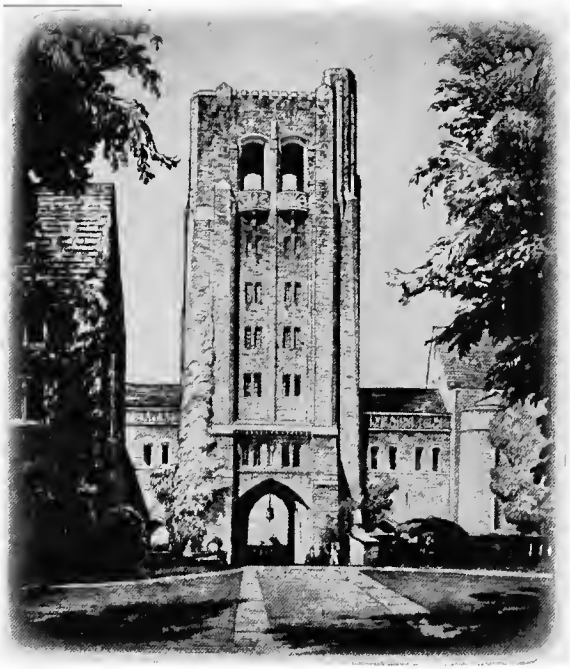

A TREATISE

ON

ELECTRIC LAW

COMPRISING

THE LAW GOVERNING

ALL

ELECTRIC CORPORATIONS, USES AND APPLIANCES

ALSO ALL

RELATIVE PUBLIC AND PRIVATE RIGHTS

SECOND EDITION
IN
TWO VOLUMES

VOL. 2

BY
JOSEPH A. JOYCE
AND
HOWARD C. JOYCE

NEW YORK
THE BANKS LAW PUBLISHING CO.
23 PARK PLACE
1907

A TREATISE ON ELECTRIC LAW

VOLUME II

CHAPTER XXII.

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§ 495. **Conduction, induction and interference generally.**— The construction and operation of electrical lines in the streets for the different purposes of transmitting news and intelli-

gence; of furnishing light, heat and power, and for propelling street cars, has raised many interesting questions as to the rights of each. These questions have involved interference, by means of conduction and induction; contact of wires by sagging; prior occupation of the streets, as affecting the rights of each; the use of appliances or devices to prevent interference of one electrical line with another; and the duties and liabilities of electrical companies in general, under such circumstances. In this connection also, several terms, phrases and appliances are referred to, which we shall consider in the following sections, as well as the general question of the rights and duties of rival electrical companies in the streets in reference to each other.

§ 496. **Use of the earth as a return circuit.**— The use of the earth for the purpose of forming the return section of an electric circuit has been known for years, the practicability of such use having been discovered about 1838, many years before the application of electricity to the purposes of telephone, electric lighting or of street railways.[1] It is a right which is common and universal, and to which no company can obtain an exclusive privilege.[2] This return circuit is formed by the grounding of the electrical wires.

§ 497. **Conduction.**— Conduction is the discharge or escape of electricity into the earth, from the wires or plant of one electrical company, by which the wires or plant of another electrical company are affected. It may occur from the grounding of wires or from the use of the rails of an electric railway, for the purpose of forming the return circuit. The result may be only slight upon the wires of another company, or it may be such

1 Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 10 Ry. & Corp. L. Jour. 92, 3 Am. Elec. Cas. 443, 30 Cent. L. Jour. 218; Cumberland Teleg. & Teleph. Assn. v. United Elec. Ry. Co., 93 Tenn. 492, 4 Am. Elec. Cas. 298, 29 S. W. 104, 27 L. R. A. 36.

2 Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 10 Ry. & Corp. L. Jour. 92, 3 Am. Elec. Cas. 443, 30 Cent. L. Jour. 218; Cumberland Teleg. & Teleph. Assn. v. United Elec. Ry. Co., 93 Tenn. 492, 4 Am. Elec. Cas. 298, 29 S. W. 104; 27 L. R. A. 36; Bell Teleph. Co. v. Montreal St. Ry. Co., Rapport's Judic. de Quebec (Can.), 10 C. S. 162, and see cases, post, in this chapter.

as to seriously interfere with the operation of the line, the effect varying according to the power of the current discharged, the condition of the earth in certain cases also causing a more serious result, owing, perhaps, to the dampness of the ground, or to a larger supply of metals beneath the surface. Telephone companies have suffered the most from this, owing to the delicate current which is used for the transaction of their business and the more powerful currents used for electric light and railway purposes. The effect upon the wires of a telephone company, caused by conduction, is in the nature of a buzzing sound, varying according to the many conditions by which it is produced, and in many instances so affecting the wires that it is impossible to converse over them. This is liable to occur as above stated where the different companies use the earth for the purpose of forming the return circuit.[3]

§ 498. **Induction.**— Induction is where wires of two circuits are suspended parallel to each other, and owing to the more powerful and changing currents in one wire, a current is induced upon the other wire, producing variations corresponding to those upon the stronger wire. In this case also, it is the telephone companies who have suffered the most, in many instances the disturbing currents being such as to prevent the successful transmission of messages.[4]

[3] Hudson River Teleph. Co. v. Watervliet Turnp. & Ry. Co., 135 N. Y. 393, 63 N. Y. St. R. 642, 32 N. E. 148, 4 Am. Elec. Cas. 275; Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 3 Am. Elec. Cas. 443, 27 N. E. 890, 29 Am. St. Rep. 559; Central Penn. Teleph. & Supply Co. v. Wilkesbarre & West Side Ry. Co., 11 Penn. Co. Ct. 417, 4 Am. Elec. Cas. 272; Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 4 Am. Elec. Cas. 306, 29 S. W. 104, 27 L. R. A. 36; Rocky Mountain Bell Teleph. Co. v. Salt Lake City Ry. Co. (Dist. Ct., Utah Ter., 3d Jud. Dist., Salt Lake Co.), 3 Am. Elec. Cas. 350, and cases referred to in this chapter, post.

[4] Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 3 Am. Elec. Cas. 443; Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 4 Am. Elec. Cas. 302, 29 S. W. 104; Hudson River Teleph. Co. v. Watervliet Turnpike & R. Co., 56 Hun (N. Y.), 67, 29 N. Y. St. R. 694, 9 N. Y. Supp. 177, 3 Am. Elec. Cas. 387.

§ 499. **Sprague single trolley system.**— A large number of the cases in which the questions of conduction, induction and general interference with wires and operation of electrical lines have been considered, are those where either the single overhead trolley system is in operation, or its use is contemplated. In this connection, it may be well to know of what this system consists. The "Sprague Single Trolley Overhead System" has been described in the following terms: "The electricity used to operate the motors under the cars is conveyed to them by a single overhead trolley wire, and a single arm or pole attached to the car and carrying a contact wheel, which runs along and presses up underneath the trolley wire. The current passes down the pole or arm to the switch apparatus on board the car, through the motors, thence to the wheels, and to the tracks. It then passes back to the station along the iron rails of the track, interlaced together by conducting wires, and firmly connected by a conducting wire with the negative pole of the dynamo, the greater portion of the current flowing along this line of the track as the return current." [5] It will be seen that in this system the rails are used for the purpose of conducting the current so as to make a return circuit, but the current which is poured into these rails will, to a great degree, escape into the surrounding earth and affect other electrical wires.

§ 500. **Double trolley system.**— The double trolley system consists in the use of two wires, one of which is for the purpose of conveying the return current back to the dynamos, without any contact with the earth. This system, although by its use the danger of conduction is obviated, is much more expensive than the single trolley system, and said to be inferior in many respects.[6] By this method, two trolley wheels are used in connection with the two wires. The current passes from one wire, through one trolley and into the motor, from which,

[5] Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 30 Cent. L. Jour. 218, 10 Ry. & Corp. L. Jour. 82, 3 Am. Elec. Cas. 443.

[6] Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 29 S. W. 104, 27 L. R. A. 36, 4 Am. Elec. Cas. 297; Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 42 Fed. 273, 3 Am. Elec. Cas. 408.

instead of passing into the wheels, it passes through the other trolley into the other wire and back to the generator.[7]

§ 501. **McCluer device.**— The effect of conduction may be avoided by the use of what is known as the McCluer device. This consists of a wire suspended upon the telephone poles, and to which the wires of the telephone company are connected at both ends, and which serves as a return circuit in place of the earth.[8] This device has been declared, in the cases to which it has been referred, as being the most effective remedy that has been discovered for disturbances caused by conduction.[9]

§ 502. **Conduction and induction — Federal case.**— In Cumberland Telephone and Telegraph Company v. United Electric Railway Company,[10] an application was made by a telephone company to restrain the use of the single trolley system by a street railway company, or the use by it of a means of electric propulsion, by which the earth was used as a return circuit. The principal grounds alleged in the complaint were that the wires of the telephone company were affected, both by conduction and induction, greatly interfering with telephonic communication. The injunction was denied, on the ground that the defendants were making lawful use of the franchise conferred upon them by the State; that no negligence had been shown in the use of such franchise; or any unnecessary or wanton disregard of the rights of the complainant; and that the injury or damages occasioned were not the direct result of the

[7] Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 30 Cent. L. Jour. 218, 10 Ry. & Corp. L. Jour. 82, 3 Am. Elec. Cas. 443.

[8] Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 42 Fed. 273, 3 Am. Elec. Cas. 408; Cincinnati Inclined Plane Ry. Co. v. City & Suburban Teleg. Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 30 Cent. L. Jour. 218, 10 Ry. & Corp. L. Jour. 82, 3 Am. Elec. Cas. 443; Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 27 L. R. A. 36, 29 S. W. 104, 4 Am. Elec. Cas. 297; Rocky Mountain Bell Teleph. Co. v. Salt Lake City R. R. Co. (Dist. Ct., Utah Ter., 3d Jud. Dist., 1889), 3 Am. Elec. Cas. 356.

[9] Cumberland Teleg. & Teleph. Co. v. United Elec. Ry. Co., 93 Tenn. 492, 27 L. R. A. 36, 29 S. W. 104, 4 Am. Elec. Cas. 297. See also cases cited in preceding note.

[10] 42 Fed. 273, 3 Am. Elec. Cas. 408.

construction of the road, but incidental damages resulting from its operation, and not recoverable. The question of the use of devices to avoid the results alleged was discussed by the court, and in reference to the McCluer device it was said: "We think we are justified in assuming that the adoption of this device by the complainant would obviate the disturbances now produced by leakage," and "we think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it. The substance of all the cases we have met in our examination of this question * * * is that, where a person is making a lawful use of his own property, or of a public franchise, in such a manner as to occasion injury to another, the question of his liability will depend upon the fact, whether he has made use of the means which in the progress of science and improvement have been shown to be the best; but he is not bound to experiment with recent inventions, not generally known, or to adopt expensive devices, when it lies in the power of the person injured to make use himself of an effective and inexpensive method of prevention. * * * Unless we are to hold that the telephone company has a monopoly of the use of the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which in the progress of science and invention may hereafter require its use, we do not see how this bill can be maintained." [11]

§ 503. **Conduction and induction — New York case.** — The case of Hudson River Telephone Company v. Watervliet Turnpike and Railroad Company is a leading case in this connection. This case first came up before the General Term of the Supreme Court,[12] on an appeal from an order of the Special Term, restraining the defendant from operating its railway by the single trolley or single wire system, between certain points in the city of Albany, until such time as the action brought for a permanent injunction might be finally determined. It was alleged that the operation of defendants' road by the single trolley would prevent the telephone company from conducting its business, without a complete change of its plant and the system

11 Per Brown, J.

12 56 Hun (N. Y.), 67, 29 N. Y. St. R. 694, 9 N. Y. Supp. 177, 3 Am. Elec. Cas. 387.

and mode of operation of its line. It appeared that the occupation of the streets by the telephone company was prior to the use of electric motors on defendants' road. The injunction was continued for thirty days, until stipulation and bond provided for in the opinion were given. This order was appealed from, and the case next came before the Court of Appeals,[13] where the appeal was dismissed, on the ground that the order was not reviewable in that court, and the court declared that it ought not to dispose of the merits of the case in this proceeding, and furthermore, that as the case was now being tried upon its merits, and that in case an appeal should be taken from that judgment, the court would then be better able to determine the ultimate rights of the parties. A trial of this case was had upon its merits before a referee,[14] who rendered a decision in favor of the electric railway company. This judgment was reversed by the General Term of the Supreme Court.[15] The case was then appealed to the Court of Appeals,[16] where the order of the court below, granting a new trial, was reversed, and the judgment entered upon the report of the referee was affirmed, with costs. It was declared, in this case, that neither priority of grant nor of occupation could avail either party. The purposes for which streets and highways were dedicated were also considered in this case, as bearing upon the respective rights of a telephone and street railway company, the distinction being made, that an electric railway was a use of the streets for one of the purposes for which they were dedicated, while the telephone was not, and it was said in this connection, referring to the right of the telephone company to the use of the streets: "It is a part of its compact with the State, that the maintenance of its lines of communication shall not prevent the adoption, by the public, of any safe, convenient and expeditious mode of transit, such as the defendants' system has been shown to be. It is not deprived of any property right, but is simply compelled to yield the subservience which it is bound to render under the charter which gave it

[13] 121 N. Y. 397, 31 N. Y. St. R. 524, 24 N. E. 832, 3 Am. Elec. Cas. 395.

[14] Mr. Isaac Lawson.

[15] 61 Hun (N. Y.), 140, 39 N. Y. St. R. 952, 15 N. Y. Supp. 752, 21 Civ. Pro. Rep. 204.

[16] 135 N. Y. 394, 63 N. Y. St. R. 642, 32 N. E. 148, 31 Am. St. Rep. 838, 4 Am. Elec. Cas. 275.

existence. * * * The use which the plaintiff is making of its grounded wires is a part of its system of telephonic communication through the public streets, and a necessary component of the service it maintains there, under the permission of the State, and is subject to the condition that it shall not incommode the use of the streets by the public. It is one indivisible franchise, and is, in its entirety, subservient to the lawful uses which may be made of these thoroughfares, for public travel. In this respect no distinction can be made between the injuries resulting from induction and conduction."[17] It was also said in this case, "We are not prepared to hold that a person, even in the prosecution of a lawful trade or business, upon his own land, can gather there, by artificial means, a natural element like electricity, and discharge it in such a volume that, owing to the conductive properties of the earth, it will be conveyed upon the grounds of his neighbor, with such force and to such an extent as to break up his business, or impair the value of his property, and not be held responsible for the resulting injury. The possibilities of the manifold industrial and commercial uses to which electricity may eventually be adopted, and which are even now foreshadowed by the achievements of science, are so great as to lead us to hesitate before declaring an exemption from liability in such a case. * * * But the record before us does not require a determination of the question in this form.* * * The use which the plaintiff is making of its grounded wires is a part of its system of telephonic communication through the public streets, and is subject to the condition that it shall not incommode the use of the streets by the public." It will be seen that in this case the decision was based mainly on the use of the streets by an electric street railway, being a proper street use, while that of the telephone company was not.

§ 504. **Conduction and induction — Ohio.**— In Ohio, in a case in which an appeal had been taken from the judgment, at General Term, affirming a judgment by which a street railway, operating by means of the single trolley system, had been enjoined from operating its line for a period of six months, the judgment granting and affirming the injunction was reversed.

[17] Per Maynard, J.

The ground upon which the application for the injunction was based was an interference, both by conduction and induction, with the wires of the telephone company, and that the latter company, by reason of its prior grant, had a right superior to that of the electric street railways. The court discussed the subject of conduction and induction and the devices for the avoidance of such results and declared that it was immaterial on which party the expense of the change might fall more heavily, but that it was a question of legal right. The respective rights of telephone companies and electric railway companies in the streets was then discussed, and also the general subject of the purposes for which streets were dedicated. The decision was based upon similar reasoning to that adopted in the New York case,[18] it being held that the question of prior grants was immaterial, since the right of a telephone company to the use of the streets was subordinate to the right of the public to use the streets for the purposes of travel, and that an electric railway being a use for this purpose, the right of the telephone company in the streets was subordinate to that of the electric railway. The following is a quotation from the opinion: "The telephone business was not among the probabilities when the streets of Cincinnati, now made use of by the telegraph association, were dedicated or condemned for the public use. The primary and dominant purpose of their establishment was to facilitate travel and transportation; they belong, from side to side and end to end, to the public, that the public may enjoy the right of traveling and transporting their goods over them. The telephone wires, poles and other appliances are not among the original and primary objects for which the streets are opened. * * * As a general rule, an occupation of the streets, otherwise than for travel and transportation, is presumptively inferior and subservient to the dominant easement of the public, for highway purposes, for if not so, the primary object of their dedication or appropriation might be largely defeated. * * * The association, in our judgment, acquired its privilege or permissory grant, subject to the duty of so changing and adjusting, when necessary, its system of operating its telephone lines, as not to curtail the enjoyment by the public of the best modes of travel and trans-

[18] See preceding section.

portation upon the streets. Whether all who go on the streets shall have the most convenient and expeditious passage and carriage of persons and goods, has not been made dependent upon the manner in which the defendant in error has preferred to locate its poles, stretch its telephone wires, or form the electric circuit. * * * The paramount easement or estate which the public acquires in the streets, carrying with it a special interest in the adoption of the most approved systems of modern street travel, cannot be made subservient to the telegraph or telephone, when admitted on the highway without the clearest expression of legislative will. * * * It is contended, however, that the defendant in error, by virtue of its grants, acquired, before the railway company had the right to use electricity as a motive power, a vested interest in the telephone system, as it now operates it, with a grounded circuit, and that not even the legislature of the State could take away from it, or injure this franchise, on the faith of which it has expended its capital and labor. * * * The exercise of their corporate privileges is subordinate to the accommodation of those who travel on the streets or highways. * * * Having received their corporate franchises from the State, they hold them in implied trust for the benefit of the community at large, and subject to the constitutional grant of legislative power to control the exercise of those franchises in the future, as the public good may require. * * * From the undisputed facts in the case, as disclosed in the record and printed argument of counsel, it is evident, as we have already seen, that the railway company acquired from the State and from the city of Cincinnati, authority to erect and maintain poles and wires in the streets or highways, and to use electricity as a motive power for its cars. Clothed with such authority, we have upon weighing the allegations in the original petition, and applying to them the well-settled principles governing the legal rights of the public in the highways, reached the conclusion that the facts set forth in the petition are not sufficient to constitute a cause of action. We are of the opinion that there has been no invasion of the rights of the telegraph association by the plaintiff in error, and that the telegraph association is not entitled to the relief prayed for in its petition." [19]

[19] Cincinnati Inclined Plane Ry. C o. v. City & Suburban Teleg. Assn.,

§ 505. **Conduction and induction — Tennessee case.**— Cumberland Telegraph and Telephone Company v. United Electric Railway Company,[20] also considers the question of conduction and induction. In this case an action for damages was brought by the telephone company against the electric railway company, for injuries to its plant by the operation of the railway by the overhead single trolley. It appeared that the telephone company had adopted the McCluer device to avoid the effects of conduction and had also incurred considerable expense in endeavoring to avoid the injury resulting from induction. The court first considered the right of the telephone company to recover for injury resulting from induction, and held that there could be no recovery for such injuries, since they were the result of the obstruction of the defendant's lawful use of the streets. Upon the question of conduction, however, the court took a different view, upon the ground that the injuries resulting therefrom did not take place upon the streets, but upon the private property of the telephone company and its subscribers, the current which was discharged into the tracks having escaped therefrom and poured through the ground for half a mile on each side. Following out its argument, based upon this ground, the court says: "The fact of plaintiff's occupation and use of the streets, a controlling factor in determining the defendant's liabililty for loss by induction, is irrelevant in the consideration of the defendant's liability for loss by conduction. This question must be determined, as if plaintiff had no poles or wires upon the streets. * * * The defendant's claim to the dominant use of the streets, if conceded, has no place in the consideration of this question, involving the rights of the parties outside the streets. * * * It is insisted

48 Ohio St. 390, 29 Am. St. Rep. 559, 27 N. E. 890, 10 Ry. & Corp. L. Jour. 82, 30 Cent. L. Jour. 218, 3 Am. Elec. Cas. 443, per Dickman, J. See also Central Union Teleph. Co. v. Sprague Elec. Ry. & Motor Co. (Com. Pl. Ct., Summit Co., Ohio, 1889), 2 Am. Elec. Cas. 307. In a later case in this State an abutting owner brought an action to restrain the construction of an electric street railway, using the overhead trolley system, in front of her property, alleging as one of the grounds interference, by induction, with the wires connecting with the telephone in her house. This ground was but briefly considered by the court, which dismissed the bill. Simmons v. City of Toledo, 8 Ohio C. C. R. 535, 5 Am. Elec. Cas. 152.

[20] 93 Tenn. 492, 27 L. R. A. 36, 29 S. W. 104, 4 Am. Elec. Cas. 297.

by defendant that plaintiff cannot recover the damages caused by induction, except on the theory that it has the right to the exclusive use of the whole earth for electric purposes. A monopoly of the earth's surface for any purpose, or by any person, is, of course, inadmissible. The plaintiff, however, repudiates this ambitious and extravagant claim, and insists that its demand is the more modest and reasonable one, for the exclusive use of electricity upon its own premises, in an authorized and nonhurtful manner, without injurious disturbance, from nonnatural electric conditions, caused by the defendant's acts. * * * In the operation of defendant's plant, large and turbulent artificial currents of the electrical fluid were generated and poured into the streets beyond defendant's control. These currents, following a natural law, left the streets and overflowed private property for half a mile on either side. It was upon the private property of the plaintiff and its subscribers, and not elsewhere, that these abnormal electric currents found and ascended plaintiff's ground wires, and throttled its plant. The injury by conduction can be obviated at an expense which entails no great hardship upon either party. We think, upon these facts, that plaintiff has the right to the protection of the courts in the enjoyment of its property. * * * The doctrine that reason sanctions and justice approves, as it appears to us, is that the lawful, harmless and accustomed use upon one's land alike of water, air, or electricity, cannot be lawfully obstructed or impaired by the injurious act of another, attended with such disturbances of natural existing conditions, and consequent loss, as that caused by conduction in this case, especially when the party performing the injurious act had the power to obviate and remedy the injury or loss, without greater sacrifice, comparatively, than is required of defendant in this case to remedy conduction. * * * The injury of conduction constitutes such invasion or taking of plaintiff's property as renders defendant liable for the damage done. It is a direct and immediate result of the defendant's injurious act. It imposes a burden upon plaintiff's property that impairs its use and value. The loss is fixed and definite in amount. It can make no difference that no material thing was taken, or that the loss resulted, not from contact of material things, but through the agency of the subtle and im-

palpable electric fluid. The important consideration is that a thing of value has been taken from plaintiff, for the benefit of defendant, as the representative of the public, and for that thing, compensation must be made." [21]

§ 506. **Conduction and induction — Utah case.**— In a case which arose in a District Court of Utah Territory, where a telephone company sought to obtain an injunction to restrain a street railway company from using the overhead single trolley system, for the propulsion of its cars, on the ground of interference with plaintiff's wires, by induction and conduction, and it appeared that the double trolley system, under the circumstances, would be attended with annoying delays and loss of time to the public, the injunction was refused, it being held that the plaintiff might avoid the trouble by the use of the metallic circuit.[22] The court said: "Streets are set apart for the people to travel on as their necessities or preferences may suggest. The use of a street for that purpose by the instrumentality of a street car is consistent with the object of its dedication. While the occupation of a street by telephone and telegraph poles is often permitted, such a use can hardly be said to be within the purposes of its dedication." [23] It was also said that each company was bound to exercise reasonable care in the maintenance of its lines, so as to prevent interference with the lines of the other company, and that it did not appear practicable for the railway company to avoid the results of conduction and induction, while it did appear to be so for the telephone company.

§ 507. **Conduction and induction — Wisconsin case.**— In a case which arose in Wisconsin,[24] which was an action by a tele-

[21] Per Pickle, S. P. J. Two judges dissented from the majority opinion in this case and one other judge concurred as to part, but dissented on the question of conduction. See East Tennessee Teleph. Co. v. Knoxville St. R. Co. (Ch. Ct., Knoxville, Tenn., 1890), 3 Am. Elec. Cas. 400, where the court refused to grant an injunction at suit of a telephone company to restrain the use by an electric railway of the earth as a return circuit.

[22] Rocky Mountain Bell Teleph. Co. v. Salt Lake City R. Co. (Dist. Ct., Utah Ter., Third Jud. Dist., 1889), 3 Am. Elec. Cas. 356.

[23] Per Zane, J.

[24] Wisconsin Teleph. Co. v. Eau Claire St. Ry. (Wis. Sup. Ct., 1890), 3 Am. Elec. Cas. 383.

phone company for an injunction restraining the operation of an electric railway, on the ground of interference with the successful operation of the lines of telephone of the plaintiff, it was held that the telephone company was not entitled to an injunction. The court declared that the use of the streets was for the purpose of the traveling public, and that the rights of the telephone company were subordinate to the right of travel. The mere fact of being subjected to inconvenience did not affect the right of the telephone company, since its use of the streets was subject to such necessary inconvenience as might result from ordinary travel, passing over the streets. The telephone company had the right to demand that those using the streets, either with vehicles or electric cars, must exercise reasonable care and be guilty of no negligence, but it could demand no more than this. The adoption of the single trolley system was not of itself negligence. The court refused the injunction, on the ground that there was a remedy for the injury, resulting from conduction and induction, which the telephone company might adopt, and having employed such remedy, then if it was found that the adoption of the remedy was made necessary by the wrongful act of the street railway company, the expense of installing the necessary devices might be recovered in an action at law. In this case the plaintiff also claimed that under a statute requiring every electrical company to provide against injury to persons or property by conduction or induction,[25] and providing for the granting of an injunction for failure so to do, it was entitled to this remedy. The court, however, held that both the plaintiff and defendant were within the meaning of the statute, one being as clearly forbidden as the other, to permit electricity to escape into the ground, and that each were in the wrong, differing only in the amount of electricity al-

[25] Laws of Wis., 1889, c. 375, §§ 1 and 2, which read as follows: "Section 1. It shall be the duty of each and every electric light and power company and of each and every person engaged in the transmission of electrical energy within this State to provide by suitable insulation, return wires, or other means against injury to persons or property, by leakage, escape, or induction of any and every current of electricity. § 2. Neglect of any of the above provisions shall entitle the person or corporation injured thereby to a preliminary injunction preventing further use of such current until said section 1 has been complied with."

lowed to escape, and that, but for the unlawful act of the plaintiff in grounding its wires, there would be no serious inconvenience from the proximity of the defendant's wires, and, therefore, the plaintiff, being in the wrong, was not entitled to an injunction.

§ 508. **Conduction and induction — Canada.**— This question also arose in a Canadian case,[26] in which it is declared that the dominant purpose of a street, being for public passage, any appropriation of it, by legislative authority, to other objects would be deemed to be in subordination to this use, unless a contrary intent be clearly expressed. In this case the operation of a telephone service, worked by the earth circuit system, was interfered with by the street railway company's adoption of electricity as its motive power. It was held that the telephone company having no vested interest in or exclusive right to the use of the ground circuit or earth system, as against a street railway company, could not recover, by way of damages, from such company, the cost of converting its earth circuit system to what is known as the McCluer system, a change which was rendered necessary by the street railway company's adoption of electricity as its motive power.

§ 509. **Conduction and induction — England.**— The question also arose in an English case,[27] in an action brought by a telephone company and one of its subscribers, to restrain an electric tramway company from so operating its lines as to occasion a nuisance to the lines of the telephone company, and also for damages. It was declared by the court that the only ground upon which the action could be maintained was on the application of the principle enunciated in Fletcher v. Rylands,[28] which is, " If the owner of land uses it for any purpose which, from its character, may be called nonnatural user, such as, for example, the introduction on to the land of something, which in the natural condition of the land is not upon it, he does so at his peril, and is liable, if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is

[26] Bell Teleph. Co. v. Montreal St. Ry. Co., Rap. Jud. Quebec, 6 Cour du Banc de la Rein, 223.

[27] National Teleph. Co. v. Baker, L. R., 2 Ch. Div. 186, 4 Am. Elec. Cas. 327.

[28] Law Rep., 1 Exch. 265 (3 H. L. 330).

thereby materially curtailed." The court then continues: "After reflecting much on the novelty of the case, on the argument addressed to me, and on the peculiarity of an electric current, as distinguished from every other power, I fail to see any reason why the principle should not be applied to it. I cannot see my way to hold that a man who has created, or if that be inaccurate, called into special existence, an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damage, which that current does to his neighbor, as he would have been, if, instead, he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate, or to control its direction or force; but when once it is established that the particular current is the creation of, or owes its special existence to, the defendant, and is discharged by him, I hold that if it finds its way on to a neighbor's land, and there damages the neighbor, the latter has a cause of action." [29] The court then refers to the claims of the defendants; first, that the plaintiff may prevent the injury complained of, by a change of system that is using the metallic return instead of the earth, and second, that since the defendants are acting under statutory powers, even if they do cause injury in the proper exercise of the powers conferred upon them, they are free from blame. The first claim was held to be without foundation and it was said in reference thereto: "There is, no doubt, a body of evidence to show that a system, different from that adopted by the plaintiff's, has been adopted elsewhere, with advantage, and may possibly prove to be the most convenient, though more expensive for them; but the evidence also proves that their present system has been largely adopted, and is received with favor by many competent to form an opinion. It also has the merits of economy. They are carrying on their own business lawfully and in the mode which they deem best, and I cannot oblige them to change their system, because they might thereby possibly enable the defend-

[29] Per Kekewich, J. In this connection in the discussion of the principle enunciated in Fletcher v. Rylands, referred to in the text, the court says: "American law apparently holds the owner of land used for a nonnatural or extraordinary purpose responsible for the consequences of such user only when they result from the owner's negligence."

ants to conduct their business without the mischievous consequences now ensuing." [30] The court then proceeded to the discussion of the second claim made by the defendants. In this connection it said: "The defendant's authority is derived, under a provisional order, confirmed by act of Parliament. * * * The Railway Acts * * * were assumed to establish the proposition that the railway might be made and used, whether a nuisance were created or not; and in my judgment a like proposition must be assumed to be established by the provisional orders, one of which is here under consideration. The defendants are expressly authorized to use electrical power, and the legislature must be taken to have contemplated it, and to have condoned by anticipation any mischief arising from the reasonable use of any such power." [31] In answer to this claim of statutory power and its effect, in reference to the operation of the railway, it was contended that, in order to avail itself of the rights thereunder, it must have acted reasonably and done its best to avoid injury to its neighbors. The court, however, found that the system in use was the most approved which science had yet discovered, and that nothing further could be demanded of the company, and it was held that the plaintiff could neither maintain an action for injunction nor for damages. It will be noted in this case, that, aside from the statute, the court was clearly inclined to favor the rights of the telephone company to an injunction and damages, but decided the case upon the ground that the construction of the railway and its operation by electricity having been authorized by Parliament, there could be no nuisance, and, consequently, no right in the telephone company to either an injunction or damages. In a later case in England the right of a cable company to an injunction restraining a tramways company from making their tramways in such a manner as to interfere with cable messages is considered. The respondent companies were incorporated by acts of Parliament and authorized to work lines of tramway by electrical power. Each statute contained a provision that the company "specially undertakes that, in the event of any electric leak taking place and any damage being caused thereby by electrolysis or otherwise, it will make good * * * all costs, damages, and expenses; and provided that

[30] Per Kekewich, J. [31] Per Kekewich, J.

nothing in this act contained shall entitle the company to use the rails as a part of its system of conductors for the return electric current without the consent of the council." A short section of the tramway lines was not included in the lines authorized by the Acts, but the road authority had granted permission to lay tramway lines on that section. Consent was obtained for the use of the rails for the return electric current, but it was found that without any negligence there was necessarily an escape of electricity from the rails into the earth, which affected a telegraph cable belonging to the appellant company, and interfered with the transmission of messages. The appellants were put to considerable expense devising means to counteract it. The court held, affirming the judgment of the court below, that there being no tangible or sensible injury to person or property, the respondents were not liable at common law for the affection of the peculiar apparatus of the appellants, within the principle of Fletcher v. Rylands,[32] although the principle of that case does obtain in the Roman law. The court also held that the necessary escape of the electricity from the rails was not a "leak," within the meaning of the statute so as to make the respondents liable for the resulting damage to the appellants.[33]

§ 510. **Conduction and induction — Conclusion.**— In the preceding sections we have only considered cases in actions which have been brought against electric railway companies, by other electrical companies, either for an injunction or for damages, embracing, so far as we have been able to obtain, all the decisions involving the respective rights of these companies, in cases of injury by conduction and induction. In the consideration of the question of the rights of such companies in case of injury resulting from the above causes, the following general principles of law are controlling: (1) Streets are for the purposes of travel, the paramount right or title to them being vested in the public. (2) Electric railways are a use for the purposes of travel and a proper street use. (3) Any appropri-

[32] 19 L. T. Rep. 220; L. R. 3 H. L. 330.

[33] Eastern & South African Teleg. Co. v. Cape Town Tramway Companies, 86 Law T. Rep. 457, 50 Wkly. Rep. 657, 71 Law J. P. C. 122 [1902], A. C. 381.

ation of the streets by legislative authority to any other purpose than that of public passage or travel, is subordinate to the latter purpose, in the absence of a clearly expressel intent to the contrary. (4) Though there may be inconvenience or loss, caused to others, by the adoption of a mode of locomotion, yet if such mode is carefully and skillfully employed, and the usefulness of the street as a public way is not destroyed or impaired, there can be no recovery, unless the right to recover is conferred by statute, or unless there has been an encroachment upon private rights, amounting to an appropriation of private property. (5) The respective rights of the companies are to be determined by what are proper and legitimate street uses, within the purposes of their original dedication. (6) Priority of grant or of occupation will not avail either company. (7) It is incumbent upon every electrical company using the streets, to exercise reasonable care to avoid injury to the lines and business of another company. (8) One electrical company, whether its occupation be superior or subordinate, cannot unnecessarily infringe upon the rights of another company. (9) No electrical company has an exclusive right to the use of the earth circuit. Applying these principles, the following rules may de deduced, which we think are clearly sustained by the weight of authority. For injuries caused by induction, due to the use of overhead trolley wires, there can be no recovery by another electrical company, provided the street railway company has exercised reasonable care and has not unnecessarily infringed upon the others' rights. For injuries caused by conduction, due to the more powerful currents used by an electric street railway company, there can be no recovery by another electrical company, whose wires are grounded upon the streets. And, though its wires may be grounded upon private property, yet if directly connected with its use of the public streets, and a part of its system in such use, there can be no recovery from the street railway company. "It is one indivisible franchise and is in its entirety subservient to the lawful uses which may be made of these thoroughfares for public travel." [34] A different rule, however, would probably prevail,

[34] Hudson River Teleph. Co. v. Watervliet Turnpike & Ry. Co., 135 N. Y. 393, 63 N. Y. St. R. 642, 32 N. E. 148, 31 Am. St. Rep. 838, 4 Am. Elec. Cas. 275, per Maynard, J.

in case the other electrical company had constructed its lines upon private property, and the streets were not affected by the operation of its system. In such a case, if the lines were so affected by conduction as to prevent their operation or the successful transaction of the business of the company, there would probably be held to be such an appropriation of private property as would require compensation to be made.

§ 510a. **Interference — Electric light and other wires — Federal case.**— The United States Circuit Court of Appeals has determined that a telephone company does not, by its prior occupation of the streets, obtain an exclusive right thereto, but that its right is subject to such incidents as result from the exercise of their rights by other parties who have acquired a valid franchise of a similar character. The court said: "It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant." And it was also declared that the first occupant was bound to exercise its privilege in such a way as to give room to another coming in and that mere interference, not affecting the practical operation of the lines of the earlier occupant afforded no ground for complaint.[35]

§ 511. **Interference — Electric light and other wires — Alabama case.**— In Consolidated Electric Light Company v. People's Electric Light and Gas Company,[36] which was an appeal from a decree dissolving a temporary injunction, restraining the defendant from placing its wires among those of the complainant, the question of the respective rights of rival electric light companies in the streets was discussed. It appeared that the complainant was first in the occupation of the streets, and also first in the operation of its system, and it was declared

[35] Louisville Home Teleph. Co. v. Cumberland Teleph. & Teleg. Co., 111 Fed. 663, 49 C. C. A. 524, 8 Am. Elec. Cas. 108, reversing 110 Fed. 593, wherein an order was made granting a preliminary injunction.

[36] 94 Ala. 372, 4 Am. Elec. Cas. 252.

by the court that by reason of such prior occupation it acquired the right not to be molested in its possession, being restricted, however, to the occupation of only so much space as was reasonably necessary for the safe and successful operation of its line. The court reversed the decree, dissolving the injunction and ordered the injunction reinstated. In a later case in this State the question is considered in a suit by a telephone company to enjoin another telephone company from erecting its poles and wires on the same side of the street as those of the complainant. It appeared from the bill and answer that defendants' poles were being placed between those of complainant and were of sufficient height to enable defendant to string its wires so as not to interfere by contact with the complainant's or act as conductors of electricity from them. Defendant's poles were to be set in the ground six feet, and braced as well as possible. Any contact with complainant's wires during the process of erection would be of a temporary and incidental character. To prevent defendant's wires acting as conductors of electricity from those of complainant scientific appliances for insulation were to be provided. The court, after considering the above facts decided that a case for injunction was not made out.[37]

§ 511a. **Interference — Electric light and other wires — Illinois case.**— In a case in Illinois the rights of different telephone companies in the streets are considered and it is decided that a telephone company which is already in occupation of the streets does not thereby acquire an exclusive right to occupy such streets or any particular side of any of them and it is declared in this case that though there may be some slight interference with an existing company by the subsequent construction and operation of another line, yet that a later company is entitled to use the streets for its line, provided it so constructs and uses its system as not unnecessarily and unreasonably to interfere with the operation by the prior company of its system.[38]

[37] American Teleph. & Teleg. Co. v. Morgan County Teleph. Co., 138 Ala. 597, 36 So. 178.

[38] Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, 65 N. E. 329, 8 Am. Elec. Cas. 81, citing Joyce on Electric Law, § 517. The court, after discussing at length the rights of the different companies, said: "While it is true that, in a certain sense, every case of overbuilding or underbuilding or

§ 512. **Interference — Electric light and other wires — Indiana case.—** A case which came before one of the lower courts of Indiana involved the rights of rival electric light companies in the streets.[39] This was an action by the company earlier in the occupation of the streets, to restrain the other company from erecting and maintaining its lines in such a manner as to interfere with the lines of the plaintiff. It appeared that the complainant had been under a contract to furnish public lighting for the city, but that its contract had expired, and that the contract for such lighting had been awarded to the defendant. The court said that if neither company had the contract for such lighting, then their rights would be co-ordinate, but by reason of the defendant having the contract, its rights in the streets were superior to those of the complainant, since by reason of the contract the defendant was obliged to furnish lamps in certain portions of the streets, and that it must place the poles where such lights were required, and for this purpose it would have the right to bring its wires by the cheapest, most convenient, direct and practical route to the point where the street was to be lighted, and to place its poles and string its wires wherever these most convenient places were. The motion for temporary injunction was, therefore, denied.

§ 512a. **Interference — Electric light and other wires — Iowa case.—** In a case in Iowa it is decided that where two telephone companies are in occupation of a street and neither company has an exclusive privilege to the use of such street or any particular side thereof, the company first in possession is entitled to be protected from unreasonable interference, and that where a good reason appears the court may require the wires of the respective companies, as constructed and proposed to be constructed, to be so separated that the practical opera-

joint occupancy is an interference, yet it is not necessarily an unnecessary and unreasonable interference. Appellant's right was not to operate its telsphone system in Aurora free from any interference whatever, but so as to be free from unreasonable or unnecessary interference, or, in other words, such interference as would prevent the practical operation of its telephone system." Per Magruder, C. J.

[39] Terre Haute Elec. L. & P. Co. v. Citizens' Elec. L. & P. Co. (Super. Ct., Vigo County, Ind., 1895), 6 Am. Elec. Cas. 193.

tion of one system will not interfere with that of the other.[40]

§ 512b. **Interference — Electrict light and other wires — Minnesota case.—** In a case in Minnesota it is decided that, as between two electrical companies entitled to use the streets, the prior occupant acquires superior rights which a subsequent occupant must not substantially invade or interfere with. In this case a telephone company which had been in the occupation of the streets for several years sought to restrain a later occupant from alleged unlawful interferences with its lines and wires. It appeared that the later company crossed the lines of the other company upon poles at street intersections, and placed its wires immediately thereunder, in such a manner as to interfere with the prior occupant in the necessary use of its franchise, and it was held that such erection and maintenance of its poles and wires by defendant was an illegal impairment of the plaintiff's rights, which would be restrained by injunction.[41]

§ 513. **Interference — Electric light and other wires — Missouri case.—** In a case which arose in Missouri,[42] the conflicting rights of telegraph companies and electric light companies in the streets was involved. This was an action for an injunction by the telegraph company to restrain the electric light company from transmitting currents of electricity through certain wires, which were strung in proximity to those of the telegraph company. In the St. Louis Circuit Court, an injunction had been granted, restraining the transmission of any electric currents through wires strung below those of the plaintiff, or the stringing of any more wires in such position; from suspend-

[40] Northern Teleph. Co. v. Iowa Teleph. Co. (Iowa, 1904), 98 N. W. 113.

[41] Northwestern Teleph. Exch. Co. v. Twin City Teleph. Co., 89 Minn. 495, 95 N. W. 460, 8 Am. Elec. Cas. 103. The court declared in this case: "As between two corporations exercising similar franchises upon the same street, priority, though it does not create monopoly, carries superiority of rights, and equity will adjust conflicting interests, as far as possible, controlling them, so that each company may exercise its own franchise as fully as is compatible with the necessary rights of others. But, where interference is unavoidable, the later occupant must give way." Per Lovely, J.

[42] Western Un. Teleg. Co. v. Guernsey & Scudder E. L. Co., 46 Mo. App. 120, 3 Am. Elec. Cas. 425.

ing any wires above those of the plaintiff, nearer than three feet, and ordering guards for the electric light company's wires. On appeal this judgment was affirmed. The court declared that there was no substantial difference in principle between the case of a licensee and of an adjoining owner, the rights of each being subject to legitimate street uses, which the city might make of its streets, even though such uses cause inconvenience to either, so long as they do not amount to a substantial subversion of private rights. Licensees obtain, by prior occupation, no exclusive right to any part of the street, as against subsequent licensees, but, there must be no substantial invasion by the latter of the rights of the former. The telegraph company being engaged in the transmission of messages partly between States, and being subject to severe penalties for any delinquency on its part, have a right to insist upon the rigid protection of the law as to the instrumentalities essential to a faithful performance of its duties.[43]

§ 514. **Interference — Electric light and other wires — Nebraska case.**— In a case which arose in Nebraska, which was an action instituted by a telephone company to enjoin an electric light company from erecting its poles and wires in the same street upon which the telephone wires were placed, it was shown, by sufficient evidence, that the ordinance giving the authority to the electric light company to erect its poles and wires upon the street was passed, and said company had constructed its plant and erected a part of its poles and wires, had decided upon the streets and public ground which it would occupy, and notified the telephone company of the fact, before it had constructed its lines thereon, which the officers and agents of the telephone company had stated would be satisfactory to them, and had also commenced the erection of its lines on the streets designated, when the telephone company erected its poles and wires on the designated line, which was immediately followed by the erection of the electric light poles and wires. It was held that the finding of the District Court. that the electric light company first occupied the street, was sustained by the evidence, and where there was sufficient evidence to sustain the finding of the above fact, the trial court would be justified

[43] Per Rombauer, P. J.

in refusing an injunction against the electric light company, restraining it from occupying the streets in question.[44]

§ 514a. **Interference — Electric light and other wires — Pennsylvania case.—** This question is considered in a case in Pennsylvania between two electric light companies where the complainant, which was first in the occupation of the streets, claimed that the later company was interfering with its line. The court declared that as between different corporations, in such cases, the one which was prior in its occupation of a street had a superior right and that if an interference of the lines was unavoidable, the later must give way. The court, however, further declared that equity will, as far as is possible, adjust the conflicting interests so that each company may execise its own franchises as fully as is compatible with the necessary exercise of the others.[45]

§ 515. **Interference — Electric light and other wires — Texas case.—** The question as to the respective rights of telephone and electric light companies in the streets also came before the Texas courts.[46] In one of the District Courts of this State an injunction had been granted, by which an electric light company was restrained from stringing its wires nearer than four feet from the telephone company's wires. Upon appeal, it appearing that the telephone company was prior in its occupation of the street, and that the electric light company was infringing upon its rights, the judgment granting the injunction was affirmed. It was said by the court that the telephone company's "franchise being superior in point of time to that of the appellant, and having exercised its right under its franchise, appellant in the absence of a superior right could not interfere with the use and enjoyment of that privilege, by stringing wires in such close proximity to those of appellee, as to impair the efficiency of appellee's telephone service."[47]

[44] Nebraska Teleph. Co. v. York Gas & Elec. L. Co., 27 Neb. 284, 3 Am. Elec. Cas. 364.

[45] Edison Electric L. & P. Co. v. Merchants & Manufacturers' E. L., H. & P. Co., 200 Pa. St. 209, 49 Atl. 766, 7 Am. Elec. Cas. 413.

[46] Paris Elec. L. & Ry. Co. v. Southwestern Teleg. & Teleph. Co. (Tex. Ct. App., 1894), 5 Am. Elec. Cas. 262.

[47] Per Rainey, J.

§ 516. **Interference — Electric light and other wires — Vermont case.**— In a Vermont case [48] the question of interference between the wires of two electric light companies, was before the court for consideration. The company earlier in occupation brought an action to restrain the later company from so maintaining its wires as to interfere by induction with the wires of the complainant. The bill was dismissed in the lower court, and upon appeal the decree dismissing the bill was reversed. It was said by the court, that when the complainant had, in reliance upon its contract, expended money in establishing its plant and appliances, the village could not, by ordinance, infringe upon these rights, nor could it confer upon another company authority to infringe. As between a prior and subsequent licensee, the prior licensee did not obtain an exclusive right to the use of the streets, but the rights of the subsequent lisensee were subordinate to those of the prior licensee, and must be exercised in such a manner as not to interfere with them.[49]

§ 517. **Interference — Electric light and other wires — Conclusion.**— Upon the question of interference by the electric wires of one company with the wires of another electrical company, the following general rule may be stated, being clearly sustained by the weight of authority.[50] As between different electrical companies, prior authority to one of the companies to occupy, or prior occupation of the streets, will not confer upon such company an exclusive right. The right of the prior licensee, however, must not be substantially invaded by the later company. Such subsequent licensee is under the duty to so maintain its wires and lines as not to interfere with the right of the prior occupant of the streets, to properly maintain and operate its lines and to transact the business it is authorized by its franchise to transact.[51]

§ 517a. **Guard wires to prevent contact of wires.**— It is the duty of an electrical company, maintaining its wires in the

[48] Rutland Elec. L. Co. v. Marble City Elec. L. Co., 65 Vt. 377, 26 Atl. 635, 4 Am. Elec. Cas. 256.

[49] Per Tyler, J.

[50] See cases in preceding sections.

[51] See also sections, ante, on Conduction and Induction.

streets, to prevent, so far as can be done by the exercise of reasonable care and diligence, the escape of electricity from its wires to other wires, by contact.[52] On account of the powerful current of electricity used in furnishing light and propelling street cars, any contact therewith of the wires of the telephone or telegraph company, conveying a weaker current, may not only cause injury to the apparatus of the latter companies, but is also a source of danger to their employees, and to the general public in many instances. Guard wires have been declared to be the most effectual remedy to prevent such contact of wires.[53] And it has been said, that if guard wires will prevent contact of wires, due care requires that they be placed by an electric street railway company, before turning on its powerful current, or it may avail itself of any other reasonable precaution or practical appliance to prevent contact, known and recognized to be effective, and that omission to take such precaution would constitute negligence.[54] In a New York case, however, it is said that in absence of evidence that such guard wires are either necessary or usual in the construction of single trolley lines, for propelling street cars, failure to use them is not negligence.[55] And in another case, it is held that a telephone company, maintaining a wire securely fastened above a trolley wire, will not be excused for negligence because of the failure of the trolley company to maintain guard wires in accordance with the duty imposed upon it, but that where both companies maintain their wires, there being no guard, with a knowledge of the danger caused thereby, they are jointly liable for negligence.[56] In a Wisconsin case it is held that it is a question of fact for the jury, whether the failure of a trolley company to maintain guard wires, so as to prevent other wires from falling upon them and becoming charged with electricity, is such negligence

[52] City Elec. St. Ry. Co. v. Conery, 61 Ark. 381, 31 L. R. A. 570, 33 S. W. 426, 3 Am. & Eng. R. Cas. (N. S.) 365.

[53] State ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co., 87 Wis. 72, 41 Am. St. Rep. 23, 4 Am. Elec. Cas. 289, 57 N. W. 970.

[54] Central Penn. Teleph. & Supply Co. v. Wilkesbarre & West Side Ry. Co., 11 Penn. Co. Ct. Rep. 417, 4 Am. Elec. Cas. 260.

[55] City of Albany v. Watervliet Turnpike & R. Co., 76 Hun (N. Y.), 136, 57 N. Y. St. R. 453, 27 N. Y. Supp. 848, 4 Am. Elec. Cas. 367.

[56] McKay v. Southern Bell Teleph. Co., 111 Ala. 337, 31 L. R. A. 589, 19 So. 695, 3 Am. & Eng. Corp. Cas. (N. S.) 605.

as will render the company liable for an injury received by a passer-by, who came in contact with a broken telephone wire, charged from a trolley wire.[57] An ordinance requiring an electric railway to maintain guard wires "Whenever it shall be necessary to cross * * * telephone lines or lines of any wire used," is reasonable, since it requires that to be done which in law and good conscience ought to be done, and it is also clearly sustained, under the police power of a city. In case of failure to comply therewith, mandamus will issue in a proper case to compel compliance.[58]

[57] Block v. Milwaukee St. R. Co., 89 Wis. 371, 5 Am. Elec. Cas. 293, 61 N. W. 1101.

[58] State ex rel. Wisconsin Teleph. Co. v. Janesville St. Ry. Co., 87 Wis. 72, 41 Am. St. Rep. 23, 4 Am. Elec. Cas. 289, 57 N. W. 970.

CHAPTER XXIII.

RATES AND CHARGES.

§ 518. Electric railways — Rates of fare — Municipality may regulate.
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§ 518. **Electric railways — Rates of fare — Municipality may regulate.** — A municipality in granting the right to construct a street railway may impose a condition as to the rate of fare to be charged for the carriage of passengers, and where the grant is accepted, upon the terms imposed, the company is estopped to deny that the charging of a greater sum than the terms allow is an unjust discrimination.[1] And it may also be

[1] People, Jackson v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349; Gaedeke v. Staten Island M. R. Co., 43 App. Div. (N. Y.) 514, 60 N. Y. St. R. 598.

obliged to furnish transfers to its connecting lines.[2] And it is held that a private citizen may apply for a writ of mandamus to compel a compliance with conditions as to rates of fare.[3] Under the New York laws, providing for the carrying of passengers at a certain fare, under contract between companies,[4] it is held that the contract contemplated by such act is a traffic agreement, and that a lessee from another company operating the road or routes embraced in a lease from such other company is not affected thereby.[5] A city has the power to regulate the rates of fare upon street railways, where such power is either conferred upon it in express terms or arises by necessary implication from the words used in a statute.[6] And in case of a doubt whether the charter of a municipality confers power upon it to regulate the charges of a street railway, it is decided that the doubt should be resolved in favor of the existence of such power.[7] In the absence of any such delegation of power, the city has no right to exercise any control, so far as rates of fare are concerned, by reason of a clause in the ordinance of authorization, providing that the company shall be subject to all laws and ordinances in force, or which may thereafter be made.[8] Although a municipality may possess this right, yet it must be exercised in a reasonable manner and in such a way as will not amount to confiscation or the taking of property without compensation or due process of law.[9] It cannot require the carrying of passengers without reward, or at such a rate of fare as will deprive the company of a reasonable return on its investment, and any attempt at regulation of fares, which would have such a result, would deprive the company of property, in violation of United States Con-

[2] Gaedeke v. Staten Island M. R. Co., 43 App. Div. (N. Y.) 514, 60 N. Y. St. R. 598.

[3] People, Jackson v. Suburban R. Co., 178 Ill. 594, 53 N. E. 349.

[4] N. Y. Railroad Law, § 104.

[5] Roosa v. Brooklyn Heights R. Co. (Sup. Ct., Trial Term, 1899), 59 N. Y. Supp. 664.

[6] Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

[7] Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

[8] Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

[9] Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337, 14 Nat. Corp. Rep. 774; rehearing denied in 151 Ind. 156, 51 N. E. 80, 41 L. R. A. 344, 30 Chic. L. News, 414, 5 Det. L. News, No. 19.

stitution.[10] And where it appears, upon fairly reasonable grounds, that a loss of interest upon the bonds of a street railway company may ensue from an enforced reduction of fares by the municipality, a bondholder may be entitled to an injunction against the enforcement of the ordinance. It is not necessary for him to submit to loss in order that the injury may be demonstrated, before seeking relief.[11] In determining whether an ordinance is reasonable, the earnings of the railway, at existing rates, in connection with the capital actually invested, should be resorted to and not possibilities of the future.[12] Where the rate of fare which a street railway may charge is fixed by the township for all of its line within the limits of such township, the fact that a village, which forms a part of such township, and which is represented on the township board, requires it to charge no less than a certain sum, will not authorize the company to charge a sum additional to that fixed by its township franchise.[13] A grant of power to a city to pass by-laws in reference to carriages, wagons, carts, drays, etc., and any by-law, ordinance or regulation which it may deem proper for the peace, health, order or good government of the city, will not confer upon it power to require a street railway company to carry any person between any points on its line at a single fare, and to furnish transfers.[14]

§ 519. **When city may not reduce fares.**— Where power is conferred upon a city to fix the rate of fares upon street railways, but the statute conferring such power is silent as to any

[10] Milwaukee R. & L. Co. v. Milwaukee, 87 Fed. 577.

[11] Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

[12] Milwaukee R. & L. Co. v. Milwaukee, 87 Fed. 577. In this case reduction by the municipality was held not justified where it appeared that the bonds of the company were at 5 per cent. interest, and the largest estimate of earnings was only 5 2-10 per cent., based on a reasonable and conservative estimate of the value of its property. It also appeared in this case that the company had extended its tracks, had acquired control of independent lines, that only a single fare was required over all the lines operated by the company, where several fares had been formerly required, and that the rates were the same as those which generally prevailed in other cities of similar size.

[13] Kissane v. Detroit, Y. & A. A. R. Co., 121 Mich. 175, 79 N. W. 1104.

[14] Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

authority to change the rate of fares which it has once fixed, if the city, in granting authority to construct and operate a street railway, has fixed the rate of fare to be charged, it has thereby exhausted its power, and is precluded from subsequently enforcing an ordinance or regulation, making a change of rates,[15] in the absence of any reservation of the right to so change or alter them.[16] Unless, however, there is an express reservation of this right, a mere general reservation of authority to control and regulate such street railway will confer upon it no such power.[17] Where the charter of a street railway company provided that its rates should be subject to the approval of the mayor and city council, it was held that, having fixed the rates with no reservation of power to alter, the municipality could not subsequently change them.[18] And where the first ordinance granting a right of way to a street railway company contained a reservation of the power to alter rates of fare, but subsequently the company extended its lines and consolidated with other roads, and new ordinances again fixed rates of fare, but contained no special reservation of right to alter during the life of the grant, it was held that the city had no power to subsequently change the rate.[19]

§ 519a. **Ordinance as to "labor tickets" at reduced rate and transfers — When a contract.** — An ordinance which grants permission to a street railway company to operate its line in the streets of a city and which requires it to sell "labor tickets" at reduced rates, and also to furnish transfers without additional charge over connecting lines, constitutes a contract between the company and the city when it has been accepted

[15] Cleveland City R. Co. v. Cleveland, 94 Fed. 385, affid., City of Cleveland v. Cleveland City R. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. ed. 1102; Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

[16] Cleveland City R. Co. v. Cleveland, 94 Fed. 385, affd. City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102.

[17] Cleveland City R. Co. v. Cleveland, 94 Fed. 385, affd. City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102.

[18] Old Colony Trust Co. v. Atlanta, 83 Fed. 39.

[19] Cleveland City R. Co. v. Cleveland, 94 Fed. 385, affd. City of Cleveland v. Cleveland City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, which was followed on this point by Cleveland v. Cleveland Electric Railway Co., 201 U. S. 529, 50 L. Ed. 854.

and acted upon by the former, and there must be a compliance by the company with its terms.[20]

§ 519b. **Federal Constitution — Street railroad — Rates of fare.**— A reduction of fares of a street railroad company by a municipal corporation deprives it of property in violation of the Federal Constitution, where such reduction deprives the company of a reasonable return on its investment.[21]

§ 519c. **Street railways — Power of legislature to reduce fares for students during certain months.**— A State statute may provide for the reduction of rates of fare on street railways for students during certain months when schools are in session, although under the bill of rights of the Constitution the legislature had no power to reduce fares to a confiscatory amount or to an amount which would render it unprofitable to operate the road, there being no allegation of that kind in the pleadings and no evidence that such reduction would seriously impair the road's revenues, or that the reduced rate of fare would not leave the company a sufficient income to pay for repairs and a fair income on its investment.[22]

§ 520. **Telephone companies — Duty to public — Rates.**— Telephone companies are common carriers of news, and as such are bound to serve the public with substantial impartiality,[23] and may be compelled to supply, without discrimination, similar facilities to all who are in similar circumstances.[24] A

[20] Virginia Passenger & Power Co. v. Commonwealth, 103 Va. 644, 49 S. E. 995.

[21] Milwaukee Elec. R. & L. Co. v. Milwaukee, 87 Fed. 577. See Indianapolis v. Navin, 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337, 14 Nat. Corp. Rep. 774. Rehearing denied, 151 Ind. 156, 51 N. E. 80, 41 L. R. A. 344, 5 Det. Leg. News, 19.

[22] San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 309, 310, 26 Sup. Ct. 261.

[23] Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721, 2 Am. Elec. Cas. 14; Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171; State ex rel. Webster v. Nebraska Teleph. Co., 17 Neb. 126, 52 Am. Rep. 104, 22 N. W. 237, 8 Am. & Eng. Corp. Cas. 1, 44, 1 Am. Elec. Cas. 700; Bell Teleph. Co. v. Commonwealth ex rel. B. & O. Tel. Co. (Pa. Sup. Ct., 1886), 17 Week. N. of Cas. 505, 3 Atl. 825, 2 Am. Elec. Cas. 407. See § 27, herein, as to carriers.

[24] State v. Citizens Teleph. Co., 61 S. C. 83, 39 S. E. 257, 7 Am. Elec. Cas. 838, holding that mandamus is the proper remedy.

statute imposing this duty upon such companies is but declaratory of their common-law duty,[25] and they are within a statute providing for the regulation of rates of such carriers.[26] The reasons assigned for the decision in the Express Cases do not apply to the right of telephone companies to make discrimination by special contract in the transmitting of messages.[27] And to entitle a person to telephone service at the same rate at which it is furnished to others, there must be a similarity of conditions under which the service is to be rendered.[28]

§ 521. **Telephone companies — Rates — Subject to legislative control.**—It is within the power of the legislature of a State to regulate the charges which may be made by telephone companies for the rental of telephones and for general telephone service and facilities, within the limits of the State, and a statute prescribing a maximum rental for such service is constitutional and valid.[29] The power to regulate such charges is held

[25] Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 2 Am. Elec. Cas. 14, 5 N. E. 721.

[26] Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171.

[27] State ex rel. Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co., 47 Fed. 633, 3 Am. Elec. Cas. 533, affd., 50 Fed. 677, 3 U. S. App. 30, 2 U. S. C. C. A. 1, 39 Am. & Eng. Corp. Cas. 1, 4 Am. Elec. Cas. 579. In the Express Cases it was held that railroad companies might give the use of their lines to one or more companies or withhold the use of their lines from such companies altogether. Express Cases, 117 U. S. 1.

[28] Williams v. Maysville Teleph. Co., 26 Ky. Law R. 945, 82 S. W. 995.

[29] State of Mo. ex rel. B. & O. Teleg. Co. v. Bell Teleph. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404; Central Union Teleph. Co. v. State ex rel. Hopper, 123 Ind. 113, 3 Am. Elec. Cas. 529, 24 N. E. 215; Central Union Teleph. Co. v. State ex rel. Falley, 118 Ind. 194, 2 Am. Elec. Cas. 27, 19 N. E. 604; Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 2 Am. Elec. Cas. 14, 5 N. E. 721; Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171. See section 57 herein as to rates interfering with interstate commerce.

The power of the legislature of a State to prescribe the maximum charges which a telephone company may make for services rendered, facilities afforded, or articles or property furnished for its use in business is plenary and complete. Hockett v. State, 105 Ind. 250, 259. 5 N. E. 178, 55 Am. Rep. 201, per Niblach, C. J.

In Nebraska, the board of transportation has power, under the Act of 1897 (Sess. Laws, c. 56), to regulate the rentals for telephone serv-

to be a legislative and not a judicial function.[30] Where there has been no action by the legislature or under its authority, to determine the reasonableness of telephone rates, it is held that mandamus will not lie to compel service at less rates than those charged, on the ground that the rates charged are not reasonable.[31] While patent laws secure to the patentee valuable rights and tend to promote and encourage inventive genius,

ice. Nebraska Teleph. Co. v. Cornell, 59 Neb. 737, 82 N. W. 1, affg. on rehearing 58 Neb. 823, 80 N. W. 43.

Where the constitutionality of a statute fixing telephone rates, is assailed on the ground that it operates to destroy property rights, the fact that it does so destroy them must be established beyond a reasonable doubt. And in determining this question it is proper to consider what the reasonably actual value of the property is and what it costs to maintain and carry on the business. Chesapeake & P. Tel. Co. v. Manning, 186 U. S. 238, 22 S. Ct. 881, 46 L. Ed. 1144.

[30] Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171. The following are some of the acts in reference to telephone rates which have been passed: Act creating a commission to regulate the charges of certain quasi-public corporations, and among others telegraph and telephone companies. Const. of La., adopted 1898, art. 284. Act regulating the charge for use of telephones between cities. Laws of Md., 1896, c. 139. Telegraph and telephone companies under control of the board of transportation, who shall have power to regulate charges, etc. Control as to charges only as to messages from one point to another in the State. Laws of Neb., 1897, c. 56, §§ 1 and 2. Telephone companies shall make no discrimination in rates at which they furnish telephones or telephone service to its subscribers at its different offices or places of business in the several towns or cities, more than is necessary on account of the difference in the cost of supplying such service, the number of subscribers at the different offices being taken into consideration. So. Car., Laws 1898, pp. 779, 780.

In Ohio, in a proceeding instituted in the probate court by a telephone company under the provisions of § 3461, Rev. St. 1892, which authorize and require the court to direct in what mode such telephone company may construct its lines along the streets, alleys and other public ways of a city or village, the court has no jurisdiction, as a part of its order, to prescribe or determine the rates to be charged citizens of the municipality for the use of the telephones, and so much of the order as undertakes to determine such rates is void for want of jurisdiction. State ex rel. Sheets v. Toledo Home Teleph. Co., 72 Ohio St. 60, 74 N. E. 162.

[31] Nebraska Teleph. Co. v. State, Yeiser, 55 Neb. 627, 45 L. R. A. 113, 76 N. W. 171; Commercial Un. Teleg. Co. v. New York & New Eng. Teleph. & Teleg. Co., 61 Vt. 241, 15 Am. St. Rep. 893, 17 Atl. 1071, 2 Am. Elec. Cas. 426.

yet the rights obtained thereby are subject to the general power of each State to control and regulate its internal affairs, as shall, in the judgment of the supreme power, best promote the interests of the public, with proper regard for the rights of all. So it is said that "There is no peculiar sanctity hovering over or attaching to the ownership of a patent. It is simply a property right to be protected as such."[32] And it is declared in another case that while "It is true that letters-patent confer upon the patentee a monopoly to the extent of vesting in him, his heirs and assigns, the exclusive right to make, use and vend the tangible property brought into existence by the practical application of the discovery by the letters-patent, for a limited time, it is not true that such exclusive right authorizes the making, using or vending of such tangible property in a manner which would be unlawful, except for such letters-patent, and independently of State legislation and State control."[33]

§ 522. **Telephone companies — Cannot discriminate against telegraph companies — Contract with parent company.** — While the owner of a patent has the right to determine what use, if any, shall be made of his invention, yet if having once determined upon its use and offered it to the public, it is a duty incumbent upon him to treat all persons alike, without discrimination as to rates or conditions.[34] In many cases, contracts have been made between the parent company, which owns the telephone instruments and appliances, and the local company to which it leases them, providing that service shall not be furnished to certain telegraph companies. Provisions of this character have been generally held to be void, on the ground that when a telephone company has once offered itself to the public, it cannot discriminate against certain patrons, but must furnish service to all alike, who are willing to accede to its terms and comply with its reasonable rules and regulations.[35]

[32] State ex rel. B. & O. Teleg. Co. v. Bell Teleph. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404, 8 Am. & Eng. Corp. Cas. 7, 24 Am. Law Reg. 573, per Brewer, J.

[33] Hockett v. State of Indiana, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178, 11 Am. & Eng. Corp. Cas. 577, per Niblock, Ch. J.

[34] People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394, per Parker, J.

[35] State ex rel. Postal Teleg. Cable Co. v. Del. & A. Teleg. & Teleph. Co., 47 Fed. 633, 3 Am. Elec. Cas. 533, affd., 50 Fed. 677, 3 U. S. App.

§ 523. **Telephone companies — Rates prescribed by legislature — Evasion of.**— A statute prescribing the maximum rates to be charged for telephone service, in the absence of any classification of rates, will entitle the applicant for such service to receive the highest grade or class of telephone service, at the rate prescribed.[36] The word "telephone," in a statute prescribing the maximum rental for the use of telephones, will be construed as referring not to a single instrument only, but to all the necessary and usual apparatus and instruments for the ready and convenient reception and transmission of telephonic messages.[37] And such a statute cannot be evaded by supplying a limited service, at the rates designated, and a complete service at an excess rates,[38] but the applicant should be supplied with all the usual exchange connections and facilities. Nor can such a statute be evaded by adopting the public toll station system in place of the renting system.[39] Nor by dividing the rate charged into two items, one being the maximum rate allowed, and designated as being for subscribers' use, and the other being a fixed rate in addition thereto, and designated as for "nonsubscribers."[40]

§ 524. **Telephone rates — Statute — Evasion of — Articles patented.**— The fact that the apparatus or parts furnished by a

30, 2 U. S. C. C. A. 1, 39 Am. & Eng. Corp. Cas. 1, 4 Am. Elec. Cas. 579; State ex rel. B. & O. Teleg. Co. v. Bell Teleph. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404; Chesapeake & Potomac Teleph. Co. v. B. & O. Teleg. Co., 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809, 2 Am. Elec. Cas. 416, 16 Am. & Eng. Corp. Cas. 219; State ex rel. Am. Union Teleg. Co. v. Bell Teleph. Co. (St. Louis C. C. Ct.), 22 Alb. L. Jour. 363, 24 Alb. L. Jour. 283, 1 Am. Elec. Cas. 304; State ex rel. Am. Un. Teleg. Co. v. Bell Teleph Co., 36 Ohio St. 296, 1 Am. Elec. Cas. 299.

[36] Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721, 2 Am. Elec. Cas. 18.

[37] Hockett v. State of Indiana, 105 Ind. 250, 55 Am. Rep. 201, 5 N. E. 178, 11 Am. & Eng. Corp. Cas. 577, 2 Am. Elec. Cas. 1. See Chicago Teleph. Co. v. Illinois Mfgrs. Assoc., 106 Ill. App. 54, holding that the words "telephone service" in an ordinance include subsequent improvements which may be made to render the service more efficient.

[38] Central Union Teleph. Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721, 2 Am. Elec. Cas. 14.

[39] Central Union Teleph. Co. v. State ex rel. Hopper, 123 Ind. 113, 3 Am. Elec. Cas. 529, 24 N. E. 215; Central Union Teleph. Co. v. State ex rel. Falley, 118 Ind. 194, 2 Am. Elec. Cas. 27, 10 N. E. 604.

[40] Johnson v. State of Indiana, 113 Ind. 143, 2 Am. Elec. Cas. 22, 15 N. E. 215.

telephone company to its patrons are patented does not preclude the right of the State to regulate telephone rental charges by fixing a maximum rate therefor.[41] That such contracts are invalid, in so far as they attempt to discriminate against one or more telegraph companies, is clearly sustained by the weight of authority. In a Connecticut case, however, a contrary decision was given, based upon the technical ground that the foreign licensor had neither been made a party to the proceeding, nor had he submitted himself to the jurisdiction of the court, and that, therefore, the court had no power, either in behalf of the licensee or of the general public, to confiscate the property of such licensor. It was also declared that the fact that the foreign licensor had leased its instruments to be used in that State, under limitations, did not effect a surrender of its inventions to public use in such State, nor make it a common carrier of speech therein, and that under such a lease, it did not subject itself to the law governing common carriers or public servants, so as to be concluded by a judgment that it had dedicated its patent to the public and forfeited its reserved rights in it.[42] In State ex rel. Baltimore and Ohio Telegraph Company v. Bell Telephone Company,[43] a dissenting opinion is given on similar grounds, in which it is said that "There is no authority for courts to compel a man to do what he has no right to do, and force him to violate his contract. He stands on his contract as he has made it, and there end his duties, ob-

[41] Hockett v. State of Indiana, 105 Ind. 250, 2 Am. Elec. Cas. 1, 5 N. E. 178. See also *Federal.* State ex rel. Postal Teleg. Cable Co. v. Del. & A. Teleg. & Teleph. Co., 47 Fed. 633, 3 Am. Elec. Cas. 533; State ex rel. B. & O. Teleg. Co. v. Bell Teleph. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404. *Missouri*: State ex rel. American Union Teleg. Co. v. Bell Teleph. Co. (St. Louis C. C. Ct.), 22 Alb. L. Jour. 363, 24 Alb. L. Jour. 283, 1 Am. Elec. Cas. 304. *New York*: People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394. *Ohio*: State ex rel. Amer. Union Teleg. Co. v. Bell Teleph. Co., 36 Ohio St. 296, 1 Am. Elec. Cas. 299. *Pennsylvania*: Bell Teleph. Co. v. Commonwealth ex rel. B. & O. Teleg. Co., 17 Week. N. of Cas. 505, 3 Atl. 825, 2 Am. Elec. Cas. 407 (Pa. Sup. Ct., 1886). *Vermont*: Commercial Union Teleg. Co. v. New Eng. Teleph. & Teleg. Co., 61 Vt. 241, 15 Am. St. Rep. 893, 17 Atl. 1071, 2 Am. Elec. Cas. 426.

[42] American Rap. Teleg. Co. v. Conn. Teleph. Co., 49 Conn. 352, 1 Am. Elec. Cas. 390.

[43] 23 Fed. 539, 2 Am. Elec. Cas. 404, 24 Am. Law Reg. 573, 8 Am. & Eng. Corp. Cas. 7.

ligations and rights, and courts cannot cause him to violate it." [44] In case of a refusal to supply such service, mandamus may be granted to compel the company to furnish it.[45] Under the provisions of the New York Transportation Corporations Law,[46] by which telephone companies are required to receive and transmit despatches from other lines, corporations or individuals, it is held that a rival company is not entitled to the service of a telephone and the transmission of its messages at no greater compensation than that paid by an individual.[47]

§ 525. **Telephone charges — Power of city to regulate.**— Although a municipality may be empowered to regulate and control the use of streets, yet this power will not confer upon it authority to regulate telephone charges.[48] So it is held that

[44] Per Treat, J.

[45] State ex rel. B. & O. Teleg. Co. v. Bell Teleph. Co., 23 Fed. 539, 2 Am. Elec. Cas. 404; People ex rel. Postal Teleg. Cable Co. v. Hudson River Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394. See, also, cases cited in preceding note.

[46] Section 103.

[47] People, Oneida Teleph. Co. v. Central New York Teleph. & Teleg. Co., 41 App. Div. (N. Y.) 17, 58 N. Y. Supp. 221.

[48] Macklin v. Home Teleph. Co., 24 Ohio Cir. Ct. R. 446; State ex rel. Wisconsin Teleph. Co. v. City of Sheboygan, 111 Wis. 23, 86 N. W. 657, 7 Am. Elec. Cas. 109, wherein the court holds that a city has power to prescribe reasonable police regulations in reference to the poles and wires of a telephone company and then says in construing an ordinance fixing telephone rates and charges: "The city seeks to go much further. It in effect says to relator that: 'Before you can make any changes, or extend your system, you must consent to an ordinance fixing rates of charges to patrons. * * * The fixing of minimum charges for the use of telephone service in the city is said to be a lawful police regulation to prevent extortion. That is based upon the assumption that the power of police control possessed by the city is unlimited. Such is not the fact. Such power is inherent in the State, and is a necessary attribute of sovereignty. It does not pass to the minor divisions of government except by express grant, or by necessary implication from other powers granted. * * * No express authority is given the city to regulate charges for telephone service, nor is there any express grant of power from which such authority can necessarily be implied. Construing the charter and the statute in the light of the rules of law stated, the city has authority to exercise its police power to protect the public from unnecessary obstructions, inconvenience, and danger, and to determine in what manner the relator may erect its poles so as to accomplish this result. * * * It has no authority to impose other conditions. That power rests in the leg-

the city of St. Louis, under the delegation of power to it by the legislature, has no power to fix or limit the rates of charges of telephone companies doing business within its limits.[49] In this case the court said: "If the city had such power, it must be found in a reasonable and fair construction of its charter. * * * We are at a loss to see what this power to regulate the use of streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."[50] And though the city may have power to "license, tax and regulate" telephone companies, yet it cannot, under such power, regulate the charges for telephone service.[51] In this connection it has also been decided that a city being obligated to agree with such a company as to the manner in which its streets may be used without any right on the part of the city to compensation, the fact that the company offers to furnish service at a certain rate as a compensation for the duty imposed does not operate as an estoppel upon the company and it will not be enjoined from making a charge which is just and reasonable for such service.[52] Where, however, the city has authority to regulate the rates which may be charged by a telephone company, the company may, at the suit of an individual, be enjoined from charging a rate in

islature. The power to regulate charges was not included in or incidental to the power to regulate the manner of using streets. There is not the remotest relation between them. The attempt of the city to justify its position on that ground must fail," per Bardeen, J.

But see Charles Simons Sons Co. v. Maryland Teleph. & Teleg. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

[49] City of St. Louis v. Bell Teleph. Co., 96 Mo. 623, 2 Am. Elec. Cas. 44, 10 S. W. 197. See, also, State, Matthews v. Central Union Teleph. Co., 14 Ohio C. C. 273, 7 Ohio Dec. 536, which holds that a city has no such power, and also holding that a refusal of a telephone company to assent to rates fixed by the city in granting consent to the use of streets by a telephone company is not such a failure to agree as to the use of streets as to come within the Ohio Rev. Stat., § 3461, which provides that in case of the failure of the city and a company to agree the Probate Court shall direct the mode of construction.

[50] Per Black, J.

[51] City of St. Louis v. Bell Teleph. Co., 96 Mo. 623, 2 Am. Elec. Cas. 44, 10 S. W. 197.

[52] Macklin v. Home Teleph. Co., 24 Ohio Cir. Ct. R. 446.

excess of that prescribed.[53] And a city ordinance granting a license or privilege to a telephone company to occupy the streets under conditions as to rates, will obligate such company as to service in localities merged into the city, although such localities had granted permission under ordinances with no limitation of time or rates. Nor is such a company entitled to limit its service at rates fixed and to render an inadequate service and to charge higher rates for efficient service.[54] Nor can a telephone company which has accepted an ordinance limiting the rates which it may charge subsequently deny the validity of such ordinance on the ground that the rates specified are not reasonable.[55]

§ 525a. **Ordinance fixing telephone rates — Suit to enjoin enforcement — What necessary to show.**— In a suit to enjoin the enforcement of an ordinance fixing telephone rates on the ground that the rates so fixed are unreasonable and would operate as a taking of property without due process of law, it is not necessary for the company to state any facts to show that its own rates are reasonable, but it is sufficient if facts that show the ordinance rates to be unreasonable are pleaded, which may be done by showing the aggregate cost to the company of the operation and maintenance of its plant and that the rates prescribed by ordinance will not yield a sufficient sum to pay such cost.[56]

§ 525b. **Telephone contract construed — Rebate for interrupted service.**— A provision in a contract for telephone service that in case of interrupted service not due to negligence or wilful interference of the subscriber, a rebate shall be made for the time such interruption continues after reasonable notice in writing to the company, is held to have for its object the securing of a reasonably efficient service to the subscriber, and to prevent on his part a claim for nonliability for the

[53] Charles Simon's Sons v. Maryland Teleph. & Teleg. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727. See Chicago Teleph. Co. v. Illinois Mfgr's Assoc., 106 Ill. App. 54.

[54] People, City of Chicago v. Chicago Teleph. Co., 220 Ill. 238, 77 N. E. 245.

[55] Charles Simon's Sons v. Maryland Teleph. & Teleg. Co., 99 Md. 141, 57 Atl. 193, 63 L. R. A. 727.

[56] Ozark-Bell Teleph. Co. v. City of Springfield, 140 Fed. 666.

specified rental, based upon bad and defectice service, or a total cessation of service, unless an opportunity is first afforded the company to remedy whatever defects there may be in the service. And in an action upon such a contract by the company for the stipulated rental it has been decided that it is error to admit evidence in behalf of the defendant of an interrupted service where there is no evidence showing that the required notice was given.[57]

§ 526. **Electric light company — Cannot discriminate.**— The property of an electric light company, which is engaged in furnishing light to the streets and inhabitants of a municipality, is so far devoted to a public use that the company cannot discriminate in the matter of rates, but must furnish light, without partiality, and at a reasonable price.[58] As in the case of telephone service, however,[59] the conditions may be so dissimilar that a difference in the charge which is made will not amount to an unjust discrimination.[60]

§ 527. **Electric light service — Charges for — New York laws.**— Under the New York laws,[61] by which an electric light company is required, upon application, to make connections with and furnish light to any building, but which contains no provision limiting the rate which may be charged by the company, it is held that such a company may require, as a condition precedent, an agreement to pay a reasonable minimum monthly charge.[62]

[57] Atlanta Standard Teleph. Co. v. Porter, 117 Ga. 124, 43 S. E. 441, 8 Am. Elec. Cas. 848. The contract in this case provided: "If the service is interrupted otherwise than by negligence or willful interference of the subscriber, a rebate at the rate hereinbefore specified shall be made for the time such interruption continues after reasonable notice in writing to the company, but no other liability shall in any case attach to the company."

[58] Cincinnati, H. & D. R. Co. v. Bowling Green, 57 Ohio St. 336, 41 L. R. A. 422, 49 N. E. 121.

[59] § 520.

[60] Mercur v. Media Electric Light, H. & P. Co., 19 Pa. Super. Ct. 519.

[61] Transportation Corporations Law, art. 6, § 65 (Laws of 1890, c. 566).

[62] Gould v. Edison Elec. Illum. Co. (N. Y., 1899), 29 Misc. Rep. 241, 60 N. Y. St. R. 559. In this case $1.50 a month was held to be a reasonable minimum charge where it appeared that the company was obliged to expend $20 for each additional lamp attached to its circuit.

§ 527a. **Street railways — Fares — Condition on transfer check.**— A condition printed on a street railroad transfer check is unreasonable and will not be enforced when it provides that "In accepting this transfer, passenger agrees that in case of controversy with conductor about this ticket, and its refusal, to pay the regular fare charged, and apply at the office of the company for refund of same within three days."[63]

§ 527b. **Tender of fare — Rule of company as to furnishing change.**— While a passenger upon a street car is not obliged to tender the exact amount of fare to the conductor to entitle him to transportation, yet the conductor cannot be expected or required to give change for a bill without regard to its denomination. And the company may impose a reasonable regulation which will be binding upon a passenger as to the amount of change which its conductor may be required to give. So it has been held in New York that a rule of a horse street car company in a large city, requiring conductors to furnish change to the passengers to the amount of two dollars is reasonable, and that a tender, by a passenger, of five dollars to be changed for a five-cent fare is unreasonable and need not be accepted. It was also decided in this case that a common carrier need not bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce.[64]

[63] O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872.

[64] Barker v. Central Park, North & East R. R. Co., 151 N. Y. 237, 45 N. E. 550, 56 Am. St. Rep. 626, 35 L. R. A. 489, affg. 3 Misc. R. 635, 51 N. Y. St. R. 945, 22 N. Y. Supp. 1132.

CHAPTER XXIV.

PASSENGERS — ELECTRIC RAILWAYS.

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§ 528. **Passenger — Definition of — When relation begins.—** A passenger on a street railway is a person whom the company has undertaken to carry by virtue of a contract, express or implied.[1] To create the relation of carrier and passenger

[1] A passenger is a "person whom a railway, in the performance of its duty as a common carrier, has contracted to carry from one place to

it is not necessary for one to have entered the car, but the relation may exist before a person has actually boarded a car. Thus, a person who has signalled a passing car to stop, and upon its stopping puts his foot upon the step for the purpose of boarding, may be a passenger.[2] The relation can, however, only be created by virtue of a contract, express or implied. There must be an acceptance by the street railway company of some offer or request to be carried to create the relation.[3] The attempt of a person to board a car will not of itself make him a passenger in the absence of any act of those in charge of the car indicating acceptance of him as a passenger. Such acceptance, however, must be implied in a large number of cases.[4] So it has been decided that there is an implied acceptance of an offer to become a passenger and that the relationship of carrier and passenger is created where a person is at a place where passengers are usually received, and gives the usual signal, which is seen by the motorman, who there-

another place for a valuable consideration, or whom the railway in the course of the performance of that contract, has received at its station, or in its car or under its care." Paterson's Ry. Acc. Law, § 210. "One who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as for the payment of fare or that which is accepted as an equivalent therefor." Anderson's Dictionary of Law, p. 754. "Passenger is one who has taken a place in a public conveyance for the purpose of being transported from one place to another. Anyone may become a passenger by applying for transportation to a carrier of passengers. The relation of common carrier can be created by the exhibition of a bona fide intention on the part of a passenger." Atlemeier v. Cincinnati St. Ry. Co., 4 Ohio N. P. 224, 4 Ohio L. News, 300, per Smith, J.

[2] West Chicago St. Ry. Co. v. James, 69 Ill. App. 609; Davey v. Greenfield Street Ry. Co., 177 Mass. 106, 58 N. E. 172.

[3] Schepers v. Union Depot R. Co., 126 Mo. 665, 5 Am. Elec. Cas. 398, 29 S. W. 712; Lewis v. Houston Elec. Co. (Tex. Civ. App., 1905), 88 S. W. 489, 18 Am. Neg. R. 640, 644, wherein it is said: "It may often be difficult to determine just when the relation of carrier and passenger begins, and what acts of the parties are necessary to create such relation, but there are certain well-established general principles by which the facts of each particular case must be tested. The relationship may arise before the person desiring to become a passenger actually gets on the conveyance of the carrier, and it may continue after he leaves the conveyance, but it can only be created by contract between the parties, expressed or implied," per Pleasants, J.

[4] Schepers v. Union Depot R. Co., 126 Mo. 665, 5 Am. Elec. Cas. 398, 29 S. W. 712.

upon slackens the speed of the car to such an extent as to lead a person of ordinary care to believe that he is thereby invited to become a passenger. In such a case it is also declared that it is immaterial that the motorman may not have intended to stop the car for the purpose of allowing the passenger to get on where no warning was given by the motorman that the car was not being stopped for the purpose of receiving passengers.[5]

§ 528a. **Person on street approaching car not a passenger.**— Though the relation of carrier and passenger, so far at least as the degree of care which the former owes to the latter is concerned, may arise before a person has actually boarded a car,[6] yet a person does not become a passenger by the mere fact that he is approaching a car with the intention of becoming a passenger where he has not actually reached the car and is still upon the highway. The street railway company in such a case, is not charged with the high degree of care which it must exercise towards a passenger, but only with the exercise of that care which it must exercise towards travelers upon the street. So where one was approaching a car and was injured by the fall of a car sign, which was caused by the trolley pole breaking and striking it, the relation of carrier and passenger was held not to be created and the company not liable.[7]

[5] Lewis v. Houston Electric Co. (Tex. Civ. App., 1905), 88 S. W. 489, 18 Am. Neg. R. 640. The court said: "It is a universal rule of law that one cannot disclaim responsibility for the consequences which usually and naturally result from his acts. If the appellant, in the exercise of ordinary care and prudence, could assume that the act of the motorman in checking the car was in response to his signal, and for the purpose of allowing him to board it, in acting upon such assumption and attempting to get on the car he had the right to rely upon the performance by the motorman of his duty to use that high degree of care to protect him from injury which the law requires a carrier to exercise for the safety of its passengers. In other words, if the act of the motorman, who had seen appellant's signal, reasonably induced appellant to believe that he was accepted as a passenger, while so believing, he was entitled to protection as such," per Pleasants, J. See Connor v. Street Railway Co., 105 Ind. 62, 4 N. E. 441, 3 Am. Neg. Cas. 181, 55 Am. Rep. 177.

[6] See § 528, herein.

[7] Duchemin v. Boston Elevated R. Co., 186 Mass. 353, 71 N. E. 780, 17

§ 529. **Duty of company — Degree of care required.** — A street railway company is a common carrier,[8] and is bound to

Am. Neg. R. 61. The court said in this case: "The question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway, where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind, and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth, or the street clear of obstructions to his progress, than it owes to all other travelers on the highway. It is under no obligations to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such a person, who has not yet reached the car, there is any other duty, as to the car itself, than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car, but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveler on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others," per Barker, J.

[8] *Georgia*: Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128. *Kentucky*: Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co. (Louisville L. & Eq. Ct., 1890), 3 Am. Elec. Cas. 236, 261, affd., 95 Ky. 50, 23 S. W. 592, 4 Am. Elec. Cas. 202. *Missouri*: Redmon v. Metropolitan St. Ry. Co., 185 Mo. 1, 84 S. W. 26. *Nebraska*: Lincoln Traction Co. v. Webb (Neb., 1905), 102 N. W. 258, 17 Am. Neg. Rep. 617; Lincoln Traction Co. v. Heller (Neb., 1904), 100 N. W. 197, 16 Am. Neg. Rep. 490; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, 69 Am. St. Rep. 736; East Omaha St. R. Co. v. Godola, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. (N. S.) 300. *New York*: Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 16 Am. Neg. Rep. 181. *Texas*: Houston Electric Co. v. Nelson (Tex. Civ. App.), 77 S. W. 978.

a high degree of care to carry its passengers in safety.[9] Though it is not an insurer,[10] yet it is bound to exercise the utmost care in all that pertains to and is connected with the construction, maintenance and operation of its line to protect the safety of its passengers so far as may be consistent with a practical operation of its road.[11] In this connection it has

[9] Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128; Posch v. Southern Elec. R. Co., 76 Mo. App. 601, 2 Mo. App. Repr. 10; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074; Scott v. Bergen Co. Traction Co., 63 N. J. L. 407, 43 Atl. 1060; Whalen v. Consol. Traction Co., 61 N. J. L. 606, 40 Atl. 645, 4 Am. Neg. Rep. 426; Elliott v. Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 614, 23 L. R. A. 208, 4 Am. Elec. Cas. 451.

[10] *Maryland*: United Rys. & Elec. Co. v. State, 93 Md. 619, 49 Atl. 923, 10 Am. Neg. Rep. 71. *Nebraska*: Omaha St. Ry. Co. v. Boesen (Neb., 1905), 105 N. W. 303, 19 Am. Neg. Rep. 358; Bevard v. Lincoln Traction Co. (Neb., 1905), 105 N. W. 635, 19 Am. Neg. Rep. 366. *New York*: Stierle v. Union Ry. Co., 156 N. Y. 70, 50 N. E. 419, 4 Am. Neg. Rep. 203. *Texas*: Houston Elec. Co. v. Nelson (Tex., Civ. App.), 77 S. W. 978. *Washington*: Foster v. Seattle Elec. Co., 35 Wash. 177, 76 Pac. 995.

[11] *United States*: Christensen v. Metropolitan St. R. Co., 137 Fed. 708, 70 C. C. A. 657, 18 Am. Neg. Rep. 690. *District of Columbia*: Kight v. Metropolitan R. Co., 21 App. D. C. 494. *Illinois*: Alton Light & Traction Co. v. Oliver, 217 Ill. 15, 75 N. E. 419, 19 Am. Neg. Rep. 141; North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793, 14 Am. Neg. Rep. 275, declaring that a street railway company must do "all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance, the practical operation of the road, and the exercise of its business as carrier." Elwood v. Chicago City Ry. Co., 90 Ill. App. 397. *Iowa*: Blumenthal v. Union Elec. Co. (Iowa, 1906), 105 N. W. 588, 19 Am. Neg. Rep. 235, holding that a carrier is bound to exercise the highest degree of skill and foresight to protect the safety of its passengers. Hutcheis v. Cedar Rapids & M. C. R. Co. (Iowa, 1905), 103 N. W. 779, 18 Am. Neg. Rep. 400, holding that the company must exercise the highest degree of care reasonably consistent with the practical conduct of business. Fitch v. Mason City & C. L. T. Co., 124 Iowa, 665, 100 N. W. 618. *Kentucky*: Bennett v. Louisville Railway Co. (Ky., 1906), 90 S. W. 1052, 19 Am. Neg. Rep. 248. *Maryland*: Jones v. United Rys. & Elec. Co., 99 Md. 64, 57 Atl. 620; United Rys. & Elec. Co. v. State, 93 Md. 619, 49 Atl. 923, 10 Am. Neg. Rep. 71. *Massachusetts*: Hayne v. Union St. R. Co. (Mass., 1905), 76 N. E. 219, 19 Am. Neg. Rep. 281. *Minnesota*: Fewings v. Mendenhall, 88 Minn. 336, 93 N. W. 127, 13 Am. Neg. Rep. 346, holding that a street railway company must exercise "the highest care in respect to the equipment of its road and the transportation facilities, in pro-

been decided that a charge to the jury that a street railway company is bound to "exercise all the care and skill which human prudence and foresight could suggest to secure the safety of its passengers," is not correct, such obligation only existing with "respect to those results which are materially to be apprehended from unsafe roadbeds, defective machinery, imperfect cars, and other conditions endangering the success of the undertaking." [12] "The common carrier is not an insurer of the safety of its passengers; but it is, and properly should be, bound to use its utmost skill and vigilance to guard against the possibility of accidents from the condition of its road and of the machinery used in the transportation of passengers." [13] So, where a car was overturned, injuring a passenger, it was held to raise a presumption that it either resulted from a defective condition of the tracks or mismanagement of the car, or both, and the burden was held to be on the company to show that the accident resulted from some cause for which it was not responsible.[14] And generally the happening of an accident, if connected with the means of transportation, raises a presumption of negligence on the part of the company.[15] But the mere fact of an injury to a pas-

viding suitable machinery for the operation of its cars, in the employment of competent and faithful servants, and, generally, as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier." *Nebraska*: Omaha Street Ry. Co. v. Boesen (Neb., 1905), 105 N. W. 303, 19 Am. Neg. Rep. 358; Lincoln Traction Co. v. Webb (Neb., 1905), 102 N. W. 258, 17 Am. Neg. Rep. 617, holding that such companies "are bound to exercise extraordinary care, and the utmost skill, diligence and human foresight, for the protection of their passengers, and are liable for the slightest negligence." Lincoln Traction Co. v. Heller (Neb., 1904), 100 N. W. 197, 16 Am. Neg. Rep. 490. *New Jersey*: Paganini v. North Jersey St. Ry. Co., 70 N. J. L. 385, 57 Atl. 128, 15 Am. Neg. Rep. 612. *Ohio*: Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604, 11 Am. Neg. Rep. 626. *Pennsylvania*: Palmer v. Warren St. Ry. Co., 206 Pa. St. 574, 56 Atl. 49. *Washington*: Johnson v. Seattle Elec. Co., 35 Wash. 382, 77 Pac. 677; Foster v. Seattle Elec. Co., 35 Wash. 177, 76 Pac. 995.

[12] Stierle v. Union Ry. Co., 156 N. Y. 70, 50 N. E. 419, 4 Am. Neg. Rep. 203, per Gray, J.

[13] Stierle v. Union Ry. Co., 156 N. Y. 70, 50 N. E. 419, 4 Am. Neg. Rep. 203, per Gray, J.

[14] Elgin City R. Co. v. Nielson, 56 Ill. App. 365, see also Electric R. Co. v. Carson, 98 Ga. 652, 27 S. E. 156.

[15] *California*: Bosqui v. Sutro

senger raises no inference of negligence except it occur from the abuse of agencies within the company's power.[16] And a street railway company is not liable for an injury to a passenger which the exercise of reasonable foresight would not have anticipated or due care have avoided, or, in other words, if the accident is not the reasonable, natural, and probable result of the situation, which ought to have been foreseen by the company in the exercise of the degree of care exacted from a carrier of passengers, the company is not liable.[17] A passenger, though he is not obligated to be continually on the lookout to see if there is any danger,[18] must exercise ordinary care to prevent injury,[19] and a recovery may be precluded by contributory negligence on his part.[20] The fact, however, that a passenger may not be occupying a seat in a car or may be in a position which is somewhat dangerous will not lessen the degree of care which the company should exercise towards him.[21] The Nebraska statute, which provides that a railroad company shall be liable for every injury received by a passenger in transportation, except it be due to criminal negligence of the passenger, is held not to apply to a street railway

Ry. Co., 131 Cal. 390, 63 Pac. 682. *Georgia*: Electric R. Co. v. Carson, 98 Ga. 652, 27 S. E. 156. *Illinois*: Elgin City R. Co. v. Wilson, 56 Ill. App. 365. *Nebraska*: Lincoln Traction Co. v. Heller (Neb., 1905), 102 N. W. 262, 17 Am. Neg. Rep. 627; Lincoln Traction Co. v. Webb (Neb., 1905), 102 N. W. 258, 17 Am. Neg. Rep. 617. *Ohio*: Toledo Consol. St. R. Co. v. Fuller, 9 Ohio C. D. 123, 17 Ohio C. C. 562. *Pennsylvania*: Kepner v. Harrisburg Traction Co., 183 Penn. St. 24, 38 Atl. 416, 5 Am. Neg. Rep. 78. *Rhode Island*: Cheetham v. Union Railroad Co., 26 R. I. 279, 58 Atl. 881, 17 Am. Neg. Rep. 368.

[16] Chicago City R. Co. v. Catlin, 70 Ill. App. 97, 3 Am. Neg. Rep. 533; Mt. Adams & E. P. I. P. R. Co. v. Isaacs, 18 Ohio C. C. 177.

[17] Ayers v. Rochester Ry. Co., 156 N. Y. 104, 50 N. E. 960, per Bartlett, J., revg. 88 Hun (N. Y.), 613; Reem v. St. Paul City Co., 77 Minn. 503, 80 N. W. 638.

[18] Jones v. United Rys. & Elec. Co., 99 Md. 64, 57 Atl. 620.

[19] Denver Tramway Co. v. Reid, 4 Col. App. 53, 35 Pac. 269, 4 Am. Elec. Cas. 333; Wellmeyer v. St. Louis Transit Co. (Mo., 1906), 95 S. W. 926; Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074.

[20] Bageard v. Consol. Traction Co., 64 N. J. L. 316, 45 Atl. 620; Wellmeyer v. St. Louis Transit Co. (Mo., 1906), 95 S. W. 926

[21] Birmingham Ry. L. & P. Co. v. Bynum, 139 Ala. 389, 36 So. 736; see also §§ 538–543, herein.

company so as to render it liable to a passenger who suffers injury through want of ordinary care.[22]

§ 529a. **Boarding car — Generally.—** The question as to the liability of an electric street railway company for injury to a passenger while boarding a car must depend in each case upon the facts and circumstances of that particular case. Though there are some decisions which hold that the obligation of the company is that of the exercise of ordinary care,[23] yet the true rule would seem to be that where a person has signaled a car to stop and the employees of the car have indicated an acceptance of the person as a passenger and have stopped the car apparently for the purpose of enabling him to board it, and such belief would be induced in the mind of a person in the exercise of ordinary care, then the company is under the obligation to exercise a very high degree of, or the utmost, care consistent with the practical operation of its road to enable that person to board the car in safety, at least after he has taken hold of, or stepped upon, the car for that purpose,[24] and will be liable for an injury received by a passenger where the requisite care towards him has not been exercised and there is a freedom from contributory negligence on his part.[25] These questions of negligence of the company and of contributory negligence on the part of the passenger in such cases are ordinarily ones for the jury to determine.[26]

[22] Lincoln St. R. Co. v. McClellan, 54 Neb. 672, 74 N. W. 1074, construing Neb. Comp. Stat. 1897, c. 72, § 3.

[23] Brock v. St. Louis Transit Co. (Mo. App., 1904), 81 S. W. 219; Eikenberry v. St. Louis Transit Co., 103 Mo. App. 442, 80 S. W. 360.

[24] See § 529, herein.

[25] Maguire v. St. Louis Transit Co. (Mo. App.), 78 S. W. 838.

See sections immediately following herein.

[26] *District of Columbia*: Guenther v. Metropolitan R. Co., 23 App. D. C. 493. *Illinois*: Alton Light & Traction Co. v. Oller, 217 Ill. 15, 75 N. E. 419, 19 Am. Neg. Rep. 141. *Indiana*: Citizens' Street Ry. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491. *Iowa*: Jaques v. Sioux City Traction Co., 124 Iowa, 257, 99 N. W. 1069. *Minnesota*: Gaffney v. St. Paul City Ry. Co., 81 Minn. 457, 84 N. W. 304. *Missouri*: Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142. *Pennsylvania*: Mulhause v. Monongahela St. Ry. Co., 201 Pa. St. 237, 244, 5 Atl. 937, 940, 11 Am. Neg. Rep. 141.

§ 529b. **Struck by car — Waiting to board it.**— Though it may happen in some cases that where a person is struck by a car while waiting to board it, the street railway company would be liable, yet it would seem that, in most cases, the fact that a person is so injured cannot raise any inference or presumption of negligence on the part of the street railway company, for, whether a person be standing beside the track or upon a station platform, he should ordinarily be able to avoid any injury of such a character. No definite rule can, however, be stated in this class of cases, except that where a person has been injured under such circumstances there can be no recovery where he has been guilty of contributory negligence.[27] So, where it appeared that a person signaled an approaching car that projected eight inches over the rail, and he stood at a point about two feet from the rail and leaned his head forward as the car neared him, and was struck on the head by some part of the car, but his body was not injured, it was decided that he was not in the exercise of due care and not entitled to recover for the injuries so sustained.[28] The court said in this case: "It is the duty of a person intending to enter a car upon a highway to take a position outside the reach of an approaching car; for it is common knowledge that a car usually passes a person who has signaled it to stop, so that he may enter by the rear end.[29] And where a person, after signaling an approaching street car that slackened its speed, placed herself in such close proximity to the track that she was struck by the over-hang of the car that accelerated its speed as it was rounding the curve, and she was injured, it was decided that the street railway company was not liable, as the person had no right to infer that the car would come to a stop at any particular point on the curve. The court also declared in this case that where a person is waiting for a car to come to a stop in response to his signal, it is clearly the duty of a would-be passenger to take a position outside of the

[27] State v. United Ry's & Elec. Co., 98 Md. 397, 56 Atl. 789, 15 Am. Neg. Rep. 329; Garvey v. Rhode Island Co., 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581; examine Consineau v. Muskegon Traction & L. Co. (Mich., 1906), 108 N. W. 720.

[28] Neale v. Springfield Street R. Co. (Mass., 1905), 75 N. E. 702, 19 Am. Neg. Rep. 274.

[29] Per Lathrop, J.

reach of the passing car.[30] Where, however, it appears that the injury was caused by the negligence of the street railway company, a recovery may then be had from such company for the injury so sustained.[31] So, where a boy at a street car station, while waiting to board a car, was struck by people on the running board of the car and it appeared that about two hundred people were waiting at the station to board the car, that there was no person in charge at the entrance to the station nor any officer to control the crowd, and that the car was going at an excessive rate of speed when it entered the station, it was held that the facts were sufficient to go to the jury on the question of the company's negligence.[32]

§ 530. **Boarding moving car.**— It is not, as a matter of law, contributory negligence for a person to attempt to board a moving electric street car, but it is in each case a question of fact to be determined by the jury taking into consideration all the circumstances of the case, such as the speed of the car, the place at which the attempt to board it is made, the custom which prevails in large cities to seldom bring the car to a full stop where a male is waiting to board it, the physical condition of the person, and whether he is incumbered with any bundles or packages.[33] In this connection it is said in a case

[30] Garvey v. Rhode Island Co., 26 R. I. 80, 58 Atl. 456, 16 Am. Neg. Rep. 581.

[31] Muhlhause v. Monongahela St. Ry. Co., 201 Pa. St. 237, 244, 50 Atl. 937, 940, 11 Am. Neg. Rep. 141; Denison & S. Ry. Co. v. Craig (Tex. Civ. App.), 80 S. W. 865.

[32] Muhlhause v. Monongahela St. Ry. Co., 201 Pa. St. 237, 244, 50 Atl. 937, 940, 11 Am. Neg. Rep. 141.

[33] *Alabama*: Birmingham R. & E. Co. v. Clay, 108 Ala. 233, 19 So. 309. *Illinois*: Cicero & Proviso St. R. Co. v. Meixner, 160 Ill. 320, 31 L. R. A. 331, 43 N. E. 823, 6 Am. Elec. Cas. 404. *Indiana*: Citizens' St. R. Co. v. Spahr, 7 Ind. App. 23, 4 Am. Elec. Cas. 416, 33 N. E. 446. *Kentucky*: Central Pass. R. Co. v. Rose (Ky., 1893), 22 S. W. 745, 4 Am. Elec. Cas. 429. *Massachusetts*: Carlin v. West End Ry. Co., 154 Mass. 197, 4 Am. Elec. Cas. 406, 27 N. E. 1000. *Missouri*: Schepers v. Union Depot R. Co., 126 Mo. 665, 5 Am. Elec. Cas. 398, 129 S. W. 712; Eikenberry v. St. Louis Transit Co., 103 Mo. App. 442, 80 S. W. 360; Leu v. St. Louis Transit Co., 106 Mo. App. 329, 80 S. W. 273; Hansberger v. Sedalia Electric Ry. L. & P. Co., 82 Mo. App. 566. *Nebraska*: Omaha St. R. Co. v. Martin, 48 Neb. 65, 6 Am. Elec. Cas. 417, 66 N. W. 1007. *New York*: Kimber v. Metropolitan St. Ry. Co., 69 App. Div. 353, 74 N. Y. Supp.

in Illinois: "In large and populous cities, where cars are constantly receiving and discharging passengers at crossings, it is a well-known fact that such passengers board cars and alight therefrom before the car has come to a full stop, and that they do so usually with perfect safety. It is well known, also, that street car companies tacitly invite many passengers to board and alight from their cars by checking up to a slow rate of speed, and immediately starting up at a greater speed when the passenger is safely aboard or has alighted. It would be impossible for the court to lay down the rule as to what particular rate of speed would be sufficient notice to a passenger that if he attempted to get on or off, he would be held guilty of contributory negligence. It would also be a great hardship, and unjust, to lay down a general rule that a passenger attempting to board any street car while in motion at all should be held in contributory negligence. * * * We cannot say, however, that it is inconsistent with ordinary care and caution for a person to board a street car while in motion. Whether one has not exercised due care or caution in so doing is to be determined by the particular circumstances in each case, and is, therefore, a question of fact to be submitted to the jury."[34] Therefore, where it appears that a person was guilty of contributory negligence in attempting to board a car, there can be no recovery for an injury received under such circumstances.[35] So if one attempts to board a moving car after it has passed a crossing, and it suddenly starts, he is held to be guilty of contributory negligence, unless it appears that the

966, 11 Am. Neg. Rep. 309; Fay v. Metropolitan St. Ry. Co., 62 App. Div. 51, 70 N. Y. Supp. 763. *Texas*: Lewis v. Houston Electric Co. (Civ. App., 1905), 88 S. W. 489, 18 Am. Neg. Rep. 640.

[34] Cicero & Proviso St. R. Co. v. Meixner, 160 Ill. 320, 31 L. R. A. 331, 43 N. E. 823, 6 Am. Elec. Cas. 404, per Phillips, J. Compare Joliet St. R. Co. v. Duggan, 45 Ill. App. 450, 4 Am. Elec. Cas. 409.

[35] Murphy v. North Jersey Street Ry. Co., 71 N. J. L. 5, 58 Atl. 1018; Schmidt v. North Jersey Street Ry. Co., 66 N. J. L. 424, 49 Atl. 438, 10 Am. Neg. Rep. 621; Foster v. Seattle Electric Co., 35 Wash. 177, 76 Pac. 995.

Evidence of a custom to stop at a certain place for the purpose of taking on passengers is not admissible in evidence, either to corroborate evidence that the car was moving slowly or as tending to excuse an attempt to board a rapidly moving car, West Chicago Street R. Co. v. Torpe, 187 Ill. 610, 58 N. E. 607.

speed of the car had been reduced in response to his signals.[36] And it has been held to be contributory negligence to attempt to board a moving car, with both arms full of bundles.[37] But for a person with an umbrella in one hand and a handkerchief in the other to attempt to board a car as it was stopping to take on passengers, was held not to be contributory negligence.[38] And a boy is not, as a matter of law, guilty of contributory negligence in boarding a moving car, but in so doing he is bound to exercise prudence equal to his care, knowledge and experience, and he is held responsible in law to that extent.[39] In boarding a moving electric car by the front platform a person must use such care as would be exercised by a reasonably prudent person, and it is held that a greater degree of care is required than in case of boarding the car by the rear platform or where it has stopped.[40] In order to charge a company with negligence for injury to a person attempting to board a car, it is necessary that those in charge of the car be in some way apprised of a desire on the part of such person to board the car, or that, from the surrounding circumstances, notice of a desire to board might reasonably be presumed.[41]

§ 531. **Boarding car — Sudden starting of.** — While a person is in the act of boarding a car, it is negligence for those in charge thereof, with knowledge or notice of such act, to suddenly start the car.[42] In many cases a car stops at some

[36] Reidy v. Metropolitan St. R. Co. (Sup. Ct. App. Term, 1899), 58 N. Y. Supp. 326.

[37] Birmingham R. & E. Co. v. Clay, 108 Ala. 233, 19 So. 309. See, also, Smith v. Birmingham Ry. L. & P. Co. (Ala., 1906), 41 So. 307, holding that a person carrying a bundle was guilty of negligence in attempting to board a car, in the night time when it was running from four to six miles an hour.

[38] White v. Atlanta Consol. St. Ry., 92 Ga. 494, 17 S. E. 672, 4 Am. Elec. Cas. 462.

[39] Sly v. Union Depot R. Co., 134 Mo. 681, 36 S. W. 235; Little Rock Traction & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

[40] Paulson v. Brooklyn City R. Co., 13 Misc. (N. Y.) 387, 34 N. Y. Supp. 244, 5 Am. Elec. Cas. 419.

[41] Bachrach v. Nassau Elec. R. Co., 35 App. Div. (N. Y.) 633, 54 N. Y. Supp. 958.

[42] *Connecticut*: Post v. Hartford St. Ry. Co., 72 Conn. 362, 44 Atl. 547. *Illinois*: Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450, 4 Am. Elec. Cas. 409. *Indiana*: Citizens' St. R. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491; Citizens' St. Ry. Co. v. Spahr, 7 Ind. App. 23, 4 Am. Elec. Cas. 416, 33 N. E. 446. *Ken-*

point where several persons are standing, when, perhaps, only one person has signalled for the car to stop. In such a case it is the duty of whoever is in charge of the car to see if any others besides the one signalling desire to board, and to suddenly start the car when the one person had boarded the same, without regard to others, would be negligence.[43] Although, in a case in New York, it is held that if a car is slowed down or stopped to enable an intending passenger to board it, the person in charge of the car is under no obligations to look and see if any other person is following, and seeking to take advantage of the stopping of the car to board it.[44] Again where a person had taken hold of a car, but it had started before she had boarded it, the fact that she continued to hold on to the car was held not to constitute contributory negligence.[45] In such a case it is declared that an emergency is presented which requires the exercise of judgment by the person attempting to board the car, as to what course is best to pursue to avoid injury, and that the fact that a person is injured in the course

tucky: Central Pass. Ry. Co. v. Rose, 15 Ky. Law. R. 209, 22 S. W. 745, 4 Am. Elec. Cas. 429. *Missouri*: Shanahan v. St. Louis Transit Co., 109 Mo. App. 228, 83 S. W. 783; O'Mara v. St. Louis Transit Co., 102 Mo. App. 202, 76 S. W. 780; Hansberger v. Sedalia Electric Ry. L. & P. Co., 82 Mo. App. 566. *New Jersey*: Schmidt v. North Jersey St. Ry. Co., (N. J. 1904), 58 Atl. 72, 16 Am. Neg. R. 501. *New York*: MacKenzie v. Union Ry. Co., 178 N. Y. 638, 71 N. E. 1134, affg. 82 App. Div. 124, 81 N. Y. Supp. 748; Kellegher v. Forty-Second St. M. & St. N. Ave. Ry. Co., 56 App. Div. 322, 67 N. Y. Supp. 767; Fine v. Interurban St. Ry. Co., 45 Misc. R. 587, 91 N. Y. Supp. 43; Pfeffer v. Buffalo Ry. Co., 4 Misc. 465, 54 N. Y. St. R. 342, 24 N. Y. Supp. 490, 4 Am. Elec. Cas. 439, affd., 144 N. Y. 636, 64 N. Y. St. R. 868, 39 N. E. 494. *Pennsylvania*: McCurdy v. United Traction Co., 15 Pa. Super. Ct. 29. *Texas*: Christie v. Galveston City R. Co. (Civ. App. 1897), 2 Am. Neg. Rep. 260, 39 S. W. 638.

See also Etson v. Fort Wayne & B. I. R. Co., 114 Mich. 605, 72 N. W. 598, 4 Det. L. News, 692, as to sudden start of car.

[43] Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450, 4 Am. Elec. Cas. 411; Davey v. Greenfield & Turner Falls St. Ry. Co., 177 Mass. 106, 58 N. E. 172; Goldwasser v. Metropolitan Street Ry. Co., 32 Misc. R. (N. Y.), 682, 66 N. Y. Supp. 505 affg. 32 Misc. R. 742, 65 N. Y. Supp. 1134; McCurdy v. United Traction Co., 15 Pa. Super. Ct. 29.

[44] Sexton v. Metropolitan St. R. Co., 40 App. Div. (N. Y.), 26, 57 N. Y. Supp. 577, 6 Am. Neg. Rep. 135.

[45] Joliet St. Ry. Co. v. Duggan, 45 Ill. App. 450, 4 Am. Elec. Cas. 410.

he decides upon will not render such conduct by him contributory negligence as a matter of law, but that this question is one for the jury to determine.[46] And where the sudden jerking of the car was caused by the application of the brake, for the purpose of stopping it, so that the intending passenger might board, the company was sheld not liable for an injury to such intending passenger.[47] And it has been decided that a street railway company will not be liable for an injury to one caused by the sudden starting of the car while he was attempting to board it where it appeared that the motorman acted in response to a signal to start which was given by another passenger,[48] or by one, who though he was in the employ of the company, was not, in giving the signal, then acting in the service of the company or within the course and scope of his employment.[49]

§ 531a. **Boarding car — Sudden starting of — Passenger not seated.**— The company is not under the duty not to start a car until a person is seated and the fact that a car is started before a passenger has reached a seat does not of itself show negligence which will render the company liable for an injury caused by the passenger falling,[50] though in a case in New York it is said that whatever may be the rule when the passenger is a man, it is negligence in the case of a woman

[46] Fay v. Metropolitan Street Ry. Co., 62 App. Div. 51, 70 N. Y. Supp. 763, 10 Am. Neg. R. 621 n, wherein it was said by Ingraham, J.: "Nor do I think that the plaintiff was, as a matter of law, guilty of contributory negligence. Having hold of the car, about to board it, when the car suddenly started, there was presented an emergency which required the exercise of judgment as to the best course to avoid being injured. If, to avoid being thrown down by the sudden starting of the car, he held on to the car to steady himself until he could let go in safety, it was certainly not negligence as a matter of law."

[47] Paulson v. Brooklyn City R. Co., 13 Misc. (N. Y.) 387, 34 N. Y. Supp. 244, 5 Am. Elec. Cas. 419.

[48] McDonough v. Third Ave. R. Co., 95 App. Div. (N. Y.) 311, 88 N. Y. Supp. 609.

[49] Lima Railway Company v. Little, 67 Ohio St. 91, 65 N. E. 861, 13 Am. Neg. R. 424, holding that the question as to what capacity the employee was acting in was one of fact to be submitted to and determined by the jury from all the facts and circumstances proven in the case.

[50] Sharp v. New Orleans City R. Co., 111 La. 395, 35 So. 614; Herbich v. North Jersey St. Ry. Co., 67 N. J. L. 574, 52 Atl. 357, 12 Am. Neg. R. 334.

to start the car with a sudden jerk before she has taken her seat.[51] And it may be stated generally that, though the company may not be guilty of negligence in starting a car before a passenger has reached a seat, there may be facts or circumstances which would render such an act negligent. The car in such a case should be started slowly and not with a sudden and violent jerk such as would throw a passenger, who is in the exercise of reasonable care for his own safety, to the floor.[52] The question of negligence on the part of the company may also be affected by the age or physical condition of the passenger. As is said in a recent case in Kentucky: "There are instances in which a car should be permitted to remain still until the passenger is seated; that is, where the passenger is old, feeble, crippled or in any condition which makes it reasonably apparent to those in charge of the car that the person needs unusual care and precaution for his or her protection." [53]

§ 532. **Boarding car which has stopped at place in violation of company's rules.**— Although it may be contrary to the rules of a street railway company for its cars to stop at a certain place, yet, if they are in the habit of stopping at such place, and of taking on and letting off passengers, and a person with no knowledge of such rules attempts to board a car at that point, and is injured by the sudden starting of the car, there is no contributory negligence by his merely attempting to board it, and the company is liable.[54]

§ 533. **Boarding car by front platform.**— An attempt to board a stationary electric car by the front platform is not negligence per se.[55] If, however, the car be moving, it is held that

[51] Doehterman v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 13, 52 N. Y. Supp. 1051, 4 Am. Neg. Rep. 689, affd. 164 N. Y. 583, 58 N. E. 1087.

[52] See Dochterman v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 13, 52 N. Y. Supp. 1051, 4 Am. Neg. R. 689, affd. 164 N. Y. 583, 58 N. E. 1087.

[53] Bennett v. Louisville Railway Co. (Ky. 1906), 90 S. W. 1052, 19 Am. Neg. R. 248, per Munn, J.

[54] Pfeffer v. Buffalo Ry. Co., 4 Misc. (N. Y.) 465, 54 N. Y. St. R. 342, 24 N. Y. Supp. 490, 4 Am. Elec. Cas. 439, affd., 144 N. Y. 636, 64 N. Y. St. R. 868, 39 N. E. 494.

[55] Eberhardt v. Metropolitan Street Ry. Co., 69 App. Div. (N. Y.) 560, 75 N. Y. Supp. 46, affd., 174 N. Y. 522, 66 N. E. 1107;

a greater degree of care is required than in boarding it by the rear platform.[56] A provision forbidding passengers to board or alight from the front platform of street cars, and requiring each car to be provided with a gate or guard for the prevention of the same, is held not to be within the title "An act to regulate the sale of tickets, the rate of fare to be charged and taxes and license to be paid by street railway companies" in a certain city.[57]

§ 534. **Barrier on side of car next to parallel track.**— Where there are double tracks in a street, summer cars operated over them are generally provided with a barrier on the side next to the other or parallel track. The object of such barrier is to prevent passengers from boarding or alighting on that side, and thus avoid the danger of injury from cars coming in the opposite direction. The presence of the barrier in place is a notice to persons that they are not to enter or alight from that side, and in the absence of negligence on the part of the company, it will not be liable to a person for any injury received while attempting to enter or alight on the side on which the barrier is placed.[58] In a case in New Jersey a boy twelve years of age attempted to enter the car under such circumstances, and while so doing the car was suddenly started by order of the conductor and the boy was injured. In this case it appeared that the conductor say the boy attempting to enter on the barred side and in a position of danger, but signalled the car to start, and by the sudden movement the boy was thrown to the ground and injured. The court held that it

Pfeffer v. Buffalo Ry. Co., 4 Misc. (N. Y.) 465, 54 N. Y. St. R. 342, 24 N. Y. Supp. 490, 4 Am. Elec. Cas. 439, affd., 144 N. Y. 636, 64 N. Y. St. R. 868, 39 N. E, 494.

See Townsend v. Binghamton R. Co., 57 App. Div. (N. Y.) 234, 68 N. Y. Supp. 121, holding, in an action by one who had boarded a car by the front platform and was thrown off and injured as the car was rounding a curve, that it was error to instruct the jury that it was the duty of the plaintiff to board the car by the rear platform and to obtain a seat if he could by reasonable effort, and that he was guilty of negligence in failing to do so.

[56] Paulson v. Brooklyn City R. Co., 13 Misc. (N. Y.) 387, 34 N. Y. Supp. 244, 5 Am. Elec. Cas. 419.

[57] Witzman v. Southern R. Co., 131 Mo. 612, 33 S. W. 181.

[58] Malpass v. Hestonville, Mantua & Fairmont Pass. Ry. Co., 189 Pa. St. 599, 42 Atl. 291, 5 Am. Neg. Rep. 471.

could not say, as a matter of law, that it was negligence to attempt to enter the car on the side on which the barrier was, though its presence signified that entrance was not invited there, but that, under the circumstances, the questions of negligence and contributory negligence were for the jury.[59] If, however, the barrier is removed, its absence is an invitation to passengers to enter from that side.[60]

§ 535. **Boarding moving car — Accident insurance.**— An attempt by a person to board a moving street car by the front platform is held not to be, as a matter of law, "a voluntary and unnecessary exposure to danger and obvious risk," for which an insurance company excepts itself from liability in a policy of accident insurance.[61]

§ 536. **Failure of employee to give starting signal.**— Where a passenger is injured by reason of the failure of an employee off duty to give the starting signal, as requested by the conductor in charge of the car, it is held that the company is liable, without regard to whether a custom existed among employees on duty, and was assented to by the company, to call upon employees off duty for assistance.[62]

§ 537. **Fare — Tender of — What is — Ejection of passenger.**— The fact that the redemption of mutilated notes is provided for by the rules of the Treasury Department of the United States does not affect the question of their legal tender. So a tender of a dollar bill from the corner of which a piece an inch and a quarter by an inch and a half had been torn, was held not to be a legal tender for car fare, and where the conductor ejected the passenger for refusal to make other tender, it was held that the conductor was not bound to accept a sub-

[59] Kelly v. Consolidated Tract Co., 62 N. J. L. 514, 41 Atl. 686, 5 Am. Neg. Rep. 414.

[60] Gaffney v. Brooklyn City Ry. Co., 6 Misc. (N. Y.) 1, 58 N. Y. St. R. 119, 25 N. Y. Supp. 996, 4 Am. Elec. Cas. 454, affd., 148 N. Y. 725, 70 N. Y. St. R. 873, 42 N. E. 723.

[61] Johanns v. National Accident Society of City of New York, 16 App. Div. (N. Y.) 104, 45 N. Y. Supp. 117, 2 Am. Neg. Rep. 767. See 3 Joyce on Insurance, §§ 2624, 2627, as to this exception in accident insurance policies.

[62] Leavenworth Elec. R. Co. v. Cusick, 60 Kan. 590, 57 Pac. 519.

stantially mutilated bill, but under the foregoing circumstances he might eject such passenger.[63] The company will, however, be liable for the act of its conductor in ejecting a passenger who refuses to tender in payment of his fare other than a silver coin of the United States, distinguishable as such and genuine, but which the conductor refuses to accept, acting in good faith under the belief that it is counterfeit, such belief being due to the fact that the coin is somewhat rare, and differs in appearance from coins of the same denomination of later dates.[64]

§ 538. **Standing in aisle of car.**— In many of the large cities, where street cars are extensively used, the seating accommodations are inadequate to accommodate all of the passengers. Most cars are provided with straps, suspended from a bar along the tops of the cars, so as to enable passengers who are obliged to stand in the aisles to support themselves. Under such circumstances those in charge of the car should exercise reasonable care in starting it, so as to avoid injury to those standing. Thus, where there were no vacant seats in the car, and a person standing in the aisle, supporting herself by one of the straps, was, by the negligent starting of the car, thrown to the floor and injured, the company was held liable. And it was held not to be contributory negligence to stand in the aisle under such circumstances.[65] And in an action to recover for

[63] North Hudson Co. Ry. Co. v. Anderson, 61 N. J. L. 248, 40 L. R. A. 410, 39 Atl. 905.

[64] Atlanta Consol. St. R. Co. v. Keeny, 99 Ga. 266, 33 L. R. A. 824, 25 S. E. 629, 5 Am. & Eng. R. Cas. (N. S.) 305.

[65] Grotch v. Steinway R. Co., 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075.

See Goodkind v Metropolitan Street Ry. Co., 93 App. Div. (N. Y.) 153, 87 N. Y. Supp. 523, 16 Am. Neg. R. 238 n, holding, in an action by one who was standing in the aisle of a car holding onto a strap, and was thrown when the car started, that the following charge was erroneous: "If the jury find that the particular car upon which the plaintiff was a passenger was caused to start forward without notice or warning to the plaintiff, from a position of rest, with a sudden and unusual lurch forward, so violent as to cause the plaintiff and other passengers in the car to be thrown in the manner testified to by plaintiff and his witness, Minzesheimer; and if the jury further find that the car could have been started, by the exercise of a reasonable degree of skill and care on the part of the motorman controlling the car, without such sudden, violent and unusual lurch at all; and if they should further find that the seats in the car were all occupied

an injury sustained by a passenger who was standing between the seats in an open summer car and was thrown to the street and injured as the car was rounding a curve, it was held proper to refuse to charge the jury that if they should find that the car was not going at a dangerous and improper rate of speed their verdict must be for the defendant company, it being declared that the judge in refusing to give such charge properly said that the jury might find that irregularity of motion, not excessive speed, caused the injury.[66]

§ 539. **Riding on platform of car.**— In many cases, owing to the crowded condition of a car, if a person boards it, it is necessary to stand upon either the front or rear platform. In other cases a passenger may voluntarily assume such position when there is still standing or sitting room inside the car. In either case it is not, as a matter of law, contributory negligence for a passenger to stand upon the platform of a car, whether front or rear, but in each case it is a question of fact to be determined by the jury.[67] But it has been held that where there is room inside of a car for a passenger to be seated, it is

and the plaintiff was standing inside the car, holding onto a strap provided for such purpose, at the time of such lurch, and was solely by reason thereof thrown down and received the injuries that were testified to in this case — then the plaintiff would be entitled to a verdict." The court decided that this charge was erroneous, as under it the jury were permitted to find the company liable without finding that there was any negligence on its part, or that its negligence was the proximate cause of the accident, or that there was a want of contributory negligence on the part of the plaintiff; that negligence was not established as a matter of law by the fact that the car was started with a jerk which was unnecessary; and that this question was one of fact for the jury to determine.

[66] Brierly v. Union R. Co., 26 R. I. 119, 58 Atl. 451, 16 Am. Neg. R. 578.

[67] *California*: Seller v. Market Street Ry. Co., 139 Cal. 268, 72 Pac. 1006, 14 Am. Neg. R. 249; Holloway v. Pasadena & Pac. R. Co., 130 Cal. 177, 62 Pac. 478. *Illinois*: Chicago Union Traction Co. v. Laurence, 211 Ill. 373, 71 N. E. 1024, affg. 113 Ill. App. 269. *Indiana*: Marion St. Ry. Co. v. Shaffer, 9 Ind. App. 486, 4 Am. Elec. Cas. 458, 36 N. E. 861; Terre Haute Elec. R. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 581. *Kentucky*: South Covington & C. St. Ry. Co. v. Riegler's Adm'r, 26 Ky. Law Rep. 666, 82 S. W. 382. *Maine*: Coombs v. Mason, 97 Me. 270, 54 Atl. 728; Watson v. Portland & C. E. R. Co., 91 Me. 584, 64 Am. St. Rep. 268, 40 Atl. 699, 11 Am. & Eng. R. Cas. (N. S.) 194. *Massachusetts*: Sweet-

negligence per se to remain upon the platform of a car, with no special reason therefor.[68] This latter class of cases cannot however, be accepted as declaratory of the true rule, which is, that riding on the platform of a car is not negligence as a matter of law, for certainly where a passenger is permitted to occupy such a position, his being there does not render him any the less a passenger or relieve the company of the duty placed upon it by law to use extraordinary diligence to secure his safety.[69] If, when a passenger boards a car, it is crowded beyond its normal capacity and there is no vacant place except the platform, on which the passenger takes his position and his fare is accepted while he is there, he is justified in remaining there, provided he exercises proper care.[70] And it has been

land v. Lynn & B. R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783, 9 Am. Neg. R. 575. *Minnesota*: Blondell v. St. Paul City R. Co., 66 Minn. 284, 68 N. W. 1079, 6 Am. & Eng. R. Cas. (N. S.) 272. *Missouri*: Wellmeyer v. St. Louis Transit Co. (Mo. 1906), 95 S. W. 925. *Nebraska*: East Omaha St. Ry. Co. v. Godola, 50 Neb. 906, 70 N. W. 491, 7 Am. & Eng. R. Cas. (N. S.) 300, 2 Am. Neg. Rep. 24. *New Jersey*: Scott v. Bergen County Traction Co., 63 N. J. L. 407, 43 Atl. 1060. *New York*: Dittmar v. Brooklyn Heights R. Co., 91 App. Div. 378, 86 N. Y. Supp. 878; Lucas v. Metropolitan Street Ry. Co., 53 App. Div. 405, 67 N. Y. Supp. 833; Bradley v. Second Ave. R. Co., 34 App. Div. 284, 54 N. Y. Supp. 256, 12 Am. & Eng. R. Cas. (N. S.) 184; Sias v. Rochester R. Co., 92 Hun, 140, 71 N. Y. St. R. 148, 36 N. Y. Supp. 378; Taft v. Brooklyn Heights R. Co., 14 Misc. 410, 35 N. Y. Supp. 1042, 70 N. Y. St. R. 750. *Pennsylvania*: Reber v. Pittsburg & B. Traction Co., 179 Penn. St. 339, 36 Atl. 245, 1 Am. Neg. Rep. 181; Germantown Pass. Ry. Co. v. Walling, 97 Penn. St. 55, 39 Am. Rep. 796. *Rhode Island*: Brunnchow v. Rhode Island Co., 26 R. I. 211, 58 Atl. 656; Elliott v. Newport St. R. Co., 18 R. I. 707, 31 Atl. 694, 23 L. R. A. 208, 4 Am. Elec. Cas. 452. *Washington*: Graham v. McNeill, 20 Wash. 466, 43 L. R. A. 300, 55 Pac. 631, 5 Am. Neg. Rep. 484, 12 Am. & Eng. R. Cas. (N. S.) 149; Bailey v. Tacoma Traction Co., 16 Wash. 48, 47 Pac. 241.

[68] Kirchner v. Oil City Street Ry. Co., 210 Pa. St. 45, 59 Atl. 470; Thane v. Scranton Traction Co., 191 Penn. St. 249, 6 Am. Neg. Rep. 185, 43 Atl. 136, 71 Am. St. R. 767, 4 Chic. L. J. Weekly, 260, see also Brennan v. Brooklyn Heights R. Co., 12 Misc. (N. Y.) 570, 5 Am. Elec. Cas. 416, 33 N. Y. Supp. 842; Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.), 465, 25 N. Y. Supp. 242, 4 Am. Elec. Cas. 449.

[69] Augusta Railway & Elec. Co. v. Smith, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. R. 33.

[70] McCaw v. Union Traction Co., 205 Pa. St. 271, 54 Atl. 893, 13 Am. Neg. R. 582 n.

held to be evidence of negligence on the part of the company where a street car, when it is already filled greatly in excess of its seating capacity, stops and takes on additional passengers, permitting them to ride on the platforms and steps of the car.[71] And where, under such circumstances, a passenger already upon the car, standing on the platform, was pushed off the platform by the crowd boarding the car and injured, the company was held to be guilty of negligence.[72] A passenger who voluntarily takes a position on the platform of a car should, however, be held to a greater degree of care than if riding in a safe position inside the car, since in riding upon the platform there is necessarily increased danger and certain obvious risks which require a degree of care proportionate thereto.[73]

§ 540. **Riding on platform of car — Cases.**— Standing upon the platform of a car while it is rounding a curve is not contributory negligence, as a matter of law, even though the car be approaching a curve at a high rate of speed, since, in such a case, the passenger has a right to assume that the speed will be slackened.[74] But the running of a car around a curve at such a rate of speed as to throw passengers from their seats, and others from the platform, was held to constitute negligence on the part of the company.[75] Leaving a seat at the request of the conductor that male passengers vacate their seats in favor of ladies, and going upon the platform, is not an act which will relieve the company from liability for injuries

[71] East Omaha St. R. Co. v. Godola, 50 Neb. 596, 70 N. W. 491, 2 Am. Neg. Rep. 24, 7 Am. & Eng. R. Cas. 300.

[72] Reem v. St. Paul City Ry. Co., 77 Minn. 503, 80 N. W. 638.

[73] Watson v. Portland & C. E. R. Co., 91 Me. 584, 40 Atl. 699, 64 Am. St. R. 268, 11 Am. & Eng. R. Cas. (N. S.) 194; Magrane v. St. Louis & Suburban Ry. Co., 183 Mo. 119, 81 S. W. 1158; Reber v. Pittsburg & B. Tr. Co., 179 Pa. St. 339, 36 Atl. 245, 57 Am. St. Rep. 599, 1 Am. Neg. Rep. 181.

[74] Blondel v. St. Paul City R. Co., 66 Minn. 284, 68 N. W. 1079, 6 Am. & Eng. R. Cas. (N. S.) 272; East Omaha St. R. Co. v. Godola, 50 Neb. 596, 70 N. W. 491, 7 Am. & Eng. R. Cas. 300, 2 Am. Neg. Rep. 24; Reber v. Pittsburg & B. Traction Co., 179 Pa. St. 339, 36 Atl. 245, 1 Am. Neg. Rep. 181.

[75] East Omaha St. R. Co. v. Godola, 50 Neb. 596, 70 N. W. 491, 7 Am. & Eng. R. Cas. 300, 2 Am. Neg. Rep. 24.

caused by a collision from the rear.[76] Nor is it contributory negligence, as a matter of law, for a passenger to voluntarily vacate his seat in order that a lady may sit down, and to go out upon the platform.[77] Nor to stand on the front platform, from which he is thrown by reason of the car jumping a switch,[78] or by a sudden jerk caused by applying the brake suddenly.[79] And it was held not to be contributory negligence, as a matter of law, for a person to stand on the platform, where he was injured by a broken trolley pole and wheel falling upon him.[80] Nor to put his head beyond the side of the car while standing on the platform, by which he was injured, his head coming in contact with a tree.[81] The act of a passen-

[76] Terre Haute Elec. R. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 581. See McCaw v. Union Traction Co., 205 Pa. St. 271, 54 Atl. 893, 13 Am. Neg. Rep. 582 n.

[77] Stile v. Nassau Elec. R. Co., 32 App. Div. (N. Y.) 276, 52 N. Y. Supp. 975. See McCaw v. Union Traction Co., 205 Pa. St. 271, 54 Atl. 893, 13 Am. Neg. Rep. 582 n.

[78] Taft v. Brooklyn Heights R. Co., 14 Misc. (N. Y.) 410, 70 N. Y. St. R. 750, 35 N. Y. Supp. 1042. Compare Byron v. Lynn & B. R. Co., 177 Mass. 303, 58 N. E. 1015, holding that the fact that a passenger is thrown from the car when it passes from the main track onto a switch does not render the company liable in the absence of evidence showing some defect in the car or track or that the car was going at a dangerous or unusual rate of speed or that the jar was greater than usual.

[79] Bradley v. Second Ave. R. Co., 34 App. Div. (N. Y.) 284, 54 N. Y. Supp. 286, 12 Am. & Eng. R. Cas. (N. S.) 184.

Compare Timms v. Old Colony Street Ry. Co., 183 Mass. 193, 66 N. E. 797, in which it appeared that the plaintiff was standing on the platform, near the edge thereof, with one hand in his pocket and not holding on to anything. The speed of the car was suddenly slackened and there was a little jerk and the plaintiff was thrown to the street. It did not appear from the evidence that there was any defect in the car or condition of the rails or that the sudden stopping was not caused by some obstacle suddenly appearing in front of the car which rendered it necessary to stop it to avoid a collision. The court held that the company was not liable, there being no evidence showing negligence on its part.

[80] Marion St. Ry. Co. v. Shaffer, 9 Ind. App. 486, 4 Am. Elec. Cas. 458, 36 N. E. 861.

[81] Sias v. Rochester R. Co., 92 Hun (N. Y.), 140, 71 N. Y. St. R. 148, 36 N. Y. Supp. 378. Under the facts of the case, however, it was held that such act was contributory negligence precluding recovery. S. C., in 18 App. Div. 506, 46 N. Y. Supp. 582. Subsequently it was again held that the company was not liable, it appearing that he was riding on the car of another company and which was operated by

ger, in making a feint to drive off boys who are trespassing on the car, as a result of which another boy is thrown from the platform, was held not to be the proximate cause of the injury sustained by the latter.[82] The projection of a bolt, used to fasten the steps of the car, so that it injures the leg of a passenger, falling from the platform, was held not to show that the company was negligent in the construction of the car.[83] Where, by the sudden starting of a car, as it approached a switch, a passenger standing upon the front platform was thrown off and injured, the following instruction was held to be correct: "If standing upon the front platform as above described would be an act of carelessness or failure to exercise such a degree of care as men of ordinary prudence would exercise under the same circumstances," the plaintiff cannot recover.[84]

§ 540a. **Riding on platform of car — Rules of company —** An electric street railway company has the right to impose reasonable rules and regulation as to the positions which passengers may take upon its cars, and it is a reasonable rule or regulation to provide that passengers standing upon the platforms do so at their peril or to forbid them from standing there.[85] And in construing such regulations it has been de-

such company over the tracks of the defendant under a contract between them, the court declaring that the relation of carrier and passenger did not exist between the plaintiff and defendant. 51 App. Div. 618, 64 N. Y. Supp. 1148, affirmed 169 N. Y. 118, 62 N. E. 132.

[82] Marks v. Rochester Ry. Co., 41 App. Div., 66, 58 N. Y. Supp. 210.

[83] Posten v. Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391.

[84] Beal v. Lowell & Dracut St. Ry., 157 Mass. 444, 4 Am. Elec. Cas. 462, 32 N. E. 653.

[85] Augusta Railway & Elec. Co. v. Smith, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. Rep. 33, determining liability of company where the following printed notice was posted on the car: "It is dangerous to ride upon this platform or steps; to get on or off cars while in motion; to get on or off cars next to adjoining track. Passengers violate these warnings at their own risk."

Burns v. Boston Elevated Ry. Co., 183 Mass. 96, 66 N. E. 418, 13 Am. Neg. Rep. 527, holding following rule reasonable: "Passengers riding on the front platform do so at their own risk." The court said in this case: "The rule in respect to passengers riding on the front platform must be regarded, it seems to us, as a reasonable rule, and such a rule as the defendant had a right to adopt. * * * It would have had the right to prohibit absolutely

clared that in a contract for safe carriage there is an implied agreement that the passenger will obey the reasonable rules of the carrier,[86] and also that a street railway company is not obliged to carry persons unless they are willing to submit to, and to be bound by, the reasonable rules and regulations which it has established, and in case of refusal may lawfully eject them.[87] An electric street railway company cannot, however,

passengers from riding on the front platform, and a passenger who, without sufficient excuse, knowingly violated the rule, and was injured in consequence thereof, would have been guilty of contributory negligence, and would not have been entitled to recover, even though the defendant had also been negligent. * * * We do not think that the only alternatives open to the defendant were those of absolute prohibition or unqualified permission. The notice contained a fair warning that the front platform was regarded by the company as a place of exposure to danger, and that it was unwilling that passengers should ride there, unless they were content to take the risks of doing so; and it is not unreasonable, it seems to us, to say that a passenger who knew the rule, as the plaintiff did, and rode upon the front platform, accepted the risk, in the absence of anything to show that the rule had been waived by the company, or that it was not in force. The rule is to be regarded, we think, as designed to promote the safety of passengers, by warning them that the front platform was or might be a place of danger, and that they rode there at their own risk, rather than as designed to protect the defendant from the results of its own negligence, or that of its servants or agents," per Morton, J.

Sweetland v. Lynn & B. R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783, 9 Am. Neg. Rep. 575. holding following rule reasonable: "Notice, all persons are forbidden to be on the front platform of this car, and this company will not be responsible for their safety. Per order of the directors."

Montgomery v. Buffalo Ry. Co., 165 N. Y. 139, 58 N. E. 770, 9 Am. Neg. Rep. 124, affg. 24 App. Div. 454, 48 N. Y. Supp. 849, and holding a rule that conductors should "not allow passengers to sit, or stand on, or to crowd the rear platform" was a reasonable one.

Cincinnati, L. & A. Elec. St. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 13 Am. Neg. Rep. 663, holding a rule: "Passengers not allowed on the platform" reasonable.

[86] Cincinnati, L. & A. Elec. St. R. Co. v. Lohe, 68 Ohio St. 101, 67 N. E. 161, 13 Am. Neg. Rep. 663.

[87] Montgomery v. Buffalo Railway Co., 165 N. Y. 139, 58 N. E. 770, 9 Am. Neg. Rep. 124, affg. 24 App. Div. 454, 48 N. Y. Supp. 849. The court said: "I think that if the rule was a reasonable one the passenger was bound to submit to it, and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his

shield itself from liability for injury to a passenger received while riding on the platform of one of its cars, by the fact that a rule of the company provides that any passenger riding upon a platform does so at his own risk where it habitually compels passengers to ride there owing to the crowded condition of its cars and the passenger injured was compelled to ride on the platform in order to be carried,[88] and likewise though a rule of the company forbids passengers to ride in such a position, yet if the company frequently compels passengers to ride there owing to the overcrowding of its cars, or does not endeavor to enforce the rule and leads its passengers by its conduct to believe that the company does not intend to enforce it, it cannot avail itself of the rule to avoid liability.[89]

§ 541. **Riding on running-board of car.**— It is not negligence per se for a passenger to ride on the footboard of a crowded street or summer car.[90] Nor is it negligence per se

right to be carried any further," per Gray, J.

[88] Augusta Railway & Elec. Co. v. Smith, 121 Ga. 29, 48 S. E. 681, 17 Am. Neg. Rep. 33.

[89] Sweetland v. Lynn & B. R. Co., 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783, 9 Am. Neg. Rep. 575, wherein it was said by Knowlton, J.: "We have no doubt that a railroad company, after making a rule in regard to the conduct of passengers, may waive and abandon it, and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If a railroad company does this, it cannot set up the rule to defeat the rightful claim of a passenger who has acted in the well warranted belief that the rule is not in force. * * * If such signs as this are placed over the front platform of cars, and if afterwards the persons in charge of the cars are accustomed to receive passengers upon the cars in such numbers as to crowd the front and rear platforms, as well as the other parts of the cars, and the passengers are permited to ride freely and without question upon the front platforms, paying for so riding the usual fare, the passengers may well believe, and the jury may well find, that the notice was not intended as a rule to be obeyed, and that the front platforms were intended by the company to be used by the passengers."

[90] *Illinois*: North Chicago Street Ry. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793, 14 Am. Neg. Rep. 275; Purington-Kimball Brick Co. v. Eckman, 102 Ill. App. 183; West Chicago St. R. Co. v. Marks, 82 Ill. App. 185. *Indiana*: Ft. Wayne Traction Co. v. Hardendorf (Ind.), 72 N. E. 593. *Missouri*: Kreinelmann v. Jourdan (Mo. App.), 80 S. W. 323. *New Jersey*: Wheeler v. South Orange & M. T. Co., 70 N. J. L. 725, 58 Atl. 927, 17 Am. Neg. Rep. 310. *New York*: Hassen

under all circumstances for a carrier to allow a passenger to stand in such a position, but in each case the question of negligence is one of fact for the jury.[91] A passenger, however, in taking such a position on the car assumes the risk of such dangers as are obviously incident to that position, and the company, in accepting him there as a passenger, owes to him the duty arising out of that relation.[92] And where the car is crowded and a passenger is permitted to ride in such a position, the carrier assumes the duty of exercising the care demanded by the circumstances.[93] And where it appeared that the car was running on a down grade at the rate of from fifteen to twenty miles per hour, and that a passenger, while riding on the running-board of the car, was struck by a plank which was on the track and was injured, it was held that it was not error to instruct the jury that the company was liable if the injury could have been avoided by extraordinary care and diligence. It was also held not to be contributory negligence in riding on the running-board.[94] And the company has been held liable for injuries received by a passenger in such a posi-

v. Nassau Elec. R. Co., 34 App. Div. 71, 53 N. Y. Supp. 1069. *Oregon*: Anderson v. City & Suburban R. Co., 42 Or. 505, 71 Pac. 659. *Rhode Island*: Elliott v. Newport St. R. Co., 18 R. I. 707, 28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208, 4 Am. Elec. Cas. 449, 5 Am. Elec. Cas. 384. *Washington*: Lawson v. Seattle & Renton R. Co., 34 Wash. 500, 76 Pac. 71, 16 Am. Neg. Rep. 253.

See Burns v. Johnstown Passenger Ry. Co. (Pa. 1905), 62 Atl. 564, 19 Am. Neg. R. 501, holding that where a person stands on the running board of a car he assumes the risk of his position, unless he relieves himself by showing that it was not practicable for him to go inside. Compare Sheeron v. Coney Island & B. R. Co., 78 App. Div. (N. Y.) 476, 79 N. Y. Supp. 752.

[91] North Chicago Street R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793, 14 Am. Neg. Rep. 275; Anderson v. City & Suburban R. Co., 42 Or. 505, 71 Pac. 659.

[92] Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. 645, 4 Am. Neg. Rep. 422, per Dixon, J.

[93] North Chicago Street R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793, 14 Am. Neg. Rep. 275. In Bumbear v. United Traction Co., 198 Pa. St. 198, 47 Atl. 961, 9 Am. Neg. Rep. 361, it is said: "As the plaintiff was received as a passenger when the car was so full that he could not go inside, and stood on the step with the knowledge and assent of the conductor, he would assume that reasonable precautions would be taken to protect him from such dangers as could be readily seen and guarded against," per Fell, J.

[94] Cogswell v. West St & North End Elec. Ry. Co., 5 Wash. 46, 31 Pac. 411, 4 Am. Elec. Cas. 412.

tion, where, by the sudden starting of the car, he was forced to break his hold, and, as his body swung out, he was struck by a trolley pole.[95] So, again, where the conductor stumbled and fell against a passenger on the running-board, knocking him off the car, it was held that a nonsuit was erroneous, and that the question should have been submitted to the jury.[96] And where a passenger riding on the footboard of a crowded car which was run around a curve at a high rate of speed was so jolted that his head was thrown outward and came in contact with a trolley pole which was only distant about twenty-five inches from the body of the car, it was held that the conclusion drawn by the court that the defendant was negligent in permitting its passengers to ride upon the running-board while running its car at such a rate of speed along the track at the point in question with the pole situated as it was, was justified.[97] And it is held that a street railway company is not, as a matter of law, free from negligence where it permits a passenger to ride on the running-board of a car, without warning, over a portion of its line, where posts are erected so close to the track that a person riding in such a position will collide with them, unless he inclines his body forward.[98] In another case, where a passenger, in riding on the running-board of a summer car, leaned back far enough from the car to strike an electric light pole, which was fifteen inches from the nearest part of the step, it was held that he was guilty of such contributory negligence as would preclude recovery.[99] And likewise where

[95] Hassen v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 71, 53 N. Y. Supp. 1069, 5 Am. Neg. Rep. 83.

[96] Whalen v. Consol. Traction Co., 61 N. J. L. 606, 40 Atl. 645, 4 Am. Neg. Rep. 422.

[97] Hesse v. Meriden S. & C. T. Co., 75 Conn. 571, 54 Atl. 299, 13 Am. Neg. Rep. 482.

[98] West Chicago St. R. Co. v. Marks, 82 Ill. App. 185.

[99] Sibley v. New Orleans & L. R. Co., 49 La. Ann. 588, 21 So. 850; see also Gilly v. New Orleans City & Lake R. Co., 48 La. Ann. 588, 21 So. 850, 2 Am. Neg. Rep. 558; Flynn v. Consolidated Traction Co., 67 N. J. L. 546, 52 Atl. 369; Woodroffe v. Roxborough C. H. & N. R. Co., 201 Pa. St. 521, 51 Atl. 324, 11 Am. Neg. Rep. 346.

In Burns v. Johnstown Passenger Ry. Co. (Pa. 1905), 62 Atl. 564, 19 Am. Neg. Rep. 501, it was decided that there could be no recovery for the death of one who was killed while on the running board of a car by being struck by a pole where it appeared that he took such position with knowledge of the proximity of poles to the track and had warned others standing there of the danger.

a passenger who was riding in such a position leaned back from the car so as to enable the conductor to pass more easily under his arm and was struck by a pole, it was declared that in making such movement he assumed the risk.[1]

§ 541a. **Riding on running-board of car — Passenger intoxicated.**— Negligence will not be imputed to a person riding on the running-board of a car from the fact that he was intoxicated, but the question is whether he exercised ordinary care, and it has also been declared that if the intoxication of a passenger is known to the motorman he should run the car more carefully in order to prevent throwing the passenger off the car.[2]

§ 541b. **Riding on running-board of car — Liability of owner of vehicle for injury to passenger.**— One using the streets with a vehicle must exercise his right with due regard to the rights of others who are entitled to use the same, and if by his negli-

[1] Nugent v. New Haven Street R. Co., 73 Conn. 139, 46 Atl. 875, 8 Am. Neg. Rep. 179.

[2] Lawson v. Seattle & Renton R. Co., 34 Wash. 500, 76 Pac. 71, 16 Am. Neg. Rep. 253, holding the following instruction to be correct: "You are instructed that intoxication on the part of the plaintiff, if you believe that the plaintiff, Mr. Lawson, was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence, or such evidence of negligence, as will bar his recovery in this action. The law refuses to impute negligence, as of course, to a plaintiff from the bare fact that at the moment of receiving the injury he was intoxicated. Intoxicated persons are not removed from all protection of the law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, then his intoxication, if you believe that he was intoxicated, had nothing to do with the accident. I wish to substitute in place of the words 'had nothing to do with the accident' 'would not prevent his recovery.' When contributory negligence is one of the issues, as in this case, the defendant must prove to you, or it must appear to you from all the evidence, that the plaintiff did not exercise ordinary care; and that, too, without reference to his intoxication. The question is not whether or not the plaintiff was drunk, but whether or not he exercised ordinary care. You are instructed that if you find that the plaintiff was intoxicated and in a place of danger, and that if you find that the motorman knew those facts, the motorman was bound to run the car more carefully, in order to prevent throwing Mr. Lawson off the car, if Mr. Lawson was in a place of danger." A judgment for plaintiff in this case was affirmed with instructions to the trial court to reduce the amount.

gence a person riding on the footboard of a car is injured he will be liable therefor. So where the driver of a team of three horses left the outside trace of the horse standing nearest the track unfastened, and, as the car was passing by, the horse "sheered" or moved towards the car and the passenger was crushed between the car and the hindquarters of the horse, it was decided that the driver was negligent and that his employer was liable for the injury sustained.[3]

§ 541c. **Passing along running-board of car for seat.**— The question whether a passenger in boarding a car, or who is standing on the car, is guilty of contributory negligence in passing along the footboard to secure a seat which will preclude a recovery for an injury sustained while in such position is ordinarily one of fact for the jury to determine under the circumstances of each particular case.[4] So where a passenger who was standing on the rear platform of a car left his position, when the car slowed down, and stepped upon the footboard for the purpose of taking a seat inside the car, when a sudden movement of the car forward caused him to lose his balance and while attempting to regain it he was struck by contact with a trolley pole and fell, it was held that the question of contributory negligence of the passenger was for the jury.[5] But where a person boarded a car in the rear and, after paying the fares of himself and of his friends who had boarded the forward part of the car, passed along the running board, on the side on which cars were liable to pass, for the purpose of joining his friends, and while so doing was struck by a passing car and was injured, it was decided that, there

[3] McCormack v. Boston Elev. R. Co., 188 Mass. 342, 74 N. E. 599, 18 Am. Neg. Rep. 468.

[4] Wheeler v. South Orange & M. T. Co., 70 N. J. L. 725, 58 Atl. 927, 17 Am. Neg. R. 310; San Antonio Traction Co. v. Bryant (Tex. Civ. App. 1902), 70 S. W. 1015; see also Citizens' Street Ry. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491.

[5] Wheeler v. South Orange & M. T. Co., 70 N. J. L. 725, 58 Atl. 927, 17 Am. Neg. Rep. 310, wherein the court declared that the plaintiff was in the exercise of a right that belonged to him as a passenger when he attempted to go upon the running-board to find a seat in the car and that such acts are not ordinarily negligence per se, citing Scott v. Bergen Co. Tr. Co., 63 N. J. L. 407, 43 Atl. 1060; Traction Co. v. Gardner, 60 N. J. L. 571, 38 Atl. 669; Paganini v. North Jersey Street Ry. Co. (N. J. Sup.), 57 Atl. 128.

being vacant seats where he boarded the car, he assumed the risk, in passing along the running-board, of contact with a car. The court said in this connection: "Manifestly a position on the running-board of a car in motion, on the side on which other cars are liable to pass, is one of danger; and we think that a passenger who boards an electric car in which there are plenty of vacant seats at the place where he boards it, and who chooses, for his own accommodation and pleasure, to pass along the running-board, while the car is in motion, to another part of the car, on the side on which other cars are liable to pass, must be held to have assumed the risk of contact with and injury from cars passing on the neighboring track." [6]

§ 542. **Riding on steps of car.**— It is not, as a matter of law, contributory negligence for a person to ride on the steps of a crowded street car. The questions of negligence and contributory negligence in such cases are for the jury to determine.[7] But for a passenger to ride upon the steps of a street car voluntarily, when there is sufficient room for him to sit or stand within the car, would clearly constitute contributory negligence.[8] So, under such circumstances, a refusal to charge "That if the jury find that the plaintiff was riding at the time of the accident on the steps of the front platform, then plaintiff was guilty of contributory negligence, and the verdict should be for the defendant," was held to be error.[9] And an instruction that if the plaintiff was standing on the rear step of the

[6] Moody v. Springfield Street Ry. Co., 182 Mass. 158, 65 N. E. 29, 13 Am. Neg. Rep. 109, per Morton, J. See Allen v. St. Louis Transit Co., 183 Mo. 411, 81 S. W. 1142.

[7] *California*: Fraser v. California St. C. R. Co., 146 Cal. 714, 81 Pac. 29, 18 Am. Neg. Rep. 5. *Illinois:* Alton Light & T. Co. v. Oller, 217 Ill. 15, 75 N. E. 419, 19 Am. Neg. Rep. 141. *Massachusetts:* Wilde v. Lynn & Boston R. Co., 163 Mass. 533, 40 N. E. 851, 5 Am. Elec. Cas. 414. *Nebraska:* Pray v. Omaha St. Ry. Co., 44 Neb. 167, 62 N. W. 447, 5 Am. Elec. Cas. 407. *New York:* Wood v. Brooklyn City R. Co., 5 App. Div. 492, 38 N. Y. Supp. 1077; McGrath v. Brooklyn, Queens County & Suburban R. Co., 87 Hun 310, 5 Am. Elec. Cas. 422, 34 N. Y. Supp. 365; Kinkade v. Atlantic Ave. R. Co., 9 Misc. 273, 61 N. Y. St. R. 323, 29 N. Y. Supp. 747, affd., 149 N. Y. 615, 44 N. E. 1125.

[8] Tanner v. Buffalo Ry. Co., 72 Hun (N. Y.), 465, 4 Am. Elec. Cas. 447, 25 N. Y. Supp. 242.

[9] Francisco v. Troy & Lansingburgh R. Co., 78 Hun (N. Y.), 13, 5 Am. Elec. Cas. 374, 29 N. Y. Supp. 247.

car while it was in motion, and there was room to sit or stand inside the car, and he was thrown to the ground by the negligence of the motorman, and would not have been thrown if he had been sitting or standing inside of the car, the jury shall find for the defendant, was held to be proper.[10] It may be stated, however, that a street railway company is not relieved from the exercise of a high degree of care which it owes to a passenger to carry him in safety by the fact that he may be standing on the step of a car.[11] And where a motorman attempted to run his car, upon the steps of which passengers were standing, past a standing truck, there being room enough, unless the position of the truck was changed, it was held that he was not, as a matter of law, free from negligence.[12] Where, however, a passenger, after signaling the conductor to stop the car, and his failure to do so, went out upon the step of the car, from which he fell, it was held he could not recover.[13] But where a boy, who was sitting on the rear platform with his feet upon the steps of the car, became dizzy and fell off, the conductor was held guilty of negligence in that he did not either order him inside the car, or stop the car and put him off, and the company was held liable.[14] And where it appeared that the motorman had put on all the power that the motor would permit while the car, which was crowded, was going up grade; that while the car was in rapid motion the conductor crowded out onto the front platform to give out transfers, and that the plaintiff, a boy who was riding on the steps of the front platform, released one hand to take a transfer from the conductor when the car gave a lurch, throwing passengers standing on the platform against the plaintiff and knocked him from the car, or that he was thrown from the steps by the lurching and rapid motion of the car, it was decided that the questions of negligence were properly sub-

[10] McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

[11] Parks v. St. Louis & S. Ry. Co., 178 Mo. 108, 77 S. W. 70.

[12] Wood v. Brooklyn City R. Co., 5 App. Div. (N. Y.) 492, 38 N. Y. Supp. 1077.

[13] Shade v. Union Traction Co. (C. P.), 7 Penn. Dist. Repr. 34, 20 Penn. Co. Ct. Rep. 292.

[14] Jackson v. St. Paul City R. Co., 74 Minn. 48, 5 Am. Neg. Rep. 47, 76 N. W. 956; see also as to boy sitting on steps of a car. Mills v. Wolverton, 9 App. Div. (N. Y.) 82, 41 N. Y. Supp. 190.

mitted to the jury and a judgment for plaintiff was affirmed.[15]

§ 543. **Riding on platform, running-board or steps of car — Generally.**— From the preceding sections it will be seen that it is not negligence per se for a passenger to stand upon the platform, steps, or running-board of an electric street car which is crowded, and the weight of authority also supports the rule that it is not contributory negligence, as a matter of law, for a passenger to stand upon the platform of a car, whether there be vacant seats or not inside of the car. And whether the passenger be standing upon the platform, running-board or steps the questions of negligence and contributory negligence would seem to be, in the majority of cases, questions for the jury to determine. A person standing upon the platform of a car is obligated to a greater degree of care and precaution than if safely seated inside the car, owing to the greater exposure to injury, due to the stopping and starting of the car and the turning of curves in the road. A person standing upon the steps or running-board of a car must exercise a still greater degree of care, since, in such a position, not only is he subject to the same dangers which a passenger standing upon the platform of the car is subject to, but he is also liable to injury from collision with vehicles or with posts placed beside the tracks, as they are in many cases. Corresponding with the degree of care imposed upon the passenger, those in charge of the car,

[15] Alton Light & Traction Co. v. Oller, 217 Ill. 15, 75 N. E. 419, 19 Am. Neg. Rep. 141, wherein the court said: "Slight care and foresight only was necessary to arouse apprehension that the passengers on the platform and steps of the car would be endangered by an excessive speed, and that speed even more moderate than the usual rate of speed was the more prudent and safe course for the safety of such passengers. It was the duty of the appellant company to regulate the speed of its car in view of the fact that it had encouraged its patrons to overcrowd the aisles, platforms, and steps. The high degree of care which the law enjoined upon it for the safety of its passengers should have been the paramount consideration. The practical operation of the car did not require that a rapid rate of speed should be employed. Whether it was negligence on the part of the appellee, as a passenger, to stand on the steps or platform of the car, was a question of fact for the decision of the jury (North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 67 N. E. 793) and not of law to be determined by the court. The cause was properly submitted to the jury," per Boggs, J.

where they have knowledge that passengers are exposed to such dangers, should be held to an equal degree of care, especially in those cases where the passenger is impliedly invited to take such a position on the car, and his fare is accepted in such position without remonstrance. It has been urged in some cases that, owing to the increased speed at which electric cars are run, the rule applicable to standing upon the platform or steps of horse cars should not apply in the case of electric cars, and that it should be considered negligence per se to take such a position on the latter. It would seem reasonable, however, that the question of the increased speed should be equally applicable as bearing upon the question of negligence on the part of the company. Frequently electric cars already occupied greatly in excess of their reasonable capacity are stopped to take on additional passengers, the company thus inviting persons to stand on the platforms, steps or running-board, in case of summer cars, and accepting fare from them. In such cases the carrier should be held to a high degree of care, since he has voluntarily assumed the responsibility of carrying the passenger in safety, and owes to him a duty in that regard. The passenger should also be held to a degree of care such as a reasonably prudent man would exercise under like conditions.

§ 544. **Riding on bumper of car.**— Riding on the bumper of an electric car without the knowledge of the conductor is contributory negligence and will preclude recovery for an injury caused by the car being struck by another car. It has been declared that the bumper of a car is not for use by passengers for any purpose, but is to relieve against the shock of contact between cars.[16] So where a person boarded a crowded street car and rode on the bumper after he was advised by the conductor not to ride there, by telling him he had better get off and wait or get inside, and he was injured by a car coming up from the rear and striking the car on which he was riding, it was decided that he was guilty of contributory negligence and a judgment in his favor was reversed.[17] It was declared in this case that: "When a place is one not

[16] Bard v. Pennsylvania Traction Co., 176 Penn. St. 97, 34 Atl. 953, 6 Am. Elec. Cas. 444.

[17] Nieboer v. Detroit Electric Ry. Co., 128 Mich. 486, 87 N. W. 626, 10 Am. Neg. Rep. 609. Two judges dissented in this case.

provided or intended for passengers to ride upon, and is in itself dangerous, the employee who assumes to permit a passenger to ride in such a place acts without authority, unless such authority be shown expressly or by common custom.[18] In a case in New Jersey, however, where it appeared that a person was permitted to take his position on the bumper of a car and a fare was collected from him while there, and he was killed by a car from the rear colliding with his car, the accident occurring in broad daylight, it was decided that the company was guilty of negligence and liable for such death.[19] And it would seem in this class of cases that where a passenger has tendered his far and it has been accepted while riding on the bumper of the car, that he cannot be said to assume all risks. It may be that he assumes the risk of falling or being thrown therefrom, but it does not seem reasonable to hold that there can be no recovery for an injury caused by a car approaching from the rear and colliding with the car on which he is riding and thus causing an injury, where the collision is due to the negligence of the company, especially in those cases where the car is crowded and a position on the bumper of the car is the only available one. And certainly it cannot be said to be such contributory negligence as will preclude recovery for an injury so sustained owing to the negligence of the company; where a habit or custom is shown on the part of the company to accept fare from and to carry passengers while in that position. In such cases the questions as to negligence should ordinarily be for the jury.[20]

§ 544a. **Passenger injured — Sudden stopping of car.**— An electric street railway company should, in the stopping of its cars, be held to the utmost care consistent with the practical operation of its road, and if it fails to exercise the degree of care required and is guilty of negligence in suddenly stopping its cars, in consequence of which a passenger is injured, the company will be liable for the injury so caused. The circumstances may be such, however, that the sudden stopping

[18] Per Grant, J.

[19] Grieve v. North Jersey Street Ry. Co., 65 N. J. L. 409, 47 Atl. 427.

[20] See Paquin v. St. Louis & Suburban R. Co., 90 Mo. App. 118. See Nieboer v. Detroit Electric Ry. Co., 128 Mich. 486, 87 N. W. 626, 10 Am. Neg. Rep. 609, as to custom and also dissenting opinion as to contributory negligence.

of a car was caused by a sudden emergency, as where a collision was imminent without fault on the part of the company, and in such a case the company cannot be held responsible for an injury to a passenger caused by such stopping, the injury under such circumstances being held to be the result of a pure accident and damnum absque injuria. So this principle was applied where a passenger was thrown from a cable car and injured by the sudden stopping of the car to avoid a collision with a wagon.[21]

§ 545. **Injury to passenger — Defective appliances.**— An electric street railway is bound to exercise the utmost skill and diligence to prevent injury to its passengers from defects in the machinery and appliances used in their transportation.[22]

[21] Cleveland City Ry. Co. v. Osborn, 66 Ohio St. 45, 63 N. E. 604, 11 Am. Neg. Rep. 626, wherein the court said: "In the effort to avert that which might have cost the life of the driver of the wagon, and perhaps serious injury to the passengers in the car, the defendant in error was, if the finding of the jury was right, thrown from the car and injured. If the gripman had not tried to avoid the collision and the defendant in error had been injured while sitting in the car, the plaintiff in error would have been liable. Now, it is claimed that because he did endeavor to avert the collision he did it too vigorously, and that the plaintiff in error should pay for a result which was unusual and which could not have been anticipated. It is true that the plaintiff in error was required to exercise towards the defendant in error, as a passenger, the highest practical degree of care, or, to state it in another way, the highest degree of care possible under the circumstances; but we are sure that the gripman did no more than he ought to have done, and we are not able to conceive what else he could have done under the circumstances. The jury was not authorized to infer negligence from the proven facts. The judgment of the lower court presents the anomaly of requiring of one the strict performance of an act as a legal duty, yet requiring it at his peril. One cannot do right and do wrong at the same time. The injury to the defendant in error, as she puts it before the court, was a pure accident, without the elements of negligence or culpability. It is damnum absque injuria," per Davis, J.

As to pleading sufficiently alleging proximate cause of injury in such a case see McCauley v. Rhode Island Co., 25 R. I. 558, 57 Atl. 376, 16 Am. Neg. Rep. 237.

Evidence insufficient to sustain verdict against the company for injury alleged to be caused by sudden stopping of car. Ehrhard v. Metropolitan Street Ry. Co., 58 App. Div. (N. Y.) 613, 68 N. Y. Supp. 457.

[22] Logan v. Metropolitan Street Ry. Co., 183 Mo. 582, 82 S. W. 126; Stierle v. Union Ry. Co., 156 N. Y. 70, 50 N. E. 419, 4 Am. Neg. Rep.

And where any injury is caused to a passenger by any defects in the machinery or appliances used on the cars, a prima facie case of negligence is established, imposing upon the street railway company the burden of proving its lack of negligence.[23] Thus, it was so held where a passenger was injured by the escape of electricity,[24] and by the breaking of a trolley pole which was being manipulated in the usual way to reverse the direction of the car.[25] But where a passenger was injured by a curtain rod, the curtain having broken loose under a strong wind, the company was held not liable, only ordinary care being required in reference to its curtains.[26] And for injury to a dress, which was caught on a door-catch, the company was held not liable, it appearing that the car was new, the catch in good order and corresponding to those in general use, and that no prior accident had occurred.[27] And where, as a passenger was boarding a car, the brake became unfastened and caused the brake handle to whirl around rapidly and the passenger

203; Klinger v. United Traction Co., 92 App. Div. (N. Y.) 100, 87 N. Y. Supp. 864; see Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432; Mannon v. Camden Interstate Ry. Co., 56 W. Va. 554, 49 S. E. 450. In McCarty v. St. Louis & S. Ry. Co., 105 Mo. App. 596, 80 S. W. 7, it is held that a street railway company is obligated to exercise ordinary care to keep the hand rail, which is used by passengers in boarding or alighting from cars, in repair.

[23] Whalen v. Consolidated Traction Co., 61 N. J. L. 606, 40 Atl. 645, 4 Am. Neg. Rep. 422; Keator v. Scranton Traction Co., 191 Penn. St. 102, 44 L. R. A. 546, 43 Atl. 86, 6 Am. Neg. Rep. 187, 44 Week. N. of Cas. 128; see Choquette v. Southern Elec. R. Co., 2 Mo. App. Repr. 655.

[24] Denver Tramway Co. v. Reid, 4 Col. App. 53, 4 Am. Elec. Cas. 332, 35 Pac. 269; Eickhof v. Chicago North Shore St. R. Co., 77 Ill. App. 196; Burt v. Douglass Co. St. Ry. Co., 83 Wis. 229, 4 Am. Elec. Cas. 329, 53 N. W. 447. See Bucklee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360, 72 N. Y. Supp. 217, holding question of negligence of street railway company one for jury in an action by passenger claiming to have been injured by an electric shock.

[25] Cincinnati Traction Co. v. Holzenkamp (Ohio 1906), 78 N. E. 529; Keator v. Scranton Traction Co., 191 Penn. St. 102, 44 L. R. A. 546, 43 Atl. 86, 6 Am. Neg. Rep, 187, 44 Week. N. of Cas. 128; see Mannon v. Camden Interstate Ry. Co., 56 W. Va. 554, 49 S. E. 450.

[26] Leyh v. Newburgh Elec. Ry. Co., 41 App. Div. (N. Y.) 218, 58 N. Y. Supp. 479.

[27] Atwood v. Metropolitan St. R. Co. (Sup. Co. App. Term, 1899), 25 Misc. (N. Y.) 758, 54 N. Y. Supp. 138. See Smith v. Kingston City R. Co., 55 App. Div. (N. Y.) 143, 67 N. Y. Supp. 185.

was struck and injured, it was held that negligence was not to be imputed to the company, it appearing that the mechanism of the brake was in good order, that a similar accident had never happened before on the car, and there being testimony of a competent witness that a similar accident had never come to his attention before. The court declared that a carrier was only obligated to provide against accidents such as had been known to happen or could reasonably be expected to occur.[28]

§ 545a. **Burning out of fuse.**— Though the ordinary burning out of a fuse is not prima facie evidence of negligence on the part of a street railway company, yet the circumstances in connection with its burning out may be such as to justify a conclusion that the company was negligent and liable for an injury caused thereby. So where it appeared that a fuse which burned out was located directly under a passenger's seat and that the flame which accompanied the burning lasted a few seconds, enveloped the passenger and burned her face and clothing, it was decided that the jury were warranted in reaching the conclusion that the flame was not of that harmless character as is usual in the ordinary burning out of a fuse, but that the results were unusual and would not have occurred if proper care had been exercised.[29]

[28] Holt v. Southwest Missouri Elec. Ry. Co., 84 Mo. App. 443; see Hansberger v. Sedalia Electric Ry. L. & P. Co., 82 Mo. App. 566.

[29] Cassady v. Old Colony Street Ry. Co., 184 Mass. 156, 68 N. E. 10, 14 Am. Neg. Rep. 559. The expert evidence in this case showed that the report, flash and vapor-like puff attendant upon the burning out of a fuse when in proper condition are instantaneous and harmless and that no physical injury, either by burning or by an electrical shock, could be expected to result therefrom. There was evidence tending to show that holes in the veil worn by the passenger, spots and marks upon the face, and a scorching of the hair and eyebrows were caused by the flame, and a judgment in favor of the plaintiff was sustained. Upon the general proposition that the burning out of a fuse is not of itself prima facie evidence of negligence the court said: "It is a safety device, and the evidence in this case shows that, in view of the rapid action of electricity, the practical difficulty of controlling it at all times, the inability of the motorman to ascertain the amount of power upon the wires or on the motors, the variable weight of the load to be carried, the reasonably necessary conditions of the traffic as to weight of machinery and cost of transportation, it is a proper device. It is intended to prevent

§ 545b. **Passenger injured — Slipping on platforms or steps — Duty of company.**— The highest degree of care should be exercised by a street railway company so far as is consistent with the practical operation of its road, and the climatic and weather conditions, to keep the steps and platforms of its cars in a safe condition so far as respects accumulations of ice or snow thereon. And if the company is negligent in this respect and in consequence thereof a passenger slips and is injured, it will be liable for the injury so sustained.[30]

harm to the machinery, which otherwise might result from the practically unavoidable fluctuations of the power. The fuse is expected to burn out when, for any cause, the electrical current exceeds its carrying capacity; and the evidence of the experts in this case shows that in the ordinary operation of cars properly wired and equipped, such an event is liable often to happen without negligence upon the part of any one. When, therefore, a fuse burns out, it cannot be said that the connection between the occurrence and negligence is such as, in the absence of other evidence, to justify the conclusion that the result was due to negligence. As well might it be said that the escape of steam from the safety valve of a locomotive engine momentarily stopping at a station is evidence of negligence. The ordinary burning out of a fuse, therefore, is not prima facie evidence of negligence; and, if there had been nothing else in this case, the defendant would have been entitled to a verdict." The court then, after considering the evidence in this case, said: "The jury upon the evidence may have found that the flame in this case was not the instantaneous and harmless flame which results from the burning out of a fuse when in proper condition; that the burning of this fuse was attended with unusual results, which would not have occurred if the fuse had been in proper condition; and that the most reasonable conclusion was that, if proper care had been exercised there would have been no such flame. We cannot say that such a conclusion was not warranted by the evidence."

As to the location of the fuse box the court said: "This was an open car, and this fuse box was placed directly under a seat intended for passengers, so that if, for any reason, there should be a harmful flame resulting from the burning out of a fuse, it might be reasonably apprehended that it would reach and injure a passenger. While, therefore, the mere burning out of a fuse properly located and in proper condition does not of itself import negligence on the part of the defendant, still, if the fuse be so located as, by its burning out, to injure a passenger, such a location may be inconsistent with the degree of care which a common carrier owes to its passengers," per Hammond, J.

[30] Herbert v. St. Paul City Ry. Co., 85 Minn. 341, 88 N. W. 996, 11 Am. Neg. Rep. 451. The plaintiff in this case was a passenger on one of defendant's street cars and, in attempting to alight therefrom at her destination slipped on the steps of

§ 546. Injury to passenger by collision.— An electric street railway company, in the operation of its cars, is bound to exercise a high degree of care, such as cautious, prudent persons, skilled in the particular business, would commonly use under like circumstances, the amount of care required in each case to be determined by the circumstances of the particular occasion.[31] And the question of negligence is one for the jury.[32] If a passenger is injured by a collision between the car in which he is riding and another car or vehicle, without contributory negligence on his part, but owing to negligence, however slight, on the part of the employees in charge of such car, and such collision could have been avoided by the exercise of ordinary human foresight, the company will be liable.[33] So, where the motorman, seeing another car on the same track, about fifty feet ahead of him, slowing up gradually, did not apply the brakes until he was within about twenty-five feet of the other car, and after it had stopped, but owing to the slip-

the car and was injured as she claimed by the company negligently permitting ice and snow to remain upon the steps of the car. A verdict in her favor was rendered and an appeal was taken from an order denying a new trial, which order was affirmed. In reaching this conclusion the charge of the trial court was referred to and it was said: "In an exceedingly fair and impartial charge to the jury, applied to the facts, the learned trial court substantially stated the duty defendant owed to its passengers was the exercise of the highest degree of care to keep its platforms and steps in safe condition for their use, consistent with its undertaking to transfer them in the season when such duties occurred, in this climate, as far as practicable, considering the climate, the temperature and the condition of the air and ground with respect to snow, moisture and frost. This obligation of duty, as stated by the trial court, was sufficiently favorable to the defendant, and stated the correct rule of law applicable to the case in that respect," per Lovely, J.

[31] Dallas Consol. Traction Ry. Co. v. Randolph, 8 Tex. Civ. App. 213, 27 S. W. 925, 5 Am. Elec. Cas. 379.

[32] *Illinois*: Chicago City Ry. Co. v. McClain, 211 Ill. 589, 71 N. E. 1103. *Maryland*: Jones v. United Rys. & Elec. Co., 99 Md. 64, 57 Atl. 620, 16 Am. Neg. R. 79. *Michigan*: Thurston v. Detroit United Ry. Co., 137 Mich. 231, 100 N. W. 395. *Missouri*: Binsbacher v. St. Louis Transit Co., 108 Mo. App. 1, 82 S. W. 546. *New York*: Freeland v. Brooklyn Heights R. Co., 43 Misc. R. 134, 88 N. Y. Supp. 264.

[33] Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, rehearing denied in 17 Mont. 351, 43 Pac. 713; Frank v. Metropolitan St. Ry. Co., 91 App. Div. (N. Y.) 485, 86 N. Y. Supp. 1018; Quinn v. Shamokin & M. C. Elec. R. Co., 7 Penn. Super. Ct. 19; Sears v. Seattle Con-

pery condition of the rails he was unable to stop in time to avoid a collision, he was held guilty of negligence, rendering the company liable to a passenger who was injured thereby.[34] But in another case, where a car had been thrown upon the track by a collision with a beer wagon, about 150 feet in front of another car, and the motorman of the latter, remaining at his post, applied the brakes and used every reasonable effort to stop his car, the company was held not chargeable with negligence, and, therefore, not liable to a passenger injured by the collision.[35] Again where, after a collision, a woman stood up between the seats of an open car, not heeding the warning to resume her seat, and fell from the car and was injured, and no evidence appeared of any act or commission on the part of the company which induced her fall, it was held that the company was not liable.[36] But, where in the case of a collision between an electric car and a cable car at a crossing, it appeared that the watchman stationed at the crossing in the employ of both companies had signalled the cable car to proceed, it was held that this fact did not relieve those in charge of the cable car from exercising care and caution to avoid a threatened danger if it was seen, and that a charge relieving the cable car company from liability for injuries to a passenger on the electric car, because a signal had been given to the former to proceed, was erroneous in that it totally ignored the duty of the cable car company to exercise care and caution to avoid a collision.[37]

§ 546a. **Injury to passenger by collision — Presumption of negligence.—** Where a person, while occupying an ordinarily safe position as a passenger in a car, is injured as a result of

sol. St. R. Co., 6 Wash. 227, 33 Pac. 389, 1081, 4 Am. Elec. Cas. 423; see West Chicago Street R. Co. v. Tuerk, 90 Ill. App. 105, affd., 193 Ill. 385, 61 N. E. 1087.

[34] Wynne v. Atlantic Ave. R. Co., 14 Misc. (N. Y.) 414, 70 N. Y. St. R. 737, 35 N. Y. Supp. 1034.

[35] Snediker v. Nassau Elec. R. Co., 41 App. Div. (N. Y.) 628, 58 N. Y. Supp. 457.

[36] Jackson v. Philadelphia Traction Co., 182 Penn. St. 104, 37 Atl. 827, 3 Am. Neg. Rep. 827. See Dallas Consol. Traction Ry. Co. v. Randolph (Tex. Civ. App., 1894), 5 Am. Elec. Cas. 379, where passenger jumped from a car believing a collision with a locomotive engine was imminent.

