the carrier, is regarded as having acted as the agent of the other.[1] In the case now before us it could make no difference to Callarden & Labourdette whether the message was correctly transmitted or not, as wheat could not be purchased at the time in San Francisco at the price which they had fixed, and the plaintiff was the only one who could be, and who was, affected injuriously by the mistake in the message. The error made led him to the purchase of over $17,000 worth of wheat, upon which he expected, upon the assumption that the despatch was correct, to make his ordinary commis-

[1] Citing Danes *v.* Peck, 8 T.R. 330; Griffith *v.* Ingledew, 6 S. & Rawle, 429; Freeman *v.* Birch, 1 Nev. & Manning, 420; 28 Com. Law, 326; Dutton *v.* Solomonson, 3 Bos. & Pull. 584; Everett *v.* Saltus, 15 Wend. 474.

sions; and the purchase proving unavailable when the mistake was discovered, he was subjected to actual loss." The Court say, further, that for certain purposes Theophilus De Rutte might be regarded as the agent of Callarden & Labourdette in giving the order, but was more especially the agent of the plaintiff in procuring it for him; and the despatch was sent on plaintiff's account and for his benefit. "It was an order given to a commission merchant to purchase grain for a foreign house, if it could be bought at a certain price. In that event he had an interest to the extent of his commissions, and that he might have the earliest intelligence of it, and secure, if possible, any advantage to be derived from it, it was, by the direction of his agent and correspondent at Bordeaux, and at his (the plaintiff's) expense, sent by telegraph, from New York to San Francisco;" and that consequently the contract was with the plaintiff, and the action for the breach was properly brought by him.[1]

§ 180. Delivery in time and to the proper person is a cardinal feature in the business of telegraphing. In the absence of stipulation, the company is bound to due care and diligence from the very nature of the undertaking. Reasonable regulations for this part of the service may of course be adopted by the company. We do not find that any case has been adjudged in England, involving the duty of delivery, and only one is reported in America,[2] in which the company was

[1] N.Y. & Wash. Teleg. Co. *v.* Dryburg, 35 Pa. St. R. 298; Eyre *v.* Higbee, 15 How. Pr. R. (N.Y.), 45.

[2] Bryant *v.* The Am. Teleg. Co. 1 Daly, 575. See § 263, where the effect of a notice limiting this liability is discussed.

held to a very strict performance in the discharge of this implied duty. The analogy with similar engagements by others is recognized and enforced.

§ 181. The first question to be considered is, what will constitute a delivery so as to absolve the company from all further obligations under the contract.

The message delivered must be a duplicate of the message presented by the sender for transmission.

The first duty of the company, then, after the message has been transmitted over the wires, is to have it translated from the telegraphic symbols into the vernacular language. It should also have stated upon the paper whereon it is written, the name of the place from which it was transmitted, and the exact time of day it was delivered for transmission. This should always be noted on the message transmitted, by the first or receiving operator, as the exact time of the day in communications of this character is often important.

§ 182. If the message delivered for transmission is in some language other than the English, the letters composing each word would be translated into the telegraphic characters, and so transmitted, and at the office of destination would be again translated back into the letters composing the words, and so formed into the words of the foreign language; and to discharge this duty it would be unnecessary that either operator should understand the foreign language; for, as we have seen, the operator is not required to understand the meaning of the message.[1]

[1] But let us suppose the message delivered for transmission was in a language in which the English alphabet was not used, as, for example, Chinese or Arabic. It would seem that the sender must bring a translator

§ 183. A case might occur where an oral delivery of the message would discharge the obligation of the company; as, where the person to whom it was addressed was in the office at the time of its reception, and it was read off to him by the receiving operator.[1]

§ 184. There is a *primâ facie* obligation resting upon the company to make an actual personal delivery to the person to whom it is addressed; but this may be controlled by a well-established usage or custom recognizing a different mode of delivery; and it would be presumed, in such case, that the parties contracted in reference to such custom. It is so held in case of railroad companies.[2]

§ 185. When the address of the person to whom the message is to be delivered is not given with such accuracy and particularity as to enable the company's agent, in the exercise of due diligence, to find him,

with him, not in order that the operator may understand the meaning of the message, but in order that the English alphabet may be used in forming the words; and for the reason that the telegraph symbols adopted are arranged to represent the letters of the English alphabet; and no arbitrary signs, so far as we know, have been adopted to represent any other alphabet.

If the line was in China or Arabia, however, we should think the operators would be bound to know the language of the country; and the company must have an agent competent to translate the message into the English alphabet, in order to transmit it, and another agent at the office of destination to render it again into the Chinese or Arabic, and so deliver it.

It may be that when telegraph lines are established in such countries, a new class of symbols will be adapted to the alphabet of such language.

[1] Durkee *v.* Vt. Cent. R.R. Co. 29 Ver. R. 127.

[2] Story on Bailments, § 544; Gibson *v.* Culver, 17 Wend. 305; s.c. 1 Denio, 45; Farmers' & Mechanics' Bank *v.* Champlain Transportation Co. 16 Vt. 52; 18 ib. 131; Farmers' & Mechanics' Bank *v.* Champlain Trust Co. 23 Vt. 186. See Pierce on American Railroad Law, p. 434, where these authorities are cited.

personal delivery would be excused; and the company would have sufficiently discharged their duty, by making publication, showing that a message was in the office for such person.[1]

§ 186. But if the address is given with sufficient particularity to enable the agent of the company to find the party, without delay, personal delivery should in all cases be made, except when the party lives in a different place from that in which the office is located; and in that case the message should be sent to him, in a sealed envelope by mail; and such, we believe, is the custom of telegraph companies. The first operator should make the additional charge for postage when the message is delivered for transmission.

When personal delivery is required, we should think the duty would be discharged, by leaving the message, sealed up and properly addressed, at the place of business or residence of the party.

§ 187. Where personal delivery cannot be made, because the address of the party is not known, the manner of giving notice that such a message was in the office would depend in a great degree upon the

[1] It is customary to put such notices in the daily newspapers in cities. Personal delivery is not incumbent on railroad companies; the reason is, that their line of movement and points of termination are locally fixed; their cars are confined to certain tracks; and if personal delivery was required of them, they would have to resort to another and distinct species of transportation, and they are therefore only required to deliver at their stations. Pierce on American R.R. Law, p. 435; Thomas *v.* Boston & Providence R.R. Co. 10 Met. 472. But this rule as to railroad companies, we think, could not be properly applied to telegraph companies, as no such reason exists for excusing personal delivery in their case. Wherever the address of the party to whom the message is sent is sufficiently given to enable him to be found, there personal delivery should be made, if he lives in the same locality where the office is situated.

custom of the company, or of other companies in the same business.[1] The principle which governs all such questions is, Was there the exercise of that diligence which the law requires of such public bailees, in making the delivery which they impliedly promise to do, in the contract for transmission of the message? And whether there was the exercise of such diligence would be a question of fact for the jury, to be determined by the character of the business, the situation of the parties, and the local customs in such cases.[2]

[1] Blin *v.* Mayo, 10 Vt. R. 56; 2 Kent Com. 604.

[2] In some of the States, provision is made by statute for the delivery of messages.

In Missouri (Revised Statutes, c. 156, secs. 7, 8,) it is provided that telegraph companies or owners shall deliver all despatches by a messenger, to the persons to whom the same are addressed, or to their agent, on payment of any charge due for the same; *provided*, such person or agents reside within one mile of the telegraph station, or within the city or town in which such station is.

If such person or agents do not reside as above specified, such company or owner shall, if so directed, and upon payment of postage, send the same, postage prepaid, by post, to them, to such post-office as may be named. Appendix W.

There is a similar provision in Indiana (Revision of 1860, c. 179, sec. 3), except as to the duty of sending by mail. Appendix L.

In Ohio (Act May 1, 1852), it is required that despatches shall be delivered in the order of time in which they are received for transmission, except those of public interest, which shall have preference; and it is further provided that no telegraph company shall be required to deliver despatches at a greater distance from the station at which they are received than the published regulations of such company require the company to deliver them. If the applicant (?) direct the despatch to be mailed at the place of delivery, and offer to pay the necessary postage thereon, the telegraph company shall affix the necessary postage-stamp, and mail the despatch in time for the first mail that shall depart for the place of final destination, within a reasonable time after such despatch shall have been received at the office of delivery; and for omission so to do, shall be liable to a penalty. Appendix CC.

In Virginia (General Acts, c. 149, Act May 26, 1852), there is this sin-

§ 188. Delivery must be made within a reasonable time.

What would constitute reasonable time would be a question of fact for the jury, depending upon the circumstances of each particular case.[1]

In the ordinary course of business of the company, the obligation would rest upon it to deliver the message in the order of time, in relation to other messages, in which it was received at the terminal office. We say in the ordinary course of the business of the company; but when the character of the message showed urgency, or in any manner disclosed the importance of immediate delivery, then it should be delivered at once.[2] Order of time is adopted in the transmission

gular provision in reference to the delivery of messages: "In case of failure on the part of the telegraph company to deliver a despatch within such time as will allow, after its reception at the first office, one hour, for each one hundred miles over which such despatch containing fifty words or less, may be transmitted, and, at the same rate for messages, the owner or association which received the charge therefor shall refund the same, on demand of the party from whom it was received."

By the Act of February 21, 1866, telegraph companies are required to deliver despatches promptly to the persons to whom they are addressed, where the regulations of the company require such delivery, or to forward them promptly as directed when the same are to be forwarded; and for every failure to deliver or forward a despatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the despatch, or the person to whom it is addressed, and be liable in damages to the party aggrieved. Appendix KK.

[1] Nettles *v.* S.C. R.R. Co. 7 Rich. 190; Broadwell *v.* Butler, 6 McLean R. 296.

[2] As in Western Union Telegraph Co. *v.* Ward, 23 Ind. R. 377, where the message delivered for transmission was, "Come on the night train without fail;" so, in Parks *v.* Alta California Teleg. Co. 13 Cal. 422, "Due $1,800; attach if you can find property; will send note by to-morrow's stage," — such messages should be delivered with the utmost promptitude.

of messages because of the limited capacity of the wire; no such reason could necessitate such a rule in reference to the delivery of the message; and we think the company would not be justified in adhering to such a rule in a case where, by so doing, there might be injurious delay.

The company is under obligation to provide itself with a sufficient force for the delivery of messages, according to the exigencies that may arise.

§ 189. Where preference is given by statute to messages of a certain class, the priority must be given to the delivery of them. What we have said in reference to the duty of the company to give precedence to the transmission of messages of public and general interest, and in furtherance of public justice and the public weal,[1] will apply equally to the delivery of such messages.

§ 190. The reasons and principles upon which the courts have rested the right of telegraph companies to enforce their regulations in reference to repeating messages upon the wires do in no just sense apply to delivery after transmission has been effected. Their reasonableness as applied to transmission is predicated upon the ground that the repetition may be necessary to insure accuracy, and to enable the company to inform themselves as to whether the message has in fact been transmitted.

§ 191. But, we submit, this reasoning would have no application to the delivery of the message. It could make no difference, in considering the obligation as to its delivery, whether the message had

[1] Ante, part 2, c. 2, § 131, *et seq.*

been sent as a repeated or an unrepeated message. The ability of the company to make the prompt, correct, and safe delivery of the message could in no degree be affected by this consideration. And we doubt not that this regulation, so far as it excuses the company as to the delivery of the message, will be held unreasonable, with the same uniformity that it has been held a reasonable regulation in respect to its transmission.

§ 192. We are now speaking of the contract implied by law, between the parties, and which is to be construed in relation to such reasonable rules and regulations as the company may make; for, of course, in cases of express contract that they are not to be responsible for the delivery of an unrepeated message, the company, under the American authorities, would only be liable in case of negligence; and by the English authorities, only in case of gross negligence, if at all. Indeed, it might be a question, under the American authorities, whether, even if the case of an express contract, and where thereby the company would only be liable for negligence in the delivery, the question is not practically the same as in cases of implied contracts; for, in determining the question of negligence, it seems to be settled by the later and best-considered authorities, that negligence exists in all cases where that degree of diligence has not been exercised, which the nature of the business, in each case, would require for the accomplishment of the object.

§ 193. Delivery must be made to the proper person; and the company would be liable for a delivery

to a wrong person, although it was made by the company in good faith, believing it was to the proper person.[1]

[1] It was so held in case of a delivery by a railroad company to a person who presented an order for the goods, purporting to be signed by the consignee, but which order was in fact forged. Powell *v.* Myers, 26 Wend. 591; Angell on Carriers, §§ 321–326.

This requirement has been pushed to its utmost limit, in a very recent case decided in the Supreme Court of Indiana: The American Express Company *v.* Calvin Fletcher. See the November (1866) number of The American Law Register, p. 21. The opinion, delivered by Frazier, C.J., is as follows: "Fletcher & Sharp, who were bankers at Indianapolis, sued the appellants for the loss of a package of paper money, which the latter undertook to convey from Indianapolis to Arcola, Illinois, and to deliver to one 'J. O. Riley in person.' It so appears by the receipt given for the package, a copy of which is made a part of the complaint. The complaint is in two paragraphs in the usual form, as against a common carrier, — the first charging a loss by negligence; and the second, that the package was carelessly delivered to another person than Riley, and thereby lost. It is alleged in both paragraphs that the defendant was a foreign corporation, and a common carrier of goods and money, etc. It is not alleged that it had complied with the provisions of our statute concerning express companies (1 G. & H. 327, sec. 2); but no question arises as to that.

"The answer was, 1. The general denial. 2. That the agent of the express company at Arcola was also operator of the telegraph line communicating with Indianapolis, and that a person pretending to be J. O. Riley despatched through the said operator a telegram to the plaintiffs, requesting them to send him $1,900 by express; that in due time, the same agent received by express a package purporting to contain valuables, addressed to J. O. Riley, whereupon the same person who had despatched the telegram, demanded said package, and it was thereupon delivered to him; and that this was the same grievance mentioned in the complaint. 3. That upon the arrival of the package at Arcola, a person presented himself, claiming to be J. O. Riley, and demanded the package, and having identified himself as the very person upon whose telegram, despatched on the day previous, in the name of J. O. Riley, the package had been forwarded; thereupon the defendant, having no means of identifying the claimant, and believing him to be the genuine J. O. Riley, delivered the same to him.

"Demurrers were sustained to the second and third paragraphs of the answer, and this raises the only question presented for our consideration.

If, by reason of the negligence or misfeasance of the company's agents, the message was delivered to the wrong person, the person for whom the message was intended would have his remedy *ex delicto* against the company for such damage as he had sustained by reason of the misdelivery.

§ 194. If, after due diligence used to make delivery

The paragraphs are the same in legal effect, and were, in our opinion, not good.

"The express undertaking of the appellant was to deliver the package to '*J. O. Riley in person.*' The utmost that the answer alleged was, that the delivery was to another person, who pretended to be Riley. He identified himself merely as having so pretended on the day before, by transmitting a telegram in Riley's name.

"This was no better evidence that his name was Riley, than if he had so stated to the express agent, or any third person. That the package had been sent in response to a telegram purporting to be from J. O. Riley, simply proved that Riley had credit, or some arrangement with the plaintiffs to furnish him money, and that the package was sent to him, not that he was the person who sent the despatch, or that any man pretending to be he, was to receive it. The electric fluid was not capable of transmitting the man's autograph, so that the plaintiffs could have any opportunity of detecting an imposition. This the defendant was bound to know, and should have acted accordingly. The failure to act with proper caution was such negligence as clearly rendered the defendant liable for its consequences, even though its liability be limited to that of a forwarder, as was attempted to be done by the receipt given. That liability holds him to ordinary diligence; *i.e.*, such care as every prudent man commonly takes of his own property.

"The payment of $1,900, of a man's own money, to a stranger, without requiring him to identify himself as the person really entitled to it, would be an act of very gross carelessness.

"Without considering whether the facts pleaded in the second and third paragraphs of the answer would have been admissible in evidence under the general denial, we are of opinion that these paragraphs were justly held bad on demurrer. The class of cases cited in argument for the appellant, being cases where payments had been made on forged orders, and it was held that money thus paid to an innocent party could not be recovered back, unless notice of the forgery had been given on the same day, we do not deem applicable to a case like this. The reasons upon which these decisions rest do not exist here."

[212]

in person to the proper party, he cannot be found, and such notice is given as the usage of telegraph companies requires, that the message is at the office, the company will be excused from further efforts to make the delivery, and their responsibility will be at an end.[1]

We should think, in such cases, there was no obligation resting upon the company to inform the sender of the message of their inability to deliver the message. They have fully complied with their contract when they have transmitted the message, and used the diligence which the law requires to make the delivery. If the sender desires information as to the delivery of the message, he can make an express contract with the company to give him such information.[2]

§ 195. If the contract with the sender is, that the charges for transmission are to be collected from the person to whom the message is addressed, or if nothing is stipulated between the parties in reference thereto, and the message is sent without prepayment of the charges, the company would be under no obligation to deliver the message until the charges were paid.

In case of failure or refusal to pay the charges, by the person to whom the message was addressed, or where the company were unable to find the proper person to make delivery to, we think the company would have a lien upon the message for its charges;

[1] Fisk v. Newton, 1 Denio, 45, as to carriers.

[2] It is usual, we believe, for telegraph operators to make the inquiry gratuitously for the sender of the message, whether the message has been delivered, when so requested by him.

and would have a right to sell the same for its charges, as other bailees may do in enforcing their lien upon the thing bailed. Whether it had any market value would be determined by the demand for such an article.[1]

§ 196. It would seem reasonable to require of the company, where a party refuses to accept and pay for the message, that they shall make an immediate demand upon the sender for payment, so that he could have his option to pay the charges, including the cost of this demand, and have the message delivered; and, upon payment by him, that the duty of delivery would immediately arise. Upon a delivery of the message, or a sufficient excuse for failure, the responsibility of the company terminates, and the implied contract with the sender has been complied with.

§ 197. The telegraph company may be the agent of the sender of the message, or of the receiver of the message where there is privity of contract with him; or it may be, that in some cases they would be held to be the agent of both sender and receiver, as in the case of N.Y. & Wash. Prin. Teleg. Co. *v.* Dryburg.[2] Wherever the relation of principal

[1] We might conceive of a market value to a certain class of messages, as "press despatches," or despatches in relation to the condition of the markets, and such like; but of course no market value could well attach to ordinary private despatches. This, however, is well known by the telegraph companies, and they therefore properly insist on prepayment very strictly.

[2] In the case of Ellis *v.* Am. Teleg. Co. 13 Allen, 226, the right of the receiver of the message to sue and recover for damages consequent upon error in transmission, is clearly recognized; but the company was held to have complied with the contract under the rule as to unrepeated messages.

and agent is established between either of these parties and the telegraph company, the principles of law applicable to this relation in other cases would apply to this, in respect to the liabilities of the one to the other. And so, in cases of controversy between a third party and either sender or receiver of the message, in relation to its transmission, or any other matter with which the duty of the telegraph company was connected, upon all questions arising as to the agency of the telegraph company, the same principles would be applied as in other cases of agency.

CHAPTER IV.

EXTENT OF RESPONSIBILITY IN RELATION TO MESSAGES.

§ 198. This is the most important branch of telegraph law. The extent of responsibility is to be determined by considering the nature of the engagement of telegraph companies with the public, and the duties which the law imposes upon the contracting parties. The subject is so entirely new, and the interests involved so immense, that a conflict of judicial opinion is naturally expected. Comparatively few cases have been reported; and some of them have turned upon questions of pleading and evidence. The discussions have been chiefly directed to the analogies between telegraph companies and common carriers. We will present the subject first upon the authorities; and after that, submit a more systematic view upon principle, bearing in mind that the utility of the common law and the wisdom of the courts are never so clearly shown as in the application of old rules to new facts.

§ 199. In the case of Parks *v.* Alta California Telegraph Company,[1] the Supreme Court of California regarded telegraph companies as common carriers, and held that they are subject to the same stringent responsibilities as common carriers of goods. This

[1] 13 Cal. R. 422.

decision was rendered in 1859, and is the only one known to us in which this doctrine has been asserted without qualification.

The case was this: The plaintiff had delivered to the defendant's operator the following message for immediate transmission: "Due $1,800; attach if you can find property; will send note by to-morrow's stage." This message was addressed to the agent of the plaintiff at Stockton, and was in answer to one received that morning from this agent, informing plaintiff of the failure of a firm at that place, and inquiring the amount due from them to him. There was delay in the transmission of the message, and before its reception, prior attachments of other creditors of the firm had absorbed their assets. These attachments were levied after the time when the message of plaintiff would have been received, had it been transmitted without delay. Consequently the plaintiff's debt was lost, as it appeared that an attachment might have been obtained and the plaintiff's debt saved if the message had been promptly transmitted; or, if he had been informed that it could not be promptly transmitted, he could have secured the debt by taking the next stage for Stockton.

An accident, it seems, prevented the sending of the message, of which the plaintiff was not informed until 9 o'clock A.M. of the next day. The message was then forwarded, but did not reach the plaintiff's agent until about 12 M., and the writ did not reach the sheriff's hands until about 6 P.M.

The jury found that the failure to send the message was by the gross neglect of the company's ser-

vant. The Court below held that a telegraph company was not a common carrier; that it was not in any sense an insurer; that a telegraphic despatch had no market value, and the measure of damages was limited to the amount paid by plaintiff for its transmission.

§ 200. In the Court of Appeals it was argued that the telegraph company was a common carrier; that it was a public vehicle, whose value consisted in its accuracy and despatch, which, to be preserved, must be guarded by the strict rules defining the liability of common carriers; and that no exemption from such liability could be claimed, because the motive power was a subtile and uncontrollable agent.

And the Court sustained this view in an opinion delivered by Baldwin, J., who said, "The rules of law which govern the liability of telegraph companies are not new. They are old rules applied to new circumstances.

"Such companies hold themselves out to the public as engaged in a particular branch of business, in which the interests of the public are deeply concerned. They propose to do a certain service for a given price. There is no difference, in the general nature of the legal obligation of the contract, between carrying a message along a wire and carrying goods or a package along a route. The physical agency may be different; but the essential nature of the contract is the same. The breach of the contract, in the one case or in the other, is, or may be, attended with the same consequences, and the obligation to perform the stipulated duty is the same in both cases. The importance of the discharge of it in both cases is

the same. In both cases the contract is binding, and the responsibility of the parties is governed by the same general rules." The case was remanded for a new trial.

§ 201. With due deference to the tribunal from which this opinion came, we submit, that the case as presented did not require the determination of this question, or any expression of the views here announced. It seems that the message was permitted to remain in the office, from the time it was received, until 9 o'clock the next morning, when the plaintiff for the first time was informed that it had not been sent; and then it did not reach its destination until 12 o'clock M. Whether or not the accident that prevented its transmission was of a nature that would have excused the company, would not be a material inquiry; for, whatever its character, it was manifestly the duty of the company's agent to have informed the plaintiff that the message could not be promptly transmitted, and more especially as the message disclosed on its face the urgency of the case, and the importance of immediate transmission.

§ 202. It would seem, then, that in this respect there was negligence on the part of the company, and such negligence as would make them liable for all the direct, natural, and proximate damages arising from the failure of the plaintiff's agent to obtain the desired information in time. And even if the telegraph company could be held only to that degree of care and diligence which is exacted of ordinary bailees, still they would be liable; and so, it being a case of actual negligence, it mattered not whether the law

onerated them with the extraordinary responsibility which would make them the insurer of the safe and prompt transmission of the message, or only held them to reasonable care and diligence; their liability was the same in either view of the case.

§ 203. The case of Bowen & McNamee *v.* The Lake Erie Telegraph Co.,[1] of which we have only a meagre report, tends in the same direction; but the doctrine is not so explicitly declared. It was an action to recover damages sustained by reason of a mistake in the transmission of the message, whereby the words "one handsome," were altered to "one hundred." The message was transmitted from Monroe in the State of Michigan, to the city of Buffalo, N.Y.; and the mistake occurred in an office on defendant's line.

It was urged, in defence, that telegraph companies were not to be held to the same accountability as common carriers, and that such an error might occur without gross negligence. Starkweather, J. (in the Court of Common Pleas, Ohio), charged the jury, in substance, that "telegraph companies, holding themselves out to transmit despatches correctly, were under obligation to do so, unless prevented by causes over which they had no control; that they were bound to send the message correctly; and if they failed in this duty, whereby damage had occurred, the plaintiff would be entitled to recover."

§ 204. In view of the fact that the mistake occurred in an office on defendant's line, this charge would operate as strongly against the defendant as if

[1] 1 American Law Reg. 685.

the Court had held the company to the responsibility of common carriers; but it is probable that the Court did not intend to assert the doctrine so broadly.

§ 205. In 1855, a case came before the Court of Common Pleas in England, in which the plaintiffs were damaged by a change in a message, causing their ship to be taken to a port different from the one ordered. As it was not repeated, the defendants insisted that no liability had arisen, because they had adopted a rule which was made a part of this particular contract, notifying the public that they would not be liable for mistakes, unless messages should be repeated, and that they could thus limit their liability under the Act of Parliament allowing them to adopt reasonable conditions. The Court avoided all collateral questions, and only considered the reasonableness of this rule as applicable to an unrepeated message, and said "that in this respect a telegraph company was '*in the nature of a carrier*,' who might limit its liability by a special notice, subject to the condition that it could not limit it so as to protect itself against the consequences of gross negligence."

We give the case below,[1] that the reader may see

[1] McAndrew *v.* The Elec. Teleg. Co. 33 Eng. Law & Eq. R. 180.

This was an action to recover damages for a loss sustained in consequence of a mistake in the transmission of a message. The company had the usual regulation, so often heretofore referred to, as to unrepeated messages; the message in question was sent as an unrepeated message. It was agreed that the question presented by the case was one of law; viz., whether the condition as to unrepeated messages was reasonable or not.

In discussing this point, Byles, Sergt., said, "The defendants, by their acts, are placed in the position of persons who have liabilities cast upon them at the common law, — such as carriers, who are bound to carry; inn-

how the subject was discussed at that early day; and because it is a leading case, and a subject for reference and comment elsewhere. Mr. Parsons, in his

keepers, who are bound to receive guests; or the owner of a mill, at which the tenants are bound to grind, and who is bound to take their grist. Here the company are bound to transmit the messages which any one may wish to send; and this obligation would be evaded altogether, if they could impose unreasonable conditions; the Act of Parliament has, therefore, expressly limited the regulations they may make by the word 'reasonable.' The question therefore is, Are the conditions indorsed on the message proper, and so brought home to the plaintiff's knowledge, reasonable? It is submitted that these are conditions such as the company have no right to impose. They sell, so to speak three kinds of articles, — unrepeated messages, repeated messages, and insured messages. After advising the public that, in order to provide against mistakes, messages ought to be repeated, and half the original charge is added for repeating, they go on to say, 'the company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise.' Then, as to repeated messages, the only distinction is, that the words 'from whatever cause they may arise,' are omitted. In both cases they say they will not be responsible for any mistakes, unless the message be insured; and then follows a scale of premiums.

"Now, as to insuring, — although the question will not actually turn on that, — what is a man to insure? How is it possible that he can calculate the risk, or the damages likely to arise from a mistake in the transmission of a message? How, for instance, in the present case, could the plaintiffs calculate upon their ship being missent to Southampton? In order to know what he is to insure against, he must first know what mistakes the company are going to commit."

[Jervis, C.J.: "Do you maintain that the legislature intended to cast on the company, for 2s. 6d., a liability to £100,000?"]

"So far as this: that if it can be made out, for example, that a mistake occurred from gross negligence of their servants, they would be liable. The legislature did intend that; the legislature never could have intended the public to have the benefit of this means of transmitting messages, and yet that there should be conditions imposed, as that by no possibility could the company be obliged by the public to do their duty. Surely a condition which excludes under any circumstances the possibility of any liability whatever, on the part of the company, is unreasonable."

[Jervis, C.J.: "Look at the case without reference to the statute, as a carrier at common law, for instance. A common carrier has the right to make a special contract to limit his liability; still he is liable for gross

work upon Contracts, refers to it as sustaining the doctrine that they are common carriers; and, referring

negligence. You admit that the point of gross negligence does not arise; it is subject to that qualification."]

"They say they will not be responsible for any mistakes whatever; and even if repeated, you may, for your own security, pay a higher sum, but even then we will not be responsible." . . .

[Jervis, C.J.: "Are there not two views of looking at the case? First, are the conditions within the 'regulations' contemplated by the act? Secondly, if not, are the character and constitution of the company such as will enable them to make such contracts by reasonable notice?"]

"No doubt a carrier at common law could limit his liability, but it must be within reasonable bounds. He cannot limit it absolutely. In Garnett *v.* Willan (5 B. & Ald. 56), Bayley, J., thus expresses the law: 'A carrier is entitled to have a compensation in proportion to the value of the article intrusted to his care, and the consequent risk which he runs. He may, therefore, by a special notice, limit his responsibility *to a reasonable extent*. So that it comes to this: In all cases where a man has the liability cast upon him, by the common law, of entertaining or keeping or carrying, he can only limit his responsibility to a reasonable extent. Therefore, when the Act of Parliament casts upon the defendants the duty of conveying messages for all the public, it is submitted that even without the words of the act as to reasonable regulations, they could only limit their liability to a reasonable extent.'

"In other words, the question simply is, are these conditions reasonable or not, — that for unrepeated messages they will not be liable under any circumstances, neither for repeated messages, beyond £5; and they will only be liable in case of a premium paid for insurance?"

[Jervis, C.J.: "The only condition under discussion is as to unrepeated messages. Are they to be liable for unrepeated messages?"]

"It is submitted that the whole of the conditions are to be taken together. The alternative which the company really proposes is this: You shall either exempt us from all liability of every kind, even if our servants should cut the wires; or you shall pay us a sum as insurance, which it is impossible for you to calculate. That, it is submitted, is not a condition which the Act of Parliament contemplates, or the general use which the public ought to have of the circumstances."

Jervis, C.J.: "I am of opinion in this case that there ought to be no rule. I suggested, in the course of the argument, on my brother Byles's motion, that one mode in which the case might be considered was, whether the condition which is on the back of the contract was or was not a regulation within the meaning of the Act of Parliament. He, upon con-

to this case, says, "It has been held in England, by the Queen's Bench, that telegraph companies are

sideration, had very properly not presented that point, because it comes, in effect, to the same thing, whether it was or was not a regulation within the act. If it be a regulation within the act, then the question would arise, is it reasonable within the act? On the other hand, if it be not a regulation within the act, then the company would be in the nature of a carrier, who would have a certain liability imposed upon him at common law; but they might limit this liability by special notice, as a carrier could, subject to the condition or qualification that they could not limit it to the extent of protecting themselves against the consequences of gross negligence. Therefore, in either way of looking at the case, the question would be, aye or no, Is this particular regulation or condition reasonable or not? Now, we are not called upon to say whether the whole and every portion of the conditions at the back of the contract is or is not reasonable; although my brother Byles was warranted in referring to different parts of it, as illustrating his argument. All that we are called on to say is whether the part which is relied on as a defence is or is not reasonable; viz., that the company will not be responsible for unrepeated messages. So far from that being, as was contended by my brother Byles, an unreasonable qualification, it seems to me to be highly just and reasonable that the company should require to be checked, as it were, as a means of ascertaining whether they are correctly representing what has been intrusted to them to convey, by having the message repeated; so that the person who sends it may see whether they are correct in the message they have sent. My brother Byles argues that this is not reasonable, thus: 'It is impossible to calculate the loss which is to be insured against; therefore you cannot estimate the amount for which the premium is to be paid as the price of the insurance.' If that be a valid argument, it goes against all insurance, and the consequence would be that in every possible case the company would be without protection, and would be obliged, from the uncertainty of the risk which of necessity is incident to the nature of the business, to take on themselves (what it is not contended that they are) the character of general insurers against all loss. For if this condition is unreasonable because you cannot ascertain the amount to be insured against, as you can in no case ascertain the amount to be insured against, every protection would be unreasonable. There is, in fact, an infirmity in this respect, necessarily arising from the nature of the business undertaken between the contracting parties, which is well known to them both, who engage, the one to send, the other to have sent, a message by his direction; but this is no reason why the former ought not to avail themselves of what persons in their position, namely, carriers, may; viz., stipulations and condi-

common carriers; and the same thing has been held

tions brought home to the knowledge of the party contracting with them, which will limit their liability. I think this highly reasonable; and therefore there ought to be no rule."

Crowder, J.: "I am of the same opinion. By the 18th sec. of the 16 & 17 Vict. c. 203, it is enacted, that the use of the telegraph shall, subject to such reasonable regulations as may be from time to time made or entered into by the company, be open for the sending and receiving of messages; and the question here is, whether the regulation, which has been referred to, is a reasonable regulation within the meaning of that section. In the opinion which I give, I confine myself entirely to the regulation which raises the question upon this record, and do not express any opinion on the whole which I find at the back of this message paper, embracing as it does, some points about which there may be considerable doubt. The question is, whether it is a reasonable regulation that the message must be repeated in order to make the company responsible. Now, the words, so far as that part of the indorsement is concerned, containing the rule are, 'The public are informed, that in order to provide against mistakes in the transmission of messages by the electric telegraph, every message of consequence ought to be repeated. Half the usual price for transmission will be charged for repeating the message. The company will not be responsible for mistakes in the transmission of unrepeated messages, from whatever cause they may arise.' At all events, the public have thus an opportunity of paying a small sum for an unimportant message. If it is a matter of importance, and they wish to avoid mistakes, it may be repeated, and then an additional sum is to be paid for its being repeated. What is there in the slightest degree unreasonable in that? I do not enter into the question, how far the condition afterwards imposed here, was correct or not. That is not before us. The mistake which arose between 'Hull' and 'Southampton,' was alleged to have arisen from the message not having been repeated. That appears to have been a mistake within this regulation; and I therefore think that there ought to be no rule."

Willes, J.: "I am of the same opinion. It may be material to consider whether the word 'regulation' in the Act of Parliament was intended to include such a condition as this introduced into the contracts between the company and those who might send messages; because, supposing that the word 'regulation' does include such part of the contract, it might be reasonable for the company to do what a person, if he were to send a message for himself by the telegraph, would do. If a man wants to send a message by the telegraph which shall be correctly read, he would have it repeated; then, if it is repeated, that imposes more labor, and he must pay for it; he must pay more for a repeated message than for an unre-

in this country,"[1] citing Parks *v.* Alta California Telegraph Company.

§ 206. It will be observed, however, that the Court only said they are "in the nature of a carrier;" which words do not imply as much as indicated by the learned writer just quoted; but the analogy, as a matter of law and fact, is distinctly recognized as the basis upon which the decision is placed. And it may be observed by the reader, that there are principles affirmed and points established in nearly all the cases, which in a similar manner sustain this view, although the conclusion of the Court, in the particular case, may be against it. The reasons for the same conclusion are not always the same, and in some instances

peated message; and of course he must pay more to the company for taking upon themselves to insure the message going rightly, notwithstanding the risk arising from the accidents to which such things are liable. I think that it is obviously reasonable that a man who requires either greater labor or the greater risk of the company, should pay them something more for it. It is not stated here that the amount charged by the company by way of difference between the unrepeated and the repeated message, or the uninsured and the insured message, is greater than fairly represents the difference of labor or the amount of risk. On the other hand, supposing the word 'regulation' does not extend to a condition imposed by the company in their capacity of bailees, then, so far as they are bailees, they are regulated by the common law. Now, so far back as the year 1863 it appears, by the case of Izett *v.* Mountain (4 East, 371), to have been considered so clear that counsel declined to argue, that a carrier, upon whom is imposed the liability of an insurer by the common law, could not protect himself by such a notice as was equivalent to this condition; the carrier's notices being nothing more than conditions imported into the contracts between them and their customers. If, therefore, at common law, such a condition might have been imposed on the plaintiffs, it is clear that under this statute there is nothing to prevent the company from imposing this condition."

Rule refused.

[1] 2 Parsons on Con. 251, ed. 1866.

the points conceded should have controlled the case, though the decision was adverse to holding telegraph companies to be common carriers. We have not attempted to classify the cases otherwise than by the result of the decision on this point. We shall avail ourselves of good reasoning wherever found, and endeavor to conduct the investigation to a legitimate conclusion.

§ 207. We now produce a number of cases in which the courts have taken the opposite view. The Court of Appeals in Maryland, in the case of Birney *v.* New York & Washington Printing Telegraph Co.,[1] held that a telegraph company is not a common

[1] 18 Md. R. 341. The argument of counsel and the opinion are given as illustrating and supporting each other. By an agreed statement of facts, it appeared that the defendant was an incorporated company, carrying on the business of publicly sending for hire messages by telegraph from Baltimore to New York, having places of business in both cities, and lines of telegraph extending between them; that its authorized agent received from the plaintiff, at its place of business in Baltimore, on the 10th of November, 1858, at nine o'clock A.M., a message to be sent to Drake & Carter, stock-brokers in New York, and agents of the plaintiff, ordering them to sell for him on that day one hundred shares of the New York Central Railroad stock, then in their possession and belonging to the plaintiff; that the plaintiff paid the charges of transmission; but that the defendant forgot and neglected to send the said message, and that it never was sent. And then the agreement set forth the difference in price of the stock in New York on the 10th and the 15th, when the plaintiff for the first time learned that the defendant had neglected to send the message, and on which day he sold the same.

It appeared that the company had the usual regulations as to *repeated* messages, and as to insured messages (as in case of Breese & Mumford *v.* The United States Telegraph Company. See ante, § 149). The plaintiff paid neither a repeating nor insurance price as named in these terms.

Gwinn, for the appellee, said, "A party dealing with the corporation is bound by these rules and regulations, thus forming a part of the contract; he is bound to know their rules, and to ascertain for himself whether the agent, by whom alone the corporation can act, was author-

carrier, but a bailee, performir · through its agents a work for its employer, according to certain rules and

ized to make the contract on which he relies; he is bound to ascertain for himself the extent of the authority conferred upon such agent. But the appellant attempts to assimilate this case to that of a common carrier, and to maintain that the defendant was subject to a legal responsibility which it had no power to modify, except by an express notice brought home to the parties dealing with it.

"I shall attempt to establish upon principle that a telegraph company is not a common carrier, and therefore is not put to the necessity of making what may amount to a special contract, in order to modify any common law liability as an *insurer*. I enter at this point upon new ground, which the case requires should be explored. We adopt the proper definition of a common carrier, when we select the text and citations of Chitty on Carriers, 15. He is one who, by ancient law, held, as it were, a public office, and was bound to the public. To render a person liable as a common carrier, he must exercise the business of carrying as a public employment, and must undertake to carry *goods* for all persons indiscriminately. He is a person that carries *goods* for hire. (Jacob's Law Dictionary, tit. Carrier.) *The custom of the realm* created his employment and fixed his responsibility. Since he was in charge of the goods from the moment he received them until the end of their journey, that custom made him responsible for them in every event against which individual care and foresight could guard. (Jones on Bailments, 104.)

"He was left with but two excuses which would avail him in case of loss. Where the misfortune occurred by the act of God, or through the enemies of the State, he was exempt, but in no other case. The reason of this responsibility, founded on the impossibility of otherwise holding the carrier to strict account, is clear enough; and the result of the rule is, practically to make the carrier *insurer* against every injury or loss, except such as is occasioned by the act of God or of the enemies of the State. But we repeat, that no employment comes within the definition of a common carrier, *according to the custom of the realm*, except where the employment is concerned in the transportation of *goods*. (Chitty on Carriers, 243, 306.)

"The inquiry here is, whether a telegraph company is a common carrier, according to the custom of the realm; that is to say, does it carry *goods*, and is it an *insurer* from the nature of its occupation? These are tests which will enable us to discover whether the defendant is a common carrier or not. We settle these questions, however, when we dispose of the first.

"It was because of the fact that the goods were in his sole custody,

regulations, which, under the statute, it had the right to make for its government. The counsel urged, and

and were subject to his single superintending care from the moment they were received to the moment the terminus of the journey was reached, that the custom of the realm and the common law made the carrier responsible for them in every event, except those against which individual vigilance could not guard. It was because, in its contemplation, only the providence of God and the acts of the enemies of the State were events beyond the control of the carrier, that he was held responsible for all losses proceeding from other sources to the goods in his charge, and was for this reason *practically* an insurer. But his whole obligation was one founded upon the actual and manual possession of the *goods* of the person employing him. Nor was the rule an unreasonable one, when we know that the carrier who received the goods was able to measure, by his knowledge of their character and value, the terms upon which he would undertake to carry them, and also the precise measure of diligence which was needful to their safety.

"Now we ask, whether the duty which a telegraph company has to perform ranges itself under any such description, or is capable of enjoying any such safeguard in its exercise? In the first place, it agrees to carry no *goods*, nor any thing that can be so described by the greatest stretch of legal ingenuity.

"What does a telegraph company do?

"It receives a written message for transmission. It uses machinery to reproduce the words of that message at a distant point, either by direct copying of the message, under some alphabetical system, or by translating that message into certain symbols, which, marked upon paper at a distant point, are there translated into our ordinary language. Can it be said to be even in the manual charge of the message so transmitted, during its transmission?

"Not so. It relies confessedly on machinery, and upon threads of communication, which stretch hundreds of miles, and are liable at each fraction of an inch to break, or interruption, through accident, influence of climate, wantonness, or malice.

"These circumstances make it impossible for the company to remain in actual practical custody and observation of its line. The idea of annexing to such machinery, and to such modes of communication, the office of a common carrier, and requiring its proprietors to regard themselves as *insurers* of every message committed to them, except in cases in which they could show that they had failed to transmit a message because of the providence of God, or of the violence of the enemies of the State, would cast upon them an intolerable burden.

"The carrier of the goods can avail himself of such excuses, *for he*

the Court yielded to the force of the argument, that a telegraph company should not be held to that severe

sees what happens to his charge at the moment it happens, by his own vision or the eyes of his agent. But a telegraph company, owing to the myriad causes which may disturb the security of its lines, would be left as often open to liability because of the providences of God, unknown to it, as because of any other reason. It is impossible to come to the conclusion that the law casts upon a telegraph company the character of an *insurer*. And since it neither receives goods for transmission, nor is an insurer, because of the character of its undertaking as to such goods, we must look elsewhere for the class of bailments to which its operation ought to be likened. For we may add here, if it be a common carrier, and a message sent by it was defectively delivered, or not delivered, it would be liable, under a declaration properly framed, and laying special damage, for all the direct damages arising from such defective delivery or non-delivery of the message. But surely, it may be asked whether any Court would hold that a telegraph company was liable for the enormous losses that might be entailed upon it for the non-transmission or the defective transmission of a message in relation to transactions of the pecuniary importance of which it was not advised by the sender, and of which perhaps the arbitrary words used as symbols in the message as written might give it no warning. No such enormous and disproportionate risk is cast upon the carrier of goods, because the carrier has always the means of apportioning the risk to his responsibility. The true character of the bailment made to a telegraph company is in that class known as the *locatio operis faciendi*. (Story on Bailments, § 370.)

"The telegraph company 'does some work and bestows some care on the thing bailed.' (1 Parsons on Contracts, 610.) It is not an insurer, but comes within the strong and clear language of Justices Turton, Gould, and Powys, in the celebrated post-office case of Lane *v.* Cotton, reported in 1 Salk. 17, and 1 Ld. Raym. 646. 'Its office is for *intelligence*, not for *insurance*.' A telegraph company may, with such knowledge as it has of the condition of its line, *assume* the office of an insurer, if it chooses so to do, for certain considerations; but the *duty* of insurance is not cast on it by the law. *It is not an insurer except it becomes so by contract, and therefore it is not a carrier.* This telegraph company was not a common carrier, but a bailee, performing through its agents a work for its employer, according to certain rules and regulations which it was authorized to prescribe for its government. It was not a common carrier, because by the Act of 1852, c. 369, sec. 10, it was authorized to contract, not by force of any common law duty or obligation, but in accordance with its rules and regulations; and this power is inconsistent with the common law definition of a carrier. The

responsibility which would make it the insurer of the message, because its agents and servants cannot go with it in the course of transmission, and remain in the actual practical custody of the line in all its length; and consequently cannot foresee and avoid the casualties and delays which may attend the message in its transit; and that herein is a marked and essential difference between it and the common carrier of goods, who is, either himself or by his agents, all the time present at all stages of the route with the goods he carries, and can see what happens to

employer who knew, or was supposed in law to know, that the engagements of the company were subordinated to the rules and regulations thus formally adopted, does himself, in law, ingraft them on his contract of bailment, and is bound by them, if they were rules and regulations which the corporation contracting with him had the right to adopt." . . .

Goldsborough, J., in delivering the opinion of the Court, said, . . . "The appellant's counsel attempted assimilate the responsibility of this telegraph company to that of a common carrier. But the distinction is obvious. It is well defined by the appellee." [Then quotes from the argument above given, and continues.] "While a common carrier is an *insurer*, and is protected from liability by the act of God or the enemies of the State, he can avail himself only of such excuses. He sees what happens to his charge the moment it happens. But a telegraph company, owing to innumerable causes which may disturb the security of its lines, would be as often open to liability because of the providences of God unknown to it, as because of any other reason.

"This telegraph company is not a common carrier, but a bailee, performing through its agents a work for its employer, according to certain rules and regulations, which, under the law, it has the right to make for its government. The appellant is supposed to know that the engagements of the appellee are governed by those rules and regulations, and does himself in law ingraft them in his contract of bailment, and is bound by them.

"The appellee cannot be considered a common carrier, because by the Act of 1852, c. 369, it was authorized to contract, not by force of any common law duty or obligation, but in accordance with its rules and regulations; and this power is inconsistent with the common law definition of a carrier."

his charge the moment it occurs. Not only is this the case, but as he is thus all the time present with the goods, he can often foresee also what is likely to happen to them, and take the necessary precautions to prevent loss or injury to them.

§ 208. Another reason assigned is, that, although in the case of common carriers the loss will be excused if occasioned by the act of God or the public enemy, yet the *onus* is upon the company to establish such cause or loss by proof; so that, if the same rule be applied to telegraph companies, and they be bound to establish this defence by proof, there would, in most cases, be an impossibility of making the proof that the loss was occasioned by the act of God, although the fact be so; for "a telegraph company, owing to innumerable causes which may disturb the security of its lines, would be as often open to liability because of the providence of God *unknown to it*, as because of any other reason;" and hence, in the opinion of the Court, this of itself should prevent the application of this stern requirement, in case of common carriers, to telegraph companies.

§ 209. The Court further held, that as the statute under which the company were authorized to do business allowed them to "receive despatches from and for other telegraph lines and associations, and from and for any individual, for transmitting despatches *as established by the rules and regulations of such telegraph line*," etc., they were authorized to contract, not by force of any common law duty or obligation, but in accordance with their rules and regulations. Similar language is used in the various tele-

graph statutes of England, Canada, and the American States.[1]

§ 210. The Supreme Court of Pennsylvania, in 1860, in an action by the receiver of a message,[2] negatived the idea that telegraph companies are common carriers in the sense and to the extent of being insurers for the safe delivery of what is intrusted to them; but placed their responsibility, whatever it may be, upon the public nature of their employment, and the contract under which the particular duty is assumed. This was an action by the receiver of the message, who was thereby directed to send "two hundred bouquets," the message, as written, being "two hand bouquets." The liability of the company to Le Roy, the sender, was not denied, nor was it conceded; but the fact that Dryburg was receiver of the message was relied on as sufficient to defeat the action. The Court, however, held that a telegraph company is the common agent of the parties at either end of the line; so that this action could be main-

[1] We note our dissent from this view, and cite the construction placed on the words "according to the regulations" by the Court in Ellis *v.* Am. Teleg. Co., 13 Allen, 226: "This provision does not confer the right to impose such conditions or restrictions in the mode of conducting the business as the self-interest or caprice of owners and conductors of telegraphs may dictate; but only those which are reasonable and proper, in view of the nature of the business and the risks and responsibilities which it involves, and the necessity of securing to the public due opportunities for a fair and reasonable use of the telegraph, as well as of affording due protection to the rights of those on whom are imposed the duty and burden of conducting the business for public accommodation. This is the true interpretation of the statute; any other construction would lead to the result that the legislature conferred a power to establish unreasonable regulations for the conduct of a business of a *quasi* public nature, — a conclusion which is manifestly absurd."

[2] The N.Y. & Wash. Teleg. Co. *v.* Dryburg, 35 Pa. St. R. 298.

tained, especially as Dryburg used the same medium in responding to the message.

§ 211. Woodward, J., in delivering the opinion of the Court, said, "The wrong of which the plaintiff complained consisted in sending him a different message from that which they had contracted with Le Roy to send. That it was a wrong is as certain as that it was their duty to transmit the message for which they were paid. Though telegraph companies are not, like common carriers, insurers for the safe delivery of what is intrusted to them, their obligations, so far as they reach, spring from the same source, — the public nature of their employment, and the contract under which the particular duty is assumed. One of their plainest duties is to transmit the very message prescribed. No question arose here as to any statutory privileges inconsistent with the common law obligation of common carriers, as the action was by the receiver of the message, who suspected that the message was wrong, and asked his correspondent how many bouquets he wanted. The answer was 'two hand bouquets, and not two hundred.'" But in the mean time a large quantity of expensive flowers had been cut, and of course were a loss. The jury assessed the damages at one hundred dollars. The telegraph company set up its rule as to unrepeated messages, and relied on McAndrew's and Camp's cases in defence; but the revising Court adjudged it to be a case of misfeasance, and sustained the verdict. This would probably have been the result if an express company or any common carrier had been defendant. Indeed, the question of the

extent of original responsibility was not necessarily involved, and it was alluded to only by way of narrowing the case down to the precise point in judgment, and in answer to argument of counsel, who insisted that the company was not an insurer.

§ 212. In Louisiana, the doctrine, that they are not to be held to the extraordinary responsibility of common carriers, is announced in the case of Shields *v.* The Washington & New Orleans Telegraph Company.[1] The decision in this case is rested upon still another ground; viz., that the message in this instance had no appreciable value. The Court held that it was unreasonable to apply the doctrine which is applied to common carriers to a case where the message did not disclose on its face its character or importance; and such was the character of the message in the case before the Court. The despatch read, "Oats fifty-six, bran one ten, corn seventy-three, hay twenty-five." The Court say, "The person who sent the despatch made no explanation to the operator, and without explanation how could the operator know whether the numbers in question referred to dollars and cents or to bushels and bales? Again, how could the operator know whether the said despatch conveyed an order to purchase, or an account of sales? nd if he was bound to infer the former, what information did the despatch convey to his mind of the extent of the order?

"The meaning of the despatch was a secret to all but the parties corresponding. Under the circumstances, the value of the message was inappreciable,

[1] 11 American Law Journal, 311.

and the telegraph company had no means of knowing the extent of the responsibility which ought to be involved in the correct transmission, upon the principles contended for by the counsel for the plaintiff."

§ 213. Various courts in New York have denied that telegraph companies are common carriers. In March, 1866, Judge Daly delivered an opinion in the Court of Common Pleas, in the case of Edward De Rutte *v.* The New York, Albany, & Buffalo Electric Magnetic Telegraph Company,[1] using this language: "The next question that arises is as to the nature and exact extent of the responsibility which the law should impose upon those who engage in the public business of transmitting intelligence from one place to another, by means of the electric telegraph, whether considered with reference to their liability upon contract, or for injuries brought about by their negligence. The law upon this subject is yet undefined, for the business is of recent origin, and the cases which have arisen are comparatively few. I have already pointed out one distinguishing feature, that, though pursued for reward, it is designed for the general convenience of the public.

"Like the business of common carriers, the interests of the public are so largely incorporated with it, that it differs from ordinary bailments, which parties are at liberty to enter into, or not, as they please. In this State it is made the duty of telegraph companies by statute to transmit despatches from and for any individuals with impartiality and good faith, upon the

[1] Court of Common Pleas, 1 Daly, 547.

payment of their usual charges; a duty which would arise from the nature of their business, even if there were no statute upon the subject. Common carriers are held to the responsibility of insurers for the safe delivery of the property intrusted to their care, upon grounds of public policy, to prevent frauds or collusion with them, and because the owner, having surrendered up the possession of his property, is generally unable to show how it was lost or injured.[1] These reasons, which are the ones usually assigned for the extraordinary responsibility of common carriers, cannot be regarded as applicable to the same extent to telegraph companies; nor are there any reasons, in my judgment, why they should be held in any extent to the responsibility of insurers for the correct transmission and delivery of intelligence."

§ 214. The same view is taken by the Supreme Court of New York, in Breese & Mumford *v.* The United States Telegraph Co.[2] The Court said (Johnson, J.), "I cannot refrain from observing here that the business in which the defendant is engaged, of transmitting ideas only, from one point to another, by means of electricity operating upon one extended and insulated wire, and giving them expression at the remote point of delivery by certain mechanical sounds, or by

[1] Riley *v.* Herne, 5 Bing. 217. Thomas *v.* The Boston & Providence R.R. Corp., 10 Met. (Mass.), 476. Caggs *v.* Bernard, 1 Ld. Raym. 909, and Appendix.

[2] 45 Barb. 274; where it is denied that telegraph companies, as do common carriers, innkeepers, and the like, owe any duty to the public irrespective of their engagements in particular instances; and that their liability in respect of the accurate transmission and faithful delivery of messages rests entirely in contract. We have had occasion to dissent from the view that they owe no duty to the public. See ante, § 123.

marks or signs indented, which represent words or single letters of the alphabet, is so radically and essentially different, not only in its nature and character, but in all its methods and agencies, from the business of transporting merchandise and material substances from place to place by common carriers, that the peculiar and stringent rules by which the latter is controlled and regulated, can have very little just and proper application to the former; and all attempts heretofore made by courts to subject the two kinds of business to the same legal rules and liabilities will in my judgment sooner or later have to be abandoned, as clumsy and indiscriminating efforts and contrivances to assimilate things which have no natural relation or affinity whatever, and at best but a loose and mere fanciful resemblance. The bearer of written or printed documents and messages from one to another, if such was his business or employment, might very properly be called and held a common carrier, while it would obviously be little short of an absurdity to give that designation or character to the bearer of mere verbal messages, delivered to him by mere signs or speech, to be communicated in like manner. The former would be something which is or might be the subject of property, capable of being lost, stolen, or wrongfully appropriated; while the latter would have nothing in the nature of property which could be converted or destroyed, or form the subject of larceny or of tortious caption or appropriation, even by the 'king's enemies.'" [1]

[1] See argument of counsel and opinion for numerous references, 45 Barb. 274.

We do not find that this point has been adjudged in the Court of Errors and Appeals of the State of New York.

§ 215. In the Supreme Court of Indiana, in 1864, it was adjudged in a proceeding under the statute in that State, regulating telegraph companies,[1] that they may defend in a suit for the penalty, by showing that, after receiving the message, the same could not be sent, by reason of some derangement of the wires, or that the despatch was postponed, in consequence of the transmission of intelligence of general and public interest, or communications for and from officers of justice, such despatches having priority by the terms of the statute.[2]

This despatch was a request for witnesses to come by the night train, and it was not sent in time.

§ 216. The company defended upon two grounds: that the sender must show that the message was not sent with impartiality and in good faith and in the order of time in which it was received; and that, in the absence of this proof, mere negligence was not a sufficient ground for recovery under the statute; admitting, however, that the company would be liable for damages in the proper action for negligence. The jury found that the message was received in time by the operator, who said it could be forwarded immediately; and on this the Court say the defendant is liable, unless subsequent to that time the wires become damaged, or privileged messages caused the postponement.

[1] 1 G. & H. 611, sec. 1.

[2] Western Union Telegraph Co. v. Ward, 23 Ind. R. 377. Also see Appendix, title "Indiana."

It will be seen that the statute gives preference to public newspaper or general news despatches, but does not mention derangement of the wires as a justification for delay. This is only one of many causes which might authorize a verdict for a company in a penal action. Delay by common carriers of goods may be accounted for by accidents which ordinary prudence and foresight could not guard against; but they must go on with diligence to delivery, as soon as the obstacles can be removed.

And if the action now under consideration had rested upon a question of negligence alone, and if it should be held that the defendant was a common carrier, the defence suggested by the Court would have been equally available.

§ 217. The case of the Western Union Telegraph Co. *v.* Carew was lately decided in the Supreme Court of Michigan,[1] when the point now being treated of was adjudged as follows: "We are all agreed that telegraph companies, in the absence of any provision of statute imposing such liabilities, are not common carriers, and that their obligations and liabilities are not to be measured by the same rules; that they do not become insurers against all errors in the transmission or delivery of messages, except so far as by their rules and regulations, or by contract or otherwise, they choose to assume that position, or hold themselves out as such to the public, or to those who employ them. The statute of this State authorizing such companies, and to some ex-

[1] 15 Mich. R. 525.

tent prescribing their duties and liabilities, imposes no such liability.[1]

§ 218. "Impartiality and good faith are the chief, if not the only, obligations required by the statute, so far as relates to the question here involved. Beyond these statute requirements, their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy recognized alike by common sense and the common law. The statutes of the other States in reference to this branch of business are in the main substantially like our own.

§ 219. "Telegraph companies, like common carriers, it is true, exercise a public employment; and the former are bound to send messages for those who apply, and are ready to pay the usual or settled charges, as the latter are bound to transport goods for those who seek their services upon similar terms; and doubtless the same rules for securing impartiality would apply to both, except as modified by statute. (See section 15, of chapter 70, above cited.) But beyond this, as relates to the actual transportation of goods in the one case, and the transmission of ideas in the other, there is, in the nature of things and the different means and agencies employed, but very little substantial resemblance; and any analogy must be more fanciful than real, and likely to lead to error and injustice. . . .

§ 220. "But it would be extremely unjust, and, con-

[1] Comp. L. c. 70.

sidering the small amount of compensation for sending a message, would effectually put an end to this method of correspondence, to hold them absolutely liable as insurers for the entire correctness of all messages transmitted, or to hold them responsible for all damages which might accrue from an error, especially when only a single transmission, without repeating, is relied upon or paid for; or to deny them all power, by rules and regulations or notices, to limit their liability even in the case of repeated messages. And it would be equally unreasonable to require them to repeat a message when they are paid only for a single transmission.

