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Contracts-Liability Resulting from Telegraphic Errors

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CONTRACTS – LIABILITY RESULTING FROM TELEGRAPHIC ERRORS

Of peculiar interest to persons of legal inquisitiveness is the split of authority in this country concerning the liability of a telegraph company for sending an erroneous message. It is possible to form a contract by telegram even though there has been an error in communication. This is possible since the test of the true interpretation of an offer or acceptance is not what the party making it thought it meant or intended it to mean, but what a reasonable person in the position of the parties would have thought it meant. This is the doctrine of manifestation of mutual assent.[1] Therefore, many courts hold that if either party instead of communicating with the other party directly uses an intermediary who makes a mistake in the words transmitted, the mistake is binding on the party employing the intermediary.[2] Thus, the telegraph company is considered to be the agent of the sender. However, the English court and many American courts contend that the telegraph company is not the agent of the sender but an independent contractor. This is the point upon which there has been wide divergence of legal opinion.

The Telegraph Company As An Agent

Ayer v. Western Union Telegraph Company,[3] one of the leading cases on this phase of contract law in America, expounds the view that the telegraph company becomes the agent of the offeror and the offeror is treated as having made the offer in the form in which it was received by the offeree. In this case the plaintiff, a lumber dealer, delivered to the defendant, a telegraph company, this message: "Will sell 800M. laths, delivered at your wharf, two ten net cash. July shipment. Answer quick."[4] This message was delivered by the defendant with the word "ten" omitted. The party to whom the erroneous message was delivered accepted on the basis of this telegram. Letters passed subsequently which disclosed the error in transmission. Upon the insistence of the buyer, the plaintiff finally shipped at $2. In an action against the telegraph company for the loss sustained it was maintained that the plaintiff was not bound by the erroneous message and that the plaintiff was not, in fact, damaged to a greater extent than the price paid for the transmission of the message. As the court pointed out, the question of the lia-

1. CONWAY, OUTLINE OF THE LAW OF CONTRACTS p. 25 (2nd ed. 1939); Also RESTATEMENT, CONTRACTS §§ 20, 21.
2. WILLISTON, CONTRACTS § 94 (Stud. ed. 1938).
3. 79 Me. 493, 10 Atl. 495 (1887).
4. *Id.*, p. 495.

bility of the telegraph company is important and not easy of solution. The court further said: "It is hard to impose upon the sender the negligence of the telegraph company which might have arisen from uncontrollable causes which the sender neither authorized nor contemplated. It would be equally hard for the receiver acting in good faith to lose all claim upon the sender since he might have entered negotiations with a third party. Thus, either the sender or receiver must bear the loss".[5] In this case the plaintiff was allowed recovery on the theory that the telegraph company was his agent. An agent is one who is employed to do a particular act. The telegraph company was employed to bring about contractual relations between the sender, his principal, and a third person.[6] Therefore, by the authority and assent of the sender the message sent by the telegraph company became a binding contract, for the act of an agent is the act of the principal. Consequently, if the error in transmission had been a reasonable one, the sender would have been bound even though the sendee learned of the mistake after acceptance but before shipment. Therefore, the plaintiff, in suit against his agent, the telegraph company, was allowed to recover the difference between the amount transmitted, $2, and the price that should have been communicated, $2.10.

It was held further in the *Ayer* case that as between the sender and receiver, the party who selects the telegraph as the means of communication should bear the loss caused by an error of transmission. In a later case, *Butler v. Foley*,[7] the plaintiff initiated bargaining by telegraph and the defendant made a counter-offer by the same means of communication. The telegraph company made an error in the transmission of the counter-offer which the plaintiff had accepted. Because the plaintiff sustained large loss when the defendant failed to deliver the shares, suit was brought. The court held that the offeror takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him.[8] Thus, the plaintiff sustained judgment, for the defendant became the offeror and constituted the telegraph company his agent when he made a counter-offer by making a qualified acceptance of the plaintiff's offer.