[37] Taylor v. Grand Ave. Ry. Co., 137 Mo. 363, 39 S. W. 88, 1 Am. Neg. Rep. 469.

a collision between the car and some vehicle or object in the street, it has been decided that a presumption of negligence on the part of the railway company is raised by the occurrence of the accident. So where it appeared that the plaintiff, who was a passenger on the car and was occupying one of the seats provided by the street railway company for the use of its passengers, was injured by a marble slab on a passing wagon striking him on the arm while his elbow was resting upon the brass rail at his side, but did not project beyond the car, it was decided that under these circumstances the occurrence of the accident by which he was injured raised the presumption of negligence on the part of the street railway company and that the burden was cast on the latter to show that the injury did not result from its negligence or that the passenger was himself guilty of negligence directly contributing to its occurrence.[38]

§ 546b. **Injury to passenger by derailment of car.**— The fact that a car leaves the track is prima facie proof of negligence on the part of the company.[39] So it is declared in a case in California where an action had been brought by a passenger for an injury caused by the car leaving the track that when it is shown that the injury to the passenger was caused by the act of the carrier in operating the instrumentalities employed in his business, there is a presumption of negligence which throws upon the carrier the burden of showing that the injury was sustained without any negligence on his part.[40] Where, however, evidence of such fact is met by proof which renders it equally probable that the derailment of the car was not due to negligence on the part of the company, it is then declared that the company is entitled to a verdict, in the absence of other evidence establishing its liability.[41] In such a

[38] Jones v. United Rys. & Elec. Co., 99 Md. 64, 57 Atl. 620, 16 Am. Neg. Rep. 79.

[39] Omaha Street Ry. Co. v. Boesen (Neb. 1905), 105 N. W. 303, 19 Am. Neg. Rep. 358; Cheetham v. Union Railroad Co., 26 R. I. 279, 58 Atl. 881, 17 Am. Neg. Rep. 368.

[40] Bassett v. Los Angeles Traction Co., 133 Cal. xix, 65 Pac. 470, 10 Am. Neg. Rep. 5, per Smith, C.

[41] Omaha Street Ry. Co. v. Boesen (Neb. 1905), 105 N. W. 303, 19 Am. Neg. Rep. 358. The court said in this case: "When the proof of such accident is met by proof of other facts and circumstances, making it equally probable that it was the result of causes wholly beyond the control of the defendant, and which no human skill or foresight could have guarded against or pre-

case it may be shown that the cause of the accident was due to some extraneous act which the company could neither prevent or guard against. So it was held that the presumption of negligence arising from the derailment of a car was rebutted by proof that obstructions had been placed on the track at various points, and that before the car left the track a jolt was felt as if the wheels had struck some obstacle, and that a spike was picked up shortly after the accident which showed marks as if it had been run over.[42]

§ 547. **Electric cars — Approaching railroad tracks — Duty to passengers — Negligence.**— An electric street railway company owes the duty to its passengers of a high degree of care where its tracks intersect those of a steam railroad, and is under the same obligation in approaching such tracks with its cars as are travelers either on foot or in vehicles.[43] This duty is in many cases provided for by statute, and in this connection it has been decided that a statute requiring those in control of a train to stop it a certain distance from another track before crossing the same, and not to proceed until it is known that the way is clear to cross, is applicable to street railway companies.[44] And, although the railroad company may be required by statute to give a signal before crossing a public highway, yet a failure to give such signal will not authorize a presumption, on the part of those in charge of the electric car, at the risk of the lives of its passengers, that the railroad train will be stopped before reaching the highway.[45] Nor will the fact that railroad companies are required to stop their trains when approaching a railroad crossing justify those in charge of an electric street car in a belief that the train will be stopped so as to relieve the street railway company from lia-

vented, one probability offsets the other, and the affirmation of the issue, in the absence of other evidence tending to establish it, stands, just as it stood at the beginning of the controversy, not proved," per Albert, C.

[42] Cheetham v. Union Railroad Co., 26 R. I. 279, 58 Atl. 881, 17 Am. Neg. Rep. 368.

[43] State v. Young (N. J. 1904), 56 Atl. 471; see chapter herein, "Construction Across Street Railways and Railroads."

[44] Montgomery Street Ry. Co. v. Lewis (Ala. 1906), 41 So. 736, construing Ala. Code, § 3441.

[45] Hammond, Whiting & East Chicago Elec. Ry. Co. v. Spyzehalski, 17 Ind. App. 7, 46 N. E. 47, 1 Am. Neg. Rep. 225.

bility for injuries caused by a collision between the car and a train where it has not performed the statutory duty also imposed upon to stop its cars before crossing the railroad track.[46] And where street railway companies are required by statute to stop their cars before crossing a railroad track and to send forward an employee to see if a train is coming, the fact that the view may be unobstructed or that gates are maintained at the crossing will not relieve the company from the duty imposed upon it to stop a car as required.[47] It is also sufficient to charge an electric railway company with negligence where it appears that the car and the railroad train approached in full view of each other, and that no effort was made to stop the car.[48] Though instructions may be given by an electric railway company to its conductors as to their duties and care in crossing tracks of a steam railroad, yet such fact will not relieve the company from liability for an injury sustained by a collision at a crossing which is due to the conductor's negligence.[49] And there is no obligation on the part of a passenger to look and listen for approaching trains at an intersection of tracks, unless he has some reason to distrust the diligence of those in charge of the car.[50] As is said in a recent case: "A passenger traveling in a street car is not bound, as is a person approaching a dangerous crossing, to keep all of his senses alert, and be constantly on the lookout for danger. He has, while exercising ordinary care and prudence on his own part, a right to presume that the railway company in whose cars he is traveling will discharge its duty towards him as a passenger and exercise that high degree of care for his protection which the law requires of it." [51] A street railway company will not, however, be liable for an injury to a passenger caused by a

[46] Montgomery Street Ry. Co. v. Lewis (Ala. 1906), 41 So. 736.

[47] Mulderig v. St. Louis, K. C. & C. R. Co. (Mo. App. 1906), 94 S. W. 802.

[48] Hammond, Whiting and East Chicago Elec. Ry. Co. v. Spyzehalski, 17 Ind. App. 7, 46 N. E. 47, 1 Am. Neg. Rep. 225; Vreeland v. Cincinnati, S. & M. R. Co., 109 Mich. 585, 67 N. W. 905, 3 Det. L. N. 246.

[49] Hammond, Whiting, & East Chicago Elec. Ry. Co. v. Sypzehalski, 17 Ind. App. 7, 46 N. E. 47.

[50] East Tenn. V. & G. Ry. Co. v. Markens, 88 Ga. 60, 14 L. R. A. 281, 13 S. E. 855.

[51] Jones v. United Rys. & Elec Co., 99 Md. 64, 57 Atl. 620, 16 Am. Neg. Rep. 79, per Schmucker, J.

sudden increase of speed while crossing a railroad track, where it appears that the car had been stopped, that the conductor had gone forward and exercised proper care to see if the way was clear, and that as the car was proceeding over the crossing a train suddenly appeared around a curve and that a collision seeming imminent the speed was suddenly increased to avert it and that it was in fact narrowly averted.[52]

§ 548. **Passenger ill — Negligent conductor.**— Where a passenger upon a street car becomes suddenly ill, it is the duty of the conductor to afford reasonable care and attention to prevent injury, and, in case of a desire to alight, to afford such reasonable attention and assistance as may be necessary. So, where a girl became sick upon a street car, and after twice asking the conductor to stop the car, and upon his failure to pay any attention to the request went to the door to see if she could get some one to stop the car, it was held that the conductor was guilty of negligence for his failure to comply with the request, and to afford her such reasonable attention as would save her from harm by reason of her detention in the car.[53] But where a passenger was suddenly taken sick and dizzy with nausea and put her head out of the window, and as she did so was struck by a trolley pole near the track, it was decided that she was guilty of such contributory negligence as would preclude a recovery by her for the injury so sustained.[54] And in a case in Massachusetts where it appeared that a passenger, after paying his first fare, fell into a stupor and could not be aroused

[52] Corkhill v. Camden & S. Ry. Co., 69 N. J. L. 97, 54 Atl. 522, 13 Am. Neg. Rep. 563.

[53] McCann v. Newark & S. O. R. Co., 58 N. J. L. 642, 33 L. R. A. 127, 34 Atl. 1052, 4 Am. & Eng. R. Cas. (N. S.) 382.

[54] Christensen v. Metropolitan Street Ry. Co., 137 Fed. 708, 70 C. C. A. 657, 18 Am. Neg. Rep. 690. It appeared in this case that there were iron screens covering the windows up from the window sills for a distance of from fourteen to sixteen inches, leaving a space of about fourteen inches between the top of the screen and the top of the car window; that the meshes in the screens were about three-quarters of an inch square; that the screens were of such a character as would effectually prevent passengers from being injured by any involuntary action on their part; and that in order to put her head outside of the car window, over this screen, she would necessarily have to arise from her seat, turn about and either stand or kneel upon the seat.

when it came time to pay a second fare, upon which the conductor and motorman carried him from the car and laid him beside the track, and the same car upon its return trip ran over and killed him, it was decided that he was not in the exercise of due diligence within the meaning of a statute which made a street railway company liable in damages for negligently causing the death of a person "in the exercise of due care and diligence." [55]

§ 549. **Passenger — Arm out of window — Negligence — Contributory negligence.**— Where those in charge of an electric car have knowledge that a passenger is in a position of danger it is their duty to use reasonable effort to avoid injuring him, and although the passenger may be negligent, yet it is the duty of whoever is in charge of the car to warn him of the danger, since the negligence on the part of the passenger does not excuse the company from the performance of this duty. Thus it was so held where a passenger had his arm out of the window of the car, where it came in contact with the iron girder of a bridge and it appeared that there was no written or printed notice of warning, and that no warning was given by the conductor, although he saw the passenger's danger in time to have warned him.[56] Ordinarily the question whether a passenger on a street car is guilty of negligence in permitting some part of his body to extend beyond the side of a car is one of fact for the jury to determine.[57] In a case in New Jersey,

[55] Hudson v. Lynn & Boston R. Co., 185 Mass. 510, 71 N. E. 66, 16 Am. Neg. Rep. 366, construing Mass. St. 1886, p. 117, c. 140. It would seem under this decision that there can be no recovery under such a statute in this State, no matter how negligent the company may be shown to have been in causing a person's death provided the person was incapable, whether from sickness, intoxication, or mental disability, of exercising that degree of diligence known as "due diligence," which a person of ordinary mental capacity would exercise under the same or similar conditions.

[56] South Covington & Cincinnati St. Ry. Co. v. McCleave (Ct. App., Ky., 1897), 38 S. W. 1055, 18 Ky. L. Repr. 1036, 1 Am. Neg. Rep. 260; see North Chicago Street Ry. Co. v. Polkey, 106 Ill. App. 98.

[57] Cummings v. Wichita R. & L. Co., 68 Kan. 218, 74 Pac. 1104, 15 Am. Neg. Rep. 548, citing Dahlberg v. Minneapolis Street Ry. Co., 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585, 9 Am. Neg. Cas. 481; Tucker v. Buffalo Ry. Co., 65 N. Y. Supp. 989; Francis v. New York Steam Co., 114 N. Y. 380, 21 N. E. 988; Germantown Passenger R. Co. v. Brophy, 105 Pa. St. 38, 10 Am.

however, where an action was brought by a passenger for an injury to his arm by collision with a vehicle, while his arm rested on the window sill and extended beyond the side of the car, it was held proper to instruct the jury that the motorman had the right to assume that no part of the person of the passenger would protrude beyond the lines of the car and that if the evidence satisfied the jury that the plaintiff's elbow, or any part of his arm, protruded beyond the line of the car, and that but for this fact the accident would not have happened, then the defendant had failed to establish negligence upon the part of the defendant company and the verdict must be for the defendant.[58]

§ 550. **Passenger carried beyond where he desires to alight — Injured in walking back — Conductor's direction.**— In a case in New Jersey, where it appeared that a passenger was carried, in the night-time, beyond the point at which he desired to alight, it was contended that the passenger had notified the conductor of the car as to the point at which he wished to alight, before reaching it, and that the conductor on his leaving the car had directed him to walk back on the track, giving him no warning as to a trestle, over which the track was laid, both of which contentions were denied by the company. It was acknowledged, however, that the conductor had directed the passenger to walk back on the track, but it was claimed that he had been warned not to cross the trestle. In walking back he came upon the trestle and was struck by a car coming in the opposite direction. In an action against the company it was held: (1) That the conductor in giving this instruction was acting as agent of the company. (2) That whether he gave it, and (3) whether it was an act of negligence, were properly questions for the jury. (4) That whether the plaintiff was guilty of contributory negligence was also a question for the jury. (5) If the passenger was directed not to go on the trestle, he disobeyed such direction at his peril, and the company was not liable. (6) The trestle being built upon private property and being in no respect a highway, the motorman of the car which

Neg. Cas. 109; Summers v. Crescent City R. R. Co., 34 La. Ann. 139, 44 Am. Rep. 419, 9 Am. Neg. Cas. 386.

[58] Zeliff v. North Jersey Street Ry. Co., 69 N. J. L. 541, 55 Atl. 96, 14 Am. Neg. Rep. 393.

struck the passenger was under no duty to exercise a vigilance predicated on the possibility of a pedestrian being on the trestle at that time of night.[59] And where a car was not stopped at the passenger's destination and he was carried to the next street it was decided that the failure to stop the car was not the proximate cause of an injury received by the passenger in slipping and falling upon the pavement while walking back to the point where he should have been permitted to alight.[60] But where a passenger had notified the conductor of his desire to alight at a certain point, and after the car had passed beyond that point a signal was given for the car to stop, which it did, it was decided that, though the car did stop at a usual stopping place, yet the passenger had the right to assume that she might alight and that the company was liable to her for an injury which she received by the starting of the car while she was attempting to alight.[61]

§ 550a. **Use by employee of insulting and abusive language to passenger.**— The duty imposed upon a carrier of passengers to a passenger includes that of protecting the latter from insult at the hands of its employees, and where an employee of a street railway company, in charge of one of its cars, uses insulting and abusive language to one of its passengers, the company will be liable in compensatory damages for the humiliation and injury to the feelings of the passenger occasioned thereby.[62]

[59] Young v. Camden, Gloucester & Woodbury Ry. Co., 60 N. J. L. 193, 37 Atl. 1013, 3 Am. Neg. Rep. 436.

[60] Haley v. St. Louis Transit Co., 179 Mo. 30, 77 S. W. 731; see Lynch v. St. Louis Transit Co., 102 Mo. App. 630, 77 S. W. 100, holding that failure to stop is not proximate cause of an injury received while the passenger is attempting to alight at a point beyond his destination.

[61] Selby v. Detroit Ry. (Mich. 1905), 104 N. W. 376, 18 Am. Neg. Rep. 476, affg. 122 Mich. 311, 81 N. W. 106.

[62] Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 16 Am. Neg. Rep. 181. It appeared in this case that the passenger gave the conductor a twenty-five-cent piece from which to take the fare, that the conductor collected another fare and then on demand of the passenger for change refused to give it and called the passenger a deadbeat and swindler. The court of appeals decided as above and reversed the judgments of the Appellate Division of the trial court of twenty cents for the plaintiff.

§ 550b. **Passenger assaulted by another passenger.**— A street railway company, though it is bound to exercise the utmost care to protect its passengers from injury due to defects in the means or method of transportation or to the acts of its employees,[63] and is ordinarily liable for an assault committed by an employee upon a passenger,[64] yet it is not necessarily liable for an assault committed upon one passenger by a fellow-passenger. If, however, the servants of the company know or in the exercise of proper care should know that such an assault is about to be committed, the duty then devolves upon them to protect its passengers and to avert it if they have the time and means to do so. As is said in one case: "It is just as incumbent on the carrier to protect all his passengers from assault by a fellow-passenger, when his servants have the knowledge or the means of knowing that an assault on some one is imminent, and when they have time and the means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation. Consequently it will not do to say, after an assault has been made, that the servants of the carrier did not know or could not have foreseen that the particular individual who was assaulted would be injured by an assault, if they were apprised, or with proper care could have known, of circumstances which indicated that some one would be injured unless the disorderly passenger or stranger were ejected or controlled." [65]

§ 551. **Passenger assaulted by employees in charge of car.**— Although in the earlier cases the courts adhered strictly to the doctrine that, to render the master liable for acts of his servant,

[63] See § 529 herein.

[64] See § 551 herein.

[65] United Railways & Elec. Co. v. State, 93 Md. 619, 49 Atl. 923, 10 Am. Neg. Rep. 71, per McSherry, J. It appeared in this case that a drunken passenger, who had been ejected from the car again boarded it, and that though he was seen by the conductor and motorman, they made no effort to at once remove him, nor did they when the car stopped at the next crossing, although he was acting in a disorderly manner. Subsequently he struck the deceased, causing his death, and it was held in an action against the company that the employees were negligent in failing to remove the passenger and that the company was liable therefor.

As to liability of carrier generally in such cases, see note 10 Am. Neg. Rep. 77. See also Indianapolis Street Ry. Co. v. Dawson, 31 Ind. App. 605, 68 N. E. 909.

such act must be within the scope and authority of the employment, and that the master was not liable for any malicious injury inflicted by the servant, when not acting within the scope of his authority, yet the courts have inclined to the view that this rule is not applicable as between a carrier of passengers and a passenger, and that a carrier owes the duty to its passengers of protecting them from wilful acts of its servants,[66]

[66] *Alabama*: Birmingham Ry. L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701; Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 30 So. 456. *Arkansas*: Little Rock Ry. & Elec. Co. v. Goerner (Ark. 1906), 95 S. W. 1007. *District of Columbia*: Kohner v. Capital Traction Co., 22 App. D. C. 181, 62 L. R. A. 875. *Indiana*: Citizens' Street Ry. Co. v. Clark, 33 Ind. App. 190, 71 N. E. 53. *Kentucky*: Lexington Ry. Co. v. Cozine, 111 Ky. 799, 64 S. W. 848, 10 Am. Neg. Rep. 595. *Massachusetts:* Hayne v. Union Street R. Co., 189 Mass. 551, 76 N. E. 219, 19 Am. Neg. Rep. 281. *Michigan*: Foster v. Grand Rapids R. Co. (Mich. 1905), 104 N. W. 380, 18 Am. Neg. Rep. 479. *Missouri*: O'Brien v. St. Louis Transit Co., 185 Mo. 263, 84 S. W. 939; O'Donnell v. St. Louis Transit Co., 107 Mo. App. 34, 80 S. W. 315; Strauss v. St. Louis Transit Co., 102 Mo. App. 644, 77 S. W. 156. *New York*: Stewart v. Brooklyn & Crosstown R. Co., 90 N. Y. 588; Barry v. Union Ry. Co., 105 App. Div. 520, 94 N. Y. Supp. 449, 18 Am. Neg. Rep. 568; Moritz v. Interurban Street Ry. Co., 84 N. Y. Supp. 162.

As showing the tendency of the courts in considering the question of assault by employees of carriers of passengers upon persons whom they have entered into a contract with to carry, or upon trespassers, the following decisions are referred to. The carrier has been held to be liable for the acts of employees in the following cases: *Arkansas*: Unnecessary beating of passenger who had slapped conductor's face. St. Louis & W. R. Co. v. Berger, 64 Ark. 613, 39 L. R. A. 784, 44 S. W. 709. *Georgia*: Assault by baggagemaster, intent to commit rape, Savannah F. & W. R. Co. v. Quo,, 103 Ga. 125, 40 L. R. A. 483, 29 S. E. 607. Unprovoked abusive language by conductor. Cole v. Atlanta & W. P. R. Co., 102 Ga. 474, 31 S. E. 107, 12 Am. & Eng. R. Cas. (N. S.) 14, 3 Chic. L. J. Week. 562. Wanton and willful act of conductor in shooting passenger after leaving train. Brunswick & W. R. Co. v. Moore. 101 Ga. 684, 28 S. E. 1000. Shooting of trespasser by conductor while expelling him from train, Higgins v. Southern R. Co., 98 Ga. 751, 25 S. E. 837. *Indiana*: Wilful injury to trespasser boarding train, Lake Erie & W. R. Co. v. Matthews, 13 Ind. App. 355, 41 N. E. 842. *Kansas*: Unjustifiable assault on passenger, Atchison, Topeka & Santa Fe R. Co. v. Henry, 55 Kans. 715, 29 L. R. A. 465, 41 Pac. 952, 2 Am. & Eng. R. Cas. (N. S.) 418. Illegal arrest and false imprisonment, caused by conductor acting in line of his employment, Atchison, Topeka & Santa Fe R. Co. v. Henry, 55 Kans. 715, 29

and in a recent case in Illinois it has been held that a passenger, by the contract of carriage, is guaranteed by the company against personal injuries from the employees in charge of the

L. R. A. 465, 41 Pac. 952, 2 Am. & Eng. R. Cas. (N. S.) 418. *Louisiana*: Unjustifiable abuse and annoyance, Lafitte v. New Orleans C. & L. Railroad Co., 43 La. Ann. 34, 8 So. 701. *New Jersey*: Malicious assault, Hover v. Central R. Co., 62 N. J. L. 282, 43 L. R. A. 84, 41 Atl. 916, 5 Am. Neg. Rep. 197, 12 Am. & Eng. R. Cas. (N. S.) 261, 48 Cent. L. J. 75, 4 Chic. L. J. Week. 44. *New York*: Unjustifiable assault and attack by driver, who was also conductor, Stewart v. Brooklyn & Crosstown R. Co., 90 N. Y. 588. Where passenger was pushed or thrown from car, Schultz v. Third Ave. Ry. Co., 89 N. Y. 247. *North Carolina*: Outside scope of authority, without provocation, malicious and wilful, Williams v. Gill, 122 N. C. 967, 29 S. E. 879. *Texas*: Wilful and malicious acts of conductor, Dillingham v. Anthony, 73 Tex. 47, S. W. 139. Abuse and insult, one waiting to become passenger, Texas & P. R. Co. v. Jones (Tex. Civ. App.), 39 S. W. 124, 1 Am. Neg. Rep. 531.

In the following cases the carrier has been held not responsible for the act of its employees: *United States*: Where trespasser, after having been ejected from train, attempted to return, and he was injured by having his fingers stepped upon, and being kicked in the head by one of the trainmen, Johnson v. Chicago, St. P. M. & O. R. Co. (C. C., N. D., Iowa), 94 Fed. 473. Causing arrest of passenger after ejection from car, Lezinsky v. Metropolitan St. R. Co., 88 Fed. 437, 59 U. S. App. 588, 31 Chic. L. News, 42. *Indiana*: Driving of trespasser from rapidly moving train by brakeman, Lake Shore & M. S. R. Co. v. Peterson, 144 Ind. 214, 42 N. E. 480, rehearing denied, 43 N. E. 1. *Mississippi*: Where baggagemaster compelled person to jump from moving train, after having passed, without stopping, the station at which he was to get off, Yazoo & M. V. R. Co. v. Anderson, 77 Miss. 28, 25 So. 865. *New Hampshire*: In ejecting trespasser from car, though done in a negligent manner, or actuated by a wanton and reckless purpose to accomplish in an unlawful manner, Rowell v. Boston & M. R. Co., 68 N. H. 358, 44 Atl. 488. *New York*: Malicious act, conductor assaulting and ejecting passenger, Wright v. Glens Falls, S. H. & Ft. E. St. R. Co., 24 App. Div. 617, 48 N. Y. Supp. 1026. Assault by conductor, induced by abusive and insulting language of the passenger, Scott v. Central Park, N. & E. R. Co., 53 Hun, 414, 6 N. Y. Supp. 382. War ton and wilful trespass in pushing passenger off platform of street car, Isaacs v. Third Ave. R. Co., 47 N. Y. 122. *Texas*: Where boy was riding on tender of freight train with consent of fireman and engineer, who turned hot water on him for amusement, under impression that it was cold water, International & G. N. R. Co. v. Cooper, 88 Tex. 607, 32 S. W. 517. *England*: Malicious prosecution and false imprisonment by act of conductor, Knight v. North Metropolitan Tramway Co. (Q. B.), 78 Law T. R. 227.

car.[67] And it has been decided that the company will not be relieved from liability by the fact that an assault upon a passenger by one of its employees on the car grew out of a discussion of private business between the two,[68] or that abusive language or epithets were used by the passenger towards such employee.[69] Though a conductor may have knowledge of a passenger's infirmities, yet this is held not to increase the carrier's obligations, although, in case of an unjustifiable assault upon such passenger, by the conductor, the company must answer for the actual consequences of the wrong, and the fact that the injuries might have been less severe had there been no infirmity will not operate to reduce the damages; as the measure of duty in determining whether a wrong has been committed is one thing, and the measure of liability, when a wrong has been committed, is another.[70] But if in the lawful and reasonable ejection from the car of a disorderly person, by the conductor, who is using ordinary care, such person falls against a passenger, no recovery can be had from the company, where the fall is the necessary consequence of the act, since it is the duty of the conductor to eject such persons, and it may be said to be one of the things which a passenger may reasonably contemplate on entering a car.[71] And where the passenger has first assaulted the conductor in charge of the car the company will not be responsible for the acts of the conductor in resenting and repulsing such assault.[72] Nor is the company liable as a matter of law for injuries maliciously or wilfully inflicted by its employees in charge of a car upon persons found upon its cars who are trespassers and not passengers.[73] In a case

[67] Hanson v. Urbana, etc., Elec. St. R. Co., 75 Ill. App. 474.

[68] Hanson v. Urbana, etc., Elec. St. R. Co., 75 Ill. App. 474. See Schaefer v. North Chicago St. R. Co., 82 Ill. App. 473, where it is held that, in an action for an assault by a conductor upon a passenger, the question of contributory negligence does not arise.

[69] Birmingham Ry. L. & P. Co. v. Mullen, 138 Ala. 614, 35 So. 701; Hanson v. Urbana, etc., Elec. St. R. Co., 75 Ill. App. 474.

[70] Spade v. Lynn & Boston R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 5 Am. Neg. Rep. 367, per Holmes, J.

[71] Spade v. Lynn & Boston R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 5 Am. Neg. Rep. 367.

[72] City Elec. Ry. Co. v. Shropshire, 101 Ga. 33, 3 Am. Neg. Rep. 369, 28 S. E. 508; Rudgeair v. Reading Traction Co., 180 Penn. St. 333, 36 Atl. 859.

[73] Barry v. Union Ry. Co., 105 App. Div. (N. Y.) 520, 94 N. Y. Supp. 449, 18 Am. Neg. Rep. 568.

in New Jersey, it is held that punitive or exemplary damages cannot be charged against a railway company for the illegal or wanton conduct of a conductor towards a passenger, unless the company either authorized such act, expressly or impliedly, or subsequently approved of it.[74] But in a decision in Kentucky it is declared that: "A great majority of the American State courts hold that a corporation is liable in exemplary damages for the wilful, malicious, oppressive, insulting, or fraudulent act of its servant, although it had not previously authorized or subsequently ratified it, if the act was committed by the servant in the course of his employment, and while acting within the scope of his authority." [75]

§ 551a. **Assault on passenger by deputy sheriff paid by company.**— Where a deputy sheriff, who is paid by the company to ride upon its cars and preserve order, assaults a passenger upon his refusal to pay fare to the conductor, and the passenger has not been guilty of any breach of the peace, it is held that the company is liable for his act. In such a case it is declared that the only reasonable conclusion as to the interference by the officer is that he acted either upon the express or implied request of the conductor, and in the assault represented the street railway company and not the public.[76]

[74] Fohrmann v. Consol. Traction Co., 63 N. J. L. 391, 43 Atl. 892.

[75] Lexington Ry. Co. v. Cozine, 111 Ky. 799, 64 S. W. 848, 10 Am. Neg. Rep. 595, per Burnam, J. The street railway company in this case complained of an instruction which told the jury that, if they believed from the evidence that the assault made upon the plaintiff was inspired by malice on the part of the conductor towards the plaintiff, they might allow the plaintiff punitive damages, by way of punishment. The court said: "While there is nothing in this record to show that appellants either authorized or approved the conduct of their conductor in this transaction, yet he was clearly acting in the line of his employment at the time of his brutal and unjustifiable assault upon a passenger who was entitled to his care and protection, and the case is clearly brought within the rule of law which authorized the instruction complained of," per Burnam, J.

[76] Foster v. Grand Rapids R. Co. (Mich. 1905), 104 N. W. 380, 18 Am. Neg. Rep. 479. The court said in this case: "As a peace officer, Shinski's sole duty was to preserve the peace and to arrest those who were engaged in the breach thereof. It was not a part of his duty to the public to assist in the removal of passengers who refused to pay their fares, unless the removal was accompanied by such disturbance and violence as to amount to an ac-

§ 552. **Passenger assaulted after alighting from car.**— If the assault is made upon a passenger after he has alighted from the car, when the relation of carrier and passenger has been terminated, the company will not be liable.[77] So it has been decided that the company is not liable for an assault by a conductor upon a person in the company's office who had gone there to complain of the former's conduct towards him, it being declared that the relation of carrier and passenger had ceased.[78]

§ 552a. **Act of employee on another car causing injury to passenger.**— The liability of a street railway company for the acts of an employee causing injury to a passenger on one of its cars is not limited to those cases where the act is done by an employee upon the car on which the passenger is riding, but it is held that the obligation to protect passengers from injuries includes those employed in the general business of transportation and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not. So where a dead hen which was thrown in sport by the conductor of a car at the motorman of a passing car missed the latter person and struck and broke a window whereby a passenger was injured, it was decided that the company was liable for the misconduct of the conductor, although he was not employed upon the car in which the person injured was riding.[79]

§ 553. **Arrest of passenger on charge of conductor.**— Where a conductor is only authorized to eject passengers from a street

tual or threatened breach of the peace. Neither under the plaintiff's nor the defendant's testimony was there any disturbance before the assault was made. The car had not stopped, and the court correctly instructed the jury that the defendant's servants had no authority to remove plaintiff from the car until it had stopped. Plaintiff had not refused to leave the car for nonpayment of fare. Under the defendant's own showing, all that had been done prior to the seizure of plaintiff by Shinski was the demand for fare, the assertion by plaintiff that he had either tendered or paid the fare, and the statement by the conductor that he would have to pay his fare or get off," per Grant, J.

[77] Hanson v. Urbana, etc., Elec. St. R. Co., 75 Ill. App. 474.

[78] Reilly v. New York City Ry. Co., 40 Misc. R. (N. Y.) 72, 91 N. Y. Supp. 319.

[79] Hayne v. Union Street R. Co., 189 Mass. 551, 76 N. E. 219, 19 Am. Neg. Rep. 281.

car, but has no authority conferred upon him to order their arrest, it has been held that an arrest of a passenger upon the charge of the conductor, that he was riding without payment of fare, did not render the company liable for false imprisonment.[80] And in a case in Massachusetts it has been decided that where a statute provides a penalty for evading payment of fare on a street car, a conductor is justified in ordering the arrest of a person who had no transfer and refused to pay a fare where by the rules of the company a passenger was required to produce a transfer or pay fare.[81] In the absence, however, of any statute bearing upon the subject it would seem that a street railway company would be liable in damages for the illegal arrest of a passenger at the instance of the conductor. So in a case in New York, which was an action by a passenger for an alleged assault and false imprisonment, it was declared that: "There can be no such thing as a reasonable rule and regulation which protects the company against the mistakes of its own agents which result in the invasion of a passenger's rights, otherwise all that would be necessary for a railroad corporation to do would be to regulate a given subject and then shield itself behind such regulation when called upon to account for an infringement of the legal rights of its passengers."[82] And in a case in North Carolina where it appeared that a passenger on a street car, who refused to pay his fare after repeated demands, finally tendered it to the conductor, who refused to accept it and ordered the passenger's arrest, it was decided that malice on the part of the conductor was shown and a judgment in favor of the plaintiff was affirmed.[83]

§ 554. **Ejection of passengers.**— A street railway company owes the duty to its passengers, and has the right to keep its cars clear of obnoxious persons, and no passenger can com-

[80] Little Rock Traction & E. Co. v. Walker, 64 Ark. 144, 40 L. R. A. 473, 45 S. W. 57. But see Brown v. Christopher & Tenth Sts. R. Co., 34 Hun (N. Y), 471.

[81] Crowley v. Fitchburg & L. St. R. Co., 185 Mass. 297, 70 N. E. 56, 15 Am. Neg. Rep. 586, decided under Mass. Rev. Laws, ch. 111, § 251.

[82] Jacob v. Third Ave. R. R. Co., 71 App. Div. (N. Y.), 199, 75 N. Y. Supp. 679, 11 Am. Neg. Rep. 615, per Hatch, J.

[83] Kelly v. Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 14 Am. Neg. Rep. 164.

plain of any consequence which the performance of that duty necessarily entails.[84] So, where a passenger is intoxicated and is obnoxious and annoying to other persons, he may be ejected, and it is held that a drunken passenger may be ejected where it is reasonably certain that he will become obnoxious or annoying to the other passengers, either by act or speech, though no such act has been committed by him at the time he is ejected.[85]

And a conductor has been held to be justified in ejecting a passenger for using profane language,[86] or for refusing to remove his feet from the cushions of the seats,[87] or for refusal to pay his fare or produce a transfer.[88] Where, however, a passenger has a right to remain in a car, the act of the conductor in ordering him to leave is tortious, and where the passenger obeys the order he may recover from the company.[89] And if a passenger refuses to obey an order to leave the car, unnecessary force should not be used to eject him, and for any injury he may sustain, by reason of wanton acts of the conductor in ejecting him, the company will be liable.[90] He does not lose

[84] Spade v. Lynn & Boston R. Co., 172 Mass. 488, 52 N. E. 747, 43 L. R. A. 832, 5 Am. Neg. Rep. 367.

[85] Edgerly v. Union St. R. Co., 67 N. H. 312, 36 Atl. 558.

[86] Robinson v. Rockland T. & C. St. R. Co., 87 Me. 387, 29 L. R. A. 730, 32 Atl. 994.

[87] Davis v. Ottawa Elec. R. Co., 28 Ont. Repr. 654.

[88] Hornesby v. Georgia Ry. & Elec. Co., 120 Ga. 913, 48 S. E. 339.

A reasonable time in which to pay the fare should be given and it cannot be said as a matter of law that a reasonable time had elapsed and that the ejection of a passenger for non-payment of fare was justified by the mere fact that the car had traveled a quarter of a mile after he boarded it. Huba v. Schenectady Ry. Co., 85 App. Div. (N. Y.) 199, 83 N. Y. Supp. 157, 14 Am. Neg. Rep. 602.

Where fare is not tendered within a reasonable time and the process of ejection has been begun by stopping the car or by applying force to a passenger, when necessary, the ejection may be completed and the company will not be liable therefor by the fact that a subsequent tender of fare was made, it being declared that the passenger has forfeited his rights by such conduct, Garrison v. United Rys. & Elec. Co., 97 Md. 347, 55 Atl. 371, 14 Am. Neg. Rep. 314.

[89] Consolidated Traction Co. v. Taborn, 58 N. J. L. 1, 32 Atl. 685, 2 Am. & Eng. R. Cas. (N. S.) 124, affd., 58 N. J. L. 408.

[90] Schaefer v. North Chicago St. R. Co., 82 Ill. App. 473. Citizens' Street R. Co. v. Clark, 33 Ind. App. 190, 71 N. E. 53. Compare Huba v. Schenectady Ry. Co., 85 App. Div. (N. Y.) 199, 83 N. Y. Supp. 157, 14 Am. Neg. Rep. 602.

any of his rights by refusing to leave or using reasonable efforts to resist being ejected where he is rightfully on the car.[91] And where a passenger was ejected from a street car, owing to some defect in his transfer slips, which the conductor refused to accept, and which the passenger before he was ejected explained to the conductor as being due to the negligence of the conductor on the first car, the company was held liable.[92] Nor is it any justification for the ejection of a passenger that he handed his transfer folded to the conductor and refused to unfold it.[93] Again, where a passenger repeatedly tendered a dollar bill to the conductor, and requesting him to take the fare out of it, and the conductor refused to accept it, believing it to be a counterfeit, and upon refusal of the passenger to make payment in other money ejected him from the car, it was declared that the ejection under such circumstances was unlawful.[94] And it has also been decided that the liability of a street railway company for compensatory damages for an injury caused by the

[91] Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78, 15 Am. Neg. Rep. 372, wherein the court said: "It is not the law that it was plaintiff's duty to leave the car when he was told to do so by the conductor, in the circumstances proven in this case. Defendant was a public carrier of passengers for hire, plaintiff was rightfully aboard its car, and had tendered and continued to tender lawful money to pay his fare, and he was at no time in the wrong, and unquestionably had the right to remain upon the car until he should arrive at his destination. Being in the right and the conductor in error, he had a right to object, protest, and to reasonably resist his expulsion from the car, and forfeited none of his rights to recover damages by resisting, within lawful bounds, the wrong and indignity perpetrated upon him by the conductor in ejecting him from the car. It is not the law that one must submit to wrong, for fear that he will lose some of his rights. On the contrary, he may manfully assert his rights, and make all lawful efforts to maintain them," per Bland, J. Compare Kiley v. Chicago City Ry. Co., 189 Ill. 384, 59 N. E. 794, affg. 90 Ill. 275.

[92] O'Rourke v. Citizens' St. R. Co., 103 Tenn. 124, 52 S. W. 872. See Perrine v. North Jersey Street R. Co., 69 N. J. L. 230, 54 Atl. 799; Jacobs v. Third Ave. R. R. Co., 71 App. Div. (N. Y.) 199, 75 N. Y. Supp. 679, 11 Am. Neg. Rep. 615; Cleveland City Ry. Co. v. Conner (Ohio 1906), 78 N. E. 376; Memphis Street Ry. Co. v. Graves, 110 Tenn. 232, 75 S. W. 729, 14 Am. Neg. Rep. 473.

[93] El Paso Elec. Ry. Co. v. Alderete (Tex. Civ. App. 1904), 81 S. W. 1246.

[94] Breen v. St. Louis Transit Co., 102 Mo. App. 479, 77 S. W. 78, 15 Am. Neg. Rep. 372.

forcible ejection of a passenger from a car will not be defeated by the fact that words of provocation may have been used by such passenger to the conductor.[95] Such a company has also been held liable in damages for the ejection of one whom it has accepted as a passenger on a car specially chartered for a particular purpose.[96] But, though a passenger may be wrongfully ejected, the company will not be liable for his death, in being struck by another train, unless such ejection was the proximate cause of his death.[97] And where passengers were ejected for violating a rule of the company forbidding the carrying of any dogs on its cars, it was determined that the rule was a reasonable and proper one, the court declaring that the defendant, "not being compelled by the law to carry any dogs, could lawfully determine that it would carry none." [98]

§ 555. **Ejection of passenger — Failure to return fare.**— Where, under a city ordinance, a street railway company is prohibited from allowing passengers to stand upon the front platforms of its cars, if a passenger boards a car by the front platform, and the car is so crowded that he cannot enter it, the company, having accepted his fare while in that position, has no right to eject him from the car without first returning to him the fare which he has paid.[99]

[95] Mahoning Valley Ry. Co. v. De Pascale, 70 Ohio St. 179, 71 N. E. 633, 16 Am. Neg. Rep. 548.

[96] McCarter v. Greenville Traction Co., 72 S. C. 134, 51 S. E. 545, 18 Am. Neg. Rep. 625.

[97] Edgerly v. Union St. R. Co., 67 N. H. 312, 36 Atl. 558. See Johnson v. Chester Traction Co., 209 Pa. St. 189, 58 Atl. 173, 16 Am. Neg. Rep. 177, holding company not liable where a drunk or disorderly passenger was ejected and was struck by the car on its return trip.

[98] O'Gorman v. New York & Q. C. R. Co., 96 App. Div. (N. Y.) 594, 89 N. Y. Supp. 589, 17 Am. Neg. Rep. 111, per Hirschberg, J.

[99] Hanna v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 137, 45 N. Y. Supp. 437, 3 Am. Neg. Rep. 449. In this case the passenger boarded the car by the front platform, tendered a transfer slip while there, which the conductor accepted, was subsequently informed by two officers of the company that he could stand there, but was unable to enter the car and was ejected, no tender back of his fare being made to him. The court said: "It was undoubtedly a reasonable and proper regulation, and the defendant could enforce it; but it could not, when it had no accommodation open to him within the car, retain the plaintiff's ticket or accept his fare while riding on the front platform, and then eject him from the car."

§ 555a. **Ejection of passenger — Refusal to pay additional fare — Contract duty to give transfer to point within city limits — Extension of city limits.**— Where a franchise granted to a street railway company provides that the company shall give a transfer on any of its lines to any point within the city limits and such franchise is accepted, it constitutes a contract between the company and the city, which is to be construed liberally in favor of the public. And where a franchise of such a character is granted and accepted it has been decided that the phrase within the city limits is not to be construed as meaning the limits which were fixed at the time the franchise was granted, and that where the limits were subsequently extended to include additional territory through which the company's line ran, a passenger was entitled to a transfer to any point within the extended limits, though the company had a franchise which entitled it to charge an additional fare beyond the original limits and into the annexed territory prior to the extension of the limits, and in such a case it is decided that where a transfer is given to a passenger the company will be liable for his ejection upon a refusal to pay an additional fare when the annexed territory is reached.[1]

§ 555b. **Franchise granted by village specifying rates to points outside village — Contract — Ejection passenger upon refusal to pay extra fare.**— A franchise granted to a street railway company by a village, and providing that certain rates shall be charged to and from points outside the village limits, is held to constitute a contract between the company and the village, which obligates the company to carry passengers at the rate specified. And in such a case it has been determined that where the company refuses to carry a passenger to or from such points upon a proper tender of the rate specified and ejects him upon refusal to pay an additional rate, it will be liable in damages for ejecting him.[2]

§ 556. **Riding on car on invitation of employee — Not trespasser.**— Where a motorman or conductor invites a boy to ride

[1] Indiana R. Co. v. Hoffman, 161 Ind. 593, 69 N. E. 399, 15 Am. Neg. Rep. 527.

[2] Vining v. Detroit Y. A. A. & J. R. Co., 133 Mich. 539, 95 N. W. 542, 14 Am. Neg. Rep. 349; citing Coy v. Detroit Y. & A. A. Ry., 125 Mich. 616, 85 N. W. 6; Rice v. Detroit Y. A. A. & J. R. Co., 122 Mich. 677, 81 N. W. 927.

on the car, such act is held to be within the scope of his employment, and a boy who innocently accepts such invitation is not a trespasser, but is entitled to the exercise of the same degree of diligence and care on the part of the company as it owes to passengers of his age and discretion.[3] But it is held in another case that where a conductor, in violation of his duty, invites a person sui juris to ride on the car, the company will not be liable for an injury to a person who accepts such invitation.[4]

§ 557. **Trespasser — Newsboy — Duty of company to.** — A street railway company owes no duty to persons who are trespassers upon its cars, save that it shall not wantonly inflict injury upon such persons. Thus it was so held, where boys were in the habit of stealing rides upon the cars without the consent of the employees in charge thereof.[5] So, where a boy nine years of age boarded a car on the side where the barriers were to prevent ingress and egress, and stood on the boxing of the axle, holding on to a portion of the seat with his hands, but neither paid, offered to pay, nor was asked for his fare, was not seen by any of the employees on the car, and asked no one to stop the car, and after he had ridden about three-fourths of a mile fell off and was injured, it was held that he was a trespasser, and the company not liable for the injuries sustained by him.[6] And in the case of newsboys who jump upon the cars without the consent of the company, and who make no offer to pay their fare, they are not entitled to the rights of a passenger and the company will not ordinarily be liable for an injury sustained by such a one while upon or leaving the car.[7] Again,

[3] Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

[4] Marks v. Rochester Ry. Co., 41 App. Div. (N. Y.) 66, 58 N. Y. Supp. 210.

[5] Little Rock Traction & Electric Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Pope v. United Traction Co. (C. P., Penn. St., 1899).

[6] Udell v. Citizens' St. Ry. Co., 152 Ind. 507, 5 Am. Neg. Rep. 562, 52 N. E. 799.

[7] Massell v. Boston Elev. Ry. Co. (Mass. 1906), 78 N. E. 108; Padgitt v. Moll, 159 Mo. 143, 60 S. W. 121.

So in an action by a newsboy, who was either pushed off the car by the motorman or who fell or jumped off, and was injured, it was said by the court: "The only reason he assigns for being upon the car was with a view to selling papers. He paid no fare, and, while it does not appear that he refused

where a boy jumped upon the step of the front platform of a car, intending to become a passenger, and the motorman did not decrease the speed of the car or open the door which barred access to the platform, it was decided, in an action to recover for an injury to the boy caused by a collision with a wagon which threw him off, that a nonsuit was properly granted, it being declared that the company owed no duty to the plaintiff except to abstain from wilful injury.[8] But where, after the speed of the train had been increased to a dangerous and unlawful rate, a trespasser was compelled to jump therefrom, the company was held liable.[9] In another case, however, where he was pushed off the car by the motorman, who was vested with no authority in reference to persons or passengers on the car, the company was held not liable.[10]

§ 558. **Transfer of passengers — Conditions on transfer slip.** — A passenger who has received a transfer ticket, does not necessarily have the right to board the first car which approaches on the line, regardless of whether there is accommodation for him. It is his duty to wait until a car approaches which is in a proper condition to receive him, and, in case none comes, the company will be liable to him for breach of its contract.[11] Under the New York laws [12] a passenger on a street car is, in certain cases, entitled to "one continuous trip," and to have a transfer delivered to him without extra charge. Under this law it is held that a street railway company cannot burden a transfer ticket with the condition that it shall not be good un-

to pay fare, it does not, on the other hand, appear that he intended to become a passenger by paying his fare to any particular point. In these circumstances I am of opinion that he was not entitled to the rights of a passenger." Barry v. Union Ry. Co., 105 App. Div. (N. Y.) 520, 94 N. Y. Supp. 449, 18 Am. Neg. Rep. 568, per Laughlin, J.

[8] Barlow v. Jersey City, H. & P. R. Co., 67 N. J. L. 364, 51 Atl. 463; compare Citizens' Street Ry. Co. v. Merl, 26 Ind. App. 284, 59 N. E. 491.

[9] Washington, A. & Mt. V. Elec. R. Co. v. Quayle, 95 Va. 741, 30 S. E. 391.

[10] Coll v. Toronto R. Co., 25 Ont. App. 55.

[11] Hanna v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 137, 45 N. Y. Supp. 437 5 Am. Neg. Rep. 449. *As to ejection of passenger* where conductor refuses to accept transfer tendered, see § 554 herein.

[12] New York Laws of 1892, c. 676, § 104.

less used within ten minutes, regardless of the capacity of cars passing within that time to give such passenger suitable accommodations, but that he may wait until such a car approaches.[13] But in the absence of any charter, municipal or statutory requirement, bearing upon this subject, it would seem that a street railway company might impose such reasonable time limit as it desired, in reference to the use of its transfers, and that a passenger would be bound thereby,[14] at least so far as the use of the transfer is concerned, though not to the extent of depriving him of a remedy where he is unable to use it within the stipulated time through the failure of the company to provide the necessary accommodations. So it is decided in a case in Maryland that a street railway company is not prohibited from making a reasonable regulation as to the time within which a transfer must be used by a statutory requirement that a street railway company shall give a transfer for a "continuous" ride to each passenger paying a cash fare, and it was declared that if the time had expired before he could use it owing to the fault of the company, and he was required to pay an extra fare, he would have his action against the company.[15] Al-

[13] Jenkins v. Brooklyn Heights R. Co., 29 App. Div. (N. Y.) 8, 51 N. Y. Supp. 216, 4 Am. Neg. Rep. 555; rehearing denied 30 App. Div. 622, 51 N. Y. Supp. 868.

[14] Heffron v. Detroit City Railroad Co., 92 Mich. 406, 52 N. W. 802; see also Little Rock Ry. & Elec. Co. v. Goerner (Ark. 1906), 95 S. W. 1007.

[15] Garrison v. United Rys. & Elec. Co., 97 Md. 347, 55 Atl. 371, 14 Am. Neg. Rep. 314, construing Act of 1900, p. 463, c. 313. It was said by the court in this case that whilst the above act "contains no specific provision declaring for what length of time the transfer shall be good, it is obvious that it does not contemplate that no reasonable regulation shall be made upon the subject. In the nature of the case, regard being had to the character and the magnitude of the business of conveying on street cars hundreds of thousands of passengers, it would seem to be a very proper precaution for the company to protect itself from imposition by affixing to the transfers which it is required to issue a limit beyond which they should not be available for use. When thus limited, they are void, and do not entitle the holder to ride on the cars after the expiration of the time specified by the punch marks. The statute makes the transfers good for a continuous ride, and that language would seem to exclude the notion that there can be no time limit affixed. A continuous ride does not mean a ride interrupted by a considerable interval of time. If the time within which the transfer may be used expires by reason of the failure of the company to

though a street railway company can only impose reasonable conditions in reference to its transfers, and though a transfer ticket may provide that a "passenger, in accepting this transfer, agrees to read and be governed by the conditions on the back thereof, subject to the rules of the company," a passenger will not be bound thereby unless such conditions are reasonable.[16] So, where a street railway company has established, by its practice, a right in its passengers to change without a transfer ticket from one car into another in the completion of their journey, it is held that it cannot change such practice without due notice.[17] A passenger obtains no right to transfer himself to another car, because of an accident, which delays the car in which he is riding, but by the carrier's refusal to transfer him, he may maintain an action against the carrier for breach of the contract to carry him to his destination within a reasonable time.[18]

§ 559. **Passenger injured while transferring.**— While a passenger is transferring from one car to another the company owes to him the same high degree of care which it owes to passengers on board of its cars, in so far as it is responsible for negligent conduct in the operation of its cars and defects in appliances of the same. The person in transferring is still a passenger, the transfer being but a part of a trip, for the whole of which the company agrees to convey in safety.[19] So, where a passenger with a transfer ticket was approaching a street car to board the same and was injured by a piece of the trolley pole, which broke, it was held that she still retained the char-

run its cars frequently enough, that fact does not make the transfer good or authorize a conductor to honor it. In such circumstances it is the plain duty of the passenger to pay his fare. But he is not without remedy. If, by the company's fault the transfer expires before the holder has had an opportunity to use it, and in consequence he is required to pay and does pay his fare, he would have his action against the company," per McSherry, J.

[16] O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872.

[17] Consolidated Traction Co. v. Taborn, 58 N. J. L. 1, 32 Atl. 685, 2 Am. & Eng. R. Cas. (N. S.) 124, affd., 58 N. J. L. 408, 36 Atl. 1128.

[18] Taylor v. Nassau Elec. R. Co., 32 App. Div. (N. Y.) 486, 53 N. Y. Supp. 5, 5 Am. Neg. Rep. 80.

[19] Baldwin v. Fairhaven & Westerville R. Co., 68 Conn. 567, 37 Atl. 418, 2 Am. Neg. Rep. 308.

acter of passenger, and that the company was liable.[20] And where a passenger, in transferring to another car, was injured by the car which she was seeking to board starting backwards as she was passing in the rear of it, the company was held liable.[21] In a case in Oregon, where it appeared that owing to the streets being flooded, an electric street railway had constructed for the convenience of its passengers a temporary bridge, consisting of two planks, twelve inches each in width and eight feet in length, it was held that the company was only bound to make the bridge reasonably safe, and that an instruction to the jury that it must make it as reasonably safe as possible was imposing too high a degree of care, and the court held that such was not the duty of the company towards a passenger who had been given a transfer and was crossing the bridge for the purpose of reaching the other car.[22] This decision, however, seems hardly consistent with the duty imposed by law upon common carriers of passengers. It is true, that the street is in no sense a passenger station, and that the company was under no obligation to construct the bridge, yet having constructed such bridge, thus expressly inviting passengers to use the same for the purpose of transfer from one car to another, and it being the only means, owing to the depth of the water, it would seem that the company should be held to a high degree of care, to make the bridge reasonably safe. A passenger who leaves a car for the purpose of transferring to another car, using agencies provided by the company for that purpose, does not lose his character as passenger when he alights from the car, but still remains a passenger, and while using the means which have been expressly provided by the company is entitled to the same degree of care from the company to protect him from danger as he was entitled to on board the car.

§ 559a. **Refusal to transfer passenger — Leased lines — Penalty — New York statute.**— Under the New York laws providing that certain formalities are to be observed in the execution of a contract for the use of another road and also provid-

[20] Keator v. Scranton Traction Co., 191 Pa. St. 102, 43 Atl. 86, 44 L. R. A. 546, 6 Am. Neg. Rep. 187.

[21] Cameron v. Union Trunk Line, 10 Wash. 507, 5 Am. Elec. Cas. 388, 39 Pac. 128.

[22] Finseth v. Suburban Ry. Co., 32 Ore. 1, 39 L. R. A. 517, 51 Pac. 84.

ing for a penalty for refusal to give a transfer from one road to another, it has been decided that the section of the statute as to giving transfers applies to street railway lines leased to and operated by the lessee, and that for a refusal of the latter to give a transfer over a leased line the lessee will be liable for the penalties provided for the refusal.[23] It is, however, decided that the penalties provided for by such act are not cumulative, that but one penalty can be recovered, and that the bringing of an action must be regarded as a waiver of all previous penalties incurred.[24]

§ 559b. **Ordinance requiring transfers between different companies — Connecting lines.** — A municipality has no power to impose by ordinance or otherwise upon street railway companies which are separate and distinct corporations and in no way connected, the reciprocal obligation to accept transfers from one line to the other. An ordinance to this effect is in violation of the constitutional provision against the taking of property without due process of law, and it is not material that it might operate to stimulate new business to such an extent that the companies would suffer no loss. So it is said by the court in construing such an ordinance: "The enjoyment of property is not simply the right to have the property as valuable as it was before, especially if the judgment as to that value would be exercised by somebody else. The right to enjoy property is the right to not simply obtain all the increment it brings with it. I cannot be said to enjoy my property if some one else, a stranger to me in that respect, can compel me to enjoy it in any way but his way; although he be beneficent enough to say, and to prove, that such exercise of it will not hurt me financially. It does hurt me in my rights as a property owner. It does hurt me in the enjoyment of my property. He may not compel me to go into a co-partnership with somebody whom I don't care to go into a co-part-

[23] Griffin v. Interurban Street Ry. Co., 179 N. Y. 438, 72 N. E. 413, modifying 96 App. Div. 636, and construing Laws 1890, p. 1106, c. 656, § 78, as amended by Laws 1892, p. 1398, c. 676, O'Reilly v. Brooklyn Heights R. Co., 179 N. Y. 450, 72 N. E. 517, affg. 95 App. Div. 253.

[24] Griffin v. Interurban Street Ry. Co., 179 N. Y. 438, 72 N. E. 413, construing Laws 1890, p. 1082, c. 565, as amended by Laws 1892, pp. 1398, 1406, c. 676, §§ 78, 104.

nership with. He may not compel me to link up my business with strangers. Strangers may or may not honestly observe reciprocal relations. The enjoyment of property meant by the 14th Amendment is that full exercise of dominion over one's own property — over that which one has himself created — that the whole law of property, from ancient times down to the present time, gives to a man, subject only to the paramount rights of the State. And if the State has any paramount interest it must exercise it under the other provisions in the Constitution and in the way pointed out. The city and State may take property, either for the purpose of operating it itself, or for the purpose of linking it up with some larger corporation, and allowing the larger corporation to operate it on the one transfer and one fare principle, but the State cannot compel either one of these companies to do that. The State can take it by paying for it. But it cannot compel these companies to enter involuntarily into a co-partnership such as that. To do that is to take one of its rights of enjoyment of property without due process of law. If the city can do that, it can put forward its ordinances step by step, until there is no property right left at all; until the State would have control of everything; and upon the mere defense that it was doing no injury — that in the end one got more, or as much of it as he was getting before — would take away the dominion entirely. Dominion is enjoyment, and dominion is a part of the property right that the 14th Amendment was intended to protect." [25] In a case in Illinois, however, it is decided that the city of Chicago, under the authority conferred upon it by its charters to regulate and prescribe the compensation of street railway companies as carriers of passengers, has power to pass all such ordinances, rules and regulations as may be proper or necessary to carry into effect the power so granted; that it has the power to fix the maximum rate of fare; and as an incident to that power can provide for transfers from one line to another operated by the same company. The court said: "The power to fix the rate of fare must necessarily include the power to fix the rate for carrying a passenger over two lines operated by one company as well as the

[25] Chicago City Ry. Co. v. City of Chicago, 142 Fed. 844, per Grosscup, J.

power to fix the rate for carrying a passenger over one line operated by such company, the question being not as to the reasonableness of the charge, but as to the power to regulate or fix the charge.[26]

§ 560. **Carrier and passenger — Electric cars — When relation is terminated.**— The relation of carrier and passenger is, as a general rule, terminated, when the passenger has alighted in safety from the car.[27] So, where, after a passenger had alighted from the car and after both feet were upon the pavement, her dress was in some way caught in the car, which dragged her a considerable distance, the company was held not liable, it appearing that the car was of the most approved form and pattern and not defective.[28] But though the relation of carrier and passenger is ordinarily terminated when the passenger has alighted in safety from the car, yet it has been decided that the relation may be terminated by a failure or refusal of the passenger to pay a second fare when it is due.[29]

§ 561. **Passenger leaving seat to alight — Not negligence —** It is not negligence per se for a passenger who has notified the conductor of his desire to alight, to leave his seat in the car and go to the door or upon the platform, or to the side of an open car, for the purpose of being ready to alight,[30] but the question of negligence in each case is properly one for the jury to

[26] Chicago Union Traction Co. v. City of Chicago, 199 Ill. 484, 65 N. E. 451, 59 L. R. A. 631.

[27] *Georgia*: Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406, 4 Am. Elec. Cas. 138. *Illinois*: West Chicago St. Ry. Co. v. Walbsh, 78 Ill. App. 595. *Kentucky*: South Covington, etc., R. Co. v. Beatty, 50 S. W. 239, 6 Am. Neg. Rep. 75, 20 Ky. L. Repr. 1845. *Ohio*: Toledo Consol. St. R. Co. v. Fuller, 9 Ohio Ct. Dec. 123, 17 Ohio C. C. 562. *Oregon*: Smith v. City & S. R. Co., 29 Ore. 539, 46 Pac. 136, 5 Am. & Eng. R. Cas. (N. S.) 163, 6 Am. Elec. Cas. 561; rehearing denied, 29 Ore. 546, 46 Pac. 780.

[28] Doyle v. Metropolitan St. R. Co., 60 N. Y. St. R. 475, 29 Misc. Rep. 331.

[29] Hudson v. Lynn & Boston R. Co., 185 Mass. 510, 71 N. E. 60, 16 Am. Neg. Rep. 366.

[30] Davis v. Camden, G. & W. Ry. Co. (N. J. 1906), 63 Atl. 843; Paganini v. North Jersey Street Ry. Co., 70 N. J. L. 385, 57 Atl. 128, 5 Am. Neg. Rep. 612; Scott v. Bergen County Traction Co., 63 N. J. 407, 43 Atl. 1060; Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132, 2 Am. Neg. Rep. 196.

determine.[31] So, where a passenger, under such circumstances, was standing on the platform of a car, it was held that the occurrence of a sudden lurch or jerk, by which she was thrown off the car, would justify the inference that proper care had not been exercised on the part of the company.[32] And where a passenger who was unable to see out of the window believed that he was at his destination and signalled to the conductor to stop the car, which he did, and the passenger got up from his seat and went to the door, which the conductor opened, when the passenger saw and told the conductor that he had made a mistake and wished to get off at the next stopping place, and the passenger, to protect himself against the sudden start of the car, put his hand against the jamb of the doorway with his thumb in the slot in which the door ran, and the conductor in a rage slammed the door onto the passenger's thumb, when he knew or could have known with proper care that his thumb was in the slot, it was held that the passenger was not negligent in placing his thumb there and that the conductor was guilty of negligence, for which the company was liable.[33]

§ 562. **Duty of conductor — Passengers alighting from car.**— It is the duty of the conductor of a car to exercise reasonable care, where persons are boarding or alighting, and in case of the car being crowded, it is his duty to exercise special care to prevent injury to passengers by reason of a sudden rush of passengers to leave the car.[34] But in the absence of special danger he is under no obligation to assist able-bodied passengers to alight.[35]

[31] Strauss v. United Rys. & Elec. Co., 101 Md. 497, 61 Atl. 137, 18 Am. Neg. Rep. 447; Denison & S. Ry. Co. v. Johnson, 36 Tex. Civ. App. 115, 81 S. W. 780; see Parker v. Washington Elec. St. R. Co., 207 Pa. St. 438, 56 Atl. 1001, 15 Am. Neg. Rep. 681.

[32] Consolidated Traction Co. v. Thalheimer, 59 N. J. L. 474, 37 Atl. 132, 2 Am. Neg. Rep. 196; Scott v. Bergen Co. Traction Co., 63 N. J. L. 407, 43 Atl. 1060. See, also, Root v. Des Moines City Ry. Co., 113 Iowa, 675, 83 N. W. 904, Currie v. Mendenhall, 77 Minn. 179, 79 N. W. 677. But see Conroy v. Detroit United Ry., 139 Mich. 173, 102 N. W. 641; Neis v. Brooklyn Heights R. Co., 68 App. Div. (N. Y.) 259, 74 N. Y. Supp. 41.

[33] Carroll v. Boston & Northern St. R. Co., 186 Mass. 97, 71 N. E. 89, 16 Am. Neg. Rep. 376.

[34] Baldwin v. Fairhaven & Westville R. Co., 68 Conn. 567, 37 Atl. 418; James v. Duluth St. R. Co., 55 Minn. 271, 4 Am. Elec. Cas. 462.

[35] Jarmy v. Duluth St. R. Co., 55

§ 563. **Alighting from moving car.**— It is not negligence as matter of law, for a passenger to attempt to alight from a car while it is in motion,[36] but in such cases the question of negligence on the part of the passenger is one for the jury to determine,[37] as is also that of the negligence of the company.[38] In a Pennsylvania case, however, it is held that to jump from a moving car is contributory negligence, as matter of law, and that to justify such action the motion must be so inconsiderable that a person of reasonable prudence, exercising ordinary care, would not hesitate about the safety of the attempt to alight, and it was also held that to jump from a car, moving at the rate of from four to five miles per hour, was contributory negligence, as matter of law.[39] A street railway company may impose reasonable regulations as to entering and leaving its cars, which a passenger will be bound by, and, where the company has posted in a conspicuous place in its cars a notice prohibiting passengers from leaving the car while in motion, it is held that where a passenger, in violation of such rule, attempts to alight from the car, such act will constitute contributory negligence, as a matter of law.[40] While, however, the general rule seems to be that to alight from a moving car is not contributory negligence, as matter of law, yet ordinarily such an act shows want of ordinary care on the part of the passenger,[41] and where the passenger is guilty of con-

Minn. 271, 4 Am. Elec. Cas. 462, 56 N. W. 813.

[36] Birmingham v. Montgomery St. R. Co., 110 Ala. 161, 20 S. E. 317; Birmingham Railroad & Elec. Co. v. James, 121 Ala. 120, 25 So. 847; Posten v. Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391; Denver Tramway Co. v. Reid, 22 Colo. 349, 6 Am. Elec. Cas. 399; Creamer v. West End St. R. Co., 156 Mass. 320, 31 N. E. 391, 16 L. R. A. 490; Wallace v. Third Ave. R. Co., 36 App. Div. (N. Y.) 57, 55 N. Y. Supp. 132, 5 Am. Neg. Rep. 215.

[37] Root v. Des Moines City Ry. Co., 113 Iowa, 675, 83 N. W. 904.

[38] Chicago Union Traction Co. v. Grommes, 110 Ill. App. 234; Abbott v. St. Louis Transit Co., 106 Mo. App. 640, 81 S. W. 484; Michelson v. Metropolitan Street Ry. Co., 87 N. Y. Supp. 501.

[39] Jagger v. People's St. Ry. Co., 180 Penn. St. 436, 38 L. R. A. 786, 36 Atl. 867; see also Boulfrois v. United Traction Co., 210 Pa. St. 263, 59 Atl. 1007.

[40] State, Sharkey v. Lake Roland Elevated Ry. Co., 84 Md. 163, 34 Atl. 1130, 28 Chic. L. News, 410.

[41] Chicago City R. Co. v. Meehan, 77 Ill. App. 215; Creamer v. West End St. Ry. Co., 156 Mass. 320, 31 N. E. 391. See Wade v. Columbia St. R., L. & P. Co., 51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233.

tributory negligence in such a case there can be no recovery.[42] Again, though the employees in charge of an electric car may be in the habit of slackening the speed of the car, without stopping, so as to enable a passenger to jump off, such act will not be binding upon the company, so as to render it liable for injuries received by such passenger, in jumping from the car.[43] And where reasonable time has been allowed to passengers to alight at a regular stopping, the company will not be liable for an injury received by a passenger in jumping from the car, after it has started, without the knowledge of the conductor.[44] And where the car does not stop at the place a passenger expects it will, the company will not be liable for an injury received by such passenger in jumping from the car without making any effort to have the car stop.[45] But though a passenger was guilty of contributory negligence in attempting to alight from a moving car, the company was held not to be relieved from liability, as a matter of law, where, as he was stepping from the car, the conductor seized and held him by the arm.[46] And, where a conductor permitted a boy to play on the car and jump from it while in motion, the company was held chargeable with negligence.[47] And in another case, where it appeared that the conductor called out the terminus of the route and for the passengers to change cars and then began to put up the rear fender, and a passenger, believing from the conductor's call and conduct that the car had stopped, went to the rear platform and stepped off and was injured, as the car had not fully stopped, but was moving very slightly, it was declared that such passenger was justified in believing that it was intended she should alight when she did, and that she might alight safely, and she was held not guilty of contributory negligence.[48]

[42] Lynch v. Interurban Street Ry. Co., 88 N. Y. Supp. 935; Knoxville Traction Co. v. Carroll, 113 Tenn. 514, 82 S. W. 313; Parks v. San Antonio Traction Co. (Tex. 1906), 94 S. W. 331.

[43] Jagger v. People's St. Ry. Co., 180 Pa. St. 436, 38 L. R. A. 786, 36 Atl. 867, 1 Am. Neg. Rep. 522.

[44] Augusta Ry. Co. v. Glover, 92 Ga. 132, 4 Am. Elec. Cas. 433, 18 S. E. 406.

[45] White v. West End St. Ry. Co., 165 Mass. 522, 43 N. E. 298.

[46] Posten v. Denver Consol. Tramway Co., 11 Colo. App. 187, 53 Pac. 391.

[47] Pueblo Elec. St. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322.

[48] Elwood v. Connecticut Ry. &

§ 564. **Sudden starting of car while passenger alighting.**— Where passengers are alighting from electrical cars, it is negligence for the employees in charge of such car, having knowledge of such act on the part of a passenger, to suddenly start the car, and for any injury received by a passenger, due to such sudden starting of the car, the company will be liable.[49] "When a street car is stopped under circumstances which justify a passenger in believing that he is invited to alight, it is a reasonable and universal rule that the conductor must not start his car while the passengers are in the act of alighting." [50] And though a reasonable time may have been allowed for passengers to alight, yet this will not excuse the company for suddenly starting the car, causing injury to one

L. Co., 77 Conn. 145, 58 Atl. 751, 17 Am. Neg. Rep. 18.

[49] *District of Columbia*: Rouser v. Washington & G. R. Co., 26 Wash. L. Repr. 759, 13 App. Dec. Cas. 320. *Illinois*: Chicago Union Traction Co. v. Hanthorn, 211 Ill. 367, 71 N. E. 1022. *Indiana*: Union Traction Co. v. Siceloff, 34 Ind. App. 511, 72 N. E. 266. *Kansas*: Leavenworth Elec. R. Co. v. Cusick, 60 Kan. 590, 57 Pac. 519. *Kentucky*: Belt Elec. Line Co. v. Tomlin, 40 S. W. 925, 2 Am. Neg. Rep. 554, 19 Ky. L. Repr. 433. *Louisiana*: Boikens v. New Orleans, etc., R. Co., 48 La. Ann. 831, 19 So. 737. *Michigan*: Selby v. Detroit Railway (Mich. 1905), 104 N. W. 376, 18 Am. Neg. Rep. 476, affg. 122 Mich. 311, 81 N. W. 106. *Minnesota*: Piper v. Minneapolis St. Ry. Co., 52 Minn. 269, 53 N. W. 1060, 4 Am. Elec. Cas. 461. *Missouri*: Behen v. St. Louis Transit Co., 186 Mo. 430, 85 S. W. 346; Reagan v. St. Louis Transit Co., 180 Mo. 117, 79 S. W. 435; Slaughter v. Metropolitan St. Ry. Co., 116 Mo. 269, 23 S. W. 760, 4 Am. Elec. Cas. 462; Wegeschiede v. St. Louis Transit Co. (Mo. App. 1906), 94 S. W. 774; Jacobson v. St. Louis Transit Co., 106 Mo. App. 339, 80 S. W. 309. *New Jersey*: Davis v. Camden G. & W. Ry. Co. (N. J. L. 1906), 63 Atl. 843; Scott v. Bergen County Tract Co., 63 N. J. L. 407, 43 Atl. 1060; Williams v. Camden & Atlantic R. Co. (N. J., 1897), 37 Atl. 1107, 3 Am. Neg. Rep. 569. *New York*: Brady v. Metropolitan Street Ry. Co., 33 Misc. R. 793, 67 N. Y. Supp. 588; Pfeffer v. Buffalo Ry. Co., 4 Misc. R. 465, 54 N. Y. St. R. 342, 24 N. Y. Supp. 490, 4 Am. Elec. Cas. 444, affd., 144 N. Y. 636, 64 N. Y. St. R. 868, 39 N. E. 494; Weiss v. Metropolitan St. Ry. Co., 60 N. Y. St. R. 473, 29 Misc. R. 332. *North Carolina*: Morrison v. Charlotte Elec. Ry., L. & Power Co., 123 N. C. 414, 31 S. E. 720. *Ohio*: Ashtabula Rapid Tr. Co. v. Holmes, 67 Ohio St. 153, 65 N. E. 877, 13 Am. Neg. Rep. 420. *Wisconsin*: Champane v. La Crosse City Ry. Co., 121 Wis. 554, 99 N. W. 334.

[50] Selby v. Detroit Railway (Mich. 1905), 104 N. W. 376, 18 Am. Neg. Rep. 479, per Grant, J.

who has not moved as quickly as she might have done.[51] A passenger has the right to presume that sufficient time will be allowed for him to alight, and is not guilty of contributory negligence in acting upon such presumption.[52] The passenger may, however, by his own contributory negligence, preclude recovery for injuries.[53] So, where the car was suddenly started, as the passenger was about to alight, and the employee in charge of the car had no knowledge of the intention of the passenger to alight, or no reason to suspect it, the company was held not liable.[54] But where, while a passenger was alighting from the car, another passenger gave the signal to start, and the conductor, making no efforts to see whether the passenger had alighted in safety, allowed the car to start and continue in motion, the company was held liable for injury sustained by such passenger.[55] Where, however, the passenger wishing to alight, gave a signal in response to which the motorman slowed up the car, and, as it was about to stop, she again gave a signal, which the motorman believed to be a signal to start, and without looking, suddenly started the car just as the passenger was alighting, as a result of which she was injured, it was held that the injury was due to her own act, and that the company was not liable.[56] And where the sudden starting of a car while a passenger is alighting is due to the act of the conductor in an emergency, as where a collision seems imminent, and the starting of the car is done for the purpose of averting it, it has been decided that the company will not be liable for an injury so caused.[57] In an action to recover for

[51] Morrison v. Charlotte Elec. R., L. & P. Co., 123 N. C. 414, 31 S. E. 720.

[52] North Chicago St. R. Co. v. Brown, 178 Ill. 187, 52 N. E. 864, affg. 76 Ill. App. 654.

[53] Kohler v. West Side R. Co., 99 Wis. 33, 74 N. W. 568. See Meade v. Boston El. Ry. Co., 185 Mass. 327, 70 N. E. 197; McDonald v. City Electric Ry. Co., 137 Mich. 392, 100 N. W. 592.

[54] Kohler v. West Side R. Co., 99 Wis. 33, 74 N. W. 568. See Brown v. Interurban Street Ry. Co., 43 Misc. R. (N. Y.) 374, 87 N. Y. Supp. 461.

[55] Leavenworth Elec. R. Co. v. Cusick, 60 Kans. 590, 57 Pac. 519. See, also, as to sudden starting of car on signal of passenger, Nichols v. Lynn & Boston R. Co.,, 168 Mass. 528, 47 N. E. 427, 3 Am. Neg. Rep. 189.

[56] Sirk v. Marion St. Ry. Co., 11 Ind. App. 680, 39 N. E. 421, 5 Am. Elec. Cas. 394.

[57] Kantrowitz v. Metropolitan Street Ry. Co., 63 App. Div. (N. Y.) 65, 71 N. Y. Supp. 568, 10 Am. Neg. Rep. 170.

an injury, caused by the sudden starting of a car, it is not necessary to show the cause of the sudden starting.[58]

§ 565. **Alighting from car — Duty of company to furnish safe place.**— While an electric street railway company is not an insurer of the safety of its passengers from any injury which they may receive, owing to the condition of the street or highway where they may alight, yet it is bound to exercise a high degree of care in furnishing a reasonably safe and fit place for alighting when its cars are stopped to permit passengers to get off,[59] and will be liable for an injury sustained by a passenger owing to its failure to exercise the requisite care.[60] So it is held that a street railway company, whose roadbed is not in a fit condition for passengers to step on, is bound to inform them, when about to alight, that they cannot do so with safety.[61] And where a motorman stopped his car at a point beyond a crossing, where it was dangerous for an intending passenger to go, it was held that he was guilty of negligence in not backing his car to the crossing.[62] And in a case in Pennsylvania it was held that the company was liable for injuries received by a passenger after he had alighted from the car and taken a few steps from it.[63] If, however, a car stops because of an obstruction on the track, and not to take on or let off passengers, the company is not liable to a passenger who

[58] Martin v. Second Ave. R. Co., 3 App. Div. (N. Y.) 448, 73 N. Y. St. R. 714, 38 N. Y. Supp. 220.

[59] Richmond Traction Co. v. Williams, 102 Va. 253, 46 S. E. 292.

[60] Macon Ry. & L. Co. v. Vining, 120 Ga. 511, 48 S. E. 232; Topp v. United Rys. & Elec. Co., 99 Md. 630, 59 Atl. 52; Joslyn v. Milford H. & F. St. R. Co., 184 Mass. 65, 67 N. E. 866, 14 Am. Neg. Rep. 341.

[61] Ft. Wayne Traction Co. v. Morvilius, 31 Ind. App. 464, 68 N. E. 304; Sweet v. Louisville Ry. Co., 113 Ky. 15, 67 S. W. 4, 11 Am. Neg. Rep. 584; MacDonald v. St. Louis Transit Co., 108 Mo. App. 374, 83 S. W. 1001; Flack v. Nassau Electric R. Co., 41 App. Div. (N. Y.) 399, 632, 58 N. Y. Supp. 839, 59 N. Y. Supp. 1104.

[62] Vasele v. Grand St. Elec. R. Co., 16 Wash. 602, 48 Pac. 249, 9 Am. & Eng. R. Cas. (N. S.) 75.

[63] Sowash v. Consolidated Traction Co., 188 Pa. St. 618, 5 Am. Neg. Rep. 472, 41 Atl. 743. *That street railway company is not liable* for injury received by passenger after he has alighted in safety from a car and is walking away from it; see Indiana Traction & T. Co. v. Pursell (Ind. 1906), 77 N. E. 357; Fielders v. North Jersey Street Ry. Co., 68 N. J. L. 343, 53 Atl. 404, 13 Am. Neg. Rep. 156; Goldberg v. Interurban Street Ry. Co., 90 N. Y. Supp. 347.

alights at such place, which is dangerous, for injuries received, where those in charge of the car had no notice or knowledge of his intention to alight.[64] The passenger in alighting from the car, should also exercise reasonable care and judgment. Thus it was so held where displaced rails had been laid between the track and the sidewalk, and a passenger was injured in stepping upon them.[65] And where a passenger in alighting from a street car, instead of taking a safe course to the sidewalk by which she would have received no injury, stepped upon a pile of dirt, which had been thrown up by the defendant company in excavating for a new track, and she was injured, it was held that the company was not guilty of negligence, the court declaring that it could not be said that there was any duty resting upon the defendant to direct her to take the safe course plainly indicated to her by the situation.[66]

§ 566. **Gates on cars to prevent passengers alighting.**— Where cars are provided with gates to prevent passengers from alighting on the side next to a parallel track, whether failure to make use of them is negligence is a question for the jury.[67] And where a gate is used upon the platform of a car and it is closed, it would seem that a passenger who is permitted to stand upon the platform may assume that it is securely fastened and that where he falls from the platform owing to the fact that the gate is not properly fastened, the company will be liable for an injury so sustained.[68]

§ 567. **Passenger alighting with face towards rear end of car — Contributory negligence.**— A passenger in alighting from a car is not guilty of contributory negligence because of the fact that he turns his face to the rear end of the car, if the car is not moving at the time he starts to take the last step.[69]

[64] Augusta Ry. Co. v. Glover, 92 Ga. 132, 4 Am. Elec. Cas. 433, 18 S. E. 406.

[65] Wells v. Steinway R. Co., 18 App. Div. (N. Y.) 180, 45 N. Y. Supp. 864.

[66] Lee v. Boston Elev. Ry. Co., 182 Mass. 454, 65 N. E. 822, 13 Am. Neg. Rep. 319.

[67] Augusta Ry. Co. v. Glover, 92 Ga. 132, 18 S. E. 406, 4 Am. Elec. Cas. 133.

[68] See Aston v. St. Louis Transit Co., 105 Mo. App. 226, 79 S. W. 999.

[69] Morrison v. Charlotte Elec. Ry., L. & P. Co., 123 N. C. 414, 31 S. E. 720; compare Scanlon v. Phil-

§ 568. **Alighting from car — Parallel tracks.**— A passenger who after he has alighted from a car attempts to cross a parallel track, without having first looked to se if a car is approaching on such track, is guilty of negligence.[70] But it is held that he is not, as a matter of law, guilty of such negligence as will preclude recovery, regardless of the negligence of the company,[71] although negligence of the passenger in failing to look has been held not to be excused by the fact that the car was running at too high rate of speed and without giving proper signals.[72] Nor is it excused by a violation of a rule, by which a car was obliged to come to a full stop before passing another car at a street crossing.[73] But where the motorman saw a person alighting from a car and in all probability about to step upon the track, and made no effort to stop his car, it was held that the question of negligence was for the jury, and that a verdict against the railway company would not be disturbed.[74] Again where a passenger jumped off an open car, standing on the track, for the purpose of getting his hat, which had blown off, and was struck by a car approaching on a parallel track, it was held that he was not, as a matter of law, guilty of such contributory negligence as would preclude recovery, where he had looked before alighting and did not see the car approaching because of a turn in the road which cut off his

adelphia Rap. Tr. Co., 208 Pa. St. 195, 57 Atl. 521.

[70] *United States*: MacLeod v. Graven, 73 Fed. 627, 43 U. S. App. 129, 19 C. C. A. 616. *Alabama*: Birmingham Ry. L. & P. Co. v. Oldham, 141 Ala. 195, 37 So. 452. *Indiana*: Stowers v. Citizens' St. R. Co., 21 Ind. App. 434, 52 N. E. 710, 1 Repr. 559. *Kansas*: Metropolitan Street Ry. Co. v. Ryan, 69 Kan. 538, 77 Pac. 267. *Louisiana*: Schneidau v. New Orleans, etc., C. R. Co., 48 La. Ann. 866, 19 So. 18. *Ohio*: Toledo, Consol. St. R. Co. v. Lutterbech, 11 Ohio C. C. 279. *Pennsylvania*: Gray v. Ft. Pitt Traction Co., 198 Pa. St. 184, 47 Atl. 945.

[71] Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128; Dohert v. Troy City R. Co., 91 Hun (N. Y.), 28, 71 N. Y. St. R. 250, 36 N. Y. Supp. 105; see Craven v. International Ry. Co., 100 App. Div. (N. Y.) 157, 91 N. Y. Supp. 625.

[72] MacLeod v. Graven, 73 Fed. 627, 43 U. S. App. 129, 19 C. C. A. 316.

[73] Doyle v. Albany R. Co., 5 App. Div. (N. Y.) 601, 39 N. Y. Supp. 440.

[74] Erickson v. Brooklyn Heights Ry. Co., 11 Misc. (N. Y.) 662, 32 N. Y. Supp. 915.

view.[75] But where a passenger, after alighting, started to pass around the rear of the car and was injured by her foot being caught in a rope that was dragging, and which was fastened to the car by some unknown person, it was decided that the company was not negligent in not failing to discover and remove the rope.[76] To relieve a passenger of the charge of negligence, under such circumstances, he must show that he was exercising due care.[77] In a case in Georgia it is held that while a street railway company is only bound to use ordinary care and diligence in reference to travelers on foot who may cross its tracks, yet that when one of its cars is approaching a crossing where passengers are alighting from a car on a parallel track it is bound to use extraordinary care and diligence, especially so, where the motorman has reason to believe that passengers may alight dangerously near the track upon which his car is running.[78] In a case in Missouri, however, an instruction that in such a case it was the duty of the employees in charge of the car to run it at such a rate of speed as would enable them to check and stop it, if it became necessary to avoid striking a person passing from the standing car to the sidewalk, was held to impose too high a degree of care.[79]

§ 569. **Jumping from car — Fear of collision — Car on fire.** — The action of a passenger, where he notices that there is danger of a collision between the car in which he is riding and another car or railroad train, in jumping from the car, is not, as matter of law, such contributory negligence, as will relieve the company from liability for injuries received by him, where the apparent peril is due to the negligence of the employees in charge of the car or to defective appliances.[80] So, where the

[75] Thomas v. Union R. Co., 18 App. Div. (N. Y.) 185, 45 N. Y. Supp. 920.

[76] La Fond v. Detroit Citizens' St. Ry. Co., 131 Mich. 586, 92 N. W. 99, 13 Am. Neg. Rep. 112.

[77] Creamer v. West End St. Ry. Co., 156 Mass. 320, 31 N. E. 391, 16 L. A. R. 490; Evansville St. R. Co. v. Gentry, 147 Ind. 408, 37 L. R. A. 378, 44 N. E. 311, 5 Am. & Eng. R. Cas. (N. S.) 300.

[78] Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128.

[79] Van Natta v. People's St. R., E. L. & P. Co., 133 Mo. 13, 34 S. W. 505.

[80] Shankenbery v. Metropolitan St. Ry. Co., 46 Fed. 177; Quinn v. Shamokin & M. Co. Elec. R. Co., 7 Penn. Super. Ct. 19.

controller on a car being out of order, and while the inspector was examining it at a railroad crossing, the car suddenly darted forward and broke through the gates, which were down, the company was held liable for injuries received by a passenger who jumped from the car.[81] An apparent imminent danger is also frequently presented where an explosion occurs upon the car or where as a result of some disarrangement or defect in the apparatus of the car it is enveloped in smoke or flames. In such cases it has generally been decided that a passenger is not guilty of negligence, as a matter of law, in jumping from the car, but that in each case the question of negligence is one for the jury to determine.[82] So where a passenger jumped from the car and was injured under such circumstances it was held proper to instruct the jury that where a passenger, without fault on her part, is confronted with a sudden danger, or an apparent sudden danger, the obligation to exercise ordinary care for her safety did not require her to act with the same deliberation and foresight which might be required under ordinary circumstances.[83] And in this class of cases it has also been decided that where an accident of this kind occurs, as where the controller blows out, it is prima facie evidence of negligence on the part of the company.[84] So where a girl jumped from a car, in the belief that the car was on fire, it was held that an inference of negligence on the part of the company arose from the unexplained evidence.[85] But where an explosive was placed upon a street railway track by a stranger and as the car passed over a severe explosion oc-

[81] Willis v. Second Ave. Traction Co., 189 Penn. St. 430, 42 Atl. 1, 5 Am. Neg. Rep. 245.

[82] *District of Columbia*: Kight v. Metropolitan R. Co., 21 App. D. C. 494. *Iowa*: Blumenthal v. Union Elec. Co. (Iowa 1905), 105 N. W. 588, 19 Neg. Rep. 235. *Louisiana*: Chretien v. New Orleans Rys. Co., 113 La. 761, 37 So. 716. *New York*: Dorff v. Brooklyn Heights R. Co., 95 App. Div. 82, 88 N. Y. Supp. 463. *Washington*: Firebaugh v. Seattle Elec. Co., 40 Wash. 658, 82 Pac. 995, 19 Am. Neg. Rep. 579. *Wisconsin*: Wanzer v. Chippewa Val. Elec. Co., 108 Wis. 319, 84 N. W. 423.

[83] Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410, 18 Am. Neg. Rep. 380.

[84] Chicago Union Traction Co. v. Newmiller, 215 Ill. 383, 74 N. E. 410, 18 Am. Neg. Rep. 380; Firebaugh v. Seattle Electric Co., 40 Wash. 658, 82 Pac. 995, 19 Am. Neg. Rep. 579.

[85] Paulson v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 221, 45 N. Y. Supp. 941.

curred, whereby the trap in the floor of the car was forced up and open at the side, and flame and smoke came through with such suddenness as to terrify and bewilder a passenger, who started to her feet and was thrown or jumped from the car and injured, it was declared that the wrongful act of a third party alone was not sufficient to make the company liable unless it could have reasonably been foreseen by the company as one of the incidents liable to occur during her transportation and she could have been protected against it.[86]

[86] Bevard v. Lincoln Traction Co. (Neb. 1905), 105 N. W. 635, 19 Am. Neg. Rep. 366.

CHAPTER XXV.

TRAVELERS — CHILDREN AND OTHERS — ELECTRIC RAILWAYS, ETC.— USE OF STREETS.

§ 570. Electric railway — Nature of right in street.
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§ 613. Hitching horse to electric light pole.
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617. Highway defective between tracks — Notice to company of injury — Statute.
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622. Dogs on track — Injury to — Negligence of motorman.
623. Assault by motorman on traveler.
624. Car standing on track at end of line — Started by children.

§ 570. **Electric railway — Nature of right in street.**— The right of an electric street railway in the use of the streets is equal with that of the traveling public. It has no exclusive right to the use of that portion of the streets occupied by its tracks. It has, however, to a certain extent, a right in the use of the portion occupied by its tracks superior to that of the traveling public, since the course of its cars in the street is

a fixed one, confined to the tracks laid in the street, and is, therefore, not subject to the rules requiring vehicles to turn aside to avoid a collision. This superior right, however, does not authorize it to either recklessly or carelessly ignore the rights of persons using the streets. The rule as to steam railroads having an exclusive right to the use of their tracks does not apply to electric street railways. The rights of the latter and of the traveling public in the streets are equal, and each must exercise the right of user with a proper regard for the rights of the other.[1]

[1] *Arkansas*: Hot Springs St. Ry. Co. v. Johnson, 64 Ark. 64, 42 S. W. 833, 3 Am. Neg. Rep. 323. *California*: Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, 5 Am. Neg. Rep. 299; Mahoney v. San Francisco & San Mateo Ry. Co., 110 Cal. 471, 6 Am. Elec. Cas. 457, 42 Pac. 968. *Colorado*: Davidson v. Denver Tramway Co., 4 Colo. App. 283, 35 Pac. 920, 4 Am. Elec. Cas. 537. *Connecticut*: McCarthy v. Consolidated Railway Co. (Conn. 1906), 63 Atl. 725; Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545; Laufer v. Bridgeport Traction Co., 68 Conn. 475, 37 L. R. A. 533, 37 Atl. 379, 2 Chic. L. Jour. Week. 287, 2 Am. Neg. Rep. 310. *Delaware*: Garrett v. Peoples' Railway Co. (Del. 1906), 64 Atl. 254; Higgins v. Wilmington City R. Co., 1 Marv. 352, 41 Atl. 86; Maxwell v. Wilmington City R. Co., 1 Marv. 199, 40 Atl. 945. *Florida*: Consumers' Elec. L. & St. R. Co. v. Pryor, 44 Fla. 354, 32 So. 797, 12 Am. Neg. Rep. 417. *Maine:* Flewelling v. Lewiston & A. H. R. Co., 89 Me. 585, 36 Atl. 1056, 2 Am. Neg. Rep. 19, 6 Am. Elec. Cas. 488. *Maryland*: United Rys. & Elec. Co. v. Watkins (Md. 1905), 62 Atl. 234. *Massachusetts*: Halloran v. Worcester Consol. St. Ry. Co. (1906), 78 N. E. 381; Ellis v. Lynn & Boston R. Co., 160 Mass. 341, 35 N. E. 1127, 4 Am. Elec. Cas. 532; Benjamin v. Holyoke St. Ry. Co., 160 Mass. 3, 35 N. E. 95, 4 Am. Elec. Cas. 519; White v. Worcester Consol. St. Ry. Co., 167 Mass. 13, 44 N. E. 1052, 6 Am. Elec. Cas. 498. *Michigan*: Daniels v. Bay City Traction Co. (1906), 107 N. W. 94; Rascher v. East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413, 51 N. W. 463, 4 Am. Elec. Cas. 473. *Minnesota*: Shea v. St. Paul City Ry. Co., 50 Minn. 395, 52 N. W. 902, 4 Am. Elec. Cas. 484. *Nebraska*: Omaba St. Ry. Co. v. Duvall, 40 Neb. 29, 58 N. W. 531, 5 Am. Elec. Cas. 502. *New Jersey*: Adams v. Camden & Suburban Ry. Co., 69 N. J. L. 424, 55 Atl. 254, 14 Am. Neg. Rep. 410; Buttelli v. Jersey City, Hoboken & Rutherford Elec. Ry. Co., 59 N. J. L. 302, 36 Atl. 700, 6 Am. Elec. Cas. 510. *New York:* O'Rourke v. Yonkers R. Co., 32 App. Div. 8, 52 N. Y. Supp. 706; Rosenblatt v. Brooklyn Heights R. Co., 26 App. Div. 600, 50 N. Y. Supp. 333; Huber v. Nassau Elec. R. Co., 22 App. Div. 426, 48 N. Y. Supp. 38; Bresky v. Third Ave. R. Co., 16 App. Div. 83, 79 N. Y. St. R. 108, 45 N. Y. Supp. 108, 2 Am. Neg. Rep. 765; Chapman v. Atlan-

§ 571. **Electric street railway company — Duty of.**— Owing to the high rate of speed at which electric street cars may be run, thus increasing the danger to the traveling public, those in charge of electric cars should be held, it is said, to a higher degree of care than is imposed in the case of horse railways.[2] The general rule as to the operation of electric railways is that the company must exercise ordinary care, that is, such care as a reasonably prudent man would exercise, commensurate with the necessities of each case, having in view the instrument it is operating, the possibility of danger from its operation, and due regard for the rights of others, whether on foot or in vehicles.[3] So it has been said that law and common prudence dictate that those in charge of an electric car should not only keep a strict watch along all portions of its route, but that they should give warning of the approach of a car to a

tic Ave. R. Co., 14 Misc. 404, 70 N. Y. St. R. 753, 35 N. Y. Supp. 1045; Brozek v. Steinway Ry. Co., 10 App. Div. 360, 6 Am. Elec. Cas. 542; Zimmerman v. Union Ry. Co., 3 App. Div. 219, 6 Am. Elec. Cas. 527; Arnesen v. Brooklyn City R. Co., 9 Misc. 270; Degnan v. Brooklyn City R. Co., 14 Misc. 408, 70 N. Y. St. R. 755, 35 N. Y. Supp. 1047. *Pennsylvania*: Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Penn. St. 180, 24 Atl. 596, 4 Am. Elec. Cas. 487; Smith v. Elec. Tract. Co., 187 Penn. St. 110, 40 Atl. 966, 42 Week. N. of Cas. 351; Gilmore v. Federal St. & Pleasant Valley Pass. Ry. Co., 153 Penn. St. 31, 25 Atl. 651, 4 Am. Elec. Cas. 490. *Texas*: San Antonio St. Ry. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829, 1 Am. Neg. Rep. 354; San Antonio St. Ry. Co. v. Mechler, 87 Tex. 628, 30 S. W. 899, 5 Am. Elec. Cas. 585; Houston City St. Ry. Co. v. Woodlock (Civ. App., 1895), 5 Am. Elec. Cas. 580. *Utah*: Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 6 Am. Elec. Cas. 598, 4 Am. & Eng. R. Cas. (N. S.) 77.

The general principle is that where a railroad runs along the surface of a street, the rights of the company and of travelers must each be exercised with a due regard to the rights of the other, in a reasonable and duly careful manner. And what is reasonable care in such cases mutually depends very largely upon the peculiar circumstances of each particular case. North Jersey Street Ry. Co. v. Schwartz, 66 N. J. L. 437, 49 Atl. 683, 10 Am. Neg. Rep. 326.

[2] Coggswell v. West Street & North End Elec. Ry. Co., 5 Wash. 46, 31 Pac. 411, 4 Am. Elec. Cas. 412; Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 463.

[3] *California*: Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, 5 Am. Neg. Rep. 299. *Connecticut*: Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545. *Minnesota*: Wilson v. Minneapolis St. Ry. Co., 74

street or public crossing.[4] And in another case it is determined that, though the employees of a street car company in operating cars have the right to presume that a pedestrian will exercise ordinary and reasonable care and avoid injury from moving cars, and they are not required to stop a car until it becomes evident to a person of ordinary and reasonable care and prudence that the pedestrian has failed in his duty, and has placed or is about to place himself in a perilous position, yet, the duty devolves upon the employees to keep a vigilant lookout for persons on or approaching the tracks, especially at street crossings, and, when they are discovered to be in danger or going into danger on the track, to use every effort consistent with the safety of passengers to avoid injuring such persons.[5] And in another case the court says: "It is the duty of street railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence on their own part, may not be able at the moment to get out of the way of a passing car. The degree of care to be exercised must necessarily vary with the circumstances of each case."[6] And again, it has been held that where cars are operated by electricity the company is bound to exercise extraordinary care and is liable for slight negligence.[7] So in

Minn. 436, 5 Am. Neg. Rep. 385, 77 N. W. 238. *Missouri*: Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 467. *Pennsylvania*: Winter v. Federal St. & Pleasant Valley Pass. Ry. Co., 153 Penn. St. 26, 4 Am. Elec. Cas. 500. *Rhode Island*: Goldrick v. Union R. Co., 20 R. I. 128, 37 Atl. 635, 2 Am. Neg. Rep. 647. *Texas*: San Antonio St. Ry. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829, 1 Am. Neg. Rep. 354. *Canada*: Lines v. Winnipeg Elec. St. R. Co., 11 Manitoba Rep. 77. See concluding section in this chapter.

[4] Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 463, per Biggs, J. See Indianapolis Street Ry. Co. v. Schmidt, 35 Ind. App. 202, 72 N. E. 478, holding that the presence of persons on the tracks of a street railway is a thing which those in charge of a car are bound to anticipate and that a constant lookout should be kept by such persons to avoid injury.

[5] Consumers' Elec. Light & St. R. Co. v. Pryor, 44 Fla. 354, 32 So. 797, 12 Am. Neg. Rep. 417.

[6] Kestner v. Pittsburg & Birmingham Tract. Co. (Penn. Sup. Ct., 1893); Jones v. Greensburg J. & P. St. R. Co., 9 Penn. Super. Ct. 65, 43 Week. N. of Cas. 298. But see Macon & Indian Springs St. Ry. Co., 103 Ga. 655, 30 S. E. 563, 4 Am. Neg. Rep. 251, 12 Am. & Eng. R. Cas. (N. S.) 385.

[7] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 4 Am. Elec. Cas. 332, 35 Pac. 269.

a New York case it is held that an electric street railway company owes to pedestrians a degree of care in the management of its cars not less than that required by the company to its passengers.[8]

§ 571a. **Electric street railway company — Speed at which cars are run — Ordinance as to — Negligence.**— Where an ordinance limits the speed at which streets cars may be run, it is held to be negligence on the part of the company to run a car at a speed in excess of that prescribed which will render the company liable for an injury caused to a traveler who is himself exercising due care. The fact, however, that an ordinance permits cars to run at a certain rate of speed will not relieve the company from the charge of negligence for an injury which occurs while the car is running at the speed allowed or at a less speed, but the question of negligence will depend on whether the care was exercised which was required under the circumstances.[9]

§ 572. **Traveler on foot or in vehicle — Duty of — Generally.**— The degree of care which a person should exercise in using the streets or highways, either on foot or in vehicles, differs according to the varied conditions existing at the time of such use. What might be contributory negligence at one time of day or in a particular locality might not be at another time or in a different locality. As a general rule, therefore, the degree of care to be exercised is subject to the rule that, where one is exercising his lawful rights in a place where the exercise of like rights by others may put him in peril, he must use such care and precaution for his safety as a reasonably prudent man would use under the circumstances.[10] We have

[8] Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595, 74 N. Y. St. R. 732, 40 N. Y. Supp. 172, affd., 154 N. Y. 770, 49 N. E. 1101.

[9] Beier v. St. Louis Transit Co. (Mo. 1906), 94 S. W. 876. See § 600 herein.

[10] Newark Pass. Ry. Co. v. Block, 55 N. J. L. 605, 4 Am. Elec. Cas. 524, 27 Atl. 1067, per Magie, J.; Connelly v. Trenton Pass. Ry. Co., 56 N. J. L. 705, 29 Atl. 438, 5 Am. Elec. Cas. 510.

"In using the tracks of a street railway company it is the duty of the traveler to keep in mind the fact that cars will be likely to follow and overtake him, and to maintain such a reasonable watchfulness for the approach of a car as, under the circumstances of the particular case, an ordinarily prudent

already stated in the preceding section that the use of electricity as a motive power has increased the degree of care to be exercised by the street railway company, and the reverse of the proposition would also seem to be reasonable, that is that, by the application of electricity as a motive power for street cars, travelers, either on foot or in vehicles, should be held to a higher degree of care than before its use.[11] In a case in Utah it is said that a traveler crossing a street, on which there are street car tracks, should be held to the same degree of care as the railway company is required to exercise.[12] And if it appears that a motorman is not going to respect the rights of a person upon the highway who is starting to cross the street, such person, after knowledge of such fact, should wait or he will be guilty of contributory negligence if he is hurt, it being declared that a person cannot take chances and hold himself free from contributory negligence, there being a difference between an unforeseen peril and being overtaken by one recklessly incurred.[13] On a motion, however, to direct a verdict for the defendant, the plaintiff is held to be entitled to every inference which the jury would have been warranted in drawing from the evidence adduced.[14] And the fact that a person is driving on the left hand side of a street does not constitute negligence, as a matter of law.[15] In this class of cases the question, whether a person who has been injured while traveling upon the street was guilty of negligence, is ordinarily one for the jury to determine.[16]

man would. * * * We do not think he is required to be constantly looking back, or that he is necessarily negligent for not seeing the car. He has a right to rely to some extent upon the exercise of proper caution on the part of the motorman in controlling his car in accordance with his legal duty, and giving notice of its approach." Ablard v. Detroit United Ry., 139 Mich. 248, 102 N. W. 741.

[11] Siek v. Toledo Consol. St. Ry. Co., 16 Ohio C. C. 393, 9 Ohio C. D. 51.

[12] Burgess v. Salt Lake City R. Co., 17 Utah, 406, 53 Pac. 1013.

[13] Schwanewede v. North Hudson County Ry. Co., 67 N. J. L. 449, 51 Atl. 696, 11 Am. Neg. Rep. 463.

[14] McLean v. Omaha & C. B. Ry. & B. Co. (Neb. 1905), 103 N. W. 285, affg. 100 N. W. 935.

[15] Wood v. Boston Elevated Ry. Co., 188 Mass. 161, 74 N. E. 298.

[16] *Illinois*: Chicago City Ry. Co. v. Wilson, 215 Ill. 436, 74 N. E. 458; Chicago Union Traction Co. v. O'Donnell, 211 Ill. 349, 71 N. E. 1015, affg. 113 Ill. App. 259. *Indiana*: Indianapolis Street Ry. Co. v. O'Donnell (Ind. 1905), 74 N. E. 253; Indianapolis Street Ry. Co. v. Johnson, 163 Ind. 518, 72 N. E.

§ 573. **Motorman — Duty of.—** It is the duty of the motorman in charge of a car to exercise ordinary care in the management of the same, so as to avoid, so far as is reasonably possible, injury to persons using the streets for the purpose of travel.[17] He should exercise a reasonable care and watchfulness in reference to persons or vehicles upon the track or about to come upon it, or in dangerous proximity thereto, and should keep his car so far under proper control as to avoid injury to pedestrians or persons in vehicles, who are themselves exercising due care to avoid injury.[18] And it is declared to be the duty of those in charge of an electric car, which is run at a high rate of speed, to give audible and timely signals of its

571. *Massachusetts*: Sullivan v. Boston Elevated Ry. Co. (Mass. 1906), 78 N. E. 382; Logan v. Old Colony Street R. Co., 190 Mass. 115, 76 N. E. 510, 19 Am. Neg. Rep. 303; Kerr v. Boston Elevated Ry. Co., 188 Mass. 434, 74 N. E. 669; Wood v. Boston Elevated Ry. Co., 188 Mass. 161, 74 N. E. 298; Murphy v. Boston Elevated Ry. Co., 188 Mass. 8, 73 N. E. 1018; McCarthy v. Boston Elevated Ry. Co., 187 Mass. 493, 73 N. E. 559. *Minnesota*: Oddie v. Mendenhall, 84 Minn. 58, 86 N. W. 881, 10 Am. Neg. Rep. 297. *Nebraska:* McLean v. Omaha Street Ry. Co. (Neb. 1905), 103 N. W. 285, affg. 100 N. W. 935.

[17] Cunningham v. Los Angeles R. Co., 115 Cal. 561, 1 Am. Neg. Rep. 8, 47 Pac. 452; Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 131; Louisville Ry. Co. v. Blaydes (Ky., 1899), 52 S. W. 960; Barrie v. St. Louis Transit Co. (Mo. App. 1906), 96 S. W. 233; Deitring v. St. Louis Transit Co., 109 Mo. App. 524, 85 S. W. 140; Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 463.

[18] *Arkansas*: Hot Springs Ry. Co. v. Johnson, 64 Ark. 64, 42 S. W. 833, 3 Am. Neg. Rep. 323. *Indiana*: Indianapolis Street Ry. Co. v. Schmidt, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478. *Kentucky*: Lexington Railway Co. v. Fain, 25 Ky. Law Rep. 2243, 80 S. W. 463; Central Pass. Ry. Co. v. Chatterson (Ky. Super. Ct., 1893), 14 Ky. L. Repr. 663, 4 Am. Elec. Cas. 501. *Louisiana*: Haas v. New Orleans Rys. Co., 112 La. 747, 36 So. 670; Conway v. New Orleans City & Lake R. Co., 51 La. Ann. 146, 24 So. 780, 1898, 5 Am. Neg. Rep. 354. *Minnesota*: Fonda v. St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166; Flannagan v. St. Paul City Ry. Co., 68 Minn. 300, 71 N. W. 379, 3 Am. Neg. Rep. 560. *Missouri*: Heinzle v. Metropolitan Street Ry. Co., 182 Mo. 528, 81 S. W. 848; Barrie v. St. Louis Transit Co. (Mo. App. 1906), 96 S. W. 233; McLeland v. St. Louis Transit Co. (Mo. App. 1904), 80 S. W. 30. *New Jersey*: Consol. Tract. Co. v. Glynn, 59 N. J. L. 432, 37 Atl. 66, 2 Am. Neg. Rep. 31. *New York*: Klimpe v. Metropolitan Street Ry. Co., 92 App. Div. 291, 87 N. Y. Supp. 39.

approach.[19] Actual knowledge on the part of the motorman of the peril in which a person injured was placed is held not to be essential in order to charge the company with negligence where a person was injured while on the track.[20] But it is held that the question, as to whether failure to give timely warning is negligence, is for the jury, under all the circumstances of the case,[21] as is also the question whether a collision could have been avoided by the motorman in the exercise of retasonable care after he had discovered the peril in which the person injured was placed.[22]

§ 574. **Motorman — Error of judgment.**— Where a motorman, in the presence of imminent danger, has two or more lines of action open to him, and he chooses one of them in good faith, the fact that it may subsequently appear that by the adoption of another line of action the danger might have been better avoided, will not of itself constitute negligence on his part or render the company liable.[23] Thus it was so held where the motorman, being obliged to determine instantly by what means to stop the car, used the brake instead of the reverse handle.[24] And where the motorman, as he started to cross the street, saw a runaway horse coming towards the track,

[19] Consol. Tract. Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067, 5 Am. & Eng. R. Cas. (N. S.) 599, affg. 58 N. J. L. 416, 34 Atl. 817; Consol. Tract. Co. v. Haight, 59 N. J. L. 577, 37 Atl. 175, 2 Am. Neg. Rep. 192; Hart v. Cedar Rapids & M. C. Ry. Co., 109 Iowa, 631, 80 N. W. 662.

[20] Indianapolis Street Ry. Co. v. Turley (Ind. 1905), 72 N. E. 1034, affg. 72 N. E. 169.

[21] Devine v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 848, 54 N. Y. Supp. 626.

[22] Daniels v. Bay City Traction & Elec. Co. (Mich. 1906), 107 N. W. 94.

[23] Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, revg. 89 Hun, 609; Stabenau v. Atlantic Ave. R. Co., 15 App. Div. (N. Y.) 408, 44 N. Y. Supp. 36, 2 Am. Neg. Rep. 44; Bittner v. Crosstown St. Ry. Co., 153 N. Y. 76, 46 N. E. 104, 1 Am. Neg. Rep. 642, revg. 12 Misc. (N. Y.) 514, 67 N. Y. St. R. 367, 33 N. Y. Supp. 672; Phillips v. People's Pass. R. Co., 190 Penn. St. 222, 42 Atl. 686, 43 Week. N. of Cas. 531, 5 Am. Neg. Rep. 719; Lockwood v. Belle City R. Co., 92 Wis. 97, 65 N. W. 866; Bishop v. Belle City St. R. Co., 92 Wis. 139, 65 N. W. 733.

[24] Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, revg., 89 Hun, 609; Stabenau v. Atlantic Ave. R. Co., 15 App. Div. (N. Y.) 408, 44 N. Y. Supp. 36, 2 Am. Neg. Rep. 44.

and had but a brief time to decide on the proper course to pursue, it was held that though he may have erred in judgment, as to continuing to cross the street, yet he was not guilty of negligence.[25] And again, where, after a car had passed over a boy, and the motorman in his excitement reversed the car and again ran over him, he being still alive, it was held that it should have been distinctly stated to the jury that if, in what he did, he used his judgment, the defendant was not responsible, even if it was an error which brought about the lamentable results claimed.[26]

§ 575. **Walking on or beside tracks.**— It is the duty of an electric street railway company to exercise ordinary care to prevent injury to persons upon its tracks, or in such close proximity that they may be struck by passing cars.[27] As a general rule, however, it is not required to stop its cars in all cases, where a person is walking upon or beside its tracks, but the person in charge of the car may assume that such person will exercise such care and caution as an ordinarily prudent man would exercise, and step out of the way in time to avoid the car, unless it appear that the signal announcing the car's approach has not been heard, or unless there be some action on the part of such person which should induce the motorman, acting as a reasonably prudent man, to stop the car.[28] While, as a general rule, those in charge of the car might prudently assume that persons upon or beside the tracks would leave their position of peril, yet there are many cases where, under the circumstances, such assumption would not be

[25] Phillips v. People's Pass. R. Co., 190 Penn. St. 222, 42 Atl. 686, 43 Week. N. of Cas. 531, 5 Am. Neg. Rep. 719.

[26] Bittner v. Crosstown St. Ry. Co., 153 N. Y. 76, 46 N. E. 1044, 1 Am. Neg. Rep. 642, revg. 12 Misc. (N. Y.) 514, 67 N. Y. St. R. 367, 33 N. Y. Supp. 672.

[27] San Antonio St. Ry. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829, 1 Am. Neg. Rep. 354. See § 573, in this chapter, Duty of Motorman.

[28] Lyons v. Bay City Consol. R. Co., 115 Mich. 114, 73 N. W. 139, 4 Det. L. News, 797; Beem v. Tama & T. Elec. R. & L. Co., 104 Iowa, 563, 73 N. W. 1045, 10 Am. & Eng. R. Cas. (N. S.) 610.

A motorman may act upon the assumption that, where a person is on the track in the full power of locomotion and with no impediment to his escape, he will use his senses for his protection, and get out of the way of danger before he is struck. Garvick v. United Rys. & Elec. Co., 101 Md. 239, 61 Atl. 138.

warranted by the surroundings.[29] So, where a person was walking upon or close to the tracks, it was held that the motorman was not, as a matter of law, free from negligence in failing to stop his car, where such person appeared to be apparently heedless of the signals.[30] And where a person, walking along a narrow passageway between electric and steam car tracks, such passageway being used for the purpose of boarding trains, was struck by an electric car approaching from the rear, it was held that the failure of the motorman to see such person on a clear day was culpable negligence.[31] And where a person who was walking along the only path intended for travelers, and customarily used by them, and had looked back twice in 700 feet, was struck by a car from the rear, running from twenty to twenty-five miles per hour, and which carried only a small kerosene lamp for a headlight, it was held that he was not guilty of contributory negligence.[32] And again, where a person, who was a musician in a street parade, was walking so close to the track that he knew a car must hit him in passing, but relied on hearing the signal so as to get out of the way, it was held that the company was liable for an injury received by him, where he was struck by a car coming up behind, the motorman of which saw such person and his dangerous position, but did not give any signal or stop his car, until more than thirty feet after it struck him.[33] But it was decided that the motorman was not guilty of negligence where a woman, who was standing between the track and a wagon, in which space there was ample room for her to stand and the car to pass in safety, suddenly stepped upon the track when the car was only a few feet distant and was struck by the car, where it appeared that signals were given by the motorman, who made every effort to stop the car when he saw her

[29] Houston City R. Co. v. Farrel (Tex. Civ. App., 1894), 5 Am. Elec. Cas. 576.

[30] Buttelli v. Jersey City, H. & R. Elec. R. Co., 59 N. J. L. 302, 36 Atl. 700, 2 Chic. L. Jour. Week. 202.

[31] Conway v. New Orleans City & L. R. Co., 51 La. Ann. 146, 5 Am. Neg. Rep. 354, 24 So. 780.

[32] Carlson v. Lynn & B. R. Co., 172 Mass. 388, 52 N. E. 720, 5 Am. Neg. Rep. 365.

[33] Montgomery v. Lansing City Elec. Ry. Co., 103 Mich. 46, 61 N. W. 543, 5 Am. Elec. Cas. 471.

The failure of a motorman to sound the gong does not of itself constitute negligence in the case of a pedestrian where it appears that the latter saw the car and knew

peril.[34] And where a person in the night time left the street, where he could have walked with perfect safety, to avoid the inconvenience arising from the muddy condition of the street and proceeded to walk along the street car track, where he was struck by a car, it was held that he was guilty of contributory negligence, the court declaring that a reasonably prudent person would not, under the circumstances, have walked on the track, and in doing so the plaintiff failed in the performance of his duty; in other words, he was guilty of negligence.[35] Again it has been decided in Massachusetts that a person is not in the exercise of due care where he stops upon the track and while in a stooping position is struck by the car.[36]

§ 576. **Pedestrian drunk.**— It is the duty of the motorman to exercise such care as an ordinarily prudent man would exercise to avoid injury to intoxicated persons, upon or in the immediate vicinity of the tracks, where they may be in a position of peril. But where a person lay in a drunken stupor, with his feet across the rails, on one side of the tracks, in which position his feet were crushed by a passing car, it was held that the company was not liable for the injury, where it appeared that the car could not have been stopped by the motorman, though an effort had been made by him to stop it immediately after the plaintiff's feet were visible.[37]

§ 577. **Pedestrian — Hearing impaired.**— It is incumbent upon a person whose hearing is impaired to be more alert in the use of his other faculties when approaching or walking upon or in the immediate vicinity of electric railway tracks.[38] And where there was an instruction to the effect that plain-

of its approach and proximity. Garvick v. United Rys. & Elec. Co., 101 Md. 239, 61 Atl. 138; Haller v. City of St. Louis, 176 Mo. 606, 75 S. W. 613.

[34] Lennon v. St. Louis & S. Ry. Co. (Mo. 1906), 94 S. W. 975.

[35] Penman v. McKeesport, Wilmerding & D. S. Ry. Co., 201 Pa. St. 247, 50 Atl. 973, 11 Am. Neg. Rep. 157.

[36] Quinn v. Boston Elevated Ry. Co., 188 Mass. 473, 74 N. E. 687; Jordan v. Old Colony Street Ry. Co., 188 Mass. 124, 74 N. E. 315.

[37] Kramer v. New Orleans & L. R. Co., 51 La. Ann. 1689, 26 So. 411.

[38] Hall v. West End St. Ry. Co., 168 Mass. 461, 47 N. E. 124, 3 Am. Neg. Rep. 38.

tiff's deafness could not lessen the degree of care required; that, notwithstanding this defect, he should exercise the same caution "which every prudent man would exercise under the same or similar circumstances," it was said: "This did not imply that he was required to exercise only that care which a prudent man who could hear would use, but which a prudent man in the same condition as to the impairment of his hearing would exercise."[39] So, where a person who was deaf failed to look for an approaching car, which he could not have failed to have seen if he had looked before attempting to cross, he was held to be guilty of contributory negligence.[40] And in a case in Massachusetts it was held that a person, who was seventy-eight years old and very deaf, was not in the exercise of due care while walking upon the street car track.[41] The fact that a person is deaf, however, will not, it is held, prevent recovery for injuries received by an electric car striking him from the rear, while walking upon or beside the track, there being no sidewalk or path.[42] And it is held that it is not negligence, as a matter of law, for a man whose eyesight and hearing are impaired to attempt to cross the tracks of an electric street railway, while unattended.[43]

§ 578. **Pedestrian — Aged or infirm.**— Where aged or infirm persons are upon or about to go upon or across the tracks of an electric street railway, and their infirmities are apparent and plainly in evidence, it is the duty of the motorman upon the car to exercise special care to have his car sufficiently under control to avoid injuring them by collision.[44] So, where a car was about 100 feet distant, it was held that a woman seventy-two years of age was not, as a matter of law, guilty of

[39] Atlanta Consol. St. Ry. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128, per Lewis, J.

[40] Beem v. Tama & T. Elec. R. & L. Co., 104 Iowa, 563, 73 N. W. 1045, 10 Am. & Eng. R. Cas. (N. S.) 610; Hall v. West End St. Ry. Co., 168 Mass. 461, 47 N. E. 124, 3 Am. Neg. Rep. 38.

[41] Adams v. Boston & N. St. Ry. Co. (Mass. 1906), 78 N. E. 117.

[42] Buttelli v. Jersey City, H. & R. Elec. R. Co., 59 N. J. L. 302, 36 Atl. 700, 2 Chic. L. Jour. Week. 202.

[43] Robbins v. Springfield St. R. Co., 165 Mass. 30, 6 Am. Elec. Cas. 495, 42 N. E. 334.

[44] Haight v. Hamilton St. R. Co., 29 Ont. Rep. 279.

contributory negligence in stepping upon the track for the purpose of crossing the same.[45]

§ 579. **Parallel tracks — Passing around rear of car on to other track.**— Where there are parallel tracks in a street it is such contributory negligence as will preclude recovery for a person to pass in the rear of a car and go upon the other track, without first looking for an approaching car on such track.[46]

§ 580. **Employees working on streets.**— Where men are engaged in working upon the streets, they must exercise ordinary care for their own safety, and it is also incumbent upon the company to exercise similar care to avoid injury to such persons.[47] It is the duty of those in charge of a car to sound the gong or give some warning of its approach, under such circumstances, and it is held that, where a workman is injured, by a failure to do so, it constitues actionable negligence.[48] But where laborers are at work on a portion of the street, where they are in no danger from the car, a motorman is not chargeable with negligence for failure to give a signal of the approach of a car.[49] And where a person who was employed in filling in a trench in a street stood, when cars were passing, in the space between the trench and the track where he had stood in safety when other cars had passed, but, as the car in question was passing was injured by the body of the conductor, who was on the footboard of the car, coming in contact with

[45] Walls v. Rochester Ry. Co., 92 Hun (N. Y.), 581, 36 N. Y. Supp. 1102, 72 N. Y. St. R. 250. See Adams v. Boston & N. St. Ry. Co. (Mass. 1906), 78 N. E. 117.

[46] *Michigan*: McCarthy v. Detroit Citizens' St. R. Co., 120 Mich. 400, 79 N. W. 631. *Minnesota*: Greengard v. St. Paul City R. Co., 72 Minn. 181, 75 N. W. 221. *Oregon*: Smith v. City & S. R. Co., 29 Or. 539, 46 Pac. 136, 5 Am. & Eng. R. Cas. (N. S.) 163; rehearing denied, 29 Or. 146, 46 Pac. 780. *Pennsylvania*: Blaney v. Electric Tract. Co., 184 Pa. St. 524, 41 Week. N. of Cas. 555, 39 Atl. 294. *Utah*: Burgess v. Salt Lake City R. Co., 17 Utah, 406, 53 Pac. 1013. See § 568, Parallel Tracks, in chapter on Passengers.

[47] Young v. Citizens' St. R. Co., 148 Ind. 54, 47 N. E. 142, 6 Am. Elec. Cas. 479; denying rehearing, 44 N. E. 927.

[48] Green v. Toronto Ry. Co., 26 Ont. Rep. 319. See Hennessey v. Forty-second St. M. & St. N. Ave. R. Co., 44 Misc. R. (N. Y.) 198, 88 N. Y. Supp. 728.

[49] Eddy v. Cedar Rapids & M. C. R. Co., 98 Iowa, 626, 67 N. W. 676.

him, it was held that there was no evidence of negligence on the part of the company or the conductor and a judgment for plaintiff was reversed.[50] If, however, the men are at work upon the track, the fact that they are in the habit of stepping out of the way will not excuse a motorman for not having his car under control as he approaches them.[51] But where a workman was deaf and could not hear the signals, it was held that he was guilty of contributory negligence, precluding recovery, for his failure to look for an approaching car, which could have been seen by him over a third of a mile away.[52] Where the motorman stopped the car about twenty-five feet from a gang of men, at work upon the tracks, and after the track was apparently cleared, he proceeded slowly with his car, not seeing a signal, which the plaintiff testified he gave him, not to proceed, the question whether the motorman was negligent in failing to see such signal was held to be for the jury.[53]

§ 581. **Children — Duty of company — Proper employees.**— Though it is the duty of an electric street railway company to employ proper servants to manage and operate its cars, yet it is only under the obligation of exercising ordinary care in this respect, so far as infants are concerned. So it was held that the fact of the motorman being inexperienced was not

[50] United Railway & Elec. Co. v. Fletcher, 95 Ind. 533, 52 Atl. 608. The court said: "The case in the evidence at bar only goes so far as to show that the body of the conductor while passing along the footboard of the moving car, struck and injured the plaintiff. The conductor not only had the right to pass along the footboard of the car when it was in motion, but the discharge of his duty required him to do so very frequently. * * * There is no evidence that the conductor in this case acted in a negligent or unlawful manner when passing along the footboard. The entire space between the railway track and the ditch was but three feet, a considerable part of which must have been occupied by the overhanging part of the car and the footboard. Under these circumstances the mere fact that the plaintiff, while standing in the narrow space between the car and the ditch, came in contact with the body of the conductor, is not per se even prima facie evidence of negligence on the part of the latter." Per Schmucker, J.

[51] Pittsburg Elec. R. Co. v. Kelly, 57 Kan. 514, 46 Pac. 945.

[52] Lyons v. Bay Cities Consol. R. Co., 115 Mich. 114, 73 N. W. 139, 4 Det. L. News, 797.

[53] Morrissey v. Westchester Elec. Ry. Co., 18 App. Div. (N. Y.) 448, 45 N. Y. Supp. 444.

to be taken into consideration in determining the question of negligence in stopping the car, since such issue should be determined by what took place at the time of the accident.[54] And it has been decided that negligence on the part of the company, which will authorize a recovery for the death of a child, is not sufficiently shown by the fact that the company did not provide a conductor for its car.[55]

§ 582. **Children — Duty of motorman.**— A motorman in the operation of his car is held to the exercise of ordinary care, which, as we have previously stated, is a degree of care varying with the circumstances of each particular case. It is the duty of the motorman to consider, in the regulation of his car, the apparent age and condition of persons upon the tracks, or in dangerous proximity thereto, and he should be held to a high degree of care and watchfulness, where he observes or has reason to expect that little children are playing near the track.[56] And a failure to use reasonable care and precau-

[54] Cunningham v. Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452, 1 Am. Neg. Rep. 8.

[55] Di Prisco v. Wilmington City Ry. Co., 4 Pen. (Del.) 527, 57 Atl. 906.

[56] Hanley v. Ft. Dodge Light & Power Co. (Iowa, 1906), 107 N. W. 593; Bergen County Tract. Co. v. Heitman, 61 N. J. L. 682, 40 Atl. 651, 11 Am. & Eng. R. Cas. (N. S.) 286, 4 Am. Neg. Rep. 511; Murray v. Paterson Ry. Co., 61 N. J. L. 301, 39 Atl. 648; Wallace v. City & Suburban Ry Co., 26 Or. 174, 5 Am. Elec. Cas. 554, 37 Pac. 477; Galveston City Ry. Co. v. Hanna, 34 Tex. Civ. App. 608, 79 S. W. 639.

In Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299, it was said that the trial court properly ruled "that the same degree of care is required toward infants as toward adults, but that conduct which comes up to that degree of care when exercised toward adults may fall short of it when exercised toward infants under the same circumstances."

An instruction is properly refused which ignores the duty imposed upon a motorman to look out for persons who may be on the track. Birmingham Ry. L. & P. Co. v. Jones (Ala. 1906), 41 So. 147.

When question of negligence of motorman one of law. Where the motorman of a trolley car, which was rapidly approaching a place where a small boy was trying to assist his smaller brother to extricate his foot from the track, made no effort to stop the car when he first saw the boys, supposing, as he testified, that they were playing on the track, as many boys did, until the last moment and that they would, as usual, get off the track in time, and when the car was within a few yards of the boys he saw and realized their situation, and did

tion, commensurate with the danger, will render him liable for negligence in case of injury.[57] Though a child may be guilty of contributory negligence, in being upon the track, yet if the motorman, in the proper discharge of his duties, ought to have seen his peril in time to avoid injury, or if having seen it he could, by the exercise of proper care, have avoided it, the company will be liable.[58] So, where a passenger saw a child leave the curb to cross the street, it was held that the motorman was not, as a matter of law, free from negligence in failing to see her until she was in front of and almost under the car.[59] And in another case, where a child two and a half years old, having crossed the track a few feet in advance of the car, suddenly turned back on the track, the motorman was held not free from negligence, as a matter of law.[60] And it was also similarly held, where the motorman had turned his face away from the track and was talking to a passenger.[61] And again, in another case, where the motorman, having brought his car almost to a stop, suddenly released the brake on a down grade, where a child under four years of age stood within five feet of the

what he could to stop the car, but did not succeed in doing so and one of the boys was so injured that one of his legs had to be amputated, and the jury found the defendant company guilty of negligence, it was held in passing upon the question of the motorman's negligence that negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence and that if, from the facts admitted or conflicting testimony, such men may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact, to be settled by the jury under proper instructions. McDermott v. Severe, 202 U. S. 600.

[57] Nelson v. Crescent City R. Co., 49 La. Ann. 491, 21 So. 635.

[58] *Alabama*: Birmingham Ry. L. & P. Co. v. Jones (Ala. 1906), 41 So. 147. *Louisiana*: Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791. *Maryland*: Baltimore City P. R. Co. v. Cooney, 87 Md. 261, 39 Atl. 859, 11 Am. & Eng. R. Cas. (N. S.) 759. *Missouri*: Baird v. Citizens' R. Co., 146 Mo. 265, 48 S. W. 78. *Pennsylvania*: Nolder v. McKeesport, Wilmerding & D. Ry. Co., 201 Pa. St. 169, 50 Atl. 947. *Texas*: Galveston City Ry. Co. v. Hanna, 34 Tex. Civ. App. 608, 79 S. W. 639. *Wisconsin*: Slensby v. Milwaukee St. R. Co., 95 Wis. 179, 70 N. W. 67, 3 Am. Neg. Rep. 393.

[59] Calumet Elec. St. R. Co. v. Lewis, 68 Ill. App. 598, affd., 168 Ill. 249, 48 N. E. 153.

[60] North Chicago St. R. Co. v. Hoffart, 82 Ill. App. 539.

[61] Karahuta v. Schuylkill Traction Co., 6 Penn. Super. Ct. 319, 42 Week. N. of Cas. 47.

track, and only ten feet distant from the car, it was held that the motorman was not, as a mater of law, free from negligence, though the child had turned away from the track.[62] In another case where a child on the west bound track crossed over to the east bound track when the car on the latter track was only a short distance from her and it appeared from the evidence that the motorman saw or ought to have seen her one hundred and fifty feet ahead of him, the court declared that though she was not at that time on the track, the motorman was bound to know that in her childish caprice she was as likely to cross over in front of his moving car as to go back to the pavement, and that his duty, the instant he saw her, or, if exercising proper care and watchfulness, he ought to have seen her, was to stop or to so absolutely control his car as to avoid the risk before him.[63]

§ 583. **Children — Falling on track — Motorman not bound to anticipate.**— Where a child is crossing the track of an electric railway, the motorman of a car, which is running at reasonable speed, is not bound to take into consideration the possibility of the child falling.[64] So, where several little girls started to cross the track in front of a car, less than 100 feet away, and as one of them fell upon the tracks the motorman immediately applied the brake and shut off power, but was unable to stop the car before it had struck her, although it was stopped before its length had passed over her, it was held that the company was not liable.[65] And in a case in Missouri, where it appeared that a child while crossing a street railway track, stumbled and was run down by the car, it was declared that, where an individual by some accident precipitating a casualty resulting in an injury to himself owing to a dangerous situation brought about by another's negligence, his own

[62] Woeckner v. Erie Electric Motor Co., 176 Penn. St. 451, 35 Atl. 182, 38 Week. N. of Cas. 549.

[63] Jones v. United Traction Co., 201 Pa. St. 344, 346, 50 Atl. 826, 827, 11 Am. Neg. Rep. 151, per Brown, J.

[64] Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 4 Am. Neg. Rep. 206, revg. 89 Hun, 609; Murray v. Paterson R. Co., 61 N. J. L. 301, 39 Atl. 648.

[65] Stabenau v. Atlantic Ave. R. Co., 155 N. Y. 511, 50 N. E. 277, 4 Am. Neg. Rep. 206, revg. 89 Hun, 609. See also Baltimore City P. R. Co. v. Cooney, 87 Md. 261, 39 Atl. 859, 11 Am. & Eng. R. Cas. (N. S.) 759.

mischance, instead of the prior negligence of the other, is not necessarily deemed the proximate cause of the injury, but that whether the injured person is entitled to recover from the negligent one depends on whether he himself was guilty of negligence that proximately caused the injury.[66]

§ 584. **Children — Duty of motorman — Slacken speed of car.** — The question whether a motorman is guilty of negligence for failure to slacken the speed of his car, where he observes that children are in the street, must depend upon the circumstances of each case. In this respect, it can only be said that he should be held to the exercise of such care as a reasonably prudent man would exercise under the same circumstances. To run a car very rapidly through a street, in which the motorman has knowledge or notice of the presence of children, might constitute negligence. Or again, to run a car moderately fast where there are children in the vicinity of the track. So a motorman was held not free from negligence, as a matter of law, in running his car at the rate of nineteen miles an hour, through a street crowded with children.[67] And where a child was running away from the car, towards a part of the street obstructed to within three feet of the track, it was held that the motorman was not, as a matter of law, free from negligence in attempting to run the car past her.[68] And in another case where it appeared that a boy six and a half years old ran near or against the car and was on the lower step at the forward end, as the car was going around a curve, clinging to the car, and he called to the motorman to let him off, but the motorman, who saw and heard him and knew that he was in a place of danger, turned on the power in a wanton and reckless way, with a view to increasing the speed of the car and the boy was thrown off and injured, it was declared that conduct of the plaintiff which would be negligence preclud-

[66] Kube v. St. Louis Transit Co., 103 Mo. App. 582, 78 S. W. 55.

[67] Buente v. Pittsburg, A. & M. Traction Co., 2 Super. Ct. (Penn.) 185. See also Harkins v. Pittsburg, A. & M. Traction Co., 173 Pa. St. 149, 33 Atl. 1045, 6 Am. Elec. Cas. 569, 38 Week. N. of Cas. 163, 26 Pitts. L. Jour. (N. S.) 427.

[68] Calumet Elec. St. R. Co. v. Van Pelt, 68 Ill. App. 582, 29 Chic. L. News, 197, 2 Chic. L. Jour., Wkly., 110; compare Hanley v. Ft. Dodge Light & Power Co. (Iowa, 1906), 107 N. W. 593.

ing recovery if the injury were caused by ordinary negligence of a defendant will not commonly preclude recovery if the injury is inflicted wilfully through wanton carelessness, and a verdict for the plaintiff was sustained.[69] But where a child was playing in the gutter and gave no indication of an intention to cross the street, until the car was within about ten feet of the place where it attempted to cross, it was held that the motorman was not chargeable with negligence, for failing to slacken the speed of the car.[70] And allegations that the car was proceeding at an undue speed were held not to be sustained by indefinite statements of witnesses, where it was shown that the car was stopped almost immediately after the child was struck.[71]

§ 585. **Children — Degree of care required of — Contributory negligence.**— Although an infant may be held to the exercise of ordinary care, yet he is not necessarily or generally held to the same degree of care as an adult.[72] The degree of care and caution required of children must be graduated according to the age, experience and knowledge of the child in each particular case.[73] In this connection it has been decided that a

[69] Aiken v. Holyoke Street Ry. Co., 184 Mass. 269, 68 N. E. 238, 15 Am. Neg. Rep. 73.

[70] Fleischman v. Neversink M. R. Co., 174 Pa. St. 510, 34 Atl. 119.

[71] Moss v. Philadelphia Traction Co., 180 Pa. St. 389, 36 Atl. 865, 1 Am. Neg. Rep. 519.

[72] Colomb v. Portland & B. St. Ry., 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 11, wherein the court said: "Though a child, she was nevertheless bound to exercise due care. Though children are not by law holden to the exercise of the same extent of care that adults are, though the age and intelligence of a party are important factors in determining whether due care has been used, yet the plaintiff was bound to exercise that degree or extent of care which ordinarily prudent children of her age and intelligence are accustomed to use under like circumstances. Gleason v. Smith, 180 Mass. 6, 61 N. E. 220, 19 Am. St. Rep. 261 (the case of a child twelve years old). If children unreasonably, intelligently, and intentionally run into danger, they should take the risks." Per Savage, J.

"*The term 'ordinary or reasonable care' applied to the conduct of a child* means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances." Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299, per Hall, J.

[73] *Colorado*: Pueblo Electric St. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322. *Louisiana*: McLaughlin

child three years old cannot be chargeable with contributory negligence,[74] and similarly of a child three years and four months old;[75] and that a child who is only three and a half years of age is incapable of contributory negligence.[76] And in a recent case in Alabama it is declared that prima facie a child between the ages of seven and fourteen is not capable of exercising judgment and discretion, but that evidence is admissible for the purpose of showing capacity. And it was also said in this case that the mere fact that a child between such ages was shown to have capacity to know danger did not of itself establish contributory negligence on his part in the doing of an act which would be negligence in a person of mature age.[77] In case of a fair doubt, however, whether in law a child is of such age and capacity as to render it responsible for an act contributing to its injury, the question should be submitted to the jury.[78] So a child six years old was held not to be guilty of contributory negligence, as a matter of law, in passing over a crosswalk from one side of the street to the other while on her way to school, where a street railway ran through the street.[79] So, where a child seven and a half years old attempted to cross in front of a car, running at an unreasonable rate of speed, it was held that he was not guilty of contributory negligence, as a matter of law.[80] And

v. New Orleans & C. R. Co., 48 La. Ann. 23, 18 So. 703. *Maine*: Colomb v. Portland & B. St. Ry., 100 Me. 418, 61 Atl. 898, 19 Am. Neg. Rep. 11. *Maryland*: Baltimore City P. R. Co. v. Cooney, 87 Md. 261, 39 Atl. 859, 11 Am. & Eng. R. Cas. (N. S.) 759. *New York*: Muller v. Brooklyn H. R. Co., 18 App. Div. 177, 45 N. Y. Supp. 954; Penny v. Rochester R. Co., 7 App. Div. 595, 40 N. Y. Supp. 172, 74 N. Y. St. R. 732, affd., 154 N. Y. 770, 49 N. E. 1101.

[74] Indianapolis Street Ry. Co. v. Schomberg (Ind. App. 1904), 71 N. E. 237.

[75] Woeckner v. Erie Elec. Motor Co., 176 Penn. St. 451, 35 Atl. 182, 38 Week. N. of Cas. 549; see also North Kankakee St. R. Co. v. Blatchford, 81 Ill. App. 609.

[76] Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791; Barnes v. Shreveport City R. Co., 47 La. Ann. 1218, 5 Am. Elec. Cas. 452, 17 So. 782.

[77] Birmingham Ry. L. & P. Co. v. Jones (Ala. 1906), 41 So. 147.

[78] Pueblo Elec. St. R. Co. v. Sherman, 25 Colo. 114, 53 Pac. 322. See also Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595, 74 N. Y. St. R. 732, 40 N. Y. Supp. 172, affd., 154 N. Y. Supp. 770.

[79] McDermott v. Boston Elevated Ry. Co., 184 Mass. 126, 68 N. E. 34, 14 Am. Neg. Rep. 571.

[80] Young v. Atlantic Ave. R. Co., 10 Misc. (N. Y.) 541, 5 Am. Elec. Cas. 530.

the same was held where a child of ten failed to see a car approaching, at a high rate of speed, and which gave no signal of its approach,[81] and in another case, where a child of the same age attempted to cross in front of a car, eight feet away;[82] and again, where a boy ten years of age was injured, in stepping on to the rail of the track after it had been welded, but was still hot.[83] So also, failure of a girl eleven and a half years of age, who was familiar with the running of the cars, to look or take any precaution to see if a car was approaching, before stepping on the track, was held not to be contributory negligence, as a matter of law.[84] In another case, however, a boy eight years and one month old was held guilty of contributory negligence, as a matter of law, in attempting to cross immediately in front of an approaching car, which he could have plainly seen and heard.[85] So also, the act of a boy over nine years of age, in jumping from a wagon, immediately in front of a car, after being warned to look out for it, was held to be contributory negligence, as a matter of law, precluding recovery for his death.[86] As was also the act of a boy, eleven years of age, in stopping in the center of a track, without looking to see whether it was safe.[87] And of a deaf and dumb boy, fourteen years old, in failing to look when about to cross the track.[88] And of a girl of the same age, in stepping from the rear of a car, upon a parallel track, without looking.[89]

§ 586. **Children on track — Negligence of parents.**— A large proportion of the accidents, due to the operation of electric street railways, have occurred in the case of children who have

[81] Consolidated City & Chelsea Park Ry. Co. v. Carlson, 58 Kan. 62, 48 Pac. 635, 2 Am. Neg. Rep. 536, 7 Am. & Eng. R. Cas. (N. S.) 274.

[82] Kitay v. Brooklyn, Q. C. & S. R. Co., 23 App. Div. (N. Y.) 228, 48 N. Y. Supp. 982.

[83] Kane v. West End St. R. Co., 169 Mass. 64, 47 N. E. 501.

[84] Consolidated & C. P. R. Co. v. Wyatt, 59 Kan. 772, 52 Pac. 98, 9 Am. & Eng. R. Cas. (N. S.) 756.

[85] Morey v. Gloucester St. R. Co., 171 Mass. 164, 50 N. E. 530.

[86] Mullen v. Springfield St. R. Co., 164 Mass. 450, 41 N. E. 664.

[87] O'Rourke v. New Orleans City & L. R. Co., 51 La. Ann. 755, 25 So. 323.

[88] Thompson v. Salt Lake Rap. Trans. Co., 16 Utah, 281, 52 Pac. 92, 40 L. R. A. 172, 10 Am. & Eng. R. Cas. (N. S.) 563.

[89] Thompson v. Buffalo Ry. Co., 145 N. Y. 196, 5 Am. Elec. Cas. 535, 39 N. E. 709.

been permitted to go upon the streets unattended, or who have escaped from homes or yards, or temporarily from the custody of parents or some other person. In numerous cases it has been contended that it is negligence, as a matter of law, for parents to either permit their children to go upon the streets unattended, or to fail to exercise such watchful care over them as will prevent their escaping from places of safety. The courts, however, hold, as a general rule, that parents are not, as a matter of law, guilty of contributory negligence in such cases, but that the question of negligence is for the jury to determine.[90] As a general rule, the fact that a child to whom

[90] Mellen v. Old Colony Street Ry. Co., 184 Mass. 399, 68 N. E. 679, 15 Am. Neg. Rep. 79, holding, where a father permitted a child three years and three months old to go into the yard to play with her older sister, aged nine years and nine months, and with the daughter of a neighbor aged ten years, and the children wandered into the street where the youngest one was run over by the car, that it was a question for the jury whether, in the first place, the father exercised due care in letting the plaintiff play in the yard, and whether, in the second place, the plaintiff was under the charge of her older sister after they left the yard and went upon the street. Hewitt v. Taunton St. Ry. Co., 167 Mass. 483, 46 N. E. 406, 1 Am. Neg. Rep. 444, holding it to be for the jury whether due care was exercised by the parents of a child four years of age who was permitted to play in the yard from which he escaped. Howell v. Rochester R. Co., 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17, holding it a question for jury where parents permitted child of five to be on street with sister two years older and was injured under circumstances which would have rendered a person sui juris guilty of contributory negligence. Ehrman v. Nassau Elec. R. Co., 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379, deciding it not to be negligence as a matter of law where a parent permits a child non sui juris to be on a side street unattended. Weitzman v. Nassau Elec. R. Co., 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905, where it is held not negligence per se to permit a child of five to cross a street within sight of an older sister. Muller v. Brooklyn H. R. Co., 18 App. Div. (N. Y.) 177, 45 N. Y. Supp. 954, in which it was held that parents were not guilty of negligence as a matter of law in allowing an intelligent child four and a half years old to play upon the sidewalk with proper instructions. Kitchell v. Brooklyn Heights R. Co., 6 App. Div. (N. Y.) 99, 39 N. Y. Supp. 741, holding question of contributory negligence of father to be for jury in leaving a seven-year-old child, bright, intelligent, and accustomed to be out upon the street, unattended in crossing a street car track. Martineau v. Rochester R. Co., 81 Hun (N. Y.), 263, 62 N. Y. St. R. 722, 30 N. Y. Supp. 778, 5 Am. Elec. Cas. 524, affd., 146 N. Y.

contributory negligence cannot be attributed is permitted to go upon the public street unattended will not excuse the company from liability for its negligence.[91] So, it was held that the negligence or imprudence of parents, who sued for the death of their infant child, which was not of the proximate character to defeat recovery, could not be considered by the court or jury in mitigation of damages.[92] And where a child was negligently permitted, by its parents, to wander upon street railway tracks, it was held that this would not relieve the

376, 67 N. Y. St. R. 899, 41 N. E. 90, holding, where child was permitted by its mother to run to meet its father across the street, that it was not contributory negligence as a matter of law. Jones v. Brooklyn Heights R. Co., 10 Misc. (N. Y.) 543, 64 N. Y. St. R. 22, 31 N. Y. Supp. 445, 5 Am. Elec. Cas. 533, in which it is decided that a parent was not guilty of contributory negligence per se in permitting a child four years of age to play upon the street in charge of one twelve years of age. Karahuta v. Schulykill Traction Co., 6 Penn. Super. Ct. 319, 42 Week. N. of Cas. 47, holding that it is not contributory negligence as a matter of law to leave a two-and-a-half-year-old child upon the doorstep of a house with a warning not to leave. Woeckner v. Erie Elec. Motor Co., 182 Penn. St. 182, 37 Atl. 936, where it was held that it was not contributory negligence as a matter of law where the parents of a child non sui juris placed it in charge of an older sister, whose direction to follow her into the house was disobeyed, and the child ran into the street unobserved. See also following cases: *California*: Cunningham v. Los Angeles R. Co., 115 Cal. 561, 47 Pac. 452. *Massachusetts*: Rosenberg v. West End St. Ry. Co., 168 Mass. 561, 47 N. E. 435, 3 Am. Neg. Rep. 192; Hewitt v. Taunton St. Ry. Co., 167 Mass. 483, 46 N. E. 106. *New York*: Albert v. Albany Ry. Co., 5 App. Div. 544, 39 N. Y. Supp. 430, 6 Am. Elec. Cas. 529; Dowd v. Brooklyn Heights R. Co., 9 Misc. 279, 61 N. Y. St. R. 321, 29 N. Y. Supp. 745, 5 Am. Elec. Cas. 517. *Oregon*: Hedin v. City & Suburban Ry. Co., 26 Or. 155, 37 Pac. 540; Wallace v. City & Suburban Ry. Co., 26 Or. 174, 5 Am. Elec. Cas. 544, 37 Pac. 477. *Pennsylvania*: Evers v. Phila. Tract. Co., 176 Penn. St. 376, 35 Atl. 140; Harkins v. Pittsburg, Allegheny & Manchester Traction Co., 173 Penn. St. 146, 149, 33 Atl. 1044, 1045, 6 Am. Elec. Cas. 571; Dunseath v. Pittsburg, Allegheny & Manchester Traction Co., 161 Penn. St. 124, 28 Atl. 1021, 5 Am. Elec. Cas. 561. *Utah*: Riley v. Salt Lake Rap. Trans. Co., 10 Utah, 428, 37 Pac. 681, 5 Am. Elec. Cas. 594.

[91] Bergen County Traction Co. v. Heitman's Admr., 61 N. J. L. 682, 40 Atl. 651, 4 Am. Neg. Rep. 511, 11 Am. & Eng. R. Cas. (N. S.) 286; Barnes v. Shreveport City Ry. Co., 47 La. Ann. 1218, 5 Am. Elec. Cas. 452, 17 So. 782.

[92] Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791. But see Hogan v. Citizens' R. Co., 150 Mo. 36, 51 S. W. 473.

company from liability for the death of the child, caused by a car running over it, where, but for the gross negligence of those in charge of the car, no accident would have happened.[93] And it is held that in an action by a minor child, against a third person, for injuries sustained through negligence, the negligence of the parents of the child, contributing to the accident, cannot be imputed to it.[94]

§ 587. **Children — Municipal ordinance as to playing in streets.**— An ordinance forbidding children playing in the street, or indulging in any game which interferes with the free, safe and convenient use of such street or highway, by any person traveling or passing along the same, does not lessen or modify the degree of care to be exercised by motormen towards children who may be playing upon the streets.[95]

§ 588. **Children unexpectedly coming on track — Liability of company — Generally — Cases.**— An electric street railway company is not liable for injuries caused to children, where they suddenly and unexpectedly come upon the track, so immediately in front of an approaching car that it is impossible to stop the car in time to prevent striking them.[96] So it is held, in an action to recover for an injury to a boy caused by being struck by a car, in front of which he suddenly jumped from

[93] Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 50 Pac. 25, 9 Am. & Eng. R. Cas. (N. S.) 825. See also Slensby v. Milwaukee St. R. Co., 95 Wis. 179, 70 N. W. 67, 3 Am. Neg. Rep. 393.

[94] Ploof v. Burlington Traction Co., 70 Vt. 509, 43 L. R. A. 108, 41 Atl. 1017, 13 Am. & Eng. R. Cas. (N. S.) 702. See also Barnes v. Shreveport City Ry. Co., 47 La. Ann. 1218, 5 Am. Elec. Cas. 452, 17 So. 782.

[95] Budd v. Meriden Elec. R. Co., 69 Conn. 272, 37 Atl. 683, 3 Am. Neg. Rep. 335.

[96] Culbertson v. Crescent City R. Co., 48 La. Ann. 1376, 20 So. 902; McLoughlin v. New Orleans, etc., R. Co., 48 La. Ann. 23, 18 So. 703; Ogier v. Albany Ry. Co., 88 Hun (N. Y.), 486, 5 Am. Elec. Cas. 545; Adams v. Nassau Elec. R. Co. (N. Y. App. Div., 1899), 58 N. Y. Supp. 543; Callary v. Easton Transit Co., 185 Penn. St. 176, 39 Atl. 813; Mulcahy v. Electric Traction Co., 185 Penn. St. 427, 39 Atl. 1106; Kierzenkowski v. Philadelphia Traction Co., 184 Penn. St. 459, 39 Atl. 220, 8 Am. & Eng. R. Cas. (N. S.) 533; Funk v. Electric Traction Co., 175 Penn. St. 559, 34 Atl. 861; Hunter v. Consolidated Traction Co., 193 Penn. 557, 44 Atl. 578. See Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 58 Atl. 5, 16 Am. Neg. Rep. 299.

behind a wagon near the track, that it is proper to refuse an instruction that the company had no exclusive right to the part of the highway occupied by its tracks where the plaintiff was injured and that the latter had a right to cross the tracks, it being declared that an instruction to this effect would seem to indicate that the plaintiff had a right to cross under the circumstances under which he attempted to.[97] And, where a child suddenly ran upon the track, from behind a pile of lumber lying alongside the track, but not placed there by the company, and was struck by an approaching car, not moving at an unusual rate of speed, but which it was impossible for the motorman to stop before striking the child, though he made every effort to stop it, and there being nothing in the evidence which could be construed as putting the motorman on notice that persons were accustomed to be behind such pile of lumber, or that children were there on this particular occasion, it was held that a nonsuit was properly granted.[98] And in another case it was held that a motorman could not be charged with negligence because he did not apprehend that a boy would jump from the rear of the wagon on which he was riding and run in front of his car.[99] And it is held that the company will not be liable in such cases, though the car may be running at a negligent rate of speed.[1]

§ 589. **Rights of electric cars and travelers at street intersections.**— An electric car has no paramount right of way over pedestrians or other vehicles, at street crossings,[2] but the rights of each are equal,[3] though it may be otherwise provided by

[97] Cornelius v. South Covington & C. St. Ry. Co. (Ky. 1906), 93 S. W. 643.

[98] Perry v. Macon Consol. St. R. Co., 101 Ga. 400, 29 S. E. 304, 10 Am. & Eng. R. Cas. (N. S.) 819.

[99] Baier v. Camden & S. Ry. Co., 68 N. J. L. 42, 52 Atl. 215.

[1] Pletcher v. Scranton Traction Co., 185 Penn. St. 147, 39 Atl. 837.

[2] McCarthy v. Consolidated Railway Co. (Conn. 1906), 63 Atl. 725; Watson v. Minneapolis St. R. Co., 53 Minn. 551, 4 Am. Elec. Cas. 510, 55 N. W. 742; Bernhard v. Rochester Ry. Co., 68 Hun (N. Y.), 369, 51 N. Y. St. R. 880, 22 N. Y. Supp. 821, 4 Am. Elec. Cas. 506; Brozek v. Steinway R. Co., 22 N. Y. App. Div. 623, 48 N. Y. Supp. 345; Zimmerman v. Union R. Co., 3 N. Y. App. Div. 219, 74 N. Y. St. R. 18, 38 N. Y. Supp. 362, 6 Am. Elec. Cas. 527.

[3] Tonner v. Brooklyn Heights R. Co., 60 N. Y. Supp. 289. See Koehler v. Interurban Street Ry. Co., 88 N. Y. Supp. 904.

statute,[4] or by ordinance.[5] A person attempting to cross electric railway tracks at such places, whether on foot or in a vehicle, must exercise a reasonable degree of care and watchfulness,[6] while those in charge of the car are also held to the exercise of ordinary care at street crossings, the degree of care, however, being greater than required in other portions of the street.[7] It is the duty of the company, at such places, and also when approaching them, to exercise a greater degree of watchfulness, than under other circumstances.[8] So, where a person in a vehicle, after driving alongside of the tracks for a short distance, started to cross at a street crossing, when he was struck by an electric car, it was said by the court, upon the question of the negligence of the motorman: "If he saw the plaintiff in his perilous position in time to stop the car and avoid the injury, he was bound to do so. If he did not see him, then he was equally guilty of negligence, because it was his duty to look and ascertain whether or not the track was clear, when he was approaching a public crossing. If, as is contended by counsel for respondent, the plaintiff was driving alongside the track with his back towards the car, it was especially the duty of the motorman to give warning and keep his car under control. He had no right to presume that the plaintiff would not cross the track at such crossing."[9] And in another case where it appeared that as a person in a carriage was approaching a crossing he saw the car distant about forty feet and standing, while passengers were getting on and off and he proceeded to drive over the tracks without again looking towards the car which struck the horse and threw the driver out, it was held that it was proper to deny a motion for non-

[4] Knox v. North Jersey Street Ry. Co., 70 N. J. L. 347, 57 Atl. 423, construing statute giving fire engines right of way.

[5] Cushing v. Metropolitan Street Ry. Co., 92 App. Div. (N. Y.) 510, 87 N. Y. Supp. 314, construing ordinance giving vehicles going north or south right of way over vehicles going east or west.

[6] McLaughlin v. New Orleans, etc., R. Co., 48 La. Ann. 23, 18 So. 703; Roenfeldt v. St. Louis & S. Ry. Co., 180 Mo. 554, 79 S. W. 706; March v. Traction Co., 209 Pa. St. 46, 57 Atl. 1131.

[7] Wallen v. North Chicago St. R. Co., 82 Ill. App. 103.

[8] Wallen v. North Chicago St. R. Co., 82 Ill. App. 103.

[9] Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77, 6 Am. Elec. Cas. 598, per Bartch, J.

suit on the ground of contributory negligence.[10] Pedestrians or persons in vehicles should not unnecessarily obstruct the passage of the cars, and on the other hand, motormen should not carelessly run them down.[11] So it is the duty of the company to have the car under reasonable control, and for negligence of the employees in failing so to do the company will be liable.[12] And if the car is not actually slowed down the motorman should have the means at his command to stop the car immediately upon the appearance of danger.[13] So also it is the duty of the motorman, when approaching a street crossing, to give some warning of the approach of the car, and, where a gong is provided for the purpose of warning persons of the approach of the car, it should be sounded by him, whether the track is clear or not.[14] While it would be negli-

[10] North Jersey Street Ry. Co. v. Schwartz, 66 N. J. L. 437, 49 Atl. 683, 10 Am. Neg. Rep. 326. The court said: "We might in the present case be willing to believe that the plaintiff was not as prudent as he should have been, in attempting to cross, with the car so near, at least without continuing to keep an eye to its movement as he passed over the tracks. But, in looking at all the circumstances, we must consider that when near the tracks he saw that the car was then standing still; that he had a right to rely upon the motorman's exercising reasonable care in controlling the movement of his car over a public crossing in a populous city, then being traversed by a carriage, with the plaintiff's carriage closely following." Per Hendrickson, J.

[11] Bernhard v. Rochester Ry. Co., 68 Hun (N. Y.), 369, 51 N. Y. St. R. 880, 22 N. Y. Supp. 821, 4 Am. Elec. Cas. 506.

[12] Citizens' Rap. Trans. Co. v. Seigrist, 96 Tenn. 119, 6 Am. Elec. Cas. 583, 33 S. W. 920. See Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106, 12 Am. Neg. Rep. 604; Heinzle v. Metropolitan Street Ry. Co., 182 Mo. 528, 81 S. W. 848; Tonner v. Brooklyn Heights R. Co., 60 N. Y. Supp. 239.

Due care on the part of the motorman requires that in approaching a crossing he should have his car under such control that the safety of the careful traveler thereon will not be endangered. Searles v. Elizabeth P. & C. J. Ry. Co., 70 N. J. L. 388, 57 Atl. 134, 15 Am. Neg. Rep. 614.

[13] Penny v Rochester Ry. Co., 7 App. Div. (N. Y.) 595, 74 N. Y. St. R. 732, 40 N. Y. Supp. 172, 6 Am. Elec. Cas. 535, affd., 154 N. Y. 770.

[14] *Illinois*: Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267, 70 N. E. 294, 477; City Elec. Ry. Co. v. Jones, 61 Ill. App. 183, 6 Am. Elec. Cas. 473. *Kansas*: Consolidated City & Chelsea Park Ry. Co. v. Carlson, 58 Kan. 62, 48 Pac. 635, 7 Am. & Eng. R. Cas. (N. S.) 274, 2 Am. Neg. Rep. 536. *Kentucky*: South Covington & C. St. R. Co. v. Beatty, 20 Ky. L. Rep. 1845, 6 Am. Neg. Rep. 75, 50 S. W. 239. *Minne-*

gence for a person to attempt to cross in front of a car, which is so close that it is reasonably certain that a collision cannot be avoided, yet if a person sees a car approaching at such a distance that the crossing of the track can apparently be made in safety, he has a right to attempt it, and is not guilty of negligence per se, in making the attempt.[15] So it was declared in one case that "the driver would have the right of way, if proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks, in advance of the approaching car; the latter being sufficiently distant to be checked, and if need be stopped, before it should reach him."[16] This right is not to be construed as meaning that if a driver can, by activity, reach the crossing first, he, therefore, has the right of way and will not be guilty of negligence. He must in all such cases exercise reasonable care and prudence.[17] So, where a driver acted upon the assumption that if he reached the track first he would be entitled to cross, and that the duty of avoiding the collision would rest entirely with the motorman, and consequently drove upon the track in front of a heavily loaded car, approaching on a down grade and which was quite near, and used no effort to quicken the pace of his horse, it was held that he was, as a matter of law, guilty of contributory negligence.[18] But where a driver could have crossed in safety except for the unusual rate of speed of the

sota: Gray v. St. Paul City Ry. Co., 87 Minn. 280, 91 N. W. 1106, 12 Am. Neg. Rep. 604; Shea v. St. Paul City Ry. Co., 50 Minn. 395, 4 Am. Elec. Cas. 481, 52 N. W. 902. *New York*: Tonner v. Brooklyn Heights R. Co., 60 N. Y. Supp. 289. *Utah*: Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 4 Am. & Eng. R. Cas. (N. S.) 77, 6 Am. Elec. Cas. 516. But see Kline v. Elec. Traction Co., 181 Penn. St. 276, 37 Atl. 522, 40 Week. N. of Cas. 337, 2 Am. Neg. Rep. 644.

[15] Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 4 Am. Elec. Cas. 510, 55 N. W. 742; New Jersey Elec. Ry. Co. v. Miller, 59 N. J. L. 423, 36 Atl. 885, 6 Am. & Eng. R. Cas. (N. S.) 519, 1 Am. Neg. Rep. 476.

[16] New Jersey Elec. Ry. Co. v. Miller, 59 N. J. L. 423, 36 Atl. 885, 6 Am. & Eng. R. Cas. (N. S.) 519, 1 Am. Neg. Rep. 476, per McGill, Ch.; Zimmerman v. Union Ry. Co., 3 App. Div. (N. Y.) 219, 74 N. Y. St. R. 18, 38 N. Y. Supp. 362, 6 Am. Elec. Cas. 527.

[17] New Jersey Elec. Ry. Co. v. Miller, 59 N. J. L. 423, 36 Atl. 885, 6 Am. & Eng. R. Cas. (N. S.) 519, 1 Am. Neg. Rep. 476.

[18] Smith v. Electric Traction Co.,

car, it was held he was not, as a matter of law, guilty of contributory negligence.[19] And where the motorman failed to slacken the speed of the car, when approaching a crossing, over which a loaded truck was being driven, it was held that he was not, as a matter of law, free from negligence.[20] Where a street railway company propels its cars by electricity along the public streets of a city, it is held that it owes a duty to the public which requires it to so regulate the movements of its cars, at the intersection of such streets, when receiving or discharging passengers from a standing car, as not to unnecessarily expose pedestrians to the danger of collision with a passing car on the opposite track.[21]

§ 590. **Intersection — Street car tracks.**— At a street intersection, where the tracks of one street railway company cross those of another, the rights of each are subject to the same general principles as control in case of electric cars and travelers stated in the preceding section. So it is held that the driver of a horse car is justified in believing that a motor car, which is approaching on an intersecting track, is moving at a lawful rate of speed, and where he arrived first at the crossing, and thus had the right of way, it was held that he was not guilty of contributory negligence in attempting to pass before it.[22] Where a statute provided that in case of intersection of tracks, the cars upon the track first laid should have precedence as to right of way, where the cars approached the crossing at substantially the same time,[23] it was held that where one car had stopped about twenty feet from the intersecting track of another railway, on which there was a car between 100 and 200 feet distant, and then started to cross, the car on the latter track, which was first laid, was not entitled to the right of way,

187 Penn. St. 110, 40 Atl. 966, 42 Week. N. of Cas. 351, 4 Am. Neg. Rep. 726. See Huber v. Nassau Elec. R. Co., 22 App. Div. (N. Y.) 426, 48 N. Y. Supp. 38.

[19] Callahan v. Philadelphia Traction Co., 184 Penn. St. 425, 39 Atl. 222, 41 Week. N. of Cas. 509.

[20] Hergert v. Union R. Co., 25 App. Div. (N. Y.) 218, 49 N. Y. Supp. 307.

[21] Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 6 Am. Elec. Cas. 516.

[22] Metropolitan R. Co. v. Hammett, 13 App. D. C. 370, 26 Wash. L. Repr. 762.

[23] Mich. Comp. Laws, 1897, § 6463.

upon the ground that the cars approached at substantially the same time.[24]

§ 591. **Driving upon electric car tracks.**— An electric street railway company has no exclusive right to the portion of the street occupied by its tracks, and a person in driving upon the tracks is not guilty of negligence, in the absence of special circumstances rendering such act negligence.[25] His conduct may, however, be such as to preclude a recovery for an injury caused by a collision between the vehicle in which he is riding and a car where he drives upon the track recklessly without looking to see if a car is approaching.[26] And he should not, when driving upon the track, unnecessarily obstruct or interfere with the passage of cars. While he has the right to expect that the motorman will use reasonable care not to run into him, yet it is incumbent upon him also to exercise reasonable care and

[24] Becker v. Detroit Citizens' St. R. Co., 121 Mich. 580, 80 N. W. 581.

[25] *California*: Mahoney v. San Francisco & San Mateo Ry. Co., 110 Cal. 471, 42 Pac. 968, 6 Am. Elec. Cas. 457. *Illinois*: Calumet Elec. St. R. Co. v. Christenson, 170 Ill. 383, 48 N. E. 962, 3 Am. Neg. Rep. 537, affg. 70 Ill. App. 84; North Chicago St. R. Co. v. Allen, 82 Ill. App. 128; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463. *Massachusetts*: Shea v. Lexington & B. St. Ry. Co., 188 Mass. 425, 74 N. E. 931. *Michigan*: Rouse v. Detroit Electric Ry. Co., 135 Mich. 545, 100 N. W. 404, 16 Am. Neg. Rep. 400; Rascher v. East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413, 51 N. W. 463, 4 Am. Elec. Cas. 474. *Missouri*: Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 463. *New York*: Bernhard v. Rochester Ry. Co., 68 Hun, 369, 51 N. Y. St. R. 880, 22 N. Y. Supp. 821, 4 Am. Elec. Cas. 506. *Pennsylvania*: Smith v. Philadelphia Traction Co., 3 Pa. Super. Ct. 129, 40 Week. N. of Cas. 501. *Wisconsin*: Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30, 4 Am. Elec. Cas. 497.

The question of negligence is one for the jury. North Chicago Street Ry. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812, 14 Am. Neg. Rep. 281; Logan v. Old Colony Street R. Co., 190 Mass. 115, 76 N. E. 510, 19 Am. Neg. Rep. 303; Hughes v. Camden & Suburban Ry. Co., 65 N. J. L. 203, 47 Atl. 441, 9 Am. Neg. Rep. 110; Connor v. Metropolitan Street Ry. Co., 87 App. Div. (N. Y.) 618, 84 N. Y. Supp. 1121, 12 Am. Neg. Rep. 610; Mapes v. Union R. R. Co., 56 App. Div. (N. Y.) 508, 67 N. Y. Supp. 358, 9 Am. Neg. Rep. 112 n.

[26] McGanley v. St. Louis Transit Co., 179 Mo. 583, 79 S. W. 461; Fellenz v. St. Louis & S. Ry. Co., 106 Mo. App. 154, 80 S. W. 49; Marahan v. Interurban Street Ry. Co., 87 N. Y. Supp. 537.

diligence to turn off from the track in order to avoid a collision.[27] In this connection, it is said: "In many streets the burden of use, by the street cars themselves, would amount to an exclusive use of the street if all other traffic were to halt when a car was in motion. So the care required is relative, having regard to the burden of use and the right of vehicles, as well as street cars, to occupy the street for passage. The increasing burden which traffic has imposed upon many streets and the necessity which arises out of that condition has modified, somewhat, the rule of the earlier cases. The operator of a street car is bound to have the car under control, and to so operate the same as to give vehicles a reasonable opportunity to get off the track, and to exercise reasonable diligence in making discovery of obstruction in his front."[28] Where a person is driving upon the track, the motorman should use ordinary care and prudence, under the circumstances, to avoid injury.[29] And it would seem to be the duty of a motorman, seeing a vehicle on the track in front of his car, to give timely warning of its approach,[30] especially when approaching the vehicle from

[27] *Illinois*: West Chicago St. R. Co. v. Levy, 82 Ill. App. 202; North Chicago St. R. Co. v. Zeiger, 78 Ill. App. 463. *Michigan*: Rascher v. East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413, 51 N. W. 463, 4 Am. Elec. Cas. 474. *Missouri*: Hickman v. Union Depot R. Co., 47 Mo. App. 65, 4 Am. Elec. Cas. 473. *New York*: Devine v. Brooklyn H. R. Co., 34 App. Div. 248, 54 N. Y. Supp. 626; Johnson v. Brooklyn H. R. Co., 34 App. Div. 271, 54 N. Y. Supp. 547; Fishback v. Steinway Ry. Co., 11 App. Div. 152, 6 Am. Elec. Cas. 547, 76 N. Y. St. R. 883, 42 N. Y. Supp. 883; Bernhard v. Rochester Ry. Co., 68 Hun, 369, 51 N. Y. St. R. 880, 22 N. Y. Supp. 821, 4 Am. Elec. Cas. 506; Belford v. Brooklyn Heights R. Co., 43 Misc. R. 148, 88 N. Y. Supp. 267; Witte v. Brooklyn City Ry. Co., 4 Misc. 286, 53 N. Y. St. R. 334, 23 N. Y. Supp. 1028, 4 Am. Elec. Cas. 516, affd., 143 N. Y. 667, 63 N. Y. St. R. 867, 39 N. E. 22. *Ohio*: Siek v. Toledo Consol. St. R. Co., 16 Ohio C. C. 393, 9 Ohio C. D. 51. *Wisconsin*: Will v. West Side R. Co., 84 Wis. 42, 54 N. W. 30, 4 Am. Elec. Cas. 497.

[28] Fishback v. Steinway R. Co., 11 App. Div. (N. Y.) 152, 6 Am. Elec. Cas. 547, 76 N. Y. St. R. 883, 42 N. Y. Supp. 883, per Hatch, J.

[29] North Chicago St. R. Co. v. Allen, 82 Ill. App. 128; Witte v. Brooklyn, 4 Misc. (N. Y.) 286, 53 N. Y. St. R. 384, 23 N. Y. Supp. 1028, 4 Am. Elec. Cas. 516, affd., 143 N. Y. 667, 63 N. Y. St. R. 867, 39 N. E. 22.

[30] Devine v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626; Abrahams v. Los Angeles Traction Co., 124 Cal. 411, 57 Pac. 216.

the rear. It is held, however, that a driver must exercise such care as a reasonably prudent man would exercise, and in doing so that he cannot depend upon timely warning being given by a motorman in coming up behind him.[31] And where a driver saw the approach of a car, it was held that actionable negligence of the company could not be established by proof of the fact that the motorman did not ring the gong.[32] And on the other hand, it has been decided that the fact that the gong was sounded by the motorman does not, where it appears that the speed of the car was not decreased, show, as a matter of law, that due care was exercised by him.[33]

§ 592. **Driving upon electric car tracks — Continued.**— The motorman is not held to the exercise of such a degree of care in the management of his car that an accident will in no event happen, no matter how careless the driver of a vehicle may be.[34] He is, however, required to exercise ordinary care, or in other words, such care as a reasonably prudent man would exercise to prevent accidents. So, though a person upon the tracks may be negligent, in not observing the approach of a car, yet if the motorman observes his danger and fails to make any effort to avoid a collision, he is negligent, and the company will be liable.[35] So it is declared, in reference to electric cars, that when overtaking another vehicle, directly in the line of their progress and a possible obstacle in their way, a proper regard for the rights of others requires that the car be reduced to such control that it may immediately be brought to a standstill, if necessary.[36] It is the duty of the motorman, where he observes a vehicle on the track in front of his car, to have the car under

[31] Devine v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 248, 54 N. Y. Supp. 626.

[32] Williamson v. Metropolitan St. Ry. Co., 60 N. Y. St. R. 477, 29 Misc. (N. Y.) 324.

[33] North Chicago Street R. Co. v. Rodert, 203 Ill. 413, 67 N. E. 812, 14 Am. Neg. Rep. 281, affirming a judgment for the plaintiff.

[34] Morrissey v. Bridgeport Traction Co., 68 Conn. 215, 35 Atl. 1126.

[35] Wilkins v. Omaha & C. B. R. & B. Co., 96 Iowa, 668, 65 N. W. 987; McKeon v. Steinway R. Co., 20 App. Div. (N. Y.) 601, 47 N. Y. Supp. 374. See Beier v. St. Louis Transit Co. (Mo. 1906), 94 S. W. 876; Steinman v. St. Louis Transit Co. (Mo. App. 1906), 94 S. W. 799.

[36] Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 175, 2 Am. Neg. Rep. 192, per Dayton, J.

proper control, and even to stop, if necessary, to avoid a collision.[37] So, where the driver of a heavily laden wagon was endeavoring to get it off the track, but was unable to because the rails were slippery, owing to snow and ice, it was held that the failure of the motorman to make any effort to slacken the speed of the car in approaching such vehicle was prima facie negligence, and the direction of a verdict for the company, in an action for injuries caused by collision, under such circumstances, was held to be error.[38] While, as a general rule, a motorman may assume that a person driving upon the tracks will turn out in time to avoid a collision, where he sees the car, or the gong is sounded,[39] yet such assumption is not justified under all circumstances.[40] Of the right of the motorman to make such an assumption, however, it is said in a case in New Jersey: "The additional assignment of error may be considered, namely, that the judge refused to charge that, if the motorman gave timely notice, he had a right to assume that the driver of the truck would turn out in time, and it was only when it became apparent to him that the latter did not intend to do so that it became his duty to check the speed of the car. To maintain such a doctrine would be to hold that, if audible and sufficient notice was given by a car, it rested solely in the discretion of the motorman to determine when he should begin to exercise care to avoid a collision; and the whole question would be taken out of the domain of issues to be decided by the jury, as to whether or not reasonable care had been exercised, which is the true rule of law and test of responsibil-

[37] Schron v. Staten Island Elec. R. Co., 16 App. Div. (N. Y.) 111, 45 N. Y. Supp. 124, 3 Am. Neg. Rep. 61; Sears v. Seattle Consol. St. Ry. Co., 6 Wash. 227, 4 Am. Elec. Cas. 423, 33 Pac. 389, 1081; Ewing v. Toronto R. Co. (Com. Pl.), 24 Ont. Rep. 694.

[38] Will v. West Side R. Co., 84 Wis. 42, 4 Am. Elec. Cas. 494, 54 N. W. 30. See also Bush v. St. Joseph & B. H. St. R. Co., 113 Mich. 513, 71 N. W. 851, 4 Det. L. News, 377; Davidson v. Schulykill Traction Co., 4 Penn. Super. Ct. 86.

[39] Morrissey v. Bridgeport Tract. Co., 68 Conn. 215, 35 Atl. 1126; Glazebrook v. West End St. Ry. Co., 160 Mass. 240, 4 Am. Elec. Cas. 546, 35 N. E. 553, Siek v. Toledo Consol. St. R. Co., 16 Ohio C. C. 393, 9 Ohio C. D. 51.

[40] White v. Worcester Consol. St. R. Co., 167 Mass. 43, 44 N. E. 1052; Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 175, 2 Am. Neg. Rep. 192.

ity." [41] Although it may be the right of the motorman to assume that a driver will turn out from the track upon the approach of the car,[42] yet this should not relieve him from his duty to have the car under proper control, and to use all reasonable efforts to avoid a collision in case it becomes apparent that the driver will not turn out.[43] And in a case where error was assigned upon a part of the judge's charge, in which he said that the plaintiff "had, you may say, a right to assume that a trolley car would not run into him," it was said that these words constituted only a part of the sentence, and when read in connection with the rest of the paragraph, stated the correct rule of law as established in that court, and it was declared that the paragraph was no more than a statement to the jury that the plaintiff might assume that the trolley company, having equal rights with him, and he having equal rights with it, in the public highway, would so exercise those rights as not to do damage to him.[44] Where, however, a person drove along the tracks for over half a block, without paying any attention to a car approaching from the rear, and relying entirely upon the vigilance of the motorman to avoid a collision, it was held that he was, as a matter of law, guilty of contributory negligence, precluding recovery for injuries received by him.[45] And where a driver on a street car track saw a car 125 feet behind him, approaching at a rate of speed greater than that of his own vehicle, it was held that he was guilty of contributory negligence in failing to drive off the track at once, and in attempting to take a long slanting turn off the track.[46]

§ 593. **Driver turning onto track to pass car or another vehicle — Crossing bridge.**— In many cases collisions occur be-

[41] Consolidated Traction Co. v. Haight, 59 N. J. L. 577, 37 Atl. 175, 2 Am. Neg. Rep. 192, per Dayton, J.

[42] See §§ 572, 573, herein.

[43] Glazebrook v. West End St. Ry. Co., 160 Mass. 240, 35 N. E. 553, 4 Am. Elec. Cas. 546.

[44] Shelly v. Brunswick Traction Co., 65 N. J. L. 639, 48 Atl. 562, 9 Am. Neg. Rep. 533.

[45] Bryant v. Metropolitan St. R. Co., 28 Misc. R. (N. Y.) 532, 59 N. Y. Supp. 595.

[46] Morrissey v. Bridgeport Tract. Co., 68 Conn. 215, 35 Atl. 1126. See also South Covington & Cincinnati St. Ry. Co. v. Enslen, 18 Ky. L. Repr. 921, 38 S. W. 850, 1 Am. Neg. Rep. 258; Johnson v. Brooklyn H. R. Co., 34 App. Div. (N. Y.) 271, 54 N. Y. Supp. 547. But see Camden, G. & W. R. Co. v. Preston, 59 N. J. L. 264, 35 Atl. 1119.

tween vehicles and electric cars owing to the driver turning on to the track, for the purpose of passing another vehicle, or to his turning from a track upon which he is driving to another track to avoid an approaching car. As a general rule, the act of the driver in so turning is not contributory negligence, as a matter of law, but the question of negligence must be determined by the jury under the circumstances of each particular case.[47] So where a person driving on the left hand tracks of a street railway, upon seeing a car coming toward him on that track, drives on to the right hand track, though there is room to turn to the left, such act is not negligence per se, and it is proper for the trial court to refuse to direct a verdict for the company in an action against it for an injury sustained by the driver and caused by a car overtaking and striking the vehicle from the rear.[48] And where a person was driving across a bridge on the left side, and along a car track, upon which he saw a car approaching, and turned to the right hand track, upon which he knew a car was also approaching from the rear, but which was sufficiently distant to have enabled him to cross in safety if it was proceeding at an ordinary rate of speed, it was held that he was not guilty of contributory negligence, and that the company was liable for injuries received by the car running into the vehicle from the rear.[49] In this connection the court said: "They have a common right in the highway with every other traveler, and they must be so managed as not to interfere unreasonably with the like rights of others. Every person in the use of a highway is bound to

[47] State Consol. Tract. Co. v. Reeves, 58 N. J. L. 573, 34 Atl. 128; Consol. Tract. Co. v. Shaffery, 60 N. J. L. 34, 36 Atl. 890, 1 Am. Neg. Rep. 475, affd., 60 N. J. L. 590, 40 Atl. 1131; Schron v. Staten Island Elec. R. Co., 16 App. Div. (N. Y.) 111, 45 N. Y. Supp. 124, 3 Am. Neg. Rep. 61; Murphy v. Nassau Elec. R. Co., 19 App. Div. (N. Y.) 583, 46 N. Y. Supp. 283; Lenkner v. Citizens' Tract. Co., 179 Penn. St. 486, 36 Atl. 228, 28 Pitts. L. Jour. (N. S.) 11.

[48] Adams v. Camden & Suburban Ry. Co., 69 N. J. L. 424, 55 Atl. 254, 14 Am. Neg. Rep. 410.

[49] Laufer v. Bridgeport Tract. Co., 68 Conn. 475, 37 L. R. A. 533, 37 Atl. 379, 2 Chic. L. Jour. Week. 287. See also Reilly v. Troy City Ry. Co., 32 App. Div. (N. Y.) 131, 52 N. Y. Supp. 611, 4 Am. Neg. Rep. 719, where collision occurred between vehicle and electric car, where former was proceeding in narrow space between track and edge of bridge, and horse suddenly swerved towards the track.

use it with reasonable care. A traveler and a railroad company, when using a public highway in common, must each look out for the presence of the other,— the one to avoid being injured, the other to avoid inflicting injury." [50] In this case it also appeared that the driver's only recourse to get out of the way of the car approaching on the left track was to turn upon the other track, there being no room for him to turn to the left. In another case where a person who was driving on the right hand track crossed over to the left hand track to enable a car to pass which was coming from the rear and after he had driven about sixty feet on that track the wagon was struck with much force by a car from the opposite direction which came around a curve about four hundred feet distant it was declared that, as it might reasonably be inferred that the car which collided with plaintiff's wagon with such force and effect was traveling at such speed that it could not be stopped after its headlight revealed plaintiff's wagon, or that its speed was not diminished when the wagon was perceived, it was properly a case for the jury to determine whether the motorman was negligent, and that they would have been justified in finding negligence on his part.[51] A person, however, in turning onto the tracks of a street railway to pass a vehicle or obstacle should exercise reasonable care to avoid a collision with a car and if he is negligent in this respect and injury ensues as a result of a collision the negligence of the driver may be regarded as the proximate cause of the accident which will preclude a recovery for the injury so sustained.[52]

§ 594. **Vehicle turning around — Approaching car.**— The operation of electric cars in a street does not deprive travelers of any of their rights therein. So, where a driver turns a vehicle around in the street, and in so doing it is necessary to cross the track of an electric railway, such crossing is not contributory negligence per se. In this as in all other cases, where travelers are upon or about to go upon electric street railway tracks, ordinary care is required, both of the driver of a vehicle

[50] Per Andrew, Ch. J.

[51] Hughes v. Camden & Suburban Ry. Co., 65 N. J. L. 203, 47 Atl. 441, 9 Am. Neg. Rep. 110.