§ 221. "And while, in settled weather, or when the normal condition or operation of the electrical currents is not affected by any temporary or local disturbance, a single transmission by a skilful operator may be relied upon, as a *general rule*, and for matters of comparatively small importance; yet it must be well known to most men (if not to all who have such a degree of intelligence as to be likely to resort to this mode of correspondence) that the electrical state of the atmosphere is liable to sudden and violent changes, extending over areas of greater or less extent, which cannot be foreseen or guarded against, and which materially affect the currents transmitted from a battery along the wires, and for a time render the operation of the instruments uncertain and unreliable; that these disturbances often affect distant portions of the line or of a connecting line, while their influence may be scarcely felt, or not felt at all, at the station from which a message is sent, and that therefore, to insure entire

and uniform correctness, the only safe method is to have the message verified by repeating it back to the station from which it was sent."

§ 222. This was an action of assumpsit brought by the defendant in error, to recover damages for the failure, on the part of plaintiff in error, to transmit correctly a certain telegraph message from Detroit to Baltimore. The charges were paid to Baltimore, though the lines of plaintiff in error only extended to Philadelphia. The message was correctly sent to Philadelphia, and delivered there to the agent of the Baltimore line. The error occurred between that point and Baltimore, and consisted in changing "forty," to "four" cases. The company, by its regulations, disclaimed responsibility for any error or delay in the transmission or delivery, or for the non-delivery of any unrepeated message beyond the amount paid for sending the same, unless specially insured; and stipulated against all responsibility for error or neglect of any other company along whose lines the message might be sent. This was an unrepeated message. In passing upon these limitations of responsibility the Court further said, "The regulation, therefore, of most, if not all, telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered highly reasonable, giving their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question. And as the compensation ought always to be in proportion to the risk assumed, the provision in

these regulations in reference to insurance must be regarded also as just and reasonable.[1]

§ 223. "As the statute of this State and of the other States, so far as we have examined them requires them to receive despatches from and for other telegraph lines, and to transmit, etc., it is but reasonable, when the message is to pass over the lines of more than one company, that each should be responsible for only the errors occurring on its own line, and the receipt of the money by the company first transmitting the message, as the agent of the other lines, is much more for the convenience of the person sending the message, than for that of the company."

§ 224. The case of Ellis *v.* American Teleg. Co.[2] was in tort for error in the transmission of this message: "City Cambridge ten (10) men, one hundred twenty-five dollars." Meserve wrote this on the company's printed blank, and paid for a single transmission. Ellis received a similar blank containing these words: "City Cambridge ten (10) men, one hundred seventy-five (175) dollars." The error in the sum, made by the company's agent, was alone the ground of complaint. The message was an offer of $125 per man, and the change made it an offer of $175 per man. Special damages were not shown. Verdict for plaintiff, with $40 damages.

§ 225. After disposing of some preliminary matters, the Court (Bigelow, C.J.) said, "We are then to look into the provisions of the statute to ascertain how far

[1] It is suggested elsewhere (§ 104), that this is only a tariff of rates; and its reasonableness, in the absence of contract, is a question for the jury, in a verdict for services rendered by the company.

[2] 13 Allen, 226.

they regulate and control the relative rights and liabilities of the parties to this suit. The only important clause bearing on the questions saved by the exceptions is found in the tenth section of the chapter of the General Statutes already cited. It is in these words: 'Every company shall receive despatches from and for other telegraph lines, companies, and associations, and from and for any person; and, on payment of the usual charges for transmitting despatches according to the regulations of the company, shall transmit the same faithfully and impartially.' The leading feature in this enactment is, that it in effect takes the business of conducting and managing a line of electric telegraph within this Commonwealth out of the class of ordinary private occupations, and makes it a *quasi* public employment, to be carried on with a view to the general benefit and for the accommodation of the community, and not merely for private emolument and advantage. Under this provision, an owner or manager of such a line becomes to a certain extent a public servant or agent. He is bound, under a heavy penalty, to the due and faithful execution of the service which he holds himself out as ready to perform. He cannot refuse to receive and forward despatches; nor can he select the persons for whom he will act. He cannot transmit messages at such times or in such order as he may deem expedient. He is required to send them for every person who may apply, at a usual or uniform tariff or rate, without any undue preference, and according to established regulations applicable to all alike. There can be no doubt that, in view of the nature of the

business, these requisitions are just and expedient. They certainly tend to prevent monopoly and exclusive privileges, and to secure to the public an equal enjoyment of the benefits arising from this new method of inter-communication between distant points. In some respects, they assimilate the duties and obligations incident to the employment to those which the law attaches to that of common carriers. But it is a mistake to say that the extent or degree of responsibility is the same. There is nothing in the statute which gives countenance to the suggestion urged by the plaintiff's counsel, that owners or conductors of telegraphs are bound to warrant or insure a correct transmission of the messages which they undertake to send. Nor would it be just or reasonable to hold them to such a standard of diligence. The reasons of policy and expediency on which the rule of the common law is founded, which imposes on carriers of goods a liability for all losses not caused by the act of God or the public enemy, do not apply to the business of transmitting messages by means of the electric telegraph. Carriers are intrusted with the manual possession of the property committed to their care. While in their custody it is wholly out of the control and supervision of its owner. The identity of the article which they received with that which they delivered cannot be mistaken. By the use of a proper degree of diligence and care, such as is necessary to the safety of the goods in their charge, they can guard against their loss arising from any cause except such as from the nature of things are beyond their control; while the danger of fraud and the opportunity

for its practice by those who have the exclusive and absolute custody and control of property for carriage, render it expedient and necessary to hold them to the strictest accountability for its safe transportation and delivery.

§ 226. "But the trust reposed in the owner or conductor of a line of telegraph is of a very different character. No property is committed to his hands. He has no opportunity to violate his trust by his own acts of embezzlement, or by his carelessness to suffer others by means of larceny or fraud to despoil his bailors of their property. Nor can it be at all times in the power of an operator, however careful or skilful he may be, to transmit with promptness or accuracy the messages committed to him. The unforeseen disarrangement of electrical apparatus; a break in the line of communication at an intermediate point not immediately accessible, occasioned by accident or by wantonness or malice; the imperfection necessarily incident to the transmission of signs or sounds by electricity which sometimes renders it difficult if not impossible to distinguish between words of like sound or orthography, but different signification,— these and other similar causes, the effect of which the highest degree of care could not prevent, make it impracticable to guard against errors and delays in sending messages to distant points. To these hinderances and embarrassments in the conduct and management of the business are to be added the mistakes and misapprehensions which will unavoidably take place, however vigilant and careful the operator may be in reading and correctly understanding the messages to

be sent, and interpreting them at the point of their reception, as they are transmitted by the arbitrary signs or sounds which are the substitute for the written or spoken words. It would be manifestly unreasonable and unjust to annex to a business of such a nature the liability of a common carrier, or to require that those engaged in it should assume the risk of loss and damage rising from causes the operation of which they could neither prevent or control." . . .

§ 227. After setting forth that they are not exempt from all responsibility for want of fidelity and care; that they cannot protect themselves against the consequences of fraud or gross negligence, the Court go on to say, —

"But we need not have recourse to these familiar and well-settled principles of the common law, in order to establish the right of the owners and conductors of telegraphs to make rules and regulations by which to define and limit their duties and obligations in the transaction of the business which they assume to carry on. This right is clearly recognized and affirmed by the statute already cited. By that, corporations, associations, and individual owners of lines of telegraph, doing business within this Commonwealth, are only required to transmit despatches 'according to the regulations' which they may establish. It is hardly necessary to say, that this provision does not confer the right to impose such conditions or restrictions in the mode of conducting the business as the self-interest or caprice of owners and conductors of telegraphs may dictate; but only those which are reasonable and proper, in view of the

nature of the business, and the risks and responsibilities which it involves, and the necessity of securing to the public due opportunities for a fair and reasonable use of the telegraph, as well as of affording due protection to the rights of those on whom are imposed the duty and burden of conducting the business for public accommodation. This is the true interpretation of the statute. Any other construction would lead to the result, that the legislature conferred a power to establish unreasonable regulations for the conduct of a business of a *quasi* public nature, — a conclusion which is manifestly absurd.

§ 228. "We are then brought to the real question on which the decision of this case must depend; and that is, whether the rule on which the defenantsd relied in defence of the plaintiff's claims is a just and reasonable one, such as they had a right to prescribe, and by which the plaintiff was bound in the reception of the message which they transmitted to him. Upon this point we can entertain no doubt. We are not called on in this case to determine whether all the conditions and stipulations are valid and binding which were set forth in the printed paper on which the message was written by the sender, and which were also inserted in that on which the message was transcribed at the point of its reception, and which was delivered to the plaintiff. The sole question here is, whether that portion of the terms and conditions prescribed by the defendants is reasonable and valid, which provides that the defendants will not hold themselves responsible for errors and delays in the transmission and delivery of messages unless they are

repeated; that is, sent back from the station at which they are received to that at which they were originally sent, with the payment for such repetition of half the usual price for transmission. In view of the risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delays in the performance of such a service, which have been already alluded to, and also of the very extensive liability to damages which may be incurred by a failure to deliver a message accurately, we think it just and reasonable that the conductor of a telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received, at the request and expense of the parties interested, if they intend to hold him responsible in damages for any mistake which may have taken place in the transmission of messages. There is nothing in this regulation which tends to embarrass or hinder the free use of the telegraph, or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty. The repetition of a message may be unimportant. A mistake in its transmission might occasion no serious damage or inconvenience to the parties interested. Whether it would do so or not would be within the knowledge of the sender or receiver, rather than within that of the operator who transmitted it. The latter could rarely be expected to know what would be the consequences of an error in its transmission. It is therefore a most reasonable requisition that it should be left to those who know the occasion and the sub-

ject of the message, and who can best judge of the consequences attendant upon any mistake in sending it, to determine whether it is of a nature to render a repetition necessary to ascertain its accuracy, instead of throwing this burden on the owner or conductor of the telegraph, who cannot be supposed to know the effect of a mistake, or the consequences in damages of a failure to transmit it correctly.

§ 229. "Nor can we see any good reason why, on similar grounds, it would not be a just and proper exercise of the right to establish regulations for the conduct of such business, to require that persons transmitting or receiving messages should make known the extent and nature of the risk to be assumed by the conductor or owner of the telegraph, if, in case of failure to transmit them accurately, a pecuniary loss would be involved for which he might be held liable. By no other means could they be certain of obtaining a compensation proportionate to the risk to be assumed, or an opportunity of exercising unusual diligence to protect themselves against the chances of mistake or miscarriage." [1]

[1] Quite similar are the reasoning and conclusion of the Court of Appeals of Maryland, in the case of Gildersleeve *v.* The United States Teleg. Co., not yet reported. On this point it was said (Alley, J.) : —

"Then, as to the extent that the appellant can claim to be exonerated from liability under such terms and conditions thus incorporated into the contract. And in reference to this question, it is to be observed that the message was not to be repeated, nor was there any special agreement for an insurance of its transmission and delivery. It was sent to the office of the appellant to take its turn; and under the terms and conditions to which it was subject, good faith and due diligence in despatching, transmitting, and delivering it, were all that could be required. The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own wilful misconduct or gross negligence,

§ 230. We have thus presented various cases, in the American courts, in which this question has been considered; and have given copious extracts from the opinions of the judges, in order that the reader may see the lines of thought and argument with which the subject has been illustrated.[1] The weight of

or any conduct inconsistent with good faith, nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its despatch and accurate transmission to the other end of the line if the wires were in working condition; or, by special contract for insurance, could have secured himself against all consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message. And, having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix liability on the company. (McAndrew *v.* The Electric Teleg. Co. 33 Eng. Law & Eq. R. 187.) If, then, the appellant despatched the appellee's message in due course, and with the ordinary care to secure its safe and correct transmission, and was guilty of no negligence in regard to its delivery to the party to whom it was addressed, the obligation under the contract was performed, and the *onus* of proof was upon the appellee to show affirmatively that there had been negligence or want of good faith, either in despatching the message or in regard to its delivery. (N.J. Steam Navigation Co. *v.* Merchants' Bank, 6 How. U.S. 384; Beardslee *v.* Richardson, 11 Wend. 25; Story on Bailments, § 213.) Negligence of the appellant is the gist of this action, and, unless it be established, there can be no recovery; and as the first and second prayers of the appellant were founded upon this assumption, we think, when taken in connection with the sixth prayer, that there was error committed by the Court below in refusing to grant them."

[1] An article in the American Law Review for July, 1868, presents the points in various decisions, and adds, "We have now discovered three distinct classes of cases, in each of which a different degree of liability has been imposed upon telegraph companies. The first class, regarding their employment as analogous to that of common carriers of goods, holds them to the responsibility of insurers. The second class agreeing with the first, so far as concerns their employment, assimilates their liability to that of the passenger carrier. And the third class, differing in every respect

opinion is adverse to holding telegraph companies to be common carriers; but nearly all, in effect, hold them to be subject to most of the rules and restrictions governing common carriers, and to partake to a great extent of their nature. But it is to be observed that no Court has set forth in its opinion a full and critical examination of this subject; and, in some instances, the reasoning is quite unsatisfactory. Different courts have arrived at similar conclusions, upon reasons given, which are not easily seen to be reconcilable. These facts, — want of uniformity in the decisions, and incongruity in the reasoning, — together with the vast and growing interests involved, will furnish, it is hoped, a sufficient apology for attempting an analysis of the facts and principles upon which the true doctrine rests.

§ 231. The public are more concerned to know *what* services telegraph companies will undertake to perform, than the *modes* of performance. A commissioner of patents would subject their agents and instruments to a scientific test, and satisfy himself as to the actual merits of a new process, or as to the relative value of the old and new agencies, and issue patents to the deserving inventor. A purchaser of

from the others, regards their employment as a mere agency, and holds them responsible only for the want of ordinary care and diligence (p. 627).

Chief-Justice Redfield has a chapter upon this subject in the late edition of his valuable treatise upon the Law of Railways. He cites Camp's case, 2 Met. (Ky.) 164, as containing as correct a statement of the rule as may be found in any of the cases (vol. 2, § 189 *b*, subd. 14).

He also says, repetition of the message is the only ground upon which a company could be held responsible as insurers (§ 189 *b*, subd. 12, 13).

an instrument or an invention would ascertain its value by experiment, before purchasing. Legislators, before granting charters, ought to satisfy themselves that the applicants are capable of rendering the service proposed. All these are preliminary questions which do not concern the courts, when they come to ascertain the duties and responsibilities growing out of an engagement to send and deliver a message. It is not material to inquire into the construction of batteries, the texture of wires, modes of insulation, or the relative skill of operators; for these and many other things are pretermitted, when negotiations have ended in the contract. And, if there be no contract, the law and the public nature of the business alike require of the company a knowledge, and the use, of the highest improvements in telegraphing.

§ 232. In construing the engagements and in declaring the liabilities of common carriers, it is needless to consider the perfection or imperfection of motive powers. This is eminently so in regard to telegraphing. Vast improvements already made have thrown into utter discredit instruments and appliances which once challenged the admiration of the most scientific. Possibly, telegraphing will soon be more accurate than photographing, and the result be a *facsimile* rather than a rendition of arbitrary points and clattering sounds, depending for accuracy upon the degree of auricular attention given by the operator. But, however this may be, the art has now reached such perfection, that skill and diligence are the chief standards of success; and upon this basis, telegraph companies assume to send messages for all who may

employ them. They know the hinderances to which they are exposed from natural causes; they know the character of their employers, and the ordinary expenses and profits of the business. In view of these facts they arrange their own tariff of charges, and assert their ability to perform the work. They have private property condemned, and they establish their lines again the consent of the owner; and this right is conceded alone upon the grounds of public use. They are bound to serve their customers in the order in which application is made; and to exhaust their capacity in the service, if required. What, then, is the extent of their responsibility?

§ 233. In answering this question, it will be useful to make a clear statement of what is done in sending a message. Ordinarily it is written out and delivered to an agent, who files or notes it, so as to fix its time or place in the succession of messages to be sent. After being sent, the paper writing is filed away, as valuable in several respects: as an original, by which to make corrections, and as an instrument of evidence to bind the parties interested, showing the rights of the parties sending and receiving and transmitting the message; as well as duties and obligations connected with or growing out of the transaction, including the specific tax to the government. This paper, full of legal significance, is thus bailed to the company. The work of sending or carrying is exhibited in its ordinary forms, when the agent takes it from the window or desk to the operator's seat, wherever that may be, far or near. It is then passed along, it may be across a street, a State, or a continent, to the custody of the

next appropriate agent, whose place is fixed and certainly known, whose capacity is guaranteed, and for whose fidelity the company is bound.

He receives and reduces it to writing, and it is then in his hands for the accomplishment of all the objects, and protection of all the rights, as designed by the bailment in the first instance. By contract it is to be the same as the original; and it is the same in its legal significance.

§ 234. When a message has thus been taken off the wires, it has to be delivered by the active intervention of an agent, who moves the commodity, it may be only to a box in the company's office, or to the post-office, or, most usually, to the party addressed. Thus it appears that the appliances or agencies required are the same as those used by common carriers, from the instant of reception until the message is put upon the wires; and from the moment of receiving at the other end of the line until its final delivery. During the actual transmission upon the wires, it is the subject of constant manipulation. The acts of sending and of receiving are strictly contemporaneous. When the operator sending the message has touched the key for the last time, the work of the receiver is *eo instanti* completed: there is nothing more for him to hear. Between the two, *space* intervenes; but *time* does not, as regards each individual sign or sound by which they are governed. There is an actual, unceasing propulsion of the message by the fluid, applied and regulated by the hand of the operator.

Delays, accidents, and mistakes do not relieve the company from the duty of correct transmission and

final delivery. Where hindering causes intervene, it should have the immunity accorded to it which is received at the hands of the courts by the carrier, and no more. It has the custody of the original despatch, and should repeat its efforts to transmit upon the wires until success has been attained. In every successful transmission it can be truly said the company has absolute possession and control of the message from bailment to delivery.

§ 235. If any one should unlawfully deprive the company of this custody, there is an appropriate remedy for recovering the possession of the paper writing, which is as much a chattel as notes, bonds, or mortgages. Whilst the message is in the mind of the operator receiving it for reduction to writing, it is not the subject of trespass and conversion, and, of course, needs no such protection.

§ 236. The character of a chattel thus seems to be stamped upon a message *reduced to writing;* and when we consider that the public is chiefly interested in this form, we need not waste time in elaborating rules for verbal messages, until their importance shall come to be known.

The message, as originally written and delivered, always remains in the hands of the company unchanged; and is valuable for some purpose, until the transaction predicated upon it shall have been in all respects completed. That it shall be reduced to writing at the other end of the line, is a part of the contract; and the written document there is in lieu of the draft first delivered for transmission, and is a chattel to all intents and purposes; and so remains

until the end sought shall have been attained. It seems to be consonant with principle, and just in practice, to hold the company as a common carrier of these two papers. The contract is that the contents of the first shall be delivered to the party addressed. The delivery of the second is a compliance with the company's contract. The message thus to be delivered has become the right and property of the party addressed, and he could enforce its delivery by law. As thus presented it would seem to be an ordinary case of letter-carrying; and if there were nothing more to be considered, doubtless the authorities would be uniform in holding telegraph companies to be common carriers.

§ 237. But there is a period of time, during transmission, when the message is not under manual control so perfect as to be exempt from possible disturbance. This has been the great obstacle with the courts, when asked to declare telegraph companies to be common carriers. In the case of Birney *v.* New York & Washington Printing Telegraph Co.[1] the Court approves what the counsel said on this point, — *That a telegraph company cannot be held as a common carrier, because the mode of transmission makes it impossible for the agent to see what happens to his charge, and to guard against threatened danger.*

§ 238. There seems to be a want of accuracy in this reasoning. Whilst it is true that the carrier may generally see the goods in his charge, at any time during transit; yet his liability does not depend on that incident. He contracts to deliver the goods;

[1] 18 Md. R. 341.

and as a matter of necessity, as well as of protection, he sends his agents along. Being in the exclusive possession, he could so easily appropriate to his own use, allow strangers to do so, or wink at their destruction, that the law requires him to deliver the goods unconditionally. If he should adopt a mode of carrying in which the immediate presence of an intelligent agent was not required, that would not vary his contract or responsibility. If he should undertake to deliver letters, and should use a carrier pigeon for the purpose, he could not avoid a recovery of damages for non-delivery, by proving that the bird flew beyond the range of his vision. The books do say,[1] that holding the carrier as an insurer is no hardship, because he has the goods always in his immediate custody, or in sight of his agents; but nowhere do we find it held that he would not be so if the fact were otherwise. The obligation to deliver is the substantial element in the contract; and so it is in the undertaking of innkeepers, and the like.

§ 239. The engagement is entered into by the telegraph companies in view of the fact that the message must pass over the stipulated space, without the attendance of any person. They choose a subtile fluid for their agent, and by quickness and accuracy beat down competition. The very nature of the motive power excludes the possibility of personal attendance upon the transit. As retaining goods in manual charge, clearly does not constitute a common carrier, so a stipulation that a message shall pass out of sight, for

[1] Angell on Com. Car. § 152, and note 4, § 153.

a moment, cannot be said to change the nature of an engagement to deliver it.

§ 240. This responsibility is not modified by the fact that an intervening furtive operator may attach his battery, and take a copy of the message; for this does not produce change or delay. It is a singular fact that every battery in regular connection along the line, gives the same indications at the same instant, and the number of batteries does not weaken the motive power, nor render the communication less rapid or distinct. Whoever lets the current on his battery may get the message; but that does not interfere with the company's duties of transmission and delivery. It is still true, however, that the very nature of the business imposes a high obligation to secrecy. It is generally defined in the charter, and grave penalties are prescribed for a violation of it, — not merely as common carriers, but as special confidential agents. This branch of the subject is more fully discussed elsewhere,[1] in treating of fiduciary relationship.

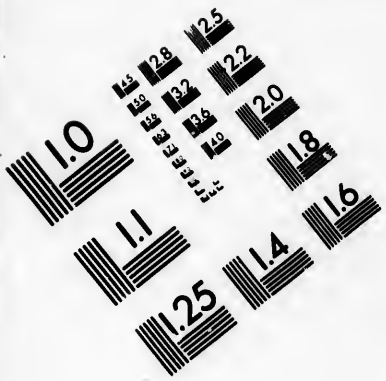
§ 241. It is assumed in some of the cases cited heretofore, that a company should not be held as a common carrier, because it cannot know the value of the message sent. We are not aware that ignorance of the nature, use, or value of goods affords any protection to the carrier against a demand for damages consequent upon their loss. He may inform himself upon these points on receiving the goods, and may consider of them in fixing his compensation; but if he fails to do so, he is bound in any event to a faith-

[1] See §§ 136, 137, and c. 9.

ful delivery.[1] In point of fact he seldom knows the value of commodities shipped. They are ordinarily classified upon the basis of weight, bulk, and hazard, without regard to specific values. But even where there is a special stipulation as to value, usual with our modern express companies, that only serves to fix the measure of damages in case of default.

§ 242. In the same decisions where it is held that telegraph companies are not common carriers, because ignorant of the value of the message, it is conceded that for a higher rate of compensation they may be held under their rules as *insurers;* and this without any information being imparted to them as to value. Whether they are bound by the common law, or the usages of trade, or by special contract, their engagement is to send messages literally as they are written. It is not their business to send incorrect messages; nor do they inquire into the value of messages, when they offer to be bound for their correctness on delivery. They charge additional rates for repeating, but mere repetition affords no additional knowledge as to value. For additional work, they demand additional pay. It will not do to say that their fidelity is increased in the same ratio; for absolute good faith is due to every employer alike. It requires no more skill to send one message than another, and their rates for *insured*

[1] "If any thing is delivered to a person to be carried, it is the duty of the person receiving it, to ask such questions about it as may be necessary; if he ask no questions, and there be no fraud to give the case a false complexion, on the delivery of the parcel, he is bound to carry the parcel as it is." Walker *v.* Jackson, 10 M. & Welsb. R. 168. The carrier is responsible for the loss, whatever may be its value. Angell, Com. Car. § 264, and note 3.



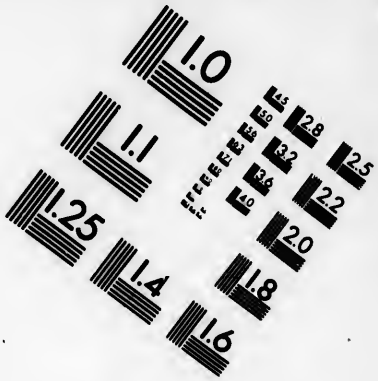
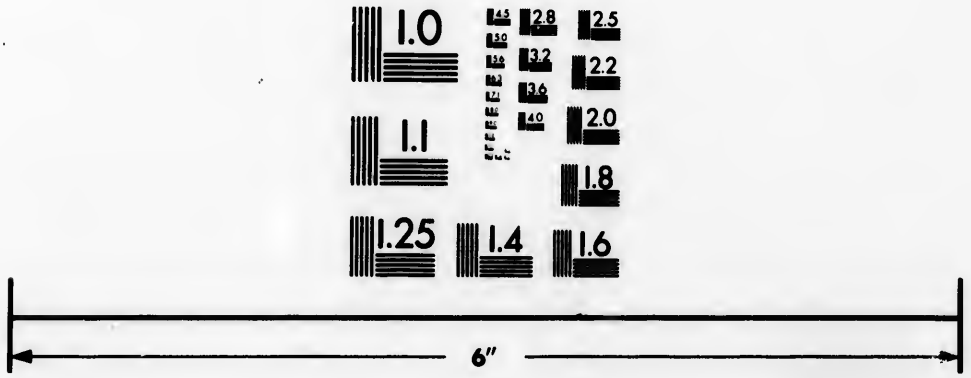
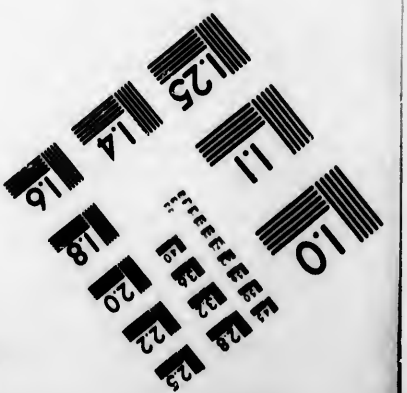


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

messages do not imply a difference, but simply this: that for more pay they will give additional evidence to the sender that his message has been correctly transmitted. To effect this, the operator at the other end of the line answers that he has received a message containing certain words, which, when compared by the sender with the original message *delivered for transmission*, is verified or corrected as the case may demand. In all this there is no such thing as *insurance*, in a technical sense. The anxiety of the sender induces him to pay for another message. He may be unwilling to risk the possibility of negligence or accident. He chooses to correct errors at once, because he cannot afford to lose the present advantage or gratification, and afterwards rely upon compensation in a suit for damages.

§ 243. The company is equally interested in knowing that the message has been correctly transmitted, and it makes a fair bargain with the sender, in having the same message sent back for half-price. It thus procures evidence of its strict compliance with the undertaking, and the sender is assured that his purposes will be accomplished. Each party bears half the expense. If it should appear that a mistake had been made, the company would of course have it corrected in protection of itself upon the original undertaking, and not in consideration of the half-price paid for the repeated message. It would be entitled to the benefit of this repeated message as an instrument of evidence as fully as the sender, and would retain a copy for possible use. After repetition, if it should be ascertained that a mistake had still supervened so

that the sender had been damaged, he could only sue for damages, and his right of recovery would be governed by the ordinary rules, and not by some new application of laws regulating the insurance of life or property. We feel safe in saying that there is no element of insurance in the business; there is nothing to insure but their own fidelity. It is a matter of *assurance*.[1]

§ 244. In this repeated message, in this additional pay, in this obvious solicitude of both parties, the company finds no index of precise value. It is impossible for the operator to know what may be the peculiar significance of the words or letters used; he may not be able to tell whether the employer means business or pleasure. Indeed, it is not his right or privilege to know; it would be impertinent for him to inquire. The success of the enterprise may depend upon concealment. It is enough for him to know the words and that they have been paid for; because that binds him to skill and diligence in behalf of the employer. Prompt delivery will be a full compliance with the obligation assumed by the company. Ordinary messages disclose their own purpose, and the operator can place some estimate upon their value;

[1] A practical comment upon the insufficiency of judicial reasoning upon this matter of insurance, is to be found in the fact that the later regulations of various companies upon this point require that a special contract shall be entered into, fixing in each case the amount for which they will be liable, as to repeated as well as unrepeated messages; thus entirely abandoning the idea of insurance (which was always illusory), and making it liquidated damages in case of default. See the rules of the Western Union Teleg. Co. 15 Mich. R. 525, and Ellis *v.* The Am. Teleg. Co. 13 Allen, 226.

but if he fails to see the object of the sender, that of itself should inspire diligence.

§ 245. So much as to the company's ignorance of value. Another objection of kindred character has been urged against the highest degree of responsibility, and it is this: *a message, abstractly considered, has no appreciable value.*[1]

Conceding this, would not affect the integrity of our argument. Abstract values are not involved in the discussion. It is conceded that telegraphing is a public employment, and that the company, by consequence, is bound to take and transmit all messages, upon uniform rates. How, then, can there be any legitimate inquiry as to their pecuniary value, except as affording a rule for compensation? But in point of fact, their sole tests in this respect are the number of words in the despatch, the number of repetitions, and the distance to be sent. Many of the chief objects of telegraphing might be wholly defeated if the operator were permitted to ascertain the meaning or value of the despatches, either actual or relative.

§ 246. In the case of McAndrew *v.* Elec. Tel. Co.,[2] Justice Jervis presented the point thus: "Do you maintain that the legislature intended to cast on the company, for 2*s.* 6*d.*, a liability to £100,000?" That is the whole argument; and it concedes that for 2*s.* 6*d.* the company would have been bound for some amount of damages. Nor could the company escape this responsibility by denying that the message had any value. Such a plea could not be maintained as

[1] Breese & Mumford *v.* The United States Teleg. Co. 45 Barb. 274.
[2] 33 Eng. Law & Eq. R. 180.

a question of law; nor would it be just or honest for the company to take the pay, and then screen itself from the consequences of its own neglect, by showing the folly of the sender. It is a question of contract, to be construed in the light of the general law upon such subjects, and, as such, the legislature had no *intentions*. In undertaking to deliver messages *in ipsissima verba*, the company precludes itself from denying their value, and are bound to proper diligence in performing their part of the contract. For failure they are answerable in damages according to the nature of the case.

§ 247. There is another striking analogy which induces us to insist upon holding telegraph companies to the responsibility of carriers. The intent to deprive the true owner of his goods is a chief element in the definition of larceny. Common carriers are bound to account for goods intrusted to them, chiefly because of the ease with which they can collude with thieves.[1]

Now, civilization has so advanced, that things have an appreciable and commerical value which formerly was not available. Books, maps, charts, diagrams, etc., have a recognized existence in the list of goods and chattels; and the right of property in them may be secured by copyrights, patents, etc. Their value has a certain permanence, and it may be said in many cases that it is intrinsic. But there are facts and information, the worth of which depends on the time — the day or the hour — when known or communicated.

[1] Jones on Bailments, 103.

§ 248. If, by labor, skill, and diligence, a man shall come to know the state of the market, at a particular place, and by transmission to another, he could make a profit, he is fairly entitled to the benefit.

To accomplish the purpose, he intrusts it to a telegraph company, specially engaging to deliver it within such time as will make it available to the correspondent. Thus the operator becomes possessed of this valuable information. If he should violate his duty, and impart it to third parties, the sender could thus be defeated, and deprived of his lawful gains; and yet he could not prove how it was done. His news, his commodity, had passed into the exclusive custody of the operator, who was as far removed from observation, in this instance, as a common carrier could be in any possible shipment of goods. Bad faith may be as injurious in one case as in the other. The carrier, by collusion with the robber, deprives the owner of his chattel; the operator, by precisely the same means, may sell the information to speculators, or to any interested party, and thus entirely defeat the object of the bailment. For such palpable wrong there should be some adequate remedy. If it be conceded that the company is bound to deliver the written message in any event, it follows that it is bound to deliver it without any diminution in value, just as the carrier must deliver the specific chattel. Here the analogy is complete. The propriety of the rule in both cases is founded upon the same considerations.

§ 249. But it is urged that telegraph companies should not be held responsible as common carriers,

because, owing to innumerable causes which may disturb the security of their lines, they would be as often open to liability because of the providence of God unknown to them, as for any other reason.[1]

Upon close investigation, we think this will prove to be more in apprehension than reality. Common carriers relieve themselves from liability, by proving the loss to have been caused by lightning, storms, floods, or earthquakes. It would seem that one class of persons could prove these things as well as another.

It is true, the common carrier usually has a witness in charge of the goods; and it is therefore easy to make proof of the act of God; but that is not the reason why exemption is allowed. It is because these phenomena of nature cannot be simulated; false testimony as to their existence can nearly always be controverted successfully; and because the loss is not caused by the neglect of the carrier. As all parties are free from blame, it is but common justice that the owner should bear the loss.

§ 250. If a storm should prostrate telegraph posts, it would be susceptible of proof. Length of wires and number of posts are no causes of exemption, for these are matters of choice on the part of the company; and their charges have reference to compensation for these very things. But if posts go down from decay, or negligence in their erection, no special immunity should be allowed; for these are facts peculiarly within their own cognizance, and for which they alone are responsible.

[1] 18 Md. 341. This ground of exemption is stated in slightly different phraseology, in Ellis' case, 13 Allen.

§ 251. The most frequent cause of disturbance, however, is electricity. Whilst this is a dreadful enemy of ordinary carriers, — destroying railroad trains, ships, and cargoes,— yet it is the chosen agent and trusted friend, the very life and soul of telegraphy. Where wires traverse a continent, excess of electricity will happen at some point almost every day. And so upon the ocean, some ship is in a storm all the time. But the chance for establishing the truth in telegraph cases is much more favorable, both for the public and the company. The whole land is full of witnesses; but not so of the sea. The company has its agents every few miles, whose instruments instantly and infallibly detect the presence of the disturbing element, and measure its force and duration. Within a few hours they may know exactly where the storm occurred, and fortify themselves with proof of its locality, duration, and force. It is true the lines may be influenced by atmospheric or electrical disturbances, not obvious to the world at large, yet these minor causes, as well as the more public storms, are only occasions of delay. Every operator on the line knows when there is an excess of electricity; and can tell when a message may be accurately transmitted. He is not required to work his puny battery when the storm-king rides in majesty over the wires; but, when this overwhelming force has disappeared, the wonderful agent resumes its kindly relations, and obeys the gentlest biddings of its master. This triumph of science is dazzling indeed, but it should not blind the eyes of the law. If the chances for gain impel the companies to the contest with superior powers, they well

know the risk, and cannot plead that the failure to transmit and deliver was caused by a "providence of God unknown," or by an "unforeseen disarrangement of electrical apparatus." The employer may indeed be ignorant of the disturbance, and yet he must submit to the necessary delay, without redress. When the emergency shall have passed, however, he is entitled to his place upon the list of messages to be sent, and to diligence in the operator sending them.

§ 252. We have, at the risk of prolixity, shown the conflict in the various decisions, among themselves; but the case of Carew[1] seems to invite special attention, on account of its singularly inaccurate and contradictory reasoning. It is first laid down that telegraph companies are not common carriers, unless made so by statute. The liabilities of common carriers were originally determined by the usages of trade, and the opinions of the judges, predicated upon the obligations they assumed and the nature of their business. We have known many acts of incorporation, under which this kind of business was conducted; but do not remember any statute, anywhere, declaring an individual or company to be a common carrier.[2] If telegraph companies avoid this responsibility, until devolved upon them by statute, they will probably enjoy perpetual immunity.

The Court further say, "that they do not become insurers against all errors in the transmission or delivery

[1] The Western Union Teleg. Co. *v.* Carew, 15 Mich. R. 525.

[2] In Ellis' case, it is observed that "there is nothing in the statute which gives countenance to the suggestion, urged by plaintiff's counsel, that owners or conductors of telegraphs are bound to warrant or insure the correct transmission of the messages which they undertake to send."

of messages, except so far as by their rules and regulations, or by contract, or otherwise, they choose to assume that position, or hold themselves out as such to the public or those who employ them;" all of which would seem to imply that whenever a telegraph company is a common carrier, the fact of its being so ought not to be doubted. In this case, some duties and liabilities are prescribed in the statute; such, for instance, as taking all messages, either from individuals or other companies, and transmitting them faithfully and impartially in their order, for uniform rates, in doing which they exercise a public employment; yet they are not common carriers, say the Court, because the statute contains no provision imposing the liabilities of common carriers. Perhaps the true test as to whether a corporation is a common carrier or not, is found in the objects for which the charter was granted, and not in the mere incident of having power to make certain regulations, nor in the failure of the legislature to superadd a synopsis of its responsibilities upon contracts to be made in the future.

§ 253. But the Court announced a doctrine, which we do approve: "Impartiality and good faith are the chief, if not only, obligations required by the statute, so far as relates to the question here involved. Beyond these statute requirements, *their obligations must be fixed by considerations growing out of the nature of the business in which they are engaged, the character of the particular transactions which may arise in the course of their business, and the application of the principles of justice and public policy, recognized alike by common sense and the common law.*"

This seems to be the true foundation; and upon it rests the superstructure of our argument. All the statutes are similar in this respect; and it seems to us that the only plausible grounds for an adverse opinion rests upon the general provision allowing them to make rules and regulations for the conduct of their business.

§ 254. But before discussing their power thereby to make limitations of responsibility, we will remark, that viewing the subject in these different lights, seems to us to sufficiently demonstrate that responsibility of the company for a faithful delivery of the message does not depend upon the value of the message, nor the mode of transmitting, nor the rate of compensation; *but upon the nature of the engagement;*[1] as in the case of all other common carriers.

§ 255. But if they are to be held only to a certain diligence, or to a higher degree of diligence than ordinary bailees; or if a peculiar liability is to be carved out and defined,— the whole public, including the companies, must continue for a long time incumbered with distressing doubts as to their rights and duties.

Public welfare is the great and final test in matters at common law; and this is eminently so as regards privileged classes and monopolists. We have shown, by analogy, strong reasons for holding them to be common carriers; and this conclusion is greatly strengthened by the argument of convenience.

[1] Also, see an interesting article on the subject of Telegraphs and Telegrams, in the February number, 1865, of The Am. Law Reg., (N.S.) vol. iv. p. 193, where the analogy is discussed, in contrast with letter-carriers.

They must be regarded as works of internal improvement, essentially public works. They operate under charters, invoke the government's powers of eminent domain, and thus force their lines to such points as they may select; and enjoy other privileges more or less exclusive. Their business is operated through agencies yet mysterious to the unskilful, and by processes of a character highly scientific. Misconduct on their part is therefore easily concealed; detection is almost impossible; and a defence may be readily framed upon the basis of unknown providences and disturbing forces.

§ 256. Many of the adjudged cases, critically examined, show readiness on the part of the courts to act upon suggestions, more specious than real, of mysteries and impossibilities. Undeniably they are more like common carriers than any other class of bailees; and, all things considered, it would be safe and proper to hold them to that basis of accountability; and if, in future workings, cases arise in which an exception should be made, founded upon sufficient reasons of public policy, and the nature of things, let it be definitely declared.[1] Thus gradually a system of telegraph law will be built up, and the rights of all be fully protected.

§ 257. Telegraph companies usually have a clause in their charters, authorizing them to make rules and regulations in reference to the sending of messages; and prominent among them is one, declaring that important messages ought to be repeated, and that they will not be responsible for mistakes or delays in

[1] 2 Parsons on Contracts, 173.

the transmission or delivery of unrepeated messages, from whatever cause they may arise, beyond the cost of transmission.

The phraseology is almost identical, as at first adopted by most of the companies in England and America. The charters and general statutes are very much alike in the language authorizing the adopting of their rules.[1]

In England, common carriers are permitted to go further in limiting their liabilities than in America; and hence the by-laws of telegraph companies must receive different constructions in the courts of these two countries, though they should concur in holding them to be, or not to be, common carriers. In reviewing and weighing authorities, this difference should be carefully remembered.

§ 258. We shall first consider the rule, as if made by an ordinary bailee for hire, or as of that class of bailments known as "*locatio operis faciendi*." Such bailees may charge for skill and labor as they choose; and may reject offers of employment, because they are in no way bound to the public. They might refuse to send a message, unless repeated once or oftener. They might agree to send, but decline to deliver. In short, the whole matter would rest in contract, and a rule would be unnecessary.

But it is not true that chartered telegraph companies fall within this definition. They are works of internal improvement, public, to all intents and purposes, bound to send all messages offered, in their order, and for uniform rates; and faithfully and

[1] Ante, §§ 113–117.

promptly to deliver them. All these ideas are inconsistent with the nature of mere bailees for hire.

§ 259. In the second place, consider the rule as if made in bailments denominated *locatio operis mercium vehendarum.*

Can common carriers enforce such a rule? Certainly they cannot protect themselves from the consequences of their own neglect, either in shipping, custody, or delivery. They may establish fast and slow lines, and may graduate their charges accordingly; but the measure of responsibility is not modified or changed. The identical goods must be delivered, in the usual time, unless good and sufficient excuse can be rendered. The obligation is to deliver safely at all events, excepting the goods be lost by the act of God or the public enemy. When the responsibility has begun, it continues, until there has been a due delivery by the carrier, or he has discharged himself of the custody of the goods in his character of common carrier.[1] The true question is not one of *actual blame*, but of legal obligation. The fact of non-delivery is alone sufficient to render him responsible. Even a private carrier must give some account of the loss, must prove the fact; and a failure to do so would of itself be conclusive evidence of gross negligence, or even fraud.

§ 260. It has been held in some of the States of the Union, that common carriers cannot restrict their liability by notices, receipts, and contracts; because doing so contravenes the policy of the law.[2]

[1] Kent, 604 (6th ed.).

[2] Fish *v.* Ross, 2 Kelly (Geo.) R. 349; and Ang. Com. Car. § 241, *et seq.*

It has been denied in American courts, after the most elaborate consideration, that they may, by a general notice, limit, restrict, or avoid the liability devolved on them by the common law.[1]

A common carrier cannot exempt himself entirely from the responsibility or from the duties which the law has annexed to his employment, by a notice published;[2] and, notwithstanding any notices that may be given, the owner of goods has a right to insist that the carrier shall receive them, subject to all the responsibilities incident to the business of carrying.[3] There are certain obligations fixed upon them by law, against which they may not stipulate; and among these are the duty of taking business as offered, at uniform rates, and of exercising such diligence and care as a prudent man would upon his own business. They cannot protect themselves against misfeasance or gross negligence.[4]

§ 261. Now, it is clear that a common carrier may by special contract limit his liability for loss or injury of goods, arising from any cause, except the misfeasance or neglect of himself and servants. And yet, when he fails to deliver the goods, the burden of showing the fact of loss or injury, still rests upon him. He must negative the presumption of negligence, consequent upon every failure to deliver, by proof of circumstances which do not lead to any presumption of negligence on his part. Doing this, shifts the *onus*,

[1] 2 Greenleaf, Ev. § 215.

[2] New Jersey Steam Nav. Co. *v.* The Merchants' Bank, 6 How. U.S. R. 344.

[3] 2 Greenleaf, Ev. § 215.

[4] Angell on Com. Car., §§ 267–275, and cases cited.

and gives him the benefit of defending under the special contract by which his liability may be limited. In order to success, the plaintiff must then show that the loss or injury was occasioned by want of due care or by gross negligence.[1]

Under the workings of this rule, the common carrier secures the benefit of most of the immunities enjoyed by the private carrier; but not all. He is a common carrier still. He must meet the wants of the public, by furnishing suitable and sufficient accommodations in his peculiar line for ordinary demands; all his agencies and appliances must come fully up to the most improved state of the art; he must take business in the order in which it may be offered, at uniform rates, and treat his employers with impartiality.

§ 262. And now, to make a practical application of this discussion, we ask, What is the difference between the rights, duties, and responsibilities of telegraph companies, and those of common carriers? We regard them as being so nearly identical, that they can be safely subjected to precisely the same rules of responsibility in all their engagements with the public. This holding will not deprive the telegraph companies of the full and perfect enjoyment of all that is meant by the chartered privilege of making rules for the conducting of their public business, and the government of their internal affairs; and, at the same time, it avoids many of the hazards and positive injuries that must necessarily supervene whilst a peculiar system of telegraph law is being built up and established. As to custody and delivery

[1] Story on Bailments, § 278.

of goods and of messages, it seems plain that there is no difference. In the act of transmission the difficulty is said to appear; and, to lessen responsibility, some companies give notice that important messages should be repeated. For this repetition additional compensation must be paid. That suggests a rate of charges, and not a measure of responsibility; for a repeated message is subject to the ordinary mishaps of an unrepeated message; both are alike affected by storms, unknown providences, and imperfection of instruments; and additional certainty is only attained by corresponding labor, care, and diligence. The company cannot refuse to send a message; and for that service the employer must pay the ordinary charge. If a repetition is desired, the additional price must be paid. If the parties choose to make a special contract as to the company's responsibility, that may be done within the limits prescribed by the law as applicable to common carriers. How such contracts may be made, the modes of proof, and the rules of construction, are treated of elsewhere in this book, and in various works upon common carriers.

§ 263. The adjudged cases nearly all are confined to a consideration of errors in the transmission of messages; but they have not been as explicit as perhaps is desirable, in restricting their language to that part of the regulation which applies to this default alone. There is no propriety in holding that the company would be excused for non-delivery of one kind of message, by causes that would not be sufficient for another. We have found but one case

in which delay in the delivery of a message after transmission was the ground of complaint.[1] This action was brought to recover damages for a delay on the part of the telegraph company in delivering a message in Providence, R.I., by which the plaintiffs lost the opportunity of attaching a house and lot in that city, belonging to a debtor. This property was attachable while the debtor was out of the State, and it could and would have been attached, if the operator had delivered the message as promptly as he might have done. The urgency of the case was fully made known to him by the despatch itself, and *aliunde*. Responsibility was resisted on the ground that this was an unrepeated message; that by the company's regulation it avoided being "responsible for mistakes or delays in the transmission of unrepeated messages, from whatever causes they may arise."

§ 264. Upon this point the Court held (Daly, J.), "It is apparent from the wording of the conditions that there is a distinction between the transmission and the delivery of a message: that the first means its transmission, from the office or station at which it is received, to the one to which it is sent; and the other, the delivery of it to the person to whom it is addressed. The clause relating to messages which are repeated refers to mistakes or delays in their transmission or delivery; while that which relates to unrepeated messages refers to mistakes or delays in their transmission alone. What is obviously meant by the latter clause is, that the company will not be responsible for any mistake or delay in the trans-

[1] Bryant *v.* The Am. Teleg. Co. 1 Daly, 575.

mission of a message, unless it is repeated; which has no application to this case, as there was no mistake or delay in the transmission of the message, but the delay was in the delivery after it had been correctly transmitted. That the message had not been repeated, therefore, furnished no ground for granting a nonsuit."

§ 265. This transaction occurred in 1860. The discrimination seems just, and the decision proper. But, if we turn our attention to the later regulations of other companies, we find that the grounds for this discrimination have been removed by a change of terms. Take, for instance, those of the Western Union Telegraph Co., in the case of Carew,[1] decided in 1867. There it is prescribed, "Nor will the company be responsible for any error or delay in the transmission or delivery, or for the non-delivery, of any unrepeated message, beyond the amount paid for sending the same, unless in like manner specially insured, and amount of risk stated thereon and paid for at the time." This places delay, erroneous delivery, and non-delivery of a message after transmission, upon precisely the same footing of restricted liability, as if applicable to transmission alone.

§ 266. To sustain this there can be no argument predicated upon unknown providences, unforeseen derangement of electrical apparatus, arbitrary signs, sounds, etc. This regulation fixes the amount of liability, and, if binding, will be sufficient to protect the company against the consequences of non-feasance, misfeasance, and gross negligence. It makes the

[1] 15 Mich. 525.

cost of transmission the penalty in any case, and leaves performance to depend upon the estimated difference between profit and convenience. Where courts allow common carriers to contract in this way, telegraph companies will be properly allowed the same advantage; but to us it seems violative of principle, and destructive of the very objects for which the franchise was bestowed.[1]

§ 267. We have spoken of the rights of telegraph companies in respect of messages in cipher or obscurely written. These may be absolutely rejected. But, if undertaken, the company will be bound to the use of due care, skill, and diligence in the transmission. If this be so, there must be some mode of enforcing the contract; and therefore a stipulation against all liability is void. If a message is not legible, it is the same as no message; and no operator should undertake, for pay, to send a message which he cannot read.

§ 268. Responsibility for messages beyond the com-

[1] The case of the Balt. & Ohio Railroad Co. *v.* Rathbone, 1 West Va. 87, does not sustain the text as to gross negligence. It is there held "that it is competent for a common carrier to diminish and restrict his common law liability by special contract, and that he may, by express stipulations, also absolve himself from *all* liability resulting from any and every degree of negligence, however gross (if it fall short of misfeasance or fraud), provided the terms and language of the contract are so clear and definite as to leave no doubt that such was the understanding and intention of the parties."

It is hardly to be supposed that any published regulations or offered terms of a contract will go to this length, where there is competition; and yet it is generally insisted, on behalf of telegraph companies in litigation, that the regulations which they do actually publish are effectual to the exclusion of all responsibility not fixed by special contract of *insurance*, as it is called.

pany's line is treated of elsewhere, at large;[1] but it is proper here to consider how far it may be affected by the usual printed notices or blanks. They usually contain a clause like this: "Nor is any liability assumed by this company for any error or neglect by any other company over whose lines this message may be sent to reach its destination." The company has the right to restrict its business to its own line, except so far as it may be required to receive and forward to other lines, by its charter; and in doing this no responsibility is assumed for any thing beyond its own line. But if business relations shall be established, involving an association of lines, and community or division of profits, as such; or if any other arrangement shall be made different from the absolute independent working of each separate line in the matter of transmitting and delivering messages, — then we should say that the employer would be entitled to the full benefit of all such arrangements, as against the company receiving his message, notwithstanding the stipulation in the blank upon which it was written.

§ 269. If this independent action of the line within its own limits shall be maintained, then it is fit and proper for this regulation to go further, as is usually the case, and stipulate that the company shall be considered as the agent of the sender to forward his message. But if one company is really the agent or associate of another, for mutual advantage and gain, a stipulation that it must be regarded as the agent of the sender becomes nugatory. It cannot justly hold

[1] Post, c. 5.

this position of double agency, and choose which it will claim and which ignore, when responsibilities are pressed upon it by the sender.[1]

[1] See post, c. 5.

NOTE. — In his late edition of the Law of Railways, Chief-Justice Redfield has inserted the leading propositions hitherto declared in the courts, both in England and America; and his summary, as evincing "the *animus* of the rule of law upon the point of the responsibility of telegraph companies," is as follows: —

"1. If they annex no conditions to their undertaking, they will be expected to do it in the same careful and faithful manner that other careful and skilful men in that department do such business.

"2. If a message is left and paid for as a single transmission, the sender, or those interested in the sending, will be expected to assume what risk necessarily attends such transmission, after diligent and faithful efforts to accomplish the duty.

"3. As there is but one sure test of the accuracy of messages being sent, that is, by repeating them, one who desires to secure that, or where business is of such importance as to make that desirable and reasonable, will be expected to so inform the company, and pay for the insurance.

"4. This rule is so obviously just and reasonable, that we believe it forms a standing and undeviating rule of all the telegraph companies here and elsewhere, and is so notorious, that all persons sending messages may fairly be presumed connusant of its existence, and will be bound by it."

Upon the first proposition we remark, that it accords with what we have written, if the word "department" refers to the business of common carriers. But if it is restricted to that of telegraphing, we fail to see the effect of the comparison.

Upon the fourth: It goes beyond the decisions, and announces that as presumption of law, which yet rests in contract. At least the telegraph companies are not willing to risk such a presumption. They are very careful to have messages written on their blanks, so as to make a contract; for if not so done, they remain under the exactions of the first rule above set forth, whatever may be their "department" of business.

CHAPTER V.

RESPONSIBILITY FOR MESSAGES BEYOND THE COMPANY'S LINE.

§ 270. In determining the responsibility of telegraph companies for the transmission of messages over connecting lines of other companies, the most formal and scientific method would be to consider specially the nature of their business engagements with the public. But this need not be done for the present; for, whatever may be the ultimate decision as to whether they are, or are not, common carriers, the resemblances and analogies between the two are so strong in this respect, that all will probably agree, that the rules of law which govern one, may safely be applied to the other. The authorities are not harmonious as to the liability of railroads and other common carriers, for failures in duty by connecting lines; but, as a general thing, the same courts hold the same rules to be applicable alike to carriers and telegraph companies; thus at least maintaining a consistency in this respect. The cases involving the responsibilities of the former are always used as determinative of those of the latter. We think the analogy is perfect; and will, for the sake of perspicuity, briefly rehearse the authorities declaring the responsibilities of common

carriers, as aids in ascertaining what should be the responsibilities of telegraph [illegible]nies.

§ 271. The doctrine upon this subject is now perfectly well settled in England. It is this: "Where a railroad company receives goods for carriage, directed to a particular place beyond the terminus of its route, and does not by positive stipulation limit its liability to a part only of the distance, this is *primâ facie* evidence of a contract to carry the goods to the place to which they are directed, although such place be beyond the terminus of its route.

This was the doctrine announced in the case of Muschamp *v.* The Lancaster & Preston Railroad Co.,[1] which is the leading case in the English courts upon this subject; and the rule there laid down has been followed and approved in all subsequent decisions.[2]

And as a corollary from this proposition, it is held, that in such cases the original company alone is liable to the sender of the goods, being the only party contracting with him, although it be shown that the loss occurred on the connecting line; such connecting company is not liable to him.[3]

[1] 8 Mees. & Welsb. 421.

[2] Mytton *v.* Midland Railway Co. Eng. Ex. 4 H. & N. 614; Coxon *v.* Great Western R.R. Co. 5 H. & N. 272; Blake *v.* Same, 7 ib. 986; Crouch *v.* London & N.W. Railway, 25 Eng. Law & Eq. R. 287; Scotthorn *v.* South Saffordshire R. 18 Eng. Law & Eq. R. 553; Wilson *v.* York N. & B. Railway, 18 Eng. Law & Eq. R. 557.

[3] Collins *v.* The Bristol & Exeter Railway Co. 11 Exch. R. 789.

In this case it is held that express stipulations in the contract between the original company and the sender of the goods, whereby it restricted its responsibility for losses, would protect all the connecting companies, although the losses occurring on such connecting line may have been of such a character as to fix the liability of a common carrier.—S.C. 7 Ho. Lords Cas. 194.

§ 272. The law upon this subject is still unsettled in the American courts, and much diversity of decision exists in the different States.

Some of them go to the extent of fully re-affirming the English rule as above stated;[1] while, in other States, it is held, that the acceptance of goods by a common carrier marked for a destination beyond the terminus of its route, or the giving of a receipt for the entire distance, or receiving the freight for the entire distance, is not regarded as *primâ facie* evidence of an undertaking to carry the goods through to such place; but that there must be a special contract to make the original company liable for losses beyond its own route.[2]

There is in other States a modification of this last-stated rule, and a strong leaning toward the English decisions.[3]

[1] Iowa, South Carolina, and Tennessee; Angle & Co. *v.* Mississippi & Mo. R.R. Co. 9 Iowa, 487; Bradford *v.* S.C. R.R. Co. 7 Rich. 201; Kyle *v.* The Lawrence R.R. Co. 10 Rich. 382; Carter *v.* Peck, 4 Sneed, 203. This last case is as to passengers, but the same principle is recognized as in case of goods.

[2] Massachusetts, Connecticut, and Vermont; Nutting *v.* Conn. River R.R. Co. 1 Gray, 502; Briggs *v.* Boston & Lowell R.R. Co. 6 Allen, 246; Elmore *v.* Naugatuck R.R. Co. 23 Conn. 457; F. & M. Bank *v.* Champlain Transportation Co. 18 Vt. R. 140.

[3] Perkins *v.* Portland, Saco, & P. R.R. Co. 47 Maine, 573; Bennett *v.* Filyaw, 1 Florida R. 403; Cin., Ham., & Dayton R.R. Co. and Dayton & Mich. R.R. Co. *v.* Spratt, 2 Duvall (Ky.) R. 4; where it is said, "In all such cases of associated companies engaged in a common undertaking for transportation on a long line, of which each associate owns a different link, public justice and commercial policy require a stringent construction against any intermediate irresponsibility as common carriers." Candee *v.* The Penn. R.R. Co. 21 Wis. R. 582, citing Illinois Cen. R.R. Co. *v.* Copeland, 24 Ill. 332, and Peet *v.* Chicago & N.W. R.R. Co. 19 Wis. 118, "holding that where a railroad company contracted as carrier to transport goods for the whole line, it became liable for any injury which might hap-

§ 273. But the doctrine is fully recognized, both in the English and American courts, that common carriers may make valid contracts to carry beyond the limits of their own route, and thus render themselves liable for the acts of other carriers, who at the same time are independent carriers, and in no way under the direction or control of the contracting company.[1]

This is sustained upon the ground that the right to make such contracts is one of the implied or incidental powers belonging to such corporations; and as these connecting lines are becoming every day more numerous and indispensable to the facilitating of commerce, such powers must be regarded as indispensable incidents to the express powers.

§ 274. But the difficulty is to be found in determining what facts and circumstances shall be evidence of such a contract on the part of the company, to whom the goods are delivered for carriage. The rule laid down in the English cases, as we have seen, is clearly defined and readily comprehended.

The fact of receiving the goods marked to a destination beyond the company's route is evidence of a contract upon the part of the company to deliver at such place; and the company, in order to confine its responsibility to its own route in such cases, must do so by express contract.

§ 275. If it be admitted that the common carrier has the right to contract for responsibility beyond its

pen to them beyond the terminus of its own road, while under the control of other carriers."