As Independent Contractor

On the other hand many decisions agree that the telegraph com-

5. *Id.*, p. 497.
6. CLARK, HANDBOOK OF LAW OF CONTRACTS p. 490 (4th ed. 1931).
7. 211 Mich. 668, 179 N.W. 34 (1920).
8. 13 C. J. 30.

pany is an independent contractor[9] with no power to bind the sender. A South Carolina case, *Harper v. Western Union Telegraph Company,*[10] is indicative of this view. A produce company at Richmond, Virginia, wired the plaintiff at Estill, South Carolina, asking a quotation upon a certain kind of potato. The plaintiff wired quoting the price at $2.75 per cwt. f.o.b. Richmond. The telegram was delivered reading $2.25 per cwt. The produce company wired and accepted the offer. The plaintiff shipped and attached the bill of lading for $2.75. The produce company replied that the price stated in the telegram was $2.25, and the plaintiff believing himself bound, accepted. The market price at the time was $2.75 to $3.00. The court held that the telegraph company was an independent contractor. Mechem has defined an independent contractor as one who exercises some independent calling, occupation, or employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the directions and control of his employer; but being responsible to his employer for the end to be achieved and not for the means by which he accomplishes it.[11] The sender of a telegram exercises no control over the process by which the message is transmitted and delivered. Therefore, the court held that since the telegraph company was an independent contractor, it was the duty of the plaintiff on learning of the negligence of the company to make every effort to mitigate damages. Judgment was not awarded because the plaintiff failed to minimize the damages, the condition of the market at the time being such that a prompt disposal would have resulted in no loss being incurred. If damages had been unavoidably incurred because of the error in transmission, even though the telegraph company was treated as an independent contractor, damages would have been allowed. The telegraph company has the duty to transmit a message correctly. If the company breaches this duty and damages are incurred, recovery will be allowed the injured party. In the *Harper* case, however, it was the plaintiff who was negligent for he did not dispose of the potatoes on the currently existing high market. This decision was in accord with a previous South Carolina holding in *Eurekea Cotton Mills v. Western Union Telegraph Company,*[12] the first case decided

9. For the tests to be used in determining the existence of an independent contractor see RESTATEMENT, AGENCY § 220 (1923); MECHEM, AGENCY §§ 506-512 (3rd ed. 1923).
10. 133 S.C. 55, 130 S.E. 119 (1925).
11. MECHEM, AGENCY § 20 (3rd ed. 1923).
12. 88 S.C. 498, 70 S.E. 1040 (1911).

on this point in South Carolina. The same reasoning is employed by the English courts. In the leading case of *Henkel v. Pape*[13] the defendant wrote a message for transmission by telegraph to the plaintiff ordering three rifles. By mistake the telegraph clerk telegraphed the word "the" for "three"; and the plaintiff thereupon, acting upon a previous communication with the defendant to the effect that he might perhaps want as many as fifty rifles, sent that number to him. The defendant declined to take more than three. In an action against him to recover the price of the fifty rifles, it was held that the defendant was not responsible for the mistake of the telegraph clerk and that, therefore, the plaintiff was not entitled to recover the price of more than three rifles. The results reached under the English rule are the same as those reached in states which hold that the telegraph company is an intermediary and not an agent. It would appear that the only cause of action for a mistake in communication available to either sender or sendee would be one against the telegraph company.

The Effect of an Unreasonable Mistake

When a telegram quoting a price has been changed in transmission the acceptance thereof does not create a contract where the message as delivered gives a price so far above or below the established market that the addressee is put on notice that there has been a mistake. All courts refuse recovery in this instance if a reasonable man would have detected the error. The *Germain Fruit Company v. Western Union Telegraph Company*[14] is indicative of this point. A message was transmitted in which oranges, mistakenly, were quoted at $1.60 per box when the current market was $2.60. Recovery was not allowed. This decision was based on the principle that one cannot receive something for nothing.