[52] Cicardi v. St. Louis Transit Co., 108 Mo. App. 462, 83 S. W. 980; Lightfoot v. Winnebago Traction Co., 123 Wis. 479, 102 N. W. 30.

and of those in charge of a car, to avoid collision, and the question of negligence and of the liability of the company for injuries received in a collision, under such circumstances, must be decided upon the facts of each particular case. So, where an ice wagon was being turned around in a street, and, at the time the driver started to turn the wagon, a car was standing upon the track 133 feet distant, and there was nothing between the wagon and the car to obstruct the vision of the motorman, and as the wagon was almost across the track, the rear end of it was struck by the car, injuring a helper, who was standing on the rear step, so that he died, it was held that the company was liable.[53]

§ 595. **Vehicle standing on track.**— The same general principle is applicable in case of vehicles standing upon the track of an electric railway, as in other cases involving the use by travelers of the portion of the street occupied by such track, that is, that a traveler must not unnecessarily obstruct or interfere with the passage of cars, but that the rights of each must be exercised with a due regard for the rights of the other. There are many cases where it is necessary temporarily for a vehicle to stop or stand upon electric railway tracks, as for instance the breaking of some portion of the vehicle, the falling of a horse, the wheels becoming stuck in the track, or owing to a heavy load, the horses being unable to proceed. The motorman must use such care as a reasonably prudent man would exercise in the management of the car, to discover such cases of temporary obstruction, and to avoid injury, and for failure to exercise such care the company will be liable. So where a horse and truck became stuck upon the track on a clear night, and within fifty feet of an electric light, and a car was at the time 300 feet distant, and the driver of the vehicle called repeatedly to the motorman to stop the car, but the latter made no effort to do so, it was held that the motorman was not, as a matter of law, free from negligence.[54] And, where a driver

[53] McCormack v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 333, 46 N. Y. Supp. 230, 2 Am. Neg. Rep. 631; denying rehearing, 44 N. Y. Supp. 684, 16 App. Div. (N. Y.) 24, 78 N. Y. St. R. 684. Judgment, however, entered on verdict for $12,000 ordered reversed unless plaintiff stipulated within twenty days to reduce the sum to $8,000.

[54] Saffer v. Westchester Elec. R. Co., 22 Misc. (N. Y.) 555, 49 N. Y.

was waiting, with his wagon across an electric railway track, for the gate to the place into which he was going to be opened, and called repeatedly to the motorman to stop the car, it was held that he was not, as a matter of law, guilty of contributory negligence. It was also held that the motorman was not, as a matter of law, free from negligence where, in the exercise of reasonable care, he could have seen the wagon in time to avoid running into it.[55] But where a driver left a milk wagon painted white, and without lights, upon an electric railway track, while he went down a side street to deliver milk to customers, it was held that he was guilty of such negligence as would preclude recovery.[56] In another case where a driver left a vehicle in a narrow, unlighted street, upon the track of an electric street railway in the night-time, while he went into a stable, such act was held to be contributory negligence which would bar recovery. It was said by the court in this case: "He left his horse and wagon standing unguarded upon the track and went into a stable in close proximity. How long he was absent does not appear, nor is it material. It was his duty to exercise the same watchful care when upon the track that the law exacts of the railway company in running its cars. It is an unbending rule to be observed at all times and under all circumstances that a person about to cross the track of a street railway must look in both directions for approaching cars before attempting to cross, * * * but compliance with this rule would be an idle ceremony if a person might afterwards stop his horse or vehicle upon the track, relax his vigilance and, leaving his horse unguarded, go into a building in the vicinity and there remain any length of time whatever. As well might a motorman desert his post of duty and go into the car to speak to a passenger, or for any other purpose."[57] Where, however,

Supp. 998. See Consol. Tract. Co. v. Behr, 59 N. J. L. 477, 37 Atl. 142, 2 Am. Neg. Rep. 189; McClellan v. Fort Wayne & Belle Isle Ry. Co., 105 Mich. 101, 62 N. W. 1025.

[55] McGrane v. Flushing & C. P. Elec. Ry. Co., 13 App. Div. (N. Y.) 177, 43 N. Y. Supp. 385.

[56] New York Condensed Milk Co. v. Nassau Elec. R. Co., 60 N. Y. Supp. 234, 29 Misc. (N. Y.) 127.

[57] Gilmore v. Federal St. & Pleasant Valley Pass. Ry. Co., 153 Penn. St. 31, 4 Am. Elec. Cas. 490, 25 Atl. 651, per Heydrick, J. See also Winter v. Federal St. & Pleasant Valley Pass. Ry. Co., 153 Penn. St. 26, 4 Am. Elec. Cas. 498, 25 Atl. 1028.

a driver stopped his wagon within six inches of the track, for the purpose of conversing with another driver, and the motorman saw the position of the wagon in time to have avoided a collision, but, without lessening the speed of the car, continued to approach, and the driver did not see the car until too late to avoid the collision, it was held that the company was liable.[58]

§ 596. **Imputed negligence — Person riding with driver.**— The contributory negligence of a driver in case of a collision with an electric street railway car will not be imputed to a third person riding with him and taking no part in the control or management of the vehicle so as to defeat recovery from the company, where the negligence of the latter is the proximate cause of the injury.[59] And this is also true where a person, while riding in a conveyance owned and driven by another, is injured by a collision with the pole of an electrical company which was, without necessity therefor, so placed that it was an obstruction to the use of the highway.[60] If, however, such person is directing the management of the horse, and instructing the driver in this particular, then the negligence of the driver will be imputable to him,[61] but it will not be so merely because of suggestions made by him as to the line of route to be taken,[62] or by a caution to "ride slow" in approaching a crossing.[63] And a person, in riding with the driver of a vehi-

[58] Atwood v. Bangor, Orono & Old Town Ry. Co., 91 Me. 399, 40 Atl. 67, 4 Am. Neg. Rep. 160.

[59] Cahill v. Cincinnati, N. O. & T. P. Ry. Co., 92 Ky. 345; 18 S. W. 2; United Railways & Elec. Co. v. Biedler, 98 Md. 564, 56 Atl. 813, 15 Am. Neg. Rep. 333; Consol. Tract. Co. v. Behr, 59 N. J. L. 477, 37 Atl. 142; Consol. Tract. Co. v. Hoimark, 60 N. J. L. 456, 38 Atl. 684, 9 Am. & Eng. R. Cas. (N. S.) 380, affg. 59 N. J. L. 297, 36 Atl. 100; Zimmerman v. Union Ry. Co., 4 Am. Neg. Rep. 665, 28 App. Div. (N. Y.) 445, 51 N. Y. Supp. 1; Strauss v. Newburgh Elec. R. Co., 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998; McCormack v. Nassau Elec. R. Co., 18 App. Div. (N. Y.) 333, 46 N. Y. Supp. 230; denying rehearing, 16 App. Div. (N. Y.) 24, 44 N. Y. Supp. 684; Kessler v. Brooklyn Heights R. Co., 3 App. Div. (N. Y.) 426, 38 N. Y. Supp. 799; Bergold v. Nassau Elec. R. Co., 30 App. Div. (N. Y.) 438, 52 N. Y. Supp. 11. But see Prideaux v. City of Mineral Point, 43 Wis. 513, 28 Am. St. Rep. 558.

[60] Little v. Central District & P Teleg. Co., 213 Pa. St. 229, 62 Atl 848.

[61] Zimmerman v. Union Ry. Co., 28 App. Div. (N. Y.) 445, 51 N. Y. Supp. 1, 4 Am. Neg. Rep. 665.

[62] Zimmerman v. Union Ry. Co., 28 App. Div. (N. Y.) 445, 51 N. Y. Supp. 1, 4 Am. Neg. Rep. 665.

[63] Bergold v. Nassau Elec. R. Co., 30 App. Div. (N. Y.) 438, 52 N. Y. Supp. 11.

cle, is not relieved from the consequences of his own failure to exercise due care.[64] So, where a person who was riding on an ice-wagon driven by his fellow-servant noticed a car approaching a short distance from the wagon, as it was about to cross the tracks, but did not slip from the wagon or warn the driver to stop or alter his course, it was held that he was not free from negligence.[65] And, where a driver of a vehicle turned upon a track with a car only a short distance away, and approaching on a down grade, and the motorman used every effort to stop the car but was unable to do so in time to prevent a collision, it was held that there was no evidence of negligence in the management of the car, and that a person riding with the driver could not recover damages from the company.[66]

§ 596a. **Imputed negligence — Electric light company not lighting streets — Liability of city.**— Where a person while traveling in a vehicle over a highway which an electric light company has contracted with the city to light and has negligently failed to keep its contract and in consequence thereof the person is injured while using such care as persons of ordinary prudence would use under like circumstances, it is decided that the negligence of the company will be imputed to the city which will be held liable for the injuries so occasioned. So, in a case against the city of Baltimore to recover for injuries so received the court said, after referring to the powers conferred upon the city: "There can be no question, then, that, as the municipal authorities of Baltimore had the power and authority to regulate and to remove obstructions from its streets, and to cause the streets to be lighted at the expense of the city, it was its plain duty to have kept the avenue lighted, and in a safe condition for public travel, on the night of the accident in question. The law is well settled that, if it negligently fails so to do, and persons acting without negligence on their part are injured while passing along its highways, the city is liable in damages for the injuries caused by the neglect, and

[64] Bergold v. Nassau Elec. R. Co., 30 App. Div. (N. Y.) 438, 52 N. Y. Supp. 11. See also Johnson v. Superior Rap. Trans. Co., 91 Wis. 233, 64 N. W. 753.

[65] Anderson v. Metropolitan St. Ry. Co. 30 Misc. R. (N. Y.) 104, 61 N. Y. Supp. 899.

[66] Kane v. People's Pass. Ry. Co., 181 Pa. St. 53, 37 Atl. 110, 2 Am. Neg. Rep. 61.

the person so injured can recover against the municipality therefor. * * * The municipality could not escape liability for its neglect of duty in not having its streets and avenues lighted at night because of the failure of an electric light company who had contracted to light the streets, but had neglected its duty. The neglect of the company would be the neglect of the city." [67]

§ 597. **Horses frightened — Noise of car — Duty of company.** — In the absence of negligence on the part of its employees an electric street railway company is not liable for accidents due to horses becoming frightened from the usual operation of its road.[68] And the question of negligence must be determined from the facts and circumstances in each case.[69] The company must exercise reasonable care, in the operation of its road, not to frighten horses, and for a failure to exercise such care the company will be liable.[70] So it is said, in one case: "The

[67] Mayor of Baltimore City v. Beck, 96 Md. 183, 53 Atl. 976, 13 Am. Neg. Rep. 313, per Briscoe, J.

[68] Wachtel v. East St. Louis & St. L. Elec. R. Co., 77 Ill. App. 465.

[69] Wachtel v. East St. Louis & S. L. Elec. R. Co., 77 Ill. App. 465. See following cases where under the facts question of negligence in either causing fright of horse or failing to observe that it had become restive. Kelly v. Pittsburg & B. Tract. Co., 10 Penn. Super. Ct. 644; Hill v. Rome St. R. Co., 101 Ga. 66, 28 S. E. 31, 3 Am. Neg. Rep. 353. Where horses were frightened by coats hung on the side of a water sprinkler operated by electricity over company's tracks, question of negligence held for jury. McCann v. Consol. Tract. Co., 59 N. J. L. 481, 38 L. R. A. 236, 36 Atl. 888, 7 Am. & Eng. R. Cas. (N. S.) 280, 1 Am. Neg. Rep. 478. Whether motorman was negligent in running car through a pool of water in such a manner as to frighten horses. Ayars v. Camden & S. R. Co. (63 N. J. L. 416), 43 Atl. 678.

[70] *Georgia*: Georgia Railway & Elec. Co., 120 Ga. 905, 48 S. E. 336. *Illinois*: Kankakee Elec. Ry. Co. v. Lode, 56 Ill. App. 454. *Maine*: Flewelling v. Lewiston & A. H. R. Co., 89 Me. 585, 36 Atl. 1056, 2 Am. Neg. Rep. 19, 6 Am. Elec. Cas. 488. *Massachusetts*: Joyce v. Exeter H. & A. St. Ry. Co. 190 Mass. 304, 76 N. E. 1054; Ellis v. Lynn & Boston R. Co., 160 Mass. 341, 35 N. E. 1127, 4 Am. Elec. Cas. 531. *Michigan*: McVean v. Detroit United Railway, 138 Mich. 263, 101 N. W. 527, 17 Am. Neg. Rep. 284. *Minnesota*: Oddie v. Mendenhall, 84 Minn. 58, 86 N. W. 881, 10 Am. Neg. Rep. 297. *New Jersey*: Cameron v. Jersey City H. & P. St. Ry. Co., 70 N. J. L. 633, 57 Atl. 417; McCann v. Consol. Tract. Co., 59 N. J. L. 481, 38 L. R. A. 236, 36 Atl. 888, 7 Am. &

motorman is supposed to know that his car is likely to frighten horses that are unaccustomed to the sight of such vehicles, while most horses are easily taught after a time to pass it without fear. It is his duty, if he sees a horse in the street before him that is greatly frightened at the car, so as to endanger his driver or other persons in the street, to do what he reasonably can in the management of his car to diminish the fright of the horse, and it is also his duty in running the car to look out and see whether, by frightening horses or otherwise, he is putting in peril other persons lawfully using the street on foot or with teams." [71] While a motorman need not necessarily stop his car upon the first indication of a horse being frightened, yet, where he has observed that a horse is frightened by the approach of his car, it would seem that such fact would be construed as sufficient notice to him to exercise reasonable care; that is, to act as a reasonably prudent man would under the same circumstances, and, therefore, if his car is advancing at a high rate of speed, to slacken its speed, or, if being run at only a moderate rate, to have it under control so that he may readily stop it if the latter act appear necessary from the subsequent actions of the horse. This duty he owes not merely to the person or persons in a vehicle, but also to the traveling public, who may suffer injury in case the horse becomes unmanageable. He should not wait until the horse is beyond the driver's control, for then any action on his part would probably avail little, but he should be required to act at that point of time in the occurrences when a reasonably prudent man might infer that the horse would become unmanageable, and would act.[72]

Eng. R. Cas. (N. S.) 280, 1 Am. Neg. Rep. 478. *North Carolina*: Doster v. Charlotte Street Ry. Co., 117 N. C. 651, 23 S. E. 449. *Texas*: Denison & S. Ry. Co. v. Powell, 35 Tex. Civ. App. 454, 80 S. W. 1054. *Virginia*: Danville Railway & Elec. Co. v. Hodnett, 101 Va. 361, 43 S. E. 606, 13 Am. Neg. Rep. 620, citing Joyce on Electric Law, § 597.

[71] Ellis v. Lynn & Boston R. Co., 160 Mass. 341, 4 Am. Elec. Cas. 531, 35 N. E. 1127, per Knowlton, J.

[72] Lines v. Winnipeg Elec. St. R. Co., 11 Manitoba Rep. 77; Terre Haute Elec. R. Co. v. Yant, 21 Ind. App. 486, 51 N. E. 732; Citizens' St. Ry. Co. v. Lowe, 12 Ind. App. 47, 39 N. E. 165, 5 Am. Elec. Cas. 436.

The above text is quoted with approval in Danville Railway & Elec. Co. v. Hodnett, 101 Va. 361, 43 S. E. 606, 13 Am. Neg. Rep. 620.

§ 598. **Horses frightened — Noise of cars — Cases.** — Where a woman was sitting in a sleigh standing at the side of the road when another team of horses drawing a wagon was coming off a bridge just as an electric car was approaching from the opposite direction at a high rate of speed, as was alleged, and the latter team showed signs of fright, but the motorman did not slacken the speed of the car, and the frightened team got beyond the control of the driver and ran into the sleigh, injuring the woman, it was held that the company was liable for the negligence of the motorman in not slackening speed or stopping when he saw, or should have seen, the frightened team.[73] And where a motorman, seeing that a horse was frightened by the car and becoming unmanageable, did not slacken or lessen the speed of the car it was held that he was guilty of negligence.[74] So, also, where there was a narrow road-space between the track and the outer edge of the road, it was held that it was the duty of those in charge of a car to lessen its speed or stop it when they saw, or with reasonable diligence should have seen, that horses were frightened.[75] Again, where it appeared that a girl fifteen years of age was riding with her sister, who was driving an ordinarily gentle horse which became frightened as a street car rapidly approached, causing an unusual commotion of dust and leaves, whereupon the girl jumped from the buggy with the intention of getting the horse by the head and holding him until the car passed and she was struck by the car which projected nearly two feet into the space between the rail and the curb and was injured, it was held that the questions of negligence were properly submitted to the jury and a judgment for plaintiff was affirmed.[76] In another case, where the motorman, although he observed that a team at the side of the track were uneasy, made no effort to stop his car or slacken its speed, it was held that such failure did not make him guilty of negligence where the driver had control of them until at the instant when they dashed on the track in front

[73] Lines v. Winnipeg Elec. St. R. Co., 11 Manitoba Rep. 77.

[74] Richter v. Cicero & P. St. R. Co., 70 Ill. App. 196; Danville Railway & Elec Co. v. Hodnett, 101 Va. 361, 43 S. E. 606, 13 Am. Neg. Rep. 621.

[75] Gibbons v. Wilkes-Barre & S. Street Co., 155 Penn. St. 279, 4 Am. Elec. Cas. 546, 26 Atl. 417; Geipel v. Steinway Ry. Co., 14 App. Div. (N. Y.) 551, 43 N. Y. Supp. 934.

[76] McVean v. Detroit United Railway, 138 Mich. 263, 101 N. W. 527, 17 Am. Neg. Rep. 284.

of the car.[77] Where a horse is frightened by the sudden and unusual noise of the passengers on a car, the company has been held not liable.[78] And it has also been held not liable for fright of an animal caused by the usual noise incident to running the car by electricity, where no unnecessary noise has been made for the purpose of scaring the animal.[79]

§ 599. **Horses frightened — Sounding of gong.**— As a general rule it is the duty of the motorman to give timely warning of the approach of the car so as to avert any danger of injury to pedestrians or persons in vehicles, and generally electric street cars are provided with gongs for this purpose. It, therefore, follows, that since the duty is imposed upon the company of giving timely warning of the approach of its cars, a motorman is not guilty of negligence in ringing such gong, though, as a result thereof, a horse becomes frightened and injury ensues, unless there was something in the behavior of the horse to indicate that it was frightened prior thereto.[80] If, however, the motorman sees, or, by the exercise of ordinary diligence could see, that horses are frightened by the ringing of the gong, and are liable to become unmanageable, and he continues ringing the gong without regard to such fact then he is guilty of negligence.[81]

§ 600. **Rate of speed excessive or prohibited.**— Pedestrians or persons in vehicles have a right to assume that electric street

[77] Flaherty v. Harrison, 98 Wis. 559, 74 N. W. 360, 10 Am. & Eng. R. Cas. (N. S.) 176. See also Eastwood v. La Crosse City R. Co., 94 Wis. 163, 68 N. W. 651.

[78] Boatwright v. Chester & M. Elec. R. Co., 4 Penn. Super. Ct. 279, 40 Week. N. of Cas. 330, 6 Del. Co. Rep. 558.

[79] Doster v. Charlotte St. R. Co., 117 N. C. 651, 34 L. R. A. 481, 23 S. E. 449.

[80] Henderson v. Greenfield & T. F. St. R. Co., 172 Mass. 542, 52 N. E. 1080, 5 Am. Neg. Rep. 625; North Side St. Ry. Co. v. Tippins (Tex. 1890), 14 S. W. 1067, 3 Am. Elec. Cas. 489.

[81] Wachtel v. East St. Louis & St. L. Elec. R. Co., 77 Ill. App. 465; Galesburg Elec. Motor & P. Co. v. Manville, 61 Ill. App. 490, 6 Am. Elec. Cas. 476; Owensboro City R. Co. v. Lyddane, 19 Ky. L. Repr. 698, 41 S. W. 578, 3 Am. Neg. Rep. 170; Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 4 Am. Elec. Cas. 517; Citizens' Ry. Co. v. Hair (Tex. Civ. App.), 32 S. W. 1050, 6 Am. Elec. Cas. 589.

cars will be run moderately and prudently, and it is the duty of the company to regulate the speed of its cars in conformity to the locality in which its cars are being operated.[82] The mere fact of a collision, however, between an electric car and a vehicle is not sufficient to establish the fact that a car is running at an improper rate of speed in the absence of other evidence.[83] And it is held that, though an electric car may be run at a rate of speed forbidden by an ordinance, yet the mere fact of a collision while so running does not render the company liable, unless it appears that such violation was the proximate cause of the injury.[84] But, in an action for injuries caused by a collision with an electric car, it is held that a nonsuit should not be granted where it appeared that the car was running at a prohibited rate of speed, and that no signal was given, though the accident might not have happened if plaintiff had used ordinary care and caution.[85] And, where a car proceeding at an unlawful rate of speed struck a vehicle, breaking the shaft and causing the horse to run away, it was held that the unlawful speed of the car was the proximate cause of an injury to the driver in being struck by the shaft while trying to secure the horse.[86]

§ 601. **Young horse frightened by cars.**— Electric street railways have an equal right with the public to the use of the streets. Electric street cars are for the purpose of aiding public travel and promoting the public convenience, and it necessarily follows that where any accident occurs, which is due to the usual and necessary operation of the road, the company will not be liable where it is free from negligence. In many cases horses, young and unaccustomed to electric cars, are taken on streets, where such cars are running, for the purpose of trying them and accustoming them thereto. The driver of such a horse, in so doing, must be held to a knowledge of the fact that young horses are usually greatly frightened at the appearance of the cars, and are likely to become unmanageable,

[82] Toronto R. Co. v. Gosnell, 24 Can. Sup. Ct. 582. See section on Maintenance and Operation as to Rate of Speed.

[83] Guilloz v. Ft. Wayne & B. I. R. Co., 108 Mich. 41, 65 N. W. 666, 2 Det. L. News, 808.

[84] Davidson v. Schuylkill Tract. Co., 4 Penn. Super. Ct. 86. See in this connection § 571a herein.

[85] Dederichs v. Salt Lake City R. Co., 13 Utah, 34, 44 Pac. 649.

[86] Duffy v. Cincinnati St. R. Co., 2 Ohio C. P. 294.

and he must be held to have assumed a certain amount of risk in making the attempt; that is, a degree of risk extending to that point where it may be said that the negligence of the company in the operation and management of its car is the proximate cause of the injury. The company, however, will not be liable for any injury resulting from the fright of the horse which arises from the usual and necessary incidents in connection with the running of its cars, but, on the other hand, it will be held to the exercise of the same degree of care as is generally required in cases of the fright of horses; that is, those in charge of the car must exercise such care as a reasonably prudent man would exercise under the same circumstances.[87]

§ 602. **Horse injured by electricity from rails.**— Where a horse being driven upon the public street is injured by contact with the rails of an electric street railway, such fact is presumptive proof of negligence by the company in the operation of its road.[88] Thus it was so declared, and the company held liable, where a horse, in being driven across electric railway tracks, stopped immediately as he stepped upon one of the rails and then plunged violently forward and ran away, injuring the two occupants of the vehicle, it appearing upon subsequent examination that he had suffered from an electrical shock.[89]

[87] Cornell v. Detroit Elec. Ry. Co., 82 Mich. 495, 3 Am. Elec. Cas. 486, 46 N. W. 791. See also Flewelling v. Lewiston & A. H. R. Co., 89 Me. 585, 36 Atl. 1086, 2 Am. Neg. Rep. 19.

[88] Trenton Pass. Ry. Co. v. Cooper, 60 N. J. L. 219, 38 Atl. 730, 38 L. R. A. 637, 2 Am. Neg. Rep. 55; Clarke v. Nassau Elec. R. Co., 9 App. Div. (N. Y.) 51, 41 N. Y. Supp. 78, 75 N. Y. St. Repr. 439, 6 Am. Elec. Cas. 234.

See Wood v. Wilmington City Railway Co. (Del. 1905), 64 Atl. 246, wherein it is held that it is incumbent on plaintiff, in an action for injury alleged to have been caused to a horse by electric shock from the rails of a street railway, to prove by a preponderance of the evidence that the injury was caused by the electric current as alleged, that the current came from the railway track of the defendant company, and that it came by reason of the fault or negligence of the defendant. But where the doctrine of *res ipsa loquitur* applies, that is, that the accident itself with all its surroundings, speaks in such a way and is of such a character as to show negligence on the part of the company, the burden is then imposed upon it of rebutting such negligence by proof.

[89] Trenton Pass. Ry. Co. v. Cooper, 60 N. J. L. 219, 38 Atl. 730, 38 L. R. A. 637, 2 Am. Neg. Rep. 55.

§ 602a. **Horse hitched to post supporting electric sign — Killed by shock.**— An electrical company cannot be held liable for the death of a horse, hitched to a post supporting an illuminated sign, caused by an electrical current communicated to the horse as a result of some defect in construction, or from a lack of perfect insulation, of the wires, where it appears that such company has no interest in or control over the wires or post.[90] Where, however, the wires are shown to be under the control and the property of the company, it would be obligated to exercise a high degree of care to prevent injury from such causes and where it has failed to exercise the degree of care required it should be held liable for the injury resulting therefrom.

§ 603. **Horse left unhitched in street.**— A driver is guilty of negligence in leaving a horse unhitched, unattended, and out of his control and reach in a city street, and in the absence of negligence of the employees in charge of a car an electric street railway company will not be liable where injury ensues as a result thereof.[91] So, where a horse which was left unhitched in the street suddenly backed the wagon into a passing car, it was held that the company was not liable.[92]

§ 604. **Bicyclists — Rights and duties of.**— The right of the bicyclist in the streets is equal with that of other travelers, and he is also under the same obligations and duties in respect to other persons using the streets. The duties imposed upon him in case he is upon or about to cross electric railway tracks are also the same as are imposed upon the traveling public in general, and the questions of negligence and contributory negligence, and of the liability of the railway company in cases of injuries received by a collision, are subject to the same general rules and principles which we have stated in the preceding sections of this chapter. A bicyclist should exercise ordinary care when about to go upon the tracks of an electric street railway, or when riding thereon should turn out for approaching cars when necessary, and should, under such circumstances,

[90] Memphis Consol. Gas & Elec. Co. v. Speers, 143 Tenn. 83, 81 S. W. 595, 16 Am. Neg. Rep. 596.

[91] Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86.

[92] Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352, 41 Atl. 86.

use reasonable care to avoid danger.[93] And it is declared that the motorman of an electric car, where he has given the customary warning of the approach of the car, is justified in assuming that a bicyclist riding on the track in front of the car has made himself aware of its approach, and will either increase his speed or turn aside from the track, since it is a matter of common knowledge that a bicycle propelled by a rider of ordinary skill and experience can be made to attain a much higher speed than that ordinarily attained by electric cars, and can, with slight effort, be turned aside almost instantly, and in much quicker time than a pedestrian or a vehicle can turn.[94] The question, however, of the liability of the company must depend upon the circumstances in each case, subject to the general principles already stated by us in this chapter. So, where a person unaccustomed to riding a bicycle attempted to ride one upon a city street, it was held that she was not guilty of such contributory negligence as would preclude recovery for injuries sustained by being run over, without warning, by a street car.[95] And though it appears that the negligence of the deceased in coming upon the track in a position of danger, in the first instance, contributed toward the collision, yet if there is evidence tending to show that the motorman in control of the car which caused the death saw the deceased in the position of danger, or, by the exercise of reasonable diligence, should have seen him in time to stop the car and avoided the death, the proximate cause of death is one of fact for the jury.[96] But it was held that the motorman was not guilty of negligence, rendering the company liable for injuries to a bicyclist where

[93] Everett v. Los Angeles Consol. Elec. R. Co., 115 Cal. 105, 43 Pac. 207, 34 L. R. A. 350, 6 Am. Elec. Cas. 460, affd., 46 Pac. 889.

[94] Everett v. Los Angeles Consol. Elec. R. Co., 115 Cal. 105, 34 L. R. A. 350, 43 Pac. 207, 6 Am. Elec. Cas. 460, affd., 46 Pac. 889.

[95] Louisville R. Co. v. Blaydes, 21 Ky. Law Rep. 480, 668, 51 S. W. 820.

[96] Metropolitan Street Ry. Co. v. Arnold, 67 Kan. 260, 72 Pac. 857, 14 Am. Neg. Rep. 297. See also Rawitzer v. St. Paul City Ry. Co., 93 Minn. 84, 100 N. W. 664, 16 Am. Neg. Rep. 453.

It is not necessarily negligent for a traveler upon a bicycle to stop upon the track in front of an approaching car, without looking behind him, when the usual audible warning of its approach, by bell or gong, is not given by the motorman. Zolpher v. Camden & Suburban Ry. Co., 69 N. J. L. 417, 55 Atl. 249, 14 Am. Neg. Rep. 407.

he suddenly came upon the track from behind a wagon at a cross street.[97]

§ 604a. **Bicyclist between tracks turning onto track — Effect of custom as to direction of cars on certain tracks.**— Where a person who is riding between the double tracks of an electric street railway suddenly turns upon the track in front of a car approaching from the rear, it is held that the motorman is not chargeable with negligence.[98] And where a bicyclist riding between tracks desires to turn onto the track from which a car might strike him from the rear, if run in accordance with its custom, he should exercise reasonable care to see that he can do so with safety, and a failure to exercise such care would ordinarily constitute contributory negligence which would preclude recovery for an injury sustained as a result of being struck from the rear. And though cars may frequently or generally be run in the opposite direction to that in which a bicyclist may be riding as he turns onto the track in response to a signal from the rear as he is riding between tracks, yet it has been declared that this is contributory negligence unless it can be shown that he had a right to rely upon the practice as an invariable one.[99] And

[97] Gould v. Union Traction Co., 190 Penn. St. 198, 42 Atl. 477, 43 Week. N. of Cas. 521, 5 Am. Neg. Rep. 717. See also Hine v. Bay Cities Consol. St. R. Co., 115 Mich. 204, 73 N. W. 116, 4 Det. L. News, 813; Cardonner v. Metropolitan St. R. Co., 38 App. Div. (N. Y.) 597, 56 N. Y. Supp. 500.

Negligence cannot be imputed because of the failure to perform a duty so suddenly and unexpectedly arising that there is no opportunity to comprehend the situation and act according to the exigency. McKee v. Harrisburg Traction Co., 211 Pa. St. 47, 60 Atl. 498, 18 Am. Neg. Rep. 254.

[98] Gagne v. Minneapolis St. R. Co., 77 Minn. 171, 79 N. W. 671.

[99] Baldwin v. Heraty, 136 Mich. 15, 98 N. W. 739, 15 Am. Neg. Rep. 589. In this case it appeared that a bicyclist riding between tracks, heard a car approaching from the rear and supposing the car was on the east track turned, without looking, upon the west track to allow the car to pass and that the wheel was almost immediately struck from the rear and the rider killed by a car going north. The evidence also showed that it was customary, and probably necessary, for the car to go north on the west track for a certain distance and some cars did so regularly. The plaintiff's proof tended to show that it was customary for north bound cars to go on the east track. The court declared that the evidence showed no such uniformity of practice as

in a case in Illinois a judgment for the plaintiff was reversed, on the ground of an error in the instructions to the jury, from which it was said they would be justified in understanding that he had a right to rely upon the continued observance by the railroad company of that which it was contended to be understood to be a fixed and established custom and that, if he did so rely thereon, it should be deemed as a matter of law, that he had exercised ordinary care, the court declaring that it was for the jury to determine whether the deceased exercised ordinary care and that this instruction invaded the province of the jury.[1]

§ 605. **Injuries from poles — Collision with.**— The fact that authority is conferred upon an electrical company to erect its poles in the streets or highways does not authorize it to so erect them as to unnecessarily interfere with public travel and if due care is not exercised by a company in the location of its poles and public travel is unnecessarily impeded in consequence of which a person is injured, the company will be liable therefor, in the absence of contributory negligence on the part of the person injured. In such cases the questions of negligence of the company and of contributory negligence of the one injured are ordinarily for the jury to determine.[2] In most cases the

to justify the decedent in taking it for granted that the car was upon the east track and disregarding the duty of turning his head to see whether he was safe when he heard the bell and that the court might properly have said to the jury that the deceased was guilty of contributory negligence.

[1] North Chicago Street Ry. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077, 14 Am. Neg. Rep. 19. See also as to question of negligence where car not on customary track. Minnich v. Wright, 214 Pa. St. 201, 63 Atl. 428.

[2] Little v. Central District & Printing Teleg. Co., 213 Pa. St. 229, 62 Atl. 848, 19 Am. Neg. Rep. 521; Borough of Norwood v. Western Union Teleg. Co., 25 Pa. Super. Ct. 406; Alice, Wade City, etc., Teleph. Co. v. Billingsley, 33 Tex. Civ. App. 452, 77 S. W. 255; Watts v. Southern Bell Teleph. Co., 100 Va. 45, 40 S. E. 107, 3 Va. Sup. Ct. Rep. 577.

In Massachusetts it is decided under a statute of that State (Mass. Rev. Laws, c. 122, § 15) that where a person is injured by the vehicle in which he is riding striking a telephone pole the company will be liable for such injury without regard to the question of its negligence in the absence of contributory negligence on the part of the person injured. Riley v. New England Teleg. & Teleph. Co., 184 Mass. 150, 68 N. E. 17.

poles of electrical companies are located in accordance with the direction of the local authorities, such designation of location being often required as a condition precedent to their erection.[3] Such poles should, however, be erected so as not to constitute a nuisance to the traveling public, and the fact that the local authorities may have designated their location, or directed their erection, is, as a general rule, held not to be conclusive as to their not being a nuisance. So, where an electrical company has erected poles in dangerous proximity to the traveled portion of the highway, and a traveler in a vehicle, while in the exercise of due care and vigilance, is injured by contact therewith, the company will be liable for the injury, and it is held that a municipality which directs or permits the maintenance of a pole in such a dangerous locality will be liable jointly with the company.[4] So, where a person was driving a horse which became frightened, and although he used every effort to subdue it he could not prevent the vehicle from striking a telephone pole, it was held he could recover damages for injuries received.[5] But if the poles do not impede or obstruct public travel, and are so placed that only a runaway horse would come into collision with them there can be no recovery.[6] So, where a person was injured by the breaking of a pole, it was held that if the proximate cause of the breaking was the collision of a runaway team with the pole, which was so placed as to be safe from the ordinary dangers of collision, there could be no recovery, and this irrespective of the strength or weakness of the pole.[7] But where a hack collided with a pole encroaching upon the roadway, it was held that the negligence of the driver could not be imputed to a gratuitous passenger riding at the driver's invitation.[8]

[3] See §§ 362, 363, herein.

[4] Therien v. Montreal (Rap. Jud., Quebec), 15 C. S. 380; Atkinson v. Chatham, 29 Ont. Rep. 518; Cleveland v. Bangor, 87 Me. 259, 47 Am. St. Rep. 326, 32 Atl. 892; Trustees of Village of Geneva v. Brush Elec. L. Co., 50 Hun (N. Y.), 581, 20 N. Y. St. R. 422, 3 N. Y. Supp. 595, 2 Am. Elec. Cas. 303, aff'd., 130 N. Y. 670, 41 N. Y. St. R. 952, 29 N. E. 1034. But see Young v. Inhabitants of Yarmouth, 9 Gray (Mass.), 386; Allen's Teleg. Cas. 65.

[5] Wolfe v. Erie Teleg. & Teleph. Co., 33 Fed. 320.

[6] Roberts v. Wisconsin Teleph. Co., 77 Wis. 589, 46 N. W. 800, 3 Am. Elec. Cas. 471.

[7] Allen v. Atlantic & Pac. Teleg. Co., 21 Hun (N. Y.), 22, 1 Am. Elec. Cas. 310.

[8] Fisher v. Mt. Vernon, 41 App. Div. (N. Y.) 233, 58 N. Y. Supp. 499.

§ 605a. **Injuries from poles — Falling of.**— An electrical company should exercise reasonable care in the maintenance of its poles and if, owing to the negligence of the company in this respect, a pole, either from decay or other cause, falls and injures a person upon the highway, who is in the exercise of due care, the company will be liable for the injury so caused.[9] And where a company is engaged in removing a pole the fact that one who is employed upon the street continues to work in such proximity to the pole that he is struck and injured by the pole falling is not of itself such contributory negligence as a matter of law which will preclude a recovery.[10]

§ 606. **Broken wires — Injury to traveler — Negligence — Contributory negligence.**— While an electrical company is not an insurer of the safety of the passer-by from injuries due to the falling or breaking of its wires,[11] yet it must exercise reasonable care to prevent such accidents.[12] And, where a traveler

[9] Joseph v. Edison Elec. Co., 104 La. 634, 29 So. 223. See Cumberland Teleph. & Teleg. Co. v. Warner, 25 Ky. Law. Rep. 1843, 79 S. W. 199; West Kentucky Teleph. Co. v. Pharis, 25 Ky. Law Rep. 1838, 78 S. W. 917. See § 455 herein.

[10] Kyes v. Valley Telephone Company, 132 Mich. 281, 93 N. W. 623, 13 Am. Neg. Rep. 340. The court said: "The defendant does not contend that there was no evidence of negligence on the part of the defendant, but upon the trial insisted and requested the court to instruct the jury that the deceased was guilty of contributory negligence. It is insisted that he continued to work in this dangerous position with full knowledge that the pole was liable to fall. We cannot concur in this view. It is unnecessary to state the testimony in detail. He was not warned by the defendant that there was any danger. The fact that he knew that the telephone wires were being cut and removed, and that some of them had fallen near where he was at work, was not sufficient notice to him that the pole would fall. He had a right to act upon the belief that when the defendant's employees were ready to take down the pole they would notify him, if there was any danger, or would adopt safe means to take it down." Per Grant, J.

[11] Citizens' Ry. Co. v. Gifford, 19 Tex. Civ. App. 631, 47 S. W. 1041. See sections herein in chapter XXI on "Maintenance and Operation."

[12] See §§ 449a–454 herein in chapter XXI on "Maintenance and Operation."

Where wire beoomes crystallized. A person who maintains a wire in the street subjected to strain, and charged with electricity, after the wire has undergone usage for such a length of time that according to experience it has probably become crystallized, is not in a strict sense,

is injured by contact with an electrical wire lying upon the surface of the street or suspended in close proximity thereto, the presence of such wire, it would seem, would raise a presumption of negligence,[13] as would also the falling of a wire whereby a passer-by is injured,[14] and in each case the burden is upon the company maintaining the wire, of overcoming such presumption. In a case in New York, where a trolley wire fell, injuring a passer-by, it was held that the presumption of negligence on the part of the company was not overcome by evidence of interested persons that the supports used were the best obtainable, and that the line was frequently inspected, where it appeared that a device called the "breaker system" was in use, which, if properly adjusted, would automatically cut off the current, if the wire touched the ground.[15] In a case in Pennsylvania, however, it is held that no presumption of negligence arises against an electric street railway company by reason of the mere breaking of a trolley wire, as a result of which a horse becomes frightened, and persons in the vehicle are injured.[16] A person who, in crossing a street diagonally, is struck and

"warned" of the danger, but is, or rather should be, advised of it. Citizens' Street R. R. Co. v. Batley, 159 Ind. 368, 65 N. E. 2, 13 Am. Neg. Rep. 48.

The specific cause of an accident need not be shown, it being sufficient if such facts and circumstances are proved as will fairly justify an inference by the jury of negligence on the part of the company. Wolpers v. New York & Queens Elec. L. & P. Co., 91 App. Div. (N. Y.) 424,, 86 N. Y. Supp. 845.

[13] Western Un. Teleg. Co. v. State, Nelson, 82 Md. 293, 33 Atl. 763, 6 Am. Elec. Cas. 210; Newark E. L. & P. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 5 Am. Neg. Rep. 405, affirmed; Ruddy v. Newark Electric L. & P. Co., 63 N. J. L. 357, 46 Atl. 1100; Wolpers v. New York & Queens Elec. L. & P. Co., 91 App. Div. (N. Y.) 424, 86 N. Y. Supp. 845; Boyd v. Portland General Elec. Co., 41 Or. 336, 68 Pac. 810; Norfolk Railway & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502; compare Augusta Railway & Elec. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444.

[14] O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, 58 Alb. L. Jour. 347.

[15] O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, 58 Alb. L. Jour. 347.

[16] Kepner v. Harrisburg Traction Co., 183 Penn. St. 24, 38 Atl. 416, 4 Am. Neg. Rep. 77. In this case it appeared that a horse became frightened by the noise and sparks occasioned by a trolley wire breaking, and that the plaintiff was either thrown or jumped from the wagon, and that neither the wire nor the sparks touched the wagon, the horse, the plaintiff or his companion.

injured by falling wires, is not guilty of contributory negligence in attempting to cross in such manner where there is nothing in the surroundings to charge him with notice that he incurs greater danger by crossing diagonally.[17] And the failure of a traveler to notice a broken electrical wire over which he falls is not contributory negligence as a matter of law.[18] In another case where a pedestrian was injured by the breaking of a span-wire, which supported trolley wires, it was held that the doctrine of "res ipsa loquitur" applied.[19] Again where employees of a city are cutting down a telephone pole which, in its fall, causes one of the wires to strike and injure a boy, it is held that the city will be liable, though the boy may have been warned, and was struck while running away as the pole fell.[20] So, also, where a patrol wire used by the city fell and killed a pedestrian, it was held that the city was liable.[21] But where a horse which was left unattended and unhitched in a street was frightened and ran away, owing to the fall of a broken telegraph wire which struck him, it was held that the company was not liable for his death.[22] In this class of cases the questions of negligence are ordinarily ones for the jury to determine.[23]

[17] City of Denver v. Sherrett, 60 U. S. App. 104, 31 C. C. A. 499, 88 Fed. 226, 5 Am. Neg. Rep. 520.

[18] Brush Elec. L. Co. v. Kelley, 126 Ind. 220, 25 N. E. 812, 3 Am. Elec. Cas. 857.

[19] Jones v. Union R. Co., 18 App. Div. (N. Y.) 267, 46 N. Y. Supp. 321. See also Clancy v. New York & Q. C. Ry. Co., 82 App. Div. (N. Y.) 563, 81 N. Y. Supp. 875; Smith v. Brooklyn Heights R. Co., 82 App. Div. (N. Y.) 531, 81 N. Y. Supp. 838; Chaperon v. Portland General Elec. Co., 41 Or. 39, 67 Pac. 928.

[20] McGaw v. Lancaster (C. P.), 14 Lanc. L. Rev. 276.

[21] Twist v. Rochester, 37 App. Div. (N. Y.) 307, 55 N. Y. Supp. 850. See also Emery v. City of Philadelphia, 208 Pa. St. 492, 57 Atl. 977, 16 Am. Neg. Rep. 563.

[22] Western Un. Teleg. Co. v. Quinn, 56 Ill. App. 319.

[23] *Alabama*: Postal Teleg. Cable Co. v. Jones, 133 Ala. 217, 32 So. 500. *Georgia*: Lloyd v. City & Suburban Ry. Co., 110 Ga. 165, 35 S. E. 170, *Illinois*: Economy Light & P. Co. v. Hiller, 203 Ill. 518, 68 N. E. 72, affg., 106 Ill. App. 306. *Indiana*: Central Union Teleph. Co. v. Sokola, 34 Ind. App. 429, 73 N. E. 143. *Kentucky*: Lexington Railway Co. v. Fairis, Admr., 24 Ky. Law. Rep. 1443, 71 S. W. 628; Macon v. Paducah Street Ry. Co., 23 Ky. Law Rep. 46, 62 S. W. 496. *Massachusetts*: Linton v. Weymouth Light & P. Co., 188 Mass. 276, 74 N. E. 321, 18 Am. Neg. Rep. 459. *New Jersey*: Rowe v. New York & N. J. Teleph. Co., 66 N. J. L. 19, 48 Atl. 523. *New York*:

§ 607. **Broken wire in contact with other wires.**— Electrical wires in breaking and falling frequently come in contact with other electrical wires, as a result of which they become charged with a dangerous current of electricity. Where a traveler is injured by contact with a broken wire so charged, recovery may be had of the company maintaining such wire if the breaking and falling thereof may be attributed to its negligence, though the current is received by contact with another wire carrying the dangerous current.[24] And it is held to be negligence on the part of a company to suspend wires in such a position that, in the event of their breaking, they will become charged with a dangerous current of electricity from wires underneath.[25] Or, after they have fallen, to permit them to remain for an unreasonable length of time where they will be a source of danger to the traveling public.[26] If the company whose wire has broken and fallen across another wire negligently permits it to remain there, where, by contact, it receives a dangerous current of electricity, and the company maintaining the other wire has failed to provide guard-wires, and to

Wolpers v. New York & Queens Elec. L. & P. Co., 91 App. Div. 424, 86 N. Y. Supp. 845; Ensign v. Central New York Teleph. & Teleg. Co., 79 App. Div. 244, 79 N. Y. Supp. 799, affirmed, 179 N. Y. 539, 71 N. E. 1130; Gordon v. Ashley, 34 Misc. R. 743, 70 N. Y. Supp. 1038. *Oregon*: Boyd v. Portland General Elec. Co., 41 Or. 336, 68 Pac. 810. *Texas*: Wehner v. Lagerfelt, 27 Tex. Civ. App. 520, 66 S. W. 221.

Notice to, and negligence of, city. Whether a public street in a city, rendered unsafe for travel by the falling of an electric wire, has remained in such a condition a sufficient length of time to charge the city with constructive notice of its unsafe condition or whether the city has actual notice of the unsafe condition of the same, and might with reasonable diligence after the receipt of such notice have repaired the same and averted an alleged injury occasioned thereby, is a question of fact for the jury, not a question of law for the court. Burns v. City of Emporia, 63 Kan. 285, 65 Pac. 260, 10 Am. Neg. Rep. 47.

[24] City of Albany v. Watervliet Turnpike & R. Co., 76 Hun (N. Y.), 136, 57 N. Y. St. R. 453, 27 N. Y. Supp. 848, 4 Am. Elec. Cas. 367; Western Un. Teleg. Co. v. State, Nelson, 82 Md. 293, 33 Atl. 763, 6 Am. Elec. Cas. 210. See § 499a herein as to duty to prevent contact of wires.

[25] Caron v. La Cité De St. Henri, 9 Rap. Jud. de Queb. (Cour Super., 1896), 490.

[26] Caron v. La Cité De St. Henri, 9 Rap. Jud. de Queb. (Cour Super.) 490. See, also, more fully, sections in c. XXI on "Maintenance and Operation."

notice the condition of the wire which broke, and which was such as to arrest the attention of a prudent man engaged in the business of either company, it is held that both companies will be jointly liable for injuries to a traveler caused by contact therewith.[27] If, however, the company maintaining the broken wire is free from negligence, and owing to the negligence of the company maintaining the wire across which it falls, such broken wire becomes charged with a current of electricity, causing injury to a traveler, the latter and not the former company will be liable.[28] And where it appeared that a boy was injured by contact with a broken telephone wire which lay upon the ground in a public street and through which a dangerous current passed as a result of a contact with an improperly insulated and unprotected electric light wire against which it was pressed by the limb of a tree which was broken during a severe storm, it was decided that, though only a short time elapsed between the breaking of the wire and the accident, the question of defendant's negligence was for the jury, and it was declared that the sole proximate cause of the accident was not the breaking of the limb but that the failure to properly insulate or to guard the wire were concurring causes.[29] And it is not necessarily negligent in a person upon the highway to take hold of a wire for the purpose of removing it from his way.[30] Again in an action against a village to recover for an injury caused by contact with a broken wire it has been decided that the negligence of the village is a question for the jury, to be determined with reference to the length of time they might find the wire had been hanging down, whether the village knew or should have known of its condition, and also with reference to the place at which it was hanging, and whether it was likely at that point to be dangerous, and it is held that

[27] Electric Railway Co. v. Shelton & Cumberland Teleph. & Teleg. Co., 89 Tenn. 423, 3 Am. Elec. Cas. 477, 14 S. W. 863.

[28] Morgan v. Bell Teleph. Co., Rapports Judiciares De Quebec, 11 C. S. 103. See also Kankakee Ry. Co. v. Whittemore, 45 Ill. App. 484, 4 Am. Elec. Cas. 362; Macon v. Paducah Street Ry. Co., 23 Ky. Law Rep. 46, 62 S. W. 496.

[29] Warren v. City Electric Railway Co., 141 Mich., 298, 104 N. W. 613, 19 Am. Neg. Rep. 21.

[30] Fox v. Village of Manchester, 183 N. Y. 141, 75 N. E. 1116, 19 Am. Neg. Rep. 416.

no notice on the part of the village of the obstruction or danger being shown it cannot be held liable.[31]

§ 608. **Wires sagging or suspended low.**— We have already stated in a prior part of this work that it is the duty of electrical companies whose wires are suspended along or across the streets and highways, to string them in such a manner as not to interfere with or obstruct public travel.[32] If a traveler who is free from contributory negligence is injured by contact with wires stretched along or across a public highway he may recover from the company maintaining such wires, for the injury.[33] And a person who is traveling in a vehicle along a public street need not, to relieve himself from a charge of contributory negligence, be continually on the lookout to see if any wires are not suspended at a sufficient height to enable his vehicle to pass thereunder in safety, assuming of course that the vehicle in which he is riding is such a one as may be ordinarily used in safety so far as any collision with wires may be concerned. He is only held to the exercise of that degree of care which a reasonably prudent man would exercise in traveling through the street in a similar vehicle under similar circumstances and where he has exercised such a degree of care and it appears that he has been injured by collision with a wire under such circumstances and the hanging of the wire at such a height can be attributed to the negligence of the company maintaining it, such company will be liable therefor.[34] So, where a wire stretched across a highway had be-

[31] Fox v. Village of Manchester, 183 N. Y. 141, 75 N. E. 1116, 19 Am. Neg. Rep. 416.

[32] See sections herein, in chapters on "Construction" and "Maintenance and Operation."

[33] Dickey v. Maine Teleg. Co., 43 Me. 492, 46 Me. 483, Allen's Teleg. Cas. 139; Pennsylvania Teleg. Co. v. Varnan (Penn.), 15 Atl. 624. See Postal Teleg.-Cable Co. v. Jones, 133 Ala. 217, 32 So. 500.

[34] Jones v. Finch, 128 Ala. 217, 29 So. 182; Jacks v. Reeves (Ark. 1906), 95 S. W. 782. See Hovey v. Michigan Teleph. Co., 124 Mich. 607, 83 N. W. 600, holding that whether a person is negligent in not seeing a wire in such a case is one of fact for the jury.

It is prima facie evidence of negligence on the part of the company where it is shown that an accident occurred from such a cause and that injury resulted therefrom and where evidence of these facts is given the company has the burden of proving that it was in the exercise of due care prior to and at the time of the occurrence of the injury. Jacks v. Reeves (Ark. 1906), 95 S. W. 781.

come slack, and a passenger in a stage coach, which was upset by collision therewith, was injured, it was held that the company was liable.[35] But it was held in this case that the passenger must not only show that the company maintaining the wire was at fault, but must also show that both she and the driver were in the exercise of due care.[36] In another case, where a driver of a float above the ordinary height veered from one side of the street to the other to avoid collision with a wagon, and in so doing the float came in contact with an electric light wire suspended over parts of the street at a distance of fifteen feet from the ground, it was held that he was not guilty of contributory negligence.[37] And, where a telegraph wire had been permitted by the company to remain suspended within one and a half to two feet from the ground and across a highway for a period of two and a half months, it was held that a traveler who was injured by his horse striking the wire was not precluded from recovery because no notice had been given to the company of its own neglect.[38] Due diligence, however, on the part of a street railway company to prevent injury to travelers from a sagging wire is shown where the company both discovers with reasonable promptness that the wire is sagging and also takes steps at once to remove the danger.[39]

§ 609. **Collision with guy-wire.**— Where a traveler is injured by collision with a guy-wire negligently placed or maintained by the company, the latter will be liable where the traveler was in the exercise of due care.[40] And if there is

[35] Dickey v. Maine Teleg. Co., 43 Me. 492, 46 Me. 483, Allen's Teleg. Cas. 139.

[36] Dickey v. Maine Teleg. Co., 43 Me. 492, 46 Me. 483, Allen's Teleg. Cas. 139.

[37] Williams v. Louisiana E. L. & P. Co., 43 La. Ann. 295, 8 So. 938, 3 Am. Elec. Cas. 479.

[38] Western Un. Teleg. Co. v. Engler, 21 U. S. C. C. A. 246, 44 U. S. App. 517, 75 Fed. 102.

[39] Read v. City & Suburban Ry. Co., 115 Ga. 366, 41 S. E. 629.

[40] *Delaware*: Neal v. Wilmington & N. C. Elec. Ry. Co., 3 Pen. 467, 53 Atl. 338. *Kentucky*: Louisville Home Teleph. Co. (Ky. 1906), 93 S. W. 1057. *Montana*: Lundeen v. Livingston E. L. Co., 17 Mont. 32, 41 Pac. 995. *Nebraska*: New Omaha Thompson-Houston Elec. L. Co. v. Johnson, 67 Neb. 393, 93 N. W. 778. *New York*: Sheldon v. Western Un. Teleg. Co., 51 Hun, 591, 22 N. Y. St. R. 837, 4 N. Y. Supp. 526, 2 Am. Elec. Cas. 299, aff'd., 121 N. Y. 697, 31 N. Y. St. R. 995, 24 N. E. 1099.

nothing in the evidence to charge a traveler with knowledge of the dangerous character of a guy-wire from which he receives a shock, it is held that the court may properly refuse to submit the question of contributory negligence to the jury.[41] And evidence that deceased, a lad of seventeen years, knew that a guy-wire of an electric light post carried an electric current, and that he voluntarily laid his hands upon it after being told by a younger companion to watch out, and get away, has been held not to conclusively show contributory negligence where it also appeared that the current had been running over this guy-wire for several days, with notice to defendant, and that the wire had been handled, pulled, and shaken frequently by various parties during that time, and, a few minutes previous to the fatal occurrence, by deceased, and by others in his presence without harm.[42] The fact also that one is a trespasser as between himself and a landowner is held not to relieve an electrical company from the duty to exercise care towards the former and the jury may infer negligence from the omission of a guard wire between the electric light wire and the guy-wire. And it is held that a telephone company is not excused because the danger arose after the construction of the telephone line and was due to the running of the electric light wire below the guy-wire, as the care required changed with the changed circumstances.[43] In such cases, however, a person must also use reasonable care and it is proper to instruct the jury that if under all the circumstances surrounding the plaintiff he could readily have seen and as an ordinarily prudent and careful man ought to have seen, the wire over which he claims

[41] Turton v. Powelton Elec. Co., 185 Penn. St. 406, 39 Atl. 1053.

[42] South Omaha Waterworks Co., v. Vocaseh, 62 Neb. 710, 87 N. W. 536, 10 Am. Neg. Rep. 580.

[43] Guinn v. Delaware & A. Teleph. Co. (N. J. L. 1905), 62 Atl. 412, 19 Am. Neg. Rep. 389. The court said: "In the present case, the guy wire was stretched over an open field across which people were accustomed to travel without objection by the landowner. The adjoining field was used as a ball ground. It was probable that, if the guy wire broke, some one crossing the field would come in contact with it. That whoever did so was a trespasser or a bare licensee, as against the landowner, cannot avail the defendant. If a bare licensee, he would still be there lawfully. If a trespasser, his wrong would be to the landowner alone, not a public wrong, nor a wrong to the defendant," per Swayze, J.

to have fallen, then he was guilty of contributory negligence and is not entitled to recover.[44]

§ 610. **Trespasser on pole — Injury from wires.**— If a person without any license or right climbs a pole upon which electrical wires are attached, he becomes a trespasser and cannot recover for any injury received by him by contact with any of the wires on such pole.[45]

§ 611. **Person injured who broke down wire.**— An electrical company owes no duty to a person who breaks down its wires, except to refrain from wilful acts to his injury, and it is, therefore, not liable to such person for any injury he may receive as a result of the breaking.[46]

§ 612. **Fallen wire — Position changed by traveler — Subsequent injury to bicyclist.**— Though by the act of a traveler the position of a fallen wire may be changed and in such new position another traveler is injured, yet this will not relieve the company from liability where the wire was in a sufficiently dangerous position to have caused the injury without such traveler's intervention. Thus, it was so held where the end of a fallen telephone wire was attached to a tree by a small boy only a few minutes before a bicycle rider was injured by running against it.[47].

§ 613. **Hitching horse to electric light pole.**— A person who hitches a horse to an electric light pole must be held to assume the risk of any injury he may receive due to the erection, condition or maintenance of the pole. So where a horse hitched to an electric light pole was injured by having his foot caught between the curb and the pole, it was held that he assumed such risk, and that the company was not liable.[48]

[44] Buchholtz v. Town of Radcliffe, (Iowa, 1905), 105 N. W. 336, 19 Am. Neg. Rep. 219.

[45] Augusta Ry. Co. v. Andrews, 89 Ga. 653, 4 Am. Elec. Cas. 378, 16 S. E. 203.

[46] Newark E. L. & P. Co. v. McGilvery, 62 N. J. L. 451, 41 Atl. 955, 5 Am. Elec. Cas. 187.

[47] District of Columbia v. Dempsey, 27 Wash. L. Repr. 87, 13 App. D. C. 533, 31 Chic. L. News, 217.

[48] Ryther v. Austin, 72 Minn. 24, 74 N. W. 1017.

§ 614. **Construction of line — Due care — Negligence.**— An electrical company which has been granted the use of the streets or highways should use due care in work of construction. The fact that it has received legislative or municipal authorization will not relieve it from liability for negligence. So, a company engaged in blasting rock upon a street or highway will, if it negligently fails to warn all travelers of the danger, and to take due care that no one is injured, be liable for any injury to a traveler occasioned by such blasting.[49] So, where, in the erection of poles, it was necessary to blast, and owing to the negligence of the company a horse became frightened and ran away, the company was held liable.[50] And likewise where a street railway company in the construction, repair, or maintenance of its line negligently leaves the street in a dangerous and unsafe condition it will be liable for an injury of which such condition is the proximate cause.[51] And where a street car company allowed its track to remain above the level of a street and the occupants of a buggy which was drawn by a runaway horse were thrown out when the buggy struck the tracks it was held that it could not be said as a matter of law that the runaway horse was the proximate cause of the injury but that the questions whether the defendant was negligent and whether the defect in the street was the proximate cause of the injury were questions for the jury.[52] But, where a person endeavored to drive between the curb and a manhole, through which a telephone company was engaged in drawing its wires, it was held that the company was not liable for a death caused by the horses becoming frightened, it appearing that it was not necessary for the driver to take this route, but that he took it voluntarily and with a full knowledge of the surroundings.[53]

[49] Mills v. Wilmington City R. Co. (Super. Ct.), 1 Marv. (Del.) 269, 40 Atl. 1114.

[50] Brunner v. American Teleg. & Teleph. Co., 160 Penn. St. 300, 28 Atl. 690.

[51] Citizens' Street R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921, 14 Am. Neg. Rep. 288; see Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767, 10 Am. Neg. Rep. 113, holding city liable for an injury caused by defective railroad tracks. Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N. W. 763, 10 Am. Neg. Rep. 106, holding same as preceding case.

[52] Gray v. Washington Water Power Co., 27 Wash. 713, 68 Pac. 360, 11 Am. Neg. Rep. 561.

[53] Cain v. Ohio Valley Teleph. Co., 20 Ky. L. Repr. 855, 47 S. W. 759.

And in another case where a telephone company had dug a trench in the street for the purpose of laying conduits and had excavated for manholes it was held to be error to refuse to charge that the red lights and the dirt thrown up in the excavation of the trench indicated that there was danger, and that the plaintiff was bound to exercise unusual care in passing that locality, and that by "unusual care" was meant greater care than would be required in passing over a street without obstacles, and in which excavations did not appear.[54]

§ 615. **Excavaions for construction of street railway — Traveler injured — Liability of town.**— Where the local authorities have authorized the construction of a street railway and the work is being carried on under their supervision, the local government cannot escape liability for an injury received by a traveler from excavations in the street made in the work of construction, on the ground that it had no express notice of the defective condition of the highway.[55]

§ 616. **Repair of tracks — Injuries from failure to, or negligence in.**— If a traveler is injured either by failure of an electric railway company to keep its tracks in repair where required by law so to do, or by the negligence of the company or its servants in making repairs, the company will be liable for any injury so received.[56] But where the only conditions imposed upon a street railway company are that it shall not elevate its tracks, but shall lay them in such a manner that vehicles can easily and freely cross the same without obstruction, and there is no obligation upon it to keep any part of the street in repair, it will not be liable to a traveler for an injury re-

[54] Walsh v. Central New York Teleph. & Teleg. Co., 176 N. Y. 163, 68 N. E. 146, 15 Am. Neg. Rep. 154, wherein the court said: "It is true that the obligation resting on the plaintiff was the exercise of ordinary care, but at the same time the general rule is that care, or, more accurately, precaution, must be commensurate with the danger, and ordinary care will dictate and require a degree of vigilance under one set of circumstances that would be unnecessary under another," per Cullen, J.

[55] Carstesen v. Town of Stratford, 67 Conn. 428, 35 Atl. 276.

[56] Citizens' Street R. Co. v. Marvil, 161 Ind. 506, 67 N. E. 921, 14 Am. Neg. Rep. 288; Mahnke v. New Orleans City & L. R. Co., 104 La. 411, 29 So. 52.

See sections in chapter XXI on "Maintenance and Operation."

ceived owing to the condition of the pavement between its tracks.[57] Where a street railway company was paving between its tracks, and a traveler was injured by driving over a granite paving block, it was held that a finding that the company was liable for the injury was not sustained where it appeared from the evidence that no granite paving blocks were used by the company, but that they had been used by both the city and private individuals for some time previous to the accident.[58]

§ 617. **Highway defective between tracks — Notice to company of injury — Statute.**— Under the Massachusetts statute[59] requiring as a condition precedent to the right to sue for any injury caused by defects in the highway that notice of such injury shall be given to the "county, town, place or persons by law obliged to keep said highway * * * in repair," if a person has been injured by reason of any defect in the highway between the tracks of a street railway company which is obligated by law to keep such portion of the highway in repair, notice of the time, place and cause of the injury must be given to the company.[60]

§ 618. **Cornice to which wire attached falling — Traveler injured — Negligence.**— If an electrical company attaches a wire to a cornice which is in danger of falling, and such danger is apparent, it is guilty of negligence, and in case the cornice falls, causing injury to a traveler, the company will be liable for the injury without regard to whether it is prohibited by ordinance from attaching its wires to buildings or not.[61]

§ 619. **Traveler injured —Negligence of contractor — Company liable.**— An electrical company must exercise reasonable care in the construction of its lines to protect travelers from injury, and it owes this duty to the public whether the work be performed by its servants or by independent contractors.[62]

[57] Calumet Elec. St. R. Co. v. Nolan, 69 Ill. App. 104.

[58] Ruppert v. Brooklyn H. R. Co., 154 N. Y. 90, 47 N. E. 971.

[59] Mass. Pub. Stat., Chap. 52, §§ 18, 19.

[60] Maloney v. Natick & C. St. Ry. Co., 173 Mass. 587, 54 N. E. 349; Dobbins v. West End St. Ry. Co., 168 Mass. 556, 47 N. E. 428, 3 Am. Neg. Rep. 188.

[61] Swanson v. Menominee Elec. R. & P. Co., 113 Mich. 603, 71 N. W. 1098, 4 Det. L. News, 405.

[62] Holliday v. National Teleph. Co. (C. A., 1899), 2 Q. B. 392;

So, a telephone company employing a plumber to connect at the joints the tubes through which its wires ran was held liable to a traveler for an injury caused by the negligence of the plumber, though he was an independent contractor, where the act, in the performance of which the negligence occurred, was usual and customary in the performance of such work.[63]

§ 620. **Person injured while traveling on Sunday — Statute in reference to.**— Under a statute in Maine[64] persons are prohibited from traveling on Sunday, except in works of necessity and charity, the statute also providing that "a moral fitness or propriety of traveling under the circumstances of any particular case may be deemed necessary within this section." In a case which arose in this State where a person who was an invalid, and unable to walk with comfort, accepted her husband's invitation to ride for the enjoyment of the open air and the benefit of her health, and she was injured by the vehicle colliding with a pole erected by an electric street railway, and which was found by the jury to constitute a defect in the highway, it was held that the above statute did not preclude recovery in such a case. It was said by the court that it had "been repeatedly held in this State and Massachusetts that walking or riding in the open air, in a quiet and civil manner, with no object of business or pleasure, except the enjoyment of the air, and gentle exercise, and the consequent promotion of the health, is not in violation of the Sunday law."[65]

§ 621. **Fireman injured while driving to fire — Collision with electric car — Guy-wires.**— In a case in Michigan, which was an action to recover for the death of a driver of a fire truck, who had been killed by collision between the truck and a car at a street intersection, while attempting to drive across the tracks in front of an approaching car, it was declared by the court that the driver was guilty of negligence in approaching the track, which must be crossed, without having his horses

North Chicago St. R. Co. v. Dudgeon, 83 Ill. App. 528. But see Hauser Metropolitan St. R. Co. (Sup. Ct., App. T., 1899), 58 N. Y. Supp. 286.

[63] Holliday v. National Teleph. Co. (Ct. App., 1899), 2 Q. B. 362.

[64] Me. Rev. Stat., chap. 124, § 20.

[65] Cleveland v. Bangor, 87 Me. 259, 47 Am. St. Rep. 356, 32 Atl. 892, 5 Am. Elec. Cas. 346.

under such control as would permit of stopping them, even though the truck had the right of way under city ordinance.[66] Under the particular circumstances of this case, however, it appearing that there was sufficient evidence from which the jury might find that the car was far enough away to have justified the driver in attempting to cross, the question of contributory negligence was held to be for the jury. The court practically decided in this case that fire trucks and engines, though given the right of way by a municipal ordinance, were under the same obligation in crossing street car tracks as an ordinary traveler, and to follow this decision to its logical conclusion it must necessarily be held that in driving to a fire the driver should have his horses under control in crossing all streets where pedestrians or vehicles may be crossing, since it is declared in all the cases that the rights of travelers, whether on foot or in vehicles, are equal with street cars at street intersections. In other words, in all cases of collision where the driver of a fire engine or truck does not have the horses under "such control as to permit of stopping," he will be guilty of negligence. It does not, however, seem to us that such a driver should be required to have his team under such control at street crossings, or that he would be guilty of negligence for failure to do so. If such a rule were followed by firemen the efficiency of the fire departments would be seriously affected, especially in our large cities, where quickness and dispatch are necessary to save property and lives in many cases, and where, in driving to fires, it is oftentimes necessary to cross numerous street car tracks, to say nothing of intersecting streets every two or three hundred feet. If, however, means for giving warning of the approach of an engine or truck were provided, and no warning of approach were given, then a driver might be held guilty of contributory negligence in case of an accident. As a general rule, however, mere failure to have horses attached to such a vehicle under such perfect control in approaching street car tracks, as to be able to stop them almost instantly, should not, it seems to us, of itself and independent of any other act showing negligence, be held to be contributory negligence on the part of a

[66] Garrity v. Detroit Citizens' St. Ry. Co., 112 Mich. 369, 37 L. R. A. 529, 70 N. W. 1018, 2 Am. Neg. Rep. 574, 2 Chic. L. Jour. Week. 277, Det. L. News, 46.

driver, especially where, by ordinance, such vehicles are given the right of way, but we believe his right to recover for any injury received in a collision with an electric street car should be made to depend upon whether he was guilty of any act, aside from mere failure to have his horses under control, which would show negligence, and whether there had been an exercise of due care on the part of the street railway company. The duty is imposed upon the latter of having its cars under such control in approaching crossings that, if necessary, the car may be stopped in time to prevent collision, and to exercise reasonable care at such places to notice the approach of vehicles about to cross its tracks. If the company fulfils its obligations in this respect, and the driver uses the means afforded him for giving warning of the approach of the engine or truck, there could be but little danger of a collision, and it would seem that the questions of negligence and contributory negligence would generally depend upon whether such requirements had been complied with. In another case, where the use of a certain portion of a street was forbidden to horses and vehicles, but it appeared that it had been driven across in cases of necessity for the extinguishment of fires, it was held where the driver of a fire engine was injured by contact with a guy-wire negligently placed there by a telephone company, that he could recover from the company for the injuries received.[67] And in a case in New York where an action had been brought to recover damages for the death of a fireman who was killed by a collision at a street intersection between a hook and ladder truck on which he was riding and a street car it was held that the court properly refused to charge the jury that if they believed the proximate cause of the collision was the reckless and negligent conduct and want of reasonable care on the part of the truck driver they should find for the defendant, and a verdict for the plaintiff was sustained.[68]

[67] Wilson v. Great Southern Teleph. & Teleg. Co., 41 La. Ann. 1041, 3 Am. Elec. Cas. 466, 6 So. 781.

[68] Geary v. Metropolitan Street Ry. Co., 84 App. Div. (N. Y.) 514, 82 N. Y. Supp. 1016, affirmed 177 N. Y. 535, 69 N. E. 1123. Examine Wood v. New Orleans Ry. & L. Co. (La. 1906), 41 So. 436, holding the company not liable under the facts of the case for injuries resulting from a collision between a hose carriage and fire truck.

§ 622. **Dogs on track — Injury to — Negligence of motorman.**—Where a motorman negligently runs down and injures or kills a dog the company will be liable for his negligence,[69] even if the dog is a trespasser.[70] It is declared in one case, however, that a dog is not a trespasser on street car tracks, which are laid in the highway and on the same level with it.[71] So, it is the duty of the motorman to slacken the speed of the car where he discovers he is in danger of running a dog down,[72] and he cannot absolve himself from all duty and care to prevent running over him by relying upon the quickness and celerity of the dog.[73]

§ 623. **Assault by motorman on traveler.**— A street railway company is not liable for the act of its motorman, in leaving his car and committing an assault upon a person on the street, such act not being within the scope of his employment. So where a motorman jumped off his car and committed an assault upon the driver of a wagon which was obstructing the passage of the car, the company was held not liable.[74] And where the motorman had been instructed by the company to use special diligence to prevent boys placing obstructions upon the track, it was held that the company was not liable for an injury to a boy, caused by his being hit by a stone, thrown by the motorman for the purpose of frightening boys away.[75]

§ 624. **Car standing on track at end of line — Started by children.**— Where a car is left standing upon the track, at the end of the line, with brakes of the ordinary kind, so set as to hold it, unless they are loosened by some one, the company will not be liable for an injury to a child, caused by the car being

[69] Citizens' Rapid Transit Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518.

[70] Meisch v. Rochester Elec. Ry. Co., 73 Hun (N. Y., 604, 55 N. Y. St. R. 146, 25 N. Y. Supp. 244, 4 Am. Elec. Cas. 520.

[71] Citizens' Rap. Trans. Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518.

[72] Meisch v. Rochester Electric Ry. Co., 73 Hun (N. Y.), 604, 55 N. Y. St. R. 146, 25 N. Y. Supp. 244, 4 Am. Elec. Cas. 520.

[73] Citizens' Rap. Trans. Co. v. Dew, 100 Tenn. 317, 45 S. W. 790, 40 L. R. A. 518.

[74] Rudgeair v Reading Traction Co., 180 Penn. St. 333, 36 Atl. 89, 1 Am. Neg. Rep. 523.

As to assaults on passengers, see §§ 550b–552a, herein.

[75] Dolan v. Hubinger, 109 Iowa, 408, 80 N. W. 514.

set in motion by children playing thereon, where the element of danger is not a hidden one, but open to observation and could have been comprehended by a child of the age of the one injured, with average intelligence.[76]

[76] George v. Los Angeles Ry. Co., 126 Cal. 357, 58 Pac. 819.

CHAPTER XXVI.

TRAVELER — CROSSING ELECTRIC STREET RAILWAY TRACKS.

§ 625. "Stop, look and listen"— Railroad crossing — Not strictly applicable in case of electric cars.
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§ 625. **"Stop, look, and listen" — Railroad crossing — Not strictly applicable in case of electric cars.** — There has been an endeavor in a large number of cases, in behalf of electric street railway companies, to obtain an enforcement, with the same degree of strictness, of the rule which requires persons about to cross the tracks of a steam railroad to "stop, look and listen," and making failure to do so negligence per se. The courts, however, have not inclined to a strict application of this rule in the case of electric railway tracks, owing to the difference in the character of the roads, their rights in reference to their tracks, and the general conditions affecting and surrounding their operation. An electric street railway is within the purposes for which a street is dedicated or taken, while a steam railroad is not. The right of the company in the street is merely a right in common with that of the public It possesses no proprietary interest in or to the right of way, and the cars are not run at such a high rate of speed and are more easily and quickly stopped. On account of these distinctions and differences in the character and operation of the roads, the rule that

persons must "stop, look and listen," before crossing the tracks of a steam railroad, do not apply as strictly in the case of crossing the tracks of an electric street railway.[1]

§ 626. **Duty of traveler crossing electric railway tracks — Duty of company — Federal case.—** It is not the law that persons crossing electric street railway tracks should not only look and listen, but also stop, look and listen, before crossing, unless there is some circumstance which would make such action ordinarily prudent. It is the duty of the company to exercise a degree of care proportioned to the possibility of danger from the instrument it is operating. While such a company is subject to the rule requiring one to use such care in the manipulation of any machine, with reference to the rights of others, which the ordinarily prudent man would use, yet the degree of care required will vary according to the circumstances and according to the possible or probable danger arising from the use of the instrument. So, though a person crossing the tracks of a street railway is negligent, yet if the motorman in charge of the car observed the negligence, and might avoid its effect by due care, the company will be liable.[2]

[1] *California.* Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, 5 Am. Neg Rep. 299. *Colorado*: Davidson v. Denver Tramway Co., 4 Colo. App. 283, 35 Pac. 920, 4 Am. Elec. Cas. 534. *District of Columbia*: Capital Traction Co. v. Lusby, 26 Wash. L. Repr. 163, 12 App. D. C. 295. *Indiana*: Evansville St. R. Co. v. Gentry, 147 Ind. 408, 44 N. E. 311, 37 L. R. A. 378, 5 Am. & Eng. R. Cas. (N. S.) 500. *Iowa*: Orr v. Cedar Rapids & M. C. Ry. Co., 94 Iowa, 423, 62 N. W. 851, 5 Am. Elec. Cas. 445. *Massachusetts*: Robbins v. Springfield St. Ry. Co., 165 Mass. 30, 42 N. E. 334, 6 Am. Elec. Cas. 495. *Minnesota*: Holmgren v. Twin City Rapid Trans. Co., 61 Minn. 85, 63 N. W. 270, 5 Am. Elec. Cas. 499; Shea v. St. Paul City Ry. Co., 50 Minn. 395, 52 N. W. 902, 4 Am. Elec. Cas. 481. *New Jersey*: Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 34 Atl. 1094, 6 Am. Elec. Cas. 616; Consolidated Traction Co. v. Behr, 59 N. J. L. 477, 37 Atl. 142, 2 Am. Neg. Rep. 189; Consolidated Traction Co. v. Haight, 59 N. J. L. 577. 37 Atl. 135, 2 Am. Neg. Rep. 192. *New York*: Brozek v. Steinway Ry. Co., 10 App. Div. 360, 41 N. Y. Supp. 1017, 6 Am. Elec. Cas. 542. *Pennsylvania*: Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Penn. St. 180, 24 Atl. 596, 4 Am. Elec. Cas. 486. *Tennessee*: Citizens' Rapid Trans. Co. v. Seigrist, 96 Tenn. 119, 33 S. W. 920, 6 Am. Elec. Cas. 583. *Utah*: Hall v. Ogden City St. R. Co., 13 Utah, 243, 44 Pac. 1046, 6 Am. Elec. Cas. 598, 4 Am. & Eng. R. Cas. (N. S.) 77.

[2] Cincinnati St. Ry. Co. v. Whitcomb, 66 Fed. 915, 14 C. C. A. 183, 5 Am. Elec. Cas. 602, per Taft, J.

§ 626a. **Duty of traveler crossing electric railway tracks — Duty of company — Alabama.**— In this State it is decided that if a person who is driving along the street turns upon the track of a street railway company without looking to see if a car is approaching and so suddenly that it is impossible to stop the car in time to avoid a collision, he cannot recover from the company for an injury received in consequence thereof. It is said in this connection: "The street car company has a right to the use of its tracks, and the public likewise have the right to use the streets. To hold that the cars must check up whenever a vehicle is on the street near the track would be almost to prohibit the cars from running, except at a very low rate of speed, as vehicles are on the streets at almost all times. Consequently the motorman has a right to suppose that the person traveling on the street will remain on that part of the street not occupied by the railway, at least until he shows by his actions that he is going to attempt to cross, and if the traveler, without looking to see whether the car is approaching, turns into the track so suddenly that it is impossible to check it in time to prevent the accident, the company is not liable for the consequences." [3]

§ 627. **Duty of traveler crossing electric railway tracks — Duty of company — California.**— In a case decided by the California Supreme Court, in 1896, it was held to be contributory negligence, as matter of law, for a bicyclist to ride upon the tracks of an electric street railway without looking or listening for the approach of cars, and it was said by the court: "We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway, than that one must look and listen before crossing a street car track, upon which the motive power is electricity or the cable. * * * When the evidence discloses a failure to take such reasonable precautions for one's own safety, it constitutes negligence in law, and is not a question to be submitted to the jury." [4] In a later case in this State, one of the grounds

[3] Birmingham Ry. Light & P. Co. v. Clarke (Ala. 1906), 41 So. 829, per Simpson, J.

[4] Everett v. Los Angeles Consol. Elec. Ry. Co., 115 Cal. 106, 43 Pac. 207, 46 Pac. 889, 6 Am. Elec. Cas. 460, per Van Fleet, J.

upon which a reversal of judgment was sought was a refusal to charge as follows: "A person about to cross a street railroad track is obliged to use due care to keep out of the way of moving cars. On approaching a track he is bound to look for approaching cars, and, if his sight be obstructed by any objects, to listen or take other satisfactory means to assure himself that no car is approaching that will injure him. The failure to take such precautions is negligence." The court said in reference to such refusal: "Conceding that in the case at bar the instruction refused might have been properly given, yet we do not think that its refusal warrants the reversal of the judgment, because in other instructions given by the court the principle contained in the refused instruction was sufficiently stated."[5] The court then referred to the following instructions given: "If the plaintiff approached and attempted to cross the track of the railway, operated by the defendant, without exercising due care in ascertaining if any car was approaching which might injure him, your verdict should be for the defendants." Also: "If, when plaintiff first saw the approaching car, it became apparent to him, or should have been apparent to him (after it became apparent), that a collision between the car, operated by defendant, and plaintiff's wagon (if it did so become apparent), was inevitable, if he attempted to cross the track, then the plaintiff was bound to exercise prudence to prevent injury to himself, if possible; and if he was negligent in this respect, and such negligence contributed directly to the injury, your verdict should be for the defendant." Also: "It is the duty of the railroad company to endeavor to avoid injuring a party traversing the street. It is the duty of the party traversing the street to look out for himself and to exercise ordinary care for his own protection. To authorize a recovery by plaintiff it must appear that he exercised ordinary care to avoid the injury complained of; that is, that he acted with ordinary prudence, under the circumstances." In a concurring opinion, however,[6] the view was expressed, that the refusal of the proposed instruction was proper, as being an incorrect exposition of the law, and upon this point it was said: "The proposed instruction makes identical the duty of one who is about to cross the right of way of

[5] Per McFarland, J.

[6] Per Henshaw, J.

a steam railroad with that of one who is about to cross the track of a street car line. From the nature of the business of steam railroads; from the character of the conveyances and of the motive power; from the necessity for swift transportation; from the fact that they carry the mails of the country; from the additional facts that the trains are of immense weight; that rapidity in locomotion is a high desideratum; that they cannot be easily and readily stopped; that they move upon their own right of way; that the number of them passing a given point is comparatively few,— the rule of conduct made necessary to one who is about to cross their right of way, even upon the line of a public highway, has become crystallized into a single phrase. It is a well recognized rule, which requires the traveler, if necessary for his own protection 'to stop and look and listen,' and imputes negligence to him if he does not. * * * The distinction between the two kinds of public vehicles is too broad, the differences between their characters too substantial, to justify their obliteration, and to impose upon a citizen, occupying a highway, where his right is the same as that of the street car company, a duty identical with that which is his, when he attempts to cross the right of way of a steam railroad company." [7] Although there is no express declaration, aside from that of the concurring opinion, it would appear that in the latter case the rule so strongly asserted in the former one was somewhat modified. In another case in California where it appeared that the plaintiffs were driving along a street towards an intersecting street along which electric cars ran, and by reason of obstructions did not see a car until they reached the crosswalk, when they saw one about two hundred feet distant, and the motorman also saw them as they approached the track but made no effort to stop the car, which was running at the rate of twenty-five to thirty miles an hour, until it reached the west side of the street along which plaintiffs were driving and they were injured by the car striking the buggy in which they were riding, it was said, in affirming a judgment in their favor: "If the car was running at a point two hundred feet west of the crossing at a rate of twenty-five miles an hour, and the motorman made no effort to slacken its speed until he reached the west side of the crossing, and it struck

[7] Clark v. Bennett, 123 Cal. 275, 55 Pac. 908, 5 Am. Neg. Rep. 299.

the buggy violently and hurled its occupants to the ground, it is a reasonable, if not an almost irresistible, conclusion that the collision was the result of this mode of operating the car; and in the absence of any other fact from which the collision could have been caused, the finding of the court that the defendant was guilty of negligence in the operating and managing of said car and in running at said rate of speed reasonably involves the inference that the collision was the result of this negligence." [8]

§ 628. **Duty of traveler crossing electric railway tracks — Duty of company — Connecticut.**— Street railway companies have a right in the streets in common with other travelers, and are under the duty of operating their cars in such a manner as not to interfere unreasonably with the rights of others upon the highways. A person about to cross the track of an electric street railway, in a vehicle, is not bound to know, at his peril, that a collision will not occur with an approaching car. He is only obligated to make such observation and acquire such information as would convince a reasonably prudent man that he could cross in safety.[9] And in a recent case in Connecticut where an action was brought to recover for the death of a person as a result of a collision at a street intersection between an electric car and a vehicle in which the deceased was attempting to drive across the street car tracks, it was said: "It is not necessarily the duty of the driver of an approaching team to wait until the street car has passed, nor is it necessarily his right to push on and cut off its advance. Each party must act reasonably under all the attending circumstances. The driver of an ordinary vehicle can, under ordinary circumstances, be justified in proceeding, at a highway crossing, to go over a street railway in the face of an approaching car, when, and only when, he has reasonable ground for believing that he can pass in safety if both he and those in charge of the car act with reasonable regard to the rights of each other. The duty to slow up or stop, if necessary to prevent a collision,

[8] Paine v. San Bernardino Valley Tr. Co., 143 Cal. 654, 77 Pac. 659, per Harrison, C.

[9] Lawler v. Hartford St. R. Co. 72 Conn., 74, 43 Atl. 545.

rests equally on each party."[10] So where an electric car ran into a vehicle crossing its tracks, it was held that the company was not free from negligence if, in the exercise of reasonable care and prudence, it should have run its car at a less rate of speed, or have kept it in better control, or the motorman should have used the appliances provided for sanding the tracks.[11]

§ 628a. **Duty of traveler crossing electric railway tracks — Duty of company — Delaware.**— In a case in Delaware it is said in this connection, in a charge to the jury: "We do not mean to say that a motorman must stop or slacken the speed of his car every time a person is seen to approach the crossing with apparent intent to cross the tracks of the company. He may very properly assume that the traveler, if far enough away to cross safely, will continue his movements and cross in front of the car, or if not far enough away, and if warned of the approach of the car, that he will stop and let the car pass first. The motorman has a right to assume that a person under such circumstances will exercise ordinary care, under all the circumstances, until the contrary appears. There is a corresponding duty on the part of the traveler to exercise reasonable care, prudence and diligence at railway crossings to prevent accident, and especially so if there be obstructions, so as to affect his view of an approaching car; and a person in charge of an automobile or other vehicle, approaching such crossing with which he is familiar, is bound to avail himself of his knowledge of the locality and the presence of danger, and to exercise that degree of caution which an ordinarily careful and prudent person would exercise under all the conditions."[12]

§ 629. **Duty of traveler crossing electric railway tracks — Duty of company — Georgia.**— It is the duty of a person about to cross the tracks of an electric street railway to exercise ordinary care, and though the railway company may be guilty of negligence, yet if the person having become aware of the existence of such negligence could, by the exercise of ordinary dili-

[10] McCarthy v. Consolidated Ry. Co. (Conn. 1906), 63 Atl. 725, per Baldwin, J.

[11] Lawler v. Hartford St. R. Co., 72 Conn. 74, 43 Atl. 545.

[12] Garrett v. People's Railway Co. (Del. 1906), 64 Atl. 254, per Boyce, J., in charge to jury.

gence, avoid its consequences, failure on his part to so act will prevent recovery. So, in a given case, the following charges of the court were held error: "Indeed the plaintiff could recover, if the injury was inflicted under these circumstances, if his going upon the track had been in the exercise of ordinary care, notwithstanding he may have been himself in some degree of negligence. If his going upon the track was proper, under the evidence, in that it was not contrary to the exercise of ordinary care, and he was injured thereafter, he would be entitled to recover, even though you should believe he was at some fault himself, in failing to avoid the injury." And "If he (the plaintiff) was advised of the defendant's negligence, the moment he was so advised, or the moment he had reason to apprehend the defendant's negligence, he was bound from that moment to exercise ordinary diligence, to keep from receiving any injury, by reason of the negligence of the defendant; and to the extent he failed to exercise such diligence he would be negligent. Such negligence would not defeat his recovery, but would lessen it in accordance with what you believe its proportion bore to the defendant's negligence." [13]

§ 630. **Duty of traveler crossing electric railway tracks — Duty of company — Illinois.**— Failure to look for approaching cars, before attempting to cross the tracks of a street railway, is not, as a matter of law, contributory negligence.[14] But a person cannot recover for any injury sustained, from being struck by a street car, unless he has exercised ordinary care, for his own safety, and the injury is due to the company's negligence.[15] In another case in this State, affirming a judgment of the lower court, in favor of a woman who had been struck by a trolley car while crossing the tracks, it appeared that as she started to cross the street, her attention was attracted by a

[13] Macon & Indian Springs Elec. St. Ry. Co. v. Holmes, 103 Ga. 655, 30 S. E. 563, 4 Am. Neg. Rep. 251.

[14] West Chicago St. R. Co. v. Huhnke, 82 Ill. App. 404; North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229, 3 Chic. L. Jour. Week. 582.

See Chicago Union Traction Co. v. Jacobson, 217 Ill. 404, 75 N. E. 508, holding that under the evidence in this case the question of the exercise of due care by the traveler was one for the jury.

[15] Chicago City R. Co. v. Fennimore, 78 Ill. App. 478, 3 Chic. L. Jour. Week. 520.

runaway team, and as she was watching that she was struck by a car and injured. The court said: "Persons crossing a street, in which a track is laid for the passage of electric cars, may be presumed to know that such cars are to be expected at any time, from either direction, and yet it is not at all unusual to depend more or less upon the warnings that are given at street crossings. Cars move both ways, and to be perfectly safe one must look both ways and not depend upon hearing the signals, but probably very few persons comparatively do so. Such caution is, perhaps, extraordinary. At any rate when one's attention is attracted by an unusual and frightful thing, like a runaway, it would hardly do to say that he was not exercising ordinary care, if for a moment he omitted to look up and down the street for an approaching car. All the plaintiff need prove is such care as ordinarily would have been exercised under the same circumstances. It is not probable that any ordinary person would have acted differently, in view of the circumstances here shown." [16] To attempt to cross a street, on a dark night, at a regular crossing, is not contributory negligence, as a matter of law, which will preclude recovery for injuries, from being struck by a car, where no signal was given of the approach of the car and the headlight was dim.[17] A street railway company is not bound to exercise such care as will prevent accident or injury to persons crossing the street, and an instruction to such effect was held erroneous.[18] So where it appeared that a person, whose horse and wagon had been standing near the curb in a street where there were two street railway tracks, suddenly drove upon one of the tracks where his wagon was struck by a street car, the court declared, in reversing a judgment for the plaintiff, that the motorman was not required to assume that when his car was too near the horse and wagon to permit him to stop his car before it would strike the wagon, that the appellee would suddenly and without notice drive upon the track; that the motorman was only required to operate his car with reference to peril which might reasonably be expected to occur and that to require him to run

[16] City Elec. Ry. Co. v. Jones, 61 Ill. App. 183, 6 Am. Elec. Cas. 473, per Wall, J.

[17] North Chicago St. R. Co. v. Nelson, 79 Ill. App. 229, 3 Chic. L. Jour. Week. 582.

[18] West Chicago St. R. Co. v. Wizeman, 83 Ill. App. 402.

his car with such caution as to guard against unusual or extraordinary peril would be to require him to so operate his car as to prevent the practical operation of the road.[19] And an instruction to the effect that if both motorman and the plaintiff erred in their judgment, both believing that the latter could cross the tracks in safety, was held to be improper, where it was modified by a qualification equivalent to declaring that the degree of care on the part of the plaintiff was immaterial, however careful the motorman may have been.[20]

§ 631. **Duty of traveler crossing electric railway tracks — Duty of company — Indiana.**— A person who attempts to cross an electric street railway track, without looking or listening for an approaching car, is guilty of contributory negligence, as a matter of law.[21] And where a person in a vehicle suddenly turned upon the track, about forty feet in front of an approaching car, and the motorman exercised all the means within his power to avert a collision, but was unable to do so, it was held that the latter was not chargeable with negligence.[22] This question also is considered in this State in a case where it appeared, in an action for the death of one killed by a collision with a street car, that decedent was riding a bicycle at a speed of six or eight miles an hour along a street containing double street car tracks; that there were two wagons in the street and that he increased his speed so as to pass around them, and that in attempting to cross the tracks he was struck by a car and killed. It also appeared that the decedent was familiar with the street and that the approaching car could have been seen by him at all times while he was on the street, if he had looked, except while he was riding a distance of about ten feet, when the wagons were between him and the car, and that the noise made by the car could have been heard by him for a distance of one hundred feet if he had listened. Under these facts it was decided that he was guilty of contributory negligence which would preclude a recovery.[23]

[19] Chicago Union Traction Co. v. Browdy, 206 Ill. 615, 69 N. E. 570, 15 Am. Neg. Rep. 627 n.

[20] South Chicago City R. Co. v. Adamson, 69 Ill. App. 110.

[21] Young v. Citizens' St. R. Co., 148 Ind. 54, 44 N. E. 927, 6 Am. Elec. Cas. 479, rehearing denied, 47 N. E. 142.

[22] Kessler v. Citizens' St. R. Co., 20 Ind. App. 427, 50 N. E. 891.

[23] Indianapolis Street R. Co. v.

§ 632. **Duty of traveler crossing electric railway tracks — Duty of company — Iowa.**— A person driving upon the tracks of an electric street railway, without looking for an approaching car, is guilty of contributory negligence. Such negligence, however, was held not to preclude recovery for an injury, subsequent to the collision, caused by the motorman starting the car and running it against the wagon.[24] And where, before a person drove upon the tracks of a street railway, he stopped and waited for a car to pass, and after it had passed he looked, but owing to the curtains on his carriage was unable to see a portion of the track, and seeing or hearing nothing, he drove upon it, where he was struck, a verdict for the plaintiff was held to be sustained by the evidence, where it also appeared that the accident would probably have not occurred, had the usual signals been given, that the car would have been seen by the driver when he looked, had it been the usual distance behind the preceding car, and that after the motorman discovered the danger he might, by reasonable diligence, have averted the injury.[25] Again, a request to charge that if the sound of the car could have been heard, by a person in such a vehicle as plaintiff was in, at a certain distance from where the collision occurred, the plaintiff could not recover, was held to be properly refused, where no reference was made therein as to the speed of the car or the impossibility on the part of the plaintiff to avoid the danger, if he first knew of the approach of the car at the distance stated.[26]

§ 632a. **Duty of traveler crossing electric railway tracks — Duty of company — Kansas.**— A traveler upon a city street who is about to cross the track of an electric street railway company, should exercise his faculties of sight and hearing, and in other respects take ordinary precautions to avoid collision with the cars. If he do look and listen he will be held to an apprehension of that which should have been seen and heard, and, if he fail to look and listen, he will be charged with the same

Zaring, 33 Ind. App. 297, 71 N. E. 270.

[24] McDevitt v. Des Moines St. R. Co., 99 Iowa, 141, 68 N. W. 595, 6 Am. & Eng. R. Cas. (N. S.) 106.

[25] Hart v. Cedar Rapids & M. C. Ry. Co. 109 Iowa, 631, 80 N. W. 662.

[26] Wilkins v. Omaha & C. B. R. & B. Co., 96 Iowa, 668, 65 N. W. 987.

liability in case of disaster as if he had done so. But a person may cross an electric street railway track in front of an approaching car which he plainly sees and distinctly hears, and not be negligent, and whether or not the hazard is such as an ordinarily prudent man would accept under all the circumstances is ordinarily a question for the jury to determine.[27] So where the driver of a heavy wagon attempts to cross the tracks of a street car company at night, and, before doing so, looks both ways upon the track, and is unable to discover any car approaching, but does see the headlight of one, which he believes to be moving towards him at a distance of three to four hundred yards; and where the evidence justifies the jury in determining that such car was traveling at an unusual, reckless and dangerous rate of speed, which fact such driver did not and could not know before starting to drive across such track; and when by reason of such high rate of speed, and the failure of those in charge of the car to make any effort to stop it, such wagon is struck and the driver is injured, it is held that the question whether the latter was so far guilty of contributory negligence as that he may not recover is one of fact for the jury, under proper instructions of the court.[28] In an

[27] Kansas City-Leavenworth R. Co. v. Gallagher, 68 Kan. 424, 75 Pac. 469, 15 Am. Neg. Rep. 558. As to the question negligence in crossing in front of an approaching car the court said: "Hundreds of people do so every day and yet satisfy every demand for care and caution which the law imposes upon them. The requirement of the law that a man shall look and listen means no more than that he shall observe and estimate with reasonable accuracy his distance from the car and the speed of its on-coming. He is then to make a calculation and comparison of the time it will take the car to come and the time it will take to cross the track, and if, under the same circumstances, a reasonably prudent person would attempt to cross at a given rate of speed, he will not be negligent in doing so. It is true that a reasonably prudent man may be mistaken or be deceived, but, if so, and if his conclusion from the facts as they appear to him be erroneous, and an injury result, he is nevertheless guiltless of contributory negligence, for the law does not measure human conduct in such cases by any higher standard of care than that which such a man would acercise; and whether or not a prudent man would accept the hazard is generally a question of fact for the jury," per Burch, J.

[28] Metropolitan Street Ry. Co. v. Slayman, 64 Kan. 722, 68 Pac. 628, 11 Am. Neg. Rep. 390. It was said by Ellis, J. in this case: "If to the driver of a vehicle there reasonably appears to be sufficient time for him

action, however, against a street railway company to recover for an injury sustained by one who was driving across street car tracks and was run into by a street car, it was held to be error to refuse to instruct the jury that: "If you find from the evidence that plaintiff looked to the north for an approaching car before going upon the track, and you further find that at the time she so looked the said car was there approaching and within view of her, then you are instructed that plaintiff is chargeable with knowledge of its approach, although plaintiff claims that she did not see said car approaching." [29]

§ 633. **Duty of traveler crossing electric railway tracks — Duty of company — Kentucky.**— In a case which arose in this State, it was declared that persons in vehicles leaving a safe unobstructed way and crossing over onto a track, which, as reasonable people, they must have known was being used or about to be used by the cars, without once looking back or taking any sort of precaution for their own safety, were recklessly careless. It was also said that it was the duty of the motorman to keep a lookout, so as to avoid causing injury to persons or vehicles and to give timely warning of the approach of the car, either by sounding the gong or by some other means, and that if, after the plaintiffs had negligently placed them-

to cross the track before a moving car will, while running at its ordinary speed, arrive at the place of crossing, and if, in good faith, and in the exercise of due care, he attempts to so cross in front of such car, it cannot be said as a matter of law, that he is so far negligent in making such attempt as that he cannot recover, should an accident occur because the car was running much faster than usual, and because no effort was made by those in charge of it to prevent disaster. It is hardly necessary to say that the degree of watchfulness and caution requisite in any case to constitute ordinary care must be commensurate with, and measured, by, the danger to be avoided. Here it is evident that plaintiff below misjudged the distance as well as the velocity of the car. Still, as the circumstances were such that he might easily have been misled, and as the testimony fully justifies the conclusions which the jury undoubtedly reached — that the car was moving with unnecessary and reckless celerity, and no effort whatever was made to stay its course or save plaintiff below from injury — the court did not err in refusing to take the case away from the jury and direct a verdict in favor of the street railway company."

[29] Metropolitan Street Ry. Co. v. Agnew, 65 Kan. 478, 70 Pac. 345, 12 Am. Neg. Rep. 599.

selves in the position of peril, the employees in charge of the car could, by the exercise of ordinary care, have seen and avoided the collision, the company would be liable. The company is not only liable for the acts of its employees, operating cars, in injuring those whom they see in peril and could by reasonable care avoid injuring, but also for the carelessness of such employees in injuring those whose peril they ought to see.[30] It appeared in this case that the plaintiffs drove along the side of the tracks and suddenly attempted to cross them, without looking back to see if any cars were approaching, and it was declared that, under the facts of the case, the plaintiffs were clearly guilty of contributory negligence and that the court should have so told the jury. In another case in this State, where one drove nearly 100 feet alongside of the track, after noticing a car approaching in his rear, and then suddenly turned upon the track for the purpose of crossing, without looking for the car, it was held that he was guilty of such contributory negligence as would preclude recovery for an injury sustained by collision with the car, although no signals were given for the crossing.[31]

§ 634. **Duty of traveler crossing electric railway tracks — Duty of company — Louisiana.**— In a case in this State it is held that a person is guilty of contributory negligence, in driving upon the tracks of an electric street railway, without first looking or listening for an approaching car, or where if he had looked and listened, he must have seen and heard a car rapidly approaching half a block away.[32] In an earlier case in this State, it is held that the rule requiring one to "stop, look and listen," crossing railroad tracks, applies to an electric street railway, and that whenever any want of care on the part of a person about to cross such tracks is shown, his right to recover is thereby destroyed.[33] In another case it was held also that a

[30] Central Pass. Ry. Co. v. Chatterson (Ky. Super. Ct., 1893), 14 Ky. L. Repr. 663, 4 Am. Elec. Cas. 501, affd., 29 S. W. 18, per Barbour, J.

[31] South Covington & Cin. St. Ry. Co. v. Enslen, 18 Ky. L. Repr. 921, 38 S. W. 850.

[32] Dieck v. New Orleans City & Lake R. Co., 51 La. Ann. 262, 25 So. 71.

[33] Hoelzel v. Crescent City R. Co., 49 La. Ann. 1302, 22 So. 330, 38 L. R. A. 708, 3 Am. Neg. Rep. 409.

person before attempting to cross electric street railway tracks should look to ascertain whether, prudently, the crossing should be attempted; and that he should look at a time and place where it may be effective.[34] And where a person attempted to cross the track of an electric street railway immediately in front of an approaching car, on which the gong was being continuously sounded, it was held that he was guilty of such contributory negligence as would preclude recovery for injuries.[35] And in another case the company was held not liable, where a person halted his team for the purpose of allowing a car to pass, and after it had passed, suddenly attempted to cross in front of a rapidly approaching car, which was not more than 225 feet distant, which was in plain view and which the motorman vainly endeavored to stop.[36]

§ 634a. **Duty of traveler crossing electric railway tracks — Duty of company — Maine.—** In a case in this State it has been declared that a person who seeks to cross the tracks of a street car company is required to do for his own safety and protection what ordinarily careful persons are accustomed to do under like circumstances, and that the exercise of ordinary care and prudence requires him to look and listen for an approaching car before attempting to cross the tracks. In this case it appeared that the view of the plaintiff, who was familiar with the crossing, was intercepted by massive hedges until within a few feet of the street line, and the court said that if the plaintiff had stopped and listened before he reached a point which commanded a view of the approaching car, he could not have failed to hear the hum of the machinery or the rumble of the car, and that if he had stopped to look and listen after he reached the line of vision, or had looked without stopping, he must have seen the brilliant headlight and the lighted monitor of the approaching car, and under the facts of the case it was held that the proximate cause of the accident was the negligence of the plaintiff. In reference to the rule of looking and listening before crossing the tracks of a steam railroad being

[34] Snider v. N. O. & Carrollton R. Co., 48 La. Ann. 1, 18 So. 695.

[35] Webster v. New Orleans City & L. R. Co., 51 La. Ann. 299, 25 So. 77.

[36] Hemmingway v. New Orleans C. & L. R. Co., 50 La. Ann. 1087, 23 So. 952.

applicable in the case of electric street railways, the court said: "True, the established rule respecting steam railroads that it is negligence per se for a person to cross the track without first looking and listening for a coming train is not deemed wholly applicable when crossing the tracks of a street railway company in a public street, where the cars do not enjoy the exclusive right of way. In other words, it cannot be declared, as a matter of law, that it is the absolute duty of a traveler to look and listen before crossing the tracks of a street railway. * * * But the reasons for the rule applied to steam railways may, under some circumstances, be applicable to the crossing of a street railway. It may be determined, as a matter of fact, that the exercise of ordinary care and prudence would require a traveler in some situations to look and listen before crossing the tracks of a street railway." [37] And in another case where a child of between ten and eleven years old was struck by a car in attempting to cross the track it was declared by the court that to attempt to cross the track, in front of a moving car which could not have been many feet from her, was an act of contributory negligence, her conduct being such as the judgment of common men would universally condemn as careless in any child of sufficient age and intelligence to be permitted to go alone across a street on which electric cars are frequently passing.[38] And in another case in this State it is decided that it is the duty of a street railway company at all times to use due care in view of apparent dangers, and those which may reasonably be expected, so to regulate the speed of its cars, so to have them under control and so to be on the lookout for teams about to cross, that those in the teams, if they themselves are in the exercise of due care, shall not be put in jeopardy. If, however, it appears from the evidence that a plaintiff was clearly negligent and that his negligence contributed to the injury, he must fail unless it appears further that after the plaintiff's negligence, independent of and distinct from any prior negligence of his own, the

[37] Warren v. Bangor, Orono, & O. T. Ry. Co., 95 Me. 115, 49 Atl. 609, 10 Am. Neg. Rep. 67, per Whitehouse, J.

[38] Colomb v. Portland & B. St. Ry. Co., 100 Me. 418, 61 Atl. 898.

defendant was negligent and that this negligence was the proximate cause of plaintiff's injury.[39]

§ 635. **Duty of traveler crossing electric railway tracks — Duty of company — Maryland.**— Mere negligence or want of ordinary care will not prevent recovery by a person for injury by a street railway car, unless such injury would not have occurred but for such negligence, and if the company could, by the exercise of ordinary care, have averted the injury after becoming aware of such neglect, recovery may be had.[40] But in a later case in this State it has been declared that no matter how negligent a street railway company's servants may be, yet a person who leaves a place of safety and attempts to drive across street car tracks directly in front of a rapidly moving car is equally guilty of negligence which immediately contributes to an injury received and which will preclude a recovery therefor. It was declared in this case that there is not such a difference between an electric railway in the country and a steam railway as to change what would be contributory negligence as respects the latter into noncontributory negligence or due care as respects the former.[41] In another case, however,

[39] Butler v. Rockland, Thomaston & C. St. Ry. v. Knox, 99 Me. 149, 58 Atl. 775.

[40] Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338, 43 Atl. 762.

[41] McNab v. United Railways & Elec. Co., 94 Md. 719, 51 Atl. 421, 11 Am. Neg. Rep. 240. The court said as to this latter point: "It is not because of a difference in the motive power employed upon a steam and an electric railway, but because of other circumstances, that acts which would be regarded as acts of contributory negligence in the one instance would not be so treated in the other. It is far more dangerous to attempt to cross in advance of a car moving at a high rate of speed, whether propelled by steam or electricity, than to make a like attempt when the car is moving along the streets of a city at a very moderate rate of speed. The difference in the method of the construction of the tracks in the country from that in the city, the very marked difference in the speed attained in the one locality from that tolerated in the other, the adaptation of city streets to the uses of pedestrians and vehicles of all kinds as well as to the cars, are all circumstances, wholly apart from what the motive power propelling the cars may be, which must be considered in determining whether a given act is or is not an act of contributory negligence. Thus to drive across a street-car track at the intersection of two streets in a city, where the rails are flat and offer no resistance, might not be an act of contributory negligence even

in this State it is decided that an attempt to cross street railway tracks in a city while driving a four-horse team, and when the car is approaching and is a block distant, is not negligence as a matter of law, but the question of negligence is one for the jury.[42] The court said in this connection that the rights of the company and of a traveler to the use of the streets were equal and that each as a consequence owes to the other precisely the same duty to avoid an injury, and that the railway company has no more right carelessly to run its cars along its tracks than the individual has to cross or traverse them. "When the facts show, as in some of the cases they have shown, that the injury had resulted from a deliberate, but unsuccessful, effort, to cross the track in the face of evident danger, or when the disaster had been due to a miscalculation as to the chances of the individual being able to clear the track before the car would reach the point where the collision coincidentally occurred, a recovery has been denied upon the obvious ground that such a reckless attempt was gross negligence on the part of the person injured. Whilst each party, the driver of the team and the railway company, had an equal right to use the highway lawfully, neither was justified in using it in such a way as to imperil the safety of the other, and the individual who disregarded his own safety by rashly undertaking to cross the track when no prudent man would venture to do so was in no position to hold the company answerable from the consequences of his own heedlessness or folly." [43]

though an approaching car going at the rate of six miles an hour, but required to stop or slow up on the near side of the intersected street, were but forty feet distant; but to make the attempt in the country, where T rails themselves interpose obstructions; and where the car is running at the same high rate of speed which cars propelled by steam attain, would be just as clearly an act of contributory negligence as it would be were the car being moved by steam power instead of electricity. A car making six miles an hour can be slowed or stopped much more promptly than when making twenty-five miles an hour, and this circumstance is of considerable importance in determining whether an attempt to cross in front of it is an act of contributory negligence. It is the relation which the act done bears to the final result in the light of all the attendant circumstances that determines whether the act so done is or is not one of negligence or of contributory negligence," per McSherry, J.

[42] United Railways & Elec. Co. v. Watkins, 102 Md. 264, 62 Atl. 234.

[43] Per McSherry, J.

In another case in this State, where it appeared that the plaintiff, a woman, driving a wagon on a dark morning in midwinter, came to the tracks of defendant's electric street railway, saw a car coming, but, erroneously thinking that there was time to cross, attempted to do so and the wagon was struck by the car and plaintiff injured, it was held, there being no evidence that the motorman could have stopped the car, after perceiving her peril, in time to have avoided the collision, that the case was properly withdrawn from the jury, because there was no evidence of defendant's negligence and there was evidence of plaintiff's contributory negligence.[44]

§ 636. **Duty of traveler crossing electric railway tracks — Duty of company — Massachusetts.**— Failure to look and listen for approaching cars, before attempting to cross the tracks of an electric street railway, is not such contributory negligence, as a matter of law, as will preclude recovery from the company for an injury received in a collision with a car,[45] though under the facts of the particular case the jury may properly find that a traveler was guilty of contributory negligence in not looking and listening.[46] And where the evidence is conflicting the question of negligence is one for the jury to determine.[47] It has, however, been declared that when the whole evidence has no tendency to show care on the part of the traveler, but, on the contrary, shows that he was careless, it is the duty of the court to direct a verdict for the defendant.[48] In a recent case in this State it is decided that it is the duty of a motorman to notice the apparent movement and consider the probable movements of teams traveling before him in the same direction, especially if the driver is so seated that he cannot see a car approaching behind him, and that the driver of such a team has a right to suppose that a motorman, coming from

[44] Heying v. United Railways & Elec. Co., 100 Md. 281, 59 Atl. 667.

[45] Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334; Benjamin v. Holyoke St. R. Co., 160 Mass. 3, 35 N. E. 95, 4 Am. Elec. Cas. 517.

[46] Kelley v. Wakefield & Stoneham St. Ry. Co., 175 Mass. 331, 56 N. E. 285.

[47] Silva v. Boston Elev. R. Co., 183 Mass. 249, 66 N. E. 808; Coleman v. Lowell, Lawrence & H. St. R. Co., 181 Mass. 591, 64 N. E. 402.

[48] Mathes v. Lowell, Lawrence & H. St. R. Co., 177 Mass. 416, 59 N. E. 77, 9 Am. Neg. Rep. 296.

behind, will give him time to cross the tracks after he has started to do so, and not run against him while he is crossing. While it is his duty to use reasonable care for his own safety, he may trust something to the expectation that others will do their duty.[49]

§ 637. **Duty of traveler crossing electric railway tracks — Duty of company — Michigan.**— In a case in this State where a person in attempting to cross the tracks of an electric street railway at a street crossing was injured by being struck by a car, an appeal was taken from a judgment of the lower court in favor of the plaintiff. The judgment was reversed by the Supreme Court, it being held that the court should have charged the jury, as requested by the defendant, that upon the evidence the plaintiff could not recover.[50] The rule in Michigan to be deduced from this case is, that a person, before attempting to cross the tracks of an electric street railway, must look and listen for approaching cars, not only when leaving the curb, but also just before stepping upon the tracks. In this connection the court said: "While pedestrians have the right to be upon and travel along the public highway, yet they are bound to take notice of the dangers incident to the public travel thereon, and especially is this so where street cars are constantly passing and repassing, driven with electricity * * * These cars are heavy, laden with motors, and they cannot at once be stopped. They have no right to run down pedestrians, but those in charge have a right to suppose that pedestrians will not walk onto the track, without looking to see if a car is coming. * * * He was bound to look both ways before getting on the track. It will not do to say that he acted prudently and carefully in looking before getting off the curb, and was, therefore, not bound to look again, because he saw no car coming from the north at that time. * * * We see no more reason for applying the rule that one must look and listen before crossing the tracks of a steam railway, than that one must look and listen before crossing a street car track, upon which the motive power is electricity or the cable. In this

[49] Williamson v. Old Colony Street Ry. Co., 191 Mass. 144, 77 N. E. 655, per Knowlton, C. J.

[50] McGee v. Consolidated St. Ry. Co. 102 Mich. 107, 60 N. W. 293. 5 Am. Elec. Cas. 562.

State it is well settled that persons passing over railroad crossings must exercise care. They must look and listen, and, under certain circumstances, must stop before attempting the crossing. Electric street car crossings are also places of danger. The cars are run at a great speed on this street in question. The city ordinance permits it, and the rule must be that, before going upon such tracks, every person is bound to look and listen. * * * It will not do to say that he has discharged his responsibility in case of an accident, by looking, when some feet away, for he may miscalculate the distance, and the speed of the car. To avoid danger, he must look just before he enters upon the track." [51] So a person was held guilty of such contributory negligence, as would prevent recovery, in attempting to drive across electric railway tracks, in front of an approaching car which he could have seen had he looked, especially where the motorman, after he saw the vehicle coming upon the tracks, used every effort to avoid the collision.[52] But where, although the driver of a vehicle did not look for an approaching car from the rear, it appeared that the car was going only six miles per hour, and that the motorman when within thirty feet of the vehicle suddenly started the car, believing he had room to pass, and that the wagon traveled thirty-five feet in the line of the car before it was struck, it was held that the driver was not guilty of such contributory negligence as would prevent recovery.[53] Where the evidence is conflicting the question of contributory negligence is one for the jury.[53a] Electric cars should be lighted at night, and where a car having no headlight or any other light collided with a vehicle, it was held that the failure of the driver to see such car was not such contributory negligence as would bar recovery. Although electric cars have a superior right in

[51] Per Long, J.

[52] Borschall v. Detroit Ry. Co., 115 Mich. 473, 73 N. W. 551, 4 Det. L. N. 938, see also Doherty v. Detroit Citizens' St. Ry. Co. 118 Mich. 209, 80 N. W. 36, affg. 76 N. W. 377; Graff v. Detroit Citizens' St. Ry. Co., 109 Mich. 77, 67 N. W. 815, 5 Am. & Eng. R. Cas. (N. S.) 447, 3 Det. L. News, 12; Fritz v. Detroit Citizens' St. Ry. Co. 105 Mich. 50, 62 N. W. 1007, 5 Am. Elec. Cas. 480.

[53] Blakeslee v. Consolidated St. Ry. Co., 112 Mich. 63, 70 N. W. 408, 29 Chic. L. News, 257, 3 Det. L. News, 844, 1 Am. Neg. Rep. 627.

[53a] Chauvin v. Detroit United Ry., 135 Mich. 85, 97 N. W. 160.

the use of their tracks, yet it must be exercised with proper caution and a due regard for the rights of others. The cars run with greater rapidity and momentum than other vehicles, and, therefore, require greater care in their operation and management to avoid collision. At night-time it is the duty of the company to light its cars so that other travelers may see their approach.[54]

§ 638. **Duty of traveler crossing electric railway tracks — Duty of company — Minnesota.**— It is not negligence, as a matter of law, and without regard to circumstances, to one about to cross electric street railway tracks to fail to look in both directions for approaching cars. While the rights of the traveler on the highway are, in a certain sense, subordinate to those of the street railway company, yet a street railway has no exclusive or proprietary interest in the portion of the street occupied by its tracks. The street railway company has only a right in common with the public generally, to the use of the streets. Travelers on the highway have no right to unnecessarily obstruct the passage of cars, and as the cars are confined to fixed tracks, it is the duty of persons on foot or in vehicles to turn out, whenever necessary to avoid a collision. "The rule that one approaching a railroad crossing, upon a highway, must look up and down the track before he attempts to cross, is not applicable, as a hard and fast rule, to one who attempts to cross a street car track upon a public street. The failure to do so is not, as a matter of law, and without regard to circumstances, negligence." [55] And it is said by the court in a later case in this connection that the look and listen rule applicable to steam-railroad track crossings should be extended to street railways with great caution; otherwise, it will lead to a lessening of care on the part of those operating street cars, to the imperiling of the limbs and lives of those who have an equal right with themselves to use the public streets.[56] The reciprocal relations of the public and a street railway company also

[54] Rascher v. East Detroit & Grosse Pointe Ry. Co., 90 Mich. 413, 51 N. W. 463, 4 Am. Elec. Cas. 473.

[55] Shea v. St. Paul City Ry. Co., 50 Minn. 395, 52 N. W. 902, 4 Am. Elec. Cas. 481, per Mitchell, J.

[56] Riley v. Minneapolis Street Ry. Co., 83 Minn. 96, 85 N. W. 947, 10 Am. Neg. Rep. 338 n.

vary according to circumstances and conditions.[57] And where the evidence is conflicting the question whether a party is guilty of negligence n attempting to cross a street railway track without first looking and listening for cars is ordinarily a question of fact.[58] Whether a person is guilty of contributory negligence, in attempting to cross the tracks of an electric street railway, in consequence of which he is injured, is to be determined by the application of the rule that to constitute contributory negligence there must have been a want of ordinary care, under all the circumstances of the case, contributing to the injury, as an efficient and proper cause thereof, and that there is no want of ordinary care when, under all of the circumstances and surroundings of the case, the person injured did or omitted nothing which an ordinarily careful and prudent person, similarly situated, would not have done or omitted.[59] So, where a person 250 feet in front of an electric car turned upon the tracks to avoid another vehicle, and the motorman made no effort to slacken speed until within twenty feet or less of the vehicle, it was held that there was no contributory negligence on the part of the plaintiff, but that the motorman was negligent and the company liable.[60] And where a person, with a heavily loaded vehicle, looked and saw a car a block distant, and attempted to cross the tracks at a street crossing, and while on the tracks he was struck by the car, he was held not to be guilty of negligence per se. A person is under no obligation to stop, before attempting to cross electric railway tracks at a street crossing, unless, under the circumstances of the case,

[57] Wosika v. St. Paul City Ry. Co., 80 Minn. 364, 83 N. W. 386, 8 Am. Neg. Rep. 72, wherein the court said: "In the case of steam railways, the relative degree of care required from the company and traveling public varies according to the nature of the crossing or the peculiar circumstances of each case. So with reference to street railways. While, as a general rule, in the populous part of a city a person in crossing a street car track in a public street should not be held to any greater degree of care than the street-railway company, yet there may be such circumstances and conditions as would make it necessary to modify the rule," per Lewis, J.

[58] Riley v. Minneapolis Street Ry. Co., 83 Minn. 96, 85 N. W. 947, 10 Am. Neg. Rep. 338 n.

[59] Flannagan v. St. Paul City Ry. Co., 68 Minn. 300, 71 N. W. 379, 3 Am. Neg. Rep. 560, per Collins, J.

[60] Flannagan v. St. Paul City Ry. Co., 68 Minn. 300, 71 N. W. 379, 3 Am. Neg. Rep. 560.

such act would be the act of a reasonably prudent man. The railway company at street intersection has no priority of way with respect to other vehicles, but is held to the same degree of care as persons in other vehicles.[61] But a person about to cross a street, along which cars are propelled by electricity, having full appreciation that to do so he must act hastily or be run down, is guilty of negligence per se, if he rushes upon the track, without listening or looking for the whereabouts of a car which he expects and knows is rapidly approaching the place of crossing.[62] And where a person started to cross a street diagonally apparently without regard to his surroundings and without giving any attention to an approaching car which he could easily have seen, and he was struck by the car as he stepped on the track and was killed, it was held that he did not exercise reasonable care and was guilty of contributory negligence which would preclude a recovery, and an order dismissing the case was affirmed.[63] In another case it appeared that a woman who was familiar with the street, and in possession of all her faculties, started diagonally across the track of a street railway, with nothing to obstruct her view, and held her muff to her face to protect it from the wind, and that she was struck by the car and injured. The trial in the court below resulted in a verdict for plaintiff, which was set aside on motion of defendant, and judgment ordered in its favor notwithstanding the same, and plaintiff appealed. The court declared that the rule in such cases is that if the person have no actual knowledge of the danger causing the injury, and could not by the exercise of reasonable care have discovered it, he cannot be said to be guilty of contributory negligence, but that, if ignorant of the danger, and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence, and to the same extent as though perfectly familiar with the location and dan-

[61] Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742, 4 Am. Elec. Cas. 510.

[62] Hickey v. St. Paul City Ry. Co., 60 Minn. 119, 61 N. W. 893, 5 Am. Elec. Cas. 494; Kennedy v. St. Paul City Ry. Co., 59 Minn. 45, 60 N. W. 810, 5 Am. Elec. Cas. 492; Terien v. St. Paul City Ry. Co., 70 Minn. 532, 73 N. W. 412, distinguishing Watson v. Minneapolis St. R. Co., 53 Minn. 551, 55 N W. 742.

[63] Baly v. St. Paul City Ry. Co., 90 Minn. 99, 95 N. W. 757.

ger, and it was held that the evidence showed conclusively that plaintiff was guilty of contributory negligence.[64] Where, however, a woman more than seventy-five years old, while riding in a funeral procession in a vehicle owned and driven by another, and whom she had no reason to believe was not exercising proper care, was injured by a collision with an electric car, it was held that failure on her part to look and listen for approaching cars was not negligence and a recovery was allowed.[65] Those in charge of electric cars should exercise additional caution in case of storm and darkness, when proceeding along a street where travelers may reasonably be expected to be crossing.[66]

§ 639. **Duty of traveler crossing electric railway tracks — Duty of company — Missouri.**— It is the duty of a person, before attempting to cross electric street railway tracks, to look and listen for approaching cars. Failure, however, on the part of a person so to do will not, it is held, amount to contributory negligence, unless it can reasonably be inferred that if he had looked and listened the accident would not have occurred. The fact of his going upon the tracks does not make him a trespasser, since he has a right to be there. This right, however, does not entitle him to unnecessarily obstruct or interfere with the passage of cars. If, however, by attempting to cross the tracks, he has placed himself in a position of peril, it is the duty of whoever is in charge of the car to use ordinary care to discover the danger to which such person is exposed and to exercise reasonable diligence to avoid the accident.[67] If a person, in the face of known and imminent danger, assumes the risk of crossing electric railway tracks, he is guilty of contributory negligence, which will preclude recovery, even though in the moment of danger those in charge of the car may neglect their duties. Thus, it was so held where a person attempted to cross

[64] Russell v. Minneapolis Street Ry. Co., 83 Minn. 304, 86 N. W. 346, 10 Am. Neg. Rep. 337 n.

[65] Johnson v. St. Paul City R. Co., 67 Minn. 260, 36 L. R. A. 586, 69 N. W. 900, 1 Am. Neg Rep. 93. Four thousand dollars damages were held not to be excessive in this case.

[66] Boyer v. St. Paul City R. Co., 54 Minn. 127, 55 N. W. 825, 4 Am. Elec. Cas. 515.

[67] Hickman v. Union Depot R. Co. 47 Mo. App. 65, 4 Am. Elec. Cas. 463, per Biggs, J.

immediately in front of a moving electric railway train.[68] And in a recent decision in this State it is held that it is error to refuse to charge the jury that it was the duty of the plaintiff, before going on the track, to look and listen for the approaching car, and if, by looking or listening, he would have seen or heard the car in time to have avoided the accident by the exercise of ordinary care, but neglected to do so, then, notwithstanding the defendant might also have been guilty of negligence contributing to the accident, the plaintiff could not recover.[69] And in a later case in this State it is declared that, unless the conditions are exceptional, the law requires a person about to drive on a car track to look and listen for cars before doing so.[70] In this case, which was an action by one who was riding in a covered vehicle at the invitation of the driver, it appeared that the driver did not look for a car until his horse was in the very act of stepping on the track, and it was held that if the plaintiff was aware of the danger, and that the driver was remiss in guarding against it and the former took no care to avoid injury, he could not recover, not because the driver's negligence was imputable to him, but because his own negligence proximately contributed to the damage. Where the evidence is conflicting upon the question of contributory negligence and tends to show negligence on the part of those in charge of the car in running it at a high rate of speed, the questions of negligence should be submitted to the jury.[71]

§ 639a. **Duty of traveler crossing electric railway tracks— Duty of company — Nebraska.—** The negligence of a person in driving across a street railway track without stopping to look and listen will not excuse the company from its duty to use reasonable diligence to stop its car after discovering the perilous situation, and if its failure to do so after seeing the danger directly and immediately causes an injury to him, the com-

[68] Watson v. Mound City St. Ry. Co., 133 Mo. 246, 34 S. W. 573, 3 Am. & Eng. R. Cas. (N. S.) 385, 6 Am. Elec. Cas. 500.

[69] Murray v. St. Louis Transit Co., 176 Mo. 183, 75 S. W. 611.

[70] Fechley v. Springfield Traction Co., (Mo. App. 1906), 96 S. W. 421.

[71] Moritz v. St. Louis Transit Co., 102 Mo. App. 657, 77 S. W. 477, reversing a judgment of non-suit.

pany will be held liable for such injury. And where the evidence is fairly conflicting the question as to the direct and proximate cause of an alleged injury is one of fact for the determination of the jury.[72]

§ 640. **Duty of traveler crossing electric railway tracks — Duty of company — New Jersey.**— A person, in crossing the tracks of an electric street railway, should use such precaution and care as a reasonably prudent man would, under the circumstances.[73] And if it appears that the motorman is not going to respect the rights of a person about to cross the street first

[72] Omaha Street Ry. Co. v. Larson (Neb. 1903), 97 N. W. 624, 15 Am. Neg. Rep. 380, the court said in this case: "It will be observed that the charge of negligence in the petition was the failure of the defendant to check the speed of the car and stop it after the impact of the car with the horse and wagon, and that by its want of care in this particular the injury was occasioned. This is the sole issue of negligence tendered by the petition. At the outset it is insisted by the defendant street railway company that plaintiff has no right to maintain an action for defendant's failure to use diligence in stopping its car, without showing himself free from negligence in going on the track; that the subsequent negligence, if any, of the company, is indivisible from the negligence of Larson in the first instance, and if, as alleged by the defendant, he drove on the track without stopping to look and listen, such contributory negligence on his part constitutes a complete defense to the action. On the question as to whether the defendant used ordinary diligence in attempting to stop the car after the impact with defendant's horse and wagon, the testimony is fairly conflicting. Plaintiff's evidence tends to show that defendant was dragged about 116 feet after the impact before the vehicle was overturned and the injury inflicted. Defendant's testimony, on the other hand, tended to show that the injury was inflicted within a few feet of the place of contact, and that reasonable efforts were used to stop the car after the collision. The question then arises as to whether plaintiff's evidence tends to show an intervening efficient cause, which of itself directly and immediately occasioned the injury. The test is, was the failure to stop the car a new and independent force, acting in and of itself in causing the injury? If so, it superseded the alleged contributory negligence complained of, so as to make plaintiff's want of proper care in driving on track remote in the chain of causation. This view is supported by numerous decisions of this court," per Oldham, C.

[73] Consolidated Traction Co. v. Chenowith, 58 N. J. L. 416, 34 Atl. 817, affd., 35 Atl. 1067; Connelly v. Trenton Pass. Ry. Co., 56 N. J. L. 700, 29 Atl. 438, 5 Am. Elec. Cas. 510.

he should wait or he will be guilty of contributory negligence.[74] He should use his powers of observation in respect to approaching vehicles and exercise a reasonable judgment to avoid collision, but he need only extend his observation to the distance within which vehicles proceeding at a customary and reasonably safe speed would threaten his safety. In case his observation is temporarily obstructed, he should wait until the required observation can be made.[75] So where, from the testimony of the plaintiff, it appeared that he saw the car at a distance of about 300 feet from where he was struck, and that after waiting two or three seconds he proceeded to cross, without again looking for the approaching car, when he was struck, it was held that it was a "question of fact for the jury to settle, whether the plaintiff, in the exercise of reasonable prudence and caution, should have apprehended that the car was coming at so high a rate of speed that it would reach him before he cleared the tracks, and to determine whether a prudent man,

[74] Schwanewede v. North Hudson County Ry. Co., 67 N. J. L. 449, 51 Atl. 696, 11 Am. Neg. Rep. 463; Earle v. Consolidated Traction Co., 64 N. J. L. 573, 46 Atl. 613, 8 Am. Neg. Rep. 95, wherein it is said: "The first to reach it had the right to pass over first. But if, when the plaintiff reached the crossing, it was apparent that his rights were not being observed by the motorman, he could not proceed without imprudence, and was bound to stop, or to turn aside, if he could by the exercise of due care do so, and protect himself from injury. His remedy in that case would have been against the company for its refusal to respect his rights upon the public way," per Van Syckel, J.

[75] Newark Pass. Ry. Co. v. Block, 55 N. J. L. 605, 27 Atl. 1067, 4 Am. Elec. Cas. 523. See also Solatinow v. Jersey City H. & P. St. Ry. Co., 70 N. J. L. 154, 56 Atl. 235, 15 Am. Neg. Rep. 135.

A child who is in sui juris is bound by the rule of duty which requires the ordinary traveler in crossing a street railway track to use his powers of observation to discover approaching vehicles and his judgment how and when to cross without collision and if in an action against a street railway to recover for an injury as the result of being struck by a car it clearly appears from the undisputed facts that his conduct was in entire disregard of the degree of prudence which one of his age might reasonably be expected to exercise he cannot recover therefore and it is declared that in such a case it is a question for the court to determine whether he was guilty of contributory negligence. Fitzhewry v. Consolidated Traction Co., 64 N. J. L. 674, 46 Atl. 698, 8 Am. Neg. Rep. 288.

with the right to presume that the company would exercise due care on its part, would have proceeded to cross the street, under the circumstances." It was also held that it was the "duty of the motorman to keep his car so far under control that he could have averted the impending danger if the plaintiff was in the exercise of due care for his own safety when he went upon the track." [76] It was also declared in this case that, if it had been the admitted facts that plaintiff stepped upon the track only five or six feet in front of the car, a nonsuit should have prevailed. In another case in this State, where a person, when about fifty feet from the tracks of an electric street railway, saw a car approaching about 250 feet distant, and just before stepping upon the track glanced back without seeing the car, but was almost immediately struck as he stepped on to the track, it was held that he was guilty of such negligence as would bar recovery.[77]

§ 641. **Duty of traveler crossing electric railway tracks — Duty of company — New York.**— The cases in this State do not seem to be in harmony as to the exact degree of care required of persons about to cross the tracks of an electric street railway. Thus, in a case, decided in 1898, it is held that the law in respect to crossing steam railroads does not apply to street surface railroads, where both parties are making use of the highways, and where the crossing is made at the intersection of streets. The court says: "There, both parties are bound to use that degree of care which ordinarily prudent men would use, under the circumstances; a degree of care commensurate with the dangers to be reasonably anticipated at such a crossing." [78] In another case in this State, decided in 1895, it is

[76] Consolidated Traction Co. v. Glynn, 59 N. J. L. 432, 37 Atl. 66, 2 Am. Neg. Rep. 31, per Van Syckel, J., affirming judgment in favor of plaintiff. See also Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100, 6 Am. Elec. Cas. 514, affd., 38 Atl. 683.

[77] Jewett v. Paterson R. Co., 62 N. J. L. 424, 42 Atl. 707. See Consolidated Traction Co. v. Knoth, 59 N. J. L. 582, 36 Atl. 1086, 1 Am. Neg. Rep. 633.

[78] Read v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209, per Woodward, J. (Second Department.) Under the given facts in the following cases in New York it was held not contributory negligence as a matter of law to attempt to cross tracks of an electric street railway. Driving on

track after looking for the car; only a short time upon the track; no car visible for two or three blocks when driver looked; and no bell rung on car. Fisbach v. Steinway R. Co., 11 App. Div. 152, 42 N. Y. Supp. 883. Where a person drove upon tracks with heavily loaded wagon, looked, but no car was in sight. Kilbane v. Westchester Elec. R. Co., 19 Misc. 184, 43 N. Y. Supp. 278. To drive an ice wagon upon tracks when car is 133 feet distant. McCormick v. Nassau Elec. R. Co., 16 App. Div. 24, 44 N. Y. Supp. 684; rehearing denied, 46 N. Y. Supp. 230, 18 App. Div. 333. Driving loaded truck upon track, front of approaching car when car is at such a distance that it appears that he can cross in safety. Hergert v. Union R. Co., 25 App. Div. 218, 49 N. Y. Supp. 307. To attempt to cross near crosswalk, in plain view of motorman, and car 130 feet distant. Ehrman v. Nassau Elec. R. Co., 23 App. Div. 21, 48 N. Y. Supp. 379. To attempt to cross rapidly, after looking in both directions from curb and seeing no car approaching. Hickman v. Nassau Elec. R. Co., 41 App. Div. 629, 58 N. Y. Supp. 858. Failure to look where it appeared that the car was forty or fifty feet distant when the crossing was attempted. Brozek v. Steinway R. Co., 10 App. Div. 360, 41 N. Y. Supp. 1017. In the following cases, under facts given, held, to constitute such contributory negligence which, as a matter of law, would prevent recovery: Driving upon tracks without looking for approaching car, and the fact that his view was obstructed by the top of the carriage, was held not to relieve the driver. Lang v. Metropolitan St. R. Co. (S. C. App. Term, 1899), 26 Misc. (N. Y.) 754, 57 N. Y. Supp. 249. Failing to look at time of crossing, although she had looked about two minutes before, and no car was in sight. Healey v. Brooklyn H. R. Co., 18 App. Div. 623, 45 N. Y. Supp. 393. Attempting to cross diagonally across a street car track, full view of approaching car. May v. Metropolitan St. R. Co. (S. C., App. Term, 1899), 26 Misc. 748, 57 N. Y. Supp. 277. Attempting to drive diagonally across track at a place not a crossing, with car 150 feet distant. Meyer v. Brooklyn H. R. Co., 9 App. Div. 79, 41 N. Y. Supp. 92, 75 N. Y. St. R. 552. After seeing car approaching for a long distance, to suddenly jump in front of it as it came near, when he had only to stand still to avoid injury. Jager v. Coney Island & Brooklyn R. Co., 84 Hun, 307. See also following cases, where, under facts stated, contributory negligence was found which prevented recovery: Where it was evident to a person that he could not cross the tracks in safety, unless the car was stopped or its speed slackened. Williamson v. Metropolitan St. R. Co., 60 N. Y. Supp. 477, 29 Misc. 324. After having looked both ways, to walk deliberately upon the track in full view of an approaching car, the gong on which was being rung. Hickman v. Nassau Elec. R. Co., 36 App. Div. 376, 56 N. Y. Supp. 751. Attempting to run diagonally across track, in front of approaching car, which he could have seen had he looked. Doller v. Union R. Co., 7 App. Div. 283, 39 N. Y. Supp. 770. Attempting to drive across tracks without looking, where, if he had looked, the driver could have seen the car in time to have avoided

declared that it is the duty of a person, before crossing electric railway tracks, to look both ways.[79] And again, in a case decided in 1896, it is held that a person is guilty of contributory negligence, which will prevent recovery, in either crossing electric railway tracks, without looking for approaching cars or in miscalculating his chances of crossing after having looked. The court says: "The law is too well settled to require the citation of any authorities, that it is the duty of a person, before crossing a traveled railway, to look for an approaching train, and a failure to do so, when the view is unobstructed or crossing with knowledge of an approaching train and miscalculating the chances, precludes a recovery for any injuries sustained." [80] In this case it was also said by the court: "The plaintiff does not swear that he looked for the down car, and the conclusion is irresistible that he either did not look or that he saw it and miscalculated his chances of crossing in safety. The latter is very probable. Either is fatal to his recovery." [81] And in another case, where a person driving a heavily-loaded truck attempted to cross in front of an approaching car, miscalculated his chances, and was injured by a collision with the same, it was held that the complaint was properly

the collision. Patten v. Schenectady St. Ry. Co., 80 Hun, 494, 5 Am. Elec. Cas. 520. Where it appeared that the decedent signalled a street car to stop and in response to a call by the conductor for him to hurry started to cross the street diagonally and was struck and killed by a car going in the other direction. Stillings v. Metropolitan Street Ry. Co., 177 N. Y. 344, 69 N. E. 641, 15 Am. Neg. Rep. 637.

In Holliday v. Brooklyn Heights R. Co., 59 App. Div. (N. Y.) 57, 69 N. Y. Supp. 174, 10 Am. Neg. Rep. 340n, it is said: "The standard of care is the conduct of persons of ordinary prudence, and the plaintiff's act is to be measured by his situation and surroundings. He was required to exercise his senses for his own protection, and claims to have done so more than once. If they failed to protect because not exercised at the precise point or moment when they would have been effective, the conclusion that the result was a want of ordinary and reasonable care would flow from inferences dependent upon measurements and estimates which it is peculiarly within the province of the jury to make."

[79] Curry v. Union Electric Ry. Co., 86 Hun (N. Y.), 559, 5 Am. Elec. Cas. 541.

[80] Doyle v. Albany Ry. Co., 5 App. Div. (N. Y.) 601, 39 N. Y. Supp. 440, 6 Am. Elec. Cas. 532, per Edwards, J. (Third Department).

[81] Per Edwards, J.

dismissed, on the ground of contributory negligence. The court said: "It seems quite clear in this case that the plaintiff, by his own act, contributed to the injury of which he complains, and that he undertook to determine, at his own peril, whether or not he could cross defendant's track in safety, and that the risk of that determination was his own, for which the defendant cannot be held responsible. The law is well settled that where the defendant is negligent, if the plaintiff, by his own negligent act, contributed to the injury of which he complains, he cannot have recourse for damages for that injury to the defendant." [82] And in a more recent case, where it appeared that the deceased started to cross the street, and as he neared the tracks, stopped and looked and saw a car within a few feet of him which slowed up at that point, whereupon he proceeded to cross, when the speed of the car was increased and he was struck by it as he was about to step upon the track, it was held that, as it did not appear that the deceased paid any attention to the car after it slowed up, but proceeded to cross, probably assuming that because it had slowed up it would come to a stop, and he could cross the street in safety, the defendant's motion to dismiss the complaint should have been granted.[83] In a later case in this State, however, a mere error of judgment on the part of one crossing railway tracks, coupled with the right of such person to assume that the motorman would have the car under control in approaching the crossing, was held not to preclude recovery.[84] In this case the trial

[82] Clancy v. Troy & Lansingburgh R. Co., 88 Hun (N. Y.), 496, 5 Am. Elec. Cas. 551, per Mayham, P. J.

[83] Thompson v. Metropolitan Street Ry. Co., 89 App. Div. (N. Y.) 10, 85 N. Y. Supp. 181.

[84] Read v. Brooklyn H. R. Co., 32 App. Div. (N. Y.) 503, 53 N. Y. Supp. 209. This was an action to recover damages for injuries sustained by the plaintiff's intestate, by reason of a collision between a carriage driven by him and a car of the defendant, an electric railroad company, at a street crossing. It appeared that the plaintiff's intestate was driving along an avenue 100 feet wide, affording a view for several hundred feet of the defendants tracks, on a street also 100 feet wide, which crossed the avenue, and the evidence tended to show that the car and the vehicle in which the plaintiff's intestate was traveling must have been in plain view of each other for a period of seven seconds, and that the plaintiff's intestate had ample opportunity up to the last second before the collision to turn his horses into the street on which the defendant's

court had instructed the jury that if plaintiff's intestate "started to cross that track within a distance of forty feet of the approaching car, going at rate of thirty miles an hour, and appreciated the speed, there can be no recovery," and it was declared that this was as far as the trial court was justified in going under the circumstances of the case, and that it was properly submitted to the jury. In another case it is held that though a person may be guilty of contributory negligence in attempting to cross the tracks of an electric street railway, yet, if the employees in charge of the car could, by the exercise of proper care, have avoided the injury, the company will be liable.[85] In determining the question of contributory negligence on the part of persons about to cross electric railway tracks, the locality in which the crossing is attempted is an important element to be considered. In some of the large cities, cars are run at such frequent intervals, and so closely together, that in order to cross the tracks at all, it is generally necessary to cross in front of approaching cars only a short distance away. A rule requiring a pedestrian or a driver of a vehicle to wait until an approaching car, a short distance away, had passed would necessitate a waiting until, perhaps, late in the evening. So it is declared in one case that while as a general rule it is negligence to attempt to cross a street railway track, a short distance in front of an approaching car, yet that, for the above reasons, such rule cannot be rigidly applied where a vehicle is run into by a street car on a thoroughfare crowded with cars.[86]

§ 642. **Duty of traveler crossing electric railway tracks — Duty of company — Ohio.**— In a case in this State it is de-

tracks were, and could thus have avoided the collision. It was held that in view of the presumption that the plaintiff's intestate would not intentionally drive in front of a rapidly approaching car, there was evidence in the facts and circumstances of this case which might justify reasonably minded men in differing as to the negligence or absence of negligence on the part of the plaintiff's intestate, and that it was, therefore, proper to submit the question of contributory negligence to the jury. See also Walls v. Rochester Ry. Co., 92 Hun (N. Y.), 581.

[85] Weitzman v. Nassau Elec. R. Co., 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905.

[86] Kelly v. Brooklyn Heights R. Co., 12 Misc. (N. Y.) 568, 5 Am. Elec. Cas. 543.

clared that a person about to cross the tracks of an electric street railway must use ordinary care; such degree of care as men of ordinary prudence commonly use under like circumstances; care proportioned to the danger to be avoided, and the consequences which might result from want of it, conforming in amount and degree to the particular circumstances under which it was to be exercised.[87] The following is an extract from the opinion: "Life and limb are of more consequence than quick transit. The vehicle man must not run down the pedestrian. The opposite doctrine appears to have found lodgment in many minds, and there seems a disposition to assume that a foot passenger has no right upon a public street as against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled, at their peril, to keep out of the way. As a matter of law, it is as much the duty of the vehicle to keep out of the way of the footman, and especially so at crossings, as it is for the latter to escape being run over, giving due consideration to the greater difficulty of guidance, and arresting the progress of the vehicle. The use of streets for railways is allowed, only because it is considered not to be a substantial interference with their free and unobstructed use of the highways for passage. So long, therefore, as there is no unreasonable interference with the public right of passage, railways in streets are lawful structures; but if operated upon the theory of exclusive right to their track, they become wrongdoers. * * * Undoubtedly the footman must reasonably use his senses for his own protection, and if he knows of the approach of a vehicle, and, using his faculties, perceives that he cannot continue on without danger of collision, he may not rush forward, regardless of consequences. He is not bound, however, to anticipate negligence on the part of drivers of vehicles, but has the right to assume that they will not be negligent. * * * It is insisted that, as a matter of law, it is negligence for one about to cross a railway not to look each way. Authorities are to be found giving apparent support to this proposition. The practice in

[87] Cincinnati St. Ry. Co. v. Snell, 54 Ohio St. 197, 43 N. E. 207, 6 Am. Elec. Cas. 436.

some courts is for the court to direct a verdict whenever, in the opinion of the judge, the evidence would not warrant a judgment. And some of these decisions imply that the court has held persons about to cross a street car track to the same degree of care as would be demanded were he crossing a steam railroad. We think there is no just analogy between the right of a street railway running cars along a highway and the right of a steam railroad running its trains across a highway at grade, and that the rule of care incumbent upon one about to cross a steam railroad is hardly a fair one to be applied in all its strictness to street railways in cities, where a car that can be speedily stopped, passes a crossing at frequent intervals, and where people necessarily cross the streets frequently and hurriedly. * * * We think one so crossing could not be asked to extend his observation beyond that distance within which a car proceeding at a customary and reasonably safe speed would threaten his safety." [88] It is, however, held that a person in crossing the tracks of an electric street railway must exercise a higher degree of care than in crossing the tracks of a horse railway.[89] And where a person, at night, drove upon the tracks of an electric street railway, without looking for an approaching car, it was held that he was guilty of contributory negligence, where he was struck by a car which was lighted and which could have been seen several hundred feet away.[90] In another case, in one of the lower courts of this State, it is held that a motorman is not bound to regulate the speed of a car or give warning of its approach so that pedestrians may cross in safety at a place other than a street crossing, and that he need not apprehend that pedestrians will step upon the track without first observing whether a car is approaching.[91]

§ 643. **Duty of traveler crossing electric railway tracks — Duty of company — Oregon.—** In a case decided in 1894 in this State, which was an action to recover for the death of a child, the court declared that the general rule undoubtedly was, that it was the duty of a pedestrian to look and listen before at-

[88] Per Spear, J.

[89] Hawthorne v. Cincinnati St. R. Co., 2 Ohio Dec. 548.

[90] Schauster v. Toledo Consol. St. R. Co., 7 Ohio Dec. 389.

[91] Bethel v. Cincinnati St. R. Co., 15 Ohio C. C. 381.

tempting to cross a street car track, and that a failure to do so would bar recovery, but that the rule was not to be applied in all cases without regard to age or circumstances.[92]

§ 644. **Duty of traveler crossing electric railway tracks — Duty of company — Pennsylvania.**— The general rule that travelers when approaching the tracks of steam railroads, for the purpose of crossing, must "stop, look and listen," is applicable only in part to the crossing of electric street railways.[93] It was said in this case: "A person about to cross a street at a regular crossing is not bound to wait because a car is in sight. If a car is at such a distance from him that he has ample time to cross, if it is run at the usual speed, it cannot be said as matter of law that he is negligent in going on. The rule to stop, look, and listen, applicable to the crossing of steam roads, applies only in part to the crossing of street railways. There is always a duty to look for an approaching car, and, if the street is obstructed, to listen, and in some situations to stop."[94] So it is said in an earlier case that it may not be necessary to stop before approaching such a crossing, but it is necessary to look before going upon the track.[95] In a case which was decided two years later, the court declared that a person was presumptively negligent in attempting to cross electric street railway tracks without looking or listening, when the approach of the car might have been discovered by him in ample time if he had looked and listened, and it declared that such rule was supported by authority and reason.[96] And it

[92] Wallace v. City & Suburban Ry. Co., 26 Or. 174, 5 Am. Elec. Cas. 554, 37 Pac. 477, per Bean, Ch. J.

[93] Callahan v. Philadelphia Traction Co., 184 Pa. St. 425, 39 Atl. 222, 41 Week. N. of Cas. 509.

[94] Per Fell, J. Quoted with approval in Hamilton v. Consolidated Traction Co., 201 Pa. St. 351, 50 Atl. 946, 11 Am. Neg. Rep. 153.

[95] Carson v. Federal St. & Pleasant Valley Ry. Co., 147 Pa. St. 219, 23 Atl. 369, 4 Am. Elec. Cas. 470. See Timber v. Philadelphia Rapid Transit Co. (Pa. 1906), 63 Atl. 824.

A bicyclist is not exempt from observing the caution imposed upon all others of the public about to cross railway tracks but he is bound to look and listen before crossing. McCracken v. Consolidated Traction Co., 201 Pa. St. 378, 50 Atl. 830, 11 Am. Neg. Rep. 146.

[96] Smith v. City & Suburban Ry. Co., 29 Or. 539, 46 Pac. 136, 5 Am. & Eng. R. Cas. (N. S.) 163, 6 Am. Elec. Cas. 561, per Bean, Ch. J.

was also held that the following instruction which was asked for by defendant was good law: "If plaintiff failed to look to see if a car was approaching before she attempted to cross the track, and, by reason of such failure, stepped upon the track and was struck by an approaching car, which she could have seen and avoided by looking, then she was guilty of contributory negligence and cannot recover in this action." A refusal to give this instruction was held to be error, and upon a petition for rehearing, the court held that the proposed instruction was not given in substance by the court in its general charge, to the effect that "if the accident 'was caused by the carelessness or negligence of the plaintiff,' or if she did not 'use proper care and caution to ascertain whether a car was approaching,' before attempting to cross the track, she cannot recover." The court said: "The instruction as given contained nothing more than the featureless generality, that plaintiff must exercise ordinary care and caution, leaving the jury to determine what would satisfy that requirement, while the instruction asked and refused defines precisely what would be want of ordinary care, under the circumstances of this case, and, if given, would have furnished the jury with a criterion by which to determine whether plaintiff exercised such care or not." [97] And in another case the court says: "The rule to stop, look and listen is applicable, in part at least, to crossing street railways. * * * When a citizen attempts to cross such track, it is his duty when he reaches it to look in both directions for an approaching car. It very rarely, if ever, happens that the street is so obstructed that the car may not be seen as the citizen approaches the track. It is his duty to look at that point, and if there is any obstruction, to listen, and his neglect to do so is negligence per se. This is an unbending rule to be observed at all times and under all circumstances." [98] And again, it is declared by the court in another case, that "It is an unbending rule to be observed at all times and under all circumstances, that a person about to cross the track of a street railway must look in both directions for approaching cars, be-

[97] Smith v. City & Suburban Ry. Co., 29 Or. 546, 46 Pac. 780, 5 Am. Elec. Cas. 566, per Bean, Ch. J.

[98] Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. St. 180, 24 Atl. 596, 4 Am. Elec. Cas. 486, per Paxton, Ch. J.

fore attempting to cross." [99] The court also said in this case, in reference to the duty of the company: "Street railway companies have not an exclusive right to the highways upon which they are permitted to run their cars, or even to use their own tracks. The public have a right to use these tracks in common with the railway companies; and, therefore, while the rights of the latter are in some respects superior to those of the former, * * * it is not negligence per se for a citizen to be anywhere upon such tracks. So long as the right of a common user of all the tracks exists in the public, it is the duty of passenger railway companies to exercise such watchful care as will prevent accidents or injuries to persons who, without negligence upon their own part, may not, at the moment, be able to get out of the way of a passing car. The degree of care must necessarily vary with the circumstances, and, therefore, no unbending rule can be laid down." [1] Where a pedestrian attempted to cross a street 100 feet in width, it was held that it was not sufficient to stop, look and listen at the side of the street, but if at any time before reaching the track he could have seen the car and avoided the danger by stopping, it was his duty so to look and stop.[2] And it has also been held in the

[99] Gilmore v. Federal St. & Pleasant Valley Pass. Ry. Co., 153 Pa. St. 31, 25 Atl. 651, 4 Am. Elec. Cas. 491, per Heydrick, J. See also Smith v. Electric Traction Co., 6 Penn. Dist. Rep. 471, 40 Week. N. of Cas. 486.

[1] Per Heydrick, J.

[2] Nugent v. Philadelphia Traction Co., 181 Pa. St. 160, 40 Week. N. of Cas. 243, 37 Atl. 206, 2 Am. Neg. Rep. 232. See following cases, on question of contributory negligence under given facts: Not contributory negligence, as a matter of law, where the car, at the time a person attempted to cross, was at sufficient distance for him to have crossed in safety if run at usual speed. Callahan v. Philadelphia Traction Co., 184 Pa. St. 425, 39 Atl. 222, 41 Week N. of Cas. 509. Not contributory negligence, as a matter of law, to attempt to drive across tracks on a dark and windy night, where driver saw no car, though he looked and listened. Tompkins v. Scranton Traction Co., 3 Super. Ct. (Penn.) 576. Contributory negligence, as matter of law, to drive on tracks, where driver can see only about twenty-five feet of them, and no signals can be heard because of noise. Omslaer v. Pittsburg & Birmingham Traction Co., 168 Pa. St. 519, 32 Atl. 50, 5 Am. Elec. Cas. 568. Negligence per se to attempt to drive heavily loaded wagon across tracks without looking back for cars coming in same direction as vehicle was going. Ehrisman v. East Harrisburg City Pass. Ry. Co., 150 Pa. St. 180, 24 Atl. 596, 4 Am. Elec. Cas. 486. Where

case of a person riding in a vehicle that it is not sufficient to relieve from a charge of contributory negligence to show that he looked when at a distance of several yards from the track.[3]

§ 645. **Duty of traveler crossing electric railway tracks — Duty of company — Texas.**— In this State it is held that the railway company has no exclusive right to the use of its tracks. It is the duty of a person on or about to cross electric railway tracks to exercise reasonable care to avoid injury, that is, such care as a person of ordinary prudence would exercise, under similar circumstances and surroundings, and as a general rule, failure to exercise such care will preclude recovery for an injury. If a person in attempting to cross tracks is injured by the negligence of the company and through no fault of his own, the company will be liable. The electric street railway company should exercise the same degree of care as is required of a railroad company in reference to persons lawfully upon its tracks at a crossing of a highway, which is ordinary care, that care which a man of ordinary prudence would exercise, under like circumstances. Those engaged in operating electric cars should use ordinary care to see that the

pedestrian might have seen car had she looked, and was struck as soon as she stepped on track, it was held contributory negligence, precluding recovery. Sweeney v. Scranton Traction Co. (C. P.), 5 Lack. L. News, 86. To attempt to cross between two cars approaching each other, held contributory negligence, precluding recovery. Meyer v. Pittsburg, A. & M. Traction Co., 189 Pa. St. 414, 42 Atl. 41. To drive across at a walk, with knowledge of car approaching on down grade, held contributory negligence. Smith v. Electric Traction Co. (C. P.), 6 Penn. Dist. Rep. 471, 40 Week. N. of Cas. 486. Held improper to grant a non-suit where it appeared that deceased stopped at curb and looked, that car was from 120 to 185 feet distant, and testimony as to rate of speed not uniform, and there being no further evidence as to action of deceased before reaching track. McGovern v. Union Traction Co. (Penn., 1899), 43 Atl. 949. Motorman held not free from negligence, as a matter of law, where he failed to stop his car in time to prevent a collision with a vehicle crossing the track at other than a street crossing, and which started to cross when car was some distance away. Lenkner v. Citizens' Traction Co., 179 Pa. St. 486, 36 Atl. 228, 28 Pitts. L. Jour. (N. S.) 11.

[3] Pieper v. Union Traction Co., 202 Pa. St. 100, 51 Atl. 739, 11 Am. Neg. Rep. 243 n.; Burke v. Union Traction Co., 198 Pa. St. 497, 47 Atl. 470, 9 Am. Neg. Rep. 600.

track is clear and to avoid collision with persons and vehicles that may be upon the track or upon the street.[4] In this connection it is said in one case that: "The person operating the car must exercise that amount of vigilance that a man of ordinary prudence would have exercised, under the same circumstances. This may, under some conditions, require the use of every available means to avoid the injury; but it is, after all, ordinary care, in degree, because a man of ordinary prudence under like conditions, would do the same thing. Yet, it might be the utmost care, or great care, as regards the quantum of diligence, because the particular circumstances demanded that much."[5] Though a person may negligently be upon the tracks, yet, after a person is thus placed in a position of peril, the company will be liable, if it appears that by the exercise of proper care the injury could have been avoided by those in charge of the car. To make this rule operative, however, it must appear that those in charge of the car ought, by the exercise of due care and discretion, both, to have realized the danger and have had the power to avert it.[6] In another case the court says: "People of cities are guided largely, in their manner of crossing such streets upon which cars are run,

[4] San Antonio St. Ry. Co. v. Mechler, 87 Tex. 628, 30 S. W. 899, 5 Am. Elec. Cas. 585, per Brown, J.; Dallas Rapid Trans. Ry. Co. v. Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455, 5 Am. Elec. Cas. 571. See Citizens' Railway Co. v. Ford, 25 Tex. Civ. App. 328, 60 S. W. 680, 9 Am. Neg. Rep. 376, wherein it was decided, where it appeared that the plaintiff's wife crossing in front of one car was struck by a car on the other track, as she stepped on that track, that the court erred in refusing to charge the jury that if they believed from the testimony that plaintiff's wife ran in front of defendant's street car while it was in motion and within about six feet of same, and that after this, and without stopping, or looking, or listening, ran into defendant's car on the other track in daylight, when both of said cars were in plain view; and if they believed that she could have known by the use of ordinary diligence that both of said cars were passing along the street; and if they further believed that such conduct of the plaintiff's wife was negligent and such acts as would not have been performed by a reasonably prudent person under the same circumstances then they should find for the defendant.

[5] San Antonio St. Ry. Co. v. Mechler, 87 Tex. 628, 30 S. W. 899, 5 Am. Elec. Cas. 585, per Brown, J.

[6] Houston City Ry. Co. v. Farrell (Tex. Civ. App., 1894), 5 Am. Elec. Cas. 577, per Williams, J.

by the known regulations and customs governing the operation of such railways. The electric street car is usually provided with a bell or gong, to be sounded as a warning of approach. A man is placed at the front of the car to keep a vigilant watch ahead, to give warning of its approach, keep his car under control, and stop it when there is apparent danger ahead. The actions of the people in crossing such streets must be judged of in the light of such regulations and customs, in determining the question of contributory negligence. Some persons can rely with more safety upon hearing than sight, and knowing the regulations and customs of such railways, they listen for the ringing of the bell or sound of the gong to govern their actions in crossing the streets. They have the right to expect of the operatives of such dangerous machinery along the streets of a populous city, care in proportion to the danger of the undertaking. The conduct of persons, based upon the idea that the usual safeguards will be observed by those in charge of such cars, and which become hazardous only by the operatives neglecting to observe these precautions, should not be treated as contributory negligence, defeating the right of recovery for injuries inflicted through such negligence of the servants of the railway company." [7]

§ 646. **Duty of traveler crossing electric railway tracks — Duty of company — Utah.**— Although a street railway company may be permitted to use a portion of the streets for the construction and operation of a road, yet this confers upon it no right in the streets superior to that of the public at large, except the right to lay its track and operate its cars, which must be done with as little inconvenience to ordinary travel as possible. It has no exclusive right to the use of the portion occupied by its tracks. It must exercise due care to avoid injury and accidents, which are the proximate result of the want of proper care, skill or vigilance on the part of its agents. A person about to cross electric railway tracks is also held to the exercise, equally with the company, of a proper degree of care, skill and vigilance, but is not held to the exercise of the same degree of care as in the case of a steam railroad, since persons

[7] Dallas Rapid Trans. Ry. Co. v. Elliott, 7 Tex. Civ. App. 216, 26 S. W. 455, 5 Am. Elec. Cas. 571, per Finley, J.

have the right to travel over every portion of the highway, while as a general rule they have no such right on a railroad track, and furthermore, street cars can be more easily controlled than steam cars. Though a person may be guilty of negligence in attempting to cross electric railway tracks, yet if the injury could have been avoided by the exercise of ordinary care and reasonable prudence on the part of the company, it will be liable.[8] In this case the court said: "The duty of the company to recognize the rights of the persons in the lawful use of the streets is imperative, and if it adopts a propelling power which increases the hazards of such persons, it must be held to a degree of care proportionate to the increase of danger of such propelling power. This is so, because the more dangerous the appliance the more likely it is for casualties to happen, and, consequently, the greater the degree of care which must be exercised in order to avoid their occurrence. As the company, however, is held to a degree of care commensurate with the circumstances of each particular case, so likewise is the citizen, for he cannot recklessly place himself in the way of danger and then complain of injury. He is bound equally with the company to the exercise of a proper degree of care, skill and vigilance. He has no exclusive right of any particular portion of the street, any more than has the railway company. Ordinarily, he may walk or drive upon the track or across it, but because cars are designed to run only upon the track, he cannot heedlessly obstruct its passage, without assuming the risk of injuries, for which he may have no redress. The car has the right of way in case of meeting a person or vehicle on the track, but each party, in order to avoid accident, is bound to exercise ordinary care and such reasonable prudence and precaution as the surrounding circumstances may require. These circumstances necessarily vary in each particular case, in their relation to each other, and the conduct of the parties must be considered in the light of their surroundings at the particular time when they were called upon to act. What may be considered ordinary care in one case may, under the circumstances of another, amount to culpable negligence. So an act which would have been viewed

[8] Hall v. Ogden City St. Ry. Co 13 Utah, 243, 44 Pac. 1046, 6 Am. Elec. Cas. 598, per Bartch, J.

with indifference when the street cars were drawn by horses at such low rate of speed as to be easily controlled, might be gross negligence when the car is propelled by electric power at a much higher rate of speed." [9] In this case it was held that a nonsuit was improperly granted, upon the following facts: The plaintiff as he drove into the street where the tracks were, from an alley-way, looked for an approaching car, but his view being obstructed by trees and poles, he saw none, and he drove towards the track, making no further particular effort to see whether a car was coming, and it being still possible that the trees and poles obstructed his view. As he was crossing the track he was struck by a car going at the rate of twenty-five or thirty miles per hour, and upon which no gong was sounded until just before the collision.

§ 646a. **Duty of traveler crossing electric railway tracks — Duty of company — Virginia.**— In a case in this State it is held proper to instruct the jury to the effect that, where a street car approaches a vehicle from behind, which is crossing the street car track, it is the duty of the motorman to give timely warning unless he sees that his approach is clearly observed, and to reduce his speed to a point sufficient to enable him to stop his car if it becomes necessary to avoid a collision, and to continue to run at such guarded rate of speed until the vehicle has cleared the track or the danger of collision is passed, and that if the company did not perform its duty under the circumstances of the case and could have done so by exercising reasonable care, and, as a result, collided with plaintiff's wagon, thereby injuring him without negligence on his part, they must find for the plaintiff.[10]

§ 647. **Duty of traveler crossing electric railway tracks — Duty of company — Washington.**— In a case which arose in this State it was held that a person who goes upon the tracks of an electric street railway, without looking for an approaching

[9] Per Bartch, J.

[10] Richmond Traction Co. v. Clarke (Va. 1903), 43 S. E. 618, holding one not guilty of contributory negligence as a matter of law in attempting to drive across a street railway track where an approaching car is one hundred yards distant.

car, is guilty of such contributory negligence as will prevent a recovery for injuries caused by a collision.[11]

§ 648. **Duty of traveler crossing electric railway tracks — Duty of company — Wisconsin.**— It is decided in this State that it is the duty of a person about to cross the tracks of an electric street railway to look and listen for approaching cars, and that if he fails to do so and is injured in consequence, he cannot recover, though the street railway company may be guilty of want of ordinary care.[12] And in a later case in this State it is declared that: "Whatever difference of opinion there may be upon the subject as an original proposition, it is now firmly settled as a part of the law of this State that it is the duty of a person approaching the track of an electric street railway, whether he be walking or riding in a vehicle, to look and listen for approaching cars; and that, if he fails to do so, and is injured by a car while crossing the track, he is guilty of contributory negligence, as matter of law."[13] It is also held in another case decided in the same year that a person approaching a railway track with a view of entering upon it, must look both ways and listen, and that the performance of that duty is not excused by negligence on the part of the railway company, and that the duty to look and listen includes that of performing such duty when and where it will be reasonably certain to effect its purpose.[14] And if the un-

[11] Christenson v. Union Trunk Line, 6 Wash. 75, 32 Pac. 1018.

[12] Little v. Superior Rapid Trans. Ry. Co., 88 Wis. 402, 60 N. W. 705, 5 Am. Elec. Cas. 599; Johnson v. Superior Rapid Trans. Ry. Co., 91 Wis. 233, 64 N. W. 753.

[13] Dummer v. Milwaukee Electric Ry. & L. Co., 108 Wis. 589, 84 N. W. 853, 9 Am. Neg. Rep. 271 n., per Winslow, J.

[14] Tesch v. Milwaukee Electric Ry. & L. Co., 108 Wis. 593, 84 N. W. 823, 9 Am. Neg. Rep. 388, per Marshall, J., who also further said: "The test of the ordinary traveler's right in crossing a street car track to harmonize reasonably with the spirit of an unrestricted franchise to maintain and operate, as regards the rights of other users of the way, may properly be stated thus: A person desiring to cross a street car track in advance of an approaching car has the right of way if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without interfering with the movement of the car to and past the point of crossing, assuming that it is moving at a reasonable and lawful

disputed facts disclose a negligent failure to look and listen, before attempting to cross such tracks, it is held that a nonsuit should be directed, since such requirement is a rule of law to be applied by the court and not a mere rule of evidence for the consideration of the jury.[15] So where a person was driving towards electric street railway tracks, seated so far back in his wagon that by reason of the side covering he could not see an approaching car, and where, though the bell was repeatedly sounded, the plaintiff did not hear it, it was held that he was guilty of contributory negligence which would bar recovery.[16] And where a car was in perfect condition, operated with proper signals, run at a lawful rate of speed, and the motorman kept a sharp lookout, but was unable to stop it, so as to avert a collision with a vehicle which suddenly drove upon the track, it was held that the company was not chargeable with negligence.[17]

§ 649. **Duty of traveler crossing electric railway tracks — Duty of company — Canada.**— A person who attempts to cross the tracks of an electric street railway, without looking for an approaching car, is guilty of contributory negligence, which will prevent recovery for injuries sustained by collision. Thus, where a person who was driving along a street, upon which were the tracks of an electric railway, suddenly attempted to cross the track at a street crossing, without looking behind him for an approaching car, it was held that he was guilty of such contributory negligence as would bar recovery for any injury received by a collision with a car, and it was also held that,

rate of speed. If a person, exercising his judgment as indicated, attempts to cross the track, and it turns out that he has miscalculated, he cannot be held guilty of a breach of duty to exercise ordinary care. If in the circumstances stated, other than the speed of the car, the car is approaching at an unlawful rate of speed, and it is observable by the person about to cross the track, by the exercise of ordinary care, he must take that into consideration in determining whether there is time to safely clear the track, the duty to exercise ordinary care for his own protection not being excused by the fault of anybody else."

[15] Cawley v. La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179, 12 Am. & Eng. R. Cas. (N. S.) 453.

[16] Boerth v. West Side R. Co., 87 Wis. 288, 58 N. W. 376, 4 Am. Elec. Cas. 544.

[17] Cawley v. La Crosse City R. Co., 101 Wis. 145, 77 N. W. 179, 12 Am. & Eng. R. Cas. (N. S.) 453.

under such circumstances, he could not recover, even though the car was running at an excessive rate of speed and gave no proper signal of its approach.[18]

§ 650. **Duty of traveler crossing electric railway tracks — Duty of company — Conclusion.**— We have endeavored in the preceding sections to give, so far as possible, the rules and principles in each State where we have been able to find decisions governing persons crossing the tracks of electric street railways, either on foot or in vehicles. At the beginning of this chapter we have stated that the courts have not inclined to make the crossing of electric street railways subject to the same strict rules as are applied to crossing railroad tracks. In only two States[19] are decisions to be found which favor a strict application of such rule, and in both of these States these decisions appear to be modified by later ones. In the majority of the States the rule seems to be, that it is the duty of a person about to cross tracks to look and listen[20] and that a failure to do so is contributory negligence. In other cases, part of them in the same States, it is declared that persons about to cross the tracks of an electric railway should look both ways for approaching cars.[21] And again, it is held in other cases that a person should exercise reasonable care,[22] such care as a reasonably prudent man would exercise,[23] and ordinary care.[24] Thus, it will be seen that the decisions are apparently not uniform in defining the degree of care to be exercised, although there seems to be a uniformity as to the view that the rules controlling as to the crossing of steam railroads do not apply in all their strictness to the crossing of electric railway tracks. The terms, however, "ordinary care," "reasonable care," and "such care as a reasonably prudent man would exercise," each call for a degree of care which is practically the same. Or-

[18] Danger v. London St. R. Co., 30 Ont. Rep. 493 (Div. Ct.).

[19] California and Louisiana.

[20] Indiana, Iowa, Kansas, Louisiana, Maine, Michigan, Missouri, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, Texas, Washington, Wisconsin and Canada.

[21] Illinois, Michigan, New York and Pennsylvania. See also Alabama case.

[22] Texas.

[23] Connecticut, Delaware and New Jersey.

[24] California, Georgia, Illinois, Maryland, New York, Ohio and Utah.

dinary care is such care as a reasonably prudent man would exercise, under the circumstances, a degree of care commensurate with the danger to be reasonably anticipated or avoided, and conforming to the particular circumstances under which it is to be exercised. It is a degree of care varying with the circumstances of each particular case, requiring, perhaps, slight care in one case and in another a high degree of care. Ordinary care would generally require, it would seem, that a person should look both ways, or look and listen before crossing tracks, since we can conceive of but few cases where a reasonably prudent man would not exercise his powers of vision and of hearing before attempting to cross electric railway tracks, and in our opinion the degree of care defined in the different cases as necessary to be exercised varies but little, whether it be ordinary care, reasonable care, such care as a reasonably prudent man would exercise or the requirement to look both ways, or to look and listen. So we think we are justified in stating the rule that it is the duty of a person about to cross the tracks of an electric street railway to look and listen for approaching cars, and that failure to do so is prima facie contributory negligence, not necessarily precluding recovery, but dependent as to its effect upon the circumstances of each particular case. Those operating electric railways are held to the exercise of ordinary care to prevent injury to persons crossing their tracks, that is, a degree of care such as an ordinarily prudent man would exercise, under the same circumstances, commensurate with the necessities arising from the use of the instrument operated, the possibility of danger, and the circumstances of each particular case. They have no right to recklessly run down pedestrians or persons in vehicles who may be crossing their tracks. The latter have an equal right with the company to the use of the portion of the street occupied by the tracks, subject only to the limitation that they must not unnecessarily obstruct the passage of cars.[25] Though a person may, by his own negligence, be in a position of danger on the tracks of an electric street railway, yet his act will not preclude re-

[25] See cases in following States given in this chapter, as to above principles: Illinois, Kentucky, Michigan, New York, Ohio, Pennsylvania, Texas and Utah, also Federal case.

covery, if those in charge of the car, after having become aware of his danger, could, by proper care and diligence, have avoided the injury.[26]

[26] Georgia, Kentucky, Maryland, Missouri, Nebraska, New Jersey, New York, Texas, Virginia, and Federal cases.

CHAPTER XXVII.

EMPLOYEES.

§ 651. Duty of employer to employee — Generally.
651a. Duty of company as to rules and regulations.
652. Employees of electrical companies — Risk of employment.
652a. Same subject — Application of rules.
653. Duty of company as to fellow servants.
654. Electric railways — How affected by statutes as to fellow servants.
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657. No absolute rule — Company's liability to linemen.
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660. Crossarm defective — Lineman injured — Liability of company.
660a. Lineman injured — Defective pin used as step.
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662. Lineman injured — Limb of tree breaking.
§ 663. Injury to employees — Contact with wires — Duty of company.
663a. Injury to employees — Contact with wires — Duty of employee.
663b. Injury to employees — Contact with wires — Cases.
663c. Police telegraph wire on elevated railway — Employee repairing wire injured — Defective insulation.
664. Employees working on roofs — Contact with wires.
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666. Wires over steam railway — Negligence.
666a. Different companies using same poles — Duty as to employees.
667. Different companies using same poles — Employee of one company stepping on cross-arm of another not trespasser.
667a. Electric light wires near distributing pole of telephone company — Duty of former as to employees of latter.
668. Employee injured — Failure to use apparatus supplied by company.
669. Employee trimming lamp — Negligence as to leg-wires.

§ 670. Use of gloves by employees.
671. Defective appliance selected by employee.
672. Electric crane — Derrick cables — Defective insulation.
673. Liability of electric railway company for injuries to conductor.
674. Liability of electric railway company for injuries to motormen.
675. Electric car colliding with railroad train — Negligence of motorman.
676. Pole close to railroad track — Injury to brakeman — Risk not assumed.
677. Telegraph operator — Duty of railroad to — On track.
678. Violation of rules of company — Conductor on footboard of car — Running car at prohibited speed.
679. Remedy of defects in machinery — Statute.

§ 651. **Duty of employer to employee — Generally.**— It is the duty of an electrical company to exercise reasonable care to provide a reasonably safe place for its employees to work in and to furnish its employees with safe appliances and to keep the same in reasonable repair,[1] and this is a duty, the per-

[1] *Colorado*: Denver Tramway Co. v. Crumbaugh, 23 Colo. 363, 48 Pac. 503, 2 Am. Neg. Rep. 303. *Connecticut*: McAdam v. Central Ry. & Elec. Co., 67 Conn. 445, 35 Atl. 341, 6 Am. Elec. Cas. 348. *Delaware*: Strattner v. Wilmington City Elec. Co., 3 Pen. 245, 50 Atl. 57, 10 Am. Neg. Rep. 536. *Illinois*: Capital Elec. Co. v. Hauswald, 78 Ill. App. 359. *Iowa*: Barto v. Iowa Telephone Co., 126 Iowa, 241, 101 N. W. 876, 17 Am. Neg. Rep. 502, 504. *Massachusetts*: Chisholm v. New England Teleg. & Teleph. Co., 185 Mass. 82, 69 N. E. 1042, 15 Am. Neg. Rep. 577. *Nebraska*: Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W 740, 4 Am. & Eng. R. Cas. (N. S.) 273. *New Jersey*: Burns v. Delaware & A. Teleg. & Teleph. Co., 70 N. J. L. 745, 59 Atl. 220, 17 Am. Neg. Rep. 673; Western Un. Teleg. Co. v. McMullen, 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384, 2 Am. & Eng. Corp. Cas. (N. S.) 588, 6 Am. Elec. Cas. 338; Essex Co. Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427, 5 Am. Elec. Cas. 360. *New York*: Koren v. National Conduit & Cable Co., 179 N. Y. 552, 71 N. E. 1132, aff'g. 82 App. Div. 527, 81 N. Y. Supp. 614; Kennealy v. Westchester Electric Ry. Co., 86 App. Div. 293, 83 N. Y. Supp. 823; Harroun v. Brush Elec. L. Co., 12 App. Div. 126, 42 N. Y. Supp. 716, 6 Am. Elec. Cas. 357; appeal dismissed, 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615; McKnight v. Brooklyn Heights R. Co., 51 N. Y. Supp. 738, 23 Misc. 527. *North Carolina*: Orr v. Southern Bell Teleph. & Teleg. Co., 132 N. C. 691, 44 S. E. 401, 14 Am. Neg. Rep. 442.

"It is one of the duties of an

formance of which cannot be delegated to another, so as to relieve the company from liability.[2] In this connection we give the following extract from a charge to the jury, which was held to be correct: "You will readily apprehend that this term 'reasonable care and prudence' is, however, a relative one, to be determined by the nature of the thing which is required of the employer. So that what would be sufficient care and foresight in one case would, perhaps, be utterly inadequate in another, and I think it may fairly be said that, while in a general way the law requires reasonable care and fore-

employer to exercise reasonable care that the place in which he sets his servant to work, and the system or method adopted by the employer for the doing of the work, shall be reasonably safe for the servant, and free from latent dangers known to the master or discernible by an ordinary prudent master in the circumstances." Burns v. Delaware & A. Teleg. & Teleph. Co., 70 N. J. L. 745, 59 Atl. 220, 17 Am. Neg. Rep. 673, per Pitney, J.

In another case which was an action to recover damages for the death of a lineman it was said: "It was the duty of the defendant to exercise reasonable care and diligence in seeing that the structure and appliances which it provided were free from defects, so that the plaintiff's testator and others in its employ, being themselves in the exercise of due care, could safely perform the work which they were employed to do." Chisholm v. New England Teleg. & Teleph. Co., 185 Mass. 82, 69 N. E. 1042, 15 Am. Neg. Rep. 577, per Morton, J.

Meaning of word "safe" as used in this connection: "The word 'safe' as it is here used, and indeed in common parlance, does not mean a place so made and guarded as to exclude all possibility of danger. No amount of care, prudence and foresight can produce or insure such a condition. Many employments are in and of themselves dangerous, and it involves no paradox to say that a place of danger may be 'safe' in the proper sense of the word. It is 'safe' when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employee while he is himself exercising reasonable care in the service which he undertakes to perform." Martin v. Des Moines Edison Light Co. (Iowa, 1906), 106 N. W. 359, per Weaver, J.

[2] Chisholm v. New England Teleg. & Teleph. Co., 185 Mass. 82, 69 N. E. 1042, 15 Am. Neg. Rep. 577.

Duty cannot be delegated: It is the duty of the master to furnish proper tools to an employee and, as this is a personal duty, it cannot be delegated to a fellow servant, so as to relieve the master. The mere fact of such delegation would create a vice principal to that extent. Orr v. Southern Bell Teleph. & Teleg. Co., 132 N. C. 691, 44 S. E. 401, 14 Am. Neg. Rep. 442.

sight by the employer in the selection and provision of appliances for the use of the employee, that care and prudence must be proportioned to what may properly be expected of him, under the circumstances, and increases in a corresponding ratio with the danger and hazard necessarily connected with the use of the appliances."[3] So it is declared that the machinery and appliances should be reasonably safe and suitable, and such as are in general use in that particular line of business.[4] And the general rule seems to be that the question of an employer's negligence in furnishing appliances is to be determined by the ordinary usage of the business, and that, though juries are to determine the responsibility of individual conduct, yet they cannot be allowed to set up a standard which shall in effect dictate the customs or control the business of a community by declaring that the way commonly adopted by those in the same business is a negligent way.[5] And an employer is not bound to furnish tools and appliances of the latest design or the newest and best devices.[6] Nor is he an insurer of the safety of the appliances furnished.[7] Although an em-

[3] Harroun v. Brush Elec. L. Co., 12 App. Div. (N. Y.) 126, 42 N. Y. Supp. 716, 6 Am. Elec. Cas. 357; appeal dismissed, 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615.

[4] Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727, 56 Pac. 90.

[5] See Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727, 56 Pac. 90, and cases there cited.

[6] Shadford v. Ann Arbor St. Ry. Co., 111 Mich. 390, 69 N. W. 661, 6 Am. & Eng. R. Cas. (N. S.) 584, 3 Det. L. News, 712; Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727, 56 Pac. 90; Lorimer v. St. Paul City Ry. Co., 48 Minn. 391, 51 N. W. 125.

It is said in this connection in a case in Delaware: "It was, therefore, the duty of the defendant to provide for the plaintiff a reasonably safe place to work in, and reasonably safe machinery, and appliances with which to work in the prosecution of his employment. Such place, machinery and appliances need not have been the latest, the most improved or the best; but they must have been so adapted to and adequate for the purposes for which they were used as to be reasonably safe under all the conditions of the employment." Strattner v. Wilmington City Elec. Co., 3 Penn. (Del.) 245, 50 Atl. 57, 10 Am. Neg. Rep. 536.