[1] Except in Connecticut, where this is denied. Hood *v.* N.Y & N.H. R.R. Co. 22 Conn. 1; s.c. ib. 509. See Elmore *v.* Naugatuck R.R. Co. 23 Conn. 457; Naugatuck R.R. Co. *v.* Waterbury Button Co. 24 Conn. 468.

own route, it is difficult to perceive why such contract must be express upon the part of the company, and why it may not be implied from the facts and circumstances attending the particular case, just as in all contracts made by itself or other persons. Suit for a loss would be predicated upon the facts, and a declaration averring loss upon a connecting line for whose acts the defendant was responsible, would not be demurrable. But statement of bailment, and loss by default of defendant, would be sufficient. Proof of loss by default of a company for whose acts the defendant was answerable, in respect of the loss, would sustain either declaration. This responsibility for the conduct of others may be shown by a contract to that effect, or by facts from which it may be implied. How this was, the jury, under proper instructions from the Court, would determine.[1]

§ 276. The shipment of goods, and the transmission of messages over connecting lines, is a matter of daily occurrence; and the great multiplication of railroad and telegraph companies, and the connections which they must make with each other so as to form one continuous route, make it important that the rules on this subject should be well settled and accurately defined; and it becomes a matter of regret that such is not the case in the American courts.

§ 277. The practical advantages, and the more satisfactory reasoning, considering the relation in which the shipper of the goods and the sender of the message stand to the company who undertakes to carry or

[1] Bennett *v.* Filyaw, 1 Florida R. 403; Weed *v.* Sar. & S. R.R. Co. 19 Wend. 534.

transmit for them, seem to be found in the English rule; for the sender of the goods or message may not know where the company's line terminates, nor what arrangements it may have with connecting lines, if there be such, on the route over which his goods or message must pass. It will be a simple, convenient, and useful rule in any case where services are to be performed beyond the company's line or road, for an express contract to be made, if desirable, stipulating against errors, losses, or delays upon the lines or roads of other companies.[1] In modern days, what is called "through business," upon railways at least, is of more importance than the local. Combinations are made so that inducements of a substantial character may be offered, with a view of securing patronage. Not the least among these is the assurance of prompt and convenient adjustment of possible losses.

§ 278. In a recent American work on railways,[2] it is said: "Where different roads are united in one continuous route, such an undertaking in regard to merchandise, received and booked for any point upon the line of the connected companies, is almost a mat-

[1] After much diversity of decisions in the New York courts, this question has been finally settled in accordance with the above view, as to railroad companies, by statute, 2 Revised Statutes, secs. 67, 693.

[2] Redfield on Railways, 284. In the case of St. John *v.* Van Santvoord, 6 Hill, 157, it was held that if the owner of the goods neglects to make the necessary inquiries as to the custom or usage of the company, or to give directions for their disposal, it is his fault, and the loss, if any, after the carrier has performed his duty according to the ordinary course of his business, must fall on the owner.

On the other hand, in Angle & Co. *v.* The Mississippi R.R. Co. 9 Iowa, 487, it is held that to exempt the company, the usage to deliver at the termination of their road must be *brought home* to the consignor.

ter of course. It is, we think, the more general understanding upon this subject among business men and railways, their agents and servants."

But few cases have arisen upon this subject in reference to telegraph companies. There can be but little doubt but the rule in relation to telegraph companies will be the same as that which may have been previously adopted in the court where the decision is made, in reference to railroad companies.

§ 279. The question has never been before the courts of England. They will doubtless follow Muschamp *v.* The Lancaster & Preston Railway Co.,[1] and establish the doctrine that where a telegraph company undertakes the transmission of a message directed to a particular place beyond the terminus of its own line, and does not by express stipulation limit its liability, it shall be liable for losses or delays or mistakes occurring beyond the terminus of its line, in the same manner and to the same extent, as if the injury had occurred upon its own line.

§ 280. The question has come before the courts of Canada for determination, in the case of Stevenson *v.* The Montreal Telegraph Co.[2]

The Montreal Telegraph Company owned a line extending from Montreal to Buffalo only, but connected with other lines in Canada and the United States; and in their printed handbills they advertised their line as "connecting with all the principal cities and towns in Canada and the United States."

The plaintiff delivered to the defendants' operator at Montreal, for transmission to New York City, a mes-

[1] 8 Mees. & W. 421. [2] 16 Upper Canada R. 530.

sage addressed to his agent at that place, and paid the full price for its transmission to its destination. It does not appear that the defendants gave the plaintiff any notice of the terminus of their line, except so far as it was contained in the general notice that they connected with all the principal cities and towns in Canada and the United States.

At Buffalo, the terminus of defendants' line, their operator delivered the message to the operator of the American line at Buffalo, and paid him the charges of transmission from that point to the city of New York.

There was delay either in the transmission over the American line, or in the delivery of the message in New York by that company. Damage was thereby sustained, and the plaintiff brought this action against the original company.

§ 281. It was held by a divided court, that the Montreal Telegraph Company under this state of facts could not be held liable for delay beyond their own line, but that their responsibility was limited to the transmission of the message to Buffalo, and the delivery of it to the American line, and the payment of the charge of its transmission to its destination; and that the announcement that their line "connected with all the principal cities and towns in Canada and the United States," only meant that the defendants had effected such arrangements as would insure to the public the convenience of having their messages received by other connecting lines and forwarded to places beyond the terminus of the defendants' line, both in Canada and the United States; and the Court

were further of opinion, that a contract to deliver the message at the city of New York could not be implied from the defendants' having received the whole charge for transmitting the message the entire distance; but that this was done for convenience of the plaintiff merely, and relieved him from the necessity of making any other arrangement to pay the charges at the commencement of the connecting line.

§ 282. The dissenting opinion was based upon the principles announced in Muschamp *v.* Lancaster & Preston Junction R.R. Co., and other leading English cases; and it was considered that the defendants, by undertaking to transmit the message to any point which was *in fact* beyond the terminus of its line, did thereby in fact contract to do so, and that, in such case, the connecting line was but the agent of the company receiving the message for transmission, for the purpose of completing the contract. The judge delivering the dissenting opinion said, further, that the notice above referred to was not to be regarded as a limitation of their undertaking, and that they thus contracted to send over their own line, and forward it by the connecting line, merely; but by stating to the plaintiff that his message could be sent to New York, and receiving from him the price of its entire transmission, the company thereby undertook and agreed to send the message to New York, and to be responsible for its delivery there.

And as the defendants did not inform him to the contrary, the plaintiff had the right to suppose that they had control of the line to New York; that the paper gave no information that the defendants may

not have been the owners of the line of wires the whole distance to New York; and nothing appeared in the case to show that the plaintiff may not have supposed that the defendants had at least the control of the line, so as to send on his message the whole distance, as he paid for the whole distance.[1]

[1] As this is a question of great practical importance, we give the opinion of the Court, and the dissenting opinion in full, upon this branch of the case.

The opinion of the Court was delivered by Robinson, C.J., who said, —

"We none of us doubt that a telegraph company, like other incorporated companies, if it undertakes, for reward, to perform a service within the proper scope of its business, is bound to discharge the duty which they have undertaken with care and diligence, and with a reasonable degree of skill and efficiency; and that if they fail in any of these particulars, the person who employed them can recover from them in a court of law compensation in damages for the injury which they have occasioned, not always, indeed, to the full extent of what such person may have lost, but compensation for any injury directly and naturally arising from the company's default, and such as consequently may be fairly supposed to have been within the contemplation of the parties when the service was undertaken.

"Taking this view, then, we have to consider, —

"1st, What was it that these defendants engaged to do?

"2d, Did they fail, and in what particular, in fulfilling their engagement?

"3d, Is their failure fairly attributable to neglect, such as should make them legally liable?

"4th, And if so, on what principle should the damages be estimated?

"As to the first point — the contract. What did the defendants engage to do? I find no case bearing on this point, where the principles of law happen to have been laid down in regard to a telegraph company. We must take them, I think, from analogy with what has been laid down in regard to railway companies. I have looked through all the English cases I can find on this subject, down to the case of Collins v. The Bristol & Exeter Railway Company (1 H. & N. 517), decided in the Exchequer Chamber; and my opinion is, that, although the Montreal Telegraph Company announced in their handbills, that they connected with all the principal towns and cities in the United States, they did not thereby declare that they were connected with them in business, but only that they had

§ 283. This dissenting opinion accords with the doctrine laid down in Iowa,[1] where it is held, that

made such arrangements as would insure to the public the convenience of their messages being taken up and forwarded to cities and towns to which the operations of the Montreal Telegraph Company do not extend. We see scarcely a railway in the Province, whether the line be long or short, or a line of steamers, in reference to which it is not announced by the handbills which they put out, that they connect with railways and lines of steamers leading to the various places to which it is known that travellers chiefly resort. Our Northern Railway Company, for instance, may inform the public that they connect with steamers in Toronto, going to Kingston and Oswego. In respect to the short railway between Port Stanley and London, as I happened lately to observe, it is announced in handbills that it connects at London with trains which go east and west, to various points named, extending from Quebec to the Mississippi. Such advertisements, in my opinion, mean nothing more than that the passengers carried upon the line belonging to the company which puts out these handbills, will find the arrangements such as will prevent detention, and enable them to pursue their journey promptly and conveniently to the several points mentioned.'

"It was never imagined (and it would be a most unreasonable construction to place upon the announcements) that the company giving the public such information, were thereby engaging upon their own responsibility to convey passengers safely and without delay along all the lines of which they make mention in their handbills.

"Then, besides their handbills, or rather besides the heads which appear upon the telegraph messages, and which are intended to circulate the information I am speaking of, there was nothing shown at the trial from which to imply a contract, further than that the company sent the message from Hamilton direct to Newman & Co., at New York, and that they took the forty cents on behalf of the Buffalo & New York line of telegraph, which was known to be the price, and by which arrangement the convenience was secured to the person sending the message of having it taken up and continued along that line. Some such arrangement as that is indispensable, or the message must necessarily stop at the end of the Montreal Telegraph line, or it would have to be directed to some agent there, who would have to go to the commencement of the other line, and transmit the same message there, which arrangement would be most inconvenient, and occasion delay and expense.

"A traveller can continue his route from one railway to another, and

[1] Angle & Co. *v.* The Mississippi R.R. 9 Iowa, 487.

"the company would be exempt if an unvarying usage to deliver at the terminus of their road was

can pay as he goes along; but the person sending the telegraph message cannot accompany it, and pay on each new line the charge for carrying it further. To meet the exigency, it appears the Montreal Telegraph line took from the person sending a message to New York from Hamilton the exact sum which a person going to the office would have to pay at Buffalo for sending on the message from there to New York, and this insures it going on with that care and despatch for which the company sending the message from Buffalo is responsible.

"I observe in one of the English cases that the arrangement was different, and the company receiving the package of goods to be carried to a place beyond their line, had such an understanding with the other company, that their charges, as well as the charge for the transit over the other line, was received at the place to which the goods were ultimately carried. The Court remarked that that showed the latter company to be the agents of the former, as they received the money coming to them, and that the first company were therefore responsible for them, as all employers are for the agents they employ. Here the case is reversed. The Montreal Telegraph Company received the twenty-five cents, to be accounted for by them to the American Company, and in that respect, were not their employers, but their agents.

"In my opinion, what the defendants in this case did, had not the effect of making them responsible for the punctual delivery of the message at New York, by the servants of the American Telegraph Company, to the person there to whom it was addressed."

And then follows a discussion of the question whether the defendants failed in fulfilling their engagements upon their own line, and as to the principle of damages in the case.

The dissenting opinion was delivered by Burns, J., who said,—

"It appears to me the defendants did contract to transmit the message the whole way to New York, and there to be delivered to the plaintiff's agent, and did not merely contract to transmit the same to the end of their line at Buffalo, and there cause the message to be delivered to the American line for the purpose of transmission.

"The cases of Muschamp *v.* The Lancaster & Preston Junction Railway Co. (8 M. & W. 421); Watson *v.* The Ambergate, Nottingham, & Boston Railway Company (15 Jur. 448), and Scotthorn *v.* The South Staffordshire Railway Co. (8 Exch. 341), sufficiently, I think, establish that the defendants, by undertaking to forward messages to any place which, as a matter of fact, was beyond their own line, in fact did contract to do so, and for the purposes of the messages being correctly transmitted and delivered, the companies or persons into whose custody or hands the mes-

proven, and knowledge of such usage brought home to the consignor."

§ 284. The decision in New York upon this question in relation to telegraph companies, fully sustains the doctrine as now settled in the English cases.

This was the case of De Rutte *v.* N.Y., Alb., & Buf. Teleg. Co., where the message was transmitted from New York City to San Francisco. The entire charge for its transmission to the latter place was paid by the agent of the plaintiff to the defendants' operator at the time the message was delivered to him for transmission, at the office in New York.

sages were delivered, are, in fact, their agents for the purpose of completing the contract.

"The defendants were paid for transmission of the message the whole distance to New York, and I do not look upon the words in their printed papers, which they give to persons desiring to send messages upon which to write the message; namely, 'connecting with all the principal cities and towns in Canada and the United States,' as being a limitation of their undertaking to send over their own line merely, and that they will do their best to have the message sent forv .rd beyond that. Such words may sometimes have such limitation, but must always, I think, look upon the nature of the business done by both parties, their conduct and all things connected with it, to interpret the meaning.

"Now, giving parties information that they connect in the manner mentioned amounts to this: When a person goes to the office in Hamilton, he asks, Can a message by the telegraph be sent to New York?— and the answer is, that it can, and then the price for sending is paid. It amounts to no more than that, as it appears to me; and if no more took place between the parties than that, it would be an undertaking to send and deliver the message in New York to the correspondent, without inquiring how it is to be done. All communications are to be strictly confidential, and that provision is an agreement extending the whole distance, I should say. The paper gives no information that the defendants may not be the owners of the line of wires the whole distance to New York, and nothing appears upon the evidence to show that the plaintiff may not be supposed to have thought the defendants had at least the control of the line, so as to send on his message the whole distance, as he paid for the whole distance."

The defendants' line extended only from New York to Buffalo, where it connected with other independent lines, and, through them, with a pony express to San Francisco. The defendants transmitted the message safely over their own line, and it was correctly transmitted on the connecting lines as far as St. Louis; but, when delivered to the plaintiff at San Francisco, there were several mistakes in it.

§ 285. The Court held, that when a telegraph company is paid for transmitting a message beyond its own line, to a place with which they are in communication through the medium of the lines of other companies with which they connect, they must be regarded as undertaking that the message will be transmitted and delivered at that place; and that it appeared in this case, that nothing was said by the defendants, limiting their liability to their own line.

It was further held, that the sender of the message informing the defendants' agent that he desired the message sent to San Francisco, and the defendants' agent receiving from him the entire charges for the transmission to that place, was *primâ facie* evidence of an engagement to do so. This brings the case fully up to the doctrine laid down in Muschamp *v.* The Lancaster & Preston Junction Railway.

§ 286. It was contended in the argument, that, as by the Statute of 1848, sec. 11, it is made the duty of telegraph companies to receive messages from and for other telegraph companies, therefore, when the defendants had transmitted the message correctly over their own line, they were not answerable for errors occurring afterwards. But the Court held, that this

requirement of the statute was intended as much for the benefit of telegraph companies, as for the individuals who employed them; and that the object of the provision was to enable new companies to compete with established lines, and could not be construed as making the company the collecting agent of other lines.[1]

This construction of the statute becomes the more important from the fact that this is a very usual provision in the statutes of the different American States.

§ 287. The Court thus strongly and clearly state the principle which was held to govern the case: "They took upon themselves the whole charge of sending it; and what arrangements were made, or what sum would be paid for the use of the lines in connection with them were matters not disclosed to the party interested in the transmission of the message, and with which, consequently, he had nothing to do.

"He made his contract with them, and, if injured by its non-fulfilment, he has a right to look to them for compensation for the injury sustained."

§ 288. The Supreme Court of California manifested a strong disposition to hold the doctrine of the English cases, in the case of Thurn *v.* The Alta California Telegraph Company.[2]

The action was brought to recover a penalty under the Statute of 1850, which provided for the recovery

[1] It is plainly a requirement upon the companies in behalf of the public, so that a message may be forced through, where, without this provision, personal attendance or special agencies would be required. Being thus compelled to receive from and for each other, they make mutual accommodation arrangements about collections.

[2] 15 California R. 472.

of a penalty of five hundred dollars for every neglect or refusal to transmit despatches with impartiality and good faith, etc., "to be recovered with the costs of the suit in the name and for the benefit of the person or persons sending or desiring to send such despatches."

The plaintiff had delivered to another company, The State Telegraph Company, at San Francisco, a message to be transmitted to Jackson. The State Telegraph Company's line extended only a part of the distance, and then connected with the defendant's line.

The entire charge was paid to the State Telegraph Company. The message was promptly transmitted over their line, and taken by their agent to the office of the defendant at the place where the lines of the two companies connected, to be transmitted; and certain charges were tendered by the State Telegraph Company's agent to the defendant's operator as the price of transmission, who declined to send it for this sum, as the charges had been increased.

§ 289. The Court held that the penalty could not be recovered, as the suit was not instituted by the proper person; that while the plaintiff might have contracted with the defendant through his agent, and in such case have enforced the penalty, that there was no agency disclosed here, the contract being made by the plaintiff with the State Telegraph Company, and that this company was alone responsible to the plaintiff; that even if the fact had been disclosed to the plaintiff by the State Telegraph Company, that there was a connecting line over which his message must pass to reach its destination, it did not

follow that the contract was not made with the State Telegraph Company, trusting alone to its responsibility, and leaving it to make such additional contracts in its own behalf as might be necessary to secure the transmission and delivery of the message to the person to whom it was addressed.

This statute likewise contained the same provision as the New York statute, making it the duty of telegraph companies to receive messages from and for other telegraph companies.

§ 290. Many of the telegraph companies in the United States have the terms and conditions on which messages are received, printed upon the slip of paper which they furnish the sender of the message upon which to write out the message he desires to send.

One clause in the printed headings used by many companies is to the following effect: That no liability is assumed by the company for any error or neglect by any other company over whose lines the message may be sent to reach its destination, and that "the company is hereby made the agent of the sender of the message to forward it over the lines extending beyond those of this company." Whenever these or similar terms have been incorporated in the contract, or become part of the contract by fair implication, they restrict the responsibility of the company. But, in order to determine what is the contract, it is proper to look at all the facts. If these headings or printed forms contain statements that the company will receive and transmit messages to points beyond their lines, or if they be so worded as clearly to imply that their lines extend to a given point, these are elements in the special contract,

and must have a very important bearing in its construction.

§ 291. If limited responsibility is claimed under an implied contract, or if assent to the printed terms rests upon implication, then it is proper to consider all the surroundings of the case, in order to see what was reasonably to be implied as to the extent of the company's undertaking. If, in point of fact, the contracting company was the agent of the other companies, and as such received the business and the pay for them, upon the plan of a "through" arrangement for mutual convenience and interest, the former would be responsible for the defaults of the latter. They cannot assume an agency for profit, involving liability, and then afterwards, without a disclosure of the first, assume or stipulate for a second agency in protection of itself against the original liability. But if they do in good faith restrict their business to their own lines, and only forward as agent of the sender, they are entitled to the benefit of this restricted responsibility.

§ 292. But the English courts have gone to the extent of holding, at least in one case,[1] that even where the company had published a general notice that they would not be responsible for forwarding goods beyond their own road, the freight agent whose duty it was to receive and forward goods had the power to bind the company by express contract that the goods should be forwarded to a point beyond the terminus of the company's road, and over the line of an independent company, and delivered to the consignee,

[1] Wilson *v.* York, Newcastle, & Berwick Railway, 18 Eng. Law & Eq. R. 557; case at Nisi Prius, before Jervis, C.J., in 1851.

and the owner could recover damages for losses beyond the terminus of the company's road.

§ 293. The more generally adopted view in the American courts is, that when goods are marked for a particular place, and delivered to the carrier for shipment, but without any directions being given for their transportation and delivery, except such as may be inferred from the marks themselves, the carrier is only bound to transport and deliver them according to the established usage of the business in which he is engaged, and that it makes no difference, in this respect, whether such usage were known to the shipper of the goods or not.[1]

[1] See Jenneson *v.* Camden & Amb. Railway, Dist. Court of Phila., 4 Am. Law Reg. Feb. 1856, 234, where all the cases on this subject are reviewed, and the conclusion arrived at which is stated in the text. The Supreme Court of Massachusetts have directly disapproved the case of Musehamp *v.* Lancaster & Preston Junction Railway, 8 M. &. W. 421, in the case of Nutting *v.* Connecticut River R.R. Co. 1 Gray, 502; and held that where the receipt was given for goods marked to a place beyond the terminus of its route, and the statement made in the receipt that they were for transportation to such place, the burden was upon the plaintiff to show a special contract by the company to carry the goods beyond the terminus of its own railway.

In the case of Hood *v.* N.Y. & N.H. R.R. Co. 22 Conn. R. 1,502, the Supreme Court of Connecticut went a step further in this direction, and held that the conductor had no authority to bind the company to carry beyond the limits of its railway, and rested this holding upon the ground that the company itself could not make any such binding contract.

See also Elmore *v.* Naugatuck R.R. Co. 23 ib. 457; 24 ib. 468. See generally, Van Santvoord *v.* St. John, 6 Hill (N.Y.) R. 157; Farmers' and Mechanics' Bank *v.* Champlain Transportation Co. 18 Vt. R. 140; Lowell Wire Fence Co. *v.* Sargent, 8 Allen, 189; Northern R.R. Co. *v.* Fitchburg R.R. Co. 6 Allen, 254; Noyes *v.* Rut. & Bur. R.R. Co. 27 Vt. 110; Wright *v.* Boughton, 22 Barb. 561; Bradford *v.* S.C. R.R. Co. 7 Rich. 201.

It will thus be seen how wide is the diversity of judicial opinion upon this subject, reaching from the holding in the Connecticut cases, that the

§ 294. This subject is one of great practical importance in the business of transmission by telegraph, as well as of shipment by rail; and it is to be regretted that there is not greater uniformity in the decisions of the different States upon this subject.

§ 294 *a*. Whenever the company is liable for the transmission and delivery of the message at its place of destination, although it may be passed over intermediate independent lines, the clerk or servant of the connecting company at the place for delivery of the message will be the agent of the original company, for all purposes connected with the delivery of the message, in the same manner that the original company's own servants would have been, had the message been addressed to some point on its own line.

company has *no power*, even by express contract, to bind itself beyond its own line, on the one hand, to the extreme doctrine of the English cases on the other, which apply the same rule announced in Muschamp *v.* Lancaster & Preston Junction Railway, to cases where the destination of the goods is beyond the realm, as in Crouch *v.* N.W. R.R. Co. 25 Eng. Law & Eq. R. 287, and which makes the company liable in such cases as if the loss were on its own line, unless it expressly stipulates against such liability.

CHAPTER VI.

THE TELEGRAPH AS A MEDIUM OF CONTRACT.

§ 295. The telegraph may be used as the medium of communication between contracting parties, without any previous understanding to that effect. If a proposition were made in the first instance by telegraph, and it should be accepted by the other party through the same medium, without there having been any previous dealings or agreement between the parties, the contract would be as complete as if the communications had been made by letter through the mail, or directly by the parties themselves in each other's presence; the only difference being in the character of evidence necessary to prove the contract.

So the communication of one of the contracting parties may be by mail, and the reply thereto by telegraph, and thus the contract be completed.[1]

§ 296. It is becoming more and more important that the rules governing negotiations made by telegraph should be clearly defined and settled, as contracts thus made are constantly increasing in number and magnitude. The telegraph lines in this country and in England are becoming more extended, and are bringing remote commercial points into direct communication with each other. They are now largely

[1] Prosser v. Henderson, 20 Upper Canada Q.B. R. 483.

employed, not only in transmitting friendly information and general and commercial news, but messages which are the only evidence of the negotiations of contracting parties in their business transactions.

§ 297. Interesting questions may be expected to come before the courts in reference to the duty of resorting to the telegraph for the purpose of conveying information, where an obligation rests upon one party to furnish it to another, and where delay may occasion loss or injury.

Let us suppose A. in New York was under legal obligation, although there may have been no express agreement to that effect, to furnish B. in St. Louis with information about some particular fact, a knowledge of which, within a certain time, was material to B.'s pecuniary interests; as, for example, the price of gold, or of cotton, on a particular day, or at a particular time in the day. Could it be said that this duty was discharged by a resort to the mail by A.?

Or let us suppose it was some article not usually mentioned in the press despatches, in reference to which the duty of giving immediate information rested upon A. Suppose A. deposited a letter in the mail at New York addressed to B. at St. Louis, conveying this information immediately upon its being ascertained by him, and that by reason of the length of time necessary for transporting the mail, B. lost the advantage of a purchase, or investment, which he could have availed himself of, had the information been by telegraph. Could A. have excused himself upon the ground that he had used due diligence in furnishing the information which he

was under a legal obligation to furnish, by showing that he thus promptly deposited a letter in the post-office in New York? Would not the question be, Was that degree of diligence used which the duty to be performed required? And such being the question, and a more rapid medium of communication than the mail being at A.'s command, must not A., in the exercise of due diligence, have resorted to such mode of communication?

§ 298. Suppose A. had made an agreement with B. to keep him advised as to the condition, for example, of the gold market in New York. Here, if he had sent the information from day to day by mail, it seems clear there would have been no compliance with the contract, for information so conveyed could be of no advantage to B. in St. Louis. It would doubtless be held, in such case, that the parties contemplated the use of the telegraph as the medium of conveying this information. And why? Because, from the nature of the case, it was the only practicable mode of carrying into effect the object in contemplation of the parties. And we should say, in a case where there was no express agreement between the parties, but an implied promise to send the information, the holding would be the same.

§ 299. And so, in all other cases, where the time in which the information is to be received is important, and loss may be sustained by the delay, and there is telegraph communication open between the parties, we should think it the better opinion, that, in the exercise of that diligence which the law requires, there

would be a legal obligation resting upon the party to use the telegraph.

§ 300. This proposition conforms to the general doctrine of agency under similar circumstances, and yet it is not known to have passed into judgment. One or two cases, however, have occurred, in which the duty of using the telegraph is distinctly recognized, even where the rights of third parties may be consequentially involved. A very recent case in England[1] presented the following point: —

The plaintiff in Liverpool employed an agent at Smyrna to buy and ship goods. The agent shipped goods on a vessel which sailed Jan. 23, but was stranded the same day. The cargo became a total loss. The agent learned the loss Jan. 24, and on the next post-day informed the plaintiff of it by letter, but purposely abstained from telegraphing, in order that the plaintiff might not be prevented from insuring. The plaintiff, on Jan. 31, without any knowledge of the loss, effected an insurance. *Held*, that he could not recover against the underwriters.

As the agent could have communicated with his principal by telegraph, the latter was bound by the knowledge of the former; and the underwriters were entitled to an avoidance of the policy.

§ 301. *The Conroy's Wheat*[2] is the other case. There a bill of lading of wheat, signed by the master of the vessel on which the wheat was shipped at Chicago, stated that the wheat was to be delivered to the consignees at "O. *via* W. Railway from Port C., to Port D.,

[1] Proudfoot *v.* Montefiore, Eng. Law Rep. 2 Q.B. 511.

[2] 3 Wallace (U.S.) R. 225.

thence by sail or steam to O. Freight to Port C., eight and a half cents per bushel." The course of trade is for wheat shipped to Port C., to go through the railway's elevator there; and, if the vessels are so numerous that the elevator cannot discharge them immediately, they must wait their turn. There were several vessels at Port C., and no place where the wheat could be stored; the master, without waiting for his turn, *or telegraphing*, as he might have done, to the consignors, sailed to the nearest port, and stored the wheat. *Held*, that the owners of the vessel had no lien on the wheat for freight and demurrage. The master could have obtained instructions at once; and if ordered to another port, his lien for freight and demurrage would have been fixed.

These are the only cases we have found recognizing this duty to resort to the telegraph. In the future adjudications upon this interesting branch of telegraph law, we have every reason to expect that the Courts will uniformly adopt this view.

§ 302. Suppose a valuable package is to be sent, which could be carried by mail, but could also be carried by express. Could the party whose duty it was to send it, deposit it in the mail for conveyance when the express, which was the safer conveyance, and which furnished a responsible party or company to be held liable, as an additional security in case of loss, was open to him? In this case *safety* is the controlling consideration; in the case of the telegraph, *time* is the desideratum. Time may be as important an element in the question of loss in the one case, as safety is in the other.

§ 303. Where there is a custom, or usage, to convey the information by mail, the duty will have been discharged by resorting to the mail; as, for example, in the case of notices of protest. Here, although it is important that notices should be sent immediately to all antecedent parties, yet, as in such cases, the telegraph has never been resorted to for that purpose, the notary or other agent would have discharged his duty by sending the notices by mail.

§ 304. It has been suggested by an eminent writer upon commercial law, that if a notice were duly sent by telegraph and duly delivered, it would be deemed sufficient.[1]

[1] 1 Parsons on Notes and Bills, pp. 486–489, where it is said, "It may be expected that questions will arise on this subject before long, by reason of the recently invented and already generally used magnetic telegraph. We have no knowledge, however, of its being used for purposes of this kind, or of any supposition by merchants or lawyers that it is the necessary or proper instrument for giving such notices. We shall not attempt to anticipate either these questions or the answers to them further than to remark, that if a message were duly sent by telegraph, and duly delivered, it would no doubt be deemed sufficient; and if the importance of giving early information of the dishonor of negotiable paper should induce our merchants to apply the telegraph to this purpose, a usage may grow up which would gradually acquire the force of law. At present no such usage is known to exist. A question may arise in other cases of notice as well as that now under consideration, in which a party who is entitled to the earliest information of an important fact, from a delay in giving this notice suffers actual damage, and this may cause the inquiry whether the informing party discharged the whole of his duty. And if he made use of the mail, which required a delay of many days, when a means of telegraphic communication was open to him, for which as many minutes sufficed, and one which is found to be reasonably safe and trustworthy, and which does not at all interfere with a resort to the mail also, the question may arise whether it was not his duty to make use of this more rapid means; or, on the other hand, whether it would not be competent for him to say that he had no confidence in new things, but preferred *ire per antiquas vias*."

§ 305. It might be urged, in opposition to the view that there is a legal obligation to use the telegraph, in all cases where there is a duty to give immediate information of any fact, that the telegraph is but a private enterprise; and that there was no greater obligation to use it than to intrust the information to any private messenger, who would propose to convey the intelligence in advance of the mail.

But it would seem that telegraph companies sustain very different relations from that of a private messenger. They are incorporated, or authorized by statutory law; they sustain a public relationship; they are bound to carry for all persons alike; and engage in a general public duty, regulated by fixed rules, and a regular mode of procedure; they hold out guarantees for the safe transmission of messages in providing a mode in which all messages may be repeated, thereby enabling the party who sends the message to know whether or not it reaches the station to which it is addressed.

§ 306. If it be urged that this mode of communication is subject to mistakes and irregularities and failures, it may be answered that the mail communication is also subject to irregularities, delays, and failures. The telegraph, in fact, affords facilities which the mail cannot do, in enabling all parties to ascertain at once, or within a very short space of time, whether or not the message has reached its destination safely and correctly; and if not, the failure can be overcome, and the message again sent the second time, in most instances immediately upon ascertaining that there is any error in the first transmission. If it be urged that the

rules of telegraph companies require the prepayment of messages, it may be answered, that letters sent by mail must likewise be prepaid. The fact that a little larger amount is required for the prepayment of messages, when these rules are adopted by telegraph companies, requiring prepayment in all cases, than for the prepayment of letters, cannot, we submit, vary the legal principle; for in cases where the party sending the information would have the right to debit the other party with all necessary expenditures connected therewith, he would have the same right to debit him with the postage he pays, as with the telegraph charges he would pay; and this, we believe, is always done by notaries public in notices of protest of foreign bills of exchange.

The stronger reason, in support of the obligation to use the telegraph, would seem to be that it does not interfere with a contemporaneous use of the mail, as suggested by Professor Parsons in the extract just given in the note.

§ 307. Many of these questions would be put at rest if the telegraph should be made by law a part of the postal system of the Government.[1] The State governments would of course adapt their legislation to the emergency, so that notices of protest and all formal notices, should be sent by telegraph. But without any such subordinate enactments, it would unquestionably become the duty of all persons to use

[1] There are strong indications that this will soon be done in England; and the initiatory step was taken in the United States by Act of Congress, July 24, 1866, providing for the purchase of all lines five years after the companies should file written acceptance of the bounty conferred by the act.

this means upon whom rested the obligation to give immediate information. A failure to do so, then, would be negligence for which the party would be liable, just as now in cases where there is an obligation to use the post.

§ 308. In the State of California it is provided by statute,[1] "that wherever any notice, information, or intelligence, written or otherwise, is required to be given, the same may be given by telegraph, provided that the despatch containing the same be delivered to the person entitled thereto, or to his agent or attorney," and that notice by telegraph shall be deemed actual notice.

It is also provided, that any power of attorney or other instrument of writing, properly proven and certified, may be transmitted by telegraph, and the telegraphic copy or a duplicate shall *primâ facie* have the same force and effect as the original instrument, and may likewise be admitted to record; and further, that checks, due-bills, promissory notes, bills of exchange, and all orders for money, or other thing of value, may be made or drawn by telegraph, and shall have the same force to charge the maker, drawer, indorser, or acceptor, and shall create the same rights and equities in favor of the payee and other parties to the paper entitled to days of grace, as if duly made and delivered in writing; if the genuineness or execution of the instrument is denied under oath, the original instrument must be then proven.

It is also provided, that instruments in writing, duly certified, by notaries public, commissioners of deeds,

[1] Appendix F.

or clerks of courts, to be genuine within their personal knowledge, may, together with the certificate, be sent by telegraph, and the telegraphic copy shall *primâ facie* have the same force and effect as the original, and the burden of proof shall rest with the party denying the genuineness and due execution of the original.

Provision is also made for the transmission by telegraph of writs for the arrest of criminals, and of writs or other process in civil cases. It is provided in reference to notes, bills, orders, etc., transmitted by telegraph, that the original message shall be preserved in the office from which it is sent; and in the case of writs, etc., that certified copies shall be preserved in the office from which they are sent. Wherever the instrument is under seal, it may be expressed in the telegraphic copy by the letters "L. S." or the word "seal."

Similar provisions are also to be found in the statutes of Oregon.[1]

§ 309. These are important provisions; and the rapid extension of telegraph lines over every part of the country, and the great facilities they afford in communications of every description, will probably cause the provisions of the statutes of California and Oregon to be incorporated into the laws of the different States, and of England.

§ 310. It may now be considered as the settled law, both in England and the United States, that where parties resort to the mail as a medium of contract, and a proposition is made by letter, and an answer accepting the proposition is deposited in the post-

[1] Appendix DD.

office, properly addressed to the party making the proposition, the contract is then complete, although the answer never reaches the proposer.[1] This is in case where, up to the time of depositing the letter of acceptance in the post-office, the acceptor has received no notice of the withdrawal of the proposition.

This doctrine is, we have said, the settled law in the United States, although in the States of Massachusetts and Tennessee a contrary doctrine is asserted.[2]

§ 311. The question as to how far this principle is applicable to the case where the telegraph is used as a medium of contract, came before the Supreme Court of New York, in the case of Trevor & Colgate *v.* Wood.[3]

Trevor & Colgate were partners, dealing in specie, exchange, and bullion, in the city of New York.

John Wood & Co. were partners engaged in a similar enterprise in New Orleans.

An arrangement had been made between the respective firms, that if John Wood & Co. had dollars to sell, they should telegraph to the plaintiffs, who would answer whether they would take them or not; and it was agreed that the negotiations should be conducted through the medium of the telegraph.

The correspondence, however, was conducted both by mail and telegraph.

The plaintiffs transmitted their messages by the

[1] Adams *v.* Lindsell, 1 Barn. & Ald. 681; Mactier *v.* Frith, 6 Wend. 103; Taylor *v.* Merchants' Insurance Company, 9 How. (U.S.) 390.

[2] McCulloch *v.* Eagle Insurance Company, 1 Pick. 278. Gillespie *v.* Edmonston, 11 Hum. 553.

[3] 41 Barb. 255.

"Interior or National Line;" the defendants sent theirs by "The Seaboard Telegraph Line."

On the 30th of January, 1860, the plaintiffs sent the defendants the following message: —

"To John Wood & Co.

"At what price will you sell one hundred thousand Mexican dollars, per next steamer, delivered here?

"Trevor & Colgate."

On the 31st of the same month, the defendants replied by telegram: —

"Trevor & Colgate, New York.

"Will deliver fifty thousand at seven and one-quarter, per 'Moses Taylor.' Answer. John Wood & Co."

The word *answer* was not on the message when delivered to the plaintiff.

On the same day the plaintiff telegraphed: —

"To John Wood & Co.

"Your offer of fifty thousand Mexicans at seven and one-quarter accepted. Send more if you can."

"Trevor & Colgate."

The plaintiffs at the same time acknowledged the receipt of the defendants' message by mail, with a copy of their telegraphic reply thereto.

The defendants, likewise, had on the same day written by mail to the plaintiffs, copying their telegram, and saying, —

"If you accept our offer at seven and one-quarter, we will ship you by same steamer. We await your answer to our despatch of to-day."

On 1st February, 1860, the plaintiffs again telegraphed: —

"To John Wood & Co.

"Accepted by telegraph yesterday your offer for fifty thousand Mexicans. Send us as many more, same price. Reply.

"Trevor & Colgate."

§ 312. In consequence of some derangement of the line used by the plaintiff, this message, and the one of the 31st of January, did not reach defendants until ten o'clock A.M. of February 4th.

The derangement of the lines was not reported to the plaintiffs until February 4th.

On February 3d defendants telegraphed: —

"Messrs. Trevor & Colgate, New York.

"No answer to our despatch of 31st. Dollars are sold.

"John Wood & Co."

And wrote to the same effect by mail the same day.

The plaintiffs received this despatch February 3, and answered the same day as follows: —

"To John Wood & Co.

"Your offer was accepted on receipt, and again the next day. The dollars must come, or we will hold you responsible. Reply.

"Trevor & Colgate."

The next day the plaintiffs again telegraphed: —

"To John Wood & Co.

"Telegraph company reports line down on 31st. Hence the failure of our two messages. We sold the dollars, and must have them by this or the next steamer, as we are liable for damages. Don't fail to send the dollars at any price, Will write to-day.

"Trevor & Colgate."

On the same day the defendants telegraphed: —

"To Trevor & Colgate.

"No dollars to be had. We may ship by steamer, 12th, as you propose, if we have them. John Wood & Co."

It was insisted for the defence, that the telegraph company employed by the plaintiffs was the agent of the plaintiffs, and the delay in transmitting the messages was the fault of this agent, and that the defendants were therefore justified in selling the dollars.

§ 313. The Court, however, decided the case upon the ground that there was no contract completed between the parties at the time the defendants sold the dollars; and this was the main question discussed in the argument.

It was held, that in this case there was no *aggregatio mentium*, in respect to the purchase and sale of the dollars; that the plaintiffs must be regarded as having undertaken to bring home to the defendants knowledge of their acceptance of the offer made, the parties having previously agreed that their negotiations should be by telegraph; that this was, in effect, a warranty by each party that his communication should be received by the other; that it could not be supposed that the parties were willing to incur the hazard of the safe delivery of the respective messages.

§ 314. The Court further held, that the communication is only initiated when it is delivered to the telegraph operator, and is only complete when it comes to the possession of the party to whom it is addressed; that the rule established by the authorities, in relation to contracts made by letters sent through the mail, is not applicable to communications sent by telegraph; and the reason assigned for this distinction is, that the post-office is a public institution, and the officers who direct its operations are

regulated by law, and the violation of this law is punished criminally; while, on the other hand, the telegraph is controlled by private enterprise, and the operators of the telegraph are responsible to those who employ them for the proper performance of their services; and that the telegraph, which is conducted by private enterprise, could not be so clothed with a public official character, as to make the receipt of a message at the office of the telegraph operator for transmission, of the same effect in relation to the acceptance of an offer, as the depositing of a letter in the post-office, and as the actual delivery of the message would have been.[1]

[1] The opinion was delivered by Leonard, J., who said, "There was never an *aggregatio mentium*, or meeting of the minds of the parties in respect of the purchase and sale of the dollars in question. The plaintiffs failed to notify the defendants of the acceptance of their offer until after the defendants had countermanded or recalled it.

"The plaintiffs must be regarded as having undertaken on their part to bring to the defendant the knowledge of their acceptance or refusal of the offer made.

"The parties had agreed beforehand that their communication should be made by telegraph.

"This was in effect a warranty by each party that his communication to the other should be received.

"It cannot be supposed that the party who was to receive the communication was willing to incur the hazard of a safe delivery of the message of the other party with whom he was in treaty, through the medium of the telegraph.

"The communication is only initiated on its delivery to the telegraph operator. It is completed when it comes into possession of the party for whom it is designed.

"We think that the rule that has been established by the courts in respect to contracts made by letters sent through the mail, is not applicable to communications by telegraph. (Mactier *v.* Frith, 6 Wend. 103. Vasser *v.* Camp, 1 Kernan, 441.)

"The public post-office is governed by no private interests. The officers who direct its operations are regulated by law, and its violation is punished criminally. The operators of the telegraph are appointed or

§ 315. The question here presented for determination is one of great practical importance in respect to negotiations through the medium of the telegraph, and may be expected to be brought before the courts frequently in the future.

It is of the first importance that this point should be clearly and definitely settled, so that parties may know how to carry on their negotiations by telegraph.

§ 316. If the principle laid down in the above case can be sustained, it must be upon the ground that the telegraph company was the agent who transmitted the message of acceptance, and that until it be actually received by the other party, it is still under the control of the party proposing to accept, and subject to be countermanded or recalled by him.

§ 317. Whether the mail and the telegraph stand upon the same footing in relation to the completion of the contract made through them, is a question not altogether free of difficulty.

The principle upon which it is held, that an acceptance of a proposition made by letter is complete and the contract complete, when the letter of acceptance is placed in the post-office, does not seem to depend upon the fact that the mail is a governmental institution, over which the individual has no control.

employed by private enterprise, and are responsible to those who employ them for the proper performance of their services.

"There are also other distinctions. The telegraph companies have been conducted, so far as has come to my knowledge, with great integrity and fidelity; but an institution of that description cannot, while conducted by private enterprise, be so clothed with a public official character as to make the receipt of a communication at the office of the telegraph company of the same effect in relation to the acceptance of an offer by a contracting party as the actual delivery of it could have."

It stands upon the same principle as all other contracts; and that is, To constitute a contract there must be an agreement, a meeting of the minds of the respective parties.

This is the essential element of a contract, whether the agreement is consummated by the parties in the presence of each other, or through the instrumentality of communications made from a distance.

§ 318. Different states of circumstances may require different characters of proof, to show this meeting or agreement of minds; but still the question in all cases is the same: Was there in fact a concurrence of intention, or meeting of minds, upon the subject-matter of the contract?

§ 319. In commenting upon this principle, in Mactier *v.* Frith,[1] the learned judge who delivered the opinion, says, "What will constitute an acceptance will depend in a great measure upon circumstances.

"The mere determination of the mind unacted upon can never be an acceptance. When the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept. Where it is made by a messenger, a determination to accept returned through him or sent by another would seem to be all the law required, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties. Keeping silence under certain circumstances is an assent to a proposition; any thing that shall amount to a formal determination to accept, communicated, or put in a

[1] 6 Wend. 103.

proper way to be communicated, to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession, or under the control, of the writer. An acceptance is a distinct act of one party to the contract, as much as the offer is of the other.

"The knowledge, by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other."

§ 320. The learned judge combats the view taken in McCulloch *v.* The Eagle Fire Insurance Co.,[1] in the Supreme Court of Massachusetts, which was, that the minds of the contracting parties must not only meet on the subject of the contract, but they must know the fact; and proceeds to say that the contract cannot be obligatory upon one before it is on the other; that there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not therefore arise from a knowledge of the present concurrence of the wills of the contracting parties; and if more than a concurrence of minds upon a distinct proposition is required, to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a *knowledge* of this meeting; and he refers to the

[1] 1 Pick. 278.

cases of Adams *v.* Lindsell,[1] and Eliason *v.* Henshaw,[2] as supporting the view that a knowledge of the concurrence of minds is not an essential element of a contract.

In the same case, it was said by Mr. Senator Maynard, in support of this view, that when the party accepting receives information that his acceptance is received and offer confirmed, he is in equal uncertainty as to the meeting of minds, because there may have been a revocation of that confirmation. Such a negotiation would be endless, for the parties could never know that their minds met.

§ 321. This question came before the Supreme Court of the United States in the case of Tayloe *v.* The Merchants' Fire Insurance Company,[3] where the rule laid down in Mactier *v.* Frith is recognized as the correct enunciation of the principle, and the doctrine of McCulloch *v.* The Eagle Fire Insurance Company was expressly repudiated.

It is said in this case that in a case of negotiations through the medium of the mail, on the acceptance of the terms proposed transmitted by due course of mail, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete.

The party to whom the proposal is addressed has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

[1] 1 Barn. & Ald. 681. [2] 4 Wheat. 225.
[3] 9 Howard, 390.

"Upon any other view the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection.

"For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by the act of acceptance."

§ 322. The Court proceeds to say that the fallacy of the argument consists in the assumption that the contract cannot be consummated without a knowledge, on the part of the proposer, that the offer had been accepted; but that a little reflection will show that in all cases of contracts entered into by parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present; and that it seems more consistent with the acts and declarations of the parties to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated, instead of postponing its completion till notice of such acceptance has been received and assented to.

Therefore such acceptance, transmitted by due course of mail, is regarded as closing the bargain, and it makes no difference whether it is ever received or not.

These principles, and this mode of reasoning by which they are established, we think will apply with equal force to negotiations through the medium of the

telegraph, as well as to cases where they are conducted by letter through the mail.

§ 323. It may with much force be urged that the act of Trevor & Colgate, in transmitting their reply, accepting the defendants' offer, completed the contract without any reference to whether the message of acceptance was in fact received.

The acceptance being as much an ingredient of the contract as the offer, should not the party accepting have knowledge that his message of acceptance has been received by the party offering? Has he not just the same right to know that the acceptance has come to the knowledge of the offering party, as the offering party has to know that his offer has come to the knowledge of, and been received by, the other party?

It is true that the party must in fact accept, but this is a very different thing from knowledge on the part of the offering party, that the acceptance has been made; for, if this be made essential, it destroys the possibility of completing contracts between parties at a distance.

§ 324. Here was an act of Trevor & Colgate, professing to accept the defendants' offer. The message of acceptance was written out and delivered to the telegraph company, with directions for its transmission to the defendants, together with a payment of the charges of transmission. And, moreover, this was in the mode contemplated by and agreed upon between the parties. It may be observed that the offering message has the word "*Answer*" appended; we understand this word when so appended is used merely to indicate to the telegraph company that it is a reply to a pre-

vious message, in order to avoid prepayment of charges; and hence this word was not on the message delivered to the other party. It is true the second message, informing defendant that plaintiff had accepted the offer by a previous message, has the word "*Reply*" attached to it; but it will be observed that at that time the accepting despatch had not only been transmitted, but this despatch made an additional request: "Send as many more at the same price." And the conclusion might well be drawn, that the word "Reply" had reference to this request.

§ 325. The main difficulty seems to be in the consideration that, upon the assumption that the telegraph company who transmitted the accepting message was the *agent* of that party, and that therefore the message was subject to be recalled, or its delivery countermanded at any time before its actual delivery, therefore there could be no acceptance in contemplation of law until the party who transmitted the accepting message had entirely lost his right to control it, which would not be until its actual delivery. There is some plausibility in this reasoning, and it might be assumed in the case above, that as each party used the lines of different and independent companies, each company was the agent of the party who transmitted by its line.

But let us suppose the case where the parties agreed to conduct their negotiations through the telegraph, and they do in fact use the same line; the question would then arise, Was not the telegraph company the common agent of both parties, and would not such case be in all respects analogous to the sending of letters through the mail?

But even in the case above given, where different lines may have been used, if the view there taken be correct, it must have the effect of very much embarrassing negotiations by telegraph, and will go far toward destroying their usefulness as a medium of contract.

§ 326. On the other hand, if the view should be taken in the future adjudications upon this subject, that, where the party to whom the offer is made deliberately delivers an accepting message to the telegraph company and pays the charges thereon, or otherwise complies with their regulations upon this subject, with the view that the operator shall put the message on its transit over the wires to the other party, such act will amount to an acceptance and complete the contract, it will very much facilitate commercial transactions, and make the telegraph a very useful instrument of communication in all negotiations conducted between parties at a distance from each other.[1]

[1] In the case of Taylor, defendant in error *v.* Steamboat Robert Campbell, 20 Missouri (5 Bennett) R. 254, the case seems to have been decided upon the assumption that depositing the accepting message with the operator, and its being forwarded by him, completed the contract, although the point of inquiry in the case seems to have been one of evidence, whether the accepting message was sent by the defendant in error.

At the trial, the telegraph operator at Booneville testified that the plaintiff delivered in his office the following despatch, which was forwarded to Lexington on the day of its date: —

"Booneville, December 11, 1852.

"To Robert Campbell.

"Make room for 400 hogs at fair rates. Wm. Taylor."

The operator at Lexington testified that this message was received at his office on the day of its date, and on same day was delivered to the

§ 327. We think the true principle upon which the question must rest is, that the positive and unequivocal act of the party manifesting an intention to accept, constitutes the completion of the contract in all cases; that the question of agency is not properly involved in its consideration.

If the parties agree to conduct their negotiations by

officers of the steamboat "Robert Campbell;" and that on the next day the following message was deposited in his office and forwarded to Booneville: —

"Lexington, December 12.

"Will take your hogs. Be down to-morrow morning.

"Capt. Edds."

Upon this testimony the plaintiff was permitted to read the messages in evidence.

From the report of the case it does not appear that any evidence was introduced to show that the accepting message was received by the plaintiff. It is said in the opinion, "When men consent to use the telegraph for the purpose of making an agreement, there is no hardship in submitting to a jury, as evidence of their consent to such agreement, those facts and circumstances which are received by and acted on by mankind in communicating through that medium. Here the defence does not turn upon any imposition or forgery on the part of the agents of the telegraph, but the plaintiff, by the pleadings, is put to the proof of the contract on which he has sued. The evidence is complete to show that a communication was made by the plaintiff to the defendant; but the difficulty arises in showing that the answer to the communication was from the agent of the defendant. The telegraph agent testified that the despatch received from the plaintiff was delivered to the officers of the steamboat 'Robert Campbell,' and a despatch in answer to that of the plaintiff was deposited in his office, to be forwarded to the plaintiff, which was done on the next day.

"If, under such circumstances, a person had received a despatch in answer to one forwarded by him, he would not have failed to act upon it. His contract would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph."

telegraph, the act of delivering the message of acceptance for transmission may well be considered as such an act indicating assent, as was contemplated by the parties, no matter to what line delivered. If there be no such agreement, and the parties do in fact use this medium, the intention to accept is just as satisfactorily manifested by the act of depositing the message in the telegraph office, as by depositing a letter in the post-office.[1]

[1] After the text was written, we received the February number, 1868, of the Am. Law. Reg. (N.S.), vol. 7, No. IV., in which (see p. 215) this case was reversed in the Court of Appeals. Our comments upon the opinion of the Supreme Court are sustained and strengthened by this opinion, which may be considered as establishing the principle that a contract is consummated by any distinct unequivocal act which shows the concurrence of the minds of the parties upon a distinct proposition; that sending a letter announcing a consent to the proposal is a sufficient manifestation of the acceptance; and that sending a despatch is equally conclusive. Any thing that shall amount to a manifestation of a formed determination to accept, communicated, or put in the proper way to be communicated to the party making the offer, would doubtless complete the contract, as held in Mactier *v.* Frith, 6 Wend. 103.

The Court say (p. 218), "It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies.

"In accordance with this agreement, the offer was made by telegraph to the appellants in New York; and the acceptance, addressed to the respondents in New Orleans, was immediately despatched from New York, by order of the appellants.

"It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been selected by prior agreement between them, as that by means of which their business should be transacted.

"Under these circumstances, the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the

§ 328. In the case we have been considering, Trevor *v.* Wood, it is further said, "The plaintiffs failed to notify the defendants of their acceptance of the offer until after the defendants had countermanded or recalled it." The correctness of this proposition will depend upon what shall constitute an acceptance in negotiations by telegraph.

If the actual delivery of the message of acceptance to the offering party is necessary to the completion of the contract, then the above is correct; but otherwise not.

§ 329. The principle of law in such cases is, that if the acceptance is made before the accepting party *has knowledge* of the recall of the offer, the recall comes too late, and the contract is complete; unless the offer is limited to a specified time, or to the happening of a particular event.

An offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, and during such time the party to whom it is addressed may accept or reject the offer. It is true the offer may be withdrawn at any moment, but in contemplation of law it is not withdrawn until the other

contract became complete." This case is reported in 36 N.Y. (9 Tiffany) R. 307.

Other actions, say the Court in Mactier *v.* Frith, are equally conclusive upon the parties. Keeping silence, under certain circumstances, is an assent to a proposition.

Thus the telegraph is recognized as a means of making contracts, not because of its character or its modes of transmitting intelligence, but simply because sending an acceptance, or putting it in the way to be sent, is an overt act, clearly manifesting the intention of the party sending it to close with the offer of him to whom it is sent, thus making that *aggregatio mentium* which is necessary to constitute a contract.

party has notice of such withdrawal. It is regarded as a continuing offer during every moment of time until the other party has notice of such withdrawal; and if he accepts before he receives such notice, the contract is complete.

§ 330. The Court in this case further held, that the parties having previously agreed that their negotiations should be through the medium of the telegraph, this was, in effect, a warranty by each party that his communication should be received by the other.

We should think it the better opinion that where there is a previous agreement that the negotiations in reference to a particular matter shall be by telegraph, the proper construction of this agreement is, that the telegraph shall be used according to the course of business of telegraph companies, and in accordance with their rules and regulations; and the obligation resting upon the respective parties is to deliver written messages properly addressed, to the telegraph operator for transmission, and to pay the usual and proper charges for the same, provided prepayment is required by the regulations of the company. And that such agreement implies no further duty, and imposes no obligation upon the parties to see to the delivery of the respective messages.[1]

[1] See Trevor *v.* Wood, 36 N.Y. R. 307. In commenting upon this case, as decided by the Supreme Court, 41 Barb. 255, Mr. Redfield expressed his dissent, vol. ii. § 189 *b*, subd. 8, of his valuable work on Railways. In speaking of the attempt to establish a rule for telegraph contracts, different from those negotiated by mail, he says, "It seems to us that the same rules will in the main apply. . . . But we do not comprehend the existence of any such distinction. Both are the agents of the party employing them."

Here questions with reference to the delivery of messages bear upon the completion of the contract, and only become important in deciding whether or not the telegraph company is so far the agent of the party transmitting a message of acceptance, as to cause the message to remain, in contemplation of law, in his custody and under his control, until an actual delivery. We have already offered our views upon this point.

§ 331. An important and interesting question was discussed in this case, which was, whether or not such contracts are void within the Statute of Frauds; it was not decided, however being unimportant in the view the Court took of the case.[1]

There can be little doubt but that in all cases of contract made through the medium of the telegraph, the signing of the message either by the sender himself, or it being written down by the operator in his presence, will be held to be sufficient, in all cases of contracts, under the Statute of Frauds.

§ 332. The manipulations of the operator by means of which the sender's name becomes appended to the message, are equivalent to the sender's actual signature, and the translation of the message by the operator at the delivery station, from the symbols back into the vernacular, will be considered as the signature of the sender of the message, appended by his lawfully authorized agent. The principle which will sustain the notings of the auctioneer as a sufficient memorandum within the Statute of Frauds to

[1] But it has since been decided in this same case, on appeal, to have been a writing within the Statute of Frauds, 36 N.Y. R. 307.

bind the bidder at auction sales, upon the ground that the auctioneer is the agent of the purchaser, will, we think, sustain the position that the telegraph operator is likewise the agent of the sender of the message for this purpose.

§ 333. In the case of N.Y. & Washington Printing Telegraph Co. *v.* Dryburg,[1] it was held that the telegraph company may be considered the common agent of both parties.

The principle seems to be clearly recognized in the case of Dunning & Smith *v.* Roberts,[2] that where

[1] 35 Pa. State R. 298.

[2] 35 Barb. R. 463. The plaintiffs were hardware merchants at Champlain; the defendants resided at Chateaugay. Porter telegraphed to the plaintiffs to send him the property mentioned in the complaint. The plaintiffs, distrusting Porter's responsibility, did not send the property on his order. The next day they received a telegram purporting to come from the defendant, directed to them, as follows: —

"To G. E. Dunning & Co.

"I will be responsible for Porter's bill of goods ordered yesterday.

"A. Roberts."

Thereupon they forwarded the property. It appeared further in the proof that the defendant authorized the message to be sent in his name; and that the property was forwarded in pursuance of the despatch, and upon the credit of the defendant. It seems that the telegraphic despatch was determined on after considerable conversation between the defendant, Porter, and one Hall. The regular telegraph operator was absent. One Edwin G. Roberts sent the despatch, as he testified, for the accommodation of the parties. He stated that the defendant was in the office at the time the message was sent, and stated that he sent the despatch, and sent it as he understood it at the time; that he wrote it down; that the defendant was there when the message was sent. The proof showed satisfactorily that the defendant was present, and agreed to the message as sent by the person acting as operator.

The Court held that Edwin acted in this matter as the authorized agent of the defendant.

The Court say, "It is insisted that the supposed liability of the de-

the telegraph is used as the medium of contract between the parties, the operator is to be regarded as the agent of the sender of the message. And it follows from this, that if the contract is one required to be in writing under the Statute of Frauds, the operator is the agent of the sender of the message for this purpose. The Court in this case say, "The manipulations of the operator by which the defendant's name became appended to the despatch were his own, and were equivalent to an actual personal signing of his name with pen and ink." And in this case the message was *orally* delivered to the operator. The Court held the message to be a sufficient writing signed by the party to be charged, to bring it within the Statute of Frauds.

§ 334. By the statutes of Indiana, California, and Oregon, contracts made by telegraph shall be deemed contracts in writing.

The Indiana statute [1] is as follows: —

"Contracts made by telegraph between two or

fendant is as surety for Porter, and hence that the agreement or promise is within the Statute of Frauds, and void.

"It is first urged that the telegram was not subscribed by the defendant, nor by his authority. But it has been above determined that, under the circumstances of this case, the act of Edwin G. Roberts in forwarding the telegram was the act of the defendant. In law, therefore, the manipulations of Edwin, by which the defendant's name became appended to the despatch, were his own, and were equivalent to an actual personal signing of his name with pen and ink."