Sender's Rights

It is uniformly recognized that the sender of telegraphic messages has an action for damages against the telegraph company. When the sender of the message makes an offer and the telegraph company agrees to transmit for consideration, a contractual obligation arises between the sender of the message and the telegraph company. However, one claiming injury as a result of a negligent breach of contract is under a legal duty to exercise at least ordinary care in lessening damages so far as it is reasonably practical. This is merely

13. L.R. 6 Exch. 7 (Eng. 1870).
14. 137 Cal. 598, 70 Pac. 658 (1902).

another example of the duty on the innocent party to mitigate damages wherever possible when there has been a breach of contract. Thus, in the *Harper* case when the plaintiff learned that the price quoted by telegraph for potatoes was negligently changed to a smaller figure in transmitting the message and yet electing to deliver at the changed price, the sender, plaintiff, cannot later hold the telegraph company for the difference between the intended price and the price as changed by the telegraph company because he did not mitigate damages.

Sendee's Rights

Also, well settled by American decisions is the rule that the sendee has a cause of action against the telegraph company, but the lines of reasoning are diverse and conflicting. It is apparent that the sendee does not stand in privity with the contracting parties and if he were to recover, it would be upon some other theory. There are two views on this point. "First, that the sendee stands in relation of a third party beneficiary to the contract between the telegraph company and the sender.[15] This view has received criticism since the sendee is not always intended to receive any benefit and thus his status as a beneficiary becomes fictional.[16] On the other hand there is the view, sounding in tort, that because of the character of the service which it renders the telegraph company has become a public service enterprise owing a positive legal duty of care to both the sender and sendee.[17] If the liability were in contract, it would limit recovery to only those damages that could actually be foreseen by a reasonable man at the time the contract was made. This follows the classic *Hadley v. Baxendale.* If the action is in tort, the plaintiff may recover for all consequential damages resulting in a casual sequence from the defendant's breach of duty.[18] In certain jurisdictions, of which New York is an example, it makes little difference which theory is relied on as the contract theory of damages will be applied. As was stated by Justice Cardozo in *Kerr Steamship Company v. Radio Corporation of America*[19] ". . . though the duty to

15. Kennon v. Western Union Telegraph, 92 Ala. 399, 9 So. 200 (1890); Sherill v. Western Union Telegraph Co., 109 N.C. 527, 14 S.E. 94 (1891).
16. Tibbits, *Liability of a Telegraph Company to One Neither Sender nor Sendee for the Negligent Transmission of a Message,* 22 CORNELL LAW QUART. 579.
17. Butler v. Western Union Telegraph Co., 62 S.C. 222, 40 S.E. 162 (1901).
18. McPeek v. Western Union Telegraph Co., 107 Iowa 356, 78 N.W. 63 (1899).
19. 245 N.Y. 284, 157 N.E. 140 (1927).

serve is antecedent to the contract, yet the contract, when made, defines and circumscribes the duty, and the damages recoverable for the non-performance of the contract are the damages recoverable for the non-performance of the duty".[20]

CONCLUSION

In conclusion it may be stated that the telegraph company is a monopoly in its field and professes to carry on its business for the public benefit. Its obligations of responsibility include accuracy, promptness and impartiality. It is submitted that those jurisdictions which adhere to the *Ayer* Doctrine reach the correct results. However, this is a fallacy resulting from the reasoning used under this doctrine because in reality the telegraph company is not an agent. An agent is a person employed to do a particular service under the direction and control of the employer. The sender of a telegram does not exercise any of these essential controls over the actions of its so called agent. Though the telegraph company is a public service instrumentality and not the agent of the offeror in the strict sense of the word, it nevertheless is the means of communication chosen by the offeror. The *Harper* Doctrine, on the other hand, advocates that the telegraph company is not the agent of either party, but an independent contractor which is liable for its own negligence. An independent contractor is one hired to do a job of certain magnitude. He has control over the service, furnishes the instruments, pays the workers, etc.[21] It would seem that the *Harper* Doctrine is the more realistic of the two views even though the results reached under it are often inequitable.

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20. *Id.*, p. 143.
21. See note 11, *supra.*