[7] Maryland Teleph. & Teleg. Co. v. Cloman, 97 Md. 620, 55 Atl. 684, 14 Am. Neg. Rep. 549; Shadford v. Ann Arbor St. Ry. Co., 111 Mich. 390, 69 N. W. 661, 6 Am. & Eng. R. Cas. (N. S.) 584, 3 Det. L. News, 712; Harroun v. Brush E. L. Co., 12 App. Div. (N. Y.) 126,

ployee may assume that suitable and safe appliances have been furnished, yet the duty is imposed upon him of exercising proper care to prevent injury.[8] And from the mere fact of an accident to an employee, negligence will not be inferred on the part of the employer.[9]

§ 651a. **Duty of company as to rules and regulations.**— In a recent case in Maine it is decided that it is the duty of persons and corporations engaged in a dangerous and complex business to adopt, promulgate, and enforce such rules and regulations, for the conduct of its business and the government of its employees in and about the discharge of their duties as will afford reasonable protection to its servants and agents in the discharge of those duties, and that a failure to do so is negligence, which will render the employer liable for an injury resulting therefrom. Such rules need not be printed, it being sufficient if they are only oral; but in either case the employer should so promulgate them as to afford the employees a reasonable opportunity of ascertaining their terms. It is essential that the servant have knowledge of the rule and if he has such knowledge it is not material how the rule was promulgated or the knowledge obtained. In the making of such rules the master is only held to the exercise of ordinary care and is not bound to anticipate and guard against accidents which cannot be foreseen by the use of ordinary prudence, or to make or promulgate rules as to how his servants shall conduct themselves outside of the scope of their employment, or as to how business shall be carried on, or any act done which is not carried on or done by his knowledge and permission or consent, either express or implied.[10]

42 N. Y. Supp. 716, 6 Am. Elec. Cas. 357; appeal dismissed, 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615; Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727, 56 Pac. 90.

[8] Bergin v. Southern New England Teleph. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192.

[9] Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. (N. S.) 273.

The negligence of a defendant cannot be inferred from a presumption of care on the part of a person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another. Looney v. Metropolitan R. Co., 200 U. S. 480, 26 Sup. Ct. 303.

[10] Moran v. Rockland T. & C. St.

§ 652. **Employees of electrical companies — Risk of employment.**— Electrical companies do not insure the safety of the employees, but the latter are subject to the general rule that one who chooses to enter into an employment, involving danger of personal injury, which the master himself might have avoided, assumes all risks incident to the employment, and which are known to him or are either plain and obvious, and which he has no reason to expect will be counteracted or removed, and that the employee cannot recover for injuries resulting from such dangers.[11] So it has been held that the company is not compelled to furnish employees with printed rules for their government, guidance and safety, when the nature of an employment makes it dangerous, and the danger incident thereto and growing out of it are of common knowledge and are fully known to and understood by the servant, and the safety of others cannot be

Ry., 99 Me. 127, 58 Atl. 676, 17 Am. Neg. Rep. 57. Compare Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 56 Pac. 90, 5 Am. Neg. Rep. 727.

11 *United States*: Britton v. Central Union Teleph. Co., 131 Fed. 844, 65 C. C. A. 598. *Connecticut*: McGorty v. Southern N. E. Teleph. Co., 69 Conn. 635, 38 Atl. 359, 4 Am. Neg. Rep. 19. *Delaware*: Strattner v. Wilmington City Electric Co., 3 Pen. 245, 50 Atl. 57, 10 Am. Neg. Rep. 536. *Illinois*: Chicago City Ry. Co. v. Euroth, 113 Ill. App. 285. *Indiana*: Union Traction Co. v. Buckland, 34 Ind. App. 420, 72 N. E. 158. *Massachusetts*: Meehan v. Holyoke Street R. Co., 186 Mass. 511, 72 N. E. 61, 17 Am. Neg. Rep. 243; Gavin v. Fall River Automatic Teleph. Co., 185 Mass. 78, 69 N. E. 1055, 15 Am. Neg. Rep. 579; Hall v. Wakefield & S. St. Ry. Co., 178 Mass. 98, 59 N. E. 668. *Michigan*: Mayer v. Detroit, Ypsilanti, A. A. & J. R. Co. (1905), 105 N. W. 888, 19 Am. Neg. Rep. 328; Harrison v. Detroit Y. A. A. & J. R. Co., 137 Mich. 78, 100 N. W. 451, 16 Am. Neg. Rep. 405. *Minnesota*: Saxton v. Northern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109; Soutar v. International Elec. Co., 68 Minn. 18, 70 N. W. 796, 2 Am. Neg. Rep. 392. *Nebraska*: New Omaha Thomson-Houston E. L. Co. v. Dent, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091, 18 Am. Neg. Rep. 540. *New Hampshire*: Shaw v. Manchester Street Ry. Co., 73 N. H. 65, 58 Atl. 1073; Carr v. Manchester Electric Co., 70 N. H. 308, 48 Atl. 286. *New Jersey*: Chandler v. Atlantic Coast Elec. Ry. Co., 61 N. J. L. 380, 39 Atl. 674, 4 Am. Neg. Rep. 189; Western Un. Teleg. Co. v. McMullen, 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384, 2 Am. & Eng. Corp. Cas. (N. S.) 588. *New York*: Flood v. Western Un. Teleg. Co., 131 N. Y. 603, 30 N. E. 196, 4 Am. Elec. Cas. 402. *Wisconsin*: Zentner v. Oshkosh Gaslight Co. (1905), 105 N. W. 911, 19 Am. Neg. Rep. 607.

imperiled by any act or omission of his in the performance of his duties, and his safety depends wholly upon the degree of care, skill and caution used by himself.[12] And if an employee voluntarily chooses the most hazardous of two or more methods of performing his work, it is held that he does so at his own risk.[13] An employee, however, when he voluntarily enters into or continues in the employment in which he is engaged only assumes the risks and conditions that are known to him or are apparent and obvious to persons of his experience and understanding.[14] And, even though a person is employed in the presence of known danger, it is held that to constitute contributory negligence it must be shown that the employee voluntarily and unnecessarily exposed himself thereto, unless it is of that character that he must assume the risk from the very nature of the danger to which he is exposed.[15] And in cases where an electrical company fails to perform its duty in furnishing safe and suitable appliances, it is decided that an employee will not be held to have assumed the risk in undertaking to perform a dangerous work, unless the act itself is obviously so dangerous that in its careful performance the inherent probabilities of injury are greater than those of safety.[16] So where there is evidence from which the jury may reasonably find that the injured servant had no knowledge of the latent danger that necessitated the use of certain precautions for his safety, it cannot be held as a conclusion of law that, because the servant knew of the absence of the precautions, he thereby assumed the risk of injury resulting to him from their absence.[17]

[12] Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727, 56 Pac. 90. But see preceding section.

[13] Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 5 Am. Neg. Rep. 727; 56 Pac. 90.

[14] New Omaha Thomson-Houston Elec. L. Co. v. Dent, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091, 18 Am. Neg. Rep. 540.

[15] Clements v Louisiana Elec. L. Co., 44 La. Ann. 692, 4 Am. Elec. Cas. 381, 11 So. 51, per McEnery, J.

[16] Orr v. Southern Bell Teleph. & Teleg. Co., 132 N. C. 691, 44 S. E. 401, 14 Am. Neg. Rep. 442, so holding where an employee who was injured in taking down a telephone pole was not furnished by the company with spikes or dead men or something equivalent thereto.

[17] Burns v. Delaware & A. Teleg. & Teleph. Co., 70 N. J. L. 745, 59 Atl. 220, 17 Am. Neg. Rep. 673. The court said in this case: "It is not merely the physical surroundings of the servant that must be

§ 652a. **Same subject — Application of rules.**— A motorman who has been in the employ of a street railway company for several months and fully understands the ordinary operation of a car and is familiar with sand boxes and sand and knows the purpose for which sand is used, the effect of its use and the danger of its absence, and who, having it on the car, fails to use it when the track is in a slippery condition and the car is on a down grade is held to assume the risk of the car running away.[18] And where an employee, who was engaged in the process of adjusting a cable wire on the arms of poles erected for that purpose and was standing on the platform of the tower wagon, voluntarily placed himself with one foot on the brace which supported the arm on that side of the pole and the other foot on the rail attached to, but two feet higher than, the platform, and, while taking hold of the arm with his left hand, grasped the cable with his right hand to help lift it over the inner pin, it was held that the danger was an open and obvious one, and that the employee who was familiar with the work and the method employed, assumed the risk of such method and could not recover for an injury caused by his being thrown off by a recoil of the cable.[19] And where a telephone company's employees were engaged in raising a pole and one of them took hold of the rope near the snatch block and when the horses, that was the power to raise the pole, started, the employee held on to the rope and his hand was drawn into the block, it was held that he could not recover

obvious to him in order that he may be held to have assumed the risks arising therefrom, but it must be obvious to him, or at least to an ordinarily prudent servant under the circumstances, that there is danger in such a situation. It is his voluntary acceptance of or persistence in an employment that involves personal hazard to him that debars his action; the theory of the law being that his wages have been fixed in view of the hazard. But where the danger is unknown to the servant he cannot be held to have voluntarily assumed it, although the physical surroundings that create the danger are known to him. And so the known absence of safeguards or precautions cannot prevent a recovery where the danger that renders them necessary is unknown to the injured servant," per Pitney, J., citing 4 Thomp. Neg. (new ed.), §§ 4608–4610, 4640, etc.

[18] Mayer v. Detroit, Ypsilanti A. A. & J. R. Co. (Mich., 1905), 105 N. W. 888, 19 Am. Neg. Rep. 328.

[19] Meehan v. Holyoke Street R. Co., 186 Mass. 511, 72 N. E. 61, 17 Am. Neg. Rep. 243.

for the injury so caused, as he should have seen and appreciated the danger.[20] Where, however, a conductor was thrown from the platform of a trolley car and injured by the derailment of the car, and it appeared that he knew that the track was rough and uneven, but it did not conclusively appear that he knew or should have known of other defects on the track which probably caused the derailment, it was held, in an action against the employer, that the court rightfully refused to nonsuit or direct verdict for the defendant, asked for on the ground that the plaintiff assumed the risk of the derailment of the car.[21] Again, where an employee who was engaged in removing decayed telephone poles, was injured by the fall of a wire, which he was detaching while at the top of a pole, it was held that there could be no recovery by him for such injury, as the risk was one which he had assumed.[22] But a lineman engaged in the repair of electric light wires does not assume the risk of a high potential current being turned on at a time when it is usually turned off, as when repairs are being made, unless he in fact knows of such risk or in the exercise of ordinary care and prudence ought to know of it.[23]

[20] Gavin v. Fall River Automatic Teleph. Co., 185 Mass. 78, 69 N. E. 1055, 15 Am. Neg. Rep. 579, wherein the court said in this connection: "The whole apparatus was open to view, and its arrangement and operation were so plain that he cannot be allowed to recover on the ground that he did not know that if he continued to grasp the rope after the horses started, there was danger that his hand would be drawn into the block, or on the ground that it was the defendant's duty to explain to him that obvious danger, and to warn him, against it. The plaintiff himself was negligent either in not seeing the block, or, if he saw it, in not appreciating the danger, or, if he appreciated it, in incurring it by continuing to grasp the rope after the giving of the order for the horses to go ahead. If the order was too quickly given, it nevertheless was an understood signal, and due care required that the plaintiff, upon hearing it, at once should let go of the rope," per Barker, J.

[21] Osterhout v. Jersey City, H. & P. St. R. Co. (N. J. 1905), 62 Atl. 271, 19 Am. Neg. Rep. 371. See Houts v. St. Louis Transit Co., 108 Mo. App. 686, 84 S. W. 161.

[22] Saxton v. Northern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109.

[23] Zentner v. Oshkosh Gaslight Co. (Wis. 1905), 105 N. W. 911, 19 Am. Rep. 607. The Court said in this case: "He had the right to assume that the defendant's officers would conduct the business in the manner usual when repairs were being made, which, according to the evidence, required the cutting off of the current from

§ 653. **Duty of company as to fellow servants.**— An electrical company owes to an employee the duty of exercising reasonable care in the selection of his fellow servants.[24] And if he knowingly employs or retains an unfit employee in his service, he will be liable to a coemployee for any injury caused by the unskilfulness or incompetency of such workman.[25] And it has been decided in a recent case in Iowa that though an electrical company has no knowledge of the incompetency of one of its servants, yet if, owing to the negligence of such servant, a fellow servant sustains an injury, the company will be liable therefor, it being declared that an employee does not assume the risk of the incompetency of a fellow servant.[26] A company is not, however, negligent, if it fails to inquire of an employee as to his fitness or competency and carefulness, before employing him, if it has already made such inquiries of a former employer, and such failure will not render the company liable for injuries caused by the carelessness of such employee to a fellow servant.[27] The fact that the acts of negligence of an employee, by which a fellow servant is injured, are prohibited by law, does not affect the liability of the company for such injury.[28]

§ 654. **Electric railways — How affected by statutes as to fellow servants.**— An electric street railway company is not a

the wires. It is not shown that he had any notice of intended departure from that custom. Such a departure involved an unusual and extraordinary risk, which under the law he did not assume, unless he had actual knowledge thereof, or unless as a reasonably careful man he, by the exercise of ordinary care should have known of it. He had no actual knowledge of such extraordinary risk so far as appears from the evidence, and the circumstances are not so clear that we can say as matter of law that he in the exercise of ordinary care ought to have known," per Kerwin, J.

[24] Chandler v. Atlantic Coast Elec. Ry. Co., 61 N. J. L. 380, 39 Atl. 674, 4 Am. Neg. Rep. 189.

[25] Chandler v. Atlantic Coast Elec. Ry. Co., 61 N. J. L. 380, 39 Atl. 674, 4 Am. Neg. Rep. 189, and cases there cited; Gier v. Los Angeles Consol. Elec. R. Co., 108 Cal. 129, 41 Pac. 22. See generally Thomas on Negligence (ed. 1895), pp. 737, 866–908.

[26] Scott v. Iowa Telephone Co., 126 Iowa, 524, 102 N. W. 432.

[27] Gier v. Los Angeles Consol. Elec. R. Co., 108 Cal. 129, 41 Pac. 22.

[28] Lundquist v. Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1106, 4 Am. & Eng. R. Cas. (N. S.) 506.

"railway corporation," within the meaning of the Texas Fellow Servants Acts.[29] And an electric street car is not a "locomotive engine or train upon a railroad," within the meaning of the Massachusetts statute,[30] under which an employer is liable for injuries to an employee, resulting from the negligence of a fellow employee on such a railroad.[31] So also the Laws of Minnesota,[32] and of North Carolina,[33] affecting the liability of railway companies for the acts of fellow servants, have been held not to apply to street railway companies.[34]

§ 655. **Fellow servants — Decisions as to who are.**— The conductors of two electric street cars on the same road have been held to be fellow servants, and the company is not liable to one of them for an injury caused by a collision, due to the negligence of the other.[35] So also an employee put in charge of a car and the motorman have been held to be fellow servants.[36] As have also the motorman and an employee at work upon the track.[37] And a conductor and a person whom he employs to aid him.[38] And a local telegraph operator receiving the orders of a train dispatcher, and the person in charge of the train to whom he delivers such orders.[39] But in an action against a street railway company to recover for an injury to a conductor who was letting down the fender of his

[29] Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247, 35 S. W. 826, construing Texas Act, May, 1893.

[30] Massachusetts Stat. 1887, chap. 270, § 1, chap. 3.

[31] Fallon v. West End St. R. Co., 171 Mass. 249, 50 N. E. 536, 4 Am. Neg. Rep. 288.

[32] Minnesota, 1887, c. 13.

[33] Act of 1897.

[34] Lundquist v. Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006, 4 Am. & Eng. R. Cas. (N. S.) 506; Rittenhouse v. Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922.

[35] Baltimore Trust & Guaranty Co. v. Atlanta Traction Co., 69 Fed. 358.

[36] Rittenhouse v. Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922.

[37] Lundquist v. Duluth St. R. Co., 65 Minn. 387, 67 N. W. 1006, 4 Am. & Eng. R. Cas. (N. S.) 506. See also Indianapolis & G. Rapid Transit Co. v. Andis (Ind. App.), 72 N. E. 145, holding that an employee repairing the track is a fellow servant with the motorman while he is riding on the car to and from home and from place to place for the purpose of performing his work.

[38] Marks v. Rochester Ry. Co., 41 App. Div. (N. Y.) 66, 58 N. Y. Supp. 210.

[39] Oregon, S. L. & U. N. R. Co. v. Frost, 44 U. S. App. 606, 21 C. C. A. 186, 74 Fed. 965.

car at the end of the line, and who, upon another car approaching so near as to interfere with his work, requested the motorman to back the other car, which the latter attempted to do, but the handle slipped, causing the car to go forward and to crush the conductor between the cars, it was held that though the conductor and motorman were fellow servants the company was liable for such injury, it further appearing that the other car had been brought from the barn by a barn man to take the place of a damaged car, and that in the exchange a handle was not left that fitted the car from the barn and that would slip when the car was attempted to be backed, it being held that such man was a vice-principal and not a fellow servant of the conductor.[40] And it has been decided that a foreman under whom workmen are employed is a fellow servant with the workmen, when engaged in accomplishing with them the common task or object; but when discharging or assuming to discharge the duties towards the workmen which the law imposes on the principal he is a vice-principal.[41] So

[40] Chicago Union Traction Co. v. Sawuch, 218 Ill. 130, 75 N. E. 797, 19 Am. Neg. Rep. 160. See also Northern Pacific Ry. Co. v. Dixon, 194 U. S. 338, 24 Sup. Ct. 683, 16 Am. Neg. Rep. 645, holding that a local telegraph operator who is called upon specially by a train dispatcher to give information relative to the arrival of a train at his station, to enable the dispatcher to formulate orders for the movement of other trains, acts in the matter of giving such information as a fellow servant of train operatives in such sense that the master is not liable to train operatives who are injured by obeying an erroneous order of the dispatcher that was induced by false information given to the local operator. In this case it was decided that a fireman who was killed by a head-on collision between two trains assumed the risk of such negligence. This case is cited on the same point in Northern Pacific Ry. Co. v. Dixon, 139 Fed. 737, C. C. A., 19 Am. Neg. Rep. 637.

[41] Christ v. Wichita Gas, Elec. L. & P. Co. (Kan. 1905), 83 Pac. 199, 19 Am. Neg. Rep. 238, wherein it is said: "He is a fellow-servant when laboring to accomplish the common object or purpose of the laborers. He is a vice-principal when performing the duties, or aiding to perform the duties, which, by law, devolve upon the master." Per Smith, J.

Compare New Omaha Thomson-Houston Elec. L. Co. v. Baldwin, 62 Neb., 180, 87 N. W. 27, 10 Am. Neg. Rep. 117, holding that a foreman who has the management, superintendence and control of a branch of an electric light company's work is not a fellow-servant with workmen under him.

where an employee was injured by the negligence of another employee, whose principal duty was that of superintendence, but who was working as an ordinary workman when the injury occurred, it was held that the company was not liable.[42]

In New Jersey this question is considered in an action by one who was a lineman in the employ of a telephone company and who was injured while engaged in work, with others, under the charge of a foreman. It also appeared that another person named Runyon was present who exercised general supervision and control of the others, including the foreman, and who also actively participated in the work. Runyon was called the "district manager," and had general charge of the company's business through a large territory, including the place where the work was being done, and power was conferred upon him also to hire and discharge employees. The evidence tended to show that the injuries received by plaintiff directly resulted from negligence on the part of Runyon while he was cooperating with plaintiff in the work and was, at the same time, supervising and directing the work. The court held that Runyon was a fellow servant of the plaintiff and that there could be no recovery for the injury from the common employer. It was said in this connection: "In some jurisdictions a tendency has been manifested to hold the master liable to a servant who sustains personal injuries through the negligence of a general superintendent or department manager, or of a servant of any grade superior to that of the servant injured; and this irrespective of the character of the work in the performance of which the negligence occurs. The rule that admits of such liability is commonly called the 'superior servant rule.' It obtains in Ohio and some other States. * * * But the courts of our State have never adopted this rule." The court then declares that the rule is that: "where the negligence is in the performance or non-performance of some duty that is imposed by law upon the master for the safety of the injured servant, the master is responsible, irrespective of the rank of the negligent employee, but, where the negligence is in the performance or non-performance of some duty that is merely incidental to the general employment the master is not responsible, although the negligent servant was superior in rank to him who was injured, or may at other times have been intrusted with the performance of the master's duties." Knutter v. New York & N. J. Teleph. Co., 67 N. J. L. 646, 52 Atl. 565, 12 Am. Neg. Rep. 109, per Pitney, J.

Evidence that the wages paid an alleged vice-principal were the same as those paid the men in the gang of which he was alleged to have charge is not admissible on the issue whether such person was in fact a vice-principal. Fritz v. Western Union Teleg. Co., 25 Utah, 263, 71 Pac. 209.

[42] Flynn v. Boston E. L. Co., 171 Mass. 395, 50 N. E. 937, 8 Am. & Eng. R. Cas. (N. S.) 479, 4 Am. Neg. Rep. 399; Cunningham v. Lynn & B. St. R. Co., 170 Mass. 298, 49 N. E. 440.

And where a lineman, while engaged in replacing wires on a pole, was killed by an electric current which was turned on contrary to the custom of the company when repairs were being made, it was held that the superintendent, who was the person charged with that duty, was not a fellow servant, and that the questions of negligence should have been submitted to the jury.[43] Under a Massachusetts statute,[44] authorizing a recovery for an injury caused by the negligence of a superintendent, it has been held that a car-shifter is not a superintendent.[45]

§ 656. **Lineman — Reliance upon soundness of poles.**— It is the duty of an electrical company to exercise reasonable care and prudence in the erection and maintenance of its poles, and it owes this duty to linemen, who in the course of their employment are continually required to climb and work upon such poles. The extent to which a lineman may rely upon the soundness of poles and the extent to which the company may be held to inspect them, and its liability for failure so to do must, we believe, depend upon the circumstances surrounding the employment of the lineman, and the general duties imposed upon him by the company. In this connection, it is said in a case in Connecticut: "It cannot be laid down as a proposition of law * * * that the linemen of telegraph and telephone companies have a right to rely upon the soundness and safety of the poles upon which they are working, and that it is the duty of such companies to inspect and test poles, and support such as are insecure, before permitting their linemen to climb them. Whether it is incumbent upon the master or the servant to perform such a duty is usually a question of fact, depending upon the terms of the contract of employment, the servant's knowledge of the hazards of the work in which he is engaged, his ability and opportunity to discover the dangers to which he is exposed, and to avoid them, and upon other circumstances. Employers have a right to decide how their work shall be performed and may employ men to work with dangerous imple-

[43] Zentner v. Oshkosh Gaslight Co. (Wis. 1905), 105 N. W. 911, 19 Am. Neg. Rep. 607; compare Williams v. North Wisconsin Lumber Co. (Wis. 1905), 102 N. W. 589.

[44] Massachusetts Stat. 1887, chap. 270.

[45] Whelton v. West End St. R. Co., 172 Mass. 555, 5 Am. Neg. Rep. 615, 52 N. E. 1072.

ments and in unsafe places without incurring liability for injuries sustained by workmen who know or ought to know the hazards of the service which they have chosen to enter." [46]

§ 657. **No absolute rule — Company's liability to lineman.**— No positive rule can be laid down, defiining the duty of the company in all such cases, nor the extent of the risk which a lineman may be held to assume. The question of the liability of electrical companies for injuries to linemen must depend upon the circumstances of each particular case, bearing in mind the rule that it is the duty of the company to exercise reasonable care in the erection and maintenance of its poles, and that a servant in entering upon an employment assumes the usual, ordinary and obvious risks incident thereto; the degree of care required of the company and the extent of risk assumed by the lineman are to be measured and determined in each case by the terms of the employment, the rules of the company as to the duties of linemen, or the custom of the company as to inspection of poles, or other special circumstances affecting the duties and obligations of one or both parties.

§ 658. **Approximate rule — Company's liability to lineman.**— The nearest approach to a rule, however, is that, while it is the duty of the company to exercise reasonable care to maintain its poles in a safe condition, yet that linemen must inspect the poles themselves, exercising their own judgment as to their safety, and that the company is not liable for injuries caused by latent defects in such poles of which the company did not know and could not ascertain by the exercise of reasonable care and diligence, and that linemen, in entering upon their employment, assume such risks as well as risks of injury from the fall of poles, due to defects which they could, by the exercise of reasonable care and diligence, for their own protection, have discovered and, perhaps, avoided, by the use of appliances provided for that purpose by the company.[47] So it is said in a

[46] McGorty v. Southern New England Teleph. Co., 69 Conn. 635, 38 Atl. 359, 4 Am. Neg. Rep. 19, per Hall, J.

[47] *United States:* Greene v. Western Un. Teleg. Co., 72 Fed. 250; Dixon v. Western Un. Teleg. Co., 71 Fed. 143. *Colorado:* Kellogg v. Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609, 14 Am. Neg.

recent case where it appeared that a lineman was injured by the fall of a pole: "The controlling question in this case is whether the defendant owed the duty to the plaintiff, whose business it was to work upon poles along the line as occasion might require, the duty to inspect its poles, and inform the plaintiff whether or not any of them were so decayed as to be unsafe to work upon. The plaintiff had worked upon poles in the construction and repair of electric lines many years. When he engaged to work for the defendant, he must have known that it would be his duty to go upon the poles that had been set in the ground for an uncertain length of time. He must have known that such poles would decay, and become unsafe for him to work upon. He must have known that the work of climbing poles and taking down and putting up wires would often put a strain upon a pole much greater than it would be exposed to in sustaining the wires when they were all in proper position. It must be conceded that in this case negligence was not established by mere proof of an accident. The burden was upon plaintiff to show that the defendant's neglect of some duty caused the accident. We are of opinion that the risk of falling on account of the weakness of the old poles was a risk of the business, which the plaintiff assumed by his contract to work as a lineman for the defendant; that, as between the plaintiff and the defendant, the defendant was under no obligation to inspect the poles to see whether they were decayed and unsafe, and there was, therefore, no evidence of negligence on the part of the defendant." [48]

Rep. 6. *Connecticut:* McGorty v. Southern New England Teleph. Co., 69 Conn. 635, 38 Atl. 359, 4 Am. Neg. Rep. 19. *Louisiana:* Bland v. Shreveport Belt Ry. Co., 48 La. Ann. 1057, 20 So. 85. *Massachusetts:* McIsaac v. Northampton E. L. Co., 172 Mass. 89, 5 Am. Neg. Rep. 41, 51 N. E. 524, Lahti v. Fitchburg & L. St. R. Co., 172 Mass. 147, 51 N. E. 524. *Minnesota:* Saxton v. Northwestern Tel. Exch. Co., 81 Minn. 314, 84 N. W. 109. *New Jersey:* Essex Co. Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427, 5 Am. Elec. Cas. 360, 60 N. J. L. 306, 37 Atl. 619, 61 N. J. L. 289, 41 Atl. 1115. *New York:* Flood v. Western Un. Teleg. Co., 131 N. Y. 603, 30 N. E. 196, 4 Am. Elec. Cas. 402.

[48] Kellogg v. Denver City Tramway Co., 18 Colo. App. 475, 72 Pac. 609, 14 Am. Neg. Rep. 6, citing McIsaac v. Northampton Electric Co., 172 Mass. 89, 51 N. E. 524, 5 Am. Neg. Rep. 41.

§ 658a. **Reliance on assurance or direction of superior.**—If the risk is not an obvious one and the lineman is not experienced and he acts under the direct and immediate control of a superior who assures him that he can work there in safety the company might then be held liable for an injury caused by the falling of the pole.[49] And it is decided that, though a lineman is experienced yet if a defect in the pole is not an obvious one and cannot be detected without an examination and the pole is inspected by a foreman who directs the lineman to climb for the purpose of removing or transferring wires, there is no contributory negligence on the part of the lineman in failing to examine the pole as he has a right to rely on the inspection made by the foreman, and in such a case the company will be liable for an injury sustained by the lineman in consequence of the breaking of the pole.[50]

[49] Lord v. Inhabitants of Wakefield, 185 Mass. 214, 70 N. E. 123, 16 Am. Neg. Rep. 82, distinguishing Tanner v. New York, New Haven & Hartford Railroad, 180 Mass. 572, 62 N. E. 993, it being said that the plaintiff in the latter case "was an experienced lineman, and was set to work with others, under a superintendent, to remove wires from a number of old poles to new ones. The plaintiff knew that the pole was an old one, and knew the tendency of poles which had been set for a long time to rot beneath the surface of the ground. After he had thrown off the wires they fell across a wire guy which connected the pole with a fence. The plaintiff told the superintendent that the wires were crossed on the guy, and asked him what he should do about it. The superintendent told him to cut it and the pole fell. The court, in its opinion, says: 'His question to the overseer was not whether it would be safe for him to cut the guy, and it could not be found fairly that the order was intended to be an expression that it was safe to cut it, or that the plaintiff had a right to interpret the order as such an expression.' The court further says, 'It was not a case in which the act of setting the workman to do a particular thing in a particular place might be understood fairly by the workman to be an assertion that the place was safe,'" per Lathrop, J.

See § 665 herein as to "Employees relying on assurance of foreman."

[50] Western Union Teleg. Co. v. Holthy (Ky. 1906), 93 S. W. 652. See Southern Bell Teleph. & Teleg. Co. v. Clements, 98 Va. 1, 34 S. E. 951, holding where a pole had been previously condemned and marked that the question of contributory negligence on the part of the lineman, who was familiar with the mark, and who climbed the pole under the direction of the foreman, was one of fact for the jury to determine.

§ 659. **Company's liability to lineman — Cases.**— A lineman assumes the risk of a pole not being properly guyed, owing to negligence on the part of his fellow workmen.[51] And where he is injured by the fall of a pole, owing to its becoming decayed beneath the surface of the ground, he is presumed to have assumed such risk,[52] especially where it is a rule of the company that linemen shall inspect and test poles upon which they are to work.[53] And the fact that the lineman has been assured, by the foreman, that the pole is safe will not render the company liable.[54] In a case in Texas, however, it was held that where an employee at work upon a pole, for the purpose of removing a feed wire, was injured by the fall of the pole, owing to a defect therein, of which he had no knowledge, the company was liable, where it might have discovered the defect by a reasonable inspection of the pole.[55] If a lineman is injured by the fall of a pole, owing to some defect therein, which was known to the company, the latter will be liable.[56] And knowledge of the defective condition of a pole will be imputed to the company, where obtained by one of its employees in the regular rounds of duty and which it is his duty to report to the proper officers, whether he has, in fact, reported it or not.[57]

§ 660. **Crossarm defective — Lineman injured — Liability of company.**— The principles which we have stated in the preceding sections, as controlling the liability of the company for injuries to its linemen, caused by the falling of poles, are likewise applicable in the case of injuries to linemen, caused by crossarms breaking. Thus, in a case in New York where a crossarm, upon which a lineman was at work and bearing his

[51] Greene v. Western Un. Teleg. Co., 72 Fed. 250.

[52] Lahti v. Fitchburg & L. St. R. Co., 172 Mass. 147, 51 N. E. 524; Mclsaac v. Northampton E. L. Co., 172 Mass. 89, 5 Am. Neg. Rep. 41; 51 N. E. 524; Essex County Elec. Co. v. Kelly, 57 N. J. L. 100, 29 Atl. 427, 5 Am. Elec. Cas. 360.

[53] McGorty v. Southern New England Teleph. Co., 69 Conn. 635, 38 Atl. 359, 4 Am. Neg. Rep. 19.

[54] McGorty v. Southern New England Teleph. Co., 69 Conn. 635, 38 Atl. 359, 4 Am. Neg. Rep. 19.

[55] San Antonio Edison Co. v. Dixon, 17 Tex. Civ. App. 320, 42 S. W. 1009.

[56] Byron v. New York State Pr. Teleg. Co., 26 Barb. (N. Y.) 39, Allen's Teleg. Cas. 68.

[57] City of Denver v. Sherrett, 60 U. S. App. 104, 31 C. C. A. 499, 88 Fed. 226, 5 Am. Neg. Rep. 520.

whole weight upon, broke and the lineman fell to the ground and was killed, the company was held not liable. The court in substance said: An electrical company must exercise reasonable and ordinary care in providing a safe place for employees to work, but does not insure their safety, and the latter assume the ordinary risks of the employment. The linemen in the discharge of their duties are continually required to climb the poles and work about the crossarms, and they are obviously the persons to notice the conditions of crossarms, and if defective or weak, to report such fact, and it is their obvious duty to inspect them for their own safety, even though persons were employed by the company to inspect poles, and replace insufficient crossarms. Linemen, in bearing their weight upon crossarms, know that they are in a place of danger, and a lineman before so doing should examine a crossarm to see if it is sound and properly adequate to support him, and has no right to rely upon the judgment or inspection of any other person.[58] And where it appeared that while the plaintiff, an experienced lineman, was sitting on a crossarm at the top of a telephone pole for the purpose of stringing wires and the crossarm broke at a point where one of the poles was bored for the inserting of a pin and the defect was obscured by paint and not visible by any ordinary inspection and the arm was of the kind in ordinary use and was purchased with the paint on it, it was decided that under the evidence the defendant could not be charged with negligence in furnishing the defective arm and that a verdict for the defendant should have been directed.[59] The court said in this case: "For the sake of humanity and for the protection of those who are required to occupy perilous positions in order to gain a livelihood, and have no means for the protection of themselves employers should not be permitted to trifle with the safety of their employees, or, for the sake of dollars and cents, withhold from them such safeguards as can be reasonably demanded of them; but the law does not exact of them unreasonable care and caution, and does not make them insurers of their employees' safety."[60] In a case in Louisiana, how-

[58] Flood v. Western Un. Teleg. Co., 131 N. Y. 603, 4 Am. Elec. Cas. 402, 30 N. E. 196, per Earl, Ch. J.

[59] Maryland Teleph. and Teleg. Co. v. Cloman, 97 Md. 620, 55 Atl. 681, 14 Am. Neg. Rep. 549.

[60] Per Boyd, J.

ever, it was held that a lineman had the right to presume that crossarms were safe, and he was entitled to rest on this presumption for his security, and the fact that a crossarm broke was a demonstration, in itself, that it was not sound, and in the absence of evidence showing that materials were carefully selected by the company, or that there was a proper inspection of the same, the company should be liable.[61] In a case in New Jersey it is held that where the city uses the topmost crossarm on a telephone company's poles, the company owning the poles owes no duty to so maintain its own crossbars that they will support the weight of a lineman employed by the city.[62] But in another case in Connecticut, where an employee was instructed as to the manner of performing his work as a lineman, but was not instructed that it was unsafe to throw his leg over a crossarm, it was held that the fact that the one who instructed him did not assume that position, would not bar recovery for injuries received by such employee, caused by a crossarm giving away while his leg was in such position.[63]

§ 660a. **Lineman injured — Defective pin used as step.**— Linemen in driving in the pins which are used as steps in ascending and descending the poles act as the agents of the company and it will be liable for their negligence. And though the rules of the company require linemen to test the poles and steps if they think there is danger and if they find any loose steps to pull them out and report them to the foreman does not as a matter of law render the chance of an accident from a defective step a risk which a lineman assumes where it does not appear that he drove in the step which came out, or that the step was loose, and there is nothing to show that he thought there was any danger, or that in the exercise of due care he ought to have discovered its condition.[64]

[61] Clarain v. Western Un. Teleg. Co., 40 La. Ann. 178, 3 So. 625, 2 Am. Elec. Cas. 344.

[62] New York & N. J. Teleph. Co. v. Speicher, 59 N. J. L. 23, 39 Atl. 661. Compare Barker v. Boston Electric L. Co., 178 Mass. 503, 60 N. E. 2.

[63] McQuillan v. Willimantic E. L. Co., 70 Conn. 715, 40 Atl. 928, 4 Am. Neg. Rep. 599.

[64] Chisholm v. New England Teleg. & Teleph. Co., 185 Mass. 82, 69 N. E. 1042, 15 Am. Neg. Rep. 577. It was held in this case that a finding that there was a defect in

§ 661. **Liabiltiy of company for injury to lineman — Other cases.**— If a company has furnished competent coservants and proper appliances, with which to take down a hood and frame from an electric light pole, it will not be liable to a lineman who, while working under the direction of a foreman, is injured by a fall from the pole, owing to the hood and frame giving away.[65] And it is held that a lineman assumes the risk of an injury, caused by his spur slipping over a tin sign nailed to the pole.[66]

§ 662. **Lineman injured — Limb of tree breaking.**— If a lineman while engaged in stringing wires is injured by the breaking of a limb of a tree, upon which he is standing, he cannot recover from the company, since the tree is not an appliance furnished by the company, but one entirely of his own choosing, and he must be held to have assumed the risk of a limb breaking, since the question whether a limb is of sufficient strength must depend entirely upon the exercise of his own judgment.[67]

§ 663. **Injury to employees — Contact with wires — Duty of company.**— Electrical companies, in the maintenance of their wires, owe to their employees, as well as to others who may of right, either for pleasure or work, be in the vicinity of such wires, the duty of exercising reasonable care, that is such care

the original construction for which the defendant was responsible and which would render it liable for the injuries received by the plaintiff's testator was warranted where the evidence tended to show that the fall of plaintiff's testator, and the injuries which he sustained, were caused by the pulling out of a pin which he had taken hold of in the course of his ascent and which came out while he had hold of it with one hand and that the hole into which the pin had been driven was bored so that the pin slanted downwards instead of being on a level or slanting upwards, and that the pin was only driven in two and a half inches instead of four, as there was testimony tending to show that it ought to have been.

[65] Gibbons v. Brush Elec. Illum. Co., 36 App. Div. (N. Y.) 140, 55 N. Y. Supp. 378.

[66] Peoria General Elec. Co. v. Gallagher, 68 Ill. App. 248.

[67] Yearsley v. Sunset Teleph. & Teleg. Co., 110 Cal. 236, 42 Pac. 638, 6 Am. Elec. Cas. 368. See also Flynn v. Boston Elec. L. Co., 171 Mass. 395, 50 N. E. 937, 8 Am. & Eng. R. Cas. (N. S.) 489, 4 Am. Neg. Rep. 399.

as a reasonably prudent man would exercise, under the same circumstances. We have already stated that reasonable care or ordinary care is a degree of care varying with the circumstances of each case, and which, in the case of electrical wires carrying a dangerous current of electricity, requires the exercise of a high degree of care to keep them properly insulated and so suspended as not to endanger lives. And this is the measure of an electrical company's duty to its employees.[68] And it owes the duty not only of properly insulating its wires, but also of exercising reasonable care in their suspension, to prevent contact with other wires.[69] The questions of negligence on the part of the company and of contributory negligence on the part of an employee are ordinarily for the jury to determine.[70]

[68] *United States:* Newark E. L. & P. Co. v. Gardner, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74, 37 L. R. 725. *Connecticut:* McAdam v. Central R. & Elec. Co., 67 Conn. 445, 35 Atl. 341, 5 Am. & Eng. R. Cas. (N. S.) 7, 6 Am. Elec. Cas. 348. *Georgia:* Atlanta Consol. St. R. Co. v. Owings, 97 Ga. 663, 33 L. R. A. 798, 25 S. E. 377, 5 Am. & Eng. R. Cas. (N. S.) 1. *Illinois:* Rowe v. Taylorville Electric Co., 213 Ill. 318, 72 N. E. 711, 17 Am. Neg. Rep. 215, affirming 114 Ill. App. 535. *Iowa:* Barto v. Iowa Teleph. Co., 126 Iowa, 241, 101 N. W. 876. 17 Am. Neg. Rep. 502; Knowlton v. Des Moines Edison Light Co., 117 Iowa, 451, 90 N. W. 818. *Kentucky:* Paducah Ry. & Light Co. v. Bell's Admr., 27 Ky. Law Rep. 428, 85 S. W. 216; Overall v. Louisville E. L. Co. (Ky.), 47 S. W. 442. *Nebraska:* New Omaha Thomson-Houston Elec. L. Co. v. Dent, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091, 18 Am. Neg. Rep. 540; New Omaha Thomson-Houston Co. v. Rombold, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030. *New Jersey:* Anderson v. Jersey City E. L. Co., 63 N. J. L. 387, 43 Atl. 654. *New York:* Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117; Kennealy v. Westchester Electric Ry. Co., 86 App. Div. 293, 83 N. Y. Supp. 823. *North Carolina:* Mitchell v. Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398. *Texas:* See Dallas Electric Co. v. Mitchell, 33 Tex. Civ. App. 424, 76 S. W. 935. *Wisconsin:* Zentner v. Oshkosh Gaslight Co. (1905), 105 N. W. 911, 19 Am. Neg. Rep. 607. *Canada:* Citizens L. & P. Co. v. Lepitre, 29 Can. S. C. 1.

[69] Dwyer v. Buffalo General Elec. Co., 20 App. Div. (N. Y.) 124, 46 N. Y. Supp. 124; Kraatz v. Brush Elec. L. Co., 82 Mich. 457, 3 Am. Elec. Cas. 491, 46 N. W. 787; Lincoln St. R. Co. v. Cox, 48 Neb. 807, 67 N. W. 740, 4 Am. & Eng. R. Cas. (N. S.) 273, 6 Am. Elec. Cas. 352. See also as to the duty of electrical companies to insulate and maintain their wires, sections in chapter XXI, on "Maintenance and Operation."

[70] *Illinois:* Economy Light & P.

§ 663a. **Injury to employees — Contact with wires — Duty of employee.—** Where the work upon which an employee of an electrical company is engaged is such that he may sustain injury from a contact with wires carrying a high current of electricity he should be held to the exercise of a degree of care commensurate with the risk involved and if he is injured by a failure to exercise the care required of him he can not recover therefor.[71] And where the risk of injury from a contact with wires is one of those dangers such as are incident to the employment as the employee knows to exist or should have acquainted himself with, he is held as a matter of law to have

Co. v. Sheridan, 200 Ill. 439, 65 N. E. 1070. *Iowa:* Knowlton v. Des Moines Edison L. Co., 117 Iowa, 451, 90 N. W. 818. *Massachusetts:* Mahan v. Newton & Beston St. R. Co., 189 Mass. 1, 75 N. E. 59, 19 Am. Neg. Rep. 15. *Missouri:* Geismann v. Edison Electric Co., 173 Mo. 654, 73 S. W. 654; Cessna v. Metropolitan Street Ry. Co. (Mo. App. 1906), 95 S. W. 278. *Nebraska:* New Omaha Thomson-Houston Elec. L. Co. v. Dent, 68 Neb. 668, 94 N. W. 819, 103 N. W. 1091, 18 Am. Neg. Rep. 540; New Omaha Thomson-Houston Elec. L. Co. v. Rombold, 68 Neb. 54, 93 N. W. 966, 97 N. W. 1030. *New York:* Wagner v Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117; Predmore v. Consumers' Light & P. Co., 99 App. Div. 551, 91 N. Y. Supp. 118. *Tennessee:* Jackson & S. St. R. R. v. Simmons, 107 Tenn. 392, 64 S. W. 705. *Wisconsin:* Williams v. North Wisconsin Lumber Co. (1905), 102 N. W. 589.

[71] Columbus R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. 635; Tri-City Ry. Co. v. Killeen, 92 Ill. App. 57; Geismann v. Edison Electric Co., 173 Mo. 654, 73 S. W. 654; Judge v. Narragansett Electric L. Co., 23 R. I. 208, 49 Atl. 961, 10 Am. Neg. Rep. 467.

Due care on the part of an employee may be inferred in many cases. Knowlton v. Des Moines Edison Light Co., 117 Iowa, 451, 90 N. W. 818; compare Judge v. Narragansett Electric L. Co., 23 R. I. 208, 49 Atl. 961, 10 Am. Neg. Rep. 467, holding that under the evidence "The case of Cassidy v. Angel, 12 R. I. 447, 34 Am. Rep. 690, as explained by Judge v. Narragansett Electric Lighting Co., 21 R. I. 128, 42 Atl. 507, does not control, for the reason that the presumption of due care there referred to is sufficient to make out a prima facie case, only 'when there is nothing appearing to the contrary.' Here something does appear to the contrary, namely, that the deceased must have come in contact with a highly charged wire * * * or else that he must have created a short circuit, and thereby have received the injury. And the happening of the accident from either of said causes is prima facie inconsistent with the exercise of due care on the part of the deceased," per Tillinghast, J.

assumed such risk.[72] If he is warned of the danger of an injury from such a cause and he disregards the warning and sustains an injury in consequence thereof, the company will not be liable for such injury, as he cannot be considered to have exercised due care.[73] Where, however, the conduct of the company's business does not require that a wire shall be charged with a dangerous current it has been decided that an employee is not obliged to assume that it will be so charged.[74] And an employee is also not required to guard against an injury by reason of a wire carrying a dangerous current of electricity where he is justified in believing that the company will keep the current turned off while he is at work upon or in close proximity to such wire.[75] And a rule of the company that linemen shall treat every wire as a live wire cannot be made a conclusive standard of negligence but is only one circumstance to be considered in connection with others.[76]

§ 663b. **Injury to employees — Contact with wires — Cases.**— Where an employee of a telephone company which had attached its wires to a pole of an electric light company was last seen at about the fifth crossarm and his body was subsequently found on the wires supported by that arm and it appeared that the insulation of the wire on the seventh crossarm was worn off at its point of contact with an iron which passed through a brace that was customarily used by persons in climbing the pole it was held that the evidence was sufficient to warrant a finding that contact with the charged brace was the cause of death and that the defendant was liable.[77] And an employee of a tele-

[72] Harrison v. Detroit Y. A. A. & J. R. Co., 137 Mich. 78, 100 N. W. 451, 16 Am. Neg. Rep. 405.

[73] Tri-City Ry. Co. v. Killeen, 92 Ill. App. 57. Compare Buckley v. Westchester Lighting Co., 93 App. Div. (N. Y.) 436, 87 N. Y. Supp. 763, holding that where an employee had been warned that a live wire was being repaired at the entrance to the boiler-house in which he was working, the question whether he was obliged to apprehend danger therefrom was dependant on the circumstances.

[74] Cessna v. Metropolitan Street Ry. Co. (Mo. App. 1906), 95 S. W. 278.

[75] Knowlton v. Des Moines Edison Light Co., 117 Iowa, 451, 90 N. W. 818.

[76] Mahan v. Newton & B. St. Ry. Co., 189 Mass. 1, 75 N. E. 59.

[77] Morgan v. Westmoreland Electric L. Co. (Pa. 1906), 62 Atl. 638, 19 Am. Neg. Rep. 504, wherein the

phone company is not guilty of contributory negligence in permitting wires which he is stringing to come into contact with electric light wires which he has a right to assume are properly insulated, provided the defect in the insulation of such wires is not a patent one.[78] Again where owing to the negligence and incompetence of a fellow servant whom an employee was assisting the latter was struck by a live wire and killed by a shock of electricity it was held that the company was liable though it had no knowledge of the servant's incompetency.[79] And where an employee went to the aid of a co-employee who had been injured by an electrical shock and in doing so caught hold of a telephone wire which they were stringing and was killed by reason of such wire being charged with a dangerous current from contact with a defectively insulated wire belonging to a trolley company it was held that the latter company was liable in damages.[80]

§ 663c. **Police telegraph wire on elevated railway — Employee repairing wire injured — Defective insulation.** — Where a city has the right by contract to string its police wires on the structure of an elevated railway company, such company should exercise reasonable care to so insulate its wires that injury will

court said: "There was no direct evidence that the deceased was killed by coming into contact with the iron brace. But direct evidence was not essential. The cause of death might properly be inferred from the location of his body with relation to the dangers to which he was exposed. The telephone wires were in themselves harmless, and death by electricity could have been caused only by the deceased coming into contact with some object charged with a powerful current. This object was at hand in a position where anyone climbing the pole would be likely to touch it. Conditions were shown to exist which indicated very clearly the cause of death, and no other cause being shown, the jury were warranted in finding that this was the cause," per Fell, J.

[78] Mitchell v. Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398.

[79] Scott v. Iowa Telephone Co., 126 Iowa, 524, 102 N. W. 432.

[80] Whitworth v. Shreveport Belt Ry. Co., 112 La. 363, 36 So. 414, 16 Am. Neg. Rep. 58. The court held in this case that the deceased in going to the rescue of his co-employee was not in fault, but was acting under a high sense of moral duty, and for his death while acting in the performance of that duty, occasioned by the negligence of the electric company, it was responsible in damages.

not result to one whose business may bring him in contact therewith. In such a case if the contract contains no provision of restraint, the city will have the right of reasonable access to its wires for the purpose of maintaining and keeping them in repair and one who is sent upon the structure to repair them is neither trespasser or bare licensee but will be regarded as lawfully thereon, and if he is injured owing to the negligence of the company in insulating its wires, the company will be responsible in damages for the injury so sustained. Nor will the right of an employee to recover in such a case be affected by the fact that he has a pass giving him free access to the stations and structures of the company, but not to passage on the trains, on condition that all risks of accident while using it are assumed by him, especially where it appears that he did not avail himself of the permission given by the pass in obtaining access to the structure, but climbed upon it.[81]

§ 664. **Employees working on roofs — Contact with wires.**— In the absence of any evidences of defective insulation of wires suspended over roofs, an employee who comes into contact with such wires in the course of his employment is not guilty of contributory negligence.[82] So, where a person at work upon the roof of a building, making repairs for the owner, is injured by contact with a live electric light wire, without negligence on his part, recovery may be had of the company for the injury.[83] And evidence is not admissible, in an action by a painter who was injured by a defectively insulated wire, of a custom

[81] Wagner v. Brooklyn Heights R. Co., 174 N. Y. 520, 66 N. E. 1117, affirming 69 App. Div. 349, 74 N. Y. Supp. 809.

[82] Clements v. Louisiana E. L. Co., 44 La. Ann. 692, 11 So. 51, 4 Am. Elec. Cas. 388. See Fitzgerald v. Edison Electric Illum. Co., 207 Pa. St. 118, 56 Atl. 350, 15 Am. Neg. Rep. 415, holding that it was proper to submit the questions of negligence to the jury where it appeared that a painter, in the course of his employment, went upon a roof to paint a cornice and finding some electric wires in his way propped them up so that he could work under them and one of the wires that had been placed by the defendant so close to the building that the insulation was worn off either fell upon him or was touched by him and he was killed. A verdict for the plaintiff was affirmed in this case.

[83] Reagan v. Boston E. L. Co., 167 Mass. 406, 45 N. E. 743, 1 Am. Neg. Rep. 78.

to give an electric light company notice that painters were at work on the building so that its wires could be cut, where it appeared that the company had actual notice of such fact.[84] Nor is it material, in an action by one who was injured while on the roof of a building painting the cornice, that it was not necessary for the plaintiff to go upon the roof.[85] If, however, the proximate cause of an employee's injuries is other than a contact with the wire the company will not be liable, as in the case of one who falls from a ladder or building and grasps a defectively insulated wire in the course of his fall.[86]

§ 665. **Employees relying on assurance of foreman or other superior.**— An employee is in many cases relieved of a charge of contributory negligence where the work upon which he is engaged is under the immediate control of a superior and the former acts under the direction of, or an assurance of safety by, the latter. And where a superior has knowledge of some condition which increases the risk and of which the employee has no knowledge and could not in the exercise of reasonable care know of such condition, and his superior directs him to perform certain work without informing him thereof, in conse-

[84] Baries v. Louisville Electric Light Co., 25 Ky. Law. Rep. 2303, 80 S. W. 814.

[85] Will v. Edison Electric Ilum. Co., 200 Pa. St. 540, 50 Atl. 161.

[86] Elliott v. Allegheny County Light Co., 204 Pa. St. 568, 54 Atl. 278, 13 Am. Neg. Rep. 600, wherein the court said, in an action by one who nad fallen from a ladder and had grasped a live electric light wire as he was falling: "At the close of the testimony the trial judge gave binding instructions in favor of the defendant, upon the ground that the proximate cause of the plaintiff's injuries was his fall from the ladder, and not his grasping the wire in the line of the fall. This view was manifestly correct. It is undisputed that the defendant was in no wise responsible for the slipping of the ladder which was the originating cause of the plaintiff's fall. It would be speculative in the extreme to attempt to differentiate between the extent of the injury which he did receive, and that which he would probably have received, if he had not come in contact with the electric light wire in the course of his fall. It is quite possible that the wire helped to break the fall, and thus lessen the extent of the injury. But even if the presence of the wire, in the condition which it was, made the consequences of the fall more serious, yet it did not bring about the accident, nor was it in any sense the efficient responsible cause of the injury," per Potter, J.

quence of which he is injured, the company will be liable therefor. Thus it has been so held where an electric light and telephone company were using the same poles and the power company turned on its current an hour earlier than usual and a foreman of the telephone company directed one of its lineman to climb a pole, without informing him of such fact.[87] And where there is no evidence that a current is passing through uninsulated electrical wires, an employee has a right to rely upon the assurance of a foreman, that such wires are not dangerous.[88] So, where the plaintiff was at work on the tracks of a street railway and the foreman in charge of the work, who had been informed by those in charge of the power that it was turned off and the third rail dead, directed the plaintiff to strike the third rail with a chisel and he was injured by a shock in doing so it was decided that the risk was not assumed by him; that he was in the exercise of due care and that there was negligence on the part of the defendant.[89] And upon the question whether a lineman was guilty of contributory negligence in coming in contact with a live wire evidence is admissible that in the course of a conversation with the superintendent the former was informed by the latter that the current would be shut off while he was at work on the wires, it being declared that if he was so informed he had a right to assume that the wires were not charged with electricity at the time he worked among and on them and he would not be guilty of a want of ordinary care in coming in contact with them.[90] Again where a foreman has shown his incompetency on several specific occasions and notice of such fact his been brought to the company's attention, the latter will be liable to an employee injured while in the performance of his duty and in the exercise of due care, by an electrical shock, due to such foreman's negligence.[91] And where an employee of an electric light company was killed by contact with a live wire on the roof of a house, it was held that he was in the discharge of his duty, if he was standing or mov-

[87] East Tennessee Teleph. Co. v. Carmine (Ky.) 1906), 93 S. W. 903.

[88] Chicago Edison Co. v. Hudson, 66 Ill. App. 639.

[89] Keeley v. Boston Elevated Ry. Co. (Mass. 1906), 78 N. E. 490.

[90] Smith v. Milwaukee Electric Ry. & L. Co. (Wis. 1906), 106 N. W. 829.

[91] Malay v. Mt. Morris E. L. Co., 41 App. Div. (N. Y.) 574, 58 N. Y. Supp. 659.

ing in a space where he could readily answer the calls of his foreman or render the assistance required by him, although he had taken two or three steps away.[92]

§ 666. **Wires over steam railway — Negligence.**— Where a steam railway permits an electrical street railway to suspend wires over its tracks in such a position that the lives of its employees are in danger, such act is an act of negligence by the steam railroad company towards its employees,[93] and it is also negligence on the part of the street railway to so construct its wires.[94] But where an employee of a railroad company who has knowledge that a trolley wire is suspended low at the point where the tracks cross and by reason of his own negligence is injured by the wire striking him, there can be no recovery for the injury so sustained and it has been held proper in such a case to refuse to instruct the jury that the plaintiff could recover though he was guilty of negligence provided the accident could have been avoided by the exercise of ordinary diligence on the part of the defendant.[95]

§ 666a. **Different companies using same poles — Duty as to employees.**— Where an electrical company over whose wires a dangerous current of electricity passes, uses poles jointly with another electrical company, it is the duty of the former to exercise ordinary care to insulate its wires so as to prevent injury to the employees of the other company, and if it is negligent in this respect and an employee of such other company is injured by defective insulation of the wires it will be liable for the injury so sustained.[96] And where a telegraph or telephone

[92] Gremnis v. Louisville E. L. Co., 20 Ky. L. 1293, 49 S. W. 184. See sections in chap. XXI, as to maintenance of wires over roofs.

[93] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86, 21 So. 153.

[94] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86, 21 So. 153. See Pittsburgh Rys. Co. v. Chapman, (C. C. A.,) 145 Fed. 886, holding, in an action against a street railway company by a brakeman who was hit by a trolley or guy wire while on the top of a railroad car, that the question whether the street railway company was negligent in not elevating its wires was one for the jury.

[95] Danville Street Car Co. v. Watkins, 97 Va. 713, 34 S. E. 884.

[96] Standard Light & Power Co. v. Muncey, 33 Tex. Civ. App. 416, 76 S. W. 931.

company permits another electrical company, whose wires are used to convey a dangerous current of electricity, to use its poles, it is decided that it is the duty of the former company to see that they were not so used as to expose its employees to perils the risks of which were not assumed in entering such hazardous employment. So where a lineman in the employ of a telephone company which permitted an electric light company to attach wires to its poles, was injured by a shock of electricity from a defectively insulated light wire while on a telephone pole in the prosecution of his work it was held that the questions of negligence were properly submitted to the jury and a verdict against the telephone company was affirmed.[97] Where, however, an employee fails to exercise due care and is injured by reason of a defect in the insulation which he could by the exercise of ordinary diligence have known of, he can not recover for such injury. So where a lineman of a telephone company, of experience, aged nineteen years, was killed by contact with a wire of an electric lighting company, which had been strung on the poles of the telephone company, and from which wire the insulation had worn off near the pole which he had climbed, and for several feet on each side of the pole,— he knowing, or being able to know by ordinary diligence, that the wire was so exposed — it was held that his mother could not recover from the electric lighting company the value of his life.[98]

§ 667. **Different companies using same poles — Employee of one company stepping on crossarm of another not trespasser.**— Where different electrical companies maintain separate crossarms upon the same poles, an employee of one company, while engaged in transferring such company's wires to other poles, is not, by the fact of his resting his foot upon the crossarm of another company, a trespasser so as to relieve the latter company from liability for injury or death occasioned by the imperfect insulation of its wires.[99]

[97] Barto v. Iowa Telephone Co., 126 Iowa, 241, 101 N. W. 876, 17 Am. Neg. Rep. 502.

[98] Columbus R. Co. v. Dorsey, 119 Ga. 363, 46 S. E. 635, 15 Am. Neg. Rep. 500.

[99] Newark E. L. & P. Co. v. Gardner, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74, 37 L. R. A. 725.

§ 667a. **Electric light wires near distributing pole of telephone company — Duty of former as to employees of latter.**— An electric light and power company which maintains its wires so near the distributing pole of a telephone company that the employees of the latter company, who are obliged to ascend and descend the pole in the performance of their duties, are liable to come in contact with such wires owes to such employees the duty of so placing and insulating its wires that they may perform their work in safety.[1]

§ 668. **Employee injured — Failure to use apparatus supplied by company.**— Where an employee is provided with implements or apparatus, by the use of which he may be able to avoid injury to himself, a failure on his part to use such implements or apparatus will prevent recovery for any injury received by him, which might have been averted by the use thereof.[2] So, where a lineman was supplied with apparatus for testing an insulator, but failed to use the same, it was held that he was guilty of contributory negligence, which would preclude recovery for injuries received from contact with a span wire.[3] But where it appeared that a telephone lineman was on a pole stringing wires and that he received a fatal shock of electricity by reason of the contact of a wire which he had hold of with an uninsulated electric light wire and that he fell to the ground and broke his neck, it was held that, there being sufficient proof that the shock killed him, it was immaterial that he would not have fallen if he had used a strap furnished him for the purpose of fastening him to the pole.[4]

[1] Ziehn v. United Electric L. & P. Co. (Md. 1906), 64 Atl. 61.

[2] Anderson v Inland Teleph. & Teleg. Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 419, 8 Am. & Eng. Corp. Cas. (N. S.) 493. See Bergin v. Southern New Eng. Teleph. Co., 70 Conn. 54, 38 Atl. 888, 39 L. R. A. 192; Huber v. La Crosse City R. Co., 92 Wis. 636, 31 L. R. A. 583, 66 N. W. 708.

[3] Anderson v. Indland Teleph. & Teleg. Co., 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 419, 8 Am. & Eng. Corp. Cas. (N. S.) 493.

[4] Rowe v. Taylorville Electric Co., 213 Ill. 318, 72 N. E. 711, 17 Am. Neg. Rep. 215. The court said: "It is contended that the uncontradicted evidence proved Rowe to have been guilty of negligence in not using the strap to fasten himself to the pole when using both hands with the wire. If he had used it, he would not have fallen, and his neck was broken by the

§ 669. **Employee trimming lamp — Negligence as to leg-wires.** — Where an employee of an electric light company is engaged in trimming lamps, and in the course of his employment, leg-wires connected with such lamps are lowered to within a few feet of the street, he must exercise reasonable care that he is not injured by travelers coming in contact with such wires, and he cannot rely merely upon the care of a driver to whom no warning has been given and who has no reason to expect that such a condition exists. Thus, where an employee was engaged in trimming a lamp, and leg-wires which extended from such lamp to a lamp on another street were lowered to within six feet of the ground in one place, and the employee called to two drivers, warning them of the wires, but gave no notice to a third driver, and did not suspend work, relying on his having heard the warning given to the other two, but which, in fact, he had not heard, and by coming in contact with the wires such employee was injured, it was held that the latter was guilty of contributory negligence, precluding recovery, and that the driver was not guilty of negligence which would render his employer liable.[5] And it has been decided that an employee of an electric light company who is experienced and engaged in such work assumes the risk of injury which may result from the lamp becoming alive by reason of a contact of the wires with those of another company.[6]

§ 670. **Use of gloves by employees.**— Where an employee of an electrical company is supplied with rubber gloves as a protection in handling "live wires," if he discards such gloves and touches uninsulated wires with his bare hands, he must be held to have assumed the risk, and damages for injury or death cannot be recovered from the company.[7] But the fact that gloves are provided by the company and are not used does not

fall of twenty-five feet upon the frozen ground; but there was evidence tending to prove that the electric shock was fatal. If the shock was sufficient to kill him, it was immaterial whether he fell or not. The court would not have been justified in directing a verdict on the ground that he was guilty of contributory negligence in not using the strap," per Cartwright, J.

[5] Campbell v. Wood, 22 App. Div. (N. Y.) 599, 48 N. Y. Supp. 46.

[6] Carr v. Manchester Electric Co., 70 N. H. 308, 48 Atl. 286.

[7] Junior v. Missouri E. L. & P.

conclusively show negligence on the part of a lineman where there is also evidence that the lineman had no reason to believe that any of the company's wires were dangerous and the accident was caused by a contact of such wires with the wires of a trolley company.[8] And where it appeared from the evidence that gloves were not worn in the morning for the purpose of trimming lamps, but were used at night on live wires, it was held that an employee engaged in trimming lamps in the morning was not guilty of negligence in not wearing gloves.[9] If an employee is injured by contact with an improperly insulated wire and it appears that it was the custom of the company to furnish its employees engaged in similar work with gloves, and which would have prevented the accident, a failure of the company to provide such employee with gloves will render it liable for the injury.[10]

§ 671. **Defective appliance selected by employee.**— Though an appliance furnished by the company for the purpose of avoiding injuries from live wires may be defective, yet if such appliance was selected by the employee from other appliances of a like character, which were not defective, and the defects in the one selected were apparent, and by the negligent use of such appliance he suffers injury, the company will not be liable. So where an employee selected a defective shunt cord, the defects being patent, leaving others which were perfect, and by grasping the defective end of the shunt cord in one hand and the uncovered end of an electric light wire, which he knew was a live wire, by the other, completed the circuit with his body, causing his death, it was held that there was no negligence on the part of the company, but that the deceased was guilty of negligence, and there could be no recovery.[11]

Co., 127 Mo. 79, 5 Am. Elec. Cas. 369, 29 S. W. 988.

[8] Mahan v. Newton & B. St. Ry. Co., 189 Mass. 1, 75 N. E. 59.

[9] Harroun v. Brush E. L. Co., 12 App. Div. (N. Y.) 126, 42 N. Y. Supp. 716; appeal dismissed, 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615.

[10] Desjardins v. Citizens' L. & P. Co., Rapport's Jud. Quebec, 15 C. S. 28.

[11] Piedmont Elec. Illum. Co. v. Patterson's Admx., 84 Va. 747, 2 Am. Elec. Cas. 350, 6 S. E. 4.

§ 672. **Electric crane — Derrick cables — Defective insulation.**— An employer who has men at work in the operation of an electric crane is guilty of negligence towards such employees, where he permits them to use such crane, he having knowledge of the fact that there is a leakage of electricity from the motor to the hauling chain, although the current used is not dangerous, when an employee is injured by reason of the contact of the wire used for the motor, and some other electrical wire, by means of which a dangerous current of electricity is communicated through the motor to the chain, and the employer will be liable for an injury so received.[12] And where one who had a limited experience as an electrician knew that contact existed between derrick cables and an electric wire, that other people had received shocks from touching the cables, and was fully warned of the danger and he attempted with a wooden stick to move the loose end of the cables from the open street to the gutter where they would be less dangerous, and it appeared that he believed that the electric wire was a secondary and not a primary wire it was decided, in an action to recover for his death, that the evidence did not conclusively establish that he was guilty of contributory negligence and that the question whether he was so guilty should have been submitted to the jury.[13]

§ 673. **Liability of electric railway company for injuries to conductor.**— Where a train consists of a motor and a trail car, the latter having no fender or lifeguard, the conductor assumes the risk of the absence of such appliances, where he could have discovered their absence by the exercise of ordinary diligence.[14] And a conductor also assumes the risk of injury from standing on the bumper of a car at an uneven place in the tracks for the purpose of replacing the trolley,[15] or of increased danger from the fact that a passenger is standing on the running-board of an open car.[16] So also of his foot being caught in the turntable

[12] Moran v. Corliss Steam Engine Co., 21 R. I. 386, 43 Atl. 874.

[13] Klages v. Gillette-Herzog Mfg. Co., 86 Minn. 458, 90 N. W. 1116, 12 Am. Neg. Rep. 488.

[14] Denver Tramway Co. v. Nesbit, 22 Colo. 408, 45 Pac. 405, 4 Am. & Eng. R. Cas. (N. S.) 605.

[15] McCauley v. Springfield St. R. Co., 169 Mass. 301, 47 N. E. 1006, 3 Am. Neg. Rep. 668.

[16] Hall v. Wakefield & S. Street Ry. Co., 178 Mass. 98, 59 N. E. 668. But see Withee v. Somerset Traction Co., 98 Me. 61, 56 Atl. 204, 15 Am. Neg. Rep. 67.

rails, which project above the floor of the carhouse where he is given the trolley rope to shift to the other end of the car, which is being shifted to the main track by means of an electric turntable, where he knew or should have known of the danger to be avoided, having done the same work on numerous other occasions.[17] And a conductor of several years' experience is guilty of contributory negligence, barring recovery, where he stands upon the running board of an electric car, in such a position as to be struck by a car on an adjoining track, though he had never before worked on an open car,[18] and a company is not guilty of negligence in failing to notify a conductor of extensive experience of such a danger.[19] In another case where it appeared that the lights of an electric car on a single track railway had been extinguished by the trolley leaving the wire, and while the conductor was on the track behind the car attempting to replace the trolley he was struck by the following car and injured, it was decided that the accident was one of the risks of the employment that the conductor assumed and that no recovery for such injury could be had of the company though the single track was operated without signals.[20] But where a conductor, who was inexperienced and who had received no instructions from the company, was injured by striking a pole while collecting fares on the running board of a car, and it appeared that fares could be collected with safety, except as to such pole, which was nearer the track than the others, although the difference in its position was not apparent, it was held that he was not guilty of contributory negligence.[21] And a conductor is not guilty of contributory negligence, if, in turning a switch, he stands between the switch track and the main line, where such place is not, in itself, a place of peril, but is the

[17] Whelton v. West End St. R. Co,. 172 Mass. 555, 52 N. E. 1072, 5 Am. Neg. Rep. 615.

[18] Fletcher v. Philadelphia Tract. Co., 190 Pa. St. 117, 42 Atl. 527, 5 Am. Neg. Rep. 721, 43 Week. N. of Cas. 521.

[19] Fletcher v. Philadelphia Tract. Co., 190 Pa. St. 117, 42 Atl. 527, 5 Am. Neg. Rep. 721, 43 Week. N. of Cas. 521.

[20] Simmons v. Southern Traction Co., 207 Pa. St. 589, 57 Atl. 45, 15 Am. Neg. Rep. 670.

[21] Pikesville, Reistertown & E. G. R. Co. v. State, Russell, 88 Md. 563, 5 Am. Neg. Rep. 358, 42 Atl. 214.

usual one, although he might have stood in another position with safety and turned the switch.[22]

§ 674. **Liability of electric railway company for injuries to motormen.**—A motorman assumes such risks in connection with his employment as are usual and ordinary so far as they are known or could be known by the exercise of reasonable care.[23] So where a motorman was killed by an electric shock while on top of a car removing a trolley pole from the socket, by the pole coming in contact with a high-tension wire over the car, or so near the wire that the current of electricity arced, and he knew of the high voltage, it was held that he assumed the risk, though no instruction had been given as to the danger of the electricity arcing if a conductor like the trolley-pole were brought either in contact with the high tension wire, or within half an inch of it, as the danger was obvious.[24] And a motorman who takes a car upon a track upon which cars are approaching from the opposite direction, though done by the order of the dispatcher, and runs the car at such a rate of speed, on a foggy morning when he is able to see only a few feet in front of the car, that he is unable to stop the car in time to avoid a collision, is guilty of negligence, which is the proximate cause of an injury received by him in such collision.[25] While an electric street railway company may be negligent in locating a pole near its track, yet it is not relatively negligent to a motorman who is injured by colliding with such pole while leaning beyond the side of the car, when neither necessity nor duty requires him to be in that position.[26] And though a motorman, while in front of a car adjusting a fender, may be killed by the sudden starting of the car, yet the company will not be liable in the absence of evidence showing the cause of the car's starting, or that it was defective and

[22] Gier v. Los Angeles Consol. Elec. R. Co., 108 Cal. 129, 41 Pac. 22.

[23] Union Traction Co. v. Buckland, 34 Ind. App. 420, 72 N. E. 158; Mayer v. Detroit, Ypsilanti, A. A. & J. R. Co. (Mich. 1905), 105 N. W. 888, 19 Am. Neg. Rep. 328.

[24] Harrison v. Detroit, Y. A. A. & J. R., 137 Mich. 78, 100 N. W. 451, 16 Am. Neg. Rep. 405.

[25] Savage v. Nassau Elec. R. Co., 42 App. Div. (N. Y.) 241, 59 N. Y. Supp. 225.

[26] Sunday v. Savannah St. R. Co., 96 Ga. 819, 23 S. E. 841.

the defect of such a nature as would tend to cause the car to start.[27] And where a motorman was killed owing to the negligence of an employee of the company while acting as a mere volunteer outside the scope of his employment, contrary to the rules of the company and without its authority, it was held that it was not liable therefor.[28] But where a street car conductor while collecting fares on the running-board, was struck by a pole erected to support the electric wire of the railway company, it was decided that it could not be said that he assumed the risk of the danger of the nearness of the pole to the car while discharging his duty unless he had actual knowledge, or that he was negligent in failing to discover the danger if it was not so patent as to exclude ignorance.[29] And where a car was in the habit of "bucking" and a motorman was killed by its so doing, it was held that it was the duty of the company to remedy such defect, and that recovery could be had of the company.[30] In this case it appeared that both the company and the motorman knew of this defect in the car, and that the former had on several occasions used efforts to remedy it, but such efforts on each occasion had failed to produce the desired results. It was claimed that by a substitution of certain parts this defect in the car could have been remedied, and the court held the company liable for not having remedied it. In another case, however, it is held that if an electric car is defective and a motorman continues to work

[27] Kenneson v. West End. St. R. Co., 168 Mass. 479, 47 N. E. 418, 1 Am. Neg. Rep. 446.

[28] Moran v. Rockland T. & C. St. Ry., 99 Me. 127, 58 Atl. 676, 17 Am. Neg. Rep. 57.

[29] Hoffmeier v. Kansas City, Leavenworth R. Co., 68 Kan. 831, 75 Pac. 1117, 16 Am. Neg. Rep. 52. The court here said: "The plaintiff upon entering the defendant's service, accepted no risk arising from its negligence. He had a right to assume that the company had not set him to toil in the midst of danger. He had a right to assume the road was built with ordinary care and consideration for the safety of the men who were to operate it, and he was not obliged to make any independent investigation for hazards resulting from the disregard of such care. Without actual knowledge of his peril, or a patency so ample as to exclude ignorance, the plaintiff assumed no risk in coming to work under the conditions surrounding him." See Withee v. Somerset Traction Co., 98 Me. 61, 56 Atl. 204, 15 Am. Neg. Rep. 67.

[30] Beardsley v. Minneapolis St. R. Co., 54 Minn. 504, 56 N. W. 176.

on such car with knowledge of the defect, he assumes the risk and the company will not be liable for an injury.[31]

§ 675. **Electric car colliding with railroad train — Negligence of motorman.**— If a motorman attempts to cross the track of a steam railroad in front of an approaching train, which, before attempting to cross, he could have seen at sufficient distance to have avoided a collision between his car and the train, and, as a result of such attempt, a collision ensues, in which he is injured, he is guilty of negligence and cannot recover from the railroad company for such injury.[32] But where, in a collision between an electric car and a railroad train, the motorman was killed, it was held that the railroad company was not, as a matter of law, relieved from the effects of its own negligence because of the negligence of the conductor of the car, who, after going upon the tracks to look for a train, had signaled to the motorman to cross, where there was no particular arrangement between the two as to the method to be employed in looking for trains.[33]

§ 676. **Pole close to railroad track — Injury to brakeman — Risk not assumed.**— Where a telegraph pole is located so close to a railroad track that employees on passing trains may be injured thereby while in the performance of their duties, risk of injury therefrom is not assumed by a brakeman unless he has knowledge or competent means of knowledge and continues in the employment.[34]

§ 677. **Telegraph operator — Duty of railroad to — On track.** — Where a railroad train has failed to obey the signal of the telegraph operator in the employ of the railroad company, and the operator, for the purpose of stopping the train in order to avoid a collision, goes out upon the track, he does not thereby

[31] Windover v. Troy City R. Co., 4 App. Div. (N. Y.) 202, 38 N. Y. Supp. 591, 74 N. Y. St. R. 218.

[32] Highland Ave. & B. R. Co. v. Fennell, 111 Ala. 356, 21 So. 324. See Goodrich v. Chippewa Val. Elec. R. Co., 108 Wis. 329, 84 N. W. 419.

[33] Harper v. Delaware, I. & W. R. Co., 22 App. Div. (N. Y.) 273, 47 N. Y. Supp. 933.

[34] Crandall v. New York, N. H. & H. R. Co., 19 R. I. 594, 35 Atl. 307, 5 Am. & Eng. R. Cas. (N. S.) 543.

become a trespasser so as to lose his right to have the utmost care exercised by the company for his safety.[35]

§ 678. **Violation of rules of company — Conductor on footboard of car — Running car at prohibited speed.**— If an employee of an electrical company violates any of the rules of the company which have been prescribed by the latter for the guidance of employees in their work, and by the observance of which certain dangers may be avoided, he thereby assumes the risk of any injury which he may receive as a result of such violation and which, by the observance of such rule, he would not have received. So, where conductors were required by the rules of the company to stand on the platform of the cars and exercise the utmost care to avoid danger while passing a trestle, and in violation of such rule a conductor stood upon the running-board of a car while passing such point, where he was injured by collision with a timber projection from such trestle, it was held that he could not recover from the municipality for such injury.[36] So, also, where a motorman was killed while running his car rapidly over a bridge in violation of the rules of the company, it was held that there could be no recovery.[37]

§ 679. **Remedy of defects in machinery — Statute.**— Under the Massachusetts statute requiring a "defect in the condition of the machinery" to be remedied for the safety of employees,[38] the defect may be remedied by a temporary device as well as by permanent repairs, since the object of the statute is the removal of the source of danger.[39]

[35] Illinois C. R. Co. v. Mahan, 17 Ky. L. R. 1200, 34 S. W. 16.

[36] District of Columbia v. Ashton, 27 Wash. L. Repr. 399.

[37] Rittenhouse v. Wilmington St. R. Co., 120 N. C. 544, 26 S. E. 922.

[38] Mass. Stat. of 1887, c. 270, §§ 1, 2.

[39] Willey v. Boston E. L. Co., 168 Mass. 40, 37 L. R. A. 723, 46 N. E. 395.

CHAPTER XXVIII.

STIPULATIONS, RULES AND REGULATIONS — TELEGRAPH AND TELEPHONE COMPANIES.

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§ 732. Profane and indecent language — Rules and regulations — Telephone.

§ 680. **Stipulations, rules and regulations — Telegraph companies — Generally.**— The questions whether a telegraph company can impose stipulations or conditions upon their patrons by having the same printed upon telegraph blanks which, perforce, the senders of telegraphic messages must sign unless they choose to contest the point in the courts, has been the source of much discussion in numerous decisions. The question is not of the right of parties to enter into valid contracts where both stand upon an equal footing and can fully understand the terms of the agreement and act advisedly upon the subject-matter of the contract before entering into it, but the matter is resolved into one of the legal right of the telegraph company as a public or quasi-public servant, to impose conditions. Telegraphic messages as a rule require, or are deemed by their senders to require, immediate dispatch, and the companies are in a position to exact conditions to the full extent of all the protection which the law provides. But, while this is true, it is equally true that the successful carrying on of the telegraphic business necessitates that such carriers of news and intelligence should be protected by all reasonable stipulations, rules and regulations which the law permits them to impose upon those whom they serve, provided they are imposed in such a lawful manner that their patrons can fairly be held to have given their consent thereto so as to be bound thereby. Therefore, the reasonableness of such printed stipulations, rules and regulations and whether they have been imposed in such a manner as to bind those who might otherwise be entitled to maintain actions against telegraph companies, are the principal questions which the courts have been called upon to decide. These points are fully considered in the following sections. It is worthy of note, however, in this connection, and this fact can be urged either in favor of or against the company, that certain telegraph blanks provide that correctness in the transmission of telegraphic messages to any point on the company's lines may be insured by contract in writing under certain conditions and on payment of an addi-

tion to the usual charge for repeated messages. The want of harmony in the decisions justifies an exhaustive and extended review of the cases, and if prepayment is not made it is no excuse where the agent accepted the message for transmission and the rule requiring prepayment did not appear to have been known to the sender.[1] Again the fact that the addressee pays nothing to the receiving operator to wire back a despatch to ascertain if there is a mistake in the message is immaterial where no demand is made for payment and there is no refusal to pay.[2] It is held that nonprepayment is no excuse for failure to transmit or for delay where the telegraph operator declines prepayment but requests the sender to forward the despatch "collect."[3] So, in case a telephone contract provides for written notice, and the subscriber who is delinquent is informed that services will be discontinued if payment is not made, there is a waiver if the subscriber told the company's representative to do as he pleased, and there is no liability for the removal of the instrument in such case.[4] Again, waiver by the company of advance payment for telephone rentals for two successive years does not obligate a continuance thereof.[5]

§ 681. **Stipulations, rules and regulations — Telegraph companies — Alabama.**— In a case in this State, in 1887, it was decided that where a message was to be forwarded beyond the company's own lines it might fix terms, conditions and regulations not contrary to law or public policy, on which it would receive and undertake to secure the transmission of cablegrams to points of destination in foreign countries. Cablegrams were required to be written on blanks on the back of which were printed the terms and conditions, and immediately preceding the message the following was printed, "send the following

[1] Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314, 4 Am. Elec. Cas. 656, 14 So. 579.

[2] Western Un. Teleg. Co. v. Landis, 21 Week. N. of Cas. 38.

[3] Western Un. Teleg. Co. v. Yopst, 118 Ind. 248, 2 Am. Elec. Cas. 553, 20 N. E. 222.

[4] Malochee v. Great Southern Teleph. & Teleg. Co., 49 La. Ann. 1690, 22 So. 922.

[5] Malochee v. Great Southern Teleph. & Teleg. Co., 49 La. Ann. 1690, 22 So. 922.

message subject to the terms and conditions printed on the back hereof, which are hereby agreed to," but it was declared that the company was not compelled by any duty to receive for transmission or to secure the transmission of messages beyond its own lines. The court also refused to consider the reasonable character of the conditions.[6] In other cases in this State it is held that a stipulation exempting the company from liability for errors in transmitting unrepeated messages does not relieve the company from liability caused by the negligence of its servants, or in other words, that it cannot stipulate against its own negligence.[7] And evidently an exemption from liability where the claim for damages is not presented within sixty days is valid, since in cases involving the application of such stipulation no question has been raised as to its validity. And the usual stipulation as to unrepeated messages is void where the company's negligence is the cause of the damage or loss.[8] So, a stipulation for repetition of telegraphic messages has no application where a delay happened after the reception of the message at the terminal office.[9] Nor does a time limit stipulation apply to a claim for damages for failure to send the message at all.[10] But a stipulation is void, so far as negligence of the company is concerned, which limits its liability for unrepeated messages.[11]

§ 682. **Stipulations, rules and regulations — Telegraph companies — Arkansas.**— A stipulation is valid which requires all claims for damages for failure, delay or error in transmission to be presented in writing within sixty days, but such a condi-

[6] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455.

[7] Western Un. Teleg. Co. v. Crawford, 110 Ala. 460, 4 Am. & Eng. Corp. Cas. (N. S.) 230, 20 So. 111; American Un. Teleg. Co. v. Daugherty, 89 Ala. 191, 3 Am. Elec. Cas. 579, 7 So. 660. See Southern Express Co. v. Bank of Tupelo, 108 Ala. 517, 18 So. 664.

[8] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 3 Am. Elec. Cas. 570, 7 So. 419; Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844. But see Southern Express Co. v. Caperton, 44 Ala. 101, 4 Am. Rep. 118.

[9] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 7 So. 419, 3 Am. Elec. Cas. 570.

[10] Western Un. Teleg. Co. v. Way, 80 Ala. 542.

[11] American Un. Teleg. Co. v. Daugherty, 89 Ala. 191, 7 So. 660, 3 Am. Elec. Cas. 579.

tion has no application to a failure to deliver caused by the negligence of defendants' agent — it implies that a liability may be incurred for negligence.[12] A stipulation, however, which limits the liability for damages caused by error, etc., in the transmission of unrepeated messages, and also exempts the company from negligence in such cases is void.[13] A time limit condition for the presentation of claims does not apply to statutory penalties, but only to claims for damages in cases of delay or failure, etc., to transmit telegrams.[14] And where an addressee failed to present his claim for non-delivery within the time specified under the contract stipulations and such failure was caused by the misleading statements of the company's agents made to the addressee and his attorney the company was held to be precluded from availing itself of the stipulation as to non-liability for neglect to present the claim within the specified contract time.[15] Again, it is held to be a question for the court whether the regulation of a telegraph company fixing office hours at a designated place is reasonable.[16]

§ 683. **Stipulations, rules and regulations — Telegraph companies — California.**— In the absence of wilful misconduct or gross negligence a stipulation limiting liability of telegraph companies in case of unrepeated messages is reasonable and valid. The burden, however, of proving such misconduct or negligence is on the party seeking to obligate the company.[17]

[12] Western Un. Teleg. Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468, 11 L. R. A. 102, 26 Am. St. Rep. 33, 3 Am. Elec. Cas. 601.

[13] Western Un. Teleg. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 3 Am. Elec. Cas. 592.

[14] Western Un. Teleg. Co. v. Cobbs, 47 Ark. 344, 1 S. W. 558, 2 Am. Elec. Cas. 474.

[15] Arkansas & L. Ry. Co. v. Stroude (Ark.) 91 S. W. 18.

[16] Western Union Teleg. Co. v. Love-Banks Co., 73 Ark. 205, 83 S. W. 949.

[17] Hart v. Western Un. Teleg, Co., 66 Cal. 579, 6 Pac. 637, 1 Am. Elec. Cas. 734. See Pierce v. Southern Pac. R. Co., 120 Cal. 156, 47 Pac. 874, 40 L. R. A. 350, affd., in banc, 52 Pac. 302, 40 L. R. A. 354, 10 Am. & Eng. R. Cas. (N. S.) 88, holding that a stipulation of a common carrier, exempting it from all damages, except in case of gross negligence is void. See § 22, herein, to point that due diligence is required of telegraph companies, but they are not common carriers. The analogy to common carriers in respect to inability to contract against negligence of the company or its servants or agents has been drawn in other States.

Such a stipulation does not, however, avail the company against its own gross negligence.[18] If, however, there is no gross negligence on the part of the company, there can be no recovery for mistake in sending a message where it is stipulated that no liability shall attach where messages are unrepeated, whether mistakes arise from the negligence of the company's servants or otherwise, and certain information is requested by telegraph, as in such case the sender makes the company's operator its agent.[19]

§ 684. **Stipulations, rules and regulations — Telegraph companies — Colorado.**— A stipulation that no claim for damages for delay in delivery "shall be valid unless presented within thirty days after sending," is reasonable and binding where the message is sent on a blank containing such condition and signed by the sender.[20] So telegraph companies may make reasonable rules and regulations which will be binding when brought home to the knowledge of those with whom they deal, but they cannot stipulate against liability arising from a failure to exercise that fidelity, skill and care which is required in the exercise of the employment which they undertake. Therefore, such companies cannot, by a notice printed on a blank on which the message is written, that it will not be liable unless the message is repeated, relieve itself from liability for a negligent failure to deliver a message, not repeated, after it was received at the office to which it was addressed. The court said in this case: "The object of repeating a message is to correct errors and not to avoid delays in delivering it. The mere fact of having it repeated could not have insured its delivery." Again, "Courts and legislatures have been liberal in allowing companies to provide against such risks as arise out of at-

[18] Reddington v. Pacific Postal Teleg. Co., 107 Cal. 317, 5 Am. Elec. Cas. 693, 40 Pac. 432.

[19] Coit v. Western Un. Teleg. Co., 130 Cal. 657, 63 Pac. 83.

[20] Western Un. Teleg. Co. v. Dunfield, 11 Colo. 335, 18 Pac. 34, 2 Am. Elec. Cas. 481. In this case plaintiff telegraphed to a bank not to pay a check, but the message was not delivered until after the check had been paid; the plaintiff admitted his signature, but denied the execution of the printed contract, and testified that the message was agreed to be delivered before the bank opened.

mospheric influences and kindred causes. At this point they have properly stopped. To permit them to contract against their own negligence would be to arm them with a most dangerous power, one, indeed, that would leave the public almost entirely remediless. * * * Public policy as well as commercial necessity requires that companies engaged in telegraphing should be held to a high degree of responsibility," and the same court also says: "While we hold that it is competent for the company to provide by rules and regulations against the unforeseen disarrangement of electrical apparatus and the imperfections necessarily incident to the transmission of signs and sounds by electricity, yet it must be conceded that these forces or accidents 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. What is needed to secure delivery is fidelity, and to this the company is bound in all messages." [21]

§ 685. **Stipulations, rules and regulations — Telegraph companies — Georgia.**— The writer and sendee of a telegraphic despatch are bound by all reasonable rules and regulations printed on the back of a message blank, where, upon the face thereof and above the space for writing the words, are plainly printed: "Send the following message subject to the terms on the back hereof which are hereby agreed to," and below said space is the warning: "☞ Read the notice and agreement on back. ☜" The regulation in question was, "no responsibility regarding messages attaches to this company until presented and accepted at one of its transmitting offices, and if a message is sent to such office by one of the company's messengers he acts for that purpose as the agent of the sender," and it was held reasonable.[22] In another case it is declared

[21] Western Un. Teleg. Co. v. Graham, 1 Colo. 230, 10 Am. L. Reg. (N. S.) 319, Allen's Teleg. Cas. 578, 582 et seq., 9 Am. Rep. 136, and n., 139, per Belford, J. It is also held in this State that a common carrier cannot stipulate to relieve himself from liability caused by the negligence of himself or his servants. Merchants' Dispatch & T. Co. v. Comforth, 3 Colo. 280, 25 Am. Rep. 757.

[22] Stamey v. Western Un. Teleg. Co., 92 Ga. 613, 4 Am. Elec. Cas. 699, 18 S. E. 1008, 44 Am. St. Rep. 95.

"that any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment, with integrity, skill and diligence contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it becomes necessary for the company in transmitting messages with integrity, skill and diligence, to secure accuracy, to have said messages repeated, then the law devolves upon them that duty, to meet its requirements. We know of no law in this State which limits their tolls on messages, this is under their control, * * * 'a telegraph company cannot by any rule or regulation it may make relieve itself from mistakes caused by the want of ordinary care. Hence it would be liable for ordinary as well as gross neglect,' * * * neither do we think the company, by any rule or regulation of its own, can protect itself against every degree of negligence except 'gross negligence or fraud,' * * * nor is the effort to fix by rule or regulation the amount of damages the company may be liable for, in harmony with the law, where liability is incurred. To say the company shall only be liable for the amount of tolls paid out is practically to excuse them altogether,"[23] and half-rate messages are void in so far as they attempt to limit liability arising from gross negligence.[24] Again it is declared that the liability against which a telegraph company cannot stipulate is confined to its negligence in connection with the transmission of messages and the delivery thereof.[25] But in a recent case in this State it is held that the failure of a sendee to have the message repeated does not, as a matter of law, relieve him from negligence where the message as received is ambiguous and unintelligible by reason of a mistake in transmitting.[26] A requirement, however, that a written claim must be presented

[23] Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480, 1 Am. Elec. Cas. 404, 410, 411, per Speer, J.; Western Un. Teleg. Co. v. Shotter, 71 Ga. 760, 1 Am. Elec. Cas. 557; Western Un. Teleg. Co. v. Fontaine, 58 Ga. 433, 1 Am. Elec. Cas. 229.

[24] Western Un. Teleg. Co. v. Fontaine, 58 Ga. 433, 1 Am. Elec. Cas. 229.

[25] Stamey v. Western Un. Teleg. Co., 92 Ga. 613, 4 Am. Elec. Cas. 704, 18 S. E. 1008.

[26] Manly Mfg. Co. v. Western Un. Teleg. Co., 105 Ga. 325, 31 S. E. 156.

within sixty days after sending the message is held reasonable and binding upon the sender who is charged with knowledge of the contents of the blank upon which the message is written.[27] But it is also held in this last case that such a stipulation may be, and is waived by refusal, upon the ground that the company was not to blame, to pay damages upon oral demand. Again, such a stipulation does not apply to an action for a statutory penalty, but does as to a claim for special damages and operates not only against the sender but also the addressee where the business of both parties is involved and the message was in reply to the addressee.[28] In another case it is held that while the sendee of a telegraphic message has a right of action against the company for any damages he may sustain in consequence of its negligence in the transmission of a message to him, he is bound by the reasonable terms of the contract made between the company and the sender of the message. And where one delivers for transmission to a telegraph company a message written on the blank of another company, the blank containing printed instructions that the message shall be sent subject to the terms and conditions printed on the back thereof, the reasonable conditions therein set out are binding, notwithstanding they are in the form of a contract with a company other than the one to which the message is delivered. The delivery and acceptance of such a message is, in effect, an adoption by the parties of the blank contract made in the name of the other company. A provision in such a contract that the company will not be liable for damages or statutory penalties in any case where the claim is not presented in a writing within sixty days after the message is filed for transmission is reasonable and binding.[29]

[27] Hill v. Western Un. Teleg. Co., 85 Ga. 425, 3 Am. Elec. Cas. 614, 11 S. E. 874, 21 Am. St. Rep. 166.

[28] Western Un. Teleg. Co. v. James, 90 Ga. 254, 4 Am. Elec. Cas. 706, 16 S. E. 83; Western Un. Teleg. Co. v. Cooledge, 86 Ga. 104, 3 Am. Elec. Cas. 618, 12 S. E. 264. See Matthis v. Teleg. Co., 94 Ga. 338, 21 S. E. 564, 1039; Meadors v. Teleg. Co., 96 Ga. 788, 23 S. E. 837.

[29] Western Un. Teleg. Co. v. Waxelbaum 113 Ga. 1017, 39 S. E. 443, 10 Am. Neg. Rep. 254. In this case the court, per Lewis, J., said: "The original message sent by Kennard & Co., which, by consent, was sent to this court with the bill of exceptions, was written on a blank of

§ 686. **Stipulations, rules and regulations — Telegraph companies — Illinois.—** It is held in this State that whether the paper furnished by a telegraph company on which a message is written and signed by the sender is a contract or not depends on circumstances and that the same rule should be applied as exists in cases of express or railroad companies, and

the Postal Telegraph Cable Company, and delivered by the sender to an agent of the Western Union Telegraph Company in Chicago. At the top of the blank, just preceding the written message, are the following words: 'Send the following message without repeating, subject to the terms and conditions printed on the back thereof, which are hereby agreed to.' Among the conditions referred to is one as follows: 'This company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.' 1. 2. It is hardly necessary to argue the very evident legal proposition that where, as in the present case, the sendee of a telegraphic message sued the telegraph company for a breach of contract entered into between the company and the sender of the message, he is bound by all the reasonable conditions embodied in that contract. See Stamey v. Teleg. Co., 92 Ga. 613, 18 S. E. 1008, 44 Am. St. Rep. 95. And it can make no difference, as was contended by counsel for the defendants in error, that the original message was written on a blank of a different company from the one which received and transmitted the telegram. It is true that the printed contract on the back of the blank was in the name of the Postal Telegraph Cable Company, and recited that that company was to transmit and deliver the message subject to the terms and conditions therein set out; but Kennard & Co. took the message to the Western Union Telegraph Company, and explicitly directed it to 'send the following message, without repeating, subject to the terms and conditions printed on the back hereof, which are hereby agreed to.' The Western Union Telegraph Company accepted and undertook to transmit the message on those terms. The parties, then, adopted the Postal Telegraph Cable Company's form of contract, and it necessarily follows that they, together with the sendee, are bound by its reasonable terms and conditions. 3. It is not denied that the plaintiffs below failed to file in writing a claim against the telegraph company within sixty days after the message was filed with it for transmission by Kennard & Co., nor is any attempt made to explain their noncompliance with the clause in the contract making such a requirement one of the terms of the acceptance of the message by the company. That this clause of the contract was reasonable, and therefore obligatory, is not open to question. See Hill v. Telegraph Co., 85 Ga. 425, 11 S. E. 874, 21 Am. St. Rep. 166, citing Brown v. Insurance Co., 24 Ga. 97, and Under-

that is notice and that slight evidence of assent is sufficient.[30] It was also said in this case that "an examination of the decided cases shows that the law applicable to telegraph companies is in an unsettled condition. It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss by contract and that such a regulation as the one under which appellees defended is a reasonable regulation and amounts to a contract. * * * We are inclined to hold, admitting the paper signed by the plaintiffs was a contract, that it did not and could not exonerate the company from the use of ordinary care and diligence both as to their instruments and the care and skill of their operators. * * * On general principles, we must hold the company, notwithstanding the special conditions relied on, is responsible for mistakes happening by their own fault, such as defective instruments, or carelessness or unskilfulness of their operators, but not for mistakes occasioned by uncontrollable causes." The stipulation here limited liability for error or delay in the transmission of unrepeated messages "in order to guard against and correct as much as possible some of the errors arising from atmospheric and other causes appertaining to telegraphy."[31] Subsequently this case came before the same court[32] and was affirmed. It was declared by the court that: "In regard to the regulation of the company requiring messages to be repeated in order to secure correct results for which the sender is to pay 50 per cent. in addition to the original cost, we endeavored to show that such was then the perfection to which the art of telegraphy had reached, that the real object of such a requirement was to increase the revenues of the company. * * * The company engages to use all proper skill and care in transmitting a message over its wires for the established rates. * * *

writers' Agency v. Sutherlin, 55 Ga. 266. See also Melson v. Insurance Co., 97 Ga. 722, 25 S. E. 189; Association v. Robinson, 104 Ga. 272, 30 S. E. 918." See §§ 695, 705 herein as to message written on blank of another company.

[30] Tyler v. Western Un. Teleg. Co., 60 Ill. 491, 1 Am. Elec. Cas. 14, 21, 14 Am. Rep. 33.

[31] Tyler v. Western Un. Teleg. Co., 1 Am. Elec. Cas. 14, 21–23, per Breese, J.

[32] Western Un. Teleg. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279, 1 Am. Elec. Cas. 115.

The undertaking of the company is prima facie to send it correctly, and if their wires and instruments are in proper order and their operators skilful and careful it will traverse the wires precisely in the words and figures which composed it when placed upon the wires, and is sure in that shape and form to reach its destination, no atmospheric causes intervening to prevent. * * * On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which the message is written, is a contract, we hold it was not a contract binding in law, for the reason, the law imposed upon the companies duties to be performed to the public and for the performance of which they were entitled to a compensation fixed by themselves and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of 50 per cent. of the original charges." [33] Inasmuch as a case of this character was declared in the earlier of the above decisions to sustain an analogy to express and railroad company decisions it is proper to note that it is held in the same State that a shipper must have accepted a bill of lading and have understood and assented to its provisions to be bound thereby.[34] It is also decided in this State that the conditions on the back of the telegraph blank form no part of the contract where the sender does not assent thereto.[35] But one is chargeable with constructive notice of such conditions when he has constantly used telegraph blanks for sixteen years.[36] Although the question whether there is contract is to be determined by the jury, yet one whose attention is not

[33] Western Un. Teleg. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279, 1 Am. Elec. Cas. 114, 117, 118, per Breese, J.

[34] Chicago & A. R. Co. v. Davis, 159 Ill. 53, 42 N. E. 382, 2 Am. & Eng. R. Cas. (N. S.) 581.

[35] North Packing & P. Co. v. Western Un. Teleg. Co., 70 Ill. App. 275.

[36] Webbe v. Western Un. Teleg. Co., 64 Ill. App. 331, case revd., 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670.

called to a condition limiting the time in which to present claims for injury caused by error in transmission of a telegraphic despatch is not bound thereby,[37] and it is also held that the mere fact that a condition is printed on the back of a telegraph blank is not sufficient to bind the sendee even though only slight evidence of a contract is required. Such sendee must have assented to, or have known of, the condition.[38] If the loss or damage would not have been prevented by repeating a message the stipulation for repeating does not aid the company.[39] So, gross negligence of the company causing an error in the message and damage cannot be relieved against by stipulation in the telegraph blank, and this rule applies to commercial messages unintelligible to those in the business, though not to others.[40] Again, a stipulation limiting liability beyond the amount of tolls paid, unless a claim is presented in writing within sixty days after the message is filed for transmission, has been held valid, but it was determined upon appeal that the sendee is not bound thereby unless he has assented thereto, and that a mere notice or knowledge of such condition is insufficient.[41]

§ 687. **Stipulations, rules and regulations — Telegraph and telephone companies — Indiana.**— A telegraph company cannot

[37] Western Un. Teleg. Co. v. Fairbanks, 15 Ill. App. 600, 1 Am. Elec. Cas. 694, 696.

[38] Western Un. Teleg. Co. v. Lycan, 60 Ill. App. 124, condition requiring claim for damages to be presented within sixty days.

[39] North Packing & P. Co. v. Western Un. Teleg. Co., 70 Ill. App. 275.

[40] Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347, 1 Am. Elec. Cas. 839. That common carrier cannot stipulate against own negligence or that of servants or agents, see Chicago & A. R. Co. v. Grimes, 71 Ill. App. 397. See Pennsylvania Co. v. Greso, 79 Ill. App. 127, as to common carrier limiting its liability for all negligence, except gross negligence. See Illinois Central R. Co. v. Beebe, 174 Ill. 13, 50 N. E. 1019, 11 Am. & Eng. R. Cas. (N. S.) 163, affg. 69 Ill. App. 363, holding that stipulation that goods be carried at own risk of shipper except in case of gross negligence is void.

[41] Webbe v. Western Un. Teleg. Co., 169 Ill. 610, 61 Am. St. Rep. 207, 48 N. E. 670, revg. 64 Ill. App. 331; Western Un. Teleg. Co. v. Beck, 58 Ill. App. 564. Such a stipulation held to be reasonable, but there was not sufficient notice here of stipulation. [2]See Baxter v. Louisville, N. A. & C. R. Co., 165 Ill. 78, 45 N. E. 1003, revg. 64 Ill. App. 130, 1 Chic. L. Jour. Week. 532.

by contract absolve itself from the duty to use reasonable care and diligence, but this principle does not extend to a denial to such company of a right to make reasonable rules and regulations, nor does it preclude it from incorporating in their contracts with those with whom they deal just and reasonable provisions limiting their liability, but the extent of the right is not distinctly defined. But such company may lawfully fix by contract a time within which a claim for a statutory penalty must be presented, and this is true of claims based upon its default, provided always that such limitations are reasonable. Stipulations, however, against negligence of the company are void.[42] And stipulations in the ordinary telegraph blank, especially one limiting liability for unrepeated messages, do not apply to a statutory penalty, for an entire failure to transmit telegraphic messages, or to neglect to transmit them in the order of their reception, cannot be evaded by stipulations. The court did not, however, decide what the effect of such stipulations would be, or how far they would be obligatory in a civil action for damages.[43] But a condition that the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message does not apply where the message is not sent at all.[44] Again, a stipulation has been held void, in this State, which limits the company's liability, unless the message is repeated at an additional expense. The court said in this case: "The object, we suppose, of repeating the message is to prevent mistakes in the transmission. How the repetition of a message would induce to its prompt delivery we do not see. But aside from the unreasonableness of 'such a contract,' the defendant could not contract against liability for its own negligence. We see no reason for any distinction between telegraph companies and common carriers of goods in this respect." The gist of this action was the failure to deliver the telegraphic mes-

[42] Western Un. Teleg. Co. v. Jones, 95 Ind. 228, 43 Am. Rep. 713, 1 Am. Elec. Cas. 580; Western Un. Teleg. Co. v. Trumbull, 1 Ind. App. 121, 3 Am. Elec. Cas. 650.

[43] Western Un. Teleg. Co. v. Adams, 87 Ind. 598, 1 Am. Elec. Cas. 442.

[44] Western Un. Teleg. Co. v. Yopst, 118 Ind. 248, 2 Am. Elec. Cas. 553, 20 N. E. 222, 3 L. R. A. 224.

sage.[45] It is said in another case in this State, that "It is clear that the appellee had notice of the existence of the regulations of the company. He testified to this fact in his own evidence. It would seem that the intention of the company was that the party sending the message should write it on the same paper on which the regulation was printed and under the same, and thereby expressly agree that the message was received and to be sent under and in accordance with such regulation. In this case, however, the message was not written under such regulation, but was written on a business card and handed to the operator or agent of the company when he was absent from the office. We are inclined to hold, however, that as the appellee knew of the existence of the regulations, and as the regulations themselves provided that no employee of the company was authorized to vary the terms of them, the appellee was as much bound by them as if he had written the message on the paper presented by the company and had thus assented to them. * * * If the regulation of the company in question was reasonable and such as the company might make and was, therefore, valid, we think it protected the company from liability to any greater extent than the amount paid. The language of the regulation is, 'And it is agreed between the sender of the following message and this company, that the said company shall not be liable for mistakes or delays in the

[45] Western Un. Teleg. Co. v. Fenton, 52 Ind. 1, 1 Am. Elec. Cas. 198. By statute of Indiana (1 G. & H. 611, § 2), "Telegraph companies shall be liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting or delivering dispatches." Same statute, May 6, 1853; § 4177, Rev. Stat. 1881; Western Un. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894, 2 Am. Elec. Cas. 525, 530 et seq. That telegraph companies cannot contract in this State for liability for damages resulting from their own negligence, see Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 1 Am. Elec. Cas. 1, 12; Western Un. Teleg. Co. v. Meredith, 95 Ind. 93, 1 Am. Elec. Cas. 643; Western Un. Teleg. Co. v. Young, 93 Ind. 118, 1 Am. Elec. Cas. 612; Western Un. Teleg. Co. v. Meek, 49 Ind. 53, 1 Am. Elec. Cas. 139. Same rule applied to common carriers. Michigan Southern, etc., R. Co. v. Heaton, 37 Ind. 448, 10 Am. Rep. 89, and n., 96; Baltimore & O. S. W. R. Co. v. Ragsdale, 14 Ind. App. 406, 42 N. E. 1106. Examine Louisville, N. A. & C. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796, 5 Am. & Eng. R. Cas. (N. S.) 26, 38 L. R. A. 93.

transmission or for nondelivery of any unrepeated message, beyond the amount received for sending the same.'" But it was held that the condition did not prevail against the penalty statute of that State.[46] In still another decision it is determined that if the mere repeating of the message would not have affected or prevented the failure for which damages are claimed, a rule limiting liability in case of mistake, etc., to the amount paid for transmission in cases of unrepeated message is not available in the company's behalf to preclude recovery for the damages sustained.[47] A rule of a telephone company requiring all monies due it to be paid to the office of the Secretary on a certain specified day of the month succeeding the maturity of such indebtedness and that on failure to pay telephone service was to be discontinued until payment should be made constitutes a reasonable and enforceable regulation and it may be enforced by refusing service, even without giving a reason therefor, as notice of the rule and of its violation are chargeable to the patron, nor is the enforcement of such a rule precluded by reason of a claim of the patron against the company alleged to exceed the amount of monies due the latter, nor is it necessary for the company to enforce its rule against others before discontinuing service for noncompliance with the terms of the regulation.[48]

[46] Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744, 1 Am. Elec. Cas. 1, 6, 7, per Downey, C. J.; Ind. Stat. (1 G. & H. 611), imposing a penalty for failure to transmit a telegram.

[47] Western Union Teleg. Co. v. Henley, 157 Ind. 90, 60 N. E. 682.

[48] Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 62, 59 N. E. 327, aff'd Irvin v. Rushville Co-op. Teleph. Co., 161 Ind. 524, 69 N. E. 258, 8 Am. Elec. Cas. 852. In this case Gillett, C. J., said: "On a former appeal of this case, where there had been a recovery on each of the first 10 paragraphs of complaint which were afterwards dismissed, it was held by the Appellate Court that said by-law or rule No. 13 was valid, and that appellee was not obliged to yield such provision or incur the statutory penalty in case it could be proved that appellant had a set-off greater than the amount of the delinquent rental. Rushville Co-operative Telephone Co. v. Irwin, 27 Ind. App. 62, 59 N. E. 327. Much of the effort of appellant's counsel on this appeal has been to show that the cause of action has been so changed that the decision of the Appellate Court above referred to is not the law of the case. It is claimed that the present complaint is based on an unlawful discrimination. It is further claimed that the question as to

§ 688. **Stipulations, rules and regulations — Telegraph companies — Iowa.**— A telegraph company may stipulate in this State, that a party who desires a message to be sent with absolute correctness shall have the same repeated, provided it is known to the sender, or in case he is bound to take notice thereof, and such a rule is reasonable. But in this case the

the reasonableness of said by-law or rule was not presented to the Appellate Court and that therefore appellant is not bound by its decision upon that point. In the latter insistence counsel impliedly forgot the announced theory of their complaint, but we prefer to put our decision on a broader basis. Section 5529, supra, is as follows: 'Every telephone company with wires wholly or partly within this State, and engaged in a general telephone business, shall within the local limits of such telephone companies' (sic) business supply all applicants for telephone connection and facilities with such connections and facilities without discrimination or partiality, provided that such applicants comply or offer to comply with the reasonable regulations of the company; and no such company shall impose any conditions or restrictions upon any such applicant that are not imposed impartially upon all persons or companies in like situation, nor shall such companies discriminate against any individual or company engaged in any lawful business, or between individuals or companies engaged in the same business, by requiring as a condition for furnishing such facilities that they shall not be used in the business of the applicant, or otherwise for any lawful purpose.' The claim is made on behalf of appellant that his complaint states a cause of action within the following words of said statute, 'nor shall such companies discriminate against any individual or company engaged in any lawful business.' It is not shown by allegation that there has been any discrimination against the business of appellant, and therefore he has not brought himself within the clause of the statute last quoted. Whether he complains of the failure to furnish him connections or facilities, or of the imposing of a condition or restriction upon him that is not imposed impartially upon all persons in like situation, it is evident that, to recover, he must either successfully assail the reasonableness or operation of the by-law or rule, or show that it was not impartially applied to all similarly situated. The statute travels on the assumption that telephone companies may make reasonable rules. Appellant does not allege that the by-law or rule in question was not promulgated, or that he did not know of it, and we incline to the opinion that the complaint states such facts relative to the mutual character of the corporation that it may be said that the provision was in the nature of a legislative act, passed by the corporation for the government of its members, that appellant was bound to take notice of. Mason v. Mason, 160 Ind. 191, 65 N. E. 685, and

court did not positively decide that, notwithstanding a statute making telegraph companies liable for all mistakes in transmitting messages, they may make reasonable rules, and that a rule limiting liability for unrepeated messages was reasonable, and it was said: "The exigencies of the present appeal do not require any positive determination of it, we pass it with

cases there cited; Thompson, Com. Law Corp., sec. 939. It is further to be noted that the complaint is so drawn that it is open to inference that appellee had warned appellant before the service was denied him that it would enforce the by-law or rule against him as a consequence of his refusal of payment, and it may also be inferred that he was denied service for the reason that he had not complied with the regulation mentioned. The allegation of the complaint that at no time has the company enforced the rule was evidently inserted by the pleader by way of antithesis to the preceding charge that the rule had not been enforced against other patrons who were in default. This view is borne out by the following statement of counsel for appellant in their brief. 'The thing we complain of in this case is that the rule was unreasonably applied against the appellant; that under it the appellee refused appellant telephone service when he did not owe a cent under the rule.' If a corporation authorized to establish and promulgate a rule as a condition to furnishing service has done so, and a patron is charged with notice of the rule, and also of the fact that he has violated it, the corporation may refuse him service for such reason without informing him of the precise time of its refusal as to its reason therefor; but the corporation would not of course, be permitted to bring its rule forward as a mere afterthought. When it is shown that the corporation in a case of this kind has acted under a rule, thereby suggesting a colorable defense, it is required that the plaintiff should allege facts avoiding the operation of the rule. See Morgan v. Lake Shore, Etc., Ry. Co., 130 Ind. 101, 28 N. E. 548. The mere fact that appellee has not enforced its by-laws or rule against third persons before that time does not alone furnish a reason why it should not be revived as against appellant. As before observed, for aught that appears in the complaint, he may have been fully apprised in advance of the consequences of his refusal to pay. We are not at present dealing with the subject of discrimination. We shall consider that point hereafter. The case cited by appellant's counsel to the effect that corporations engaged in the performance of a quasi-public function, as in the furnishing of light, water, or gas, cannot, by the enforcement of their rules, preclude the courts from an examination into the facts are not in point. In this case no question is involved growing out of the relation of the parties as telephone company and patron. The appellee, it may be inferred, had rendered perfect services and had in all respects complied with its agreement 'with ap-

the statement that we will concede, for the purposes of this case, that the statute does not make the defendant liable at all events." It was decided, however, that the rule as to unrepeated messages would not be construed so as to exempt the company from liability for a loss occasioned by defective instruments or unskilled operators, or by its own fault or negligence,

pellant as its patron, and it is admitted that appellant's indebtedness to it had matured. What appellant asserts is that he has an independent claim against the appellee sufficient to extinguish the latter's claim, and that the company must continue to furnish him service, and go into court as a suitor if he desires to collect its bill, or at its peril defend suits for penalties which might be accumulated ad infinitum. It will be observed that it is not alleged that the company is insolvent, and that it does not appear that the company is not in good faith disputing the validity of appellant's claim to a set-off. Considering the quasi-public functions of corporations like the one at bar — corporations whose first duty is to the public whom they serve — we think that their revenues should not be depleted by the furnishing of service to individuals who refuse to pay because they are asserting collateral demands against it. In the course of the opinion by the Appellate Court on the former appeal of this cause it was said: 'It cannot be denied that a rule of the company requiring these monthly payments to be made in advance would have been a reasonable rule, and that upon refusal so to pay service could be denied. The company must protect its plant, and keep up its efficiency, and may enforce a rule that insures a reasonable revenue and its prompt receipt. It can maintain an efficient service only through prompt payment of all dues and tolls, and because of that fact it may use the summary remedy of denying service for nonpayment. It cannot be said it may be denied the benefit of this rule because a patron claims the company is indebted to him. It cannot be required to stop and adjudicate claims held against it. The law compels it to furnish service. A patron may take service or not, as he chooses. It must furnish efficient service to all alike who are alike situated, and must not discriminate in favor of or against any one. For failure the extraordinary remedies of mandamus and injunction may be successfully invoked. It may be said that the courts are open to the company to collect its claim, but as to this the company and the patrons are on an equal footing. The fact that the patron is solvent aids nothing in determining a rule which must apply to solvent and insolvent patrons alike. Keeping in view the nature of the company's duties, and the services it may be compelled to render, it must be held that the company may enforce the payment of its current dues and tolls by the summary remedy of denying service regardless that the fact that the subscriber claims that the company is indebted to him.' The right of

or want of proper skill or ordinary care in transmitting unrepeated or other messages, even though such rules are brought home to the sender's knowledge. But such company is not, under reasonable stipulations on its printed blanks, responsible for mistakes occasioned by uncontrollable causes, such as atmospheric disturbances, provided these mistakes could not have been guarded against or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company.[49] The same rules are supported by another and later decision.[50] Other cases in this State also hold that telegraph companies

set-off as to independent demands having in them no element on which to base a claim of equitable intervention is statutory. (Boil v. Simms, 60 Ind. 162, 168; Pomery's Code Remedies, sec. 729; 25 Amer. & Eng. Ency. Law, 489; Waterman on Set-off, secs. 9, 12, 13, 16. See Willis v. Browning, 96 Ind. 149, 151), and, whatever may be the effect of a set-off when allowed by the court we deem it clear that in an action for the enforcement of a penalty the plaintiff will not be allowed to draw in issue a claim of set-off on his part. In the circumstances of this case it appears that if neither party will yield, a resort to the law is practically the only remedy, and we think that appellant should be content with the opportunity to assert his independent demand on the civil side of the court. As to the claim of discrimination, the statement of the complaint that 35 other patrons of the company 'were in like situation with the plaintiff' is a mere conclusion. So far as averment goes, they are only shown to be in default. It is not shown that they refuse to pay. It is contended that the action of appellee deprives appellant of property without due process of law. He has not been deprived of his tangible property or of his stock, and as to the deprivation of telephone service, that has been brought about by his violation of a rule which we hold valid. He may regain his right by paying the rental up to the time service was denied him, and complying with such lawful conditions as the company has established. As to his own demand, he was at liberty to resort to the courts. This case differs essentially from the case of Indiana, etc., Co. v. State ex rel. Ball, 158 Ind. 516, 63 N. E. 220, 57 L. R. A. 761, where it was claimed that a public corporation had unlawfully discriminated against an individual, and thereby denied him the equal protection of the laws."

[49] Sweetland v. Illinois & Miss. Teleg. Co., 27 Iowa, 432, 1 Am. Rep. 285, Allen's Teleg. Cas. 471, 481, 486; McAndrew v. The Elec. Teleg. Co., 17 C. B. 3, Allen's Teleg. Cas. 38, and Wann v. Western Un. Teleg. Co., 37 Mo. 472, Allen's Teleg. Cas. 261, criticised in the Sweetland case above.

[50] Manville v. Western Un. Teleg. Co., 37 Iowa, 214, 1 Am. Elec. Cas. 94, 95, 96.

cannot stipulate for exemption from liability for damage occasioned by their own negligence.[51] And a limitation of liability in a "night message," for errors, delays or nondelivery of such message to a sum equal to ten times the sum paid for transmission, does not excuse a failure to send the message at all.[52] So the company may validly stipulate for a time limit in which claims for damages shall be presented. "There is really no reason why a telegraph company may not require notice of its defaults within a reasonable time before being held liable for alleged negligence. The nature of the business is such that a stipulation like this may be necessary to its protection against unfounded claims. * * * There is nothing unreasonable and no infraction of a just public policy, in requiring a claim to be made within such time as the failure would be known to the sender of the message. * * * It is to be remembered that such a provision in the contract does not defeat the claim for damages, and it in no manner affects the operation of the Statute of Limitations. * * * While this court has not determined this question in an action against a telegraph company, yet the same principle has been applied again and again in reference to insurance companies and railroad companies." [53] Such time limit stipulation does not, however, apply where the amount or fact of loss is not ascertainable until after the expiration of a specified time.[54]

§ 689. **Stipulations, rules and regulations — Telegraph companies — Kansas.**— A stipulation that any claim for damages shall be presented in sixty days is reasonable and vaild, and the

[51] Garrett v. Western Un. Teleg. Co., 83 Iowa, 257, 3 Am. Elec. Cas. 657, 49 N. W. 88; Harkness v. Western Un. Teleg. Co., 73 Iowa, 190, 2 Am. Elec. Cas. 571, 34 N. W. 811, where the rule is applied to half-rate messages. See Burgher v. Chicago, R. I. & P. R. Co., 105 Iowa, 335, 75 N. W. 192, 11 Am. & Eng. R. Cas. (N. S.) 130.

[52] Garrett v. Western Un. Teleg. Co., 83 Iowa, 257, 3 Am. Elec. Cas. 657, 49 N. W. 88.

[53] Albers v. Western Un. Teleg. Co., 98 Iowa, 51, 66 N. W. 1040, 4 Am. & Eng. Corp. Cas. (N. S.) 388, 6 Am. Elec. Cas. 763, per Rothrock, C. J.; Herron v. Western Un. Teleg. Co., 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731. As to insurance cases, see 4 Joyce on Insurance (ed. 1897), § 3181 et seq.

[54] Herron v. Western Un. Teleg. Co., 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731.

addressee is bound thereby.[55] And the rule that a common carrier cannot, by stipulation, relieve itself from liability for damage or loss occasioned by its own negligence is applicable to telegraph companies.[56]

§ 690. **Stipulations, rules and regulations — Telegraph companies — Kentucky.**— In this State a stipulation limiting the recovery for an unrepeated message to the amount paid for sending it is invalid, in so far as it attempts to relieve the telegraph company from liability for the damage or loss occasioned by its own negligence, and this applies to cipher despatches. So a telegraph company cannot prescribe the time limit within which a claim for damages shall be presented, as it encroaches upon the lawmaking power to prescribe the time within which an action shall be brought and is against public policy and void. Irrespective, however, of this latter point as to the attempt by such time limit stipulation to vary or affect the Statute of Limitations, all of the above named stipulations violate the Constitution of the State, which makes telegraph companies common carriers and unable to contract for relief from its common law liabilities.[57] It was said, however, in this case that any stipulation to relieve a telegraph company from its duty to exercise that degree of care and skill in the transmission of a message which a prudent man would, under the circumstances, exercise in his own affairs, or to restrict the liability for its nonuse, is forbidden by the demands of a sound public policy. A

[55] Russell v. Western Un. Teleg. Co., 57 Kan. 230, 45 Pac. 598, 6 Am. Elec. Cas. 766. See also Thorp v. Western Union Teleg. Co. (Kan. App. 1906), 94 S. W. 554.

[56] Russell v. Western Un. Teleg. Co., 57 Kan. 230, 45 Pac. 598, 6 Am. Elec. Cas. 766; Western Un. Teleg. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 5 Am. St. Rep. 795, 2 Am. Elec. Cas. 575; Western Un. Teleg. Co. v. Howell, 38 Kan. 685, 2 Am. Elec. Cas. 581, 17 Pac. 313; St. Louis & S. F. R. Co. v. Trubbey, 6 Kan. App. 467, 50 Pac. 458. See Kansas Act, March 6, 1883, § 13, as bearing upon the analogy of common carrier cases in this State.

[57] Western Un. Teleg. Co. v. Eubank, 100 Ky. 591, 18 Ky. L. Repr. 995, 36 L. R. A. 711, 38 S. W. 1068, 1 Am. Neg. Rep. 244, 6 Am. Elec. Cas. 770; Ky. Const., 1858, §§ 196, 198. See also Postal Teleg. Cable Co. v. Schaefer, 23 Ky. L. Rep. 344, 62 S. W. 1119; Davis v. Western Union Teleg. Co., 107 Ky. 527, 54 S. W. 849.

distinction was also implied in the language of the court, between a stipulation and a contract, to this extent, that a contract that notice or demand of a claim for damages should be given in a reasonable time, and if not given, that fact to be taken as prima facie evidence of the invalidity of the claim might be upheld.[58] Prior to the adoption of the Constitution, however, the unrepeated message stipulation was held to be reasonable and valid.[59] Again a telegraph company cannot, by stipulation, relieve itself from liability for a total failure to deliver a message, nor can it restrict its liability for an omission to perform the duty imposed upon it by law.[60] A telegraph company may, however, make reasonable rules as to the conduct of its business such as making press copies of messages and keeping records thereof before delivery and also as to non-delivery of messages until the following morning where they are delivered for transmission after certain hours in the evening. And upon a message being received at the exact hour specified in such a rule the company will not be obligated to deliver it that night.[61]

§ 691. **Stipulations, rules and regulations — Telegraph companies — Louisiana.**— A telegraph company is liable for an error in a telegraphic message and is not relieved by a stipulation as to repeating despatches.[62] In another case, however, it seems to have been assumed that such a stipulation was binding, in-

[58] Western Un. Teleg. Co. v. Eubank, 100 Ky. 591, 38 S. W. 1068, 1 Am. Neg. Rep. 248, 6 Am. Elec. Cas. 778.

[59] Camp v. Western Un. Teleg. Co., 1 Metc. (Ky.) 164, 6 Am. L. Reg. 443, 734, Allen's Teleg. Cas. 85.

[60] Smith v. Western Un. Teleg. Co., 83 Ky. 104, 1 Am. Elec. Cas. 743. As to inability to exempt by stipulation from its own negligence, see Western Un. Teleg. Co. v. Jump (Ky. App.), 8 Ky. L. Repr. 531. Same as to common carriers. Louisville & N. R. Co. v. Plummer, 18 Ky. L. Repr. 228, 35 S. W. 1113; Ohio & M. R. Co. v. Tabor, 98 Ky. 503, 17 Ky. L. Repr. 1411, 36 S. W. 18, 34 L. R. A. 688, aff'd on rehearing, 17 Ky. L. Repr. 568, 34 L. R. A. 685, 32 S. W. 168.

[61] Davis v. Western Union Teleg. Co., 23 Ky. L. Rep. 758, 66 S. W. 17; Western Union Telegraph Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827.

Reasonableness of office hours when question for court, see Western Union Teleg. Co. v. Crider, 107 Ky. 600, 54 S. W. 963.

[62] Seiler v. Western Un. Teleg. Co. (Dist. Ct. New Orleans), 3 Am. L. Rev. 777, Allen's Teleg. Cas. 687.

asmuch as it was declared to obligate only the sender and not the addressee of the message. The point of the validity of the regulation was not discussed or decided.[63] But it is held that a common carrier is liable for negligence.[64] In this State it is held that the sender only and not the addressee is bound by the stipulation as to repeating messages.[65]

§ 692. **Stipulations, rules and regulations — Telegraph companies — Maine.**—"That a telegraph company may make all proper and needful rules to enable it with convenience and dispatch to do the business of its customers is now unquestioned. This may be done, even without the consent of those doing business with it; knowledge alone being sufficient to bind them. With a contract, it is entirely different, that can be binding only on those who assent to its terms." [66] In this case the message was written on a blank, in which it was provided that the defendants would receive messages to be sent during the night "at one-half the usual rates, on condition that the company shall not be liable for errors or delays in the transmission or delivery from whatever cause occurring," and it was held that the condition was against public policy and void, even though assented to by the sender of the message. It was also declared that such a stipulation was not a contract, but if a special contract regulation, it was equally invalid, and a rule in relation to night messages was distinguished from stipulations for repeating messages, and the printed provision in this case contained no stipulation as to repeating messages.[67] But a stipulation is against public policy, unreasonable and void, which provides that "the company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants, or otherwise, beyond the amount received for the

[63] LaGrange v. Southwestern Teleg. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

[64] Maxwell v. Southern Pac. R. Co., 48 La. Ann. 385, 19 So. 287.

[65] LaGrange v. Southwestern Teleg. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

[66] Bartlett v. Western Un. Teleg. Co., 62 Me. 209, 16 Am. Rep. 437, 1 Am. Elec. Cas. 45, 47, per Danforth, J.

[67] Bartlett v. Western Un. Teleg. Co., 1 Am. Elec. Cas. 45, 49, 51.

same.[68] An agreement, however, on a night message blank, that a telegram need not be delivered until the following morning is not invalid.[69] It is also declared that a telegraph company is not the ultimate judge of the reasonableness of an adopted rule — this the court must determine.[70] And the signer and sender of a blank, having such a stipulation as the first above mentioned printed thereon, is not bound thereby, even though he knew of the condition, and although the blank was a night message blank and contained a tariff of reduced rates, and also provided —" send the following message subject to the above terms, which are agreed to."[71]

§ 693. **Stipulations, rules and Regulations — Telegraph companies — Maryland.**— Under the Statute of 1852[72] it was made the " duty of the owner or the association owing any telegraph line doing business in this State to receive " despatches for transmission, " as established by the rules and regulations of such telegraph line; to transmit the same with impartiality and good faith, under a penalty," etc. Such telegraph company was, therefore, held to be authorized to contract, " not by the force of any common law duty or obligation, but in accordance with its rules and regulations," and these the sender of a message is bound in law to know — they need not be brought home to his knowledge. But a rule that the company " will not be liable for any loss or damage that may ensue by reason of any delay or mistakes in the transmission or delay, or from nondelivery of unrepeated messages," does not apply where the company's operator forgets to send a message.[73]

[68] Ayer v. Western Un. Teleg. Co., 79 Me. 493, 1 Am. St. Rep. 353, 2 Am. Elec. Cas. 601, 10 Atl. 495. See also Fowler v. Western Un. Teleg. Co., 80 Me. 381, 2 Am. Elec. Cas. 607, 15 Atl. 29. Night message blank, " happening from any cause," condition invalid. True v. International Teleg. Co., 60 Me. 9, Allen's Teleg. Cas. 530, 11 Am. Rep. 156, and n., 168.

[69] Fowler v. Western Un. Teleg. Co., 80 Me. 381, 2 Am. Elec. Cas. 607, 15 Atl. 29.

[70] True v. International Teleg. Co., 60 Me. 9, Allen's Teleg. Cas. 530, 11 Am. Rep. 156.

[71] True v. International Teleg. Co., 60 Me. 9, Allen's Teleg. Cas. 530, 11 Am. Rep. 156.

[72] Chap. 369, § 10.

[73] Birney v. New York & Washington Print Teleg. Co., 18 Md. 341, 81 Am. Dec. 607, Allen's Teleg. Cas. 195.

So it is said in another case: "The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for that 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, 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 having adopted rules and regulations as authorized by law * * * the appellee was bound to know that the engagements of the company were controlled by them, and did in law engraft them into 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 contract 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 already made subject * * * were substantially the same, though differing in words as those of the appellant." There was a direction on the blank used to send the message "subject to conditions annexed." It was also held in this case that "The appellant could not, by rules and regulations, protect itself against liability for the consequences of its own wilful conduct or gross negligence or any conduct inconsistent with

good faith. * * * It was bound to use due diligence, but not extraordinary care and precaution." [74]

§ 694. **Stipulations, rules and regulations — Telegraph companies — Massachusetts.—** The right of a telegraph company to limit liability by stipulations as to repeating messages is placed upon contract and statutory grounds in this State. Therefore, a printed heading upon a telegraph blank limiting the company's liability for mistakes in the transmission of unrepeated messages to the amount received for sending the message, constitutes, when underwritten with a signed despatch, a binding contract between the sender and the company, although it has never been read to or by him, except in case of wilful default, fraud or gross negligence, and this is so, even though the mistake is of a kind to be prevented by the repetition of the message.[75] The statute required transmission with impartiality " according to the regulations of the company." [76] In an earlier case, however, though this rule is asserted, yet it is limited by the statement that reasonable rules and regulations brought home to the knowledge of the sender are binding.[77] While in a later decision the rule as to limitation of liability, in case of unrepeated messages, has been held valid and binding, even though the message was not written on the company's printed blank, where it appeared that the sender knew the contents of such blank,[78] and the addressee is bound by such a stipulation as to unrepeated messages, where there is no further proof of carelessness or negligence on the part of the company than that resulting simply from the error.[79] In this State a common carrier cannot stipulate for exemption from liability caused by its own negligence.[80]

[74] United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519, Allen's Teleg. Cas. 390, 403, 404, per Avery, J.

[75] Grinnell v. Western Un. Teleg. Co., 113 Mass. 299, 18 Am. Rep. 485, 1 Am. Elec. Cas. 70; Redpath v. Western Un. Teleg. Co., 112 Mass. 71, 17 Am. Rep. 69, and n., 72, 1 Am. Elec. Cas. 40.

[76] Mass. Gen. Stat., chap. 64, § 10. See cases in preceding note.

[77] Ellis v. American Teleg. Co., 13 Allen (Mass.), 226, Allen's Teleg. Cas. 306.

[78] Clement v. Western Un. Teleg. Co., 137 Mass. 463, 1 Am. Elec. Cas. 671.

[79] Ellis v. American Teleg. Co., 13 Allen (Mass.), 226, Allen's Teleg. Cas. 306.

[80] Cox v. Central Vt. R. Co., 170 Mass. 129, 49 N. E. 97, 9 Am. & Eng. R. Cas. (N. S.) 591; Brock-

§ 695. **Stipulations, rules and regulations — Telegraph companies — Michigan.**— In this State a stipulation is held reasonable and valid which provides that a message shall be repeated at an additional charge, to guard against mistakes and delays, and that the company shall not be liable for mistakes or delays in the transmission or delivery or the nondelivery of unrepeated messages, whether happening by the negligence of the company's servants or otherwise, beyond the amount received for sending the same. It is also held that the condition is binding upon the sender whether he had knowledge thereof or not. This decision does not, however, go to the extent of holding that the company is not liable under such a stipulation for wilful misconduct or reckless disregard of the sender's right when such acts constitute gross negligence, but the court merely determines that the facts in the case did not constitute such gross negligence. It appeared, however, that the message was unrepeated and was sent to a physician summoning him to come "quick" to the plaintiff's house, whose wife was suffering from a miscarriage and consequent hemorrhage. This physician had been attending upon the wife's case and had requested to be called at once in case of a return of the flow of blood. The operator was informed of the sickness and of the necessity of haste. The message was received for transmission at ten o'clock, A. M., and should have been delivered in about half an hour, but it was not delivered until about two o'clock P. M. The message had to go by way of Detroit, and the operator there was unable to connect with the operator at the terminal office, although he tried several times. The regular operator at said terminal office had been granted leave of absence and his place temporarily supplied by another, who did not make the proper connection with the Detroit office of the company; hence the delay. It was claimed that the wife's health was seriously impaired by such delay and the consequent failure to obtain medical attendance and treatment, and that expense had been incurred in procuring medical at-

way v. American Express Co., 168 Mass. 257, 47 N. E. 87; School Dist. v. Boston, Hartf. & E. R. Co., 102 Mass. 552, 3 Am. Rep. 502.

See § 696a, herein, as to contract made in Massachusetts and mistake occurring in Mississippi; and also as to negligence.

tendance and medicine. It was also held, in addition to the above given rule, that the fact that repetition of the message would not have prevented the delay, did not avail the plaintiff as against the stipulation. It is worthy of note that upon the facts of this case it does not appear that the failure to make the proper connection with the Detroit office was due to any cause other than the incompetency, unskilfulness or gross negligence of the operator at the terminal office.[81] But a person may be bound by stipulations as to repeating messages on the telegraph blank of one company where he has written his message thereon and it is offered to and accepted by another company for transmission.[82]

§ 696. **Stipulations, rules and regulations — Telegraph companies — Minnesota.**— A message was entitled "Half-rate Message," then followed certain printed terms and conditions, among which was the following: "No claim for damages shall be valid unless presented in writing within thirty days after sending the message," followed by a direction as follows: "Send the following half-rate message subject to the above terms, which are agreed to," and below the blank space for writing the despatch was the warning: "☞ Read the notice and agreement at the top." It was held that the regulation was a reasonable and valid one, of which the plaintiff must be presumed to have notice, and that the terms embraced in the printed form became part of the contract between him and the company; that the same rule was established in insurance cases, and thirty days was a reasonable limit.[83] So, time limit stipulations as to claims for damages or stipulations as to unrepeated messages do not apply where the message was never transmitted, and, if applicable, such conditions are void. In this case there was printed at the foot of the message blanks

[81] Birkett v. Western Un. Teleg. Co., 103 Mich. 361, 5 Am. Elec. Cas. 727, 50 Am. St. Rep. 374, 61 N. W. 645. See also Western Un. Teleg. Co. v. Carew, 15 Mich. 525, Allen's Teleg. Cas. 345.

[82] Jacob v. Western Union Teleg. Co., 135 Mich. 600, 98 N. W. 402. See §§ 685–705, herein.

[83] Cole v. Western Un. Teleg. Co., 33 Minn. 227, 1 Am. Elec. Cas. 707, 22 N. W. 385. As to the time limit rule in insurance cases, see 4 Joyce on Insurance (ed. 1897), § 3181 et seq.

the words: "Read the notice and agreement on the back." The court said: "The repeating of a message may prevent mistakes in its transmission, but it can have no tendency whatever to prevent a failure to transmit it. Hence this condition is not applicable to this case, or, if intended to be so, it is, as to such a case, void, because unreasonable. The same is true of the 'sixty-day' limitation. It is either inapplicable — at least as to the addressee of the message — to a case of failure to transmit the message at all, or, if intended to be applicable, unreasonable, for the sixty days might elapse before the addressee ascertained that any message had been delivered for transmission. The company has probably substituted the words 'after the message is filed' for the words 'after sending the message,' formerly used, in view of the decisions of the courts that the old form did not apply where the claim was founded upon a failure to send the message at all. But there are some things which cannot be accomplished even by artificially worded 'fine print' conditions. Our conclusion that these conditions are either inapplicable or unreasonable, under the facts of this case, is founded upon general principles and without reference to the provisions of Laws of 1885, chapter 208, entitled 'an act to regulate the business of operating telegraph lines and imposing penalties for misconduct of owners and agents of such lines,' the effect of which upon attempted stipulations for exemption from liability we have now no occasion to consider.[84] In this State a common carrier cannot by contract evade his liability for his own negligence, nor limit it to injuries caused by his gross negligence.[85]

§ 696a. **Stipulations, rules and regulations — Telegraph companies — Misissippi.**— It is determined in this State that a telegraph company may validly stipulate upon its blanks against liability for damages in any case from failure to transmit and deliver messages unless the claim is presented within sixty days after filing the telegram for transmission. Such regula-

[84] Francis v. Western Un. Teleg. Co., 58 Minn. 252, 5 Am. Elec. Cas. 739, 741, 59 N. W. 1070, per Mitchell, J.

[85] Shriver v. Sioux City & St. P. R. Co., 24 Minn. 506, 31 Am. Rep. 353; Starr v. Great Northern R. Co., 67 Minn. 18, 69 N. W. 632.

tion is held to be a reasonable one requiring compliance with its requirements or a reasonable excuse for non-compliance on the part of the sender of the message.[86] It is also decided that a provision in a contract made in Massachusetts for the transmission of a cipher despatch, requiring additional compensation to insure against mistakes, or otherwise the company would not be liable, being a reasonable regulation and a valid one under the construction of a statute in that State, will be upheld in Mississippi even though in the latter State it would be void as a stipulation exempting the company from the results of its own negligence.[87]

§ 697. **Stipulations, rules and regulations — Telegraph and telephone companies — Missouri.**— In an early case in this State the statute under the telegraph company was incorporated, declared that it should be the duty of the company, 'on payment or tender of the usual charge according to the regulations of the company, to transmit all despatches with impartiality and good faith, in the order of time in which they are received," etc., and such companies are made liable "for special damages occasioned by the failure or negligence of their operators or servants in receiving, copying, transmitting or delivering despatches." [88] The company by stipulation required important messages to be repeated, charging an additional sum therefor, and also provided that the company would not be liable for mistakes "from whatever cause they may arise," in the transmission of unrepeated messages. It was held that such companies might limit their liability, but could not relieve themselves from the consequences of gross negligence and that there was nothing unreasonable in declaring that they would not be responsible for unrepeated messages, and that such a construction came within the interpretation of the statute.[89] Subsequently, however, the same court

[86] Hartzog v. Western Union Teleg. Co., 84 Miss. 448, 36 So. 539; Clements v. Western Union Teleg. Co., 77 Miss. 747, 27 So. 603.

[87] Shaw v. Postal Teleg. Cable Co., 79 Miss. 670, 31 So. 222. The mistake was made in Mississippi.

[88] Rev. Code 1855, p. 1251, §§ 5, 6.

[89] Wann v. Western Un. Teleg. Co., 37 Mo. 472, 90 Am. Dec. 395. Allen's Teleg. Cas. 261.

overruled this decision. The stipulation was the same in effect and in substance, since in this latter case it was "this company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." The court, referring to the above case, said: "In other words, if that decision is to stand it simply means that in this State telegraph companies are not liable for negligence because all their messages are sent subject to this same stipulation exempting them from all liability for the negligence of their servants in transmitting messages. Ought such a precedent to be longer followed? Is it not contrary to a sound public policy which denies to common carriers and other agencies which conduct a public, as contra-distinguished from a private business, the right to stipulate against their own negligence? We unhesitatingly answer in the affirmative. * * * Notwithstanding our respect for the learned courts which have held that they are not liable for negligence, we cannot concur in that view. * * * We hold it utterly unreasonable and contrary to all analogies of the law and sound public policy to allow such companies to thus stipulate against liability for mistake caused by their own negligence. Moreover, we hold that the distinction between negligence and gross negligence, contended for by defendant, does not exist in this State. * * * Many of the courts of this country adopted the view in the Wann case (the overruled case) in the earlier stages of the discussion, but the tendency of judicial decision at present is that these companies should be held to the exercise of ordinary care; that is to say, they are bound to have suitable instruments and competent servants and to see that the service rendered to their patrons is performed with the care and skill requisite to their peculiar undertaking. Their reasons for so holding are entirely satisfactory to us." [90] It is held in this

[90] Reed v. Western Un. Teleg. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 6 Am. Elec. Cas. 791. Other decisions in this State are Jarboe v. Western Un. Teleg. Co., 1 Mo. App. Rep. 769, 63 Mo. App. 226, holding that the company is not liable for mistakes in transmitting an unrepeated message where the stipulation exempts them from damages therefor. Cowen Lumber Co. v. Western Un. Teleg. Co.

State that the usual time limit stipulation for presentation of claims is valid.[91] But such stipulation does not apply where message is not despatched.[92] Telephone companies in that State may also adopt reasonable rules and regulations.[93]

§ 698. **Stipulations, rules and regulations — Telegraph companies — Nebraska.**— The Statute in this State[94] provided that "any telegraph company engaged in the transmission of telegraphic despatches is hereby declared to be liable for the non-delivery of despatches intrusted to its care, and for all mistakes in transmitting messages made by any person in its employ, and for all damages resulting from failure to perform any other duty required by law, and any such telegraph company shall not be excused from any such liability by reason of any clause, condition or agreement contained in its printed blanks." This statute was held to be equitable and fair and obligatory upon any and all telegraph companies doing business in the State, and that any such company contracting to send a message to another State, which incorrectly transmits the same, is liable in all the damages for the breach of its contract, which are sustained by the sender of the message by reason of such breach. It was also decided that a condition printed upon a telegraph blank, which provided that "the company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message," was an attempt to limit the liability of the company in the manner which the law did not allow, and, if looked upon as a contract, was in violation of the statute and void.[95]

(1894), 58 Mo. 257; Vaughn v. Wabash R. Co., 62 Mo. App. 461, holding that common carrier cannot stipulate for exemption from own negligence.

[91] Massengale v. Western Un. Teleg. Co., 17 Mo. App. 275, 1 Am. Elec. Cas. 724, case of night message; Smith-Frazer B. & S. Co. v. Western Un. Teleg. Co. (Kan. City Ct. App., 1892), 49 App. Div. 99; Montgomery v. Western Un. Teleg. Co. (Kan. City Ct. App., 1892), 50 App. Div. 591; Kendall v. Western Un. Teleg. Co. (Kan. City Ct. App., 1894), 56 App. 192.

[92] Barrett v. Western Un. Teleg. Co., 42 Mo. App. 542.

[93] State, Payne v. Kinloch Teleph. Co., 93 Mo. App. 349, 67 S. W. 684.

[94] Neb. Comp. Stat., chap. 89a, § 12.

[95] Western Un. Teleg. Co. v. Kemp, 44 Neb. 194, 5 Am. Elec. Cas. 751, aff'g 28 Neb. 661, 3 Am.

And this is true as a limitation of liability in cases of unrepeated messages. But, irrespective of the statute, such limitation does not apply where the message was correctly transmitted to the terminal office and accurately transcribed there, but its delivery was delayed for over two hours.[96] Such stipulations were, however, held reasonable and valid, in an earlier case in this State, in the absence of gross negligence or wilful misconduct, especially so where, although the plaintiff had never read the conditions, yet he had understood that they existed and had for several years sent and received hundreds of despatches.[97]

§ 699. **Stipulations, rules and regulations — Telegraph companies — Nevada.**— A stipulation of a telegraph company provided that the company should "not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message, whether happening by the neglect of its servants or otherwise, beyond the amount received for sending the same." It was held that the condition did not apply where no mistake was made in the message by the company, nor where there was a delay in no manner attributable to its not being repeated.[98]

§ 700. **Stipulations, rules and regulations — Telegraph companies — New Mexico.**— In this State it is held that an addressee is not bound by a stipulation requiring the presentation of a claim for damages within sixty days. The court said:

Elec. Cas. 711, 44 N. W. 1064, 30 Am. & Eng. Corp. Cas. 608, 26 Am. St. Rep. 363; Western Un. Teleg. Co. v. Beals, 56 Neb. 415, 76 N. W. 903; Pacific Teleg. Co. v. Underwood, 37 Neb. 315, 4 Am. Elec. Cas. 762, 55 N. W. 1057, 40 Am. St. Rep. 490; Western Un. Teleg. Co. v. Lowrey, 32 Neb. 732, 3 Am. Elec. Cas. 717, 49 N. W. 707.

[96] Western Un. Teleg. Co. v. Lowrey, 32 Neb. 732, 3 Am. Elec. Cas. 717, 49 N. W. 707.

[97] Becker v. Western Un. Teleg. Co., 11 Neb. 87, 38 Am. Rep. 356, 1 Am. Elec. Cas. 337, 7 N. W. 868. Under the Constitution of Nebraska, article 11, section 4, the liability of railroad corporations as common carriers can never be limited so that a stipulation against liability for its own negligence is void. Pennsylvania R. Co. v. Kennard G. & P. Co. (59 Neb. 435), 81 N. W. 372.

[98] Barnes v. Western Un. Teleg. Co. (Sup. Ct. Nev., 1897), 3 Am. Neg. Rep. 427.

"If the sender of a telegraphic message cannot enter into a contract with a telegraph company so as to enable the company to relieve itself from all liability, not only from inadvertencies, but for gross negligence, misconduct or bad faith, we do not see why the same rule, founded upon public policy, would not preclude the public carrier from contracting for a conditional liability on account of the negligence. This is not a regulation in any degree essential to the proper discharge of its business. Whether a liability has been incurred or not, is the business of the company to know. Telegraph companies are bound to employ competent and faithful agents, who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance. * * * The courts are divided in opinion as to whether a stipulation between the sender of a message and the company, providing that a claim for damages shall be presented within a day named or within a reasonable time, can be entered into and upheld as a contract. Instead of being a reasonable business regulation, we think the condition named and annexed to the message was an effort on the part of the company to restrict its legal liability to sixty days. It would introduce into the local jurisprudence of every State, Territory or country in which it is sued a species of private statute of limitation or nonclaim. It would avoid the policy of the State or Territory in the matter of the time in which actions, both in tort and contract, should be brought. But aside from this we think there can be no sound reason for holding that in cases where no contract for total immunity from legal responsibility can be made, none can be made for a conditional release or discharge, because public policy alike denies the power to contract on the subject in either instance." [99]

§ 701. **Stipulations, rules and regulations — Telegraph companies — New York.—** In this State it is declared that "it is a well settled rule of law that corporations may restrict their common law liability by express stipulation. This rule has its limitations, however, and such advantage has been taken of

[99] Western Un. Teleg. Co. v. Longwill, 5 New Mex. 308, 21 Pac. 339, 2 Am. Elec. Cas. 638, 642-644, per Hendrson, J.

the opportunity which it affords to certain classes of corporations to escape all liability upon their contracts, that the tendency of the courts has very properly been in the direction of its restriction rather than expansion.[1] It has never, so far as we are aware, been held to exempt a corporation from the consequences of conduct which amounts to gross negligence, but precisely where to draw the line between acts of ordinary negligence and those to which a harsher term may be applied is sometimes attended with considerable difficulty. * * * It is undoubtedly within the power of a telegraph company, as it is of any other corporation, to make rules and regulations for the proper conduct of its business, but such rules should be reasonable in their character and in accord with good, sound public policy." It was, therefore, held that a stipulation that a telegraph messenger receiving a message to carry to the telegraph office for transmission should be deemed the agent of the sender and not of the company, was void as against public policy; and where said messenger delivered a message and received an answer, but neglected, through negligence, to deliver the same to the company for transmission, that the company could not, by such agency stipulation, relieve itself from its gross negligence; and even if the condition were enforceable is was waived by the act of the company's agent in directing said messenger to wait for an answer.[2] In another case in the Appellate Division, in the same department and decided at the same time as the last decision, it is held that a telegraph company incorporated under the General Telegraph Act may, by contract, limit its liability for mistakes or delays in the transmission and delivery or for nondelivery of message

[1] Citing Breese v. United States Teleg. Co., 48 N. Y. 141, aff'g 45 Barb. (N. Y.) 274, 31 How. 86; Nicholas v. New York C. & H. R. R. Co., 89 N. Y. 370; Kenney v. N. Y. C. & H. R. R. Co., 125 N. Y. 422, 35 N. Y. St. R. 447, 26 N. E. 626, aff'g 54 Hun (N. Y.), 143, 26 N. Y. St. R. 636, 7 N. Y. Supp. 255; Mowry v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126, 20 N. Y. St. R. 626, 5 N. Y. Supp. 952; Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256, 35 N. Y. St. R. 307, 26 N. E. 534, 3 Am. Elec. Cas. 724, aff'g 44 Hun (N. Y.), 532, 9 N. Y. St. R. 132.

[2] Will v. Postal Teleg. Cable Co. and Jones v. Postal Teleg. Cable Co., 3 N. Y. App. Div. 22, 73 N. Y. St. R. 552, 37 N. Y. Supp. 933, 6 Am. Elec. Cas. 807, per Adams, J.

caused by negligence of its servants, if the negligence be not gross, to the amount received for sending the despatch, but such company cannot by notice limit its liability in this respect by any form of contract when its negligence is gross and its conduct wilful. The stipulation here related to unrepeated messages and the evidence showed gross negligence. The message as delivered contained seven words, when the terminal operator had express notice that eight words were received. It was also held that the sender of a message who voluntarily signs a telegraph blank and has full opportunity of information as to its contents, cannot avoid the conditions on said blank on the grounds of his negligence or omission to read it or to avail himself of such information. "If he omitted to read the contract or become informed of its terms and conditions it was his own fault." The plaintiff had used such blanks for twenty-five years but had never read the conditions thereon, although he could have done so had he chosen.[3] Again it is held that a stipulation limiting liability for negligent delay in delivering a telegraphic despatch binds both the sender and addressee if the sender's assent can be presumed,[4] And it was also held in this last case that nonassent was properly found where the sender did not read said conditions and was ignorant of the contents of the printed blank or that the message was to be sent subject thereto and that his attention was neither called to it nor was anything said to him about it. Again, the fact that plaintiff was a shareholder did not charge him with notice of a resolution as to unrepeated messages and nonliability of the telegraph company beyond a certain amount, and evidence that the directors had adopted a resolution covering these grounds was held properly excluded. The message in this case was written on blank paper. It was also decided that a telegraph company incorporated under State statutes might contract against liability for negligence not gross and that mere notice is not sufficient to enable the

[3] Dixon v .Western Un. Teleg. Co., 3 N. Y. App. Div. 60, 38 N. Y. Supp. 1056, 6 Am. Elec. Cas. 803, per Green, J.

[4] Curtin v. Western Un. Teleg. Co., 16 Misc. (N. Y.) 347, 38 N. Y. Supp. 58, revg. 14 Misc. (N. Y.) 459, 72 N. Y. St. R. 260, 36 N. Y. Supp. 1111.

company to limit its liability for such mistakes and delays.[5] In another case familiarity for years with the telegraph company's blanks containing stipulations absolving the company from negligence for nondelivery of unrepeated messages was held to bind the plaintiff where there was no evidence that the nondelivery was due to the misconduct of defendant or its servants.[6] So, writing and delivering a message on a telegraph blank, for transmission, binds the sender to the printed stipulations. And a requirement that claims for damages be presented in writing written within sixty days is held not against public policy.[7] In this case the words were printed on the blank: "Send the following message subject to the above terms which are agreed to." Again it is held that conditions as to repeating messages and nonresponsibility otherwise are valid and that one who signs such a blank even though he had not read it, and fails to comply with the conditions, cannot recover for an error in transmission, there being no allegation of gross negligence or wilful misconduct on the part of the company.[8] Other cases in this State hold the usual stipulations binding where the company is not grossly negligent.[9]

[5] Pearsall v. Western Un. Teleg. Co., 124 N. Y. 253, 35 N. Y. St. R. 307, 26 N. E. 534, 3 Am. Elec. Cas. 724, aff'g 44 Hun (N. Y.), 532, 9 N. Y. St. R. 132.

[6] Kiley v. Western Un. Teleg. Co., 109 N. Y. 231, 14 N. Y. St. R. 816, 16 N. E. 75, affg. 39 Hun (N. Y.), 158.

[7] Young v. Western Un. Teleg. Co., 65 N. Y. 163, 1 Am. Elec. Cas. 187, affg. 34 N. Y. Super. Ct. 390, Allen's Teleg. Cas. 708.

[8] Breese v. United States Teleg. Co., 48 N. Y. 132, 8 Am. Rep. 526, and n., 532, affg. 45 Barb. (N. Y.) 274, 31 How. (N. Y.) 86, Allen's Teleg. Cas. 663. In this case there was also a direction, "Send the following message subject to the above condition."

[9] Bennett v. Western Un. Teleg. Co., 18 N. Y. St. R. 777, 2 N. Y. Supp. 365, 2 Am. Elec. Cas. 669; Bryant v. American Teleg. Co., 1 Daly (N. Y.), 575, Allen's Teleg. Cas. 288; Riley v. Western Un. Teleg. Co., 6 Misc. (N. Y.) 221, 56 N. Y. St. R. 528, 26 N. Y. Supp. 532, 4 Am. Elec. Cas. 767, affd., 8 Misc. (N. Y.) 217, 59 N. Y. St. R. 227, 28 N Y. Supp. 581; Mowrey v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126, 20 N. Y. St. R. 626, 5 N. Y. Supp. 952; Sprague v. Western Un. Teleg. Co., 6 Daly (N. Y.), 200, 1 Am. Elec. Cas. 204, affd., 67 N. Y. 590; De Rutte v. New York, Alb. & B. Elec. M. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403, Allen's Teleg. Cas. 273, held also in this case that knowledge must be brought home to the sender;

But the company will be liable to a sender of a message for the full measure of his damages sustained where the company is grossly negligent in sending to a certain city and State a message directed to a city in another State and in such case a recovery is not limited to the amount paid for forwarding the telegram because of a stipulation to that effect.[10] It is declared, however, that the stipulations must be reasonable and must also be brought to the knowledge of the sender, and also that the company may become liable for a loss occasioned by its own negligence.[11] Again, such stipulations as to mistakes or delay in transmission do not apply to the delivery of messages after they have been correctly transmitted.[12] If it is admitted that the mistake in the message was caused by "some error of some of the company's operators working between P. and N. Y., the precise cause of which is unknown," the court will not say that the mistake was caused by the company's negligence.[13] A stipulation upon the company's blank making the messenger to whom the message is delivered, the agent of the sender and repudiating liability of the company until after the receipt of the telegram at its office, has been held binding upon a person who upon receipt of a message from such messenger delivers one to him for transmission and it does not appear that the latter was authorized to receive messages.[14]

§ 702. **Stipulations, rules and regulations — Telegraph companies — North Carolina.—** In this State a stipulation on the

Schwartz v. Atlantic & Pac. Teleg. Co., 18 Hun (N. Y.), 157, 1 Am. Elec. Cas. 284, case of half-rate message.

[10] Postal Teleg. Cable Co. v. Robertson, 74 N. Y. Supp. 876, 36 Misc. 785.

[11] Schwartz v. Atlantic & Pac. Teleg. Co., 18 Hun (N. Y.), 157, 1 Am. Elec. Cas. 284.

[12] Bryant v. American Teleg. Co., 1 Daly (N. Y.), 575, Allen's Teleg. Cas. 288. As to inability of common carrier to stipulate against own negligence, see Marquis v. Wood (N. Y. City Ct., 1899), 61 N. Y. Supp. 251, 29 Misc. (N. Y.) 590; Morris v. Weir (Sup. Ct., App. Term, N. Y.), 20 Misc. (N. Y.) 586, 46 N. Y. Supp. 413; Sternweg v. Erie Ry. Co., 43 N. Y. 123.

[13] Breese v. United States Teleg. Co., 45 Barb. (N. Y.), 274, 31 How. Pr. (N. Y.) 86, Allen's Teleg. Cas. 663, affd., 48 N. Y. 132.

[14] Ayers v. Western Union Teleg. Co., 72 N. Y. Supp. 634, 65 App. Div. 149.

back of a telegraph blank, limiting liability of the company in cases of transmission of unrepeated messages, is held invalid as a condition exempting the company from injuries occasioned by its own negligence. The court says that formerly the cases recognized a distinction between what was called gross and ordinary or slight negligence, " and it was held that while for ordinary or slight negligence they would not be responsible, yet they would be held to account for gross or wilful negligence. But negligence is the failure to exercise that care which under the circumstances of the case a prudent man ought to use. There can be no degrees of negligence in this matter. In as certaining what damages may be awarded against one for injury by reason of negligence, the question whether it is gross or ordinary may determine as to punitive or compensatory damages; or where the doctrine of comparative negligence is recognized, it may be necessary to distinguish between degrees; but where there is a contract to transmit a message for reward, a failure to perform the undertaking is either excusable or negligent; if negligent, the party injured thereby is entitled to his damages, not according to the degree of negligence at all, but in proportion to his injury, unless it be a case in which punitive damages are allowed. If, on account of an electrical disturbance in the atmosphere, a message could not be sent, so that there was a delay, or it could be but imperfectly sent, so that words were dropped, or if, from any other cause not to be provided against with the appliances afforded by science and by a reasonable foresight, there was a failure to comply with the contract, these were matters provided for by law and not necessary to be stipulated against in the contract. The old principle that one cannot provide for contract against liability for negligence applies to every species and degree of negligence or tort. This exemption from liability ' is not extended to acts of omission involving gross negligence, but is confined to such as are incident to the service, and which may occur when there is but slight culpability in its officers and employees.' " [15]

[15] Brown v. Postal Teleg. Co., 111 N. C. 187, 32 Am. St. Rep. 793, 4 Am. Elec. Cas. 774, 16 S. E. 179. See also as to common carrier, Wood v. Southern R. Co., 118 N. C. 1056, 24 S. E. 704, per MacRae, J. That common carrier may by reasonable stipulation exempt itself

In another case in this State the same stipulation as to unrepeated messages is held, however, not to apply to a case of negligent delay in transmission of a dispatch and that if the condition has any validity at all it is only in cases of a mistake in transmitting, and then only when the negligence is slight. The reasonable length of the delay in this case (about twenty-four hours) in connection with the nature of the message (summoning a physician) was declared to constitute gross negligence.[16] But it is held that a stipulation exempting the company from liability where the claim for damages is not presented in sixty days is not a condition restricting the liability of the company for negligence; that if it were, it would be void, and, under certain circumstances, would be unreasonable. But such time limit stipulation or notice was declared in this case to be reasonable here, and, also, so as a general rule.[17]

§ 703. **Stipulations, rules and regulations — Telegraph companies — Ohio.—** A telegraph company cannot in this State stipulate for immunity from liability arising from its own negligence, and a condition will come within this rule which requires that messages be repeated at an additional charge and that the company "will not be responsible for errors or delays in the transmission or delivery or for the nondelivery of repeted messages beyond 'a specified proportionate sum' unless special agreement for insurance be made in writing and the amount of risk specified on this agreement and paid at the

from common law liability, but not against negligence, see Morgantown Mfg. Co. v. Ohio River & C. R. Co., 121 N. C. 514, 28 S. E. 474, 61 Am. St. Rep. 679.

[16] Thompson v. Western Un. Teleg. Co., 107 N. C. 449, 3 Am. Elec. Cas. 750, 12 S. E. 427.

[17] Sherrill v. Western Un. Teleg. Co., 109 N. C. 527, 14 S. E. 94, 3 Am. Elec. Cas. 759, cited in Dixie Cigar Co. v. Southern Express Co., 120 N. C. 348, 27 S. E. 73, 2 Am. Neg. Rep. 636. See also Lewis v. Western Un. Teleg. Co., 117 N. C. 436, 23 S. E. 319; Pegram v. Western Un. Teleg. Co., 97 N. C. 57, 2 Am. Elec. Cas. 684, 2 S. E. 256. Damages for mistake, when not recoverable, see Hughes v. Western Un. Teleg. Co., 114 N. C. 70, 41 Am. St. Rep. 782, 19 S. E. 100.

Service of summons within sixty days constitutes presentation of claim. Bryan v. Western Union Teleg. Co., 133 N. C. 603, 45 S. E. 938, 43 S. E. 1003.

time of sending the message; nor will the company be responsible for any error or delay in the transmission or delivery or for the nondelivery of any unrepeated message beyond the amount paid for sending the same unless in like manner specially insured and amount of risk stated therein, and paid for at the time." The court in this case considered the distinctions, in several decisions, between negligence and gross negligence and said: "These authorities show a strong tendency in the adjudications to break down the impracticable distinction between what is termed gross negligence and ordinary negligence, which some of the cases hold to exist. The rule, however, in this State is well settled that one exercising a public employment is liable for failure to bring the service he undertakes that degree of care and skill which a careful and prudent man would, under the circumstances, employ, and that any stipulation or regulation by which he undertakes to relieve himself from the duty to exercise such skill and care in the performance of the service is contrary to public policy, and consequently illegal and void. In our opinion telegraph companies fall within the operation of this rule, and that in failing to exercise such care and skill in the transmission and delivery of messages they become liable for the resulting consequences, notwithstanding their stipulation to the contrary. The right to make rules and regulations to govern the management of their business is expressly conferred by statute. But such rules must be reasonable, and if they fail to accord with the demands of a sound public policy they are void." [18]

§ 704. **Stipulations, rules and regulations — Telegraph companies — Pennsylvania.** — In this State the usual stipulations as to repeating messages and limitation of liability conditions

[18] Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 1 Am. Elec. Cas. 329, 335, per Boynton, Ch. J., citing Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, 21 Wall. (U. S.) 267. See also Hord v. Western Un. Teleg. Co. (Sup. Ct., Cincinnati, 1878), 3 Week. Cin. Law. Bull. 147. That common carriers cannot stipulate against own negligence, see Pittsburg C. C. & St. L. R. Co. v. Sheppard, 56 Ohio St. 68, 37 Ohio L. Jour. 177, 46 N. E. 61, 60 Am. St. Rep. 732, 6 Am. & Eng. R. Cas. (N. S.) 528; Toledo & O. C. R. Co. v. Amback, 10 Ohio C. C. 490, 3 Ohio Dec. 372; Voight v. Baltimore & O. S. W. R. Co. (U. S. C. C., S. D. Ohio), 79 Fed. 561.

as to unrepeated despatches and time limit stipulations are held reasonable and valid as a general rule;[19] and in one case where the stipulation also expressly provided against liability for negligence of the company or its servants the court said it was not necessarily invalid. But it is doubtful if it intended what it says, as in the case relied upon, the stipulation did not expressly provide against negligence, and the idea of an ability on the part of the company to stipulate against negligence was repudiated by the language of the court, which we have given below in the text,[20] although under certain circumstances the enforcement of such conditions will be held unreasonable. Within this exception is a case of a limitation of the time for presenting claims for damages, here "sixty days after sending the message" is an unreasonable requirement where the receiving and terminal offices of the telegraph company are 15,000 miles apart, and an answer to the dispatch can only be sent by mail.[21] Where a telegraph company dispenses with the use of its printed blanks as in case of furnishing market quotations to its customers; or where written messages are dispensed with in the business of a stock exchange and all the messages are given to the operator verbally, being whispered into the ear of a message boy, employed by the company, who communicates the same to the operator; or where they are otherwise orally conveyed to said operator and the company delivers the messages orally; in such cases it is a question of fact for the jury whether or not the company by dispensing with the use of said printed blanks did not intend to

[19] Conrad v. Western Un. Teleg. Co., 162 Penn. St. 204, 29 Atl. 888, 5 Am. Elec. Cas. 772; Western Un. Teleg. Co. v. Stevenson, 128 Penn. St. 442, 15 Am. St. Rep. 687, 30 Am. & Eng. Corp. Cas. 590, 3 Am. Elec. Cas. 764, 18 Atl. 441; Passmore v. Western Un. Teleg. Co., 78 Penn. St. 242, 1 Am. Elec. Cas. 168; Wolf v. Western Un. Teleg. Co., 62 Penn. St. 83, 1 Am. Rep. 387, Allen's Teleg. Cas. 463.

[20] Western Un. Teleg. Co. v. Stevenson, 128 Penn. St. 442, 15 Am. St. Rep. 687, 30 Am. & Eng. Corp. Cas. 590, 3 Am. Elec. Cas. 764, citing Passmore v. Western Un. Teleg. Co., 78 Penn. St. 242, 1 Am. Elec. Cas. 168. As to common carriers, see Allan v. Penn. R. Co., 2 Super. Ct. (Penn.) 335; Empire Transportation Co. v. Wamsutta Oil Co., 63 Penn. St. 14, 3 Am. Rep. 515.

[21] Conrad v. Western Un. Teleg. Co., 162 Penn. St. 204, 29 Atl. 888, 5 Am. Elec. Cas. 772.

relieve their patrons from the stipulations contained therein.

"Such an inference might fairly be drawn from the extraordinary manner in which the business was conducted. We cannot say there was no evidence to justify such an inference. If there was a rule of the company by which the responsibility of the company for the accuracy of messages transmitted over its lines was restricted to such as were repeated, and that any claim for damages must be made in writing within sixty days, the defendant was bound by such rules if he had any knowledge of them and they had not been waived or dispensed with by the company in its dealings with the defendant. These were questions of fact which were properly submitted to the jury." It was also said in this case:[22] "A railway, telegraph or other company charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence, but they must prescribe rules calculated to insure safety and diminish the loss in the event of accident, and declare, if these are not observed, that the injured party shall be considered in default and precluded by the doctrine of contributory negligence.[23] In another, where there was a direction upon the company's message blank: "Send the message subject to the above terms, which are agreed to," the time limit stipulation was held binding where it did not appear that the sender was ignorant of said condition; the presumption being that the sender has knowledge of such terms and conditions even though they are printed in very small type, where there is a printed direction or notice of the same character as that above given.[24] But the stipulations bind the sender only, and not the receiver, where the latter has no specific notice thereof even though the sender is the addressee's agent.[25]

[22] Quoting from the Passmore case, given in the first note of this section.

[23] Western Un. Teleg. Co. v. Stevenson, 128 Penn. St. 442, 15 Am. St. Rep. 687, 30 Am. & Eng. Corp. Cas. 590, 3 Am. Elec. Cas. 764, 18 Atl. 441.

[24] Wolf v. Western Un. Teleg. Co., 62 Penn. St. 83, 1 Am. Rep. 387, Allen's Teleg. Cas. 463; Western Un. Teleg. Co. v. Stevenson, cited in last note.

[25] Tobin v. Western Un. Teleg. Co., 146 Penn. St. 375, 28 Am. St. Rep. 802, 39 Am. & Eng. Corp. Cas. 565, 4 Am. Elec. Cas. 780, 23 Atl. 324; Hoffman v. Western Un. Teleg. Co. (C. P., Penn.), 12 Lanc. L. Rev. 333. See Western Un. Teleg. Co. v.

§ 705. Stipulations, rules and regulations — Telegraph companies — South Carolina.— In the following case a stipulation as to night half-rate message provided that "the company shall not be liable for errors or delays in the transmission or delivery or for nondelivery of such messages, from whatever cause occurring, and not only be bound in such cases to return the amount paid by the sender. No claim for refunding will be allowed unless presented in writing within twenty days." It was held that the stipulation was a reasonable regulation and binding all persons related to the contract, whether sender, addressee or agent of transmission; that the company was not bound to transmit messages during the night time; that the service being voluntary, the parties were at liberty to contract in relation thereto on any terms that might be agreed upon; that the general right of persons exercising this class of employments to vary their legal relations by special contract was fully recognized and could not be questioned. "No principles have been recognized and applied to these various cases that would call in question the right of a common carrier to contract in special terms for a special service, out of the course of his ordinary duty with a person who was at full liberty to deal with such carrier according to his customary terms of dealing. * * * It is not essential that the act of negligence should be of the character to which the very indefinite term 'gross' is usually applied, if it spring from disregard or indifference to what was due to the plaintiff," and a case of want of good faith is not within the terms of such contract of limitation.[26] A stipulation limiting the

Landis (Penn.), 21 Week. N. of Cas. 38, 12 Atl. 467, 2 Am. Elec. Cas. 716; Western Un. Teleg. Co. v. Richman (Penn. Sup. Ct.), 19 Week. N. of Cas. 569, 2 Am. Elec. Cas. 710. Notice of stipulation as to repetition of message must be so full, clear and explicit that it would be negligence to disregard it. "The notice proved was only notice that there were regulations of the company, and that they had been agreed to by the sender of the message. Not the slightest specification is given of the nature of the regulations nor any caution to the receiver of the message that they might be important for him to examine. We cannot say that there was anything in such a notice to put the plaintiff (receiver of telegram) upon inquiry or action at his peril." Harris v. Western Un. Teleg. Co., 9 Phila. 88, 1 Am. Elec. Cas. 37, 38, 39, per Mitchell, J.

[26] Aiken v. Western Un. Teleg.

time for presentation of claims for damages to a period within sixty days, binds a person receiving a message containing such stipulation.[27] Waiver, however, of such stipulation may arise from the acts of the company's agent.[28] Again, in that State, stipulations on the blanks of one company will bind a sender who writes his message thereon and delivers it to another company, and the latter will also be bound by acceptance of the message so written.[29] And it is also held in a recent case that a telegraph company is not relieved from any act of negligence by a stipulation on the back of its blanks.[29a]

§ 706. **Stipulations, rules and regulations — Telegraph companies — South Dakota.**— The fact that in this State a telegraph company is by statute [30] a common carrier would affect in some degree the consideration and probably to some extent the determination of the effect of stipulations, rules and regulations of telegraph companies, if not in this State, then certainly it would have some bearing upon its decisions as an authority in those States where no such statute exists. In a comparatively recent case in this State the stipulation was that "the company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." The question arose of the right of a telegraph company to decline to accept a message for transmission for the sole reason that the sender would not consent to the above stipulation. The court said: "The right of a common carrier to make and insist upon a substantial compliance with reasonable rules and regulations, designed to protect its interests and promote the safe and convenient transaction of

Co., 5 S. C. 358, 1 Am. Elec. Cas. 121, per Willard, Asso. J. That common carrier cannot stipulate against own negligence, see Springs v. South Bound R. Co., 46 S. C. 104, 24 S. E. 166.

[27] Broom v. Western Union Teleg. Co., 71 S. C. 506, 51 S. E. 259.

[28] R. M. Hays & Bros. v. Western Union Teleg. Co., 70 S. C. 16, 67 L. R. A. 481, 48 S. E. 608.

[29] Young v. Western Union Teleg. Co., 65 S. C. 93, 43 S. E. 448. See §§ 685, 695, herein.

[29a] Walker v. Western Union Teleg. Co. (S. C. 1906), 56 S. E. 38.

[30] So. Dak. Comp. Laws, §§ 3881-3910.

business when the same do not affect its liability, has been so uniformly recognized by all the courts that any citation of authorities would be redundant; and, although sections 3886 and 3888 of Compiled Laws authorized and would sustain an express agreement limiting the obligation of a telegraph company to accept, transmit and deliver a telegram, a regulation enacting such an agreement as a condition precedent to the acceptance of the message is repugnant to the spirit of the statute and would be condemned as fraudulent, oppressive and contrary to every consideration of public policy. We are, therefore, called upon to consider and determine whether the regulation complained of was reasonable, and whether by its acceptance, the company's common law liability of statutory obligation was limited or modified." The message was from a lawyer to his client and was written upon a sheet of writing paper and read: "Come down in morning. Want to see you as to your case." The plaintiff refused to write the despatch upon one of the ordinary blanks and the company refused to erase, among other stipulations, the condition above set forth. The court also said that, from the nature of the message and the proximity of the parties interested in the subject to which it related, such a time limit requirement was prima facie reasonable, and "if from any cause it should become unreasonable in its application the courts would not sustain its enforcement. The stipulation relates to and impliedly concedes that the company is bound to pay any damages which may be sustained by reason of its inexcusable neglect to perform every duty required by law, and its obligation to accept, safely transmit and promptly deliver the message is in no manner modified, limited or intrinsically affected thereby. * * * Such a regulation is beneficial to the patrons of the company as it tends to insure prompt adjustment of claims for damages and is entirely consistent with sound business principles. * * * It evidently tends to avoid vexatious litigation, promote the ends of justice and subserve the welfare of the people generally. True it is that cases may be found where a similar regulation has been construed to constitute a limitation of liability and some courts have held that the clause has the effect of a statute of limitations, but the reasoning of the opinion in which such

a conclusion has been reached is, in our opinion, unsound, and we decline to follow the decisions. The statutory time within which an action for damages may be instituted against a telegraph company is in no manner shortened by requiring a mere claim therefor to be made within a reasonable time. The action may be brought at any time within the statutory limitation. Insurance companies * * * habitually require, as a condition precedent, notice of death or fire to be given forthwith, and even sworn proofs of loss to be furnished * * * within thirty, sixty or ninety days, and it will hardly be claimed that such a requirement limits the time within which an action may be brought under the statute or that the stipulation is inconsistent with considerations of sound public policy.[31] Before presenting authorities in support of our position, we emphasize, by repetition, that the defendant would be clearly liable for damages, and the statutory penalty for refusing to accept and send plaintiff's message to its proper destination, if the regulation to which he refused to assent and conform was an unreasonable rule, or limited either the liability of the company or the time within which an action might be commenced. * * * It appearing that the stipulation under consideration has been upheld and enforced as a reasonable regulation limiting no liability in jurisdictions where, by express statutory enactment, all contracts to limit such liability are declared to be null and void, the right to exact, as a condition precedent, compliance with reasonable rules, which in no manner pertain to the carrier's liability for negligence, is not affected by the provision of our statute which authorizes a contract limiting the liability of a common carrier. * * * Our conclusion, therefore, is that our former decision should be disaffirmed and the judgment appealed from is reversed.[32] The decision re-

[31] See 4 Joyce on Insurance (ed. 1897), §§ 3181–3224, 3275 et seq.

[32] Kirby v. Western Un. Teleg. Co., 7 So. Dak. 623, 30 L. R. A. 621, 65 S. W. R. 37, 6 Am. Elec. Cas. 824, per Fuller, J.; Kellam, J., dissented. The court cites and considers Southern Express Co. v. Hunnicut, 54 Miss. 566, 28 Am. Rep. 385; Hartwell v. Northern Pac. Exp. Co., 5 Dak. 463, 476; Western Un. Teleg. Co. v. Jones, 95 Ind. 235; Western Un. Teleg. Co. v. Dougherty, 54 Ark. 221, 15 S. W. 468; Goggin v. Kansas Pac. Ry. Co., 12 Kan. 416; Sherrill v. Western Un. Teleg. Co., 109 N. C. 527, 14 S. E. R. 94; Massengale v. West-

ferred to as reversed,[33] holds that while a common carrier may limit its liability by agreement with its patrons as to unrepeated messages and time limit stipulations, yet it cannot require such agreement to be made as a condition precedent to receiving and transmitting messages. While the reviewing and reversing court holds that, under the circumstances of the case, the time limit (sixty-day clause) neither limited the liability nor the time within which an action might be commenced, nor was unreasonable, but that if it did so limit liability, etc., then the stipulation could not be imposed as a condition precedent to receiving and transmitting a message.[34]

§ 707. **Stipulations, rules and regulations — Telegraph companies — Tennessee.**— In this State it is declared that it must be assumed that the sender knew of the terms and conditions upon the printed blank on which he wrote his message. His denial of actual knowledge cannot avail him, for it is his own fault if he is ignorant. He is estopped to say that he was not aware of the agreement and regulations on the blank signed and used by him.[35] So telegraph companies may limit their liability, by reasonable stipulations, wherein they do not seek to relieve themselves from the results of their own negligence. This lat-

ern Un. Teleg. Co., 17 Mo. App. 257; Thompson v. Western Un. Teleg. Co., 107 N. C. 449, 12 S. E. 1127; Smith v. Western Un. Teleg. Co., 83 Ky. 104; Gillis v. Western Un. Teleg. Co., 61 Vt. 461, 17 Atl. 736; Wolf v. Western Un. Teleg. Co., 62 Penn. St. 83; Cole v. Western Un. Teleg. Co., 33 Minn. 227, 22 N. W. 385; Smith-Frazier B. & S. Co. v. Western Un. Teleg. Co., 49 Mo. App. 99; Heiman v. Western Un. Teleg. Co., 57 Wis. 562, 16 N. W. 32; Western Un. Teleg. Co. v. Meredith, 95 Ind. 93; Primrose v. Western Un. Teleg. Co., 14 U. S. Sup. Ct. Repr. 1098; Kiley v. Western Un. Teleg. Co., 109 N. Y. 235; Express Co. v. Caldwell, 21 Wall. (U. S.) 264.

[33] Kirby v. Western Un. Teleg. Co., 4 So. Dak. 105, 55 N. W. 759, 4 Am. Elec. Cas. 783.

[34] The statute of So. Dak., § 3910, provided that "every person whose message is refused or postponed contrary to the provisions of this chapter is entitled to recover from the carrier his actual damages, and fifty dollars in addition thereto." The question of waiver raised in the earlier case did not affect the conclusions of the reversing court.

[35] Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243, 3 S. W. 490, 2 Am. Elec. Cas. 720, 724, per Lurton, J., citing Dillard v. Louisville & Nashville R. Co., 2 Lea (Tenn.), 288.

ter they cannot do. A high degree of diligence is required of them and by statute they are liable for special damages occasioned by failure or negligence of their operators or servants in receiving, copying, transmitting or delivering despatches. Action lies in favor of the party intended to be benefited or the "party aggrieved," even though he is neither sender nor addressee. No contractual relation need exist — the company is liable for a breach of its statutory duty, independent of any contract. The rule as to reasonable stipulations and inability to relieve itself from its own negligence, applies to conditions requiring written notice of claim within sixty days after sending the message, or after it is filed, with the limitation that this is construed to mean within sixty days after the "party aggrieved," or the plaintiff, has learned of the sending of the despatch.[36] Again, the inability of the company to stipulate against its own negligence applies to the repetition clause of message blanks.[37] And within the rule that the company cannot relieve itself from liability for its own negligence is a stipulation limiting liability from "whatever cause occurring." "The same reasons which make void the contracts of a common carrier, by which he seeks to be wholly exempt from the consequences of his own negligence, or that of his servants, apply with equal force to similar agreements, contracts or stipulations, or rules or notices, by which a telegraph company seeks immunity from all responsibility for its negligence.[38] But inasmuch as the company may validly stipulate that a claim

[36] Western Un. Teleg. Co. v. Mellon, 100 Tenn. 429, 45 S. W. 443, 96 Tenn. 66, 33 S. W. 725, 6 Am. Elec. Cas. 385, Mill & V. Code Tenn., §§ 1542, 1543; Western Un. Teleg. Co. v. Munford, 87 Tenn. 190, 10 Am. St. Rep. 630, 10 S. W. 318, 2 Am. Elec. Cas. 751; Manier v. Western Un. Teleg. Co., 94 Tenn. 442, 29 S. W. 732, 5 Am. Elec. Cas. 777; Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243, 3 S. W. 490, 2 Am. Elec. Cas. 727.