The Court further held that there was a sufficient expression of consideration upon the face of the message to satisfy the requirement of the Statute of Frauds; and held further, that it imported not a conditional, but a direct and original undertaking or promise on the part of the defendant.

[1] Revision of 1860, c. 179, sec. 5. See Appendix L.

more persons shall be considered as contracts in writing."

The California statute is the same, with the proviso that "they contain a statement of the consideration thereof."

Another section is as follows:[1] —

"Contracts made by telegraph shall be deemed to be contracts in writing; and all communications sent by telegraph, and signed by the person or persons sending the same, or by his or their authority, shall be held and deemed to be communications in writing."

The statute of Oregon is the same.[2]

§ 335. Several cases have come before the courts, where the question was discussed whether or not the messages between the parties constituted a contract.

In the case of Kinghorn *v.* The Montreal Telegraph Co.,[3] the message transmitted was, "Will give you eighty cents for rye."

The reply was, "Do accept your offer. Ship tomorrow fifteen or twenty hundred."

The party making the offer failed to receive the reply, but stated that if it had been received, the bargain would have been closed at eighty cents; but that after waiting two or three days for a reply and not receiving any, the party for whom he was acting as agent would not take the rye.

Thereupon the party sending the message of acceptance instituted his action against the Montreal Tele-

[1] Act of April 18, 1862, sec. 11. See Appendix F.
[2] Compilation of 1866, sec. 17. See Appendix DD.
[3] 18 Upper Canada (Q.B.) R. 60.

graph Company for failing to transmit the message in time.

§ 336. It was held that the plaintiff was not entitled to recover any damages because there was no contract; that if the message of acceptance had been promptly transmitted and delivered, there would have been no obligation upon the plaintiff to have shipped any quantity of rye, and no obligation upon the other party to have accepted it if he had done so, because the first message did not specify the quantity of rye for which eighty cents would be given. To have completed the contract, this party must have informed the plaintiff what quantity the party would take, after he learned that plaintiff agreed to his price, and, moreover, that the plaintiff's message simply stated that he would ship fifteen or twenty hundred, without specifying what, — whether bushels or pounds.

The plaintiff claimed losses on two thousand one hundred and two bushels of rye, but there was nothing to show that the party sending the first message, even if he had received the plaintiff's message, would have been bound to take any such quantity, but would have had the right to limit the quantity to any extent he might choose. When the plaintiff named the quantity he would ship, it required a reply from the party who sent the first message, accepting that quantity.

§ 337. There is another reported case decided in the High Court of Errors and Appeals of Mississippi;[1] in which it appeared that the evidence of what was

[1] Williams v. Bicknell, 37 Miss. R. 682.

claimed to be the contract was a message transmitted by telegraph.

It appeared that the yellow fever broke out in a malignant form at a certain watering place, of which the defendant was part owner and superintendent. The defendant thereupon sent a message by telegraph to a friend in a neighboring town, which was as follows: —

"There are many cases of yellow fever at the Wells. Send out a physician this evening without fail."

The person who received this message applied to the plaintiff, who was a physician, to go to the Wells, and showed him the message. The plaintiff was reluctant to leave his regular patients, but consented to go, and left immediately for the Wells, and gave his professional services to the guests that were there.

Immediately upon arriving at the Wells the defendant asked the plaintiff what was the character of the telegraph despatch under which he came out.

The plaintiff informed him that it was the message above quoted, and thereupon asked the defendant if it was "all right," who said it was.

The defendant testified substantially to the above, but said he never promised to pay plaintiff for his services, and plaintiff never informed him that he looked to him for payment until about three months after he left the Wells.

§ 338. Upon this state of facts the Court held that there was no contract; but that it was simply a case where the defendant, prompted by motives of humanity alone, sought assistance for a suffering community, incapable of helping themselves; that there was no

request contained in the message, but only the simple announcement of a fact; and the purport of the message was merely to seek friendly aid from a neighboring city; and the Court seems to assume that there was an obligation resting upon the plaintiff to have gone to their relief.

We think it may be found difficult to reconcile this decision with the universally recognized definition of a contract; viz., If a benefit accrue to him who makes the promise, or if any loss or disadvantage accrue to him to whom it is made, at the request or on the motion of the promisor, although without benefit to the promisor, in either case the consideration is sufficient to sustain assumpsit.

§ 339. The defendant requested that a physician should be sent: the message was shown to the plaintiff, and thereupon he gave up for the time his regular practice, and went in obedience to the request, and gave his professional services to the sick at the defendant's watering place. Before entering upon this professional labor, he was asked by the defendant as to the character of the message exhibited to him; and when he informed the defendant, and asked him if it was "all right," he said it was.

It might also be urged, we think, that there was a benefit to be derived by the promisor from the services rendered by the plaintiff. He was pecuniarily interested in arresting the disease, as he was one of the stockholders in the Wells, and also its superintendent. In every aspect of the case there seems to have been a contract here; an implied promise arising out of the

request, and which constituted a sufficient consideration to support the action.

A telegraph message as follows: "I will be responsible for Porter's bill of goods ordered yesterday," held, to express a sufficient consideration.[1]

§ 339 *a*. Where orders are sent by telegraph, as to a banker to send a deposit, to a merchant to make a shipment of goods, and the like, several questions of interest may arise, but upon which we have found no adjudications. They are of great practical importance, and worthy of consideration here, although they may not be technically appropriate to this chapter.

In the class of cases suggested, if there had been a previous understanding between the parties that when such a transfer of funds or shipment of goods should become desirable, that the telegraph would be used for communicating the order, what are the duties of the receiver of the message? Suppose the order to have been obeyed, and then it should appear that the order was a forgery; upon whom would the loss fall? Who takes the risk? Must the banker or merchant ascertain the genuineness of the message, before obeying the order? Or would the loss fall upon the party who had given notice that he would use the telegraph in making the order? If the operator thus transmits a forged despatch, or a despatch with a forged signature, what liability does the company incur? Must the operator know that despatches are genuine before he sends them? What effect will the previous agreement to send such orders by telegraph have upon the telegraph company, as to diligence in

[1] Dunning & Smith *v.* Roberts, 35 Barb. 463.

identifying those who hand in messages? In some things the company is the agent of sender and receiver; but does this agency extend beyond the duty of correct and prompt transmission and delivery?

[338]

CHAPTER VII.

EVIDENCE.

§ 340. TELEGRAPH messages are instruments of evidence for various purposes, and are governed by the same general rules which are applied to other writings.

If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line; thus causing the inquiry as to which is the original.

§ 341. The original message, whatever it may be, must be produced, it being the best evidence; and in case of its loss, or inability to produce it from other cause, the next-best evidence the nature of the case will admit of must be furnished. If there is a copy of the message existing, it should be produced; if not, then the contents of the message should be shown by parol testimony.[1]

§ 342. But while these are the plain and well-settled principles of evidence which are to govern in

[1] In Durkee *v.* Vermont Central R.R. Co. 29 Vt. R. 127, it is said that it is customary in the telegraph offices in the cities to preserve copies of messages received over the lines, and to record them in books kept for that purpose; that in case of the loss of the original, such copy should be produced, and in case of inability to produce such copy, that the message should then be proven by witnesses who knew its contents.

such cases, the question arises as to which is the original message.

There seems to be confusion in the cases upon this subject, which may be relieved, to a great extent, by close attention to elementary principles.

§ 343. In many instances the message written out by the sender and delivered to the telegraph company for transmission, is the original.

In all matters connected with the message as between the sender and the company, it is the original. It is the conclusive test of accuracy for the company in transmitting the message; it is the measure of compensation for sending it, and of the operator's duty in the premises.

So, also, where a party has assumed to communicate intelligence, such as reporting the markets, or his own action as agent, the duty will have been performed by delivering the message to the company; and, in any controversy in this behalf, this is clearly the original. And as to all contracts and agreements predicated upon this paper writing alone, it is the original.

§ 344. If the company should be charged with negligence or misfeasance, in regard to its duty, that will become the highest grade of evidence which, from the nature of the case, most clearly establishes the controverted fact. If an error in transmission should be alleged, the question would be settled by comparing the operator's copy of the transmitted message with the sender's original manuscript. Both would be original testimony.

If the company failed or refused to send a message,

it would become important as evidence, according to the nature of the demand for damages.

§ 345. In all cases where the company can be considered as the agent of the sender of the message, in controversies arising out of the communication by telegraph between the sender and the person to whom the message is addressed, the message received by such person must be regarded as the original. If it differs from the message delivered for transmission by which the sender has suffered damage, he must look to his agent, the telegraph company, for indemnity. In such controversies between the sender and receiver, the message received is the best evidence.

§ 346. In case where there has been no previous arrangement or understanding between the parties that the telegraph shall be used as the medium of their negotiations, and the sender makes a proposition by telegraph, and the offer is accepted by the same medium, the message containing the offer, as reduced to writing at the office of destination and delivered to the party addressed, must be considered as the original, being that which first comes to his knowledge and upon which he must act. If he accepts the proposition, the acceptance is reduced to writing, and delivered to the operator for transmission to the party who made the offer.

§ 347. This act of delivery to the operator completes the contract;[1] and of course the paper so delivered must be an original. The two terms of the contract are upon different pieces of paper, but, taken and construed together, they constitute the sole evi-

[1] Trevor & Colgate v. Wood, 36 N.Y. R. 307.

dence of a completed contract. Neither party receives into his immediate custody the paper first written by the other party, but this is a necessity incident to the mode of communication. Each party receives a paper not signed by the other's hand, but both are bound within the Statute of Frauds.[1] Certainly, so far as the party accepting the offer is concerned, the message delivered by the offering party to the company for transmission could not be regarded as the original. If no error occurred in the transmission, it might be offered as a duplicate or copy of the original; but we should think the message delivered to the accepting party was the best evidence and should be required in the first instance; and, in case of inability to produce it, the message delivered for transmission by the offering party might be introduced, if it did not appear that any error had occurred in the transmission; but if by comparing the message with the accepting message, to ascertain how far they referred to the same subject-matter, or in any other way, or from any other circumstance, it should appear that such error existed, in such case the message would not be decisive in determining what was the contract between the parties.

The offering party having selected the telegraph as the medium of communication, the telegraph company would be regarded, we think, as his agent, and the message delivered to the party addressed would be the original.

So, also, if a proposition is made by telegraph, and the acceptance is by letter, or by any other act, the message delivered to the party addressed would cer-

[1] Trevor & Colgate *v.* Wood, 36 N.Y. (9 Tiffany), 307.

tainly be the original, and the best evidence of the contract.

§ 348. We may, say in general, that which evidences the contract, and by which the party has agreed to be bound, is an original. Duplicates, triplicates, or any number of papers, may be signed as evidencing the same contract, and all will be originals.

§ 349. The first draft of a despatch containing an offer may be used as an original in the nature of a duplicate, if it should further appear that a telegraph copy of the writing had come to the knowledge and acceptance of the party addressed. And so the telegraph copy of the message of acceptance may be used for any appropriate purpose, although the delivery of the first written paper by the accepting party to the company fixed the rights and responsibilities of the other contracting party.

§ 350. If a verbal message should be received by an operator, and it should be delivered verbally to the person addressed, then the material facts would have to be established by parol evidence. The same general rules which obtain as to written messages would obtain here, the character of the proof only being different. The witness who had the best opportunity to know, and who did best remember, other things being equal, could most satisfactorily establish the facts. Such a case may not occur, but the supposition illustrates a mode of proof, which suggests the true rule as to what writing will be treated as original or highest evidence in a similar transaction.

§ 351. If the parties have agreed beforehand that

the telegraph shall be the medium of their communication, the message containing the offer as it is delivered to the other party is the original, and the message in response, as written out by that party and delivered to the company for transmission, is also the original; and these two writings constitute the best evidence as to any matter arising between these contracting parties in relation to such negotiations.

If either party has suffered damage by reason of any error in the transmission of his particular message, or delay, or other default in reference thereto, on the part of the company, he must look to the company for his indemnity.

For the agreement to negotiate through this medium is based upon this idea of the responsibility of the company to either of them as the case may be, who may suffer any damage by the default of the company.

As between themselves, the contract is complete, and the rights fixed, by the two messages, as we have before stated.

For error or other default as to either message, the company is responsible to the party who in fact suffers the injury because of the default.

§ 352. The necessity for quick and effectual negotiations, and the general requirements of commercial transactions, make it manifest that the highest degree of responsibility should be imposed by law upon telegraph companies; for upon no other hypothesis can that absolute good faith, care, and diligence which are essential to the demands of such negotiations, be guaranteed to the contracting parties. And here we

find an additional consideration for holding them to the severe responsibility of common carriers.

§ 353. There are but few reported cases in which the principles of evidence governing telegraph messages have been discussed.

In the case of Matteson *v.* Noyes,[1] it was held that

[1] 25 Ill. R. 591. Walker, J., who delivered the opinion of the Court, said, "On the trial below, appellee offered, and the Court admitted, in evidence, what purported to be a telegram from appellant to Loren Darling. There was no evidence that it was the original, or that the original had been lost or destroyed, or could not be procured, or that the paper offered was a copy.

"It was simply offered and admitted as the despatch which was received by the witness from the telegraph office, and as primary evidence.

"It is an elementary principle that a resort must always be had to the best evidence within the power of the party by which the fact is capable of proof. And it is an inflexible rule that if it is in writing, the original must be produced, unless it be shown that it is destroyed, lost, or not within the power of the party to produce it, before secondary evidence can be received of the contents.

"And before a copy of a written instrument can be admitted, a sufficient foundation must be laid by preliminary proof of destruction or absence.

"In this case no such proof was made to justify the reception of this copy in evidence.

"We know that by the admirable system regulating the government of the telegraph companies the original despatch is preserved, and may be at all times procured for the proper purposes.

"The paper filed at the office from which the message is sent is, of course, the original; and that which is received by the person to whom it was sent purports to be a copy. If the despatch is sought to be used in evidence, the original must be produced, and its execution proved precisely as any other instrument, or its absence accounted for in the same mode, before the copy can be received.

"In this case there was no effort to produce the original, or to account for its absence; nor was there any proof even that the message was a copy of the original.

"Whilst we know that the operators employed by the company are unusually accurate and reliable; in the mode of doing business, still they do not act under the sanction of an oath; and even if they did, a copy com-

the message delivered to the operator to be sent was the original, and the message received by the party to whom it was addressed was only a copy. It does not clearly appear from the report of the case what were the exact nature and object of the message in question. It was an action by Matteson against Noyes, to recover the value of certain railroad cross-ties, delivered under a contract. It appears that a telegraph despatch was admitted in evidence, or, according to the holding of the Court, a copy of the despatch; *i.e.*, the manuscript received by the party to whom it was addressed.

§ 354. Whether this was offered as evidence of the contract between the parties is not disclosed in the report of the case, but we infer from the language of the opinion that such was the fact. Upon this hypothesis we could not concur in the opinion, unless there were other facts in evidence which the case as

ing from the office where delivered must be proven to be a true and a compared copy, before it can be admitted in a proper case.

"For these reasons we are clearly of opinion that the Court below erred in admitting this despatch, without the requisite preliminary proof.

"When all the evidence in this case is considered, it is manifest that the contract was made with the railroad company, and not with the appellant on his individual account. One witness testified that appellant stated in the presence of appellee, at the time the agreement was entered into, that it was for the road it was made, and that the company was to pay for the ties; and that appellee so understood the contract, is obvious, from the fact that he made out and presented his account for the ties against the company, and receipted to the company for the money received of them, on the contract. The ties were received, inspected, and used by the employés of the road, and we are at a loss to perceive any thing in the record which tends to rebut the presumption. It seems to be clear beyond doubt that the contract was made with the company, and that the appellee so understood it; and if so, he had no pretence of a right to look to appellant for its performance."

reported does not disclose, showing that by the understanding of the contracting parties the telegraph company was to be considered the agent of the party receiving the message.

§ 355. In Canada the same view is taken, that the message delivered for transmission is the original, in a case where the telegraph was used as the medium of contract. It was so held in the case of Kinghorn *v.* The Montreal Telegraph Co.[1]

The case disclosed that William Crawford, at Oswego, N.Y., telegraphed to the plaintiff at Kingston, Canada, "Will give you eighty cents for rye;" to which the plaintiff replied through the same medium. "Do accept your offer; ship to-morrow fifteen or twenty hundred." The evidence introduced as to the messages was that the plaintiff received a telegraph despatch from Oswego, with the name "William Crawford" attached to it, which was the same as we have given above; and on the next day he took to the defendant's office a message in reply, which was the same as the second message we have quoted above. It does not appear how these messages were proven. It thus appears that no proof was offered of the message delivered for transmission by Crawford, but only of the message as read off from the battery at the office of destination, and reduced to ordinary language, and delivered to the plaintiff.

§ 356. Robinson, C.J., in delivering the opinion of the Court upon this point, says, "We must look, I think, in the case of each communication, at the papers delivered by the party who sent the message,

[1] 18 Upper Canada R. (Q.B.) 60.

not at the transcript of the message taken through the wire at the other end of the line, with all the chances of mistake in apprehending and writing the signals, and in transcribing for delivery;" and states that the plaintiff neither produced on the trial the message signed by Crawford, nor accounted for its non-production. If this ruling is correct, we are at a loss to perceive how contracts could ever be made through the medium of the telegraph.

§ 357. In the case of Trevor & Colgate *v.* Wood,[1] in the Supreme Court of New York, the Court speak of the message delivered to the person to whom it was addressed as the copy. This was the case of a contract made through the medium of the telegraph.

But this case was reversed in the Court of Errors and Appeals,[2] and it was held that the message delivered to the person addressed was the original message, and that the message of acceptance as written out and delivered by the accepting party, for transmission, was also an original.

§ 358. The case of Dunning & Smith *v.* Roberts[3] also sustains this latter view. That was also the case of a contract by telegraph. The message was verbally delivered for transmission, and the only writing was at the office of destination where the message was written and delivered.

The Court seem to regard this as the original, and best evidence of the contract between the parties.

There was no proof that the operator who received the message for transmission wrote it down, and the inference is that he did not. It was objected in ar-

[1] 41 Barb. 255. [2] 36 N.Y. (9 Tiffany), 307. [3] 35 Barb. 463.

gument that the message was not subscribed by the defendant nor by his authority.

§ 359. The Court say, "Under the circumstances of the case the act of Edwin G. Roberts [the operator], in forwarding the telegram, was the act of the defendant; and the manipulations of the operator were equivalent to an actual personal signing of the message by the defendant with pen and ink;" but the message not having been written out by the operator to whom it was orally delivered, the only evidence of the signature would be at the other end of the line, where the message was first reduced to writing in ordinary language."

This holding is important under the Statute of Frauds.[1]

§ 360. The true doctrine is presented in the case of Durkee *v.* Vermont Central R.R. Co.,[2] where Redfield, J., in delivering the opinion of the Court, says, "In regard to the particular end of the line where inquiry is first to be made, it depends upon which party is responsible for the transmission across the line, or, in other words, whose agent the telegraph company is. The first communication in the transaction, if it is all negotiated across the wires, will only be effective in the form in which it reaches its destination.

"In such case inquiry should be made for the despatch delivered. In default of that, its contents may be shown by the next-best proof."[3]

[1] See also, on this point, Trevor & Colgate *v.* Wood, 36 N.Y. 307.

[2] 29 Vt. R. 127.

[3] In the case of Williams *v.* Bicknell, 37 Miss. R. 682, the telegraph

§ 361. An interesting question presents itself, as to whether, as a matter of evidence, the message at one end of the line can be regarded as the copy of the message at the other end of the line. When the message delivered for transmission is to be regarded as the original, is the message written out at the office of destination to be regarded as a copy, and *vice versa?*

In some of the cases one message is spoken of as a copy of the other. If there be any case in which one message may be considered as the copy of the other, it must be in a case where the telegraph has been used as the medium of contract, and in which no question arises as to error or mistake in the message; or in an action against the telegraph company for delay merely.

§ 362. In such case, if the message delivered for transmission is treated as the original message, and the inability to produce it is accounted for, so as to justify the admission of secondary evidence, then the message as written after transmission might be introduced as the next-best evidence, and as a copy, upon the presumption that it was accurately transmitted; or if the message written after transmission be considered as the original, and its non-production account-

message was proven by the testimony of witnesses who professed to state its contents, and no excuse was furnished for the non-production of the original.

This was held to be error; but, as the party entitled to the benefit of this had admitted the contents of the message, he could not avail himself of it.

There was no expression of opinion by the Court as to what was to be regarded as the original despatch, and, indeed, the case did not call for any expression of opinion on that point.

ed for so as to authorize secondary evidence, the message written before transmission may be admitted as a copy of the original, upon the same presumption that there was an accurate transmission and an accurate reproduction, so to speak, of the message, and, hence, the presumption that this first message was a copy of that which was to be considered as the original message; and such message would be admitted upon the presumption which obtains in all cases where a writing is permitted to be read as a copy; to wit, that it does not vary from the original.

§ 363. So, in case of an action against a telegraph company for delay in the transmission of a message, it may be proper to regard the one message as the copy of the other. For, as in such cases, the message delivered for transmission must be regarded as the original message, and the best evidence in the case would be its production with proof of the hour when it was delivered to the operator for transmission (and which is usually indorsed on the message itself), and then the production of the message received over the wires, with the proof of the date of its delivery to the person to whom it was addressed, or of the failure to deliver it altogether; yet in case of inability to produce the message delivered for transmission, the message received over the wires might be looked to as a copy of this message, and proof be admitted *aliunde* of the hour of its delivery for transmission and the hour of its delivery at the place of destination; or, where the message received over the wires contains a statement on its face of these periods of time (which is usually the case), it might

be considered not only as a copy of the original, but as containing in addition thereto the admission of the defendant as to the respective dates of reception for transmission, and of reception after transmission.

§ 364. In other words: In an action against a telegraph company for delay in transmitting a message, the first question is as to date of reception. If that shall have been indorsed on the sender's manuscript, by an agent, that will bind the company, and the proof is very simple. The two links are thus blended into one. The manuscript of this message by the operator at the other end of the route, in case of actual transmission, shows that much progress in the discharge of the undertaking, and the operator's indorsement of the date of reception will be part of the *res gestæ;* and, uncontradicted, will establish the fact. Ordinarily these two manuscripts and indorsements will determine the question as to diligence. As the action is for delay, their sameness as to the wording of the manuscripts is conceded, or rather is assumed as a fact; but each one has a substantive existence upon which other substantive proof may be predicated. If the agents made false entries as to dates of reception respectively, or if not entered at all, other witnesses might be called to prove the dates. They would need both manuscripts as connecting links to show that their testimony bore upon the same point, that the message received was identical with the one sent, and that unnecessary delay had taken place. In this sense the former is a copy of the latter. But it is manifest in this issue that each answers a different purpose, and is a dis-

tinct, original piece of the evidence necessary to establishing the question of delay or diligence.

§ 365. But these are all cases where no question arises as to any error or inaccuracy in the message transmitted. And, we think, in no case can the one message be considered as the copy of the other, when there is any question as to accuracy in the transmission.

§ 366. Let us take, for example, a case where there is a question as to the correctness and accuracy in the transmission of the message, and where the message received is regarded as the original.

Suppose there has been some mistake in the transmission, so that the two messages do not correspond.

Here it is clear that the message delivered for transmission cannot be considered as a copy of the message received by the person addressed; nor could it, in any sense, be looked to as secondary evidence of what is regarded as the original message.

It is not a copy. It is in fact a different message. The right of action is really based upon the fact that the message delivered to the person to whom it was addressed had been wrongfully changed, and that it was a different message from the one delivered for transmission.

§ 367. Let us suppose in the case we have so frequently referred to of New York & Washington Printing Telegraph Co. *v.* Dryburg, that instead of instituting his action against this telegraph company, Dryburg had instituted it against Le Roy, the sender of the message. The message Le Roy delivered for transmission

was, "Send two hand bouquets." The message Dryburg received was, "Send two hundred bouquets." He acted upon it and procured the two hundred bouquets. Let us suppose that the manuscript received by Dryburg had been lost, or for any other reason could not be produced in evidence; he then proposes to offer secondary evidence of its contents. If the manuscript delivered for transmission be produced, it reads, "Send two hand bouquets." Dryburg would be entitled to proof showing what his manuscript contained. This will serve as an illustration of all those cases in which there is any question of error or mistake in the transmission of the message.

§ 368. As a general thing, we should say, the one message is not to be considered as a copy of the other; but the true character of the message is more nearly assimilated to a letter of instruction from the principal to his agent.

In an action by the sender of the message against the telegraph company for failure to transmit the message as delivered, and for delivering to the person to whom it was addressed a different message, upon which he acted, and by reason thereof the plaintiff suffered loss, the question being whether the agent, the company, was guilty of negligence in transacting the business of its principal, the message delivered to the company would be the evidence defining the agency it had undertaken, and determining whether the company had complied with its undertaking: this would be ascertained by comparing that message with the message delivered by the company. In other

words, the message delivered for transmission would be the letter of attorney under which the agent, the telegraph company, acted.[1]

§ 369. In an action by the receiver of the message against the sender, upon a contract made through the medium of the telegraph, it does not require direct proof that the message was delivered to the telegraph company to be transmitted, by the defendant himself. Proof that it was delivered at the telegraph office as purporting to come from the person sought to be held liable as the sender of the message, may be given to the jury, without express proof that it was sent by the defendant or with his consent.[2]

[1] We do not consider that the provisions of the Internal Revenue Laws of the United States, in reference to messages, did or could militate against the view that the message *received* may be the original message. The Act of Congress of July 1, 1862, sec. 279, provided (now repealed) that "no telegraph company, nor its agent or employé, shall receive from any person, or transmit to any person, any despatch or message, without an adhesive stamp denoting the duty imposed by the act, being affixed to a copy thereof, or having the same stamped thereon; and, in default thereof, shall incur the penalty of ten dollars. Provided, that only one stamp shall be required, whether sent through one or more companies." Appendix.

The want of the stamp would not affect the validity of the contract, but only subject the company to a penalty for non-compliance. It applied in terms only to the message first handed in for transmission.

[2] Taylor, defendant in error, *v.* Steamboat Robert Campbell, plaintiff in error, 20 Mo. (5 Bennett) R. 254.

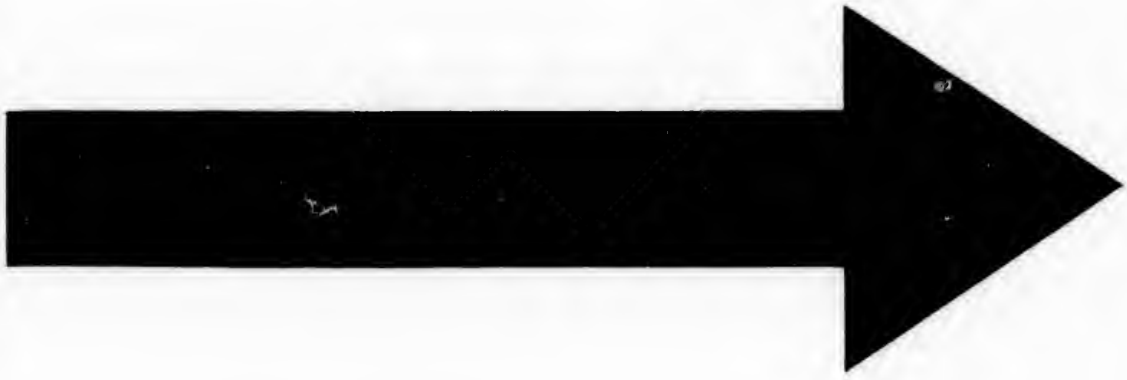
The operator at Lexington testified that the following message —

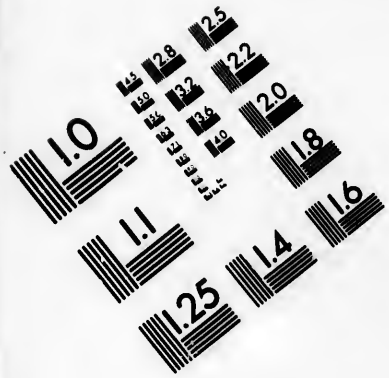
"Booneville, Dec. 11, 1852.

"To Robert Campbell.

"Make room for 400 hogs at fair rates. Wm. Taylor."

was received at his office on the day of its date, and on the same day was delivered to the officers of the steamboat "Robert Campbell;" and that on the next day the following despatch was deposited in his office, and forwarded to Booneville: —





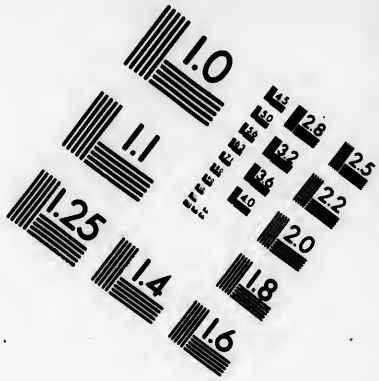
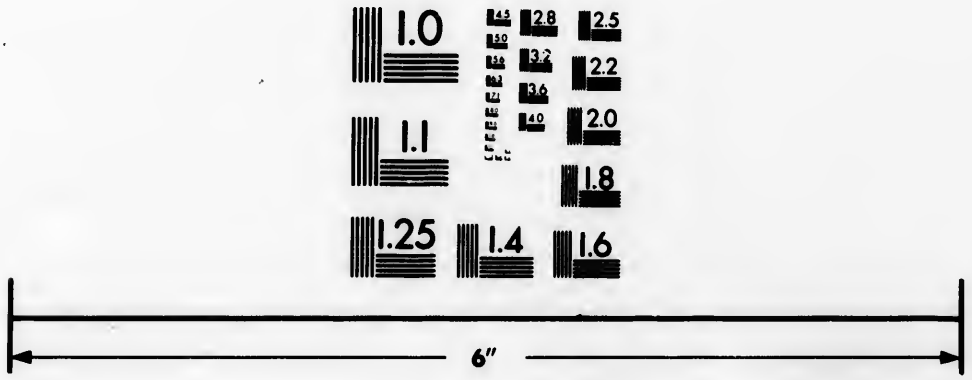
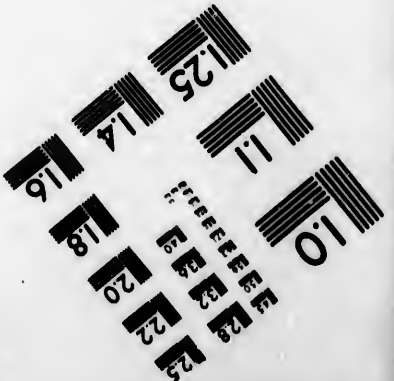


IMAGE EVALUATION
TEST TARGET (MT-3)





Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

§ 370. In an action by the sender of the message against the receiver, proof of the delivery of the message to him may be shown by the agents or servants of the telegraph company.[1]

§ 371. Where it is the custom of the telegraph company to take the receipt of the person to whom the message is addressed, by procuring him to write his name in a book kept by the company for that purpose, and proof by the agent or servant of the company that such was the uniform rule or custom of the company, and a production of the book with the name of the person written therein in the column opposite to the columns containing the name of the sender, the place and date of transmission, would probably be held sufficient evidence of the fact of the

"Lexington, December 12.

"Will take your hogs. Be down to-morrow morning.

"CAPT. EDDS."

Upon this testimony the plaintiff was permitted to read the messages in evidence to the jury, notwithstanding an objection by the defendant.

Scott, J., in delivering the opinion of the Court, says, —

"The evidence is complete to show that a communication was made by the plaintiff to the defendant; but the difficulty arises in showing that the answer to the communication was from the agent of the defendant. The telegraph agent testifies that the despatch received from the plaintiff was delivered to the officers of the steamboat 'Robert Campbell,' and a despatch in answer to that of the plaintiff was deposited in his office to be forwarded to the plaintiff, which was done on the next day.

"If under such circumstances any person had received a despatch in answer to one forwarded by him, he would not have failed to act upon it. His conduct would have been based upon the faith usually given to the correctness and fidelity with which such business is transacted by the agents of the telegraph. For these reasons we are inclined to the opinion that the evidence offered by the plaintiff was sufficient to permit the despatch to be read in evidence to the jury, who would then, from all the circumstances, determine whether it was the act of the master of the boat."

[1] Draper *v.* Worcester & Norwich R.R. Co. 11 Met. 505.

delivery of a message on that day, although the witness might have no recollection of having seen the party write his name therein, and might be unacquainted with his handwriting.

And if it were also the custom of the company to make a copy of the message received over the line, and enter it in a book kept for that purpose, a production of the book, with a copy of the message in it, taken in connection with the entry of the party's name in the company's receipt book of the delivery of messages, in the usual column opposite to the memorandum of the message, would be sufficient evidence of the delivery of the message.[1]

§ 372. In an action by the sender of the message against the company for failure to deliver the message, or for loss or incorrect transmission of the message, its agents and servants would be competent witnesses for the plaintiff and against the company;[2] but not for the company wherever the conduct of such agent or servant occasioned the loss or damage complained of, as he would be liable to the company in a subsequent action for the damages which might, in this action, be recovered against the company.

The company would have to execute a release to him to make him competent.[3]

[1] 1 Greenleaf on Evidence, §§ 115–117; Nicholls *v.* Webb, 3 Wheaton, 326; Welsh *v.* Barrett, 15 Mass. 380; Pritt *v.* Fairclough, 3 Campbell, 305.

[2] Merrill *v.* Ithaca & Oswego R.R. Co. 16 Wend. 586.

[3] See Angell on Carriers, § 469, and authorities cited. But see Draper *v.* Worcester & N. Railway, 11 Met. 505; 4 Foster 71, 89. In the case of Birney *v.* N.Y. & Wash. Prin. Teleg. Co. 18 Md. 341, the telegraph company introduced the operator whose misconduct occasioned the

§ 373. While it is true that in an action against the company for negligence either in the tranmission or delivery of the message, the burden of proof is on the plaintiff to support the allegation in the declaration, yet, having proven a delivery to the company of the message for transmission, the proof of non-transmission or non-delivery by the company, or delay in this matter, would be satisfied by slight evidence on the part of the plaintiff; for the plaintiff cannot be expected to establish this negative by positive proof, and the facts lie more particularly within the knowledge of the company.[1]

§ 374. In an action against a railroad company for non-delivery of goods to a connecting line, it has been held insufficient evidence to charge the company to show the delivery of the goods to it, and the failure of their arrival at the place of destination.[2] The same principle would be applied to the case of a telegraph company in an action against it for failure to deliver the message to a connecting line over which it must pass to reach its destination. Something more would be required than proof of delivery of the message to the original company, and its non-reception at the place to which it was addressed.

§ 375. There is a very general statutory provision, prohibiting the agents and servants of telegraph companies from making disclosures of messages transmitted over the wires of the company; and in most of the

damage complained of; but no exception seems to have been taken. See also Kinghorn v. Montreal Teleg. Co. 18 Upper Canada R. 60.

[1] Angell on Carriers, §§ 470, 471.

[2] Midland Railway v. Bromley, 33 Eng. Law & Eq. R. 235.

statutes a penalty is imposed for a violation of this requirement.[1]

It has been held, in the cases where this statutory provision has been construed, that it does not refer to disclosures made by the agent or servant of the company in courts of justice, when examined as witnesses.

The question was decided in Pennsylvania, in the case of Henisler *v.* Freedman.[2]

§ 376. The statute of Pennsylvania is similar in its terms to all the other statutes on this subject in the different States. The act declared that "it should not be lawful for any person concerned in any line of telegraph to use or make known, or caused to be used or made known, the contents of any despatch of whatever nature, which might be sent or received over any line of telegraph, without the consent or direction of either the party sending or receiving the same; and that all despatches which might be filed at any office in the Commonwealth for transmission to any point, should be transmitted without being made public, or their purport in any manner divulged at any intermediate point whatever.

§ 377. "And in all respects the same inviolable secrecy shall be maintained by the officers and agents employed upon the several telegraph lines in relation to all despatches which might be sent or received as may be enjoined by the United States in relation to the ordinary mail service of the United States. . . .

[1] See post, c. 9, §§ 435–446.

[2] 2 Parsons (Penn.), Select Cases in Equity and Law (Cases in Law), 274.

If any person in any capacity connected with any such telegraph line should use or cause to be used, or make known or cause to be made known, the contents of any despatch sent from, or received at, any office in the Commonwealth, or in any other way unlawfully expose another's business or acts, or in any way impair the value of any correspondence so sent or received, such person being duly convicted thereof shall be punished with fine and imprisonment."

§ 378. It was held, that the prohibition under the act related only to voluntary disclosures, and had no application to disclosures made in the courts of justice by the agent or servant of the company, when examined as a witness, but only to cases where the party, in the language of the act, *unlawfully exposes* the communication, which would be the case when he did so wantonly or voluntarily.[1]

[1] As this will be regarded as a leading case on this subject, we give the opinion in full, delivered by King, J. After quoting the act as we have given it in the text, he says, —

"David Brooks, a manager in the office of the Ohio & Atlantic Telegraph Company, being under examination as a witness before an alderman of the city, engaged in taking depositions under a rule of this court, to quash a domestic attachment, issued against an alleged absconding debtor, being asked whether a telegraph despatch had been sent by M. Freedman & Co. to Freedman & Co. of Pittsburg, and answering in the affirmative, he was required to produce it.

"This he declined doing, admitting that he had the despatch in his possession, claiming to be exempt from any obligation to do so, under the provision of the Act of Assembly above recited.

"The alderman suspended his proceedings in order that the objection of the witness should be submitted to the decision of this Court. The question for solution is, whether the production of a telegraphic despatch by any person connected with any line of telegraph in this Commonwealth, when required to do so, being under examination as a witness in a judicial proceeding, is the 'unlawful exposure of another's business or acts,'

§ 379. A similar decision was made in St Johns, Newfoundland,[1] where it became important in a fel-

subjecting the telegraph officer to the penalty prescribed by the act. If so, of course the witness cannot be compelled to answer, for no court of justice can or would compel a man to commit a crime against the public law.

"It must be apparent that if we adopt this construction of the law, the telegraph may be used, with the most absolute security, for purposes destructive to the well-being of society; a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber, and the swindler, by means of which their crimes and frauds could be the more readily accomplished, and their detection and punishment avoided, would become things so sacred that they never could be accessible to the public justice, however deep might be the public interest involved in their production. For, the result of the principle contended for is, that the seal of secrecy is placed upon all telegraph communication as well in courts of justice as elsewhere, and that they are to be classed with privileged communications, such as those between husband and wife, counsel and client. The wife or husband are not permitted to testify against each other, nor is the counsel permitted to reveal the secrets of his client because, otherwise, these most important social relations could not effectively exist.

"The claim that society has on the testimony of all its members, in courts appointed to administer public justice, is made to give way in such cases to the maintenance of other great relations, in which the public are even more interested. If the legislature had intended to place telegraph communications on a similar basis, it would have been easy to have said, that no person connected with any line of telegraph should be permitted to produce a telegraphic despatch, or to prove its contents, in a court of justice, without the assent of the parties to it. Had such a direct proposition been placed before the legislature, I cannot think that it would have prevailed; and I am unwilling to give this law such a construction as to produce precisely the same results as would have followed such a direct enactment.

"The real intent and object of this law was to prevent the betrayal of private affairs, communicated through the telegraph by those connected with it, for the promotion of private gain, or the gratification of idle gossip.

---

[1] In the matter of Waddell, before the Chief Justice of Newfoundland, reported in a pamphlet entitled, "Cases relating to Telegraphs and Telegrams." By Theodore Bacon, 1866, p. 85.

ony case to have the contents of certain despatches, in a proceeding before the Stipendiary Magistrates. The statute incorporating the New York, Newfoundland, & London Telegraph Company required the opera-

This new and wonderful mode of communication, and the impossibility of maintaining otherwise the confidence necessary to the existence of private correspondence, required such a law as that before us. But in using the phrase 'unlawfully expose another's business or acts,' the legislature certainly show, that they did not consider all exposures of another's business or acts 'communicated through telegraph,' by a party connected with it, to be 'unlawful,' otherwise they would not have rendered punishable only 'unlawful exposures.'

"If we are asked what are lawful exposures of business or acts communicated through telegraph, the answer would seem to be, exposures made in courts, in the course of administration of public justice; or exposures made to the public authorities for the sole and *bonâ fide* motives of preventing crime, or leading to its detection or punishment. The analogies of the law show this distinction between the lawful and unlawful exposure of secret communications. Thus a grand juror is sworn to secrecy; yet when the testimony of a grand juror is absolutely required in a court of justice, he is produced to testify. All the members of a court-martial are sworn to the maintenance of secrecy, as respects certain parts of the proceedings; yet they are required to testify in courts of justice in respect of such proceedings.

"The law is jealous of extending the circle of persons excused or interdicted from giving testimony.

"Parents are required to testify against children, children against parents, brothers against brothers, friends against friends. Communications by letter, made under the deepest obligation of friendship, affection, or honor, still must be produced, if deemed necessary to the ascertainment of truth and the administration of justice by the public tribunals.

"To this great end of social organization all secondary causes are required to give way.

"If there exists any great and overruling public necessity, which requires that telegraphic communication should be exempted from this almost universal principle, it is for the legislature, and not the judiciary, to say so. On the whole, I am of opinion that the witness must produce the despatch in his possession."

See also Tipping *v.* Clarke, 2 Hare, 383; Morison *v.* Moat, 9 Hare, 241; Williams *v.* Williams, 3 Merivale, 157; Yovatt *v.* Winyard, 1 Jac. & W. 394; Prince Albert *v.* Strange, 2 De G. & Smales, 652–677.

tor, agent, or servant to make oath that he would not wilfully divulge the contents of the message; and, like the Pennsylvania statute, made the violation a misdemeanor punishable with fine and imprisonment. Sir Francis Brady, the Chief Justice, held that "communications or messages sent through a telegraph office are not in law privileged communications; and that as the operator or other servant of the company is compelled to attend a judicial proceeding, they are bound to disclose the contents of such message, and in so doing they do not violate the oath they have taken;" and cites the opinion of Lord Ellenborough in Lee *v.* Birrell,[1] as supporting this view in a case very analogous in its circumstances.

§ 380. Telegraph messages are admissible in evidence against a person, as evidence of his declarations, when they are shown to be in his handwriting; and they will also be allowed to go to the jury as tending to prove communications by him to the person to whom they are addressed, when it appears that they were received by the operator and put upon their transit over the wires.

The case is analogous to that of letters deposited in the post-office, properly directed, where the rule is, that proof of these facts furnishes evidence tending to show that they reached their destination, and were received by the person to whom they were addressed.[2]

§ 381. Telegraph despatches from the wife of a defendant, in an action on the case for conspiracy, are not admissible as evidence against the defendant; for,

[1] 3 Camp. 337.

[2] Commonwealth *v.* Edward P. Jeffries, 7 Allen R. 548.

as declarations of the wife, they could not be allowed in evidence against the husband.[1]

§ 382. In an action by the sender against the company for failure to discharge its duty with reference to the transmission of the message, the burden of proof would rest upon the company to bring itself within any exception to its liability; as, for example, that the message was sent as an unrepeated message. For if, by virtue of its right to make reasonable regulations for the transaction of its business, it had made certain rules affixing conditions to its liability, it would have to show, affirmatively, not only that it had made and published the regulations, but that the sender had failed to comply with them. If it had published the rule of the company that it would not be liable for unrepeated messages, and the plaintiff had shown a delivery of the message, for transmission, to the operator, and a failure on its part to transmit with fidelity and promptness, its liability would be presumed; and if the message had been sent as an unrepeated message, to avail itself of this defence, it must show the fact.[2]

§ 383. We have seen, that in case of failure on the part of the sender of the message to comply with the rules and regulations of the company by which it imposes conditions to its liability, the non-compliance with such conditions will not relieve the company from liability for loss, where the company has been guilty of negligence.[3]

Whether the telegraph company which relies upon

[1] Benford *v.* Sanner, 40 Pa. St. R. 9.

[2] Pierce on American R.R. Law, pp. 467, 468.

[3] Birney *v.* N.Y. & Wash. Prin. Teleg. Co. 18 Md. 341.

the defence that it has been relieved from liability by the failure on the part of the sender to comply with such conditions, is required also to disprove negligence, is an unsettled question.

There are many authorities to show that in case of common carriers, the only effect of a special contract is to add to the exceptions imposed by law, of the act of God and the public enemy, those resulting from unavoidable accidents, and to still leave it incumbent on the common carrier to show that the loss was not occasioned by its negligence.[1]

§ 384. To what extent this rule will be applied to telegraph companies remains yet to be determined.

It will probably be held, whatever may be the extent of responsibility fixed upon them, that it devolves upon the company to show, as far as the nature of the case will admit of, that due care and diligence were used in the transmission and delivery of the message, and that its lines were in proper working order, and its batteries, and such other machinery as it may use, were in proper condition.

§ 385. In an action *ex delicto* against the company, the burden of proof is upon the plaintiff to show that the injury was occasioned by the negligence of the company; and not only this, but he must show in addition that his own negligence did not contribute to the injury complained of.[2]

§ 386. The *modus operandi* of transmitting mes-

[1] Parsons *v.* Monteath, 13 Barb. 353; Swindler *v.* Hilliard, 2 Richardson, 286; Davidson *v.* Graham, 2 Ohio R. (N.S.) 131.

[2] Robert Dickey & wife *v.* The Maine Teleg. Co. 43 Me. 492; Kennard *v.* Burton, 25 Me. R. 39–49.

sages, and all other matters connected with the workings of the batteries of the telegraph, the adjustment of insulators, wires, etc., are so far matters of science and skill, as to render the opinions of experts admissible in evidence; so, also, as to the question of the competency and skill of the operators; and so, also, in all cases of infringement of patent rights.[1]

[1] F. O. J. Smith *v.* I. W. Clark, 10 Am. Law Journal, 155; s.c. 15 How. U.S. 62–142; Fenwick *v.* Bell, 47 Eng. Com. Law R. 312; Beckwith *v.* Sydebotham, 1 Campbell, 116; Webb *v.* Manchester & Leeds R.R. Co. 1 Railway (Eng.) Cases, 576.

CHAPTER VIII.

MEASURE OF DAMAGES.

§ 387. The measure of damages in actions against telegraph companies will be determined by the same general principles which are applicable to cases against other corporations or individuals.

So, likewise, in cases between individuals where the telegraph has been used as the medium of contract.

§ 388. It may be important to notice certain distinctions which obtain in the measurement of damages in actions *ex contractu* and in actions *ex delicto*. In the former a wider range is allowed in the estimate of damages than in the latter, if the contract shows that such was in contemplation of the parties, or would have been contemplated if they had fully informed themselves as to the facts. In actions *ex delicto* the estimate is restricted to such damages as are the natural and proximate consequences of the act complained of, except in cases where, under well-known rules, vindictive or exemplary damages should be given.

§ 389. But when the contract between the parties does not show they had in contemplation this wider range in the estimate of damages, the measure of

damages seems to be substantially the same in either kind of action.

The true rule for estimating damages in actions *ex contractu* may be stated thus: The defendant is liable only for such damages as may fairly and substantially be considered as arising naturally, *i.e.* according to the usual course of things — from the breach of the contract, or — and here is where the measure of damages takes the wider range — for whatever damages may fairly be supposed to have been within the contemplation of the parties.

The rule in actions *ex delicto* is, that the damages to be recovered must be the natural and proximate consequence of the act complained of. This is the rule when no malice, fraud, oppression, or evil intent intervenes.

The damages which may be considered as arising naturally, according to the usual course of things, from the breach of the contract, are substantially the same as damages which are the natural and proximate consequences of the wrong complained of.

The rule in cases *ex contractu* has been stated thus: The defendant is liable only for such damages as were contemplated by the parties, or may reasonably be supposed to have entered into the contemplation of the parties at the time of making the contract.[1]

Mr. Sedgwick says, "The contract itself furnishes the measure of damages."[2]

The rule as laid down by the Supreme Court of Maine is, that the damages recoverable in an action of

[1] Williams *v.* Barton, 13 Louisiana, 404; Calvit *v.* McFadden, 13 Texas, 324.

[2] Sedgwick on Damages, p. 209.

contract are limited to such as are the immediate and necessary result of such breach.[1]

§ 390. The clearest and most precise definition of the rule, perhaps, is that laid down in the case of Hadley *v.* Baxendale,[2] which may be regarded as the leading case in the English courts upon this subject, and which has been adopted in the subsequent decisions.[3] The rule there stated is, "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such contract should be either such as may fairly and substantially be considered as arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract, under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were

[1] Bridges *v.* Stickney, 38 Me. 361. See also Fox *v.* Harding, 7 Cush. 516.

[2] 9 Exch. R. 341; s.c. 26 Eng. Law & Eq. 398; Alder *v.* Keighley, 15 Mees. & Wels. 117. See also Leland *v.* Stone, 10 Mass. 466; McDowell *v.* Oyer, 21 Pa. St. 417; Taft *v.* Wildman, 15 Ohio, 123.

[3] But see Gee *v.* L. & Y. Railway, 6 H. & N. 210; and note 1, following page, where the rule is criticised.

wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases, not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damage in that case, and of this advantage it would be very unjust to deprive them. The above principles are those by which I think the jury ought to be guided in estimating the damages arising out of any breach of contract."[1]

[1] This was a case of speculative damages, in which the loss of profits of a mill were claimed. (See on this subject Fletcher *v.* Tayleur, 17 C.B. 21; Griffin *v.* Colver, 16 N.Y. (2 Smith), 489; Williams *v.* Reynolds, Court of Queen's Bench, reported in April number, 1866, of Am. Law Register.) In Gee *v.* Lancashire & Yorkshire Railway Co., 6 H. & N. 210 (A.D. 1860), the plaintiffs were possessed of a cotton-mill, and made a contract with the defendants to transport cotton to their mill from Liverpool, to be manufactured. The defendants failed to deliver the cotton according to the contract, and the damages which the plaintiffs claimed were for the loss of the wages of the workmen they had employed, and of profits they would have made in running their mill if the defendants had complied with their contract. It appeared that the plaintiffs had no other cotton with which to employ their mill, and this was time and again called to the attention of the defendants, but this was done after the contract for the transportation was made, and while the mill was standing idle. It was ruled on the trial, as *matter of law*, that the plaintiffs were entitled to recover for loss of profits and wages; but the Court of Review held that this was a question which should have been left to the jury, to determine whether the stoppage of the mill was the natural consequence of the non-delivery of the cotton. Baron Wilde, in this case, thus speaks of the ruling in the case of Hadley *v.* Baxendale: "For my own part, I think that, although an excellent attempt was made in Hadley *v.* Baxendale to lay down a rule on the subject, it will be found that the rule is not capable of meeting all cases; and, when the matter comes to be further con-

§ 391. Mr. Sedgwick, in his work on Damages, after reviewing the authorities, approves of the definition that in actions *ex contractu* the damages "are such as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract," as the true rule.[1]

§ 392. The rule is thus stated in New York, in Griffin *v.* Colver:[2] "The broad, general rule in such cases is, that the party injured is entitled to recover all the damages, including gains prevented, as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature, and in respect to the cause from which they proceed."[3]

sidered, it will probably turn out that there is no such thing as a rule as to the legal measure of damages applicable to all cases.

[1] Sedgwick on Damages, p. 77.

[2] 16 N.Y. R. 489.

[3] Mr. Redfield, in his chapter on Telegraph Companies, sec. 189 *b*, subdivision 18, says, "The company must make good the loss resulting from any default on their part." After referring to Griffin *v.* Colver, and Landsberger *v.* Magnetic Teleg. Co., he makes fine practical discriminations in subdivision 19: "We do not apprehend there is any valid objection to the application of this rule of damages to the case of telegraph companies, on the ground of the secrecy and reserve with which such correspondence is commonly conducted, and that consequently the companies have not in most cases any sufficient data to form any just appreciation of the extent of the responsibility. The rule is not based so much upon what is supposed to have been the actual expectation of the parties, as what it ought to have been under the circumstances, if their minds had been drawn towards the contingency of a failure in performance. And if one or both the parties choose to enter into the contract in such ignorance

§ 393. We will now proceed to give the telegraph cases where those rules have been considered.

The rule as to speculative damages, so clearly laid down in the leading English case of Hadley *v.* Baxendale, has been recognized and approved in the cases in which telegraph companies were the defendants.

This doctrine was announced in the cases of Stevenson *v.* The Montreal Telegraph Company, and Kinghorn *v.* The Montreal Telegraph Company, decided in the Queen's Bench of Upper Canada;[1] where it was

of the facts as not to have been capable at the time of estimating the real extent of the responsibility assumed, that can be no sufficient ground to exonerate him from the full extent of responsibility attaching to the contract. The rule of responsibility is the same for all who freely enter into the same contract, whether fully or correctly informed of the extent of the obligation or not, provided they are not misled by the opposite party."

[1] Stevenson *v.* Montreal Telegraph Co. 16 Upper Canada R. 530; Kinghorn *v.* The Montreal Telegraph Co. 18 Upper Canada R. 60. In neither case was the question of damages properly before the Court for consideration, as they were decided for defendants upon other grounds. In the case of Stevenson *v.* The Montreal Telegraph Co., the message was transmitted from Montreal to New York City, and passed over independent lines with which the defendant's line connected. There was delay in its delivery at New York; and it was sought to hold the defendants liable for the neglect of the last connecting company. The Court held they were not liable, but only for transmission over their own line.

The message was, "Am disposed to realize; sell 1500 barrels." It in fact referred to flour, and was not received by the plaintiffs' merchants in New York until after business hours had closed. Had it been promptly delivered, it would have reached them within business hours. In the mean time the price of flour had fallen materially.

Upon the question of damages, Robinson, C.J., said, "Then, as to the last point, it strikes me that the endeavor to make the defendants liable, on account of some hours' or a day's delay on the part of The New York Telegraph Co., to the damages that were claimed in this action [to wit, special damage by reason of the flour not being sold by the plaintiffs' agent as soon as it otherwise would have been], was one that could not in law be maintained, and certainly not in reason. No intimation was given to the office in Hamilton that the plaintiff's message was on business

held that, in order to the recovery of the loss of profits, the message itself must disclose to the company, or

of great commercial importance, and requiring instant attention, so that the failure of an hour or two in delivering the message at New York from the office to the person to whom it was directed might, owing to fluctuations in the flour market, occasion the loss of many hundred pounds. The words, 'Am disposed to realize; sell 1500 barrels,' do not seem to denote particular urgency as to time. Would the agent receiving such a message be liable in damages if he delayed a day or two to act upon it? Whether he would or not, cannot decide the question as between these parties.

"To expect to make the defendants liable, upon the evidence given in this case, for the difference in price between the time when Newman & Co. received the message, and the time when they might have got it, and might have acted upon it, would be scarcely more reasonable, I think, than it would be to expect to make the proprietors of the Cunard line of steamers liable for the loss incurred by the failure of a house on which a bill was drawn from this country, and remitted by their steamer, during the delay of a day or two on the voyage, which by due dilligence might have been avoided; or to make a railway company liable, for being some hours behind time, for an accidental damage to a passenger who arrived too late to attend to an important sale, or to give directions in some critical point of his affairs. These are damages not reasonably to be supposed to have been within the contemplation of the parties in transacting the business in question, and therefore not to be recovered, except, perhaps, where there is something fraudulent or wilfully wrong on the part of the company failing in its duty."

Burns, J., who delivered the dissenting opinion, and held that the defendants were responsible for the acts of the connecting lines, re-affirms the doctrine laid down in Hadley *v.* Baxendale, in reference to speculative damages. He says, "I think the learned Chief-Justice was right in telling the jury that his impression was that for mere negligence the fall in the market would not give the plaintiff a ground of action of the nature set up in this case against the defendants, unless the defendants had been informed of the object of the message. They, not being flour dealers, cannot be supposed to know what the fluctuations of the market may have been, or whether flour then was on the decline or rise. The case of Hadley *v.* Baxendale (9 Exch. 341) has laid down the true rule upon this subject. The cases are collected there which bear upon the question. Trying this case by the rule, it may be asked, How is it possible for any one to say that in the contract to transmit the message in question to New York, either the rise or the fall of the flour-market entered into the consideration of the matter, so far as the defendants were concerned? It may have formed an ingredient with the plaintiff, it is true, but then, as I have

the company must otherwise be informed of the state of facts which would make such damage within the

before remarked, he should have communicated that information to the defendants, so that in fact that consideration might be said fairly to be imported into, and form part of, the contract. The defendants could not imply it from the words of the message. And suppose when the message arrived in New York it was found that the market, instead of falling, was rising; how could any one tell whether the plaintiff's agent would or would not have sold the flour in the face of a rising market any more than in the face of a falling market? It is only mere conjecture, and we see it proved in the very case, as an illustration of what I say, that the parties declined to sell in the face of a falling market after the message was received, and held the flour until January after.

"The evidence shows that the plaintiff's agent *thought* they might have sold some four hundred barrels on the 26th of November, if the message had been received in business hours, which might have given the plaintiff about seventy-five dollars more than the price was the next day. There was no certainty that even four hundred barrels could have been sold; the agent only thought perhaps he might have effected sales to that extent. If a contract had been entered into to deliver on any particular day a quantity of flour at any particular price, and the failure to do it had been caused by the non-receipt of such a message, then the case would have presented some positive evidence. At present the evidence presents merely a conjectural view, — that possibly the plaintiff's agent might on the Monday morning have found a purchaser for some portion of the flour, and also that they would have sold it at the then price in the market. It appears to me quite impossible to establish from such evidence what injury the plaintiff can or may have sustained. The case of Crouch *v.* The Great Northern Railway Co. (11 Exch. 742) confirms the former case of Hadley *v.* Baxendale, and establishes that in an action against a carrier for breach of duty in not carrying goods, the carrier is not liable for loss of business. Again, in the case of Hamlin *v.* The Great Northern Railway Co. (1 H. & N. 408), the Court of Exchequer laid down this rule: 'In actions for breaches of contract the damages must be such as are capable of being appreciated or estimated. The plaintiff is entitled to nominal damages at all events, and such other damages of a pecuniary kind as he may have really sustained as a direct consequence of the breach of contract. Each case of this description must be decided with reference to the circumstances peculiar to it; but it may be laid down as a rule, that generally, in actions upon contracts, no damages can be given which cannot be stated specifically, and that the plaintiff is entitled to recover whatever damages naturally result from the breach of contract.'"

The other case, of Kinghorn *v.* The Montreal Telegraph Co., was an

contemplation of the parties at the time of the delivery of the message for transmission.

§ 394. To the same effect was the case of Landsberger *v.* The Magnetic Telegraph Company,[1] decided in the Supreme Court of New York, where Hadley *v.* Baxendale, and Griffin *v.* Colver, are approved.

It was an action against the telegraph company by the sender of the message, to recover damages for failure on the part of the company to promptly deliver the message intrusted to it for transmission. The plaintiffs had a contract with Locan & Co., of San Francisco, to buy for them in New York a quantity of pistols, and deliver them in San Francisco by the steamer which should leave New York on the 20th of January, 1857, and were to receive a commission therefor; agreeing to hold themselves responsible in the sum of five hundred dollars, to be paid Locan & Co. if they failed to fulfil the agreement.

action against the company to recover damages for negligence in failing to deliver the message to a connecting line in propor time, by means whereof the plaintiff lost the sale of the rye to which the communications referred, "and that the market price of rye having immediately thereafter fallen, and having so continued up to the time of the action, the plaintiff had lost great gain and profits which would have accrued to him from the sale of the rye," etc.

The message was, "Will give you eighty cents for rye." The reply was, "Do accept your offer. Ship to-morrow fifteen or twenty hundred."

The Court held that these two messages constituted no contract, and hence the question of damages was not before the Court. But on the question of damages it is said, "In order to charge the defendants with the fluctuations of the market, the parties using the telegraph should inform the company o. the facts, the importance of the message, and other things connected with it, so that it may be known on both sides what the nature of the undertaking or duty is, and that these matters should be treated as imported into and forming part of the contract and duty of the defendants in the transmission of telegraph messages."

[1] 32 Barb. 530.

The plaintiffs forwarded the money — ten thousand dollars — to New York, to enable them to fulfil the agreement. Being unable to reach New York in time to make the purchase in person, one of the plaintiffs, *en route*, sent the following telegraphic message, which was carried by a special messenger to New Orleans, and there delivered to defendants for transmission by their line: —

"J. LANDSBERGER & Co., 28, Broad Street, New York.
"Get ten thousand dollars of the Mail Company."

This message was received by the defendants in New Orleans, on the 16th of January, and the next day was transmitted to and received at their office in New York, but addressed to "H. P. Lammeyer." No such person was found, and the defendants telegraphed to their office in New Orleans for "better address."

From the 17th to 23d of that month, communication was interrupted by atmospheric causes, and no reply was received to this office message until the night of the 22d January, when the correct address was received at the office in New York. On the morning of the 23d January the message was delivered to J. Landsberger & Co.

By reason of its non-delivery, before the 20th the agreement with Locan & Co. was not, and could not be, performed, for the want of the money in the message mentioned.

The sole cause of the non-delivery of the message in time was the erroneous address received at the defendants' office in New York, and was caused evi-

dently by the defendants' negligence. The plaintiffs paid Locan & Co., on demand, as liquidated damages, the five hundred dollars.

§ 395. The damages claimed were, 1st, the commissions on the purchase of the pistols to which the plaintiffs would have been entitled if the contract had been performed; 2d, the amount paid Locan & Co. as liquidated damages; 3d, the amount paid defendants for transmitting the message; and, 4th, interest on the ten thousand dollars, the receipt of which by the parties in New York was delayed five days by the non-delivery of the message.

§ 396. The Court held that the plaintiffs could only recover the two last items; and the judge who delivered the opinion, thus speaks of the rule of damages, which must govern the case: —

"It is perfectly clear in my judgment, that by reason of the non-performance by the defendants of this agreement to transmit and deliver immediately the telegraphic despatch above referred to, the plaintiffs have sustained the first two items of damage above mentioned, as well as the other items, and that such non-performance was occasioned by the defendants' negligence, for which they are liable to the plaintiffs in damages; and yet I am constrained to concur with the referee in the conclusion at which he arrived, that the amount of said two first items cannot be recovered against the defendants in this action.

§ 397. "The rule of damages applicable to this and other like cases is clearly stated in the opinion of Judge Selden (in which all the judges of the Court

of Appeals concurred), in the case of Griffin *v.* Colver,[1] as follows: 'The broad, general rule in such cases is, that the party [illegible] is entitled to recover all his damages, including gains prevented, as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature, and in respect to the cause from which they proceed.'

"The first of these conditions appears to me to exclude said first two items of damage. On receiving this despatch for transmission, the defendant had no intimation whatever in relation to it, or the purpose to be accomplished by it, except what could be derived from the despatch itself. The effect of any delay in the delivery of the despatch would naturally and necessarily be equal delay in the receipt by the plaintiffs, in New York, of the $10,000 therein mentioned. The defendants were not informed of any special use intended to be made of this sum of money; and what damages might they naturally expect to follow from the delay in the receipt of it? Clearly the loss of the use of that sum during the time that its receipt was delayed, and the damages for the loss of such use, are, by the laws of New York, determined to be the interest on the money for the period of the delay, at seven per cent per annum.

"The rule laid down, and the illustrations thereof

[1] 16 N.Y. 489.

given, in the opinion referred to, appear to me entirely decisive of the present case, and to fully sustain the judgment of the referee.

"By the case of Hadley *v.* Baxendale,[1] it appears that the same rule is recognized and acted upon in the English courts."[2]

[1] 9 Exch. 341.

[2] In the late case of Gildersleeve *v.* The United States Teleg. Co., Maryland Court of Appeals, extracts from which are given ante, §§ 118, 118 *a*, 118 *b*, embracing the facts, upon the measure of damages, the Court said,—

"Lastly, as to the measure of damages, if there be a breach of the contract. This is a subject about which there has been a considerable diversity of opinion, and great want of precision in the attempts to define rules of general application. But by the latest and best-considered cases upon the subject the rule seems to be now pretty well established that a party can only be held responsible for such consequences as may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract, and that no consequence which is not the necessary or ordinary result of a breach can be supposed to have been so contemplated, unless full information be imparted to the party sought to be held liable at the time of entering into the engagement. This is the rule furnished by the case of Hadley *v.* Baxendale, 9 Exch. 341, 354, and which has been recognized and approved in Fletcher *v.* Tayleur, 33 Eng. Law & Eq. R. 187, 191, and other cases, as being in all respects the most correct and precise. The case of Hadley *v.* Baxendale was this: The plaintiffs, owners of a steam-mill, broke a shaft, and, desiring to have another made, they left the broken shaft with the defendant, a carrier, to take to an engineer to serve as a model for a new one. At the time of making the contract the defendant's clerk was informed that the mill was stopped, and that the plaintiffs desired the broken shaft to be sent immediately. Its delivery was delayed, however, and the new shaft kept back in consequence. The plaintiffs brought their action for a breach of this contract with the carrier, and they claimed as special damages the loss of profits while the mill was kept idle. But because it was not made to appear that the defendant was informed that the want of the shaft was the only thing that was keeping the mill from operating, it was held that he could not be made responsible to the extent claimed. And the Court, in delivering its judgment, said, 'We think the proper rule in such a case as the present is this: Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of

§ 397 *a*. The case of The United States Teleg. Co. *v.* Wenger,[1] very lately published, was an action on

such breach of contract, should be either such as may fairly and substantially be considered as arising naturally, *i.e.*, according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of a contract under these special circumstances, so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances for such a breach of contract. For, had the special circumstances been known, the parties might have expressly provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.' The same rule has been adopted, and is now regarded as established, in the case of Griffin *v.* Colver, 16 N.Y. R. 489, and Landsberger *v.* The American Teleg. Co. 32 Barb. 530. And, believing it to be obviously just and reasonable, we take it to be the true rule upon the subject. And, applying it to this case, the prayer of the appellee, which was granted, was clearly incorrect. For, while it was proved that the despatch in question would be understood among brokers to mean $50,000 of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold,' may have been understood in its literal import, if it can be properly said to have any, or was as likely to be taken to mean fifty dollars as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this despatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But, without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the despatch, and thus

[1] 55 Pa. St. R. 262.

the case, predicated upon a failure to transmit the following message: —

"October 10, 1864.

"To J. O'Brien, 58, Wall Street, New York.

"Buy (50) fifty North Western, fifty (50) Prairie du Chien, limit forty-five (45).

"Reed, McGrann, & Co."

The order was repeated by mail. The plaintiff, receiving no answer that evening, went to the telegraph office to inquire about his message, and was

enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the Court committed error, and that its ruling should be reversed. As to the fifth prayer of the appellant we think the Court below was right in rejecting it. It was certainly the right of the appellee to convert his gold coin into currency, and if he lost an advantage in having it done, in consequence of a breach of contract by the appellant, it was a loss for which the former would be entitled to recover damages to the extent of indemnity."

Here the question of knowledge of the special circumstances of the case presents itself again; and also as to whether the company should inquire, or the sender disclose. Gildersleeve, in offering his despatch, placed himself in a condition to be catechised as to its meaning. The agent could and did read it. He needed no more information, and sought none. By neglecting his duty, an injury was sustained by the sender. The general rule is correctly stated, and we see no difficulty in its application. The authorities we have cited indicate that the agent should have sought information if more was needed, in order to guard the company against risk. Here was a commercial transaction clearly indicated, based upon gold as a commodity, measured in its market value by constant and sometimes unaccountable fluctuations in the paper currency and public credit. Since gold has become a commodity, transactions in it assume immense proportions. Men do not usually order the sale of fifty dollars in gold by telegraph in a distant market. We cannot imagine a despatch worded better than this to excite inquiry or reflection as to probable extent of responsibility; and the operator's negligence in this respect should not afford the company protection against *laches* in forwarding a perfectly legible manuscript.

told by the agent that it had been sent on, but was detained at Philadelphia. The charge for a transmission to New York had been paid. No request was made to have it repeated back. The letter of the 10th, repeating and referring to the telegraph, was received on the 11th by J. O'Brien, in New York, but he did not buy because of the delay of the despatch. A second despatch was sent on the 13th, and then the order was executed.

§ 397 *b*. The opinion of the Court was delivered by Thompson, J.: "The broker of the plaintiff below ordered the purchase of certain stocks in New York for him, by telegraph, on the 10th of October, 1864, and, having prepaid the charges, gave the message to the defendants for transmission to his correspondents named therein. The message, it appears, got no further than Philadelphia, although the defendants' line extended to Portland, Maine. No such reason as the law would recognize, indeed no reason at all, was given for the failure to transmit the message to its destination. Thus was there presented a clear case of gross negligence against the company in performing its undertaking, and a consequent liability to the plaintiff for such damage as he had sustained in consequence thereof. The stock ordered was, of course, not purchased on the day the despatch was given to the company to be transmitted, as it might have been, for it was not pretended it was not in the market; but three days thereafter it was procured at an aggregate advance of $462.50. This difference, the plaintiff claims, is the damage he has sustained and is entitled to recover. Undoubtedly this is the measure

of damage in the case. The despatch was such as to disclose the nature of the business to which it related and that the loss might be very likely to occur if there was a want of promptitude in transmitting it containing the order. In this respect it differs much from that in Landsberger *v.* The Magnetic Telegraph Co.[1] 'Get ten thousand dollars of the Mail Company,' the message in that case said, but did not disclose that the money was to be gotten from the Mail Company to save from failure a valuable contract; hence it was held, that the damages arising from that cause could not reasonably be presumed to have been in the contemplation of the parties to the contract, or not recoverable to that extent. Here the object of the message was for the purpose of buying stock as soon as received; and, no other time being named, and it is not possible, consistently with with any knowledge of the business of dealing in stocks, to fail to understand that damage might ensue, nay, would be likely to ensue, by delay. The damage from such a source was what would naturally have entered into the minds of the sender and the undertaker to send the message if they thought on the subject at all; and that they did think is true, if the witness was credible, and whose uncontradicted statement is that he notified the operator that he would look to the company for damages if they failed in transmitting the message. The rule laid down by the learned judge as to the measure of damages was all right enough, and therefore in accordance with settled principles."

[1] 32 Barb. 550.

The case was reversed reluctantly, as stated by the Court, on the ground that declarations were admitted in evidence which were not *res gestæ*.

§ 398. The case of Parks *v.* Alta California Telegraph Co.[1] is entirely consistent with this. It was an action *ex contractu;* the breach alleged was for failure to send the message within a reasonable time. The message was, "Due $1,800; attach if you can find property; will send note by to-morrow's mail." The message was addressed to the agent of the plaintiff in a neighboring town.

The defendant delayed the transmission of the message for such a length of time, that when it reached the agent, before he could take the necessary steps to attach, other attachments had intervened and absorbed the property, and the debt of the plaintiff was lost. The proof showed that if the message had been transmitted promptly the debtor had sufficient property which could have been subjected by attachment, to the satisfaction of the plaintiff's claim.

The Court held, that the company were liable not only for the repayment of the costs of transmitting the message, but also for the amount of the claim.

§ 399. Here the message itself gave the company notice of the object of the message, and the damages allowed may be regarded as having been in the contemplation of the parties at the time the contract was made; the Court say, also, that the loss of the debt was "the natural and proximate damages resulting from the breach of contract."[2]

[1] 13 Cal. R. 422.

[2] See also Bryant *v.* The American Teleg. Co. (N.Y. General Term,

§ 400. But few cases have come before the courts, in relation to the loss of profits, where the negotiations have been by telegraph.

The case of Prosser *v.* The Montreal Telegraph Company[1] presented this question: —

The plaintiff was a ship owner; he sent a message to a person at Chatham inquiring if this party could load his vessel with 8,000 bushels of wheat. The message transmitted stated 3,000. The person to whom it was addressed, supposing 3,000 was the quantity, replied in the affirmative. In consequence of this, the plaintiff abandoned a contract he had pending for a cargo from Detroit, and sent his vessel at once to Chatham, where it obtained a cargo of 3,000 bushels only.

The plaintiff claimed as damages the full freight from Chatham to Oswego (the point to which the cargo was to be carried), on the 5,000 bushels of wheat which the vessel would have carried, and expected to get in addition to the 3,000 bushels.

1866), 1 Daly (N.Y.) 578. In this case of Parks *v.* Alta California Teleg. Co. the Court supposes the case of transmission of a message by the owner of a house which is situate in some distant city; the message being transmitted to the sender's agent at that place, on the eve of the expiration of the policy of insurance, directing him in the message to renew the policy; or a direction by message to an agent to have a bill of exchange protested; and a neglect by the telegraph company, in either case, to send the message promptly. The damage would be the loss of the house if it should burn down uninsured before the message was received, or the amount of the bill with legal damages thereon, if the debt were lost by reason of the company's default. See, also, on this subject, Brown *v.* Arrott, 6 Watts & Serg. 402; Harvey *v.* Turner, 4 Rawle, 223; Amory *v.* Hamilton, 17 Mass. 103; Morris *v.* Summerl, 2 Wash. C.C. R. 203; Bridge *v.* Mason, 45 Barb. (N.Y.) R. 37.

[1] 7 Upper Canada Com. Plea R. 23 (Com. Plea, Easter Term, Vict.).

§ 401. The Court limited him to the expense of sending the vessel to Chatham and back, and held that he was not entitled to claim the profit he might have made from carrying the 8,000 bushels. The Court say, "It does not appear that he could have obtained a freight on 8,000 bushels if the message had been correctly transmitted. If it had been answered in the negative, he would then have insisted on his right to carry the corn" (this was the pending contract which was broken off on receipt of the message in reply), "according to his contract for that purpose. The real damage he sustained therefore was for giving up that contract. This is not alleged in the declaration as special damage, nor, as has already been stated, was the fact of such a contract having been made, communicated to the defendant's servants, at the time the message was sent; so that it cannot be said the damages in reference to it were in contemplation of the parties at that time. Under the facts shown we think the damages should stand as assessed at £25, being for the expense of sending the vessel from Detroit to Chatham and back; which are the damages that naturally flowed from the breach of the defendant's duty or contract, or which might have been reasonably in the contemplation of the parties at the time."[1]

[1] The principle that is to govern these cases where a loss of profits is claimed, is stated with great clearness by the Supreme Court of Massachusetts, in the case of Fox *v.* Harding, 7 Cush. 516. It is said, "The rule has not been uniform, or very cleary settled, as to the right of a party to claim a loss of profits as part of the damages for breach of a special contract. But we think there is a distinction by which all questions of this sort can be easily tested.

"If the profits were such as would have accrued and grown out of the

This is fully recognizing the principle laid down in Hadley *v.* Baxendale.

§ 402. A most important inquiry is presented upon the question of the measure of damages in actions *ex contractu* against telegraph companies; and that is, What is it that must be in the contemplation of the parties at the time of the delivery of the message for transmission?

Let us suppose the case where the message, although the *words* of it are plainly written, is unintelligible to the telegraph company, conveying no idea to them of the object of the message, although it may be well understood by the party to whom it is addressed.

What damages shall be considered as being in contemplation of the parties in such case, in the event of a breach of contract by delay or failure of transmission, or error or mistake from which loss is sustained?

Is the sender of the message to be restricted to the recovery merely of the charges he has paid for the transmission, upon the ground that, the message being unintelligible to the company, nothing more was in contemplation of the parties?

contract itself as the direct and immediate result of its fulfilment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence of, and by the faith of, the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit." See also Gee *v.* Lancashire and Yorkshire R.R. Co. 6 H. & N. 210; Lawrence *v.* Wardwell, 6 Barb. 423; 13 How. U.S. 307; Bell *v.* Cunningham, 3 Peters, 69.

§ 403. This view of the law is taken in a case in the Fifth District Court of New Orleans, Edward Shields *v.* The Washington & New Orleans Telegraph Company;[1] where the plaintiff sued for $164 damages, arising from the incorrect transmission of a telegraphic despatch, in which the word *sixty-six* was substituted for *fifty-six*, the correct number.

The company refunded the costs of the despatch, but resisted any liability to damages by reason of the mistake of the operator. The judge who delivered the opinion of the Court said, "What is the test of appreciation of a despatch like that which the plaintiff received in this instance from his correspondent? The despatch read or said, 'Oats, fifty-six; bran, one ten; corn, seventy-three; hay, twenty-five.'

"The person who sent the despatch made no explanation to the operator, and without explanation how could the operator know whether the numbers in question referred to dollars and cents, or to bushels and bales? Again, how could the operator know whether the said despatch conveyed an order to purchase, or an account of sales? And if he was bound to infer the former, what information did the despatch convey to his mind of the extent of the order?

"The meaning of the despatch was a secret to all but the parties corresponding.

"Under these circumstances, the value of the message transmitted was inappreciable, and the telegraph company had no means of knowing the extent of the responsibility which ought to be involved in its correct

[1] 1 Livingston's Law Magazine, 69; 4 Am. Law Journal (N.S.), 311.

transmission, upon the principles contended for by the counsel for the plaintiff."

The judgment was accordingly only for the cost of the message, and the costs of the court.[1]

§ 404. This case presents a very important question in telegraph law.

If this decision be correct, it must go far towards destroying the efficiency of the telegraph as a medium of communication, and afford telegraph companies almost entire immunity from responsibility; for it must be manifest, that it is wholly impracticable to communicate to the operator, in every instance of the transmission of a message, its character and importance, and the consequences of error or delay in its transmission.

One of the great attractions which this mode of communication presents, is the brevity of the despatch; such abreviations being used in many cases as will enable the person for whom it is intended alone to understand it; and hence the vast amount of business the telegraph operator is capable of transacting in the transmission and delivery of messages. So that an explanation of the meaning, importance, and bearing of each message would be an insufferable annoyance, and, in the multiplicity of messages delivered for transmission could not be remembered, even if the time could be spared to listen to it; and it would rarely afford any benefit or advantage to the company after the information was communicated.

§ 405. Now while it may be true that the telegraph

[1] Although this was an action by the receiver of the message, it is evident from the opinion, that the case was *ex contractu*.

company, through its agents and servants, may not know the meaning of the particular message, yet they do know that messages of great value and importance, involving heavy losses in case of failure or delay or mistake in their transmission, are constantly sent over their wires; and they do know that they hold themselves out to the public as prepared at all times, and for all persons, to transmit messages of this description.

The true rule being, then, that the damages must be such as may be fairly supposed to have entered into the contemplation of the parties when they made the contract, that is, such as might be naturally expected to follow its violation, it would seem that its proper application to telegraph cases would be this: that, although the message were unintelligible to the company, yet as it had undertaken to transmit the message promptly and correctly, both parties contemplated that whatever loss should naturally, and in the usual course of things, follow a violation of this obligation, the company should be responsible for.

§ 406. It cannot be a matter of consequence for the operator to understand or appreciate the meaning of a despatch, for he must send it in any event. It is enough for him to read what is written; and if it be illegible, he may reject it. It is to be presumed that the party receiving the message will understand it if correctly transmitted; and thus to transmit, is the special duty of the operator. If he fail to do this, and so disappoint, mislead, or deceive the party addressed that damages are suffered, they will be measured by the extent of loss and injury naturally

resulting from the error, or failure to deliver the despatch.

The transaction, of course, must be *bonâ fide;* and the court and jury must be so informed by testimony, that they can see what was the legitimate scope and meaning of the message, and also what was the damage naturally consequent upon the misfeasance or neglect.

The real facts when developed on trial afford the media through which the parties are supposed to have looked when the message was offered for transmission; and thus the triers of the case avoid speculative damages on the one hand, and arbitrary *ex parte* rules of exemption on the other.

§ 407. This view of the question has been adopted in the State of New York in the recent case of Rittenhouse *v.* The Independent Line of Telegraph.[1]

It is there held that the telegraph company is not excused from liability for an erroneous transmission of a message from the fact that its meaning was unintelligible, so long as the words were plain; and that where an order is sent by telegraph for the purchase of an article, and by the blunder of the operator the message is made to read as an order for a different article, the company must make good the difference between the price paid for the article the sender of the message actually ordered, if purchased as soon as the mistake was discovered, and the price at which it could have been purchased when the erroneous message was delivered to the person to whom it was addressed.

[1] 1 Daly Com. Pleas R. (N.Y.) 474.

The message delivered for transmission in this case was, "If we have any Old Southern on hand, sell same before board — buy five Hudson at board — quote price." The message delivered by the company at the office of destination was, "If we have any Old Southern on hand, sell same before board. Buy five *hundred* at board, — quote price." The message was addressed by the plaintiffs to their brokers, and by a previous understanding between them the words "Old Southern" meant Michigan Southern Railroad stock; the words "five Hudson" meant five hundred shares of Hudson River Railroad stock; and the word "board" meant the stockbrokers' board. So that its meaning was wholly unintelligible to the telegraph company.

§ 408. The Court held, that, if the message was intelligible to the person to whom it was addressed, that was sufficient; and the Court say, "The language employed, however indefinite to others, was intelligible to the brokers. The despatch written was not sent, and the effect of the error was to make it an order to sell the shares of Southern, and buy five hundred more." And it was accordingly held that the plaintiffs were entitled to recover of the telegraph company the difference between the price at which the five hundred shares of the Hudson River Railroad stock could have been bought at the board of brokers, and the lowest price for which the same could have been, and was, bought after the adjournment of the board on the reception of the corrected message.[1]

[1] The case before referred to, of Landsberger *v.* The Magnetic Teleg. Co. 32 Barb. 530, when properly considered, we think, will be found not to

§ 409. Still another ground of objection has been urged against the assessment of damages in cases

conflict with the view we have advanced in the text, of the responsibility in damages of the telegraph company for all losses which are the immediate and necessary result of the breach of the contract, to correctly and promptly transmit and deliver the message, or, to use the language of Hadley *v.* Baxendale, "such as may fairly and substantially be considered as arising naturally, *i.e.*, according to the usual course of things from the breach of the contract itself," in cases where the message is unintelligible to the company. It is true in that case, the Court rests the rejection of certain items of damage upon the fact that they were not in the contemplation of the parties, and not disclosed by the message. But the rejection of them might well have been placed upon the ground that they were too remote, and that they could not be said to be the direct and immediate result of the breach, or to fall within the definition of the rule above given from Hadley *v.* Baxendale.

And there can be but little doubt, but that the damages allowed in that case would have been the same, had the message been intelligible to the persons to whom it was addressed, as an order to get the $10,000 from the Mail Company, although it may have been unintelligible to the company transmitting it. For otherwise, it would show a case, where, by simply changing the form of action from *ex contractu* to *ex delicto*, the plaintiff could, in this latter character of action, proceeding, not for any breach of contract, but for neglect of a statutory duty which the company was under obligation to perform, have recovered this damage as being the natural and proximate consequences of the act complained of.

It is difficult to perceive, upon any satisfactory reasoning or principle, why there should not be the same rule in the assessment of damages in such cases, if I allege the *same fact* as constituting on the one hand a breach of contract safely or correctly to transmit a message, or on the other, as a negligent failure of dut. The duty is the same, the fault the same, the inquiry the same, the result the same. Why not the same measure of the injury in money? Why say I am damaged less by a fact, if I say the party failed to perform a contract, than I am if I allege the same fact as a wrong? The contract to safely, promptly, and correctly transmit and deliver the message, just as it is written out and delivered for transmission, exists just as much where the message is not understood by the company, as where it is understood by them. And in case of failure to so transmit and deliver, the breach is as complete in the one case as in the other; and the company must, we think, be considered as holding itself responsible for all damages that may be the direct and natural result of such breach.

where the message is unintelligible to the company; which is, that in such cases the message, being so obscure as to be inappreciable, cannot be the subject-matter of damages. This question was raised in the case of Bowen & McNamee *v.* The Lake Erie Telegraph Company, in the Court of Common Pleas of Ohio.[1]

This was an action by the receiver of the message. It was as follows: —

"To Bowen & McNamee, New York.

"Send one handsome eight-dollar blue and orange, and twenty-four red and green; three twenty-fives, Bay State. Fill former orders with best bigh colors you can.

(Signed,) "Bidwell & Co.,
"Adrian, Michigan."

§ 410. The Court held, that the defendant was bound to send the message correctly, and if they failed in this duty, whereby damages had accrued to the plaintiffs, they were liable; and said further, "If the message was originally so obscure as to be inappreciable, the error complained of could not have increased its obscurity, and the plaintiff could not recover; but if it was sufficiently plain to be understood by Bowen & McNamee, the plaintiffs in this case, the merchants to whom it was addressed, though not intelligible to others, it was appreciable; and if changed to the injury of the plaintiffs, such a change was a proper subject of damages."

The error in the transmission consisted in making the message read one *hundred*, instead of one *handsome*. The plaintiffs shipped one hundred "eight-

[1] 1 American Law Reg. 685.

dollar blue and orange Bay State" shawls, and suffered damage in consequence, by reason of the depreciation of the shawls in the market when they were sent back to them by Bidwell & Co.

The damage recovered was for this loss.

§ 411. When the action is by the *receiver* of the message, it is most generally in tort. Here the damages will be estimated according to the principles applicable to this kind of action. Such was the case of New York & Washington Printing Teleg. Company *v.* Dryburg,[1] where the receiver of the message, Dryburg, was allowed to recover from the company the entire damages he had sustained by reason of the erroneous transmission of the message. "Two hand bouquets" in the message was changed by the operator so as to read "two *hundred* bouquets." Dryburg, in filling this supposed order, wasted a large quantity of flowers, and recovered the amount of his loss occasioned thereby.

§ 412. Where the error in the transmission of a message which contains an order for the purchase of an article is such as to direct the purchase of an entirely different article, the measure of damages is the difference between the price paid for the article mentioned in the correct message, if purchased as soon as the error has been discovered, and the price at which it could have been purchased when the erroneous despatch was received.

If the article ordered in the erroneous message has

[1] 35 Pa. St. R. 298; De Rutte *v.* The New York, Albany, & Buffalo Electro-Magnetic Teleg. Co., Court of Common Pleas, N.Y. See 1 Daly, 547.

been purchased, the telegraph company is not liable for a loss upon a resale of such article, unless they have had fair notice of the resale.[1]

And, as stated in Washington & New Orleans Telegraph Company *v.* Hobson & Son,[2] the plain-

[1] Rittenhouse *v.* Independent Line of Telegraph, 1 Daly, Common Pleas (N.Y.) R. 474. The Court say, "The plaintiffs' claim for a difference of $475 on the sale of the five hundred shares of Michigan Southern was disallowed on the ground that the stock was in legal effect purchased on defendants' account, and could not be sold without some notice to them. I think the ruling was a proper one, the relations of the parties being considered. If the plaintiffs intended to disavow the purchase, the defendants should have been notified thereof, and in that way enabled to keep the stock or not, as they might deem advisable."

[2] 15 Grattan, 122. This is an interesting case on the subject of damages. The case was this: Hobson & Son, at Richmond, delivered a message to this telegraph company for transmission, addressed to Robert W. Smith & Co., at Mobile, directing them to purchase for the plaintiffs five hundred bales of cotton, at or under nine cents. In the course of its transmission the message was altered, so as to read *twenty-five* hundred bales, and delivered to Smith & Co. as an order for the purchase of twenty-five hundred bales. This message was delivered for transmission on the 2d of March, 1854. Owing to some derangement of the wires, it did not reach Mobile until the 9th of that month. Upon the reception of the message, Smith & Co. purchased two thousand and seventy-eight bales before they were informed of the mistake.

On the 20th of the month the president of the company proposed to Smith & Co. to take the one thousand five hundred and seventy-eight bales (the excess) at cost, exclusive of the commissions of two and one-half per cent charged by Smith & Co. for the purchase of the cotton. This proposition Smith & Co. declined for their principals, but proposed to lose one-half of the commissions, which was declined by the company.

At the time these propositions were pending, Smith & Co. had made a contract for the shipment of one thousand of these bales to Liverpool, of which all but two hundred and sixteen bales were on board the ship prior to the 18th of the month.

On the 21st Smith & Co. informed the company that they had received a telegraphic message from Hobson & Son, stating that Hobson & Son would take the one thousand bales shipped to Liverpool, provided the company would take the one thousand and seventy-eight bales at

tiffs must not only have given the company notice, but must offer to deliver to them the article upon

prime cost, with Smith & Co.'s charges. The company declined this proposition.

The one thousand and seventy-eight bales were sold in Mobile, at a loss of but eighty-seven dollars and seventy-two cents; but the loss on the five hundred bales shipped to Liverpool (five hundred being retained to fill the order that Hobson & Son had really given), exceeded seven thousand dollars.

It was admitted by plaintiffs that the company were prepared to carry into effect their proposition to take the cotton if it had been accepted; it also appeared that the loss on the cotton shipped to Liverpool was occasioned by a decline in the price.

Daniel, J., in delivering the opinion of the Court, said, "I think the Court also properly refused to give the second instruction asked by the plaintiffs in error. If the company, by reason of their having sent to Messrs. Smith & Co., the factors of defendants in error, a message to purchase a larger quantity of cotton than the quantity mentioned in the message which the company were authorized to transmit, had rendered themselves liable to relieve the defendants in error of any excess of cotton purchased by their factors, in pursuance of the first-mentioned message, no reason is perceived why the company is not equally bound to relieve them of all loss or obligation by them incurred on account of the accustomed and reasonable commission of their factors, charged for effecting the purchase. And upon the supposition, therefore, that Smith & Co. would have been bound to accept, in behalf of their principals, an offer by the company, or an agent of the company, to pay all the costs and the charges of the purchase of such excess, including the commissions aforesaid, on receiving such excess, or else release the company from any responsibility the said company were under to the defendants in error having transmitted a wrong message, they were not bound to accept any offer of the kind which did not include the commissions aforesaid.

"In respect to the rulings of the Circuit Court, in refusing to give the third instruction asked by the plaintiffs in error, and in giving the instruction which it did give, it was, I think, the duty of the defendants in error, as soon as they were apprised of the mistake or alteration in their message, and of the purchase by their factors of two thousand and seventy-eight bales of cotton, if they intended to hold the company responsible for the excess of the cotton over the five hundred bales, to have notified the company of such intention; to have made a tender of such excess to the company, on the condition of its paying the price and all the charges

their paying the plaintiffs the amount of loss sustained by reason of the purchase; and, upon the failure of

incident to the purchase, and to have also further notified the company, that, in case of its refusal to accept such tender and comply with its conditions, they would proceed to sell such excess at Mobile, and, after crediting the company with the net proceeds, would look to it for the difference between the amount of such proceeds and the costs of the excess, including all proper charges; and, on the failure of the company, after notice, to accede to their offer, they ought to have proceeded to act accordingly.

"I do not think that the duty of the defendants in error, upon such failure of the company, in respect to the disposition of the five hundred bales of the excess, — two hundred and eighty-four bales of which the testimony tends to show were on shipboard, and two hundred and sixteen under a contract of affreightment, — varied substantially from their duty in this regard respecting the one thousand and seventy-eight bales which they proceeded to sell at Mobile. The principles and rules regulating this subject required, as I conceive, a sale of said five hundred bales also, at the nearest market (Mobile), to be taken by the purchaser or purchasers as it stood; namely, two hundred and eighty-four bales on shipboard, and two hundred and sixteen bales as under contract of affreightment.

"The defendants in error had no right to subject the company to the hazards attendant upon sending the cotton to a foreign market. The loss (if any) which they had incurred on the said five hundred bales at the time of the refusal of the company to relieve them of the excess of the cotton purchased, was the difference between the cost, including all proper charges, and its then present value.

"Notwithstanding the refusal of the company to relieve them of the excess, or to have any thing to do with it, they had no right to subject the company to the hazards of any greater loss. These views are, I think, fully sustained by the principles to be deduced from the cases of Sands & Crump *v.* Taylor & Lovett, 5 John. 395; Cornwal *v.* Wilson, 1 Vesey, Sen. 509; Kemp *v.* Pryor, 7 Ves. 237; Chapman *v.* Morton, 11 Mees. & Wels. 533; and the doctrines on the subject stated in Paley on Agency, c. 1, sec. 7. The only doubt on the subject arising from the consideration of these authorities is, whether the defendants in error, notwithstanding their notice to the company of their purpose to send on the five hundred bales, and hold it responsible for the loss that might arise, and the company's refusal to take it off their hands, have not, by sending the cotton to Liverpool, instead of selling it at Mobile, lost all right to recover from the company for loss which might have been sustained on the said five hundred bales, in case it had been sold in Mobile. I do not think, however, if the defendants in error sent on the cotton with the intention not of taking to themselves the profits which might arise from a sale of the said five hundred

the company to accept the offer, the plaintiffs may proceed to sell, and hold the company liable for the bales in Liverpool, but of indemnifying themselves out of the proceeds of the sale to the extent of the costs of, and obligations incurred by, them by the purchase, they thereby, in the event of a still greater loss growing out of sending the cotton to Liverpool, lost any right they may have had to recover of the company for the loss that would have been sustained, had the cotton been sold at Mobile, on the refusal of the company to relieve them of the excess.

"On the other hand, if the defendants in error sent the five hundred bales aforesaid to Liverpool, for the purpose of speculation, with the intention of taking to themselves the profit, in the event of a profit, and, in the event of a loss, of visiting the loss on the company, the case in respect to said five hundred bales would, I think, be different. They could not claim all the benefits of a complete ownership of the property, and, in case of a loss, demand of the company to make good the loss. Parties thus situated, if they do not abandon the property, cannot, in case they mean to sue for damages, go further in dealing with the property retained by them, than to look to it in the nature of a pledge, which may be sold for their indemnity. And it seems to me, therefore, that the purposes and objects of the defendants in error, in forwarding the five hundred bales to Liverpool, were a matter proper to be submitted to the jury for their consideration, in passing upon the damages in respect of the five hundred bales. Whilst, therefore, I think that the Circuit Court did right in refusing to give the third instruction prayed for by the company, as asked, I think it ought, in lieu of said instruction, to have modified the instructions which it did give, in accordance with the foregoing views."

There is a case pending in the Supreme Court of New York, which presents some of the questions considered in the above case. It is the case of Smith & Randolph *v.* The Independent Line of Telegraph. The message delivered for transmission was as follows: —

"Philadelphia, March 15, 1864.

"To Drexel, Winthrop, & Co.

"If the gold bill is vetoed, buy immediately one hundred thousand.

"Smith & Randolph."

The message actually transmitted and delivered was, —

"Philadelphia, March 15, 1864.

"To Drexel, Winthrop, & Co.

"Gold bill is vetoed; buy immediately one hundred thousand.

"Smith & Randolph."

The complaint stated that Drexel, Winthrop, & Co., immediately upon receipt of this message, purchased one hundred thousand dollars of gold

difference between the price at which the article was purchased and the price at which it sold, including all costs and charges attending the purchase, custody, and sale of the article.

§ 413. In all cases where the right of action is based upon the negligence of the telegraph company, it is important to consider whether there has been any co-operating negligence on the part of the plain-

coin for one hundred and sixty-two thousand two hundred and twenty-five dollars, and that their commissions for purchasing were one hundred and twenty-five dollars; and notified the plaintiffs thereof by telegraph. The plaintiffs, upon the receipt of this message, discovering the error committed by the company, sent the following despatch immediately: —

"Philadelphia, March 15, 1864.

"Don't buy any more. You had better sell the hundred thousand out at once. The company has made the mistake. See the manager.

"SMITH & RANDOLPH."

Upon the receipt of this message, Drexel, Winthrop, & Co. at once sold the gold for one hundred and sixty thousand five hundred and sixty-two dollars, exclusive of commissions for making the sale.

The case was tried before the court without a jury, and the finding was in accordance with this statement. It was found that the gold was bought at the market price, and sold at the highest price that could be obtained.

The Court decided that Drexel, Winthrop, & Co., who were brokers, were entitled to the commissions, which sum, with the difference in interest, on amount of sales, should be deducted from the gross proceeds of the sale; and that the plaintiffs, by reason of the neglectful and careless acts of the defendants, sustained damage to the amount of two thousand four hundred and eighty-eight dollars; and gave judgment accordingly. The appeal was taken to the General Term, where the case is pending.

One of the questions presented in defence was, that if the gold was in fact purchased in reliance upon the erroneous message, and was in the plaintiffs' hands when the error was discovered, it was the duty of the plaintiffs, before selling, to inform the defendants of the error and the purchase, and give the defendants an opportunity to take the gold; and that in selling the gold without such notice, they deprived the defendants of the right to assume the purchase, and indemnify the plaintiffs, and thereby ratified the erroneous message, and lost their right of action against the defendants.

tiff, as, in such case, no recovery can be had. If it be shown that the injury complained of so far arose from the negligence of the plaintiff himself, as that, by the exercise of ordinary care and caution, it could have been avoided, this will be a good defence.

But it is essential to the operation of this principle that the conduct of the plaintiff substantially contributed to the injury complained of.[1]

If his conduct did, however, augment the injury, then the law is inadequate to apportion the wrong, and there can be no recovery.[2]

§ 414. This principle was urged in defence in the case of De Rutte *v.* New York, Albany, & Buffalo Telegraph Company; which was an action against the telegraph company for negligence, there being a mistake in the transmission of the message.

The message delivered for transmission was, —

"Buy for Callarden & Bourdette, bankers, a ship-load of five to six hundred tons white wheat, first quality; extreme limit twenty-two francs the hectolitre, landed at Bordeaux; same conditions as the Monod contract. TH. DE RUTTE."

When the message was delivered to the person to whom it was addressed, *Th. De Rutte* was changed to *Thos. De Rutte; Monod contract* to *monied contract;* and *hectolitre* to *pretorlitiere*, and *twenty-two francs* to *twenty-five francs*. The plaintiff (who was the receiver of the message), however, was not misled by any of these mistakes except the last. The words *twenty-five francs* he assumed to be correct; but before acting upon it he tried to get a copy of it at

[1] Sills *v.* Brown, 9 Carr. & Payne, 601.

[2] Sedgwick on Damages, pp. 495, 496.

the delivery office, but was informed that it could not be furnished him.

It was insisted for the company, that the plaintiff was himself at fault in not having the message repeated. But the Court say, "The change from *Th.* to *Thos.* was a very natural one; the mistake in the French word was one that might ordinarily occur, and the transformation of *Monod* (to the operator an unmeaning word) into *monied* was one of those slips or mistakes which might readily have been made. That they were so is apparent in the fact that he at once discovered them; and I think it does not follow because he discovered mistakes like these, that he was bound to regard the whole message as unreliable, and have it repeated at an expense of some fifty dollars. The words *twenty-five* were intelligible and plain. They expressed the very price at which wheat was then ranging in San Francisco, and it was very natural for him to suppose that they had been transmitted correctly. To hold that he was guilty of negligence because he assumed that the message was correct in this particular, would be to declare that no man must act upon one in which he discovers a few trivial mistakes, but which is otherwise perfectly intelligible, except at his peril. I do not profess to have much information upon the subject, but I apprehend that it is a matter of common and every-day experience for messages to be received with words misspelt or otherwise altered, without affecting their general sense, but with which they are perfectly intelligible; which the party receiving would have to disregard, or get repeated to be made secure

in acting upon them, if the courts were to recognize such a rule as the defendants insist upon."

§ 415. But it may require further adjudication to settle this question definitely. On the one hand it may be asked, what right have the company to say that the unreliability of their medium of communication shall authorize them to repel every person who does not take it for granted that every message he receives over their lines is incorrect, and to require him to pay them for ascertaining whether it is or is not so?

On the other hand it may be said, th t these infirmities in telegraphing, and which are inherent in the very nature of the agencies employed to transmit the message, are well known to all; and that the office of the company being open to the receiver of the message to have it repeated, and, if it be so, that by having it repeated the mistake or other error may be corrected, with but little loss of time, and the very message delivered for transmission be thereby received,—should not the receiver of the message, who failed to avail himself of these facilities, be considered as guilty of such negligence as would substantially contribute to the injury?

§ 416. After all, this will probably be held to be a question of fact, to be considered by the jury under all the circumstances of the case, and to be very much influenced by the consideration, as to how far the fact of having the message repeated would enable the plaintiff to know whether or not the message had been correctly transmitted.[1]

[1] In the late case of Ellis *v.* The American Teleg. Co. 13 Allen, 226,

§ 417. The cases which we have been considering, in which the measure of damages was discussed, have been cases where the message was evidence of a contract between the sender and receiver; or where it contained some order or instruction from the principal to the agent in which pecuniary interests were involved.

But there are many instances in which the message is merely the instrument of friendly communication between the parties, in conveying expressions of regard, or imparting important information of a private and social or domestic character. In such cases, if the telegraph company fails in its obligations as to the prompt and correct transmission of the message, the measure of damages would be limited to the cost of the transmission, if the action were *ex contractu*.

§ 418. But if the action be for the tort, and the message in question was one of importance to the person

it is said, "If a message be received by a telegraph company for transmission from one point to another in this Commonwealth, written upon a blank which contains, as a part of the terms and conditions upon which all messages are received by them for transmission, a statement that every important message should 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, for which repetition half the usual price will be charged, and that they will not be responsible for any error in the transmission of any unrepeated message beyond the amount paid for sending the same, unless a special agreement for insuring the same be made in writing; and if an error occurs in transmitting the same, and the same is not asked to be repeated, and the message so erroneously transmitted is written upon a blank containing the same terms and conditions above referred to, and in that form is delivered to the person to whom it is addressed, — such person so receiving the same cannot maintain an action against the company, to recover greater damages than the amount paid for sending the same, without some further proof of carelessness or negligence on their part than that resulting simply from the error."

to whom it was addressed, and in the information it conveyed affecting the feelings of the parties, — as is frequently the case, imparting joy or grief, or causing hope or disappointments, — in all such cases, if there was such gross negligence on the part of the agents of the company as to indicate a want of good faith, or wantonness or reckless indifference or malicious purpose, in connection with its transmission and delivery, then we should say, that the damages the party suing the company would be entitled to recover would be in their nature vindictive or exemplary, and largely in the discretion of the jury.

In such cases, the damages are given more to punish the offender than to recompense the party injured.

CHAPTER IX.

PENALTIES AND INDICTMENT BY STATUTE IN RELATION TO MESSAGES.

§ 419. By the statutes of several of the American States, penalties are imposed upon telegraph companies for failure in the discharge of many of the duties resting upon them in respect to the transmission and delivery of messages; as, for example, in respect to failure to transmit the message with impartiality and good faith; failure to send the message in the order of time in which it is received for transmission; disclosure of the contents of messages by the agents and servants of the company; failure to transmit and deliver the message, etc.

§ 420. In other States many of these violations of statutory duty are made criminal, and punished with fine and imprisonment.[1]

§ 421. The statutes which impose penalties are substantially as follows: It shall be the duty of the individual or association owning the telegraph line, to receive messages from and for other telegraph lines and associations and individuals, and, on the payment of their customary charges as established by their rules and regulations, to transmit the same with impartiality and good faith, under a penalty for failure

[1] See infra, 435–446.

in the discharge of this duty, to be recovered with costs in the name and for the benefit of the person sending, or proposing to send, the message.

There is a similar provision imposing a penalty for failure to transmit messages in the order in which they are received, the penalty to be recovered by the person whose message is postponed out of its order; but with the proviso that an arrangement may be made with the proprietors and publishers of newspapers for the transmission, for the purpose of publication, of intelligence of a general and public interest, out of its order.

§ 422. Such are the provisions in Maryland, Virginia, Ohio, Missouri, Indiana, Michigan, Connecticut and California.[1]

§ 423. In Pennsylvania, a penalty is imposed for sending messages out of their order, but not for want of impartiality and good faith.[2]

§ 424. In the State of Missouri a penalty is imposed for disclosing the contents of messages transmitted by the company. It provides that the company or association shall be liable in a penalty of fifty dol-

[1] Laws of Maryland, Code of 1860, art. 26, §§ 117, 118. Appendix R.
Statutes of Virginia, May 26, 1852, General Acts, c. 149, § 10. Act of February 15, 1866, § 48. Appendix KK.
Statutes of Ohio, Act of March 31, 1865, §§ 8, 9. Appendix CC.
Revised Statutes of Missouri, c. 156, § 5. Appendix W.
Statutes of Indiana, Revision of 1860, c. 179, § 1. Appendix L.
Compiled Laws of Michigan, Compilation of 1857, c. 70, §§ 2062, 2063. Appendix T.
General Laws of Connecticut, Revision of 1866, tit. 7, c. 7, §§ 572, 573. Appendix G.
California statute of May 14, 1861, § 6; Act of April 4, 1861, § 5. Appendix F.

[2] Purdon's Digest, 1861, title Telegraphs, § 1. Appendix EE.

lars "for the disclosure of any of the contents of any private despatch to any person other than to him to whom it is addressed, or his agent."[1] In most of the other States that have provisions on this subject, the offence is made criminal.

§ 425. By the statutes of Ohio and Virginia, a penalty is imposed for failure to deliver messages.[2]

§ 426. In Ohio it is provided that when the sender desires to have it forwarded over the lines of other telegraph companies whose termini are respectively within the limits of the usual delivery of such companies to the place of final destination, and shall tender to the first company the charges for transmission to the place of destination, the company shall receive the message, and deliver to connecting company, after transmitting over its own line, and shall pay the necessary charges to the succeeding company; and it shall be the duty of this connecting company to receive and transmit the same, as if they had been applied to by the sender in the first instance; and a penalty is imposed for failure, against either company who violates the requirement.

§ 427. There is another important provision in this statute, to the effect that when application is made to the telegraph company to transmit the message, it shall be the duty of the officer or agent appointed by the company to receive despatches "plainly to inform the applicant, and, if required by him, to write upon the despatch, that the line is not in working order, or

[1] Revised Statutes of Missouri, c. 156, § 6. Appendix W.

[2] Statutes of Ohio, March, 31, 1865, § 9. Appendix CC.
Virginia Act of Feb. 21, 1866, § 2. Appendix KK.

that the despatches already on hand for transmission will occupy the time so that the despatch offered cannot be transmitted within the time required, if the facts be so;" and for failure to do so, or for giving false information in regard thereto, the officer or agent, and also the company, shall incur the penalty.[1]

§ 428. In Maine, a penalty is imposed upon the operator or agent who designedly falsifies a despatch for any purpose; and in case of his inability to pay the judgment recovered upon the penalty, the company shall "forfeit the same sum."[2]

§ 429. All messages were formerly required to be stamped, by Act of the Congress of the United States; and where this was not done, the company incurred a penalty. It was provided by this act, that "no telegraph company, or its agent or employé, shall receive from any person, or transmit to any person, any despatch or message, without an adhesive stamp denoting the duty imposed by this act being affixed to a copy thereof, or having the same stamped thereupon; and in default thereof shall incur a penalty of ten dollars; *provided*, that only one stamp shall be required, whether sent through one or more companies.[3]

[1] Act of March 31, 1865, § 8. Appendix D.

[2] Revised Statutes of Maine, 1857, c. 53, § 2. Appendix Q.

[3] Thirty-Seventh Congress, Sess. 2, (1862), c. 119, § 104, Schedule B., Stamp Duties. Any despatch or message, the charge for which for the first ten words does not exceed twenty cents, one cent. When it exceeds twenty cents, three cents. Appendix D.

We extract the following from "Boutwell's Direct and Excise Tax System of the United States," 1863: —

"No. 30. Messages transmitted by telegraph and railroad companies,

The mode of taxation has been changed under the Internal Revenue laws.

§ 430. By the Canada statute,[1] a penalty is imposed upon the individual or company owning any telegraph line, for failure to transmit all messages in the order in which they are received.

There is no provision in this statute making an ex-

over their own wires, on their own business, for which they receive no pay, are not taxable.

"Telegraph despatches must be stamped, and the stamp cancelled, before the same are received for transmission.

"No. 44. Telegraphic despatches or messages sent from an office without the United States, to an office within the United States, are not subject to stamp tax; provided the message be transmitted direct to its final destination.

"If received at an office within the United States, and repeated to another office within or without the United States, the stamp must be affixed and cancelled when the message is repeated.

"It is illegal for telegraph operators to receive unstamped messages from the writers. It is the duty of the writer to affix and cancel the stamp; and the company or its agents, receiving or transmitting an unstamped message, is liable to a penalty of ten dollars."

Rulings, No. 269.

"Telegraph messages forwarded free of charge by railroad or express companies, or which are paid for in kind, must have stamps attached to them.

"Messages forwarded in the same manner for corporations or individuals, treated as free messages in their transmission, but paid for quarterly or yearly, must have stamps attached.

"Messages of a railroad company require to be stamped when going over a line which they do not own, and work exclusively for railroad purposes, although the stock of the telegraph line over which their messages pass, may be partly or chiefly owned by the railroad company."

Only such messages as are covered by the following are entitled to exemption as "free messages:" —

"Messages transmitted by telegraph and railroad companies over their own wires, on their own business, for which they receive no pay, do not require stamps. A receipt for the message is not subject to the stamp duty." Modified so that stamps are not required.

[1] Consolidated Statutes of Canada, c. 67, § 14. Appendix B.

ception in favor of the transmission of intelligence of a public and general character, with a view to its publication, as in the statutes of the different States of the Union, to which we have adverted.

§ 431. Where a specific penalty is given to the party by statute, no more than the penalty can be recovered,[1] unless the statute authorizes the recovery of damages for the act in addition.

§ 432. All penal statutes must be strictly construed; and where the statute authorizes the recovery "in the name and for the benefit of the person or persons sending or desiring to send such despatches," the person entitled to recover the penalty is the party who contracts, or offers to contract, for the transmission of the message. He may contract by his agent or servant; but when the contract is made by a party as agent of another, in order to enable the principal to recover, the fact of agency must be shown.

This question was presented upon the California statute, which imposes a penalty upon the company for failure to transmit messages with impartiality and good faith, in the case of Thurn *v.* The Alta California Telegraph Company.[2]

[1] Couch *v.* Steel, 3 Ellis & Blackburn, 412.

[2] 15 California R. 472.

The section upon which the action was predicated is as follows: —

"It shall be the duty of the owner, or the association owning any telegraph line, doing business within the State, to receive despatches from and for other telegraph lines and associations, and from and for every individual; and on payment of their usual charges for individuals for transmitting despatches, as established by the rules and regulations of such telegraph lines, to transmit the same with impartiality and good faith; and shall not disclose any communication transmitted on said line or lines, directed to a third person, in a penalty of five hundred dollars for every neglect or refusal so to do, or confidential disclosure; to be recovered, with

From the case it appeared that the plaintiff went into the office of the California State Telegraph

the costs of suit, in the name and for the benefit of the person or persons sending, or desiring to send, such despatches."

The proof was as stated in the text.

Baldwin, J., who delivered the opinion of the Court, said, "The objection is made that the plaintiff had no authority to bring this suit. . . . It is evident that the person intended here is the party who contracts, or offers to contract, for the transmission of the despatch. He may, probably, do this by his agent or servant, but when the contract is made by a party as agent of another, in order to give a right of suit to the principal, the fact of agency must be shown. . . .

"We see nothing here to justify the inference that the State Telegraph Company were the agents of the plaintiff for the transmission of the message. That company seems to have been engaged in the same general business. That they were not able to send the message by a line of their own, makes little or nothing for the argument. It is not shown that this fact was known to the plaintiff, and if it were, it does not follow that the plaintiff may not have been willing to make this contract with the State Telegraph Company, trusting to its responsibility, and that it would make such a contract or take such steps as might be necessary to secure the object of sending the message. A man having no means of expressing matter may contract to express a package, and may receive payment for it, and expect to employ regular express agents to do the business; but this does not make him the agent of his customer to contract with the express company. He may, and the presumption is he does, contract on his own account. If the message had not been transmitted, Thurn might have held the State Telegraph Company responsible; but it does not follow that he could have changed the contract into an agency for him, and sued the defendant for failure to transmit the message.

"The application was not made in the name of Thurn, though it was his message that was to be sent; but a man may desire to send a message signed in the name of another, and to contract on his own account for sending it, as well as if the message were written in his own name, and contracted to be sent for his own benefit. There is no proof that the contract was made in the name of, or for the benefit of, or as agent for, Thurn; and if the doctrine of ratification applies in a penal proceeding of this sort, which is very doubtful, the facts do not authorize its application.

"We see nothing in the facts which make out more than a contract by the State Telegraph Company to send this message, or have it sent, for which contract it charged and received a certain compensation; and to

Company, in San Francisco, and delivered a message to be transmitted to Jackson, and paid for transmitting it to that place. There was no express agreement that the California State Telegraph Company should forward the message to Sacramento, its terminal office, and employ the Alta California Telegraph Company to transmit it from there to Jackson; but something was said at the time about its being sent by that line.

The Alta California Telegraph Company refused to transmit the message over their line, when the message together with the charges were tendered by the Calfornia State Telegraph Company.

Thurn brought the action to recover the penalty of five hundred dollars given by the statute.

§ 433. It was held, that, under the state of facts, Thurn was not the person making, or offering to make, the contract within the meaning of the act, and could not recover; that the only contract shown was a contract by the California State Telegraph Company to send the message or have it sent; and a contract on its part, to contract on its own account, with the Alta Telegraph Company to send the message.

§ 434. In a suit for the penalty, the burden of proof is upon the company to show that the failure to transmit the message in the regular order was because its line was employed in the transmission of

perform this contract, an offer on its part to contract, on its own account, with the Alta Telegraph Company, to send this message. This seems to have been so considered by the Alta Telegraph Company's agent at the time. We think, under this state of facts, the plaintiff here is not the person making, or offering to make, the contract within the meaning of the act."

that class of messages to which the statute allows a preference to be given.[1]

§ 435. Telegraph companies, and their agents and employés, are held responsible criminally, to a very large extent, by the statutes of the different States of the Union.

§ 436. The acts which are made crimes by statute are, in the main, disclosing the contents of messages; sending false or forged messages; wilfully altering messages; appropriating the information contained in messages, and trading or speculating upon the same; neglecting to transmit and deliver messages; and refusing to transmit and deliver; and for failing to send in the regular order.

§ 437. There are also, in some of the States, certain acts of third persons unconnected with telegraph companies, which are made criminal offences: as opening sealed envelopes containing telegraphic messages, for the purpose of learning the contents of the messages; fraudulently personating the person to whom the message is addressed, and, by so doing, procuring the delivery of the message to himself, with intent to use, destroy, or detain the same; wilfully and fraudulently, reading, or attempting to read, any message, or to learn the contents thereof, whilst the same is on its transit, by means of any machine, instrument, or contrivance, or in any other manner; or wilfully and clandestinely learning, or attempting to learn, the contents of messages while in the office; and for attempting to communicate information so obtained to others; for inducing operator to disclose contents of messages

[1] Western Union Telegraph Co. *v.* Ward, 23 Indiana R. 377.

by payment of, or promising to pay, any reward or inducement.

§ 438. We will now refer to the statutes of the different States upon this subject.

The wilful disclosure of the contents of messages by the operator or other servant of the company is made a misdemeanor punishable with fine and imprisonment of the person committing the offence, in most of the States which have statutes on the subject of telegraphs.

Such is the law in Pennsylvania, New York, Ohio, New Jersey, Maryland, Virginia, Michigan, Iowa, Illinois, Wisconsin, Oregon, California, Minnesota, and Nevada.[1]

§ 439. By the statutes of Pennsylvania, Iowa, Illi-

[1] There is a similar provision in the Canada statute. Consolidated Statutes, c. 67, § 16. Appendix B.

Purdon's Digest of Pennsylvania Laws, 1861 (see also Digest of 1857), title, Crimes, E, § 80. Appendix EE.

Revised Statutes of New York. ed. of 1859, c. 18, title 17, § 13. Appendix AA.

Ohio Statute of March 31, 1865, § 10. Appendix CC.

Laws of New Jersey, Nixon's Digest, 1861, Telegraphs, § 11. Appendix Z.

Public General Laws of Maryland, Code of 1860, art. 26, Corporations, § 120. Appendix R.

Virginia General Acts, c. 149 (statute of May 26, 1852), § 12. Appendix KK.

Michigan (Laws of 1853, p. 112, c. 187, § 1) Compilation of 1857, § 5912. Appendix T.

Laws of Iowa, Revision of 1860, c. 56, § 1352. Appendix M.

Illinois Statutes, Revision of 1858 (Sess. Laws of Feb. 9, 1849, p. 188, § 11). Appendix K.

Revised Statutes of Wisconsin, 1858, c. 76, § 19. Appendix LL.

Laws of Oregon, Compilation of 1866, c. 54, § 8. Appendix DD.