[37] Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 4 L. R. A. 660, 25 Am. & Eng. Corp. Cas. 542, 2 Am. Elec. Cas. 756, 11 S. W. 783.

[38] Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243, 3 S. W. 490, 2 Am. Elec. Cas. 727, per Lurton, J. As to inability of common carriers to stipulate against negligence, see Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451; Glenn v. Southern Express Co., 86 Tenn. 594.

shall be presented within a certain time, such as sixty days,[39] still in the matter of time limit stipulations, it is held that the fact that the amount of damages could not be ascertained within the time limited did not excuse a failure to comply with the requirement.[40] But commencing suit, serving process, or the filing of a declaration within the time limited will constitute a compliance within the meaning thereof where the company is thereby given the necessary information as to the message, the extent and nature of the damage, etc.[41]

§ 708. **Stipulations, rules and regulations — Telegraph companies — Texas.**— The rule in this State is that telegraph companies have the power to make reasonable regulations for the conduct of their business. The right also exists, by stipulation, to limit liability in case of unrepeated messages, and also to require that notice of claim for damages shall be presented to the company. This may be done by express contract or by notice in the telegraph blank, used by and known to the sender or brought to his notice, under such circumstances as to create an implied contract. But such companies may not stipulate for exemption from liability for damages or loss occasioned by their own negligence.[42] It is also held that one who writes a

[39] Western Union Teleg. Co. v. Courtney, 113 Tenn. 482, 82 S. W. 484; Western Union Teleg. Co. v. Greer (Tenn.), 89 S. W. 327, 1 L. R. A. (N. S.) 525.

[40] Manier v. Western Un. Teleg. Co., 94 Tenn. 442, 29 S. W. 732, 5 Am. Elec. Cas. 777.

[41] Western Union Teleg. Co. v. Courtney, 113 Tenn. 482, 82 S. W. 484. See also Western Union Teleg. Co. v. Greer (Tenn.), 89 S. W. 327, 1 L. R. A. (N. S.) 525.

[42] Mitchell v. Western Un. Teleg. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016, unrepeated message, liable for negligence; Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539, 6 Am. Elec. Cas. 842, 32 S. W. 707, case of repetition of message, liable nevertheless for negligence; Southern Pac. Co. v. Phillipson (Tex. Civ. App.), 39 S. W. 958, 2 Am. Neg. Rep. 652, common carrier cannot stipulate that no presumption of negligence will arise from nondelivery of goods; Western Un. Teleg. Co. v. Russell (Ct. Civ. App. Tex.), 31 S. W. 698, facts showing negligence in failing to deliver message; Western Un. Teleg. Co. v. Burrow (Ct. Civ. App. Tex.), 30 S. W., 10 Tex. Civ. App. 122, 378; Western Un. Teleg. Co. v. Neil, 86 Tex. 368, 40 Am. St. Rep. 847, 25 S. W. 15, company may make reasonable regulations; Western Un.

message upon a printed blank is estopped, in the absence of fraud, to deny that the stipulations are binding and that he is not excused because he fails to read the conditions.[43] Although it is also decided that the sender is not bound by the stipulations upon the company's blank where he does not see them or know what they are, the message having been written by the company's agent and not having been signed by the sender.[44] But the sender is bound, where he writes his message on another paper instead of on the company's printed blank, where the operator copies it at his request on said blank. In such case the latter is the sender's agent.[45] But in case of a stipulation as

Teleg. Co. v. Piner (Ct. Civ. App. Tex.), 29 S. W., 9 Tex. Civ. App. 152, 66, time limit stipulation a matter of defense; Western Un. Teleg. Co. v. Reeves (Ct. Civ. App. Tex.), 27 S. W. 318, 8 Tex. Civ. App. 37, case of repetition of message and waiver; Western Un. Teleg. Co. v. Elliott, 7 Civ. App. Tex. 482, 27 S. W. 219; Western Un. Teleg. Co. v. Linn, 87 Tex. 7, 26 S. W. 490, stipulation as to repetition of messages, company liable for negligence; Gulf, Colorado & S. F. Ry. Co. v. Geer, 5 Tex. Civ. App. 349, 24 S. W. 86, sender bound by condition, case of connecting lines of telegraph; Lester v. Western Un. Teleg. Co., 84 Tex. 313, 19 S. W. 356, sixty days' limit is binding; Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406, 3 Am. Elec. Cas. 782, 16 S. W. 25, case where facts showed negligence; Gulf, Colorado & S. F. Ry. Co. v. Miller, 69 Tex. 739, 7 S. W. 653, 2 Am. Elec. Cas. 781, 783, time limit stipulation against negligence is void; Western Un. Teleg. Co. v. Catchpole (Tex. Ct. App.), 1 Tex. L. Rev. 6, cannot stipulate against misconduct, fraud or want of due care, case repetition of message clause; Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 13 Cent. L. Jour. 475, 44 Am. Rep. 589, 1 Am. Elec. Cas. 352, case of night half-rate message, and repetition clause, company liable for misconduct, fraud or want of due care; Womack v. Western Un. Teleg. Co., 58 Tex. 176, 44 Am. Rep. 614, 29 S. W. 932, 1 Am. Elec. Cas. 454, limitation as to repetition of messages lawful and binds user of blank who is chargeable with knowledge of conditions; Western Un. Teleg. Co. v. Rains, 63 Tex. 27, 1 Am. Elec. Cas. 697, time limit of sixty days valid and cannot be waived by operator and public policy not violated by such stipulations; Western Un. Teleg. Co. v. Hearne, 77 Tex. 83, 13 S. W. 970, 30 Am. & Eng. Corp. Cas. 589, 3 Am. Elec. Cas. 775, unrepeated message, stipulation valid.

[43] Western Un. Teleg. Co. v. Edsall, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70, 12 S. W. 41, 5 Law. Rev. 221, 1 Am. Elec. Cas. 715.

[44] Western Union Teleg. Co. v. Uvalde Nat. Bk. (Tex. Civ. App.), 72 S. W. 232.

[45] Gulf, Colorado & S. F. Ry. Co v. Geer, 5 Tex. Civ. App. 349, 4 Am. Elec. Cas. 795, 24 S. W. 86.

to free delivery limits, if the message is not written on the printed blanks, the company is bound to notify the sender of the conditions,[46] nor is the sender bound where his message is written on blank paper, and a telegraph blank is attached thereto without his knowledge or consent.[47] If the company's agent has knowledge of causes occasioning delays and fails to inform the sender the company cannot claim the benefit of a stipulation exempting it from liability for delays caused by unavoidable interruptions, etc., in the working of the telegraph lines.[48] A telegraph company may establish reasonable office hours, and where the sender of a despatch has knowledge thereof, the company is not liable, if it fails to deliver the message after the specified hours.[49] Again, a stipulation limiting the time for the presentation of a claim for damages does not apply in case of a disclosure of the contents of a telegram, which act has been fraudulently concealed until the time specified has passed.[50] But such clause runs against the addressee, even though he has not learned that the message has been presented for transmission.[51] A telegraph company may establish reasonable delivery hours, and this binds the sender of a message, even though he is not notified of the same.[52] In another case in this State it is held that the stipulation that "the company will not be liable for delays arising from unavoidable interruption in the working of its lines," most naturally refers to such as might be caused by electrical disturbances, or others beyond the company's control, and not to a case where there

[46] Western Union Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

See as to fraudulent message and agency of sender and unavoidable interruptions, Western Union Teleg. Co. v. Uvalde Nat. Bk. (Tex. Civ. App.), 72 S. W. 232.

[47] Anderson v. Western Un. Teleg. Co., 84 Tex. 17.

[48] Western Un. Teleg. Co. v. Arwine, 3 Civ. App. Tex. 156, 19 S. W. 285; Western Un. Teleg. Co. v. Pruett (Tex. Civ. App.), 35 S. W. 78.

[49] Western Un. Teleg. Co. v. Wingate, 6 Civ. App. Tex. 394, 25 S. W. 439.

[50] Gulf, Coast & S. F. Ry. Co. v. Todd (Ct. App. Tex., 1892), 19 S. W. 761.

[51] So held in Western Un. Teleg. Co. v. Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638.

[52] So held in Western Un. Teleg. Co. v. May (Ct. Civ. App. Tex., 1894), 27 S. W. 760, 8 Tex. Civ. App. 176.

was a negligent delay of a telegram, simply because the company had turned over its lines for a time to the uninterrupted control of a railway company.[53] It is also held that a stipulation relieving the company from liability in case the message is unrepeated does not apply to a failure to deliver the message,[54] nor does such a stipulation excuse the company's negligence in erroneously giving the name of the place from which the message is sent, and the message calls for a reply, since the despatch would be unavailing, unless the party who is to make said reply is correctly informed of the place to which the answer is to be sent.[55] But the company is not liable where such a stipulation exists unless there is shown to have been a want of ordinary care in changing the figures " 8th " to " 6th." [56] Again, a delay in delivering a message is not excused by a stipulation of exemption from responsibility, until messages are presented and accepted at some transmitting office of the company, where the message was given to its agent at another place, but was received at a transmitting office in time to have forwarded it and prevented loss.[57] Night half-rate messages also come within the rule of limitation of liability first above stated, and such messages must be repeated to hold the company liable for errors in transmission or delivery, and the obligation may arise from express contract or by notice in the telegraph blank, un-

[53] Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25, 35 Am. & Eng. Corp. Cas. 77, 3 Am. Elec. Cas. 782. See Western Union Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.), 72 S. W. 232; Western Union Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

[54] Mitchell v. Western Un. Teleg. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016; Gulf, Colorado & S. F. Ry. Co. v. Miller, 69 Tex. 739, 7 S. W. 653, 21 Am. & Eng. Corp. Cas. 83, 2 Am. Elec. Cas. 781; Western Un. Teleg. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, 2 Am. Elec. Cas. 815; Western Un. Teleg. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656; Western Un. Teleg. Co. v. Burrow (Ct. Civ. App. Tex., 1895), 10 Tex. Civ. App. 122, 30 S. W. 378.

[55] Western Un. Teleg. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385, 2 Am. Elec. Cas. 819. See Western Union Teleg. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982.

[56] Western Union Teleg. Co. v. Brown, Tex. Civ. App., 75 S. W. 359. See as to same principle, Western Union Teleg. Co. v. Ragland (Tex. Civ. App.), 61 S. W. 421.

[57] Western Un. Teleg. Co. v. Pruett (Tex. Civ. App.), 35 S. W. 78.

less misconduct, fraud or want of due care on the part of the company or its servants is shown.[58] So a time limit stipulation of thirty days has been held valid, and a despatch does not become a day message, and so within a sixty-day limitation, by the oral statement of the operator, that he could not transmit until the following morning.[59] Again, it is also declared that it is not necessary that there should be gross negligence on the part of the company to make it liable, but that its negligence in failing to deliver the message in question, without regard to the degree of such negligence, would render it liable.[60] The statute of this State[61] provides that any stipulation requiring notice of presentation of claims for damages shall be invalid, unless it allows ninety full days from and after the accruing and ascertainment of damages. Therefore, a condition which specifies, as a time limit, ninety days after the message is filed is invalid.[62] And as the Texas statute determines the validity of such time limit stipulation the lex fori governs, rather than the lex loci contractus.[63] It is also held that a stipulation requiring written demand within ninety days is reasonable and valid.[64] But such a stipulation is complied with by filing an action and issuing and serving a citation within the specified time limit.[65]

[58] Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589, 1 Am. Elec. Cas. 352, 13 Cent. L. Jour. 475; Western Un. Teleg. Co. v. Catchpole (Tex. Ct. App., 1883), 1 Tex. L. Rev. 6.

[59] Western Un. Teleg. Co. v. Culberson, 79 Tex. 65, 15 S. W. 219, 3 Am. Elec. Cas. 779.

[60] Western Un. Teleg. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843, 2 Am. Elec. Cas. 815, 818, per Acker, J.

[61] Supp. Sayles' (Tex.) Rev. Stat., art. 3203b.

[62] Baldwin v. Western Un. Teleg. Co. (Tex. Civ. App.), 33 S. W. 890. See Western Un. Teleg. Co. v. Jobe, 6 Tex. Civ. App. 403, 4 Am. Elec. Cas. 799, holding statute constitutional (Acts 22d Leg., § 2, p. 20).

[63] Western Un. Teleg. Co. v. Lovely (Tex.), 52 S. W. 563.

[64] Western Un. Teleg. Co. v. Vanway (Tex. Civ. App.), 54 S. W. 414. See also Western Union Teleg. Co. v. Vanway (Tex. Civ. App.), 54 S. W. 414.

[65] Western Union Teleg. Co. v. Crawford (Tex. Civ. App.), 75 S. W. 843; Phillips v. Western Union Teleg. Co. (Tex. Civ. App.), 69 S. W. 997, 63; Western Union Teleg. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427. *Compare* Western Union Teleg. Co. v. Hays (Tex. Civ. App.), 63 S. W. 17.

§ 709. **Stipulations, rules and regulations — Telegraph companies — Utah.**— A stipulation that a telegraph company "shall not be liable for mistakes or delays in the transmission or delivery or for nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same," is within the rule that public policy forbids contracts by such companies, exempting them from negligence or from the negligence of their servants or agents.[66]

§ 710. **Stipulations, rules and regulations — Telegraph companies — Vermont.**— "It is very generally conceded, that telegraph companies may limit their common-law liability by express contract, and also by rules and regulations, when brought to the knowledge of their patrons and assented to by them. But as to the extent to which they may do this, and as to the reasonableness of the rules and regulations by which they seek to do it, courts do not agree. It seems to be a fundamental principle, running through all the cases, that rules and stipulations for immunity, in order to be valid, must be just and reasonable in the eye of the law, and not inconsistent with sound public policy. But the cases differ widely in the application of this principle. * * * While courts differ widely as to whether telegraph companies can lawfully stipulate to any extent against liability for negligence, none appear to have gone the length of holding that they can properly stipulate against liability for gross negligence, as they call it. * * * It may well be doubted whether there is any difference in law between negligence and gross negligence. The tendency of judicial opinion is to deny it. But, however that may be, we are not prepared to follow this line of cases," and it is held that such company could not stipulate against its own or its servant's negligence, and that the usual condition as to unrepeated messages and nonliability for mistakes, "whether happening by the negligence of its servants or otherwise, be-

[66] Wertz v. Western Un. Teleg. Co., 8 Utah, 499, 4 Am. Elec. Cas. 813, 33 Pac. 136, approving Wertz v. Western Un. Teleg. Co., 7 Utah, 446, 3 Am. Elec. Cas. 808, 27 Pac. 172.

Reasonable office hours when for jury, see Brown v. Teleg. Co., 6 Utah, 219, 21 Pac. 988.

yond the amount received for sending the same," was within this rule.[67]

§ 711. **Stipulations, rules and regulations — Telegraph companies — Virginia.**— A telegraph company, in the absence of any showing in the record of a contract, restricting its general liability as to the transmission of messages, for the services which it undertook to render, cannot rely upon the conditions of the message blank, upon which was written the despatch delivered to the company. It must prove that the sender signed the blank or that he authorized such act.[68] It is declared in this State that the obligations of a telegraph company do not grow entirely out of contract, but that their duty to accurately transmit and faithfully deliver messages arises under the statute, as it does in cases of common carriers and the like, and the company cannot refuse to make a contract with the sender without violating a penal statute of the State. They are compelled to make the contract, upon payment of the price, according to their own regulations. " In the message blanks now commonly used, the conditions are printed upon the face of the paper in such a manner as to make them a part of the contract for transmission. This the company may do, provided the conditions are reasonable, as they are entitled to make all reasonable rules for the conduct of their affairs. This reasonableness will depend upon the circumstances of the case, and the rulings of the court applying the law to the facts. By these rules they may require prepayment, under our statute, and other stipulations, such as an application for redress within a reasonable time, and due notice of any claim for damages within a reasonable time, and these regulations must be applied with due regard to rights of senders. * * * These conditions must not only be reasonable, but must be reasonably construed, and a company will not be held able thus to make a contract against all liabilities, nor indeed against any liability imposed by law upon them, nor

[67] Gillis v. Western Un. Teleg. Co., 61 Vt. 461, 15 Am. St. Rep. 917, 17 Atl. 736, 25 Am. & Eng. Corp. Cas. 568, 2 Am. Elec. Cas. 841, per Rowell, J., citing Railroad Co. v. Lockwood, 17 Wall. (U. S.) 357, and numerous other cases.

[68] Western Un. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828; 6 Am. Elec. Cas. 853; Va. Code, §§ 1291, 1292.

relieve themselves from liability for the improper or negligent conduct of its servants. * * * Companies cannot adopt general printed rules, exacting as a condition for sending messages, that the sender shall exonerate or release the company from damages caused by defective instruments or by want of proper skill in the operators, or by failure to use due care." And as the statute did not apply to any one kind of despatch more than to another, but included all messages, the rule as to negligence was held to cover cipher dispatches.[69]

§ 712. **Stipulations, rules and regulations — Telegraph companies — West Virginia.**— In this State it is held that a common carrier cannot stipulate against its own negligence.[70] And as we have seen, this rule as to common carriers has been held applicable, in other States, to telegraph companies. So a total failure to deliver a message in that State is not excused by a stipulation against liability beyond the amount paid for transmission.[71]

§ 713. **Stipulations, rules and regulations — Telegraph companies — Wisconsin.**— In a case in this State, the question arose "whether the plaintiffs were bound by the condition in the printed rules and regulations of the defendant company, which if accompanying the original message to be sent, or known by the plaintiffs to exist, in respect to such message, became the contract between the parties —' that no claim for damages shall be valid unless presented in writing within twenty days from sending the message.' The testimony of the plaintiffs, themselves, was that for many years they had used the blanks of the company containing these rules in respect to night messages, and one of the plaintiffs wrote in pencil the address of the message in question, together with the date, upon one of these blanks. That the plaintiffs were bound by these rules, as the contract between the parties in respect to this message, in view

[69] Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182, 1 Am. Elec. Cas. 487, per Lacy, J.; Va. Code, 1873, chap. 65, p. 619.

[70] Berry v. West Va. & P. R. Co., 44 W. Va. 538, 30 S. E. 143, 11 Am. & Eng. Corp. Cas. (N. S.) 103.

[71] Beatty Lumber Co. v. Western Union Teleg. Co., 52 W. Va. 410, 44 S. E. 309.

of the evidence, is too clear for argument or question," and it was held a reasonable and binding regulation, and the fact that, through the company's fault, the message was delayed was decided not to modify the condition or extend the time, if a reasonable time remained in which to give notice after knowledge of the mistake. "Such a condition has been held obligatory in insurance,[72] freight and other contracts, and in legislation where damages have resulted from accident or negligence, and in such cases the principle is now undisputed. * * * What is a reasonable time in which an act is to be performed, when the contract is silent as to the time, may be a question of fact for the jury, but whether the time fixed by contract in which an act is to be performed is reasonable, as affecting the validity of the contract itself, is a matter of law." [73] In another case the plaintiff sent, by defendant's telegraph, a message, written on a blank, exonerating defendant from liability for errors or delays, from whatever cause occurring, in the transmission of messages sent during the night, at one-half the usual rates. The despatch was in cipher. By gross negligence of the company's servants the message was delayed. It was held that the condition was unreasonable and void; that the company was liable and that the stipulation was against public policy and without consideration.[74] Again, the plaintiff admitted that he knew the contents of the message blank, which was conditioned for repeating despatches, and it also limited the amount of recovery, but it was held that the company could not free itself, by stipulation, from liability for want of ordinary care and diligence in transmitting messages.[75]

[72] See 4 Joyce on Insurance (ed. 1897), §§ 3181–3224, 3275 et seq.

[73] Heimann v. Western Un. Teleg. Co., 57 Wis. 562, 16 N. W. 32, 1 Am. Elec. Cas. 531, per Orton, J.

[74] Candee v. Western Un. Teleg. Co., 34 Wis. 471, 17 Am. Rep. 452, 1 Am. Elec. Cas. 99; Hubbard v. Western Un. Teleg. Co., 33 Wis. 558, 14 Am. Rep. 775, 1 Am. Elec. Cas. 62.

[75] Thompson v. Western Un. Teleg. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644, 1 Am. Elec. Cas. 772. That common carriers cannot stipulate against own negligence, see Lamb v. Chicago, M. & St. P. R. Co., 101 Wis. 138, 76 N. W. 1123; Densmore Commission Co. v. Duluth, S. S. & A. Ry., 101 Wis. 563, 77 N. W. 904; Schaller v. Chicago & N. W. R. Co., 97 Wis. 31, 71 N. W. 1042, 15 Nat. Corp. Repr. 257; Davis v. Chicago, M. & St. P. R. Co., 93 Wis. 470, 33 L. R. A. 654, 67 N. W. 16, 4 Am. & Eng. R.

§ 714. **Stipulations, rules and regulations — Telegraph companies — United States decisions.**— In a case in the Supreme Court of the United States, which has been frequently cited, there was the following notice upon a telegraph blank, just below the space left for the message: "☞ Read the notice and agreement on the back of this blank ☜." Above said space were the printed words, "Send the following message, subject to the terms on the back hereof, which are hereby agreed to." Upon the back were conspicuously printed certain conditions or restrictions. Those which were directly involved in this case were: (1) one by which the company was not to be liable for mistakes in the transmission or delivery of any message beyond the sum received for sending it, unless the sender ordered it repeated by being telegraphed back to the original office for comparison, and paid half that sum in addition; and (2) another condition by which the company was not to be liable at all for errors in cipher or obscure messages. It was also stipulated that the company should not "be liable for mistakes in the transmission or delivery or for nondelivery of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." The message was a "cipher" despatch, sent by the plaintiff to his agent, and was unrepeated. The action was brought to recover damages for a negligent mistake in transmitting the message, certain words being changed therein. Mr. Justice Gray delivered the opinion of the court, and it was declared that, by the settled law of the court, common carriers of goods or passengers could not, by any contract, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants, but that they might, however, by special contract with the owner, restrict the sum for which they might be liable, even in case of loss, by the carrier's negligence. It was also said that by the regulation in question the company did not undertake to wholly exempt itself from liability for negligence, but only to require

Cas. (N. S.) 622; rehearing denied, 67 N. W. 1132. As to constitutionality of Wisconsin statute relating to liability of telegraph companies, see Summerfield v. Western Un. Teleg. Co., 87 Wis. 1, 41 Am. St. Rep. 17, 57 S. W. 973.

the sender to repeat the message at an additional charge, "in order to hold the company liable for mistakes or delays in transmitting or delivering or for not delivering a message, whether happening by the negligence of its servants or otherwise." And that the reasonableness and validity of such regulations have been upheld by English and Canadian decisions, as well as by the great preponderance of authority in this country. The court then reviews, at length, numerous decisions in support of its assertion, refers to and considers others wherein such regulations have been held void, but says many of them "appear to have been influenced by considerations which have no application to the case at bar. Some of them were actions brought not by the sender, but by the receiver of the message, who had no notice of the printed conditions until after he had received it, and could not, therefore, have agreed to them in advance. * * * Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which in effect all liability beyond the price paid was avoided." The court then mentions other cases which admittedly, without qualification, hold such stipulations void, and criticises adversely the case of Tyler v. Western Union Telegraph Co.[76] It is then declared that since the plaintiff wrote the despatch on one of a bunch of blanks at his office, even though he did not read the notices on the face of the blank, nor the printed conditions on the back thereof, nevertheless, there was no doubt that the terms on said blank, so far as they were not inconsistent with the law, formed a contract between him and the company, and inasmuch as the mistake was not due to defective instruments or equipment, nor to incompetent operators, and could have been remedied by repeating the message, there was nothing more than ordinary negligence, and, therefore, the plaintiff could not recover more than the stipulated sum, under the printed conditions. It was also held that the stipulation as to obscure handwriting and cipher messages was reasonable, and that where the contents or importance of such cipher message were not made known to the operator, only the sum paid could be recovered in case of error in transmission, when by

[76] 60 Ill. 421, 74 Ill. 168. See § 686, herein.

repeating said message the error could have been avoided.[77] In another case in the United States Circuit Court of Appeals, it is held that where a State statute requires the exercise of "great care and diligence," the company cannot stipulate in such State for exemption from liability for a failure to use such required care and diligence, and to permit it would be unreasonable and against public policy.[78] A time limit stipulation for the presentation of claims will be binding.[79] Again, where the plaintiff had full knowledge of a condition in a night half-rate message limiting the time for presentation of claims, he was held to have agreed thereto to the extent to which they were valid and obligatory and the conditions were considered as a contract, and the company was held not liable for error not caused by gross negligence or fraud.[80] But a time limit stipulation of thirty days after sending a night half-rate message was held unreasonable and void.[81] And such a condition does not bind the addressee.[82] Nor can a telegraph company stipulate against gross negligence, nor is it liable for damages caused by atmospheric disturbances.[83] Although it is held in another case that the company is liable for its own negligence and cannot stipulate against it.[84]

[77] Primrose v. Western Un. Teleg. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. ed. 883, 5 Am. Elec. Cas. 809.

[78] Western Un. Teleg. Co. v. Langley, 61 Fed. 624, 9 U. S. C. C. A. 680, 5 Am. Elec. Cas. 799. Case of repetition of message stipulation. Cal. Civ. Code, § 2162. By the statute of this State a telegraph company is not a common carrier. Cal. Civ. Code, § 2168.

[79] Whitehill v. Western Union Teleg. Co., 136 Fed. 499.

[80] Jones v. Western Un. Teleg. Co. (U. S. C. C., E. D. Ark., 1883), 18 Fed. 717, 1 Am. Elec. Cas. 561.

[81] Johnston v. Western Un. Teleg. Co. (U. S. C. C., S. D. Ga., 1887), 33 Fed. 362, 2 Am. Elec. Cas. 862.

[82] Johnston v. Western Un. Teleg. Co. (U. S. C. C., S. D. Ga., 1887), 33 Fed. 362, 2 Am. Elec. Cas. 862; Findlay v. Western Un. Teleg. Co. (U. S. C. C., W. D. Va., 1894), 64 Fed. 459.

[83] White v. Western Un. Teleg. Co. (U. S. C. C., D. Kan., 1882), 14 Fed. 710.

[84] Abraham v. Western Un. Teleg. Co. (U. S. C. C., D. Or., 1885), 23 Fed. 315, 1 Am. Elec. Cas. 728; New York, N. H. & H. R. Co. v. Sayles (U. S. C. C. A., 2d Cir.), 58 U. S. App. 18, 87 Fed. 444, 32 C. C. 485, signing receipt by shipper does not bind unless brought to knowledge so as to imply assent to conditions. Common carrier cannot stipulate against own negligence. Voight v. Baltimore & O. S. W. R. Co. (U. S. C. C., S. D. Ohio), 79 Fed. 561; Calderon

§ 715. **Stipulations, rules and regulations — Telegraph companies — English and Canadian decisions.**— In a leading English decision the printed form contained in a perpendicular column the words "Message," "Repeating," "Reply," "Porterage," and opposite, in another perpendicular column, under the headings "£ s. d," were the prices for the "message" and "porterage," with spaces for charges for "repeating" and 'reply." There were also the words: "Please send the following message according to the conditions indorsed hereon." There was also this notice: "Before signing, please see that the amount to be charged for the message is correctly entered above and on the receipt, and read the indorsed conditions." Among the indorsed conditions was a statement as to the advisibility of repeating messages and the charges therefor or for insuring messages, and this stipulation: "The company will not be responsible for mistakes in the transmission of unrepeated messages from whatever cause they may arise, nor will the company be responsible for mistakes in the transmission of a repeated message, nor for delay in transmission or delivery, nor for nontransmission or nondelivery of any message, whether repeated or unrepeated, to any extent above 5l., unless it be insured." The Electric Telegraph Company's Act of 1853 [85] provided that, "subject to the prior rights of use thereof for the service of her majesty and for the purposes of the company, and subject also to such reasonable regulations as may be from time to time made or entered into by the company," the use of any telegraph line formed under the act should "be open for the sending and receiving of messages by all persons alike, without favor or preference." The message sent was unrepeated, and in the transmission thereof one word was by mistake substituted for another. Jervis, C. J., said: "If they were regulations within the act of Parliament the question would be whether they were reasonable, and if they were not regulations within the act, the company would be in the situation of carriers at the common law and entitled to limit their

v. Atlas SS. Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033. See the George Dumois (U. S. D. C., E. D. N. Y.), 88 Fed. 537, rev'd 115 Fed. 65.

[85] 16 and 17 Vict., chap. 203, § 66.

liability by a special notice, subject to this qualification, that the notice would not protect them against the consequences of gross negligence, so that in any view of the case the question still would be whether or not the regulation or condition is a reasonable one," and it was held that the stipulation as to repeating messages was a reasonable one within the statute, and an answer to the action.[86] In a later English case a similar

[86] MacAndrew v. Electric Teleg. Co., 17 Com. B. Rep. 3, 33 Eng. L. Eq. Rep. 180, Allen's Teleg. Cas. 38. Cited, Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 1 Am. Elec. Cas. 8, to point that regulation reasonable; Tyler v. Western Un. Teleg. Co., 60 Ill. 421, 1 Am. Elec. Cas. 18, to point that common carriers may restrict liability; Redpath v. Western Un. Teleg. Co., 112 Mass. 71, 1 Am. Elec. Cas. 43, to point that condition valid and answer to action. Distinguished, Bartlett v. Western Un. Teleg. Co., 62 Me. 209, 1 Am. Elec. Cas. 49, as containing a stipulation not in the citing case. Cited, Grinnell v. Western Un. Teleg. Co., 113 Mass. 299, 1 Am. Elec. Cas. 79, to point that subsequent acts and declarations of company's agents not connected with the transmission of message were not competent evidence. Aikin v. Western Un. Teleg. Co., 5 S. C. 358, 1 Am. Elec. Cas. 126, to point that regulation was reasonable; Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 1 Am. Elec. Cas. 331, to point that telegraph companies are common carriers and insurers of safe transmission of message; Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589, 13 Cent. L. Jour, 475, 1 Am. Elec. Cas. 355, to point that telegraph companies are not insurers; Western Un. Teleg. Co. v. Neill, 1 Am. Elec. Cas. 358, 359, as to construction of regulation being valid in part and as to reasonableness and validity of rule as to repeating messages; Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182, 1 Am. Elec. Cas. 494, as to common carriers and ability to limit liability; Western Un. Teleg. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713, I Am. Elec. Cas. 580, as to right to make regulations under statute; Western Un. Teleg. Co. v. McGuire, 104 Ind. 130, 1 Am. Elec. Cas. 780, 2 N. E. 201, as sustaining by analogy a by-law requiring deposit from transient persons wishing answer to telegraphic despatch; Fowler v. Western Un. Teleg. Co., 80 Me. 381, 2 Am. Elec. Cas. 612, as holding only by implication that telegraph companies are insurers; Kiley v. Western Un. Teleg. Co., 109 N. Y. 231, 2 Am. Elec. Cas. 650, 16 N. E. 75, to point that such stipulations may be exacted; Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243, 3 S. W. 490, 2 Am. Elec. Cas. 724, as holding that telegraph companies, though not strictly common carriers, are governed by same rules; Marr. v. Western Un. Teleg. Co., 2 Am. Elec. Cas. 733, declared not an authority for proposition that telegraph company may contract against own negligence as

condition was before the court, and a private statute[87] was also involved, which was substantially the same as that noted in the preceding case. During the argument of this case, Cockburn, C. J., stated to counsel that the condition might not be unreasonable or inconsistent with the statutable obligation if it were not that it seemed to "cover cases even of gross negligence. There is a distinction illustrated in the cases as to carriers between mere casual mistakes, such as may well happen in the manipulation of such a delicate instrument as the electric telegraph and such as arise from gross and egregious negligence, and, though it might be reasonable that the company should protect themselves from the consequences of casual mistakes, it might be most unreasonable that they should have immunity for injuries caused by the grossest want of care, as, for instance, by having persons to manage the telegraph utterly incompetent or unfit." The same judge then discusses in an opinion the obligation of the company to use reasonable care, and says, "that if the plaintiff were otherwise entitled to maintain the action this condition would not stand in the way." But a special case was stated at the suggestion of the court, and the decision turned upon the right of the addressee to recover, which was decided in the negative. It was, however, said that the obligation to use due care and skill in the transmission of a message was one arising out of contract.[88] In a Canadian decision, where a telegraphic

English doctrine is that common carrier may so contract. Cited, Johnston v. Western Un. Teleg. Co. (U. S. C. C., S. D. Ga., 1887), 33 Fed. 362, 2 Am. Elec. Cas. 863, as being cited by counsel to support proposition that telegraph company may limit its liability; Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256, 35 N. Y. St. R. 307, 26 N. E. 534, 3 Am. Elec. Cas. 732, as holding that common-law liability of telegraph companies can be limited by notice. "But in England it was held that carriers could by notice limit their liability for loss of goods, even in cases of gross negligence, which resulted in statutes providing that their liability could not be limited except by express contract (§ 6, chap. 68, 11 Geo. IV, and 1 Wm. IV; § 7, chap. 31, 17 and 18 Vict.)"; Riley v. Western Un. Teleg. Co. (N. Y., 1893), 6 Misc. (N. Y.) 221, 56 N. Y. St. R. 528, 26 N. Y. Supp. 532, 4 Am. Elec. Cas. 771, upon the question whether the telegraph company would be liable for error and delay in delivery of a despatch.

[87] 25 and 26 Vict., c. 131, § 61.

[88] Playford v. United Kingdom Elec. Teleg. Co., 17 Law. Jour. (N. S.) 243, Law. Rep., 4 Q. B. 706, Al-

message was sent from Hamilton to H., in New York, written upon a blank providing for repetition of messages, it was held that such conditions were not unreasonable and the plaintiff must be taken to have been aware of them; also that the liability of telegraph companies could not be treated as analogous to or coextensive with that of common carriers.[89] But one who gives an oral message, which the operator accepts and writes out on a message blank, is not bound by the printed conditions thereon, although the latter signs the sender's name thereto, where the sender can neither read nor write, and his attention is not called to the conditions.[90] In another case it is decided that where there is evidence of negligence on the part of the telegraph company it will not be protected from the consequences thereof by a printed condition on the message blank to the effect that the company would not be liable for damages from any error in the transmission of unrepeated messages.[91]

§ 716. **Stipulation, rules and regulations — Telegraph companies — Summary and conclusion.**— It is evident from the preceding decisions that it is impossible to formulate any other than what might well be called a composite rule, and, inasmuch as the State courts are showing a more decided inclination to adhere to their own precedents, it is doubtful whether, as against said precedents, a court would follow decisions of other State courts even though they might be deemed to constitute what has been called the weight of authority. There are, however, certain points upon which the different decisions

len's Teleg. Cas. 437. See Potts v. Electric Teleg. Co., 18 Law. Rep. 477, Allen's Teleg. Cas. 690, "although of no particular value," though sometimes cited (per Mr. Allen, the compiler).

[89] Baxter v. Dominion Teleg. Co., 37 Upper Can. Q. B. R. 470 (1875), That common carrier cannot stipulate against own negligence, see Cobban v. Canadian Pac. R. Co., 23 Ont. App. 115; Pigeon v. Dominion Exp. Co. (C. Ct.), Rapports Judic. de Quebec, 11 Cour. Super. 276. That common carrier can so stipulate. Glengirl v. Pilkington, 28 Can. Sup. Ct. 146.

[90] Berube v. Great N. W. Teleg. Co., Rapports Judic. de Quebec, 14 Cour. Super. 178.

[91] Great Northwestern Teleg. Co. v. Lawrence, 1 Rapports Judic. de Quebec, 1 (1892), Cour du Banc.

do agree. The following summary will show the several positions taken upon the questions under consideration.

§ 717. **Summary continued — Power to make stipulations, etc.** — In Illinois, New York, South Carolina, Vermont and the Federal courts telegraph companies may, by express stipulation or contract (and in Texas by contract or notice), limit or restrict their common law liabilities. In Maine there is a distinction made between a contract and regulations. In Georgia, Indiana, Maine, New York, South Dakota, Tennessee, Texas and Virginia such companies may make all reasonable rules and regulations for the conduct of their business. In Georgia, Indiana, New York, Ohio, Vermont and Virginia it is declared that stipulations, rules and regulations must be reasonable. In Pennsylvania the rules, it is said, may be reasonable and their enforcement unreasonable. In South Dakota, if they are unreasonable in their application, it is said that the courts will grant relief; and in Virginia it is declared that their unreasonableness depends on circumstances. In Georgia a rule making a messenger the agent of the sender to deliver a despatch at the company's office is held reasonable. In New York the same rule is declared void. In Texas telegraph companies may establish reasonable office hours, reasonable delivery hours and free delivery limits.

§ 718. **Summary continued — Knowledge of and consent to stipulations, etc.**— In Canada an oral message does not bind the sender with the printed terms on the message blanks. In Colorado the conditions are valid when signed and brought to the sender's knowledge. In Georgia the sender is charged with knowledge of such stipulations. In Illinois the question whether writing and signing a message binds the sender with notice is for the jury, although slight evidence only is required. In another case, however, in this State, it is declared that the conditions on the back of the blank are sufficient notice. Again, it is held in this State that the sender is not bound unless his attention is called to the conditions; in another case that there is no contract unless the sender assents, and in still another, that there is a constructive notice where one uses such message blanks constantly. In Indiana the sender is

bound if he has knowledge of such stipulations. In Maine consent to rules and regulations is necessary where there is knowledge of their existence on the part of patrons. But in case of a night message knowledge does not bind of itself in Maine. In Massachusetts reasonable rules and regulations are obligatory when brought to the sender's notice, and signing the message on the printed blank binds, and it is held that if the sender knows the conditions he is obligated, although the message is written on another paper. In Michigan the conditions are binding on the sender whether he knew of them or not. In Nebraska the usual stipulations were formerly valid if understood to exist even though not read by the sender. In New York it has been held that the conditions must be brought to the sender's knowledge. In another, and later case, writing and signing the message and delivering it to the operator for transmission was held binding upon the sender where he had a full opportunity to inform himself of the terms on the printed blank, and his omission to read the same did not excuse him where he had used the blanks for years, even though he was ignorant of the contents thereof. In Pennsylvania in the early decisions it is said that the notice must be full and clear. In Tennessee the sender is assumed to know and is bound to know the conditions when he writes and signs the message on the usual blank. In Texas the sender need not be notified of the conditions, it is sufficient that he writes a message on the blanks, his failure to read is no excuse, although it is held that conditions as to office hours are binding if the sender has knowledge thereof. In this State the sender is also bound even though the message is written on another paper, when it is copied onto the regular blank by the operator at his request, although if said blank is attached to another paper without the sender's knowledge or consent, he is not bound by the conditions in the blank and the company may be obligated to notify the sender of the existence of such conditions if the message is not written on the printed blank. In Vermont reasonable stipulations are valid when brought to the knowledge of the sender of the message. In Virginia the company must prove that the sender signed the blank. In Wisconsin if the message blanks have been used for years by the sender, he is bound by the terms thereon. It is also held that if the conditions

are on the blanks used and are known to exist they are obligatory. In some cases stress has been placed upon the fact that upon the face of the message blank the written message is made "subject to" the printed stipulations, or there is a special direction or notice to read the conditions. In Maine such a provision was held not to aid the company where a night message stipulation was void. In Maryland a certain stipulation was held valid for this reason among others; so, also, in Alabama, Georgia, Minnesota, New York, Pennsylvania, and in a United States case.

§ 719. **Summary continued — Effect of statutes — Uncontrollable, atmospheric, etc., causes.**— Statutes have affected the decisions in California, England, Iowa, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New York, Ohio, South Dakota, Tennessee, Texas, Virginia and in a Federal case in California, while the Constitution has governed Kentucky cases. Liability caused by atmospheric and other like uncontrollable causes may be stipulated against under the Iowa, Colorado, North Carolina and United States decisions.

§ 720. **Summary continued — Stipulations as to unrepeated messages.**— The usual stipulation as to repeating messages and unrepeated messages is valid in California, Canada, England, Illinois, Indiana, Iowa, Michigan, New York, Pennsylvania and Texas (night message); so, also, under a United States decision, even though it relieves against the company's negligence when not gross. In Kentucky such a condition was valid before the present Constitution. Such a stipulation is valid when it does not, in terms or by equivalent words, provide against the negligence of the company or its servants in Louisiana, Missouri, Ohio, Tennessee, Texas, Utah and Vermont. In Pennsylvania, in case of oral message, the question whether such a stipulation is binding may be one for the jury. Such a condition is held void in Indiana, Maine, Nebraska, North Carolina. This regulation or restriction has no application to delay in or failure to deliver a message in Alabama, Arkansas, Colorado, Georgia, Kentucky, Nevada, New York, North Carolina and Texas, or to failure to send a message at all in Iowa (night message). Nor does this stipulation

apply to a case of statutory penalty in Indiana. But in Massachusetts the repetition clause is valid even though the mistake could not have been prevented by repeating the message, and the same is true as to a delay of the message in Michigan.

§ 721. **Summary continued — Time limit stipulations for presenting claims.**— The usual stipulation limiting the time for presentation of claims is valid in Alabama (evidently), in Arkansas, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky (night message), Minnesota (night message), in Missouri, North Carolina (when reasonable), in Pennsylvania, Tennessee, Texas (when reasonable), in Virginia (when reasonable), in Wisconsin and the United States courts (night message). In Pennsylvania an oral message may be within such limit if the condition is known. In South Dakota such condition is reasonable and valid where it does not limit liability or the time of bringing an action. In Kentucky such a stipulation is void; in Pennsylvania it may be unreasonable and void under certain facts; in New Mexico it is void; in Nebraska it violates the statute, and, under a United States decision, it may be void. This stipulation does not apply to a statutory penalty in Arkansas and Georgia; nor to a case where the message was never sent in Alabama, Indiana, Minnesota and Missouri..

§ 722. **Summary concluded — Stipulations against negligence and gross negligence.**— Telegraph companies are obligated to use at least reasonable or ordinary care, skill and diligence, and cannot stipulate against this obligation in Colorado, England (statute), Georgia, Illinois, Indiana, Virginia (statute), Wisconsin, and in a United States decision (statute). Such companies are liable for mistakes and cannot stipulate for exemption from loss or damage caused by their own negligence in Alabama, Arkansas, Canada, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana (common carrier), in Maine (night message), in Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, Tennessee (statute), in Texas, Utah, Vermont, Virginia, and West Virginia (common carrier). In South Carolina a stipulation against liability from whatever cause, in a night half-rate message, is valid. In Pennsylvania

such a stipulation is not, however, necessarily invalid, and in this last State, while the company cannot stipulate against negligence, it may limit its liability for loss by a condition calculated to diminish it. So, in North Carolina it is said slight negligence may be held excusable. In South Carolina it is declared that the negligence need not be gross. In Texas gross negligence is not necessary — negligence makes the company liable. In Ohio the distinction between negligence and gross negligence does not exist and the same is true in North Carolina. Telegraph companies may not stipulate against gross negligence in California, Georgia, Illinois, Massachusetts, Michigan, New York, Vermont, and Wisconsin (night message) and in a United States case. In New York and a United States case it is held that such companies may, by contract, limit loss even against negligence, and in the latter court that the usual stipulation as to repeating and unrepeated messages is valid even though it is a condition against negligence, provided it is not gross negligence. In New York, however, the stipulation has, in one decision, been limited to negligence.

§ 723. **Notice of claim for damages.— When stipulation complied with.—** The usual stipulation on telegraph blanks limiting the time for presentation of claims for damages is sufficiently complied with by the commencement of an action in Alabama,[92] Indiana,[93] North Carolina,[94] Tennessee,[95] and Texas,[96] though it is also held in this last State that commencement of an action is not a sufficient compliance.[97] A notice which apprises the company of the nature of the claim is sufficient.[98]

[92] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 3 Am. Elec. Cas. 570, 7 So. 419.

[93] Western Un. Teleg. Co. v. Trumbull, 1 Ind. App. 121, 3 Am. Elec. Cas. 650, 27 N. E. 313.

[94] Sherrill v. Western Un. Teleg. Co., 109 N. C. 527, 14 S. E. 94, 3 Am. Elec. Cas. 759. See Bryan v. Western Union Teleg. Co., 133 N. C. 603, 45 S. E. 938, 43 S. E. 1003.

[95] Western Un. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725, 6 Am. Elec. Cas. 835, S. C., 100 Tenn. 429, 45 S. W. 443, action was commenced here by the beneficiary within sixty days after learning that such telegram had been filed for transmission. See § 707 herein.

[96] Western Un. Teleg. Co. v. Karr, 5 Tex. Ct. App. 60, 24 S. W. 302; Western Un. Teleg. Co. v. Piner (Tex. Ct. Civ. App.), 29 S. W. 66, 9 Tex. Civ. App. 152. See § 708 herein.

[97] Western Un. Teleg. Co. v. Ferguson (Ct. Civ. App., Tex., 1894), 28 S. W. 1048.

[98] Western Un. Teleg. Co. v.

§ 724. **Notice of claim for damages — When stipulation not complied with.**— A letter signed by the manager of a corporation, setting forth the claim, and addressed to the telegraph company, is not a compliance with a stipulation requiring written notice.[99] A claim setting forth damages to a wife only is insufficient where the action is to recover for mental distress occasioned to the husband.[1]

§ 725. **Notice of claim for damages — To whom given.**— If a notice of a claim for damages is given to the local agent at the terminal office of a foreign telegraph company, it is a sufficient notice within the usual stipulation as to presentation of claims.[2] And where the operator is informed of the mistake and he refers the plaintiff to the principal office, where he is informed by a clerk that the manager is busy and the latter notes his complaint and hands it to a person, introduced to the plaintiff as the company's attorney, who takes the complaint and promises to investigate the matter, and, afterwards, in reply to the plaintiff's inquiry, said attorney writes a letter upon paper and using an envelope wherein he is stated to be the company's attorney, rejecting the claim, it sufficiently appears that the proper authorities are notified.[3] A claim is not, however, sufficiently served by delivery to the company's messenger to be delivered to the operator or local agent,[4] nor is it sufficient to present a claim to an operator or receiving clerk and permitting it to be perused and then receiving it back from him and destroying it, even though an unsuccessful attempt is made to see the president and treasurer, who were absent.[5]

Brown, 84 Tex. 54, 19 S. W. 336. See 4 Joyce on Insurance (ed. 1897), §§ 3181–3224.

99 So held in Western Un. Teleg. Co. v. Beck, 58 Ill. App. 564.

1 So held in Swain v. Western Un. Teleg. Co. (Ct. Civ. App., Tex., 1896), 34 S. W. 783, 34 S. W. 783. See 4 Joyce on Insurance (ed. 1897), §§ 3181–3224.

2 Western Un. Teleg. Co. v. May 8 Ct. Civ. App., Tex. 176, 27 S. W. 760.

3 Bennett v. Western Un. Teleg. Co., 18 N. Y. St. R. 777, 2 N. Y. Supp. 365, 2 Am. Elec. Cas. 669.

4 Western Un. Teleg. Co. v. Terrell (Ct. Civ. App., Tex.), 10 Tex. Civ. App. 60, 30 S. W. 70.

5 Young v. Western Un. Teleg. Co., 65 N. Y. 163, 1 Am. Elec. Cas. 187, affg. 34 N. Y. Super. Ct. 390, Allen's Teleg. Cas. 708. See 1 Joyce on Insurance (ed. 1897), §§ 575, 581.

§ 726. **Notice of claim for damages — Waiver.**— Waiver of presentation of a claim may be affirmatively shown, but cannot be presumed, and circumstances may excuse presentation.[6] Such waiver exists where an oral claim is made and the company corresponds with the plaintiff and offers settlement within the time limit.[7]

§ 727. **Stipulations, rules and regulations — Telephone companies.**— The rules in relation to the right of telegraph companies to make certain reasonable stipulations and regulations in the conduct of their business would undoubtedly govern in case of telephone companies in so far as the principle of a right to make rules is concerned, and also in so far as the nature of their business might require similar rules for the company's protection. Thus the rule that such companies cannot stipulate for exemption from liability caused by their own negligence applies to telephone companies, since they cannot relieve themselves by conditions from the obligations which they owe their patrons.[8] It also appeared in this case that a conspicuous "special notice" was in the office of a telephone company, where its instruments were located, with rules printed thereon in large, plain type, among which were the provisions that said company would not undertake to transmit or deliver messages, and would not be responsible therefor, and that any person who assisted in conversation did so as the agent or employee of the patron and not of the company. It was held that if said rules or regulations constituted an attempt of the company to exempt itself from liability for the conduct of its messenger, they would be in violation of its duty to the public and void, but it was interpreted not as an attempt to thus escape liability, but as a provision that it would not undertake to transmit and deliver verbal messages beyond the telephone stations. The case, however, was declared to be not one of failure to deliver a verbal message, but one of a failure to

[6] Western Un. Teleg. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713, 1 Am. Elec. Cas. 580, 585, per Elliott, J.

[7] Western Un. Teleg. Co. v. Stratemeier (Ind., 1892), 32 N. E. 871. See 4 Joyce on Insurance (ed. 1897), §§ 3183, 3207–3212, 3219–3221, 3287, 3354 et seq., 1 id., § 580 et seq.

[8] Central Un. Teleph. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035, 6 Am. Elec. Cas. 679.

bring a person to the telephone to be placed in telephonic communication with another party who had called him up. "We grant that if the appellant had adopted a rule that it would not undertake to call persons to the telephone whose place of business or residence was so remote from the station as to render it unreasonable that they should be required to find them, such a rule would be reasonable and could be enforced, * * * the only ground upon which the appellant seeks to avoid liability is that it is not responsible for the negligence of the messenger in calling Rhine. We do not think the appellant's position tenable, and must hold that it was a part of its public duty under the facts of this case" (Rhine was within a short distance of the telephone station) "to place the parties in communication with each other within a reasonable time after its agents were informed of the nature of the service desired, and had undertaken, for a consideration, to furnish such service." The contract also provided that the appelllant should send a messenger for Rhine and bring him to the telephone, at least the complaint so alleged, and it was not denied. "If, then, the appellant undertook to perform such messenger service by the terms of its contract, and failed to do so, it would be liable for a violation of the contract whether its duty to the public required it to render such service or not. * * * Appellant has the right to adopt and promulgate reasonable rules and regulations for the management of its business," both under the statute and independently thereof.[9] A regulation is unreasonable and void which forbids the use of a telephone to call messengers not in the employ of the telephone company. But it was also held that a regulation not forbidden by the New York statute, which forbade the use of the company's instruments for messages on which tolls were to be paid to parties other than the company, was reasonable at common law.[10]

[9] Central Un. Teleph. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035, 6 Am. Elec. Cas. 679, per Reinhard, J.; Ross, J., concurred, but not in the reasoning, and Gavin, C. J. doubted the obligation of the company to send messengers in such service unless contracted for expressly or impliedly; § 5529, Ind. Rev. Stat. 1894.

[10] People, Postal Teleg. Cab. Co. v. Hudson River Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394;

§ 728. **Stipulations, rules and regulations — Telegraph and telephone companies — Payment — Prepayment — Waiver.**— Telegraph companies may require, by regulation, a deposit from transient persons who wish an answer to a telegram presented for transmission.[11] Nor is such company bound to transmit a message until the charges are paid.[12] But such prepayment may undoubtedly be waived.

§ 729. **Regulations — Tolls and rates — Discrimination.**— In North Carolina the power of the board of railroad commissioners is limited to fixing rates, and the statutes conferring such powers does not authorize an action for delay in the transmission of a telegram.[13] Sending messages partly over the line of another company, to evade a statute establishing rates, will not be upheld where the telegraph company has a continuous line between the places of receiving and delivering a despatch, even though the company's line is fully occupied with contract work for another company, since such contract involves illegal discrimination.[14] In a New York case, decided in 1873, it was declared that telegraph companies could not, under the statute, discriminate as to rates in regard to persons similarly situated "unless there are reasons in the particular case which justify it, which the law would consequently approve." [15] And in a Georgia case, decided in 1882, it was said that the law did not undertake to limit or restrict the compensation to be paid for telegraphic messages, and that the amount of tolls was under their own control.[16]

N. Y. Laws of 1845, chap. 265, § 11, amd. by Laws of 1855, chap. 559; same statute, 2 Rev. Stat. (7th ed.), §§ 1719. See Discrimination; also Penalty statutes herein.

[11] Western Un. Teleg. Co. v. McGuire, 104 Ind. 130, 1 Am. Elec. Cas. 777; 2 N. E. 201; Hewlett v. Western Un. Teleg. Co. (U. S. C. C., W. D. Tenn., 1886), 23 Fed. 181, 2 Am. Elec. Cas. 851.

[12] Macpherson v. Western Un. Teleg. Co., 52 N. Y. Super. Ct. 232, 1 Am. Elec. Cas. 755.

[13] Mayo v. Western Un. Teleg. Co., 112 N. C. 343; Stat. N. C., Acts of 1891, c. 320, § 26.

[14] Leavell v. Western Un. Teleg. Co., 116 N. C. 211, 47 Am. St. Rep. 798, 5 Am. Elec. Cas. 689; No. Car. Stat., Acts of 1891, chap. 320. Such statute is constitutional. Railroad Commission v. Telegraph Co. (Albea's case), 113 No. Car. 213.

[15] Atlantic & Pac. Teleg. Co. v. Western Un. Teleg. Co., 4 Daly (N. Y.), 527, 1 Am. Elec. Cas. 81.

[16] Western Un. Teleg. Co. v.

§ 730. **Discrimination — Tolls and rates — Constitution and statute — Newspapers.—** The Constitution of Nebraska provides that "the legislature shall pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies in this State, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." [17] The statute of that State also prohibits discrimination in newspaper rates or charges and provides for liability for damages sustained in consequence of such discrimination.[18] It was held that not every discrination was unjust,[19] and that the statute bore a just and reasonable construction within the constitutional limitation. Said statute also provided that all telegraph companies should transmit all despatches with impartiality in the order received and that due diligence should be used in their delivery, without discrimination.[20] It also provided [21] that the company should not charge a greater sum for the transmission of a message over a given distance than it charged for a similar message over a greater distance, but "that despatches transmitted during the night and despatches for publication in the newspapers may be forwarded and delivered at reduced rates; such rates must, however, be uniform to all patrons for the same service." Another section [22] provided that telegraph companies and press associations should furnish equal facilities to all newspaper publishers "and furnish the despatches collected by them for publication in any given locality, to all newspapers there published, on the same conditions as to payment and delivery." In regard to these several statutory provisions it was held that the legislature sought thereby to prohibit, first, all partiality or discrimination between patrons in the handling of business; second, all partiality or discrimination as to rates for similar services; third, all such partiality or discrimination as to terms of payment or delivery; and fourth, all discrimination in favor of

Blanchard, 68 Ga. 299, 45 Am. Rep. 480, 1 Am. Elec. Cas. 404, 410, per Speer, J. See chapters herein on Penalty statutes.

[17] Const. Neb., art. 11, § 7.

[18] Neb. Comp. Stat., c. 89a, § 8.

[19] Citing note, 11 Am. St. Rep. 643.

[20] Neb. Comp. Stat., c. 89a, § 5.

[21] Neb. Comp. Stat., c. 89a, § 7.

[22] Neb. Comp. Stat., c. 89a, § 9.

persons transmitting despatches to a greater distance. But it was also held that the statute could not be construed so as to require a telegraph company to transmit messages to two patrons under different conditions at the same rate, and that said act was only declaratory of the common law; that there was no force in the claim that no cause of action could be predicated upon the mere fact that another patron obtained services for a lesser rate where it was not shown that the rate charged was in itself unreasonable or excessive, but that rates must not only be reasonable in themselves, but must be relatively reasonable. So, again, it was held that rates must be reasonable and the company must not, without just and reasonable grounds for discrimination, render to one patron services at a less rate than it renders to another, where such discrimination operates to the disadvantage of that other. It was also decided that it is not unjust discrimination, not contrary to the common law nor to the statute, to make a difference in rates where the expense or difficulty of performing the services renders such discrimination fair and reasonable; and that under the common law and the statute the telegraph company was bound (first) to charge for services no more than what was reasonable; (second) that under like conditions it must render services to all patrons on equal terms; (third) that it must not so discriminate in its rates to different patrons as to give one an undue preference over another; but, (fourth) it is not an undue preference to make to one patron a less rate than to another, where there exists differences in conditions, as to the expense or difficulty of the services rendered, which fairly justifies such a difference in rates, and under these rules no cause of action arises without evidence to show that the difference in rates is disproportionate to the difference in conditions, nor can such disproportion be found by a jury without evidence.[23]

[23] Western Un. Teleg. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 5 Am. Elec. Cas. 673, per Irvine, C. Citing Boards of Trade v. Chicago, M. & St. P. R. Co., 1 Int. Com. Rep. 215; Hays v. Pennsylvania R. Co., 12 Fed. 309; Scofield v. Lake Shore & M. S. R. Co., 43 Ohio St. 571, 54 Am. St. Rep. 846; Chicago & A. R. Co. v. People, 67 Ill. 11, 16 Am. Rep. 599; Indianapolis, D. &. S. R. Co. v. Ervin, 118 Ill. 250, 59 Am. Rep. 369; Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 13 Am. Rep. 457; Atwater v. Dela-

§ 731. **Stipulations — Message written by operator — Question of fraud.**— The sender of a message, upon being requested by the operator to write his message, said he knew nothing of the business and that he had never written a telegram, and asked the operator to write it for him. This was done, the sender dictating the same. When it was written and corrected the operator placed the blank, with the writing thereon, upon the counter, keeping one hand upon the top of the message and pointed out to the sender the place where his name should be signed, which was done. The usual printed stipulations, agreements and notices were upon the blank. It was claimed that the operator so held the message for signature that the printed conditions were excluded, by the hand, from the sender's view, and that the operator's conduct in this respect was such a fraud as released the sender from any binding effect of the conditions on the blank. This claim was not sustained.[24]

§ 732. **Profane and indecent language — Rules and regulations — Telephone.**— A telephone company may stipulate against the use of profane and indecent language over its telephone lines. Such a rule is reasonable and may be enforced by refusing further service in case of its nonobservance.[25]

ware, L. & R. Co., 48 N. J. L. 55, 57 Am. Rep. 543; McDuffee v. Portland & R. R. Co., 52 N. H. 430, 13 Am. Rep. 72; Houston & T. C. R. Co. v. Rust, 58 Tex. 98; Ragan v. Aikin, 9 Lea (Tenn.), 609, 42 Am. Rep. 684; Interstate Commerce Comm. v. Baltimore & O. R. Co., 43 Fed. 37; Bayles v. Kansas Pac. R. Co., 13 Col. 181; Root v. Long Island R. Co., 114 N. Y. 300, 11 Am. St. Rep. 643, 23 N. Y. St. R. 226, 21 N. E. 403, affg. 1 N. Y. St. R. 503; Sowitz v. Ohio & M. R. Co., 49 Ill. App. 315; London & N. W. R. Co. v. Evershed, L. R., 3 App. Cas. (Eng.) 1029. A late statute in Kentucky provides, under penalty of forfeiture of charter, that every telegraph or telephone company, or every association or company engaged in the buying, gathering or transmitting of despatches, shall afford the same and equal facilities to all newspapers and publishers of newspapers and furnish to all parties news collected by them for publication, on the same condition as to terms, payment and delivery. Supp. Ky. Stat. 1899, p. 25.

[24] Western Un. Teleg. Co. v. Edsall, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70, 12 S. W. 41, 5 Law Rev. 221, I Am. Elec. Cas. 715.

[25] Pugh v. City & Sub. Teleph. Assn. (Ohio), 9 Cin. Law. Bull. 104, I Am. Elec. Cas. 471. Although this case was decided in a county District Court, it is undoubtedly in harmony with sound legal rulings.

CHAPTER XXIX.

DUTIES AND LIABILITIES — TELEGRAPH AND TELEPHONE COMPANIES.

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774. Same subject continued.
774a. Agent's forged message — Injury woman's reputation — Mental suffering.
774b. Delivery by telegraph company of check to impostor — Holder for value.
775. Intervening cause — Dishonesty or fraud of third person.
776. Liability to banker cashing draft — Stranger to company and telegram.
776a. Undisclosed principal of sender or addressee.
776b. Undisclosed principal of addressee — Ascertaining identity of sender — Unauthorized and false representations — Telephone message to telegraph company for transmission.

§ 776c. Bank cashing draft — Forged message — Wires "tapped."
777. Alteration of message by receiving operator.
778. Cipher despatches generally.
779. Same subject continued.
780. Furnishing stock quotations — Contract.
780a. Furnishing stock quotations — Termination of contract by sale — Tapping wires.
781. "Futures"—"Dealing in options" — Gaming — Telegrams.
§ 782. Same subject continued.
783. Telegraph office — When a betting-house.
783a. Delivery of telegram by common carrier of passengers.
783b. Refusal to pay telegraph order for money.
783c. Telephone company—Right to deprive subscriber of extension set.
783d. Telephone companies — Decisions generally.

§ 733. **Duties and liabilities of telegraph companies — Generally.**— The obligations of telegraph companies to the public, arising from the nature of their business as well, also, as their liabilities arising from mistakes, delays, errors and otherwise in transmission and delivery of despatches, is almost necessarily involved in the decision of every telegraph case before the courts, and is, therefore, traceable in a greater or less degree in nearly, if not all, telegraph cases considered throughout this work. Outside of the fact that such companies are not insurers of absolute accuracy in the transmission of messages, owing to certain atmospheric disturbances and uncontrollable causes [1] they have been held bound to exercise various degrees of care and diligence, such as, due care; ordinary care, or such care as an ordinary or reasonably prudent man would exercise; care commensurate with their undertaking; a high degree of care; a very high degree of care; slight negligence is excusable; negligence which is not gross may be stipulated against; a degree of care which the circumstances necessitate; ordinary care and vigilance; bound to conduct business with skill, care and attention; due and proper care; and so on through the decisions. We believe, however, that their obligations may be properly stated thus: Telegraph companies act in the capacity of public or quasi-public servants; they are required to exercise, irrespective of statutory obligations and special contracts, at

[1] See chaps. I, II, herein. They are, nevertheless, willing, for extra compensation, to insure absolute accuracy.

least that degree of care which reaches up to the point where negligence commences, and negligence commences when the company, acting in its public or quasi-public capacity, fails to exercise that degree of care and skill which the law requires under the particular circumstances of the case. No unchanging, unalterable rule applicable to all cases, can be deduced from the decisions. Courts have attempted it and they disagree. Although the rule stated in particular cases may appear sound law as so applied, yet other facts may necessitate that another rule be formulated. The nearest approach to any reasonable, general rule is that which requires of such companies a degree of care commensurate with their undertaking, acting as such public or quasi-public servants. It is also true that such care and skill is required as can be obtainable by the use and employment of proper and suitable appliances, instruments and apparatus and competent and skilled servants, agents and operators, and such companies are obligated to use all reasonable and proper means and agencies within their control to secure effective service, promptness and accuracy. If their instruments, appliances or apparatus are defective, their servants and operators unskilled or incompetent, the company cannot evade responsibility for mistakes, inaccuracies, errors or delay occasioned thereby. They are not, however, liable where such mistakes, etc., are occasioned by what are generally designated as uncontrollable causes, atmospheric disturbances and the like. But, as has been declared in numerous cases noted in the beginning of this work, they are not insurers.[2]

[2] The following are a few of the decisions showing the expressions used: Prompt and skilful performance of their undertaking required, Western Un. Teleg. Co. v. Hyer Bros., 22 Fla. 637, 2 Am. Elec. Cas. 484, 1 Am. St. Rep. 222, 1 So. 129; when telegraph companies undertake for a compensation to perform a duty or work they are liable the same as natural persons and must perform it or, to be excused, must show a good reason for the exemption, Pope v. Western Un. Teleg. Co., 9 Ill. App. 283, 1 Am. Elec. Cas. 367, 371; must use good instruments and employ skilful agents and must exercise due and proper care, Sweatland v. Illinois & Miss. Teleg. Co., 27 Iowa, 432, Allen's Teleg. Cas. 471, 485–486, per Dillon, Ch. J.; due care and diligence, Western Un. Teleg. Co. v. Woods, 56 Kan. 737, 44 Pac. 989; liability is not founded purely on contract, Smith v. Western Un. Teleg. Co., 83 Ky. 104, 1 Am. Elec. Cas. 743, 748; bound to have suitable instru-

§ 733a. **Same Subject.**— If a message is tendered to a telegraph company with the requisite lawful charges it is obligated

ments and competent servants, and to see that the service is rendered with that degree of care and skill which the peculiar nature of the undertaking requires, Fowler v. Western Un. Teleg. Co., 80 Me. 381, 2 Am. Elec. Cas. 613, 15 Atl. 29; ordinary care and vigilance, and liable for neglect and omission of duty of their servants and agents, Baldwin v. United States Teleg. Co., 45 N. Y. 744, Allen's Teleg. Cas. 613, 651, per Allen, J.; a telegraph company is obligated to exercise due diligence to transmit with celerity and skill all messages delivered to them, subject to such reasonable rules as may be adopted to protect their rights and facilitate the performance of their duties, Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256, 35 N. Y. St. R. 307, 26 N. E. 534, 3 Am. Elec. Cas. 724, 731, per Follett, Ch. J.; bound to conduct the business with skill, care and attention; company undertakes that it will deliver the message with the expected dispatch; acceptance of it implies that it is to be sent immediately or certainly within a few hours, Leonard v. New York, Alb. & B. Elec. Mag. Teleg. Co., 41 N. Y. 544, Allen's Teleg. Cas. 500, 505, 506, per Hunt, J.; telegraph companies are bound to transmit despatches, unless prevented by causes over which they have no control; they are bound to send the message correctly, Borven v. Lake Erie Teleg. Co. (Ohio C. P., 1853), I Am. L. Reg. 685, Allen's Teleg. Cas. 7, 8; telegraph company is a public agent, and as such is bound to the exact diligence which is the condition precedent of all faithful service, Passmore v. Western Un. Teleg. Co., 78 Penn. St. 242, 1 Am. Elec. Cas. 168, 171, per Hare, P. J.; a carrier of messages for reward must use great care and diligence in the transmission of messages; a carrier of messages by telegraph must use the utmost diligence, Annot. Stat. So. Dak., 1899, § 5069; Cal. Civ. Code, § 2162, was originally the same but changed so as to read "must use great care and diligence;" responsible for a very high degree of care and diligence, Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 2 Am. Elec. Cas. 725, 3 S. W. 496; diligence which an ordinarily prudent man would use is not the measure of duty public policy demands from such companies, but it demands a very high degree of care, Jones v. Western Un. Teleg. Co., 101 Tenn. 442, 47 S. W. 699; statute prescribes duty to transmit messages correctly, Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 2 Am. Elec. Cas. 720, 3 S. W. 496; not an insurer of absolute accuracy, if the company's servants exercised ordinary care to transmit and deliver "accurately" the message the company is not liable, Western Un. Teleg. Co. v. Odom (Tex.), 52 S. W. 632; charged with the duty of faithfully serving the public to all reasonable extent, Western Un. Teleg. Co. v. Rosentretter, 80 Tex. 406, 3 Am. Elec. Cas. 782, 791, 16 S. W. 25, per Marr, J.; obligated to honestly and faithfully perform their duty whenever it is fixed in a given case, Gulf, Col. & S. F. Ry. Co. v. Levy,

to receive the same for transmission.[3] Although such tender of the fee or of prepayment is not necessary to be alleged where there exists a special arrangement with the company for the collection, at certain periods of time, of amounts due for services in transmitting messages agreed to be forwarded at the usual rate.[4] And reasonable diligence to transmit must be exercised,[5] although it is held that the duty as to delivery is not absolute and that only ordinary care is required in promptly transmitting and delivering a telegram;[6] and that

59 Tex. 542, 1 Am. Elec. Cas. 543, 549, also said in this case that the company's duties do not rest solely on contract, but the failure to perform is a tort; the sender of a telegram has a right to rely upon transmission and delivery without unreasonable delay, and is not bound to provide against the company's negligence in failing to do so, Mitchell v. Western Un. Teleg. Co., 12 Tex. Civ. App. 262, 33 S. W. 1016; degree of care and skill is required, which prudent men exercise under like circumstances, Gillis v. Western Un. Teleg. Co., 61 Vt. 461, 2 Am. Elec. Cas. 847, 15 Am. St. Rep. 917, 17 Atl. 736, 25 Am. & Eng. Corp. Cas. 568; "the plaintiff had no reason to anticipate negligence on the part of the defendant (telegraph company); on the contrary, the natural presumption was that the defendant had acted with due care; the nature of the business of a telegraph company requires it to act with such care," Western Un. Teleg. Co. v. Virginia Paper Co., 87 Va. 418, 3 Am. Elec. Cas. 811, 816, 12 S. E. 755; "bound to discharge the duty which they have undertaken with care and diligence, and with a reasonable degree of skill and efficiency," Stevenson v. Mutual Teleg. Co., 16 Up. Can. Q. B. Rep. 530, Allen's Teleg. Cas. 71, 75, per Robinson, Ch. J.; must transmit message with skill and correctness, Berube v. Great N. W. Teleg. Co., Rapport's Judic. Quebec 14, Cour. Super. 178; obligation to use care and skill arises out of contract, Playford v. United Kingdom Elec. Teleg. Co., 17 Law T. (N. S.) 243, 4 Q. B. 706, Allen's Teleg. Cas. 437. See other cases in notes in chaps. I, II, herein. Although the statute may require that the company's agent notify the sender of a message when the line is not in working order, yet if the agent has and can obtain no knowledge of such fact, the statute does not apply. Smith v. Western Un. Teleg. Co., 57 Kan. City Ct. App. 259.

[3] Western Union Teleg. Co. v. McDonald (Tex. Civ. App. 1906), 95 S. W. 691.

[4] Western Union Teleg. Co. v. Henley, 157 Ind. 90, 60 N. E. 682.

[5] Seffel v. Western Union Teleg. Co. (Tex. Civ. App.), 65 S. W. 897.

[6] Western Union Teleg. Co. v. Hays, 29 Tex. Civ. App. 25, 63 S. W. 171. See also Western Union Teleg. Co. v. McDonald (Tex. Civ. App. 1906), 95 S. W. 691; Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687.

an exercise of the highest degree of care, diligence, and skill is unnecessary.[7] But great care and diligence may be required under a statute, although if, in such case, there exists no gross negligence or any other degree of negligence in delivering an erroneous telegram no recovery can be had.[8]

§ 734. **Negligence defined.**— Negligence has been defined as the doing of some act which a cautious and prudent man would not do, or the neglecting to do some act which a cautious and prudent man would not neglect, assuming that he was acting in his own interest or affairs.[9] Thus it is said to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[10] Again it is declared to be want of ordinary care in the discharge of a duty;[11] a want of that degree of care which an ordinarily prudent man would have exercised, under the circumstances;[12] a failure to exercise that degree of care which ordinarily prudent persons would exercise, under the same circumstances;[13] that the degree of

[7] Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687. See Reynolds v. Western Union Teleg. Co., 81 Mo. App. 223.

[8] **Coit** v. Western Union Teleg. Co., 130 Cal. 657, 63 Pac. 83.

[9] Ahern v. Oregon Telephone Co., 24 Or. 276, 4 Am. Elec. Cas. 361, 33 Pac. 403, 35 Pac. 549.

[10] McGraw v. Chicago, R. I. & P. Ry. Co., 59 Neb. 397, 81 N. W. 306.

[11] Murphy v. City of Dayton, 8 Ohio S. & C. P. Dec. 354. See also the following cases: *Illinois:* Illinois Cent. Ry. Co. v. Keegan, 112 Ill. App. 28, affd. 210 Ill. 150, 71 N. E. 321; Chicago City Ry. Co. v. Schuler, 111 Ill. App. 470. *Kentucky:* Louisville & N. R. Co. v. Logsdon, 24 Ky. L. Rep. 1566, 71 S. W. 905. *Missouri:* Ford v. Kansas City, 181 Mo. 137, 79 S. W. 923; Swanson v. City of Sedalia, 89 Mo. App. 121. *New York:* German-American Ins. Co. v. Standard Gaslight Co., 73 N. Y. Supp. 973, 67 App. Div. 539, affd. 174 N. Y. 508, 66 N. E. 1109. *Ohio:* Murphy v. City of Dayton, 7 Ohio N. P. 227, 8 Ohio S. & C. P. Dec. 354. *Texas:* St. Louis Ry. Co. of Tex. v. Brown (Tex. Civ. App.), 69 S. W. 1010. *Wisconsin:* Williams v. North Wisconsin Lumber Co., 124 Wis. 328, 102 N. W. 589; Hanlon v. Milwaukee Elect. Ry. & Light Co., 118 Wis. 210, 95 N. W. 100.

[12] Galveston, H. & S. A. Ry. Co. v. Simon (Tex. Civ. App., 1899), 54 S. W. 309.

[13] Greef v. Brown, 7 Kan. App. 394, 51 Pac. 926. See also the following cases: *Georgia:* Western &

care to be exercised must be determined by the circumstances;[14] the absence of due care, under the circumstances;[15] the want of care and diligence;[16] and also that the test of negligence is the ordinary usage of business.[17] A distinction is also made between the relation which due care sustains as to mere negligence and wilfulness.[18] Numerous other definitions

A. R. Co. v. Vaughan, 113 Ga. 354, 38 S. E. 851. *Missouri*: Anderson v. Union Terminal R. Co., 161 Mo. 411, 61 S. W. 874. *New York*: Heffernan v. Arnold, 63 N. Y. Supp. 261, 48 App. Div. 419. *North Carolina*: Jones v. American Warehouse Co., 138 N. C. 546, 51 S. E. 546, 49 S. E. 355; Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Bradley v. Ohio River & C. Ry. Co., 126 N. C. 735, 36 S. E. 181. *Texas:* Houston & T. C. R. Co. v. Buchanan (Tex. Civ. App.) 84 S. W. 1073; Missouri & K. T. Ry. Co. of Texas v. Wood (Texas Civ. App.) 81 S. W. 1187; Galveston H. & S. A. Ry. Co. v. Simon (Tex. Civ. App.), 54 S. W. 309.

[14] Galveston, H. & S. A. R. Co. v. Gormley, 91 Tex. 393, 43 S. W. 877, 9 Am. & Eng. R. Cas. (N. S.) 468, case reverses 42 S. W. 314.

[15] Patton v. Southern R. Co. (U. S. C. C. App., 4th Cir.), 42 U. S. App. 567, 27 U. S. C. C. App. 287, 82 Fed. 979. See also Wofford v. Clinton Cotton Mills, 72 S. C. 346, 51 S. E. 918. Examine as to "due care," "ordinary care," etc., Raymond v. Portland R. Co., 100 Me. 529, 62 Atl. 602.

[16] Hodgson v. Dexter, 1 Cranch (U. S. C. C.), 111.

[17] Beck v. Hood, 185 Penn. St. 32, 99 Atl. 842.

[18] Tinsley v. Western Union Teleg. Co., 72 S. C. 350, 51 S. E. 913.

Distinctions — Negligence — Ordinary negligence — Gross negligence:— The term "negligence" by itself suggests only inadvertence or want of ordinary care, and however great may be the degree of such want of care, so long as the element of inadvertence remains, wilfulness is excluded. The term "gross negligence" signifies wilfulness. It involves intent, actual or constructive, which is a characteristic of criminal liability. If one is guilty of inadvertence causing injury to another, that one's fault is denominated want of ordinary care. If one is guilty of wilful misconduct causing actionable injury to another, the former's fault is denominated "gross negligence." Since in the first case suggested intention to do the injury, actual or constructive, must be absent and in the second case present, a complaint using language to describe defendant's fault appropriate to both species of misconduct, as if they occurred at one and the same time, and that one included the other, is indefinite and uncertain. Gross negligence does not include ordinary negligence, and proof of the former does not prove but rather disproves the latter. Rideout v. Winnebago Traction Co. (Wis. 1904) 101 N. W. 672, 17 Am. Neg. Rep. 400. See also as to gross negligence,

have been given,[20] but the nearest approach to any definite standard is that of a cautious and prudent man, engaged in his own affairs, subject, however, to the varying circumstances,

Kelly v. Malott, 135 Fed. 74, 67 C. C. A. 548; Louisville & N. R. Co. v. Walden, 25 Ky. L. Rep. 1, 74 S. W. 694; Chesapeake & O. Ry. Co. v. Dodge, 23 Ky. L. Rep. 1959, 66 S. W. 606; Illinois Cent. Ry. Co. v. Stewart, 23 Ky. L. Rep. 637, 63 S. W. 596; Macon v. Puducah St. Ry. Co., 23 Ky. L. Rep. 46, 62 S. W. 496; Dolphin v. Worcester Consolidated St. Ry. Co., 189 Mass. 270, 75 N. E. 635.

Gross negligence — Insufficient plea — Delivery telegram. See Kopperl v. Western Union Teleg. Co. (Tex. Civ. App.), 85 S. W. 1018.

Wilful, or wanton negligence, whereby liability is incurred irrespective of the contributory negligence of the party injured, is a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. Alger, Smith & Co. v. Duluth-Superior Traction Co. (Minn. 1904) 101 N. W. 298, 17 Am. Neg. Rep. 95. As to wanton or willful negligence, see Cleveland C. C. & St. L. Ry. Co. v. Cline, 111 Ill. App. 416, 424; Chicago Terminal Transfer R. Co. v. Gruss, 102 Ill. App. 439, affd. 200 Ill. 195, 65 N. E. 693. As to meaning of willful act in connection with negligence, see Gosa v. Southern Ry. 67 S. C. 347, 45 S. E. 810.

As to comparative negligence, see Harvey v. Chicago & A. R. Co., 116 Ill. App. 507, affd. 77 N. E. 569; Harrison v. Kansas City Electric Light Co. (Mo. 1906), 93 S. W. 951; Weaver v. Pennsylvania R. Co., 212 Pa. 632, 61 Atl. 1117. See also as to degrees of negligence Belt Ry. Co. v. Banicki, 102 Ill. App. 642; Magrane v. St. Louis & Suburban Ry. Co., 183 Mo. 119, 81 S. W. 1158.

[20] *United States*: Texas & P. R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 Ed. 1136; Railroad Co. v. Jones, 95 U. S. 439; Hunter v. Kansas City & M. R. & B. Co. (U. S. C. C. App., 6th Cir.), 54 U. S. App. 653, 29 U. S. C. C. A. 206, 85 Fed. 379; Rosen v. Chicago G. W. R. Co. (U. S. C. C. A., 8th Cir.), 49 U. S. App. 647, 27 U. S. C. C. A. 534, 83 Fed. 300. *Connecticut*: Lanfer v. Bridgeport Tract. Co., 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533, 2 Chic. L. Jour. Week. 287; Nolan v. New York, etc., R. Co., 53 Conn. 471, 4 Atl. 106. *Georgia*: Brunswick & W. R. Co. v. Gibson, 97 Ga. 489, 25 S. E. 484, 5 Am. & Eng. R. Cas. (N. S.) 441. *Indiana*: Wabash R. Co. v. Miller, 18 Ind. App. 549, 48 N. E. 663. *Maine*: Cowett v. American Woolen Co., 100 Me. 65, 60 Atl. 703. *Maryland*: Baltimore. C. P. R. Co. v. Nugent, 86 Md. 349, 38 Atl. 779, 39 L. R. A. 161. *Michigan*: Webster v. Symes, 109 Mich. 1, 66 N. W. 580, 2 Det. L. News, 982. *Nebraska*: McGraw v. Chicago R. I. & P. Ry. Co., 59 Neb. 397, 81 N. W. 306; Brotherton v. Manhattan Beach I. Co., 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, affd. on rehearing, 50 Neb. 214, 69 N. W. 757. *New York*:

and it has been declared to be "a word of very undefined signification." [21]

§ 735. **Want of repair of telegraph apparatus — Liability.—** If the failure to send a telegram results from a long standing want of repair of the company's apparatus. a verdice for the defendant will be properly refused.[22]

§ 735a. **Delay — Storms — Lines Down.—** Knowledge of the company or of the sender of a message as to the inability to transmit messages by reason of storms and the lines being down constitutes an important factor in determining whether such negligence existed as to render the company liable for delay or nontransmission. Thus if the former has no such knowledge at the time it accepts a telegram for transmission it does not constitute negligence to fail to transmit by another line.[23] Nor is the company liable, where the sender has not had the message repeated, for delay, of which its agent was ignorant, occasioned at an intermediate office to which the telegram had been sent for transmission because direct communication could not, by reason of storms, be had with the city to which the message was directed to be sent.[24] But delay occasioning damage may render the company liable, even though the sender's agent had knowledge that certain lines were down, where he did not know but that there were other lines of the company over which the telegram could be forwarded. And the mere posting of notices in the office of the company as to the lines being down and that delay would

Coxhead v. Johnson, 20 N. Y. App. Div. 605; McKay v. Buffalo, etc., Co., 40 N. Y. Supp. 592, 17 Misc. (N. Y.) 601. *Ohio*: Maitland v. Cleveland, L. & W. R. Co. (C. P.), 4 Ohio L. News, 289. *Pennsylvania*: Philadelphia, etc., R. Co. v. Stinger, 78 Penn. St. 225. *Texas* Missouri Pac. R. Co. v. Harris, 67 Tex. 169; Milligan v. Texas & N. O. R. Co. (27 Tex. Civ. App. 600), 66 S. W. 896.

[21] Submarine Teleg. Co. v. Dickson, 15 C. B. (N. S.) 759, 10 Jur. (N. S.) 211, Allen's Teleg. Cas. 229, 247. 1 Shearm. & Redf. on Neg. (5th ed.), § 1.

[22] Western Un. Teleg. Co. v. Merrill (Tex. Ct. Civ. App., 1893), 22 S. W. 826.

[23] Faubion v. Western Un. Teleg. Co., 36 Tex. Civ. App. 98, 81 S. W. 56.

[24] Jacob v. Western Un. Teleg. Co., 135 Mich. 600, 98 N. W. 402.

be occasioned thereby is insufficient to exempt the company from liability for delay in transmission unless it appears that such facts were brought to the sender's knowledge or notice, or that he had actual notice of the condition of the wires and the congestion of business.[25]

§ 736. **Negligence — Gross negligence — Liability — Inquiry as to error — Telegraph companies — Generally.**— Liability for failure to deliver a telegraphic despatch or to notify the sender of the company's inability to deliver depends upon the question of negligence.[26] The addressee is not in Missouri, the sender's agent to waive delivery.[27] A lack of due diligence in delivery may be assumed where the message arrived at the terminal office, in a small town, half an hour before closing time, and the addressee was a well known citizen living near the office.[28] The company is guilty of gross negligence where the message as received for transmission is plainly written, and there is a mistake in transmission, and the addressee, through the receiving operator, causes due inquiry to be made as to the message being correctly sent, and the company has no exculpatory evidence.[29] A telegraph company should promptly and immediately deliver its messages, or as nearly so as practicable, upon the day of date.[30] But delay in transmission is not necessarily gross negligence.[31] Although mislaying a telegram and failing to send it for a week constitutes gross negligence.[32]

§ 737. **Same subject continued.**— A failure to deliver at all, the message merely being sent to some repeating office, is

[25] Western Un. Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

[26] Western Un. Teleg. Co. v. Davis (Tex., 1899), 51 S. W. 258.

[27] Brashears v. Western Un. Teleg. Co., 45 Mo. App. 433, 3 Am. Elec. Cas. 701.

[28] Western Un. Teleg. Co. v. Carter, 85 Tex. 580, 22 S. W. 961.

[29] Western Un. Teleg. Co. v. Howell, 38 Kan. 685, 17 Pac. 313.

[30] Bliss v. Western Un. Teleg. Co., 30 Mo. App. 103, 2 Am. Elec. Cas. 631.

[31] Birkett v. Western Un. Teleg. Co., 103 Mich. 361, 50 Am. St. Rep. 374, 61 N. W. 645.

[32] Mowry v. Western Un. Teleg. Co., 52 Hun (N. Y.), 126, 20 N. Y. St. R. 626, 5 N. Y. Supp. 952, 2 Am. Elec. Cas. 679; Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 2 Am. Elec. Cas. 795, 9 S. W. 598.

negligent.[33] Forty-eight hours, when the distance is only twelve miles from the transmitting station, constitutes negligent delay.[34] From one afternoon until evening of the next day is negligent delay in transmission.[35] So delay in delivery for three days, if unexplained, is negligence.[36] If the pleadings, in an action for damages, consequent upon a mistake in the messages, does not charge negligence, an instruction that the company is not responsible as a common carrier, but only as a general agent for such gross negligence as amounts to fraud, may be refused, as it is not justified by the pleadings.[37] Again, if the company makes a mistake in telegram, whereby an agent makes a contract for the sale of property in his own name, which is not binding on the principal, but the latter ratifies and carries on the contract to protect his agent, he has then no right of action against the company.[38] It is not a sufficient exercise of the diligence required to attempt to deliver a message to a business house on Saturday evening, after the close of business hours and then to call again on Sunday, no further effort being made to deliver said despatch, the company merely retaining the same in its office.[39] And where a cablegram was received at 10:24 a. m., and not delivered until 11:55 a. m., when a five minutes' walk would have enabled the messenger to deliver it, a verdict is not wrong which finds such delay unreasonable.[40]

§ 737a. **Negligence Continued — Effect of — Excuses.**— If the company is negligent in transmitting a message accepted

[33] Western Un. Teleg. Co. v. Fontaine, 58 Ga. 433, 1 Am. Elec. Cas. 229.

[34] Thompson v. Western Un. Teleg. Co., 64 Wis. 531, 25 N. W. 789, 54 Am. Rep. 644, 1 Am. Elec. Cas. 772. See § 737b herein.

[35] Candee v. Western Un. Teleg. Co., 34 Wis. 47, 17 Am. Rep. 452, 1 Am. Elec. Cas. 99.

[36] Harkness v. Western Un. Teleg. Co., 73 Iowa, 190, 2 Am. Elec. Cas. 571, 34 N. W. 811; Manville v. Western Un. Teleg. Co., 37 Iowa, 214, 1 Am. Elec. Cas. 92.

[37] Washington & N. O. Teleg. Co. v. Hobson, 15 Gratt. (Va.) 122, Allen's Teleg. Cas. 120.

[38] Shingleur v. Western Un. Teleg. Co., 72 Miss. 1030, 18 So. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604, 12 Am. R. & Corp. Cas. 648, 6 Am. Elec. Cas. 783.

[39] Western Un. Teleg. Co. v. Lindley, 62 Ind. 371, 1 Am. Elec. Cas. 275.

[40] Western Un. Teleg. Co. v. Fatman, 73 Ga. 285, 1 Am. Elec. Cas. 666, 669.

by it, its failure to fulfill its obligation is held to constitute a tort.[41] And where the agent to whom the message was delivered for transmission was informed as to which place the telegram was to be sent, the fact that there were two of the same name does not exempt the company from the results of its negligent delay, nor is the company relieved of liability for delay by reason of its having no messengers in the office, nor by the fact that its agent was not allowed to leave the office.[42] Again, the principle of the rule that a common carrier cannot escape the results of its negligence because the condition of the person thereby affected was unusual, applies also to the business of a telegraph company in transmitting messages for hire.[43] And where the plaintiff is not in privity but is a stranger as to certain third persons, the latter's negligence cannot operate to excuse the company's neglect to deliver a telegram.[44] In case of negligence in laying aside and not transmitting the message the company is not aided by a limitation of liability in case of unrepeated messages.[45] A neglect of duty to deliver messages in the order received, should, when relied upon be averred, although the allegation of negligence and carelessness in delivering a second message, so that it was received before an earlier one, which was alleged to have been negligently delayed in transmission, may be a sufficient averment of negligence.[46] And the plaintiff, and defendant company may treat an issue as made as to negligence in transmission and delivery even though the complaint only avers negligence in delivery.[47]

§ 737b. **Negligence — Presumptions as to.**— A presumption of negligence exists where a telegraph company fails to send,[48]

[41] Cowan v. Western Un. Teleg. Co., 122 Iowa, 379, 98 N. W. 281. See § 1013 herein.

[42] Western Un. Teleg. Co. v. Parsons, 24 Ky. L. Rep. 1008, 72 S. W. 800.

[43] Western Un. Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052.

[44] Barnes v. Western Un. Teleg. Co., 27 Nev. 438, 65 L. R. A. 666, 76 Pac. 931.

[45] Brooks v. Western Un. Teleg. Co., 26 Utah, 147, 72 Pac. 499.

[46] Hocker v. Western Un. Teleg. Co., 45 Fla. 363, 34 So. 901.

[47] Western Un. Teleg. Co. v. Parsons, 24 Ky. L. Rep. 1008, 72 S. W. 800.

[48] Western Un. Teleg. Co. v. Merrill (Ala.), 39 So. 121.

or where it is proven to have delayed the delivery of a message,[49] or has neglected to deliver it within a reasonable time;[50] as where delivery to a certain street number was delayed until the next day after it was received and then the addressee called for it;[51] or where without legal excuse a message transmitted to a place only a few miles distant is delayed twenty-seven hours,[52] or where the delay is only or fourteen hours.[53] And prima facie negligence may be evidenced by an error in changing the last syllable of an addressee's name.[54]

§ 737c. **Negligence — Questions for Jury.**— The question, however, or ordinary care,[55] or of intentional wrong or inadvertence of a telegraph company may be one for the jury,[56] as may also the question of the addressees identity being ascertainable in case of similiarity of names caused by two letters in the name being transposed,[57] and evidence should not be excluded from the jury which enables them to determine whether a certain mistake could readily occur without negligence even though it is conceded that it could occur without negligence of the company.[58] But it constitutes error even though hamless to submit a question of modification by parol of the printed stipulations on the back of a telegram in a suit for negligence in delivery.[59]

[49] Poulnot v. Western Un. Teleg. Co., 69 S. C. 545, 48 S. E. 622.

[50] Arial v. Western Un. Teleg. Co., 70 S. C. 418, 50 S. E. 6.

[51] Green v. Western Un. Teleg. Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985.

[52] Western Un. Teleg. Co. v. Parsons, 24 Ky. L. Rep. 1008, 72 S. W. 800. See § 737 herein.

[53] Young v. Western Un. Teleg. Co., 65 S. C. 93, 43 S. E. 448.

[54] Western Un. Teleg. Co. v. Morris, 60 S. W. 982.

[55] Poulnot v. Western Un. Teleg. Co., 69 S. C. 545, 48 S. E. 622.

[56] Marsh v. Western Un. Teleg. Co., 65 S. C. 430, 43 S. E. 953.

[57] Cogdell v. Western Un. Teleg. Co., 135 N. C. 431, 47 S. E. 490.

[58] Western Un. Teleg. Co. v. Brown (Tex. Civ. App.), 75 S. W. 359.

Evidence of plaintiff's knowledge of mistake — Jury.— See Western Un. Teleg. Co. v. Chambers, 34 Tex. Civ. App. 17, 77 S. W. 273.

[59] Western Un. Teleg. Co. v. Stubbs (Tex. Civ. App. 1906), 94 S. W. 1083.

§ 737d. **Negligence — Obligation to trace or repeat Message.** — A telegraph company may at the risk of being held liable in direct damages if it refuses so to do, be obligated to trace or repeat a message upon a tender of charges where an error occurs in transmission, as failure to do this constitutes negligence.[60]

§ 738. **Negligence — Gross negligence or misconduct of operator.**— Gross negligence and palpable misconduct, exists where an operator withholds a message for his own personal advantage, as where the despatch announced the failure of a bank to a branch bank, and the message was withheld to enable the operator to withdraw his money, and the company is liable to the receiver for the money so withdrawn, but not for money subsequently withdrawn from said bank.[61] It is also gross negligence of the terminal operator to omit words from a message, when he is informed of and knows the number of words is less than in the telegram as forwarded to him,[62] especially so where the transmitting operator testifies that the receiving operator is incompetent.[63] A telegraph company is liable for loss or damage, where it fails to provide servants and equipments to meet the demand of the law.[64] And it is gross negligence to employ an operator who is ignorant of the existence of a country town, which is one of the stations on the company's line.[65] And it is said to be the duty of the operator to write upon the message the name of the place from which it is sent.[66] But if the operator is skilful and careful, his negligence in transmitting a different message is inexcusable.[67] If the com-

[60] Newsome v. Western Un. Teleg. Co., 137 N. C. 513, 50 S. E. 239. There was, however, no evidence as to the amount of the damages if any.

[61] Stiles v. Western Un. Teleg. Co. (Ariz., 1887), 15 Pac. 712, 2 Am. Elec. Cac. 471.

[62] Western Un. Teleg. Co. v. Goodbar (Miss., 1890), 7 So. 214.

[63] Pegram v. Western Un. Teleg. Co., 97 N. C. 57, 2 Am. Elec. Cas. 684, 2 S. E. 256.

[64] Western Un. Teleg. Co. v. Scircle, 103 Ind. 227, 1 Am. Elec. Cas. 787, 2 N. E. 604.

[65] Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

[66] Western Un. Teleg. Co. v. Simpson, 73 Tex. 422, 2 Am. Elec. Cas. 824, 11 S. W. 385.

[67] Tyler v. Western Un. Teleg. Co., 60 Ill. 491, 1 Am. Elec. Cas. 14, 19.

pany employs incompetent agents, this does not operate, of itself, to charge it with negligence, where it does not appear that said agents had been negligent at any other time.[68] Again, where failure to transmit a message was due to long standing want of repair of the company's apparatus, a verdict for said defendant company was held properly refused.[69] Although it is liable as for a failure to transmit and deliver, where the operator substitutes a deadhead message in his own name, for one which the sender had paid for transmitting, and where such act is not ratified by the sender.[70] An agreement with the sender for a subsequent transmission is not available as an excuse for failure or neglect to translate originally where the later agreement was brought about by the false representations of the company's servants;[71] thus where such servants, by stating that a message could not be sent at the time, induce a party to agree for its transmission the next morning, and such delay is unwarranted, as the message could have been forwarded when received, a recovery may be had.[72] An averment of incompetency of the company's agent is insufficient where the carelessness is not connected with the specific act upon which reliance must be had for recovery in case of neglect in delivering a telegram.[73]

§ 738a. **Contributory negligence.**— As stated elsewhere herein contributory negligence may avail the telegraph company as an excuse or defense,[74] and if the plaintiff's negligence directly contributed to the result, the court will not consider whether such negligence or that of the defendant's was the more proximate cause.[75] But it is also held that it is only

[68] So held in Western Un. Teleg. Co. v. Karr, 5 Tex. Ct. App. 60, 24 S. W. 302.

[69] Western Un. Teleg. Co. v. Merrill (Tex. Civ. App., 1893), 22 S. W. 826.

[70] Western Un. Teleg. Co. v. Moss, 93 Ga. 494, 21 S. E. 63, 4 Am. Elec. Cas. 707.

[71] Seffel v. Western Un. Teleg. Co. (Tex. Civ. App.), 65 S. W. 897.

[72] Western Un. Teleg. Co. v. Seffel, 31 Tex. Civ. App. 134, 71 S. W. 616.

[73] Hocker v. Western Un. Teleg. Co., 45 Fla. 363, 34 So. 901.

[74] See § 821 herein. See also Mitchiner v. Western Un. Teleg. Co., 70 S. C. 522, 50 S. E. 190.

[75] Western Un. Teleg. Co. v. Baker, 140 Fed. 315. See Mauch v. City of Hartford, 112 Wis. 40, 87 N. W. 816.

necessary, in order to be availed of, to show that the negligence of the plaintiff concurred and contributed proximately with that of the telegraph company to cause the injury complained of,[76] and contributory negligence cannot exist where, under the circumstances, the defendant company is not negligent, nor does the doctrine apply where the plaintiff's negligence precedes and is not concurrent with that of the defendant; as where the plaintiff is alleged to have misspelled the addressee's name and the action is based upon neglect to deliver the telegram and to inquire as to the identity of the addressee.[77] Nor does contributory negligence arise where the plaintiff, in an action against the company for refusal to receive an important message, neglects to select other means of communication or transmission where he has no knowledge of the existence of such other means.[78] And the fact that certain matters are nonapparent upon the face of messages cannot be availed of as constituting such contributory negligence as to preclude recovery where the circumstances and the situation have been explained by the sender to the company's agent who received the messages for transmission.[79] But where the gravamen of the charge was not a failure to promptly deliver a message but was the negligent delivery of

[76] Western Un. Teleg. Co. v. Rawls (Tex. Civ. App.), 62 S. W. 136. See St. Louis Southwestern of Tex. v. Parks, (Tex. Civ. App.), Ry. Co. of Tex. v. Parks, (Tex. Civ. App.), 90 S. W. 343. Examine Kansas City Southern Ry. Co. v. Prunty, 133 Fed. 13, 66 C. C. A. 163.

[77] Cogdell v. Western Un. Teleg. Co., 135 N. C. 431, 47 S. E. 490.

Furnishing best address obtainable though an indefinite one. See as to contributory negligence, Western Un. Teleg. Co. v. Bowen (Tex. Civ. App.), 76 S. W. 618, rev'd 97 Tex. 621, 81 S. W. 27.

Failure to designate official capacity of addressee. See as to charge as to contributory negligence, Western Un. Teleg. Co. v. Wofford, 32 Tex. Civ. App. 427, 74 S. W. 943, 72 S. W. 620.

More certain designation as to locality — Neglect to address in care of another — Where not contributory negligence. [2]Western Un. Teleg. Co. v. James, 31 Tex. Civ. App. 503, 73 S. W. 79.

[78] Western Un. Teleg. Co. v. Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078.

Necessity of subsequent efforts of sender to communicate with addressee. See Western Un. Teleg. Co. v. Barefoot (Tex. Civ. App.), 74 S. W. 560, rev'd 97 Tex. 159, 76 S. W. 914.

[79] Hocker v. Western Un. Teleg. Co., 45 Fla. 363, 34 So. 901.

a message intended for another not the actual addressee, which was occasioned by a similarity in sound of names, and the person to whom the delivery was made did not notice the difference and an inquiry was made by telegram by the company's agent at the request of the recipient of the message, but a reply was not received and the person to whom the delivery was made acted upon the contents of the telegram, it was held that the company was not liable. "If it were to be conceded that the defendant may have been found to have been negligent, plaintiff was none the less so because he acted with precisely the same information possessed by the defendant, and therefore must have been guilty of contributory negligence and cannot recover," even though the defendant's agent undertook to ascertain for whom the telegram was intended, since, except for the agent's promise, the duty of making the inquiry did not devolve upon defendant, and it was bound only to exercise reasonable diligence in delivering the telegram as received.[80]

§ 739. **What constitutes transmission of message — Delivery.** — Transmission is held to include delivery, so that a failure to transmit includes a failure to deliver, and mere transmission of a message to the receiving office does not complete a delivery, since this term includes the delivery to the person to whom the message is addressed.[81] But it is also held that transmission means only the sending of a message from the office or station where it is received, to the terminal office, and that the work performed by the messenger in carrying the message from the sender to the telegraph office is no part of the transmission.[82] Another decision goes to the extent of holding that the company's contract with the sender of a message is not fulfilled by a delivery through a telephone, but that there must be a delivery in writing, and in case of error in such delivery by telephone, the company will become liable for the

[80] Bowyer v. Western Un. Teleg. Co. (Iowa, 1906), 106 N. W. 748.

[81] Western Un. Teleg. Co. v. Gongar, 84 Ind. 176, 1 Am. Elec. Cas. 412; Western Un. Teleg. Co. v. Lindley, 62 Ind. 371, 1 Am. Elec. Cas. 275; Western Un. Teleg. Co. v. Taylor, 84 Ga. 408, 3 Am. Elec. Cas. 604, 613, 11 S. E. 396.

[82] Stamey v. Western Un. Teleg. Co., 92 Ga. 613, 4 Am. Elec. Cas. 704, 18 S. E. 1008.

statutory penalty.[83] Although in this last case it is declared that the general contract might be varied by a special agreement, making a delivery other than by writing sufficient. We believe, as we have stated in that part of this work, where questions of interstate commerce and the Federal Constitution have been considered, that in certain cases the act of transmission and delivery may be separable, so far as the remedy is concerned, and the point arises whether the tort, as under a statutory penalty case, was committed in one State or in another. But beyond this, the question as intimated in the last case in this section depends upon the contract. The usual contract for transmission is, as a rule, not separable from the delivery. The sender contracts, generally, that the message shall be transmitted, that is, carried over the intervening distance from him to the addressee, by the telegraph company, the agency employed by the company is not restricted to the telegraph instruments and apparatus, and it is within the intent of the contract that the despatch delivered should be a written message, otherwise the very object for using the telegraph might fail.[84] The custom to demand extra charges for special delivery may constitute part of the contract of transmission and also raise a question of negligence for the jury.[85]

§ 740. **"Transmit"— Telephone company — Exclusive contract — Discrimination — Canadian decision.**— The Bell Telephone Company carried on the business of executing orders, by telephone, for messenger boys, cabs and the like, which it sold to the Electric Dispatch Company, agreeing, among other things, not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Electric Company. The G. Company afterwards established a messenger service, for the purposes of which the wires of the telephone company were used. An action was brought for the breach of the agreement with the Electric Company, and for an in-

[83] Brashears v. Western Un. Teleg. Co., 45 Mo. App. 433, 3 Am. Elec. Cas. 701. See § 741a, herein.

[84] But see chapters herein on penalty statutes.

[85] Evans v. Western Un. Teleg. Co., (Tex. Civ. App.), 56 S. W. 609.

junction to restrain the telephone company from allowing their wires to be used for giving orders for messengers, etc. It was held, Ritchie, J., doubting, that the telephone company, being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the telephone company was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications, with a view to preventing such orders being given,[86] and it might also be urged that, in so far as the G. Company was concerned, the Bell Company could not refuse to grant to the G. Company the use of its wires, simply because of the contract with the Electric Company.

§ 740a. **Receiving messages by telephone for transmission by telegraph.**— There is no doubt but that the telephone at the present day is extensively used for the purpose of facilitating the despatch of messages by telegraph, for the reason that the message can be sent by telephone to the telegraph office with as much accuracy as the written message and with a greater saving of time than by the old methods in use before the telephone become the important and necessary instrument of communication it now is. What is said by the court in a Federal case in considering the question of a telegraph company's obligation to ascertain the identity and authority of a person sending a message over the telephone,[87] is pertinent here. The court says: "The great purpose of telegraphy is the quick transmission of messages from senders to addressees. In the conduct of this business all other considerations are subordinate. The telephone furnishes the most speedy and convenient means of communicating these messages from the senders to the offices of the telegraph companies, and from these offices to the addressees of the messages. For this reason its use for this purpose has become general throughout the land." [88] It does not

[86] The Electric Disp. Co. v. Bell Teleph. Co., 20 Can. Sup. Ct. 83.

[87] See §§ 776b, 981b, herein for further consideration of this case and the questions involved.

[88] Bank of Havelock v. Western Un. Teleg. Co., 141 Fed. 522, 529, per Sanborn, Civ. J., in discussing case.

constitute negligence for a telegraph company to receive a message over the telephone for transmission and to forward and receive the same and attempt to deliver it to a person of the name understood by the sending agent to be that of the addressee, there being no other evidence of negligence, and the sender being the agent of the plaintiff.[89]

§ 741. **Custom to receive messages by telephone.**— A custom of the telegraph company's employees to receive messages by telephone for transmission binds the company to send messages thus agreed to be sent, where the company has acquiesced in such custom.[90]

§ 741a. **Delivery of telegram by telephone — Messenger, sendee's agent.**— If the addressee asks the messenger to telephone him the contents of a telegram because he is outside of free delivery limits, such messenger is thereby made the sendee's own agent; and even though the telephone used was in the telegraph company's office and the telegraph operator knew that the message was telephoned, still the principle of adoption or ratification of the messenger's acts would not apply so as to render the company liable for his mistakes made in so telephoning, it not appearing that the operator heard the messenger read the message or that the operator knew of any mistake being made.[91] The question, however, of negligence in wrongfully delivering a message through the telephone may be one for the jury.[92]

§ 742. **Delivery of message — Duty — Failure to deliver — Liability — Contract.**— A telegraph company must receive, transmit and deliver a message promptly and for a failure so to do it is liable [93] for the direct and natural result, without regard

[89] Western Un. Teleg. Co. v. Gault, 28 Ky. L. Rep. 881, 90 S. W. 610. The name understood by the receiving agent as that of the addressee was "John P. Ganet," that of the plaintiff was "John P. Gault."

[90] Texas Teleg. & Teleph. Co. v. Seiders, 9 Tex. Civ. App. 43, 29 S. W. 358.

[91] So held in Norman v. Western Un. Teleg. Co., 31 Wash. 577, 72 Pac. 474. See § 739, herein.

[92] Barnes v. Western Un. Teleg. Co., 120 Fed. 550.

[93] Cogdell v. Western Un. Teleg.

to the degree of negligence.[94] And the contract may bind the company as to the place of delivery irrespective of the direction in the message.[95] But the company is not liable for unavoidable delay in delivery.[96] A failure to deliver is held not a mere breach of contract, but a neglect to perform a duty which rests upon the telegraph company as a public servant.[97] But the company may be liable for a breach of contract to deliver a message outside of the State.[98] The company, however, is not liable for damages for failure to make a prospective "trade," unless it appears that it would have been made if there had been a prompt delivery of a message.[99] Again, it is held that delivery is of the essence of the contract for transmission and delivery, and its breach in this respect authorizes a recovery back of the consideration paid.[1]

§ 743. **Delivery — Duty to find addressee — Personal Delivery.**— It is the duty of a telegraph company to use at least reasonable diligence to find the addressee and deliver the message, where it requires a delivery.[2] If the company is unable

Co., 135 N. C. 431, 47 S. E. 490. See next following note.

[94] Western Un. Teleg. Co. v. Broesche, 72 Tex. 654, 2 Am. Elec. Cas. 815, 10 S. W. 734. But see § 722, herein.

[95] Harper v. Western Un. Teleg. Co., 92 Mo. App. 304.

Duty to obtain more certain information than address. See Western Un. Teleg. Co. v. Bowen, 26 S. W. 613 (Tex. Civ. App.), rev'd 97 Tex. 621, 81 S. W. 27.

[96] Western Un. Teleg. Co. v. Stiles (Tex. Civ. App.), 35 S. W. 76.

[97] Reese v. Western Un. Teleg. Co., 123 Ind. 294, 3 Am. Elec. Cas. 640, 649, 24 N. E. 163.

[98] Kemp v. Western Un. Teleg. Co., 28 Neb. 661, 3 Am. Elec. Cas. 711, 715, 44 N. W. 1064.

Law of state from which telegram sent — When it governs. See Hancock v. Western Un. Teleg. Co., 137 N. C. 497, 49 S. E. 952. See § 812c. herein.

[99] Western Un. Teleg. Co. v. Morrison (Tex. Civ. App.), 33 S. W. 1025.

[1] Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 3 Am. Elec. Cas. 768, 774, 12 S. W. 857. As to liability for failure to transmit, see Francis v. Western Un. Teleg. Co., 58 Minn. 252, 49 Am. St. Rep. 507, 59 N. W. 1078.

[2] Western Un. Teleg. Co. v. Whitson (Ala., 1906), 41 So. 405; Hurlburt v. Western Un. Teleg Co., 123 Iowa, 295, 98 S. W. 794; Reynolds v. Western Un. Teleg. Co., 81 Mo. App. 223. See Reed v. Western Un. Teleg. Co., 31 Tex. Civ. App. 116, 71 S. W. 389. Examine the cases under the following sections. Examine note, 27 Am. St. Rep. 923–925.

to make a personal delivery, it is its duty to deliver the message at the store or residence of the sendee, at the place of destination;[3] or the delivery may in such case be made to the authorized agent of the addressee.[4] But although a sender of a message may contract for a personal delivery of a message, and a delivery in such case to an agent would be insufficient, still no such contract is implied from the mere act of delivery of a message to a telegraph company to be transmitted according to the usual regulations. The mere acceptance of a message by a telegraph company does not necessitate a delivery to the sendee in person, but only obligates the company to make such a delivery as would be good in law; that is any delivery of a telegram which in law would be good as between the receiver of the message and the company is good as between the sender and the company.[5] Again, the following refusal to charge was held correct: "If a party has a known place of residence and a known place of business, it is no part of defendant's duty to hunt said party upon the streets of the city; and the failure of defendant's messenger to hunt the party on the streets is no evidence of negligence on the part of the defendant."[6] And a failure of the messenger to use ordinary diligence to find the addressee is negligence, for which the company is liable.[7] In case there is a residence and place of business of the addressee at the town or city to which the message is sent for delivery, said despatch should be delivered to some one at such residence or business place.[8] But the company is also obligated to use reasonable diligence to find the addressee; where he is not at the place specified in the address, it is insufficient to leave the telegram at such place.[9] Nor will a delivery made to a boy at play be sufficient although he is a

[3] Western Un. Teleg. Co. v. Woods, 56 Kan. 737, 44 Pac. 989.

[4] Western Un. Teleg. Co. v. Whitson (Ala., 1906), 41 So. 805.

[5] Norman v. Western Un. Teleg. Co., 31 Wash. 577, 72 Pac. 474.

[6] Western Un. Teleg. Co. v Cooper, 71 Tex. 507, 2 Am. Elec. Cas. 801, 10 Am. St. Rep. 772, and n., 9 S. W. 593, 1 L. R. A. 728.

[7] Herron v. Western Un. Teleg. Co. (90 Iowa, 129), 57 N. W. 696. See Western Un. Teleg. Co. v. Manker (Ala., 1906), 41 So. 851.

[8] Western Un. Teleg. Co. v. Woods, 56 Kan. 737, 44 Pac. 989.

[9] Western Un. Teleg. Co. v. DeJarles (8 Tex. Ct. Civ. App. 109), 27 S. W. 792.

son of the addressee.[10] So a telegram given to the addressee's son, who is passing by, makes the latter the company's messenger and the company becomes liable for his negligent delay.[11]

§ 743a. **Delivery of message — Basis of recovery — Duty — Rulings and instances.**— Not only must the claimed damage or loss have been sustained but it must also have been occasioned by reason of the claimed negligent acts of the telegraph company or a recovery will not be upheld.[12] And recovery will be precluded in a case where the alleged error was not the proximate cause of the plaintiff's loss;[13] or where he has obtained information equally as valuable from other sources than the undelivered telegram.[14] But the question whether a definite contract of employment was made, the loss of which is relied upon, may be one for the jury,[15] as may also the question whether the alleged delay was due to natural causes uncontrollable by the company,[16] or whether the alleged loss was due to the company's negligence.[17] Evidence is improperly admitted when offered to prove matters which are not properly averred, or when too remote as to the claimed damages.[18] But it may be proven by competent testimony that the addressee was well known and resided but a short distance from the company's office;[19] or that if proper inquiry had been made of a

[10] Western Un. Teleg. Co. v. Whitson (Ala., 1906), 41 So. 405.

[11] Mott v. Western Un. Teleg. Co. (N. C.), 55 S. E. 363.

[12] *Georgia*: Western Un. Teleg. Co. v. Bailey, 115 Ga. 725, 42 S. E. 89. *Mississippi*: Western Un. Teleg. Co. v. Pallotta, 81 Miss. 216, 32 So. 310. *New York*: Altman v. Western Un. Teleg. Co., 84 N. Y. Supp. 54. *North Carolina*: See Salmons v. Western Un. Teleg. Co., 133 N. C. 541, 45 S. E. 896. *South Carolina*: Wallingford v. Western Un. Teleg. Co., 60 S. C. 201, 38 S. E. 443. *Texas*: Western Un. Teleg. Co. v. Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580.

[13] Strahorn-Hutton-Evans Co. v. Western Un. Teleg. Co., 101 Mo. App. 500, 74 S. W. 876.

[14] Reynolds v. Western Un. Teleg. Co., 81 Mo. App. 223.

[15] Western Un. Teleg. Co. v. Bowman, 141 Ala. 175, 37 So. 493.

[16] Western Un. Teleg. Co. v. McGown (Tex. Civ. App.), 93 S. W. 710.

[17] Wallingford v. Western Un. Teleg. Co., 60 S. C. 201, 38 S. E. 443; Evans v. Western Un. Teleg. Co. (Tex. Civ. App.), 56 S. W. 609.

[18] Western Un. Teleg. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

[19] Western Un. Teleg. Co. v. Jones (Tex. Civ. App.), 73 S. W. 79.

certain person by the messenger boy, who had been advised that such person could give information, the sendee could have been found.[20] If the addressee's name is misspelled, still if the proper search and inquiry would enable the company to deliver it to the right person, such search and inquiry should be made.[21] And it is negligence to fail to inquire at a house nearby the telegraph office, there being only two houses in the place, even though the addressee had lived there but a few weeks.[22] But where the addressee has been known only a short time in the town and his description in the telegram is that of a certain occupation and the proper inquiry is made at hotels and other places there is no negligence.[23] Again, the company is not bound to deliver a message at the sender's residence in one locality where it is addressed to his wife in another locality, as a delivery at the specified address is sufficient.[24] If the company's negligence occasions a loss in weight of cattle owing to their detention consequent upon such negligence recovery may be had.[25] So the loss of an advantageous purchase may constitute a basis of recovery, even though such loss might have been prevented by a telegram back.[26] But it may properly be a question whether the circumstances were such that the company might reasonably infer what would be the result of its negligence.[27] If a special contract relating to the time of delivery is relied on, it must be established by the proper evidence;[28] but, in such a case, evidence that it could have been delivered in one-quarter of the time specified by the sender and that it was unreasonably delayed far beyond such time and was repeated, will uphold a recovery.[29] And where a message

[20] Western Un. Teleg. Co. v. Waller, 96 Tex. 589, 72 S. W. 264, 74 S. W. 751.

[21] Cogdell v. Western Un. Teleg. Co., 135 N. C. 431, 47 S. E. 490.

[22] Western Un. Teleg. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679.

[23] Western Un. Teleg. Co. v. Cox, (Tex. Civ. App.), 74 S. W. 922.

[24] Western Un. Teleg. Co. v. Christensen (Tex. Civ. App.), 78 S. W. 744.

[25] Western Un. Teleg. Co. v. Simpson, 10 Kan. App. 473, 62 Pac. 901.

[26] Western Un. Teleg. Co. v. Snow, 31 Tex. Civ. App. 275, 72 S. W. 750.

[27] Western Un. Teleg. Co. v. Norton (Tex. Civ. App.), 62 S. W. 1081.

[28] Jacob v. Western Un. Teleg. Co., 135 Mich. 600, 98 N. W. 402.

[29] Postal Teleg. Cable Co. v. William Rhett & Co. (Miss.), 35 So. 829.

showed on its face that it was not received at its destination until the day following that on which it was sent and it was not delivered until the next day recovery was had.[30] Again, where a loss is sustained by nondelivery, it is no excuse that the contents of the message are not mandatory but advisory where the message if received would have been acted upon and the loss so sustained may be recovered.[31]

§ 744. **Delivery of message to addressee's wife.**— Whether a delivery of a message to the addressee's wife, during his absence from town, is sufficient to satisfy the company's obligation, is a question for the jury, to be determined by all the circumstances.[32] But where the company telephoned to the addressee's house and ascertained that he was out of town, and then telegraphed the sender and delivered the despatch to the wife of the addressee, and it was held that it had fulfilled its obligation.[33]

§ 744a. **Obligation to notify sender.**— If the company agrees to transmit a message immediately and it ascertains that it cannot do so it should notify the sender at once of such fact where the latter is well known and can be easily communicated with.[34] And it is also decided that the company is obligated to give such notice to the sender in case of inability to deliver either by reason of a faulty address or of additional expense.[35] But the question whether a failure to notify the sender constitutes negligence may be one for the jury; and using the services of persons passing the sender's house to communicate such notice is not negligence in law.[36] Nor does gross negligence exist where the company not only promptly entrusts its messenger with the telegram, but he spends a large portion of the

[30] Western Un. Teleg. Co. v. Pallotta, 81 Miss. 216, 32 So. 310.

[31] Western Un. Teleg. Co. v. Houston Price Mill Co. (Tex. Civ. App., 1906), 93 S. W. 1084.

[32] Western Un. Teleg. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209.

[33] Given v. Western Un. Teleg. Co. (U. S. C. C., S. D. Iowa, 1885), 24 Fed. 119, 1 Am. Elec. Cas. 776.

[34] Swan v. Western Un. Teleg. Co., 129 Fed. 318, 63 C. C. A. 550.

[35] Cogdell v. Western Un. Teleg. Co., 135 N. C. 431, S. E. 490. *Duty to notify sender.* See note 67 L. R. A. 153.

[36] Faubion v. Western Un. Teleg. Co., 36 Tex. Civ. App. 98, 81 S. W. 56.

day in endeavoring to find the addressee, and in addition the company wires to the original station for a better address.[37] Negligence may, however, exist, even though such better address is wired for, where the company has the sendee's address in a book kept for that purpose in its office at the place where the message is sent for delivery.[38]

§ 745. **Transmission and delivery of important messages.— Negligence.—** The degree of diligence exercised by a company in the transmission and delivery of its messages should, in case of telegrams important upon their face, equal the emergency which the importance requires, without regard to the company's rules and office hours.[39] If a message shows on its face its importance it is not improper for such fact to be considered in determining the extent of liability for non-delivery,[40] for the necessity of prompt action on the part of the company as to such telegram is imparted by such notice.[41]

§ 745a. **Same Subject — Instances.—** Where a message is not delivered for eight days, and the receiver's place of business is well known and a short distance from the terminal office of the company, this constitutes negligence, the telegram being: "Come in haste, your wife is at the point of death.[42] A delay of a week, caused by mislaying a telegram, is negligent.[43] The company is liable for neglect to deliver a telegram until Mon-

[37] Western Un. Teleg. Co. v. Cross, 25 Ky .L. Rep. 268, 74 S. W. 1098.

[38] Western Un. Teleg. Co. v. Krichbaum (Ala., 1906), 41 So. 16.

[39] Brown v. Western Un. Teleg. Co., 6 Utah, 219, 2 Am. Elec. Cas. 834, 21 Pac. 988. See Western Un. Teleg. Co. v. Gavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

[40] Wallingford v. Western Un. Teleg. Co., 60 S. C. 201, 38 S. E. 443; Brooks v. Western Un. Teleg. Co., 26 Utah, 147, 72 Pac. 499. Examine Wolff v. Western Un. Teleg. Co. (Tex. Civ. App., 1906), 94 S. W. 1062.

As to wording of telegram imparting notice of its importance. See Western Un. Teleg. Co. v. Wofford (Tex. Civ. App.), 58 S. W. 627, rev'd 94 Tex. 345, 60 S. W. 546.

[41] Beatty Lumber Co. v. Western Un. Teleg. Co., 52 W. Va. 410, 44 S. E. 309.

[42] Young v. Western Un. Teleg. Co., 107 N. C. 370, 9 L. R. A. 669, 3 Am. Elec. Cas. 734, 11 S. E. 1044.

[43] Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 2 Am. Elec. Cas. 795, 9 S. W. 598.

day evening, when it was presented for transmission, and summoned an attorney-at-law to court Monday morning.[44] Again, a delay of twenty-four hours in sending a message, summoning a husband to his sick wife, constitutes negligence.[45] Where the distance to the terminal office was only eighty miles and the message was an important one, calling a wife to her sick husband, a delay of twenty-seven hours in transmission of the telegram was held negligent.[46] If a telegram is delayed from 4:30 p. m. until 9 a. m. the next day, the company is negligent, where the message was an order of a coffin for the sender's son.[47]

§ 746. **Delivery of important messages — Physician.**— Where a physician was well known in town and his residence was close by the terminal office, and the messenger knew him and knew where he resided, the duty to deliver a message summoning the physician to attend a childbirth, is not fulfilled.[48]

§ 747. **Delivery of important messages continued — Neglect to make due inquiry.**— If a telegram shows its importance on its face, and inquiry at the post-office or reference to the city directory would have enabled the company to find the addressee, a failure to make such inquiry constitutes negligence. This rule was applied to a case where a message was addressed to certain "freight yards" in a city which did not appear to be a public place where telegrams were received by persons having business with the railroad company, and it appearing that upon inquiry there the messenger was informed that no such person was known there. But the messenger made no further effort to find the addressee, nor did he leave the message with the yardmaster.[49] So, where the sendee lived within

[44] Western Un. Teleg. Co. v. McLaurin, 70 Miss. 26, 13 So. 36.

[45] Thompson v. Western Un. Teleg. Co., 107 N. C. 449, 3 Am. Elec. Cas. 750, 12 S. E. 427.

[46] Western Un. Teleg. Co. v. Clark (Ct. Civ. App., Tex., 1894), 25 S. W. 990.

[47] Western Un. Teleg. Co. v. Carter, 2 Tex. Civ. App. 624, 21 S. W. 688.

[48] Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598, 2 Am. Elec. Cas. 801, 10 Am. St. Rep. 772, 1 L. R. A. 728. See chapter XXXI, on Illness, Death, etc., hercin.

[49] Western Un. Teleg. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800.

the free delivery limits, and by the exercise of proper care could have been found, the company is guilty of negligence in failing to deliver an important message requesting the sendee "to come at once; bring father to secure my bond," which had been given by one known to be a guard of a jail, to the company for transmission.[50] Where the agent of a telegraph company is a peace officer, and receives a message from one known to be a judge, requesting him not to let a certain person escape, he is justified in the belief that such message is for the purpose of arresting the party named, and he is excusable for a slight delay in delivering a message to the same party, warning said addressee that armed men are following him, and, if such addressee is killed by the pursuers owing to such delay, the company is not liable, where it also appears that the despatch was addressed to no particular locality, and the killing took place while the addressee was proceeding to the telegraph office, and the message could not have been delivered in the intervening time, even if the company had had notice when he was in sight of the office.[51]

§ 748. **Delivery of message in care of another — General rule.** — The same rule of diligence, the same requirement of prompt delivery, and the same obligation to find the person in whose care a message is addressed, undoubtedly applies as that which governs in the delivery of messages to the addressee himself.

§ 749. **Delivery of message in care of another — Inability to find such person — Company's duty.** — If the company attempts the delivery to the person in whose care the message is sent, and exercises the legally required diligence to find such person, but fails, then, under certain circumstances, negligence will arise from a failure to deliver to the addressee, as, where the latter was well known, his boarding-place was very near the telegraph office, and the slightest inquiry would have enabled the company to have delivered the message to him, and, in addition, the despatch was an important one.[52]

[50] Western Un. Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536, 6 Am. Elec. Cas. 847.

[51] Ross v. Western Un. Teleg. Co., 52 U. S. App. 290, 26 U. S. C. C. A. 564, 81 Fed. 676, 30 Chic. L. News, 29.

[52] Western Un. Teleg. Co. v.

§ 749a. **Same subject.**— If by the exercise of ordinary care the addressee could have been found at another place than "some hotel" in care of which the message is directed such care should have been exercised in order to relieve the company.[53] Again, in an action against a telegraph company for delay in delivering a message, where the court charged that defendant would have discharged its duty "if it tendered the telegram at the mills where plaintiff was employed, and to which the telegram was addressed, to an employee thereof having access to the pay rolls, and who refused to receive the same, telling defendant that plaintiff was not employed there, and defendant then inquired of a boy in the millyard, at the post office, at the city directory, and also sent a service message" this was sufficient and it was error to add, "and used the diligence that one of ordinary prudence would have exercised under the circumstances," as the jury was thereby left in doubt concerning the measure of diligence to be exercised by the company.[54] The question of ordinary care, of negligence and of the company's obligation may rest upon the question whether an agreement or special contract exists to transmit and deliver to the person in whose care the message is addressed.[55]

§ 750. **Delivery of message in care of another — Refusal to receive.**— It is decided that if a person in whose care a message is sent refuses to receive or accept it, the telegraph company has fulfilled its duty in tendering it to such person.[56] Although it would seem that the company ought in order to discharge the duty imposed upon it by law to use every reasonable effort

Houghton, 82 Tex. 562, 17 S. W. 846, 39 Am. & Eng. Corp Cas. 577, 1 Ry. & Corp. L. Jour. 112.

[53] Western Un. Teleg. Co. v. Waller (Tex. Civ. App.), 84 S. W. 695. See Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664, 2 Am. Neg. Rep. 468, 39 S. W. 1002.

[54] Hinson v. Postal Teleg. Cable Co., 132 N. C. 460, 43 S. E. 945.

[55] Western Un. Teleg. Co. v. Barefoot, 97 Tex. 159, 76 S. W. 914, rev'g (Tex. Civ. App.), 74 S. W. 560; Western Un. Teleg Co. v. Pearce, 95 Tex. 578, 68 S. W. 771, rev'g (Tex. Civ. App.), 67 S. W. 920; Western Un. Teleg. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720.

[56] Western Un. Teleg. Co. v. Young, 77 Tex. 245, 3 Am. Elec. Cas. 777, 19 Am. St. Rep. 751, 13 S. W. 985; Western Un. Teleg. Co. v. Thompson (Tex. Civ. App., 1895), 31 S. W. 318. See last section herein.

to find the sendee and deliver the telegram, or to obtain a better address. It is held however in this connection that if an employer in whose care the message is addressed refuses to receive it such refusal will be that of the sender and not be imputed to the company.[57] The company may also deliver a message to the person in whose care it is sent where the addressee has left the city before the message could reasonably have been delivered.[58]

§ 751. **Delivery of message in care of another — When duty fulfilled.**— Where a telegram is sent to one person in care of another, delivery to the latter is, as a rule, sufficient.[59] And delivery may be made to an agent of a corporation of a message sent in the latter's care, reasonable care having been made to find the sendee; nor need such agent be informed as to the importance of the message.[60]

§ 752. **Important telephone message — In care of another — Misdelivery — Duty of company.**— If a telephone message shows its importance, and it is to be sent to the addressee in care of another, the company is negligent if, without inquiry whether the sendee is there, it delivers it to a person of the same surname, but a different christian name from the one in whose care the message is sent, when the latter is shown by the city directory to be within two blocks of the company's office, and in said directory said name is connected with that of the sendee.[61] This case shows that it is the duty of a telephone company as well as of a telegraph company to make due inquiry, and to exercise reasonable diligence at least, to find the

[57] Hinson v. Postal Teleg. Cable Co., 132 N. C. 460, 43 S. E. 945; for a fuller consideration of this case see § 749a, herein.

[58] Sweet v. W. U. T. Co., 139 Mich. 322, 102 N. W. 850, 11 Det. Leg. N. 841.

[59] Western Un. Teleg. Co. v. Terrell (10 Tex. Civ. App. 60), 30 S. W. 70.

[60] Lefler v. Western Un. Teleg. Co., 131 N. C. 355, 59 L. R. A. 477, 42 S. E. 819.

Delivery to copartner and brother of person in whose care message sent. See Western Un. Teleg. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720, 26 Tex. Civ. App. 366, 63 S. W. 341.

[61] Martin v. Sunset Teleph. & Teleg. Co., 18 Wash. 260, 51 Pac. 376.

person to whom the message is intended to be delivered, and to deliver it to him. This obligation is stronger, and the diligence required greater in degree, or at least the negligent misdelivery is less excusable, where the contnts of the message show its importance. There is no reason why telephone companies, in so far as this feature of their business is similar, should not be held to as great a degree of diligence, and as strictly liable for nonperformance of their duty, as are telegraph companies.

§ 753. **Agreement with company's agent to deliver to third person for delivery.**— The company's agent has authority to agree to deliver a message, expected by the addressee, to a third person, to be taken to the addressee, and such agreemnt becomes a part of the company's contract for transmission.[62]

§ 754. **Receiving and sending agent of company — Duty as to delivery.**— Although it is decided that a local agent receiving a telegram for transmission has no control or authority over agents at the other end of the line, whose duty it is to take the message from the wire and promptly deliver it, and that it is not the duty of the sending agent to forward to the delivery agent, by telegraph, notice of the importance of the telegram and the necessity for prompt delivery;[63] yet whether the negligent failure to deliver a message resulted from the acts of the agent who received it from the sender or of the agent who received it at the terminal station for delivery does not aid the company.[64] And the acceptance of a message with the charges therefor by an assistant of the agent and operator, such assistant being in charge of the office, binds the company,[65] although the question whether the party receiving the message was the

[62] Western Un. Teleg. Co. v. Evans, 5 Tex. Civ. App. 55, 23 S. W. 998. See Thompson v. Western Un. Teleg. Co. (10 Tex. Civ. App. 120), 30 S. W. 250.

[63] So held in Pope v. Western Un. Teleg. Co., 14 Ill. App. 531, 1 Am. Elec. Cas. 615–617, 9 Ill. App. 283.

[64] Howard v. Western Un. Teleg. Co., 27 Ky. L. Rep. 858, 86 S. W. 982, 84 S. W. 764.

[65] Arkansas & L. Ry. Co. v. Lee (Ark., 1906), 96 S. W. 148. See also Western Un. Teleg. Co. v. Vanway (Tex. Civ. App.), 54 S. W. 414.

company's agent may be one for the jury.[66] It is held that the law of the place where the message is received for delivery governs, even though the agent at the place from which the message was sent was the cause of the delay.[67] The question whether an agreement was made by the accepting agent for collecting the extra charges for delivery at the place of delivery may be important.[68] If, however, the receiving agent has knowledge that the addressee can be found at another place where the company has an office, and the company has received extra compensation for its transmission and delivery and knows the importance of the telegram, it should be forwarded to the addressee.[69]

§ 755. **Attempt to deliver — Inquiry — Addressee, stranger or obscure.—** Although the addressee may be an obscure person or a stranger in the place of delivery, this does not excuse due diligence on the part of the company to make reasonable inquiries, and to exercise due vigilance to deliver the message. Thus, where the messenger was accustomed to make inquiry at the post-office, where persons were unknown, and on this occasion found the general delivery window closed, but saw a light in the office, and could have obtained the address from clerks who were in the office, it was held that there was sufficient evidence of negligence.[70] So, specimens of printed cards and letter-heads used by the addressee in his business, are pertinent to the issue that the addressee was an obscure person, whom the messenger could not find, especially where the addressee testifies that such cards, etc., were used by him.[71] Again, where the place of delivery was a small town of about 600 inhabitants, with one hotel, at which the addressee had stopped with his wife, and he had a sample of a fence machine

[66] Western Un. Teleg. Co. v. Craven (Tex. Civ. App., 1906), 95 S. W. 633.

[67] Western Un. Teleg. Co. v. Lacer (Ky., 1906), 93 S. W. 34.

[68] Roche v. Western Un. Teleg. Co., 24 Ky. L. Rep. 845, 70 S. W. 39.

[69] Western Un. Teleg. Co. v. Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 34.

[70] Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 31 S. E. 350, 5 Am. Neg. Rep. 85.

[71] Gulf, C. & S. F. R. Co. v. Wilson, 69 Tex. 739, 7 S. W. 653, 21 Am. & Eng. Corp. Cas. 83.

which he was selling, set up in the principal village street, one block from the hotel, from which it could be seen, and the addressee was there at the time, engaged in trying to sell such machine, it was held evident that a diligent search would have enabled the messenger to have found the addressee, and that mere inquiry which showed who he was did not excuse non-delivery.[72]

§ 756. **Delivery to hotel clerk or manager — Agent.**— Taking a room at a hotel, and lodging there impliedly constitutes the clerk or other person charged with the management of the hotel, the servant and agent of the roomer, to take telegrams for him in his absence.[73] In this case the addressee was a practicing lawyer in that city, and had roomed at the hotel about two months. He received his mail at the post-office, and all telegrams at his office, which was within three squares of the telegraph station. The messenger went directly to his place of business and found the office locked, and learned by due inquiry that the addressee resided at a certain hotel, where he went, and was informed by the clerk that he would be there soon, and the message, at the clerk's suggestion, was left with him, and he receipted for the same and put it in the keybox corresponding to the number of the addressee's room, although the latter had never previously received any letter or telegram through said box. The addressee returned to the hotel, dined, went to his office at one o'clock, and returned at six forty-five and found his telegram when he went for his key, not having had any knowledge thereof prior thereto, and the telegraph company was held not negligent, and it was also decided that the clerk had implied authority to receive said telegram. The rule first above stated must necessarily be considered as governed by the above circumstances, and, therefore, it would not apply in a case where the resident at the hotel has a place of business in that town or city and no effort is made to deliver it to the addressee at such place, and the same ought to be true as to transients or temporary roomers engaged

[72] Herron v. Western Un. Teleg. Co. (90 Iowa, 129), 57 N. W. 696, 4 Am. Elec. Cas. 731.

[73] Western Un. Teleg. Co. v. Trissal, 98 Ind. 327, 1 Am. Elec. Cas. 682, 686.

in business at a known place within that city or town during their stay.[74]

§ 757. **Addressee's oral instruction to messenger — Place of delivery.**— An oral instruction, given by a person to a messenger in the employ of the telegraph company, specifying the place where telegraphic messages addressed to such person should be delivered, does not bind the company. Such messenger is not a proper officer of the company to receive such instruction, if it is intended to govern said company's actions. To have this effect, a notification or direction in writing should be sent, a mere casual statement to the messenger outside the office is insufficient to constitute any legal obligation.[75]

§ 758. **Oral message — Custom.**— In the absence of satisfactory evidence of a known course of business to receive for transmission messages orally given to operators, a telegraph company is not liable for failure to transmit such a message, especially so, where it appears that no written despatch was presented for transmission to the addressee, who was the plaintiff, and no message was charged or paid for.[76]

§ 759. **Oral contract as to nondelivery during night.**— The company is not liable for failure to deliver a message during the night-time, where there is an oral agreement between the sender and the company's agent that messages need not be delivered during the night.[77]

§ 760. **Message written on other than printed blank.**— We have considered in the chapter preceding this the question of

[74] See Herron v. Western Un. Teleg Co. 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731 (considered in preceding section); Western Un. Teleg. Co. v. Barefoot, 97 Tex. 159, 76 S. W. 914, revg. (Tex. Civ. App.), 74 S. W. 560; Barefoot v. Western Un. Teleg. Co., 28 Tex. Civ. App. 457, 67 S. W. 912; Western Un. Teleg. Co. v. Cobb, 95 Tex. 333, 67 S. W. 87; Western Un. Teleg. Co. v. Redinger (Tex. Civ. App.), 66 S. W. 485.

[75] Given v. Western Un. Teleg. Co. (U. S. C. C., S. D. Iowa, 1885), 24 Fed. 119, 1 Am. Elec. Cas. 766.

[76] Western Un. Teleg. Co. v. Dozier, 67 Miss. 288, 3 Am. Elec. Cas. 682, 7 So. 325.

[77] Western Un. Teleg. Co. v. Wingate, 6 Tex. Civ. App. 394, 25 S. W. 439.

oral messages and the Stock Exchange;[78] also the right of the company to refuse a message not written on the usual blank,[79] and the binding force of conditions on said printed blanks, even though the message is written on another paper.[80] We may add here that the fact that a message is not written on one of the company's blanks does not excuse the failure to deliver such despatch, where the same has been accepted for transmission and paid for.[81] The company is not, however, obligated to send a message written on a leaf of a book and given to its agent, where nothing is said about payment therefor and none is tendered.[82] And where the message was not written on the usual printed blanks, it was held no error to refuse to charge the jury as to the conditions on said blanks.[83] Again, where the operator copied the message, which was written on note paper, the company was held obligated, notwithstanding a rule exempting the company from damages where despatches were not written on its blanks, it appearing that the sender had no knowledge of such a condition.[84] And where a message is written on paper other than the usual blank, a condition thereon as to extra compensation for delivery of message outside of delivery limits, does not bind the sender in the absence of notice.[85]

§ 761. **Delivery outside of office hours — Night messages.**— A telegraph company is not, as a rule, answerable for delay in the delivery of a message, caused by its being received outside of office hours,[86] as the non-transmission of a message after

[78] See § 704 as to "Stipulations * * * Pennsylvania."

[79] See § 706 as to "Stipulations * * * South Dakota."

[80] See "Summary" of the law as to stipulations, etc., under preceding chapter, §§ 716–722.

[81] Western Un. Teleg. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. 471, 4 Am. Elec. Cas. 739. See Western Un. Teleg. Co. v. Simmons (Tex. Civ. App., 1906), 93 S. W. 687.

[82] Western Un. Teleg. Co. v. Liddell, 68 Miss. 1.

[83] Western Un. Teleg. Co. v. Hinkle, 3 Tex. Civ. App. 518, 22 S. W. 1004.

[84] Beasley v. Western Un. Teleg. Co., 29 Fed. 181. See Western Un. Teleg. Co. v. Shumate, 2 Tex. Civ. App. 429, 21 S. W. 109.

[85] Anderson v. Western Un. Teleg. Co., 84 Tex. 17, 19 S. W. 285.

[86] Western Un. Teleg. Co. v. Neel, 86 Tex. 368, 4 Am. St. Rep. 847, 25 S. W. 15.

the office is closed does not constitute negligence.[87] Nor is it liable for failure to deliver a despatch during the night where, by the night-message blank conditions, it is not to be delivered earlier than the next morning.[88] And in the absence of negligence in transmitting a message on the following day the company is not liable under a stipulation not to transmit until that time.[89] If, however, a telegraph company undertakes to deliver a message outside of office hours it is obligated to exercise reasonable diligence to fulfil its undertaking, and this rule applies where an agent acting within the scope of his agency undertakes to deliver a despatch outside of the hours fixed for the actual discharge of his duties.[90] And this is so even though the message is written on a blank for night messages and the agreement to deliver is by parol.[91] So, even though a telegraph office might properly be closed shortly after 6 o'clock, if the company receives a message, stating the illness of the addressee's child, at about 4 o'clock in the afternoon and delays its delivery until after 9 o'clock the next morning, it is negligence.[92] As we have stated elsewhere, a telegraph company may establish reasonable office hours, and where the sender of a message has knowledge thereof, the company is not liable for nondelivery after such hours,[93] nor is it liable for nondelivery,

[87] Western Union Teleg. Co. v. Christenson (Tex. Civ. App.), 78 S. W. 744.

[88] Western Un. Teleg. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827.

[89] Western Union Teleg. Co. v. Johnson, 107 Ky. 631, 21 Ky. L. R. 1391, 55 S. W. 427.

[90] McPeek v. Western Un. Teleg. Co., 107 Iowa, 356, 78 N. W. 63, 43 L. R. A. 214, 5 Am. Neg. Rep. 314. See also Western Un. Teleg. Co. v. Lindley, 62 Ind. 371, 1 Am. Elec. Cas. 275, 279; Seffel v. Western Union Teleg. Co. (Tex.), 57 S. W. 857. Compare Sweet v. Postal Teleg. & Cable Co., 22 R. I. 344, 47 Atl. 881.

[91] Seffel v. Western Union Teleg. Co. (Tex.), 57 S. W. 857.

[92] Western Un. Teleg. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830.

[93] Western Union Teleg. Co. v. Rawls (Tex. Civ. App.), 62 S. W. 136; Western Un. Teleg. Co. v. Wingate, 6 Tex. Civ. App. 394; Western Un. Teleg. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827; Western Un. Teleg. Co. v. Trotter, 55 Ill. App. 659; Western Un. Teleg. Co. v. Gibson (Tex. Civ. App., 1899), 53 S. W. 712; Western Un. Teleg. Co. v. Steinbergen, 107 Ky. 469, 54 S. W. 829; Western Un. Teleg. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830. See further chapter XXI, herein. But see Western Un. Teleg. Co. v. Hill (Tex. Ct. Civ. App., 1894), 26 S. W. 252. That company not obli-

until after a reasonable time has elapsed from the opening of the office at its regular hours the next morning, where a message is received during the night.[94] And an agent only contracts with reference to established office hours, where he merely states that he thinks he can get the message through and will send it immediately, but that he does not know at what hour the terminal office of the message closes, and this is not altered by the fact that the message announced the death of a near relative, where said despatch was tendered for transmission shortly after 6 p. m.[95]

§ 761a. **Same subject — Instances.**— If a message is received after reasonable office hours and delivered promptly within an hour after the office is opened there is no actionable negligence.[96] But the question whether the office hours, as established, are reasonable may be a proper one for the jury.[97] As may also the question whether the rule as to closing applies in a particular case to a claimed agreement as to transmission;[98] and the jury may be permitted to determine under the evidence what the office hours were.[99] It is also competent to show the non-existence of a rule as to office hours, but the non-observance of such a rule on some occasions is insufficient to establish such a fact.[1] If, however, the company is evidently prepared to transact business by having its office open after the claimed office hours have passed, and it then has operators and messengers present, the claimed rule will not aid the company.[2] In

gated to acquaint sender with office hours at terminal station, see Western Un. Teleg. Co. v. Georgia Cotton Co., 94 Ga. 444, 21 S. E. 835.

[94] Western Un. Teleg. Co. v. Steinbergen, 107 Ky. 469, 54 S. W. 829. See Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 4 Am. Elec. Cas. 708.

[95] Western Un. Teleg. Co. v. Gibson (Tex. Civ. App., 1899), 53 S. W. 712.

[96] Bonner v. Western Union Teleg. Co., 71 S. C. 303, 51 S. E. 117.

[97] Western Union Teleg. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548.

[98] Western Union Teleg. Co. v. Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433.

[99] Western Union Teleg. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548.

[1] Western Un. Teleg. Co. v. Crider, 107 Ky. 600, 54 S. W. 963.

[2] Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841.

case of extra compensation under a special agreement to deliver a message the company will be obligated.[3] But a failure to deliver until the next day a message received after office hours does not make the company liable where the addressee lived several miles from the delivery office and there were no messengers for such delivery and the sender had not informed the company of the fact of the distance of the addressee's residence.[4]

§ 761b. **Office hours — Acts of person not employee of company.**— Where the company delivers a message immediately after the office opens, it is reasonable diligence where the message is received after office hours by one not connected with the company and left by him on the operator's table.[5] Where, however, a message is received conditionally for its delivery only in case there is an agent at the office to which it is to be sent the company is not responsible for its attempted delivery by a railroad operator, who is not its employee at such receiving office, and who is not authorized to make such delivery, even though he occasionally acted in such matters, and on this occasion employed a messenger of the company to deliver the same.[6] Nor is the company liable to an addressee for delay in delivering a message received by an operator who merely occupied the office after office hours by the company's permission, and was not its employee or agent.[7]

§ 762. **Operator's knowledge that office closed — Important message.**— If the operator knows that the terminal office is closed for the night, but does not so inform the sender and receives an important message for transmission, announcing death, promising to send it as quickly as possible, the company is liable for failure to make any effort to forward said message until the next morning.[8] If the agent misinforms the sender

[3] Western Union Teleg. Co. v. Perry, 30 Tex. Civ. App. 243, 70 S. W. 439.

[4] McCaul v. W. U. T. Co., 114 Tenn. 661, 88 S. W. 325.

[5] Harrison v. Western Union Teleg. Co., 71 S. C. 386, 51 S. E. 119.

[6] Western Union Teleg. Co. v. Rawls (Tex. Civ. App.), 62 S. W. 136.

[7] Sweet v. Postal Teleg. & Cable Co., 22 R. I. 344, 47 Atl. 881.

[8] Western Un. Teleg. Co. v. Bruner (Supreme Ct., Tex., 1892), 19 S. W. 149.

by a statement that the receiving office is closed the company is liable for negligence in delaying the message.[9] And if no notice is given to the sender as to office hours, and the message is important and the agent being so informed promises immediate transmission thereof the company will be bound,[10] although the company will not, it is held, be liable to the addressee where knowledge that the office to which the message was sent was closed was not possessed by the receiving operator or sender.[11]

§ 763. **Agent's knowledge of places where messages can be sent — Duty and liability.**— It is within the apparent scope of the authority of an agent, who receives a message at the company's office for transmission, to know to what places telegraphic despatches can be sent; and if he receives a message to be forwarded to a place where the company has no wire, and is paid for its transmission, the principal is liable for a failure to transmit and deliver said message according to its contract with the sender. But the fact that the agent delivered the message by telephone may be shown in excuse of the nondelivery. In case of a mistake of the above character, the agent should, upon learning of the same, notify the sender and return or tender to him the money paid for transmission.[12]

§ 764. **Important message — Duty of operator — Wiring back for better address.**— If message calls for an answer, is known to be very important, and special delivery charges have been paid, it is the duty of the receiving operator, who has difficulty in delivering said despatch, because of its address, to wire back a notice to the sender, of its nondelivery, and to ask for a better address, where it also appears that the sender has left sufficient money for any answer, and that her address is known at the transmitting office.[13]

[9] Seffel v. Western Union Teleg. Co. (Tex. Civ. App.), 65 S. W. 897.

[10] Western Union Teleg. Co. v. Crumpton, 138 Ala. 632, 36 So. 517.

[11] Sweet v. Postal Teleg. & Cable Co., 22 R. I. 344, 47 Atl. 881.

[12] Western Un. Teleg. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 15 So. 471, 4 Am. Elec. Cas. 739. See also Western Un. Teleg. Co. v. Hargrove, 14 Tex. Civ. App. 79, 36 S. W. 1077.

[13] Sherrill v. Western Un. Teleg. Co., 117 N. C. 352, 23 S. E. 277, S. C., 116 N. C. 655, 5 Am. Elec. Cas. 754.

§ 765. **Delivery of telegram — Uncertain, not specific or ambiguous address.**— An address is not specific enough to warrant a recovery against the company for nondelivery of a message, where the christian name or street number of the addressee is not given, although asked for, but the sender rests upon the supposition that the addressee was well known.[14] "Care of some hotel," is not so indefinite or negligent an address as to excuse a failure to deliver a message.[15] But the court refused to disturb the verdict, under a penalty statute, from which the telegraph company had appealed, where part of the instruction defined the duty of the company as to the delivery of telegrams, and then charged the jury, that if "the company, in good faith, attempted to deliver the message, but was unable to do so, because of the fact that the address was uncertain and ambiguous, then the company is not liable.[16] The use of the word "street," instead of "alley," does not excuse prompt delivery, where the alley was known to the people generally as a street and was placed under that designation in the city directory.[17] The questions of contract may arise in regard to a reply message which is not that designated by the sender and in such case the matter may be one for the jury.[18] If, however, a message is directed to 291 R. street, and there are North and South R. streets, both having like numbers, and the despatch is delivered at the number specified on North R. street, to a person who said the addressee lived there and receipted for said message, when the actual addressee lived at South R. street, the company is not liable for misdelivery, because of the improper and incomplete address.[19]

[14] Western Un. Teleg. Co. v. McDaniel, 103 Ind. 294, 1 Am. Elec. Cas. 793, 2 N. E. 709.

[15] Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App 664, 2 Am. Neg. Rep. 468, 39 S. W. 1002. See Western Union Teleg. Co. v. Waller (Tex. Civ. App.), 84 S. W. 695.

[16] Western Un. Teleg. Co. v. Young, 93 Ind. 118, 1 Am. Elec. Cas. 612.

[17] Western Un. Teleg. Co. v. Cain (Tex. Civ. App.), 40 S. W. 624.

[18] Harper v. Western Union Teleg. Co., 92 Mo. App. 304.

[19] Deslottes v. Baltimore & O. Teleg. Co., 40 La. Ann. 183, 3 So. 566, 2 Am. Elec. Cas. 596. In this case the name of the addressee was not in the directory.

§ 766. **Alteration of or mistake in address by receiving operator.**— A receiving operator has no authority to alter an address to some name in the directory, where he cannot find therein the name of the addressee, as specified in the message, even though such operator is actuated by honest motives.[20] If the change in the address is caused by a mistake of the receiving operator in taking the name from the wires and recording it, the company will be liable for loss occasioned by the negligent nondelivery of the telegram.[21]

§ 766a. **Delivery beyond own line — Delivery by mail.**[22]— A telegraph company may by express contract based upon a consideration engage to deliver a telegram beyond its own line including sending it by mail from its terminal office, and its delivery from that point, and its agent is clothed with apparent authority to make such a contract.[22a] If a negligent delay occurs under a contract of this character the company will be liable.[23]

§ 767. **Delivery beyond free delivery limits.**— If a message is received and the addressee is beyond the free delivery limits, the operator receiving such despatch must use ordinary diligence to ascertain if the addressee is in town, and to deliver the same. Diligent search is not required.[24] But if the sendee lives within such limits and can be found, by the exercise of ordinary care, it must be exercised.[25] If the company's rule, guaranteeing free delivery only within a certain distance, is known to the sender, or if he is presumed to have knowledge

[20] Elsey v. Postal Teleg. Co., 15 Daly (N. Y.), 58, 2 Am. Elec. Cas. 674, 678.

[21] Green v. Western Union Teleg. Co., 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985.

[22] See next following chapter herein.

[22a] Western Union Teleg. Co. v. Carter, 24 Tex. Civ. App. 80, 58 S. W. 198. Examine Western Union Teleg. Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767, revg. (Tex. Civ. App.), 65 S. W. 1080.

[23] Western Union Teleg. Co. v. McIlvoy, 107 Ky. 633, 21 Ky. L. Rep. 1393, 55 S. W. 421.

[24] Western Un. Teleg. Co. v. Daniels (Ky. Super. Ct., 1894), 15 Ky. L. Repr. 813, 4 Am. Elec. Cas. 738.

[25] Western Un. Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536; Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515, 39 N. E. 874.

thereof, it is his duty to make arrangements for the delivery of a message, where the addressee resides outside of the free limits, and this latter fact he is assumed to know, and a rule establishing such limits is reasonable.[26] But it is also decided that where both the sender and the telegraph agent knew the sendee's post-office address, but not whether he lived outside the town or not, and they made arrangements to have the message delivered, any extra expense to be paid by the sender, then an instruction is properly refused, which is to the effect that, in order to warrant a recovery for failure to deliver, the contract for sending said message must have been made with a mutual understanding that the sendee lived outside the free delivery limits.[27]

§ 767a. **Same subject.**— A telegraph company may make reasonable rules establishing free delivery limits.[28] If a rule establishes such limits within a certain "radius" this will not be construed to mean a distance by the nearest travelled route between the termini but by a straight line.[29] But the company should also exercise the required diligence in ascertaining whether the addressee can be found within the delivery limits at the place to which the message is addressed and this is required even though the addressee resides beyond said limits.[30] The company is, however, only required to exercise this diligence and is not obligated to deliver the telegram a distance outside of those limits unless there is some agreement or custom imposing such an obligation.[31]

[26] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 3 Am. Elec. Cas. 570, 7 So. 419.

[27] Western Un. Teleg. Co. v. Warren (Tex. Civ. App.), 36 S. W. 314.

[28] Western Union Teleg. Co. v. Scott, 27 Ky. L. Rep. 975, 87 S. W. 289.

Submission to jury of reasonableness of rules when error, see Western Union Teleg. Co. v. Ayers (Tex. Civ. App. 1906), 93 S. W. 199.

[29] Western Union Teleg. Co. v. Jennings, 98 Tex. 465, 84 S. W. 1056, affg. (Tex. Civ. App.), 81 S. W. 1278.

[30] Rosser v. Western Union Teleg. Co., 130 N. C. 251, 41 S. E. 378.

[31] Western Union Teleg. Co. v. Harvey, 67 Kan. 729, 74 Pac. 250. Examine Western Union Teleg. Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767, revg. (Tex. Civ. App.), 65 S. W. 1080.

§ 768. **Special messenger — Outside free delivery limits — Important message.—** Although a telegraph company is under no obligation to incur extra expense to deliver a message to an addressee a long distance from the terminal office and outside the free delivery limits,[32] yet, if it has knowledge of the importance of the message and agrees, upon the sender's guaranty of the costs, to make a delivery, by special messenger, outside the free delivery limits, the company is not only obligated so to do, but it is also required to make inquiry as to the sendee's address at places where he is most likely to receive information thereof, and this, even though the sendee resides several miles distant from the telegraph office.[33]

§ 769. **Free delivery limits — Unpublished, unobserved and unknown rule as to.—** Although the company has established free delivery limits, yet where it has never observed, enforced or published such a rule, and it is not known to the sender or the general public, and prompt delivery is promised without exacting extra pay therefor, and the company fails in its duty of prompt delivery, the company is liable.[34] And if the sender has no knowledge of the existence of free delivery limits or of any requirement of extra toll for delivery beyond them the company cannot relieve itself from liability in case of nondelivery by the facts that the addressee was not within those limits and that such tolls had not been paid.[35]

§ 770. **Delivery outside free limits — Rule as to wiring back for prepayment — Notice to sender.—** Where a rule of the telegraph company requires the terminal office operator to wire back for prepayment or a guaranty therefor, but, instead of

[32] Western Un. Teleg. Co. v. Taylor, 3 Tex. Civ. App. 310, 22 S. W. 532. See Western Un. Teleg. Co. v. Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417.

[33] Western Un. Teleg. Co. v. Drake, 13 Tex. Civ. App. 572, 36 S. W. 786.

[34] Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. 545. See also Western Un. Teleg. Co. v. Cain (Tex. Civ. App.), 40 S. W. 624. But examine Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 4 Am. Elec. Cas. 708, 34 N. E. 581.

[35] Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841. See Bryan v. Western Union Teleg. Co., 133 N. C. 603, 45 S. E. 938, 131 N. C. 828, 43 S. E. 1003.

so doing, he undertakes delivery beyond the limits, reasonable promptness in delivering the message is required,[36] and it is negligence for the operator to fail to comply with such a rule.[37] Again, the company ought not to remain inactive and make no attempt to deliver a telegram although the addressee resides beyond the free delivery limits, but should notify the sender of its requirement as to extra compensation and of its refusal,[38] since it constitutes negligence not to notify the sender that a payment or guaranty is a prerequisite to making the delivery, or to wrongly wire him that the party is not known, such wire being based upon the fact alone that the addressee was outside the free delivery limits.[39] It is held that a guaranty to be operative should be consummated by the proper wire from the sending agent in answer to a request therefor by wire from the receiving agent.[40]

§ 771. **Prepayment, special delivery charges — Free delivery limits — Regulations or conditions.**— Prepayment of special delivery charges before transmission of a telegram is not necessarily a prerequisite to the duty to deliver a message in a city or town, where the addressee lives beyond the free delivery limits, and a regulation requiring such prepayment, whether the sender knows the distance from the station or not, is unreasonable and void.[41] But a rule may be reasonable which requires extra compensation for delivery beyond such limits, where the sender of the message is notified thereof.[42] So a guaranty of charges for delivery in the country may be required.[43] Again, conditions on a printed blank will be binding,

[36] Whittemore v. Western Un. Teleg. Co. (U. S. C. C., 1st Div., Dist. Kan., 1895), 71 Fed. 651.

[37] Sherrill v. Western Un. Teleg. Co., 117 N. C. 352, 23 S. E. 277.

[38] Hood v. Western Union Teleg. Co., 135 N. C. 622, 47 S. E. 607. See Hendricks v. Western Union Teleg. Co., 126 N. C. 304, 35 S. E. 543.

[39] Bryan v. Western Union Teleg. Co., 133 N. C. 603, 45 S. E. 938, 131 N. C. 828, 43 S. E. 1003.

[40] Hargrave v. Western Union Tel. Co. (Tex. Civ. App.), 60 S. W. 687. Compare Western Union Teleg. Co. v. Warren (Tex. Civ. App.), 36 S. W. 314.

[41] Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 39 N. E. 874, 54 Am. St. Rep. 515.

[42] Brashears v. Western Un. Teleg. Co., 45 Mo. App. 433, 3 Am. Elec. Cas. 701.

[43] Western Union Teleg. Co. v. Mathews, 107 Ky. 663, 55 S. W.

which require a payment of special charges to cover the cost of delivery, where the addressee lives beyond such delivery limits; although, where the message is not written on such blank, notice to the sender of said requirement is necessary to bind him.[44] And like regulations on the blank binds the addressee when the stipulation is reasonable.[45] If the stipulations limit the company's liability to delivery of messages within certain limits, evidence is inadmissible which tends to show a negligent failure to make inquiries, where the addressee lived outside the delivery limits, and no guaranty of delivery was made and no extra compensation paid for delivery.[46] Again, if there is no provision made for special delivery and there is no waiver, and the sender of a despatch knows that the addressee lives outside delivery limits, there can be no recovery for failure to deliver.[47]

§ 772. **Same subject continued.**— An undertaking to deliver outside of such limits upon extra compensation paid therefor, or a custom to make a free delivery outside the limits, would prevent a successful defense against negligent failure to deliver a message.[48] So where a consideration is given for such delivery its obligation must be fulfilled even though it involves a greater expenditure than the amount received.[49] And if a requirement as to prepayment is dispensed with or not insisted upon the company will be obligated to exercise the same dili-

427. See Western Union Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 435.

[44] Anderson v. Western Un. Teleg. Co., 84 Tex. 17, 19 S. W. 285.

[45] Western Union Teleg. Co. v. Ayers (Tex. Civ. App., 1906), 93 S. W. 199.

[46] Western Un. Teleg. Co. v. Redinger, 22 Tex. Civ. App. 362, 54 S. W. 417.

[47] Whittemore v. Western Un. Teleg. Co. (U. S. C. C. 1st Div., Dist. Kan., 1895), 71 Fed. 651.

[48] Western Un. Teleg. Co. v. Teague (Tex. Ct. Civ. App., 1896), 36 S. W. 301, case of a failure to deliver message to an addressee just beyond free delivery limits. See Western Union Teleg. Co. v. Matthews, 24 Ky. L. Rep. 3, 67 S. W. 849; Hellams v. Western Union Teleg. Co., 70 S. C. 83, 49 S. E. 12; Western Union Teleg. Co. v. Davis, 30 Tex. Civ. App. 590, 71 S. W. 313, 24 Tex. Civ. App. 427, 59 S. W. 46; Western Union Teleg. Co. v. Swearingen, 95 Tex. 420, 67 S. W. 767, revg. (Tex. Civ. App.), 65 S. W. 1080.

[49] Western Union Teleg. Co. v. Matthews, 24 Ky. L. Rep. 3, 67 S. W. 849.

gence as if the necessary toll had been prepaid.[50] And where the operator told the sender that the telegram would be delivered, and any extra charge collected from the addressee, the fact that there was no prepayment of special charges for delivery beyond the free limits, does not relieve the company from liability.[51] If there is no contract requiring extra compensation, for delivery beyond the limits, and an action is brought for negligent failure to deliver a message outside such limits, an instruction submitting the issue as to free delivery limits is properly refused, especially where the only issue on which there is a conflict of evidence is that of delivery of the message for transmission.[52] So the obligation to deliver outside of such limits exists, where an agreement is made by a solvent sender to pay the additional charges;[53] and if payment for a special messenger is guaranteed, the company is bound to use reasonable diligence to find the addressee.[54] It is not negligence to intrust a guaranteed message to a stranger, where a trusty messenger is se-

[50] Cogdell v. Western Union Teleg. Co., 135 N. C. 431, 47 S. E. 490. See Western Union Teleg. Co. v. Pierce (Tex.), 70 S. W. 360, revg. (Tex. Civ. App.), 67 S. W. 920.

[51] Western Un. Teleg. Co. v. O'Keefe (Tex. Ct. Civ. App., 1895), 29 S. W. 1137.

[52] Western Un. Teleg. Co. v. Leyles (Tex. Civ. App.), 42 S. W. 636. "It is not shown that the failure of the company to deliver the message to the person to whom it was addressed made it necessary for the appellee to bear the expense of sending some one to Mineola to ascertain where John D. Rains was. The telegram was, 'Where is John D. Rains?' It is not shown that the whereabouts of John D. Rains could not have been ascertained by letter during the time which intervened between sending of the despatch and the time when the person, on account of whose expenses the judgment was rendered, started from Corpus Christi to Mineola; but if this had been shown, no such facts are alleged or proved as would make the appellant liable for the expenses of such person or services of such person. The person to whom the despatch was sent did not live within the limits in which free delivery under the contract would be made, and nothing was paid for delivery beyond the free limit. At the time the message was sent nothing seems to have been said in reference to the fact, that such person resided beyond such limits." Western Un. Teleg. Co. v. Rains, 63 Tex. 27, 1 Am. Elec. Cas. 697, 699.

[53] Western Un. Teleg. Co. v. Warren (Tex. Ct. Civ. App., 1896), 36 S. W. 314. Compare Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687.

[54] Western Un. Teleg. Co. v.

lected, to carry a despatch a distance of two and one-half miles and beyond the free delivery limits.[55]

§ 773. **Forged telegrams— Impostor — Company's agent — Fraud and negligence — Liability.**— In England, where a statute declares that one is guilty of felony who, with intent to defraud, obtains money or property upon or by virtue of any forged or altered instrument, a telegram comes within such act when sent by a clerk in the post-office to a bookmaker, offering to bet upon a certain horse for a race, and which falsely purports to have been handed in before the race was won, the clerk having, in fact, received the news after the horse had won.[56] If the messenger of a telegraph company carelessly permits a forged and false message to be substituted for the despatch placed in his hands for delivery, the company is liable for the loss occasioned thereby, even though the original message was transmitted correctly.[57] Again, one forged a telegram in the name of another person, requesting a National bank to forward $500 to such other person. Upon the telegram being received, the agent of such other person gave his note for the money, which was subsequently paid, and the bank forwarded the money, as desired, by express. The express company delivered it to the sender of the telegram. The agent making the delivery knew that the party was a stranger who had just arrived in town. The innkeeper with whom the stranger lodged called with the stranger for the package, and treated him as the party to whom it was addressed, but there was no identification, or request by the agent for an identification. It was held that, while the innkeeper may have been known to the agent as worthy of trust and confidence, the company was liable for the loss occasioned by the delivery to the wrong per-

Drake, 13 Tex. Civ. App. 572, 36 S. W. 786.

[55] Western Un. Teleg. Co. v. Daniels (Ky. Super., 1894), 15 Ky. L. Repr. 813, 4 Am. Elec. Cas. 738.

[56] Regina v. Riley (C. C. R., 1896), 1 Q. B. 309, 74 Law T. Rep. 254, 65 L. Jour. U. C. (N. S.) 74; Eng. Forg. Act. of 1881, § 38. The Postmaster-General in England has the exclusive privilege of transmitting telegrams. Eng. Teleg. Act. of 1869, § 4 (32 & 33 Vict., chap. 73).

[57] Strause v. Western Un. Teleg. Co. (U. S. C. C., Dist. Ind., 1877), 8 Biss. 104.

son.[58] But a telegraph company's operator is guilty of negligence, for which the principal is liable, where he fails to use such care and caution as it is in his power as such agent to employ, in order to avoid being made the instrument of deception and fraud. Therefore, sending a message, from an impostor, signed by the cashier of a bank, to another bank, without any evidence of authority to use the cashier's name, the sender being only known to the operator by name, constitutes gross negligence.[59]

§ 774. **Same subject continued.**— It is also held in California that the agent of the company is authorized to transmit messages, and that transmission of a false message, whether contrived by himself or contrived by another, and negligently sent by him, is within the course of his employment, and that one receiving a despatch from a telegraph company has the right to rely upon the exercise of ordinary care and prudence, by the agent of the company who transmitted the message, in discharging his duty of deciding whether the sender was the person he represented himself to be. So again, where a "valuable" message is sent, the identity of the sender must be determined by the appropriate agent of the company, and if the agent is guilty of negligence in failing to ascertain such identity, the telegraph company is liable. Under the facts of this case, the above doctrines would be applicable, since the regular operator intrusted the management of the office to another, who was his own employee, and the latter forged a telegram to a bank at San Francisco, signed by the cashier of the bank at Colusa, ordering the payment to himself of $1,200 in gold. And it was the duty of the operator to keep the party, who had forged the telegram, from using the wires. The money

[58] Southern Express Co. v. Van Meter, 17 Fla. 783, 35 Am. Rep. 107.

[59] Elwood v. Western Un. Teleg. Co., 45 N. Y. 549, 6 Am. Rep. 140, Allen's Teleg. Cas. 594, 611. In this case the operator received a message dated E., addressed to bankers at P., which read: "Keystone bank will pay the check of T. F. McCarthy to the amount of twenty thousand dollars ($20,000), J. J. Town, Cashier of Keystone Bank," and the operator failed to demand evidence of McCarthy's authority. Case cited under McCormick case, third section next following herein.

was paid to said forger upon the identification of a third party.[60] This case was cited in a Minnesota decision, where the company was held liable to the receiver of a message which the company's agent had forged and sent over its line. Said agent was also in the employ of an express company and intercepted the money sent pursuant to the telegram and converted it to his own use. The plaintiff in this case had acted in good faith and sent the money in the usual course of business, and the court said the plaintiff, where there was nothing to excite suspicion, was justified in believing that the company's agents would perform their duty to patrons, and would not knowingly send a false and forged message. "If the corporation fails in the performance of its duty through the neglect or fraud of the agent whom it has delegated to perform it, the master is responsible."[61] But in an Alabama case, an impostor, at Cincinnati, and a stranger, sent a despatch in the name of B. over defendant's telegraph line, to C., at Selma, Alabama, requesting C. to send a telegraphic money order to B. at Cincinnati; C. complied, and defendant paid the money, without his identification, to the impostor at Cincinnati, and it was held that defendant was not liable for the mistake, in the absence of any suspicious circumstances.[62] We cannot forbear making the suggestion that, in the bank cases above considered, the act of the banks in paying money, on the strength of a telegram purporting to be signed by the cashier of another bank, was contributory negligence, when the care and caution of an ordinarily prudent man would, if exercised, have caused the bank to wire back to the purported signer for information.

§ 774a. **Agent's forged message — Injury to woman's reputation — Mental suffering.**— If an unmarried woman's reputation is injured and mental suffering is caused her by reason of the acts of the company's agent in forging her name to a message

[60] Bank of California v. Western Un. Teleg. Co., 52 Cal. 280, 1 Am. Elec. Cas. 239. See Bank of Palo Alto v. Pacific Postal Cable Co., 103 Fed. 841; Pacific Postal Teleg. Cable v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413.

[61] McCord v. Western Un. Teleg. Co., 39 Minn. 181, 2 Am. Elec. Cas. 620, 25 Am. & Eng. Corp. Cas. 578, 12 Am. St. Rep. 636, 39 N. W. 315.

[62] Western Un. Teleg. Co. v. Meyer, 61 Ala. 158, 32 Am. Rep. 1, 1 Am. Elec. Cas. 282.

and sending the same to an unmarried man, and his act in sending the message as purporting to come from her was within the scope of his authority the company will be liable in damages, the contents of the message having been made public by the agent.[63]

§ 774b. **Delivery by telegraph company of check to imposter — Holder for value.—** A telegraph company which, upon order by telegraph, issues and delivers its check by mistake to the wrong party, is liable in the amount thereof to an innocent purchaser for value, who takes the same upon his indorsement. Prima facie such indorser is the payee intended, and a purchaser who takes the check from him in good faith, believing him to be the payee, is not called upon to inquire any further than may be necessary to establish the identity of the indorser and the party to whom the check was delivered as payee.[64]

[63] So held in Magouirk v. Western Union Teleg. Co., 79 Miss. 632, 31 So. 206, 89 Am. St. Rep. 663.

[64] Burrows v. Western Un. Teleg. Co., 86 Minn. 499, 90 N. W. 1111. The court, per Lewis, J., said: "This presents a question somewhat difficult of solution. We have found no case in the books presenting exactly the same facts. It is well settled that a bank has no authority to pay out the money of its depositors upon a check where the name of the payee has been forged. It is also the law that where the entire transaction is fictitious, and the payee and check have no existence in fact, at no time does such a check obtain legal status, no matter whether parties deal with it in good faith or not. It has been decided that where a check has been issued, payable to a certain party as payee, and another party of the same name comes into possession of it either by mistake or fraud, and forges the signature of the real party, this does not give the check any legal status, so as to protect a bank against which it was drawn. Mead v. Young, 4 Term R. 28; Graves v. American, 17 N. Y. 205; Famous v. Crosswhite, 124 Mo. 34, 27 S. W. 397. The authorities on this subject are quite thoroughly reviewed in the note to Land v. Northwestern, 196 Pa. St. 230, 50 L. R. A. 75, 84, and thus . . . the test to be applied is whether, by the usual custom with reference to identification, appellant was negligent in failing to have the party presenting the check identified as the party to whom it was given. It was said in the case of Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, that a check is within the purview of G. S. 1878, c. 73, § 89, which provides that possession of a note or bill, is prima facie evidence that the same was indorsed by the person by whom it purports to be indorsed, and checks were brought within this provision

§ 775. **Intervening cause — Dishonesty or fraud of third person.**— If a telegraph company is in default, but its default is made mischievous to a plaintiff only by the operation of some other intervening cause, such as the dishonesty of a third

of the statute for the reason that they are negotiable instruments, much used and growing in use in business transactions, and possessing all of the characteristics of inland bills. If, therefore, a check is indorsed when presented, it is to be received as prima facie evidence that it is the indorsement of the payee, because such rule is required by the necessities of business. For like reason, when the person indorsing a check as payee and presenting it, has been identified as the party who received it from the maker, and whom the maker designated as payee, he is presumed to be the payee, and entitled to receive the proceeds. Appellant was required to do no more in this instance. He was required to determine whether the party presenting the check to him was the person to whom it had been delivered as the payee by the telegraph company. He could have ascertained that fact by accompanying the indorser across the street to the office of the telegraph company, and asking them if this was the party entitled to the check. Or Bellevean, who was waiting at the door of the store, might have been called in, and repeated the identification made to the telegraph company. In such case appellant would have been justified in taking the check. Instead of so doing, he took his chances as to his being the same man. He was the same, and hence inquiry was unnecessary. Respondent sent the man out with the check, and with the authority to dispose of it in the usual course of business to anyone who in good faith believed him to be the party to whom the check had been delivered as payee; and, as against such innocent purchaser, it is estopped from denying the validity of the instrument which it set afloat in the commercial world. However, it is claimed that appellant was negligent in taking no steps to make inquiry about the personality of the party presenting the check, for the reason, if he had, he might possibly have discovered that the party was not the real Jerome. We have already answered this objection. It was not the duty of appellant to go beyond the necessities of identification as above outlined, and the mere fact that he might have discovered more than he was required to cannot be charged against him as an act of negligence unless there were facts which should put him upon inquiry. The facts in this case are undisputed. There was nothing to arouse suspicion, and appellant is entitled to the relief sought as a matter of law."

In the above connection the following decision is pertinent: — The drawer of a check, draft, or a bill of exchange, who delivers it to an impostor, supposing him to be the person whose name he has assumed, must, as against the drawee or a bona fide holder, bear the loss where the impostor obtains payment of, or negotiates the same. In such a case the fact that the check was

person, the rule "causa proxima non remota spectatur" applies, and the company cannot be made responsible for the loss occasioned by the act of such third person.[65]

§ 776. **Liability to banker cashing draft — Stranger to company and telegram.**— Where a telegram from a drawee purports to authorize the drawer to make a draft, and, upon the faith of such message, a banker cashes said draft, and the banker has merely seen the despatch, he being a stranger, to whom the company owes no duty, and has not delivered the message to him, the fact that the banker has acted upon it to his injury does not render the company liable, even though

drawn by the trust department of a trust company on its own banking department and payment of it refused by the banking department, because of lack of identification of the person presenting the check, immediately after it was issued is immaterial. Land Title & Trust Co. v. Northwestern National Bank, 211 Pa. 211, 60 Atl. 723 (Dean & Potter, dissenting). The court relied upon Land Title & Trust Co. v. Northwestern National Bank, 196 Pa. 230, 46 Atl. 420, 50 L. R. A. 75, 79 Am. St. Rep. 717, which holds that a bank is not liable for the payment of a check on a forged indorsement where the person who committed the forgery and received the money was in fact the person to whom the drawer delivered the check, and whom he believed to be the payee named. In this case the facts were as follows: A person calling himself A. called on B., a property owner, under the pretense of desiring to purchase real estate and secured from him his title papers. A. took the papers to a responsible conveyancer, to whom he applied for a loan on mortgage, representing himself as B. The conveyancer believing the man to be B., negotiated the loan and a settlement was made through a trust company to which the conveyances introduced A. as B. A. signed the mortgage as B., and received the trust company's check, drawn on itself to the order of B. This check indorsed with B.'s name was deposited in a bank by a person who had opened an account with it as R., and was collected by the bank of the trust company in the usual course of business. It did not appear that A. and R. were the same person. The fraud was discovered six months later when B. was called upon to pay the interest on the mortgage. The money was drawn out of the bank by R. four weeks after it was deposited. A. and R. disappeared, and were not heard of afterwards. It was held, that the trust company could not recover from the bank the amount of the check. (Green, C. J., and Dean, J., dissented.)

[65] So decided in First Nat. Bank v. Western Un. Teleg. Co., 30 Ohio St. 555, 27 Am. Rep. 485.

there was an error in transmitting the amount for which the draft was authorized.[66]

§ 776a. **Undisclosed principal of sender or addressee.**— A telegraph company owes a duty of care to receive and transmit messages to the undisclosed principals of senders, and such undisclosed principal of the sender of a message may recover for negligence in its transmission or delivery, because the company makes a contract with the sender, and it is bound by that knowledge of the law, which it may not deny, with notice that it inures to the benefit of any undisclosed principal whom the sender may have. The duty to the undisclosed principals of senders also rests on the fact that contract has been made between the sender and the telegraph company and that in the negotiation and enforcement of contracts the law places undisclosed principals in the shoes of their agents so that the telegraph company, which must know the law, is charged with notice and may reasonably anticipate that its misrepresentations may affect them.[67] So it is said in a Georgia case, per Cobb,

[66] McCormick v. Western. Un. Teleg. Co. (U. S. C. C. App., 8th Cir.), 49 U. S. App. 116, 79 Fed. 449, 38 L. R. A. 684, 6 Am. Elec. Cas. 873. The court said: "The defendant telegraph company, by its contract with the sender of the telegram, made in consideration of payment for the service, was bound to him to transmit his message correctly, and would be liable to him for any damage he might sustain as the direct result of failure to perform such contract, except in so far as such liability had been lawfully limited by the terms of the contract. It also owed a duty to the person to whom the telegram was addressed, and to whom it was delivered by the telegraph company to be acted upon, to exercise care that the telegram so delivered should be authentic and accurate. The cases of May v. Western Un. Teleg. Co., 112 Mass. 90, and Elwood v. Western Un. Teleg. Co., 45 N. Y. 549, sustain the right of a person to whom a telegram is addressed and to whom it is delivered by the telegraph company, to recover for damages caused by negligence of the character indicated. But a telegraph company cannot be liable to a stranger to the company and to the telegram, one to whom it has never delivered the message, and to whom it owes no duty whatever, merely because he has seen the telegram and acted upon it to his injury. Western Un. Teleg. Co. v. Wood, 6 U. S. C. C. A. 432, 57 Fed. 471; Savings Bank v. Ward, 100 U. S. 195," per Lochren, J.

[67] Western Union Telegraph Co. v. Schriver, 141 Fed. 538, per Sanborn, Cir. J.