California Act of April 18, 1862, § 1. Appendix F.

General Laws of Minnesota, 1860, c. 12, § 3. Appendix U.

Laws of Nev a, c. 23 (Act of Nov. 25, 1861), § 1. Appendix X.

nois, California. and Oregon, it is made a misdemeanor punishable with fine and imprisonment, in any agent or operator of a telegraph company to knowingly send by telegraph any false or forged message, with intent to deceive, injure, or defraud any person or corporation; and if any other person shall furnish to such agent or operator to be so sent, such a message, and with such intention, such person shall be guilty of a misdemeanor punishable with fine and imprisonment.[1]

§ 440. By the statutes of California and Nevada, it is made a misdemeanor, punishable with fine and imprisonment, for the operator or agent of the company, or any other person, to wilfully change a message by adding to or omitting from the same any word, so as to materially alter the sense, to the injury of the person sending or receiving the same.[2]

§ 441. The statute of Oregon provides that if the operator or other agent of the company "shall designedly alter or falsify" the message, "for any purpose whatever," he shall be liable to indictment, etc.[3]

§ 442. It is made a misdemeanor by the statutes of

[1] Purdon's Digest, Penn. Laws, 1861, Crimes, E, § 185. Appendix EE.

Laws of Iowa, Revision of 1860, Telegraphs, c. 56, § 1352. Appendix M.

Public Laws of Illinois, Telegraph Despatches (Act Feb. 21, 1861), § 1. Appendix K.

California Act, April 18, 1862, § 2. Appendix F.

Laws of Oregon, Compilation of 1866, c. 54, § 9. Appendix DD.

[2] Statutes of California, c. 262 (Act of April 18, 1862), § 1. Appendix F.

Laws of Nevada, c. 23 (Act of Nov. 25, 1861), § 1. Appendix X.

[3] Laws of Oregon, Compilation of 1866, c. 54, § 6. Appendix DD.

California, Oregon, and Nevada, for the operator or other agent of the company to use, or in any way appropriate, any information derived from private messages, or to trade or speculate upon any such information, or in any other manner turn, or attempt to turn, the same to his own profit and advantage.[1]

§ 443. It is made a misdemeanor by the statutes of New York, Maryland, Michigan, California, and Oregon, for the operator or other agent of the telegraph company to wilfully neglect or refuse to transmit and deliver the message.[2]

§ 444. For unreasonable refusal or wilful neglect, upon the part of the operator or other agent, to send the message in its regular order, he is guilty of a misdemeanor and subject to fine and imprisonment by the statutes of California, Illinois, Oregon, and Nevada.[3]

§ 445. It is also made a misdemeanor in California, Oregon, and Nevada, for any person unconnected with the telegraph company to wilfully and unlawfully open any sealed envelope inclosing a message, for

[1] Statutes of California, c. 262 (Act April 28, 1862), § 3. Appendix F.

Laws of Oregon, Compilation of 1866, c. 54, § 10. Appendix DD.

Laws of Nevada, c. 23 (Act Nov. 25, 1861), § 3. Appendix X.

[2] Statutes of California, c. 262 (April 18, 1862), § 4. Appendix F.

Revised Statutes of New York, edition of 1859, c. 18, title 17, § 13. Appendix AA.

Maryland Code of 1860, art. 26, § 120. Appendix R.

Compiled Laws of Michigan, Compilation of 1857, c. 70, § 5915. Appendix T.

Laws of Oregon, Compilation of 1866, c. 54, § 6. Appendix DD.

[3] Statutes of California, c. 262 (April 18, 1862), § 4. Appendix F.

Laws of Oregon, Compilation of 1866, c. 54, § 11. Appendix DD.

Laws of Nevada, c. 23 (Act Nov. 21, 1861), § 4. Appendix X.

Illinois Session Laws (Feb. 9, 1849), p. 188, § 11. Appendix K.

the purpose of learning its contents; or to fraudulently personate the individual to whom the message is addressed, with intent to use, destroy, or detain the same from the person entitled to receive it; and, in addition to the fine and imprisonment, such person is liable in treble damages to the party injured.

§ 446. It is also made a misdemeanor by these statutes, for a person unconnected with the company to wilfully and fraudulently read a message as it is passing over the wires; or to wilfully or fraudulently or clandestinely learn, or attempt to learn, the contents or meaning of a message while it is in the office of the company; or by the payment or promise of any bribe, inducement, or reward, to the operator or other agent, to procure, or attempt to procure the disclosure of the contents of any private message; or to use, or attempt to use the information so obtained.[1]

[1] Statutes of California (April 18, 1862), c. 266, §§ 5, 6, 7. Appendix F.

Laws of Oregon, Compilation of 1866, c. 54, §§ 12, 13, 14. Appendix DD.

Laws of Nevada, c. 23 (Act of Nov. 25, 1861), §§ 5, 6, 7. Appendix X.

or to fraudu-
n the message
, or detain the
ve it; and, in
such person is
jured.
eanor by these
h the company
iessage as it is
or fraudulently
learn, the con-
t is in the office
or promise of
the operator or
procure the dis-
message; or to
so obtained.[1]

66, §§ 5, 6, 7. Ap-

12, 13, 14. Appen-

1), §§ 5, 6, 7. Ap-

APPENDIX.

APPENDIX.

A.

ENGLAND.

ANNO VICESIMO SEXTO & VICESIMO SEPTIMO VICTORIÆ REGINÆ.

C A P. CXII.

An Act to regulate the Exercise of Powers under Special Acts for the Construction and Maintenance of Telegraphs.

[28th *July*, 1863.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

1. This Act may be cited as The Telegraph Act, 1863.

2. This Act shall apply —

(1.) To every Company to be hereafter authorized by Special Act of Parliament to construct and maintain Telegraphs:

(2.) To every Company so authorized before the passing of this Act by any such Special Act, notwithstanding anything in any such Special Act contained, — but so that, except as herein-after expressly provided, nothing in this Act shall give to any Owner, Lessee, or Occupier of Land, or

other Person, or to any Body, as against any such Company as last aforesaid, in respect of anything lawfully done before the passing of this Act by such Company under any such Special Act, any further or other Right, Power, Jurisdiction, Authority, or Remedy, than he or they would have had if this Act had not been passed: Provided also, that nothing in this Act shall interfere with the Maintenance or Repair, under any such Special Act, of any Work lawfully constructed before the passing of this Act by any such Company under any such Special Act, or with the increasing of the Number of the Wires forming Part of any such Work; and that nothing in this Act shall relieve any such Company from any Obligation or Liability under any Agreement made before the passing of this Act, or shall make lawful any Work constructed by the Company before the passing of this Act which is the Subject of any Proceedings at Law or in Equity pending at the passing of this Act, or which has been constructed without such Consent as was required for the Construction thereof before the passing of this Act.

3. In this Act—

The Term "the Company" means any Company to be hereafter authorized as aforesaid (herein-after distinguished by the Term "future Company"), or any Company already so authorized (herein-after distinguished by the Term "existing Company"):

The Term "Telegraph" means a Wire or Wires used for the Purpose of Telegraphic Communication, with any Casing, Coating, Tube, or Pipe inclosing the same, and any Apparatus connected therewith for the Purpose of Telegraphic Communication:

The Term "Post" means a Post, Pole, Standard, Stay, Strut, or other aboveground Contrivance for carrying, suspending, or supporting a Telegraph:

The Term "Work" includes Telegraphs and Posts:

The Term "Street" means a public Way situate within a City, Town, or Village, or between Lands continuously built upon on either Side, and repaired at the public Expense, or at the Expense of any Turnpike or other public Trust, or *ratione*

tenuræ, including the Footpaths of such Way, and any Bridge forming Part thereof:

The Term "public Road" means a public Highway for Carriages being repaired at the public Expense, or at the Expense of any Turnpike or other public Trust, or *ratione tenuræ*, and not being a Street, including the Footpaths of such public Highway, and any Bridge forming Part thereof, and also any Land by the Side and forming Part of such a public Highway, but not including a Railway or Canal:

The Term "Railway" includes any Station, Work, or Building connected with a Railway:

The Term "Canal" includes Navigation or navigable River, and any Dock, Basin, Towing-path, Wharf, Work, or Building connected with a Canal:

The Term "Land" means Land not being a Street or public Road, and not being Land by the Side and forming Part of a public Road, and includes Land laid out for and proposed by the Owner to be converted into a Street or public Road:

The Term "Body" includes a Body of Trustees or Commissioners, Municipal Corporation, Grand Jury, Board, Vestry, Company, or Society, whether incorporated or not; and any Provision referring to a Body applies to a Person, as the Case may require:

The Term "Person" includes Corporation Aggregate or Sole:

The Term "the Board of Trade" means the Lords of the Committee of Her Majesty's Privy Council for the Time being appointed for the Consideration of Matters relating to Trade and Foreign Plantations:

The Term "Justice" means Justice of the Peace acting for the Place where the Matter requiring the Cognizance of any such Justice arises:

The Term "Two Justices" means Two or more Justices met and acting together, or any One Police Magistrate or Justice having by Law Authority to act alone for any Purpose with the Powers of Two Justices:

The Term "Sheriff" means the Sheriff Depute of the County or Ward of a County in *Scotland*, and the Steward Depute of the Stewartry in *Scotland*, in which the Matter submitted to the Cognizance of the Sheriff arises, and includes the Substitutes of such Sheriff Depute and Steward Depute respectively.

4. The Provisions of The Railway Clauses Consolidation Act, 1845, with respect to the Recovery of Damages not specially provided for, and of Penalties, and to the Determination of any other Matter referred to Justices, and the Provisions of The Railway Clauses Consolidation (*Scotland*) Act, 1845, with respect to the Recovery of Damages not specially provided for, and to the Determination of any other Matter referred to the Sheriff, or to Justices, shall, so far as the same are applicable, and save so far as the same are inconsistent with any express Provision of this Act, be incorporated with this Act; and Terms used in those Provisions shall be interpreted as the same Terms are directed to be interpreted in this Act.

5. The following Provisions shall apply to Notices and Consents under this Act:

(1.) Every Notice or Consent shall be in Writing or Print, or partly in Writing and partly in Print:

(2.) Any Notice to or by the Company or a Body having the Control of a Street or public Road, or of the Sewerage or Drainage thereunder, may be given to or by the Secretary, Clerk, or Surveyor, or other like Officer (if any) of the Company or of such Body, as the Case may be:

(3.) Any Consent may be given on such pecuniary or other Terms or Conditions (being in themselves lawful), or subject to such Stipulations as to the Time or Mode of Execution of any Work, or as to the Removal or Alteration, in any Event, of any Work, or as to any other thing connected with or relative to any Work, as the Person or Body giving Consent thinks fit.

General Powers of Company.

6. Subject to the Restrictions and Provisions herein-after contained, the Company may execute Works as follows:

(1.) They may place and maintain a Telegraph under any Street or public Road, and may alter or remove the same:

(2.) They may place and maintain a Telegraph over, along, or across any Street or public Road, and place and maintain Posts in or upon any Street or public Road, and may alter or remove the same:

(3.) They may, for the Purposes aforesaid, open or break up any Street or public Road, and alter the Position thereunder of any Pipe (not being a Main) for the Supply of Water or Gas:

(4.) They may place and maintain a Telegraph and Posts under, in, upon, over, along, or across any Land or Building, or any Railway or Canal, or any Estuary or Branch of the Sea, or the Shore or Bed of any Tidal Water, and may alter or remove the same:

Provided always, that the Company shall not be deemed to acquire any Right other than that of User only in the Soil of any Street or public Road under, in, upon, over, along, or across which they place any Work.

7. In the Exercise of the Powers given by the last foregoing Section the Company shall do as little damage as may be, and shall make full Compensation to all Bodies and Persons interested for all Damage sustained by them by reason or in consequence of the Exercise of such Powers, the Amount and Application of such Compensation to be determined in manner provided by The Lands Clauses Consolidation Act, 1845, and The Lands Clauses Consolidation (*Scotland*) Act, 1845, respectively, and any Act amending those Acts, for the Determination of the Amount and Application of Compensation for Lands taken or injuriously affected.

8. In the Exercise of the aforesaid Powers, the Company shall also be subject to the following Restrictions:

(1.) They shall cause as little Detriment or Inconvenience as Circumstances admit to the Body or Person to or by whom any Pipe for the Supply of Water or Gas belongs or is used:

(2.) Before they alter the Position of any such Pipe they shall give to the Body to whom the same belongs Notice of their Intention to do so, specifying the Time at which they will begin to do so, such Notice to be given Twenty-four Hours at least before the Commencement of the Work for effecting such Alteration:

(3.) The Company shall not execute such Work except under the Superintendence of the Body to whom such Pipe belongs, unless such Body refuses or neglects to give such

Superintendence at the Time specified in the Notice for the Commencement of the Work, or discontinues the same during the Work; and the Company shall execute such Work to the reasonable Satisfaction of such Body:

(4.) The Company shall pay all reasonable Expenses to which such Body may be put on account of such Superintendence:

And the Body to whom any such Pipe belongs may, when and as Occasion requires, alter the Position of any Work of the Company already constructed, or to be hereafter constructed, under, in, or upon a Street or public Road, on the same Conditions as are by the last foregoing and present Sections imposed on the Company in relation to such a Body, *mutatis mutandis*.

Restrictions as to Telegraphs under Streets and public Roads.

9. The Company shall not place a Telegraph under any Street within the Limits of the District over which the Authority of the Metropolitan Board of Works extends, or of any City or Municipal Borough or Town Corporate, or of any Town having a Population of Thirty thousand Inhabitants or upwards (according to the latest Census), except with the Consent of the Bodies having the Control of the Streets within such respective Limits.

10. Where the Company has obtained Consent to the placing, or by virtue of the Powers of the Company under this Act intends to proceed with the placing, of a Telegraph under a Street or public Road, the Depth, Course, and Position at and in which the same is to be placed shall be settled between the Company and the following Bodies:

The Body having the Control of the Street or public Road:

The Body having the Control of the Sewerage or Drainage thereunder:

But if such Settlement is not come to with any such Body, the following Provisions shall take effect:

(1.) The Company may give to such Body a Notice specifying the Depth, Course, and Position which the Company desires:

(2.) If the Body to whom such Notice is given does not, within

Twenty-eight Days after the giving of such Notice, give to the Company a Counter-Notice objecting to the Proposal of the Company, and specifying the Depth, Course, and Position which such Body desires, they shall be deemed to have agreed to the Proposal of the Company:

(3.) In the event of ultimate Difference between the Company and such Body, the Depth, Course, and Position shall be determined in *England* or *Ireland* by Two Justices, and in *Scotland* by Two Justices or the Sheriff.

11. Every underground Tube or Pipe of the Company shall be so marked as to distinguish it from Tubes or Pipes of every other Company.

12. The Company shall not place a Telegraph over, along, or across a Street or public Road, or a Post in or upon a Street or public Road, except with the Consent of the Body having the Control of such Street or public Road; and where a public Road passes through or by the Side of any Park or Pleasure Grounds, and where a public Road crosses, by means of a Bridge or Viaduct, or abuts on any ornamental Water belonging to any Park or Pleasure Grounds, and where a public Road crosses or abuts on a private Drive through any Park or Pleasure Grounds, or to any Mansion, the Company shall not, without, or otherwise than in accordance with, the Consent of the Owner, Lessee, and Occupier of such Park, Pleasure Grounds, or Mansion, place any Work above Ground on such public Road.

13. Where any Landowner or other Person is liable for the Repair of any Street or public Road (notwithstanding that the same is dedicated to the Public), the Company shall not place any Work under, in, upon, over, along, or across such Street or public Road, except with the Consent of such Landowner or other Person, in addition to the Consent of the Body having the Control of such Street or public Road, where under this Act such last-mentioned Consent is required: Provided, that where the Company places a Telegraph across or over any Street or public Road they shall not place it so low as to stop, hinder, or interfere with the Passage for any Purpose whatsoever along the Street or public Road.

Removal of Works affecting Streets and public Roads.

14. In the following Cases —

(1.) If any Part of the Company's Works is abandoned, or suffered to fall into Decay;

(2.) If the Company is dissolved, or ceases for Six Months to carry on Business,

the Body having the Control of any Street or public Road, or the Owner of any Land or Building affected (in the former Case) by such Part of the Company's Works as aforesaid, or (in the latter Case) by any of the Company's Works, may give Notice to the Company, or leave a Notice at the last known Office or Place of Business of the Company, to the Effect that if such Works as are specified in the Notice are not removed within One Month after the Notice given or left, the same will be removed by the Body having such Control, or by such Owner; and in every such case, unless such Works are removed accordingly, the Body having such Control or such Owner may, without Prejudice to any Remedy against the Company, remove such Works, or any Part thereof, and sell the Materials thereof or of any Part thereof, and, out of the Proceeds of such Sale, reimburse themselves their Expenses relative to such Notice, Removal, and Sale, and consequent thereon (rendering the Overplus, if any, to the Company), and may recover any unpaid Residue of such Expenses from the Company. The present Section shall apply to an existing Company, in respect of any Work already constructed or to be hereafter constructed, as well as to a future Company.

15. In case the Body having the Control of any Street or public Road at any Time hereafter resolves to alter the Line or Level of any Portion of such Street or Road under, in, upon, over, along, or across which any Work of the Company constructed either before or after the passing of this Act is placed, the Company shall from Time to Time be bound, on receiving One Month's Notice of such intended Alteration, and at their own Expense, to remove such Work, and to replace the same in such Position and Manner in all respects as may be required by such Body, or, in the event of Difference between such Body and the Company, in such Position and Manner in all respects as may be determined in *England* or

Ireland by Two Justices, and in *Scotland* by Two Justices or the Sheriff.

16. Where the Company has, before the passing of this Act, placed Posts in or upon a Street or public Road, and the Body having the Control of the Street or Road considers the Position of any such Post to be dangerous or inconvenient, the following Provisions shall take effect:

(1.) Such Body may give to the Company a Notice requiring them to remove or alter the Position of such Post, and specifying the Grounds of such Requisition:

(2.) The Company either shall, within Fourteen Days after Receipt of such Notice, remove or alter the Position of the Post in accordance with the Notice; or else, if they do not intend to remove or alter the Position of the Post in accordance with the Notice, shall, within One Week after Receipt of the Notice, deliver to such Body a Counter-Notice, specifying their Objection to such Removal or Alteration:

(3.) Such Body may send Copies of the Notice and Counter-Notice to the Board of Trade:

(4.) As soon as may be after Receipt of such Copies, the Board of Trade shall (unless the Difference between the Body giving the Notice and the Company is arranged) make Inquiry and Examination, and hear and determine the Matter of the Notice and Counter-Notice:

(5.) On hearing any such Matter, the Board of Trade may direct that the Company shall comply with the Notice, wholly or in part, or subject to any such Modifications as the Board of Trade prescribes, or on condition that the Body giving the Notice shall afford to the Company all reasonable and proper Facilities in their Power for substituting some other Work for that to which the Notice relates, or on any such other Condition as to the Board of Trade seems, according to the Circumstances of the Case, just and expedient, and the Expenses incurred in or about such Removal or Alteration shall be borne and paid by the Company or by the Body giving the Notice, or partly by one and partly by the other, as to the Board of Trade seems, according to the Circumstances of the Case, just

and expedient, the Amount of such Expenses to be determined in case of Difference by the Board of Trade.

Restrictions as to the opening of Streets and public Roads.

17. Subject to any special Stipulations made with a Company by the Body having the Control of a Street or Public Road, and to any Determinations, Orders, or Directions of the Justices, or Sheriff as aforesaid, where the Company proceeds to open or break up a Street or public Road, the following Provisions shall take effect: —

(1.) The Company shall give to the Bodies between whom respectively and the Company the Depth, Course, and Position of a Telegraph under such Street or public Road are herein-before required to be settled or determined, Notice of their Intention to open or break up such Street or public Road, specifying the Time at which they will begin to do so, — such Notice to be given, in the Case of an underground Work, Ten Days at least, and in the Case of an aboveground Work Five Days at least, before the Commencement of the Work; except in case of Emergency, in which Case Notice of the Work proposed shall be given as soon as may be after the Commencement thereof:

(2.) The Company shall not (save in case of Emergency) open or break up any Street or public Road, except under the Superintendence of the Bodies to whom respectively Notice is by the present Section required to be given, unless such Bodies respectively refuse or neglect to give such Superintendence at the Time specified in the Notice for the Commencement of the Work, or discontinue the same during the Work:

(3.) The Company shall pay all reasonable Expenses to which such Bodies respectively may be put on account of such Superintendence.

18. Subject to any such special Stipulations as aforesaid, after the Company has opened or broken up a Street or public Road they shall be under the following further Obligations: —

(1.) They shall, with all convenient Speed, complete the Work on account of which they opened or broke up the same,

and fill in the Ground, and make good the Surface, and generally restore the Street or public Road to as good a Condition as that in which it was before being opened or broken up, and carry away all Rubbish occasioned thereby:

(2.) They shall in the meantime cause the Place where the Street or public Road is opened or broken up to be fenced and watched, and to be properly lighted at Night:

(3.) They shall pay all reasonable Expenses of keeping the Street or public Road in good Repair for Six Months after the same is restored, so far as such Expenses may be increased by such opening or breaking up:

If the Company fails to comply in any respect with the Provisions of the present Section, they shall for every such Offence (without Prejudice to the Right of any Person, to enforce specific Performance of the Requirements of this Act, or to any other Remedy against them), be liable to a penalty not exceeding Twenty Pounds, and to a further Penalty not exceeding Five Pounds for each Day during which any such Failure continues after the First Day when such Penalty was adjudged; and any such Penalty shall (notwithstanding anything herein-before, or in any Act relating to Municipal Corporations, or to the Metropolitan Police Force, or in any other Act, contained) go and belong to the Body having the Control of the Street or public Road, and shall form Part of the Funds applicable by them to the Maintenance of the Street or public Road.

19. Whenever the permanent Surface or Soil of any Street or public Road is broken up or opened by the Company, it shall be lawful for the Body having the Control of the Street or Road, in case they think it expedient so to do, to fill in the Ground, and to make good the Pavement or Surface or Soil so broken up or opened, and to carry away the Rubbish occasioned thereby, instead of permitting such Work to be done by the Company; and the Costs and Expenses of filling in such Ground, and of making good the Pavement or Soil so broken up or opened, shall be repaid on Demand to the Body having the Control of the Street or Road by the Company, and in default thereof may be recovered by the Body having the Control of the Street or Road from the Company as a Penalty is or may be recoverable from the Company.

20. The Company shall not stop or impede Traffic in any Street or public Road, or into or out of any Street or public Road, further than is necessary for the proper Execution of their Works. They shall not close against Traffic more than One Third in Width of any Street or public Road, or of any Way opening into any Street or public Road, at One Time; and in case Two Thirds of such Street or Road are not wide enough to allow Two Carriages to pass each other, they shall not occupy with their Works at One Time more than Fifty Yards in Length of the One Third thereof, except with the special Consent of the Body having the Control thereof.

Restrictions as to Works affecting private or Crown Property.

21. The Company shall not place any Work by the Side of any Land or Building, so as to stop, hinder, or interfere with Ingress or Egress for any purpose to or from the same, or to place any Work under, in, upon, over, along, or across any Land or Building, except with the previous Consent in every Case of the Owner, Lessee, and Occupier of such Land or Building, which Consent, in case of any Land or Building belonging to or enjoyed by the Queen's most Excellent Majesty in right of Her Crown, may be given by the Commissioners for the Time being of Her Majesty's Woods, Forests, and Land Revenues, or One of them, on behalf of Her Majesty: Provided always, that with respect to Lands and Buildings situate within the Limits of the District over which the Authority of the Metropolitan Board of Works extends (herein-after referred to as the Metropolis), or within the Limits of any City or Municipal Borough or Town Corporate, or any Town having a Population of Thirty thousand Inhabitants or upwards, according to the latest Census (herein-after referred to as a City or large Town), if the Body having the Control of any Street in the Metropolis or a City or large Town, consents to the placing of Works by the Company in, upon, over, along, or across that Street, then and in every such Case that Consent shall (unless it is otherwise provided by the Terms thereof), be sufficient Authority for the Company, without any further Consent, except as to any Land or Building belonging to or enjoyed by Her Majesty in right of Her Crown, to place and maintain a Telegraph over, along, or across any Building adjoining to or near the Street, and situate within the Limits of the District over which the Powers of the consenting Body extend, or over,

along, or across any Land, not being laid out as Building Land, or not being a Garden or Pleasure Ground, adjoining to or near the Street and situate within the same Limits, subject nevertheless to the following Provisions: —

(1.) Twenty-one Days at least before the Company proceeds to place a Telegraph by virtue of the Authority so conferred, they shall publish a Notice stating they have obtained the Consent of such Body as aforesaid, and describing the intended Course of such Telegraph:

(2.) Where the Company by virtue of the Authority so conferred places a Telegraph directly over any Dwelling House, they shall not place it at a less Height above the Roof thereof than Six Feet, if the Owner, Lessee, or Occupier thereof objects to their placing it at a less Height:

(3.) If at any Time the Owner, Lessee, or Occupier of any Building or Land adjoining to a Building, directly over which Building or Land the Company by virtue of the Authority so conferred places a Telegraph, desires to raise the Building to a greater Height, or to extend it over such Land, the Company shall increase the Height or otherwise alter the Position of the Telegraph, so that the same may not interfere with the raising or Extension of the Building, within Fourteen Days after receiving from the Owner, Lessee, or Occupier a Notice of his Intention to raise or extend the Building, or in case of Difference between the Company and the Owner, Lessee, or Occupier as to his Intention, then within Fourteen Days after receiving a Certificate, signed by a Justice of the Peace, certifying that he is satisfied of the Intention of the Owner, Lessee, or Occupier to raise or extend the Building:

(4.) The Company shall make full Compensation to the Owner, Lessee, and Occupier of any Land or Building over, along, or across which the Company by virtue of the Authority so conferred places a Telegraph, and which may be shown to be in any respect prejudicially affected thereby, the Amount of such Compensation to be determined in manner provided by the said Lands Clauses Consolidation Acts respectively and any Act amending those Acts for the determination of the Amount of Compensation with respect to Lands injuriously affected:

Provided also, that the Consent of any Person occupying as a Tenant from Year to Year only shall not be required, nor shall any Person so occupying be entitled to such Compensation as aforesaid.

22. Subject and without Prejudice to the foregoing Provisions, the Company shall not place a Telegraph above Ground, or a Post, within Ten Yards of a Dwelling House, or place a Telegraph above Ground across an Avenue or Approach to a Dwelling House, except subject and according to the following Restrictions and Provisions:—

(1.) They shall in each such Case obtain the Consent of the Occupier (if any) of such Dwelling House, and if there is no Occupier, then of the Lessee entitled to Possession, and if there is none, then of the Owner:

(2.) The Consent of an Occupier shall be effective only during the Continuance of his Occupation:

(3.) On the Termination of the Occupation of any Occupier the Lessee or Owner entitled to Possession, if he did not consent to the placing of the Telegraph or Post, may give Notice to the Company that he requires it to be removed:

(4.) The Company shall remove the same accordingly within One Month after receiving such Notice:

(5.) If any Question arises between a Lessee or Owner and the Company as to such Removal, or the Time or Mode thereof, the same shall be referred to the Determination in *England* or *Ireland* of Two Justices, and in *Scotland* of Two Justices or the Sheriff, which Justices or Sheriff may give such Directions as to such Removal, and the Time and Mode thereof, as may seem reasonable, and may impose on the Company for not carrying such directions into effect such Penalty not exceeding Five Pounds a Day as may seem just.

23. Before the Company proceeds to place a Telegraph over, along, or across a Street (not being a Street in the Metropolis or in a City or large Town) or a public Road, or to place Posts in or upon a Street (not being such a Street as aforesaid) or a public Road, they shall publish a Notice stating that they have obtained the Consent in that Behalf of the Body having the Control of the

Street or public Road, and describing the intended Course of the Telegraph,—

(1.) By affixing such Notice on some conspicuous Places by the Side of the Part of the Street or Road affected, at Distances of not more than One Mile apart:

(2.) By leaving such Notice at every Dwelling House fronting on the Part of the Street or Road affected, and being within Fifty Feet thereof:

(3.) By inserting such Notice as an Advertisement once at least in each of Two successive Weeks in some One and the same local Newspaper circulating in the Neighborhood of the Part of the Street or Road affected:

And they shall not so place any such Telegraph or Post until the Expiration of Twenty-one Days from the last Publication of such Advertisement.

24. At any Time during such Twenty-one Days the Owner, Lessee, or Occupier of any Land or Building adjoining to either Side of such Street or Road may give to the Company Notice of his Objection to their intended Works as prejudicially affecting such Land or Building, and send to the Board of Trade a Copy of his Notice of Objection.

25. Until such Objection is settled, or is determined in manner herein-after provided, the Company shall not execute that Part of their intended Works to which the Objection relates.

26. As soon as may be after the Receipt of such Copy of Notice of Objection, the Board of Trade shall (unless the Difference between the Company and the Person objecting is arranged) make Inquiry and Examination, and hear and determine the Matter of the Objection.

27. On hearing any such Objection the Board of Trade—

(1.) may allow the Objection, wholly or in part; or

(2.) may authorize the Company to proceed with their Works, subject to the Provisions of this Act, according to their published Notice, paying to the Owner, Lessee, or Occupier objecting full Compensation (the Amount thereof to

be determined, in case of Difference, by the Board of Trade) for any Damage done to him; or

(3.) may authorize the Company to so proceed subject to any such Conditions as to the Time or Mode of Execution of any Work, or as to the Removal or Alteration in any event of any Work, or as to any other Thing connected with or relative to any Work, as the Board of Trade thinks fit; or

(4.) may authorize the Company to so proceed subject to any such Modification of any intended Work as the Board of Trade prescribes; but so that in that Case such Notice and Opportunity of objecting and being heard as the Board of Trade directs shall be given to any Owner, Lessee, or Occupier whom such Modification may affect.

28. The Determination of the Board of Trade on the Matter of any such Objection shall be final and conclusive.

29. The Board of Trade may allow to any Owner, Lessee, or Occupier so objecting such Costs as seem just; to be paid by the Company.

Removal or Alteration of Works affecting Land or Buildings.

30. Where at any Time before or after the passing of this Act the Company has constructed any Work, under, in, upon, over, along, or across any Land or Building, or any Street or public Road adjoining to or near any Land or Building, and any Owner, Lessee, or Occupier of such Land or Building, or any Lord of a Manor, or other Person having any Interest in such Land or Building, desires to build upon or inclose such Land, or in any Manner to improve or alter such Land or Building, or to use such Land or Building in some Manner in which it was not actually used at the Time of the Construction of such Work by the Company, and with which the Continuance of such Work would interfere, then and in every such Case the following Provisions shall take effect:

(1.) Such Owner, Lessee, Occupier, Lord of a Manor, or other Person interested may give to the Company a Notice specifying the Nature of such intended Building, Inclo-

sure, Improvement, Alteration, or other Use of the Land or Building, including Ingress or Egress thereto or therefrom, and requiring the Company to remove or alter their Work so that the same may not interfere therewith:

(2.) Within Fourteen Days after the Receipt of such Notice, or in case of Difference between the Company and the Person giving the same as to his Intention, then within Fourteen Days after the Receipt of a Certificate, signed by a Justice of the Peace, certifying that he is satisfied of the Intention of such Person to make such Building, Inclosure, Improvement, Alteration, or other Use of the Land or Building, and that the Continuance of such Work would interfere therewith, the granting of such Certificate being deemed to be a Matter referred to the Determination of the Justice so certifying, the Company shall remove or alter their Work so that the same shall not interfere with such intended Building, Inclosure, Improvement, or Alteration, or other Use of the Land or Building:

(3.) When such Certificate is required by the Company the Costs thereof, when obtained, shall be paid by the Company to the Person giving the Notice:

(4.) Nothing herein shall empower any Person to obtain the Removal or Alteration of any Work contrary to the Terms of any Grant or Consent in Writing made or given by him, or by any Person through whom he takes his Estate or Interest.

31. Where the Company has, before the passing of this Act, constructed any Work under, in, upon, over, along, or across a Street or public Road, and the Owner, Lessee, or Occupier of any Land or Building adjoining to or near the Street or public Road considers such Land or Building to be prejudicially affected by such Work, then the following Provisions shall take effect:

(1.) Such Owner, Lessee, or Occupier may give to the Company a Notice requiring them to remove or alter such Work, and specifying the Grounds of such Requisition:

(2.) The Company either shall, within One Month after Receipt of such Notice, remove or alter the Work in accordance with the Notice, or else, if they do not intend to remove or alter the Work in accordance with the Notice, shall,

within One Week after Receipt of the Notice, deliver to the Person giving the Notice a Counter-Notice, specifying their Objection to such Removal or Alteration:

(3.) The Person giving the Notice may send Copies of the Notice and Counter-Notice to the Board of Trade:

(4.) As soon as may be after Receipt of such Copies the Board of Trade shall (unless the Difference between the Person giving the Notice and the Company is arranged) make Inquiry and Examination, and hear and determine the Matter of the Notice and Counter-Notice:

(5.) Such Owner, Lessee, or Occupier shall be entitled to obtain a Direction from the Board of Trade for the Removal or Alteration of such Work in every Case where it appears to the Board of Trade that such Land or Building is prejudicially affected by such Work, and that the Removal or Alteration thereof may be effected consistently with a due Regard to the efficient Working of the Company's Telegraphs, such Direction nevertheless to be given on such Terms and Conditions as to the Board of Trade seem, according to the Circumstances of the Case, just and expedient, including, if it seems expedient, the Condition of the Payment by such Owner, Lessee, or Occupier of any Expense incurred by the Company in or about such Removal or Alteration, the Amount thereof to be determined in case of Difference by the Board of Trade:

(6.) Nothing herein shall empower any Person to obtain the Removal or Alteration of any Work contrary to the Terms of any Grant or Consent in Writing made or given by him, or by any Person through whom he takes his Estate or Interest.

Restrictions as to Works affecting Railways and Canals.

32. The Company shall not place any Work under, in, upon, over, along, or across any Railway or Canal, except with the Consent of the Proprietors or Lessees, or of the Directors or Persons having the Control thereof. But this Provision shall not restrict the Company from placing any Work (subject and according to the other Provisions of this Act) under, in, upon, over, along, or across any Street or public Road, although such Street or public Road may

cross or be crossed by a Railway or Canal, so that such Work do not damage the Railway or Canal, or interfere with the Use, Alteration, or Improvement thereof.

33. If at any Time after the Company has placed any Work under, in, upon, over, along, or across any Canal, any Person having Power to construct Docks, Basins, or other Works upon any Land adjoining to or near such Canal constructs any Dock, Basin, or Work on such Land, but is prevented by the Company's Work from forming a Communication for the convenient Passage of Vessels with or without Masts between such Dock, Basin, or other Work, and such Canal, or if the Business of such Dock, Basin, or other Work is interfered with by reason or in consequence of any such Work of the Company, then the Company, at the Request of such Person, and on having reasonable Facilities afforded them by him for placing a Telegraph round such Dock, Basin, or other Work, under, in, upon, over, along, or across Land belonging to or under his Control, shall remove and place their Work accordingly. If any Dispute arises between the Company and such Person as to the Facilities to be afforded to the Company, or as to the Direction in which the Telegraph is to be placed, it shall be determined by the Board of Trade.

Appointment of Arbitrator by Board of Trade.

34. If in any Case where any Matter is herein-before authorized or directed to be determined by the Board of Trade it appears to the Board of Trade to be expedient, for Convenience of local Investigation or for any other Reason, that the Matter should be determined by an Arbitrator, the Board of Trade may, notwithstanding anything herein-before contained, and whether the Board of Trade has entered on the Investigation or not, refer the Matter to some competent and impartial Person as Arbitrator; and with respect to the Matter so referred any such Arbitrator shall have the like Authority and Jurisdiction as the Board of Trade has under this Act, and his Determination shall have the same Effect as a Determination of the Board of Trade under this Act. The Reasonable Expenses and Remuneration of the Arbitrator (to be settled in case of Difference by the Board of Trade) shall be paid by the Company.

Restrictions as to Works affecting Seashore.

35. The Company shall not place any Work under, in, upon, over, along, or across any Estuary or Branch of the Sea, or the Shore or Bed of any tidal Water, except with the Consent of all Persons and Bodies having any Right of Property, or other Right, or any Power, Jurisdiction, or Authority in, over, or relating to the same, which may be affected or be liable to be affected by the Exercise of the Powers of the Company (which Consent, where Her Majesty in right of Her Crown is interested, may be given on behalf of Her Majesty by the Commissioners for the Time being of Her Majesty's Woods, Forests, and Land Revenues, or One of them, in Writing signed by them or him).

36. Before Commencing the Construction of any such Work as last aforesaid, or of any Buoy or Sea Mark connected therewith, except in Cases of Emergency for Repairs to any Work previously constructed or laid, and then as speedily after the Commencement of such Work as may be, the Company shall deposit at the Office of the Board of Trade a Plan thereof, for the Approval of the Board of Trade. The Work shall not be constructed otherwise than in accordance with such Approval. If any Work is constructed contrary to this Provision, the Board of Trade may, at the Expense of the Company, abate and remove it, or any Part of it, and restore the Site thereof to its former Condition.

37. Notwithstanding anything in The Merchant Shipping Act, 1854, or any Act amending the same, contained, the Company may, in or about the Construction, Maintenance, or Repair of any such Work, use on board Ship or elsewhere any Light or Signal allowed by any Regulation to be made in that Behalf by the Board of Trade.

38. If any such Work, Buoy, or Sea Mark is abandoned, or suffered to fall into Decay, the Board of Trade may, if and as they think fit, at the Expense of the Company, either repair and restore it or any Part of it, or abate and remove it or any Part of it, and restore the Site thereof to its former Condition.

39. The Board of Trade may at any Time, at the Expense of the Company, cause to be made a Survey and Examination of any such Work, Buoy, or Sea Mark, or of the Site thereof.

40. Whenever the Board of Trade, under the Authority of this Act, does, in relation to any such Work, any Act or Thing which they are by this Act authorized to do at the Expense of the Company, the Amount of such Expense shall be a Debt due to the Crown from the Company, and shall be recoverable as such, with Costs, or the same may be recovered, with Costs, as a Penalty is or may be recoverable from the Company.

General Obligations and Liabilities of Company and their Servants.

41. Every Telegraph of the Company shall be open for the Messages of all Persons alike, without Favour or Preference; but this Provision shall not prejudicially affect the Operation of any Lease or Agreement authorized by this Act.

42. The Company shall be answerable for all Accidents, Damages, and Injuries happening through the Act or Default of the Company or of any Person in their Employment by reason or in consequence of any of the Company's Works, and shall save harmless all Bodies having the Control of Streets or public Roads, collectively and individually, and their Officers and Servants, from all Damages and Costs in respect of such Accidents and Injuries.

43. The Company shall not sell, transfer, or lease their Undertaking or Works, or any Part thereof, to any other Company or to any Body or Person, except with the Consent of the Board of Trade previously obtained for such Sale, Transfer, or Lease; but this Provision shall not, as far as it relates to Leases, apply to the Universal Private Telegraph Company, constituted by the Special Act of 1861 in the Schedule to this Act mentioned, and shall not restrict the granting of any Lease by any Company in pursuance of any Agreement in that Behalf made before the Twelfth Day of *February* One thousand eight hundred and sixty-three, and shall not restrict the making or carrying into effect by any Company of any Arrangement with any Person for providing any Work for his private Use only.

44. The Company, before exercising any Power for the Construction of Works or the opening or breaking up of Streets or public Roads in any One of the Three Parts of the United Kingdom, shall give to the Registrar of Joint Stock Companies acting for that Part of the United Kingdom under The Companies Act, 1862, Notice of the Situation of some Office where Notices may be served on the Company within that Part of the United Kingdom; and the Company shall from Time to Time give to such Registrar Notice of any Change in the Situation of such Office: Every such Notice shall be recorded by the Registrar, and the Record thereof may be inspected from Time to Time by any Person: The Delivery at the Office of which Notice is so given of any Notice, Writ, Summons, or other Document addressed to the Company shall, for the Purposes of this Act and all other Purposes, be deemed good service on the Company: The Company shall, on giving each Notice to the Registrar under the present Section, pay such Fee as is Payable under the last-mentioned Act on Registration of any Document by that Act required or authorized to be registered, other than a Memorandum of Association; and every Person inspecting the Record of such Notice with the Registrar shall pay such Fee as is for the Time being payable under the last-mentioned Act for Inspection of Documents kept by the Registrar under that Act.

45. If any Person in the Employment of the Company —

Wilfully or negligently omits or delays to transmit or deliver any Message;

Or by any wilful or negligent Act or Omission prevents or delays the Transmission or Delivery of any Message;

Or improperly divulges to any Person the Purport of any Message, —

He shall for every such Offence be liable to a Penalty not exceeding Twenty Pounds.

46. Nothing in this Act, and nothing in any future Special Act, except so far as express Provision to the contrary hereof may be thereby made, shall relieve the Company from being subject to any Restrictions, Regulations, or Provisions which may hereafter be made by Act of Parliament respecting Telegraphs or Telegraph Companies or their Charges.

Saving as to Restrictions on and Duties of existing Companies.

47. Nothing in this Act shall affect any of the Enactments specified in the Schedule to this Act.

Powers of Her Majesty's Government over Company.

48. If One of Her Majesty's Principal Secretaries of State, or the Board of Trade, or other Department of Her Majesty's Government, requires the Company to transmit any Message on Her Majesty's Service, such Message shall (notwithstanding anything herein-before contained) have Priority over all other Messages; and the Company shall as soon as reasonably may be transmit the same, and shall, until Transmission thereof, suspend the Transmission of all other Messages.

49. On the Request of the Board of Trade, the Company shall from Time to Time place and shall maintain such a Telegraph as the Board of Trade appoints, to be for the exclusive Use of Her Majesty, and to be applied to such Purposes, whether for the immediate Service of Her Majesty, or otherwise, as Her Majesty thinks fit.

50. If the Company refuses or neglects to place a Telegraph in accordance with such Request, the Board of Trade may cause such a Telegraph to be placed in connexion with any of the Company's Works, by such Persons and in such Manner as the Board of Trade thinks fit, and for that Purpose shall have and may exercise all the Powers under this Act or otherwise vested in the Company; subject, nevertheless, to the Restrictions and Provisions under this Act or otherwise applicable to the Company, and without Prejudice to the Exercise by the Company of the Powers under this Act or otherwise vested in them.

51. Where the Company places a Telegraph, in pursuance of such Request of the Board of Trade, the Commissioners of Her Majesty's Treasury shall pay to the Company, as Remuneration for the same, out of Money to be provided by Parliament for the Purpose, such Sum, annual or in gross, or both, as may be settled between the Board of Trade and the Company by Agreement, or, in case of

Difference, by Arbitration, such Arbitration to be conducted as follows:

(1.) The Board of Trade and the Company shall each, within Fourteen Days after the Delivery by one to the other of a Demand in Writing for an Arbitration, nominate an Arbitrator:

(2.) The Two Arbitrators nominated shall, before entering on the Arbitration, nominate an Umpire:

(3.) If either Party or Arbitrator makes default in nominating an Arbitrator or Umpire within Fourteen Days after receiving from the other a Demand in Writing for such Nomination, the Lord Chief Justice of Her Majesty's Court of Common Pleas at *Westminster* may, on the Request of the Board of Trade, or of the Company, by Writing under his Hand, nominate an Arbitrator or Umpire:

(4.) The Arbitrators shall make their Award within Twenty-eight Days after their Nomination, otherwise the Matter shall be left to be determined by the Umpire:

(5.) The Umpire shall make his Award within Twenty-eight Days after Notice from the Arbitrators or One of them that the Matter is left to be determined by him; or, on default, a new Umpire shall be appointed as nearly as may be in manner aforesaid, who shall make his Award within the like Time, or on default be superseded; and so *toties quoties*:

The Award of the Arbitrators or Umpire shall be final and conclusive as between the Board of Trade and the Company.

52. Where, in the Opinion of One of Her Majesty's Principal Secretaries of State, an Emergency has arisen in which it is expedient for the Public Service that Her Majesty's Government should have Control over the Transmission of Messages by the Company's Telegraphs, the Secretary of State, by Warrant under his Hand, may direct and cause the Company's Works, or any Part thereof, to be taken possession of in the Name and on behalf of Her Majesty, and to be used for Her Majesty's Service, and, subject thereto, for such ordinary Service as may seem fit; or may direct and authorize such Persons as he thinks fit to assume the Control of the Transmission of Messages by the Company's Telegraphs, either

wholly or partly, and in such Manner as he directs. Any such Warrant shall not have effect for a longer Time than one Week from the issuing thereof; but the Secretary of State may issue successive Warrants from Week to Week as long as, in his Opinion, such Emergency continues. The Commissioners of Her Majesty's Treasury shall pay to the Company, as Compensation for any Loss of Profit sustained by the Company by reason of the Exercise by the Secretary of State of any of the Powers of the present Section, out of Money to be provided by Parliament for the Purpose, such Sum as may be settled between the Secretary of State and the Company by Agreement, or, in case of Difference, by Arbitration, — such Arbitration to be conducted in manner provided in the last foregoing Section, the Secretary of State being only substituted for the Board of Trade.

53. Where it appears to the Board of Trade that any Provision of this Act has not been complied with on the Part of the Company, and that it would be for the public Advantage that Compliance therewith should be enforced, the Board of Trade may certify accordingly to Her Majesty's Attorney General for *England* or for *Ireland*, or to the Lord Advocate for *Scotland*, as the Case may require; and thereupon the Attorney General or Lord Advocate may, by such Civil or Criminal Proceeding as the Case may require, enforce Compliance with such Provision, by the Recovery of Penalties, or otherwise according to Law. But no such Certificate shall be made by the Board of Trade until the Expiration of Twenty-one Days after they have given Notice to the Company of their Intention to make the same. This Provision shall be deemed to be cumulative, and to be without Prejudice to any other Remedy or Process against the Company on the Part of Her Majesty or of any Person or Body.

SCHEDULE.

Enactments in Special Acts of existing Companies which are not to be affected by this Act.

Session and Chapter of Act.	Short Title of Act.	Enactments to which Saving extends.
16 & 17 Vict. c. clix. -	The British Electric Telegraph Company's Act, 1853.	Section Forty-three (relating to Works affecting the Thames).
16 & 17 Vict. c. cciii.	The Electric Telegraph Company's Act, 1853.	Section Fifty-six (relating to Works affecting the Thames).
24 & 25 Vict. c. lxi. -	The Universal Private Telegraph Company's Act, 1861.	Section Twenty-seven (relating to Works affecting the Mersey Dock Estate).
24 & 25 Vict. c. xcii. -	Bonelli's Electric Telegraph Act, 1861.	Sections Twenty-five, Twenty-six, Twenty-seven (relating to Works affecting the Thames), and Thirty-eight and Thirty-nine (relating to Works affecting the Mersey, and to the Mersey and Irwell Navigation).
25 & 26 Vict. c. cxxxi.	United Kingdom Electric Telegraph Act, 1862.	Sections Fifty-three, Fifty-four, Fifty-five (relating to Works affecting the Thames), Fifty-seven, Fifty-eight (relating to Works affecting the Mersey, and to the Mersey and Irwell Navigation), Seventy-four (relating to a Sale, Transfer, or Lease), and Seventy-six (relating to Works in Scotland).

B.

CANADA.

CONSOLIDATED STATUTES. CAP. LXVII.

An Act respecting Electric Telegraph Companies.

Organization.

1. Any number of persons, not less than three, may associate for the purpose of constructing telegraph lines, with branches, from and to any point in the Province, upon the terms and conditions, and subject to the liabilities, prescribed in this act. 16 Vict. c. 10, sec. 1.

2. They shall, under their hands and seals, make a certificate specifying the name of the association, which is to be used in its dealings, and by which it may sue and be sued; and the line or lines of telegraph to be constructed by them, and the routes by which they are to pass.

Its capital stock, and the number of shares into which it is divided, and any provision made for increasing the same; the names of the shareholders, and the amount of stock held by each; the period at which it commenced, and is to terminate; and a copy of the articles of association, — shall also be set forth in the certificate. 16 Vict. c. 10, sec. 2.

3. This certificate shall be acknowledged before a notary, and the original, or a copy certified by the notary, must be filed in the office of the Provincial Secretary. Ibid.

4. Upon complying with the above provisions, the association shall be a body corporate, by the name designated in the certificate. Ibid. sec. 3.

Evidence.

5. A copy of this certificate, duly certified by the Provincial Secretary, may be used as evidence in all courts and places for and against the company. 16 Vict. c. 10, sec. 3.

Powers and Restrictions.

6. Every such association shall have power to purchase, hold, and convey only such real estate as may be necessary for the convenient transaction of the business, and for effectually conducting its operations.

7. They may appoint directors, officers, and agents, and make such prudential rules, regulations, and by-laws, as may be necessary, not inconsistent with the laws of the Province. 16 Vict. c. 10, sec. 4.

8. They may construct their lines upon any lands purchased by them, or the right to carry their lines over which has been conceded to them by the person having the right to make such concession; and along the public roads or highways, or across the waters within the Province, by the erection of the necessary fixtures, including posts, piers, and abutments: provided the same are so constructed as not to incommode the public use, or to impede the free access to any house or other building erected in the vicinity of the same, or injuriously to interrupt the navigation of such waters. 16 Vict. c. 10, sec. 5.

9. But they shall not build bridges over navigable waters. 16 Vict. c. 10, sec. 5.

10. They may, by their articles of association, provide for an increase of their capital, and number of associates. 16 Vict. c. 10, sec. 7.

11. They shall not contract debt exceeding half their capital stock. 16 Vict. c. 10, sec. 8.

12. All evidence of debt they issue, shall be signed and issued by the President and Treasurer. 16 Vict. c. 10, sec. 8.

Other Companies.

13. Any telegraph company or association organized on or before the 10th Nov. 1852, on filing in the office of the Provincial Secretary a certificate authorized by a resolution of its Board of Directors, signed and certified by its Secretary, containing the particulars hereinbefore required in like cases, and signifying its acceptance of this act, may become incorporated under this act. 16 Vict. c. 10, sec. 9.

Regulations Respecting Messages.

14. Except in the cases provided for in next section, the company

should transmit all despatches in the order in which they are received, under a penalty of not less than twenty, nor exceeding one hundred dollars, with costs of suit, to be recovered by the person whose despatch has been postponed out of its order.

15. Messages in relation to the administration of justice, arrest of criminals, the discovery or prevention of crime, and government messages, shall be transmitted in preference to all other messages, if required by persons connected with the administration of justice, or authorized by the Provincial Secretary. 16 Vict. c. 10, sec. 10.

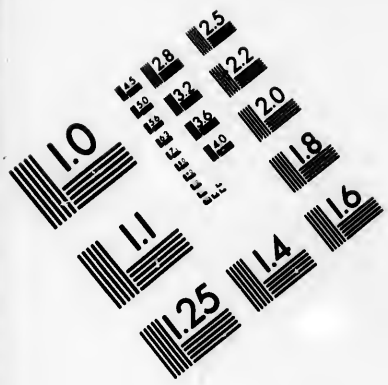
16. If the operator or employés of the company divulge the contents of private despatches, it shall be a misdemeanor, punishable by fine not exceeding one hundred dollars, or three months' imprisonment, or both, in the discretion of the Court. 16 Vict. c. 10, sec. 11.

Governmental Supremacy.

17. Her Majesty may at any time, and for any length of time assume and retain possession of telegraph lines and all things necessary to the sufficient working thereof; may require the exclusive service of the operators and employés; and during such time the operators and employés shall faithfully obey such orders, and transmit and receive such messages, as may be required by any duly authorized officer of the Provincial Government, under a penalty not exceeding one hundred dollars for such refusal or neglect, to be recovered by the crown for the public use of the Province, with costs, in any way in which debts of like amount are recoverable by the crown. 16 Vict. c. 10, sec. 12.

18. At any time after the commencement of a telegraph line under this act, the government may, after two months' notice to the company, assume the possession and property of the same, and thereupon such line, and all the property real and personal essential to the working thereof, and all the rights and privileges of the company as regards such line, shall be vested in the crown. 16 Vict. c. 10, sec. 13.

19. In case of difference between the company and those who act for the crown, as to the compensation for the telegraph line and appurtenances, taken under sec. 18,— or, for the temporary exclusive use, under sec. 17,— such difference shall be referred to three arbitrators, one appointed by the crown, one by the company, and the



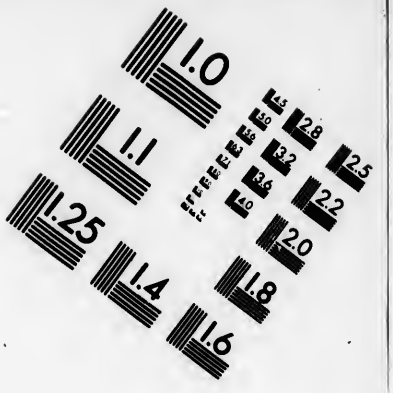
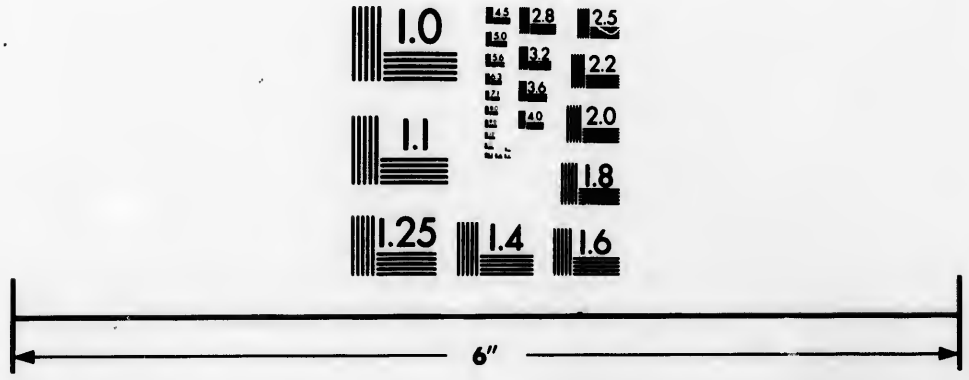


IMAGE EVALUATION
TEST TARGET (MT-3)



Photographic
Sciences
Corporation

23 WEST MAIN STREET
WEBSTER, N.Y. 14580
(716) 872-4503

third by these two appointed arbitrators. The award of any two of them shall be final. If the company fail or refuse to appoint, or if the two arbitrators cannot agree upon the third, such arbitrator shall be appointed by any two Judges of the Queen's Bench or Common Pleas, in Upper Canada, or of the Superior Court in Lower Canada, on application on the part of the crown. 16 Vict. c. 10, sec. 14.

20. Any municipal corporation in the Province, or joint-stock company incorporated by Act of the Parliament of this Province, may be a stockholder in any company formed under this act, and pay the stock out of municipal or other funds not otherwise specially appropriated, and may levy money by rate to pay such stock subscription; and shall have such rights as a member of the company, and shall vote upon its stock in such manner, and through such person or officer, as prescribed by the articles of association. 16 Vict. c. 10, sec. 15.

21. The wilful and malicious cutting, breaking, molesting, injuring, or destroying any instrument, cap, wire, post, line, pier, or abutment, or material or property belonging thereto, or any other erection used for or by any line in operation under any act in force herein, and the malicious, wilful obstruction of or disturbance of the working of any line shall be a misdemeanor, punishable by fine not exceeding forty dollars, or imprisonment not exceeding one month, or both, at the discretion of the Court. 16 Vict. c. 10, sec. 6–13; 14 Vict. c. 31.

22. The jurisdiction over all offences against this act shall be in any Justice of the Peace in any parish, village, city, town, or county where the offence has been committed, or the offender found; and the proceedings therein shall be summary.

23. The fine imposed with costs may be collected by Warrant of Distress and sale of the goods and chattels of the offender; and whether imprisonment be or be not part of the sentence, the offender may (in the discretion of the magistrate) be imprisoned for not exceeding thirty days, in addition to, and after the expiration of, any other imprisonment making part of his sentence, unless such fine and costs be sooner paid; and all such fines, when collected, shall belong to the party aggrieved by and complaining of the offence. 13 & 14 Vict. c. 31.

C.

NEW BRUNSWICK.

Whoever shall maliciously cut, injure, or destroy the posts, wires, or other apparatus or property connected with or belonging to any line of electric telegraph now or hereafter to be established, shall be guilty of felony, and be imprisoned for any term not exceeding seven years. Revision of 1854, c. 153, sec. 7.

D.

UNITED STATES.

An Act to expedite Telegraphic Communication for the uses of the Government in its Foreign Intercourse. (Approved March 3, 1857.)

. . .

That the Secretary of State, in the discretion and under the direction of the President, may contract with any competent person or association, for the aid of the United States, by furnishing not exceeding two ships in laying down a submarine cable, to connect existing telegraphs between the coasts of Newfoundland and Ireland; and for its use, when established by the United States, on such terms and conditions as to the President may seem just and reasonable, not exceeding seventy thousand dollars per annum, until the net profits of such person or association shall be equal to a dividend of six per cent per annum; and then not exceeding fifty thousand dollars per annum for twenty-five years: provided the Government of Great Britain make a like contract.

"*And provided*, that the tariff of prices for the use of such submarine communication by the public shall be fixed by the Secretary of the Treasury of the United States and the Government of Great Britain, or its authorized agent.

"*Provided further*, that the United States, and the citizens thereof, shall enjoy the use of said submarine telegraph communication for all time, on the same terms and conditions which shall be stipulated in favor of the Government of Great Britain, and the subjects

thereof, recognizing equality of rights amongst the citizens of the United States, in the use of said submarine communication, and the lines of telegraph which may at any time connect with the same, at its terminus on the coast of Newfoundland, in the United States, in any contract to be entered into by such person, persons, or association, with that government.

"*Provided further*, that the contract to be made by the British Government shall not be different from that already proposed by that government to the New York, Newfoundland, and London Telegraph Company, except such provisions as may be necessary to secure to each government the transmission of its own messages by its own agents.

"*And provided further*, that it shall be in the power of Congress, after ten years, to terminate said contract, upon giving one year's notice to the parties to such contract."