P. J., that: "There is no question about the right of an undisclosed principal to sue a telegraph company for negligence in the delivery of telegrams. 'The governing principle is that an undisclosed principal, as the ultimate party in interest is entitled, against third persons, to all advantages and benefits of such acts and contracts of his agent, and consequently that he may sue in his own name on such contracts.'" And it was distinctly held in this case that where an agent sends a telegram for an undisclosed principal, the principal may maintain an action in his own name for damages resulting from an error in transmission which brought about delay in the delivery of a telegram.[68] On the other hand, however, a telegraph company is held to owe no duty to the undisclosed principal of the addressee of a telegram to exercise reasonable care to receive and transmit authorized messages only, because injury to him cannot be reasonably anticipated as the consequence of the lack of such care and because such injury is the effect of an independent intervening cause, viz.: the act of the addressee. A telegraph company is not liable for the lack of reasonable care to one of whose interest in the telegram it has no notice, and who is neither the principal of the sender nor the addressee. A telegraph company owes this duty to exercise such care to such persons only who, the telegrams inform it, have a beneficial interest in the dispatches it transmits; it owes this duty to these parties because injury to them is the natural and probable consequence of its want of care, an effect which it may reasonably anticipate from its notice of the fact that they are interested in the messages.[69]

§ 776b. **Undisclosed principal of addressee — Ascertaining identity of sender — Unauthorized and false representations — Telephone message to telegraph company for transmission.**— In a case in the Federal Court of Appeals a suit was brought by plaintiffs who constituted a co-partnership, doing business as a

[68] Propeller Towboat Co. of Savannah v. W. U. T. Co. (Ga. 1905), 52 S. E. 766, 19 Amer. Neg. Rep. 135, citing Story Agency, § 418 et seq. Dodd Grocery Co. v. Postal Teleph. Co., 112 Ga. 685, 37 S. E. 981. Compare Western Union Teleg. Co. v. Bell (Tex. Civ. App.), 90 S. W. 714.

[69] Western Union Teleg. Co. v. Schriver, 141 Fed. 538, per Sanborn, Cir. J.

"bank" to recover damages against a telegraph company under a claim that said company had received by telephone and delivered to plaintiffs a telegram, purporting to have been sent by a certain other bank, stating that a draft would be paid in favor of a named person whereby the plaintiffs had surrendered to said person certain cattle and lost a lien which they had thereon. The said telegram had never been authorized by the bank to be forwarded. At the close of the evidence counsel for defendant made a motion, which the court granted, for an instruction to the jury to return a verdict for their client upon the specific grounds that plaintiffs had never taken or expended anything for any draft in reliance upon the telegram, that the telegram was so indefinite that they had no right to rely upon it, and that the plaintiffs had no right to recover for the surrender of the cattle, or for the loss of their lien upon them, because the telegram contained no agreement to indemnify them against any such loss, nor was the release of any such security within the contemplation of the parties. This ruling was assigned as error. The following point, which is pertinent here, was directly decided, viz.: In the absence of notice of facts or circumstances which would awaken inquiry and arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation regarding the authority to send it of the party who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only does not require them to investigate or ascertain the identity, or authority to send it, of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone. But, when such facts or circumstances come to the notice of the company, or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only requires the party who receives the notice either to investigate or ascertain the authority of the sender before transmitting the message, or to communicate the facts and the circumstances and the inquiry or suspicion to the addressee at or before its delivery. The court also discussed and passed upon the right of the mortgagees to recover damages for the loss of

their lien upon the cattle[70] and then passing upon the erroneous ruling and the whole case held: That when a verdict is directed upon specific and untenable grounds, it may be affirmed on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the verdict was rendered. But that when the defeated party has introduced at the trial all the legal evidence he offered and has rested his case, he has thereby estopped himself, and cannot deny that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor; and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other but untenable ground is error without prejudice and no ground for reversal; accordingly it was declared that: "The result is that it is clear beyond doubt that no verdict or judgment in favor of the plaintiffs could have been sustained in this case, and as the erroneous ruling of the court below did not prejudice, and could not have prejudiced, the plaintiffs, the judgment must be affirmed," and it was so ordered.[71] In another case in the same court the plaintiffs under similar facts as to the receipt by a telegraph company and delivery to them of a telegram claimed that they were induced to pay certain checks and orders, and the point first decided in the above case was reaffirmed. The court also held that (1) The receipt and transmission to the addressee of a message to the effect that a bank, in whose name it is telephoned, will honor the checks or drafts of a beneficiary, by an operator who knows the message is telephoned to him by either the beneficiary or by the cashier of the bank, but who does not know by which one, without inquiring into the identity or authority of the sender, constitutes substantial evidence for the consideration of the jury, upon the question whether or not the operator exercised reasonable care to receive and transmit genuine and authorized messages only. It was further held that (2) Proof in an action of tort of a certain amount of loss,

[70] Considered in § 981b herein.

[71] Bank of Havelock v. Western Union Teleg. Co. (C. C. A. 1905), 141 Fed. 522.

which includes both legal damages and those too remote to warrant recovery, in the absence of any evidence from which the jury can determine the amount of either, will not sustain a verdict for more than nominal damages. Courts and juries may not lawfully transfer the property or money of one citizen to another by guess.[72] In still another case in the same court the plaintiffs had sold cattle and received the vendee's check therefore, but refused to surrender the cattle unless they received some assurance of payment. The vendee agreed to have the bank upon which the check was drawn guarantee its payment by telegram and the plaintiffs directed him to have the telegram sent to a bank which they designated. The vendee went to the place where the bank on which he had drawn the check was located and without authority from the bank telephoned to the telegraph company's operator a message for transmission to the bank designated by the vendor. This message guaranteed to honor the check in question and it was forwarded by the telegraph company and upon the strength thereof the cattle were delivered to the vendee, but neither the check nor the purchase price of the cattle was ever paid. In a suit against the telegraph company it was held that (1) A telegraph company owes no duty to the undisclosed principal of the addressee of a telegram to exercise reasonable care to receive and transmit authorized messages only. (2) That the action for damages for such an injury is an action of tort for false representations in the nature of a false warranty caused by the breach of the duty to exercise reasonable care to receive and transmit authorized messages only. It is not an action on a contract. (3) An injury that could not have been foreseen or reasonably anticipated as the probable consequence of negligence is not actionable. An injury that is not the natural consequence of an act of negligence, and that would not have resulted from it but for the interposition of some new independent cause that could not have been anticipated is not actionable. (4) A duty of care owing by the party who occasions the loss to him who suffers it is an indispensable element of actionable negligence. The breach of such a duty owing to others is immaterial. (5)

[72] Western Union Teleg. Co. v. Totten (C. C. A. 1905), 141 Fed. 533.

One who makes a false representation owes no duty of care to tell the truth to those to whom he does not communicate it and to whom he does not anticipate that it will be conveyed, and a person of ordinary prudence and intelligence would not anticipate that it would be conveyed and such parties have no cause of action against him for injuries they sustain in reliance upon it. (6) The rule that, where one of two innocent parties must suffer from the fraud of a third, he who furnishes the means to commit it must bear the loss, is limited in its application to cases in which the party chargeable makes the third party his real or apparent agent, cases in which he provides the means intentionally, or for a dishonest purpose or negligently, and cases in which he derives a benefit from the fraud of the third party. It does not govern the great majority of cases where one innocently, for an honest purpose and with reasonable care, furnishes to a third party the means by which he perpetrates a fraud from which he who provides the means derives no benefit.[73]

[73] Western Union Teleg. Co. v. Schriver (C. C. A. 1905), 141 Fed. 538. The court, per Sanborn, J., said in this case: "But neither the sender nor his principal can recover for negligence of the company in the receipt or transmission of a message which the sender forges or fraudulently signs without authority, because the contract of transmission is voidable for the fraud of the sender and neither he nor his principal can take advantage of his wrong. . . . The cause of action is for the false representation that the Bank of Denison signed the message. It is not an action for deceit, because the intent to deceive or knowledge of the falsehood or a reckless misrepresentation in ignorance of the fact is indispensable to an action of deceit. Union Pac. Ry. Co. v. Barnes, 64 Fed. 80, 83, 12 C. C. A. 48, 51; Kahl v. Love, 37 N. J. Law 5, 6, 7; Polhill v. Walter, 3 Barn. & Adolph. 114, 124. There was no such intent, knowledge, or recklessness in this case. The operator did not intend to deceive any one. He did not know that Barnes was not authorized to send the message in the name of the bank. He undoubtedly believed that he had this authority, and not without some reason; for he had repeatedly sent messages in its name, and no repudiation by the bank or other objection had been made. His only fault was his failure to make inquiry or to notify the addressee regarding the questionable authority of Barnes in the light of facts and circumstances which might naturally have aroused the suspicions of a person of ordinary prudence and intelligence in a like situation and have suggested an investigation of that authority. Western Union Telegraph Co. v. Totten, 141 Fed. 533. The

§ 776c. **Bank cashing draft — Forged message — Wires "tapped."**— Where from information received by a stranger from a telegraph operator the telegraph wire was "tapped" by a person who held control thereof for several hours, during which he telegraphed to a bank to cash a worthless draft for a confederate the telegraph company was held liable for its negligence, and it was also held that there was no contributory negligence on the part of the bank in paying the money on the paper where it wired back to ascertain if the draft would be honored and the wire "tapper" telegraphed an answer that it would be honored.[74]

action is not founded upon a false warranty or upon any contract. Conceding, without deciding, that the addressee and the apparent beneficiary of a genuine message honestly sent may recover in an action upon the contract for a failure to transmit or to deliver it speedily and correctly, the only basis of such a recovery is that the telegraph company and the sender have made the contract for the transmission for the benefit of the addressee or of the apparent beneficiary. But the only contract which the telegraph company made in this case was with Barnes. He induced the agreement by the fraudulent representation that he was authorized to send the message in the name of the Bank of Denison. If the plaintiffs or the Bank of Denison have any contract rights here, they derive them from Barnes as the beneficiary of his agreement. But neither they nor he can enforce that contract because it is voidable by the company for the fraud of Barnes and because neither they nor he can take advantage of his wrong." The court considers then the question of breach of duty and decides on that point as stated in the text. It then considers the question of undisclosed principal of the addressee and quotes from Lee v. Western Union Telegraph Co., 51 Mo. App. 375, 382, and says: "In this way it appears that at the time the telegram was sent the declared law upon this subject had been for ten years that a telegraph company was not liable for negligence to the undisclosed principal of the addressee." Additional points, that the company made its representation and owed its duty to a class of persons and that this class included all who might take the check or draft described in the message in reliance upon the telegram that the defendant company was a member of this class; the question of fraud; and of the duty of a telegraph company generally, are discussed at length.

[74] Western Union Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.), 72 S. W. 232. aff'd. 97 Tex. 219, 77 S. W. 603.

§ 777. **Alteration of message by receiving operator.**— If the receiving operator alters a message, by writing out a supposed contraction of a word, the company is liable.[75]

§ 778. **Cipher despatches generally.**— The fact that abbreviations common to the trade, and known to defendant's agents, are used, does not constitute a cipher despatch.[76] But it is often of the utmost importance that a message should be sent in cipher or obscure, to prevent the contents being known and the object of the parties being defeated.[77] It is said, however, to be well settled that telegraph companies are not chargeable with knowledge of the importance of delivering a cipher despatch, and as the very nature of such a despatch is to keep them from a knowledge of its contents, the rule is a just one, which preserves them from the responsibility that such a knowledge would impose upon them. "There seems to be an effort to extend this rule beyond the occasion for it and to practically make all telegrams, expressed in abbreviated language, cipher despatches," and the court distinguishes between them.[78] So it is decided, however, that where the company has no notice of the nature of a cipher despatch, it is not liable for delay thereof, even though it is stated to be important, and there is a request to rush it through.[79] But it is also held that where a cipher message is plainly written in the letters of the English alphabet, the fact that the operator does not know the meaning of the words employed is no excuse for a failure to transmit or deliver such a cipher telegram.[80] So the company is liable for

[75] New York & Wash. P. Teleg. Co. v. Dryburg, 35 Penn. St. 298, 78 Am. Dec. 338, Allen's Teleg. Cas. 157.

[76] Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 2 Am. Elec. Cas. 756, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542, 4 L. R. A. 660, 11 S. W. 783.

[77] Western Un. Teleg. Co. v. Eubank, 100 Ky. 591, 38 S. W. 1068, 18 Ky. L. Repr. 995, 36 L. R. A. 711, 1 Am. Neg. Rep. 244, 248.

[78] Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 3 Am. Elec. Cas. 768, 771, 12 S. W. 857, per Henry, Ass. J.

[79] Houston, E. & W. T. Ry. Teleg. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605.

[80] Western Un. Teleg. Co. v. Hyer Bros., 22 Fla. 637, 2 Am. Elec. Cas. 484, 1 So. 129. See American Un. Teleg. Co. v. Daughtery, 89 Ala. 191, 3 Am. Elec. Cas. 579, 7 So. 660; Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455; Western Un.

unreasonable delay in transmitting such a message, even though unadvised of its importance.[81]

§ 779. **Same subject continued.**— The company is not relieved from liability for failure to transmit a cipher despatch from the receiving office, even though it has, by stipulation, limited its liability for mistakes and delays in transmission and for errors in transmitting cipher or obscure messages.[82] One of the main or principal questions, however, seems to be this: Whether or not the company had actual knowledge of the importance of the message or ought to have had knowledge of its importance as apparent from the face of the telegram itself, or as arising from the character of the transaction involved, or from the company's knowledge of the business relations or constant dealings between the sender and addressee.[83] Where the telegraph agent knew that the sender and addressee were partners, and was acquainted with the nature of their business and had frequently been told that all their messages were important and should be sent and delivered with dispatch, and the telegram in question was marked " rnsh," and, in addition, the manager of the company was told to rush it, that it was very important, and to get an answer by wire as soon as possible, and part of the contents were not in cipher, the company was held responsible. The court said, however, that the facts took the case out of the general rule as to cipher telegrams.[84] But it is also held that a sufficient notice of importance of haste does not arise, in the absence of gross negligence, from an oral request to the operator to send a cipher despatch " before

Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715, 1 Am. Elec. Cas. 487; Daughtery v. Western Un. Teleg. Co., 75 Ala. 168, 1 Am. Elec. Cas. 588. Examine Saunders v. Stewart, 35 Law Times, 370.

[81] So held in Western Un. Teleg. Co. v. Fatman, 73 Ga. 285, 1 Am. Elec. Cas. 666. See also Dodd Grocery Co. v. Postal Teleg. Cable Co., 112 Ga. 685, 37 S. E. 981. But see Abeles v. Western Un. Teleg. Co., 37 Mo. App. 544, and chapter on Damages, herein.

[82] So held in Western Un. Teleg. Co. v. Way, 80 Ala. 542, 4 So. 844.

[83] Western Union Teleg. Co. v. Houston Rice Mill Co. (Tex. Civ. App., 1906), 93 S. W. 1084; Western Union Teleg. Co. v. McGown (Tex. Civ. App., 1906), 93 S. W. 710; Western Union Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

[84] Western Un. Teleg. Co. v.

the cotton market opened." The message in this case was unrepeated.[85]

§ 780. **Furnishing stock quotations — Contract.**— If a telegraph company contracts to furnish stock quotations, it is liable for a failure to furnish them accurately, when loss is occasioned thereby.[86] But, whenever the contract is terminated, such company cannot be compelled to enter into another, or to continue the old contract when it is desired to terminate the same.[87] The company cannot, however, excuse itself from its contract obligation to convey correct information by showing that its source of information is defective.[88] And where a company is licensed, under the English Telegraph Act to establish telegraphs, to transmit prices on the Stock Exchange, it may refuse to continue supplying stock quotations to one not a member of the Stock Exchange, nor is such company a monopoly at common law, nor a part of the monopoly of the Postmaster-General, under the statute.[89] But where a telegraph company

Nagle, 11 Civ. App. (Tex.) 539, 6 Am. Elec. Cas. 842, 32 S. W. 707, citing Telegraph Co. v. Sheffield, 71 Tex. 570; Teleg. Co. v. Williford, 2 Tex. Civ. App. 574; Telegraph Co. v. Bowen, 84 Tex. 478; Mitchell v. Teleg. Co., 5 Tex. Civ. App. 527, 24 S. W. 550; Telegraph Co. v. Moore, 76 Tex. 68; Potts v. Telegraph Co., 82 Tex. 545; Telegraph Co. v. Blanchard, 68 Ga. 299; Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575; Hadley v. Western Un. Teleg. Co., 115 Ind. 191, 15 N. E. 845; Manville v. Telegraph Co., 37 Iowa, 214.

[85] Cannon v. Western Un. Teleg. Co., 100 N. C. 300, 6 Am. St. Rep. 590. 21 Am. & Eng. Corp. Cas. 124, 2 Am. Elec. Cas. 699, 6 S. E. 731.

[86] Western Un. Teleg. Co. v. Stevenson, 128 Penn. St. 442, 3 Am. Elec. Cas. 764, 18 Atl. 441; Metropolitan Grain & Stock Exchange v. Mutual Un. Teleg. Co., 11 Biss. (U. S. C. C., N. D. Ill., 1883) 531, where it is said: "It is no part of the duty of a telegraph company to collect and transmit information. If they volunteer to follow that class of employment they are bound to do it with fidelity while their contract continues."

[87] Metropolitan Grain & Stock Exchange v. Mutual Un. Teleg. Co., 11 Biss. (U. S. C. C., N. D. Ill., 1883) 531.

[88] Bank of N. O. v. Western Un. Teleg. Co., 27 La. Ann. 49, 1 Am. Elec. Cas. 147.

[89] Cochrane v. Exchange Teleg. Co., 65 L. Jour. Ch. (N. S.) 334, Eng. Teleg. Act of 1869. See cases under chapter on Parties and Remedies herein, as to injunctions.

Furnishing stock quotations only to persons designated by Stock Exchange.— Refusal of further service although paid for in advance — Divulging contents of messages.

has by its continuous acts in supplying stock quotations impressed its business with a public interest it cannot remain in that business and refuse to supply quotations to a customer on equal terms with others where they are necessary to the carrying on of such patron's business, but this would not apply to a person desiring to use such quotations for illegal or gambling purposes, as in case of a bucket shop.[90]

See Renville, In re 61 N. Y. Supp. 549, 46 App. Div. 37. The court considers and distinguishes New York and Chicago Grain & Stock Exchange v. Board of Trade of City of Chicago, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107; and said, "We cannot agree with that decision so far as it appears to justify an interference by the public or the courts with a voluntary association in the transaction of its business, because the public desire information as to its transactions," per Ingraham, J.

[90] Western Union Teleg. Co. v. State, Hammond Elevator Co., 165 Ind. 492, 76 N. E. 100. In this case Montgomery, J., said: "It appears from the averments of the complaint that for a period of ten years appellant, in the exercise of its charter rights, and in conjunction with its other business, was engaged in buying the continuous quotations of prices of grain and hog products of the Board of Trade of Chicago, and selling the same at a fixed price to such persons as desired them, until such quotations became necessary to the safe and successful conduct of business in such products, and such quotations and system of gathering and supplying the same became impressed with a public interest. Conceding these facts to be true, as the demurrer does, so long as appellant, a *quasi* public corporation, continues in such business, it must be subject to such regulations as may be found necessary to prevent injury to such public interest. The law will not permit a telegraph company under such circumstances to enjoy a monopoly, and to misuse its franchise by supplying such quotations to some and refusing them to others who are equally able and willing to pay for them and to be governed by all reasonable rules and regulations. The facts alleged in the complaint make it plain that it was the duty of appellant to supply appellee elevator company with the continuous quotations of the Board of Trade of Chicago, without discrimination, and upon the same terms exacted of others. New York & Chicago Grain & Stock Exchange v. Board of Trade of Chicago (1889), 127 Ill. 153, 19 N. E. 855, 11 Am. St. Rep. 107, 2 L. R. A. 411; Inter-Ocean Pub. Co. v. Associated Press (1900), 184 Ill. 435, 450, 56 N. E. 822, 42 L. R. A. 568, 75 Am. St. Rep. 184; Friedman v. Gold & Stock Teleg. Co., 32 Hun (N. Y.), 4; Nebraska Teleph. Co. v. States, Yeiser, 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; State v. Citizens Tel. Co., 61 S. C. 83, 39 S. E. 257, 85 Am. St. Rep. 870, 55 L. R. A. 139; Smith v. Gold & Stock Teleg. Co. (1886), 42 Hun (N. Y.), 454. No error was committed in overruling appellee's de-

§ 780a. **Furnishing stock quotations — Termination of contract by sale — Tapping wires.**— A contract whereby a telegraph company is to furnish a commission merchant with Board of Trade quotations will be terminated by a sale of such commission business, where the agreement is a personal one not assignable without the company's consent. And where a

murrer to the amended complaint. * * * We have no statute denouncing option gambling as a crime, but contracts for the purchase and sale of commodities, not to be delivered, but only to be performed by advancing and paying differences, are void at common law, in the absence of statute. Irwin v. Williar (1884), 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225; Rumsey v. Berry (1876), 65 N. E. 570; Gregory v. Wendell (1878), 39 Mich. 337, 33 Am. Rep. 390; Mohr v. Miesen (1891), 47 Minn. 228, 49 N. W. 862; Cunningham v. National Bank (1883), 71 Ga. 400, 51 Am. Rep. 266; Cothran v. Ellis (1888), 125 Ill. 496, 16 N. E. 646. This court has denounced such practices in the strongest terms: 'The business or operations of the "bucket-shop" have been the source of much evil. Embezzlements and other crimes on the part of public officers, and bank officials, having the custody of money belonging to others, have been in the past some of the evil fruits directly traceable to dealing in futures in these institutions; and the question of prohibiting such transactions or business, as it is generally conducted, merits the consideration of the legislature." Pearce v. Dill (1897), 149 Ind. 136, 144; Plank v. Jackson (1891), 128 Ind. 424; Davis v. Davis (1889), 119 Ind. 511; Sondheim v. Gilbert (1889), 117 Ind. 71, 5 L. R. A. 432, 10 Am. St. Rep. 23; Whitesides v. Hunt (1884), 97 Ind. 191, 49 Am. Rep. 441. The requirement of the board of trade that every applicant for its continuous quotations shall, as a condition precedent to receiving them, obligate himself not to use the same for such illegal purposes, is not an unlawful discrimination meriting the condemnation of the court, but, on the contrary, is a proper and reasonable regulation to which this court unhesitatingly gives its approval. Board of Trade of City of Chicago v. Christie Grain & Stock Co. (1905), 198 U. S. 236, 253, 25 Sup. Ct. 637, 49 L. Ed. 1031; Central Stock & Grain Exch. v. Board of Trade of Chicago (1902), 196 Ill. 396, 63 N. E. 740; Sullivan v. Postal Teleg. Cable Co. (1903), 123 Fed. 411, 61 C. C. A. 1. * * * We are unwilling that the board of trade of Chicago should be a more considerate guardian of the morals of this State than its own courts, and, assuming the facts pleaded to be true, unhesitatingly declare that no court, under the guise of requiring the performance of a duty by a public service corporation, should, either in violation of the contract pleaded or in its absence, compel the performance of acts vitally necessary to the continued operations of a bucket-shop."

party after the wires had been cut by the company without the latter's consent or knowledge, reconnects his office with the wires of the company thereby again possessing himself of the quotations and such acts are contrary to the statute providing against unlawful cutting or tapping of wires, he cannot obtain equitable relief as he does not come into a court of equity with clean hands.[91]

§ 781. **"Futures"—"Dealing in options"— Gaming — Telegrams.—** The New York Cotton Exchange is a corporation created under New York laws, and authorized to deal in cotton, both for present and future delivery. No contract is recognized under the rules of the Exchange, except for the sale and purchase of cotton to be actually delivered. The Arkansas statute makes the buying and selling or otherwise dealing in what is known as futures, with a view to profit, an act of gambling, and a misdemeanor, subject to punishment. The plaintiff was requested, by telegram, from a citizen of Arkansas, the defendant, to purchase 500 bales of cotton, and $500 was deposited in bank to his credit for such purpose. Said purchase was ac-

[91] Sullivan v. Chicago Board of Trade, 111 Ill. App. 492. Mr. Justice Ball said: "Appellant had no contract with the telegraph company which entitled him to receive from it continuous quotations of the Board of Trade prices. The contract the company had with Rowland was a personal one, which he could not assign without its consent. By the act of selling out his business Rowland put an end to that contract. Having no contractual relations with appellant, the company had the right, at any time after his purchase of the interest of Rowland, to disconnect its wires and to cease to furnish him such quotations. That it did so gave appellant no just cause of complaint. By sections 5 and 15, ch. 134 R. S., the unlawful cutting or tapping of, or connecting with, any telegraph or telephone wire is made a criminal offense, punishable by fine or imprisonment, or by both. The record shows that appellant, after he filed his first bill and before he filed his second bill, without the consent of the company, and without lawful excuse, 'caused the wires so cut (by the company) to be restored and reconnected with two tickers in his place of business in the same way they were before they were cut by said telegraph company; that said wires had been so reconnected and were giving complainant the quotations before he obtained the temporary injunction' in this last suit. Appellant does not come into court with clean hands. He cannot take advantage of his own wrongful and illegal acts as the foundation for equitable jurisdiction and relief."

cordingly made under the rules of said Exchange, contemplating actual delivery. It was stated by the plaintiff in the correspondence with defendant, that money would be made out of the transaction. Upon a decline in market, margins were necessarily advanced by the plaintiff, and suit was brought for their recovery from the defendant. It appeared that the plaintiff knew that when the contract should close, defendant would be financially unable to pay for the cotton. The contract was upheld and decided not to be a gaming contract, nor a dealing in futures, within the above statute.[92] In California, contracts for the sale and future delivery of stocks are invalid under the Constitution.[93] In a Georgia case, contracts for the sale of cotton "futures" are gaming contracts, illegal and contrary to public policy, and cannot, therefore, be invoked to measure the damages sustained by a breach of an agreement, based on speculation in such futures.[94] In Illinois the statute provides for punishment of one who contracts for options to buy or sell at any future time the stock of any railroad or other company, and makes such agreements gambling contracts.[95] In Missis-

[92] Johnston v. Miller, 67 Ark. 172, 53 S. W. 1052, cited in Barnes v. State, 77 Ark. 124, 126, as stating the law of the case. In the citing case, however, a conviction of gambling was held to have been sustained by evidence that defendant sold so many bales of cotton on a margin of one dollar per bale, and that at the time of the sale nothing was said about the delivery of the cotton. "The margins engrossed their attention to the exclusion of any mention of delivery."

[93] Maurer v. King, 127 Cal. 114, 59 Pac. 290; Cal. Const., art 4, § 26. See Parker v. Otis, 130 Cal. 322, 92 Am. St. Rep. 56, 62 Pac. 571, 927.

[94] Moss v. Exchange Bank, 102 Ga. 808, 30 S. E. 267, overruling Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480. But see Gray v. Western Un. Teleg. Co., 87 Ga. 350, 13 S. E. 562, considered under chapter XXXII, herein, on Penalty Statutes, post. Examine Miller & Co. v. Shropshire (Ga. 1906), 53 S. E. 335; Forsyth Mfg. Co. v. Castlers, 112 Ga. 199, 37 S. E. 485.

[95] Ubban v. Binnian, 182 Ill. 508, 55 N. E. 552. Case upon the validity of a certain agreement, which was held a conditional sale and not within the statute, reversing 78 Ill. App. 330; Ill. Crim. Code, § 130, cited in Kantzler v. Bensinger, 214 Ill. 589, 596, 597; Osgood v. Skinner, 211 Ill. 229, 233. What is not a purchase of stock within the statute, see Skinner v. Osgood, 83 Ill. App. 454. Case of purchase of grain when within Ill. Crim. Code, § 132. Kruse v. Kennett, 181 Ill. 199, 54 N. E. 965, revg. 69 Ill. App.

sippi, where stock is bought and sold for present and not for future delivery, even though such purchases and sales follow each other in rapid succession, the acts do not constitute a dealing in "futures," within the statute.[96]

§ 782. **Same subject continued.**— In Missouri the statutory offense of dealing in options must be committed within the State, to be punishable. Sending telegrams to brokers outside the State is not an act within the statute.[97] In a South

566; Jamieson v. Wallace, 167 Ill. 388, 47 N. E. 762, affg. 60 Ill. App. 618.

[96] Western Un. Teleg. Co. v. Littlejohn, 72 Miss. 125, 18 So. 418. Examine Isaacs v. Silverberg, 87 Miss. 185, 189, 190, 39 So. 420, a case of futures and recovery of margins.

As to Sales and Future Delivery see also the following cases: — *United States*: Berry v. Chase, 146 Fed. 625 (sale of stocks for future delivery). *Alabama:* Hooper v. Knuckles (Ala. 1905), 39 So. 711 (sale of cotton, future delivery, intention). *Illinois*: Hocomb v. Kempner, 214 Ill. 458, 73 N. E. 740 (undisclosed intention of agent to gamble on grain). *Indiana*: Western Union Teleg. Co. v. State, Hammond Eelevator Co., 165 Ind. 492, 76 N. E. 100 (considered at end of § 780 herein and note). *Massachusetts*: Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706 (action to recover money paid on margins). *New York*: Zeller v. Leiter, 99 N. Y. Supp. 624 (contract to purchase grain, future delivery). *North Carolina*: Rankin v. Mitchen (N. C. 1906), 53 S. E. 854 (sale of cotton, futures and question for jury as to actual intention of parties). *North Dakota*: John Miller Co. v. Klovstad (N. D. 1905), 105 N. W. 164 (sale of grain, future delivery). Beidler & Robinson Lumber Co. v. Co.-Commission Co. (N. Dak. 1905), 102 N. W. 880 (sale of grain at future date when valid, when not). *Oregon*: Overbeck, Starr & Cooke Co. v. Roberts (Oreg. 1906), 87 Pac. 158 (purchase of cotton, gambling). *Pennsylvania*: Snider v. Harvey, 215 Pa. 538, 64 Atl. 687 (stock transaction, no actual delivery, evidence). Jennings v. Morris, 211 Pa. 600, 61 Atl. 115, affd. 211 Pa. 606, 61 Atl. 117 (futures, gambling contract). *South Carolina*: Barr v. Satcher, 72 S. C. 35, 51 S. E. 530 (sale and delivery of cotton at future time, statute frauds, pleading). *Texas*: Norris v. Logan (Tex. Civ. App., 1906), 94 S. W. 123 affd. (Tex. 1906), 97 S. W. 820 (sale of cotton for future delivery).

Telegram as to futures, burden of proof. See Western Union Teleg. Co. v. Hill (Tex. Civ. App.), 65 S. W. 1123.

[97] State v. Gritzner, 139 Mo. 512, 36 S. W. 39; Mo. Rev. Stat. of 1889, §§ 3931–3933. When speculation in grain not within Mo. Rev. Stat. of 1889, § 5209, as to recovery back of money. Connor v. Black, 132 Mo. 150, 33 S. W. 783. Examine Hingston v. Montgomery (Mo. App.), 97 S. W. 202; Stewart v. Hutchinson (Mo. App.), 96 S. W. 253.

Carolina case it is held that a failure to deliver a message relating to cotton futures gives no cause of action, as such contracts are contra bonos mores in that State and will not be enforced, even though valid where made.[98] In a Texas case, where the transaction between the sender and the broker, directing a purchase in cotton, was a deal in futures, and so void as against public policy, it was held that there could be no recovery for a loss caused by an error in the telegram.[99] In a Federal decision it is held that, even though the seller does not own the goods at the time and can only obtain them by a purchase in the market, nevertheless, a contract for sale with future delivery is valid, where an actual delivery and payment are intended; but if it contemplated that there shall be paid only the difference between the contract and market price at the date set for execution of the agreement, and no actual delivery is contemplated, then there is only an invalid wagering or gaming contract. It is also sufficient, however, to avoid the gambling taint, that one of the parties intended no illegality, as where a seller contemplated actual delivery, and would have delivered on demand had the goods been called for, and this, even though the purchaser did not intend or expect actual delivery.[1]

§ 783. **Telegraph office — When a betting-house.** — A telegraph office is held a betting-house, and the one who keeps it may be convicted therefor, under the Canada Code, where a system of betting on race horses was carried on in said office, as follows: Information as to horse races in the United States was furnished at the telegraph office to holders of receipts for moneys deposited in a bank and given in the name of a person in the United States; said receipt holders telegraphed instructions to place bets on horses in the races, and winnings were paid the holders at another office, by telegraphic instructions, from the person placing bets in the United States.[2]

[98] Gist v. Western Un. Teleg. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 753.

[99] Western Un. Teleg. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599.

[1] Hill v. Levy (U. S. D. C., Va., 1899), 98 Fed. 94; Sanborn & H. Dig., § 1634 et seq.

[2] Regina v. Osborne (Q. B.), 27 Ont. Rep. 185; Can. Crim. Code, §§ 197, 198.

§ 783a. **elivery of telegram by common carrier of passengers.**— Where a captain of a steamer directs the purser to accept a message for delivery to a passenger the common carrier will not be liable for non-delivery of the telegram unless is has knowledge, or permits its officers and agents to make such delivery or there exists a custom to receive telegrams for its passengers, or the officers or agents of the company are shown to be clothed with the proper authority to act for the company in such matters.[3] In this case the court, per Powers, J. said: "The defendant sets up that in directing the telegram to be delivered to the purser, the captain acted in excess of his authority, and outside of the scope of his employment and of the business in which he was engaged, and that therefore, the defendant itself never received the telegram or became charged with the duty of its delivery. * * * The court cannot infer, as a matter of law, the authority of the captain of a passenger steamboat to charge the owners with the duty of delivering telegrams to its passengers. It is a matter of fact, to be established by evidence and found by the jury. The exceptions fail to show that any evidence was offered in this case which would warrant such a finding. The defendant was a common carrier of passengers by water. Its contract resulting from the relation of carrier and passenger, nothing else appearing, was to transport its passenger safely and with a proper regard for his comfort and convenience, together with such articles and money as might be properly contained in the baggage he brought with him. The exceptions show no express contract with the passenger for more than this, and nothing from which more can be implied. They utterly fail to show that it was any part of the defendant's business, habit, or custom to accept telegrams for delivery to its passengers, or that it knew or permitted this to be done by its officers, servants or agents. In general the business of common carriers of passengers on our inland waters, and that of receiving and delivering telegrams, are entirely separate and distinct, and the latter is in no proper and legal sense incidental to or connected with the former. Common carriers of passengers making no charge for such a service, and its very responsible

[3] Davies v. Eastern Steamboat Co., 94 Me. 379, 47 Atl. 896.

duties and burdens should not be imposed upon them without their consent unless some rule of public policy requires it. * * * The defendant, therefore, owed no contractual duty to the passenger to receive and deliver the telegram. It does not appear that it was part of its business or incidental thereto If not, it necessarily follows, nothing else appearing in the case, that the act of the captain of the defendant's steamboat was outside of the scope of the business in which he was engaged, and not connected with the service which he was employed to perform. For such acts the defendant is not liable unless it held the captain out to the world as having authority, and the case is barren of any such showing."

§ 783b. **Refusal to pay telegraph order for money.**— If a telegraph company, with a full knowledge of the conditions and of all the facts and circumstances showing that the probable direct result of its action will be injury and damage, wilfully refuses to pay money upon a telegraph order to the payee it is liable for the resulting injury and it is not relieved from liability by paying over the amount of the order to the transmitting banks.[4]

§ 783c. **Telephone company — Right to deprive subscriber of extension set.**— A corporation having a monopoly of the telephone business in a community can deprive a subscriber of telephone service where he refuses to discontinue the use, in connection with the company's wires on his premises, of an extension set furnished by another company, and although a telephone corporation has the right to choose its own agencies for the performance of its duties such a right is not absolute but contingent. It is subject to the obligation that the corporation shall be able and willing to furnish extension sets as efficient and convenient as the state of the act affords and to serve its patrons as conveniently as they can provide for themselves from the market, and that at prices which are not so extortionate as to render its offer nugatory in effect. The subscriber, however, cannot insist upon a particular form of apparatus if the telephone company is ready and willing and

[4] Western Union Teleg. Co. v. Wells, 50 Fla. 474, 39 So. 838.

offers to furnish one at a reasonable compensation which will substantially accomplish the same purpose and which is adapted to the circuit they operate. The instruments in question in this case were of what were called the "long distance type" and consisted of a shaft placed upon a standard with a switch on which hung a watch case receiver, a granular carbon transmitter and a platinum diaphragm, not differing materially, except in superior lightness and elegance of construction, from the long-distance extension instruments chiefly used by the defendant telephone company. There was no attempt by the subscriber to conceal the use of these instruments, they and the connecting wires being at all times in plain sight and the attention of the agents of the company had been called to them whenever they visited the plaintiff's house. No rule as to the use of such extension sets had ever been promulgated except the prohibition against their use made by the company. The price of the sets had also decreased to one-quarter of that paid by the plaintiff.[5]

[5] So held in Gardner v. Providence Telephone Co., 23 R. I. 262, 49 Atl. 1004, 7 Am. Elec. Cas. 867. Stiness, C. J., dissenting, said: "Agreeing with the general statements of law in the foregoing opinion, I am unable to agree with its conclusion, which, to my mind, is inconsistent with it. Having said that the defendant's proposition, that it should have the right to furnish and control the whole telephonic plant on the premises of a subscriber cannot be assented to in full, and, further, that 'such improvements as are offered must not be accompanied with extortionate demands for compensation, so as to render the offer nugatory,' and that 'if, however, the company neglects its duty to the public, and is not provided with means to secure the accommodation of its customers, or, having at its command such appliances, refuses to furnish them, except at exorbitant rates, we cannot question the right of the customer to supplement the imperfect service of the company with approved appliances procured elsewhere, provided that such appliances can be used in connection with the company's circuits without detriment to their harmonious operation,' the logical result from the facts in this case is a decree for the complainant. The opinion asserts the right of a subscriber to supplement the service of the company under two conditions, both of which appear in this case. First, if the company demands exorbitant rates. The complainant now receives satisfactory service for $82 per year, and the company demands $220 for the same service. The extension instruments cost $12.50 at retail, and the company charges $18 per year for the use of it — at least 150 per cent. of its cost. The additional charge

783d. **Telephone companies — Decisions generally.—** We have considered elsewhere the subjects of the suties of telephone companies to the public; of legislative control; of discrimination; of rates and charges; of their right to make stipulations, rules and regulations; and the various other questions upon which decisions have been rendered in connection with such corporations and it is our purpose to consider here only certain decisions relating generally to telephone companies. Thus, a city cannot by ordinance establish a maximum rate for telephone charges where no power has been delegated to it by the State so to do.[6] If a telephone company refuses to put in a telephone it may show, not in defense but as a reason why damages should be reduced, that other customers had been refused as well as the plaintiff because the condition of the switchboard precluded putting in other wires and that its facilities were limited; the company, however, cannot refuse to allow the use of its telephone to a subscriber unless upon condition that the latter agrees to use its instruments exclusively, no such condition being imposed upon others in the same business.[7] A telephone company may, however, refuse to install an instrument in a house of ill-repute.[8] The court, in a suit to compel a telephone company to replace an instrument will not disturb a finding in defendant's favor where the evidence is conflicting as to discrimination in removing the telephone.[9] A patron is not bound by a rule of a telephone company which is not brought to his notice and of which he has no

is made for a metallic circuit, which is neither shown to be necessary nor of advantage to the subscriber or to the company, except in the matter of income to the company. Under these circumstances, the company's demand is manifestly exorbitant. Second, no detriment to the company is shown by the complainant's use of the extension set, either in its demand upon service or in safety. On the contrary the opinion is in favor of the complainant on both these grounds. I am therefore unable to see any sufficient reason for refusing the complainant's prayer for an injunction."

[6] State, Garner v. Missouri & K. Teleph. Co., 189 Mo. 83, 88 S. W. 41.

[7] Gwynne v. Citizens' Teleph. Co., 69 S. C. 434, 48 S. E. 460, 61 S. C. 83, 39 S. E. 257, 7 Am. Elec. Cas. 838.

[8] Godwin v. Carolina Teleph. & Teleg. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251.

[9] Crouch v. Arnett, 71 Kan. 49. 79 Pac. 1086.

knowledge and notifying such person after a contract is made that it was customary to require pay for back rent before an instrument taken out would be reinstalled is not a rule or reasonable requirement and is unenforceable especially where the customer is solvent and it is fairly doubtful whether back rent is owing as the instrument was not in working order and the service was a failure for the period for which the back rent was claimed and the company had been notified to remove the instrument. The company cannot arbitrarily pass on the patron's rights and be a judge in its own case nor does the fact that the company provides public stations for the use of every one that will pay toll constitute any defense. It must furnish private services in residences and offices when asked, giving to all equal privileges.[10] Where a franchise of a telephone company, subject to certain conditions under the grant, is purchased the vendee will be bound by such conditions and will be held to have purchased with knowledge thereof. It will also be bound by the construction which it has itself placed upon the contract and also by its acts thereafter in permitting access to its service by the patrons of the original company, and it cannot repudiate its acts and refuse to continue such access and service.[11] A telephone company may be obligated to deliver messages where it expressly agrees to do so and is paid the charges therefor even though it has given orders that messages are not to be received for delivery to the sendee.[12]

[10] State, Payne v. Kinloch Teleph. Co., 93 Mo. App. 349, 67 S. W. 684, 8 Am. Elec. Cas. 863.

[11] Mahan v. Michigan Teleph. Co., 132 Mich. 242, 93 N. W. 630, 8 Am. Elec. Cas. 38.

[12] Cumberland Teleph. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155.

CHAPTER XXX

CONNECTING, PARALLEL AND COMPETING TELEGRAPH LINES

§ 784. Connecting lines — Telegraph companes — Generally.
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§ 784. **Connecting lines — Telegraph companies — Generally.**— In the cases relating to the transmission of telegrams over connecting lines and their delivery, the analogy of such connecting lines and common carriers is declared to be so great that the established rules of law which determine the liability of the latter should be applied with equal force to the former.[1] The analogy between common carriers and telegraph companies has also been considered in numerous questions arising in cases relating to the latter.[2]

§ 785. **Rules and regulations as to connecting lines.**— A telegraph company may require that messages received from other places and presented by other telegraph companies for transmission to Europe, shall specify thereon the date of reception and the company's name from whom it came, and may make an additional charge therefor. Such conditions are reasonable and valid. But a refusal to accept messages without a written power of attorney from the original sender, authorizing the message to be forwarded, is unreasonable and will not be sanctioned by the courts.[3] So a common carrier may validly restrict its liability for loss on connecting lines.[4] And where the sender of a message writes a message on another paper, which the operator copies upon the regular blank, he is held to act as agent of the sender, who will, therefore, be bound by the conditions on said blank, relieving the company from liability for the mistakes or delays, etc., of connecting lines.[5]

[1] Smith v. Western Un. Teleg. Co., 84 Tex. 359, 31 Am. St. Rep. 59, 19 S. W. 441.

[2] See cases cited in the following sections and the numerous cases relating to rules and regulations, duties and liabilities, and in fact throughout this work.

[3] Atlantic & Pac. Teleg. Co. v. Western Un. Teleg. Co., 4 Daly (N. Y.), 527, 1 Am. Elec. Cas. 81; Western Un. Teleg. Co. v. Munford, 87 Tenn. 190, 2 Am. Elec. Cas. 751, 10 S. W. 318. See Western Un. Teleg. Co. v. Carew, 15 Mich. 525, Allen's Teleg. Cas. 345.

[4] Taylor v. Little Rock, M. R. & T. R. Co., 32 Ark. 393, 29 Am. Rep. 1.

[5] Gulf, Col. & S. F. R. Co. v.

§ 786. **Initial company not liable beyond own line where no contract.—** Connecting lines of telegraph resemble the case of several successive carriers of goods. Each in the absence of evidence of a special agreement, or, as is said in some cases, an express or implied contract to the contrary, is liable only for his own acts and not for the acts and defaults of others, and the initial company is bound only to deliver the property, in accordance with its legal contract, to the next line or carrier whose line or route he does not own, operate or control. But he is liable until delivery to the connecting carrier where property is received to be carried beyond his own line.[6] So, where

Geer, 5 Tex. Civ. App. 349, 4 Am. Elec. Cas. 795$_2$ 24 S. W. 86. Mo. Rev. Stat. 1889, § 944, provides in effect that common carrier cannot stipulate against negligence of connecting carrier if its contract for carriage is not limited to end of own route. State Nat. Bank v. Chicago G. W. R. Co., 72 Mo. App. 82; McCann v. Eddy, 133 Mo. 59, 33 S. W. 71, 35 L. R. A. 110, 2 Am. & Eng. R. Cas. (N. S.) 633.

Message on "plain white paper." See opinion of court in note to § 787a herein.

[6] Baldwin v. United States Teleg. Co., 45 N. Y. 744, Allen's Teleg. Cas. 613, 649, per Allen, J., revg. 54 Barb. (N. Y.) 505, 6 Abb. Pr. (N. S.) (N. Y.) 405, 1 Lans. (N. Y.) 125; Pittsburg, C. & St. L. R. Co. v. Morton, 61 Ind. 539, 28 Am. Rep. 682. Nor is he bound to provide other means of transportation on his own route than such as he owns, uses or holds out to the public for that purpose. *United States*: Texas & P. R. Co. v. Clayton (U. S. C. C., 2d Cir.), 51 U. S. App. 676, 28 U. S. C. C. A. 142, 84 Fed. 305, 9 Am. & Eng. R. Cas. (N. S.) 821. *District Columbia*: Howard v. Chesapeake & O. R. Co., 25 Wash. L. Repr. 750, 11 App. Dist. C., 300. *Kentucky*: Louisville & N. R. Co. v. Cooper, 19 Ky. L. Repr. 1152, 42 S. W. 1134; Louisville & N. R. Co. v. Tarter, 19 Ky. L. Repr. 229, 7 Am. & Eng. R. Cas. (N. S.) 607, 39 S. W. 698, 2 Am. Neg. Rep. 154, 155, per Hazelrig, J. *Maine*: Grindle v. Eastern Express Co., 67 Me. 317, 24 Am. Rep. 31. *Maryland*: Hoffman v. Cumberland Valley R. Co., 85 Md. 391, 37 Atl. 214. *Massachusetts*: Burroughs v. North Car. & W. R. Co., 100 Mass. 26, 1 Am. Rep. 78. *Mississippi*: Crawford v. Southern R. Assn., 51 Miss. 222, 24 Am. Rep. 626. *Missouri*: Eckles v. Missouri-P. R. Co., 72 Mo. App. 296; Miller G. & E. Co. v. Union P. R. Co., 138 Mo. 658, 40 S. W. 894, 8 Am. & Eng. R. Cas. (N. S.) 1. *New York*: Lamb v. Camden & A. R. & Transp. Co., 46 N. Y. 271, 7 Am. Rep. 327. *Rhode Island*: Knight v. Providence & W. R. Co., 13 R. I. 572, 43 Am. Rep. 46.

For discussion of the principle involved in the text as to common carriers generally, examine also the the following cases: *Alabama*: Southern Ry. Co. v. Levy (Ala.), 39 So. 95. *Indiana*: Chicago I. & L. Ry. Co. v. Woodward, 164 Ind.

a telegraph company receives a message to be transmitted to a point beyond its own line and on a connecting line, it undertakes for care and attention in transmitting it over its own line, and for prompt delivery to a competent and responsible company for further transmission. When so delivered, its liability terminates, and that of the receiving company begins.[7]

§ 787. **Liability for failure to deliver to connecting line.**—A telegraph company is bound to deliver the telegram to the connecting line with reasonable promptness, and where it fails so to do it is liable, where its delay contributed to the failure to finally deliver said telegram.[8]

360, 72 N. E. 558; 73 N. E. 810. Pennsylvania Co. v. Dickson, (Ind.) 67 N. E. 538. *Kentucky*: Louisville & N. R. Co. v. Cooper, 19 Ky. L. Rep. 1152, 42 S. W. 1134. *Missouri*: Hubbard v. Mobile & O. Ry. Co., 112 Mo. App. 459, 87 S. W. 52. *New York*: Bishawaiti v. Pennsylvania Ry. Co., 92 N. Y. Supp. 783. *North Carolina*: Meredith v. Seaboard Air Line Ry., 137 N. C. 478, 50 S. E. 1. *Texas*: Gulf C. & S. F. Ry. Co. v. Edwards (Tex.), 89 S. W. 968, revg. (Tex. Civ. App.) 86 S. W. 47. See also note 106 Am. St. Rep. 604.

[7] Leonard v. New York, Alb. & B. Elec. M. Teleg. Co., 41 N. Y. 544, 1 Am. Rep. 446, Allen's Teleg. Cas. 500. "The plain and simple rule upon this branch of the subject is furnished by the law of common carriers. Id. 503, per Hunt, J. See id. 510, per Woodruff, J.

Liability ceases when goods actually delivered to a competent carrier, under Dakota Compiled Laws, section 3905, in absence of special contract. Page v. Chicago, St. P., M. & O. R. Co., 7 So. Dak. 297, 64 N. W. 137, 28 Chic. Leg. News, 30, 2 Am. & Eng. R. Cas. (N. S.) 622.

[8] Weatherford, M. W. & N. W. R. Co. v. Seals (Tex. Civ. App.), 41 S. W. 841.

If the initial carrier agrees to deliver to another, it is liable for loss until delivery. American Roof Co. v. Memphis & C. P. Co., 5 Ohio N. P. 146. An initial carrier is liable for negligent delay in delivering to a connecting line. Texas & P. R. Co. v. Scharbauer (Tex.), 52 S. W. 589. An initial carrier delivering goods to a different connecting carrier from the one agreed upon insures safe delivery of goods. Brown & H. Co. v. Pennsylvania Co., 63 Minn. 546, 65 N. W. 961, 2 Am. & Eng. R. Cas. (N. S.) 640. Initial carrier liable until terminal association is put in possession of way bills and full information, but custom and agreement terminates initial carrier's liability in delivery to such association. Bosworth v. Chicago, M. & St. P. Ry. Co. (U. S. C. C. App., 7th Cir.), 56 U. S. App. 274, 87 Fed. 72.

§ 787a. **Connecting lines — Refusal to accept message for — Possible negligence of, no excuse — Other refusals as evidence — Limiting liability — Tariff book, agents knowledge of places.** — It is the duty of a telegraph company when a message is presented to it for transmission with the necessary charges therefor to deliver it promptly to the connecting line and it constitutes no excuse for a failure to transmit, that if it had been diligent the connecting line would not have been diligent. It must perform its duty irrespective of what other lines might do, and being liable for failure to deliver promptly it certainly would be liable for refusal to deliver at all to the connecting line; again, although a first and similar message to the same point had been accepted by it, it constitutes no excuse for refusing the second message that the negligence of the connecting lines prevented prompt delivery, it also appearing that a message was sent by telephone and delivered to the connecting line and an answer received promptly. It further appeared that when the company refused to receive the message it did not know that the first message had not been delivered. Gross negligence cannot be defended against by showing possible negligence on the part of another. In such a case allegations as to other refusals of the same telegram are properly admissible in evidence as tending to show a deliberate intention upon the part of the telegraph company to violate its public duty and to disregard utterly the rights of the plaintiff, it also appearing that the latter did not insist that the former should be liable for negligence beyond its own line but tendered a message which the sender was willing should be written on the company's blanks which contained a clause limiting its liability to its own lines; nor in such case does the allegation and evidence as to the absence of a tariff book containing the name of the place designated operate to prejudice the company where the agent, whether he knew anything about the place or not, knew to what place on the company's line to send messages intended for places, in the State where the place designated was located, and he should have forwarded the message to the proper place, and had no right to absolutely refuse to transmit.[9]

[9] Western Union Teleg. Co. v. Simmons (Tex. Civ. App. 1906), 93 S. W. 686, rehearing denied. The court, per Fly, J. said: "Ap-

§ 788. **Ordinary care must be used in selecting route.**— A telegraph company which has the choice of two or more routes, must use ordinary care in selecting the route over which it will send a message.[10]

§ 788a. **Selection route by sender.**— Persons sending messages to designated places on connecting lines have the right to select the route and it is the duty of the telegraph company to carry out the instruction and to adopt such selection of a route, even though the route selected is out of order.[11]

pellant cannot shift its responsibility for its inexcusable conduct in refusing the second message, by a claim that, if it had performed its duty its connecting carrier would not, and the telegram would not have been delivered anyway. The law recognizes no such specious defense. It should have performed its duty, and thereby shifted the responsibility to other shoulders. The law countenances the shifting of liability by duty well performed, but does not countenance the release of one guilty of negligence on a plea that someone else might possibly have destroyed the fruits of its performance of duty by negligent acts. The jury was justified in finding that the proximate cause of the damages suffered by appellee was the negligence of appellant in refusing to transmit the message tendered it on the morning of November 27, 1902. That was the only ground of negligence submitted to the jury. * * * Neither the allegations nor the proof as to the different refusals tended to confuse the minds of the jury, for the court in a clear and perspicuous manner instructed the jury that the investigation must be confined to the telegram tendered on the morning of November 27. * * * It was the duty of appellant to receive any message, not containing improper matter, and to use ordinary care to transmit it to its destination, even though it be beyond its own line, and the court did not err in so instructing the jury. As to what was ordinary care, under such circumstances, the court had already instructed the jury that it meant the transmission of the message, with reasonable promptness, to the end of its own line and its delivery to its connecting line. That duty rested on appellant. * * * If the message was written on 'plain white paper,' as claimed by appellant, it should have had it written on one of their blanks. That was shown to be their custom, and the message was not refused on that ground, but because the agent 'was afraid' to send a second one. It follows that the court did not err in refusing to make the fact that 'plain white paper' was used an issue in the case."

[10] Mitchell v. Western Un. Teleg. Co., 38 S. W. 1016, 12 Tex. Civ. App. 262.

[11] Western Un. Teleg. Co. v. McDonald (Tex. Civ. App. 1906) 95 S. W. 691.

§ 788b. **Selection telephone route by sender — Sending by another line — Rule as to nearest open connecting line.**— A sender of a message beyond the destination of the company receiving it for transmission and reached by connecting telephone lines has the right to direct that it be sent by a certain telephone line and an attempt of the telegraph company to send it by another telephone connection does not constitute a discharge of the duty owed to the sender, the telegraph company having held itself out, in addition to the duty imposed upon it of sending messages to the point designated upon payment of charges, as willing to forward messages over connecting lines, acting as the agent of the sender. And the right of the sender to select a route is not taken away by a rule of the company directing its agents to send messages by the nearest open connecting line, especially so where such nearest line was not open. In such case the company will be liable for delay in delivery resulting from its attempt to so forward the message by a different telephone connection than that designated.[12]

§ 789. **Initial company liable only on own line — Contract — Stipulations and conditions, etc.**— One who uses a printed blank, whereon the telegraph company stipulates that it "is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company, when necessary to reach its destination," cannot hold said company liable for the negligent delay of the message by a connecting company, and such a stipulation is valid.[13]

[12] Western Un. Teleg. Co. v. Turner, 94 Tex. 304, 60 S. W. 432.

[13] Western Un. Teleg. Co. v. Munford, 87 Tenn. 190, 2 Am. Elec. Cas. 751; 10 S. W. 318. Western Un. Teleg. Co. v. Carew, 15 Mich. 525, Allen's Teleg. Cas. 345. A common carrier is not liable beyond its own line where it so expressly or impliedly contracts. Little Rock & Ft. S. Ry. Co. v. Odom, 63 Ark. 326, 38 S. W. 339; Chicago & N. W. R. Co. v. Simon, 160 Ill. 648, 43 N. E. 596, held in this case that common-law liability to deliver at final terminus cannot be limited by notice, stipulation or condition, but may be, by special contract, although the contract in bill of lading might contain restrictions. Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 5 Am. Rep. 92, also holding that receipt so stipulating would be construed as a special contract if the consignors understood and assented thereto. Richmond, N. I. & B. R.

§ 789a. **Stipulations, agent of sender, non-liability — Telephone lines not intended — No obligation to use — Telephone or mail where no special contract.**— If the contract expressly limits the telegraph company's liability to its own line the company undertakes only as the agent of the sender to deliver the message to the connecting line.[14] But the fact that a telegraph message is written on a blank having a stipulation thereon to the effect that the receiving company is agent of the sender, without liability, to forward the message over the lines of any other company when necessary to reach its destination, does not, as a matter of law, preclude the sender from showing that the receiving company or its agent was the agent of the other company sued for negligence.[15] If a blank upon which a message is written for transmission by a telegraph company stipulates that it is made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination, such a stipulation refers to other telegraph lines and not to telephone lines. The law does not impose upon telegraph lines the duty to telephone a message and so impair the confidential relations assumed by a telegraph company with relation to the transmission of telegrams; although, if such transmission by telephone to any one who would receive and undertake to deliver the message is authorized by the sender or adressee, there might arise a question for the jury as to the exercise of due diligence in delivery.[16] Again, where a message is directed to a point not on

Co. v. Richardson, 19 Ky. L. 1495, 43 S. W. 465; Louisville & N. Ry. Co. v. Tarter, 19 Ky. L. 229, 39 S. W. 698, 7 Am. & Eng. R. Cas. (N. S.) 607; Hope v. Delaware & H. C. Co., 111 Mich. 209, 69 N. W. 487, 3 Det. L. News, 633; Cincinnati, H. & D. etc., R. Co., v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; Galveston, H. & S. A. R. Co. v. Houston (Tex. Civ. App.) 40 S. W. 842; Galveston H. & S. A. R. Co. v. Johnson (Tex. Civ. App.), 37 S. W. 243; Inman v. St. Louis S. W. R. Co., 14 Tex. Civ. App. 39, 37 S. W. 37. Liability may be limited to own line by usage with the shipper where there is no specific contract to the contrary. Klein v. Dunlap (Sup. Ct. App. Term), 73 N. Y. St. R. 566, 37 N. Y. Supp. 947, 16 Misc. 34.

[14] Western Un. Teleg. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122.

[15] Western Un. Teleg. Co. v. Craven (Tex. Civ. App. 1906) 95 S. W. 633.

[16] Hellams v. Western Un. Teleg. Co., 70 S. C. 83, 49 S. E. 12.

the telegraph company's own line and the contract for transmission contains no agreement or condition obligating the telegraph company to use the mails or the telephone, neither of these means being selected by the sender, the company is not obligated to use other than its established means to deliver the message. And where the company's liability is limited to its own line and it delivers the message to the connecting line it is not liable for negligence, in not transmitting the telegram by mail or telephone where the connecting line was not working to the point designated.[17]

§ 790. **Initial company liable only on own line — Receiving entire compensation.**— It is held that, although a telegraph company advertises their line as "connecting with all the principal cities and towns in Canada and the United States," and receives the charge for transmission of a message, nevertheless, it is not liable for delay beyond its own line, and that its duty is to transmit to the connecting line and pay its charge there, to the destination. The initial company was also held in this case to be the agent of the connecting line, to account to it for the money received for the transmission of the telegram over its line.[18]

§ 791. **Initial company liable beyond own line — Receiving entire compensation.**— The decisions in this country are opposed to that in the last section, and it is held here that the initial company which receives a message for transmission to a point beyond its own line and receives the entire compensation therefore, is bound, in the absence of a contract, express or implied, to the contrary, to carry the telegram to its destination and deliver it, and is liable for mistakes, errors, delays or negligence, even though the same be that of a connecting line, nor is the initial company the agent of the connecting line, but the employer.[19]

[17] Western Un. Teleg. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122.

[18] Stevenson v. Montreal Teleg. Co., 16 Up. Can. Q. B. 530, Allen's Teleg. Cas. 71, Burn, J., dissenting. See next section herein.

[19] Smith v. Western Un. Teleg. Co., 84 Tex. 359; 19 S. W. 441. DeRutte v. New York, Alb. & B. M. Elec. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403, Allen's Teleg. Cas. 273, 279; Western Un. Teleg. Co. v. Shumate,

§ 792. **That initial company liable, by acceptance or contract, beyond own line.—** The acceptance of goods for carriage, directed to a point beyond the initial carrier's route, is prima facie a contract for delivery at the destination, for such carrier is not bound to assume responsibility beyond his own route. He may, however, contract upon acceptance of goods for exemption from liability beyond his own line.[20] And if the telegraph agent informs the sender that if the company has a line to an office at the point of destination, it is estopped to set up the usual stipulation, as to nonliability for connecting company's acts of negligence.[21] So, the initial or connecting

2 Tex. Civ. App. 429; 21 S. W. 109. An initial carrier is liable for damages during transportation where the entire freight charges are paid to it and the connecting carrier receives no portion thereof and does not undertake a thorough transportation of the goods. Savannah, F. & W. R. Co. v. Commercial G. Co., 103 Ga. 590, 30 S. E. 555, 12 Am. & Eng. R. Cas. N. S.) 848. Where there is a continous line of different carriers, united by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the carriers receives goods to be transported on the continous line, marked for any place on it, and receives pay for transportation through, such carrier is prima facie hound to carry the goods, or see that they are carried to the place of destination, and is liable for any accidental loss happening on any part of the connecting line. Nashua Lock Co. v. Worcester & Nashua R. Co. v. 48 N. H. 339, 2 Am. Rep. 242. Initial carrier is liable for the whole route where it receives pay therefor, even though it contracts against such liability. So held in Eckles v. Missouri P. R. Co., 72 Mo. App. 296. See also as to principle involved Eckles v. Missouri Pac. Ry. Co., 112 Mo. App. 240, 87 S. W. 99.

20 Mobile & G. R. Co. v. Copeland, 63 Ala. 219, 35 Am. Rep. 13; Illinois Cent. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527, revg. 62 Ill. App. 618; Illinois R. Co. v. Frankenberg, 58 Ill. 88, 5 Am. Rep. 92; Erie Ry. Co. v. Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Popham v. Barnard, 77 Mo. App. 619, 2 Mo. App. Rep. 177. See Baldwin v. United States Teleg. Co., 1 Lans. (N. Y.) 125, Allen's Teleg. Cas. 635-638, per James, P. J., 45 N. Y. 744, Allen's Teleg. Cas. 649, per Allen, J.

21 Western Un. Teleg. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871. It is the duty of a common carrier to receive goods and safely forward to connecting line. Fremont, E. & M. V. R. Co. v. Waters, 50 Neb. 592, 70 N. W. 225; Seasongood v. Tennessee & O. T. Co., 21 Ky. Law 1142, 54 S. W. 193.

carrier will be liable, where it expressly or impliedly contracts to carry to and deliver at the destination.[22]

§ 793. **Notice of importance of message to initial company.**— If telegraph companies, having successive connecting lines, simply receive messages from each other as required by general law, but without any express contract with each other, it is held that notice of the importance of a telegram, given to the first or initial company, does not obligate the connecting companies.[23]

§ 793a. **Connecting line out of order — Notice to sender.**— Although a connecting line is out of order, or not in working condition, the initial company is not absolutely obligated in all cases, upon learning of the fact, to notify the sender, such duty arises only when ordinary prudence in the

[22] Colfax M. F. Co. v. Southern P. R. Co., 118 Cal. 648, 50 Pac. 775, 40 L. R. A. 78, revg. in banc, 46 Pac. 668. Acceptance of goods and giving receipt beyond own line is prima facie a contract to carry and deliver at point specified. Chicago & N. W. R. Co. v. Simon, 160 Ill. 648, 43 N. E. 596. May contract for carriage beyond terminus of own route and become liable for whole distance, the connecting carriers being agents, for whose negligence initial carrier responsible. St. Louis S. W. R. Co. v. Elgin C. M. Co., 175 Ill. 557, 51 N. E. 911, affg. 74 Ill. App. 619. Issuing through ticket makes connecting carrier agent and initial carrier liable for its negligence. Omaha & R. V. R. Co. v. Crow, 54 Neb. 747, 74 N. W. 1066. Express contract beyond own line not varied by receipts of separate charges over own line and acceptance of charges over whole route. Taylor v. Maine C. R. Co., 87 Me. 299, 32 Atl. 905, 2 Am. & Eng. R. Cas. (N. S.) 614. May be liable by contract for entire route. Hill Mfg. Co. v. Boston & L. R. Co., 104 Mass. 122, 6 Am. Rep. 202, Esckles v. Missouri P. R. Co., 72 Mo. App. 296. If contract is for through transportation without prepayment, initial carrier is bound to see the goods carried through. Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451. Receipt agreeing to forward and deliver constitutes a contract to deliver at destination. Cutts v. Brainerd, 42 Vt. 566, 1 Am. Rep. 353. Examine further as to principle involved. Chicago I. & L. Ry. Co. v. Woodward, 164 Ind. 360 72 N. E. 558; 73 N. E. 810. Ireland v. Mobile & O. R. Co., 20 Ky. L. Rep. 1586, 1589, 49 S. W. 188; Johnson v. Toledo S. & M. Ry. Co., 133 Mich. 596, 95 N. W. 724; 10 Del. Leg. N. 324.

[23] Baldwin v. United States Teleg. Co., 45 N. 744, revg. 54 Barb. (N. Y.) 505, 6 Abb. Pr. (N. S.) (N. Y.) 405, 1 Lans. 125, Allen's Teleg. Cas. 613, 648.

protection of the interests of the party concerned requires it, notwithstanding the ordinarily accepted rule requires such notice. But it is the company's duty to notify the sender of the refusal or inability of the connecting line to transmit the message where the initial company knows of the importance of the message, and this obligation also exists even where the connecting line gives only a modified acceptance, not agreeing to prompt transmission.[24]

§ 793b. **Long-distance telephone connecting lines — Common agents negligence and knowledge of importance of message.**— A telephone company owned and operated a long-distance telephone line which connected with another long-distance line. At the town where these lines connected there was a common agent or operator for all communications between the points with which plaintiff desired connection. It was the duty of this agent to connect the wires of the two lines so that patrons could communicate between certain points. The two companies divided the fees, but the defendant company did not contribute to the remuneration of the common agent and did not control his employment or retention, but by agreement he acted for defendant, although it had no other agent at that point, said agent being the only person acting there, for defendant. It was held that such agent was the defendant's agent to make calls and connections and that the defendant company was liable for his negligent acts and was chargeable with his knowledge of the importance of the message.[25]

§ 794. **Limitations of liability of initial company not available by connecting company — Duty.**— The limitations of liability upon the printed blank of the initial telegraph company are not available by a subsequent connecting company so as to enable the latter to avoid its own liability, unless such latter company is given the benefit of said exemption by contract.[26]

[24] Western Un. Teleg. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122. See Western Un. Teleg. Co. v. McDonald (Tex. Civ. App. 1906) 95 S. W. 691.

[25] Southwestern Teleg. & Teleph. Co. v. Taylor, 26 Tex. Civ. App. 79, 63 S. W. 1076.

[26] Squire v. Western Un. Teleg. Co., 98 Mass. 232, Allen's Teleg. Cas. 372; Lake Erie & D. R. Co. v. Sales, 26 Can. Sup. Ct. 663; Ban-

This question of ability to adopt the first company's contract, by implication, is said, however, to be immaterial, since if a connecting line receives the message it must use proper diligence to transmit and deliver it.[27]

§ 795. **Partnership or agency — Each liable for own acts when no contract.**— No partnership or mutual agency can be inferred between coterminous lines of telegraph from the fact that each has received from the other telegrams, for transmission over its own line when required so to do by law, and each will be liable only for his own acts, in the absence of a special agreement or arrangement, either with the sender of the message or with each other.[28] The sharing of profits, arising from

croft v. Merchants' Disp. Tr. Co., 47 Iowa, 262, 29 Am. Rep. 482.

[27] Western Un. Teleg. Co. v. Smith (Tex. Civ. App.), 26 S. W. 216; Bancroft v. Merchants' Disp. Tr. Co., 47 Iowa, 262, 29 Am. Rep. 482.

[28] Baldwin v. United States Teleg. Co., 45 N. Y. 744, 6 Am. Rep. 165, Allen's Teleg. Cas. 648. A consignee of goods by a line of connecting carriers may maintain an action for their loss against the carrier in whose hands the loss happens. Packard v. Taylor, 35 Ark. 402, 37 Am. Rep. 37. Each company is liable over all other lines where contract of shipper is with them under one name and style adopted by all. Rocky Mountain M. Co. v. Wilmington & W. Ry. Co., 119 N. C. 693, 25 S. E. 854. May recover from any intermediate carrier (to distant consignee) whose negligence causes loss. Cavallaro v. Texas & P. R. Co., 110 Cal. 348, 42 Pac. 918. Intermediate carrier liable. Bancroft v. Merchants' Disp. Tr. Co., 47 Iowa, 262, 29 Am. Rep. 482; Halliday v. St. Louis, K. C. & N. R. Co., 74 Mo. 159, 41 Am. Rep. 309. Liable for negligence in receiving goods from connecting carrier where goods not properly shipped and the second carrier does not notify consignee. Shea v. Chicago, R. I. & P. R. Co., 66 Minn. 102, 68 N. W. 608. Connecting carrier liable when shipment does not reach destination in reasonable time, even though delayed by initial carrier. Fort Worth & D. C. R. Co. v. Byers (Tex. Civ. App.), 37 S. W. 1082. Carrier liable under contract when goods in actual custody. A carrier is liable when goods are in actual custody when contract so provides. Texas & P. R. Co. v. Clayton (U. S. C. C., 2d Cir.), 51 U. S. App. 676, 28 U. S. C. C. A. 142, 84 Fed. 305, 9 Am. & Eng. R. Cas. (N. S.) 821. May contract that carrier in whose actual custody goods are when loss occurs shall only be liable. Bird v. Southern R. Co., 99 Tenn. 719, 42 S. W. 451. A contract between two connecting lines of common carriers, which provides, among other things, that the gross receipts for transportation on

the transmission of a telegram, does not necessarily determine that there is a partnership between connecting carriers, under which they would become jointly liable.[29]

§ 796. **Liability of terminal company — Presumptions.—** It will be presumed that a message was correctly delivered to the terminal telegraph company at the point where its own line commenced, and where there is an error in the telegram as delivered, the presumption arises that it occurred through such terminal carrier's negligence. This rule was applied, where a telegraph company agreed to furnish a grain dealer with daily reports of the grain market at a place which was beyond the company's line, and, by reason of an error in the report, plaintiff was induced to purchase a quantity of grain to fill a contract for future delivery.[30]

the through line shall be divided in a certain proportion between the two corporations, but that "loss or damage occasioned by injuries to person or property on said line shall be borne by the party having possession of the same at the time the injuries were done," gives a person who delivers goods to one corporation, to be transported to a point on the route of the other corporation, no right of action against the first corporation for the loss of the goods while in the possession of the second. Burroughs v. Norwich, etc., R. Co., 100 Mass. 26, 1 Am. Rep. 78. A stipulation in a bill of lading, given by one of an association of connecting carriers, that if loss or damage of goods occurs, the company in whose custody they were at the time shall alone be answerable, is valid, and binds the shipper accepting it, whether he reads it or not. Phifer v. Carolina Central R. Co., 89 N. C. 311, 45 Am. Rep. 687. Georgia Civil Code, section 2298, makes each carrier responsible only to its own terminus and last carrier receiving goods in good order is liable for damage. Kerr v. Georgia R. Co., 105 Ga. 371, 31 S. E. 114.

[29] Houston, E. & W. T. R. Co. v. Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062. A common carrier does not become liable under the initial carrier's contract for carriage over both lines where it does not acquiesce therein, even though it receives its proportion of the charges made. Gulf, C. & S. F. R. Co. v. Short (Tex.), 51 S. W. 261.

[30] Turner v. Hawkeye Teleg. Co., 41 Iowa, 458, 20 Am. Rep. 605. Last of connecting carriers is liable for delivery to the wrong person under wrong directions from a prior carrier. Foy v. Chicago, M. & St. P. R. Co., 63 Minn. 255, 65 N. W. 627. Forwarding carrier's liability ceases on safe delivery and warehousing at destination. Illinois C. R. Co. v. Carter, 165 Ill. 570, 46 N. E. 374, 36 L. R. A. 527. The last of several connecting carriers is not liable for a loss by a prior carrier on the same line. Lowen-

§ 796a. **Railroad telegraph line — Charges for designation of connecting line not arbitrary impost or discrimination.**— Where a railroad company is and has been at all times willing and able to transmit over the lines under its exclusive control all public and commercial telegraph messages, but where such messages are destined for points beyond its own lines the sender is required to designate the connecting telegraph company over whose line the message should be sent, and a small additional charge is made for the words necessary to designate the connecting line, and such charge is in accordance with the uniform practice among telegraph companies in like cases, it is not an arbitrary impost levied upon those seeking to use the telegraph lines of the railroad company but constitutes merely an additional charge for an additional service.[31]

§ 796b. **Connecting telephone lines — Duration of contract — Duty to transmit without delay or discrimination — Constitutional provision.**— Two telephone companies contracted to erect and maintain lines from certain points to meet and attach at a certain place, the contract provided for joint service, also that the receipts over each company's own line were to belong to each company but receipts for all business over any part of the lines belonging to both companies were to be equally divided. Provision was also made for the fixing of rates of toll by mutual agreement, for making repairs of lines, etc. No time was fixed for the duration of the contract. It was decided that it was not revocable at the will of either party but the period of its duration was the corporate existence of the two companies and if either party refused or failed to transmit messages over its lines received by the other party for transmission over the connecting lines, an injunction would issue to compel performance. It was also decided that under the contract

burg v. Jones, 56 Miss. 688, 31 Am. Rep. 379. Georgia Civil Code, section 2298, makes each carrier responsible only to its own terminus, and last carrier receiving goods in good order is liable for damage. Kerr v. Georgia R. Co., 105 Ga. 371, 31 S. E. 114.

[31] So held in United States v. Northern Pac. R. Co., 120 Fed. 546. The decree in this case was, however, subsequently reversed upon the question of jurisdiction and parties, 134 Fed. 715.

either of the parties could require the other to transmit messages though emanating from other points than the initial point, that is, where the company's lines started, the constitution of the State providing that telephone companies operating exchanges in different towns or cities, "shall receive and transmit each other's messages without unreasonable delay or discrimination." [32]

§ 797. **Connecting lines — Penalty statute.**— A statute requiring prompt delivery of messages and prescribing a penalty for failure to comply with such requirement applies to a connecting company which has received the message from another company, for forwarding. It is not limited in its application to the initial telegraph line.[33] If a statute makes it the duty of a telegraph company to receive messages from and for other lines of telegraph, and provides that, where they transmit and deliver messages correctly to a connecting line, they are not liable for errors occurring afterwards, the duty imposed is as much for the benefit of the companies as for the individuals who make use of them. "But while the statute makes it the duty of the telegraph company to receive and transmit such messages, it does not make it the agent of the other lines." [34] And where such a statute exists, the company cannot impose upon other companies conditions precedent, to receiving despatches, which are so unreasonable as to be practically impossible of compliance, although reasonable conditions may be imposed.[35]

§ 798. **Connecting, parallel and competing lines — Penalty statute — Refusal to receive telegram — Liability — Parties.**—

[32] Campbellsville Teleph. Co. v. Lebanon, Louisville & Lexington Teleph. Co., 26 Ky. L. Rep. 127, 80 S. W. 1114. Examine Western Union Teleg. Co. v. Pennsylvania Co., 125 Fed. 67, 8 Am. Elec. Cas. 938, rev'd, 129 Fed. 849, 64 C. C. A. 285; St. Paul, Minneapolis & Manitoba Ry. Co. v. Western Union Teleg. Co., 118 Fed. 497, 55 C. C. A. 263; Baston Teleph. Co. v. Richmond Teleph. Co., 25 Ky. 1249, 77 S. W. 702, 8 Am. Elec. Cas. 935 (parol agreement). See, also, § 194a herein as to duration of contract.

[33] Conyers v. Postal Teleg. Cable Co., 92 Ga. 619, 19 S. E. 253.

[34] De Rutte v. New York, Alb. & B. Elec. M. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403; Allen's Teleg. Cas. 273, 278, 279, per Daly, F. J.; Stat., Laws of N. Y., 1844, p. 395, § 11.

[35] Atlantic & Pac. Teleg. Co. v.

A statute provided that telegraph companies should receive despatches from and for other telegraph lines and associations, and, on payment of the usual charges, should transmit the same under penalty for noncompliance. It was also declared that nothing contained in the statute should be construed to require any such company to receive and transmit despatches from or for any company owning a parallel line of telegraph or doing business in competition with the line over which the despatch was required to be sent. It was held that if the line of the plaintiff company was parallel and competing within the intent of the statute, the defendant company was under no obligation to receive a message for transmission over any line with which the plintiffs' line was in competition. But as it appeared that the lines were in competition only a part of the distance, when the defendant's line deflected and passed through the place of destination of the tendered message, and that plaintiff had no competing line from said point of deflection to said point of destination, the defendant company was held liable for the penalty. It was also held that the fact that the plaintiff received the message under the usual contract condition, exempting it from liability for errors, etc., of connecting lines, and making it the agent of the signer, to forward said message over other necessary lines, did not excuse the defendant. It was further decided that the plaintiff might bring the action in its own name for the penalty.[36] And a like decision was given in another case, where the companies had such competing lines in certain localities, but the company tendering the message for transmission had no connecting line with ocean cables.[37] But it is also held in an early California case, that the company presenting the despatch for transmission to another company is not constituted the agent of the sender of the despatch, so as to entitle it to sue the latter company, in his name, to recover the penalty for refusal to receive the despatch, but that the action should be brought in the name of the first company.[38]

Western Un. Teleg. Co., 4 Daly (N. Y.), 527, 1 Am. Elec. Cas. 81.

[36] United States Teleg. Co. v. Western Un. Teleg. Co., 56 Barb. (N. Y.) 46, Allen's Teleg. Cas. 254.

[37] Atlantic & Pac. Teleg. Co. v. Western Un. Teleg. Co., 4 Daly (N. Y.), 527, 1 Am. Elec. Cas. 81.

[38] Thurn v. Atlanta Teleg. Co., 15 Cal. 472, Allen's Teleg. Cas. 146.

CHAPTER XXXI.

TELEGRAMS AS TO DEATH, SICKNESS AND THE LIKE.

§ 799. Telegrams—Sickness, death, accidents, etc. — Generally.
800. Notice of importance or that damages may result — Contemplated damages.
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801a. Same subject — Mental anguish.
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809. Negligent delivery — Free delivery limits — No terminal office — Sickness.
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§ 809b. Office hours — Mental suffering.
809c. Transmission and delivery of message of sickness, etc., on Sunday — Mental anguish.
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810. Delivery to telephone for transmission — Guaranteed charges — Death.
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§ 815. Notice of claim for damages — Parties.
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818. Evidence — Messages as to sickness and death — Mental anguish, etc.
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823. Theory upon which damages allowed.
824. Damages for mental suffering — Preliminary remarks.
825. Theory or reasons upon which damages for mental suffering allowed.
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827. States allowing mental suffering damages — Telegrams of sickness, death, etc.
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829. Mental suffering damages continued — Text writers.
830. Mental suffering damages — Telegrams of sickness, death, etc. — Conclusion.
831. Physical suffering following mental suffering.
832. Mental suffering damages — Special governing facts.
833. Mental suffering damages — That addressee may recover.
834. Mental suffering damages — That addressee may not recover.
835. Verdicts — Damages, when excessive, when not — Mental suffering.

§ 799. **Telegrams — Sickness, death, accidents, etc.— Generally.—** One of the underlying principles in cases of telegrams relating to death, sickness and the like is the specially important nature of such messages, apparent upon the face thereof. These despatches, therefore, stand apart, in this respect, for the large majority of telegrams, so that in determining the cases before them, involving these messages, courts have considered this fact of their manifest importance, in applying the measure of diligence required of telegraph companies, and have more rigorously applied the rules governing their duty, than in cases of ordinary messages of whose importance the company has received no notice. Courts have

also mode other exceptions in this class of cases, as appears from those decisions which allow the right to recover damages for mental distress or anguish alone. Other instances will be apparent in the cases throughout this chapter.

§ 800. **Notice of importance or that damages may result — Contemplated damages.—** It is declared that the diligence which a telegraph company is required to use in the delivery of a message will be determined to some extent from the character and importance of the message; and messages of the nature of those relating to sickness and the like should be promptly delivered and should be regarded as of more importance to the parties concerned than mere business messages. And it is also said that such messages, "in promptness of delivery, should have preference over messages of the latter class."[1] The force of this latter expression as to "preference over messages," should, however, be neither misapplied, misunderstood, nor illegally extended. Again, it is said, "When such communications relate to sickness and death, there accompanies them a common sense suggestion that they are of importance."[2] Again, if a telegraphic message announces sickness, this, in itself, is notice of the importance of prompt transmission and delivery.[3] So, where a despatch read "Your child is very low, come at once," it was held that this was a sufficient notice to the company that the child might die at any moment, and

[1] Reese v. Western Un. Teleg. Co., 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163, 3 Am. Elec. Cas. 640, 646, per Berkshire, J. In this case the message read: "My wife very ill, not expected to live."

[2] Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 3 Am. Elec. Cas. 768, 771, per Henry, Asso. J., quoted with approval in Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 31 S. E. 350, 5 Am. Neg. Rep. 85, 88, per Furchess, J. The telegram in the Adams case was: "To F. E. Adams, Athens: Clara, come quick, Rufe is dying. (Signed) O. M. Simons." See also Western Un. Teleg. Co. v. Smith (Tex. Ct. Civ. App., 1895), 33 S. W. 742; Western Un. Teleg. Co. v. Nations, 82 Tex. 539, 3 Am. Elec. Cas. 799, 18 S. W. 709; Western Un. Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676; Potts v. Western Un. Teleg. Co., 82 Tex. 545, 18 S. W. 604; Western Un. Teleg. Co. v. Carter, 85 Tex. 580, 22 S. W. 961.

[3] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695, 2 Am. Elec. Cas. 742, 8 S. W. 574. Case was disapproved in 44 Fed. 555.

called for prompt delivery, and in default thereof, resulting in a failure of the addressee to arrive in time for the funeral. the company was liable.[4] So a telegram in these words, "Send doctor on first train, Katy has broken her finger," manifests its importance, and the necessity of prompt and active conduct in transmitting and delivering such message, and also, that the degree of diligence required must equal the emergency. This was held to apply, without regard to rules and hours established by the company, although the reasonableness of a rule, fixing office hours, was declared to be properly left to the jury. The above telegram was not delivered, by reason of the office being closed, until the next morning, and it had been received in time to have been delivered the preceding night.[5] Again, a telegram sufficiently indicates its importance, which reads, "Miss Carrie sick, she wants you, come to-morrow."[6] So also, where the message announces the birth of a child to the addressee's daughter, and adds the words, "Come at once," even though it is stated that all are doing well.[7]

§ 801. **Same subject continued.**— Notice of importance is given, where the despatch states that person named therein "is dead, answer."[8] Again, where a father telegraphs for medical attendance for a sick child, and the latter dies without such medical attendance, because of a failure to deliver the message, the company is liable in damages, the company's agent being fully aware of the situation, and no excuse for the neglect being made.[9] If, however, the company cannot be reasonably presumed to have contemplated that mental anguish would result from delaying a message, it is held that the sender cannot recover damages therefor.[10] But a message reading, "My wife

[4] Western Un. Teleg. Co. v. Waller (Tex. Civ. App., 1898), 47 S. W. 396.

[5] Brown v. Western Un. Teleg. Co., 6 Utah, 219, 2 Am. Elec. Cas. 834, 21 Pac. 988.

[6] Western Un. Teleg. Co. v. McLeod (Tex. Civ. App., 1893), 22 S. W. 988.

[7] Western Un. Teleg. Co. v. Lavender (Tex. Civ. App.), 40 S. W. 1035.

[8] Western Un. Teleg. Co. v. Carter, 85 Tex. 580, 22 S. W. 961.

[9] Western Un. Teleg. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708.

[10] Ikard v. Western Un. Teleg. Co. (Tex. Civ. App., 1893), 22 S. W. 534; Western Un. Teleg. Co. v.

is very ill, not expected to live," shows, so it is decided, upon its face that mental distress would be a probable result of non-transmission,[11] and it would seem that in those States where a recovery is allowed for mental anguish or distress, or where evidence of such anguish or distress is admissible, telegrams as to sickness, death and the like ought to be held to give notice, upon their face, that mental suffering would necessarily result from negligent nondelivery.[12] So damages for the death of a valuable horse, by reason of negligent delay in delivery of a telegram, may be considered as within the contemplation of the contract, where the message read: "Bravo is sick, come and fetch Miller at once," and it must have been known, from the nature of the message, that promptness was necessary.[13]

§ 801a. **Same subject — Mental anguish.**— In jurisdictions where recovery may be had for mental anguish, if a telegraph company has actual notice or knowledge, or if the message upon its face imparts notice or knowledge that damages or mental suffering and anguish can fairly, naturally and reasonably be anticipated as liable to follow from the company's failure or neglect to perform the duty imposed upon it, or if it appears that such damages, or suffering ought naturally and reasonably to have been in the contemplation of the parties to the contract as the proximate probable and reasonable consequences

Bryant, 17 Ind. App. 70, 46 N. E. 358, 1 Am. Neg. Rep. 425, 427; Western Un. Teleg. Co. v. McMillan (Tex. Ct. Civ. App., 1895), 30 S. W. 298; Western Un. Teleg. Co. v. Kirkpatrick, 76 Tex. 217, 13 S. W. 70; Western Un. Teleg. Co. v. Henley, 23 Ind App. 14, 54 N. E. 775; Western Un. Teleg. Co. v. Bryant, 17 Ind. App. 70, 46 N. E. 358, 6 Am. Elec. Cas. 756. Telegram read, "Cannot come to-day, will come to-morrow."

[11] Reese v. Western Un. Teleg. Co., 123 Ind. 294, 7 L. R. A. 583, 24 N. E. 163, 3 Am. Elec. Cas. 640. See also Western Un. Teleg. Co. v. Moore, 76 Tex. 66, 12 S. W. 949; Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 3 Am. Elec. Cas. 768.

[12] See Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 3 Am. Elec. Cas. 768, 2 S. W. 857; Western Un. Teleg. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860; Western Un. Teleg. Co. v. Randles (Tex. Ct. Civ. App., 1896), 34 S. W. 447; Western Un. Teleg. Co. v. Moore, 76 Tex. 66, 12 S. W. 949, and cases in next sections herein.

[13] Hendershott v. Western Un. Teleg. Co., 106 Iowa, 529, 76 N. W. 828. See c. XXXV, herein, on Damages.

of its breach, then upon failure of the company to perform its duty and fulfill its obligations in the transmission and delivery of a telegram it will be liable, otherwise not.[14] So in Kentucky, if a telegram apprises the defendant that mental suffering may be reasonably anticipated from the failure to deliver a telegram then there may be a recovery for such suffering and the rule applies that such damages may be recovered as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as the probable result of the breach of it, and the rule as to mental suffering is not confined to cases of telegrams relating to sickness or death of near relatives.[15] In South Carolina the statute does not allow recovery for mental suffering and anguish in all cases of negligence in receiving, transmitting and delivering messages. Not only must negligence be shown, but the injury must have been the direct, natural and proximate result thereof. The message must also show upon its face or the company must have knowledge of such facts as will enable it to foresee that mental suffering might reasonably be expected from its failure or neglect of duty. If the mental anguish is merely incidental thereto it could not be reasonably anticipated and is not such a result which it could be said was within the contemplation of the parties when they entered into the contract.[16]

[14] Western Union Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775; Hancock v. Western Union Teleg. Co. (N. C., 1906), 55 S. E. 82; Davis v. Western Union Teleg. Co., 139 N. C. 79, 51 S. E. 898; Sparkman v. Western Union Teleg. Co., 130 N. C. 447, 41 S. E. 881; Jones v. Western Union Teleg. Co., 70 S. C. 539, 50 S. E. 198; Western Union Teleg. Co. v. Ford (Tex. Civ. App.), 90 S. W. 677; Western Union Teleg. Co. v. Kuykendell (Tex.), 89 S. W. 695, revg. (Tex. Civ. App.) 86 S. W. 61; Western Union Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052; Western Union Teleg. Co. v. Campbell, 36 Tex. Civ. App. 276; Western Union Teleg. Co. v. Burch, 36 Tex. Civ. App. 237, 81 S. W. 552; Western Union Teleg. Co. v. Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649; Western Union Teleg. Co. v. Christensen (Tex. Civ. App.), 78 S. W. 744; Western Union Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482; Western Union Teleg. Co. v. McFadden, 32 Tex. Civ. App. 582, 75 S. W. 352; Western Union Teleg. Co. v. Ragland (Tex. Civ. App.), 61 S. W. 421.

[15] Postal Teleg. Cable Co. v. Terrel (Ky. App., 1907), 100 S. W. 292.

[16] Du Bose v. Western Union Teleg. Co., 73 S. C. 218, 53 S. E. 175.

And in Arkansas although the statute allows a recovery for mental anguish, yet the company must be charged with notice or knowledge of the special circumstances by reason of which the mental anguish was occasioned and must have had such notice at the time of receiving the message or making the contract for transmission.[17] Notice of the importance or of the urgency of the message may be sufficiently imparted by its contents,[18] or by statements made or information given to the company's authorized agent by the sender, especially so when coupled with what is disclosed by the contents of the telegram.[19] But if there is nothing in the message itself and no statements made or notice or information given showing the importance, urgency and purpose of the telegram, the company will not be liable within the rule first above stated.[20]

[17] Western Union Teleg. Co. v. Raines (Ark., 1906), 94 S. W. 700, Kirby's Dig. § 7947.

[18] Postal Teleg. Cable Co. v. Pratt, 27 Ky. L. Rep. 430, 85 S. W. 225 (announcing death, time and place of interment); Hall v. Western Union Teleg. Co., 139 N. C. 369, 52 S. E. 50 (inquiring as to mother's health and showing that a journey would be taken if no answer sent); Meadow v. Western Union Teleg. Co., 132 N. C. 40, 43 S. E. 512 (disclosing that wife is at point of death); Harrison v. Western Union Teleg. Co., 136 N. C. 381, 48 S. E. 772 (announcing death, time and place of interment); Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841 (announcing death); Western Union Teleg. Co. v. Ford (Tex. Civ. App.), 90 S. W. 677 (informing of death of son); Western Union Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052 (announcing wife's illness and asking husband to come at once and that serious operation necessary).

[19] Davis v. Western Union Teleg. Co., 139 N. C. 79, 51 S. E. 898; Western Union Teleg. Co. v. Bell (Tex. Civ. App.), 90 S. W. 714; Western Union Teleg. Co. v. Burch, 36 Tex. Civ. App. 237, 81 S. W. 552; Western Union Teleg. Co. v. Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661.

[20] Western Union Teleg. Co. v. Pearce, 82 Misc. 487, 34 So. 152 (where plaintiff was enceinte and it did not appear that the company had notice thereof); Williams v. Western Union Teleg. Co., 136 N. C. 82, 48 S. E. 559 (telegram for physician to meet sender and sister-in-law did not receive necessary medical services); Sparkman v. Western Union Teleg. Co., 130 N. C. 447, 41 S. E. 881 (only nominal damages received as nothing showed that mental anguish might result, even though the message was sent in response to a death message); Darlington v. Western Union Teleg. Co., 127 N. C. 448, 37 S. E. 479; Kennon v. Western Union Teleg. Co., 126 N. C. 232, 35 S. E. 468 (telegram to meet sender — damages for mental anguish because of

So under a late Texas decision where there is no evidence other than that of the message, and it contains nothing giving a telegraph company notice that a deprivation of the opportunity of being with his mother at his father's funeral and giving her comfort would cause him grief or mental suffering no recovery can be had on those grounds.[21] Notice, however, is imparted by a telegram as to sickness of the sendee's wife.[22] And it is held that sickness and worry is shown by an inquiry by wire as to the condition of one of the family of plaintiff.[23] And the company may be bound by the acts and statements of its agent showing his understanding and knowledge of the importance of a message.[24] It is error, however, to instruct the jury that further explanation is unnecessary to render the company liable when the terms of the message show its nature and importance.[25]

§ 801b. **Notice of interest or benefit — To whom company owes duty — Wife's benefit — Mental anguish.**— It is said in a federal decision that telegraph cases "recognize and affirm the rule that a company owes a duty and incurs a liability to those parties only of whose interest it has notice and for those injuries only which it might reasonably anticipate. The pertinent cases fall into four classes: (1) Those which assert a duty and liability to the undisclosed principal of the sender.[26]

inability to see aunt before she became unconscious); Jones v. Western Union Teleg. Co., 70 S. C. 539, 50 S. E. 198 (mental pain of plaintiff for suffering of wife and baby, not connected with transmission, on face of message is not recoverable); Western Union Teleg. Co. v. Ayers (Tex. Civ. App., 1906), 93 S. W. 199 (notice as to certain place of funeral not imparted); Western Union Teleg. Co. v. Bell (Tex. Civ. App.), 90 S. W. 714 (notice of inability to bury mother not imparted); Western Union Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482 (inability to comfort sister when her child was buried); see Western Union Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[21] Western Union Teleg. Co. v. Butler (Tex. Civ. App., 1907), 99 S. W. 704.

[22] Western Union Teleg. Co. v. Craven (Tex. Civ. App., 1906), 95 S. W. 633.

[23] Willis v. Western Union Teleg. Co., 69 S. C. 531, 48 S. E. 538.

[24] Western Union Teleg. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

[25] Western Union Teleg. Co. v. McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969.

[26] Citing Milliken v. Western Union Tel. Co., 110 N. Y. 403, 18 N.

(2) Those which recognize a duty and liability to a person who appears on the face of the telegram to be its beneficiary, although neither the sender nor the addressee.[27] (3) Those which deny any duty or liability to those who do not appear from the message to have any interest in it.[28] (4) The decision which denies any liability to the undisclosed principal of the addressee.[29] In the cases of the two latter classes the duty and liability are denied on the ground that the company received no notice from the telegrams of their probable existence, and hence could not have anticipated injuries to those who did not appear to be beneficiaries of the messages or to be likely to incur the damages which were sought." [30] Although, as will hereafter appear, recovery may be had in certain jurisdictions for mental anguish alone. Still, under certain decisions, unless notice or knowledge is imparted to the telegraph company, or unless it has notice or knowledge, that a message is intended for the benefit of the wife or that she has some interest she cannot recover for mental anguish occasioned by the non-delivery, or negligence in delivery of a message as to sickness or death. This ruling has been applied in Texas in the case of a telegram to a husband, and the statement of the addressee's agent that the brother of the addressee's

E. 251, 1 L. R. A. 281; Harkness v. Western Union Tel. Co., 73 Iowa, 190, 34 N. W. 811, 5 Am. St. Rep. 672; Leonard v. Telegraph Co., 41 N. Y. 544, 1 Am. Rep. 446; Cashion v. Western Union Tel. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160; Western Union Tel. Co. v. Morris, 28 C. C. A. 56, 83 Fed. 992; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Western Union Tel. Co. v. Broesche, 72 Tex. 654, 10 S. W. 734, 13 Am. St. Rep. 843; Western Union Tel. Co. v. Church (Neb.), 90 N. W. 878, 57 L. R. A. 905.

[27] Citing Western Union Tel. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; Telegraph Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

[28] Citing McCormick v. Western Union Tel. Co., 79 Fed. 449, 25 C. C. A. 35, 38 L. R. A. 684; Western Union Tel. Co. v. Kirkpatrick, 76 Tex. 217, 218, 13 S. W. 70, 18 Am. St. Rep. 37; Western Union Tel. Co. v. Carter, 85 Tex. 580, 22 S. W. 961, 34 Am. St. Rep. 826; Morrow v. Western Union Tel. Co., 107 Ky. 517, 54 S. W. 853.

[29] Citing Lee v. Western Union Tel. Co., 51 Mo. App. 375.

[30] Western Union Tel. Co. v. Schriver, 141 Fed. 538, 548, per Sanborn, Cir. J.

wife was dead does not impart such notice.[31] So in Kentucky a message to the husband as to the mother's sickness is within the ruling and recovery by the wife for mental anguish is precluded, although the message is not delivered, where no notice is imparted as to her being a party or having any interest.[32] So in North Carolina recovery for the mental anguish of a wife, because she is unable to attend the funeral of a grandchild, is precluded where a message to her husband announcing death is delayed in its delivery, but it does not appear therefrom that she has any interest.[33] But in a comparatively recent case in Texas a telegram to a husband from his wife, announcing the death of one daughter and the sickness of another discloses its importance, and it is for the benefit of both husband and wife, and the mental anguish of the wife caused by her husband's inability to attend the funeral when occasioned by the company's wrongful acts renders the company liable.[34] But notice that the addressee of a telegram has a beneficial interest as the wife of a person for whom the message was sent is not imparted where such telegram was signed by a different name, even though it requested her to come at once as her baby was dead, and although the operator subsequently learns from the sender upon sending another message to her that she has a beneficial interest as such wife.[35]

§ 802. **Notice of relationship — Generally.**— The decisions are not uniform upon the point, whether messages of the character under discussion sufficiently indicate such relationship or not, or whether the question of relationship is important enough to excuse the company's failure to deliver such despatch. The weight of authority seems to indicate, however, that such telegrams sufficiently manifest whatever relationship exists to prevent the company from alleging want of notice of relationship as an excuse for negligence or delay in transmis-

[31] Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686. See Du Bose v. Western Union Teleg. Co., 73 S. C. 218, 53 S. E. 175.

[32] Davidson v. Western Union Teleg. Co., 21 Ky. L. Rep. 1292, 54 S. W. 830.

[33] Crawford v. Western Union Teleg. Co., 138 N. C. 162, 50 S. E. 685.

[34] Western Union Teleg. Co. v. Simmons (Tex. Civ. App., 1906), 93 S. W. 686, rehearing denied.

[35] Potiel v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 113.

sion or delivery of messages which are upon their face those of death, sickness and the like.

§ 803. **That it is necessary to disclose relationship — Decisions.**— A telegram announcing that the stepfather of the sendee is dying is held not to disclose the tender and affectionate relations existing between them so as to render the company liable for delay in delivery.[36] It is also held that special notice to the company or its operator, of relationship, and so of mental distress as a consequence, should be alleged in the complaint to enable the addressee to recover damages for mental suffering for delay in a telegram announcing the death of his brother.[37] Again the relationship between brother-in-law and sister-in-law is not such as to raise a presumption of mental suffering from delay in a telegram announcing death.[38] So it is held that if the telegraph company had no knowledge that a wife and daughter were interested in a message relating to serious illness, it was not liable for mental suffering by a wife, nor for her husband's increased mental suffering on his wife's account.[39] So there must be notice of special relations of affection between a mother-in-law and son-in-law to warrant recovery for mental suffering by the former.[40] And where the addressee and his wife were prevented attending the funeral of a daughter and they both sued but the wife continued the suit upon the decease of her husband, it was held proper to instruct the jury that the company should have been notified that the relation of daughter to the wife existed or recovery for mental anguish would be precluded.[41]

[36] Western Un. Teleg. Co. v. Garrett (Tex. Civ. App.), 34 S. W. 649. See also Western Un. Teleg. Co. v. Gibson (Tex. Ct. Civ. App., 1896), 39 S. W. 198. But contra, Western Un. Teleg. Co. v. Nations, 82 Tex. 539, 3 Am. Elec. Cas. 799, 18 S. W. 709.

[37] Western Un. Teleg. Co. v. Brown, 71 Tex. 723, 2 Am. Elec. Cas. 812.

[38] Cashion v. Western Un. Teleg. Co., 123 N. C. 267, 31 S. E. 493, citing Western Un. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896.

[39] Weatherford, M. W. & N. W. R. Co. v. Seals (Tex. Civ. App.), 41 S. W. 841.

[40] Western Un. Teleg. Co. v. Gibson (Tex. Civ. App.), 39 S. W. 198.

[41] Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687.

§ 804. **That it is not necessary to disclose relationship — Decisions.—** Where a telegram was sent from a husband to a wife, announcing a fatal accident to him, but the relationship was not disclosed, it was held that the wife could recover for mental suffering caused by delay in delivering the message, whereby she was prevented from reaching her husband before his death.[42] It was said in this case that common sense suggested that messages of this character were of importance, and that the persons addressed had in them a serious interest.[43] The relationship of the parties was not disclosed in another case where the telegram read: "Tell Henry to come home, Lou is bad sick."[44] So it is held that notice of relationship is unnecessary where there was a delay in a message announcing a son's illness.[45] So also where a message by a married woman relates to the burial of her child, even though her name is not signed thereto, nor the company notified that it was sent by her direction or for her benefit.[46] Nor is it necessary that a telegram as to death should disclose the relationship between the addressee and the deceased.[47] So the relationship was not dis-

[42] Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 31 S. E. 350, 5 Am. Neg. Rep. 85. In this case the plaintiff was the widow of one R. G. Lyne, who was called by her "Gregory." A brother-in-law of the plaintiff, and a brother of her husband, sent her the following message: "To Mrs. R. G. Lyne, care of Mrs. Mattie Wortham, Raleigh, N. C.: Gregory met accident, not live more 24, 26 hours. J. B. Lyne." Telegram was sent 6 o'clock, p. m., October 23d, and was not delivered until October 24th, at 1 o'clock, p. m. Message was dated at Richmond and nondelivery was due to the company's negligence.

[43] Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 31 S. E. 350, 5 Am. Neg. Rep. 88, quoting Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 3 Am. Elec. Cas. 768, 771, per Henry, Asso. J.; Western Un. Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676.

[44] Sherrill v. Western Un. Teleg. Co., 109 N. C. 528, 14 S. E. 94. See also Western Un. Teleg. Co. v. Lavender (Tex. Civ. App.), 40 S. W. 1035.

[45] Western Un. Teleg. Co. v. Feegles, 75 Tex. 537, 12 S. W. 860.

[46] Landie v. Western Un. Teleg. Co., 124 N. C. 528, 32 S. E. 886.

[47] Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406, 3 Am. Elec. Cas. 782, 16 S. W. 25, 35 Am. & Eng. Corp. Cas. 77. Telegram in this case was: "To Otto Rosentreter, care of Louis Grassmuck, Brenham: Emma died last night. Will be buried this evening. (Signed) August Schoppe." Western Un. Teleg. Co. v. Nations, 82 Tex. 539, 3 Am. Elec. Cas. 799, 18 S. W. 709. Telegram was: "Your

closed in another case stating that the sender's wife was very sick and not expected to live, and it was held no excuse for delay.[48] And relationship was not disclosed in a case where the telegram stated that a wife of a certain person was at the point of death, and such person signed the telegram.[49] Nor was it disclosed in a message announcing the death of a person.[50] And it was held unnecessary to disclose relationship where the telegram summoned a sister to the deathbed of her brother.[51] Nor need it be disclosed in a telegram stating the death, time and place of burial of a person.[52] And this has been applied generally to messages of sickness and death.[53]

§ 805. **Duty of company to inquire as to relationship.**— It is held to be the duty of the telegraph company to inquire about the relationship of the parties if they desire such information, upon a telegram relating to sickness being presented to such company for transmission.[54]

§ 806. **What is sufficient notice of relationship.**— A telegraph company is charged with notice of the relationship, and it is unimportant whether such relationship is disclosed or not, where the telegram is to the addressee, from a sick person.[55] So, even if the message does not directly indicate relationship, it is sufficient to put the company on inquiry in this particular where it is sent to a wife and reads: "Come at once, Mr. Potts is not expected to live.[56] The rule applies where the message

stepfather died this morning." See Western Un. Teleg. Co. v. Ward (Tex. Civ. App., 1892), 19 S. W. 898.

[48] Reese v. Western Un. Teleg. Co., 123 Ind. 294, 3 Am. Elec. Cas. 640, 646, 24 N. E. 163.

[49] Meadows v. Western Union Teleg. Co., 132 N. C. 40, 43 S. E. 572.

[50] Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841.

[51] Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 12 S. W. 857, 3 Am. Elec. Cas. 768. Telegram was: "Clara, come quick, Rufe is dying."

[52] Postal Telegraph Cable Co. v. Pratt, 27 Ky. L. Rep. 430, 85 S. W. 225; Hunter v. Western Union Teleg. Co., 135 N. C. 453, 47 S. E. 745.

[53] Bennett v. Western Union Teleg. Co., 128 N. C. 103, 38 S. E. 294.

[54] Western Un. Teleg. Co. v. Porter (Tex. Civ. App., 1894), 26 S. W. 866.

[55] Western Un. Teleg. Co. v. Sweetman, 19 Tex. Civ. App. 435, 47 S. W. 676.

[56] Potts v. Western Un. Teleg. Co., 82 Tex. 545, 18 S. W. 604. See also Western Un. Teleg. Co. v. Car-

reads: "Billie is very low, come at once;" [57] to a case of a message from a daughter to her mother, reading: "I am sick;" [58] and likewise to a telegram stating: "Jerry is in hospital at Ledora dangerously sick with pneumonia." [59]

§ 807. **What is not notice of relationship.**— If there is nothing to put the company on notice of the wife's interest in a message to her husband, damages for her mental suffering cannot be recovered.[60] It is also held that the telegraph company is not chargeable with notice of relationship, so as to make it liable for the mental anguish of the sender for want of her daughter's presence, caused by negligent delay in delivery of a telegram sent to the daughter announcing the sickness of the sender's husband and asking the sendee to come home at once.[61] And the relations of the parties is decided not to be sufficiently disclosed by a telegram stating that an infant would die and requesting the sendee to come at once, and also announcing that the addressee's sister was "very dangerous." [62] Nor is relationship disclosed by a mere announcement in a telegram of the arrival of the sender at a certain place.[63] Again the company is held not chargeable with notice that a telegram is for the benefit of the wife, so as to warrant a recovery for her mental suffering, by reason of negligent delay in delivery of the message, where the agent and the addressee merely states to the company that the brother of the addressee's wife is dead.[64]

§ 807a. **Degree of relationship — Mental suffering.**— Although in case of a near relative damages for mental suffering

ter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961.

[57] Western Un. Teleg. Co. v. Moore, 76 Tex. 66, 12 S. W. 949.

[58] Western Un. Teleg. Co. v. Clark, 14 Tex. Civ. App. 563, 39 S. W. 721.

[59] Western Un. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585, 25 S. W. 722.

[60] Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686; Davidson v. Western Un. Teleg. Co., 21 Ky. L. Rep. 1292, 54 S. W. 830.

[61] Western Un. Teleg. Co. v. Luck, 91 Tex. 178, 41 S. W. 469, revg. 40 S. W. 753. See Western Un. Teleg. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826, 22 S. W. 961.

[62] Western Union Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482 (Tex Civ. App.), 76 S. W. 600.

[63] Western Union Teleg. Co. v. Hogue (Ark., 1906), 94 S. W. 924,

[64] Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686.

may be allowable in certain States, where the telegram announces the serious illness of such relative and the company fails to perform its duty of promptly delivering it,[65] still, even in such jurisdictions relationship does not necessarily raise the presumption of mental suffering.[66] And it is declared that the company is in no way responsible for mental anguish for loss of a husband.[67] But a grandmother may recover for such suffering, where she is, through the company's negligent delay in delivering, prevented from viewing her grandchild's remains;[68] so where she is unable to see a young grandson before his death such damages are recoverable in a suit by the father of the child as sender of the message.[69] And a father-in-law is entitled to a like recovery where he is prevented from being present at the funeral of his daughter-in-law.[70] Although there can be no such recovery by a father-in-law because the son-in-law could not be present at the death of his mother-in-law.[71] Nor can such damages be had by a father for the inability of his brother-in-law to see his daughter before her death.[72] Nor does an aunt sustain such a relationship to a nephew as will warrant a recovery for mental anguish because of negligence in nondelivery of a telegram containing information of his death.[73] And the same ruling applies where an uncle is unable to be present at the funeral of his niece,[74] although a wife and the uncle of her husband who stood in a parental relation to both are not necessarily so distantly related as to preclude a recovery of such damages when resulting from nondelivery

[65] Meadows v. Western Union Teleg. Co., 132 N. C. 40, 43 S. E. 512.

[66] Harrison v. Western Union Teleg. Co., 136 N. C. 381, 383, 48 S. E. 772.

[67] Cashion v. Western Union Teleg. Co., 124 N. C. 459, 466.

[68] Western Union Teleg. Co. v. Porterfield (Tex. Civ. App.), 84 S. W. 850.

[69] Western Union Teleg. Co. v. Crocker, 135 Ala. 492, 33 So. 45.

[70] Bennett v. Western Union Teleg. Co., 128 N. C. 103, 38 S. E. 294.

[71] Western Union Teleg. Co. v. Steinberger, 107 Ky. 409, 21 Ky. L. Rep. 1289, 54 S. W. 829; Davidson v. Western Union Teleg. Co., 21 Ky. L. Rep. 1292, 54 S. W. 830.

[72] Western Union Teleg. Co. v. Ayers, 131 Ala. 391, 31 So. 78.

[73] Denham v. Western Union Teleg. Co., 27 Ky. L. Rep. 999, 87 S. W. 788.

[74] Western Union Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482 (Tex. Civ. App.), 76 S. W. 600.

to such uncle of a message conveying information of the death of the husband.[75] And a second cousin is not so far removed as to preclude recovery.[76] Other instances appear throughout this chapter.

§ 808. **Failure to inquire — Wrongful delivery by one not a messenger — Sickness.**— It is negligence where a terminal receiving agent sends one not a messenger with a telegram announcing serious illness and requesting an immediate answer, and such person delivers it to one who lives but a short distance from him, without inquiry whether or not the one to whom it was delivered was the person addressed, and without taking a receipt for the message.[77]

§ 809. **Negligent delivery — Free delivery limits — No terminal office — Sickness.**— Negligent nondelivery of a message, rendering the telgraph company liable, exists where a telegram announcing the sickness of the sendee's daughter is not delivered at her home within the free delivery limits, even though, at the time, she was outside such limits, when said message would have been forwarded at once to the sendee had it been so delivered, and the sendee's house could have been found by the exercise of due diligence;[78] and where a message importing urgency is received by a telegraph company, it is obligated to use reasonable diligence in transmitting the same, even though it is addressed to a place where the company has no electrical connection, and the agent of the company has accepted it under the mistaken belief that there is an office at such place.[79] But a reasonable effort to deliver relieves the company from liability, as where it is delivered at a hotel, where plaintiff boarded, situate outside of the free delivery limits, even though notice is not given by the messenger at the time of making the delivery to the landlord, although a more diligent inquiry might have located the addressee.[80]

[75] Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841.

[76] Hunter v. Western Union Teleg. Co., 135 N. C. 458, 47 S. E. 745.

[77] Sherrill v. Western Un. Teleg. Co., 117 N. C. 352, 23 S. E. 277.

[78] Western Un. Teleg. Co. v. Clark, 14 Tex. Civ. App. 563, 38 S. W. 225.

[79] Western Un. Teleg. Co. v. Hargrave, 14 Tex. Civ. App., 79, 36 S. W. 1077.

[80] Western Union Teleg. Co. v.

§ 809a. **Free delivery limits continued — Special contract — Delivery by mail.**— If a telegraph company undertakes by special contract to make a delivery outside of free delivery limits or beyond the terminus of its lines, of an important message announcing sickness, the degree of diligence required to be exercised in an endeavor to deliver the message must be that contemplated by the agreement and commensurate with the importance of the telegram. This rule has been applied in case of a special contract for delivery of a message informing the addressee, who resided some distance in the country, of his son's sickness, and the fact that the addressee was away that part of the day when the message arrived, will not in such case, avail the company as an excuse for its negligent failure to endeavor to make a delivery at the addressee's house.[81] But if no such contract is entered into and no charge, though made, for the extra service for delivery beyond the free delivery limits is paid or fee tendered, delay in delivery is not a ground for damages, it also appearing that application was to be made to a person, in whose care the telegram was sent, for information as to the place of residence of the addressee, although delivery was not to be made to the former.[82] The address may justify depositing the message in the post-office for further delivery where there are also no free delivery limits and no telegraph station at the place designated.[83] And as free delivery limits in a small place are not generally presumed to be known to the public, the failure of the telegraph company's sending agent to inquire as to the place of residence of the addressee in such place may be shown.[84]

§ 809b. **Office hours — Mental suffering — Waiver.**— As we have stated elsewhere herein a telegraph company may prescribe reasonable rules and regulations as to the office hours,[85]

Redinger (Tex. Civ. App.), 63 S. W. 156.

[81] Western Union Teleg. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720.

[82] Western Union Teleg. Co. v. Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406.

[83] Gainey v. Western Union Teleg. Co., 136 N. C. 261, 48 S. E. 653.

[84] Western Union Teleg. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

[85] See also Carter v. Western Union Teleg. Co. (N. C., 1906), 54 S. E. 274.

and it may be shown that such hours are reasonable in an action for delaying the delivery until the following morning of a message giving information of the serious sickness of a near relative, and, in case of such a message, the company's rules establishing office hours are not abrogated nor its obligations, irrespective thereof, fixed by contract, by its agent's statements that he will send a message at once and thinks he can get it through, although he does not know the office hours at the terminal station.[86] But an agent of a telegraph company may, however, agree to rush a message and deliver it as soon as possible, as it is within his apparent authority and rules as to office hours will not be binding upon a party who has no knowledge thereof.[87] Where the mental suffering for which recovery was claimed was for a deprivation of the privilege of plaintiff, of which she would have availed herself, of being with her sister before and at her death and of attending her burial and funeral and of being with her family in the bereavement, the telegraph company is not liable, where the message announcing the serious illness of the sister was received outside of office hours by the operator, who was at the office as railroad agent, and death occurred before the succeeding office hours and the last train by which plaintiff could have arrived left before such succeeding and regular office hours.[88] But rules as to office hours will not justify a negligent delay in delivery of a message as to sickness of a child of the addressee where the message was received for transmission two hours before the proper closing time.[89] Again, where there is evidence tending to show that defendant's office hours if any at the terminal station did not interfere with the delivery of a message announcing death, a claim is of no avail which is: that where the evidence is uncontradicted that appellant had at its terminal office reasonable office hours within which it only did business, and that there is no evidence tending to show that the message was unreasonably delayed in delivering within its office hours, and that there is no

[86] Western Union Teleg. Co. v. Gibson (Tex. Civ. App.), 53 S. W. 712.

[87] Western Union Teleg. Co. v. Cook (Tex. Civ. App., 1907, rehearing denied), 99 S. W. 1131.

[88] Roberts v. Western Union Teleg. Co., 73 S. C. 520, 53 S. E. 985.

[89] Western Union Teleg. Co. v. Fisher, 107 Ky. 513, 21 Ky. L. Rep. 1293, 54 S. W. 830.

allegation or proof to the effect that the message should have been delivered without reference to defendant's office hours, the verdict for plaintiff against the company should be set aside.[90] The company may waive its rules and regulations as to office hours.[91]

§ 809c. **Transmission and delivery of messages of sickness, etc., on Sunday — Mental anguish.**— [91a] The fact that a message was sent on Sunday does not preclude the sender from recovering for mental anguish, under a State statute which permits a recovery for such suffering where a telegraph company is negligent in receiving, transmitting and delivering messages.[92] So a reasonable necessity for transmission of a telegram on Sunday may be disclosed by information given the agent as to the relations of the parties, the critical condition of health of a near relative and the sender's anxiety.[93] It is decided that there exists no legal presumption that the sending agent in New Orleans has knowledge of the Sunday hours of the company of a place in Texas, and if no special contract requiring delivery exists the mere acceptance of a message for transmission does not obligate the company to deliver irrespective of such hours. Nor is a rule establishing Sunday hours annulled or waived by the company's acts in delivering messages outside of the specified hours where it is done as a matter of accommodation only and no messenger force for delivery is kept during the closed hours. And if a message announcing death is received on Sunday during the hours when the office is closed under established rules, and a reasonable time is taken in waiting for a messenger and in preparing, after the office is open, the message for delivery; it will not be held that the company has negligently delayed delivery, even though the addressee is unable to catch a train which he claims he might have caught had the delivery been made a few minutes sooner.[94] If a telegraph

[90] Western Union Teleg. Co. v. Hidalgo (Tex. Civ. App., 1906, rehearing denied, 1907), 99 S. W. 426.

[91] Harrison v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 450.

[91a] See §§ 872–874 herein.

[92] Arkansas & L. Ry. Co. v. Lee (Ark., 1906), 96 S. W. 148.

[93] Western Union Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[94] Western Union Teleg. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

company endeavors to promptly deliver a telegram on Sunday, but the addressee is not at home, and no notice is given the sender of such failure to deliver, and the addressee, on returning and learning of the attempt to make a delivery, obtains the telegram after office hours, through the superintendent of the company, who goes with him to the office for that purpose, there is no such wilful failure to deliver as to sustain a claim for mental anguish suffered by the addressee's wife by reason of her being left alone in a strange city without his aid in preparing a dead child's body for carriage home.[95] The question, however, whether or not damage has been occasioned the plaintiff by the company's acts in not delivering a telegram on Sunday may properly be one for the jury.[96]

809d. **Office hours — Holidays.—** If a telegraph company has established office hours on a holiday by reasonable rules, it is bound to exercise a diligence consistent therewith in delivering messages, and it cannot ignore such obligation and excuse a negligent delay in delivery of a telegram on the ground that it is justified in the observance of the day as a holiday. This applies to a case where a message was received after closing hours in the morning, at the delivery office, and retained until the following morning, although there were office hours established for business in the afternoon of the day on which the message was received and some effort at delivery was made during that afternoon about three hours after the message was so received.[97]

§ 810. **Delivery to telephone for transmission — Guaranteed charges — Death.—** If a telegraph company agrees to transmit an urgent message to a telephone company for transmission over its lines, and extra charges therefor have been guaranteed, the former must use reasonable diligence in notifying the latter of said guaranty, and is liable if, through its negligence in this respect, the delivery is not made by the telephone company in time to enable the addressee to attend the funeral of his father,

[95] Potiel v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 113.

[96] Harrison v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 450.

[97] Western Union Teleg. Co. v. Ford (Ark., 1906), 92 S. W. 528.

whose death the telegram announced.[98] But where a telephone line passes through a town connecting with telegraph stations at different distances from the addressee's residence and a telegram announcing the mortal sickness of such addressee's mother is routed by the sender's agent over one of the lines to the connecting point, thence to be forwarded by telephone to the addressee, and the telegraph company promptly transmits to the telephone company, the former will not, unless it had or ought to have had, knowledge that it could not be forwarded without delay over that route, be liable for not transmitting the telegram to the other office, which was nearer to the residence of the sendee, it appearing that the telephone company did not forward the message until after the mother's decease.[99] If the question whether proper inquiry has been made and the required diligence has been exercised in attempting delivery of a telegram as to death is in issue, and evidence has been offered in support thereof by the company, it is not improper to inquire on cross-examination whether the telephone has been used for the purpose of inquiry.[1]

§ 811. **Negligent delay of or failure to deliver message preventing attendance at funeral.**— If, by reason of a negligent delay of a telegram, by the company or its agents, a husband is unable to attend his wife's funeral, and there is evidence that the funeral would have been postponed had the message been promptly forwarded and received, such evidence justifies a submission of the question to the jury, as where the husband, in answer to a despatch announcing his wife's death, sent a message reading: "Be there on the next train;" and the telegram was delayed from the forenoon of one day until the next day, and the husband, in consequence thereof, could not arrive until the second day after his wife's burial.[2] The fact that a body could not have been kept without embalming until the arrival of a son, who had telegraphed that he would come on the next

[98] Western Un. Teleg. Co. v. Davis, 16 Tex. Civ. App. 268, 41 S. W. 392. See next section herein.

[99] Western Union Teleg. Co. v. Simms, 30 Tex. Civ. App. 32, 69 S. W. 464.

[1] Western Union Teleg. Co. v. Craig (Tex. Civ. App.), 90 S. W. 681.

[2] Jones v. Roach, 90 Tex. 649, 54 S. W. 240, affg. 21 Tex. Civ. App. 301, 51 S. W. 549.

train, does not excuse delay in delivering the telegram, whereby the son was prevented attending the funeral.[3] So, failure to postpone a funeral until after the sendee's arrival, although it might have been done, does not excuse the company from negligent delay in delivery.[4] And where the plaintiff was unable to arrive in time to attend her brother's funeral, because of delay in a message which notified her of his death and which concluded: "If not otherwise instructed will bury to-day," the company was held liable.[5] The fact that the time fixed for the funeral of a relative is such that the addressee could not have reached the place in time to attend does not relieve the company from liability for its negligent acts in delaying delivery of a death message, but the company is liable for the suffering occasioned by such neglect if no notice of time is given the sendee, or if he would have gone and might have arrived in time;[6] although an averment by plaintiff that he would have attended the funeral except for the delay in delivery of the message is unnecessary.[7] If the only mental anguish for which the telegraph company could be responsible under the evidence was occasioned by the deprivation of the privilege of being present at a sister's funeral there can be no recovery if plaintiff had no intention of attending the funeral.[8] And where the plaintiff's wife was, by reason of delay in delivering a death message, prevented from attending her son's funeral and burial, recovery was had for mental suffering irrespective of what her anguish might have been had she so attended, but in such case it is proper to consider her indisposition or physical inability to have gone to the funeral.[9] If postponement of her sister's funeral to enable her to be present occasions the only mental anguish suffered by the plaintiff she can not recover therefor.[10]

[3] Western Un. Teleg. Co. v. Cain (Tex. Civ. App.), 40 S. W. 624.

[4] Western Un. Teleg. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367.

[5] Western Un. Teleg. Co. v. Vannay (Tex. Civ. App., 1899), 54 S. W. 414. See preceding section herein.

[6] Hughes v. Western Union Teleg. Co., 72 S. C. 516, 52 S. E. 107.

[7] Harrison v. Western Union Teleg. Co., 71 S. C. 386, 51 S. E. 119.

[8] Roberts v. Western Union Teleg. Co., 73 S. C. 520, 53 S. E. 985.

[9] Western Union Teleg. Co. v. Shaw (Tex. Civ. App.), 90 S. W. 58.

[10] Western Union Teleg. Co. v. Reed (Tex. Civ. App.), 84 S. W. 296.

But damages may be recovered where negligent delay in delivery of a death message prevents a father's attendance at a son's funeral even though he could not have arrived in time except upon a postponement had of the funeral upon a reply telegram from the father.[11] Cases of the class considered in this section are numerous, and as they are for the most part illustrative and dependent in many instances upon other circumstances the appended note is referred to.[12]

[11] Western Union Teleg. Co. v. Swearingin (Tex. Civ. App.), 65 S. W. 1080, affd. 97 Tex. 293, 78 S. W. 491. See Western Union Teleg. Co. v. Crawford (Tex. Civ. App.), 75 S. W. 843.

[12] *United States*: Western Union Teleg. Co. v. Baker, 140 Fed. 315 (death of *father*, but absence from *funeral* was due to failure or lack of inclination to take train rather than delay in delivery of telegram). *Georgia*: Gideens v. Western Union Teleg. Co., 111 Ga. 824, 35 S. E. 638 (delay in delivery prevented attendance at *friend's funeral*, no recovery for mental anguish). *Indiana*: Western Union Teleg. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674 (failure to deliver telegram prevented attendance at *grandmother's funeral*, no recovery for mental anguish alone). *Iowa*: Hurlburt v. Western Union Teleg. Co., 123 Iowa, 295, 98 N. W. 794 (inability to attend *mother's funeral* occasioned by non-delivery of message, recovery had for mental anguish). *Kentucky*: Postal Teleg. Cable Co. v. Pratt, 27 Ky. L. Rep. 430, 85 S. W. 225 (inability to attend *brother's funeral* resulting from failure to deliver telegram, not required to telegraph for postponement of funeral in order to avoid damages); Western Union Telegraph Co. v. Parsons, 24 Ky. L. Rep. 2008, 72 S. W. 800 (transmission delayed, preventing mother attending *son's funeral* or having it postponed, company liable); Western Union Teleg. Co. v. Herning, 24 Ky. L. Rep. 1433, 71 S. W. 642 (failure to deliver, *mother's burial*, erroneous instruction not limiting to compensatory damages for mental anguish, etc.); Morrow v. Western Union Teleg. Co., 107 Ky. 517, 54 S. W. 853 (failure to deliver telegram to husband, wife prevented from attending *grandmother's funeral and burial*, no recovery for mental anguish, question of notice to company and of wife's interest in message); Davis v. Western Union Teleg. Co., 107 Ky. 527, 54 S. W. 849 (*addressee* of death message stating time of funeral presumed to have interest, and notice of relationship unnecessary); Western Union Telegraph Co. v. Van Cleave, 22 Ky. L. Rep. 53, 54 S. W. 827 (delay in delivery, *brother's funeral*, basis of recovery for mental anguish). *Mississippi*: Hartzog v. Western Union Teleg. Co., 84 Miss. 448, 34 So. 361 (delay in delivery, brother unable to attend *sister's funeral*, cause of action stated by complaint, pain and anguish). *North Carolina*: Harrison v. Western Union Teleg. Co. (N. C., 1906), 55 S. E. 435 (notice by telegram of *death and time of*

§ 811a. **Negligent delay of, or failure to deliver message preventing viewing corpse — Mental anguish.**— A recovery may be had for mental anguish occasioned by the negligent acts

funeral of stepson, delay prevented attendance, plaintiff occupied place substantially of own mother to deceased, question of mental anguish left to jury, and held not merely a notice of hour of burial); Mott v. Western Union Teleg. Co. (N. C., 1906), 55 S. E. 363 (notice to attend *half-brother's funeral*, delay in delivery held *prima facie* negligent, and company liable); Crawford v. Western Union Teleg. Co., 138 N. C. 162, 50 S. E. 585 (death message to husband; his wife unable, through delay in delivering telegram, to attend *grandchild's funeral*, no recovery for mental anguish as telegram did not disclose that it was for wife's benefit; there were also other factors); Harrison v. Western Union Teleg. Co., 136 N. C. 381, 48 S. E. 772 (notice of importance imparted by telegram announcing death and time of burial); Bennett v. Western Union Teleg. Co., 128 N. C. 103, 38 S. E. 294 (neglect to deliver preventing father-in-law's attendance at *daughter-in-law's funeral*, recovery for mental anguish allowed). *South Carolina*: Marsh v. Western Union Teleg. Co., 69 S. C. 430, 43 S. E. 953 (unable to attend *father's funeral* through neglect to deliver message, question of error in limiting damages to mental anguish under the pleadings, etc.). *Tennessee*: Western Union Teleg. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118 (father unable to attend his *son's funeral* and the mother was deprived of the comfort and consolation of the father's presence, company negligently delayed delivery of telegram for some days, recovery had for his mental suffering; punitive damages allowed, it also appearing that a second telegram was sent). *Texas*: Western Union Teleg. Co. v. Butler (Tex. Civ. App., 1907), 99 S. W. 704 (delay in delivery of message stating *father's* death, preventing presence at *funeral* to comfort mother, question of notice not imparted, no recovery for mental anguish); Western Union Teleg. Co. v. Hidalgo (Tex. Civ. App., 1906, rehearing denied), 99 S. W. 426 (sister unable to see *brother* before interment or to attend his *funeral*, mental and bodily pain suffered, damages recovered); Klopf v. Western Union Teleg. Co. (Tex. Civ. App., 1906, rehearing denied), 97 S. W. 829 (inability of wife to attend *father's funeral*, recovery had of tolls paid); Western Union Teleg. Co. v. McDonald (Tex. Civ. App., 1906), 95 S. W. 691 (telegram requesting that *father's funeral* be postponed, lines out of order, no recovery unless, etc.); Western Union Teleg. Co. v. Craven (Tex. Civ. App., 1906), 95 S. W. 633 (failure to deliver telegram announcing illness of addressee's wife in childbirth; no recovery for mental anguish of husband or wife because of prevention of his attendance at *death or burial of infant*, unless it died during parturition); Lawrence v. Western Union Teleg. Co. (Tex. Civ. App., 1906), 95 S. W. 27 (evidence held to establish a *prima facie* case of liability against the company for delay in delivery of

of a telegraph company in failing to transmit and deliver a telegram whereby the plaintiff was prevented from viewing the corpse of his mother before burial, notice being imparted to

message of sickness and expected death of *father* preventing attendance at his *funeral*); Western Union Teleg. Co. v. Simmons (Tex. Civ. App., 1906), 93 S. W. 686, rehearing denied (telegram to husband offered by wife announcing death of one *daughter* and sickness of another, company refused to accept same, husband absent at *funeral;* company liable for mental anguish suffered); Western Union Teleg. Co. v. Ayers (Tex. Civ. App., 1906), 93 S. W. 199 (delay in delivery of message announcing death of addressee's *son*, and consequent inability to attend *burial;* no recovery as notice not imparted as to desire of addressee to be present at funeral); Western Union Teleg. Co. v. Bell (Tex. Civ. App.), 90 S. W. 714 (telegram notifying addressee that his mother was dying and requesting him to come at once; information given that it was the sender's and addressee's mother, and that the latter was the sender's only brother, held that message and information notified company that addressee's presence at the *mother's funeral* was required for consolation and sympathy, but that no notice was imparted as to the *sender's poverty and inability to inter the remains*, and that the brother could and would have made provision for such interment); Western Union Teleg. Co. v. Ford (Tex. Civ. App.), 90 S. W. 677 (telegram announcing death of *son* was delayed in delivery; held, notice imparted that addressee would desire to be present at *funeral*, and that a certain specified route, which she testified she would have taken would have enabled her to have been at the place before interment of the body, was not an improbable one); Western Union Teleg. Co. v. Kuykendall (Tex.), 89 S. W. 695, revg. (Tex. Civ. App.), 86 S. W. 61 (case of death message and notice of arrival; question of sufficiency of allegations as to distress, etc., of sendee, her lack of knowledge where the corpse was, her inability to prepare for interment or funeral; question also as to want of notice to company as to basis of claims for damages); Western Union Teleg. Co. v. Bowen, 97 Tex. 621, 81 S. W. 27, revg. (Tex. Civ. App.), 76 S. W. 613 (case of negligence of company whereby plaintiff did not learn of *father's* death for a month, and was unable to be present at *burial*, interment being by strangers); Western Union Teleg. Co. v. Ridenour, 35 Tex. Civ. App. 574, 80 S. W. 1030 (case of two messages and neglect to deliver; question for jury as basis of recovery whether if second telegram had been delivered in reasonable time sendee would have gone to *sister's funeral*); Western Union Teleg. Co. v. Wilson (Tex. Civ. App.), 76 S. W. 600 (case of addressee being unable to attend *funeral of infant* by reason of delay in delivering message; company not liable, notice not imparted as to relationship, etc.); Western Union Teleg. Co. v. Bowles (Tex. Civ. App.), 76 S. W. 456 (case of plaintiff not recovering for suffering because not attributa-

the company.[13] Such a recovery may also be had where the plaintiff was unable to see her father's body before interment;[14] or where a sister was unable to see her brother before interment and mental and bodily pain was suffered;[15] or where a grandmother was unable to view the corpse of her grandchild,[16] the plaintiff not being guilty of contributory negligence;[17] or where an addressee is unable to see his wife's body before interment.[18]

§ 811b. **Refusal to accept message — Mental anguish.—** Where a message directed to a husband is offered by his wife for transmission by a telegraph company, announcing the death of one daughter and the sickness of another and asking him

ble to his being unable to attend *son's funeral*); Western Union Teleg. Co. v. Simmons, 32 Tex. Civ. App. 578, 75 S. W. 822 (inability to be present at *brother's funeral;* evidence admissible on cross examination as to whether grief increased thereby compared with nature and duration of grief on learning of the death); Western Union Teleg. Co. v. Wilson, 97 Tex. 22, 75 S. W. 482 (uncle prevented from attending *niece's funeral* no presumption of mental anguish, where notice of consequences not imparted); Western Union Teleg. Co. v. Bryson, 25 Tex. Civ. App. 74, 61 S. W. 548 (prevented attending *brother's funeral;* excusable delay of plaintiff, duty to lessen damages); Western Union Teleg. Co. v. Rice (Tex. Civ. App.), 61 S. W. 327 (prevented attending *daughter's funeral,* recovery had); Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687 (*funeral of daughter;* no recovery); Western Union Teleg. Co. v. Vannay (Tex. Civ. App.), 54 S. W. 414 (message as to death and time of *burial of brother,* to which reply would have been made and postponement of interment; company liable for delay in delivery preventing arrival in time for burial).

[13] Western Union Teleg. Co. v. Crumpton, 138 Ala. 632, 36 So. 517.

[14] Thomas v. Western Union Teleg. Co., 27 Ky. L. Rep. 569, 85 S. W. 760. See Western Union Teleg. Co. v. Bowen, 97 Tex. 621, 81 S. W. 27, revg. (Tex. Civ. App.), 61 S. W. 27.

[15] Western Union Teleg. Co. v. Hidalgo (Tex. Civ. App., 1906), 99 S. W. 426.

[16] Western Union Teleg. Co. v. Porterfield (Tex. Civ. App.), 84 S. W. 850.

[17] Western Union Teleg. Co. v. Porterfield (Tex. Civ. App.), 84 S. W. 850.

[18] Western Union Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052. In this case deceased being large, decomposition set in rapidly, although it did not appear that the body was not properly embalmed. It was also held that such damages (for mental anguish) were not too remote or speculative.

to come home at once, and the telegram on its face shows its importance and the company refuses to accept it, such telegram is for the benefit of the husband and wife, and her mental anguish arising from the absence of the husband at the funeral that occurred after the refusal to send the message is a proximate result and natural consequence of the refusal and the company is liable to both husband and wife.[19] Again, where a physician is prevented from seeing his mother before she dies, because of the company's refusal to accept a telegram addressed to a place where it had an office, although the name on the company's books was not identical, the company is liable.[20]

§ 812. **Delay in delivery generally — Negligence — Sickness and death — Damages.**— The company is liable for nondelivery of a message addressed in care of another, whose name is erroneously given, where the addressee himself is well known, and the slightest inquiry would have enabled the company to find him, and the telegram was from the wife of the addressee, announcing the more serious condition of a sick child.[21] And a delay of twenty-seven hours in a distance of eighty miles from the receiving office to the terminal office is negligence where a message is to a wife calling her to her sick husband.[22] So where the operator knew that the terminal office could not be reached that evening, but did not so inform the sender, but stated to him that the message would be sent as quickly as

[19] Western Union Teleg. Co. v. Simmons (Tex. Civ. App., 1906), 98 S. W. 686, rehearing denied. In this case the company's agent was also informed of the circumstances and was held bound with knowledge that the body could have been embalmed and kept and if the message had not been refused and had been forwarded and received promptly by the addressee he could have had the body kept until his arrival. There was also some evidence as to the prompt delivery to the addressee of a subsequent message which was left to the jury upon the question of negligence and the question of instructions was considered.

[20] Western Union Teleg. Co. v. Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078. The place was on the company's books as A. but it had for years had an office at New A. to which latter place the message was directed.

[21] Western Un. Teleg. Co. v. Houghton, 82 Tex. 561, 17 S. W. 846.

[22] Western Un. Teleg. Co. v. Clark (Tex. Civ. App., 1894), 25 S. W. 990.

possible, and the telegram announced the death of the sender's mother, the company was held liable for delaying delivery until the next morning.[23] Again the company is liable for negligent delay in delivery of a telegram summoning a mother to the sick bed of her daughter, even though the mother might by private conveyance have reached her daughter as quickly as if she had caught the train which said negligent delay in delivery prevented.[24] But where a doctor was summoned by telegram, and the messenger went twice to his office and failed to find him, but made no further effort, it is improper to charge the jury on the basis of "no effort" to deliver.[25]

§ 812a. **Same subject — Extra charges — Mental anguish.**— Reasonable promptness,[26] ordinary care and diligence are required in the transmission and delivery of messages of death.[27] And prompt delivery should be made, or the company will be held negligent, notwithstanding non-prepayment of extra charges, where the sender is told by the operator that there is no extra toll.[28] And such damages are recoverable as result from the company's neglect to promptly deliver a telegram during office hours, even though it was found at the office by the agent the morning after it was received.[29] But only an endeavor to use reasonable diligence in making a delivery is implied by an offer of the company's agent to try to get a message through in a specified time; such a statement does not create a special contract.[30] A telegraph company is, however, actionably negligent where it delays for an unreasonable time the delivery of a message informing the sender's husband that their infant child is seriously sick and asking him to come immediately, and by reason of such delay his arrival

[23] Western Un. Teleg. Co. v. Bruner (Tex. Sup. Ct., 1892), 19 S. W. 149.

[24] Western Un. Teleg. Co. v. Lavender (Tex. Civ. App.), 40 S. W. 1035.

[25] Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598.

[26] Harrison v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 450.

[27] Hargrave v. Western Union Teleg. Co. (Tex. Civ. App.), 60 S. W. 687.

[28] Mott v. Western Union Teleg. Co. (N. C., 1906), 55 S. E. 363.

[29] Harrison v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 450.

[30] Mitchener v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 222.

home is postponed several hours beyond the time he would have arrived had the company not been negligent.[31] The company was also held liable in case of a similar message where the husband was unable to take an early train through the act of the company in delivering the telegram indirectly through others, whereby the delay was occasioned.[32] So nominal damages were recovered where the keeping of a corpse in the house for two days and nights was necessitated by the company's negligent failure to deliver a death message.[33] But mental anguish of a wife is not shown by the fact that while she was quarantined, owing to a failure to deliver a message sent to her by her husband telling her not to come because of the existence of a contagious disease, she was obliged to feed her baby on artificial food the supply of which was limited to one day.[34] So a question of negligence may be raised where a death message was not delivered owing to the addressee's name being changed by an operator at a relay station, which was one of three where repetition of the message was required, and it could have been routed over another line where only one repetion was required.[35]

§ 812b. **Telegrams as to arrival of, or meeting a person — Recovery — Mental anguish.**— Within the rules making a telegraph company liable for negligence it may become liable for the results of its negligent acts or omissions in delaying or failing to transmit or deliver a telegram announcing the arrival of a person at a certain place and time, or on a certain train at a designated place, or requesting that a person be met at such place, time, or train; and this applies, in those jurisdictions which allow such damages, to liability for mental anguish or suffering occasioned by or resulting from such negligent acts or omissions of the company. The question of notice

[31] Western Union Teleg. Co. v. Pearce 82 Miss. 487, 34 So. 152. Message was delayed in delivery eighteen hours.

[32] Western Union Teleg. Co. v. Belew, 32 Tex. Civ. App., 338, 74 S. W. 799.

[33] Denaham v. Western Union Teleg. Co., 27 Ky. L. Rep. 999, 87 S. W. 788.

[34] Mitchener v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 222.

[35] Western Union Teleg. Co. v. Ragland (Tex. Civ. App.), 61 S. W. 421.

being imparted to the company either by the message itself or orally as well as the rules elsewhere stated herein as to the result being such as ought reasonably to have been anticipated or have been in the contemplation of the parties is important in this connection. Thus where a telegram notified the addressee of the death of plaintiff's mother and that he would bring her on a certain train and to have a conveyance ready, and through failure to deliver the telegram the plaintiff was not met on arrival and the corpse of his mother was compelled to remain on the depot platform for several hours to his great mental anguish and suffering, the telegraph company is charged with notice that such results might naturally and reasonably have been expected from neglect or failure to deliver the telegram.[36] Again, where a message stating that the sender's baby is dead and requesting that he be met by the addressee with a conveyance, is sent to an uncle by marriage, who does not come within the degree of kinship whose absence furnishes a right to recover for mental anguish, but such a right is based not alone upon the fact that the sendee and others were, by reason of the telegraph company's failure to deliver the telegram, not at the train to extend their condolence, and were not there to aid and assist him with the corpse of his child and in making the funeral arrangements, and as a consequence also of the company's failure no arrangements for a funeral the next day were made; and the agent of the company knew that the train would arrive in the night, and the company must have known that the non-delivery would result in disappointment and mental anguish, a recovery was had of five hundred dollars damages.[37] Again, an addressee can recover for mental

[36] Carter v. Western Union Teleg. Co., 73 S. C. 430, 53 S. E. 539.

[37] Western Union Teleg. Co. v. Long (Ala., 1906), 41 So. 965.

As to notice and results contemplated see further the following cases: —

Arkansas: Western Union Teleg. Co. v. Hogne (Ark., 1906), 94 S. W. 924 (company not chargeable with notice of relationship from which mental anguish might arise from telegram announcing arrival on train). *Indiana*: Western Union Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775 (arrival on train, telegram to sister, no recovery, not in contemplation of parties that mental anguish would result). *North Carolina*: Davis v. Western Union Teleg. Co., 139 N. C. 79, 51 S. E. 598 (wife telegraphed husband to meet her; evidence of actual notice sufficiently

anguish suffered by his young daughter where through failure to deliver a telegram he did not meet her at a train arriving at midnight and she was compelled to wait there until the cars commenced to run in the morning. The rule allowing a recovery for mental suffering in this class of cases is not confined to

showed that mental anguish might result if message not delivered); Kennon v. Western Union Teleg. Co., 126 N. C. 232, 35 S. E. 468 (telegram to meet sender at certain time; no notice imparted; no recovery for mental anguish). *Texas*: Western Union Teleg. Co. v. Siddall (Tex. Civ. App.), 86 S. W. 343 (mother failed to meet daughter in poor health, and with child held that notice was imparted of intended trip, and that worry, mental suffering, etc., a ground of recovery); Western Union Teleg. Co. v. Burch, 36 Tex. Civ., App. 237, 81 S. W. 552 (sending agent was informed of importance of message by sender in addition to such notice as the message imparted; sender arriving with corpse of his and addressee's mother was not met at railroad station and was obliged to leave corpse at station with a relative, during his absence it was taken away in a wagon by neighbors; held that their acts in leaving it in the wagon in a wagon yard for several hours to enable them to care for the horses was not a ground for recovery as such acts could not have been anticipated as resulting from a breach of the contract for transmission and delivery of the telegram); Western Union Teleg. Co. v. Taylor (Tex. Civ. App.), 81 S. W. 69 (wife not met at night at railroad station by husband unable to obtain lodging at one hotel was escorted to another and met husband; no recovery for mental anguish subsequent to reaching first hotel); Western Union Teleg. Co. v. Christensen (Tex. Civ. App.), 78 S. W. 744 (sending agent informed of purpose of message; husband with corpse of wife's father not met at train; mental suffering of wife, expenses, etc., claimed; question of sufficiency of complaint); Western Union Teleg. Co. v. Turner (Tex. Civ. App.), 78 S. W. 362 (claim for mental anguish resulting from not being met at train by father-in-law — the sendee — with conveyance and being compelled to convey child's body in express wagon and to have funeral postponed; inadmissibility of evidence as to corpse being left at station for a short time); Western Union Teleg. Co. v. Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661 (Tex. Civ. App.), 57 S. W. 327 (recovery had for mental anguish resulting from not being met at station by relatives and being obliged while endeavoring to find them to prepare for burial of his child's body to leave the corpse in a freight warehouse; the sending agent being informed of the purpose of the message); Western Union Teleg. Co. v. Ragland (Tex. Civ. App.), 61 S. W. 421 (damages for loss of time properly considered, but exposure in walking a distance not such a result as could have been contemplated by breach of contract; sender not met; purpose of telegram also was to have grave prepared.

telegrams announcing the sickness or death of a near relative, but extends to all those cases where mental suffering may be reasonably anticipated as a natural result of the breach of contract and that appears from the face of the telegram.[38]

§ 812c. **Law governing — Mental anguish — Decisions.**— If it is agreed that the contract for transmission and delivery of a message was made in and was controlled by the laws of a State which does not allow a recovery for mental suffering or anguish alone then no recovery can be had therefor.[39] Nor does a residence in a State which permits a recovery for mental anguish warrant such a recovery there for non-delivery of a telegram sent from one point to another in another State which does not allow such damages, as the law of the place of injury and not of the former governs.[40] But although the contract was made in another State the law of the place of consummation of the contract by delivery, is held to govern in Kentucky, the place of injury being also principally in that State.[41] Under a Texas case if the mental anguish is suffered in a State whose laws permit a recovery therefor, the party so suffering is entitled in a proper case to recover, even though the law of the State wherein the message was received for transmission does not recognize such a doctrine.[42] But under another decision, in the same State, where the negligence in delivery occurred therein the law of the State where the message was received for transmission was held to control, precluding recovery.[43]

[38] Postal Teleg. Cable Co. v. Terrell (Ky. App., 1907), 100 S. W. 292. See also Green v. Western Union Teleg. Co., 136 N. C. 489, 506, 67 L. R. A. 985, 49 S. E. 165, 171, 11 Va. L. Reg. 340.

[39] Western Union Teleg. Co. v. Preston (Tex. Civ. App.), 54 S. W. 650. Examine Western Union Teleg. Co. v. Christensen (Tex. Civ. App.), 78 S. W. 744.

That law of place where contract made for transmission governs, see Hancock v. Western Union Teleg. Co. (N. C.), 49 S. E. 952.

[40] Thomas v. Western Union Teleg. Co., 25 Tex. Civ. App. 398, 61 S. W. 501. Examine Western Union Teleg. Co. v. Anderson, 34 Tex. Civ. App. 14, 78 S. W. 34.

[41] Howard v. Western Union Teleg. Co., 27 Ky. L. Rep. 244, 858, 86 S. W. 982, 84 S. W. 764.

[42] Western Union Teleg. Co. v. Blake, 29 Tex. Civ. App. 224, 68 S. W. 526.

[43] Western Union Teleg. Co. v. Buchanan,, 35 Tex. Civ. App. 437, 80 S. W. 561.

Again, in that State in a case where the delay occurred in an intermediate State the law of the State of destination allowing recovery for mental suffering was held to govern and to permit an action there.[44] Under an Arkansas decision the law of the place of injury and not that from which the message was sent governs as to the recovery of damages for mental anguish.[45] And under another decision in that State where the delay occurred there in transmission, causing delay in delivery in another State the law allowing such damages in Arkansas was held applicable.[46] Under a South Carolina case, if a mistake occurs at the office in a State from which the telegram is sent recovery may be had therein by the addressee for mental anguish where it is a ground for recovery in such State, and it need not be shown that there has been a change in the common law of the State to which the message is sent.[47] It is also determined in that State that although the telegram was received for transmission in another State, yet if there was a failure to deliver, in South Carolina an action was maintainable there for the resulting mental suffering.[48]

§ 812d. **Message in care of another.**— Where a telegram conveying information as to sickness or death is addressed to one person in care of another it should be promptly delivered, and negligence in delaying delivery of or in failing to deliver the message will render the company liable.[49] The question, however, whether a special contract exists or extra charges have or have not been paid may be important in determining

[44] Western Union Teleg. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427.

[45] Western Union Teleg. Co. v. Ford (Ark., 1906), 92 S. W. 528.

[46] Arkansas & L. Ry. Co. v. Lee (Ark., 1906), 96 S. W. 148.

[47] Walker v. Western Union Teleg. Co. (S. C., 1906), 56 S. E. 38. Examine Western Union Teleg. Co. v. Waller, 96 Tex. 589, 74 S. W. 751, revg. (Tex. Civ. App.), 72 S. W. 264.

[48] Harrison v. Western Union Teleg. Co., 71 S. C. 386, 51 S. E. 119.

[49] Hendricks v. Western Union Teleg. Co., 126 N. C. 304, 35 S. E. 543; Western Union Teleg. Co. v. Hamilton, 30 Tex. Civ. App. 300, 81 S. W. 1052.

As to alleging negligence. See Western Union Teleg. Co. v. Shaw (Tex. Civ. App.), 90 S. W. 58.

tne liability of the company; other matters, such as free delivery limits or mistakes made in transmission to a wrong address, may be considered.[50] Thus where the addressee lives a distance in the country and a special contract exists for delivery to the addressee, or, in the alternative, to a certain person for him, and it cannot be delivered to the latter, still the company must, in case of an important message announcing sickness, exercise such a degree of diligence as is contemplated by the agreement and such as is commensurate with the importance of the telegram.[51]

§ 813. **Negligence of telegraph company — Expenses as damages.**— Expenses incurred in buying flowers for his mother's funeral, and in sending his brother to attend it, are a proper element of damages and a direct result of the company's negligence in transmitting a telegram which falsely stated that the mother was dead.[52] A telegraph company is not liable for the expenses of the addressee in going to his brother's residence, where, owing to delay in the telegram announcing the brother's severe illness, said addressee did not reach such residence until after his brother's death, although such delay in delivery of the message renders the company liable for the injury caused thereby.[53] Expenses of a journey have, however, been allowed where the company had or ought to have had knowledge that its negligent acts would result in such expense, and that it could have been reasonably anticipated that such a trip would be undertaken and expense incurred.[54] But expenses, not the result of the company's negligence, or which are too remote, uncertain and problematical are not recoverable.[55]

[50] Western Union Teleg. Co. v. Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406; Western Union Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052.

[51] Western Union Teleg. Co. v. Hendricks, 29 Tex. Civ. App. 413, 68 S. W. 720.

[52] Western Un. Teleg. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627.

[53] Western Un. Teleg. Co. v. Cain, 14 Ind. App. 115, 42 N. E. 655.

[54] Hall v. Western Union Teleg. Co., 139 N. C. 369, 52 S. E. 50; Kopperl v. Western Union Teleg. Co. (Tex. Civ. App.), 85 S. W. 1018; Western Union Teleg. Co. v. Murray, 29 Tex. Civ. App. 207, 68 S. W. 549.

[55] Alexander v. Western Union Teleg. Co., 126 Fed. 445; Hilley v. Western Union Teleg. Co., 85 Misc. 67, 37 So. 556; Hunter v. Western

§ 814. **Message to physician — Damages.**— If a consulting physician is summoned by telegraph and there is a delay in the messages to and from him, but he cannot attend the patient and no suffering results from such delay, other than mental suspense, special damages cannot be recovered.[56] But where a doctor, whose professional services are requested by telegraph, would have responded had the message been delivered, and the patient, who was suffering with hernia, sustained a degree of permanent injury for want of prompt medical attention, the jury may award damages, which award will not, in the absence of passion or prejudice, be disturbed.[57]

§ 814a. **Same subject — Notice or knowledge — Mental anguish.**— Under an Arkansas decision it is held that notice, of the purpose of a message as to the requirement of a physician's presence at an operation, or that mental anxiety would result from the company's acts in delaying delivery was not imparted, although such message was sent to the physician, and read, "operate to-morrow," and even though the agent receiving the message was informed as to its importance and the necessity for prompt transmission.[58] So knowledge of or notice to the company as to the importance and character of a telegram, or that its purpose is to obtain medical assistance of a certain physician or like services for a certain operation, or other physical trouble must, it is held, be imparted to the company to warrant a recovery for mental anguish.[59] In Kentucky a telegraph company cannot be held liable for a father's mental anguish in witnessing his child's sufferings while awaiting a physician's arrival in response to a telegram which is delayed

Union Teleg. Co., 135 N. C. 458, 47 S. E. 745; Du Bose v. Western Union Teleg. Co., 73 S. C. 218, 53 S. E. 175.

[56] Western Un. Teleg. Co. v. Parks (Tex. Civ. App., 1894), 25 S. W. 813.

[57] Western Un. Teleg. Co. v. McCall (Kan. App.), 58 Pac. 797.

[58] Western Union Teleg. Co. v. Raines (Ark., 1906), 94 S. W. 700. But compare Western Union Teleg. Co. v. Church (Neb.), 90 N. W. 878, 57 L. R. A. 905; Western Union Teleg. Co. v. Stubbs (Tex. Civ. App., 1906), 94 S. W. 1083).

[59] Williams v. Western Union Teleg. Co., 136 N. C. 82, 48 S. E. 559. Examine Western Union Teleg. Co. v. Stubbs (Tex. Civ. App., 1906), 94 S. W. 1083.

in delivery.[60] In a Texas case, however, the company was held liable in a similar case.[61] And under a Nebraska decision, increased physical suffering and mental anxiety, owing to the physician's non-arrival until his services are unnecessary, affords a ground for the recovery of substantial damages against the company.[62] In Alabama mental anguish or suffering of a brother is a ground of recovery where his sister does not receive medical attendance requested by telegram which was not delivered; but if the physician could not, even if the message had been delivered, have arrived in time to have rendered such medical services and aid, recovery for mental suffering will be precluded.[63] A physician may, however, testify that he would have gone at once had he received the telegram.[64]

§ 815. **Notice of claim for damages — Parties.**— If the contract between the telegraph company and the sender of a message requires a notice of claim for damages to be given, a husband cannot sue the company for damages sustained by himself under a notice of damages to a woman, arising from failure of a telegraph company to send a message for medical attendance for her.[65]

§ 816. **Failure to deliver telegram — Proximate cause — When damages recoverable, when not.**— A delay in delivering a telegram will be the proximate cause of the death of a valuable horse, where there is every reasonable probability that the horse would have been saved had the telegram sending for a veterinary surgeon been promptly delivered.[66] But the company's delay in delivering a message announcing the serious ill-

[60] Western Union Teleg. Co. v. Reid, 27 Ky. L. Rep. 659, 85 S. W. 1151.

[61] Western Union Teleg. Co. v. Gavin, 30 Tex. Civ. App. 152, 70 S. W. 229.

[62] Western Union Teleg. Co. v. Church (Neb.), 90 N. W. 878, 57 L. R. A. 905. See Western Union Teleg. Co. v. McNair, 120 Ala. 99, 23 So. 801; Walden v. Western Union Teleg. Co., 105 Ga. 275, 31 S. E. 172.

[63] Western Union Teleg. Co. v. Haley (Ala.), 39 So. 386.

[64] Carter v. Western Union Teleg. Co. (N. C., 1906), 54 S. E. 274.

[65] Swain v. Western Union Teleg. Co., 12 Tex. Civ. App. 385, 34 S. W. 783. See c. XXVIII herein.

[66] Hendershott v. Western Un. Teleg. Co., 106 Iowa, 529, 76 N. W. 828.

ness of a child, whereby the sendee was unable to be present before the child's death, is not the proximate cause of an estrangement of the sendee from his family, caused thereby, nor is the company liable therefor.[67] It is also held that although a telegram is delayed, which states the time at which the sender would arrive to attend the burial of his mother, yet, if it was delivered before the burial, the action of those who proceeded with the burial, and did not postpone it until the sender's arrival, was the proximate cause of his inability to be present in time for the services and the negligent delay of the message was not the proximate cause.[68] And in a similar case the company's delay in delivery was held not the proximate cause, where the addressee could have arrived in time to be present at his mother's funeral, had there not been a delay in the train; and this was so held even though a prompt delivery of the message would have enabled him to have taken a train over another road, which arrived much earlier, it also appearing that he did in fact take the same train which he would have taken had there been a prompt delivery.[69] And where a mother died from exposure consequent upon her being obliged to search in the night-time for her son's house, because of a nondelivery of a telegram from his sister, requesting him to meet his mother on the train, the company was held not liable.[70]

§ 816a. **Proximate cause continued — Mental anguish.**[71]— In the case of telegrams relating to sickness or death the damages claimed should not be too remote but the question of proximate cause must be considered.[72] So it is held that in suits for

[67] McBride v. Sunset Teleph. Co. (U. S. C. C., D. Wash.), 96 Fed. 81.

[68] Western Un. Teleg. Co. v. Andrews, 78 Tex. 305, 14 S. W. 641.

[69] Western Un. Teleg. Co. v. Briscoe, 18 Ind. App. 22, 47 N. E. 473, 3 Am. Neg. Rep. 545.

[70] Stafford v. Western Un. Teleg. Co., 73 Fed. 273.

[71] See §§ 801a, 945, 951–954 herein.

[72] *Alabama*: Western Un. Teleg. Co. v. Merrill, 144 Ala. 618, 39 So. 121 (a case of wife's illness and death). *Kentucky*: Gooch v. Western Un. Teleg. Co., 28 Ky. L. Rep. 828, 90 S. W. 587. (Damages claimed, held too remote; damages for mental suffering and other financial losses, telegram as to illness of son and for money); Taliferro v. Western Un. Teleg. Co., 21 Ky. L. Rep. 1290, 54 S. W. 1025 (inquiry as to sickness; failure to deliver, brothers unable to attend funeral, company's acts not proximate cause of mental anguish). *North Car-*

mental anguish it is generally proper to instruct the jury that to warrant a verdict for damages they must find not only that the plaintiff suffered mental anguish from defendant's breach of duty as a proximate cause, but that such breach of duty in their judgment would have brought suffering to a reasonable human being in the situation of plaintiff.[73]

§ 817. **Nonrecovery for loss of wife's services.**— If a telegraph company fails to deliver a telegram summoning a physician to attend a wife, and there is no proof that her life would have been saved but for the default, it is held that the husband cannot recover in such case for the loss of his wife's services.[74] The application to every case, however, of a rule, as a general one, which would require proof that a person's life would have been saved by the attendance of a physician, would practically

olina: Bowers v. Western Un. Teleg. Co., 135 N. C. 504, 47 S. E. 597 (son's own misapprehension as to purpose and character of message held cause of his anxiety and distress); Higdon v. Western Un. Teleg. Co., 132 N. C. 726, 44 S. E. 558 (inability to attend mother's funeral; acts of company not proximate cause of injury). *South Carolina*: Michener v. Western Un. Teleg. Co., 75 S. C. 182, 55 S. E. 222. (Acts of company not proximate result of exposure to contagious disease and being quarantined); Arial v. Western Un. Teleg. Co., 70 S. C. 418, 50 S. E. 6 (mental anguish held not a proximate result of company's acts); Willis v. Western Un. Teleg. Co., 69 S. C. 531, 48 S. E. 538 (question of proximate cause for mental suffering held one for the jury). *Texas*: Western Un. Teleg. Co. v. Siddall (Tex. Civ. App.), 86 S. W. 343 (physical and mental suffering held not proximate result of company's acts); Western Un. Teleg. Co. v. Campbell, 36 Tex. Civ. App. 276 (damages must proximately result); Western Un. Teleg. Co., McNairy, 34 Tex. Civ. App. 389, 78 S. W. 969 (brother died and buried by strangers; mental anxiety etc., held too remote); Gaddis v. Western Un. Teleg. Co. 33 Tex. Civ. App. 391, 77 S. W. 37 (mental anguish of husband held not proximately caused by company's act; wife injured in storm and telegram giving assurance of want of danger, delayed in delivery) Western Un. Teleg. Co. v. Seffel, 31 Tex. Civ. App. 134, 71 S. W. 616 (mother unable to see daughter before latter's death; company's act held proximate cause of mental suffering); Western Un. Teleg. Co. v. Murray, 29 Tex. Civ. App. 207, 68 S. W. 544 (not liable for mental anguish of mother over child's exposure).

[73] Roberts v. Western Un. Teleg. Co., 73 S. C. 520, 53 S. E. 985.

[74] Western Un. Teleg. Co. v. Kendzore, 77 Tex. 257, 13 S. W. 986.

absolve a telegraph company from liability in all cases of failure to transmit or deliver a telegram summoning medical attendance, since there can be no evidence that a life would be saved by a physician's attendance. The utmost that any reputable physician could testify to in cases of serious illness would be that, in his opinion, there was every reasonable probability that life could be saved, and even this testimony would probably be subject to a qualification as to the intervention of other causes.

§ 818. **Evidence — Messages as to sickness and death — Mental anguish, etc.**— Where damages for mental suffering are allowable, it is sufficient evidence of such anguish, where a telegram, announcing the death of the plaintiff's mother, was negligently delayed, and by reason of such negligence the plaintiff was unable to attend her funeral, and it appeared that he lost time from his work in trying to discover whether a message had been sent him, and inquired therefor at the company's office, and he testified that he was desirous of attending the funeral and felt "hard" at the delay in delivery of the message, and telegraphed to ascertain if he could be present at the funeral. It also appeared that upon receipt of said message to him, he called at defendant's office and was excited and anxious and complained of the delay and why the delivery was not made at his residence, and the plaintiff's declarations and conduct also clearly indicated that he suffered mental anxiety.[75] But statements made before his death by the deceased indicating his desire to see his brother, the addressee of a telegram announcing his illness, are not admissible to show mental distress of the addressee.[76] A person can, however, testify to a desire to be with his family on the occasion of his father's death.[77] Nor can it be shown in evidence that a father was told after his son's death that the son had expressed a desire to see him and had thought he was neglected because the father had not come in response to a telegram so requesting, where it also appeared that, notwithstanding the company's negligence in not delivering

[75] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752, 62 N. W. 1, 5 Am. Elec. Cas. 709.

[76] Western Un. Teleg. Co. v. Stiles, (Tex. Super. Ct., 1896), 34 S. W. 438.

[77] Machen v. Western Un. Teleg. Co., 72 S. C. 256, 51 S. E. 697.

the telegram, he had received notice in sufficient time to have been present before the son's death.[78]

§ 819. **Same subject continued.**— It is said in a Texas case, "As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate it was doubtless thought that evidence of mental condition * * * might be given. As juries may, from their own knowledge and experience of human nature, estimate damages proceeding from that cause, without any evidence, it is not important to produce it, and when produced, it ought not, as a general rule, to have a controlling effect, and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain."[79] But evidence is inadmissible in these cases when it is not the natural result of the company's negligence, or failure in the performance of its duty to promptly transmit and deliver messages of this nature; nor is evidence admissible which is calculated to arouse the sympathies of the jury in favor of the plaintiff and against the defendant company; nor is evidence

[78] Western Un. Teleg. Co. v. Melton, 96 Tenn. 66, 33 S. W. 725. See Western Un. Teleg. Co. v. Jackson, 35 Tex. Civ. App. 419, 80 S. W. 649; Western Un. Teleg. Co. v. Waller, 96, Tex. 589, 74 S. W. 751.

[79] Western Un. Teleg. Co. v. Adams, 75 Tex. 535, 12 S. W. 857, 6 L. R. A. 844, 3 Am. Elec. Cas. 768, 772, per Henry, Asso. J., quoted with approval in Western Un. Teleg. Co. v. Jobe, 6 Tex. Civ. App. 403, 4 Am. Elec. Cas. 799, 805, 25 S. W. 168, 1036, per Neill, Asso. J. In the Adams case a witness was permited to testify that the addressee, while waiting for a train after the message had been delivered to her (stating that her brother was dying), seemed to be in great distress, and said she would give everything that she possessed to see her brother to talk to him before he died. In the Jobe case the appellant's wife had said "Words of mine are inadequate to describe my feelings;" also, "While I suffered great mental pain on account of not being with my father in his last moments and with the remainder of his family at that time in their affliction, yet I suppose that any other child, who was devoted to a father and desired to be with him in his last hours, would suffer as much as I did,' and these statements were admitted in evidence. The court said that the words of the Supreme Court, quoted in the above text, applied to these expressions.

admissible which furnishes the jury with an improper basis for damages. And of this character is evidence of the financial condition of the plaintiff; of his being among strangers and without friends and money; of his mortgaging his property; that his creditors were dunning him, and of his distress on account of his financial condition, especially so where the mortgage was given before he could have had any reasonable expectation of hearing from his father, to whom he had telegraphed, stating that his wife and baby were dead and asking his father to come to his help.[80] But evidence is admissible to show that the sender could have obtained leave of absence from his employer and could have arrived in time to have reached his mother's house twenty-four hours before her death, had the telegram announcing her illness been delivered promptly.[81] There is no error in ruling out evidence in defense that it was the custom of a physician, telegraphed for, not to come without prepayment or guaranteed payment of his charges. "It was not for the operator to speculate on the chances that the summons would or would not be obeyed.[82]

§ 819a. **Same subject continued — Mental anguish.**— Evidence is admissible to show that the plaintiff was where the message sent in care of another could have been delivered to him if the company had delivered it to such third person.[83] And it may be shown that such third person's name was intended by the parties as a reference for the purpose of enabling the plaintiff's residence to be ascertained.[84] So the fact that plaintiff's residence was found in a short time by strangers is properly admissible upon the question of want of diligence by the telegraph company.[85] But evidence of the acts

[80] Gulf, Col. & S. F. R. Co. v. Levy, 59 Tex. 542, 1 Am. Elec. Cas. 543. See Western Un. Teleg. Co. v. Porter (Tex. Ct. Civ. App., 1894), 26 S. W. 866.

[81] Western Un. Teleg. Co. v. Drake, 14 Tex. Civ. App. 601, 38 S. W. 632.

[82] Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 3 Am. Elec. Cas. 570, 578; 7 So. 419.

[83] Western Un. Teleg. Co. v. Crawford, (Tex. Civ. App.), 75 S. W. 843.

[84] Western Un. Teleg. Co. v. Bryant, 35 Tex. Civ. App. 442, 80 S. W. 406.

[85] Western Un. Teleg. Co. v. Davis, 24 Tex. Civ. App. 427, 59 S. W. 46.

of trainmen in placing the corpse upon the platform in the rain, cannot be given in evidence in an action to recover damages for the negligent acts of a telegraph company in delaying a message requesting that plaintiff's father meet him at the railroad station upon his arrival with his brother's corpse.[86] In suits for mental anguish, after the circumstances from which the suffering might arise have been brought out, the plaintiff may testify that he suffered, but he cannot testify as to his peculiar apprehensions, fears and conclusions, because these might be due to individual temperament.[87] Again, in a suit for punitive damages against a telegraph company the mental anxiety suffered by the plaintiff before the telegraph company's default is irrelevant, but statements are admissible which do not include his peculiar apprehensions, fears and conclusions, but merely cover such feelings, or sufferings of suspense and anxiety as any normal human being would suffer circumstanced as the plaintiff was without regard to peculiar temperament.[88]

§ 820. **Presumptions — Mental anguish — Spiritual aid.**— There is no presumption of mental anguish, as in the case of a husband or wife or near blood relative, but such mental anguish must be affirmatively proved in the case of a brother-in-law and sister-in-law, the former having failed to arrive in response to a telegram announcing the death of the plaintiff's husband, which message was negligently delayed.[89] But affirmative proof of mental suffering is unnecessary in case of a son unable, by reason of negligent delay of a telegram, to be present at his father's funeral.[90] An averment that one became unconscious and died before a minister summoned by telegraph reached her does not raise the presumption that such person became unconscious before the minister could have reached her, where it is also alleged that had the telegram been promptly delivered said minister would have arrived in time to have ad-

[86] Hancock v. Western Un. Teleg. Co. (N. C. 1906), 55 S. E. 82.

[87] Roberts v. Western Un. Teleg. Co., 73 S. C. 520, 53 S. E. 985. See Willis v. Western Un. Teleg. Co., 73 S. C. 379, 382, 53 S. E. 639.

[88] Willis v. Western Un. Teleg. Co., 73 S. C. 379, 53 S. E. 639.

[89] Cashion v. Western Un. Teleg. Co., 123 N. C. 267, 31 S. E. 493, citing Western Un. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896.

[90] Western Un. Teleg. Co. v. Randles (Tex. Civ. App.), 34 S. W. 447.

ministered spiritual aid.[91] But there can be no recovery for mental anguish because the attendance of a certain clergyman at the funeral of the husband and father was prevented by reason of the telegraph company's acts in failing to deliver a telegram, it appearing that another clergyman was obtained.[92] So a charge may be properly refused which states that the change of the word "better" to "dead" in a telegram is not, of itself, such proof of negligence as to entitle the sendee to recover for mental distress.[93]

§ 821. **Contributory negligence — Excuses — Telegrams as to sickness and death.**— One may be guilty of such contributory negligence as to defeat a recovery of damages for negligent delay of a message,[94] as in case where a physician was summoned by telegraph to attend a son's broken arm, and the message was not delivered for nine days, during which time the son lay unattended and another physician might have been called in. But the father's contributory negligence, while preventing his recovery, did not prevent his son's recovery of damages.[95] There is not, however, as matter of law, contributory negligence in failing to send a telegram to have a funeral postponed in answer to a delayed telegram announcing the death of a child, where, notwithstanding such delay, the addressee would have been in time if the train had not been late.[96] Nor is a recovery prevented by the fact that the sendee of a nondelivered telegram had received a letter conveying information that his mother was very sick, and the telegram announced that she had no chance of recovery.[97] Nor does the fact that the son is not really lost excuse the company for failure to deliver a telegram inquiring for a lost son.[98]

[91] Western Un. Teleg. Co. v. Robinson, 97 Tenn. 683, 37 S. W. 545, 34 L. R. A. 431.

[92] Western Un. Teleg. Co. v. Arnold, 96, Tex. 493, 73 S. W. 1043.

[93] Western Un. Teleg. Co. v. Odom 21 Tex. Civ. App. 537, 52 S. W. 632.

[94] See Western Un. Teleg. Co. v. Matthews, 24 Ky. L. Rep. 3, 67 S. W. 849.

[95] Western Un. Teleg. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048. See Chapter XXXVI, herein, on Parties and Remedies.

[96] Western Un. Teleg. Co. v. Anderson (Tex. Civ. App.), 37 S. W. 619.

[97] Western Un. Teleg. Co. v. Drake, 14 Tex. Civ. App, 601, 38 S. W. 632.

[98] Western Un. Teleg. Co. v. Womack, 9 Tex. Civ. App., 607, 29 S. W. 932.

§ 821a. **Same subject — Duty of plaintiff.**— Contributory negligence does not arise merely because a messenger on horseback is sent instead of using a telephone where the telegraph company had refused a telegram announcing serious illness, it appearing that plaintiff had no knowledge of such telephone connection.[99] The obligation, however, to use other means for communication may be submitted to the jury [1] upon the question of mitigation or reduction of damages.[2] But the question of financial ability to procure another conveyance is admissible in case of claim for nondelivery of a death message which requested a conveyance on arrival at a certain place.[3] So plaintiff's physical condition which prevented his walking to the residence of a sister who was ill and his inability to obtain a conveyance and to depart until the next morning does not support a claim of contributory negligence.[4] And the plaintiff may be justified, because of sickness of his wife, in selecting a certain route in order to reach his destination, even though by other means of conveyance he might, though leaving later, have reached his destination sooner.[5] And sickness of a child may constitute a justification for a daughter in not taking an earlier train, although not an excuse for neglect to take a connecting train after beginning the journey to her father's deathbed, even though she did not know the time of the train's departure.[6] And where the plaintiff has a justifiable excuse therefor it is not unreasonable on his part to fail to take an earlier train to a funeral in order to lessen damages, the question not being one merely of financial expenditure.[7] But evidence is admissible to show that plaintiff by a selection of conveyances or routes

[99] Western Un. Teleg. Co. v. Downs, 25 Tex. Civ. App. 597, 62 S. W. 1078.

Sender routing message over connecting telephone line, both lines out of repair; when telegraph company not liable; see Western Un. Teleg Co. v. McDonald (Tex. Civ. App. 1906), 95 S. W. 691.

[1] Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686.

[2] Willis v. Western Un. Teleg. Co., 69 S. C. 531, 48 S. E. 538.

[3] Tinsley v. Western Un. Teleg. Co., 72 S. C. 350, 51 S. E. 513.

[4] Meadows v. Western Un. Teleg. Co., 132 N. C. 40, 43 S. E. 512.

[5] Southwestern Teleg. & Teleph. Co. v. Taylor (Tex. Civ. App.), 63 S. W. 1076.

[6] Western Un. Teleg. Co. v. Matthews, 24 Ky. L. Rep. 3, 67 S. W. 849.

[7] Western Un. Teleg. Co. v. Bry-

might have reached his destination sooner, as in case of driving to another railroad station and leaving by that route.[8] The question of contributory negligence in not departing by an early train to a funeral may be one for the jury.[9] But it does not rest with the telegraph company's agent to assume that the plaintiff will select a train instead of using some other conveyance and so delay delivery of a telegram requesting plaintiff's immediate presence at home, because of his daughter's serious illness.[10] Nor does the failure to request by telegram that a funeral be postponed until the plaintiff can arrive constitute negligence where it appears that the circumstances warrant the belief that there would not have been any postponement.[11] Negligence on the part of plaintiff or his agent in giving an incorrect or insufficient address may preclude recovery.[12] And where owing to the company's mistake in stating the name of a nephew instead of that of plaintiff's as being sick the defense of contributory negligence cannot be availed of in that the plaintiff delayed his return until the next day when he learned by telegram that his child had died.[13]

§ 822. **Mental suffering — Damages — Generally.—** The question whether there can be a recovery of damages for mental suffering alone has been the subject of much controversy. Certain courts have decided that there can be such a recovery while

son, 25 Tex. Civ. App. 74, 61 S. W. 548. See Western Un. Teleg. Co. v. Porterfield, (Tex. Civ. App.), 84 S. W. 850.

[8] Western Un. Teleg. Co. v. Sorsby, 29 Tex. Civ. App. 345, 69 S. W. 122.

[9] Western Un. Teleg. Co. v. Salter, (Tex. Civ. App. 1906), 95 S. W. 549.

Extent of and burden of proof, as to contributory negligence or duty of plaintiff, see Howard v. Western Un. Teleg. Co., 27 Ky. L. Rep. 244, 84 S. W. 764, 86 S. W. 982; Hancock v. Western Un. Teleg. Co., 137 N. C. 497, 49 S. E. 952; Cumberland Teleg. & Teleph. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155; Dehougue v. Western Un. Teleg. Co. (Tex. Civ. App.) 84 S. W. 1066; Western Un. Teleg. Co. v. Adams, (Tex. Civ. App.), 80 S. W. 93.

[10] Cumberland Teleg. & Teleph. Co. v. Brown, 104 Tenn. 56, 55 S. W. 155.

[11] Western Un. Teleg. Co. v. Crawford, (Tex. Civ. App.), 75 S. W. 843; see Postal Teleg. Cable Co. v. Pratt, 24 Ky. L. Rep. 430, 85 S. W. 225.

[12] Hargrave v. Western Un. Teleg. Co. (Tex. Civ. App.), 60 S. W. 687.

[13] Efird v. Western Un. Teleg. Co., 132 N. C. 267, 43 S. E. 825.

other courts unequivocally repudiate such a doctrine. Except for the possible guidance of other courts which have not yet finally passed upon this question, it would be unnecessary to state what constitutes the weight of authority, since it may be reasonably assumed that a constant line of decisions upon this point in any one State will be followed and declared to be the law of that State, otherwise there might be a continuous series of reversals of prior rulings and a chaotic state of the law would exist; the rule stare decisis should control, so that parties may know their relative rights and remedies, and may, therefore, the better conform to the law, when once for all time it is settled what the law is. The rule stare decisis does not, however, preclude an extension of the rules of law so as to fully meet and cover new cases, nor does it preclude the application of old principles to a new state of existing things. So that the rule stare decisis may be constantly affirmed and yet new decisions frequently be given that apparently contravene the doctrines of old cases.

§ 823. **Theory upon which damages allowed.**— The rule established in Hadley v. Baxendale,[14] and which has been continuously asserted and affirmed is that the damages which a party to a contract ought to recover in respect to a breach of it by the other are such as naturally arise from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach. And it may be added that the damages must be certain, both in their nature and in respect of the cause from which they proceed. They must not be the remote, but proximate consequence of the breach of contract and must not be speculative or contingent.[15] Again, to continue the rule of the Hadley v. Baxendale case, if the special circumstances under which the contract was actually made were communicated to and thus known by both parties, the damages resulting from the breach of such a contract which they could reasonably contemplate would be the amount of injury which would ordina-

[14] 9 Exch. 341, 26 Eng. L. & Eq. Rep. 398, almost entirely the language of Alderson, B.

[15] Beaupré v. Pacific & Atlantic Teleg. Co., 21 Minn. 155, 1 Am. Elec. Cas. 141, 142, per Young, J.

rily follow from a breach of contract under those special circumstances so known and communicated. But, on the other hand, if these 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 from such breach of contract, for had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case.[16] This rule is applicable to the contracts of telegraph companies for the transmission of messages.[17] In actions for tort the rule is much broader. Damages in such cases being recoverable, not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but also consequential damages, and these damages are not limited, so far as they are compensatory, by what was in fact contemplated by the party in fault. The compensation must be commensurate with the loss or injury.[18] It is also said in the last cited case that this rule also applies to actions against telegraph companies for negligence in the performance of their duties. This question, however, whether the action for the recovery of damages in these cases last mentioned is one in contract or tort is involved in the discussion, in the different decisions hereinafter cited, of the question of recovery of damages for mental suffering.