The "act to authorize the President of the United States in certain cases to take possession of railroad and telegraph lines," etc., — approved Jan. 31, 1862, — by the 5th section provides that it shall not be in force "any longer than is necessary for the suppression of this rebellion."

[Act of July 1, 1864, c. 119.]

An Act to encourage and facilitate Telegraphic Communication between the Eastern and Western Continents.

The preamble recites that, the Governments of Russia and Great Britain having granted to Perry McDonough Collins, a citizen of the United States, the right to construct telegraph lines through their respective territories from the mouth of the Amour River in Asiatic Russia by way of Behring's Strait, and along the Pacific coast to the northern boundary of the United States, with a view of thereby uniting the telegraph systems of both continents, and of promoting international and commercial intercourse, and that Russia, in furtherance of that object, is now constructing a line of telegraph through its Asiatic territory to unite at the Amour River with the line projected by said Collins, —

It is provided that said Collins and his associates may construct a telegraph from any point on the line of the Pacific Telegraph, northerly, through any of the territories of the United States to the

boundaries of British America, with branch lines to the mining districts and settlements: they shall have the permanent right of way over unappropriated public lands, and the right to take timber, &c., for construction purposes; the use of public lands not sold, reserved, pre-empted, nor occupied by homestead settlers, as may be necessary for stations, not exceeding forty acres for each fifteen miles. The branch lines to the mining districts must be completed in five years from the approval of this act.

Sec. 2 authorizes the Secretary of the Navy to detail one steam or sailing vessel, in his discretion, to assist in surveys and soundings, laying cable, etc., along the Pacific coast both of America and Asia.[1]

Sec. 3 provides that the United States shall have priority in the use of the lines within its territory; and to connect the lines with any military posts of the United States, and to use the same for government purposes. The Secretary of War is authorized to direct commanders of military districts in the territory through which the line passes, to use any available force at their command to protect the same.

Subject to the priority of the government, the lines shall be open at all times for the use of the public, and despatches shall be sent in the order of their reception, etc.

Sec. 4 provides that in order to secure to the government at all times, but particularly time of war, the use of the line for diplomatic, naval, military, postal, commercial, and other purposes, Congress may at any time add to, alter, amend, or repeal this act.

Sec. 5 provides that the rate of charges shall not exceed the average usual rates in Europe and America for the same service, or such rates as shall be established by a convention between the United States, Russia, and Great Britain: and provided that no contract shall be made with any newspaper, or newspaper association, for transmissions upon different terms than are enjoyed by all other newspaper associations.

Stamp Duties.

By the Act of July 1, 1862, c. 119, sec. 94, a stamp duty is imposed upon messages, to be paid by the sender, according to the rate of charges designated in the schedule annexed to the act, as follows:

[1] The Act of Feb. 26, 1866, directs the Secretary of the Navy to detail one vessel from the squadron of the Pacific station for this purpose.

"Any despatch, or message, the charge for which, for the first ten words does not exceed twenty cents, one cent. Where the charge for the first ten words exceeds twenty cents, three cents."

Sec. 104 of this act provides that "on and after the date on which this act shall take effect, no telegraph company, nor its agent nor employé, shall receive from any person, or transmit to any person, any despatch or message, without an adhesive stamp denoting the duty imposed by this act being affixed to a copy thereof, or having the same stamped thereupon; and in default thereof shall incur a penalty of ten dollars: provided, that only one stamp shall be required, whether sent through one or more companies.[1]

[1] Messages transmitted by telegraph and railroad companies over their own wires, on their own business, for which they receive no pay, are not taxable.

Telegraph despatches must be stamped, and the stamp cancelled, before the same are received for transmission.

Telegraph despatches or messages sent from an office without the United States to an office within the United States are not subject to stamp tax, provided the message be transmitted direct to its final destination.

If received at an office within the United States, and repeated to another office within or without the United States, the stamp must be affixed and cancelled where the message is repeated.

It is illegal for telegraph operators to receive unstamped messages from the writers. It is the duty of the writer to affix and cancel the stamp, and the company or its agent receiving and transmitting an unstamped message is liable to a penalty of ten dollars. (Statute of 1862, sec. 104.)

From Boutwell's Direct and Excise Tax System of the United States, 1863. *Decisions Nos.* 30, 44.

Telegraph messages forwarded free of charge, by railroad or express companies, or which are paid for in kind, must have stamps attached to them.

Messages forwarded in the same manner for corporations or individuals, treated as free messages in their transmission, but paid for quarterly or yearly must have stamps attached.

Messages for a railroad company require to be stamped when going over a line which they do not own and work exclusively for railroad purposes, although the stock of the telegraph line over which their messages pass may be partly or chiefly owned by the railroad company.

Only such messages as are covered by the following, are entitled to exemption as "free messages:"—

"Messages transmitted by telegraph and railroad companies over their own wires, on their own business, for which they receive no pay, do not require stamps." (Ibid., Rulings, No. 269.)

A receipt for telegram is not subject to stamp duty. (Boutwell Tax-Payer's Manual, 1865, Rulings, No. 245.)

Income Tax.

By Act June 30, 1864, sec. 107, any person, firm, company, or corporation, owning or possessing, or having the care or management of, any telegraph line, by which telegraphic despatches or messages are received or transmitted, shall be subject to and pay a duty of five per centum on the gross amount of all receipts of such person, firm, company, or corporation.

Sec. 109 requires them, within twenty days after the expiration of each month, to make a list or return in duplicate to the Assistant Assessor of the District, stating the gross amount of their receipts respectively, for the month next preceding, to be verified by oath in the manner to be prescribed by the Commissioner of Internal Revenue; and shall also pay the Assessor the full amount of duties which have accrued in such receipts for the month aforesaid.

In case of failure to make such return for the space of ten days after the return should have been made, the Assessor or Assistant Assessor shall estimate the amount received, and the duties payable thereon, and shall add thereto ten per centum, as provided in this act in relation to other cases of delinquency to make returns; and the books of the person, firm, company, etc., shall be subject to the inspection of said officer, for the purpose of ascertaining the correctness of such return.

In case of neglect or refusal to pay the duties, with the additions above mentioned, when the same have been ascertained, for the space of ten days after the same shall have been payable, ten per centum on the amount of such duties and additions shall be collected from the party; and, in case of attempt knowingly to evade the payment of such duty, the party shall be liable to a penalty of one thousand dollars for every such attempt, to be recovered as provided in this act for the recovery of penalties. And all provisions in this act, in relation to collections by distraint, not incompatible herewith, shall apply to this section.[1]

[1] As telegraph companies or corporations are not authorized by law, to withhold and pay to government any tax upon interest paid, or dividend declared by them, all income of individuals derived from these sources is liable to income tax. — *Boutwell's Direct and Excise Tax System of the United States*, 1868, *Decisions*, No. 110.

[Vol. 14. Statutes at Large, 221.]

An Act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized, under the laws of any State in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance, and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

SEC. 2. *And be it further enacted*, That telegraphic communications between the several departments of the Government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

SEC. 3. *And be it further enacted*, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: *Provided, however*, That the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any or all of said companies at an ap-

praised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

SEC. 4. *And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act.

Approved July 24, 1866.

D.

ALABAMA.

By the Act of February 10, 1852, sec. 1, it is made the duty of telegraph companies at every point where its wires cross any private or public road, to erect substantial, durable, and permanent posts or piers, to prevent the falling of the wires so as to interfere with the travel of such road. And in case of failure so to do, and interference with travel by the falling of the wires, it shall be the duty of any Justice of the Peace of the county, upon complaint made, to issue notice to any officer or agent of the company, to be found within the county, to appear before him; the notice to be not less than ten days. And on proof that the wires are down, or have been down, for one day, a fine of not less than ten nor more than fifty dollars shall be entered, for every day the wires are permitted to remain down.

SEC. 2. If no officer or agent is found in the county, the notices to be posted at two or more places near the line of telegraph, in the neighborhood of where the wires have fallen, citing the company for five days to appear before a Justice of the Peace; if the company do not defend, fine may be entered by default. And if the company fail or refuse for sixty days to pay any fine imposed by this act, the telegraph line shall be deemed a public nuisance, and subject to be abated by the Circuit Court of the county in which the wires shall be permitted to continue down, in the same manner as nuisances are by law abated.

Penal Code of Alabama.

Sec. 194. — *Injuring telegraph line or post.*

Any person who wilfully cuts, pulls down, destroys, or in any manner injures, any telegraph line or any post, or any part thereof, must, on conviction, be fined not less than fifty nor more than five hundred dollars; and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months.

E.

ARKANSAS.

There are no general provisions in relation to telegraphs, or telegraph companies, in this State.

F.

CALIFORNIA.

By Act of April 22, 1850, any number of persons may associate for the purpose of constructing and operating telegraph lines. They shall, under their hands and seal, make a certificate, specifying the name of the association; the general route of their line, designating the points to be connected; the capital stock, and the number of shares into which it is divided; names and residences of stockholders, and the number of shares held by each; and the period at which the association shall commence and terminate. This certificate shall be proved or acknowledged and recorded, and a copy filed in office of Secretary of State.

They shall thereupon be a corporation, with the name selected in the certificate; and a certified copy of this certificate shall be evidence for and against the corporation.

They shall have power to purchase, hold, and convey only such real estate as is necessary to the transaction of business, and effectually carrying on its operations. They may appoint directors, officers, etc., and make reasonable regulations and by-laws.

They may construct their lines along the highways and across the waters of the State; may appropriate growing trees to place their

wires upon; but must not interfere with travel, nor interrupt navigation; nor shall they construct any bridge over navigable waters. (Amended April 2, 1857.)

The County Court of the county where the lands are, shall appoint three commissioners to appraise the damages sustained by the owner. Notice of the application for the appointment of the commissioners must be served on the president or one of the directors of the company.

A majority of the commissioners may make the appraisal. Duplicates of the appraisements shall be made out; one copy delivered to the applicant, and one to the president or other officer of the association, on demand.

If any damage be adjudged to the applicant, the association shall pay it, with the costs of appraisement.

The applicant shall not be entitled to damages, unless he make his application within three months after the erection of the lines.

It is a misdemeanor, punishable with fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the Court, to intentionally injure, molest, or destroy any of the lines or other property of the association.

The articles of association may provide for an increase of capital, and the number of the association.

They shall receive despatches from and for other telegraph lines and individuals, and, on payment of their usual charges, shall transmit the same with impartiality and good faith; they shall not disclose the communication; and for a violation of either of these requirements, shall be liable to a penalty of five hundred dollars, to be recovered, with costs, in the name and for the benefit of the sender.

They shall send messages in the order in which they are received, under penalty of one hundred dollars for failure, to be recovered as the above. *Provided*, that arrangements may be made with proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its order.

The Act of April 2, 1857, provides that the wilful and malicious injury or destruction of any subaqueous telegraph cable shall be punishable with fine not less than five hundred nor more than ten thousand dollars, to which may be added imprisonment in State

prison, for any term not less than one year nor more than five; and the offending party shall also be liable for damages for the injury or destruction of the same. And any vessel which, by dragging its anchor, or otherwise, injures or destroys such subaqueous cable, upon proof of the want of due care, shall be held responsible for all damages incurred, and the person having control be subject to the fine and imprisonment above provided.

Before the telegraph company or association shall have the benefit of these provisions in relation to subaqueous cables, they shall cause to be erected, at the commencement and termination of the cable, on the shores respectively, suitable monuments, indicating the place of the cable; and shall publish, for one month, in a newspaper having a circulation on or about the waters crossed by the cable, a descrip- of these monuments, and the course and termination of the cable; and, to entitle them to the benefit of the said provisions, the subaqueous cable must be at least two miles from the centre of shipping in the port of San Francisco.

The Act of April 4, 1861, amends the foregoing acts as follows:

Less than three persons shall not form the association.

Their certificate shall designate the general route of the principal line or lines, designating the principal points to be connected; the names and places of residence of the principal shareholders, and the number of shares held by each: the period of company's existence not to exceed fifty years.

By the consent of two-thirds of the shareholders, it may continue its corporate existence, or may be incorporated under the same or a new name; shall make a certificate, in which they may embrace all matters necessary to carry out the purposes of the company; stating also its capital stock, and number of shares. Such new company succeeds to all the rights, and incurs all the liabilities, of the old company.

Such company shall have power to purchase and use, or sell to others, any patent or patents for telegraphing; to purchase and hold all rights, privileges, and franchises relating to the business of telegraphing; to make all necessary contracts in relation to the construction of the telegraph works; to purchase, lease, take, etc., any telegraph works within or without the State, all property, personal and real, and all grants, franchises, and privileges, that may be necessary or proper in the transaction of its business, may appoint all necessary officers, and make reasonable regulations, by-laws, etc.

The company may at any time, with the consent of two-thirds of the shareholders, sell, lease, or assign any rights, privileges, franchises, and property, except its corporate franchise.

This act applies to companies already formed, as well as those to be formed after its passage. Statutes of California, c. 104.

The Act of April 18, 1862, makes it a misdemeanor, punishable with fine not exceeding one thousand dollars, or imprisonment not to exceed one year, or both, in any employé of the company, or any other person, to wilfully divulge the contents or the purport of any message, or part thereof, sent, or intended to be sent, over the line; or to wilfully alter the same, to the injury of the sender or the person to whom sent; and the offender shall be liable for damages in a civil action. *Provided*, That when numerals, or words of number, occur in the message, the operator may express the same in words or figures, or in both, without being guilty of an alteration of the message; nor shall the message be affected thereby.

It shall be a misdemeanor, punishable as above, to knowingly and wilfully send or deliver a false or forged message, or to furnish, or conspire to furnish, such message to an operator, to be sent or delivered, with intent to injure, deceive, or defraud any person, corporation, or the public; and the offender shall be liable for damages in a civil action.

It shall also be a misdemeanor, punishable as above, in any employé of the company to use or appropriate information in any private message acquired by him by reason of his trust as agent of the company, or trade or speculate upon the same, or in any manner to turn the same to his own account and advantage; and he shall also be liable to the injured party for all damages.

It is also a misdemeanor, punishable with fine not exceeding five hundred dollars, and imprisonment not exceeding six months, or both, to unseasonably and wilfully neglect to send a message, or postpone the same out of its order, or neglect or refuse to deliver the same; but, to constitute this an offence, the charges of transmission must have been paid or tendered; nor shall the employé of the company send any message, counselling or aiding treason against the United States or this State, or other resistance to their lawful authority; or any message calculated to further any fraudulent purpose or unlawful act, or to facilitate the escape of a criminal, or person accused of crime.

It shall be a misdemeanor, punishable as in case of divulging

messages, to wilfully or unlawfully open any sealed envelop enclosing a message, with the view of learning its contents; or to fraudulently personate another, and thereby procure the delivery to himself of the message directed to such person, with the intent to use, destroy, or detain the same; and the offending party shall be liable in treble damages to the injured person for all damage sustained thereby.

It is also a misdemeanor, punishable as above, to wilfully and fraudulently read, or attempt to read, by means of any instrument, or in any other manner, any message on its transit, or to wilfully and fraudulently or clandestinely learn, or attempt to learn, the contents or meaning of a message while in a telegraph office, or while being received thereat, or sent therefrom; or to use, or attempt to use or communicate, any information obtained by any person; and the offender shall also be liable to damages in a civil action.

It is also a misdemeanor, punishable as above, to bribe a telegraph operator or employé to disclose any private message, or the purport of the same; and it is a like offence to offer such bribe, or to offer a bribe to such operator or employé for the disclosure of any private information received by him by reason of his trust as agent, etc.; or to use, or attempt to use, such information when obtained: and the offender shall be liable to damages in a civil action.

It is a misdemeanor, punishable by fine not exceeding five hundred dollars, and imprisonment not exceeding six months, or both, to wilfully and maliciously injure or destroy any of the works or property and material of a telegraph company, or appertaining thereto; or to wilfully and maliciously interfere, in any way, with the working or the use of any telegraph line, or obstruct or postpone the transmission of any message over the same; and the offending party shall, moreover, be liable to the telegraph company in an amount equal to one hundred times the actual damage sustained thereby.

All employés of telegraph company, whilst employed in the offices of said company, or along the route of their lines, shall be exempt from militia duty, and from serving on juries, and from any fine or penalty for the neglect thereof.

Contracts made by telegraph companies shall be deemed to be contracts in writing; and all communications sent by telegraph, and signed by the sender, or by his authority, shall be deemed to be in writing.

Whenever any notice, information, or intelligence, written or otherwise, is required to be given, it may be given by telegraph; provided the message be delivered to the person entitled thereto, or to his agent or attorney. Notice by telegraph shall be deemed actual notice.

Any instrument of writing, duly proved or acknowledged and certified, so as to be entitled to record, may, together with the certificate of proof or acknowledgment, be sent by telegraph, and the telegraphic copy, or duplicate thereof, shall *primâ facie* have the same effect in all respects, and be admitted to record in the same manner as the original.

Checks, due-bills, promissory notes, bills of exchange, and all orders and agreements for the payment or delivery of money, or other thing of value, may be made or drawn by telegraph, shall have the same force and obligation upon all parties to them, and be entitled to the same days of grace, as if duly made and delivered in writing; but no person except the maker or drawer shall send any such instrument by telegraph.

When such instrument is denied under oath, it shall be incumbent on the party claiming under or alleging the same, to prove the existence and execution of the original writing from which the telegraph copy or duplicate was transmitted. The original message shall in all cases be preserved in the telegraph office from which the same is sent.

Except as above provided, any instrument in writing, duly certified by a notary public, commissioner of deeds, or clerk of Court of Record, to be genuine, within his personal knowledge, may, with the certificate, be sent by telegraph, and the telegraph copy shall *primâ facie* have the same effect as the original, and the *onus probandi* shall be on the party denying the genuineness or due execution of the original.

Whenever any person has been indicted, or accused on oath, of any public offence, or convicted thereof, and a warrant of arrest shall have been issued, the magistrate issuing it, or Justice of Supreme Court, or Judge of District or County Court, may indorse thereon an order, signed by him, and authorizing the service thereof by telegraph; it may then be sent by telegraph to any marshal, sheriff, constable, or policeman, and his duties shall be the same as if the original warrant had been placed in his hands. The telegraph

copy shall have the same force and effect in all courts and places as the original.

But, prior to indictment, no such indorsement shall be made by an officer, unless, in his judgment, there is probable cause to believe the party guilty.

The making of this order shall be *primâ facie* evidence of the regularity thereof, and of all proceedings prior thereto.

The original warrant, with indorsements, or certified copies by the officer making the order, shall be preserved in the office from which the same are sent, and, in telegraphing the same, the original or the certified copy may be used.

All civil process may be transmitted by telegraph, and the telegraph copy served, and returns made, in the same manner as on the original; and the officer executing the same shall have the same rights, and be subject to the same liabilities, as if the original were in his hands. The original, when a writ or order, shall be filed in the court from which it issued, and a certified copy preserved in the telegraph office from which it was sent; and the operator, in transmitting, may use either the original or the certified copy.

The letters "L.S." or the word "Seal," may be used by the operator to designate either private or official seals upon documents transmitted by telegraph.

The president or secretary of the telegraph companies may file in the office of Clerk of County Court of the county in which the company's principal office is situated, a copy of any printed blank or envelope, picture or device, used or to be used by the company, with his certificate that the same is commonly used, or intended to be used, in the business of the company as a distinguishing mark, notice, or index of said business. This shall give the company the exclusive right to its use, and it shall be the company's property; and it is made a misdemeanor, punishable by fine not exceeding five hundred dollars, and imprisonment not exceeding six months, to use or print, publish, and distribute such mark.

Messages shall be transmitted in the order in which they are received, under penalty of one hundred dollars, to be recovered, with costs, by the sender. *Provided*, communications between public officers, upon official business, shall have preference over all other transmissions; and provided further, that intelligence of general and public interest may be transmitted for publication out of its order.

The term "telegraph copy," or "telegraph duplicate," means any copy of a message, made or prepared for delivery at the office to which the message may have been sent by telegraph.

Nothing in this act shall be construed to lessen the liabilities of telegraph companies.

By the Act of March 24, 1864, c. 233, sec. 1, whenever any document, to be transmitted by telegraph, bears a revenue stamp, the same may be expressed in the telegraph copy by the word "stamp," stating the amount thereof, without any further description of the stamp.

G.

CONNECTICUT.

The provisions in relation to Telegraph Companies in Connecticut (see Revision of 1866, Telegraph Companies, title 7, c. 7, sec. 558–575) are the same as those contained in the California Act of April 22, 1850 (ante, App. F.), except in the following particulars: —

The copy of the certificate which the officers of the association are to make preliminary to their organization, is to be filed with the clerk of the town, instead of the clerk of the county, as provided by the California Act.

This act is silent as to the officers before whom the acknowledgment is to be taken.

Sec. 563 provides, that no telegraph company or association shall place their posts, piers, or abutments upon any highway, without the consent of the proprietors of the land adjoining the highway; or, if this consent is refused, without the approbation of one of the County Commissioners in the county where the land is situate; which approbation shall be in writing, and given only after a hearing, upon due notice to the proprietor.

Any County Commissioner has power to make orders regulating the location of the posts, piers, and abutments, and the manner of their construction so as least to incommode the public travel and individuals, and may, for sufficient cause, at any time, change their location, whether they have been erected or not; first giving the company notice to appear and be heard in relation thereto.

Sec. 565 authorizes telegraph companies to maintain established lines upon highways, and to repair, renew, and reconstruct the same as occasion may require, so as not to change substantially the present course of the lines. But if the poles become an annoyance to the public, or to an individual in the use of his property, they may be removed by order of the Superior Court of the county where such poles are, upon complaint of the State's Attorney in said county, or of the party aggrieved. After reasonable notice to the company, and a hearing of the matter, the court may make all necessary orders to enforce their removal.

The company are prohibited from cutting, or in any way injuring, fruit, shade, or ornamental trees, without the consent of the owner; nor shall they prevent the owners of land along which the lines may be constructed, from constructing and repairing buildings and fences, and grading and improving their grounds.

Sec. 566 authorizes the wardens and burgesses of any borough, and the mayor and common council of any city, upon giving reasonable notice to the company, to compel the company to furnish such poles, of the style and finish as those officials may determine, within their limits.

By sec. 567 the Superior Court in the county appoint the appraisers to assess damages, instead of the County Court, as provided by the California Act.

Sec. 568 provides, that any person entitled, nominally or otherwise, to compensation, who is not willing to waive it, shall demand it by leaving at some office of the company a written notice demanding the same; thereupon, if the parties cannot agree, the owner shall make application as provided by sec. 567.

Sec. 571 provides that the stockholders shall be jointly and severally liable for the debts and demands of the company, contracted, or which shall be due or become due, during the time of their holding the stock; but this liability shall not exceed twenty-five per cent of their stock; nor shall they be proceeded against until judgment has been rendered against the association, and the execution returned unsatisfied in whole or in part, unless the association has been dissolved.

Sec. 572 provides that telegraph despatches shall be received, and shall be transmitted with impartiality and good faith, upon payment of the regular charges; and a penalty of one hundred dollars is imposed for any neglect or refusal so to do, to be recovered

by, and in the name of the person sending or desiring to send the message.

Sec. 573 provides that the messages shall be transmitted in the order in which they are received, under a like penalty as in sec. 572; but arrangements may be made with the proprietors of newspapers for the transmission for publication of intelligence of general interest out of its order, and communications from officers of justice shall have precedence over all others.

Sec. 574 makes the provisions of this act applicable to all companies of other States whose lines extend into this State.

Sec. 575 provides that, in case of repeal of this act, all rights herein conferred on foreign corporations or persons shall be vested in the original owners of the land on which the telegraph poles are located.

By c. 4, Acts 1848 (Revision of 1866, title 12, sec. 88), to unlawfully and intentionally injure, molest, or destroy any of the lines or other property of telegraph companies organized under the laws of the State, is punishable by fine not exceeding two hundred dollars, or imprisonment not exceeding one year, or both.

An annual statement of the gross amount of receipts for telegraph despatches paid to the company within the limits of the State, shall be furnished to the Comptroller of Public Accounts, and a tax of two per cent shall be paid upon this amount, which shall be in lieu of all other taxes upon the real and personal estate of the company which is used exclusively in its telegraph business.

H.

DELAWARE.

A penalty of twenty-five dollars for the first, and of fifty dollars for the second, offence is imposed for the wilful and malicious cutting down of any pole, or injury thereto, or for cutting, breaking, or displacing any wire of any telegraph company; and when the penalty is recovered by any person other than an agent of the company, one-half shall be for the use of such person. There shall be no stay upon the judgment for the penalty; and, upon affidavit that the defendant has not sufficient property to satisfy the same, the defendant shall be imprisoned for one month.

Telegraph wires shall be attached to the poles at least twelve feet above the ground, except where they enter a house; and if any agent of the company having supervision of the line suffers this provision to be violated for ten days, after notice by mail directed to him at the post-office nearest his residence, he shall forfeit twenty dollars to any person who will sue for the same. Revised Code 1852, c. 128, sec. 19.

I.

FLORIDA.

By the Act of December 27, 1856 (Laws of Florida, c. 781, No. 7), the mode of organizing telegraph companies is substantially the same as that provided by the California Act of April 22, 1850 (ante, App. F.), except that ten or more persons must compose the association. And it is also provided that the company shall be under the management of five trustees or directors, two of whom must be citizens of the State; they shall be elected by the stockholders, and vacancies in this office shall be filled in such manner as shall be provided by the laws of the company.

The company, when organized, has similar powers to those conferred by the above California statute.

The stockholders shall be individually liable to the creditors of the association only for so much as may remain unpaid of his subscription.

The company must commence active operations within twelve months after filing the certificate in the office of the Secretary of State, or the organization shall be held to be dissolved.

The company may purchase from any person, corporation, or governments, any grants, concessions, or privileges for the prosecution, of their enterprise, and may issue stock to the amount of the same, which shall be full stock, not liable to any call or demand whatever; provided such grants, concessions, or privileges shall be material for the objects of the association.

By Act, Dec. 30, 1856, the company may erect their posts, wires, and other fixtures upon the public roads, so as not to interfere with public travel.

It is also, by this act, made a misdemeanor, punishable with fine and imprisonment, to wilfully destroy, or in any way injure, the telegraph posts, wires, or other fixtures.

J.

GEORGIA.

Any company or individual may erect posts and wires and other fixtures for telegraph purposes, on or by the side of the public roads or highways in the State; but they must be so constructed as not to interfere with the public use of the road. Digest of 1851 Magnetic Telegraph, sec. 1.

By Act, February 15, 1854, it is made a high misdemeanor punishable by imprisonment at hard labor in the penetentiary, for not exceeding three, nor less than one, year, at the discretion of the Court, to wilfully destroy, damage, or in any way injure, the wires, posts, or fixtures of telegraph companies.

K.

ILLINOIS.

The Act of Feb. 9, 1849 (Session Laws, p. 188), is the same as the California Act of April 22, 1850 (ante, App. F.), except in the following particulars:—

The commissioners to assess damages are appointed by the Judge of the Circuit Court; and there is no limitation as to the time within which the application must be made for damages. Sec. 6.

The association may provide in its articles of association not only for an increase of capital stock, but for the extension of new lines of telegraph from time to time. Sec. 8.

The refusal to receive despatches and transmit them in good faith and with impartiality, shall cause a forfeiture of all rights and privileges acquired under the act, and a dissolution of the association. Sec. 9.

The employé of the company who fails to transmit the message, or who suppresses or divulges the contents of the message, shall be guilty of a misdemeanor, punishable by fine not exceeding one thousand dollars. Sec. 11.

Process may be served upon any clerk or agent of the company. Sec. 12.

By the Act of Feb. 21, 1861, any person transmitting, or causing to be transmitted, by telegraph any falsehood, knowing the same to

be such, shall be guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars.

L.

INDIANA.

By the Act of May 13, 1852 (Revision of 1860, c. 179; see also 1 Rev. Stat. 1852, p. 481), telegraph companies shall receive messages for transmission from other lines, and from individuals, and transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty of one hundred dollars, to be recovered by the person whose despatch is postponed or neglected; provided, that communications of public interest may be transmitted for newspapers out of their order, and communications from and for officers of justice shall have precedence of all others.

Telegraph companies shall be liable for special damages, for failure or negligence in receiving, copying, transmitting, delivering, or disclosing messages. Sec. 2.

Despatches shall be delivered by a messenger, on payment of any charges due for the same, provided the person to whom the message is addressed, or his agent, resides within a mile of the city or town where the terminal is. Sec. 3.

Railroad companies may be stockholders in telegraph companies, or may construct a telegraph to connect two or more points on their road; and, if they be the sole owners of the line, shall not be obliged to transmit for the public, but may do so. Sec. 4.

Contracts by telegraph shall be contracts in writing. Sec. 5.

Telegraph companies shall have power to lease, or attach to them other telegraph lines by lease or purchase.

They may reduce the capital stock to any amount not below the cost of construction, with the consent of a majority of the stockholders.

Officers and directors to be elected from amongst stockholders living in this State, or at some point in an adjoining State where there is a telegraph station.

Irregularities in organization of former companies are legalized. Act Feb. 1, 1853 (Revision of 1860), c. 180.

The wilful and malicious injury of any telegraph pole or wire shall be punished by imprisonment in the State prison not more

than two years, or fine not exceeding five hundred dollars, and imprisonment in the county jail not less than three nor more than six months. Act of June 10, 1852, (2 Rev. Stat. 1852, p. 388). Revision of 1860, c. 6, sec. 48.

The disclosure of messages by any employé of the company except to courts of justice, shall be punished by fine not exceeding five hundred dollars. Revision of 1860, c. 7, sec. 72.

M.

IOWA.

Any person may construct telegraph lines, but so as not to incommode the public in the use of highways or the navigation of streams; and, if placed upon private grounds, a just compensation must be made.

If such person claim more damages than the proprietor of the telegraph is willing to pay, the amount of damages is to be determined as provided in Revision of 1860, sec. 1282. Revision of 1860, secs. 1348–1350.

Proprietors of telegraph lines refusing to receive and transmit with fidelity, and without unreasonable delay, messages from other telegraph lines shall lose the benefit of all laws of the State in relation to limited partnerships, to corporations, and to obtaining private property for the use of such telegraph; and, if private property has been taken without the owner's consent, he may reclaim the same.

It is a misdemeanor in any employé to intentionally transmit a message erroneously, or to divulge the contents of any message sent or received, or to unreasonably delay the transmission of any message.

The proprietor of the telegraph is liable for all mistakes made by his employés in the transmission of messages, as well as for all damages resulting from failure to perform any other duty required by law. Revision of 1860, secs. 1351–1353.

N.

KANSAS.

By the Act of Feb. 9, 1859, any number of persons not less than five may be incorporated, and they shall make a certificate which

shall be acknowledged before a magistrate, certified by the clerk of the District Court of th[illegible], and be filed in the office of Secretary of State.

The contents of this certificate, and the effect of it as evidence, are the same as provided by the California Act of April 22, 1850 (ante, App. F.). They shall have the right to construct their lines to such points, and along such routes, as are designated in the certificate.

When ten per centum of the capital stock has been subscribed, a meeting of the stockholders shall be called, and three directors elected.

There shall be an annual meeting of stockholders, when a president, three directors, and treasurer shall be chosen.

At these annual meetings regulations and by-laws may be adopted.

This act authorizes the construction of lines of telegraph upon the public roads; but so as not to incommode the public in the use of the roads. Compiled Laws of Kansas for 1862, c. 44, secs. 16–19.

Railroad companies are authorized to construct lines of telegraph along their routes, as soon as the construction of the road is commenced, with all the powers and privileges of telegraph companies. Ibid. c. 170.

O.

KENTUCKY.

The wilful and malicious injury, obstruction, or destruction of a telegraph line, or any fixtures or property connected therewith, is punishable by imprisonment in the penitentiary not less than two nor more than ten years.

It is an offence, punishable by fine of not less than ten nor more than five hundred dollars, to knowingly transmit false intelligence by telegraph, with intent to injure any one, or to speculate upon any article of merchandise, commerce, or trade, or with intent that another may do so.

If the employé of the company, from corrupt or improper motive, or wilful negligence, withholds the transmission of messages for which the customary charges have been paid or tendered, he shall

be punished by fine not less than ten nor more than five hundred dollars. Revised Statutes 1860, vol. 1, pp. 394, 395, c. 28, art. 14, secs. 5, 6.

P.

LOUISIANA.

Telegraph companies may construct their lines over any highways, and all lands owned by the State, and over all navigable waters, but so as not to interfere with the public use of the same, or the drainage or natural servitudes of the land.

There is the same provision in relation to the immediate transmission of messages, in case of war, insurrection, etc., as provided by the Tennessee statute (post, App. II); with the additional provision, that it shall be a misdemeanor, punishable with fine not exceeding one thousand dollars, and imprisonment not exceeding one year, for any officer, clerk, or operator to refuse or intentionally omit to transmit such messages, or to designedly alter or falsify the same.

Messages shall be transmitted in the order of their reception, provided they are not immoral, or contrary to law or public policy.

The unlawful and intentional injury, molestation, or destruction of any telegraph line, or property belonging thereto, or interference with the use of such line, is punishable by imprisonment in the penitentiary not exceeding one year, or fine not exceeding five hundred dollars, or both.

The refusal by any employé of the company to deliver any message, the charges having been paid, or for the payment of which a contract shall have been made, or causing the delay or detention of such message, to give precedence to a message offered for transmission subsequent to such message, or to give precedence to the message of an officer, director, or stockholder of the company, or other person, or to reveal or make use of any message, is punishable by fine not less than fifty nor more than one hundred dollars; one-half to the Charity Hospital of New Orleans, and the other half for the use of the parish in which the offence is committed; and the offender shall also be answerable in damages to the injured party, and for a subsequent offence shall be liable to imprisonment in the parish prison not more than three months.

It is an offence in any employé of the company, punishable with

imprisonment at hard labor not less than one nor more than two years, and fine not less than two hundred and fifty nor more than five hundred dollars, to transmit any message which can in any way tend to defeat the ends of justice, by preventing the apprehension of fugitives from justice, or by communicating such information as may enable any person charged with any offence to escape.

Q.

MAINE.

By the Act of 1852, c. 237, any person or company operating a line wholly or partially in the State shall be liable for the whole amount paid for the message, whenever there is any error, or any improper or unnecessary delay in the writing out, transmission, or delivery within the usual delivery-limits of their office, of such message.

If the operator or agent designedly falsify a despatch for any purpose, he shall forfeit not less than twenty nor more than one hundred dollars for each offence, to be recovered in an action of debt; and if he evade the payment of the same, or is unable to pay, the company shall forfeit the same sum.

Nothing in this act shall exonerate any employé of the company from liability for fraud committed or attempted by telegraph communication; nor the company from liability as at common law, for any neglect or wrongdoing of such company or its agents. Revised Statutes of Maine, 1857, c. 53, Telegraph Companies.

R.

MARYLAND.

Any seven or more white persons, citizens of the United States, and a majority of them citizens of this State, may form an association for constructing telegraph lines.

There are the same provisions in relation to the certificate, and the powers of the company after it is made, as contained in the California Act of April 22, 1850 (ante, App. F.), except that the certificate shall be recorded in the office of the clerk of the Circuit Court; in Baltimore, in the office of the clerk of the Superior Court of that city.

There is the same provision as to constructing lines along public roads, and across navigable streams, as contained in the above California Act.

The company shall first obtain the written consent of the person over whose land the lines are intended to pass.

If such consent cannot be had, a magistrate shall issue his warrant directing the impanelling of a jury of twelve men, who shall make a just and equitable appraisal of the damages, which shall be reduced to writing, and filed with the clerk of the Circuit Court of the county, for confirmation by the Court. When confirmed, the corporation shall pay the damages assessed, and costs of the proceeding, before proceeding to erect the posts, piers, or abutments.

The articles of association may provide for an increase of the capital stock, and the number of the association.

Stockholders shall be liable, personally, to the extent of twenty-five per centum of their capital stock, for the debts of the company contracted, or falling due, during the time they hold the stock; but the stockholder shall not be proceeded against until judgment has been taken against the company, and execution returned unsatisfied in whole or in part, unless the association has been dissolved.

The directors, with the consent of the owners of two-thirds of the stock, may extend their line of telegraph, or construct branch lines from the main line, or unite with other telegraph companies.

The telegraph companies must receive despatches from all persons, and transmit the same with impartiality and good faith, under penalty of one hundred dollars for each offence, to be recovered in the name and for the benefit of the person sending the message.

Messages must be transmitted in the order in which they are received, under like penalty; but arrangement may be made with proprietors of newspapers for sending news of general interest for publication.

It is a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment in county jail not exceeding one year, or both, to unlawfully and intentionally injure, molest, or destroy any of the works or property of the company.

The wilful disclosure of the contents or nature of a message, or the wilful refusal or neglect to send it, is a misdemeanor, and the person guilty of the offence is punishable by imprisonment, not exceeding three months, in the county jail, or fine not exceeding five hundred dollars.

If the line is so constructed as to prevent the owner of growing timber from felling the same, he shall not be liable for damages in felling his timber so as to injure the wire, or other part of the works, unless the same be done wilfully to injure the company's works. Code of 1860, art. 26, Corporations for Constructing Telegraphs, sec. 102–121.

The wilful injury or destruction of any of the works of the company, with intent to interrupt the operations of the telegraph, is punishable by fine of not less than five nor more than fifty dollars, or imprisonment in the county jail not less than three nor more than twelve months. Code of 1860, art. 30, sec. 203.

S.

MASSACHUSETTS.

There is the same provision in relation to the construction of lines along public roads, and across navigable streams, as in the California Act of 22d April, 1850. Ante, App. F.

Also the same provision as in that act, in reference to receiving messages and transmitting them with impartiality and good faith, except that the penalty is one hundred dollars.

The selectmen of the town, or mayor and aldermen of the city, through which the lines are to pass, shall give the company their writing, specifying where the posts may be located, the kind of posts, the height at which, and the place where, the same may run. This writing shall be recorded in the town or city, and the company shall conform to its requirements.

The selectmen, or mayor and aldermen, may at any time direct an alteration of any of these works, first giving the company an opportunity to be heard upon the alteration; their decision shall be recorded in the Registry of the town or city.

Application for the appraisement of damages shall be made to the selectmen of the town, or mayor of the city; the application must be made within three months after the construction of the line.

The appraisers shall take an oath to faithfully perform their duty, before a magistrate; their duties are similar to what is prescribed in the California Act of April 22, 1850. There is also the same provision as to the payment of damages and costs, except that in case no damages are allowed, the applicant must pay the costs.

The applicant, if he consider himself aggrieved by this proceeding, may have a jury, and then the proceedings shall be conducted as provided in c. 24, sec. 76, of the Revised Statutes concerning town ways and private ways.

There is the same provision in relation to the injury or destruction of the telegraph lines or other property, as contained in the California Act above mentioned, except that the term of imprisonment is not exceeding two years.

Any railroad company, chartered by the State, may become a stockholder in a telegraph company whose line connects, or is to connect, two or more places on the line of the railroad, to an amount not exceeding two hundred dollars for each mile of railroad so connected.

Telegraph corporations shall have all the powers, and be subject to all the liabilities, restrictions, and duties, set forth in chapter 44 of the Revised Statutes. Supplement of 1854 to Revised Statutes, c. 93, secs. 1–9.

By the Act of May 23, 1851 (Supplement of 1854, c. 247), telegraph companies do not acquire easements upon lands by placing and continuing their works thereon.

Individuals or companies owning telegraph lines shall be responsible in damages for all injury done to the property of others by the construction of their works.

Incorporated companies shall not commence the construction of the telegraph line until three-fourths of its capital stock has been subscribed; and the directors shall, within ten days of the commencement of the work, file a sworn statement of the subscription in the office of the Secretary of the Commonwealth.

No incorporated telegraph company shall contract or owe debts to a larger amount than one-half its capital stock paid in.

Every telegraph corporation shall, on or before the first day of December of each year, make annual returns to the Secretary of the Commonwealth, specifying the location and line of the telegraph, its name, its capital actually paid in, its capital how invested, the value of its real estate, its annual receipts and expenditures, its real estate, its cash on hand, its credits on book account, and the amount of its indebtedness. This return shall be signed by the president, clerk, and treasurer of the company, and verified by their oath.

The president and treasurer shall be jointly and severally liable for all the indebtedness of the company in case of wilful neglect or

omission on their part to comply with any of the provisions of this act.

By the Act of April 6, 1859, towns shall not be released from liability to any person for injuries done them by telegraph companies within the limits of the town, by reason of the fact that the place of the erection of the posts or other fixtures having been designated by the selectmen of the town; but the owners of the telegraph works shall be held to re-imburse and repay to said town the full amount of damages and costs recovered by the party injured.

The Act of May 4, 1864, requires telegraph companies to return list of shareholders, capital, and market value of shares, annually, for taxation. It is also provided that, where a line of telegraph extends beyond the limits of the Commonwealth, the company shall return, under oath of its treasurer, the whole length of the line, and that part of it which lies within the limits of the Commonwealth; and the portion of the capital stock taxed by this act shall be such a portion of its whole capital stock as the length of the line in the Commonwealth bears to the whole line; and every telegraph company shall pay annually to the treasurer a tax of one and one-sixth per cent upon its whole capital stock if the line be entirely within the State; otherwise on so much of its capital stock as corresponds to the length of the line in the State.

The act on the subject of taxation of corporations generally, is the Act of May 17, 1865.

T.

MICHIGAN.

The provisions in relation to the formation of telegraph companies; the certificate of organization; the general powers of the association; the places where telegraph lines may be constructed; the penalty for intentional injury to line; and the duty of the owner or association in the transmission of messages, — are the same as those of the California Act of April 22, 1850. Ante, App. F.

The mode of assessing damages is the same as provided by the above Act of April 22, 1850, except that the Commissioners are appointed by the Circuit Court of the district within which the lands lie; and by the Michigan Act there is no limitation as to time within which the application must be made.

The provision in relation to the liability of stockholders is the same as the Maryland Act (ante, App. R.), except that by the Michigan statute the stockholders are liable for all the debts of the association, instead of to the extent of twenty-five per cent of the capital stock.

Telegraph companies shall make annual reports, stating the amount of capital; the amount actually paid in; the investment of any portion of the earnings of the company in its business; the amount of money that has been borrowed, and which remains unpaid; the commencement, general route, termination, and length of its line, and the names of the places through which they pass. This report shall be signed by the president and a majority of the directors, and verified by the oath of the president or secretary, and filed in the clerk's office of the county where its business is conducted, and a duplicate in the office of the Secretary of State. If the company fails to comply with their requirements, all the directors shall be jointly and severally liable for all the debts of the company that shall have been contracted before the report is made.

Sec. 2058, c. 70, of Compiled Laws of Michigan (Compilation of 1857) provides for an annual tax, and how the same is to be estimated and paid.

The stock of the corporation shall be deemed personal estate, transferable in such mode as prescribed by the company's laws; but the person to whom it is transferred shall be liable for the debts of the company, according to the provisions of this act, until the same shall have been entered upon the company's books, so as to show the names of the persons by and to whom transferred, the number and designation of the shares, and the date of the transfer; shares shall not be transferable until all previous calls or assessments thereon shall have been paid in, or shall have been declared forfeited for non-payment of calls thereon.

The corporation shall not purchase stock in other corporations.

Service of legal process may be upon the president or secretary; and if neither can be found in the county, then on one of the directors; and if none of these officers can be found in the county, then service may be made by leaving a copy of the process at the business office of the company, in some conspicuous place.

Books shall be kept by the secretary, treasurer, or other officers of the company, containing names of stockholders, who have become such within six years, alphabetically arranged; showing their place

of residence, the number of shares held by each, the time when they became owners thereof, and the amount of stock paid in. This book shall be kept in the company's principal office in every county in which the company transacts business, for the inspection of stockholders and creditors. Every such person shall have the right to make extracts from these books. The books shall be presumptive evidence of the facts stated in them, in favor of the party suing the company or a stockholder.

Every officer or agent of the company failing to make any proper entry in such book, or who shall neglect or refuse to exhibit the same, or allow the same to be inspected, and extracts taken therefrom as herein provided, shall be guilty of a misdemeanor, and the company shall forfeit to the party injured a penalty of fifty dollars for every such neglect or refusal, or for neglecting to keep the books open for inspection.

The duty of the company in the transmission of messages is the same as provided by the California Act of 22d April, 1850.

The wilful or negligent disclosure of the contents of a message, or wilful refusal or neglect to transmit or deliver the message, is a misdemeanor, punishable by imprisonment in the county jail not exceeding six months, or fine not exceeding five hundred dollars, in the discretion of the Court; and the company shall be liable in damages to the party aggrieved.

The State shall have a lien, superior to all others, on the line and its appurtenances, for taxes remaining unpaid, and the State Treasurer shall advertise the line and appurtenances for sale for the amount of taxes remaining unpaid, in some newspaper published in Detroit, by giving three weeks' notice, and sell the same; provided the same be not paid at the time of sale, and the surplus shall be paid to the company.

The legislature may alter or repeal this act, or annul any corporation formed under it; but the alteration or repeal or dissolution shall not take away or impair any remedy given for or against the corporation, or any of its officers or stockholders, for any right acquired, or liability which may have previously occurred. Compiled Laws of Michigan, Compilation of 1857, c. 70, Telegraph Companies.

The provisions of the Act of Feb. 12, 1853, in relation to the disclosure of the contents or nature of messages, or the refusal to send them, are the same as provided by the Maryland statute. Ante, App. R.

The Act of March 20, 1863, authorizes the lines to be placed under ground along the highways, or across the waters of the State; and the former statute authorizing the assessment of damages shall be construed to include damages occasioned by the construction of lines under ground.

This act amends the former law in reference to the assessment of damages, by requiring the commissioners to file their report in the office of the clerk of the Circuit Court, and provides that this report may be confirmed by the Court at any term, and the Court shall appoint some day when it will consider the report and appraisal, and all objections to the confirmation thereof; notice of this day shall be given by service on the president or any director of the corporation.

The objection shall be as to matter of substance and in writing, and shall be filed with the clerk of the court. Upon confirmation of the report, in case any damage be adjudged to the applicant, the association shall pay the same with the costs of the appraisal. In case no damages are given by the commissioners, and their report is confirmed, the applicant shall thereafter be held to have sustained no loss or damage by reason of said lines. If the report is not confirmed, it shall not prejudice the right of the applicant to renew his application.

When the applicant owns or occupies lands lying in, or extending into, more than one county over which the line passes, the Circuit Court of any one of those counties may appoint the commissioners to assess the damages on all such lands of the applicant, provided the counties are contiguous to each other; and when it appears that the applicant owns or occupies other lands contiguous to such lands, whether in the county where said court is held, or otherwise, the commissioners shall appraise the damages upon all the contiguous lands of such person, in whatever county they may lie, unless said association shall otherwise consent in writing.

U.

MINNESOTA.

Every person who shall wilfully or maliciously break down, injure, remove, or destroy telegraph posts or wires shall be punished by imprisonment in the territorial prison for not more than three

years, nor less than six months, or by fine not exceeding six hundred nor less than fifty dollars. Public Statutes of Minnesota, Compilation of 1859, c. 90, sec. 42.

Telegraph companies may construct their lines along the public roads, so as in no way to interfere with the safety and convenience of ordinary travel on these roads.

To unlawfully injure, destroy, or obstruct the use of any telegraph line, subjects the offending party, for the first offence, to the penalty of one hundred dollars, to be paid to the company, to be recovered as a debt; or be imprisoned in the county jail not exceeding three months; and shall also be liable for all damages: for the second offence, shall be liable to imprisonment in the county jail for one year, and to a penalty of one hundred dollars to be paid to the company, and for all damages.

No one connected with any telegraph company shall divulge the contents of any message transmitted, or received for transmission, without the consent of the party sending or receiving the same; and the same inviolable secrecy shall be maintained as is now enjoined by the laws of the United States in reference to the ordinary mail service. This act has no reference to messages of a public nature, sent with a view to publicity.

If any employé or officer of a telegraph company shall use or cause to be used, or make known or cause to be made known, any message transmitted, or received for transmission, or in any wise unlawfully expose another's business which may come to his possession as such officer or employé, he shall be subject to a fine of not less than one hundred dollars, or imprisonment not exceeding six months, or both, according to the aggravation of the offence; and also be liable to the party injured for all damages. Act Feb. 3, 1860, General Laws of Minnesota, c. 12, secs. 1–4.

V.

MISSISSIPPI.

Persons desiring to be incorporated as a telegraph company may prepare a charter, containing a clear and definite statement of the purposes for which it is created; the names of the persons to be incorporated; the powers to be exercised; the period of its continuance, if it be limited in duration, "together with whatever else

is necessary to be stated;" and also a description of the proposed line, and the localities to be traversed. This charter shall be submitted to the Governor for approval, and, if approved, shall be signed by him and the Secretary of State, with the great seal of the State affixed.

Charters may be amended or renewed in the same way. In case of renewal, it may be done simply by a certificate of the Governor that it is renewed, with the great seal of the State attached.

The charter, amendment, or renewal must be filed in the office of the Secretary of State, and a copy is admissible in evidence.

When so created, the company may determine all matters deemed by it essential to a successful organization, elect officers, fix salaries, etc., and make all necessary by-laws, and impose all necessary duties. The first meeting shall be called upon ten days' notice. Revised Code of Mississippi, c. 35, sec. 1, art. 3.

The company shall be responsible for damages occasioned by the erection of their line and fixtures, which shall be assessed for the permanent continuance of the same, and upon payment of the damages the right to continue and use such line and fixtures shall exist as if by license of the owner. Ibid. sec. 9, art. 47.

W.

MISSOURI.

There is the same provision in relation to the construction of lines along public roads, and across navigable streams, as in the California Act of April 22, 1850 (ante App. F.) except that the present act is silent as to the right to appropriate trees for the use of the line.

There is substantially the same provision in relation to the duty of the trustees of a town, or mayor and aldermen of a city, in designating the location of the company's line, etc., and in reference to the alteration of the same, as contained in the statutes of Massachusetts. Ante, App. S.

The provision for the assessment of damages is the same as provided in the Michigan statute (ante, App. T.), except in this act the application is to the County Court of the county.

There are the same provisions in relation to the transmission of messages with impartiality and good faith, and in their order, with

the same exceptions, as contained in the statutes of Connecticut. Ante, App. G.

The telegraph company is liable for special damages for negligence or failure on the part of its employés in receiving, copying, transmitting, or delivering messages.

For the disclosure of the contents, or any part thereof, of such messages, they shall be liable to the sender of the message, and also to the person to whom it is addressed, in the sum of fifty dollars to each, recoverable before a Justice of the Peace, and also for all special damages.

The company shall deliver all messages, by messenger, to the person to whom addressed, or to his agent, upon payment of any charges that may be due for the same; provided such person reside within the city or town in which the station is, or within one mile from the station; and in case he does not, the company shall, if so directed, and upon payment of postage, send the same, by mail, to the post-office designated.

There is the same provision as to railroad companies as provided by the Indiana statute. Ante, App. L.

Process or notice may be served upon any clerk or agent of the company, at any office of the company. Act of Nov. 17, 1855, Revised Statutes of Missouri, c. 156, Telegraph Companies.

X.

NEVADA.

There are the same provisions in relation to the disclosure or alteration of messages; false or forged messages; employé of the company using or appropriating information derived from messages; the neglect or postponement of messages out of their regular order; opening sealed envelopes, or fraudulent representations by which messages are procured with intent to use, destroy, or detain the same; wilfully and fraudulently reading, or attempting to read, by means of machine, etc., or clandestinely learning the contents of messages; bribing telegraph employés; malicious injury to the telegraph; the provision making contracts by telegraph, contracts in writing; sending warrants for arrest, etc., by telegraph, and authority to make arrests under such despatches; and the obligation to send despatches in the order in which they are received, — as in the California Act of April 18, 1862. Ante, App. F.

There are the same provisions in relation to the transmission and service of civil process, as provided by the California Act of April 18, 1862. Ante, App. F.

By the Act of Feb. 9, 1866, any person, company, association, or corporation may construct and maintain, or, if already constructed, may maintain, or, if partially constructed, may complete and maintain, within the State, a telegraph line or lines, by making a certificate, and acknowledging it before some officer authorized to take the acknowledgment of deeds, setting forth the name of the person, company, etc., by whom the line is to be operated, the termini of the line within the State, and a general description of the route of the line, and file the same in the office of the Secretary of State; for which such person, company, association, or corporation shall pay the Secretary of State, for the benefit of the Library Fund, the sum of five dollars, and also twenty-five cents for each folio contained in the certificate. This record shall give constructive notice to all persons of its contents, and the line, if not completed at that time, shall be continued with all convenient despatch until completed.

The lines may be constructed over or through any public or private lands, and along or across any streets, alleys, roads, or streams within the State, provided they do not obstruct the same; they may operate their lines, locate their offices, stations, etc., at any city or other place along the line, and collect charges for transmission of messages.

The rates of charges shall be written, painted, or printed, in a plain and legible manner, and posted in each office on the line, and if the agents demand or collect any greater charges than there specified, they shall be guilty of a misdemeanor, and for each offence be punished by fine not exceeding one thousand nor less than one hundred dollars, and in default of payment, may be committed to jail until paid; one-half of the fine shall go to the informer, and one-half to the School Fund of the county in which the prosecution is had; but in no case shall the county be responsible for costs.

Messages must be transmitted in the order of reception, under penalty of one hundred dollars; and all damages caused by failure, to be recovered by the person whose message is postponed.

There is the same provision as to arrangement with publishers of newspapers as provided by the California Act of April 22, 1850. Ante, App. F.

Precedence may be given to official despatches for the detection and arrest of criminals. Messages on public business may be sent by the State free of charge.

Such telegraph companies shall be governed by the general laws of the State on the subject of telegraphs.

They shall have the right of way for their lines, and so much land as may be necessary for that purpose, and may enter upon private lands for the purpose of examining and surveying the same; and if the lands cannot be obtained by the consent of the owners, they may be appropriated, upon compensation being made, by the company selecting one appraiser, and the owner of the land one; these two shall select a third, and the three shall appraise the land, after being first sworn to make a true appraisement.

If the company tender the amount appraised to the owner, they may proceed with the construction of the line, or, if constructed, in the use of the same, and may pass over these and adjoining lands, for the purpose of constructing or repairing the lines, notwithstanding such tender may be refused, provided such tender shall always be kept good by them, and provided further, that an appeal may be taken by either party from the finding of the appraisers, within three months after the appraisement, to the District Court of the district in which such lands are situated.

The owner of the line shall keep the same in as good order and repair as practicable; and a failure so to do shall work a forfeiture of all their rights and privileges; the franchise may also be declared forfeited by an information in the nature of a *quo warranto.*

Y.

NEW HAMPSHIRE.

Any person who shall wilfully and maliciously injure or destroy the property of any telegraph company employed in the construction or use of their line within the limits of this State, and any person who shall aid or assist therein, shall be punished by solitary imprisonment not exceeding six months, and by confinement to hard labor for life, or a term not less than two years. New Hampshire Compiled Statutes of 1853, c. 229, Offences against Property, sec. 4.

Z.

NEW JERSEY.

By the Act of March 5, 1853, any number of persons, consisting of two or more, may become an incorporated telegraph company, whenever they shall have subscribed one-third of their capital stock, and have deposited with the Secretary of State a printed or written description of the proposed line, the localities to be traversed, the capital of the company, the corporate name; and, by complying with the provisions of this act, they may hold personal and real estate, but not more than a quarter of an acre of real estate at any one point.

Whenever as much as one-third of the capital stock has been subscribed, they may let out the contract for building the line, or build it themselves; and may receive subscriptions to the capital stock, and give receipts for instalments paid on the same.

A meeting of the stockholders shall be called, and a president, secretary, treasurer, and, at least, three directors elected, one-third of whom shall be citizens and residents of the State; whose term of office shall continue one year, and until their successors are elected. Each share of stock represented will entitle its representative to one vote; but no one person shall be allowed to cast more than one third of the votes.

Not more than twenty cents shall be charged for any message not exceeding ten words in length; and for messages of a greater number of words, ten cents for every additional ten words, and at that rate for less than ten. Provided, however, if the message is intended for transmission over but one company's line, it shall be the duty of any company chartered by this act, on the request of any public officer of the State, to transmit (confidentially, if required) messages on public business.

The company shall pay into the public treasury one-half of one per cent on its capital stock.

Companies organized under this act may maintain their line for the term of twenty years; provided they have completed the same within three years from the date of filing the certificate in the secretary's office.

They shall establish at least one office at every forty miles traversed by their line.

Injury to, or destruction of, the use of any line, shall subject the offender, for the first offence, to a penalty of one hundred dollars, to be recovered by the company, and all damages; and, for the second offence, to imprisonment in the county jail for not exceeding one year.

The company may establish their lines upon the public roads, by obtaining the consent, in writing, of the owner of the soil, but so as not to obstruct public travel; and the use of the public streets in the incorporated cities and towns shall be subject to such regulations and restrictions as may be imposed by the corporate authorities.

Stockholders shall not be liable beyond their subscriptions.

This act does not apply to existing corporations, or any lines already in operation. Nixon's Digest, 1861, Telegraphs, sec. 1–9.

There is the same provision in relation to the disclosure of messages as provided by the Minnesota statute, ante, App. U; and for the unlawful disclosure of messages the offending party shall, for every offence, be subject to a fine of not less than one hundred dollars, or imprisonment not exceeding six months, or both, according to the aggravation of the offence. Act March 30, 1855.

AA.

NEW YORK.

By the Revised Statutes, edition of 1859, c. 18, title 17, the provisions in relation to the organization of the company, power to hold real estate, construction of lines along highways, penalty for wilful trespass, and as to order of transmission of messages, are the same as the California Act of April 22, 1850. Ante, App. F.

The assessment of damages to landowners is the same as provided by the Michigan statute, ante, App. T.; except that by this act the commissioners are appointed by the County Court of the county, and there are to be five commissioners.

There is the same provision for the increase of capital stock as provided by the California Act of April 22, 1850. Ante, App. F.

The provision in relation to the liability of stockholders, as provided by the Michigan statute (ante, App. T.), except that the liability of the stockholder shall not exceed twenty-five per cent of his stock.

There is also the same provision as to forwarding messages as

provided by the Michigan statute, with the additional stipulation that the company shall not be required to receive and transmit despatches from or for any other company owning a line parallel with, or doing business in competition with, the line over which the message is to be sent.