§ 824. **Damages for mental suffering — Preliminary remarks.** — A careful and exhaustive examination of the cases discloses the reasons, which are stated as briefly as the nature of the subject warrants in the following sections, both for and against the allowance of damages for mental suffering in cases of the character noted in this chapter. The rules of damages, however,

[16] Hadley v. Baxendale, 9 Exch. 341, per Alderson, B., criticised in Daughtery v. American Un. Teleg. Co., 75 Ala. 168, 1 Am. Elec. Cas. 588, 598, 599, per Stone, J.

[17] Western Un. Teleg. Co. v. Wilson, 32 Fla. 527, 4 Am. Elec. Cas. 664, 669, 670, and citing numerous cases.

[18] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752, 62 N. W. 1, 5 Am. Elec. Cas. 709, 716, per Deemer J.

noted in the last section are urged in behalf of both sides of the issue, and have, therefore, been given precedence.

§ 825. **Theory or reasons upon which damages for mental suffering allowed.**— Telegraph companies exercise and enjoy special franchises and privileges under the law; their employment is of a public character and they are obligated to exercise due diligence or diligence commensurate with their undertaking. Their diligence is determined to some extent by the nature and importance of the message. They are obligated to transmit and deliver telegrams correctly, promptly and without unreasonable delay. The addressee of a despatch is entitled to the information contained therein, and the sender is entitled to have it conveyed, and both are entitled to whatever benefits the information may convey or confer. For its services in transmission and delivery the telegraph company receives a stipulated price. Messages relating to death, sickness and the like are of special importance and import notice thereof from the very terms and nature of the telegram; they import urgency on their face, and the company contracts with reference thereto. The company is bound to know that the natural consequences of its negligence in performance or its nonperformance would naturally produce mental suffering in cases of blood relationship, and the same rule applies in other cases of relationship where such company has knowledge of the existence of affection between the parties. These messages are of far greater importance than those of a pecuniary nature. This express or implied knowledge imports a notice of liability for such consequential damages as may arise from the company's negligence or nonperformance of its duty. Such damages must, therefore, be deemed to have been in the contemplation of the company and of the parties. Messages of this nature naturally suggest damage. Neglect in performance of the company's obligation is a wrongful act. The sender or sendee, or both, ought to be spared whatever pain and affliction the company's promptness and accuracy in transmission and delivery would have prevented. The wrongdoer knows what his duties and obligations are. Every infraction of a legal right contemplates some damage and some remedy. If the company violates its contract it is liable to some extent, and this being true it is liable for all damages.

The law does not permit any one by his wilful fault or neglect to impose with impunity an injury to another's feelings. The law authorizes a recovery of damages appropriate to the objects of the contract which is broken. The company is answerable for a breach of contract according to the nature of the contract and the character and extent of the injury suffered by nonperformance. If other than pecuniary benefits are contracted for other than pecuniary standards will be applied in the ascertainment of the damages flowing from the breach. Damages should be allowed which are the natural result of a wrongful act. If inexcusable negligence is the proximate cause of an injury, damages may be awarded commensurate with the injury. Damages in cases of mental suffering are an incident to the pecuniary loss. Damages caused by the wilful neglect or default of another are actual damage. The fact that the message does not relate to pecuniary or commercial transactions does not excuse negligence of the company in transmission or delivery thereof. In matters of mere trade the company may become liable for all natural and proximate damages and should be held equally liable where there is mental suffering. Reason and public policy affirm the right to recover for mental pain. The law has been gradually extended to cover new cases. The rule of the common law that mental suffering alone, disconnected from physical suffering, is not a ground for damages was adopted before electricity was known, and that law, as thus applied, does not cover telegraph contracts for transmission and delivery of telegrams. The common law is always adjustable to the growing needs of civilization, and is adaptable to new conditions and facts, otherwise its usefulness would cease. Action in these cases may be brought upon contract or for tort. It is an action really in the nature of a tort, not for a mere breach of contract but for a negligent failure to perform a duty; the contract merely serves to disclose the relations between the parties. As a rule, actions may be maintained for contract or tort if an injury is done by negligence in the performance of a duty contracted for. In some States forms of action are abolished, and this is important in considering and applying decisions in the United States courts and in other States where forms of action are not abolished. It is admitted that under the common law damages for mental

pain could not, as a rule, be recovered when unaccompanied by physical injury, as such damages were not within the contemplation of the parties; but they were allowed when connected with physical pain. In applying the rule, however, cases of personal injury are generally spoken of. It is a curious proposition that mental anxiety is a ground for damages when connected with physical pain, but not when standing alone. Injury to the feelings is often more injurious than a physical injury. In the latter case such injury is not more directly the result of wrongful act than in cases of the character here considered. The mind is no less a part of the person than the body. Physical pain is no more real than mental anguish. The actual right to compensation for mental pain in cases allowable under the common law had no foundation in the existence of physical pain. Both physical and mental pain have a common source of right of compensation and that is the act of the violation of a right secured by contract or the general law, and whatever necessarily results to the injured person from the violative act gives a right to compensation, and the wrongdoer knows that he is inflicting mental suffering when he withholds a message of illness or death. Damages in cases of mental suffering alone are no more vague and shadowy than in cases of mental suffering connected with physical injury and no more difficult to prove, and the verdict stands as equally proven in the first case as in the latter. The same is true as to the standard of measurement of damages, and such damages in cases of mental suffering alone, in the class of telegraphic messages under consideration, are the direct and proximate result of the company's nonperformance or neglect of its duty. Inconsistencies in jury verdicts equally prevail in cases of mental suffering connected with physical injury and those of mental suffering alone. The reason of the law applies equally in both these classes of cases. Mental suffering alone is a ground for damages: in cases where passengers are wrongfully put off or ordered from railroad trains; in certain cases from the nature of an assault where the mental pain does not result from bodily harm; in certain railway cases; in actions for breach of promise of marriage; in actions for slander and libel; for malicious arrest and prosecution; false imprisonment; for illegally suing out an attachment; criminal conversation; se-

duction, and for kissing a female against her will. Mental suffering resulting from indignity to a person is actual damage. It is an element of actual damage in suits for injuries to persons through negligence of others. In seduction of a daughter the action is technically for loss of services, but it is well known that compensation is not in fact given for them but for wounded and outraged feelings, and this applies to cases of injury to a wife. There may be a contract for the safe carriage of a passenger, yet an action will lie in tort for breach of this contract through negligence. Damages for mental suffering may be allowed to a wife for mutilation of her deceased husband's body, although there is no physical pain. So fright, causing nervous convulsions and illness, constitute a ground for mental damages. Again, if no more than the sum paid for transmission of the telegram can be recovered in the class of cases here considered, the usefulness and value to the public of telegraph companies will be seriously impaired and a premium put on their negligence. No man can depend upon the correctness or promptness of messages where the law enforces no responsibility, but if these corporations understand that they have a duty to perform and must do it or respond in damages, negligence and unskilfulness of operators will cease. This is also an answer to the argument of an intolerable amount of litigation arising if such damages are allowed. Nor should this fact, if it were one, influence courts in administering law. These companies should be held to that diligent and skilful performance of their duties which the law imposes, and the greater the extent of the wrong the greater the need for a remedy. Courts should never hesitate to perform a legal duty merely because there may be other litigation on the same question, caused by a refusal or neglect of some person to conform to the requirements of the law.[19]

[19] In addition to the cases cited in those decisions which support the doctrine of recovery for mental damages alone, and the substance of which are noted in the above text, the following comparatively recent cases are also in a line with the argument: Mental suffering is an element of damages in trespass for wrongful removal from cemetery of a child's body. Bessemer Land & I. Co. v. Jenkins, 111 Ala. 135, 18 So. 565. Negligent arrest causing mental suffering is a ground for recovery of damages. Gibney v. Lewis, 68 Conn. 392, 36 Atl. 799.

§ 826. **Theory or reasons upon which damages for mental suffering not allowed.**— It is admitted that telegraph companies agree for hire as public servants to send messages and ought to be liable for negligence or nonperformance, but this does not give the right to create a new principle of damages. Courts have no right to abrogate the common law; if old principles do

Mental suffering, connected with personal injury, can be measured by no exact pecuniary standard. North Chicago St. Ry. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 583, affg. 79 Ill. App. 632. Mental suffering caused by negligence a ground of damages. Illinois Cent. R. Co. v. Robinson, 58 Ill. App. 181. In action for selling liquor to a husband, brought by a wife against a saloon-keeper, feelings of shame, disgrace and mortification arising from a public conviction for drunkenness, resulting from the sale, are proper elements of damages. Lucker v. Liske, 111 Mich. 683, 70 N. W. 421, 3 Det. L. News, 850. Malicious prosecution entitles to mental damages as well as material. Frill v. Plumer 69 N. H. 498, 43 Atl. 618. Mental anguish damages are allowable in false imprisonment of a woman. Limbeck v. Gerry, 15 Misc. (N. Y.) 663, 39 N. Y. Supp. 95. Mental pain caused by another's negligence may be ground of damages. Goodhart v. Pennsylvania R. Co., 177 Penn. St. 1, 35 Atl. 191, 38 Week. N. of Cas. 545, 5 Am. & Eng. R. Cas. (N. S.) 364. Mortification to feelings arising from a tort is legitimate damages. Sechrist v. Jahn, 11 Penn. Super. Ct. 59. Fright causing mental injury is a basis of damages, though there is no physical pain other than that caused by fright. Mack v. South Bound R. Co., 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 3 Chic. L. Jour. Week. 272, citing Bell v. Great Northern R. Co., Ir. L. R., 26 C. L. 428; Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752, 28 L. R. A. 72, 62 N. W. 1; Purcell v. St. Paul City R. Co., 48 Minn. 134, 16 L. R. A. 203; Sloane v. Southern Calif. R. Co., 111 Cal. 668, 44 Pac. 322, 32 L. R. A. 193; Fitzpatrick v. Great Western R. Co., 12 U. C. Q. B. 645; disapproving Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781 (which reverses 77 Hun [N. Y.], 607, 59 N. Y. St. R. 892, 25 N. Y. Supp. 744, which affirms 4 Misc. 575, 30 Abb. N. C. 362); Haile v. Texas & P. R. Co., 23 U. S. App. 80, 9 U. S. C. C. A. 134, 60 Fed. 557, 23 L. R. A. 774; Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512; Ewing v. Pittsburg, C. C. & S. L. R. Co., 147 Penn. St. 40, 14 L. R. A. 666; Victorian R. Comrs. v. Coultas, L. R., 13 App. Cas. 222. Damages for libelous publication include wounded feelings. Forke v. Homann, 14 Tex. Civ. App. 536, 38 S. W. 64. Mental anguish suffered by a wife is a proper element of damages, where a ticket is sold her to a wrong station. Texas & P. R. Co. v. Armstrong, 93 Tex. 31, 51 S. W. 835. Mental suffering unaccompanied by physical pain may be allowed a passenger on account of profane, vulgar and indecent language. Houston, E. & W. T. R. Co. v. Perkins (Tex.), 52 S. W. 124.

not apply to new conditions, or if there ought to be a remedy it should be a legislative and not a judicial one. The fact that the telegraph company contemplated or knew that mental suffering must follow its negligence or nonperformance of its duty is no guide, since there is merely a breach of contract. It is only where the physical injury and mental suffering are inseparable or where the injury contains some element of malice that the law recognizes mental anguish as an element of damage. Mental anguish alone was never at the common law a sufficient ground of action. Damages are also confined to those cases in which a pecuniary estimate can be made. Bare negligence, unproductive of damage, gives no right of action; negligence causing damage does. Damages for mental suffering alone, distinct and separate from physical injury, were not allowed or supported in any decision prior to that of the Texas case of 1881,[20] and that ruling rested only on the unsupported statement of a text-writer; so that the doctrine of the common law remained unchallenged until that time, and is not, therefore, to be lightly disregarded. The Texas case of 1881 is a clear innovation of the law as it previously existed and should not be followed. It is not a principle of law. An unbroken line of English authority is against it; sentiment has carried away judgment. The decisions which support this new departure rest only upon the authority of each other and are not uniform. If this new doctrine could have been supported on legal grounds or by the application of sound legal principles it cannot reasonably be supposed that the long list of eminent and learned jurists in England and this country would have permitted such doctrine to have remained undiscovered and unsupported by any decision until 1881. Courts should prefer to travel super antiquas vias. Precedents must be followed. The rule stare decisis is the only safe rule. The causing of mental suffering itself is not an infraction of a legal right. Mental anxiety alone is not actual damage; it is speculative. It is too remote and of a metaphysical character. In contracts, damages resulting from a breach must be measured by a pecuniary standard. The object of law is to give redress for pecuniary loss only. Damages, if actual, must flow directly and naturally

[20] So Relle v. Western Un. Teleg. Co., cited under next section herein.

from the breach of contract and must be certain both in their nature and in respect to the cause from which they proceed. Public policy is not subserved by allowing damages for mental pain alone. The jury cannot fix such damages other than by arbitrary whim or caprice. Mental anguish alone is vague and shadowy, dependent upon nervous force or want of nerve energy, and varies in different persons, or it may be simulated or be a form of hysteria. The mental distress of one person is no test of the mental distress of another. Even in cases of physical injuries and connected mental pain verdicts of juries are very unsatisfactory. It is impossible to fix a monetary value upon such suffering when standing apart from physical pain. Since there can be no competent proof of the money value of mental distress alone, a verdict, in such cases, for money damages alone must fall for want of proof to sustain it. The action against a telegraph company in this class of cases is declared in some decisions to be ex contractu; in others, it is held to be in substance ex contractu, although it may be in form ex delicto, for tort is a wrong independent of contract. In some States the legislature has afforded some redress by way of a penalty for delayed telegrams. Mental suffering as damages is only allowed independently in cases of wilful wrong affecting liberty, character, reputation, personal security or domestic relations. In physical injury cases both the physical and mental pain are taken together — they cannot be taken separately. Injury to feelings is only allowed in those torts which consist of some voluntary act or very gross neglect or depend closely upon the degree of fault evinced by the circumstances. The mental suffering allowed in any case grows out of the sense of peril. No case allows such damages for breach of contract, except it be a marriage contract, and there they are only recoverable, if at all, in cases of tort. Breach of promise to marry is an action sui generis; it partakes of the character of an action for wilful tort. Malicious prosecution, false imprisonment, wrongful attachment and malicious arrest are essentially injuries and violations of rights affecting liberty, character, personal security and the like. In libel and slander, if the words are not actionable per se, special damages must be averred and proved without reference to mental distress, and a pecuniary injury being shown, mental suffering resulting from

the same act becomes an element of aggravation. In libel and slander there can be no action for mental pain alone. In seduction cases the loss of services is the basis of the suit and not the injury to the feelings. In actions of seduction and other torts independent of contract, injured feelings are only considered, not to admeasure compensation, but as a standard to estimate the enormity of the outrage committed and whether the damages awarded as a punishment shall be higher or lower. In case of the death of an adult child through negligence of another no action lies for injury to the feelings. Even under statutes allowing actions in such cases injury to the feelings is not an element of damages. In statutes for recovery for homicide against the slayer no mental grief damages are allowed. Where a statute gives a right of action for intoxicating a husband there can be no recovery for mental distress. There can be no recovery for mental pain and anxiety in case of failure to pay borrowed money nor for deliberate insults by calling names. Where passengers are put off railroad trains, the minute one is ordered off the train he is under duress, his right of personal liberty is violated. Where fright caused by negligence is so great as to immediately produce physical pain no damages are allowed for mental pain unlikely to result from the wrongful act; and in case of fright causing illness, if damages are recoverable for mental suffering, they are allowed only on the ground of the physical suffering. For desecration of a grave no action could be sustained at common law, the only protection was by indictment or trespass quare clausum fregit, brought by the owner of the lot, where injury to the feelings was allowed only because the act was wilful or wanton. Delay of a railroad train affords no ground for mental distress alone, occasioned by such delay. It is urged in one case that an invitation by delayed or nondelivered telegram affords as much ground for recovery for mental mortification and anxiety as one relating to mortal illness or death. If this new doctrine of recovery of damages for mental suffering alone is to become the law, such a rapid increase of litigation would result as would become intolerable; the consequent evils of such a rule are evidenced by the great increase in this class of cases in Texas and in other States where this doctrine has

prevailed. It is admitted, however, in one case,[21] that if there is such gross negligence on the part of the telegraph company as to indicate wantonness or a malicious purpose, there might be a recovery of damages for mental suffering alone, or mental distress might be considered as the natural and proximate result of physical injury. It is also admitted that an action may be brought for neglect of the company to perform its duty when such neglect is attended with damage, even if there is no contract.[22]

[21] Crawson v. Western Un. Teleg. Co., 47 Fed. 544, 3 Am. Elec. Cas. 820.

[22] In addition to the cases cited in those decisions which support the doctrine of nonrecovery for mental suffering alone, and the substance of which are noted in the above text, the following comparatively recent cases are also in line with the argument. Expulsion of a railroad passenger does not include mental anguish damages owing to delay in reaching a sick brother, which he explained to the conductor. Hot Springs R. Co. v. Deloney, 65 Ark. 177, 45 S. W. 351. There can be no recovery for damages for mental suffering without physical injury. Texarkana & Ft. S. R. Co. v. Anderson (Ark., 1899), 53 S. W. 673. Only mental pain for which damages can be recovered is that which is the direct and necessary result of physical pain. Chicago City Ry. Co. v. Anderson, 182 Ill. 298, 55 N. E. 366, affg. 80 Ill. App. 71. Pain and suffering allowable in personal injury case. (Penn., 1899) Schenkel v. Pittsburg & B. Tract. Co., 44 Atl. 1072; Thomas v. Gates (Cal., 1899), 58 Pac. 315; Consolidated Trac. Co. v. Lambertson, 60 N. J. L. 457, 38 Atl. 684, 10 Am. & Eng. R. Cas. (N. S.) 753, affg. 59 N. J. L. 297, 36 Atl. 100. Loud and angry words and threats to call a constable, spoken to a woman, causing great excitement and fright, and producing St. Vitus' dance, are not actionable negligence. Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, affg. 73 Ill. App. 189, 3 Chic. L. Jour. Week. 77. Mere fright or terror not a ground for damages, although it superinduces nervous shock. Braun v. Craven, 175 Ill. 401, 51 N. E. 657, 42 L. R. A. 199, affg. 73 Ill. App. 189, 3 Chic. L. Jour. Week. 77, citing numerous cases and disapproving Bell v. Great Northern R. Co., Ir. L. R., 26 C. L. 432; Purcell v. St. Paul City R. Co., 28 Minn. 134, 16 L. R. A. 203. Mental pain alone not an element of damages. Chicago City R. Co. v. Canevin, 72 Ill. App. 81, 2 Chic. L. Jour. Week. 600, citing Bovee v. Danville, 53 Vt. 183. Mental pain, disconnected from physical injury, or resulting from an accident resulting in an injury, is not a basis of damages. Chicago City R. Co. v. Taylor, 170 Ill. 49, 48 N. E. 831, 9 Am. & Eng. R. Cas. (N. S.) 513, affg. 69 Ill. App. 613. Mental suffering alone no ground for damages, except when allowed as punitive punishment in some cases. Kalen v. Terre Haute & I. R. Co., 18 Ind. App. 202, 47 N. E. 694,

§ 827. **States allowing mental suffering damages — Telegrams of sickness, death, etc.**— Damages for mental suffering and anguish may be recovered against a telegraph company for negligent or grossly negligent or inexcusable delay or non-delivery of a telegram relating to death, sickness and the like, where the company has express or implied notice, from the telegram itself or otherwise, of the relation of affection between the parties, or that they are blood relations, and that such telegram relates to death, sickness and the like in the following States, Alabama,[23] Arkansas,[24] Indiana,[25] Iowa,[26] Kan-

citing numerous cases, and distinguishing Victorian R. Comrs. v. Coultas, L. R., 13 App. Cas. 222; Fitzpatrick v. Great Western R. Co., 12 U. C. Q. B. 645. Fright, terror and mental anguish no ground alone for damages, even if they cause physical pain. Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N. E. 88, 14 Nat. Corp. Repr. 869, 38 L. R. A. 512. Mental suffering caused by suspension from an exchange by reason of a wilful violation of a rule of the exchange is no ground for damages. Albers v. Merchants' Exch., 138 Mo. 140, 39 S. W. 473, 6 Am. & Eng. Corp. Cas. (N. S.) 620. Fright alone does not constitute a basis of recovery only when accompanied by the harm occasioned by the injury. O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.), 74, 54 N. Y. Supp. 96, 58 Alb. L. Jour. 347. Fright causing miscarriage no ground for damage. Mitchell v. Rochester R. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, revg. 77 Hun (N. Y.), 607, 59 N. Y. St. R. 892, 25 N. Y. Supp. 744, which affirms 4 Misc. 575, 30 Abb. N. C. (N. Y.) 362. Statute allowing recovery for death of husband does not allow recovery for the widow's mental pain. Knoxville, C. G. & L. R. Co. v. Wyrick, 99 Tenn. 500, 42 S. W. 434 (Tenn. Code, § 4029). But see Trafford v. Adams Exp. Co., 8 Lea (Tenn.), 96. Mental worry and disappointment from delay in carrying passenger no ground for damages. Turner v. Great Northern R. Co., 15 Wash. 213, 46 Pac. 243, 5 Am. & Eng. R. Cas. (N. S.) 238. Damages for mental distress, due to delay in delivery of money sent by telegraph, not recoverable by sender. Ricketts v. Western Un. Teleg. Co., 10 Tex. Civ. App. 226, 30 S. W. 1105; nor by addressee, De Voegler v. Western Un. Teleg. Co., 10 Tex. Civ. App. 229, 30 S. W. 1107.

[23] Western Un. Teleg. Co. v. Seed, 115 Ala. 670, 88 So. 474, 3 Am. Neg. Rep. 1; Western Un. Teleg. Co. v. Adair, 115 Ala. 441, 22 So. 73, 2 Am. Neg. Rep. 487; Western Un. Teleg. Co. v. Wilson, 93 Ala. 32, 3 Am. Elec. Cas. 586, 9 So. 414; Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314, 4 Am. Elec. Cas. 656, 14 So. 579; Western Un. Teleg. Co. v. Henderson, 89 Ala. 510, 3 Am. Elec. Cas. 570, 7 So. 419. But *compare* next following section herein.

[24] Under the statute Kirby's Dig. § 7947, see Arkansas & L. Ry. Co. v. Lee (Ark., 1906), 96 S. W.

See next page for notes 25 and 26.

sas,[27] Kentucky,[28] Louisiana,[29] Nevada,[30] North Carolina,[31]

148 (where delay occurred in that State in message sent to another State and the statute was held to apply); Western Union Teleg. Co. v. Raines (Ark., 1906), 94 S. W. 700 (where the statute was held to apply only where notice imparted that such damages would probably result); Western Union Teleg. Co. v. Hogue (Ark., 1906), 94 S. W. 924 (same point as last case); Western Union Teleg. Co. v. Ford (Ark., 1906), 92 S. W. 528 (substantially like point as case first cited in this note); compare the earlier case of Peay v. Western Union Teleg. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 463.

Damages for mental anguish recoverable independent of bodily injury or pecuniary loss. Arkansas & L. R. Co. v. Stroude (Ark.), 91 S. W. 18, under above statute.

Railroad telegraph included under statute. Arkansas & L. R. Co. v. Stroude (Ark.), 91 S. W. 18.

[25] *Such was doctrine of the earlier decisions;* see Reese v. Western Un. Teleg. Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583, 3 Am. Elec. Cas. 640 (overruled, see § 828 herein); Western Un. Teleg. Co. v. Briscoe, 18 Ind. App. 22, 47 N. E. 473, 3 Am. Neg. Rep. 545; Western Un. Teleg. Co. v. Bryant, 17 Ind. App. 70, 46 N. E. 358, 6 Am. Elec. Cas. 756; Western Un. Teleg. Co. v. Cain, 14 Ind. App. 115, 42 N. E. 655; Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 5 Am. Elec. Cas. 700, 46 N. E. 358, 1 Am. Neg. Rep. 427; Western Un. Teleg. Co. v. Cline, 8 Ind. App. 364, 4 Am. Elec. Cas. 731, 35 N. E. 564; Western Un. Teleg. Co. v. Stratemeier, 6 Ind. App. 125, 32 N. E. 871, 4 Am. Elec. Cas. 730, but in this case no recovery for distress arising from sympathy with the sorrow of others. Western Un. Teleg. Co. v. Cline, 8 Ind. App. 364, 35 N. E. 564; Western Un. Teleg. Co. v. Newhouse, 6 Ind. App. 422, 33 N. E. 800.

But see contra, § 828 herein.

[26] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752, 62 N. W. 1, 5 Am. Elec. Cas. 709, 28 L. R. A. 72. But see Ferguson v. Davis, 57 Iowa, 601, 10 N. W. 906. See Cowan v. Western Union Teleg. Co., 122 Iowa, 379, 98 N. W. 281, holding that mental pain and suffering resulting from the negligent transmission of a telegram constitutes an injury for which recovery may be had; also that damages recoverable in a tort action are not limited to those contemplated by the wrongdoer but include all those which naturally and proximately flow from the injury.

[27] Western Un. Teleg. Co. v. McCall, 9 Kan. App. 886, 58 Pac. 797, a case of summoning medical aid by telegraph. Contra, West v. Western Un. Teleg. Co., 39 Kan. 93, 2 Am. Elec. Cas. 588, 17 Pac. 807.

[28] Howard v. Western Union Teleg. Co., 27 Ky. L. Rep. 244, 84 S. W. 764, 86 S. W. 982; Western Un. Teleg. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830, 21 Ky. L. Rep. 1293; Western Un. Teleg. Co. v. Van Cleave, 107 Ky. 464, 54 S. W. 827; Chapman v. Western Un. Teleg. Co., 90 Ky. 265, 30 Am. & Eng. Corp. Cas. 627, 12 Ky. L. Rep. 265, 13 S. W. 880, 3 Am. Elec. Cas. 670.

[29] Graham v. Western Union Teleg. Co., 109 La. 1069, 34 So. 91.

See next page for notes 30 and 31.

South Carolina,[32] Tennessee,[33] Texas,[34] and in a case in the Federal courts for Texas.[35]

Mental anguish and pain alone are sufficient.

[30] Barnes v. Western Union Teleg. Co., 27 Nev. 438, 76 Pac. 931, 65 L. R. 666. Damages for mental suffering caused by a tort are recoverable whether connected with physical suffering or not.

[31] Davis v. Western Union Teleg. Co., 139 N. C. 79, 51 S. E. 898; Bryan v. Western Union Teleg. Co., 133 N. C. 603, 45 S. E. 938, granting rehearing, 131 N. C. 828, 43 S. E. 1003, holding that mental anguish though unattended with physical injury is an element of damages in actions against telegraph companies for non-delivery of messages. See also Bright v. Western Union Teleg. Co., 132 N. C. 317, 43 S. E. 841; Laudie v. Western Un. Teleg. Co., 124 N. C. 528, 32 S. E. 886; Cashion v. Western Un. Teleg. Co., 124 N. C. 459, 32 S. E. 746, 45 L. R. A. 160, 123 N. C. 267, 31 S. E. 493; Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 5 Am. Neg. Rep. 85, 31 S. E. 350; Havener v. Western Un. Teleg. Co., 117 N. C. 540, 23 S. E. 457; Sherrill v. Western Un. Teleg. Co., 116 N. C. 655, 21 S. E. 429, 5 Am. Elec. Cas. 754, 117 N. C. 352, 23 S. E. 277, 109 N. C. 527; Thompson v. Western Un. Teleg. Co., 107 N. C. 449, 3 Am. Elec. Cas. 750, 12 S. E. 427; Young v. Western Un. Teleg. Co., 107 N. C. 370, 11 S. E. 1044, 3 Am. Elec. Cas. 734. See next section herein.

[32] Under Civ. Code 1902, § 2223 see Capers v. Western Union Teleg. Co., 71 S. C. 29, 50 S. E. 537; Arial v. Western Union Teleg. Co., 70 S. C. 418, 50 S. E. 6; Willis v. Western Union Teleg. Co., 69 S. C. 531, 48 S. E. 538. Compare Lewis v. Western Union Teleg. Co., 57 S. C. 325, 35 S. E. 556.

[33] Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638, 34 L. R. A. 431, 37 S. W. 545, minister was summoned in this case to dying daughter; Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695, 8 S. W. 574, 2 Am. Elec. Cas. 736.

Court refused to extend rule as to recovery for such suffering beyond cases decided, where allowance for mental anguish sustained by plaintiff being obliged to bury the body of his son in a strange place because of negligent delay in delivery of a message requesting the transmission of money to enable him to carry the body home for burial. Western Union Teleg. Co. v. McCaul, 115 Tenn. 99, 90 S. W. 856.

[34] Western Un. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896, 5 Am. Elec. Cas. 781; Western Un. Teleg. Co. v. Smith, 88 Tex. 9, 30 S. W. 549; Western Un. Teleg. Co. v. Erwin (Tex., 1892), 19 S. W. 1002; Western Un. Teleg. Co. v. Carter, 85 Tex. 580; Western Un. Teleg. Co. v. Beringer, 84 Tex. 56, 19 S. W. 336; Western Un. Teleg. Co. v. Nations, 82 Tex. 539, 18 S. W. 709, 3 Am. Elec. Cas. 799; Western Un. Teleg. Co. v. Lydon, 82 Tex. 364, 18 S. W. 701; Potts v. Western Un. Teleg. Co., 82 Tex. 545, 18 S. W. 604; Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406, 16 S. W. 25, 35 Am. & Eng. Corp. Cas. 77, 3 Am. Elec. Cas. 782; Gulf, Colo. & S. F. Teleg. Co. v. Richardson, 79 Tex. 649; Western Un. Teleg. Co. v. Adams,

See next page for note 35.

§ 828. **States not allowing mental suffering damages — Telegrams of sickness, death, etc.**— Mental suffering alone is not a ground of recovery for damages in Alabama,[36] Dakota,[37]

75 Tex. 531, 3 Am. Elec. Cas. 768, 12 S. W. 857, 6 L. R. A. 844; Western Un. Teleg. Co. v. Simpson, 73 Tex. 422, 11 S. W. 385, 3 Am. Elec. Cas. 819, case of breach of contract to send money; Western Un. Teleg. Co. v. Broesche, 72 Tex. 654, 2 Am. Elec. Cas. 815, 10 S. W. 734, 13 Am. St. Rep. 843; Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 2 Am. Elec. Cas. 795, 9 S. W. 598; Stuart v. Western Un. Teleg. Co., 66 Tex. 580, 18 S. W. 351, 2 Am. Elec. Cas. 771; So Relle v. Western Un. Teleg. Co., 55 Tex. 308, 40 Am. Rep. 805, 1 Am. Elec. Cas. 348, still the law in Texas, though reversed in Gulf, Colo. & S. F. R. Co. v. Levy, 59 Tex. 563, 1 Am. Elec. Cas. 536, 46 Am. Rep. 278; Western Un. Teleg. Co. v. Odom (Tex.), 52 S. W. 632; Ward v. Western Un. Teleg. Co. (Tex.), 51 S. W. 259; Jones v. Roach (Tex.), 51 S. W. 549, and other Court of Civil Appeal cases which want of space prevents citing by name, but which may be found in 47 S. W. 396, 25 S. W. 661, 22 S. W. 534, 36 S. W. 314, 19 S. W. 898, 22 S. W. 417, 5 Tex. Civ. App. 55, 3 Am. Neg. Rep. 618, 2 Tex. Civ. App. 129, 624, 47 S. W. 676, 6 Tex. Civ. App. 585, 54 S. W. 627, 33 S. W. 742, 26 S. W. 245, 866, 27 S. W. 792, 29 S. W. 932. But see Western Un. Teleg. Co. v. Edmonson, 91 Tex. 206, 42 S. W. 549, 2 Am. Neg. Rep. 807, revg. 40 S. W. 622.

Decisions in which recovery precluded for mental anguish. Kopperl v. Western Union Teleg. Co. (Tex. Civ. App.), 85 S. W. 1018; Western Union Teleg. Co. v. O'Callaghan (Tex. Civ. App.), 74 S. W. 798; Western Union Teleg. Co. v. Murray, 29 Tex. Civ. App. 207, 68 S. W. 549; Western Union Teleg. Co. v. Bass, 29 Tex. Civ. App. 418, 67 S. W. 515; Western Union Teleg. Co. v. Hendricks, 26 Tex. Civ. App. 366, 63 S. W. 341; Western Union Teleg. Co. v. Bell (Tex. Civ. App.), 61 S. W. 942; Thomas v. Western Union Teleg. Co., 25 Tex. Civ. App. 398, 61 S. W. 501; Western Union Teleg. Co. v. Lovett, 24 Tex. Civ. App. 84, 58 S. W. 204. Examine Western Union Teleg. Co. v. Waller (Tex. Civ. App.), 84 S. W. 695; Western Union Teleg. Co. v. Bowen (Tex.), revg. (Tex. Civ. App.), 76 S. W. 613; Western Union Teleg. Co. v. Buchanan, 35 Tex. Civ. App. 437, 80 S. W. 561.

[35] Beasley v. Western Un. Teleg. Co. (U. S. C. C., W. D. Tex., 1889), 39 Fed. 182. But see contra, Western Un. Teleg. Co. v. Wood, 13 U. S. App. 317, 6 U. S. C. C. App. 432, 57 Fed. 471, and next section herein.

[36] Western Union Teleg. Co. v. Manker (Ala., 1906), 41 So. 851 (held recoverable by way of aggravation where damages nominal); Western Union Teleg. Co. v. Waters, 139 Ala. 652, 36 So. 772 (not recoverable alone, person or estate must sustain injury); Western Union Teleg. Co. v. Brocker, 138 Ala. 484, 35 So. 468 (must be other damages to warrant recovery in action of tort for company's negligence); Western Un. Teleg. Co. v. Wilson,

See next page for note 37.

Florida,[38] Georgia,[39] Illinois,[40] Indiana,[41] Kansas,[42] Minnesota,[43] Mississippi,[44] Missouri,[45] New York,[46] Ohio,[47] Oklahoma,[48] Virginia,[49] Wisconsin,[50] and the Federal courts.[51]

93 Ala. 32, 3 Am. Elec. Cas. 586, 9 So. 414 (though proof thereof is admissible in aggravation of damages, if other grounds of damages, either nominal or substantial, be averred or proved, and if contractual relations be established).

"This court seems to be committed to the doctrine that the sender of a telegram can recover damages for mental anguish suffered as the proximate consequence of a failure to deliver the message. . . . We think a perusal of the message in the case at bar would likely suggest the importance of a delivery, and that mental anguish and suffering would naturally ensue from non-delivery." Western Un. Teleg. Co. v. Long (Ala., 1906), 41 So. 965, 967, per Anderson, J.

[37] Russell v. Western Un. Teleg. Co., 3 Dak. 315, 19 N. W. 408, 1 Am. Elec. Cas. 653.

[38] International O. Teleg. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 4 Am. Elec. Cas. 674.

[39] Chapman v. Western Un. Teleg. Co., 88 Ga. 763, 30 Am. St. Rep. 183, 4 Am. Elec. Cas. 686, 15 S. E. 901.

[40] Western Un. Teleg. Co. v. Halton, 71 Ill. App. 63. But see Logan v. Western Un. Teleg. Co., 84 Ill. 468, 1 Am. Elec. Cas. 235, which is frequently cited in support of the contrary doctrine, but it merely holds that if mental suffering is alleged, and loss of money expended in the matter of a transmission of a message, the complaint is good on demurrer at least to the extent of nominal damages paid for transmitting the message.

[41] Western Union Teleg. Co. v. Ferguson, 157 Ind. 64, 60 N. E. 674, overruling the Reese case, 123 Ind. 294 (see § 827 herein), Jordan, J., dissented.

[42] West v. Western Un. Teleg. Co., 39 Kan. 93, 2 Am. Elec. Cas. 588, 17 Pac. 807. Contra, Western Un. Teleg. Co. v. McCall, 9 Kan. App. 886, 58 Pac. 797.

[43] Francis v. Western Un. Teleg. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 5 Am. Elec. Cas. 739.

[44] Examine Western Un. Teleg. Co. v. Rogers, 68 Miss. 748, 9 So. 823.

[45] Connell v. Western Un. Teleg. Co., 116 Mo. 34, 38 Am. St. Rep. 575, 4 Am. Elec. Cas. 748, 22 S. W. 345; Newman v. Western Un. Teleg. Co., 54 Mo. App. 434.

[46] Curtin v. Western Un. Teleg. Co., 13 N. Y. App. Div. 253, 55 Alb. L. Jour. 264, 42 N. Y. Supp. 1109, 6 Am. Elec. Cas. 812, 1 Am. Neg. Rep. 127, revg. 16 Misc. (N. Y.) 347, 38 N. Y. Supp. 58, which revd. 14 Misc. 459, 36 N. Y. Supp. 1111, 72 N. Y. St. R. 260.

[47] Morton v. Western Un. Teleg. Co., 53 Ohio St. 431, 53 Am. St. Rep. 648, 6 Am. Elec. Cas. 818, 41 N. E. 689; Kline v. Western Un. Teleg. Co. (C. P.), 3 Ohio N. P. 143, extending the rule to physical suffering caused by mental suffering resulting from failure to deliver a message.

[48] Butner v. Western Un. Teleg. Co., 2 Okl. 234, 37 Pac. 1087, 5 Am. Elec. Cas. 758.

[49] Connelly v. Western Union Teleg. Co., 100 Va. 51, 4 Va. Sup.

See next page for notes 50 and 51.

§ 829. **Mental suffering damages continued — Text-writers.**— The general rule of the common law that mental suffering alone, disconnected or separate from physical injury, cannot be a sole basis of damages is asserted by a number of text-writers.[52] But other text-writers hold that mental suffering need not necessarily be connected with physical injury to constitute a basis of damages in cases of the character considered in this chapter.[53]

Ct. Rep. 6, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919.

The code provides, however, that "Grief and mental anguish occasioned to the plaintiff by the aforesaid negligent failure may be considered by the jury in the determination of the quantum of damages." Pollard's Va. Code Annot. (1904), § 1294, h. (10) p. 699. See also Acts 1900, c. 689 (Acts 1899–1900, p. 724), repealed Acts 1904, pp. 368–369.

[50] Summerfield v. Western Un. Teleg. Co., 87 Wis. 1, 41 Am. St. Rep. 17, 4 Am. Elec. Cas. 823, 57 N. W. 973.

[51] Alexander v. Western Union Teleg. Co., 126 Fed. 445 (under Va. statute); Western Union Teleg. Co. v. Sklar, 126 Fed. 295, 62 C. C. A. 281; Stansell v. Western Union Teleg. Co. (U. S. C. C. Cal.), 107 Fed. 668; Gahan v. Western Un. Teleg. Co. (U. S. C. C., Dist. Minn., 1894), 59 Fed. 433, 4 Am. Elec. Cas. 855; Western Un. Teleg. Co. v. Wood (U. S. C. C. A., No. Dist. Tex., 5th Cir. 1893), 57 Fed. 471, 4 Am. Elec. Cas. 838; Kester v. Western Un. Teleg. Co. (U. S. C. C., No. Dist. Ohio, 1893), 55 Fed. 603, 4 Am. Elec. Cas. 834; Tyler v. Western Un. Teleg. Co. (U. S. C. C., W. Dist. Va., 1893), 54 Fed. 634, 4 Am. Elec. Cas. 829; Crawson v. Western Un. Teleg. Co. (U. S. C. C., W. Dist. Ark., 1891), 47 Fed. 544, 3 Am. Elec. Cas. 820, but said in this case, that there must, to warrant such a recovery, be such gross negligence of the company as to show a wanton and malicious purpose; Chase v. Western Un. Teleg. Co. (U. S. C. C., N. D. Ga., 1890), 44 Fed. 554, 3 Am. Elec. Cas. 817. See preceding section for case contra in Federal court. It will be observed that, with one exception, none of the cases in this note were decided in circuits or districts in States holding such damages recoverable, and also that forms of action are not abolished in the Federal courts.

[52] Cooley on Torts, 271 (2d ed.), p. 716; Greenleaf on Ev., § 267; 3 Parsons on Contracts (8th ed.), bottom pp. 176, 177, * p. 167, where it is said: "But mere mental suffering seems in many case to be disregarded, unless the injury be wanton and malicious, but not always." Whart. on Neg., § 78; Woods Mayne on Damages, p. 74, note, p. 75 (1st Am. ed.), § 54, note 1.

[53] Shearman & Redfield on Neg. § 605, p. 662; 2 id. (5th ed.), § 756; 1 Sutherland on Damages (2d ed.), §§ 95–97 et seq.; 3 id., §§ 975–980; 2 Sedgwick on Damages (8th ed.), 894. See 4 Lawson's Rights & Rem., § 1970; 2 Thompson on Neg., pp. 847, 849.

§ 830. **Mental suffering damages — Telegrams of sickness, death, etc.— Conclusion.—** If we are to be governed solely by the decisions in those States which have passed upon this question in connection with telegrams alone, irrespective of any application of analogous cases, and if a majority of States out of this number constitute what is known as weight of authority, then, certainly, damages cannot be recovered for mental suffering caused by the negligence of, or nonperformance of its duty by, telegraph companies in transmitting and delivering messages relating to death, sickness and the like, even though such companies have express notice, from the telegram itself or otherwise, of the urgency of prompt transmission and delivery. "Weight of authority" is a forceful term in itself, but when it is constantly used, as in this instance, by the courts on both sides, the determination of what is the law becomes difficult. If sound argument is the factor in ascertaining what constitutes weight of authority on this question, then the application of the test must rest upon individual opinion, and the result is necessarily a conflict of authority, whether the opinions be those of courts or text-writers. We have endeavored to present fully and fairly herein, at the beginning of this discussion, the opposing views, and then, to aid us in determining the point, have studied analogous cases. We are satisfied that it was the common law rule that mental suffering alone was not a basis of action for damages, but that in cases where it was connected with physical injury it constituted an element of damages. If that rule remained in its integrity and without any exceptions, then stare decisis would be a strong argument. But exceptions have gradually crept in, and the principles of the common law have been adapted and applied to new circumstances; the underlying principle, however, still remains intact, and frequently, what seem to be clear innovations of the law are but affirmances of its principles. It is the antiquated way, but the landmarks have changed. This tendency of the courts to extend old principles to new facts is clearly manifest throughout the whole growth of electric law, and in cases based on analogous principles; the same is true of the great body of insurance laws since Lord Mansfield's time. Stare decisis has never forbidden the extension of old principles to new facts.[54]

[54] See §§ 20, 42, herein.

One leading principle of the law is that for every infraction of a legal right there ought to be some remedy. Another principle is that these telegraph companies are obligated, both by contract and by virtue of their relation to the public, to perform their legal duties. Sending these messages of illness and death is one of these duties. They have notice that such messages are important. The principle of the old rule which allowed proof of mental suffering in physical injury cases can be gradually traced from the time of its original confinement to physical injury cases down through various decisions to these telegraph cases of illness and death. Its application has been varied to meet different circumstances, gradually, slowly, it is true, but nevertheless this fact remains. We, therefore, for the above reasons, and for the reasons advanced in support of such view at the beginning of this discussion, are of the opinion that mental suffering is a proper element of damages in these telegraph cases of sickness and death, where the telegraph companies have negligently caused such injury, through failure to perform their duty. This ought to be especially applicable to those cases where medical attendance is summoned by telegraph, and the patient, by reason of inability to procure such attendance, caused by the company's negligence, suffers an increase of physical pain and naturally mental pain and anxiety.

§ 831. **Physical suffering following mental suffering.**—Physical suffering consequent upon mental suffering is held to be too remote to constitute a basis of damages in a Federal case, also in New York, and in Indiana it is not a basis of recovery.[55]

§ 832. **Mental suffering damages — Special governing facts.**—Special circumstances may change the application of the rule

[55] Tyler v. Western Un. Teleg. Co. (U. S. C. C., W. Dist. Va., 1893), 54 Fed. 634, 4 Am. Elec. Cas. 829; Curtin v. Western Un. Teleg. Co, 13 N. Y. App. Div. 253, 55 Alb. L. J. 264, 42 N. Y. Supp. 1109, 6 Am. Elec. Cas. 812, 1 Am. Neg. Rep. 127, revg. 16 Misc. (N. Y.) 347, 38 N. Y. Supp. 58, which revd. 14 Misc. 459, 36 N. Y. Supp. 1111, 72 N. Y. St. R. 260. See also Kagy v. Western Union Teleg. Co. (Ind. App.), 76 N. E. 792; Western Un. Teleg. Co. v. Bryant (Ind. App., 1897), 1 Am. Neg. Rep. 425, 17 Ind. App. 70, 46 N. E. 358.

which prevails in any State, as to damages for mental suffering. Thus a telegram "Cannot come to-day, will come to-morrow," sent by a woman to her husband, does not warrant recovery for mental distress and physical discomfort, caused by her husband not meeting her, owing to the failure of the company to deliver the telegram.[56] Nor can a wife sue for such recovery where she is not a party to, nor mentioned in, the message to her husband, announcing her mother's sickness.[57] Cases of this character are, however, necessarily illustrative, and rest upon their own particular facts, and so are given in the subjoined note.[58]

[56] Western Un. Teleg. Co. v. Bryant (Ind. App., 1897), 1 Am. Neg. Rep. 425, 17 Ind. App. 70, 46 N. E. 358.

[57] Davidson v. Western Un. Teleg. Co. (Ky., 1900), 54 S. W. 830; Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686.

[58] Where there is no blood relationship and no legal presumption of affection and relationship not disclosed no recovery can be had. Western Un. Teleg. Co. v. Steinberger, 107 Ky. 469, 54 S. W. 829; Davidson v. Western Un. Teleg. Co. (Ky., 1900), 54 S. W. 830; Southwestern Teleg. & Teleph. Co. v. Gotcher, 93 Tex. 114, 53 S. W. 686. Recovery cannot be had for loss of a brother's companionship at a mother's funeral. Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635. Nor where the addressee could not have arrived in time for the funeral if the telegram had been promptly delivered. Western Un. Teleg. Co. v. Edmonson, 91 Tex. 206, 42 S. W. 549, revg. 40 S. W. 622; Western Un. Teleg. Co. v. Linn, 87 Tex. 7, 26 S. W. 490; Western Un. Teleg. Co. v. Motley, 87 Tex. 38, 27 S. W. 52; Western Un. Teleg. Co. v. Smith (Tex. Supreme Ct., 1895), 30 S. W. 549. Nor for loss and companionship of a wife during her last hours where, notwithstanding the delayed telegram, the husband reached her side in time to converse with her, there being in this case no claim based on the shortened period of such comfort and consolation. Western Un. Teleg. Co. v. Stacy (Tex. Civ. App.), 41 S. W. 100. Nor can a wife recover for mental anguish consequent upon nondelivery of a telegram stating the time when her husband will arrive, in answer to a summons by telegraph announcing his mother's serious sickness. Johnson v. Western Un. Teleg. Co., 14 Tex. Civ. App. 536, 38 S. W. 64. So in case of death of a child before birth, mental suffering of the husband is only reflective, and damages therefor cannot be recovered. Western Un. Teleg. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598. So estrangement from his family by reason of the sendee's apparent neglect to be present at a child's death is not ground for damages for the consequent mental pain. McBride v. Sunset Teleph. Co. (C. C., D. Wash.), 96 Fed. 81.

§ 833. **Mental suffering damages — That addressee may recover.**— An addressee may recover damages for mental distress consequent upon delay of a reply message, whereby he is prevented from reaching his mother before her death.[59] If the agency of the sender is disclosed to the sendee, nominal damages for the breach of contract can be at least recovered, also damages for mental suffering of the addressee, occasioned by the company's default.[60] So special damages, and damages for mental anguish, can be recovered by the addressee under an Indiana case.[61] So also in Kentucky, for failure to deliver a message whereby the addressee was unable to reach his father before his death, but remote and conjectural damages are not recoverable, such as the probability of the donation to the addressee of a promissory note by his father, had he reached the latter before his death.[62] So a wife, who is an addressee, and who is unable, by reason of a delay in a telegram, to reach her dying husband before his death, may recover damages for her mental suffering.[63] Such damages may also be recovered by an addressee under a statute rendering a telegraph company liable to the party aggrieved, by a failure of the company to transmit messages correctly and without unreasonable delay.[64] Mental suffering damages may also be recovered by the addressee in Texas.[65] So also a person for whose benefit a mes-

[59] Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314, 4 Am. Elec. Cas. 656, 14 So. 579. See Western Union Teleg. Co. v. Krichbaum (Ala., 1906), 41 So. 16; Hurlburt v. Western Union Teleg. Co., 123 Iowa, 295, 98 N. W. 794.

[60] Western Un. Teleg. Co. v. Wilson, 93 Ala. 32, 3 Am. Elec. Cas. 586, 587, 588, 9 So. 414.

[61] Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 5 Am. Elec. Cas. 700, 39 N. E. 874. Compare Western Union Teleg. Co. v. Adams, 28 Ind. App. 420, 63 N. E. 125.

[62] Chapman v. Western Un. Teleg. Co., 90 Ky. 265, 3 Am. Elec. Cas. 670, 13 S. W. 880.

That addressee can recover. See also Postal Telegraph Cable Co. v. Terrell (Ky. App., 1907), 100 S. W. 292; Western Union Teleg. Co. v. McIlvoy, 107 Ky. 633, 55 S. W. 428. Examine Davis v. Western Union Teleg. Co., 107 Ky. 527, 54 S. W. 849.

[63] Lyne v. Western Un. Teleg. Co., 123 N. C. 129, 5 Am. Neg. Rep. 85, 35 S. E. 350; Sherrill v. Western Un. Teleg. Co., 117 N. C. 352, 23 S. E. 277; Havener v. Western Un. Teleg. Co., 117 N. C. 540, 23 S. E. 457.

[64] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695, 8 S. W. 574, 2 Am. Elec. Cas. 736.

[65] Western Un. Teleg. Co. v.

sage is sent, or who is named therein, or of whose interest therein the company has notice at the time of presentation for transmission.[66] The question whether the sender was the agent of the addressee may properly be submitted to the jury, although it is probably immaterial in Texas, where it is clearly apparent that the contract for transmission and delivery is made for the benefit of the addressee, and he would, therefore, have a right of action, though he was not a party to the contract.[67] It is held in a late case that the addressee may recover for negligent transmission and delivery where the message is sent for his benefit and he is damaged by the delay. It is unimportant as to whose agent the sender of the message was or whether he was previously instructed to send it. The party in fact served and damaged may sue.[68]

§ 834. **Mental suffering damages — That addressee may not recover.**— An addressee cannot, under a Georgia case, recover damages for mental pain and suffering, caused by failure to deliver a message whereby said addressee was unable to see his brother before the latter's death,[69] nor can a recovery be had for such damages alone, either under the common law, or by

Rosentreter, 80 Tex. 406, 3 Am. Elec. Cas. 782, 16 S. W. 25; Western Un. Teleg. Co. v. Erwin (Tex. Sup. Ct. (1892), 19 S. W. 1002; Western Un. Teleg. Co. v. Smith (Tex. Civ. App.), 33 S. W. 742; Western Un. Teleg. Co. v. Waller (Tex. Civ. App., 1898), 47 S. W. 396; Western Un. Teleg. Co. v. Sweetman (Tex. Civ. App., 1898), 47 S. W. 676; Western Un. Teleg. Co. v. Hale, 11 Tex. Civ. App. 79, 32 S. W. 814; Western Un. Teleg. Co. v. Ward (Tex. Civ. App., 1892), 19 S. W. 898; Western Un. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585; Texas Teleg. & Teleph. Co. v. Seiders (Tex. Ct. Civ. App., 1895), 29 S. W. 258.

[66] Western Un. Teleg. Co. v. Coffin, 88 Tex. 94, 30 S. W. 896, 5 Am. Elec. Cas. 781. See also Davis v. Western Union Teleg. Co., 139 N. C. 79, 51 S. E. 898. Examine Walker v. Western Union Teleg. Co. (S. C., 1906), 50 S. E. 38; Harrison v. Western Union Teleg. Co. (S. C., 1906), 55 S. E. 450.

[67] Western Un. Teleg. Co. v. Jones, 81 Tex. 271, 3 Am. Elec. Cas. 794, 16 S. W. 1006. See Western Union Teleg. Co. v. Shaw (Tex. Civ. App.), 90 S. W. 58. As to the right of the addressee to recover in other cases, see c. XXXVI, herein, as to Parties and Actions.

[68] Western Union Teleg. Co. v. Cook (Tex. Civ. App., 1907, rehearing denied), 99 S. W. 1131.

[69] Chapman v. Western Un. Teleg. Co., 88 Ga. 763, 4 Am. Elec. Cas. 686, 15 S. W. 901.

statute in Minnesota;[70] nor can such recovery be had in Mississippi;[71] nor in Ohio;[72] nor in New York, on the ground, however, of want of contractual relations;[73] and in Texas, in cases where special notice of relationship is required to be given the telegraph company, and the requirement is not complied with, the addressee cannot recover.[74] So in a Federal case, it is held that the addressee cannot recover for mental damages alone.[75]

§ 835. **Verdicts — Damages, when excessive, when not —**

[70] Francis v. Western Un. Teleg. Co., 58 Minn. 252, 5 Am. Elec. Cas. 739, 58 N. W. 1078, 49 Am. St. Rep. 507; Gahan v. Western Un. Teleg. Co. (U. S. C. C., Dist. Minn., 1894), 59 Fed. 433, 4 Am. Elec. Cas. 855.

[71] Western Un. Teleg. Co. v. Rogers, 68 Miss. 748, 9 So. 823.

[72] Morton v. Western Un. Teleg. Co., 53 Ohio St. 431, 34 Ohio L. Jour. 235, 41 N. E. 689.

[73] Curtin v. Western Un. Teleg. Co., 13 N. Y. App. Div. 253, 55 Alb. L. Jour. 264, 42 N. Y. Supp. 1109, 1 Am. Neg. Rep. 127, 128.

[74] Western Un. Teleg. Co. v. Brown, 71 Tex. 723, 2 Am. Elec. Cas. 812, 10 S. W. 323. In Gulf, Col. & S. F. Ry. Co. v. Levy, 59 Tex. 563, 46 Am. Rep. 278, it was held that the addressee could not recover, but that case is not now the law in that State. See also the following cases, where the facts prevented recovery: Western Un. Teleg. Co. v. Lain, 87 Tex. 7, 26 S. W. 490, one who is neither the sender nor receiver of a telegram cannot recover where there is nothing to show that such person has any interest; Western Un. Teleg. Co. v. Fore (Tex. Ct. Civ. App., 1894), 26 S. W. 783, nor can the addressee recover for increased sickness of his wife and mental distress of his wife and himself, nor for expenses and loss of time in pursuit of a boy who had run away where a telegram announcing such fact had been delayed. Baldwin v. Western Un. Teleg. Co. (Tex. Civ. App.), 33 S. W. 890.

[75] Crawson v. Western Un. Teleg. Co. (U. S. C. C., W. D. Ark., 1891), 47 Fed. 544, 3 Am. Elec. Cas. 820; Western Un. Teleg. Co. v. Guest (Tex. Civ. App., 1895), 33 S. W. 281, $400 not excessive where addressee unable to see dying mother; Western Un. Teleg. Co. v. Newhouse, 6 Ind. App. 422, nor is such sum excessive where addressee unable to attend burial of brother; Western Un. Teleg. Co. v. Johnson, 16 Tex. Civ. App. 546, 41 S. W. 367, $300 not excessive for inability to reach child before death; Western Un. Teleg. Co. v. Fisher, 107 Ky. 513, 54 S. W. 830, $125 is not excessive for inability to attend burial of brother; Curtin v. Western Un. Teleg. Co., 16 Misc. (N. Y.) 347, 38 N. Y. Supp. 58, revg. 14 Misc. 459, 36 N. Y. Supp. 1111, 72 N. Y. St. R. 260 (16 Misc. [N. Y.] 347, was revd. in 13 N. Y. App. Div. 253, 55 Alb. L. Jour. 264, 42 N. Y. Supp. 1109, 6 Am. Elec. Cas. 812, denying the right to recover for mental distress alone).

Mental suffering.— Mental suffering as an element of damages, whether connected with, or separate from, physical pain, is equally difficult of admeasurement, and, therefore, various cases have arisen, in some of which verdicts have been declared to have awarded excessive damages, while in others the amounts awarded by the jury have been held not excessive. These decisions establish no guiding rule, and are chiefly valuable for comparison of circumstances, and are, therefore, given in the appended note. Damages, however, which are clearly the result of passion or prejudice, will not be supported.[76]

[76] Five thousand dollars is excessive for mother being unable to reach her son before latter's death. Western Un. Teleg. Co. v. Evans, 1 Tex. Civ. App. 301, 21 S. W. 226. Four thousand seven hundred and fifty dollars is excessive for son being unable to reach his father before the latter became unconscious. Western Un. Teleg. Co. v. Piner, 1 Tex. Civ. App. 301, 21 S. W. 315. Four thousand five hundred dollars, besides the cost of transmission, for negligent failure to deliver a message announcing the more serious condition of a child is not excessive. Two thousand one hundred and fifty dollars is not excessive for son being unable to reach his father before latter became unconscious. Western Un. Teleg. Co. v. Piner, 9 Tex. Civ. App. 152, 29 S. W. 66. Two thousand dollars not excessive for gross negligence of company whereby father unable to reach his son before latter's death. Western Un. Teleg. Co. v. Houghton (Tex. Ct. Civ. App., 1894), 26 S. W. 448. One thousand nine hundred and fifty dollars not excessive where message delayed twenty-four hours and brother died before addressee could reach him. Western Un. Teleg. Co. v. Zane, 6 Tex. Civ. App. 585, 25 S. W. 722. One thousand five hundred dollars and cost of transmission not excessive where, by reason of nondelivery of telegram summoning medical attendance, child was deprived thereof for more than one day and died. Western Un. Teleg. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708. One thousand dolars is not excessive where addressee was unable to reach his daughter before her death. Western Un. Teleg. Co. v. O'Keefe (Tex. Ct. Civ. App., 1895), 29 S. W. 1137. One thousand dollars not excessive where sister was unable to see her brother before his death. Western Un. Teleg. Co. v. Trice (Tex. Civ. App., 1898), 48 S. W. 770. One thousand dollars, though addressee could have reached her dying half-sister a short time before she became unconscious, and although she did attend her funeral. Western Un. Teleg. Co. v. Porter (Tex. Ct. Civ. App., 1894), 26 S. W. 866. Seven hundred and eighty dollars not excessive for error in stating in telegram that mother was dead, when $60 was expended for flowers, etc., for funeral. Western Un. Teleg. Co. v. Hines (Tex. Civ. App., 1899), 54 S. W. 627. Five hundred dollars for want of baptism and spiritual consolation to sender's dying daughter, is not ex-

cessive. Western Un. Teleg. Co. v. Robinson, 97 Tenn. 638, 37 S. W. 545. Five hundred dollars not excessive for failure to send telegram announcing death of brother. Western Un. Teleg. Co. v. Hill (Tex. Civ. App., 1894), 26 S. W. 252; Western Un. Teleg. Co. v. Stratemeier, 11 Ind. App. 601. Five hundred dollars is excessive where father received another telegram in time to have reached his son before the latter died. Western Un. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725. Four hundred and fifty dollars for nondelivery of telegram announcing death of child.

See also the folowing cases: Western Union Teleg. Co. v. James (Tex. Civ. App.), 73 S. W. 79 ($1,995.25 not excessive; mother not informed of son's death); Western Union Teleg. Co. v. Hamilton, 36 Tex. Civ. App. 300, 81 S. W. 1052 ($1,316 not excessive; husband unable to view wife's remains); Western Union Teleg. Co. v. Shaw (Tex. Civ. App.), 90 S. W. 58 ($1,100 not excessive, prevented attending son's funeral); Western Union Teleg. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118 ($1,000 not excessive; prevented being at son's funeral); Western Union Teleg. Co. v. Patton (Tex. Civ. App.), 55 S. W. 973 ($1,000 not unreasonable; informed wrongly as to wife's condition); Western Union Teleg. Co. v. Morris (Tex. Civ. App.), 60 S. W. 982 ($1,000 not excessive; unable to see son before death and to have body buried at home); Western Union Teleg. Co. v. McIlroy, 107 Ky. 633, 21 Ky. L. Rep. 1393, 55 S. W. 428 ($1,000 not excessive; message as to brother's insanity); Western Union Teleg. Co. v. Church (Neb.), 90 N. W. 878, 57 L. R. A. 905 ($950 not excessive; physician's non-attendance at confinement); Western Union Teleg. Co. v. Giffin, 27 Tex. Civ. App. 306, 65 S. W. 661 ($750 not excessive; not met on arrival with body of child and obliged to leave it in freight warehouse).

CHAPTER XXXII.

PENALTY, DAMAGE, MISDEMEANOR AND LIKE STATUTES.

§ 836. Penalty statutes — Generally.
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§ 836. **Penalty statutes — Generally.**— Various statutes have been enacted presenting generally the duties of telegraph companies in the matters of receiving, transmitting and delivering telegraphic despatches, requiring impartiality and good faith, etc., and imposing a penalty for noncompliance with such requirements, or for giving preference in order of time to messages, or for failure to transmit and deliver, etc. Other statutes, instead of fixing a penalty for nonperformance of the obligations imposed, provide only for the recovery of damages in case of failure or neglect of a telegraph company to perform the duties specified in the statute. Other statutes exist relating to nondisclosure of the contents of a telegraphic message; cutting trees; marking poles; obstruction of highways; cutting, interfering with, or disturbing electric wires; stringing wires so as to endanger employees; and nonpayment of taxes. Most of these statutes have been considered elsewhere herein, under the different headings to which certain subdivisions of said statutory obligations naturally belong. Especially is this true of penalty statutes, and interstate commerce, which have been fully considered in a prior chapter.[1] Outside, however, of statutory duties, there are certain duties and obligations imposed upon these telegraph companies,[2] which should not be lost sight of in determining the force or application of statutes, unless the question involved depends upon a strict or technical construction or application of the statute, independent of any other point. We will add here that many of the decisions noted under this chapter are but reassertions under penalty or damage statute cases of principles generally applicable to the duties and liabilities of these telegraph and telephone companies.[3]

§ 836a. **Constitutionality of penalty statutes.**— The Indiana penalty statute relating to receiving and transmitting messages is constitutional.[4] Under a Kansas decision, however, the statute which provides a forfeiture for failure, neglect or refusal of a telegraph company to receive, transmit and deliver with-

[1] Chap. IX, herein.

[2] See chaps. XXI–XXIII, XXVIII–XXX, herein.

[3] See c. XXIX, herein.

[4] Western Union Teleg. Co. v. Ferguson, 157 Ind. 37; 60 N. E. 679, under Burns Stat. 1894, §§ 5511, 5512; Horner's Stat. 1897, §§ 4176, 4176a.

out unnecessary delay any telegraphic message, tendered under the provisions of that enactment is unconstitutional; but the statute also created a court of visitation and was void in that respect and the above provision as to forfeiture was dependent upon the validity or invalidity of the enactment in connection with the creation of said court.[5]

§ 837. **Discrimination — Telegrams must be sent without illegal preference — Uniform rates.**— It is a general rule that telegraph companies cannot refuse to receive and forward messages, nor select the persons for whom alone they will act. They must send for every person who may apply, at a uniform rate, without undue illegal preference, without special favors to anyone, and according to established rules and regulations, applicable to all alike. For all are entitled to the same privileges, subject to priority in time;[6] and also to certain messages which are by law entitled to preference.[7] Again, by acceptance of the Post Roads Act, the accepting telegraph companies are obligated to give preference to governuent business of the United States.[8]

§ 837a. **Discrimination — Excessive rates and charges — Difference in charges.**— An excessive charge for sending a telegram constitutes a discrimination rendering the company liable for the statutory penalty.[9] Where, however, there is dissimilarity in the services rendered by a telegraph company to different persons, a difference in charges is proper, and no recovery can

[5] Western Union Teleg. Co. v. Austin, 67 Kan. 208, 72 Pac. 850; Laws 1898, c. 38, § 7.

[6] Graham v. Western Un. Teleg. Co., 1 Col. 230, 9 Am. Rep. 136, 10 Am. L. Reg. (N. S.) 319, Allen's Teleg. Cas. 578, 580, 581, per Belford, J.; Davis v. Western Un. Teleg. Co., 1 Cin. Sup. Ct. Repr. 100; Allen's Teleg. Cas. 563, 566, per Storer, J. See Western Un. Teleg. Co. v. Call Pub. Co., 44 Neb. 326, 62 N. W. 506, 48 Am. St. Rep. 729, 5 Am. Elec. Cas. 673; Neb. Comp. Stat., c. 89a; Neb. Const., § 7, art. 11. Messages given them for transmission must be sent by such companies with reasonable diligence and in the order received. Western Un. Teleg. Co. v. Bierhaus, 8 Ind. App. 246, 4 Am. Elec. Cas. 723, 726, 36 N. E. 161.

[7] Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 1 Am. Elec. Cas. 487, 497.

[8] See § 52, herein.

[9] Western Union Teleg. Co. v. McClelland (Ind. App. 1906), 78 N. E. 672, under Burns' Annot Stat. 1901, §§ 5511, 5512.

be had unless it is shown, not merely that there is a difference in the charges, but that the difference is so great as, under dissimilar conditions of service to show an unjust discrimination; and the recovery must be limited to the amount of the unreasonable discrimination.[10]

§ 838. **Discrimination — Telegraph companies.**— As first above stated, telegraph companies cannot unjustly discriminate against patrons, but it is likewise true that those desiring to avail themselves of the benefit of the telegraphic services of these companies must observe all reasonable rules and regulations of which they have knowledge,[11] within the rules, elsewhere stated, determining what constitutes such knowledge.[12] Nor can a telegraph company formed for the purpose of transmitting stock quotations and other information, and which is a public corporation under the New York laws, refuse to furnish instruments to those applying therefor, and who are willing to pay the usual price and to conform to the company's reasonable rules.[13] Again, a telegraph company fails to afford equal and reasonable facilities to all where it turns over its wire exclusively to a railroad company, and fails to provide another wire or a reasonably adequate number of wires to serve the public.[14]

§ 839. **Discrimination — Void contract — Licensor and licensee — Telephone — Use of patented article — Connecting lines.** — Under a statute providing that telegraph companies shall receive despatches from and for other telegraphic lines, and from and for individuals, and transmit them with impartiality and good faith, a contract between a telephone company and

[10] Western Union Teleg. Co. v. Call Publ. Co., 181 U. S. 92, 45 L. Ed. 765, 21 Sup. Ct.—.

[11] Shepard v. Gold & Stock Teleg. Co., 38 Hun (N. Y.), 338, 1 Am. Elec. Cas. 854.

[12] See c. XXVIII, herein.

[13] Friedman v. Gold & Stock Teleg. Co., 32 Hun (N. Y.), 4, 1 Am. Elec. Cas. 621; N. Y. Laws of 1848, c. 265; Smith v. Gold & Stock Teleg. Co., 42 Hun (N. Y.), 454. But see Shepard v. Gold Stock Teleg. Co., 38 Hun (N. Y.), 338, 1 Am. Elec. Cas. 854, and sections on Mandamus and Injunction, herein. See also c. XXIX, herein.

[14] Western Un. Teleg. Co. v. Rosentreter, 80 Tex. 406, 3 Am. Elec. Cas. 782, 791, 16 S. W. 25, per Marr, J.

the owner of telephone instruments, providing that the company in use of the instruments shall discriminate as between telegraph companies, is void as against public policy and the statute. The use of a patented article devoted to public use is subject to control by State legislation where the public welfare demands it. "The property of an inventor in a patented machine, like all other property, remains subject to the paramount claims of society, and the manner of its use may be controlled and regulated by State laws when the public welfare requires it." [15]

§ 840. **Discrimination — Telephone companies — Penalty statute.**— As a rule a telephone company is obligated to furnish its instruments and facilities to all persons willing to accede to its terms, and to obey its reasonable rules and regulations.[16] So a penalty statute prohibiting discrimination by telephone companies applies to discrimination between applicants as well as patrons, and such companies cannot refuse to connect two subscribers.[17] But such a statute does not require

[15] State, American Un. Teleg. Co. v. Bell Teleph. Co., 36 Ohio St. 296, 38 Am. Rep. 583, 1 Am. Elec. Cas. 299, 302, per McIlvaine, C. J. A case of contract between the Ohio Telephone Company and the Bell Telephone Company forbidding the use of the leased instruments to certain telegraph companies. This case also holds such statute constitutional. Contract with licensor does not excuse compliance with such a statute. Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co., 66 Md. 399, 7 Atl. 809, 59 Am. Rep. 167, 16 Am. & Eng. Corp. Cas. 219, 2 Am. Elec. Cas. 416. But see State, Baltimore & O. Teleg. Co. v. Bell Teleph. Co. (U. S. C. C., E. D. Mo., 1885), 23 Fed. 539, where court equally divided. See sections as to Mandamus, herein, and section 839, herein.

[16] People, Postal Teleg. Cable Co. v. Hudson R. Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394. See Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co., 66 Md. 399, 59 Am. Rep. 167, 7 Atl. 809; State, Webster v. Nebraska Teleph. Co. (Webster Telephone Case), 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; Commercial Union Teleg. Co. v. New Eng. Teleph. & Teleg. Co., 61 Vt. 241; Delaware & A. Teleg. & Teleph. Co. v. State, Postal Teleg. Cable Co., 3 U. S. App. 30, 2 U. S. C. C. A. 1, 50 Fed. 677. Examine American Rap. Teleg. Co. v. Connecticut Teleph. Co., 49 Conn. 352, 44 Am. Rep. 237, and see note, 5 L. R. A. 161.

[17] Central Un. Teleph. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64, 6 Am. Elec. Cas. 694; § 5529, Rev. Stat. of Ind., 1894 (§ 2, p. 151, Acts of 1885); Rev. Stat. of 1881, § 115;

that one telephone company should connect its system with another company so that the latter may utilize the combined system as its own, and so be obligated only to the payment, for its own messages transmitted thereby, of the nominal sum required of subscribers.[18] But refusal of a telephone company to connect the instrument of a subscriber with that of another patron renders it liable under such a statute as to discrimination and partiality, as the duty imposed does not cease upon furnishing the instrument and connecting it with the exchange.[19]

§ 840a. **Same subject continued — Pleadings.—** If a telephone company refuses to connect a subscriber's residence or place of business with long-distance telephone lines, but requires that he shall first go to the central office and pay cash in advance for such telephone message, service, and communication, when it is not required of other subscribers, such requirement constitutes an unnecessary and unreasonable discrimination subjecting the company to the statutory penalty.[20] But under a statute which provides that telephone companies shall supply all applicants for telephone facilities without discrimination, and imposes a penalty for each day's continuance of such discrimination, a complaint which alleges that defendant telephone company failed to furnish defendant with a telephone connection, after repeated applications therefor, and "that by reason of the aforesaid discrimination and refusal" defendant had incurred a penalty, fails to state a cause of action constituting discrimination,[21] and if the action is against a telephone company to recover a statutory penalty for failure to furnish telephone facilities, because the plaintiff had not paid certain tolls and charges, an averment of non-enforcement of

Rev. Stat. of 1894, § 115; Acts of 1885, p. 151, § 2 (Rev. Stat. of 1894, § 5529). See Horner's Annot. Stat. Ind. 1901, §§ 4192a–4192c.

[18] Re Baldwinsville Teleph Co., 24 Misc. (N. Y.) 221, 53 N. Y. Supp. 574, 31 Chic. L. News, 71; N. Y. Transp. Corp. L., § 103. See c. XXXVI, post, as to Mandamus and Injunction.

[19] Central Un. Teleph. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64; Ind. Rev. Stat. of 1894, § 5529. See Horner's Annot. Stat. Ind. 1901, §§ 4192a–4192c.

[20] Yancey v. Batesville Teleph. Co. (Ark. 1907), 99 S. W. 679, under Acts 1885, p. 178.

[21] Phillips v. Southwestern Teleg. & Teleph. Co., 72 Ark. 478, 81 S. W. 605, under Laws 1885, c. 107, § 11.

the rule requiring such payment against a certain number of other patrons "who were in like situation with the plaintiff" is a mere conclusion and is insufficient to show discrimination, it not being shown that delinquent patrons had refused to pay.[22]

§ 840b. **Telephone companies — Any discrimination — Supplying facilities — Conditions and restrictions.**— A penalty may be recovered for any unlawful discrimination by a telephone company in supplying certain facilities as required by statute, or in imposing conditions or restrictions contrary to the statute.[23]

§ 841. **Evasion of statute — Discrimination — Telephone — Fixed rate —"Rental" system —"Public toll stations."**— Where a statute requires telephone companies to furnish all applicants within its territorial limits, connections and facilities without discrimination, and at a fixed maximum rate, it is no defense to the enforcement of the statute that the person or corporation engaged in furnishing telephonic service did not

[22] Irvin v. Rushville Co-operative Teleph. Co., 161 Ind. 524, 69 N. E. 258.

[23] Yancey v. Western Union Teleg. Co. (Ark. 1907), 99 S. W. 679, under Acts 1885, p. 178, § 11, providing that: "Every telephone company doing business within this State, and engaged in a general telephone business, shall supply all applicants for telephone connections and facilities without discrimination or partiality, provided such applicants comply, or offer to comply with reasonable regulations of the company, and no such company shall impose any condition, or restriction, upon any such applicant that are not imposed, impartially upon all persons or companies, in like situations, nor shall such company discriminate against any individual or company engaged in lawful business, by requiring as condition for furnishing such facilities, that they shall not be used in the business of the applicant, or otherwise under penalty of one hundred dollars ($100.00) for each day such company continues such discrimination, and refuses such facilities after compliance or offer to comply, with the reasonable regulations and time to furnish the same has elapsed; to be recovered by the applicant whose application is so neglected or refused." The court, per Battle, J., said: "The penalty of $100 is not recoverable, only, on account of a discrimination, by requiring, as condition for furnishing such facilities that they shall not be used in the business of the applicant,' but as well on account of unlawful discrimination made otherwise." see § 851 herein.

"rent" telephones, but furnished such service by means of "public toll stations" only,[24] and it is within the power of the State to enact a statute providing for a maximum rental charge.[25]

§ 842. **Discrimination — Telephone — Toll service — Sending messenger.**— The statute of Indiana requires every telephone company to supply applicants within its local limits with telephone connections and facilities without discrimination or partiality upon compliance, by said applicants, with the reasonable regulations of the company,[26] and to render efficient, what is known as the toll service, the company is therefore obligated, in order to bring itself within the terms of said statute, to send a messenger for a person wanted at the telephone, provided he lives within a reasonable distance from the receiving station, unless such person, so wanted, should himself be in possession of a telephone instrument at his residence or place of business, which is connected with the main line, otherwise the patron who desires to be placed in communication with the party at the receiving station would find the service supplied by the telephone company practically worthless.[27]

§ 843. **Discrimination — Connecting lines — Telephone in telegraph office — Oral messages — Waiver.**— A statutory obligation, imposed on telegraph companies, to receive and transmit telegraphic messages from other telegraph lines, does not include the placing of telephone instruments in a telegraph office for the purpose of receiving and transmitting oral messages, nor is this a duty of the telegraph company, even though it has other telephones in its office, since a waiver of its rights in one instance does not compel it to a like waiver in another case.[28]

[24] Central Un. Teleph. Co. v. State, Hopper, 123 Ind. 113, 3 Am. Elec. Cas. 529, 24 N. E. 215 (case of same title, 124 Ind. 600, 24 N. E. 1091, citing Central Un. Teleph. Co. v. State, Falley, 118 Ind. 194, 2 Am. Elec. Cas. 27.

[25] Central Un. Teleph. Co. v. State, Falley, 118 Ind. 194, 2 Am. Elec. Cas. 27, 19 N. E. 604.

[26] Ind. Rev. Stat. of 1894, § 5529.

[27] Central Un. Teleph. Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035, 6 Am. Elec. Cas. 679.

[28] People, Cairo Teleph. Co. v. Western Un. Teleg. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637; Ill. Rev. Stat., chap. 134, § 6.

§ 843a. **Penalty statute — Whether message may be oral — Telegraph and telephone companies.—** It is held that it is not necessary that a message be written or printed in order to render the company liable for the statutory penalty for neglect or failure to transmit, but an oral message is within the statute when the company's agent writes the message for the sender, even though in so doing he is considered as the agent of the sender; since upon filing in the company's office he becomes the company's agent in the line of his duty.[29] Directly the contrary is held in another case, or at least it is decided that the message must be in writing, as the statute, being a highly penal one, must be strictly construed, but the action in this case was against a telephone company concerning which the statute was declared to be "very imperfectly framed."[30] And in a late case in the Court of Appeals in Missouri it is held that the penalty statutes, which include telephone as well as telegraph companies, should, by reason of their being penal, receive a strained construction, that the duty imposed on the defendant telephone company was to provide facilities at its offices for the conduct of its business with the public, to receive despatches from and for other telephone lines, and from and for any individual, and when such despatch is received to transmit it promptly or become subject to a penalty; that the agent of a telephone company must receive at its office a despatch properly addressed and paid for and must transmit such despatch by the voice over its wire to the addressee; but that the statute meant a written despatch delivered by the sender to the agent of the company, reference being made in the statute to the copying and addressing despatches; the statute, therefore, was held not to apply to a refusal to permit a patron himself to hold conversation directly over the line, although damages might be recoverable for such refusal.[31]

§ 844. **Discrimination — Penalty — Electric light company.** — The Transportation Corporations Law of New York[32] pro-

[29] In Western Union Teleg. Co. v. Sanders (Ind. App. 1906) 79 N. E. 406. See § 849 herein.

[30] Cumberland Teleg. & Teleph. Co. v. Sanders, 83 Miss. 357, 35 So. 653.

[31] Pollard v. Missouri & Kansas Teleph. Co., 114 Mo. App. 533, 90 S. W. 121.

[32] Laws 1890, c. 566, § 65, Cumming & Gilbert's Genl. Laws & Stat. N. Y., p. p. 4242, 4243.

vides that upon application in writing of any owner or occupant of any building or premises within one hundred feet of the wires of any electric-light corporation, it shall supply electric light as may be required for lighting such building or premises, subject to certain conditions, and upon refusal or neglect to supply electric light as required the corporation shall forfeit a specified sum, and also a certain sum for every day such refusal or neglect shall continue, subject, however, to certain exceptions relating to obstacles preventing the laying of wires. This statute is held to be penal and to be strictly construed.[33] It is also decided that the penalty provided for cannot be recovered by an occupant of premises within the specified distance of wires of a corporation used for street lighting and not available for lighting buildings.[34] It is further determined that the requirement as to a written demand is not satisfied, so as to enable an action to be maintained for the statutory penalty for noncompliance with the statute, by an oral request followed by a written notice which fails to specify the quantity or power or number of lights wanted, although a written inquiry is made on these points which is claimed to have been orally answered, but it does not appear that such inquiry was made of any properly authorized agent for that purpose. Nor does said statute include a refusal to furnish power, but only covers electric lights.[35]

[33] Andrews v. North River Elec. L. & P. Co. 24 Misc. (N. Y.) 671, 23 Misc. (N. Y.) 523.

[34] Moore v. Champlain Electric Co., 85 N. Y. Supp. 37, 88 App. Div. 289.

[35] Andrews v. North River Elec. L. & P. Co., 24 Misc. (N. Y.) 671; 53 N. Y. Supp. 810, affg. 51 N. Y. Supp. 872, 23 Misc. (N. Y.) 512. But see Jones v. Rochester G. & Elec. Co., 7 N. Y. App. Div. 465, 39 N. Y. Supp. 1105. Where an application was made to supply gas at the applicant's office at a specified location, as previously supplied by returning the meters formerly there, said applicant offering to comply with the requirements of the company, and this was held a sufficient compliance with the statute (N. Y. Laws of 1892, chap. 566, § 65), and that the company was obligated in the penalty imposed by statute, the superintendent having recognized the notice as sufficient, the refusal of the company being based upon a past indebtedness of the applicant. The service in this case was made upon an employee at the gas company's office, to whom the applicant had applied on prior occasions for gas at other places. It is also held that such company is liable in separate penalties, where its refusal

§ 845. **Penalty statute — Whether "transmit" includes delivery.**— The duty of transmission imposed by penalty statutes has been held to include delivery and not to include delivery, as we have stated elsewhere;[36] however, transmission and delivery may be separable acts, in so far as these penalty statutes and interstate commerce are concerned, and dependent upon where the negligent act which constitutes the basis of an action for the penalty is committed.[37] Under a comparatively recent decision in Indiana the statutory penalty may be recovered even though the omission of the company was in the non-delivery of the telegram at the point of its destination, as the transmission includes delivery.[38]

§ 846. **Penalty statute — Substantial accuracy.**— Substantial accuracy is a sufficient compliance with a penalty statute requiring a telegraph company to "transmit correctly." A departure from the exact terms of the message where no harm is done, and the message is presented to the sendee in such terms as to effect the purpose for which it is sent does not subject the company to the penalty. A mere inadvertent departure from the letter of the telegram cannot render the company

also includes the applicant's residence. Jones v. Rochester G. & Elec. Co., 7 N. Y. App. Div. 474, 39 N. Y. Supp. 1110, affd., 158 N. Y. 678.

[36] See chap IX, herein.

[37] Delivery is a part of the duty of transmission under the Arkansas penalty statute. Little Rock & Ft. S. Teleg. Co. v. Davis, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 72, 1 Am. Elec. Cas. 526; Ark. Stat., Gantt's Dig., § 5721. Contra, Brooks v. Western Un. Teleg. Co., 56 Ark. 224, 4 Am. Elec. Cas. 662, 19 S. W. 572. Act of Ark., March 31, 1885, applies only to transmission and not to delivery in another State. Connell v. Western Un. Teleg. Co., 108 Mo. 459, 39 Am. & Eng. Corp. Cas. 594, 4 Am. Elec. Cas. 743; 18 S. W. 883, Rev. Stat. Mo., § 2725.

That transmit does not include delivery under penalty statute. See Rixke v. Western Union Teleg. Co., 96 Mo. App. 406, 70 S. W. 265. But compare Parker v. Western Union Teleg Co., 87 Mo. App. 553, under Rev. Stat. 1899, § 1255. Brashears v. Western Un. Teleg. Co., 45 Mo. App. 433, 3 Am. Elec. Cas. 701; Mo. Rev. Stat. of 1879, § 883. See Dudley v. Western Un. Teleg. Co., 54 Mo. App. 491.

[38] Western Union Teleg. Co. v. Sefrit (Ind. App. 1906) 78 N. E. 638.

Transmission under the penalty statute includes delivery: Western Union Teleg. Co. v. Braxton, 165 Ind. 165, Acts 1885, p. 151, Burns Stat. 1901, §§ 5511, 5512.

liable. It must be assumed that the legislature had in view not only "reasonable time" for delivery, but reasonable conformity to the terms of a message, not literal, exact conformity.[39] It will be observed that the above rule is qualified by the saving words "where no harm is done," but there are numerous classes of despatches where the slightest departure from an exact reproduction of the original message, as delivered for transmission, would defeat the very purpose for which the telegram was sent, or cause loss or injury. Therefore this rule must be cautiously applied. If harm results, even though there be substantial accuracy, then damage accrues and the statutory penalty should be given.

§ 847. **Penalty statutes — Whether only discrimination, etc., forbidden, and not mere negligence.**[40]— The Arkansas statute only forbids discrimination as to charges or promptness, under penalty,[41] while the Indiana statute provides a penalty in case of partiality, and discrimination and bad faith,[42] and the decisions of both these States are followed in a Michigan case decided in 1895.[43] Under a recent decision in Indiana, where a telegraph company is negligent in omitting to deliver a despatch, such negligence does not preclude the recovery of the statutory penalty under a statute prescribing certain duties as to telegraph companies as to the transmission of messages and prohibiting discrimination among patrons, etc.[44] And in another case in that State telegraph companies are liable to the

[39] Western Un. Teleg. v. Clark, 71 Miss. 157, 4 Am. Elec. Cas. 741, 14 So. 452; Mo. Code of 1892, § 4326. A mere verbal inaccuracy in the surname of the sender will not warrant a recovery of the statutory penalty. Western Un. Teleg. Co. v. Rountree, 92 Ga. 611, 18 S. E. 979. See Wishelman v. New York Tel. Co., 62 N. Y. Sup. 491.

[40] See § 851 herein.

[41] Frauenthal v. Western Un. Teleg. Co., 50 Ark. 78, 21 Am. & Eng. Corp. 70, 6 S. W. 236, 2 Am. Elec. Cas. 479; Act of Ark. of 1885, p. 176, repealing Mansf. Dig., § 6419. See § 114, herein.

[42] Western Un. Teleg. Co. v. Swain, 109 Ind. 405, 2 Am. Elec. Cas. 539; 9 N. E. 927, Acts of Ind. of 1885, p. 151, repealing Ind. Rev. Stat. of 1881, § 4176. See §§ 117, herein.

[43] Weaver v. Grand Rapids & Ind. R. Co., 107 Mich. 300, 65 N. W. 225, 2 Det. L. News, 677, 6 Am. Elec. Cas. 779. See §§ 119, 853, herein.

[44] Western Union Teleg. Co. v. Sefrit (Ind. App. 1906) 78 N. E. 638.

statutory penalty whether their failure to deliver messages is due to negligence or wilfullness, as these are not implied by discrimination and partiality under the statute.[45]

§ 847a. **Same subject — Telegrams into another State.**— Under an Indiana decision the failure of a telegraph company, receiving a message in Indiana, to deliver the message after it has reached its destination in another State, to the person to whom it is directed, does not constitute a failure of duty for which the statutory penalty provided for in Indiana may be recovered, even though such neglect of duty may constitute a negligence.[46] And mere delay in New York in the transmission of a telegram to a destination in another State does not, under a New York decision, warrant a recovery under its penalty statute, notwithstanding it is repeated and an extra toll paid therefor.[47]

§ 848. **Penalty statute — Prepayment or tender by sender or sendee.**— If a penalty statute requires payment or tender by the sender of the usual charges according to the regulations of the company, such requirement constitutes a condition precedent, on the part of the sender, to enable him to recover the statutory penalty for failure or postponement in the transmission of his message.[48] Again, prepayment or tender of the charges for sending a telegraphic message must, to render the company liable to the addressee, be made by the send of such message, or by the sendee or his agent, before the failure to deliver the message or the delay thereof occurred.[49] The rule of construction, however, is not so strict, where compensation alone is sought under a statutory action for damages, as is ap-

[45] Western Union Teleg. Co. v. Braxtan, 165 Ind. 165.

[46] Western Union Teleg. Co. v. Carter, 156 Ind. 531, 60 N. E. 305, under Burns' Stat. 1894, §§ 5511, 5512; Horner's Stat. 1897, §§ 4176, 4176a. See § 851, herein.

[47] Hearn v. Western Union Teleg. Co. 73 N. Y. Supp. 1077, 36 Misc. 557.

[48] Western Un. Teleg. Co. v. Mossler, 95 Ind. 29, 1 Am. Elec. Cas. 645; Ind. Rev. Stat. of 1881, § 4176. See § 847, herein.

[49] So held in Langley v. Western Un. Teleg. Co., 88 Ga. 777, 15 S. E. 291 (Act of Ga., Oct. 22, 1887); Western Un. Teleg. Co. v. Mossler, 95 Ind. 29, 1 Am. Elec. Cas. 645; Ind. Rev. Stat. of 1881, § 4176.

plied where the right to a penalty is asserted.[50] It is also held that the statutory penalty cannot be recovered upon a collect message.[51]

§ 849. **Penalty statute — Refusal to receive message not written on printed blank.**— A telegraph company may, it is held, refuse to receive for transmission a message, which the sender will not write upon the usual message blank, which requires a claim for damages or statutory penalties to be presented within sixty days after filing the message for transmission, since such a stipulation is reasonable, and does not affect the company's obligation to promptly and accurately transmit and deliver.[52]

§ 850. **Statutory damages — Company's knowledge of contents and importance of message.**— Where a statute provides that telegraph companies shall be liable for all damages occasioned by their failure or negligence, in receiving, copying, transmitting or delivering messages, such companies are liable for the damages resulting directly from such negligence, especially where the agent of the company is acquainted with the contents or significance of such messages; but there must be proof of items of expense alleged as part of the damages, otherwise there can be no recovery therefor.[53] Again, where a message is one of emergency, clearly so apparent upon its face and in addition thereto the company's receiving agent is ad-

[50] Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 5 Am. Elec. Cas. 700, 704, 705, 39 N. E. 874, per Gavin, J., holding also that prepayment of a special delivery charge is not, under all circumstances, absolutely a prerequisite to the duty to deliver a message in a city or town, and that a rule requiring such prepayment of the sender, where the amount of the charges was uncertain, would be unreasonable and oppressive. § 5513, Rev. Stat. Ind. 1894 (being § 4177, Rev. Stat. of 1881); id., § 5514. See Horner's Annot. Stat. Ind. 1901, §§ 417a, .4192a–4192c Western Un. Teleg. Co. v. Meek. 49 Ind. 53, 1 Am. Elec. Cas. 139.

[51] Western Un. Teleg. Co. v. Power, 93 Ga. 543, 21 S. E. 51.

[52] Kirby v. Western Un. Teleg. Co., 7 S. D. 263, 65 N. W. 37, 30 L. R. A. 621, 6 Am. Elec. Cas. 824, revg. 4 S. D. 105, 4 Am. Elec. Cas. 783, 55 N. W. 759, Kellam, J., dissenting. See chap. XXVIII, herein, "South Dakota," § 706.

[53] Cutts v. Western Un. Teleg. Co., 71 Wis. 46, 2 Am. Elec. Cas. 848, 36 N. W. 627; Wis. Laws of 1885, chap. 171. As to importance of messages in connection with damages, see chap. XXIX, herein.

vised as to that fact, and the message could have been transmitted almost instantly, but it is not delivered to the addressee for two hours after it is received by the company, such delay is unreasonable and justifies a verdict against the telegraph company in an action to recover a statutory penalty.[54]

§ 851. **Penalty and damage statutes — What is included — Pleading.**[55]— Under the Missouri statute of 1879, the penalty attaches for failure to transmit messages at all; for failure to transmit them with good faith; and for failure to transmit them with impartiality. The neglect or refusal, under said statute, applies to each of these duties.[56] So negligent delay in transmitting subjects the company to the penalty.[57] Again, in an action to recover the statutory penalty, a failure of the statutory cause of duty is held to be specifically averred and charged by the words "carelessly and negligently failed to transmit said message from its" sending office to the office at its destination; and an allegation that it was the duty of defendant to transmit and deliver the message correctly states the measure of duty.[58] It is held in Mississippi that, under the penalty statute of that State, the penalty mentioned for failure to transmit and deliver messages promptly applies in every case in which there is an obligation to do the things

[54] Western Union Teleg. Co. v. McClelland (Ind. App. 1906) 78 N. E. 672; Burn's Annot. Stat. Ind. 1901, §§ 5511, 5512.

[55] See 847, herein.

[56] Burnett v. Western Un. Teleg. Co. (St. Louis Ct. App.), 39 Mo. App. 599, 3 Am. Elec. Cas. 687; Mo. Rev. Stat. of 1879, § 883. The statutory penalty attaches, through failure to transmit or deliver, and was not due to partiality or bad faith. Wood v. Western Un. Teleg. Co. (St. Louis Ct. App.), 59 App. 236. The Minn. Laws of 1885, chap. 208, require telegraph companies to transmit and deliver telegrams within a reasonable time, and provide that such companies "shall be liable in a civil action at the suit of the party injured for all damages sustained by reason of such neglect or omission." Id., § 5. (See Rev. Laws Minn. 1905, §§ 2928, 2929, 2931.) This statute is construed with reference to the addressee's rights in Francis v. Western Un. Teleg. Co., 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 5 Am. Elec. Cas. 739. See §§ 828, 853, herein.

[57] Parker v. Western Union Teleg. Co., 87 Mo. App. 553. Rev. Stat. 1899, § 1255.

[58] Hill v. Western Union Teleg. Co., 105 Mo. App. 572, 80 S. W. 3.

specified under said statute.[59] And in that State the statute limits the penalty as to transmission to transmitting incorrectly, and does not warrant a recovery based upon delay or failure in transmitting.[60] But where, in a suit to recover a statutory penalty, it is obvious that the message for the non-delivery of which the recovery is sought, was not seasonably delivered, or if the time of its reception be, upon the evidence, uncertain, yet if the finding of the jury supports the contention of the plaintiff as to the statutory damages, that point will be deemed to be settled in the plaintiff's favor.[61]

§ 852. **Penalty and damage statute — Failure to transmit cipher messages.**— We shall hereafter [62] fully consider the question of damages in connection with cipher despatches. It is proper to state here, however, that a statute which renders a telegraph company liable in damages for failure to transmit despatches, applies to a case of a cipher despatch, which the company has undertaken to deliver, but which it has entirely failed to transmit, and said company is liable in damages to

[59] Western Union Teleg. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. 471, 4 Am. Elec. Cas. 479. See § 840b, herein.

[60] Hilley v. Western Union Teleg. Co. 85 Miss. 67, 37 So. 556, under Rev. Code 1892, § 4326. The court said: "We do not decide whether or not, in the particular case before us, the statute is unavailable because an interference with interstate commerce." See also Western Union Teleg. Co. v. Hall, 79 Miss. 623, 31 So. 202; Marshall v. Western Union Teleg. Co., 79 Miss. 154, 89 Am. St. Rep. 585, 27 So. 614. Examine Western Union Teleg. Co. v. McCormick (Miss.), 27 So. 606.

[61] Western Union Teleg. Co. v. Pallotta, 81 Miss. 216, 32 So. 310. In this case the plaintiff claimed $25 statutory damages, also $100 special damages. The jury assessed the entire damages at $70. The court held that there "was no evidence in the record to support the finding of the jury for any special damages. If the excess of $25 for statutory damages be remitted, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded for a new trial." The syllabus to the case reads: "A verdict for the plaintiff in a suit against a telegraph company for the statutory penalty, under code 1892, § 4326, for a failure to deliver a message in a reasonable time, will not be set aside if it be supported by evidence, although there be a conflict in the evidence as to whether the delay was in its transmission or its delivery after transmission."

[62] Under the chapter on Damages.

the same extent as if the message had been intelligible.[63] "There is no distinction drawn in the law as to one sort of promptitude with reference to one kind of despatch and another sort, and less degree of promptitude, with reference to another kind of despatch. A telegraph company in this State is required to send every despatch presented to it, on which the usual charges are paid according to the regulations of the company. The degree of negligence in each case and the extenuating circumstances attending, will depend upon the character of each case. If the company will strictly perform its obligations, and is in no default on its part, the law makes provision for its protection * * * said company seeks to justify this neglect, and failure of duty on its part by drawing a subtle and fine spun theory, about the character of the despatch, it not being understood by the company as to its full meaning and as to what the courts have decided in this country and in England about cipher despatches. If the company had not undertaken to send this despatch, on the ground that it was unintelligible to it, then this defense might, perhaps, be considered."[64] We will note in this connection, that as to cipher despatches, the knowledge of the company or its lack of knowledge of the importance of such message or of the business to which it relates, has been a subject of considerable discussion by the courts, and, therefore, we have given it full consideration elsewhere.[65]

§ 853. **Penalty statutes — Neglect or refusal to transmit — Mislaying telegram.** — It is held in a Michigan case that the act

[63] Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182, 1 Am. Elec. Cas. 487; Va. Act of 1866 (§ 2, chap. 65, Code of 1873, p. 619). This statute provides for a penalty in case of noncompliance with its terms, and also that the company shall "be liable to an action for damages to any party aggrieved." It is also declared in this case that such companies "must send messages in the order in which they are received, except in such cases as the statute authorizes preference to the government, etc., and they must send them with promptitude." Id., 1 Am. Elec. Cas. 497, per Lacy, J.

[64] Id., 1 Am. Elec. Cas. 487, 502, 503, per Lacy, J.

[65] See the sections in the chapter on Damages, post, as to Knowledge of Importance of Cipher Despatches.

of an agent of a telegraph company, in mislaying and forgetting a telegraph message, so that it is not sent, does not render the company liable, under a statute which requires the transmission of despatches with impartiality and good faith, under a specified penalty for neglect or refusal so to do.[66] This decision was placed substantially on the ground that the default was due to oversight and accident, and that penal statutes must be strictly construed; that the penalty was intended as a punishment for wilful wrongdoing, by discrimination or partiality, in favor of one or against another, and not to punish mere inadvertence or mistake, without wrongful motive; that the statute only prescribed a penalty for breach of duty in cases of bad faith, partiality and discrimination. It also appeared that the complaint only showed a mere neglect of duty, at the most, and not bad faith, partiality or discrimination. Again, it was stipulated in the case that the plaintiff sustained no actual injury, nor would the recovery of the penalty have taken away any right of action to recover damages for actual loss, if any had been sustained.[67] An instruction that if the evidence failed to show that plaintiff's message was set aside and that other messages between the same points which were received after the plaintiff's message were forwarded or delivered before it, then the verdict should be for the defendant, constitutes an incorrect statement of the law, where the plaintiff seeks to recover the statutory penalty for discrimination in transmitting a message.[68]

§ 853a. **Neglect or refusal to transmit — Wilfulness — Pleading.**— The Arkansas statute does not apply to a refusal of

[66] Weaver v. Grand Rapids & I. R. Co., 107 Mich. 300, 65 N. W. 225, 2 Det. L. News, 667, 6 Am. Elec. Cas. 779; How. Ann. Stat. of Mich., § 3706.

[67] The court cited in this last case Western Un. Teleg. Co. v. Steele, 108 Ind. 163, 2 Am. Elec. Cas. 538, 9 N. E. 78; Western Un. Teleg. Co. v. Swain, 109 Ind. 405, 2 Am. Elec. Cas. 539, 9 N. E. 927; Western Un. Teleg. Co. v. Griffin, 1 Ind. App. 46, 27 N. E. 113; Western Un. Teleg. Co. v. Rountree, 92 Ga. 611, 18 S. E. 579; Wolf v. Western Un. Teleg. Co. (Ga.), 19 S. E. 717; Frauenthal v. Western Un. Teleg. Co., 50 Ark. 78; Baltimore & O. Teleg. Co. v. State, and Western Un. Teleg. Co. v. Sloane (Ark.), 6 S. W. 513. See § 851, herein.

[68] Western Union Teleg. Co. v. McClelland (Ind. App. 1906) 78 N. E. 672, under Burns' Annot. Stat. Ind. 1901, §§ 5511, 5512.

an operator to transmit a message when such act arose merely from negligence on such agent's part in failing to ascertain that the company had an office at the place to which the message was directed; the penalty provided being only for a willful and intentional refusal to transmit a message.[69] Wilfulness and pecuniary damage must be alleged under a code provision that "any officer or agent of a telegraph or telephone company who wilfully violates either of the preceding sections," as to delaying delivery, etc., "is guilty of a misdemeanor, and the telegraph or telephone company so violating is liable in damages to the party aggrieved." [70]

§ 854. **Penalty and damage statutes — Degree of diligence in delivery — Better address — Wrong address.**— The same rule applies in cases of delivery of messages under penalty statutes, as in other cases, and that is, that the telegraph company must exercise a reasonable degree of diligence to find the addressee; but if the message is either expressly or otherwise known to the company to be of importance or of special importance, then the degree of diligence must be commensurate with the known importance of the message. Other questions are also involved, such as free delivery limits, nearness or remoteness of addressee's office or residence, the size of the city or town where delivery is to be made, the addressee being a resident of the town, city or place, his being well known or prominent, a stranger, a transient or obscure person, and the like. The above is well illustrated by an Indiana decision. It appeared in this case that T., the person in whose care the message was sent, had lived for six years in the same house, within one mile of the company's office. The delivery messenger boy made inquiry for T., but did not find him, and was again sent out and made inquiry for the addressee, but did not find him. The sender was notified, but could not give any better address. There was no evidence that the sender was the addressee's agent, and it was held that the former's negligence did not bind the addressee, and that the company was liable, under the

[69] State v. Western Union Teleg. Co., 76 Ark. 124, 88 S. W. 834, under Kirby's Digest, § 7946.

[70] Western Union Teleg. Co. v. Sklar, 126 Fed. 205, Shannon's Code Tenn. § 1838 .

statute, for damages.[71] If the address on a telegram is to the wrong street and number in a city, and the company promptly takes the message to the place specified, and it does not appear that it knew or could, by reasonable diligence, have ascertained the right address, an action for the statutory penalty for failure to deliver will not lie.[72]

§ 855. **Penalty statute —"Usual office hours"— Reasonable regulations — Nondelivery.—** The Indiana Penalty Statute of 1881 provided that companies engaged in telegraphing for the public should, "during usual office hours, receive despatches," and on payment of the usual charge, "transmit the same, with impartiality and good faith," in the order of time in which they were received, under penalty for noncompliance.[73] The statute, therefore, recognized the right of the company to make reasonable regulations for the transaction of its business, and implied that to a reasonable extent it could prescribe the hours during which it would transact business with the public, and this would include the right to regulate such office hours according to the requirements of the service at its various points of transacting business. Therefore, the words "usual office hours," in the statute, were held to include such hours at both the transmitting and receiving offices, in so far as an action for the penalty was concerned, and to excuse delivery of a message until the next day, where it was left for transmission later than the usual office hours.[74]

§ 856. **Penalty statute — Delivery limits — Transient visitor — No definite address — Nonresident.—** A telegraph company which fails to deliver a message to a transient visitor, who has

[71] Western Un. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894, 2 Am. Elec. Cas. 525; Ind. Rev. Stat. of 1881, § 4177. See further, chap. XXIX, herein.

[72] Western Un. Teleg. Co. v. Patrick, 92 Ga. 607, 18 S. E. 980.

[73] Ind. Rev. Stat. of 1881, § 4176. See Horner's Annot. Stat. Ind. 1901, §§ 4176a, 4192a–4192c. See § 847, herein.

[74] Western Un. Teleg. Co. v. Harding, 103 Ind. 505, 1 Am. Elec. Cas. 814. See chap. XXIX, herein. Where a message is inadvertently received for delivery at a place where there is no office, the statutory penalty cannot be recovered for failure to deliver said message. Peterson v. Western Un. Teleg. Co. (Ind. App., 1894), N. E. 810.

no definite address, is not liable, under a penalty statute, requiring delivery to addressee, residing within one mile of the telegraph office, or within the town of or city within which said office is. Such statute must be confined in its application and construction to that class of persons who come within the strict letter of the act. Telegraph companies are not bound to deliver messages to strangers in a town or city, when they have no means of knowing the place at which the message can be received.[75] And an addressee who is a nonresident does not make himself a resident within the statute, by giving the company a temporary address.[76] But if such nonresident addressee calls at the terminal office for the message, the company will be liable to the penalty for failure to deliver the despatch.[77]

§ 856a. **Discrimination — Delivery limits — Message in care of another.**— Where a statute provides against discrimination, but requires the transmission of all despatches in the order of their receipt, which includes the delivery of all despatches which the company undertakes to transmit, and an earlier statute requires the delivery of all despatches by messenger to the person, to whom the same are addressed, or to their agents, on payment of any charges due for the same, provided such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is, and the later statute does not regulate the distance or prescribe the limits within which telegraph companies shall deliver messages; it is held that the neglect to deliver a telegram, directed in care of a conductor of a railroad train, showed that the telegraph company was not free from impartiality and was subject to the statutory penalty, it appearing that the office of such company was in the depot where the designated railroad train regularly stopped, and where it stopped on the day in question, and that the telegraph company's agent knew the conductor and that he conversed and transacted business with him upon the arrival of the designated train.[78]

[75] Moore v. Western Un. Teleg. Co., 87 Ga. 613, 3 Am. Elec. Cas. 627, 13 S. E. 639; Ga. Acts of 1887, p. 112.

[76] Western Un. Teleg. Co. v. Timmons, 93 Ga. 345, 20 S. E. 649.

[77] Western Un. Teleg. Co. v. Mansfield, 93 Ga. 349, 20 S. E. 650.

[78] Western Union Teleg. Co. v. Sefrit (Ind. App. 1906), 78 N. E. 638. Laws Ind. 1885, p. 151, c. 48;

§ 857. **Penalty statute — Duty of delivery to residents within certain limits, distinct from duty to transmit.**— A penalty statute prescribing the duty of a telegraph company as to delivery to an addressee, residing within specified limits, does not prevent a recovery of the prescribed penalty for not transmitting messages with due diligence, whether the addressee resides within the specified limits or not, where said statute makes the duty of transmission and the duty to deliver distinct.[79]

§ 857a. **Penalty Statute — Parties — When damages recoverable.**— Under the Tennessee Code the sender may recover, although the message is received in that State from a sending point outside the State, such recovery being based upon a breach of public duty.[80] The New York penalty statute provides expressly for a recovery by the person or persons sending or desiring to send the despatch and entitled to have the same transmitted, and therefore the addressee cannot recover the penalty imposed.[81] An "aggrieved party" entitled to bring action under the Indiana penalty statute relating to receiving and transmitting messages is the person whose message the telegraph company has refused to receive or failed to transmit in the manner or on the terms prescribed by the statute.[82] Under the Indiana penalty statute relating to receiving and transmitting messages the plaintiff may recover compensation for such damages as he has actually sustained independently of the statute which furnishes a cumulative remedy and warrants the recovery of fixed punitive damages, and it is not necessary in order to recover under the statute for the injured party to show that he has sustained any actual damages.[83]

Act 1852 (1 Rev. Stat. 1852, c. 107), § 3.

[79] Horn v. Western Un. Teleg. Co., 88 Ga. 538, 15 S. E. 16; Ga. Act of Oct. 22, 1887.

[80] Gray v. Western Union Teleg. Co., 108 Tenn. 39, 64 S. W. 1063, under Shannon's Tenn. Code, §§ 1837, 1838.

[81] Thompson v. Western Union Teleg. Co., 82 N. Y. Supp. 675, 40 Misc. 443. Transportation Corporations Law 1890, c. 566, § 103, Cumming & Gilbert's Genl. Laws & Stat. N. Y., pp. 4252, 4253.

[82] Western Union Teleg. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679, under Burns' Stat. 1894, §§ 5511, 5512, Horner's Stat. 1897, §§ 4176, 4176a.

[83] Western Union Teleg. Co. v. Ferguson, 157 Ind. 37, 60 N. E. 679; under Burns' Stat. 1894, §§ 5511, 5512, Horner's Stat. 1897, §§ 4176, 4176a.

§ 858. **Penalty statute — When damages or penalty not recoverable.**— Where a statute relating to the transmission and delivery of telegrams provides a penalty for default of the company, in a suit for the recovery of the penalty, actual damage need not be proven, the statute fixes the amount to be recovered, whether the damage be great or small.[84] Nor are special damages recoverable under such a statute for delay in the delivery of a telegram.[85] A penalty statute requiring the transmission of messages promptly and with impartiality and good faith does not, it is held, apply where, without fault or negligence of the company, the delay is caused by the wires being disabled by a storm and the operator shows no partiality, acts in good faith, and is diligent in procuring transmission of the message. The wires being down is a good excuse.[86]

§ 859. **Penalty accrued prior to repealing act.**— Where a penalty has accrued prior to a repealing act, it is not affected thereby.[87]

§ 860. **Repeal of penal ordinance as to electric light companies during prosecution — Abatement of action.**— Where a penal ordinance requires railroad companies to maintain electric lights at certain crossings, and imposes a penalty for each violation and during the progress of a prosecution thereunder, said ordinance is repealed, further prosecution is prevented, there being no reservation as to pending actions in said repealing ordinance, nor is the right to continue such prosecution conferred by the adoption of another ordinance covering the same subject, but which does not substantially re-enact the former ordinance.[88]

[84] Little Rock & Ft. S. Teleg. Co. v. Davis, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 72, 1 Am. Elec. Cas. 526.

[85] Jacobs v. Postal Teleg. Co. 76 Miss. 278, 24 So. 535, 5 Am. Neg. Rep. 316.

[86] Taylor v. Western Union Teleg. Co., 107 Mo. App. 105, 80 S. W. 699.

[87] Western Un. Teleg. Co. v. Brown, 108 Ind. 538, 2 Am. Elec. Cas. 508, 8 N. E. 171; Ind. Act of 1852 (§ 4176, Rev. Stat. of Ind., 1881), repealed by Acts of Ind., 1885, p. 151; Western Un. Teleg. Co. v. Wilson, 108 Ind. 308, 2 Am. Elec. Cas. 519, 9 N. E. 172; Georgia Acts of 1888–89, p. 175, does not repeal Acts of 1886–87, p. 111; Western Un. Teleg. Co. v. Cooledge, 86 Ga. 904, 3 Am. Elec. Cas. 618, 12 S. E. 264.

[88] Terre Haute & L. R. Co. v. South Bend, 146 Ind. 239, 45 N. E.

§ 861. **Penalty statute — Nondelivery of telegram — "Futures" — Gaming — Defenses.**— We have considered at length in a prior chapter the validity and effect of contracts in relation to "futures" and the like,[89] but the following case rests upon different principles. It arose in Georgia, and it was held that when a telegraph company has contracted to transmit and deliver a message and has received the consideration therefor and neglects to deliver the same, that it cannot defend an action under a penalty statute, upon the ground that the despatch relates to a sale of futures and is, consequently, illegal. The court declared that the company could not wait to question and investigate the motives of those who offer ambiguous despatches for transmission, and that it was little concerned with unlawful or improper motives "unless they are plainly disclosed upon the face of the despatch. The cases of Bryant v. Western Union Telegraph Company,[90] and Smith v. Western Union Telegraph Company,[91] were not ruled upon any statute, but upon principles of common law. Doubtless it is true that a telegraph company is not bound, even when it contracts it do so, to furnish to 'bucket shops' reports of the market prices of stocks and provisions, nor to allow 'tickers,' for the purpose to remain in the offices of these immoral establishments. But were the supplying of market reports and 'tickers' for all applicants 'with impartiality and good faith,' enjoined by statute, a different question, and one more germane to the present case, might arise. The Sunday cases adjudicated upon in some of the cases are also without relevancy. * * * So far as we are aware no decision of any court is to be found which holds it illegal for a telegraph company to receive and transmit messages relating to speculative transactions in futures, where that class of business has not been made penal by statutes. That damages for the breach of a contract to correctly transmit a message of that nature cannot be measured by the results of such dealings, was decided in Cothran v. Western

324, revg. on rehearing, 42 N. E. 812. See also Woodburn v. Western Un. Teleg. Co., 95 Ga. 808, 23 S. E. 116.

[89] See §§ 781, 782, herein.

[90] 17 Fed. 825.

[91] 84 Ky. 664, 2 S. W. 493, 2 Am. Elec. Cas. 389, 16 Am. & Eng. Corp. Cas. 664, 2 S. W. 483.

Union Telegraph Company,[92] but there is no suggestion in that decision that the broken contract was unlawful. On the contrary, this language will be found in the opinion, 'We think this standard cannot be invoked for the reason that contracts relating to "futures" are illegal, and we see not how an illegal contract can be called in to measure the damages sustained by reason of the breach of a legal contract.' There may be strong reasons of public policy why legislation ought to prohibit all dealings in futures, and all communication by telegraph, tending to foster or facilitate such dealings, but in the present state of the law, no matter how reluctant telegraph companies may be to transmit and deliver messages of this class, especially if their reluctance arises after they have accepted pay for doing it, they have no option but to perform the service or pay the penalty." [93]

§ 862. **Immoral messages.**— If a telegraph company refuses to send a message because it is illegal or immoral, it acts upon its peril. If it is mistaken or has misjudged the tenor or purport of the message it will be held responsible to the injured party for any damage sustained by reason of its refusal.[94] The company has no right to impugn the motives of a sender of a telegram, nor does the law authorize the company or its agents to inquire into such motives, where the message is couched in decent language. The company is not, nor are its employees, censors of public or private morals, nor are they judges of the good or bad faith of any party who may seek to send a message over the company's lines. If the charges for the service are paid their duty is fixed. If, however, the intended telegram is expressed in indecent, obscene or filthy language, the company may refuse to accept it for transmission.[95]

[92] 83 Ga. 25, 2 Am. Elec. Cas. 496.

[93] Gray v. Western Un. Teleg. Co., 87 Ga. 350, 27 Am. St. Rep. 259, 35 Am. & Eng. Corp. Cas. 47, 13 S. E. 562, 3 Am. Elec. Cas. 622, per Bleckley, Ch. J. As to "bucket shops" see § 1024, herein; as to Injunctions and "Sunday," see §§ 872–877, herein.

[94] Smith v. Western Un. Teleg. Co., 84 Ky. 664, 2 Am. Elec. Cas. 393, 16 Am. & Eng. Corp. Cas. 664, 2 S. W. 483, per Bennett, J.

[95] Western Un. Teleg. Co. v. Ferguson, 57 Ind. 495, 1 Am. Elec. Cas. 266, per Howk, J.

§ 863. **Penalty statute — Evasion of liability by contract or stipulation.—** A telegraph company cannot, by contract or stipulation, evade a statutory, penal liability, for failure to transmit a message correctly, nor is a cause for action for such penalty affected by the private conditions of the usual printed blank.[96] "Again, it is said that this company entered into a valid contract, in Alabama, with the sender of the message, which provided that it would not be liable for mistakes in its transmission beyond the sum received for sending the message, unless the sender ordered it to be repeated and paid half the sum in addition, and this statute changed the liability of the company as it would otherwise exist. The message was not repeated. This kind of a contract, it is said, was a reasonable one, and has been so held by this court.[97] This, however, is not an action by the person who sent the message from Alabama, and this plaintiff is not concerned with that contract, whatever it was. There was no mistake in the transmission of the message and there was no breach of the agreement. The action here is not founded on any agreement and the judgment neither affects nor violates the contract mentioned. * * * This judgment is solely based upon the penalty granted by the statute for non-delivery.[98] It is held, however, that a telegraph company can, by stipulation, limit the time within which any claim for a statutory penalty for not sending a message must be made, and that a failure under such a condition to give a written notice will defeat an action for the prescribed penalty.[99] On the con-

[96] Western Un. Teleg. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776, Am. Elec. Cas. 442; 1 Rev. Stat. of Ind. 1876, p. 868; Rev. Stat. of Ind. 1881, § 4176. See note in 71 Am. Dec. 473.

[97] Citing Primrose v. Western Un. Teleg. Co., 154 U. S. 1, 5 Am. Elec. Cas. 809, 14 Sup. Ct. 1098, 38 L. Ed. 883.

[98] Western Un. Teleg. Co. v. James, 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. 934, 6 Am. Elec. Cas. 858, 871, 872, per Mr. Justice 1887, in this decision was repealed; Ga. Laws of 1894, no. 96. See Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 724, 1 Am. Elec. Cas. 1.

[99] Western Un. Teleg. Co. v. Yopst, 118 Md. 248, 2 Am. Elec. Cas. 553; Western Un. Teleg. Co. v. Meredith, 95 Ind. 93, 1 Am. Elec. Cas. 643; Western Un. Teleg. Co. v. Jones, 95 Ind. 228, 48 Am. Rep. 713, 1 Am. Elec. Cas. 580; Kendall v. Western Un. Teleg. Co., 56 Mo. App. 192. Any claim in stipulation in blank limiting time includes action for penalty. Montgomery

trary it is held in Georgia that such a time limit stipulation does not apply to an action for a statutory penalty.[1] Nor does such stipulation include claims for the statutory penalty under the Arkansas statute, but is confined to claims for damages.[2] But the parties may by contract provide that the promptness required under a penalty statute shall not be exacted as where there is an acceptance for transmission of a message subject to delays as where the line is out of order.[3]

§ 864. **Penalty statute — Return of money paid for sending telegram.**— Where a telegraph company has incurred the penalty prescribed by statute, it cannot then exempt itself by returning the money paid for sending the telegram.[4]

§ 865. **Penalty, misdemeanor or criminal statute — Disclosure of contents of telegram — Evidence.**— As we have frequently asserted, penal statutes must be strictly construed, and matters not placed in such a statute by the framers thereof cannot be injected therein by a forced interpretation. This rule applies to an attempt to recover a penalty for the disclosure of the contents of a telegram when the penalty statute makes no express provision herefor, but does expressly specify other matters intended to be covered. Especially is this true where there is a criminal statute making it an offense for the employees of a telegraph company to reveal the contents of any telegraphic message and providing a punishment therefor. This is also additionally true where, besides the statutes above noted, the legislature has passed an act prohibiting, in express terms, the disclosure of the contents of such messages, and giving a remedy in damages to the party injured, to the extent of such injury, and making the company liable for failure or negligence in the performance of their duties generally.[5] It is a misdemeanor

v. Western Un. Teleg. Co., 50 Mo. App. 591. See chap. XXVIII, herein. See § 847, herein.

[1] Western Un. Teleg. Co. v. Cooledge, 86 Ga. 104, 3 Am. Elec. Cas. 618, 12 S. E. 264.

[2] Western Un. Teleg. Co. v. Cobbs, 47 Ark. 344, 2 Am. Elec. Cas. 474, 1 S. W. 558.

[3] Eddington v. Western Union Teleg. Co. (Mo. App. 1905), 91 S. W. 438.

[4] Western Un. Teleg. Co. v. Moss, 93 Ga. 494, 21 S. E. 63.

[5] Western Un. Teleg. Co. v. Bierhaus, 8 Ind. App. 563, 4 Am. Elec. Cas. 723, 34 N. E. 581; Ind. (penalty stat., etc.) Rev. Stat. 1894,

in Minnesota, and punishable as such under the statute, to divulge or disclose the contents of a telegram, and this law applies to all employees.[6] But a statute prohibiting the disclosure of the contents of any private despatch to any person other than the addressee or his agent, does not prohibit such disclosure when legally required, as evidence in a judicial proceeding.[7] Where an operator thoughtlessly discloses the contents of a message which, although a private telegram, related to a public matter and necessarily would become generally known in a few hours, the imposition of punitive damages is not warranted. Such a case must be decided without reference to and independently of a code provision which imposes a penalty upon employees of telegraph companies who divulge the contents of a message, as such a statute does not apply to an action for damages arising from such publication.[8]

§ 866. **Municipal penalty ordinance against cutting trees, etc.— Valid and reasonable — Police power.**— Where a statute confers upon a municipality authority, through its township committee, to regulate, by ordinance, the use of its public streets and to direct and regulate the planting, cultivation, trimming and preservation of shade trees in said streets and public places, and said statute also vests them with the right to prohibit the removal or destruction of said trees and to restrain and punish persons injuring or defacing the same, then it is within the police power of such township to provide by ordinance for the regulation of electric wires within the township, and also to provide that within said limits no person shall cut, trim or break any tree, limb or twig thereof, standing upon a public street or highway, without first obtaining permission therefor of the township committee or its authorized agent, under penalty

§§ 5511–5513; Ind. (crim. stat.) Rev. Stat. of 1894, § 2248. See Horner's Annot. Stat. Ind. 1901, §§ 4176a, 4192a–4192c.

[6] Peterson v. Western Un. Teleg. Co., 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 8 Am. & Eng. Corp. Cas. (N. S.) 517, 5 Am. Neg. Rep. 376, 381; Gen. Stat. of Minn., 1894, § 6782.

[7] Ex parte Brown, 72 Mo. 83, 1 Am. Elec. Cas. 316, 320; Wagner's Stat. of Mo., 325, § 13, construed with § 51, p. 507. As to market reports, information and disclosure. Stat. Ill., In re Renville (N. Y. Super., 1899), 61 N. Y. St. R. 549; Laws N. Y. of 1850, c. 340.

[8] Cocke v. Western Un. Teleg. Co., 84 Miss. 380, 36 So. 392.

for a violation of said ordinance, and such requirement is reasonable.[9]

§ 867. **Statutory penalty for cutting trees — Evidence — — Action — Instruction to jury.**— To warrant a recovery of a statutory penalty for cutting trees, it must satisfactorily appear to the jury that the trees in question were cut before the action was commenced. Nor can the court instruct the jury, in its general charge in such action, to the effect that the plaintiff has made out his title to the land on which the trees alleged to have been cut, were located.[10] But it may be shown in evidence that the telegraph company's employees honestly believed they were cutting the trees of another, who had consented thereto.[11]

§ 868. **Penalty statute — Painting poles — Substitution of straight for crooked poles, etc.— Notice required.**— Where a statute imposes a penalty for neglect or refusal of a corporation, owning or operating a line of wires in a city or village, to paint its poles and substitute straight poles for crooked ones, upon notice so to do, and such statute also requires said painting to be done to the satisfaction of the aldermen or trustees of said city or village, the prescribed notice, to be valid, must definitely show by streets or other localities or designation, where the substitution of poles is required, and should also specify the color which said poles are to be painted.[12]

[9] State, Consolidated Tract. Co. v. East Orange Township, 61 N. J. L. 202, 38 Atl. 803.

[10] Postal Teleg. Cable Co. v. Brantley, 107 Ala. 683, 18 So. 321. Cannot change as to effect of testimony, except on request under Ala. Code of 1886, § 2754.

[11] Postal Teleg. Cable Co. v. Le Noir, 107 Ala. 640, 18 So. 266. See further as to cutting trees, chaps. XI, XVIII, herein.

[12] Hardwick v. Vermont Teleph. & Teleg. Co., 70 Vt. 180, 40 Atl. 169; Vt. Stat., § 4230. If a municipal ordinance requires poles to be marked in a specified way and prescribes for nonobservance a penalty for each offense, such statute will not be construed so as to authorize a recovery in separate actions of a penalty for each unmarked pole, since there can be but a single recovery for a refusal of the company to mark any of its poles. Lancaster v. Edison Elec. Ill. Co. (C. P.), 8 Penn. Co. Ct. Rep. 178, 2 Am. Elec. Cas. 116. By a recent Massachusetts statute it is provided that any corporation stringing electric wires along the streets shall affix the same to suitable supports, and shall affix at points of support to which any

§ 869. **Misdemeanor statutes — Cutting wires, etc.— Malicious prosecution.—** Where a statute makes it a misdemeanor to maliciously tear down, remove or injure any line of telegraph, and a person acting upon counsel's advice, and for the purpose of testing the validity of such statute, deliberately cuts telegraph wires not interfering with the use of the highway, nor upon private property, such act constitutes such a probable cause as to relieve the company, as for an unsuccessful malicious prosecution, of a violation of the statute.[13] Under the Texas penal code there must be such a breaking or cutting as to cause an interference with transmission of messages.[14]

§ 869a. **Injuring, destroying, etc., of lines —"Willfully and intentionally."—** Under an Arkansas decision even though a railroad company itself, without lawful right, removes lines of a telephone company from its right of way, yet if such act is without evil intent, and not within the meaning of the words "willfully and intentionally" in a statute, making it a misdemeanor under penalty and double damages to willfully and intentionally destroy, injure or obstruct any telegraph or telephone lines, no recovery can be had of double damages.[15]

§ 870. **Indictment for nuisance in obstructing highway by unlawful erection of telegraph poles.—** It was early decided in an English case, in 1862, that the assent of the Crown to the erection of telegraph poles in a high road was necessary; otherwise such erection of said poles, whether alongside the road, or on impassible parts, anywhere between the inclosures set out

wire or cable containing wires is attached a tag designating the owner or user of such wire or cable. Street railways need not affix such tag, except for its feed wires at points of attachment to poles carrying the feed wires of one or more other street railway companies. Acts and Resolves, Mass., 1899, c. 320, repealed see Rev. Laws, Mass., 1902, p. 1861, but see Rev. Laws, 1902, p. 1197, c. 122, § 23, providing for name of corporation on poles or structure.

[13] Davis v. Pacific Teleph. & Teleg. Co., 57 Pac. 764; affd. 127 Cal. 312, 59 Pac. 698; Cal. Pen. Code, § 591.

[14] Southwestern Teleg. & Teleph. Co. v. Priest, 31 Tex. Civ. App. 345, 72 S. W. 241, Pen. Code, art. 784.

[15] St. Louis, I. M. & S. Ry. Co. v. Batesville & Winerva Telephone Co. (Ark., 1906), 97 S. W. 660, under Kirby's Digest, § 1899.

by act of Parliament as a highway, constituted an indictable nuisance, since the public were entitled to the use of the entire width thereof, and were not confined to the part which was "metaled" or kept in order for the more convenient use of carriages and foot passengers, and the court, quoting from Lord Tenterden, with approval, said: "'I am strongly of opinion, when I see a space of fifty or sixty feet, through which a road passes between inclosures, set out by an act of Parliament, that, unless the contrary be shown, the public are entitled to the whole of that space, although, perhaps, from economy the whole may not have been kept in repair.' No doubt that is the highway. * * * The public have a right of passage over the whole of the highway," and, therefore, if the posts as placed were of a size and solidity to prevent the passage of carriages and horses or foot passengers upon the parts of the highway where they stood or rendered the way less commodious than before to the public, and said posts were placed with the object and intent of keeping them there permanently with profit to the company, and they were so permanently kept there, the act was unlawful and there was a public and indictable nuisance. It was also declared that it made no difference that sufficient space was left, "the public are entitled to all the space on the side of the highway" for the purpose of light and air, and parties cannot withdraw any part of the highway from the general purposes of traffic with impunity.[16]

§ 870a. **Permits for stringing wires — Obstruction of streets and ways.**— Where police regulations as to permits for the stringing of telephone, telegraph and other electric wires pro-

[16] Regina v. United Kingdom Elec. Teleg. Co., 9 Cox C. C. 174, 6 Law Times (N. S.) 378, 31 Law Jour. (Mag. Cas.) 166, 3 Fost. & Finl. 73, 8 Jur. (N. S.) 1153, 10 Week. Repr. 538, Allen's Teleg. Cas. 180, per Crompton, J., citing Reg. v. Wright, 3 B. & Ad. 681, per Lord Tenterden; Williams v. Wilcox, 8 Ad. & El. 329; Reg. v. Train, 9 Cox C. C. 180. See §§ 228, 229, herein. It is unlawful for any telegraph or telephone company or corporation or other company or corporation, or any person or persons, in using wire to brace any telegraph, telephone or other pole or post, to place such wire over any part of any right of way for public roads at a less distance than fifteen feet from the ground. Violation a misdemeanor. Sess. Laws of Col., 1899, c. 85. Mills Annot. Stat. Colo. (supp. 1891–1905), p. 357, § 1357a.

vide for a fine for violation, they are not applicable to wires on private property, placed there for private purposes, which do not cross or encroach upon public ways or streets.[17]

§ 871. **Penalty for nonpayment of taxes — Tender, when insufficient.**— It is discretionary with the legislature to determine what penalty shall be imposed for the nonpayment of taxes.[18] So an act is not invalid which imposes a penalty on a telegraph company for failure or refusal to pay a lawful tax, the amount of 50 per cent. of the taxes assessed.[19] Nor does such penalty, imposed upon telegraph, telephone and certain common carriers render the statute unconstitutional, as a denial to such companies of the equal protection of the law or as an arbitrary classification.[20] If an action is commenced for the collection of taxes, and the statute provides for 50 per cent. penalty when suit is brought, a tender thereafter of the amount of taxes and 10 per cent. for delinquency and costs is insufficient.[21]

§ 872. **Sunday telegrams — Reasonable rules — Generally.**— A telegraph company may fix reasonable office hours for the transaction of Sunday business. This is also true as to the right of the company to make reasonable regulations, and where there is no special contract as to Sunday telegrams, such rules would govern,[22] certainly in so far as they were reasonable. But right at this point comes in the question of knowledge of the sender of the existence of such stipulations, and whether the same determinative law would apply to telegrams sent on Sunday as to messages sent on other days, and it is proper to note in this connection that Sunday laws were not enacted for the benefit of telegraph companies, but to further the better observance of that day. And if a contract to transmit and deliver a telegram on Sunday can be validly made on said day, then the Sunday laws would not operate to excuse the telegraph

[17] Callum v. District of Columbia, 15 App. D. C. 521.

[18] Western Un. Teleg. Co. v. Indiana, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725.

[19] Western Union Teleg. Co. v. State, 146 Ind. 54, 44 N. E. 793.

[20] Western Un. Teleg. Co. v. Indiana, 165 U. S. 304, 17 Sup. Ct. 345, 41 L. Ed. 725.

[21] Western Un. Teleg. Co. v. State, 147 Ind. 274, 45 N. E. 473; Ind. Acts of 1893, p. 374.

[22] Western Un. Teleg. Co. v. McCoy (Tex. Civ. App., 1895), 31 S. W. 210.

company from performance of its legal duties as a public or quasi-public servant. Therefore it would seem that, in so far as a contract made on Sunday, to transmit or to deliver a message, or to transmit and deliver a message on said day, is valid, then to that extent the same rules ought to govern such valid contract as would apply were a despatch contracted about on other days. The question then arises, can a valid contract to transmit or to deliver, or to transmit and deliver any telegraphic message be validly made on Sunday, or are such contracts limited to telegrams of a particular or special nature coming within what are generally known as works of necessity, charity or mercy?

§ 873. **Whether telegraph company can validly contract on Sunday concerning transmission, etc., of telegrams.**— The general tenor of what are designated as Sunday laws is to prohibit the transaction of any business or the performance of any work on that day, except it be of the general character known as works of necessity, charity or mercy, and the term "necessity" has been broadened and extended in its application by judicial construction and legislative enactment in many jurisdictions and localities, while in other jurisdictions and localities the tendency has not been in this direction, at least it is not so apparent in any marked degree. Therefore the factor of locality is of great weight. It is held in Texas that a telegraph company may validly stipulate for delivery of a telegram on a day subsequent to its receipt at the terminal office.[23] In Mississippi it is decided that whether or not the sending of a message is a work of necessity, sufficient to justify its being sent on Sunday, nevertheless if the company accepts, for transmission, an important message on said day, summoning an attorney to appear in court on Monday morning and does not deliver it until Monday evening, it is liable for such neglect, to both the statutory penalty and in special damages.[24] And in Alabama a company may complete a contract on Saturday, for the delivery of a cablegram on Sunday in a foreign country, since the mere delivery on that day is not prohibited by statute

[23] Western Un. Teleg. Co. v. McCoy (Tex. Civ. App., 1895), 31 S. W. 210.

[24] Western Un. Teleg. Co. v. McLaurin, 70 Miss. 26, 13 So. 36.

nor by common law in that State.[25] Again, if the transportation of horses is a work necessary to be done on Sunday, the fact of such transportation constitutes no defense for a delay in transmitting a telegram, whereby injury resulted to said horses.[26]

§ 874. **Same subject — That Sunday law excludes contracts not within the statutory exceptions.**— In Alabama all contracts made on Sunday, and not within the statutory exceptions, are void.[27] So in Georgia, a telegraph company cannot validly contract to transmit and deliver messages which are not within the statutory exception of charity or necessity, and for neglect in performance of such invalid contract the company cannot be held obligated in the penalty provided under the laws of that State.[28] Nor can the statutory penalty be recovered in Indiana for failure to perform a contract made on Sunday, for the transmission of a telegram which is not a work of necessity.[29] Nor can damages be recovered in such case.[30] So in Missouri, it is illegal to transmit an ordinary business despatch on Sunday, and the penalty cannot be recovered for false information as to the time within which a message can be sent and delivered.[31] Again, the plaintiff must establish the necessity of transmission on Sunday, or the message must show that it related to a work of necessity or charity, or that the operator was so informed or had knowledge thereof, otherwise there is no cause for action for failure to transmit and deliver.[32]

[25] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455.

[26] Taylor v. Western Un. Teleg. Co., 95 Iowa, 740, 64 N. W. 660.

[27] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455.

[28] Western Un. Teleg. Co. v. Hutcheson, 91 Ga. 252, 18 S. E. 297; Ga. Code, § 4579.

[29] Rogers v. Western Un. Teleg. Co., 78 Ind. 169, 1 Am. Elec. Cas. 386. Message here was "Come up in morning, bring all."

[30] Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[31] Thompson v. Western Un. Teleg. Co., 32 Mo. App. 191, 2 Am. Elec. Cas. 634; Mo. Rev. Stat., § 885.

[32] Western Un. Teleg. Co. v. Yopst, 118 Ind. 248, 2 Am. Elec. Cas. 553, 20 N. E. 222; Willingham v. Western Un. Teleg. Co., 91 Ga. 449, 18 S. E. 298. See Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

§ 875. **Sunday law — What are not messages of necessity.**— A message announcing arrival by train is not a message of necessity, within an exception of a Sunday statute, permitting business or works of necessity to be transacted or performed on Sunday.[33] A telegram which, if sent, would conduce to the pecuniary profit or success of the sender, or which would subserve his convenience merely, is not a message of necessity.[34]

§ 876. **Sunday law — What messages are within the statutory exceptions.**— It is generally held that messages relating to sickness or death, which are calculated to relieve suffering or distress; which are intended to secure medical aid or to save or protect life, or which are designed, because of an emergency, to avert harm, preserve property, or prevent serious loss, constitute such a reasonable necessity, as to come within the exceptions of necessity and charity, under the usual Sunday statute.[35] These various emergencies constitute the ground of necessity, upon which telegraph companies are generally permitted to keep open their offices on Sunday. Besides telegraphy as a business differs in this respect from other kinds of business or work. It subserves a purpose which no agency, unless possibly the telephone in some cases, can subserve. It is, therefore, important that, once their Sunday obligations to the public be ascertained, they should be held as strictly to the performance of their duties as in other instances.[36]

§ 877. **Same subject continued — Illustrations.**— A telegram announcing death is a work of necessity.[37] So a message stating that a person, who desired to see her dying mother, would

[33] Western Un. Teleg. Co. v. Hutcheson, 91 Ga. 252, 18 S. E. 297; Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[34] Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[35] Western Union Teleg. Co. v. Yopst, 118 Ind. 248, 2 Am. Elec. Cas. 553, 20 N. E. 222; Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[36] See Western Un. Teleg. Co. v. Yopst, 118 Ind. 248, 2 Am. Elec. Cas. 553, 20 N. E. 222, and cases considered therein. See next section, herein.

[37] Western Un. Teleg. Co. v. Wilson, 93 Ala. 32, 3 Am. Elec. Cas. 586, 9 So. 414; Gulf, Col. & S. F. R. Co. v. Levy, 59 Tex. 542, 1 Am. Elec. Cas. 543, 46 Am. Rep. 269.

arrive on a certain train, is a message of necessity, especially where the operator is informed of the facts and the importance of the message. Although in such cases, the reasonable necessity may appear from the contents of the message, or the necessity, and notice thereof to the company, may be shown by extrinsic facts.[38] Again, a telegram stating that a named person is "Bad, sick, recovery doubtful," indicates a valid necessity for Sunday transmission, as well also as its importance, even though it does not show, on its face, the relationship between the parties.[39] A message from a husband to his wife, stating when he will return, and sent with intent to relieve her probable anxiety, because of his being unexpectedly detained, is a message of necessity, or at least of charity.[40] Again, the plaintiff delivered to a railway company operating a telegraph a message on Sunday, announcing to his father the death of his wife and child, requesting said father to come to him, and the company negligently failed to deliver the message until next day, too late for the funeral, and it was determined that actual and exemplary damages could be recovered.[41]

[38] Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775.

[39] Western Un. Teleg. Co. v. Eskridge, 7 Ind. App. 208, 33 N. E. 238.

[40] Burnett v. Western Un. Teleg. Co., 39 Mo. App. 599, 3 Am. Elec. Cas. 687.

[41] Gulf, Col. & S. F. Ry. Co. v. Levy, 59 Tex. 542, 46 Am. Rep. 269, 1 Am. Elec. Cas. 543. The following are miscellaneous authorities as to the Sunday laws: Where the addressee lived at his brother's house, and the message arrived on Sunday, and the company failed to deliver it because of an instruction by the brother not to deliver messages on that day, the company was held not excused, since the sender had no knowledge of such instruction. Brashears v. Western Un. Teleg. Co., 45 Mo. App. 433, 3 Am. Elec. Cas. 701. The words "or other person whatsoever" in section 1 of the Lord's Day Act (Rev. Stat. Ont., c. 203), are to be construed as referring to persons ejusdem generis as the persons named "merchant tradesmen," etc., and an incorporated company or person operating street cars on Sunday is not within the prohibition of the enactment. Semble, also that if the enactment applied, they were within the exception as to "conveying travelers." Attorney-General v. Hamilton St. Ry. Co., 27 Ont. Rep. 49, 24 Ont. App. Rep. 170. No law in this State affecting travel, business or labor on Sunday, or the operation on Sunday of any railroad or railway shall apply to any railroad company or steam railway company so as to prohibit or limit the operation on Sunday of electric

§ 877a. **Sunday messages — Office hours.**— Where a railroad company does a telegraph business for hire and, within the office hours on Sunday, a message is delivered to the station clerk in charge of the office, and the operator does not reach the office until nearly two hours after the closing hours and the message is thereafter delayed nearly an hour when it could have been transmitted in one minute there is actionable negligence.[42] In determining, however, the question of negligence in transmitting Sunday messages it is proper to consider the reasonable time spent in preparing the message for delivery after the office has opened.[43] The factor of locality is also important upon the question of negligent delay of Sunday messages as in case of country districts, and the termini being located in different States.[44]

cars. Conn. Pub. Laws of 1899, c. 63, p. 1018; Genl. Stat. Conn. Rev. 1902, p. 960, § 3875. Contracts were not invalid at the common law because made on Sunday. Hayden v. Mitchell, 103 Ga. 431, 30 S. E. 287; Steere v. Trebilcock, 108 Mich. 464, 66 N. W. 342, 2 Det. L. News, 889; Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108. As to Sunday law generally, see Shipley v. State, 61 Ark. 216, 32 S. W. 489, affd., on rehearing, 61 Ark. 221, 33 S. W. 107; Horton v. Norwalk Tramway Co., 66 Conn. 272, 33 Atl. 914, 3 Am. & Eng. R. Cas. (N. S.) 299; First M. E. Church, etc. v. Donnell, 110 Iowa, 5, 81 N. W. 171; Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87; Eaton v. Atlas A. I. Co., 89 Me. 570, 36 Atl. 1048; Goddard v. Morrissey, 172 Mass. 596, 53 N. E. 207; Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020, and 168 Mass. 519, 47 N. E. 420; Jordan v. New York, N. H. & H. R. Co., 165 Mass. 346, 43 N. E. 111, 32 L. R. A. 101; Commonwealth v. Bob, 17 Penn. Co. Ct. Rep. 350; Hennington v. Georgia, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; Hill v. Hite (U. S. C. C. A., 8th Cir.), 56 U. S. App. 403, 22 U. S. C. C. A. 549, 85 Fed. 268, and 79 Fed. 826; Attorney-General v. Hamilton St. R. Co., 24 Ont. App. 170, and 27 Ont. Rep. 49.

The Massachusetts statute as to the observance of the Lord's day and imposing a penalty for doing certain business on that day does not "prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power, * * * nor the use of the telegraph or the telephone," etc. Suppl. Rev. Laws, Mass., 1902–1906, pp. 419, 420. R. L. c. 98.

[42] Arkansas & L. Ry. Co. v. Lee (Ark., 1906), 96 S. W. 148.

[43] Western Union Teleg. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

[44] Ayers v. Western Union Teleg. Co., 72 N. Y. Supp. 634, 65 App. Div. 149. See Western Union Teleg. Co. v. McConnico, 27 Tex. Civ. App. 610, 66 S. W. 592.

TITLE VI.

CONTRACTS — TELEGRAPHIC AGENCY.

CHAPTER XXXIII.

CONTRACTS — TELEGRAPHIC AGENCY.

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§ 878. **Contracts by telegram — Generally.**— Contracts may be made through the medium of a telegraph, as well as through the mail, and such contracts are as binding and obligatory as if made in the ordinary way.[1] The entire transaction may be by telegraphic communication entirely or partly by letters and partly by telegram, or the telegraphic communication may be but one of several factors necessary to constitute a complete contract.[2]

[1] See Taylor v. Steamboat Robert Campbell, 20 Mo. 254, Allen's Teleg. Cas. 24, per Scott, J.; Trevor v. Wood, 36 N. Y. 307, Allen's Teleg. Cas. 330, 336, per Scrugham, J.

[2] See generally the cases throughout this chapter and examine note

§ 879. **Contracts by telephone.**— It is held in one of the Common Pleas Courts in Pennsylvania that a valid agreement cannot be made through a telephone, because of an uncertainty of the means of communication, unless there is some way of recognizing the person with whom the conversation is alleged to be had, or some proof that he was at the other end of the telephone at the time.[3]

§ 880. **Acceptance of proposal must bind both acceptor and proposer.**— An acceptance by telegram must be one that binds both the proposer and acceptor.[4]

§ 881. **Acceptance completes contract — Time from which acceptance by telegram dates — Revocation of proposal.**— Where the telegraph is adopted as the medium of communication between parties contemplating a contract, an acceptance of a proposal completes the contract, if sent within the time agreed upon, or if no time is specified or indicated, then if sent within a reasonably prompt time, having in view all the circumstances. The time of telegraphing is the time from which the contract becomes closed and binding; or to be more exact, the time when the proper telegram is deposited in the telegraph office, or delivered to the telegraph company or its authorized agent for transmission, is the time from which the completion of the contract dates. This is by analogy to the acceptance of a proposal through the mail. This rule assumes, of course, that the offer has not been withdrawn at the time of such acceptance. Where the proper telegram accepting a proposal is sent as above, a subsequent revocation of the proposition will not be effectual as against the contract or the accepting party, even though such revocation be telegraphed by the proposer before the message of acceptance is received by him.[5] And this rule

in 93 Am. Dec. 514–517. See also §§ 883b, 883c, herein.

[3] Crozier v. Eyre, 1 Lancaster L. Rev. (Com. Pl., Del. Co., Penn., 1884) 102. As to evidence of conversations by telephone, see chap. XXXVII, herein.

[4] Strobridge Lith. Co. v. Randall, 43 U. S. App. 160, 73 Fed. 619.

[5] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844; Trevor v. Wood, 36 N. Y. 307, 3 Abb. (N. Y. [N. S.]) 355, 1 Trans. App. 248, revg. 41 Barb. (N. Y.) 255, 26 How. (N. Y.) 451, both revg. and revd. cases reported in Allen's Teleg. Cas. 330; Perry v. Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632;

as to acceptance applies, even though the telegram so accepting does not reach the proposer.[6] An offer to sell is pending until answered or withdrawn but its withdrawal before acceptance constitutes matter of defense. And the delivery to the telegraph company of a telegram of acceptance before notice of the withdrawal of the offer is a sufficient acceptance to constitute a binding contract.[7]

§ 882. **Same subject — To what extent rule is qualified.**— It is proper to add in this connection that a locus pœnitentiæ exists in cases of an acceptance by letter, so long as either party may withdraw, and that the mailing a letter of acceptance completes the contract, as the locus pœnitentiæ is ended when the acceptance has passed beyond the control of the party.[8]

§ 883. **Same subject — A Massachusetts case.**— An offer was sent by telegram, subject to "prompt reply." Twelve minutes after the offer was received, an answer was sent by telegram, accepting the proposal. It was not delivered for nearly an hour thereafter. After the telegram of acceptance was sent, but before it was received, there was a revocation of the offer, by telegram, but it was not delivered until after the receipt of the acceptance. It was held that the contract was binding.[9]

Phœnix Ins. Co. v. Schultz, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 337.

[6] So held in Trevor v. Wood, 36 N. Y. 307, 3 Abb. (N. Y. [N. S.]) 355, 1 Trans. App. 248, revg. 41 Barb. (N. Y.) 255, 26 How. (N. Y.) 451, both revg. and revd. cases reported in Allen's Teleg. Cas. 330. For same rule as to letters, see Commercial Ins. Co. v. Hallock, 27 N. J. L. 645; Vassar v. Camp, 11 N. Y. 441, affg. 14 Barb. (N. Y.) 341; Howard v. Daly, 61 N. Y. 362, 369.

[7] McClesky & Whitman v. Howell Cotton Co. (Ala. 1906), 42 So. 67.

[8] See 1 Joyce on Insurance (ed. 1897), § 62, citing Abbott v. Shepard, 48 N. H. 14; Hallock v. Insurance Co., 26 N. J. L. 268, 27 N. J. L. 645; Ferrier v. Storer, 63 Iowa, 484, 19 N. W. 288, and numerous insurances and other cases. See also Northampton M. L. S. I. Co. v. Tuttle, 40 N. J. L. 476; Mactier v. Frith, 6 Wend. (N. Y.) 103; Patrick v. Bowman, 149 U. S. 411, 37 L. Ed. 790; Henthorn v. Fraser (1892), 2 Ch. 27; contra, Underwood v. Maguire, Rapport's Judic. Quebec, 6 B. R. 237. If there is a condition in the letter of acceptance this does not bind until letter is received. Harris v. Scott, 67 N. H. 437, 32 Atl. 770.

[9] Brauer v. Shaw, 168 Mass. 198, 46 N. E. 617.

§ 883a. **Whether it must be shown that offer would have been accepted — Proximate cause — Damages.**— Where a message was sent asking the sendee whether it would furnish certain lumber and at what price and the reply telegram stated that the lumber could be furnished at a certain price but the telegram was either never transmitted by the telegraph company or never delivered it was held that compensatory damages could not be recovered for failure to send or deliver a mere proposal to sell, as such damages are contingent upon acceptance.[10] This decision is, however, criticised in a recent South Carolina case where the court says: "The fallacy in the reasoning of the court in that case is in supposing that the telegraph company would not be liable unless it was shown that the addressee would have accepted the offer" and the same court holds that if the failure to deliver a telegram offering meal at a certain price was the direct and proximate cause of delay on the part of the addressee in postponing the purchase of meal whereby he was compelled thereafter when he went into market to pay an advanced price, damages are recoverable even though it does not apear that he would have accepted the offer made.[11]

§ 883b. **Proposition by letter not indicating mode of acceptance — Time from which acceptance by telegram dates — Jury.**— If a proposition is made by letter the party making the proposal impliedly adopts the same agency as a medium of acceptance where he suggests no other mode, and even though the letter containing the offer requests immediate action, still if it does not indicate the mode of acceptance and the answer accepting the offer is made by telegram no binding contract exists until the message or notice thereof is received, and it is held that where such a letter and telegram relate to the exchange of real estate it is a question for the jury whether the receipt of the telegram twenty-three or twenty-four hours after the letter had been received constituted an acceptance of the offer, there being no

[10] Beatty Lumber Co. v. Western Union Teleg. Co., 52 W. Va. 410, 44 S. E. 309, cited in Cherokee Tanning Extract Co. v. Western Union Teleg. Co. (N. C. 1906), 55 S. E. 777.

[11] Lathan v. Western Union Teleg. Co. (S. C. 1906), 55 S. E. 134. See also Western Union Teleg. Co. v. Love-Banks Co., 73 Ark. 205, 83 S. W. 949.

evidence of the time a letter properly mailed might have been received.[12]

§ 883c. **Telegram in response to letter — Notice imparted that time the essence of contract.**— Where a telegram was in response to a letter, which stated that the writer could "come now if you have not disposed of the cattle. If I can get them wire me at my expense and I will start or send a man at once" and the telegram after stating that the offer on the cattle was accepted also contained the expression "come on quick." Such message in connection with the letter was held to show that time was regarded by the parties, to some extent at least, the essence of the contract and that prompt acceptance was necessary to a completed sale, and where the telegram was delayed through the negligence of the telegraph company and a loss occurred, the fact that the company may not have had any actual notice or knowledge of the purpose of the expression "come on quick" was held not to relieve it from liability, for the reason that the words were sufficient, at least, to excite their inquiry, as to what was the purpose and intent of the expression and if they desired further information it could have been obtained from the sender.[13]

§ 484. **Acceptance must be unconditional — Aggregatio mentium.**— An acceptance of a proposal must be unconditional, unqualified and absolute. It must also comply in every particular with the offer, in order to effect a binding contract, for both the offer and acceptance must constitute an aggregatio mentium, both sides must agree to the same set of propositions and nothing material must be left open for future determination.[14] So, where an offer to sell stock at a specified price is conditionally accepted by telegram, and this is immediately followed by a letter stating that the sender of the latter telegram would await the result of certain matters before con-

[12] Lucas v. Western Union Teleg. Co. (Iowa 1906), 109 N. W. 191.

[13] Western Union Teleg. Co. v. Snow, 31 Tex. Civ. App. 275, 72 S. W. 250.

[14] James v. Marion F. J. & B. Co., 69 Mo. App. 207; Phœnix Ins. Co. v. Schultz, 25 C. C. A. 453, 42 U. S. App. 483, 80 Fed. 337; Melick v. Kelley, 53 Neb. 509, 73 N. W. 945.

firming the offer, there is no contract, and the party who proposed to sell may dispose of the stock elsewhere.[15] The question whether or not there was an unconditional acceptance may, however, be one for the jury.[16]

§ 885. **Offer must be unqualified and definite.**— If an offer is made by telegram, it must be unqualified and definite, in order to make an acceptance thereof a binding contract. Thus an offer, by telegram, quoting the prices of glass jars, "if specifications favorable," is not an offer as to prices, the acceptance of which, by telegram, will consummate a contract of sale.[17]

§ 885a. **Where telegram one of inquiry without offer.**— If a message is simply one of inquiry without any offer and one which merely might have opened up a correspondence as to a contract had it been promptly delivered no recovery can be had by the addressee, as such a result is too remote.[18]

§ 886. **Acceptance need not recite all the terms and conditions of a proposal.**— Where a proposition is submitted, calling for an answer, based on such proposal, the acceptance need not embody or recite all the terms and conditions embraced in the proposal. The acceptance is to be read and construed in connection with the proposal to which it is a reply, and the whole together constitutes the contract, provided, of course, that it otherwise contains the essentials of a contract. An acceptance is conclusive only so far as the terms are expressed. The acceptance alone is neither made, received nor understood as containing the entire contract. This rule was applied to a case where a party offered to hire another's barge, to be used as a receiving or storing barge at a particular place, and the other party sent a telegram stating that the proposer might have

[15] Cameron v. Wright, 21 App. Div. 395, 47 N. Y. Supp. 571, affd. 173 N. Y. 618.

[16] Western Union Teleg. Co. v. Burns (Tex. Civ. App.), 70 S. W. 784.

[17] James v. Marion Fruit Jar & B. Co., 63 Mo. App. 207.

[18] Bennett v. Western Union Teleg. Co. (Iowa 1906), 106 N. W. 13. Examine Cherokee Tanning Extract Co. v. Western Union Teleg. Co. (N. C. 1906), 55 S. E. 777.

the barge at the price named, but did not refer to the use to which it was to be put, and it was, therefore, held that the barge could only be used as a receiving or storing barge.[19]

§ 886a. **Confirmation of oral contract by telegraphic correspondence.**— If telegraphic correspondence follows oral negotiations and purports to confirm a proposed agreement, but omits essential and important parts of the agreement, such correspondence does not constitute a valid written contract, which binds the parties thereto and upon which an action to recover damages for an alleged breach thereof can be maintained.[20]

§ 887. **Performance of condition by third party may be waived by acceptor.**— The acceptor may waive performance of a condition by a third party, which prevents the agreement from being complete.[21]

§ 888. **Telegrams of proposal and acceptance may be controlled by other conditions — Canadian decision.**— Although telegrams of proposal and acceptance may effect a binding contract, still they may be controlled in this respect by other facts or communications showing that the minds of the parties never met upon the exact or entire terms of the agreement. This is illustrated by the following case: The defendant living at St. Mary's, on the 24th of September, telegraphed to the plaintiff at Forest: "Can you ship three cars, Treadwell wheat, this month, $1.20. Reply." On the same day the plaintiff answered: "Will accept your offer, three cars, Treadwell, one dollar twenty." On the 25th defendant inclosed a shipping bill to plaintiff, asking him to ship the wheat as soon as possible. This bill was a printed form in use on the Grand Trunk railway, filled up for the three cars, addressing them to the Royal Canadian Bank, Montreal. On the next day, hearing that the railway company had been inserting the words, "at owner's risk of delay," in their shipping bills, the defendant

[19] Beach v. Raritan & Del. B. R. Co., 37 N. Y. 457, citing Renard v. Sampson, 12 N. Y. 566.

[20] Brauer v. Oceanic Steam Nav. Co., ltd., 178 N. Y. 339, 70 N. E. 863; see 79 N. Y. Supp. 299, 77 App. Div. 407.

[21] Strobridge Lithographing Co. v. Randall, 43 U. S. App. 160, 73 Fed. 619.

telegraphed to the plaintiff that he could not accept the wheat if the plaintiff allowed these words to be put in. The agent of the railway, however, insisted on inserting these words in the bill of lading, and the plaintiff sent the wheat forward, and drew upon the defendant with the bill of lading attached to the draft, which the defendant refused to accept, and the wheat was sold by the bank. It was held that the two telegrams of the 24th and the letter of the 25th did not form a binding contract; that the terms of the shipping note were to be considered as part of the bargain, and that the plaintiff could not, therefore, recover.[22]

§ 889. **When telegram constitutes a binding acceptance — Agent's authority — Action by foreign principals — Canadian decision.**— One of the plaintiffs, W., of New York, and his agent C., of Ingersoll, saw defendant at his cheese factory in Stratford, and talked of the price of cheese. W., in leaving, said any correspondence would be through C., from whom defendant would, probably, hear on plaintiff's behalf when the cheese was ready for sale. Subsequently, plaintiffs authorized C. to buy cheese from defendant, and on the 20th of August, at 4 P. M., C. telegraphed defendant: "Name lowest price for your cheese, stating number of boxes," which defendant received on the 21st. On the evening of the 21st, defendant telegraphed C.: "Will sell 250 cheeses at ten and one-half cents," which C. received at 9:25 A. M., on the 22d; and immediately answered by telegraph: "I will accept your offer; when will you box; answer," which was received at the Stratford office at 10 A. M., and by defendant on the same day. On the evening of the 21st, defendant had left a telegram to be sent to C. on receipt at the telegraph office of C.'s answer to defendant's telegram naming price. It read: "I have sold in Stratford; did not get your answer in time." This was sent on the 22d to C., on the receipt of C.'s telegram accepting, and C. answered at once that the plaintiffs would claim the cheese. The defendant, in his evidence, stated that he did not understand that C. was plaintiff's agent when they came to his factory. It was held that the telegram showed a complete con-

[22] Willing v. Currie, 36 Up. Can.Q. B. Rep. 46.

tract. A question was raised whether the words, " when will you box," after accepting defendant's offer, might not be considered as leaving the bargain open as to time; but it was inferred from the evidence, the case being tried without a jury, that the parties did not so regard it and that it was an inquiry collateral to the contract and not qualifying the acceptance. It was also held that the plaintiffs, though foreign principals, might sue upon the contract, there being evidence to show that C. was authorized by them to enter into it on their behalf, and that defendant dealt with him as plaintiff's agent.[23]

§ 890. **When contract not completed — Illustrations.**—We have seen under prior sections [24] what constitute the essentials of a valid agreement, and what are the requisites of a proposal and acceptance by telegram, where that mode is exclusively adopted by the parties, or where only part of the negotiations are carried on through the medium of the telegraph. The following cases are, therefore, for the most part, illustrative. If the telegram of acceptance is not forwarded until the day after receiving a letter of proposal, which stipulates for a wired acceptance on its receipt, there is no contract.[25] Nor is a telegraphic offer of sale, requiring that it be " instantly " answered, complied with by acceptance sent Monday, when the reply might have been telegraphed Saturday night.[26] If the telegraphic offer is qualified, a letter explaining the telegram will not make it sufficiently certain to bind the acceptor, who had telegraphed his reply before receiving the letter.[27] Again, where a broker telegraphs the owner of land that he is authorized to offer a certain amount for said land, and advising an early acceptance, it is not accepted by a letter from such owner, stating that he will be at his office the next morning and telephone the broker to come, when they will decide what to do.[28] If a party is telegraphed for to come to a certain place at the

[23] Webb v. Sharman, 34 Up. Can. Q. B. Rep. 410.

[24] §§ 884–886.

[25] Eagle Mill Co. v. Caven, 76 Mo. App. 458, 1 Mo. App. 537.

[26] James v. Marion F. J. & B. Co., 69 Mo. App. 207.

[27] James v. Marion F. J. & B. Co., 69 Mo. App. 207.

[28] Montgomery v. Knickerbacker, 27 N. Y. App. Div. 117, 50 N. Y. Supp. 128.

sender's expense and the purpose for which he is wanted is explained in a letter received by the addressee prior to the telegram, such addressee cannot recover his expenses for travel if he refuses, on arrival at the place designated, to perform the services mentioned in the letter.[29] Where a telegram of acceptance specifies "particulars by letter," the letter constitutes a part of the acceptance.[30] So, also, where a letter referred to in a telegram was to furnish the basis for negotiation and the parties did negotiate on the basis of its contents.[31] Nor is the contract complete where the message of acceptance as delivered to the addressee differs from that offered by the acceptor for transmission, unless the telegraph company acts as the sender's agent.[32] And if through mistake of the telegraph company a difference and lower price for goods is offered which is accepted without knowledge of the error no contract is made which can be enforced against the sender.[33] If an essential element of the contract is the presence of the parties to perform part of the consideration, then the contract cannot be completed by telegram. This rule was applied to a case where a telegram asked if a party would turn over certain notes, and the reply was in the affirmative, but added, "if so, will release the parties to suit against Brooks & Dickson and they will get you released from all other indebtedness of the firm."[34]

§ 891. **When contract not completed — English cases — Illustrations.**— The appellants telegraphed, "Will you sell B. H. P.? Telegraph lowest cash price," and respondent telegraphed in reply, "Lowest price for B. H. P., £900," and then the appel-

[29] Ballard v. Travelers' Ins. Co., 119 N. C. 182, 25 S. E. 867.

[30] Joseph v. Richardson, 2 Super. Ct. (Penn.) 208, 38 Week. N. of Cas. 487, 27 Pitts. L. Jour. (N. S.) 138.

[31] Olds v. East Tennessee, S. & M. Co. (Tenn. Ch. App., affd. by Sup. Ct.), 48 S. W. 333.

[32] Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 2 Am. Elec. Cas. 760, 12 S. W. 783. Same principle, Phœnix Ins. Co. v. Schultz, 42 U. S. App. 483, 25 C. C. A. 453, 80 Fed. 337. See §§ 903–907, herein.

[33] Postal Teleg. Cable Co. v. Schaefer, 23 Ky. L. Rep. 344, 62 S. W. 1119. See Germain Fruit Co. v. Western Union Teleg. Co., 137 Cal. 598, 70 Pac. 598, 59 L. R. A. 575, where the acceptor acted in bad faith in obtaining the goods at a lower price.

[34] Strobridge Lithographing Co. v. Randall, 43 U. S. App. 160, 73 Fed. 619.

lant telegraphed, "We agree to buy B. H. P. for £900, asked by you. Please send us your title deed, in order that we may get early possession," but received no reply. It was held that there was no contract, as the final telegram was not the acceptance of an offer to sell, for none had been made. It was itself an offer to buy, the acceptance of which must be expressed and could not be implied.[35] Again, it was held that no contract was completed where a despatch was sent, "Send on immediately fifteen twenty tons salt, invoice in my name, cash terms," and the telegram, as delivered, read, "Send on rail immediately, fifteen twenty tons salt, Morice, in morning, name cash terms." In this case the salt was forwarded to "Morice, Peterhead," that being the place from which the telegram was sent, and the invoices were forwarded to the same address, but thirteen days thereafter were returned through the dead letter office, and thereafter the sender of the telegram refused to receive delivery of the salt.[36] In another case it was held that there was no contract for more than three rifles where plaintiff telegraphed for that number, but, by error, the telegram as delivered read "the" rifles, and fifty were sent in accordance with a previous communication.[37]

§ 892. **When contract completed — Illustrations.**— Plaintiff, through his agents at Seaforth, early in September, offered dedefendants ninety-four cents a bushel for his wheat f. o. b. at Clinton, where defendant lived, a station on the same line of railway as Seaforth. This was not then accepted, and on the 9th of September, defendant offered to take that price, but plaintiff did not then want the wheat. On the 11th of September plaintiff then telegraphed the defendant, "Will take your wheat at 94 cents f. o. b. Answer." On the same day defendant answered, "Will accept your offer 94. Send directions about shipping." It was held that the words, "Send directions about shipping," did not qualify the previous unconditional accept-

[35] Harvey v. Facey, Law Rep. App. Cas. (1893) 552. See Kinghorne v. The Montreal Teleg. Co., 18 Up. Can. Q. B. 60, Allen's Teleg. Cas. 98.

[36] Verdin v. Robertson, 10 Ct. Sess. Cas. (3d series) 35, Allen's Teleg. Cas. 695.

[37] Henkel v. Pape, L. R., 6 Exch. 7. Allen's Teleg. Cas. 567, 569. See §§ 903, 904, herein.

ance, and that there was a complete contract. It was also decided that under such a contract it was the duty of the buyer to provide the cars; that defendant in this case, not having done so within a reasonable time, could not recover for the nondelivery of the wheat; and that there was no evidence of a usage or custom to the contrary, even if such usage could be received, to vary the contract.[38] Where one dealer solicits another to make an offer to buy certain goods and the latter wires such an offer giving terms in full, and the former sends an answer in the form of a statement that he will sell the goods mentioned, repeating the very terms of the offer a contract of purchase and sale is thereby effected; and if the acceptance of an offer is otherwise sufficient it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply in any event.[39] Again, a contract for the purchase of corn arises from an offer by telegram to sell at a specified price "prompt shipment;" a reply that the price was too much and that the proposed purchaser was paying a certain lower price; a telegram accepting the offer "prompt shipment," and a telegram from the purchaser directing shipment to be made "at once."[40]

§ 893. **Telegram of acceptance delayed — Effect on contract — Liability of telegraph company — Decisions.**— Where there was a proposition to sell several thousand bales of cotton on specified terms, and a reply cablegram was sent, "We offer firm for 1,000 bales," and a telegram was delivered for transmission, and lost, which read, "Accept the offer, how much," it was held, if the contract had been consummated, it would have been for the sale of 1,000 bales only, and in this respect, that there was no question of ambiguity to be submitted to the jury.[41] Again, in case the nondelivery by the company of a telegram, offering employment, does not cause a failure to obtain the employment, as where, by reason of another existing contract, the offer could not have been consistently accepted, a

[38] Marshall v. Jamieson, 42 Up. Can. Q. B. Rep. 115.

[39] Bennett v. Cummings (Kan. 1906), 85 Pac. 755.

[40] Chicago Sugar Ref. Co. v. Armington, 67 Ill. App. 538.

[41] Western Un. Teleg. Co. v. Way, 80 Ala. 542, 4 So. 644, 2 Am. Elec. Cas. 455.

nonsuit is properly granted in an action for the company's negligence.[42] But no recovery can be had for the loss of a sale, because of the telegraph company's negligent delay in delivering a telegram of confirmation of the sale, where another despatch is thereafter received by the sender, asking if the proposal had been accepted and requesting an immediate answer, which is not replied to for an hour.[43]

§ 893a. **Same subject — Decisions continued.**— Where negotiations were entered into for the sale of personal property offered at a certain price but it was not then accepted by the party negotiating for purchase and the negotiaions were left open and thereafter an offer was made by telegram to take the property at a lower price, but the message was through the negligence of the company transmitted so as to constitute an acceptance of the original price it was held that a recovery could be had for such damages as would naturally flow from the company's negligence.[44] Again, if parties engage in telegraphic correspondence and an offer to buy at a certain price is refused but a counter offer at another price is made, and conditioned upon immediated acceptance which is accepted but the telegram is never delivered and the price of the commodity advances, the party losing is entitled to recover, without buying at the advanced price, the value of the lost bargain which would be the difference between what such party must have paid in the open market at the advanced price in the exercise of reasonable diligence and the price at which the offer was made and accepted.[45] So the company is liable in special damages where it commits an error in transmitting a telegram giving the price of goods or merchandise whereby a loss is sustained in making sales.[46] The question, however, whether certain goods were accepted in reliance upon a telegram as to their quality may be one for the jury.[47] If the telegram imparts notice or suggests

[42] Freeman v. Western Un. Teleg. Co., 93 Ga. 230, 18 S. E. 647.

[43] Western Un. Teleg. Co. v. Davis (Tex. Ct. App.), 35 S. W. 189.

[44] McCarty v. Western Union Teleg. Co. (Mo. App. 1906), 91 S. W. 976.

[45] Western Union Teleg. Co. v. T. H. Thompson Milling Co. (Tex. Civ. App. 1905), 91 S. W. 307.

[46] Thorp v. Western Union Teleg. Co. (Kan. App. 1906), 94 S. W. 554.

[47] Ashford v. Schoop, 81 Mo. App. 539.

that it is a commercial transaction relating to the acceptance of an offer notice of the necessity of delivery need not have been given the company's agent in order to warrant a recovery, where the company is negligent in delivery.[48]

§ 893b. **Remedy over against telegraph company.**— It is held in Maine that the acceptance, as delivered, binds the acceptor, who has his remedy against the telegraph company for the injury or loss sustained by an error in transmitting the message.[49] And where through the negligence of a telegraph company on stating a lower price, which is accepted, merchandise is delivered by the party making the offer and he had no knowledge at the time of the mistake he can recover his loss from the company,[50] unless the party accepting acted in such bad faith, in closing at the lower price, as to invalidate the contract.[51]

§ 894. **Contract of insurance by telegram.**— The questions of what are the essentials of a contract of insurance, and of the completion of such a contract by negotiations through the mail [52] are not within the scope of this work. It is proper to state, however, that such contracts may, as well as other agreements, be consummated through the medium of the telegraph. But such a contract is not made by telegram "With specific form can write ten thousand at ninety cents if it will help you," and a reply letter "Trust that you will do so as we would like to get it as low as possible," where such letter also incloses a form which is not of the kind indicated by previous letters and negotiations.[53] The principle underlying this case is that the minds of the parties must meet upon all the essentials of the contract, and that the acceptance must comply in terms with the offer.

[48] Western Union Teleg. Co. v. Turner, 94 Tex. 304, 60 S. W. 432.

[49] Ayer v. Western Un. Teleg. Co., 79 Me. 493, 10 Atl. 495. See §§ 903, 907, herein.

[50] Fisher v. Western Union Teleg. Co., 27 Ky. L. Rep. 340, 84 S. W. 1179.

[51] Germain Fruit Co. v. Western Union Teleg. Co., 137 Cal. 598, 59 L. R. A. 575, 70 Pac. 658.

[52] See 1 Joyce on Insurance (ed. 1897), § 43 et seq. and § 62 et seq.

[53] Phœnix Ins. Co. v. Schultz, 42 U. S. App. 483, 25 C. C. A. 453, 80 Fed. 337, revg. (U. S. C. C., W. D. Va.) 77 Fed. 375.

§ 895. **Contract of insurance — Concealment — Duty of insured's agent to telegraph information of loss.**— In cases of marine disaster it frequently becomes the duty of the insured's agent, who consigns goods to his principal, to telegraph to him information of a loss or disaster, said agent having knowledge thereof, and the agent's failure, in such case, to so telegraph, when it could have been done before insurance is effected by the principal, operates as a concealment by the latter, which vitiates the insurance contract.[54]

§ 896. **Contract of insurance of submarine or telegraphic cable.**— A telegraph cable, submarine or otherwise, may be insured, but the effect of such insurance must depend upon the terms of the contract. Such insurance may cover a loss to a submarine cable, arising from a peril of the sea during an attempt to lay such cable, and even though by the terms of the contract the insurers may be liable for a loss caused by mechanical action of the sea, yet they may not be liable for a loss caused by the chemical action of the sea water upon the cable, owing to imperfect insulation of the copper wire, which is an inherent defect. Again, the successful adventure of laying such a cable may be insured, even though the cable itself is not insured.[55]

§ 897. **Contract of employment by telegraph.**— A contract of employment may be completed by a telegraphic proposal and acceptance, and where the particulars are agreed upon, a statement in a letter referring to the telegram, that it is to be considered a contract until the employer's arrival at the place of performance, when a proper contract "to suit" will be drawn up, does not make it the less a valid agreement where the intent is merely to draw up a more formal and detailed statement, and not to reject or alter the terms of the agreement.[56] A contract by telegraph for employment may also be

[54] Proudfoot v. Montifiere, L. R., 2 Q. B. 511, 1 Joyce on Insurance (ed. 1897), § 650.

[55] Paterson v. Harris, 1 Best & S. 336, 30 L. R. Q. B. 354, 2 Best & S. 814; Wilson v. Jones, 1 L. R. Exch. 192, 36 L. J. Exch. 78 4 Hurl. & C. 221, 3 Joyce on Insurance (ed. 1897), § 2819.

[56] Nash v. Kreling (Cal.), 56 Pac. 262.

completed, even though an immaterial change is to be made in the same, where such change is really a matter of indifference to the party seeking employment.[57]

§ 898. **Contract for lease by telegraph.**— An offer by letter to lease property, and requesting an answer by telegraph "at once," may be accepted by telegram, and takes effect as a valid demise, so that the rent commences from such acceptance, and not from the time of entry.[58] And such a contract for lease of lands, made in writing by telegrams and letters, is complete and binding, even though a formal written lease is in contemplation by the parties.[59]

§ 899. **Contract by telegraph — Guaranty or sale — Renewal of note — Decisions.**— If goods are delivered to a party by reason of a telegram from another, stating that the latter will be responsible therefor, such guaranty binds and constitutes a case of bargain and sale between the party delivering the goods and the sender of the guaranty; and this is true even though the telegram was sent by an agent, and expressed a stronger guaranty than the principal intended when he authorized the agent to act for him.[60] If the maker of a note telegraphs the payee for a renewal thereof, a reply telegram which states: "Payee would prefer money if you can raise it," amounts to an offer to renew if the maker cannot conveniently raise the money.[61]

§ 900. **Contract by telegraph — Agent's authority — Undisclosed principal.**— An agent with authority to settle and adjust a claim may be authorized by telegram to accept a note for a

[57] Western Un. Teleg. Co. v. Valentine, 18 Ill. App. 576, 1 Am. Elec. Cas. 829, 833. See § 901, herein.

[58] Prosser v. Henderson, 20 Up. Can. Q. B. 438, Allen's Teleg. Cas. 170.

[59] Post v. Davis, 7 Kan. App. 217, 52 Pac. 903, citing Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 63 N. Y. St. R. 76, 39 N. E. 75, 29 L. R. A. 431, which reverses 70 Hun (N. Y.), 597, 53 N. Y. St. R. 645, 25 N. Y. Supp. 257. See § 901, herein.

[60] Dunning v. Roberts, 35 Barb. (N. Y.) 463, Allen's Teleg. Cas. 188. See College Park Elec. Belt Line v. Ide, 15 Tex. Civ. App. 273, 40 S. W. 64. See § 901, herein.

[61] Shobe v. Luff, 66 Ill. App. 414.

specified amount in full settlement, where, in answer to his telegram stating that the debtor offers a settlement on such a note basis, he receives a telegram telling him to accept if certain conditions exist, which do in fact exist.[62] So an agent may be authorized by telegram to sell at specified prices, and giving an order to such agent constitutes an acceptance of the offer.[63] But in case of a telegraphic proposal and acceptance the contract will not be held that of an undisclosed principal, where the circumstances clearly show that the telegram making the offer meant that said offer was based on advices, and was referable in terms to a telegram concerning a banker's credit to be furnished.[64]

§ 901. **Contract by telegram — Statute of Frauds.** — Telegrams and letters may be taken in conjunction to constitute such a contract in writing as will satisfy the Statute of Frauds,[65] as where a telegram accepts an offer of sale of land, and this is followed by a letter directing a deed to be made to the wife, and she enters into possession.[66] But a telegram to an agent accepting an offer for real estate is not binding on the principal under the Statute of Frauds, where said telegram contains the proviso that the notes are properly secured, although

[62] Hasbrouck v. Western. Un. Teleg. Co., 107 Iowa, 160, 77 N. W. 1034.

[63] Keller v. Meyer, 74 Mo. App. 318, 1 Mo. App. Rep. 213.

[64] Crossett v. Carleton, 23 N. Y. App. Div. 366, 48 N. Y. Supp. 309. Case cited in Brauer v. Oceanic Steam Nav. Co., 79 N. Y. Supp. 299, 302, 77 App. Div. 407, 412 to the point that it is the rule of law that a stipulation to reduce a valid contract to some other form does not affect its validity, and if the contract is in any form the stipulation may not be used by either of the parties for the purpose of imposing upon the other different obligations or of evading the performance of any of the provisions of the contract, and that this rule applies where, by means of letters and telegrams exchanged between parties, a definite proposition containing all the requirements of a completed contract, is made by one and accepted by the other with the understanding that the agreement will be expressed in a formal writing; as in cases where the whole contract, with all its material terms, could be spelled out from telegrams, etc.

[65] Godwin v. Francis, L. R., 5 C. P. 295, 22 Law Times (N. S.), 338, Allen's Teleg. Cas. 420, 427, per Willes, J., and Brett, J.; McBlain v. Cross, 25 Law Times (N. S.), 804, Allen's Teleg. Cas. 691.

[66] Underwood v. Stack, 15 Wash. 497, 46 Pac. 1031.

letters and telegrams may satisfy such statute where it requires written evidence of an agreement of the vendor of real estate, and of the authority of an attorney making such agreement in the vendor's name.[67] Again, telegraphic despatches are insufficient to constitute a memorandum or writing within the Statute of Frauds, where they only show at most the terms of payment in part, and a direction to draw up a contract accordingly, but do not otherwise describe, mention or refer to the subject-matter of the contract, especially so where the contract so referred to, and subsequently executed, is invalid as a violation of the Sunday law.[68] But, where a telegram relating to employment read: "Will you accept on two years guaranty at $1,400?" and this was accepted, and there was a reply: "Will accept you Jan. 10th. Bring all the pointers possible." This was held a valid contract in writing under the Statute of Frauds.[69]

§ 902. **Statute of Frauds — Part performance — Written contract between telegraph and railroad company.**— Part performance will take a contract of the Statute of Frauds; as where a telegraph company enters into a written contract with a railroad company for the building and operating of a telegraph line along the railway, and said contract is signed by the former company, and a copy thereof sent to the latter, which accepted it by letter of its agent, but did not sign it. The telegraph company also made large expenditures under said contract, and for more than a year both parties complied with its provisions. Such a contract is also sufficiently signed within the statute.[70]

§ 903. **Whether operator is agent of sender.**— Where a telegraph operator is the agent of the sender of a despatch is said in a Georgia case to be a debatable question in the courts, and that under the English decisions he is not such agent, but in

[67] Kleinhaus v. Jones (U. S. C. C. A., 6th Cir.), 37 U. S. App. 185, 15 C. C. A. 644, 68 Fed. 742.

[68] Hazard v. Day, 14 Allen (Mass.), 487, Allen's Teleg. Cas. 319.

[69] Little v. Dougherty, 11 Colo. 103.