Any company using Morse's telegraph may organize, under this act, by filing in the office of the Secretary of State a resolution of its board of directors, signed and certified by the officers of the company, of its desire so to organize, and by publishing notices to this effect, three months previous to such organization, in some one newspaper in the cities of New York, Albany, and Buffalo, provided two-fifths of the stockholders do not dissent therefrom; and any stockholder may, by giving thirty days' notice to the officers, or any of them, at any time before the organization, refuse to go into such organization, and he shall be entitled to receive from the company the full value of his stock.

It is a misdemeanor, punishable with imprisonment in the county jail or workhouse for not less than three months, or fine not exceeding five hundred dollars, in the discretion of the court, to wilfully divulge the contents or the nature of messages, or wilfully to refuse or neglect to transmit or deliver the same.

By sec. 15, the directors or trustees of any company incorporated under the Act of April 12, 1848, may at any time, with the consent of the persons owning two-thirds of the capital stock, extend their line of telegraph, or may construct branch lines to connect with their main line, or may unite with any other incorporated company.

By sec. 16, any number of persons may associate for the purpose of establishing telegraph lines, whether within or partly beyond the State; or for the purpose of owning any interest in telegraph lines, or grants therefor, upon the terms and conditions, and subject to the liabilities, prescribed by the Act April 12, 1848; and shall become a body corporate, and shall have the powers, and be subject to the provisions, of that act, and the several acts amending it, not inconsistent herewith. And any telegraph company using or owning any line wholly or partly within the State, may become a body corporate, and entitled to the provisions herein, on filing in the office of the Secretary of State a certificate of a resolution adopted by a majority of its board of directors to organize under this act, which shall contain the specifications required by the said recited act, and shall be proved, etc., as therein required. 1853, c. 47, sec. 1.

The association may construct lines over, across, or under the public roads and streets, or waters, in the State; and upon, through, or over any other land, subject to the right of the owner to compensation.

In case of disagreement, the landowner or association may apply to the County Court of the county where the lands are, and the Court, after twenty-one days from the filing of the petition, and notice thereof, shall appoint five persons to assess the damages, as provided in that act; and they shall determine the annual rent or compensation to be paid, or a sum in gross in lieu thereof, where the fixtures are to remain permanently. Ibid. sec. 2.

Where the company owns a line, partly within and partly beyond the State, they shall render a true report of the costs of the works within the State; and the stock of such company, in an amount equal to such cost, or the dividends thereof, shall be subject to taxation, in the same manner and at the same rate as other incorporated companies are subject. Ibid. sec. 3.

The liability of any share or stockholder shall only apply to the amount due by any such share or stockholder in the company, and unpaid on or for any such share or stock. Ibid. sec. 4.

The proprietors of the patent right of Morse's telegraph may construct lines from point to point, and across the navigable waters, of the State, but so as not to injuriously interrupt navigation, or impair private rights. This shall not authorize the construction of any bridge.

It is a misdemeanor, punishable by fine and imprisonment, to knowingly and wilfully injure or destroy these lines, or any property connected therewith. This act may be amended or repealed. c. 20, title 10.

By Act of April 22, 1862, c. 425, p. 261, (see Supplement of 1863 to Revised Statutes, Telegraph Companies), any telegraph company, incorporated under the Act of April 12, 1848, may construct, own, and use any line or lines not described in their original certificate of organization, whether wholly or partly within the State; and may join with any other company in constructing, leasing, owning, or using such lines, and may own or hold any interest in any such lines, upon the terms and conditions prescribed in said act, so far as they are applicable, pursuant to the provisions of this act.

In such cases as provided in the foregoing sections, such company

shall, within one year after constructing or becoming such owner or lessee, etc., file in the office of the Secretary of State a certificate, describing the general route of the line, designating the extreme points connected thereby, as provided in sec. 2 of the act hereby amended; this certificate shall be executed under seal by at least two-thirds of the directors of such corporation, and acknowledged by them, as provided by that act.

Any company who, before the passing of this act, may have purchased, constructed, or leased, or joined with any other company in so doing, any lines of telegraph not described in their original certificate, may, within one year after the passage of this act, make and file in the secretary's office such certificate as above provided; and upon so doing, their acts, if otherwise consistent with this act, shall be valid and effectual, saving all existing rights of other persons.

BB.

NORTH CAROLINA.

There is no general provision by statute in this State upon the subject of telegraphs.

CC.

OHIO.

The telegraph companies in the State are organized by filing a certificate in the office of the Secretary of State, stating the name of the company, the termini of its line, and the counties through which it shall pass, the capital stock and amount of each share. They may thereupon construct such line or lines as are designated in the certificate, and be a body corporate by the name adopted in the certificate.

The books shall be opened for subscription to the capital stock; and, when ten per centum shall have been subscribed, a meeting shall be called, by thirty days' notice, published in a newspaper of each county through which the line passes, at which meeting shall be elected three directors, who shall continue in office until the next annual meeting.

There shall be a meeting of the stockholders annually, at a place to be designated by these three directors, when a president, secre-

ary, treasurer, and three directors shall be chosen, who shall hold, until the next annual meeting, and until their successors are elected.

Special meetings may be called by the directors.

Regulations and by-laws may be adopted at the annual meetings.

The company may construct its line from point to point, and along the public roads, but so as not to incommode the public.

Two or more companies may consolidate themselves into a single corporation, by an agreement entered into by the directors of the companies, under the corporate seal of each, prescribing the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the number of directors, not to exceed thirteen; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation, and amount of each share; the manner of converting the shares of capital stock of each company into the shares of the consolidated company; the manner of compensating stockholders who refuse to so convert their stock, — with such other details as may be agreed upon. Such new corporation shall possess all the powers, and be subject to all the restrictions, of the two or more corporations. The stockholders of the respective companies who refuse to convert their stock shall be paid their cash value, if they so require, before the consolidation.

Such agreement of the directors shall not be deemed the agreement of the respective companies until ratified by the vote of at least two-thirds in amount of the stockholders present at the meetings of each company to be called for that purpose. Each share of capital stock is entitled to one vote cast either in person or by proxy. A notice of at least thirty days, specifying the time, place, and object of this meeting, sent to each stockholder by mail whose residence is known, and also published in a newspaper in at least one city or town where the corporation has its principal office, to be published for three successive weeks, shall be given of this meeting.

When this agreement has been ratified, and a duplicate filed in the office of the Secretary of State, the respective corporations shall be merged in the new corporation, to be known by the corporate name adopted in the agreement. Upon the election of the first board of directors, all the franchises and other property of the respective corporations shall be vested in the new corporation in the same

manner and with the same powers as when vested in the original corporations; and the titles and the real estate of each corporation shall not be deemed to revert or be impaired thereby. Provided, that all the rights of the creditors of the respective corporations, and all lines, shall be preserved unimpaired, and the respective corporations shall continue to exist as far as may be necessary to enforce the same. All the liabilities of the respective corporations shall become the liabilities of the new. Statutes of Ohio, Swan & Critchfield's Revision of 1860, c. 29, secs. 44–48.

By the Act of April 14, 1861, the Governor of the State may cause to be administered to all telegraph operators in the State an oath to support the Constitution of the United States, and of the State of Ohio, and that they will not knowingly use, or allow to be used, the telegraph lines for the purpose of conveying treasonable messages.

Nor shall they enlist in the militia of this State, nor the army of the United States, without the permission of the Governor.

For the law in relation to assessment of taxes of telegraph companies, see Acts May 1, 1862, and Feb. 24, 1863.

By the Act of May 1, 1862, telegraph companies may enter upon any lands, whether held by individuals or by corporations, for the purpose of making preliminary examinations and surveys, with a view to the location of their lines; and may appropriate so much of such lands as may be necessary for their works. They shall not be authorized, without the consent of the owner in writing, to enter any dwelling, warehouse, barn, or any building connected with them, or any other building erected for any agricultural, commercial, or scientific purpose, or any building belonging to railroad companies; or to use or appropriate any part thereof; nor shall they be authorized to erect any telegraph pole, pier, or abutment in any yard or inclosure within which any such edifice may be situated, nor to erect their works so near thereto as to cause injury. The company shall not be authorized to injure or destroy any fruit or ornamental trees.

Where lands sought to be appropriated are held by any corporation, the right of the telegraph company to appropriate them shall be limited to such use as shall not in any material degree interfere with the practical uses to which the corporation has the right to put such lands under its charter; nor shall the telegraph company place any of their fixtures so close to any other line of telegraph

as to interfere materially with the practical working of such telegraph.

The company shall be limited in the use of lands of railroad companies for the permanent structure of their lines, to the lands which lie within five feet of the outer limits of the right of way of the railroad company, whenever it is practicable to erect their lines within these limits.

Where the company seeks to appropriate lands outside of these limits, the statement shall set forth the facts showing such impracticability, and designate either by a survey and map, or by reference to monuments, or by other means of easy identification, the exact spot where they seek to establish the line; and, if controverted by the railroad company, the Probate Court shall in all instances determine whether the erection of the lines at the point indicated will interfere materially with the practical uses to which the railroad company are authorized to appropriate the lands; and, if satisfied that it will so interfere, shall reject the application, or require the structure to be erected at such other point as the Court shall direct; but nothing herein shall authorize the company to condemn the use of the track or rolling stock of the railroad for the purpose of transporting poles, materials, or employés of the company, or for any other purpose. Where lands lie in more than one county, damages may be assessed in one proceeding in the court of any one of the counties where any of the lands lie, in respect of all such lands.

Where lands are subject to the easement of any street, alley, or other public way within any city or incorporated village, the mode of use shall be such as is agreed upon between the municipal authorities and the telegraph company; in case they cannot agree, or the municipal authorities unreasonably delay to enter into such agreement, the Probate Court of the proper county, in a proceeding to be instituted for that purpose, shall designate in what mode the line shall be constructed along such highway so as not to incommode the public. The municipal corporation shall receive no more compensation from the company than is necessary to restore the pavement to its former state.

Any incorporated telegraph company may construct lines, whether described in their original certificate of organization or not, and when the line lies either wholly or partly within the State and may join with any other company in conducting, leasing, owning, or using such line or lines, upon such terms as may be agreed upon between

the directors or managers of the respective corporations; or may hold any interest in such lines, or become lessees of such lines, upon such terms as may be agreed upon.

It is a misdemeanor, punishable with fine not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding one year, or both, to unlawfully and intentionally injure, molest, or destroy any of the property of a telegraph company.

There is the same provision in relation to the transmission of messages with impartiality and good faith as provided by the Maryland statute (ante, App. R.), with this additional provision, that where the sender desires to have the message forwarded over the lines of other companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and shall tender to the company the usual charges to the place of destination, it shall be the duty of the company to receive the same, and, without delaying the message, to pay the succeeding line the necessary charges for the remaining distance; and the succeeding line shall forward the message in the same manner as if the sender had applied to them in person, and paid them the usual charges; and for omitting to do so they shall be liable to a like penalty of one hundred dollars.

It is the duty of the operator or other employé plainly to inform the sender when the line is not in working order, or that the messages already in hand for transmission will prevent the applicant's message from being sent within the time required; and, if required, he must write these statements upon the despatch offered for transmission; and for omitting to do so, or intentionally giving false information, such employé and the company also shall incur the above penalty.

There is substantially the same provision in relation to the transmission of messages in the order of their reception, etc., as provided by the Connecticut statute (ante, App. G.).

No company shall be required to deliver messages at a greater distance from the station at which they are received than required by their published regulations. If the applicant direct the message to be mailed at the place of delivery, and offer to pay the postage, the company shall affix the necessary postage stamp, and mail the despatch in time for the first mail that shall depart for the place of final destination, within a reasonable time after the message has

been received at the office of delivery; and for omission so to do the company shall be liable to the above penalty.

It is a misdemeanor, punishable by imprisonment not exceeding three months in county jail, or fine not exceeding five hundred dollars, in any person connected with the company, to divulge the contents of messages intrusted to them for transmission or delivery, or to refuse or neglect to transmit or deliver the same with a view to injure the sender or intended receiver, or to benefit himself or any other person.

It is a misdemeanor, punishable as above, to knowingly transmit false communication with intent to injure any one, or to speculate in any article of merchandise, commerce, or trade, or with intent that another may do so, or to knowingly send or deliver forged despatches, or not authorized by the person whose name purports to be signed thereto.

If any corporation desire to use their lands, upon which are the lines of a telegraph company, it shall be the duty of the telegraph company to remove their poles, fixtures, etc., to such convenient place as may be designated by the corporation, upon reasonable notice given in writing, and to erect their lines in such place so as not to interfere with the practical use to which such corporation is entitled to put its grounds.

If impracticable to erect line on such other lands of the corporation, the telegraph company may appropriate adjoining lands by a new proceeding for that purpose.

If a corporation is liable to suffer damage from the decayed or defective works of the telegraph company, they may require the company to repair the same upon five days' notice; and, if the danger is imminent, the corporation may repair them at once at the expense of the telegraph company.

DD.

OREGON.

The provision in relation to the right of telegraph companies to erect their works upon public highways and across streams, is the same as provided by the statute of Iowa. Ante, App. M.

If the person over whose land they pass, claims more damage than the company is willing to pay, each party shall select one disinter-

ested person, and these shall select a third, all of whom shall constitute a board of appraisers, who shall proceed together to the premises, and make their appraisement; and the award of damages by a majority of said board shall be final. This award shall be in writing, signed and sworn to by the appraisers agreeing thereto, and shall be filed in the office of the clerk of the County Court.

The claim for damages by a private individual must be made within twelve months from the time the line is erected on his land.

Every telegraph company shall, on application of any officer of the State or United States, in case of any war, insurrection, riot, or other civil commotion, or resistance of public authority, for the prevention of crime, or arrest of persons charged or suspected herewith, give to the communication of such officer immediate despatch, at the price of ordinary communications of the same length. And if the officer, operator, or other employé of the company shall refuse or wilfully omit to transmit, or shall designedly alter or falsify the same, for any purpose whatsoever, he may be fined and imprisoned at the discretion of the Court.

There are the same provisions in the statutes of Oregon as embodied in the California Act of April 18, 1862. Ante, Appendix F. Laws of Oregon, Compilation of 1866, c. 54, sec. 1–27.

EE.

PENNSYLVANIA.

Before any act incorporating a telegraph company shall take effect, a tax of one hundred dollars shall be paid into the State Treasury upon such act of incorporation, in lieu of the enrolment tax. Purdon's Digest of Pa. Laws, 1861, of the Enrolment Tax, sec. 28.

There is the same provision in relation to the injury or destruction of the property of the telegraph company as provided by the California Act of April 22, 1850. Ante, App. F.

It is a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both, to use or cause to be used, or make known or cause to be made known, the contents of any message, or any part thereof, sent from,

or received at, any telegraph office; or to unlawfully expose another's business or secrets, or in any wise impair the value of any correspondence so sent or received.

It is a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding twelve months, or both, to in any way attempt to lead from its uses, or to make use of the electric current, for the purpose of communicating, "telegraphically," from one station of the line to another, or to a connecting telegraph line.

It is a misdemeanor, punishable as above, to knowingly send, or cause to be sent, by telegraph, any false or forged message, as from such office, or as from any person, knowing the same to be false, forged, or counterfeited, with intent to deceive or defraud any person or body corporate. Purdon's Digest, 1861, Crimes, E, sec. 80, 156, 185.

Messages shall be forwarded in their regular order, under a penalty of one hundred dollars, one-half to the party suing for the same and the other half to the State. In these suits, notice served on the president of the company is sufficient.

There is the same provision in relation to secrecy in the transmission of messages as contained in the Minnesota statute (ante, App. U), except that the present act contains no provision for punishing this offence.

Original messages, except those intended for publication, shall be preserved for at least three years, in order to produce the same when required in courts of justice, or committees of the legislature. There is the same penalty for violating this provision as the provision in relation to forwarding messages; but it is provided that confidential communications between attorney and client so transmitted shall in no case be divulged. Purdon's Digest, 1861, Telegraphs.

FF.

RHODE ISLAND.

The wilful cutting or breaking of telegraph poles or wires, or other act interrupting telegraph communication, or attempt so to do, shall be punished by imprisonment not exceeding six months, or fine not exceeding five hundred dollars.

GG.

SOUTH CAROLINA.

There are no general provisions by statute in this State upon the subject of telegraphs.

HH.

TEXAS.

There are no general statutes on the subject of telegraphs in this State.

II.

TENNESSEE.

Any person or company may construct telegraph lines along the public highways and streets, across rivers, and over State lands free of charge, so as not to obstruct, etc.

If upon lands of individuals, if not constructed on his land by contract, compensation must be made. The claim for damages must be made within twelve months after the lines are erected.

In consideration of the right of way over public property, every telegraph company shall, in case of war, insurrection, or civil commotion of any kind, and for the arrest of criminals, give immediate despatch, at the usual rates, to any messages connected therewith of any officer of this State, or the United States.

Messages shall be transmitted in their regular order, without unreasonable delay, and correctly, and shall be kept strictly confidential; and the violation of these requirements is a misdemeanor in the employé, and the company shall be liable in damages.

The wilful destruction or injury of the poles, wires, or fixtures is a misdemeanor; so also to intercept, without authority, messages transmitted by telegraph.

It is a misdemeanor to violate any of the foregoing provisions, and the company, and the offender also, shall be liable in damages to the party aggrieved.

Damages to individuals, occasioned by the erection of telegraph works on their lands, are assessed, by the appointment, by the Circuit Court of the county, of a jury of view, consisting of five persons, who shall go upon the land and appraise the damages, and set apart

a sufficient quantity of land for the purpose intended. In estimating the damages, the jury shall give the value of the land without deduction, but incidental benefits may be considered in estimating incidental damages.

If no objection is made, the report of this jury shall be confirmed by the Court, and the land decreed to the company upon payment of the damages and costs.

Either party may object to the report; and in such case, upon good cause shown, it may be set aside, and a new writ of inquiry awarded, or appeal to a regular jury, and have a trial in the usual mode in the court.

If the company enter upon lands to make preliminary examinations and surveys, they are only liable for the actual damage done.

The land shall not be permanently occupied for the works of the company, until damages assessed and costs have been paid; or, if appeal has been taken, until bond has been given to abide by the final judgment. If, however, the company has actually taken the land, the owner may apply for assessment of damages; but, in such case, must institute proceedings within twelve months after the land was actually taken. Code of Tennessee, 1858, of Telegraphs, sec. 1316–1324 and 1325–1348.

By Act of March 13, 1868, sec. 5, telegraph companies are required to take out a semi-annual license, and pay therefor a tax of five hundred dollars.

JJ.

VERMONT.

Telegraph companies may construct their lines upon the public roads, so as not to incommode the public. If there be difficulties in the way of their construction in the above manner, the selectmen of the towns where the difficulty arises shall, upon application, determine how it shall be obviated; and shall certify their decision, to be recorded in the town clerk's office.

Where the line passes along the streets of any village, or near the residence of any person, application may be made to the selectmen of such town, "or mayor of any city, or principal officers of any incorporated village, as the case may be," who shall determine through what streets the line shall pass, and in what manner inconvenience to residences shall be obviated; and such decisions shall be

final. These officers shall be allowed one dollar a day for their services, and all expenses shall be paid by the company.

Damages to the owners of lands, by reason of the erection of the lines, shall be appraised by the selectmen of the town, or mayor of any city, in which the lands are, which shall be paid by the company before any erection shall be made; and their decision shall be final, upon notice given.

The wilful injury or destruction of any telegraph line, or appurtenances thereto, or in any manner to attempt to divert or interfere with the transmission of messages along the line, or to impair the value or security of the same, subjects the party offending to a penalty of one hundred dollars, to be recovered in the name of the superintendent for the use of the company; and also to fine and imprisonment.

They may erect their lines along the side of railroad tracks, by obtaining the consent of the railroad company, by vote of the board of directors, or consent of the superintendent of the railroad. In such cases the line and fixtures shall remain the exclusive property of the telegraph company.

There is the same provision as to easement as provided by the Massachusetts Act (ante, App. S). General Statutes, Revision of 1863, c. 88.

By the Act of Nov. 11, 1863, every telegraph company, unless incorporated, shall keep on file, and have recorded in the town clerk's office of each town where it has an office, a statement of the names and residences of the persons constituting the company.

In each town where the company has an operator, also in the office of the town clerk and post-office, the telegraph company shall post a printed card, in which shall be stated all the places with which it does business, and the rate of charges for transmission.

Whenever the company charges more than this rate, the excess may be recovered back, with twelve per cent interest thereon.

The company shall not make contracts in the State, nor enforce in the State, contracts made out of the State, until it has complied with the above provisions.

KK.

VIRGINIA.

Any company incorporated to construct works of internal improvement may construct along the line of its improvement a tele-

graph for its own use and that of the public, and make charges on messages transmitted. Code of Virginia, 1849, c. 61, sec. 25.

The inventors of any system of telegraphs, or their assigns, with the assent of the Board of Public Works, may construct such telegraph along the public roads, works, and waters, so as not to interfere with their ordinary use, and along the streets of any town, with the consent of the council or trustees; and upon the land of any incorporated company, with the consent of the company; and make reasonable charges for the transmission of messages.

The legislature may alter or repeal this, or the 25th section, c. 61, *supra*.

Telegraph companies shall make annual reports to the Board of Public Works, showing the amount of capital stock in this State invested in their line, how much thereof was received by the patentee or inventor, how much held by others, the amount per share of the stock, the expense of the line, its gross and net profits, and the regulations adopted to conserve the faithful discharge of its duties. If they fail to make this report, they shall forfeit five hundred dollars, and the like forfeiture for each succeeding month that such failure shall continue.

The Act of May 26, 1852 (General Acts, c. 149), contains the same provisions as the California Act of April 22, 1850 (ante, App. F), except in the following particulars: —

This act provides for five commissioners to make the appraisement of damages; and there is no limitation as to the time within which the application shall be made for damages.

The articles of association, in addition to providing for the increase of capital stock, may also provide for the sale and transfer of stock; the name of the new shareholders being filed with the secretary of the commonwealth.

This act contains the same provision as sec. 571 of the Connecticut statute. Ante, App. G.

Messages shall be transmitted with impartiality and good faith, under penalty of one hundred dollars for each offence, to be recovered from the party sending, or offering to send, the message. And in case of failure to deliver "or despatch within such time as will allow, after its reception at the first office, one hour for each one hundred miles over which such despatch, containing fifty words or less, may be transmitted, and at the same rate for other messages, the owner or association which received the charge therefor

shall refund the same, on demand of the party from whom it was received."

There is the same provision in relation to sending messages in their order as contained in the California act above.

For disclosing the contents of messages the offender shall be guilty of a misdemeanor, punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months in the county jail.

The directors or trustees, with the written consent of the owners of two-thirds of the stock, may extend the line of telegraph, or construct branch lines to connect with the main line, or unite with any other incorporated company, with such capital stock, and upon such terms, as may be agreed upon. This act is subject to modification by the legislature.

Telegraph operators, actually engaged in their business, are exempt from serving upon juries. Act April 9, 1853.

The personal liability of stockholders shall only extend to the amount of their unpaid stock. Act of Jan. 5, 1854.

By the Act of March 11, 1856, three or more persons may sign a certificate similar to that provided by the Act of May 26, 1852 (ante, p. 502), and acknowledge the same before the Circuit or County Court in which the operations of the company are to be conducted; and thereupon the Court may grant or refuse, in its discretion, a charter of incorporation to such persons. If granted, a copy of the certificate shall be filed with the Secretary of the Commonwealth, and also with the clerk of the court.

The minimum capital of such company shall not be less than five thousand dollars, nor the maximum exceed twenty times that amount; "and the same proportion shall be preserved for greater sums." The shares of capital stock shall not be less than twenty-five dollars each.

A telegraph company shall not hold more than two acres of ground.

The company may make calls for payment on stock subscribed, under penalty for non-compliance of forfeiture of shares subscribed, and all amounts already paid; provided there be such default after sixty days' notice, requiring such payment, in a newspaper nearest the place where the company's operations are carried on.

The Act of Feb. 15, 1866, requires telegraph companies, incorporated or unincorporated, to take out a license; and a violation of

this act subjects the offending party to a fine of not less than one hundred nor more than five hundred dollars for each offence.

The Act of Feb. 4, 1866, in addition to the penalty of one hundred dollars, makes the company liable in damages for failure to send messages with impartiality and good faith, and in their order; but they may give preference to official despatches from officers of the United States or of the State.

Messages must be promptly delivered, or promptly forwarded, as the case may be; and, for failure, the company shall forfeit one hundred dollars to the person injured, and also be liable for damages.

LL.

WISCONSIN.

Any three or more persons may become incorporated as a telegraph company, by preparing a certificate, containing substantially the same statements as required by the California Act of April 22, 1850 (ante, App. F), in relation to certificates. This certificate is to be filed in the office of the Register of Deeds, and a duplicate in the office of the Secretary of State.

The company has, when this is done, substantially the same powers as designated by the above California statute.

There shall be a president, and not less than three nor more than nine directors, including the president; to be annually elected by the stockholders, ten days' public notice being given; the election to be by ballot, and each share of stock to represent a vote. If the election be not held at the time prescribed, the corporation shall not be dissolved, but the election may be held upon another day.

The directors may adopt reasonable regulations and by-laws, and may employ officers, clerks, etc., and determine their salaries.

They may make calls upon stock; and, if stockholders do not respond, their stock may be sold at public auction, upon twenty days' notice, either published or served upon the delinquent stockholder; the surplus, over and above the amount due, to be paid over to the delinquent stockholder, and a transfer of the stock be made, by the directors, to the purchaser; or the directors may sue the delinquent stockholder for the amount due upon his subscription.

The stock is personal property, and is not transferable (unless in the manner above), except upon payment of the full amount due

upon the stock at the time; and the corporation shall not use its funds in purchasing stock in any other corporation.

Stockholders shall be personally liable to the extent of their stock, for debts of the corporation to their clerks, servants, and agents, and for all other debts of the corporation after execution returned unsatisfied, in whole or in part, against the corporation; but this liability shall not be for debts contracted after the transfer of their stock.

The representatives of stockholders, and holders of stock as collateral security, shall not be personally liable, but the person pledging the stock shall be.

Representatives of stockholders shall represent the stock in their hands at the meeting of the stockholders, and vote as stockholders.

The company may increase or diminish its capital stock, and extend indefinitely its lines.

Any company heretofore formed may avail itself of the provisions of this chapter, or extend its telegraph lines, by calling a meeting of its stockholders, upon notice published, or served upon stockholders, twenty days previous to the meeting; if the votes representing one-half of the stock are given in favor of extending the line, or increasing the stock, or availing itself of the provisions of this act, a certificate, showing a compliance with the provisions of the act, the extent to which the capital stock is to be increased, and the line extended, shall be prepared, signed, and verified by affidavit of the chairman and secretary, and acknowledged by them, and filed as other certificate above; and when so filed, these things may be done by the company, and it shall be entitled to all the privileges and subject to all the liabilities provided by this act.

The books of the company shall at all times be open for inspection by stockholders, and creditors whose demands are due.

It is a misdemeanor, punishable by fine of five hundred dollars or twelve months' imprisonment, or both, to reveal the contents of any private message to any other person than the one to whom it is directed, or to his attorney or agent. This act is subject to modification or repeal. Revised Statutes of Wisconsin, 1858, c. 76, sec. 1–20.

By c. 77, Revised Statutes, 1858, of Electric Telegraph Lines, any person having a patent-right under the laws of Congress, may construct and operate telegraph lines.

There is the same provision as to public roads and waters of the

State, and as to establishing lines on private lands, as provided by the Iowa Statute (ante, App. M), except that no provision is made for compensation; but the owner must give his consent to the erection of the lines upon his lands.

Messages must be transmitted in their order; and the employé violating this provision shall be punished by fine, not less than fifty nor more than one hundred dollars.

An annual tax of twenty-five cents upon every mile in length of the line shall be paid to the State, in lieu of all other taxes; and the State shall have a lien upon the line and the appurtenances for this tax; and when the tax is due and remains unpaid, the State may advertise and sell the line for amount of taxes unpaid, provided the same, with interest and charges, shall not be paid at the time of the sale. In case of a sale, the surplus proceeds shall be paid to the owner of the line.

There is the same provision in relation to the injury or destruction of telegraph lines as provided by the California Act of April 22, 1850 (ante, App. F), except that it is the same offence by this act "to counsel or advise" the commission of the crime.

Where a telegraph line is abandoned, the owner shall forthwith remove all the wires, poles, and other fixtures, which can in any wise endanger or obstruct travel along any public road. If not removed within three months after such abandonment, any person owning adjoining lands may remove such wires, posts, etc., and appropriate the same to his own use.

By Act Sept. 25, 1862, the Secretary of State is authorized to audit accounts for telegraphing on war business.

MM.

COLORADO.

By the Act of Aug. 15, 1862, any number of persons may organize as a telegraph company, by making a certificate similar to that provided by the California Act of April 22, 1850 (ante, App. F), and thereupon shall have like powers with those authorized by the above California Act. By this act the corporate existence is limited to ten years.

When at least ten per centum of the stock has been subscribed and paid in, a meeting shall be called, upon thirty days' public

notice, and three directors chosen by ballot, who shall continue in office until the first annual meeting of stockholders thereafter.

At these annual meetings there shall be elected a president, three directors, a secretary, and treasurer; and regulations and by-laws may be adopted, and special meeting be called, or the time of the regular meetings be changed.

There is the same provision in relation to the construction of lines along public roads as provided by the Statute of Ohio. Ante, App. CC.

INDEX.

INDEX.

A.

SECTION

ACCEPTANCE,
- of message for transmission 95–98
- of proposition by mail 310
- as to difference between acceptance by mail and telegraph 295, 314, 317
- what will constitute acceptance 319, 327
- knowledge of, not necessary to a contract . . . 319–322
- actual delivery of, not necessary 329
- actions by senders of acceptance 335–337
- formal acceptance of charter not required 6

ACTION,
- at common law, against telegraph company . . 34, 70

AGENTS,
- duty of company to appoint suitable 126
- when company liable for torts of 69, 70
- criminal responsibility of 388–393
- liability of company to its own 65, 67
- liability of company for acts of, when 67, 69
- servant of connecting line agent of the first company, when . . . . . 268, 294 *a*
- how far the company the agent of both sender and receiver of message 177–179, 197, 368
- may not be agent for sender and connecting lines at same time 269
- in contracts by telegraph, whose agent is telegraph company 197, 325, 347, 354
- when personally liable 136, 138

SECTION

AGENTS — *Continued.*
have the same recourse against principal as other agents 67
must act upon their knowledge of defective machinery 67
rule as to liability for negligence *inter sese*. . . . 67
when agents for other companies 268
agency must be shown to enable principal to recover a penalty 432
AGREEMENTS, (See CONTRACTS.)
ALTERATION,
of messages 98, 165, 236
of charter, effect of, on liability of stockholder . . 18
of location of line 38, 42
APPRAISERS OF DAMAGES,
required by statute 90, 91
mode of appraisement by 90, 91
award of 91, 92
ASSENT,
of sender of message, how shown
by the contract 104, 149, 192
by signing the restrictions . . . 118, 118 *a*, 118 *b*
by acting under the notice 113, 149
or allowing the company to act, as if assent was given 149
when presumed . . . . . 118 *a*, 148, 149
must become part of contract . . . 143, 144
may be implied from the facts . . . 148, 150
(See CONTRACT.)
ASSESSMENT,
of damages 90, 91
mode of, under statutes 90, 91
ASSIGNMENT,
of corporate franchises 39, 40
of telegraph lines, etc., for benefit of creditors . . 39

B.

BAILMENT,
engagement of telegraph companies in the transmission of messages, similar to 95, 98

SECTION

BILLS AND NOTES,
protest and notice sent by telegraph 304
proof of delivery required 304
statutory regulations in reference to sending by telegraph 308
BRIDGES,
telegraph companies not to erect 60
BURDEN OF PROOF, ... 208, 261, 373, 382, 384
in actions *ex delicto* 385
as to penalties 434

C.

CAPITAL STOCK,
statutory provisions in relation to 11, 14, 18, 19
may be taxed 11
may be exempted 12
not to be presumed 12
CHARTER,
may operate telegraph without 2
organization under 14
mode of 15
construed strictly as to exclusive privileges . . . 8, 9
obligations of contracts not to be impaired . . 7, 9, 12, 18
taking franchise, does not, when 9
imposing what burdens, does not 10, 11, 12
imposing what burdens, does 12
violations of —
what are 7, 9, 12, 18, 21
what are not 9, 10, 11, 12
constructions of —
strict, as to exclusive privileges 8, 9, 42
as to conditions precedent 16
less so as to conditions subsequent . . 16
reasonable, when 38, 57, 59
against the company in ambiguities . . . 38
amendments of 10
CHECKS,
sent by telegraph (California stat.) 308

SECTION

CITIES,
(See MUNICIPALITIES.)

CITIZENS,
telegraph companies when considered, as to jurisdiction of Federal courts 77

COMMISSIONERS,
to assess damages 90, 91
mode of appointment 90, 91

COMMON CARRIERS,
whether telegraph companies are such 95–102
conflict of authorities 198–229, 252
similarity between, and telegraph companies, as to obligations 233–251
servants and machinery 126, 127
right to limit liability by express contract . . 141–147
(See CONTRACTS, MESSAGES.)

COMPENSATION,
for property taken *in invitum* 26–29
mode of determining 30, 32, 35
what injuries included in assessment of damages 30, 90, 91

CONDEMNATION,
acquisition of real estate by 26–29
eminent domain 26
corporate franchises may be taken 27
special remedy exclusive 30, 70, 84
conditions precedent to 28

CONDITIONS,
precedent to liability of stockholders 4
organization, what are 16
subsequent to organization, what are 16
upon which company will transmit messages . . 105, 110
company may make reasonable 104

CONSOLIDATION,
power of, by statute 88
no power, except by statute 44

CONSTRUCTION OF LINES,
by whom 2, 5, 8
where by purchase 2, 24

SECTION

CONSTRUCTION OF LINES — *Continued.*

where by legislative grant, generally 3, 9, 23, 24, 26, 27, 34, 49
must comply with the charter 16, 28, 70
what discretion may be used 29, 57
when upon highways 34, 49
along railroads 27, 60
under streets and roads 31, 34, 49, 56
may be changed by law 42
by town authorities . . 3, 54, 55
by the company under its charter 38, 42
how to be constructed —
properly, safely, etc., ... 59, 63
so as not to obstruct roads, navigable rivers, etc. 2, 34, 49, 60, 63
what may be taken under power to construct —
franchises of other corporations 27
land, for the line 26
for offices, stations, etc. 26, 29
extent of interest taken 24
taken under eminent domain 26
same as to franchises, etc. 27
damages caused by —
assessed as in railways 23, 30, 33
statutory provisions, (See App.) . . . 32, 35

CONTRACTS,
general power to make, etc. 37
for what, legal contracts may be made —
for the purchase of real estate . . . 4, 24, 37
for sale of real estate 4, 25, 37
for purchase of franchises 4, 27
leasehold interests 4, 37
for construction of lines, posts, etc. 37
may mortgage same 37, 39
may not, in England 40
what are illegal 119
immoral 119
in furtherance of fraud 119

SECTION

CONTRACTS — *Continued.*

what against public policy 119
in aid of crime 119
to impede justice 119
binding, if beneficial, though made without authority 46
or if ratified and adopted 48
in relation to messages with the company—
may be made by agent 160, 177
sender's agent 432
express and implied 150, 161, 168, 170, 171, 173, 176, 180
upon printed blanks, usually made 149
effect of notices, generally 104, 149, 150, 260, 268
when blank becomes the contract 118 *b*, 149, 207
when it may be presumed to be . . 150, 162, 207
who decides as to this presumption 104
may be restricted generally to their own line 268, 274
may contract for liability on other lines . . 273
are in the nature of bailments 95, 140
not *locatio operis faciendi* 95
but, *vehendarum* 98
company, under contract to send, bound—
to literal accuracy 167
to send in order of reception . 129, 133, 168, 189
impartially and in good faith 133, 134, 170, 213, 218
must forward to connecting lines 117, 128, 268, 421
should notify applicant of suspended communication 175
under contracts to deliver—
must do so promptly . . 95, 180, 188, 216, 263
or in reasonable time 188
to the person addressed or agent, etc. 184, 185, 193
immaterial whether repeated or not . 191, 263
or forward by mail 186
when and how postage may be charged and collected 186
notice sometimes given in newspapers . . . 186

SECTION

CONTRACTS — *Continued.*
not bound to notify sender of reception . . 172
must use due diligence 187
statutory provisions 187
possibly might be done orally 183
may be by telegraph 295, 335
or partly by telegraph 295
similar to contracting by mail . . 305, 306, 317
when completed by mail 310, 319–322, 327, 328
telegraph 311–318, 326, 327
when within Statute of Frauds 331–333
when evidenced by message . . . 311–339, 417
statutes authorizing 308, 334
as to privity of, with receiver of message 197, 325, 354, 368
sender . . 197, 325, 330, 333, 368

CONCEALMENT,
duty of company's servants, as to contents of messages 136

COPY,
of message, what is,
(See EVIDENCE.)

CUSTOM,
as to prepayment of messages 109
delivery of messages 184, 187
transmission of messages over connecting lines 276, 278
sending notices 303
to copy 371

CRIMINAL RESPONSIBILITY,
of telegraph companies 13, 419–446

D.

DAMAGES,
assessment of, for lands taken 30, 90, 91
consequential 33
right of company to recover for injury to works, notwithstanding offender criminally responsible . 72

SECTION

DAMAGES — *Continued.*

company liable in, for alteration of message . 165, 167
failure to inform sender of message that line is out of order 173–178
measure of 387–414
in actions *ex contractu* and *ex delicto* 387–392
in case of loss of profits in contracts by telegraph 393–397
where message is unintelligible to the operator 402–410
when the action is by the receiver of the message 411
notice in case of resale 412
where resale is made 412
co-operating negligence 413
where message is not in relation to contracts 417, 418

DELIVERY OF MESSAGES,

duty of company in respect to 95, 180
in reasonable time, when to be made 188
to whom made 184–187
in what mode 185–187
how, when personal cannot be made 187
what is sufficient 187
company not required to deliver message until charges are paid 120
the message delivered must be duplicate of the one furnished for transmission 181
personal, to be made when and how 184
oral, might discharge the obligation 183
diligence in, a question of fact for a jury . . 187, 188
should be in the order of time in which they are received 188
when to be made immediately 188
preference as to time of delivery 189
whether rule as to repeated message is a reasonable one as to the delivery of messages . . . 190–192
what will excuse 194

SECTION

DELIVERY OF MESSAGES — *Continued.*
no obligation upon company to inform sender of inability to deliver message 194
may require payment of antecedent charges . . . 195
DIRECTORS OF COMPANY,
their powers and duties 20, 21
right of majority to control 21
may be restrained in equity 21
DELAY IN TRANSMISSION OF MESSAGES,
(See MESSAGES.)
DILIGENCE,
in transmission of messages 95–102, 216, 225, 229, 232, 244, 255
in keeping line in order 124–127
DISCLOSURE OF MESSAGES,
punishment for 419–424
DUTY OF TELEGRAPH COMPANY,
to keep line in working order 124–127
to provide competent operators 126
to avail themselves of new improvements 127
to transmit messages impartially 128, 129
to have uniform rates of charges 133, 134
to inform person offering to send message, that lines are down 173–175

E.

EMINENT DOMAIN,
real estate acquired by 27, 29
conditions precedent must be complied with . . . 28
company may enter upon lands without other authority than charter 28
mode of estimating damages where land taken by virtue of 30
EQUITY,
courts of, exercise jurisdiction, injunctive and remedial, over companies 80, 81
in case of nuisance 81
ERRORS IN TRANSMISSION OF MESSAGES,
(See MESSAGES.)

SECTION

ESTOPPEL,
in pais, as to messages written upon printed blanks . 149
in case of consolidated companies 88
EVIDENCE, ... 340–386
what is the best evidence in respect to messages 340–342
what message is the original 342–348, 361–364, 366–368
copy 349, 361, 364–368
servants of company bound to give evidence in courts, as to contents of messages 138, 370–372, 375
statutory regulations in relation to 375–379
of delivery of message 369, 371
for transmission 369
when messages admissible as declarations of party . 380
in case of negligence 382–384
of experts 386
EXEMPTION FROM TAXATION,
(See TAXATION.)
EXTENT OF POWERS,
(See chapter on Powers under the Charter.) . . 36–48
EXPERTS,
(See EVIDENCE.)

F.

FINE AND IMPRISONMENT,
(See CRIMINAL RESPONSIBILITY.)
FRANCHISE,
exclusive, not implied 86
charter granting, to be construed strictly 8
binding, when expressly granted 8
subject to right of eminent domain 9, 26
assignment of . . . . . note 1, 8
of being a corporation not assignable 39
right of company to purchase exclusive franchise only to be questioned by the State in a direct proceeding 8
legislature may grant similar privileges to other corporations, unless franchise is exclusive 8
FRAUDS, STATUTE OF,
its application to messages 331–333

SECTION

FRAUDS, STATUTE OF, — *Continued.*
message, a writing within 332
statutory regulations 334–339
FRAUDS,
perpetrated by means of messages,
(See MESSAGES.)

G.

GRANT OF EXCLUSIVE PRIVILEGE,
(See FRANCHISE.)
GOVERNMENT,
power to take control of telegraphs by statute . . . 3
preference given to, in transmission of messages . . 130

H.

HIGHWAY,
company's power to establish lines upon, by statute . 49
construction of lines upon, without statute authority, indictable 13
company indictable, when they place their lines anywhere within exterior limits of, without statutory authority 50, 51
house moved along, a proper use of, which company's wires must not obstruct 53
when towns not liable for company's lines upon streets 51
provisions of English statute . . . . . App. A

I.

ILLEGAL AND IMMORAL MESSAGES,
company not to transmit 119
INDICTMENT BY STATUTE,
for injury to telegraph lines 72–75
(See CRIMINAL RESPONSIBILITY.)
INJUNCTION,
when granted 80, 81
will not be granted unless title clear 81, 82
to restrain company from misappropriation of funds 21

SECTION

INJUNCTION — *Continued.*
when improperly proceeding to take lands *in invitum* 84
from interfering with franchises of other corporations 80
will not be granted to prevent messages being sent over rival lines 83
INJURIES,
landowners to be compensated for, when lands taken compulsorily 26, 27
to franchises 6–14, 31, 37
to highways 13, 49, 50, 53
to telegraph posts and lines 72, 75
criminal responsibility for 75
penal action against company and agents for injuries sustained 65, 67
of servants, liability of company for 69
when, company liable for wilful injuries by 69
infraction of patent rights 71
negligence of injured party 64
to servants from negligence of fellow-servants . . 66
INSTRUMENT,
of writing, sent by telegraph 308, 334
for telegraphing company must provide suitable . 67, 68
statutory provisions requiring 68
INSURERS,
telegraph company when, of messages,
(See COMMON CARRIERS.)

J.

JURY,
of view, in assessment of damages 91

L.

LANDOWNER,
whether entitled to compensation for construction of lines upon highways 34
LAND,
is occupied by passing line over . . . . note, 10, 23

SECTION

LAND — *Continued.*

ownership of company by purchase 11, 24
whether company acquires fee in 24
assets of company for payment of liabilities after dissolution 25
company may mortgage or transfer . . . 25, 38, 39, 40
specific performance of contract to convey, decreed . 25

LETTER, CONTRACTS BY,
(See CONTRACT.)

LEVY,
of execution upon telegraph line 41

LIABILITY EX DELICTO,
of company to its agents,
(See AGENTS. TELEGRAPH COMPANY.)
injury to property of company subjects offender to 72, 75
for violation of rules and regulations of company . 74
when company delivers message to wrong person . 193

LOCATION OF LINE,
upon highways, and across navigable streams . . . 49
route and termini to be stated in articles of association 57
change of, when and how to be made . . 3, 38, 42, 52
regulated by towns and cities 54, 55
where right to change location is given, it must be strictly pursued 59

M.

MACHINERY,
telegraph companies must provide suitable . . 124–126
no warranty of absolute sufficiency of 67
statutes requiring company to provide 128

MANDAMUS,
to compel company to perform duty imposed by law 13, 78
to compel company to complete its line 78
to establish uniform rates of charges 78
to compel commissioners to assess land damages . . 78
appropriate remedy to compel performance of statutory obligation when no other remedy provided . 78

SECTION

MEASURE OF DAMAGES,
(See DAMAGES.)

MESSAGES,
what they are 95
prescribed form of letters and words . . . 99
the finished work of the sender 95
usually in writing 97, 233
may be oral, when 97
written, have a tangible existence . . 97, 236
are letters forwarded by electricity 97
must be reduced to writing at other end of line 97, 236
are susceptible of loss 97
are not susceptible of loss . . 151, 207, 214, 226
may be destroyed by error 98
same by contract, in hands of both operators 233
paper writings, recoverable as chattels . . 235
have the character of chattel, by being reduced to writing 236
have not the character of chattels, . . note, 151
are instruments of evidence . 233, 243, 340, 380, 417
a commodity 248
intelligence for transmission . . . 207, 214, 219
may be libellous . . . . . 138 *a*
what are repeated messages 111
how to be sent —
as written, ... 107
in regular order, faithfully, impartially, etc. . 167 168, 189, 225
but preference may be given to government . 130
and to messages of public interest . . . 131, 132
to whom delivered —
to the party addressed 184
or to agents 185
at place of business, when 186
may give notice in newspaper, when . . . 186
usual diligence required 187
when and how payment for, to be enforced —

SECTION

MESSAGES — *Continued.*

prepayment may be required 109
may be withheld until paid for 120
by lien on 120, 195
by notifying sender 120, 196
duties of company to the public in relation to —
must keep lines in good repair 113, 124, 125, 127
must provide suitable instruments, etc. 113, 125
operators 126
sufficient force for delivery 188
must send for all 128, 133
must fix uniform rates 128, 134
must not send immoral messages 119
must give certain public officers preference . 130, 131, 132, 189
may disclose private messages in legal proceedings 138
must receive from other corporations and forward . . . 117, 128, 268, 421
only in the statutory alphabet 95, 166, 182, 267
not in cipher of arbitrary characters 166
nor obscurely written 107, 166, 267
when to be translated 182
Mr. Redfield's four rules . . . . note to c. iv. 269
duties to individuals, in relation to —
to receive from all 140, 157
to receipt for, if desired 164
to forward at once, in order of time, faithfully 129, 133, 168, 189
impartially, on uniform rates . 133, 134, 170, 215, 218
must transmit correctly 167
deliver promptly . . . 95, 180, 188, 216
in reasonable time . . . 188, 189
preserve secrecy . . . 136, 171, 376–378
note date of reception by first operator . 181
second operator 181

SECTION

MESSAGES — *Continued.*

may reject those in arbitrary cipher, or obscure, or in foreign alphabets . . 95, 166, 182
should inform sender, if the lines are down, etc. 173, 427
nature of engagement as to —
bailment 95, 140
locatio operis mercium vehendarum . 98
not *locatio operis faciendi* 95
undertaking same as carriers of goods . . 95, 100
not the same 99, 102
is like, in certain respects . . . 101
rules and regulations in respect to —
power to make, generally . . 104, 141–148, 150
conferred by statute, where 104
peculiar in sending messages, etc. 104
when valid 104
validity, by whom decided 104
when offered as terms of contracts 104
sender may refuse to contract specially . . . 157
when and how accepted . . . . . 118 *b*
effect of, after acceptance . . . . . 118 *b*
rules and regulations for convenience, etc. —
analogous to railway rules, for safety, convenience, etc. 104, 151–153
must not be contrary to law 104
validity hypothetically declared by the court . 104
for protection of operators at work 105
to insure secrecy 106
requiring messages to be legible 107
excluding numerals in stating sums, etc. . . 108
especially in those making contracts . . . 108
for prepayment 109, 120
classifying charges 110
governing repeated messages 111
must all be reasonable 113–117
whether they should be made public . 152, 155
as instruments of evidence —
original, when 343, 348, 361–364

SECTION

MESSAGES — *Continued.*
secondary, when 361
one may be best evidence of part of contract . 351
the other of another part 351–364
when original in the nature of a duplicate . 349
illustration by verbal message 350
how affected by previous agreement . . . 351
cases decided 353–360
question, how affected by nature of controversy 365–368
MISDEMEANORS,
offences by companies and their agents defined 421, 436
statutory provisions of the various States 422–428, 438, 446
United States 429
Canada 430
offences by third persons defined 437

N.

NAVIGABLE STREAMS,
telegraph lines across 49
right to build bridge across, generally prohibited . . 60
NEGLIGENCE,
co-operating negligence will defeat action for damages 64, 413
burden of proof on plaintiff in such cases 64
can company stipulate for exemption from? 110–115, 117, 142, 143, 205, 210, 266, 267
in relation to delivery of messages 110–114, 190, 264–266
non-compliance with its rules does not exonerate company, when it has been guilty of negligence . 383
NOTICE,
should be given in assessment of land damages, although statute is silent as to 94
company may limit liability by special 205
knowledge of general notice brought home to party, binds him 205–210
of resale, in action for damages 412

SECTION

NUISANCE,
telegraph works erected on highway without statutory authority, are such 13
equity will enjoin that which is, *per se* 80
when manifestly so, and the complainant's rights clear 81
decline where right is doubtful 82

O.

OPERATOR,
company must provide suitable 126
no right to change message to read as he understands its meaning 167
should note upon message time of day when received 181
his duties in the transmission of messages 233
duty of operator who receives message after transmission 233, 234
when agent of sender of message 316
ORGANIZATION,
of telegraph companies 14–22

P.

PATENT RIGHTS,
can telegraph company assign? 40
infringement of 71
interference with, must be as to patentable matter . 71
PENALTIES,
penal statutes strictly construed 432
rule in case of specific penalty 431
who may sue for 432, 433
burden of proof, where 434
POWER OF ATTORNEY,
statutory provisions in relation to transmitting by telegraph 308
POWERS OF TELEGRAPH COMPANY,
under charter 36, 38
incidental, to dispose of property 39
rule otherwise in England 40

SECTION

POWERS OF TELEGRAPH COMPANY — *Continued.*
to purchase exclusive franchise from individuals . . 40
construction of 40
to alter route, when authorized by statute, strictly construed 42
power to re-locate exhausted by location 42
to make arrangements with other companies for transmission of messages 44
to enter into contracts without seal 45
PREFERENCE,
to certain public officers 130, 131, 132, 189
by statute to newspaper in transmission of messages 131
in relation to press despatches 131
PROCESS,
civil and criminal sent by telegraph 308
PROMISSORY NOTE, (See BILLS AND NOTES.)
PROTEST,
notices of, sent by telegraph 304–306
statutory provisions 308

R.

RECEIVER OF MESSAGE, (See CONTRACT.)
REMEDIES,
by statute, for assessment of land damages . . 90, 91
statutory remedy exclusive 36, 70
except where there is fraud 92
mandamus 78
scire facias and *quo warranto* 79
penal actions 419–434
actions *ex delicto* . . . 63, 69, 70, 74, 193, 385, 388, 391
ex contractu 388, 391, 402
indictment for injury to telegraph line, by statute . 75
in equity 80–85
company not answerable beyond the remedy given by statute, when 70
at commmon law for abuse of power conferred by statute 70
company to be sued at its usual place of business . 77

SECTION

REPEATED MESSAGES, (See MESSAGES.)

RESPONSIBILITY OF TELEGRAPH COMPANIES,
extent of responsibility, (See COMMON CARRIERS.)
for messages transmitted over connecting lines 270–294 *a*
governed by same rule as in case of railroad companies 278
rule as to railroad companies 278
conflict in American cases as to railroad companies . 272
rule in Canada that telegraph company is not liable beyond its own line 280–283
rule in New York 284
in California 288
receiving pay for entire distance, *primâ facie* proof of responsibility for the entire route 282
may become liable by contract, general rule . . . 273
except in Connecticut 273

RIGHTS OF TELEGRAPH COMPANIES,
to make rules and regulations . . . . 103–118 *b*, 151
to require message to be in writing 107
to refuse transmission of oral messages 107
to require that numerals shall not be used in messages 108
to fix rates of transmission 108
to require prepayment of messages 109
to classify charges in relation to messages 110
to decline messages so obscurely written, that the words cannot be read 166
and so, if in arbitrary cipher or foreign alphabets . . 95, 166, 182, 267

RULES AND REGULATIONS,
company may make 104, 141–148, 150
validity a question of law 104
reasonableness of application decided by jury . . . 104
may make, for facilitating business 151
such as to eject from office person violating, etc. 104–118, 115, 154
as to repeated messages . . . . . 104–118 *b*, 149
the reasonableness of rules as to transmission 111–118 *b*, 205–229, 242–244, 246, 257, 262

SECTION

RULES AND REGULATIONS — *Continued.*
difference when applied to delivery of message 190, 192, 263–266
Mr. Redfield's four rules (end of c. iv.) 269
duty of company to publish 152, 155
whether sender of the message is bound to know them 118, 155

S.

SCIRE FACIAS AND *QUO WARRANTO*, (See REMEDIES.)
SECRECY,
in relation to messages, enjoined by statute . . . 136
must be observed as to messages in absence of statutory requirement 136, 171
right of company to establish rules in relation to 104, 106
implied contract as to 171
SELECTMEN OF TOWN,
agents of the public 54, 55
SERVANTS, (See AGENTS.)
SHAREHOLDER,
personal liability, by statute 86, 87
conditions precedent to personal liability of, must be complied with 17
STATE,
telegraph companies in relation to 1–13
STATIONS,
may be established at intermediate points on the line, although not expressly authorized by statute . 57

STATUTES, PAGE
of England 421
Canada 447
New Brunswick 451
United States 451
Alabama 457
Arkansas 458
California 458
Connecticut 465

PAGE

STATUTES — *Continued.*

Delaware 467
Florida 468
Georgia 469
Illinois 469
Indiana 470
Iowa 471
Kansas 471
Kentucky 472
Louisiana 473
Maine 474
Maryland 474
Massachusetts 476
Michigan 478
Minnesota 481
Mississippi 482
Missouri 483
Nevada 484
New Hampshire 486
New Jersey 487
New York 488
North Carolina 491
Ohio 491
Oregon 496
Pennsylvania 497
Rhode Island 498
South Carolina 499
Texas 499
Tennessee 499
Vermont 500
Virginia 501
Wisconsin 504
Colorado 506

STOCKHOLDER, SECTION

liability of 17
subscription of stock a contract 18
effect of legislation amendatory of charter upon this contract 18
municipal corporation may be 19

PAGE

. 467
. 468
. 469
. 469
. 470
. 471
. 471
. 472
. 473
. 474
. 474
. 476
. 478
. 481
. 482
. 483
. 484
. 486
. 487
. 488
. 491
. 491
. 496
. 497
. 498
. 499
. 499
. 499
. 500
. 501
. 504
. 506

SECTION

. 17
t 18
of charter upon this
. 18
. 19

T.

SECTION

TAXATION,
- of telegraph lines 11, 12
- of capital stock 11
- of capital stock against company, and of shares against individuals, cannot be made at same time . 11
- of income 11, 429
- exemption of telegraph companies by legislation . . 12
- exemption to be held temporary, if act will bear that construction 12

TELEGRAPH COMPANIES,
- may operate lines without charter 2
- when chartered, are private corporations 4
- powers under their charter 4, 36–48
- may make arrangement with other companies for connecting lines 44
- acceptance of charter creates a contract between them and the State 5
- legislature may impose additional burdens upon . . 10
- liable to indictment at common law, when 13
  - by statute, when 420–430
  - to damages for obstructing public use of highway 63, 64
  - for all breaches of public duty 62
- individual must show special damage in such case . 62
- must keep their line in proper condition 63, 124
- duty to provide suitable instruments 65, 124
- liability to its own agents and servants in respect to defects in machinery 65, 67
- no warranty as to absolute sufficiency of machinery 65, 67
  - patent defects 67
- liable for injuries done by its servants 69
  - when for wilful acts 69
- not for fraudulent representations made outside of scope of agency 69
- liable beyond statutory damage, when 70
- will be protected in the use of line 72

SECTION

TELEGRAPH COMPANIES — *Continued.*
nature of engagement of, in respect to messages . 95, 97, 99–102
cannot provide against their own negligence . 113, 116
liability of, where no effort to transmit message, although sent as unrepeated message 117
no right to require transmission of message over their lines 121
may limit their responsibility in transmission of messages by express contract 141–146, 205
liability to sender of message under its published rules and regulations 148–163
no right to have explanation of the meaning of messages 165
not liable for error where message is illegible, in cipher of arbitrary character, or in foreign alphabets 166

TELEGRAPH LINES,
injury to, indictable by statute 3, 75
may be taken by government when public exigencies require 3
taxation of 11
authority to carry "across" railway does not authorize carrying "under" 31
company will be protected in the enjoyment of . 72–75
interference with, actionable 72
obligation upon telegraph companies, by statute, to provide suitable 65, 68
obligation upon telegraph companies, by statute. to keep in good condition 63
when medium of contract,
(See CONTRACT.)
duty of resorting to, in giving information . 297–299
cases decided 300, 301

TOWNS,
not liable to individual injured by telegraph works on streets, when 55

TORTS,
company liable for, like other persons 61

SECTION

TORTS — *Continued.*
liability may be enlarged by statute 61
company liable for agents', when 69, 70
as to patent rights 71
others liable to company 72, 74
statutes respecting 75, 419

U.

USAGE, (See CUSTOM.)

W.

WITNESS, (See EVIDENCE.)
WRITS, (See PROCESS.)

ERRATA.

At top of p. 83, *for* "§ 66," *read* "§ 67."
§ 69, n. 2, *for* "Drybury," *read* "Dryburg."
§ 146, n. 2, *for* "Calder," *read* "Colder."
§ 184, n. 2, *for* "Trust Co.," *read* "Transp. Co."
§ 213, n. 1, *for* "Caggs," *read* "Coggs."
§ 282, third line from top of page, *for* "employers," *read* "employés."
§ 310, n. 1, *for* "Taylor," *read* "Tayloe."
§ 333, § 339, n. 1, and § 358, *for* "Dunning & Smith *v.* Roberts," *read* "Dunning *v.* S. & R."

Cambridge: Press of John Wilson & Son.