[70] Western Un. Teleg. Co. v. Chicago & P. R. Co., 86 Ill. 246, 29 Am. Rep. 28.

the American courts he is generally so held. "We agree with the American doctrine. * * * The English authorities seem to rest on the connection of the telegraphic lines there with the post-office, and to go on the principle that the Government is not responsible for the negligence of a clerk. * * * In this country the company is a private corporation, acting as bailee or agent or carrier, to transmit offers to sell and answers buy." [71] In one of the cases cited by the court in the above decision, the question of agency rested simply upon the ground that to admit the agency of the telegraph clerk would be of a most serious character to the merchantile class, and therefore an inadmissible proposition. "To hold that a sender communicating through a telegraph clerk," said Lord Neaves, "is equally bound as if he had sent the message by a clerk of his own, is a proposition to which I cannot assent." A general proposition applicable as well in this country as in England.[72]

§ 904. **Whether operator is agent of sender continued.**— The doctrine of nonagency of the telegraph company is asserted, and the English doctrine followed, in a Tennessee case in 1899,[73]

[71] Western Un. Teleg. Co. v. Shotter, 71 Ga. 760, 1 Am. Elec. Cas. 557, 560, per Jackson, C. J. Case related to sale of merchandise. See § 904 for criticism of this case.

[72] Verdin v. Robertson, 10 Ct. Sess. Cas. (Scot., 1871 [3d series]) 35. It is true that in the findings in the interlocutor of the sheriff the point was evidently made (as appears from the report in Allen's Teleg. Cas. 697, 699, note) that the Postmaster-General had under 32 and 33 Vict., c. 73, the exclusive privilege of transmitting telegrams, and the sender of a message had no choice but to send through him, and, therefore, the rule that a person is in general responsible for his messenger's fault did not apply. But according to Henkel v. Pape, L. R., 6 Exch. 7, if the post-office authorities are instructed to send a certain message, but that message is never received, and one not authorized is sent by mistake, then there is no contract, as the sender never authorized the erroneous message to be sent; therefore, the sender is not responsible. This same reasoning would likewise apply equally in America. "It is well settled that although he (the Postmaster-General) and his subordinates are each liable for their own personal negligence, he is not liable for the neglect or default of the officers employed in the department." Findings in said interlocutor reported in Allen's Teleg. Cas. 699.

[73] Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 4 L. R. A. 660, 25 Am. & Eng. Corp. Cas. 542, 2 Am. Elec. Cas. 756, 11 S. W. 783. The court cites and considers the following cases:

and in Mississippi the company is not the sender's agent so as to enable the addressee to hold him liable in case the message is altered in transmission. The Tennessee case last noted is considered and approved, the theory being that the minds of the parties in case of an altered message have never met, and that neither can be bound to the other unless the telegraph company

Henkel v. Pape, L. R., 6 Exch. 7; Verdin v. Robertson, 10 Ct. Sess. Cas. (3d series) 35, both holding nonagency so as to bind the sender; Wilson v. Minn. & N. W. R. Co., 31 Minn. 481, where the question of agency was not involved; Rose v. U. S. Teleg. Co., 3 Abb. Pr. (N. Y. [N. S.]) 408, that employer of telegraph company is responsible on altered message, but case does not necessarily determine the question of agency; Dunning v. Roberts, 35 Barb. (N. Y.) 463, as of little weight, the sender of the message, in the absence of the operator, telegraphing it himself; Saveland v. Green, 40 Wis. 431, no question of mistake, but only whether message received or sent was the original, so as to make it competent evidence; Durkee v. Vermont Cent. R. Co., 29 Vt. 127, no question here of mistake, or of sender being bound, but merely one of which message was the original; New York & Wash. P. T. Co. v. Drybnrg, 35 Penn. St. 298, here the receiver of an altered message was permitted to recover against the telegraph company as for a tort. "If the telegraph company is the agent of the party who sent the telegram, then we are unable to see how the receiver actually suffered injury in this case, because if the sender of the telegram was bound to make good to the receiver the contract as reported in the altered message according to its terms, then the party addressed could have recovered of the sender the value of the 200 bouquets called for in the altered message, instead of two bouquets. What is said in this case as to agency of the company so as to bind the sender is pure dictum;" Hawley v. Whipple, 48 N. H. 487, said to be mere dictum; "So of Barons v. Brown, 25 Kan. 410; Matteson v. Noyes, 25 Ill. 591; Chicago & St. L. R. Co. v. Mahoney, 82 Ill. 73; Williams v. Brickell, 37 Miss 682; Chicago & I. R. Co. v. Russell, 91 Ill. 298; State v. Hopkins, 50 Vt. 316, they relate alone to the question of secondary evidence, so far as they touch directly or indirectly upon the matter now under consideration;" Morgan v. People, 59 Ill. 58, there was here no mistake in the telegram, and one delivered was held the original; Smith v. Easton, 54 Md. 138, message written was original, and that received was not evidence of liability where the other not accounted for; this case seems adverse to company's agency, see third note following this one. Examine Whilden v. Merchants & Planters' Nat. Bank, 64 Ala. 1; Anhauser-Busch Brew. Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, this case holds that when sender has taken the initiative the message delivered is the original.

is the agent of the sendee, and this "is repudiated on principle and authority.[74] In this case the court, referring to the Georgia case, and quoting from the Tennessee case,[75] says: The former is the only decision "'which directly adjudges that the sender of a telegram is bound to the receiver by the terms of a message as negligently altered by the company. * * *' The learned judge places his conclusion in part on the fact that in England the Government has charge of the telegraph lines, and upon the idea that a merchant or business man would lose credit and commercial standing were he to refuse to make good to his correspondent the contract contained in his message, as delivered. We cannot see how the fact of governmental charge of the telegraphic system can make any difference, for in this country the sender is as impotent to control and direct the movements and conduct of the telegraph company as if it were under the Government. Nor can we see how the commercial standing of the sender who remits his correspondent to his recourse to the telegraph company for such injury as may result from the erroneous message, can be effected.'" As bearing upon this question, it is held in Maine that the sender of a message embodying a commercial offer or acceptance is bound to the receiver by the terms of the message as delivered to the latter, and the court, in discussing the question whether in case of error in transmission the sender or receiver should suffer loss, says: "We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed.[76] It is held in Alabama that if the agent of one party

[74] Shingleur v. Western Un. Teleg. Co., 72 Miss. 1030, 6 Am. Elec. Cas. 783.

[75] § 903, first cited case, and first cited case under this section.

[76] Ayer v. Western Un. Teleg. Co., 79 Me. 493, 1 Am. St. Rep. 353, 2 Am. Elec. Cas. 601, 10 Atl. 495. It was also said: "The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon

is requested by another party to make an offer to sell, he becomes the latter's agent for the purpose of making the offer and receiving its acceptance and notice to such agent that the offer is accepted is sufficient to bind the parties making the offer even though they personally receive no notice.[77] The relation of a telegraph operator to the company is also held to be that of master and servant and not that of principal and agent.[78]

§ 905. **Whether operator is agent of sender continued — Opinions of text-writers.**— Mr. Gray [79] states the rule as holding nonagency of the telegraph company in England, and says that the rule here is contra, although he inclines to the English rule.[80] Judge Thompson [81] holds to the rule which makes the sender who telegraphs a proposal bound by the terms of the message as delivered, on the ground of agency of the telegraph company. In other words, the sender must stand by the proposition embodied in the message as delivered by his agent, and sue the company for the damages he has sustained by its misfeasance, but he qualifies this by the rule that the party who first invites the use of the telegraphic agency impliedly undertakes to assume the risk of the telegraph company's mistakes.[82] Mr.

this point. In Durkee v. Vermont Cent. R. Co., 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In Saveland v. Green, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of the contract, binding on the sender. In Morgan v. People, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are dicta to the same effect in Wilson v. M. & N. Ry. Co., 31 Minn. 481, and Hawley v. Whipple, 48 N. H. 488." The court also considered Western Un. Teleg. Co. v. Shotter, 71 Ga. 760, as "almost a parallel case," per Emery, J.

[77] McClosky & Whitman v. Howell Cotton Co. (Ala. 1906), 42 So. 67.

[78] Western Union Teleg. Co. v. Wofford, 32 Tex. Civ. App. 427, 74 S. W. 943, 72 S. W. 620.

[79] Gray on Teleg., § 104, note 3.

[80] See also Scott & Jarnagin on Teleg., §§ 340, 341.

[81] Thompson on Electricity (ed. 1891), §§ 483–487.

[82] This author relies upon Ayer v. Western Un. Teleg. Co., 79 Me. 493, 10 Atl. 495; Western Un. Teleg. Co. v. Shotter, 71 Ga. 760; Dunning v. Roberts, 35 Barb. (N. Y.) 463, and Durkee v. Vermont Cent. R. Co., 29 Vt. 127, 140.

Crosswell [83] notes substantially the English rule, and briefly considers the Georgia and Maine cases,[84] and states no rule so far as we can discover.

§ 906. **Whether operator is agent of sender continued.— Inconsistencies of rules.—** If the telegraph company is not the agent of the sender, or of the party who invites the use of this instrumentality, then the telegram of acceptance, as delivered for transmission, and not the one delivered to the addressee, binds. The latter, when erroneous, is not the real acceptance, the minds of the parties have never met, and there is no contract, this would compel the addressee to act at his peril, or have the message repeated, at perhaps a loss of time which might make the contract valueless. But the contract dates from the time of sending the acceptance; there exists, therefore, the anomolous position of a contract made at one end of the line and none at the other. If, on the contrary, the message, as delivered to the addressee, binds the contract, and such message is erroneous, and not the one sent, when does the message so delivered to the addressee take effect? It cannot take effect from the time the sender delivered his mesage to the office for transmission, for the message delivered to the addressee is not the same message. If the addressee is bound by his message as received, and the sender by his message as sent, when the telegraph company has made an error in transmission, then there must be two valid contracts — the contract which consists of the proposal as accepted by the sender at the time he wired his acceptance, and the contract which consists of the proposal forwarded, and the acceptance received by the proposer, which must be logically held to have taken effect from the time he receives the erroneous telegram. Again, if the telegraph company is the agent of the sender, what is the extent of its authority, and why is it not the agent of the sender in all cases, and why does not the message as delivered to the addressee in all cases prevent his recovery for damages against the company and enable him to sue the sender for the company's negligence? Suppose the sender is really benefited by the company's negligence in transmission of a message and the addressee is injured, and

[83] Crosswell on Electricity (ed. 1895), §§ 684–687.

[84] See note preceding last note above.

under the cases which permits the latter to sue the sender, wherein lies the sender's remedy against the company? On what principle is the sender liable for a tort which he has never committed, or a breach of contract into which he has never entered? Assuming that the telegraph company is the agent of the sender, on what principle is the special agent, the extent of whose limited authority is known to the sendee, and agreed upon — namely, to deliver the particular message given it for transmission, and no other — authorized to enter into a different contract than the one he is empowered to perform, and so bind the sender to a contract he never contemplated, by delivering another and different message than the one actually sent, especially so if both parties have assumed the risk of the telegraph? To hold the party who has invited the use of the telegraph responsible is hardly a solution of the rule. As both parties either expressly agree beforehand to use the telegraph, or impliedly assume the risk by using it, there is no obligation on either party to use it, either for proposal or answer.

§ 907. **Whether operator is agent of sender — Conclusion.**— We must confess that we believe there can be no logical deduction from the various principles involved, as to what should be the rule. The determination must contain some element of what is called a "moral" ground, or must be an arbitrary, absolute one. We favor, however, the rulings in the Tennessee, and Mississippi cases, but admit there is much force in Judge Thompson's conclusion, although that conclusion might have been in accord with the Tennessee and Mississippi cases if he had had these cases before him.[85]

[85] The following are general decisions on the question of agency. The company cannot validly stipulate that when a message is given its messenger for delivery to the office for transmission said messenger is the agent of the sender. Will v. Postal Teleg. Cable Co., 3 N. Y. App. Div. 22, 73 N. Y. St. R. 552, 37 N. Y. Supp. 933. The operator of a telegraph company is its agent in receiving over the telephone a message to be transmitted unless there is a rule contra, of which the sender had notice. Carland v. Western Un. Teleg. Co., 118 Mich. 369, 76 N. W. 762. Night operators of a railroad company, accustomed to receive and transmit messages and receive pay therefor, are the company's agents so as to render it liable for delay in transmission of message sent by one of such operators and received by an-

§ 908. **Contracts — By what law governed.**— The general rule is said to be that the law of the place where the contract is to be performed governs, subject to the rule that a contract void by the law of the place where made is void everywhere.[86] In South Carolina it is held that a contract is to be governed by the law of the former, in the absence of proof of what the lex loci contractus is; but that, although valid where made, it will not be treated as valid in a State which makes such contracts invalid.[87] It is also held that when a message is sent from one place to another, the State from which it was sent determines the place of contract.[88] In an Illinois case the law of the place of delivery of a telegram is held to govern.[89] In Missouri a

other. Dowdy v. Western Un. Teleg. Co., 124 N. C. 522, 32 S. E. 802. Immaterial whether operator knows that person presenting message for transmission and paying therefor is sender or sender's agent. Western Un. Teleg. Co. v. Broesche, 72 Tex. 654, 18 S. W. 734. Nor can the company receiving such message and the pay therefor deny the authority of the one presenting such telegram to act for the sender. Western Un. Teleg. Co. v. Buskirk, 107 Ind. 549, 5 West. 871, 2 Am. Elec. Cas. 515. Principal may recover for negligence in transmission of message sent by his brokers. Akin v. Western Un. Teleg. Co., 69 Iowa, 31, 2 Am. Elec. Cas. 566. When telegraph operator is vice-principal, and master liable. Flannegan v. Chesapeake & O. Ry. Co., 40 W. Va. 436, 52 Am. St. Rep. 896, 21 S. E. 1028. Operator not agent of sender and so of addressee so as to bind sender and addressee with operator's knowledge of rules. Western Un. Teleg. Co. v. Neel (Tex. Civ. App., 1894), 25 S. W. 661. Operator is agent of sender when he attempts to correct mistake at sender's request. Western Un. Teleg. Co. v. Foster, 64 Tex. 220, 1 Am. Elec. Cas. 740. Operator is sender's agent where latter requests former to write message. Western Un. Teleg. Co. v. Edsall, 63 Tex. 668, 1 Am. Elec. Cas. 715, 718, 719. See further as to agency of sender, etc., generally, Ashford v. Schoop, 81 Mo. App. 539; Dowdy v. Western Union Teleg. Co., 124 N. C. 522; Norman v. Western Union Teleg. Co., 31 Wash. 577, 72 Pac. 474.

That telegraph company agent of party initiating telegraphic correspondence. See Bond v. Hurd, 31 Mont. 314, 78 Pac. 579.

[86] Western Un. Teleg. Co. v. Eubank, 100 Ky. 591, 38 S. W. 1069, 18 Ky. L. Repr. 995, 36 L. R. A. 711, 1 Am. Neg. Rep. 244, 248, 6 Am. Elec. Cas. 770, 779, per Guffy, J., citing Story on Conflict of Laws, § 243, 7 Lawson's Rights, Rem. & Pr., § 3873.

[87] Gist v. Western Un. Teleg. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 753.

[88] Perry v. Mt. Hope. Iron Co., 15 R. I., 380, 5 Atl. 632.

[89] North Packing & P. Co. v. Western Un. Teleg. Co., 70 Ill. App. 275.

contract made in Iowa is held to be governed by the laws of the latter State, which make the telegraph company liable for mistakes, etc., in transmission.[90] "The law as to what shall be deemed the place of the contract seems not to be quite well settled. A contract is made when both parties agree to it, and not before. * * * Suppose, however, that the contract is made in one place, but is to be performed in another; then in general, although perhaps not always, and for all purposes, the place of payment or performance is the place of contract.[91] A tort is committed in the State where the principal receives a telegram which through the company's negligence makes the offer received greater than that sent by the agent out of the State in consequence of which the offer is accepted.[92]

§ 909. **Banks not obligated to accept checks, etc., by telegram.**— The duty of a bank to pay checks on presentation does not obligate it to accept by telegrams its depositor's checks or drafts, even though in possession of his funds.[93]

§ 910. **Purchase of telegraph officers' undertaking by Postmaster-General — Annuity — English decision.**— By the English

[90] Reed v. Western Un. Teleg. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492. When a contract is made in one State to transport goods over a line extending through two or more States and the goods are lost, the rights of the parties will be governed by the laws of the State where the loss happened. (1896) Barter v. Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Gray v. Jackson, 51 N. H. 9, 12 Am. Rep. 1. But see as to passengers, Dyke v. Erie Ry. Co., 45 N. Y. 113, 6 Am. Rep. 43. If the law of a place where a contract, signed only by the carrier, is made for the carriage of goods, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought. Hoadley v. Northern Transportation Co., 115 Mass. 304, 15 Am. Rep. 106.

[91] 2 Parsons on Contracts (8th ed.), bot. pp. 696, 697, * pp. 582, 583.

[92] Postal Teleg. Cable Co. v. Wells, 82 Miss. 733, 35 So. 196.

[93] So held in Myers v. Union Nat. Bank, 27 Ill. App. 254.

As to promise by telegram to pay a draft, being acceptance. See Revenswood Bank v. Renecker, 18 Pa. Super. Ct. 192.

Telegraph Act of 1868,[94] officers who have been, for a fixed period, in the employment of a telegraph company, whose undertaking has been purchased by the Postmaster-General, under the provisions of the act, and who have been in receipt of a yearly salary, or of remuneration not less than £50 a year, are entitled, in the event of their receiving no offer of an appointment from the Postmaster-General in the telegraphic department, of equal value to that held under the company, to an annuity by way of compensation for the loss of their office. S. was an officer of a telegraph company whose undertaking had been purchased by the Postmaster-General, and was entitled, so far as salary and terms of office were concerned, to compensation under the Telegraph Act of 1868. It was part of his duty, when required, to travel on the company's business. When he so traveled his ordinary salary ran on, but his additional expenses were paid by the company, who agreed that he should receive certain fixed weekly sums, in lieu of making him bring in an account of his expenditure, and then repaying him. It was held that the amount saved by S. out of the sums so paid to him was to be taken into consideration in calculating the annual emolument derived by him from his office.[95]

§ 910a. **Marriage contract induced by forged telegram — Deceit — Criminal offense.**— Where an unmarried woman consents to and does enter into a marriage contract, being induced thereto by a forged telegram, in her mother's name purporting to give her consent, and she would not otherwise have entered into said contract except upon the belief, so induced, that her mother's prior objections to the marriage had been withdrawn, such facts constitute sufficient proof of deceit in obtaining the marriage, and makes the party forging such message guilty of deceit, under a code provision making the crime of forging a telegraphic message a specific offense; and so, even though the female was of full age and the marriage might be valid.[96]

[94] 31 and 32 Vict., c. 110, § 8, subd. 7.

[95] Regina v. Postmaster-General, 47 Law Jour. Rep. Q. B. 435, L. R. 3 Q. B. D. 428, affg. Q. B. D. 45, Law Jour. Rep. 609, L. R., 1 Q. B. D. 658.

[96] People v. Chadwick, 143 Cal. 116, 76 Pac. 884.

TITLE VII.

TAXATION, LICENSE, ETC., TAXES.

CHAPTER XXXIV.

TAXATION, LICENSE, ETC., TAXES.

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§ 911. **Taxation, license, privileges, etc., taxes — Generally.**— We have fully considered elsewhere[1] the subject of taxation and of license, privilege and the like taxes so far as they are connected with the question of interstate commerce. The purpose, therefore, of this chapter is to treat of the above subjects irrespective of the question of interstate commerce. Taxation of these electric corporations necessarily involves many analogous or like cases, and the rules applicable in such analogous cases would govern here and they could well be consulted.

[1] See c. VIII and IX, herein.

§ 912. **Taxation defined.**— A tax has been defined as a demand of sovereignty and is distinguished from a toll in that the latter is a demand of proprietorship.[2] A tax is a demand, charge or burden imposed for the support of the Government or for some special purpose authorized within constitutional limitations by the Government or sovereign power. It is intended for the general welfare, rests upon necessity and is vital to a proper exercise of governmental functions and the existence of the Government. It is also in derogation of public right; it must be levied for a public purpose to be lawful and is a proper exercise of the legislative power when it does not encroach upon the constitutional guaranty to the people.[3]

[2] St. Louis v. Western Un. Teleg. Co., 148 U. S. 92, 37 L. Ed. 380, 4 Am. Elec. Cas. 102, 106, per Mr. Justice Brewer, citing State Freight Taxes, 15 Wall. (U. S.) 232, 278.

[3] United States v. Baltimore & O. R. Co., 17 Wall. (U. S.) 326, per Hunt, J.; Tompkins v. Little Rock, etc., R. Co., 15 Fed. 12, per Caldwell, J.; Farrington v. Tennessee, 95 U. S. 686; County of Mobile v. Kimball, 102 U. S. 703; M'Culloch v. Maryland, 4 Wheat. (U. S.) 428, per Marshall, C. J.; Tucker v. Ferguson, 22 Wall. (U. S.) 575, per Swayne, J.; Spencer v. Merchant, 125 U. S. 355, 8 Stat. 921; Erie Ry. v. Pennsylvania, 21 Wall. (U. S.) 498, 499.

Other definitions of tax and distinctions as to, are as follows: United States: Illinois Central R. Co. v. City of Decatur, 147 U. S. 190, 13 Sup. Ct. 293, 37 L. Ed. 132 (distinction between general taxes and local or special taxes); Citizens' Savings & Loan Assn. v. City of Topeka, 20 Wall. (87 U. S.) 655, 664, 22 L. Ed. 455 ("A 'tax,' says Webster's Dictionary, 'is a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or State.' 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes Cooley on Constitutional Lim. 479,' Coulton, J., in Northern Liberties v. St. John's Church, 13 Pa. St. 104 says very forcibly, 'I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations — that they are imposed for a public purpose.' We have established, we think, beyond cavil that there can be no lawful tax which is not laid for a public purpose. * * * It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not used for purposes of private interest instead of a public use," per Mr. Justice Miller). *California*: Santa Barbara, City of, v. Stearns, 51 Cal. 499, 501 (License fee, when a tax when not); Houghton v. Austin, 47 Cal. 646, 654. ("The power of taxing the people of this State ex-

§ 912a. **Telegraph poles, wires, etc., as personal property — Not taxable as real estate.**— Poles, wires, etc., of a telegraph company located upon the property of a railway corporation,

ists only in the legislature. It is strictly legislative. A tax can only be created by law. * * * Law writers define 'taxes' to be burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes, 1 Blackwell's Tax Titles; 1 Cooley's Const. Lim. 479.") *Florida*: State v. Montague, 34 Fla. 32, 15 So. 589 ("A tax is defined to be a rate or sum of money assessed upon the person or property of a citizen by government for the use of the nation, State or municipality, Rapalje & Lawrence L. Dict., Title Tax. Cooley defines taxes to be the enforced proportional contributions from persons and property, levied by the State by virtue of its sovereignty for the support of the government and all public needs, Cooley on Taxation, page 1," per Liddon, C. J.). *Illinois*: United States Distilling Co. v. Chicago, 112 Ill. 19, 22 (License fee not a tax); East St. Louis, City of, v. Wehrung, 46 Ill. 392, 393 (License fee not a tax). *Indiana*: McClelland v. State, 138 Ind. 321, 332, 37 N. E. 1089, 1092 (Taxation is for public not private use. "Tax" defined as a burden for public purposes). *Louisiana*: Parish of East Feleciana v. Levy, 40 La. Ann. 332, 4 So. 309 (License fee when imposed for sole purpose of revenue is a tax). *Maine*: Brewer Brick Co. v. Inhab. of Brewer, 62 Me. 62, 70, 16 Am. Rep. 395 ("Taxation exacts money from individuals as and for their contributory share of the public burdens. A tax is generally understood to mean the imposition of a duty or impost for the support of government, Pray v. Northern Lib., 31 Pa. 69. 'Taxes are burdens or charges imposed by the legislature upon persons or property,' says Dillon, C. J., in Hanson v. Vernon, 27 Iowa, 28, 'to raise money for public purposes or to accomplish some governmental end,'" per Appleton, C. J.). *Maryland*: Bonaparte v. State, 63 Md. 465, 470 ("'Tax' means a 'burden, charge or imposition put or set upon a person or property for public uses.'" Distinction made between "taxes" and "debts" or "claims" against decedent's estate). *Michigan*: Lake Shore & L. S. Ry. Co. v. Grand Rapids, 102 Mich. 374, 60 N. W. 767, 29 L. R. A. 195 (Distinction between tax and assessment; assessments for local improvements not within general exemptions from taxation). *Missouri*: Deal v. Mississippi Co., 107 Mo. 464, 469, 14 L. R. A. 622, 18 S. W. 24 ("'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes,' Cooley, Con. Lim. 479. The true principle is stated by the Supreme Court of Pennsylvania in the case of Sharpless v. Mayor, 21 Pa. 168. The legislature has no 'constitutional right to create a public debt or lay a tax or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. * * * Taxation is a mode of raising revenue for public purposes,'" per Thomas, J.). *Ne-*

under a contract wherein they are reserved as personal property, are not real property, within the meaning of the irrigation

braska: Littlefield v. State, 42 Neb. 223, 226, 47 Am. St. Rep. 697, 28 L. R. A. 588, 60 N. W. 724 (Taxation in this case held to mean the providing of revenue for the ordinary expenses of State or municipal government). *New Jersey*: State, Baldwin v. Fuller, 39 N. J. L. 576, 584 ("Taxation is tolerated, as the contribution of each one's proportion to the support of his government, only to serve public ends and must, from its very nature, be imposed upon the public. This is fundamental in the idea of a tax," per Van Syckel, J., who also says (p. 578) "That a tax for State purposes must fall upon the State at large; for county purposes, upon the county; and for the public uses of any lesser political district, upon such district"). *New York*: Heerwagen v. Crosstown St. Ry. Co., 179 N. Y. 99, 71 N. E. 729 ("a tax has been defined as a forced contribution from a citizen of the State to be applied for governmental purposes, Davies System of Taxation, p. 1 * * * Both in statutes and in judicial decisions the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the State or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend exactions for the privilege of exercising franchise rights which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the State is at liberty to grant or to withhold at pleasure," per Cullen, J., quoted in North Jersey St. Ry. Co. v. Mayor, etc., of Jersey City [N. J. Sup. Ct. 1906] 63 Atl. 833, 834); Hun, matter of, 144 N. Y. 472, 477, 39 N. E. 376, 377 (Distinction between tax and assessments, "The ordinary meaning of that term" [tax] "is the contribution which the citizen is required to pay for his share of the general expense of government, and it may be imposed upon persons or property or both," per O'Brien, J.). *Pennsylvania*: Oil City, City of, v. Oil City Trust Co., 151 Pa. 454, 25 Atl. 124 (charges held not a tax but a license fee). *Tennessee*: Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151, 167, 36 S. W. 1041, 34 L. R. A. 725 ("'Tax' and 'Taxes' in their most comprehensive sense, and without qualification are the words employed by the framers of the Constitution. These words, in their usual and general sense, include every burden that may be lawfully laid upon the citizen by virtue of the taxing power, and they may be so interpreted in the absence of anything showing them to have been used with a different meaning. Constitutions must receive the same interpretation, in this respect, as other written instruments and laws," per Caldwell, J. This case holds that special assessments are taxes. Examine annotations to this case in 4 Shannon's Annot. on Tenn. Dec. [1907]). *Wisconsin*: State, Ellis v. Thorne, 112 Wis. 81, 86,

law of California, but only personal property not assessable for the revenue purposes of the district.[4]

§ 913. **Taxation — Telegraph line as land or real estate.**— It is held in a Tennessee case that a telegraph line is real estate for the purposes of taxation under the Constitution of that State, which requires all property, real, personal and mixed, to be taxed.[5] In a New York case the statute[6] provided that "the portion of any telegraph, telephone or electric light line in any town or ward in this State shall be assessed in such town or ward * * * in the manner provided by law for the assessment of lands of resident owners. * * * The word 'lines' shall include the the interest in the land on which the poles stand, the right or license to erect such poles on land, all poles, arms, insulators, wires and apparatus, instruments or other thing connected with or used as part of such line in such

87 N. W. 797, 55 L. R. A. 956 ("'Taxation is the act of levying a tax or imposing those burdens or charges upon persons or property within the State. It is the process or means by which the taxing power is exercised. The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the very existence of every government,'" per Marshall, J., quoting from Knowlton v. Rock Co., 9 Wis. 410, 418).

[4] Western Union Teleg. Co. v. Modesto Irrig. Co. (Cal. 1906) 87 Pac. 190.

[5] Western Un. Teleg. Co. v. State of Tennessee, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99, 1 Am. Elec. Cas. 326; Const. 1870, art. 2, § 28. See Electric Teleg. Co. v. Overseers of Poor (24 L. J. [N. S.] Magistrates' Cas. 146), Allen's Teleg. Cas. 27; Re Toronto R. Co., 25 Ont. App. 135. But see Boston Safe Deposit, etc., Co. v. Bankers & M. Teleg. Co., 36 Fed. 288.

[6] N. Y. Laws of 1886, c. 659, superseding Act of 1881, c. 597. The Revised Statutes provided the manner of assessment of lands of resident owners. 1 Rev. Stat. 389, tit. 2, art. 1. "The resident is to be assessed in the town or ward of his residence, when the assessment is made for the lands owned by him within such town or ward, and the full value of such land is to be set down by the assessors in a separate column in their assessment-roll. The assessors are to estimate and assess the land at its full and true value, as they would appraise the same in payment of a just debt due from a solvent debtor. This is the manner provided by law for the assessment of lands of resident owners." People ex rel. Western Un. Teleg. Co. v. Tierney, 126 N. Y. 166, 37 N. Y. St. R. 28, 27 N. E. 269, 3 Am. Elec. Cas. 40, 45, per Peckham, J. This case partly reversed 57 Hun (N. Y.), 357, 32 N. Y. St. R. 605, 10 N. Y. Supp. 940, 3 Am. Elec. Cas. 50.

town or ward." Prior acts of the legislature provided for a system of taxation of the property of telegraph companies, their franchises and business, exclusive of real estate — as that term is generally understood — which might be owned by them.[7] The court held, therefore, that the inclusion in the word "land" of the subjects specified in the statute could not change the essential nature of such articles, and as they were capable of indefinite reproduction, their cost must be their value for the purpose of the statute; that where such cost is shown by evidence which is uncontradicted and in no way doubtful, nor in fact doubted, then such cost must be deemed the value of such separate articles so enumerated in the Taxing Act. It was also held that the interest in the land on which the poles stood and the right or license to erect such poles on land were also to be included in the assessment of the company's property. But such interest in the land in a street was declared to be in reality nothing more than a license granted by the State, revocable by legislative enactment, and, therefore, the value of said interest must, it was held, be determined by this fact. So, again, as

[7] N. Y. Act of 1881, c. 597, which "provided that telegraph companies in the State should, on a certain day in each year, make a sworn statement showing the total length of their lines in each county, with the cost of construction and equipment thereof, and the assessors in each county were to assess for the purposes of taxation such proportion of the cost of construction as the length of the lines in the district of the assessors bear to the total length of the lines in the county. The legislature at the same session passed the act, c. 361, taxing the corporations therein named in the manner stated. Among such corporations are telegraph companies. The tax is declared to be one upon the corporate franchise or business of the corporation, is payable annually and is computed upon the par value of the capital stock, the percentage of tax depending upon the amount of dividends paid by the company, or if no dividends or a less amount than 6 per cent. is paid, then the tax is to be at the rate named in the statute, upon a certain valuation of the capital stock. In addition to this tax and by the same act, the companies named therein are to pay to the State Treasurer a further tax on their corporate functions or business in the State, a certain tax on the gross earnings in the State for the business therein. These two acts of the legislature should be construed together as in pari materia," per Peckham, J., in People, Western Un. Teleg. Co. v. Tierney, cited in last note (3 Am. Elec. Cas. 40, 43, 44). See Cumming & Gilbert's Gen'l Laws and Stat. N. Y. title "Taxation," pp. 3874 et seq.

there was no title whatever in the company in the land thus used, " the cost which the company incurred in obtaining the interest in the land in a public street would, in this case, taking into consideration all the acts providing for the taxation of the company, be a correct criterion by which to judge its value. If the company, in placing its poles on the land of any individual, shall have paid anything to the owner of the land for such use, or incurred any contractual liability to him, the amount paid or the amount included in such liability would be good evidence of the value of the right. There might be other elements entering into that question, but in this case all the poles seem to have been placed exclusively in the public streets." It was also decided that in the assessment for taxation under the latest statute " the property is not to be regarded as a part of a whole nor as a complete telegraph line in operation. Its value for telegraphic purposes and its position with its connections and its productive capacity are not considerations entering into the value of the property under the act last named. The considerations are foreign to its purpose. They largely enter into the question of the value of the business and franchises of the company, and the value of such business and franchises is to be assessed under the Act of 1881. * * * Where they are already taxed under a separate act, it cannot be supposed that the legislature intended to tax them again proportionately in every tax locality in the State." A distinction was also made between the class of property specified in the Act of 1886, belonging to telegraph companies and the real estate of railroad and bridge companies owned in fee by them. " In such cases it is held that in determining the value of such real estate, its earning capacity is a most important feature, and that in assessing the real estate of a railroad it is to be assessed, not as an isolated piece of property, but in connection with its position, its incidents and the business and profits to be derived therefrom; its productive capacity and its earnings are all to be considered, and the cost of the whole road is to be taken into account. * * * This interest (in land on which poles stand) and this right (to erect poles) differ wholly in character and nature from the real estate owned in fee by the railroad or bridge company, and the rules for the valuation of that species of property are by no means appropriate

for the purpose of arriving at the full value of the property of the telegraph company under the statute of 1886, * * * which should lead to a different rule in the assessment of what is, in fact, real estate or earth in one case and personal property in the other, though called land." [8]

§ 914. **Telegraph wires, posts and attachments ratable as land — English decision.—** A telegraph company with a central office afforded to subscribers facilities for communicating with one another by means of their wires. The company had also telephonic wires and apparatus which they put up for the private use of firms and individuals on payment of a rent. The wires of the company were accordingly laid between their office and the business premises of their subscribers, and the telephonic apparatus required by the private firms and individuals was erected from time to time by the company for the exclusive use

[8] People, Western Un. Teleg. Co. v. Tierney, 126 N. Y. 166, 37 N. Y. St. R. 28, 27 N. E. 269, 3 Am. Elec. Cas. 40, revg. in part 57 Hun (N. Y.), 357, 32 N. Y. St. R. 605, 10 N. Y. Supp. 940, 3 Am. Elec. Cas. 50; People, Western Un. Teleg. Co. v. Dolan, 126 N. Y. 166, 37 N. Y. St. R. 28, 3 Am. Elec. Cas. 40, revg. in part 32 N. Y. St. R. 599, 11 N. Y. Supp. 35. As to taxation of subways as real estate, see Herkimer Co. Light & P. Co. v. Johnson, 37 N. Y. App. Div. 257, 55 N. Y. Supp. 924. The New York statute of 1899 (Laws of 1899, c. 712, Wells' Railroad Corp. Laws of N. Y. [1899], pp. 744, 745), specifically defines "land," "real estate" and "real property," as used in the Tax Law, and it includes "all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through streets, highways or public places; * * * all mains, pipes and tanks laid or placed in, upon or under any public or private street or place for conducting * * * electricity or any property, substance or product capable of transportation or conveyance thereon, or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon or through any streets, highways or public places, any mains, pipes, tanks, conduits or wires, with their appurtenances, for conducting * * * heat, light, power, gas * * * or other substance, or electricity for telegraphic, telephonic or other purposes." See also People, Cons. T. & Elec. Sub. Co. v. Barker, 151 N. Y. 639, affg. 7 N. Y. App. Div. 639. See sections next following and § 491, herein.

of persons so requiring it. In all cases the wires were carried overhead, being supported either by poles fixed in the ground, or more generally by attachment to the roofs and chimneys of the houses over which they passed, and the company obtained the consent of the owners and occupiers of such ground and houses by agreements under which they paid a small rent, and undertook to make good any damage to the property, and to remove the wires, etc., upon certain notice. Access by the company to the poles and attachments could only be had on permission granted by such owners and occupiers. It was held that the company, as being in occupation of land, were ratable in respect of the wires, posts and attachments.[9]

§ 915. **Tower used as lighthouse and telegraph station not ratable — English decision.**— The Mersey docks and harbor board have, by statute, the right to levy certain harbor and light dues; but these dues are so fixed that with the other receipts applicable to conservancy purposes the receipts must not exceed the expenditure on those purposes, so that no profit can accrue to the board in respect to the lighthouses. The board own as part of their conservancy apparatus a tower which is used as a lighthouse and a telegraph station, and they also own certain houses near to this tower, which are inhabited by light keepers and workmen as servants of the board. It was held that the board were not liable to be rated in respect of the tower, inasmuch as the use of it was so limited by statute that no profit could arise therefrom, and, therefore, that there could be no beneficial occupation of it by any tenant, but that they were liable to be rated in respect of the adjoining houses, and that in estimating the value of these houses the fact of their proximity to the lighthouse tower ought to be taken into account.[10]

§ 916. **Telegraph wires, when not ratable — English decision.**— By the terms of an agreement between the plaintiff and

[9] Lancashire & Cheshire Teleph. Exch. Co. v. Overseers of Manchester, 54 Law Jour. Rep. M. C. 63; L. R., 14 Q. B. D. 267. See also Electric Teleg. Co. v. Overseers of the Poor, 24 Law Jour. (N. S.) Magistrates' Cases, 146, Allen's Teleg. Cas. 27.

[10] Mersey Docks & Harbor Board v. Overseers of Parish of Llauelian, 54 Law Jour. Rep. Q. B. 49, L. R., 14 Q. B. D. 770.

the Postmaster-General, the latter covenanted that he would provide and thenceforth during the continuance of the agreement appropriate and maintain for the exclusive use of the plaintiff certain telegraph wires between the landing place of a submarine cable near the Land's End and the office of the plaintiff's at Penzance and thence to their office in London, with the necessary translators and batteries; such wires, translators and batteries to remain the property of the Postmaster-General. The plaintiffs were to provide and maintain their own instruments and to work their own wires at their own cost, permitting the Postmaster-General from time to time to inspect their instruments. The Postmaster-General was to repair accidental defects and interruptions, but to be paid for making good any damage to the wires occasioned by the neglect or default of the plaintiffs. The plaintiffs were to pay rent for the wires and not to part with the possession of them or sublet the benefit of the agreement without the consent of the Postmaster-General, who, in the event of their doing so, was to be at liberty to determine the agreement. On the expiration of the agreement the Postmaster-General was to resume possession of the wires. The telegraph posts remained the property of the Postmaster-General, who could, if he chose, attach other wires to them besides those appropriated to the use of the plaintiffs. It was held that the plaintiffs had not such an exclusive occupation of the wires appropriated to their use as would make them ratable to the relief of the poor in respect thereof.[11]

§ 917. **Poles, wires, dynamos, etc., of electric light plant — When not real estate.**— The poles and wires of an electric light company are not fixtures to the lot on which the electric light is generated, so as to be taxable as real estate, even though they cannot be assessed as personal property because not enumerated in the statute as within that class, it appearing that such poles and wires are partly in the highways, placed there by lawful contract but subject to revocation without notice, and some on private property under revocable license, and some of the wires being on poles of other companies.[12] So dynamos

[11] Paris & New York Teleg. Co. v. The Penzance Union, 53 Law Jour. Rep., Magistrates' Cases, 189, L. R., 12 Q. B. D. 552, per Cave, J., Lord Coleridge, Ch. J., dubitante.

[12] Newport Illum. Co. v. Tax As-

for generating electricity, propelled by steam power and easily detachable from the realty without physical injury thereto, are taxable as personal property under a statutory provision imposing a tax on "machines of all sorts propelled by steam or water power," and are not taxable as real estate under a statute including in that classification for taxation, steam engines, boilers, shafts, pulleys and wheels attached to the realty for operating machinery.[13]

§ 917a. **Boilers, engines, dynamos, etc., of electric railway, in power house — When real estate.**— Where an electric railway installed ponderous boilers, engines, dynamos, etc., in its power house for the purpose of generating electricity, and its superintendent testified that it was intended that such machinery should so remain until it should become worthless, either from wear or tear or because of the discovery of improved appliances, such machinery constitutes fixtures taxable as real estate, even though apparatus had been erected whereby it might be removed without material injury to the building.[14]

§ 918. **Wires of electric light company — When personalty.** — It is held in an Illinois case that electric light wires, lamps and poles connected with the generating plant of the company are personal property for the purpose of taxation.[15] So in Rhode Island the switchboard and connected wires inside the station of an electric light company, so attached to the realty as to be easily removed therefrom without injury thereto, is taxable as personal property under the statute.[16]

sessors, 19 R. I. 632, 36 Atl. 426, 36 R. A. 266. See People v. Feitner, 90 N. Y. Supp. 826, 45 Misc. 12.

[13] Newport Illum. Co. v. Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266; R. I. Pub. Stat., chap. 42, §§ 3, 11.

[14] Detroit United Ry. v. Board of State Tax. Commrs. 136, Mich. 96, 10 Det. Leg. N. 993, 98 N. W. 997.

[15] Shelbyville Water Co. v. People, Bradduck, 140 Ill. 545, 4 Am. Elec. Cas. 559; 30 N. E. 678. See §§ 920, 932, 933, 936, herein.

[16] Newport Illum. Co. v. Tax Assessors, 19 R. I. 632, 36 Atl. 426, 36 L. R. A. 266, under R. I. Pub. Stat., chap. 42, § 11, which includes machinery of all sorts propelled by steam or water in any machine or manufacturing establishment.

§ 919. **Rails, poles and wires of electric railway company are real estate.—** The rails, poles and wires of an electric street railway company, when laid and erected in a public highway, are assessable and taxable as real estate.[17]

§ 920. **Poles, wires and fixtures of electric companies, whether taxable as real estate or personalty — Conclusion.—** Whether the poles, wires and fixtures of electric companies, such as telegraph, telephone, electric light and power and electric railway corporations are taxable as real estate or personal property must depend almost wholly, if not entirely, upon statutory construction and the enumeration therein of classes of property to be taxed. There are also numerous and varied circumstances to be considered, as is apparent from the cases herein noted, such as those where there is a revocable license either from the public or from private individuals, whether the wires are on the company's own poles or on the poles of others; whether they are inside or outside fixtures, detachable or permanently affixed to the freehold; whether the company is a manufacturing corporation; the construction of technical words in statutes; the distinction between railways having a roadbed and rails and other electric companies which have only poles and wires, such poles occupying no continuous portion of the highway but only limited spaces at intervals — there are other factors of more or less importance. Therefore, we can state no rule applicable to all cases but must limit the consideration, as has been done in the above sections, to what are principally illustrative decisions.

§ 921. **What is taxable and what may be included — Generally.—** The question of what is taxable and what may be included in the assessment is in this, as in the question noted under the preceding section, one dependent upon statutes and statutory construction, and the cases must also for that reason be illustrative for the most part. In New York it is held that where the real property and debts of a corporation exceed its total assets, no tax can be imposed on the personalty even though its capital stock has a market value above par, since value may be given stock by an untaxable franchise.[18]

[17] So held in Re Toronto R. Co., 25 Ont. App. 135.

[18] People, Brooklyn City R. Co. v. Neff, 19 N. Y. App. Div. 590, 46.

So real estate purchased for the removal thereon of a power-house may be assessed and levied on for taxes before actual occupation, even though the erection of necessary buildings is commenced from the time of purchase.[19] Again, the terms of the charter must be resorted to to determine the purpose for which a corporation is organized, as affecting its liability to assessment by the State Board of Equalization.[20] So wires are maintained "for telegraph and telephone lines" where the "salvage and notification" business in which a person is engaged consists of the employment of a system similar to that of telegraphy in combination with the telephone used conjointly for the purpose of furnishing information to subscribers.[21]

§ 922. **Street railway as railroad within taxation statute.**— Under the Florida statute, which provides for the taxation of railroad property and the sale thereof for delinquent taxes, a street railway is a "railroad" for such purpose.[22]

§ 922a. **The New York franchise tax cases — Classification — Surface and sub-surface roads — Constitutionality.**— In the New York franchise tax cases the following points are decided by the United States Supreme Court: (1) Presumptively all property within the territorial limits of a State is subject to its taxing power and the burden of proof is on one claiming that any particular property is by contract or otherwise beyond the reach thereof; and growing out of the conditions of

N. Y. Supp. 385, affd., 154 N. Y. (Appendix) 33; People, Edison Elec. Illum. Co. v. Brooklyn Assessors, 19 N. Y. App. Div. 599, 46 N. Y. Supp. 388.

19 Chester v. Chester Elec. L. & P. Co. (C. P., Penn.), 7 Del. Co. Rep. 92.

20 Evanston Elec. Illum. Co. v. Kochersperger, 175 Ill. 26, 51 N. E. 719.

21 Newman v. Village of Avondale (Hamilton Co., Ohio C. P.), 31 Week. Bull. 123. When tax on property of telegraph companies deemed an attempted regulation. Commonwealth v. Smith and Commonwealth v. U. S. Express Co., 92 Ky. 38, 36 Am. St. Rep. 578; 17 S. W. 187.

22 Bloxham v. Consumers' E. L. & St. R. Co., 36 Fla. 519, 18 So. 444, 51 Am. St. Rep. 44, 29 L. R. A. 507. Examine further § 28, herein. Not a "railway corporation" for taxation, see Cedar Rapids & M. C. R. Co. v. Cedar Rapids, 106 Iowa, 476, 76 N. W. 728; Acts of Iowa, 18th Gen. Assembly, chap. 32; Iowa Code of 1873, § 1317.

modern business a large proportion of valuable property is now to be found in intangible things such as franchises, which are, like other property, subject to taxation. (2) In grants from the public nothing passes by implication, and, in the absence of direct stipulations relinquishing the right of taxation, a provision, in grants of privileges or franchises, that the grantee shall pay something therefor is not to be construed as an equivalent or substitute for taxes amounting to a contract of exemption from future taxation within the impairment clause of the federal constitution. (3) The omission of the legislature for one year, or for a series of years, to tax certain classes of property, otherwise taxable, does not destroy the power of the State to subject them to taxation when it sees fit to do so. (4) Nothing in the federal constitution prevents a State from granting exemptions from taxation; and the reduction, upon equitable considerations, of payments made in the nature of taxes by certain corporations on their franchises from the amount to which they are subjected by a general law does not entitle every franchise owner to a similar reduction and render the tax invalid because it denies the holders of some franchises the equal protection of the law or deprives them of their property without due process of law. (5) The difference between surface street railroads and subsurface street railroads is sufficient to justify classification in the mode and extent of taxation, and a tax otherwise legal on surface street railroad franchises does not deprive the owners thereof of the equal protection of the laws because subsurface street railroad franchises are not subjected to a similar tax. (6) The tax law of New York[23] imposing taxes on certain public franchises is not repugnant, so far as the franchises in this case are involved, to the equal protection, due process, or impairment of obligation clauses of the federal constitution and of the fourteenth amendment thereto.[24]

[23] As amended May 26, 1899, c. 712, p. 1589.

[24] People, Metropolitan St. Ry. Co. v. New York, 199 U. S. 1, 25 Supp. Ct. 705, 50 L. Ed. 65 revg. 79 App. Div. 183, 80 N. Y. Supp. 85, see also People, Brooklyn City R. R. Co. v. New York, 199 U. S. 48, 25 Sup. Ct. 713, 50 L. Ed. Both cases followed People, Twenty Third St. Ry. Co. v. New York, 199 U. S. 53, 25 Supp. Ct. 705, and affg. 174 N. Y. 417, 67 N. E. 69.

§ 923. **Taxation of subways.**— We have noted[25] under a prior section[26] the New York statute of 1899 relating to "land," "real estate," and "real property," and its inclusion of subways. This statute, section 2, subdivision 3, has been held in the Appellate Division to be applicable to machinery used in connection with the mains and wires for generating and transmitting electricity, and assessable as such real estate.[27] Again, in Massachusetts the legislature has constitutional power to order or sanction taxation of a subway which is to be leased to a street railway for the carriage of passengers for fare, as it is a public use.[28]

§ 923a. **Tunnels or conduits for wires — When and when not real property —"Rights and privileges in land."**— Tunnels in a city through and by means of which a telegraph and telephone company and a tunnel company operate and carry on their business are tangible in form and are not mere "rights and privileges in land," but are "real property" within the meaning of those words as used in a statute providing for the assessment of real property for the purposes of taxation, even though the city owns the fee of the streets and where the board of assessors have failed to assess the same the board of review should have assessed such tunnels as real property.[29] But pipes and wires on private property under a contract are held not to be real estate for the purpose of taxation.[30]

§ 923b. **Franchise tax — Intangible property — Stocks, bonds, accounts, etc.**— Under a Kentucky decision a franchise tax, under the Kentucky statute, is simply a tax on the intangible property of the corporation, and such property must be considered and estimated in fixing the value of corporate franchises, and the stocks, bonds, notes, accounts, and other credits of a telephone company are intangible property and not sub-

[25] See § 94, herein.

[26] § 913, note at end of section.

[27] Herkimer Co. L. & P. Co. v. Johnson, 37 N. Y. App. Div. 257, 55 N. Y. Supp. 924. See annotations to Wells' Railroad Corp. in N. Y. (1899); p. 745. Cumming & Gilbert's Genl. Laws and Stat. N. Y. as to statutes and parts thereof repealed, etc.

[28] Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610.

[29] People, City of Chicago v. Upham, 221 Ill. 555, 77 N. E. 531.

[30] People v. Feitner, 90 N. Y. Supp. 904, 99 App. Div. 274.

ject to assessment by the local assessor, but are to be considered by the board of valuation in fixing the franchise tax.[31]

§ 924. **Taxation of capital stock — Mileage basis.**[32]— Partly paid up shares of stock will, in fixing the tax upon capital stock, be valued at the amount paid thereon where there have been no sales on the market of shares on which such amount has been paid. So, the average value of shares is arrived at, not by averaging the highest and lowest prices at which such shares have been sold, but by dividing the aggregate of the proceeds of the different sales on the stock market by the number of shares sold. And where one-half the par value has been paid upon shares of capital stock issued to stockholders in proportion to their holdings, the value of such shares is to be determined for the purpose of taxation by reference to the average prices at which other shares, on which a like amount has been paid have been sold on the market and not necessarily by reference to the amount paid thereon.[33] A presumption exists that the capital stock has not been impaired, and that debts are offset by assets above the capital which would otherwise have been liable to taxation.[34] Depreciation in the value of assts must be supported by proof, and where there is no such proof it will not be allowed in the assessment. Nor will an estimate be allowed as an indebtedness, as to the portion of the year before which an assessment is made, where it is merely an estimate by a corporation of the annual taxes divided

[31] Commonwealth v. Cumberland Teleph. & Teleg. Co. (Ky. App. 1907), 99 S. W. 604.

[32] See § 91, herein. See annotations in Wells' Railroad Corp. of N. Y. (1899), pp. 751, 756.

[33] Commonwealth v. People's Tract. Co., 183 Penn. St. 405, 39 Atl. 42. See People, Manhattan Ry. Co. v. Barker, 146 N. Y. 304, and 152 N. Y. 417, which reverses 6 N. Y. App. Div. 356, 39 N. Y. Supp. 682.

[34] So held in People, Manhattan R. Co. v. Barker (Sup. Ct. N. Y.), 28 Misc. (N. Y.) 13; 59 N. Y. Supp. 926, 165 N. Y. 305, see People, Edison Gen. Elec. Co. v. Barker, 141 N. Y. 251, 56 N. Y. St. R. 823, 36 N. E. 196, revg. 74 Hun (N. Y.), 418, 56 N. Y. St. R. 798, 26 N. Y. Supp, 519; People, Equitable G. L. Co. v. Barker, 144 N. Y. 94, 63 N. St. R. 33, 39 N. E. 13, revg. 81 Hun (N. Y.), 22, 62 N. Y. St. R. 563, 29 N. Y. Supp. 1147; People, Second Ave. R. Co. v. Barker, 141 N. Y. 196, 56 N. Y. St. R. 834, 36 N. E. 184, affg. 72 Hun (N. Y.), 126, 55 N. Y. St. R. 186, 25 N. Y. Supp. 340.

into twelve equal parts, as such amount is necessarily uncertain.[35] Again, a mileage tax may be imposed by ordinance as a condition for the privilege of using the streets by a street railway company, such ordinance being confined to the power or privilege granted by statute.[36]

§ 925. **Capital in patent rights not taxable.**— Capital invested in patent rights is not subject to State or local taxation.[37]

§ 926. **Capital stock — Domestic and foreign corporations — Patent rights — Licensor and licensee.**— Where local companies are formed in a State for the purpose of carrying on a telephone business, and such companies obtain their instruments by lease from a foreign corporation whose business is that of manufacturing under its patents, and leasing to and licensing the use of telephones by others in various States, for which it receives only certain specified royalties, the relation is that of licensor and licensee, and the local companies are liable for taxation, and not the foreign company. And the fact that the

[35] People, N. Y. & N. J. Teleph. Co. v. Neff, 15 N. Y. App. Div. 8, 44 N. Y. Supp. 46, affd., 156 N. Y. 701.

[36] Chicago General R. Co. v. Chicago, 176 Ill. 253, 52 N. E. 880. See Allegheny v. Millville, E. & S. St. R. Co., 159 Penn. St. 411; Providence v. Union R. Co., 12 R. I 473; Covington, St. R. Co. v. Covington, 9 Bush (Ky.), 127. The fair proportion of the capital stock of a telegraph company taxable in one of several States in which its business is carried on is properly ascertained by the proportion which the number of miles of its poles and wires in the State bears to the entire mileage. Commonwealth v. Western Un. Teleg. Co. (Penn.), 2 Dauph. Co. Rep. 30.

[37] People, Edison Elec. Illum. Co. v. Brooklyn Assessors, 19 N. Y. App. Div. 599, 46 N. Y. Supp. 388; People, Edison Elec. L. Co. v. Campbell, 138 N. Y. 543, 53 N. Y. St. R. 184, 34 N. E. 370, revg. 51 N. Y. St. R. 939, 22 N. Y. Supp. 1113; People, Badische Fabrik v. Roberts, 152 N. Y. 59, 46 N. E. 161, affg. 11 N. Y. App. Div. 310, 76 N. Y. St. R. 502, 42 N. Y. Supp. 502; People, Edison Elec. L. Co. v. Wemple, 148 N. Y. 690, revg. 63 Hun (N. Y.), 444, 44 N. Y. St. R. 702, 18 N. Y. Supp. 511; People, N. Y. & N. J. Teleph. Co. v. Neff, 15 N. Y. App. Div. 8, 44 N. Y. Supp. 46, affd., 156 N. Y. 701. Examine Commonwealth v. Edison Elec. L. Co., 157 Penn. St. 529; Commonwealth v. Elec. L. Co., 145 Penn. St. 105, 121, 131, 147; 22 Atl. 839. See § 926, herein.

foreign corporation may be a stockholder in the local company, or may require leases of instruments to be made in its name, will not vary the rule.[38] It is held, however, that where a corporation had its entire capital stock originally invested in

[38] People v. American Bell Teleph. Co., 117 N. Y. 241, 27 N. Y. St. R. 459, 22 N. E. 1057, 3 Am. Elec. Cas 26, 29 Am. & Eng. Corp. Cas. 616, revg. 50 Hun. (N. Y.), 114, 19 N. Y. St. R. 748, 3 N. Y. Supp. 733. The controversy was presented under an agreed statement of facts under section 1279 of the Code for decision. "The plaintiffs claim the right to recover taxes from the defendant for five years, between 1881 and 1887, upon some portion of its capital stock and upon its gross earnings in this State, by virtue of the provisions of chapter 542 of the Laws of 1880, as amended by chapter 361 of the Laws of 1881, and chapter 501 of the Laws of 1885. The taxes contemplated by the statutes referred to are a certain percentage upon the amount of the capital stock of 'every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country and doing business in this State.' Laws of 1880, chap. 542, § 3; Laws of 1881, chap. 361, § 3. By chapter 501 of the Laws of 1885 the tax upon the capital stock of corporations, when such stock was only partially employed in this State, was limited to so much only of such capital stock as was thus employed. Section 6 of chapter 542 of the Laws of 1880, and section 6 of chapter 361 of the Laws of 1881, authorize, in addition to other taxes and among other corporations, as a tax upon its corporate franchise or business in this State, a certain percentage upon the gross earings of every 'telegraph company or telephone company incorporated under the laws of this or any other State and doing business in this State.' The taxes authorized by these statutes are in addition to the usual and ordinary taxes levied upon property, and were intended to reach and tax the business and franchise only of the corporations designated. The main question presented to us is whether the defendant is a corporation 'doing business in this State,' within the meaning of these words, as used in the statutes. * * * The defendant is a foreign corporation, chartered under the laws of Massachusetts, and located and doing business in that State. It is authorized by its charter 'to carry on the business of manufacturing, owning, selling, using and licensing others to use electric speaking telephones and other apparatus and appliances pertaining to the transmission of intelligence by electricity.' Practically its whole business consists in manufacturing under its patents and leasing to and licensing the use of telephones by others in various States of the Union." The court further considers the nature of the business, under its contracts with the parent company, and says: "The duties and obligations of the

patents, as capital employed in the State, it is taxable upon stock of other domestic corporations issued to it in compensation for the right to use its patents, but the same rule does not apply to stock of foreign corporations so issued to it and employed as capital outside of the State, although it might be otherwise if such bonds were employed as capital within the State; such domestic company is also taxable upon patent rights not granted but held by it for use in certain territory.[39] In New Jersey, where a statute exempts corporations from a franchise tax on their capital stock when they have 50 per cent. of their capital stock invested in manufacturing carried on within the State, this does not cover so much of the capital of a manufacturing corporation as is invested in patents and used to acquire the right to manufacture outside of the State.[40] In Pennsylvania, if a foreign telephone company transacts no business in the State and has no part of its capital or property there, except leased instruments with a license to use the same under contracts made in another State with the parent company, it is not subject to a tax upon its capital stock, even though such company, by virtue of a reservation of power in the contract, might resume possession of and operate said in-

Bell Telephone Company, under their contracts, may be stated concisely as an obligation to furnish the local companies at such times as they may call for them, with a sufficient number of transmitters and receivers to supply the demand for the same by the patrons and subscribers of the local companies. * * * The case does not disclose the aggregate capital of the several local companies in the State, but it is manifest that all of the capital necessarily required in doing their business is invested in and owned by such local companies, and it is indisputable that only the capital actually employed in such business is justly subject to taxation in this State," and that the foreign corporation could not be taxed in New York upon its capital or gross assets or any part thereof, per Ruger, Ch. J. As to noninclusion in assessment of unearned rentals of a telephone company consisting of advance payments, see People, N. Y. & N. J. Teleph. Co. v. Neff, 15 N. Y. App. Div. 8, 44 N. Y. Supp. 46, affd. 156 N. Y. 701. See § 925, herein.

[39] People, Edison Elec. L. Co. v. Campbell, 138 N. Y. 543, 53 N. Y. St. R. 184, 34 N. E. 370, revg. 51 N. Y. St. R. 939, 22 N. Y. Supp. 1113.

[40] State, Electric Storage B. Co. v. State Board of Assessors, 60 N. J. L. 66, 36 Atl. 1090, 7 Am. & Eng. Corp. Cas. (N. S.) 155.

struments.[41] But it is also held in that State that stock of a local telephone company, issued to a foreign parent company which owns its instruments, pursuant to the contract between the two companies for the leasing of the instruments, is not invested in "patent rights" so as to exempt the local company from taxation on such stock.[42] It is held in a Federal case that the American Bell Telephone Company's transactions with its licensee corporations of Ohio, at its foreign place of business and not elsewhere, do not constitute carrying on business in Ohio, and that its contracts create the relation of licensor and licensee, and lessor and lessee, and not that of agency.[43]

§ 927. **Interest payments — Mortgages — Indebtedness — "Stock trust certificates."**— Where a company has outstanding mortgage debts and charges up monthly to its indebtedness one-twelfth of the yearly accruing interest on said mortgages, it cannot be allowed to treat as a debt so much of said interest as accrues before the time for making the tax assessment upon its personal property.[44] If mortgages are issued by private parties and secured upon property conveyed to a private corporation which does not assume the indebtedness, no tax is due from said corporation in respect to said mortgages under a statute requiring private corporations to deduct a State tax of a specified ratio from interest payments on bonds and certificates of indebtedness, and another statute which requires a specified tax upon all mortgages. But when a statute imposes a certain tax upon moneys owing by solvent debtors, whether by promissory note, bond or judgment, and another statute requires the treasurer of private corporations to deduct for the State's benefit a certain ratio per cent. on every dollar of interest paid on bonds or certificates of indebtedness issued by such corporation, both statutes must be construed together, and the cor-

[41] Commonwealth v. American Bell Teleph. Co., 129 Penn. St. 217, 2 Am. Elec. Cas. 90; 18 Atl. 122.

[42] Commonwealth v. Central Dist. & P. Teleph. Co. (Penn., 1891), 22 Atl. 841. Examine also cases under § 925, herein.

[43] United States v. American Bell Teleph. Co., 29 Fed. 17.

[44] People, N. Y. & N. J. Teleph. Co. v. Neff, 15 N. Y. App. Div. 8, 44 N. Y. Supp. 46, affd., 156 N. Y. 701.

poration must deduct the tax specified under the first mentioned statute from the interest paid on corporate bonds. Again where two corporations had agreed that certain dividends should be received by the holders of shares deposited with a trustee by way of rental under a lease of the plant of one corporation to another, said tax statutes do not cover interest paid by a private corporation upon "stock trust certificates" issued by said trustee, and representing the stock of the other corporation deposited with him when said interest is in lieu of and just the amount of said dividends.[45]

§ 927a. **Payment from gross receipts not a tax — Ordinance — Contract.**— An ordinance, accepted and acted upon by its grantees, based upon a consideration of the right of a telephone company to use the public streets of a city for the poles, lines and wires necessary to the operation and maintenance of its service, for which the grantees are to pay the city a certain percentage of the gross receipts, does not, it is held, impose a tax, but is to be construed as a sale or rental of the necessary portions of the street for the specified time for the purpose specified; such a charge is not to be regarded as a demand of sovereignty, but as a demand of proprietorship and constitutes a contract which both parties had a legal right to make, and in construing the same the mutual intention of the parties must govern such intention to be ascertained from the language of the instrument and the circumstances under which it was made.[46]

§ 928. **Division into street lighting districts for taxation.**— Street lighting districts may be created as taxing districts by the legislature out of part of a political district by making such part a political district or political subdivision of the State, with local governmental powers, and the statute may provide for the erection and maintenance of street lights therein and the election of light commissioners.[47]

[45] Commonwealth v. Union Tract. Co., 192 Pa. St. 507, 43 Atl. 1010; Penn. Act. of June 30, 1885, § 4; Penn. Act. of 1891, § 1.

[46] Lancaster, City of, v. Briggs & Melvin, 118 Mo. App. 570, 96 S. W. 314; see Plattsburg, City of, v. People's Teleph. Co., 88 Mo. App. 306.

[47] State, Street L. Dist. No. 1 v. Drummond (N. J. Sup. Ct.), 43 Atl. 1061.

§ 929. **Valuation.**— In determining the value of street railway franchises for taxation, reference should be had to elements bearing directly upon said value other than the earning capacity as a basis.[48] In New York the valuation placed upon real property of a corporation by the commissioner of taxes and assessments is conclusive in computing the value of all the corporate property for the purpose of determining the assessment upon the personal property.[49] It has been decided, however, that the value of an electric light company's franchise is not subject to local taxation.[50]

§ 929a. **Special franchise tax — Deductions — Payment out of gross receipts — When gross receipts considered.**— A payment by a street surface railway company to a city under an agreement therewith, whereby a percentage of its gross receipts, previously payable, had been reduced in consideration of the granting of transfers to passengers is under the tax law "in the nature of a tax" and the amount thereof should be deducted from its special franchise tax as assessed by the board of tax commissioners of the State.[51] Under a Nebraska decision the value of the tangible property of an express, telephone, or telegraph company, apart from its gross receipts for the year prior to the time of the assessment and its franchise or right to carry on its business, does not furnish the true value of its property for taxation. Such value should be ascertained from a consideration of all of the aforesaid items taken together and

[48] St. Charles St. R. Co. v. Board of Assessors, 51 La. Ann. 458, 25 So. 90; La. Const., art. 203; Acts of 1890, No. 105, §§ 1, 28.

[49] People, Consol. Teleg. & E. S. Co. v. Barker, 7 N. Y. App. Div. 27, 39 N. Y. Supp. 776, revg. 16 Misc. (N. Y.). 258, 39 N. Y. Supp. 106, affd., 151 N. Y. 639. See further as to valuation, People, Equitable G. L. Co. v. Barker, 66 Hun. (N. Y.) 21, 49 N. Y. St. R. 428, 20 N. Y. Supp. 797, affd., 137 N. Y. 544, 50 N. Y. St. R. 930, 33 N. E. 336; People, Elec. Illum. Co. v. Barker 139 N. Y. 55, 54 N. Y. St. R. 44, 34 N. E. 722; People, Malcolm B. Co. v. Neff, 19 N. Y. App. Div. 596, affd., 154 N. Y. 437; People, Manhattan, Ry. Co. v. Barker, 152 N. Y. 417; People, v. Ulster & D. R. Co., 128 N. Y. 240, 40 N. Y. St. R. 280, 28 N. E. 635, affd., 58 Hun. (N. Y.), 266, 34 N. Y. St. R. 938, 12 N. Y. Supp. 303.

[50] People, Edison Elec. Illum. Co. v. Assessors of Brooklyn, 19 N. Y. App. Div. 599, 46 N. Y. Supp. 388.

[51] Eberwagen v. Crosstown St. Ry. Co., 179 N. Y. 99, 71 N. E. 729, modifying 90 App. Div. 275.

by treating the corporation as a growing concern.[52] In a New Jersey case the amount of a tax to be levied under the statute of 1900 is two per cent. of the company's gross annual receipts from all business and not merely two per cent. of its receipts from the exercise of municipal franchises; and a company which constitutes a consolidation and merger of several corporations and continues to exercise their franchises is subject to the taxation of its franchises.[53]

§ 930. **Municipal corporation has no inherent power to levy taxes.**— It may be stated generally that a municipal corporation has no inherent power to levy taxes, and the grant of such powers must be plain and unmistakable, and such corporations are held strictly within the limits of the power granted.[54]

§ 931. **Income tax on profits of telegraphic or submarine cables — English decision.**— A foreign telegraph company with an agency in the United Kingdom had, besides certain lines abroad, three marine cables which landed on the shores of the United Kingdom, through which it despatched and received messages between the United Kingdom and foreign parts. It had in the United Kingdom a separate line worked by its own servants. A message received by the company for transmission passed partly over lines belonging to the post-office, over the marine cables of the company, over cables belonging to foreign governments or companies, and in some cases over cables abroad, belonging to the company. The proprietors of each of the cables received a portion of the sum paid for the transmission of the message and the company retained the balance. No profit accrued to the company from its land lines in the United Kingdom. It was held that the company exercised a trade within the Kingdom within the meaning of 16 and 17 Vict., chapter 34, section 2, schedule D, and that an income tax was

[52] Nebraska Teleg. Co. v. Hall County (Neb. 1906), 106 N. W. 471.

[53] Peterson & Passaic Gas & Elec. Co. v. State Board of Assessors, 69 N. J. L. 116, 8 Am. Elec. Cas. 403, 54 Atl. 246, affd., 70 N. J. L. 825, 59 Atl. 1118.

[54] City Council of Charleston v. Postal Teleg. Cable Co., 9 Ry. & Corp. L. Jour. 129, 3 Am. Elec. Cas. 56, 60. See 1 Dill. on Mun. Corp (4th ed.), § 63 (36), 2 Dill. on Mun. Corp. (4th ed.), § 739 (590) et seq.

payable on the profits accruing therefrom — that is, on the difference between the sum received and the cost of earning that sum.[55]

§ 931a. **Taxation — Franchise tax when a license tax and not tax upon property — Gross receipts — Exemptions.**— In a New Jersey case the question involved was the right of a municipality to levy a property tax upon the right, privilege, license, or franchise of a company to lay and maintain street railway tracks and operate trolley cars thereon. This necessitated the construction of a statute of that State providing for the taxation of all property, real and personal, not expressly exempted by or excluded from the operation of the enactment. The property so exempted was all offices and franchises and all property used for railroad and canal purposes, "the taxation of which is provided for by any law of this State." This statute was held constitutional. It was also decided that the franchise tax imposed by the act was in the nature of a license tax and not a tax upon property; that the franchises to use or occupy public streets, which were subject to a franchise tax, were not subject to a property tax; that a tax on gross receipts was not a property tax but a license tax imposed by the State as a condition precedent to the exercise of special privileges in the streets, and that a distinction was observed throughout between a property tax and a franchise tax. "We think it clear that the franchise tax was not intended to be a property tax. That impositions of this character may be imposed by way of a license tax is well settled. Such a tax is imposed by this State upon the general franchises to a corporation, and has been sustained by the courts. * * * It cannot be doubted that the legislature or a municipal corporation vested with power to grant or refuse its consent to the special privilege to use the streets may grant the privilege upon terms. * * * The same reasoning which justifies the special tax upon the general corporate franchises justifies a special tax upon the special franchise to use the streets, although that special franchise may antedate the imposition of the tax. * * * We think the franchise sought to be taxed by Jersey City are franchises the taxation of

[55] Ericksen v. Last, 51 Law Jour. Rep. Q. B. 86, L. R., 8 Q. B. D. 414, affg. Q. B. D., 50 Law Jour. Rep. 570, L. R., 7 Q. B. D. 12.

which is provided by another law and that therefore they are not taxable as property under the Act of 1903." [56]

§ 932. **Electric light, etc., plants — When a "manufacturing" corporation — Taxation — Exemption.**— In Colorado the operation of an electric light plant is manufacturing and gives a right to condemn a way over lands for the purpose of carrying water for power to operate such plant.[57] It is also a manufacturing corporation within a statute authorizing such corporations to consolidate.[58] And the production of electricity is a manufacture, so as to exempt the corporations producing it, from taxation under the New York Laws of 1880.[59]

§ 933. **Electric light, etc., plants — When not a "manufacturing" corporation — Taxation — Exemption.**— In Maryland, even though an electric corporation, organized "to furnish light, heat and power for public and private uses," generates its own electricity, it is not purely a manufacturing corporation under the statute of that State so as to exempt its capital stock and franchise from assessment by the State Board of Equalization.[60] Nor is it a manufacturing industry within an ordinance which exempts such industries from taxation.[61] But this decision was based upon the fact that although in a certain sense electric

[56] North Jersey St. Ry. Co. v. Mayor, etc. of Jersey City (N. J. Sup. Ct. 1906), 63 Atl. 833, per Swayze, J.

[57] Lamborn v. Bell, 18 Colo. 346, 4 Am. Elec. Cas. 573, 32 Pac. 989.

[58] Beggs v. Edison Elec. Illum. Co., 96 Ala. 295, 3 Am. Elec. Cas. 504, 11 So. 381.

[59] People, Edison Elec. Illum. Co. v. Wemple, 129 N. Y. 664, 42 N. Y. St. R. 280, 29 N. E. 812, 3 Silvernail's Ct. App. 653, 4 Am. Elec. Cas. 563, revg. 61 Hun (N. Y.), 53, 39 N. Y. St. R. 605, 15 N. Y. Supp. 711. See also People, Western Un. Teleg. Co. v. Roberts, 30 N. Y. App. Div. 78, affd., 156 N. Y. 693; People, Edison Elec. L. Co. v. Campbell, 88 Hun (N. Y.), 527, 68 N. Y. St. R. 746, 34 N. Y. Supp, 711, 6 Am. Elec. Cas. 653; People, Western Elec. Co. v. Campbell, 145 N. Y. 587, 65 N. Y. St. R. 526, 40 N. E. 239, affg. 80 Hun (N. Y.), 466, 62 N. Y. St. R. 304, 30 N. Y. Supp. 472. See N. Y. Laws as amended by Laws of 1885, c. 359; Laws of 1889, c. 193, 353, and Laws of 1890, c. 522; Wells' Railroad Corp. in N. Y. (1899), pp. 418–420, 755–757. See next section, herein.

[60] Evanston Elec. Illum. Co. v. Kochersperger, 175 Ill. 26, 21 N. E. 719, under Ill. Rev. Stat., c. 120, § 3, cl. 4.

[61] Frederick Elec. L. & P. Co. v. Frederick, 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130, 6 Am. Elec. Cas. 644.

light companies are "manufacturing" corporations, nevertheless the statute authorizing the creation of such companies excluded them from the class designated as "manufacturing companies" and placed them in another class, where they have remained since 1886.[62] Several cases in Pennsylvania also hold that such companies are not manufacturing corporations so as to be exempt from taxation under the Laws of 1885.[63] So, also, under the Act of 1891.[64] But in a recent case it is held that premises of an electric light company, occupied for a reserve emergency plant for supplying light, are exempt from taxation on the ground of being used for manufacturing purposes, even though not actively so occupied at the time.[65]

§ 934. **Premises of telegraph company exempt from house duty — English decision.**— Premises occupied merely for carrying on the business of a telegraph company are held to be premises occupied for the purposes of trade, within the English statute, and exempt from inhabited house duty.[66]

§ 935. **Exemption from duty — Rails for railways and tramways — English decision.**— The exemption from duty in a statute [67] of "steel rails weighing not less than twenty-five pounds per lineal yard for use on railway tracks," does not apply to rails to be used for street railways which are subject to duty as "rails for railways and tramways of any form." [68]

[62] C. 306, Laws of 1886, § 30, class 17.

[63] Commonwealth v. Northern Elec. L. & P. Co., 145 Penn. St. 105, 22 Atl. 839; Commonwealth v. Edison Elec. L. Co., 145 Penn. St. 131, 22 Atl. 841, 845; Commonwealth v. Brush Elec. Light Co., 145 Pa. 147, 22 Atl. 844.

[64] Commonwealth v. Edison Elec. L. & P. Co. (Penn. C. P.), 1 Dauph. Co. Rep. 127, affd., 170 Penn. St. 231, 32 Atl. 419.

[65] Southern Elec. L. & P. Co. v. Philadelphia, 191 Penn. St. 170, 43 Atl. 123. Examine St. Mary's Gas Co. v. Elk Co., 191 Penn. St. 458, 43 Atl. 321; Ridgeway L. & H. Co. v. Elk Co., 191 Penn. St. 465, 43 Atl. 323.

[66] Chartered Mercantile Bank of India v. Wilson, 47 Law Jour. Rep. Exch. 159, L. R., 3 Exch. D. 108, Cleasby, J., dissenting, 32 and 33 Vict., c. 14, § 11.

[67] 50 and 51 Vict., c. 39, item 173.

[68] Toronto Ry. Co. v. McQueen, 25 Can. Sup. Ct. 24.

§ 936. **Exemptions from taxation continued.**— If a statute makes provision for an annual report to designated authorities and constitutes a certain board for the purpose of determining the rate of tax to be levied and provides that such tax shall be in lieu of all other taxes, State and local, this exempts telephone companies from local taxation.[69] The fact that land is farm land does not exempt a borough citizen from taxation for furnishing light and water to the borough, even though such land is not directly benefited, there being no constitutional or statutory exemption of such land.[70] But lands, buildings and appliances of an electric light company are exempt from local taxation where they are necessary to carry on the corporate business of such company.[71] If the Constitution makes it the duty of the legislature to provide for the organization of cities and towns, and authorizes it to restrict their power of taxation and assessment and to prevent abuses thereof, it may exempt the property of street railway companies from the payment of special city assessments where they have paid license fees in lieu thereof, as provided by law, and such property is in such case so exempt.[72]

§ 936a. **In lieu of all other taxes — Exemption — Change of motive power — Fixtures.**— Where a street railway company under its franchise from a municipal corporation was to pay a certain percentage to the city out of its gross earnings, and also such taxes for municipal purposes as might be levied "upon the lots and parcels of land, and buildings thereon" which were the company's property; the same to be in lieu of all other taxes and charges, and at the time of the incorporation of such provision the cars of the company were operated by animal power, but electricity was thereafter substituted for the

[69] Attorney-General v. Detroit, 113 Mich. 388, 71 N. W. 632, 4 Det. L. News, 326; Mich. Pub. Acts of 1883, Act No. 129, § 8; How. Ann. Stat. § 3718h; Mich. Sess. Laws of 1881, Act No. 168. See § 111, herein.

[70] Hummelstown v. Brunner (C. P.), 5 Penn. Dist. Rep. 8, 17 Penn. Co. Ct. 140.

[71] Brush Elec. L. Co. v. Philadelphia (C. P.), 8 Penn. Dist. Rep. 231. See § 926, herein.

[72] Milwaukee Elec. R. & L. Co. v. Milwaukee, 95 Wis. 42, 69 N. W. 796, 6 Am. & Eng. R. Cas. (N. S.) 411; Wis. Const., art. 11, § 3; Wis. Laws of 1895, c. 363, § 6.

motive power, and the company for that purpose installed a large amount of electricity; and at such time also the general tax law provided that real property should, for the purposes of taxation, include all lands within the State, and all buildings and fixtures thereon and appurtenances thereto, except otherwise expressly provided by law, the company was held not to be exempt from taxation on so much of its machinery as constituted fixtures.[73]

§ 937. **License, privilege or occupation taxes or charges.**— We have considered fully in a prior chapter the questions of license privilege or occupation taxes, fees, rentals or charges, under the various names by which they are designated, in connection with the question of interstate commerce,[74] and this eliminates a greater number of the decisions to the extent that but few cases are left for consideration here. It may be generally stated that, subject to the restrictions and exceptions imposed by or arising from the power of Congress to regulate commerce, municipalities may impose reasonable charges upon electric companies for the privilege of erecting poles in and stringing wires over the streets of a city, where its charter or delegated powers expressly or impliedly confer such right. Thus express authority may and generally is given by the legislature to levy and collect license or privilege taxes on occupations, trades and calings, and where this includes electric companies, it has been held that the municipality is not limited to the mere expense of regulation, but that such charges may be imposed to obtain revenue for the general expenses of the city.[75] So, ordinances imposing an annual license tax on telegraph poles and wires are a valid exercise of the police power.[76]

[73] Detroit United Ry. v. State Tax Commissioners, 136 Mich. 96, 10 Det. Leg. N. 993, 98 N. W. 997.

[74] See c. VIII, herein.

[75] Chipchase, In re, 56 Kan. 357, 43 Pac. 264, 6 Am. Elec. Cas. 92. See next section, herein. See Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 29 Atl. 819, 24 L. R. A. 161, 5 Am. Elec. Cas. 37.

[76] Philadelphia v. American Un. Teleg. Co. (Penn., 1895), 6 Am. Elec. Cas. 85. See also upon the right to impose such fees, Landsdowne v. Delaware Co. & P. Elec. R. Co., 9 Penn. Super. Ct. 621, 7 Del. Co. Rep. 395; Lancaster v. Edison Elec. Illum. Co. (C. P.), 8 Penn. Ct. Rep. 178, 2 Am. Elec. Cas. 116; McKeesport v. McKeesport & R. Pass. R. Co., 2 Super. Ct. (Penn.) 242; Kittanning Elec.

§ 938. **License, privilege or occupation taxes or charges continued.**— If an ordinance grants consent to the erection of telegraph and telephone poles and also imposes an annual license fee on each pole and is accepted by the company, it is liable even though the municipality reserves the right to use its own wires on some of the poles.[77] Again, where a statute provides that telephone companies shall pay a license tax of a specified amount on every plant, but a less sum where the "incs" are less than twenty-five miles, then the aggregated length of all the wires connecting with each other by a call wire and used by all the different subscribers, will be considered in determining whether the "line" exceeds the twenty-five miles, even though the sum of the distances covered by the poles is less than that number of miles.[78] If telegraph companies are granted the use of a city's streets free of charge by statute, then the municipality cannot impose a rental upon them for such street use.[79] Again, where a specified percentage of its earnings are agreed to be paid a city for the use of its streets by a railway company, the fact that part of such earnings arise from traffic outside does not release the company.[80] Where under municipal ordinances a

L., H. & P. Co. v. Kittanning, 11 Penn. Super. Ct. 31; Taylor v. Central Penn. Teleph. & S. Co. (C. P.), 8 Penn. Dist. Rep. 92, 4 Lack. L. News, 191, holding also that such ordinance is valid, even though, in computing the amount, poles on private property do not appear to have been excepted, where it is not shown that the poles were so situated; Norristown v. Keystone Teleg. Co. (C. P., Penn.), 15 Mont. Co. L. Rep. 9, holding also that fact that license tax has not been enforced against other like corporations is no excuse for nonpayment; Braddock v. Second Ave. Tract. Co. (C. P., Penn.), 28 Pitts. L. Jour. (N. S.) 278, holding that a license tax may be imposed by a borough upon electric street cars, under a statute authorizing a tax upon vehicles. See next section, herein.

[77] Norristown v. Keystone Teleg. & Teleph. Co. (C. P., Penn.), 15 Mont. Co. L. Rep. 9. But see St. Louis v. Western Un. Teleg. Co. (U. S. C. C., E. D. Mo., 1894), 5 Am. Elec. Cas. 43.

[78] Southern Bell Teleph. Co. v. D'Alemberte, 39 Fla. 25, 21 So. 570.

[79] Hodges v. Western Un. Teleg. Co., 72 Miss. 910, 18 So. 84, 29 L. R. A. 770, 5 Am. Elec. Cas. 56.

[80] Carlisle v. Cumberland Valley Elec. Pass. R. Co. (Penn. C. P.), 22 Penn. Co. Ct. 221. Such a contract is not illegal. An annual charge of $4 per lineal foot, inside measurement, upon each car run, requires payment on the number of cars actually operated, and not upon the yearly average of cars operated. Cincinnati v. Cincinnati St. R. Co. (Cin. Super. Ct.), 6 Ohio N. P. 140.

street railway company had permission to construct lines of railway in the city streets and to maintain its system and to operate cars thereon, upon the condition that it pay a certain annual license fee for each car so operated and the ordinance was accepted and the lines constructed and cars operated in conformity therewith for many years, its successors who acquired such lines and assumed the obligations imposed were held to be estopped from setting up, that the acts of the municipality were *ultra vires*.[81]

§ 938a. **License fee — Nature of — Property tax — Impairment clause of constitution.**— A license fee is a charge for the privilege of carrying on a business or occupation, and is not the equivalent or in lieu of a property tax, and a provision in the grant of a franchise for a license fee does not, in the absence of express stipulations or exemptions, relieve the property employed in the business from the ordinary burdens of property taxation and amount to a contract of exemption from further taxation, within the impairment of contract clause of the federal constitution.[82] A tax of one dollar for each telephone station or box which is imposed upon telephone companies by the general tax Act of 1896 of Georgia is not a tax upon property, but an occupation or business tax.[83]

[81] Mayor, etc., of Jersey City v. North Jersey St. Ry. Co. (N. J. Sup. Ct. 1905), 61 Atl. 95.

[82] People, Brooklyn City R. R. Co. v. New York, 199 U. S. 48, 25 Sup. Ct. 713, 50 L. Ed. 79. See Borough of Braddock v. Allegheny County Telephone Co., 25 Pa. Super. Ct. 544.

[83] Southern Bell Teleph. & Teleg. Co. v. Stewart (Atlanta National Bldg. & Loan Ass'n v. Stewart), 109 Ga. 80, 35 S. E. 73. "Can this be claimed to be a tax on property? There is not the slightest hint that the value of the box or station has any connection with the tax. For a station or box worth twenty-five dollars the company would pay one dollar; for another costing or worth a thousand dollars, it would pay exactly the same. No effort is made to ascertain value, or to deal with property as to its value. The company might have buildings and real estate worth a million dollars and other property worth ten thousand dollars, or it might have no property and operate with rented property, and it would be the same in either case. It simply refers to the number of stations or boxes rented or used. A tax on a person, graduated according to the number of a certain kind of articles, apparatus, or machines employed by him or it, without regard to value, is unquestionably not a property tax, but an occupation tax," per Cobb, J.

§ 939. **What are reasonable and unreasonable license fees or charges.**— Fifty cents for each pole of an electric light company is unreasonable, where the cost of inspection is only about one-tenth that amount.[84] Twenty dollars penalty for each unlicensed car is unreasonable, where the ordinance also fixes an annual license fee of $10 for each car which is run through a street, but such license fee is of itself not unreasonable.[85] We have, however, fully considered this point elsewhere, and the reader is referred thereto.[86]

§ 940. **Constitutional and statutory provisions — Assessments, taxation, reports, etc.**— The Constitutions and statutes of various States provide for the filing of annual statements or reports by telegraph, telephone and other electrical companies for taxation, for assessment of the same, and generally as to the manner and mode of taxation of the property, capital stock, or otherwise, of these companies. It is not our purpose to note these statutes in this work, except in so far as they have been construed by the several courts, and this has been done.[87]

§ 940a. **Telegraphic message — War revenue stamp.**— It is decided in Michigan that the war revenue tax on telegraphic messages must be paid by the sender of such a despatch.[88] Although it is also held in the same case that a State statute requiring the maker and sender of a telegraphic message to pay said tax is unconstitutional within that provision of the United States Constitution which makes Federal laws enacted in pursuance thereof the supreme law of the land. It is also held in a Federal case that the obligation to affix and cancel the

[84] Saginaw v. Swift Elec. L. Co., 113 Mich. 660, 72 N. W. 6, 4 Det. L. News, 432.

[85] Chester Tract. Co. v. Ridley Park (C. P., Penn.), 7 Del. Co. Rep. 302. See also North Braddock v. Second Ave. Tract. Co. (Penn. C. P.), 28 Pitts. L. Jour. (N. S.) 278; Chester City v. Western Un. Teleg. Co., 154 Penn. St. 464, 4 Am. Elec. Cas. 100; St. Louis v. Western Un. Teleg. Co., 148 U. S. 92, 37 Ed. 380, 4 Am. Elec. Cas. 102; Allentown v. Western Un. Teleg. Co., 148 Penn. St. 117, 4 Am. Elec. Cas. 90, 23 Atl. 1070.

[86] See §§ 99–101, herein.

[87] As to taxation, see 3 Cook on Corp. (4th ed.), pp. 2362–2660, containing brief compilation.

[88] Re War Revenue Tax (Atty.-Gen.), 5 Det. Leg. News, No. 48.

war revenue stamp rests upon the maker and signer of a telegraphic despatch to enable him to hold a telegraph company liable for negligent failure to transmit and deliver said message.[89] A telegraphic company is not liable for failure to transmit and deliver an unstamped message, that is, a message not having upon it a revenue stamp as required by an Act of Congress, while said act was in operation. And an agreement tc transmit the message without the required stamp is void and cannot be ratified or confirmed by subsequent acts; nor in such case would the subsequent repeal of the statute validate the contract.[90]

§ 940b. **Telephone rental agreement — English Stamp Act — Ad valorem duty.**— An agreement in writing, not under seal, whereby a telephone company agrees to erect and maintain in order a private wire and apparatus for a certain person, and to furnish the same at a named sum per year in advance, with the privilege of terminating said agreement upon a notice in writing by either party given at a specified time, is not chargeable merely with a stamp duty as an agreement, but comes within the provisions of the English Stamp Act of 1891, which provides for an ad valorem duty of a certain rate per cent. for

[89] Kirk v. Western Un. Teleg. Co. (U. S. C. C., N. D. Cal.) 90 Fed. 809; War Rev. Act, June 13, 1898. As to tax of one cent on bills of lading, held that express company, and not the shipper, is liable; United States Express Co. v. People; Western Wheel Works, 80 Ill. App. 446, affg. 16 Nat. Corp. Rep. 1231, 5 Det. Leg. News, No. 21, 30 Chic. Leg. News, 408. But examine Crawford v. Hubbell (U. S. C. C., S. D. N. Y.), 89 Fed. 961, 13 Am. & Eng. Ry. Cas. (N. S.) 92, 5 Det. Leg. News, No. 34, 31 Chic. Leg. News, 104; Biddle Hardware Co. v. Adams Express Co. (C. P., Penn.), 22 Penn. Co. Ct. 1, 8 Penn. Dist. Rep. 43.

[90] Western Union Teleg. Co. v. Young, 138 Ala. 240, 36 So. 374; Act June 13, 1898, 30 U. S. Stat. at L. §§ 7, 18, pp. 452, 455, U. S. Comp. Stat., 1901, pp. 2292, 2297, entitled "An act to provide ways and means to meet war expenditures, and for other purposes" imposed the duty on the sender of every telegraphic message or despatch to put a stamp upon it before issuing it and the failure to do so was a misdemeanor. It also prohibited any telegraph company or its agent or employee from transmitting any message without an adhesive stamp being affixed to a copy thereof or having the same stamped thereon, and in default thereof a penalty was imposed. See Western Un. Teleg. Co. v. Henley, 157 Ind. 90.

any bond, covenant, or instrument whatever, being the "only or principal or primary security * * * for any sum or sums of money at stated periods." [91]

[91] National Teleph. Co. v. Inland Rev. Comrs., 1 Q. B. 250 (C. A. 1899), 68 L. J. Q. B. (N. S.) 222. Stamp duty, 6d.; ad valorem duty, 2s. 6d. per £5.

TITLE VIII.

DAMAGES AND MEASURE OF DAMAGES.

CHAPTER XXXV.

DAMAGES AND MEASURE OF DAMAGES.

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959. Future or speculative profits.
960. Acceptance of offer to sell — Recovery by sender of message — Market value — Measure of damages.
§ 961. Offer to buy — Message accepting — Loss of profits — Market value.
961a. Acceptance of offer to sell — Where conditional — Delay in delivery of message declining acceptance on condition imposed.
962. Offer to buy — Failure to deliver message containing — Loss of sale — Market value.
963. Offer to sell — Failure to deliver message — Subsequent rise in price — Market value.
963a. Offer to sell — Message asking for bids — Negligent delay in delivery of reply.
964. Offer to sell — Error in message — Price understated — Market value.
965. Offer to buy — Error in transmission — Price understated.
966. Message ordering goods — Error in transmission — Quantity increased — Market value.
967. Message ordering goods — Error in transmission — Quantity decreased — Market value.

§ 968. Message ordering goods — Error in transmission as to place goods to be sent — Market value.

969. Message ordering goods — Delivery to wrong person — Market value.

970. Message to ship goods at once — Failure to deliver — Market value.

971. Message not to ship goods — Not to purchase — Failure to deliver — Market value.

972. Duty of person suffering loss — Reasonable measures to diminish damages.

973. Real estate transactions — Message to agent from principal — Market value — Measure of damages.

974. Reports of market quotations — Errors in — Measure of damages.

975. Commissions of agents or brokers.

976. Message offering employment — Negligence of company — Measure of damages.

977. Loss of reward for capture of criminal.

978. Failure to deliver message — Notes protested.

979. Messages in reference to claims — Directing attachment — Negligence of telegraph company.

979a. Message to sheriff to postpone sale of property — Failure to deliver.

980. Message to physician — Lawyer — Loss of fee.

980a. Sending money by telegraph — Collection of draft — Tender of check by company instead of cash — Measure of damages — Mental suffering.

§ 980b. Telegrams in reference to railroad tickets —Measure of damages for failure to transmit — Mental suffering.

981. Forged message — Payment of money in pursuance of.

981a. Forged message — Wires tapped by third person — Use of information from operator.

981b. Telegram — Unauthorized message sent by telephone — Loss of lien.

982. Libelous message by agent of telegraph company.

983. Contract between telegraph company and individual — Maintenance of office — Damages for breach of.

983a. Disconnection of telephone — Refusal of service — Breach of contract — Punitive damages.

984. Error in message — Settlement by agent with third party for less than face value of claim.

984a. Refusal of street car conductor to give change — Abusive language by conductor.

984b. Physical injury — Collision with telegraph pole — Right under statute — Massachusetts case.

985. Death — Physical injuries — Measure of damages — Generally.

986. Physical injury — Expense incurred.

987. Physical injury — Mental suffering — Fright.

§ 988. Fright — Injuries produced by.
989. Physical injury — Diminution in earning capacity.
990. Injuries causing death — Funeral charges not recoverable as part of damages — Statute.
991. Death of child — Injuries to — Measure of damages for.
992. Injury to child — Action by parent.
§ 922a. Injury to wife — Measure of damages where husband assigns claim to her.
993. Death of husband — Parent.
994. Injuries to trees.
995. Electric light plant — Injury to adjoining property.
995a. Erection of poles on private property — Measure of damages for.

§ 941. **Damages — Generally.**— Where a person has entered into a contract with another by which the performance of some obligation is imposed upon or assumed by him, or where, by common law or by statute, some duty is imposed upon a person with reference to the rights of others, in case of a violation of such obligation or duty the aid of the courts may be invoked by a suit for damages, the object of such action being to enable the injured party, so far as is possible, to obtain compensation or satisfaction for the loss he has suffered by such violation. According as the facts of each case may require, damages, if awarded, may be nominal, actual or exemplary. The different classifications and the application of the general rules of damages to cases where electrical companies are involved, will be considered in the following sections of this chapter.

§ 942. **Actual damages.**— Actual damages is a compensation to a person injured by the wrongful act of another, commensurate with the actual loss or injury sustained.[1]

§ 943. **Nominal damages.**— Nominal damages is a small or trivial sum awarded for a technical injury due to a violation or invasion of some legal right, and as a consequence of which, some damages must be awarded to determine the right.[2] Thus,

[1] In Western Union Telegraph Co. v. Lawson, 66 Kan. 660, 72 Pac. 283, 14 Am. Neg. Rep. 41, it is said: "Actual damages are such losses as are actually sustained and are susceptible of ascertainment," per Greene, J.

[2] Nominal damages arise by implication of law for the violation of the rights of another from which

though no actual damages may result from a breach of the contract by a telegraph company in negligently failing to promptly deliver a message, yet nominal damages may be awarded.[3] And, as a general rule in such cases, only nominal damages can be recovered unless some substantial damage be shown.[4] Or, unless the negligence of the company is the proximate cause of the damages sustained.[5]

§ 944. **Exemplary or punitive damages.**— Exemplary or punitive damages are those in excess of the actual loss, not intended as a compensation but rather designed as a punishment for the wanton or malicious conduct of one person towards another. Such damages can only be imposed when the wanton or malicious act can be brought home to the defendant.[6] And where actual damages have been established by the evidence, and allowed by the jury or court, however small, exemplary damages may be also recovered, if the evidence warrants such recovery.[7] So exemplary damages may be recovered of a telegraph company where it is guilty of such gross negligence in delaying the transmission or delivery of a message as amounts to wantonness or a malicious purpose.[8] Under the

injury arises, but which is either incapable of ascertainment, or the value of which the proof wholly fails to show. Western Union Telegraph Co. v. Lawson, 66 Kan. 660, 72 Pac. 283, 14 Am. Neg. Rep. 41.

[3] Western Un. Teleg. Co. v. Birchfield, 14 Tex. Civ. App. 664, 38 S. W. 635, 2 Am. Neg. Rep. 468; Kennon v. Western Un. Teleg. Co., 92 Ala. 399, 3 Am. Elec. Cas. 584, 9 So. 200.

[4] Acheson v. Western Un. Teleg. Co., 96 Cal. 641, 31 Pac. 583; Merrill v. Western Un. Teleg. Co., 78 Me. 97, 2 Am. Elec. Cas. 600, 2 Atl. 847.

[5] Bodkin v. Western Un. Teleg. Co., 31 Fed. 134, 2 Am. Elec. Cas. 857.

[6] Fohrmann v. Consolidated Tract. Co., 63 N. J. L. 391, 43 Atl. 892.

[7] Western Union Telegraph Co. v. Lawson, 66 Kan. 660, 72 Pac. 283, 14 Am. Neg. Rep. 41.

[8] *Alabama:* Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314, 14 So. 597, 4 Am. Elec. Cas. 658. *Kansas:* Western Union Teleg. Co. v. Lawson, 66 Kan. 660, 72 Pac. 283, 14 Am. Neg. Rep. 41; West v. Western Un. Teleg. Co., 39 Kan. 93, 17 Pac. 807. *South Carolina:* Hellams v. Western Union Teleg. Co., 70 S. C. 83, 49 S. E. 12; Butler v. Western Union Teleg. Co., 65 S. C. 510, 44 S. E. 91; Marsh v. Western Union Teleg. Co., 65 S. C. 430, 43 S. E. 953; Young v. Western Union Teleg. Co., 65 S. C. 93, 43 S. E. 448. *Tennessee:* Lewis v. Western Union

Georgia Code,[9] "Exemplary damages can never be allowed in cases arising on contract."[10] In Indiana punitive damages may be recovered against a corporation for the wrongful acts of its servants, where such damages might be recovered against the servant.[11] But in a case in New Jersey where an action was brought against a street railway company to recover damages for an alleged wanton and malicious assault by a street car conductor upon a passenger it is decided that the rule sustained by the reported decisions of that State limits the liability to respond in punitive damages to the actual wrongdoer, and excludes from such liability those who are only consequentially responsible for the wrongdoer's act on account of their relation to him, unless they participate in it expressly or impliedly, by conduct authorizing or approving, either before or after it was committed.[12] Exemplary damages may also be recovered in an action for trespass for destroying or injuring a telegraph or telephone line,[13] or in an action for personal injuries.[14]

Teleg. Co., 105 Tenn. 167, 35 S. E. 556. *Texas:* McAllen v. Western Un. Teleg. Co., 70 Tex. 243, 2 Am. Elec. Cas. 786, 7 S. W. 715; Western Un. Teleg. Co. v. Brown, 58 Tex. 170, 1 Am. Elec. Cas. 461.

The term wantonness as here used does not necessarily mean malice, but a reckless disregard of the rights of others. Western Union Telegraph Co. v. Lawson, 66 Kan. 660, 72 Pac. 283, 14 Am. Neg. Rep. 41.

Evidence of the facts and circumstances surrounding the transaction is properly admissible to enable the jury to determine the amount which should be awarded as exemplary damages. Marsh v. Western Union Teleg. Co., 65 S. C. 430, 43 S. E. 953.

[9] § 2943.

[10] Chase v. Western Un. Teleg. Co., 44 Fed. 554, 3 Am. Elec. Cas. 817.

[11] Western Un. Teleg. Co. v. Bierhaus, 8 Ind. App. 563, 36 S. E. 161, 4 Am. Elec. Cas. 723.

[12] Peterson v. Middlesex & Somerset Traction Co., 71 N. J. L. 296, 59 Atl. 456, 17 Am. Neg. Rep. 683, holding the following charge to the jury to be erroneous: "A corporation is an imaginary being. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands, and these minds and hands are its servants' minds and hands; and it is responsible when its servants' minds and hands perpetrate acts of a wanton, reckless and malicious character, for the damages which result therefrom, and in that case punitive or punishment damages may be assessed against it by the jury as part of the verdict."

[13] International & Great Northern R. Co. v. Teleph. & Teleg. Co., 69 Tex. 277, 5 S. W. 517, 21 Am. & Eng. Corp. Cas. 62.

[14] Wade v. Elec. R. L. & P. Co.

Where there is no evidence in the case warranting the jury to award exemplary damages evidence is not admissible of the wealth of the defendant.[15]

§ 945. **Direct damages — Proximate cause.**— Direct damages are those which are the direct, immediate or proximate result of some act without the intervention of some other act or cause. If the loss proceeds inevitably and of absolute necessity from a specified cause, that will be the proximate cause; and where a certain result usually and naturally follows from a certain cause, the one may be deemed to sustain an immediate relation to the other, but neither of these propositions constitutes the sole test whereby the proximate cause of the loss may be ascertained. If there are different agencies, each of which conduces to the loss, the moving efficient cause nearest in the point of time may be considered; but if one cause be merely the nearest and another the adequate efficient cause, the efficient cause is the proximate one, for closeness in the order of time in which certain things occur is not necessarily the test. If an efficient adequate cause be found, it is to be considered, unless some other cause not incidental to it, but independent of it, is shown to have intervened between it and the result. The act may be the primary cause operating through an unbroken successive chain of events which form a continuous whole, in which case said act is considered the proximate cause, but if the loss may be attributed to a new and controlling influence, an independent event intervening, whereby the chain of successive events is broken, then the act which set in motion the successive causes may become too remote to be considered.[16] Thus, where a

51 S. C. 296, 64 Am. St. Rep. 676, 29 S. E. 233.

[15] Western Union Teleg. Co. v. Cashman, 132 Fed. 805, 65 C. C. A. 607.

[16] 3 Joyce on Insurance, § 2834.

Proximate cause of injury where person struck by car. This question is considered in a case in Massachusetts wherein it was held that the proximate cause of an injury to a boy, who was struck by a car, was the wanton, wilful and reckless character of the act of the motorman in charge of the car and that the boy's failure to exercise ordinary care concurrent with and subsequent to the act of the motorman was not a proximate cause of the injury, and no defense to the action. The court said: "Not only is it difficult to conceive of a plaintiff's negligence as being another direct and proximate cause foreign to the

message was sent by telegraph to a person asking for $500, but by negligence of the company the message was changed to $5,000, which sum the addressee sent and the sender absconded with it, it was held that defendant was not liable for the loss, its negligence not being the proximate cause thereof.[17]

§ 946. **Remote damages**— Remote damages are those which do not directly flow from an act but which are the result of the intervention of some intermediate cause without which no injury or loss would occur, although such cause may be attributable to the original act.[18] Thus, where owing to the negligent alteration of a message in the course of transmission a merchant is unable to fulfil a contract obligation, and as a result of such inability loss of business and customers ensued, damages for the latter result are too remote and speculative to be recovered.[19] So where, owing to the negligent delay of a telephone company in delivering a message to a witness, to be present at a trial and testify, he failed to appear, and as a result of such failure it was claimed that the suit was lost, damages therefor were held to be too remote.[20] And where the addressee of a telegram lost an opportunity to bid for a railroad contract,

first, yet acting directly with it, but it would be unjust to allow one to relieve himself from the direct consequences of a wilful wrong by showing that a mere lack of due care in another contributed to the result. * * * In this commonwealth, as in most other jurisdictions, liability does not depend upon which of the different causes contributing to an injury is latest in the time of its origin, but upon which is the direct, active, efficient cause, as distinguished from a remote cause in producing the result," Aiken v. Holyoke Street Ry. Co., 184 Mass. 269, 68 N. E. 238, 15 Am. Neg. Rep. 73, per Knowlton, J.

Where a third person fastens a telephone wire, which the company has negligently permitted to overhang the street, to a tree in such a manner as to form a loop in which a traveler is caught and injured, the act of such person in so fastening the wire is not to be regarded as the proximate cause of such injury so as to preclude a recovery therefor. District of Columbia v. Dempsey, 13 App. D. C. 533.

[17] Lowery v. Western Un. Teleg. Co., 60 N. Y. 198, 19 Am. Rep. 154, 1 Am. Elec. Cas. 163.

[18] See preceeding section as to proximate cause.

[19] Fererro v. Western Un. Teleg. Co., 9 App. (D. C.) 455, 24 Wash. L. Repr. 790, 35 L. R. A. 548.

[20] Martin v. Sunset Teleph. & Teleg. Co., 18 Wash. 260, 51 Pac. 376.

owing to a delay in the delivery of the message, it was decided that the profits which he might have made on such contract were too remote for recovery, it not being certain whether he would have obtained the contract or not.[21] But where a telegraph company negligently failed to deliver a message which it accepted from a towboat company it was held that the latter could recover from the former damages for demurrage which arose from such failure and which the towboat company were legally obliged to pay to a lighterage company to which the message was addressed, such damages being declared not to be too remote.[22]

§ 947. **Liquidated damages.**— Liquidated damages are a fixed sum which by agreement between parties has been decided upon as the precise sum to be recovered. In a case in New York it was provided in a contract between an electric light company and the owner of a building that a certain amount should become due and payable to the company as damages if the company discontinued its current, either because the consumer was in arrears or failed to comply with the rules and regulations, or was, through the "fault" of the consumer, prevented from supplying a current according to the provisions of the contract. Under this contract it was held that the company could not discontinue its current and recover the liquidated damages merely because of a failure to use the electric lamps and motor while waiting for a tenant.[23]

§ 948. **Unliquidated damages.**— Unliquidated damages are those the amount of which has not been determined by any agreement or stipulation between the parties. So a suit against a telegraph company for damages sustained by the failure of

[21] Johnson v. Western Union Teleg. Co., 79 Miss. 58, 29 So. 787. See also Harmon v. Western Union Teleg. Co., 65 S. C. 490, 43 S. E. 959, where a similar conclusion was reached in an action by an addressee for failure to deliver a message requesting him to make a bid for the construction of houses. But compare Texas & W. Teleg. Co. v. Mackenzie, 36 Tex. Civ. App. 178, 81 S. W. 581.

[22] Propeller Towboat Co. v. Western Union Teleg. Co., 124 Ga. 478, 52 S. E. 766, 19 Am. Neg. Rep. 135.

[23] United Elec. L. & P. Co. v. Brenneman (Sup. Ct. App. Term), 21 Misc. (N. Y.) 41, 46 N. Y. Supp. 916.

the company to transmit a despatch, ordering a sale of gold, is a claim for unliquidated damages.[24]

§ 949. **Excessive damages.**— Excessive damages [25] are those which are so largely in excess of what the facts of the case and

[24] Smithson v. United States Teleg. Co., 29 Md. 162, Allen's Teleg. Cas. 385.

[25] See the following cases where verdicts for the amounts specified against electric railway companies have been held to be excessive or not excessive in actions for personal injuries: *Illinois:* Collar bone dislocated, $2,500 not excessive. Calumet Elec. St. Ry. v. Jennings, 83 Ill. App. 612. Injury to leg, permanently stiffened, $3,500 not excessive. North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493. Confinement to house, physician's fees and injury to carriage, $1,000 not excessive. North Chicago St. R. Co. v. Zeiger, 182 Ill. 9, 54 N. E. 1006, affg. 78 Ill. App. 463. Injury to head, chest and hip of one earning $2.50 per day, $2,405 not excessive. *Iowa:* Wilkins v. Omaha & C. B. R. & B. Co., 96 Iowa, 668, 65 N. W. 987. *Louisiana:* Loss of leg, $8,500 held excessive. Reduced to $6,000. Conway v. New Orleans, C. & L. R. Co., 51 La. Ann. 146, 24 So. 780, 5 Am. Neg. Rep. 354. *Montana:* Injuries to woman, uterine and other difficulties, $20,000 held excessive, reduced to $7,000. Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860; rehearing denied, 17 Mont. 351, 43 Pac. 713. *New Jersey:* Death of bricklayer, contractor and builder, fifty-seven years of age. Evidence showed he could probably not have lived over a month as he had Bright's disease, $3,800 not excessive. Williams v. Camden & A. R. Co. (N. J., 1897), 3 Am. Neg. Rep. 569. Death of child between four and five years old, $5,000 held grossly excessive. Consolidated Tract. Co. v. Graham, 62 N. J. L. 90, 4 Am. Neg. Rep. 660, 40 Atl. 773, 58 Alb. L. Jour. 93, 17 Nat. Corp. Repr. 213, 31 Chic. L. News, 35. *New York:* No permanent injuries, only pain and suffering, $10,000 excessive. Becker v. Albany R. Co., 35 App. Div. 46, 54 N. Y. Supp. 395, 12 Am. & Eng. R. Cas. (N. S.) 853, 5 Am. Neg. Rep. 231. Death of woman sixty-eight years old, $800 not excessive. Phalen v. Rochester R. Co., 31 App. Div. 448, 52 N. Y. Supp. 836, 28 Civ. Proc. 42. Gauger earning $60 per month, leg shortened, $7,500 not excessive. Thomas v. Union R. Co., 18 App. Div. 185, 45 N. Y. Supp. 920. Death of helper on ice wagon, $12,000 held excessive. McCormack v. Nassau Elec. R. Co., 18 App. Div. 333, 46 N. Y. Supp. 230, 2 Am. Neg. Rep. 631. Boy seventeen, suffered several months, probably recover in three or four years. Earning capacity, $10 to $12 per week, $4,300 excessive, $3,300 sufficient. Levitt v. Nassau Elec. R. Co., 14 App. Div. 83, 43 N. Y. Supp. 426, 1 Am. Neg. Rep. 344. Death of woman sixty-three years old, $7,500 excessive, ordered reduced to $5,000. Wedinger v. Brooklyn Heights R. Co., 6 App. Div. 42, 39 N. Y. Supp. 613. Grocer, confined to bed only two weeks,

the law justify as to appear to have been the result of passion, prejudice, partiality, ignorance or corruption, and a verdict which is grossly excessive and manifestly due to any of the above causes will be set aside without regard to the number of times the case has been tried and similar verdicts rendered.[26]

no permanent injury, $4,500 held excessive, reduced to $2,000. Meade v. Brooklyn H. R. Co., 3 App. Div. 432, 39 N. Y. Supp. 320. Child, eight years old, face cut open, permanent scar, unable to masticate food on one side of mouth, collar bone and four ribs broken, injury to pelvis, $6,000 not excessive. Burnett v. Brooklyn H. R. Co., 1 App. Div. 205, 37 N. Y. Supp. 447, 72 N. Y. St. Rep. 719. *Pennsylvania:* Music teacher, unable to work for four months, necessary to employ household servant, leg slightly lengthened and nervous system injured, $3,500 not excessive. Willis v. Second Ave. Tract. Co., 189 Pa. St. 430, 42 Atl. 1, 5 Am. Neg. Rep. 245. Verdict of $12,000, where scalp was torn from side of boy's head by a wire attached to a falling telephone pole, not excessive. McGaw v. Lancaster (C. P.), 14 Lanc. L. Rep. 276. *Texas:* Death of child, $6,000 not excessive. Austin Rapid Transit Co. v. Cullen (Tex. Civ. App., 1895), 30 S. W. 578. Young man who had been supporting his family, but out of employment at time, $5,000 not excessive. San Antonio St. R. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829. *Washington:* Injury to knee of passenger on running board of car, $7,000 excessive, reduced to $5,000. Coggswell v. West St. & N. E. Elec. R. Co., 5 Wash. 46. *United States:* A verdict of $15,000 against a telegraph company for compound fracture of the ankle, held not excessive. Western Un. Teleg. Co. v. Engler, 44 U. S. App. 517, 21 C. C. A. (9th Cir.) 246, 75 Fed. 102. In the following cases the question of excessive damages is considered in actions to recover for delay or failure to deliver telegraphic despatches. Mere fact of having to spend $75 in going to a given place, owing to delay in delivery, does not entitle person to recover $100 additional as damages. Western Un. Teleg. Co. v. Cain, 14 Ind. App. 115, 42 N. E. 655. Plaintiff obliged to walk several miles, $1,250 excessive. Barnes v. Western Un. Teleg. Co., 24 Nev. 125, 50 Pac. 438, 3 Am. Neg. Rep. 427. Message summoning physician for child who died, $1,500.25 not excessive. Western Un. Teleg. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708.

Where an agent of the company sent a libelous message over the wires of a telegraph company to another agent, addressed to a third person, $2,000 damages held excessive and new trial ordered, unless all in excess of $1,000 be remitted. Peterson v. Western Un. Teleg. Co., 75 Minn. 368, 77 N. W. 985, 5 Am. Neg. Rep. 376.

[26] Consolidated Tract. Co. v. Graham, 62 N. J. L. 90, 40 Atl. 773, 4 Am. Neg. Rep. 660, 17 Nat. Corp. Repr. 213, 58 Alb. L. Jour. 93, 31 Chic. L. News, 35; Peterson v. Western Un. Teleg. Co., 65 Minn. 18, 33 L. R. A. 302, 67 N. W. 646, 1 Chic. L. Jour. Week. 375.

In this connection it was declared in a case in New Jersey, where the defendant sought a new trial on the ground of excessive damages, that if the disability resulting from the injuries was likely to be permanent the damages awarded would not be regarded as so excessive as to warrant an interference with the verdict. But it appearing that the trial was brought on so soon after a surgical operation on the patient that sufficient time had not elapsed to enable the physicians to determine whether the operation would result in her complete or partial recovery and it thereby appearing that justice had not been done by the verdict, it was held that, in the exercise of its sound discretion, it became the duty of the reviewing court to set aside the verdict and grant a new trial.[27] The fact, however, that a person who has received a personal injury, has from mere ignorance and not in bad faith returned to work and thus aggravated such injury, will not cause damages which have been rendered therefor to be reduced, although compensation for the injury is impossible of separation from the aggravation.[28]

§ 950. **Inadequate damages.**— Inadequate damages are those which are so much less than the facts of the case demand, as to appear to be manifestly the result of passion, prejudice, partiality, ignorance or corruption.[29] So where the evidence called

[27] Searles v. Elizabeth, P. & C. J. Ry. Co., 70 N. J. L. 388, 57 Atl. 134, 15 Am. Neg. Rep. 614, wherein the court said: "We think that to permit the verdicts to stand under these circumstances might work injustice to the defendant, while the granting of a new trial would give the parties an opportunity to re-try the cause with the added light as to the nature and character of the plaintiff's injury and disability which the lapse of further time would develop. This is a power the court may exercise in its sound discretion, where by reason of mistake or surprise at the trial, it can see that justice has not been done by the verdict," per Hendrickson, J.

[28] Toledo Elec. St. R. Co. v. Tucker, 13 Ohio C. C. 411, 7 Ohio Dec. 169.

[29] *It is only in such cases* that a verdict should be set aside as being inadequate. In this connection it is said by the court in a case in New York: "I think that the exercise of such power should be limited to cases where the result is irreconcilable with justice or with common sense, or plainly indicates that the jury must entirely have disregarded some of the elements of damages which they necessarily should have considered upon the evi-

for substantial damages in an action to recover for an assault, a verdict of eighty-five cents was held to be inadequate.[30] But though the damages may be assessed at a less figure than the facts of the case call for, yet this is not an error of which the defendant can complain.[31]

§ 951. **Damages reasonably in contemplation — Hadley v. Baxendale rule — Breach of contract.**— Where two parties have entered into a contract, which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered, as either arising naturally — that is, 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 a breach of it. This is the rule declared by Baron Alderson in the leading English case of Hadley v. Baxendale,[32] for determining the measure of damages due to a breach of contract, and has been generally accepted and followed by the courts, both in England and the United States; and this rule has been generally applied in actions to recover damages for breach of contract to transmit or deliver telegraph messages.[33]

dence adduced," Simonsen v. Brooklyn Heights R. R. Co., 53 App. Div. (N. Y.) 478, 65 N. Y. Supp 1077, per Jenks, J.

[30] Hanson v. Urbana & C. Elec. St. R. Co., 75 Ill. App. 474.

[31] Central Un. Teleph. Co. v. Fehring, 146 Ind. 189, 45 N. E. 64.

[32] 9 Exch. 353.

[33] *United States:* Western Un. Teleg. Co. v. Hall, 124 U. S. 444, 8 S. Ct. 577, 2 Am. Elec. Cas. 868; Bank of Havelock v. Western Un. Teleg. Co. (C. C. A.), 141 Fed. 522. *Alabama:* Frazer v. Western Un. Teleg. Co., 84 Ala. 487, 4 So. 831, 2 Am. Elec. Cas. 469. *Arkansas:* Western Un. Teleg. Co. v. Short, 53 Ark. 434, 3 Am. Elec. Cas. 592, 14 S. W. 609. *Illinois:* Western Un. Teleg. Co. v. Valentine, 18 Ill. App. 57, 1 Am. Elec. Cas. 829; Western Un. Teleg. Co. v. Martin, 9 Ill. App. 587, 1 Am. Elec. Cas. 378. *Iowa:* Garrett v. Western Un. Teleg. Co., 83 Iowa, 257, 49 N. W. 88, 3 Am. Elec. Cas. 657. *Kansas:* Western Union Teleg. Co. v. Simpson, 64 Kan. 309, 67 Pac. 839, 11 Am. Neg. Rep. 218. *Kentucky:* Western Un. Teleg. Co. v. Jump (Ky., 1886), 8 Ky. L. Repr. 531. *Missouri:* Hughes v. Western Union Teleg. Co., 79 Mo. App. 133, 2 Mo. App. Rep. 405. *Nebraska:* Western Union Teleg. Co. v. Church (Neb. 1902), 90 N. W. 878, 57 L. R. A. 905. *Ohio:*

§ 952. **Communication of special circumstances — Hadley v. Baxendale — Applied to telegraph mesasges.**— In the case of Hadley v. Baxendale,[34] in connection with the rule given in the preceding section, it was also declared by Baron Alderson that if special circumstances, under which a contract was made, "were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." This latter principle has also been applied in determining the extent of the liability of a telegraph company for delay or failure to transmit or deliver a despatch. If

First Nat. Bank v. Telegraph Co., 30 Ohio St. 555, 27 Am. Rep. 485; Bowen v. Lake Erie Teleg. Co. (Ct. Com. Pl., Ohio, 1853), Allen's Teleg. Cas. 7, 1 Am. L. Reg. 685. *Texas:* Western Un. Teleg. Co. v. Edsall, 63 Tex. 668, Am. Elec. Cas. 715; Western Union Teleg. Co. v. Mellor, 33 Tex. Civ. App. 264, 76 S. W. 449; Western Un. Teleg. Co. v. Smith (Tex. Civ. App., 1894), 26 S. W. 216, 4 Am. Elec. Cas. 812. *Canada:* Stevenson v. Montreal Teleg. Co., 16 Up. Can. Q. B. Rep. 530, Allen's Teleg. Cas. 71.

See also cases cited in the following sections and generally throughout this chapter.

"The contratual obligation of a telegraph company receiving a dispatch for transmission is clear and undenied. Out of it arise the agreement to transmit correctly, and deliver with reasonable promptness, the message received, and the liability to pay all proper damages that may arise from its failure so to do. These damages, however, must be proximate, and not remote and speculative. They must be such as arise naturally from the breach of the contract, and the probable result of such breach." Western Union Teleg Co. v. Simpson, 64 Kan. 309, 67 Pac. 839, 11 Am. Neg. Rep. 218, per Cunningham, J.

This common law rule is not changed by a statutory provision that special damages which are occasioned by the negligence of a telegraph company in forwarding messages may be recovered in an action against the company. Hughes v. Western Union Teleg. Co., 79 Mo. App. 133, 2 Mo. App. Rep. 405.

[34] 9 Exch. 353.

notice is given to the company of the importance of a message and of the results likely to follow from delay in delivery, then the company, being informed of such special circumstances, will be liable under the special circumstances so known and communicated. If, however, no special notice is given to the company of any particular facts or circumstances affecting the measure of damages, aside from the contents of the message, the question of the extent of the company's liability must be determined from the facts of each case, dependent upon whether the message itself could reasonably be construed as conveying to the company knowledge of its special importance, and whether from such language the company could have reasonably contemplated that the results claimed to have followed, owing to its breach of contract, would follow. As a general rule, if the sender of a despatch does not notify the company of its importance or of special damages, which may result from a breach by the telegraph company of its contract to transmit and deliver, and the message does not, from its language, convey to the company any such knowledge, only such damages may be recovered as could have been reasonably anticipated from the language of the message, and there can be no recovery for damages arising out of such special circumstances.[35] The rule, however, is not to be construed as meaning that all the details in reference to a transaction referred to in a despatch and which are known to the parties themselves, need be disclosed to the company to render it liable for more than nominal dam-

[35] *United States:* Behm v. Western Un. Teleg. Co., 8 Biss. (U. S. C. C., 1878) 131; Western Un. Teleg. Co. v. Coggin, 68 Fed. 137; Pacific Postal Teleg. Cable Co. v. Fleischner (U. S. C. C. A., 1895), 5 Am. Elec. Cas. 840; Cahn v. Western Un. Teleg. Co., 48 Fed. 810, 3 Am. Elec. Cas. 824. *Alabama:* Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 467. *Georgia:* Western Un. Teleg. Co. v. Hines, 96 Ga. 688, 51 Am. St. Rep. 159, 23 S. E. 845. *Illinois:* Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 3 Am. Elec. Cas. 630; Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347, 1 Am. Elec. Cas. 839; Pope v. Western Un. Teleg. Co., 14 Ill. App. 531, 1 Am. Elec. Cas. 615. *Indiana:* Hadley v. Western Un. Teleg. Co., 115 Ind. 191, 2 Am. Elec. Cas. 542, 15 N. E. 845; Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 4 Am. Elec. Cas. 713, 34 N. E. 581. *Iowa:* Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 219, 3 Am. Neg. Rep. 160; Garrett v. Western

ages.[36] In this connection it is said in one case: "We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such

Un. Teleg. Co., 83 Iowa, 257, 49 N. W. 88, 3 Am. Elec. Cas. 657; Herron v. Western Un. Teleg. Co., 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731. *Louisiana:* Shields v. Washington Teleg. Co. (5th Dist. Ct. of New Orleans), Allen's Teleg. Cas. 5, 9 Week. L. Jour. 283. *Minnesota:* Beaupré v. Pacific & Atl. Teleg. Co., 21 Minn. 155, 1 Am. Elec. Cas. 141. *Missouri:* Nelson v. Western Un. Teleg. Co., 2 Mo. App. 1327. *Nebraska:* Western Un. Teleg. Co. v. Lowery, 32 Neb. 732, 3 Am. Elec. Cas. 717. *Nevada:* Mackay v. Western Un. Teleg. Co., 16 Nev. 222, 1 Am. Elec. Cas. 362. *New York:* Baldwin v. United States Teleg. Co., 45 N. Y. 744, 6 Am. Rep. 165; Mowry v. Western Un. Teleg. Co., 51 Hun, 126, 2 Am. Elec. Cas. 683; McColl v. Western Un. Teleg. Co., 7 Abb. N. C. 151, 1 Am. Elec. Cas. 280. *Ohio:* Telegraph Co. v. Griswold, 37 Ohio St. 301, 1 Am. Elec. Cas. 329. *Pennsylvania:* United Teleg. Co. v. Wenger, 55 Pa. St. 262, Allen's Teleg. Cas. 356; Western Un. Teleg. Co. v. Landis (Penn., 1887), 21 Week. N. of Cas. 38, 2 Am. Elec. Cas. 720. *Tennessee:* Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 2 Am. Elec. Cas. 756. *Texas:* Gulf, C. & S. F. R. Co. v. Loonie, 82 Tex. 323, 18 S. W. 221; Erie Teleg. & Teleph. Co. v. Grimes, 82 Tex. 89, 17 S. W. 831; Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021, 2 Am. Neg. Rep. 471; Houston, E. & W. T. Ry. Teleg. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605, 2 Am. Neg. Rep. 251; Western Un. Teleg. Co. v. Gossett, 15 Tex. Civ. App. 52, 38 S. W. 536, 6 Am. Elec. Cas. 847; Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707, 6 Am. Elec. Cas. 842; Western Un. Teleg. Co. v. Williford, 2 Tex. Civ. App. 574, 22 S. W. 244. *Wisconsin:* Thompson v. Western Un. Teleg. Co., 64 Wis. 531, 25 N. W. 789, 1 Am. Elec. Cas. 772.

But see Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 1 Am. Elec. Cas. 487, 505; Rittenhouse v. Independent Line of Teleg., 1 Daly (N. Y.), 474, 44 N. Y. 263, Allen's Teleg. Cas. 570.

See cases throughout this chapter, as to company being sufficiently notified as to importance and character of message.

[36] Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 23 N. E. 583, 3 Am. Elec. Cas. 630; Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 49, 3 Am. Neg. Rep. 160.

negligence is in some way excused." [37] So it is said in a recent case: "The authorities hold almost uniformly, that it is sufficient to create a liability on the part of a company for all damages directly and proximately resulting from the negligent acts of its agents in failing to transmit a message in the form in which it is delivered, or in omitting to send it at all, provided the message discloses enough of its nature and importance to put an ordinary and prudent person upon inquiry." [38]

§ 953. **Communication of special circumstances — Sufficient notice — Illustrations.**— A despatch by an agent to the owner of a cattle ranch that "Water is getting low, come out," is sufficient notice to the company of the importance and urgency of the message.[39] As is also a despatch, "You had better come and attend to your claim at once," sent by a bank to a firm of merchants.[40] And likewise a message as follows: "Is stonework on building finished? Wire answer to-day." [41] So a despatch, "Have you claim against P. L. D.? Answer how much," and the reply, "Yes, one hundred and sixty-one dollars and fifteen cents," is sufficient notice to the company to charge it with special damages for failure to promptly deliver.[42] And a message as follows: "One dollar fifty, freight thirteen

[37] Postal Teleg. Cable Co. v. Lathrop, 131 Ill. 575, 3 Am. Elec. Cas. 630, 23 N. E. 583, per Mr. Justice Wilkin. See also *Illinois:* Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347, 1 Am. Elec. Cas. 839. *Indiana:* Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 34 N. E. 581, 4 Am. Elec. Cas. 708. *Iowa:* Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 219, 3 Am. Neg. Rep. 160; Garrett v. Western Un. Teleg. Co., 83 Iowa, 257, 49 N. W. 88, 3 Am. Elec. Cas. 657. *New York:* Mowry v. Western Un. Teleg. Co., 51 Hun, 126, 20 N. Y. St. R. 626, 5 N. Y. Supp. 952, 2 Am. Elec. Cas. 679. *Texas:* Western Un. Teleg. Co. v. Wofford (Tex. Civ. App.), 42 S. W. 119. *Utah:* Brooks v. Western Union Teleg. Co., 26 Utah, 147, 72 Pac. 499. *West Virginia:* Beatty Lumber Co. v. Western Union Teleg. Co., 52 W. Va. 410, 44 S. E. 309.

[38] Brooks v. Western Union Teleg. Co., 26 Utah, 147, 72 Pac. 499, per McCarty, J.

[39] Mitchell v. Western Un. Teleg. Co., 5 Tex. Civ. App. 527, 4 Am. Elec. Cas. 811, 24 S. W. 550.

[40] Western Un. Teleg. Co. v. Sheffield, 71 Tex. 570, 2 Am. Elec. Cas. 802, 10 S. W. 752.

[41] Western Union Teleg. Co. v. Henley, 157 Ind. 90, 60 N. E. 682.

[42] Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 34 N. E. 581, 4 Am. Elec. Cas. 708.

cents. Answer quick," was held to sufficiently disclose to the company the fact that it related to an important business transaction.[43] As was also a message in the words: "Cover two hundred September and two hundred August." In transmission there was an error, and the message as delivered to the addressee read: "Cover two hundred September and one hundred August," and it was held that the company was liable for the full amount of damage suffered by reason of the error.[44] Where, in reply to a telegram stating the price of "pickled hams sixteens," the following message was presented for transmission on the same day: "Will take two cars sixteen. Ship as soon as convenient, via West Shore," the company was held to be sufficiently apprised of the importance of the message and that its delay might cause loss.[45] A message stating that a certain person thinks he can make a "trade," is sufficient notice to the company to render it liable for damages resulting to such person in relation to the trade, caused by the failure of the company to deliver the telegram.[46] In another case direct notice was given to the company that the sender wanted the addressee to bring a dog to assist him in driving sheep to a ranch from another county. The message as given for transmission read: "Meet me immediately with two horses at Buffalo Springs. Bring Shep." Shep was the name of the dog, and in transmission the word "Shep" was changed to "sheep." As a result of the message the addressee drove a large flock of sheep to the designated place, many of which perished from exposure. Part of the other flock for which the sender wished the assistance of the dog in driving also perished. It was held that sufficient notice was given to the company, and that it was liable for the actual loss.[47] A message directing that horses be sent to a designated place sufficiently apprises the company

[43] Dixon v. Western Un. Teleg. Co., 3 App. Div. (N. Y.) 60, 38 N. Y. Supp. 1056.

[44] Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480, 1 Am. Elec. Cas. 404.

[45] Mowry v. Western Un. Teleg. Co., 51 Hun (N. Y.), 126, 4 N. Y. Supp. 666, 2 Am. Elec. Cas. 679.

[46] Western Un. Teleg. Co. v. Morrison (Tex. Civ. App.), 33 S. W. 1025.

[47] Western Un. Teleg. Co. v. Edsall, 74 Tex. 329, 12 S. W. 41, 2 Am. Elec. Cas. 828.

that if it fails to transmit or deliver such message damage may result.[48]

§ 954. **Communication of special circumstances — Insufficient notice — Illustrations.**—In an early case in New York it appeared that the following message had been given to the telegraph company for transmission and delivery: "Get ten thousand dollars of the Mail Company." This message the company delayed delivery of. The money was desired in order to carry out a contract to purchase pistols of a third party. Owing to the failure to deliver the message in time, and consequently to get the money, it was impossible to fulfil the contract, and plaintiffs became subject to a penalty, and also lost certain commissions which they would have been entitled to if the contract had been consummated. It was held that there could be no recovery for the penalty or loss of commissions, since such damages could not have been reasonably contemplated as a result of failure to deliver.[49] In another early case in Maryland, a message was given to a telegraph company for transmission and delivery, which simply read: "Sell fifty gold." It was alleged that this was an order to brokers to sell $50,000 of gold, that it would have been so understood among brokers, and that such a sale would have been made if the message had been transmitted and delivered. It was held, however, that unless information was given to the company that such was the meaning of the words used, there could be no recovery for loss sustained by reason of failure to make such sale, though caused by the negligence of the company in failing to transmit and deliver such message.[50] Where a message addressed to a lienor, and reading: "If possible come to S. in the morning," was given to a telegraph company for transmission and delivery, and such lienor's consent was necessary to consummate a sale, and the company failed to deliver the despatch, and the sale was not consummated, owing to the nonconsent of the lienor, who was absent, it was held that the com-

[48] Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 219, 3 Am. Neg. Rep. 160.

[49] Landsberger v. Magnetic Teleg. Co., 32 Barb. (N. Y.) 530, Allen's Teleg. Cas. 165.

[50] United States Teleg. Co. v. Gildersleeve, 29 Md. 232, Allen's Teleg. Cas. 390.

pany was not liable for the loss of the sale, where no information was given to the company other than that disclosed by the message itself, of its importance or purpose.[51]

§ 955. **Cipher despatches.**— If a message in cipher is received by a telegraph company for transmission and delivery, and such message is unintelligible to the company, and it has no knowledge of its meaning or importance, and no notice thereof is given, the general rule is that the company's liability will be limited to the amount received for transmission.[52] In reference to this class of messages, it is said in one case: "If

[51] Melson v. Western Un. Teleg. Co., 2 Mo. App. Rep. 1327, 72 Mo. App. 111.

[52] *United States*: Primrose v. Western Un. Teleg. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883, 5 Am. Elec. Cas. 809; Behm v. Western Un. Teleg. Co., 8 Biss. 131. *Florida*: Western Un. Teleg. Co. v. Wilson, 32 Fla. 527, 4 Am. Elec. Cas. 664, overruling Western Un. Teleg. Co. v. Hyer Bros., 22 Fla. 637, 1 So. 129, 2 Am. Elec. Cas. 484. *Illinois*: Western Un. Teleg. Co. v. Martin, 9 Ill. App. 587, 1 Am. Elec. Cas. 378. *Missouri*: Abeles v. Western Un. Teleg. Co., 37 Mo. App. 544. *Nevada*: Mackey v. Western Un. Teleg. Co., 16 Nev. 222, 1 Am. Elec. Cas. 362. *North Carolina*: Cannon v. Western Un. Teleg. Co., 100 N. C. 300, 6 S. E. 731, 2 Am. Elec. Cas. 703. *Pennsylvania*: Ferguson v. Anglo-American Teleg. Co., 178 Pa. St. 377, 35 Atl. 979, 6 Am. Elec. Cas. 819. *South Carolina*: Hill v. Western Un. Teleg. Co., 42 S. C. 367, 20 S. E. 135, 5 Am. Elec. Cas. 775. *Texas*: Daniel v. Western Un. Teleg. Co., 61 Tex. 452, 48 Am. Rep. 305; Western Un. Teleg. Co. v. Mellor, 33 Tex. Civ. App. 264, 76 S. W. 449; Houston, East & West Tex. Ry. Teleg. Co. v. Davidson, 15 Tex. Civ. App. 334, 39 S. W. 605, 2 Am. Neg. Rep. 251. *Wisconsin*: Candee v. Western Un. Teleg. Co., 34 Wis. 471, 17 Am. Rep. 452, 1 Am. Elec. Cas. 99. *England*: Sanders v. Stuart, 1 Com. Pl. Div. 326.

But see Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 456; American Un. Teleg. Co. v. Daughtery, 89 Ala. 191, 7 So. 660, 3 Am. Elec. Cas. 579; Fererro v. Western Un. Teleg. Co., 9 App. (D. C.) 455, 24 Wash. L. Repr. 790, 35 L. R. A. 548; Western Un. Teleg. Co. v. Fatman, 73 Ga. 285, 1 Am. Elec. Cas. 666.

Knowledge of the importance of a message in cipher will not be imputed to the company from a custom on the part of the sender to deliver such messages for transmission so as to hold the company liable for a loss of the sale of cotton where it appears that the cipher code was not known by the company and that all messages sent did not have reference to a sale of cotton. Western Un. Teleg. Co. v. Mellor, 33 Tex. Civ. App. 264, 76 S. W. 449; compare Western Un. Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181.

the sender chooses to speak in unintelligible language to those who are to pass it over the wires, it is due to the company, if it is to be held responsible for serious damages, that the information of its importance should be given to the sending operator, in order that he may communicate it to an intervening agency employed in forwarding, and thereby diligence and care be secured from each." [53] A request by the sender of a cipher despatch, that it be sent promptly, so as to arrive, if possible, "before the cotton market opened," was held not sufficient notice to the operator of the importance of the message so as to render the company liable for a short delay, in the absence of gross negligence.[54] But where the sender of a cipher despatch told the agent that it was very important, and to get an answer by wire as soon as possible, and the agent, although he did not know the contents, knew that the message related to a particular transaction, and the despatch was marked "rush," it was held that the company was liable for special damages for failure to transmit.[55]

§ 956. **Market value — Damages measured by changes in.**— Where, owing to the negligence of a telegraph company, in the erroneous transmission of a message, or by delay in, or failure to deliver the same, the sender or addressee has suffered loss in reference to the purchase or sale of property, changes in the market value of such property are an element to be considered in ascertaining the measure of damages. This general principle or rule is illustrated in the following sections by special applications or adaptations thereof to various particular classes of cases, each being subject to the fundamental principle above

[53] Cannon v. Western Un. Teleg. Co., 100 N. C. 300, 6 Am. St. Rep. 590, 6 S. E. 731, 2 Am. Elec. Cas. 703, per Smith, Ch. J.

[54] Cannon v. Western Un. Teleg. Co., 100 N. C. 300, 6 S. E. 731, 2 Am. Elec. Cas. 699, 6 Am. St. Rep. 590.

[55] Western Un. Teleg Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707. See also Western Un. Teleg. Co. v. Birge-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. 181, holding that where a message partly in cipher was delivered to the company for transmission, and it knew that other messages of this character were usually "rush" message; it was sufficiently appraised of the importance of the message and that there could be a recovery of the actual damages resulting from a delay in the transmission thereof.

stated, and the rule itself only being varied so far as to adapt it to the special facts in each class of cases.[56]

§ 957. **Stock transaction — Rule — Illustrations.**— Owing to fluctuations in the value of stocks, creating the necessity of quick communication between the buyer or seller and the broker, or others, in order to complete transactions at a profit, or to save loss of further money, the telegraph is used as a means of communication between such persons. In such cases where a message is received by a telegraph company for transmission and delivery, which shows upon its face that it relates to a stock transaction, and is either an order to buy or sell shares of stock at a certain time, or at a certain figure, the company will be considered as having knowledge of its importance, and may be liable for loss of profits or other losses which might have been reasonably contemplated, and which are caused by the failure of the company to transmit or deliver. So where a message reading as follows: "T. W. Pearsall & Co., Mills Building, New York city. Buy one thousand Western Union Telegraph. T. W. Pearsall." was given to the company for transmission, but as transmitted and received the address was changed to T. W. Pearsall, Mills Building, N. Y.," and the latter, who had sent the message, being absent from his office, the message was not opened until the following day, when the shares ordered sold for $1,700 more than they did on the morning before, it was held that the company was liable for the difference between the market value of the shares at the time when the despatch should have been delivered, and the sum paid for them in the market on the receipt of the message.[57] And where a message given to a telegraph company by a mining expert for transmission and delivery to a client advised the latter to purchase certain mining stock and there was several hours delay in sending it of which fact the company did not notify either the sender or the addressee and the latter purchased the stock at a price in excess of what he would have been compelled to pay if the message

[56] See §§ 960–974, herein.

[57] Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256, 35 N. Y. St. R. 307, 26 N. E. 534, 3 Am. Elec. Cas. 724. See also United States Teleg. Co. v. Wenger, 55 Pa. St. 262, Allen's Teleg. Cas. 356.

had been promptly transmitted and delivered, it was decided that he was entitled to recover as damages the difference between the two prices.[58] But where a message for transmission to brokers, directed them to "Buy one thousand shares," and in transmission the word "hundred" was substituted for "thousand," and the brokers bought one hundred shares, it was held that the sender who had knowledge of the error and purchase on the following day, but remained inactive for several days before directing the brokers to purchase the balence, could not recover for the difference in value of the 900 shares, between the day upon which he had knowledge of the errer, and the day he purchased the stock, but that he could only recover for the difference in value between the day of the purchase of the 100 shares and the following day, when he had knowledge of the error and could have remedied the mistake.[59] In another case a message, as delivered to a telegraph company, read: "If we have any Old Southern sell same before board. Buy five Hudson at board," but the message as transmitted, read: "If we have any Old Southern sell same before board. Buy five hundred at board." Plaintiff's agent, who received the message, bought 500 Old Southern; but plaintiff, hearing of this, immediately directed the sale thereof, and the purchase of 500 shares of Hudson river, according to the intention of the original message as delivered. In the meantime Hudson River had risen, making a difference to plaintiff of $1,375. In an action against the company for damages it was held that the plaintiff could recover, and that the measure of damages was the rise in the price of stock.[60] As to the losses sustained by the purchase and sale of Old Southern, it was held that the stock was in legal effect purchased on defendant's account, and could not be sold without some notice to them, and no notice having been given, there could be no recovery, since, by having sold the stock without notice, plaintiff must be considered as having adopted the purchase. In a case in Illinois, a message con-

[58] Swan v. Western Un. Teleg. Co., 129 Fed. 318, 63 C. C. A. 550.

[59] Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 3 S. W. 490, 16 Am. & Eng. Corp. Cas. 243, 2 Am. Elec. Cas. 720.

[60] Rittenhouse v. Independent Line of Teleg., 44 N. Y. 263, 4 Am. Rep. 673, Allen's Teleg. Cas. 570.

ditioned against liability for error or delay, if unrepeated, directed the sale of 100 shares of stock. The 100 was changed to 1,000 in transmission. It was held that the measure of damages was the amount paid by plaintiff by reason of an advance in price of stock, to replace the excess of 900 shares, sold in obedience to the erroneous message.[61] In a case in Arkansas, however, it is held that the fact that stock advanced in value shortly after the message was sent, and remained so until after the trial, does not entitle the sender to special damages in an action against the company for failure to deliver the message, in the absence of proof that if the stock had been purchased it would have been sold at a profit.[62] If a message directs the sendee to sell shares of stock, which the sender does not possess, and there is no order to buy coupled with the order to sell, damages for the loss of contemplated profits, caused by the delay of the telegraph company to transmit and deliver, are too remote and speculative to be recovered.[63]

§ 958. **Dealing in option futures — Illegality as affecting damages.**— In a case in Georgia, which was an action to recover damages for error in transmitting a message relating to option futures, it was contended that the measure of such damages was to be determined by changes in market values. The court, however, held that contracts relating to futures being illegal in that State, damages based on changes in market values could not be recovered in such case. It is said by the court: "We think this standard cannot be invoked, for the reason that contracts relating to 'futures' are illegal, and we do not see how an illegal contract can be called in to measure the damages sustained by reason of a breach of a legal contract. It is true that according to the Telegraph Company v. Blanchard, 68 Ga. 299, a recovery in this case might be had, but that decision was made at a time when contracts between brokers and their principals were considered obligatory, not-

[61] Tyler v. Western Un. Teleg. Co., 60 Ill. 421, 14 Am. Rep. 38, 1 Am. Elec. Cas. 14.

[62] Western Un. Teleg. Co. v. Fellner, 58 Ark. 29. See Hughes v. Western Un. Teleg. Co. 114 N. C. 70, 19 S. E. 100.

[63] Cahn v. Western Un. Teleg. Co., 48 Fed. 810, 3 Am. Elec. Cas. 824.

withstanding the vitiating element of speculative 'futures,' but since the case of Bank v. Cunningham, 75 Ga. 366, the principle of the former case has stood virtually overruled. Besides the question in 68 Ga. related to a broker in the State of New York, whereas the broker in this case was located in this State. His contract with the principal was a Georgia contract.[64] And in a case in Maine it has been decided that if under a contract for the sale and purchase of stock, no actual stock is in fact sold or delivered and it is the intention of the parties merely to settle the difference which may exist between the market and contract price, such contract is a mergering contract and illegal, and losses sustained thereunder by reason of failure or delay in the transmission and delivery of a telegram are not recoverable as damages.[65]

[64] Cothran v. Western Un. Teleg. Co., 83 Ga. 25, 2 Am. Elec. Cas. 496, 9 S. E. 836, per Bleckley, Ch. J., citing Melchert v. Am. Un. Teleg. Co., 11 Fed. 193, and notes.

The burden of proof, in an action to recover damages for failure to deliver a message relating to the purchase of cotton, rests on defendant to show that the cotton could not or would not have been delivered, where it alleges as a defense that the message related to an illegal transaction in futures. Western Un. Teleg. Co. v. Hill (Tex. Civ. App.), 65 S. W. 1123.

[65] Morris v. Western Un. Teleg. Co., 94 Me. 423, 47 Atl. 926.

The court here said: "It is admitted, however, that 'in such a transaction or deal, the method of business in the plaintiff's deal is as follows: Such trades are made on quotations only, no actual stock being in fact sold: but settlement of differences are fully made, when the deals are closed as to profits or losses.' This admission is fatal to the plaintiff's case. It strips the transaction of the semblance of legitimate business with which the memorandum endeavored to clothe it, and leaves it a naked bet or wager upon the rise and fall of the price of the stock, which the law terms a gambling contract, and pronounces immoral and void. The particular disguise or subterfuge to which the parties have resorted to prevent their real intention from appearing in the terms of the agreement cannot control. The form is immaterial. To seek to evade the law by using the forms of the law is a well known devise. In such cases the court will not hesitate to determine and declare the true nature of the transaction. The intention is a crucial test. If the parties at the inception of the contract actually intend that the goods shall be delivered and the purchase price paid then the contract is lawful, but if they intend to settle differences only, then it is unlawful," per Powers, J.

§ 959. **Future or speculative profits.**— As a general rule a party who is injured by a breach of contract, may recover, as damages, gains prevented, as well as losses sustained, provided they are certain, and such as might be expected to follow the breach.[66] This rule is applied in actions to recover damages for failure to deliver telegraphic messages. In such cases, contemplated or speculative profits, based upon a mere opportunity or chance of profit, as a result of a possible future sale of goods or property, cannot be recovered.[67] So in an action against a telegraph company for damages for the nondelivery of a telegram, requesting oil to be supplied "as soon as possible," it was held that the plaintiff might recover the cost of the message, the advance in the price of freight, and his expenses incurred by reason of the failure to deliver the message, but not the profit that he might have made on the oil had the message been delivered and the oil sent in due time.[68] And where a message directed a broker to purchase a certain quantity of petroleum, if he thought "it safe," and on the day on which the message should have been delivered, oil could have been bought at $1.17 per barrel, but on the next day it advanced to $1.35 per barrel, at which figure the broker did not purchase, and in fact no purchase was made, it was held that, as it did not appear that the sender intended to purchase oil to resell at a profit, or that if the message had been delivered promptly, and the purchase made, he would have

[66] Beaupré v. Pac. & Atl.. Teleg. Co., 21 Minn. 155, 1 Am. Elec. Cas. 141; Western Un. Teleg. Co. v. Wilhelm, 48 Neb. 910, 67 N. W. 870, 4 Am. & Eng. Corp. Cas. (N. S.) 233.

[67] *United States*: Western Un. Teleg. Co. v. Hall, 124 U. S. 444, 8 S. Ct. 577, 2 Am. Elec. Cas. 868. *Colorado*: Western Un. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136; Postal Teleg. Cable Co. v. Barwise, 11 Colo. App. 338, 53 Pac. 252. *Georgia*: Clay v. Western Un. Teleg. Co., 81 Ga. 285, 6 S. E. 813, 2 Am. Elec. Cas. 492. *Kentucky*: Rich Grain Distilling Co. v. Western Un. Teleg. Co. (Ky. Super. Ct., 1891), 13 Ky. L. Repr. 256. *Missouri*: Reynolds v. Western Un. Teleg. Co., 81 Mo. App. 223. *North Carolina*: Cannon v. Western Un. Teleg. Co., 100 N. C. 300, 6 S. E. 731, 2 Am. Elec. Cas. 699. *Wisconsin*: Hubbard v. Western Un. Teleg. Co., 33 Wis. 558, 14 Am. Rep. 775. *Canada*: Lane v. Montreal Teleg. Co., 7 U. C. C. P. 23, Allen's Teleg. Cas. 61.

[68] Western Un. Teleg. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

resold at a profit on the following day, or that he could have resold at a profit on any subsequent day, only nominal damages could be recovered.[69] But the profits lost by failure to receive goods ordered by telegraph, by one who had resold them before sending the order, are not too remote to be recovered in an action against the telegraph company for negligently failing to transmit the message containing the order.[70]

§ 960. **Acceptance of offer to sell — Recovery by sender of message — Market value — Measure of damages.**— Where an offer to sell is made by telegraph and is accepted by the addressee a contract is created which is binding upon the sender and this is held to be true though the terms of the message as delivered to the addressee are materially different from those of the message as delivered by the sender to the company for transmission. And in such a case any damages which may be sustained by the sender in fulfilling the contract as accepted may be recovered of the company.[71] And if a telegraph company by its negligence in delaying the delivery of a message, which is an acceptance of an offer to sell at a certain price, causes to the sender a loss of the benefits of such offer, the company will be liable in damages to him for such additional sum as he may be obliged to pay at the same place by due diligence, for the same quantity and quality, after notice of the failure to deliver the telegram.[72] Thus it was so held where a person, having received an offer of a cargo of corn at ninety cents a bushel, delivered to defendant, a telegrah company, for transmission, a message in reply to the offer, in these words: "Ship cargo named at ninety, if you can secure freight at ten — wire us the result." The message was sent but was not delivered; by reason whereof the sender failed to obtain the corn at the terms offered, and the price of corn and

[69] Western Un. Teleg. Co. v. Hall, 124 U. S. 444, 2 Am. Elec. Cas. 868, 8 S. Ct. 577.

[70] Walden v. Western Un. Teleg. Co., 105 Ga. 275, 31 S. E. 172.

[71] Western Un. Teleg. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815.

[72] True v. International Teleg. Co., 60 Me. 9, 11 Am. Rep. 156, Allen's Teleg. Cas. 530; Squire v. Western Un. Teleg. Co., 98 Mass. 232, Allen's Teleg. Cas. 372; Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021, 2 Am. Neg. Rep. 471.

freight having advanced, plaintiff was compelled to purchase at high terms.[73] In another case, where a telegraph company delayed the delivery of a despatch sent by members of a firm to another member, instructing him to close an option for the purchase of cattle, and by the delay the option was lost, the company was held liable for the difference between the contract price and the market value of cattle of the same grade, at the place where the option was to be performed, on the day of its expiration, if cattle of that grade could have been obtained on the market at that time. And it was held that the fact that there was subsequently an increase in the market value of such cattle, by which, if the purchase had been made, a profit would have resulted, did not affect the measure of damages.[74] But where a person offers by telegram to sell goods at a certain price and the addressee accepts the offer by telegram, repeating therein the price stated in the message received by him, which is less than that as stated in the message which the sender delivered for transmission and the latter sends another message stating that he will let the addressee have the goods "at our price," repeating the figure stated in the message he delivered to the company, but subsequently forwards the goods with knowledge of the mistake in transmission, it has been decided that there can be no recovery of the difference in price, as the sender will be considered to have elected to furnish the goods at the price stated in the reply sent by the addressee.[75]

§ 961. **Offer to buy — Message accepting — Loss of profits — Market value.**— If, owing to the failure of a telegraph company to deliver a message, sent in response to an offer to buy property at a certain figure and as an acceptance thereof, there is a loss of the sale and a consequent loss of profits to the sender of the message, the company will be liable for the loss so sustained.[76]

[73] True v. International Teleg. Co., 60 Me. 9, 11 Am. Rep. 156, Allen's Teleg. Cas. 530.

[74] Brewster v. Western Un. Teleg. Co., 65 Ark. 537, 47 S. W. 560. See also Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021.

[75] Postal Teleg. Cable Co. v. Akron Cereal Co., 23 Ohio Cir. Ct. R. 516.

[76] Western Un. Teleg. Co. v.

§ 961a. **Acceptance of offer to sell — where conditional — Delay in delivery of message declining acceptance on condition imposed.—** Where a telegram is sent accepting an offer to sell and such acceptance imposes a condition which was not contained in the original offer, a reply which is sent refusing to accept the condition named will be regarded as a termination of the negotiations. In such a case it is decided that the telegraph company will not be liable, in an action to recover for delay in delivery of the latter message, for any loss of commissions or profits which the sender of the message of acceptance would have made by a purchase of the property, though it is claimed by him that if the message refusing to accept the condition imposed had been promptly delivered he would have accepted the terms of the seller.[77]

§ 962. **Offer to buy — Failure to deliver message containing — Loss of sale — Market value.—** If a telegraph company fails to deliver a message containing an offer to buy property owned by the addressee, at a certain specified figure, and, as a result of the failure to deliver, the addressee loses the sale, the company will be liable for the difference between the lost offer and the market value of the property at the same time and place, or in case there is no special market value to the property, the measure of damages will be the difference between the lost offer

Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707, 6 Am. Elec. Cas. 842.

[77] Fisher v. Western Un. Teleg. Co., 119 Wis. 146, 96 S. W. 545. In this case it appeared that a message had been sent offering tobacco for sale. The addressee replied as follows: "Your letter received. Offer accepted. You to pay for sampling by Linde Mamilton. Answer." The reply to this latter message was as follows: "will not pay for sampling." The court said: "Here the delayed dispatch was an adverse termination of a negotiation by which plaintiff sought to obtain Johnson's tobacco. There was no suggestion in it for a continuance of negotiations. Nothing was to be effected by the delayed dispatch beneficial to appellants. * * * Obviously, even if it be true that appellants would have renewed negotiations with Johnson and carried the same into effect, had they been seasonably informed of the failure of their first effort it cannot be said that such a cause or result would have been in the natural order of things requisite to the proximate relation of damages to breach of duty which is necessary to legal liability therefor," per Marshall, J.

and the price obtained therefor by reasonable effort to secure the best price obtainable.[78] Thus, where a person, by the failure of the telegraph company to deliver a message, lost an opportunity to sell a carload of mules at $100 per head, and was forced to keep them for a period of three months, at considerable expense, when he sold them for $77.51 per head, it was held that the company would be liable for the difference between the selling price and that offered, together with the cost of keeping them.[79] So in another case, where the addressee of a message containing an offer for a horse which had no fixed market value, lost the sale owing to the delay on the part of the telegraph company to deliver the message, it was held that he was entitled to recover from the company the difference between the price offered and that obtained subsequently, after the use of reasonable and diligent efforts to sell at the best price obtainable, together with cost of keeping, and interest.[80]

§ 963. **Offer to sell — Failure to deliver message — Delay in delivery — Subsequent rise in price — Market value.**— If a telegraph company, either by error in transmission or delay in delivery of a despatch containing an offer to sell certain specified property at a fixed price, causes a loss to the addressee of the opportunity to purchase the property specified in the message, his measure of damages will be the excess of the market value at the same place of the article or articles offered over the price at which they were offered in the message.[81] And where a person lost a sale of corn at a price in excess of the market price therefor as a result of a negligent delay of a message it was held that he was entitled to recover as damages the difference between the price which he would have received and the market value of the corn at the time and place of delivery.[82] In another case where a telegraph company neg-

[78] Brooks v. Western Un. Teleg. Co., 26 Utah, 147, 72 Pac. 499.

[79] Wallingford v. Western Un. Teleg. Co., 53 S. C. 410, 31 S. E. 275.

[80] Herron v. Western Un. Teleg. Co., 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731.

[81] Pennington v. Western Un. Teleg. Co., 67 Iowa, 631, 1 Am. Elec. Cas. 834, 24 N. W. 45, 25 N. W. 838.

[82] Western Un. Teleg. Co. v. Nye & Schneider Grain Co. (Neb.), 97 N. W. 305.

ligently failed to deliver a message tendering to the addressee an option on cotton for the sale of which he had a contract, and he purchased part of the cotton one day and the balance the following day at a higher figure, and the price tendered in the message was lower than he made either purchase at, it was held that, in the absence of any evidence showing that the entire amount could not have been bought when the first purchase was made, the measure of damages was the difference between the price paid at that time and the option price.[83] In a case in West Virginia, however, it has been decided that the sender of a telegram cannot recover compensatory damages of a telegraph company for failure to send a mere proposal to sell lumber, as they are contingent on its acceptance.[84]

§ 963a. **Offer to sell — Message asking for bids — Negligent delay in delivery of reply.**— Where a message is sent, by one who desired to sell a certain commodity, to two persons

[83] Western Un. Teleg. Co. v. Hirsch (Tex. Civ. App., 1904), 84 S. W. 394.

[84] Beatty Lumber Co. v. Western Un. Teleg. Co., 52 W. Va. 410, 44 S. E. 409.

The court said: "In this case we can only guess or surmise that there would have been a binding contract had the dispatch been sent. In order to give compensatory damages, we have to surmise and conjecture, only surmise and conjecture, that had the message been sent, there would have been an acceptance of the proposal which it made. To give compensatory damages there must have been actual loss, and the court must see that it comes from the wrongful act of the defendant; that but for such act there would not have been a loss. * * * Therefore we must be able to say with legal certainty that if that telegram had been delivered, there would have been an actual contract; for if a contract had not ensued, the company would clearly not be liable. We everywhere come across the rule that damages must not be contingent and conjectural. I do not mean here a conjectural process of fixing the mere amount of damages; but I mean that we cannot fix damages upon a party as guilty of wrong upon a cause or basis resting on a contingency, upon an event that might, or might not, have happened. We cannot say that the proposal of the lumber company would have been accepted. * * * Our conclusion, therefore, is, that as we cannot, with legal certainty, say that a contract would have come into existence if the dispatch had been received, we cannot assert or find that any actual loss was inflicted upon the plaintiff, and therefore the recovery of compensatory damages was improper in this case," per Brannon, J.

asking them to make bids, and a reply is sent by each on the same day, but owing to the negligence of the company the message containing the highest bid is not delivered until the following day, when the market price has dropped to a figure lower than both bids, it has been held that there may be a recovery as damages of the difference between the prices stated in the two messages and not of the difference between the highest bid and the market value.[85] It would seem, however, that this rule would not define the true measure of damages in all such cases but would only apply where both bids were higher than the market price and that if one bid were higher and the other lower than such price and both should have been delivered on the same day, the proper measure of damages would be the difference between the higher bid and the market price on that day.

§ 964. **Offer to sell — Error in message — Price understated — Market value.—** If, in a message containing an offer to sell goods or property at a certain price, the company in transmission erroneously understates the price, and in reliance

[85] Western Un. Teleg. Co. v. Love-Banks Co., 73 Ark. 205, 83 S. W. 949, wherein it is said: "Counsel for appellant urge further that there should be no recovery in this case for the reason that the delayed telegram was merely a step in the negotiations for the contract, and that it therefore cannot be shown with sufficient certainty whether the offer would ever have been accepted, even if the telegram had been received. We cannot agree to that doctrine. The appellee had for sale a marketable article, for which he was seeking a purchaser at the best price obtainable, and we must assume that he would have accepted the highest price offered. At least, when the telegraph company undertook to transmit for him the message and answer concerning prices, he was entitled to the opportunity to act upon the information giving the highest market price, and the company should be held responsible for its negligent failure whereby he is deprived of the opportunity of selling at the increased price offered in the message. * * * We think, however, that the learned circuit judge erred in his instruction that the measure of damages is 'the difference between the price offered in the message and the market value of the cotton at the time it was delivered.' The proof showed that the plaintiff could have obtained $.0925 for the cotton if sold at the time that the message should have been delivered, and the difference between this price and the price contained in the delayed message is the correct measure of damages," per McCulloch, J.

thereon the addressee sells or makes a binding contract to sell such goods or property at a price less than stated in the despatch, the company will be liable in damages for the difference between the price at which they were sold and the price fixed in the message.[86] And if the message specifying the price is erroneously transmitted so that the price on the message delivered is less than that on the one given to the company for transmission, and the offer as contained in the delivered message is accepted and the sale made, the telegraph company will be liable for the difference between the two prices.[87]

§ 965. **Offer to buy — Error in transmission — Price understated.**— If, in an offer to buy goods by telegraph, the company makes an error in the transmission of the message, so that in the message as delivered to the addressee the price is in excess of that in the message given to the company for transmission, and the addressee, in the absence of negligence, in reliance upon the price stated, having entered into contracts for purchase and having purchased goods of the character referred to at a price in excess of that actually offered, the company will be liable for the loss, the measure of damages being the difference between the price stated in the message given to the company for transmission and that paid by such person for the goods purchased by him, together with the expense and cost of shipment.[88]

§ 966. **Message ordering goods — Error in transmission — Quantity increased — Market value.**— If a telegraph com-

[86] Western Un. Teleg. Co. v. Crawford, 110 Ala. 460, 20 So. 111, 4 Am. & Eng. Corp. Cas. (N. S.) 230; Wolf v. Western Un. Teleg. Co., 24 Pa. Super. Ct. 129. See also Western Un. Teleg. Co. v. Shotter, 71 Ga. 760, 1 Am. Elec. Cas. 557; Pegram v. Western Un. Teleg. Co., 100 N. C. 28; 2 Am. Elec. Cas. 790, 6 S. E. 770; Western Un. Teleg. Co. v. Landis (Penn.), 12 Atl. 467, 2 Am. Elec. Cas. 716.

[87] Ayer v. Western Un. Teleg. Co., 79 Me. 493, 1 Am. St. Rep. 353, 2 Am. Elec. Cas. 601, 16 Atl. 495. See Western Un. Teleg. Co. v. Flint River Lumber Co., 114 Ga. 576, 40 S. E. 815.

[88] Western Un. Teleg. Co. v. Richman (Penn. Sup. Ct., 1887), 19 Week. N. of Cas. 569, 2 Am. Elec. Cas. 710. See also Postal Teleg. Cable Co. v. Wells (Miss.), 35 So. 190; De Rutte v. N. Y., Alb. & Buff. Elec. Mag. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403, Allen's Teleg. Cas. 273.

pany, in the transmission of a message ordering goods to be sent from one place to another, erroneously makes the message appear to be an order for a larger quantity than it in fact is and the addressee in reliance thereon sends the quantity called for by the erroneous message, the company will be liable in damages for the difference in the market value of the goods at the two places, when sold at the place of destination, and the costs of transportation for such excess.[89]

§ 967. **Message ordering goods — Error in transmission — Quantity decreased — Market value.**— Where a certain quantity of goods are ordered by telegraph, and, owing to an error in transmission, the quantity ordered is decreased and only a part of the amount ordered by the sender is forwarded, and subsequently the market value of such goods increases, the company will be liable to the sender for the loss sustained, the measure of damages being the increase in the market value for the difference in the quantity between that given in the message as delivered to the company for transmission and that erroneously stated in the message delivered to the addressee at the time when the sender could, after having knowledge of the error, with reasonable promptness, have obtained the balance of such goods.[90]

§ 968. **Message ordering goods — Error in transmission as to place goods to be sent — Market value.**— If goods ordered by telegraph are sent to a wrong place, owing to an error in the transmission of the message, the measure of damages will be the difference between the value of the goods at the place to which they should have been sent if the message were correctly transmitted, and at the place to which they were actually sent.[91] But where horses were ordered by a message to be sent to a certain place, and the company was not informed that if the message were not transmitted the horses would be shipped to an-

[89] Leonard v. New York, Albany & B. Elec. Mag. Teleg. Co., 41 N. Y. 544, Allen's Teleg. Cas. 500.

[90] Bartlett v. Western Un. Teleg. Co., 62 Me. 209, 16 Am. Rep. 437, 1 Am. Elec. Cas. 45.

[91] Western Un. Teleg. Co. v. Reid, 83 Ga. 401, 2 Am. Elec. Cas. 495, 10 S. E. 919. See also Western Un. Teleg. Co. v. Stevens (Tex.), 16 S. W. 1095.

other place, it was held that the company was not liable for damages caused by the horses being sent to such other place, owing to the failure of the company to transmit such message.[92]

§ 969. **Message ordering goods — Delivery to wrong person — Market value.**— If, owing to the negligence of a telegraph company, a message ordering goods is delivered to the wrong person, who, in reliance thereon, sends the goods ordered, but the goods are refused, and, being perishable, are spoiled, the measure of damages will be the value of the goods together with the cost of shipment. This it was so held when the agent of the company at the terminal office was unable to find a person of the same name as that to which the message was addressed, changed the name and delivered the message to a wrong person in the same line of business, who filled and forwarded the order.[93]

§ 970. **Message to ship goods at once — Failure to deliver — Market value.**— Where a message is delivered to a telegraph company for transmission and delivery to a person who is the owner of certain goods, to ship such goods "at once," and owing to the delay in delivery of the message the goods are not shipped until there has been a decline in the market value thereof, the company will be liable for the difference between the market value of the goods on the day when they would have been delivered, had the message been promptly delivered, and on the day the addressee is able to deliver them after actual receipt of the message. Thus it was so held where plaintiff was directed by his correspondent to "Ship your hogs at once," and the message containing the directions was delayed by defendant's negligence four days, during which there was a decline in the market value of hogs.[94]

[92] Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 219, 3 Am. Neg. Rep. 160.

[93] Elsey v. Postal Teleg. Co., 15 Daly (N. Y.), 58, 2 Am. Elec. Cas. 674.

[94] Manville v. Western Un. Teleg. Co., 37 Iowa, 214, 18 Am. Rep. 8, 1 Am. Elec. Cas. 92.

§ 971. **Message not to ship goods — Not to purchase — Failure to deliver — Market value.**— Where a message is given to a telegraph company for transmission and delivery, directing the addressee not to ship certain goods as the market is bad, and owing to the failure of the company to deliver such message the goods are shipped to a glutted market, the company will be liable for the difference between the price which the goods bring in the open market at the place of destination or at a place to which the sendee in the exercise of reasonably good judgment shipped them, and the value at the place of shipment. So, where a telegraph company failed to deliver a message of the above nature to the owner of cattle, in consequence of which he shipped them to a glutted market, the company was held liable as above stated, together with the cost of transportation, maintenance and sale.[95] And where a telegraph company fails to deliver a message directing the addressee not to purchase cattle on a specified day as directed by a previous message, but to wait until the following day, the company will be liable for the difference in the price of cattle on the two days.[96]

§ 972. **Duty of person suffering loss — Reasonable measures to diminish damages.**— The duty rests upon all persons for whose losses others may be liable to respond, to take all reasonable measures to diminish the damages that may occur. This principle applies to all who may claim indemnity from others for losses either upon express contracts or for torts.[97] So, in cases where a person has been injured by the failure to deliver a telegraph message or by an error in transmission thereof, and he stands in a position to suffer further loss in addition to that already incurred, he should exercise reasonable efforts to make the loss as light as possible, and there can be no recovery of damages for any loss which might have been averted by the exercise of such efforts.[98] So, where, in action against a tele-

[95] Western Un. Teleg. Co. v. Woods, 56 Kan. 737, 44 Pac. 989.

[96] North Packing & P. Co. v. Western Un. Teleg. Co., 70 Ill. App. 275. See also Western Un. Teleg. Co. v. North Packing & Provision Co., 89 Ill. App. 301, affirmed 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274.

[97] Baldwin v. United States Teleg. Co. 45 N. Y. 744, Allen's Teleg. Cas. 613, 653, per Allen, J.

[98] *Alabama*: Western Un. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844,

graph company to recover damages for its negligent delay in the delivery of a message, directing the sender's agent not to purchase cattle on a certain day, it appeared that the agent who had made purchases of cattle before the telegram was received, had no authority to sell, it was held that, upon learning of his principal's instructions, he should have exercised reasonable promptness to notify him of his purchases, and that there could only be a recovery as damages of an amount not in excess of that which would have been lost by a sale of the cattle in the market at a time which would have enabled the agent to inform his principal of the delay in delivery and purchases by him and to have enabled the principal to send back instructions.[99] If an injured party has exercised reasonable care to avert injury, the mere fact that his efforts might have been more judicious will not enable the company to escape liability.[1] So, where a person who has been injured

2 Am. Elec. Cas. 462, 463. *Arkansas*: Western Un. Teleg. Co. v. Aubrey, 61 Ark. 613, 33 S. W. 1063. *Georgia*: Giddens v. Western Un. Teleg. Co., 111 Ga. 824, 35 S. E. 638; Western Un. Teleg. Co. v. Reid, 83 Ga. 401, 10 S. E. 919, 2 Am. Elec. Cas. 494. *Illinois*: Western Un. Teleg. Co. v. North Packing & Provision Co., 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274, affg., 89 Ill. App. 301. *Kentucky*: Postal Teleg. Cable Co. v. Schaefer, 23 Ky. Law. Rep. 344, 62 S. W. 1119. *Maine*: Bartlett v. Western Un. Teleg. Co., 62 Me. 209, 1 Am. Elec. Cas. 45. *Missouri*: Reynolds v. Western Un. Teleg. Co., 81 Mo. App. 223. *New York*: Baldwin v. United States Teleg. Co., 45 N. Y. 744, Allen's Teleg. Cas. 613, 653; Leonard v. New York, A. & B. E. M. Teleg. Co., 41 N. Y. 544. Allen's Teleg. Cas. 500. *Tennessee*: Pepper v. Western Un. Teleg. Co., 87 Tenn. 554, 11 S. W. 738, 2 Am. Elec. Cas. 756; Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 2 Am. Elec Cas. 735. *Texas*: Western Un. Teleg. Co. v. Wofford (Tex. Civ. App. 1899), 42 S. W. 119; Western Un. Teleg. Co. v. Harper, 15 Tex. Civ. App. 37, 39 S. W. 599. *Virginia*: Washington & New Orleans Teleg. Co. v. Hobson, 15 Gratt. (Va.) 122, Allen's Teleg. Cas. 120.

If by a trifling expenditure and the exercise of a reasonable effort a loss could have been averted, damages therefor are not recoverable from a telegraph company for its failure to deliver a message. Reynolds v. Western Un. Teleg. Co., 81 Mo. App. 223.

As to sufficiency of evidence showing the exercise of due care and diligence, see Brooks v. Western Un. Teleg. Co., 28 Utah, 21, 76 Pac. 881.

[99] Western Un. Teleg. Co. v. North Packing Provision Co., 188 Ill. 366, 58 N. E. 958, 52 L. R. A. 274.

[1] Western Un. Teleg. Co. v. Cook, 54 Neb. 109, 74 N. W. 395.

by contact with a live wire has exercised reasonable care in the selection of a reputable physician, the company cannot escape liability because with a better physician the person injured might have secured better results.[2]

§ 973. **Real estate transactions — Message to agent from principal — Market value — Measure of damages.—** If a telegraph company, in the transmission of a message from a principal to an agent, makes an error and understates the price of a piece of real estate, and the agent, having full power to enter into a contract for the sale of such real estate, makes a contract for its sale in accordance with the price stated in the delivered message, the company will be liable for the difference between the price erroneously stated in the message and the actual market value thereof.[3]

§ 974. **Reports of market quotations — Errors in — Measure of damages.—** One of the ordinary uses of the telegraph is for the purpose of furnishing daily market reports, either by agreement with the telegraph company or by contract with an independent company or with individuals. Where such reports are transmitted by a telegraph company to a customer or addressee and the market quotation of a certain article is erroneously stated therein, the company will be liable for damages which are sustained by such customer or addressee who has entered into a contract for the purchase or sale of such article on the basis of the erroneous quotation.[4] So where a telegraph company agreed to furnish a grain dealer at S. with daily reports of the grain market at C., a point beyond its line, and by reason of an error in the report, such dealer was induced to purchase a quantity of grain to fill a contract for future delivery,

[2] New York & N. J. Teleph. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759, 5 Am. Neg. Rep. 657.

[3] Reed v. Western Un. Teleg. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 6 Am. Elec. Cas. 791.

[4] Hollis v. Western Un. Teleg. Co., 91 Ga. 801, 4 Am. Elec. Cas. 706, 18 S. E. 287; Turner v. Hawkeye Teleg. Co., 41 Iowa, 458, 20 Am. Rep. 605; Bank of New Orleans v. Western Un. Teleg. Co., 27 La. Ann. 49, 1 Am. Elec. Cas. 147; Hughes v. Western Un. Teleg. Co., 114 N. C. 70, 19 S. E. 100, 4 Am. Elec. Cas. 780.

it was held that the measure of damages was the difference between the actual purchase price and the price as represented in the report.[5] And if in the transmission of the market quotations the market price of an article is erroneously given at a figure in excess of its actual market value, and a person enters into a contract for the purchase of such article upon the basis of the erroneous price, it would seem that the measure of damages in such a case would be the difference between the actual market price and the price paid.[6] But though the price may be overstated, and a person in reliance thereon sells shares of stock, yet he receives therefor the market value, it is held that his recovery will be limited to the cost of the message, though a few days later he may be compelled to pay an advanced price to procure shares of the same stock.[7]

§ 975. **Commissions of agents or brokers.**— Where a telegraph company erroneously transmits or delays or fails to deliver a message to an agent or broker, or from such a person to a proposed buyer, as a result of which such agent or broker loses certain commissions which he would have earned if the message had been correctly transmitted, the company will be liable for the commissions so lost.[8] Thus, where the consummation of a sale of land was prevented by an error in transmission, by which the price was changed from $1,000 to

[5] Turner v. Hawkeye Teleg. Co., 41 Iowa, 458, 20 Am. Rep. 605, 1 Am. Elec. Cas. 208. In this case it appeared that the market price of wheat on the day of the quotation was $1.56 per bushel, but the message erroneously stated it at $1.21½, and the dealer directed his commission merchants in Chicago to purchase 5,000 bushels to fill a contract for future delivery, relying upon the correctness of the quotation. The wheat was purchased by them on the following Monday at $1.50 per bushel. On the following day wheat dropped to $1.12, and the day following that it was $1.12½. The difference between the price paid and the price reported by the market report was twenty-eight and one-half cents per bushel, or $1,425 on the 5,000 bushels, which amount was allowed as damages.

[6] See §§ 956–973, in this chapter.

[7] Hughes v. Western Un. Teleg. Co., 114 N. C. 70, 19 S. E. 100, 4 Am. Elec. Cas. 780. See Hollis v. Western Un. Teleg. Co., 91 Ga. 801, 4 Am. Elec. Cas. 706, 18 S. E. 287.

[8] Western Un. Teleg. Co. v. Fatman, 73 Ga. 285, 1 Am. Elec. Cas. 666; United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519, Allen's Teleg. Cas. 390; Harper v. Western Un. Teleg. Co., 92 Mo. App. 304; Western Un.

$10,000, it was held that the company was liable for the commissions of the broker.[9]

§ 976. **Message offering employment — Negligence of company — Measure of damages.**— Where a telegraph company, either by error in the transmission, or by delay in delivery, or failure to deliver, a message containing either an offer of employment or an acceptance of such an offer, causes a loss of employment, the company will be liable for the loss so caused, provided the damages are certain and such as might be expected to follow the breach of the contract to transmit and deliver.[10] So a message "Have work, come at once," is sufficient to charge the company with notice of the character of the damages which would probably result to the sendee from negligence in failing to deliver it in due time.[11] And where a person sent a telegram accepting an offer of employment for a definite time and the message as delivered to the company read "I can come" but as transmitted and delivered to the addressee read "I can't come" and in consequence of such mistake the sender did not obtain the employment, it was decided that the telegraph company was liable in damages for the difference between what he would have earned under the contract of employment as accepted by him and what was actually earned by him in other employments.[12] And where a person lost a position as teacher by reason of the negligence of the company in the transmission and delivery of a message sent by him it was decided that a recovery could be had of the company for the damages occasioned by the loss of such position but that there could be no recovery for worry as a result of such loss.[13]

Teleg. Co. v. Cook, 54 Neb. 109, 74 N. W. 395.

[9] Western Un. Teleg. Co. v. Cook, 54 Neb. 109, 74 N. W. 395.

[10] *Georgia*: Western Un. Teleg. Co. v. Hines, 96 Ga. 688, 23 S. E. 845. *Illinois*: Western Un. Teleg. Co. v. Valentine, 18 Ill. App. 570, 1 Am. Elec. Cas. 829. *Indiana*: Western Un. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894, 2 Am. Elec. Cas. 525. *Missouri*: McGregor v. Western Un. Teleg. Co., 85 Mo. App. 308. *North Carolina*: Walser v. Western Un. Teleg. Co., 114 N. C. 440, 19 S. E. 366. *Texas*: Western Un. Teleg. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W. 584.

[11] Western Un. Teleg. Co. v. Hines, 96 Ga. 688, 23 S. E. 845.

[12] McGregor v. Western Un. Teleg. Co., 85 Mo. App. 308.

[13] Western Un. Teleg. Co. v. Partlow, 30 Tex. Civ. App. 599, 71 S. W 584.

Where, however, employment has been lost by the fault of the telegraph company in the transmission or delivery of such a message, the person so injured must use reasonable effort to obtain other employment.[14] So where, by the failure of a telegraph company to deliver a message, a person lost an offered position as engineer at a salary of "two dollars per day," it was held that it was correct to charge the jury that plaintiff's damages would be $2 per day from the date of sending the message to the date of the commencement of the suit, excluding Sundays, and deducting therefrom any amount that he had earned between such dates, and that "It was the duty of the defendant to make reasonable effort to secure other employment after failing to secure the position mentioned in the telegram, and you should deduct from any amount found due plaintiff, according to the above standard, such amount as you find that by reasonable diligence he might have earned."[15] In accordance with the directions of the plaintiff in this case the message was directed to a third party, who was to inform plaintiff of the offered employment. It does not appear that the employment was for a fixed period or time, although it was alleged that the plaintiff was a competent engineer; that there had been no vacancy in the establishment since the time of such offer, and that by reason of defendant's negligence the plaintiff had lost the opportunity of permanent employment. In another case, however, where the position lost was an appointment to an office, the tenure of which was only at the pleasure of the appointing officer, it was held that damages for loss of salary were speculative and could not be made a basis for recovery.[16]

§ 977. **Loss of reward for capture of criminal.**— A telegraph company may be liable for the loss of a reward caused by its negligence in the transmission or delivery of a message relating

[14] See Western Un. Teleg. Co. v. Bowman, 141 Ala. 175, 37 So. 493, holding, however, that where a telegraph company claims in mitigation of damages that the plaintiff in such a case obtained or by the exercise of reasonable diligence could have obtained other employment, the burden of establishing such claim rests upon the telegraph company.

[15] Western Un. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894, 2 Am. Elec. Cas. 525.

[16] Kenyon v. Western Un. Teleg. Co., 100 Cal. 454, 35 Pac. 75.

to the capture of a criminal. So a telegraph company, whose agent knew that plaintiff was expecting a message relating to the capture of a criminal and that prompt delivery was required, although neither the company nor the plaintiff had any actual notice of a reward being offered, but the latter understood that it would be and was acting to secure it, it was held that damages for the loss of such reward were not too remote and that plaintiff might recover.[17]

§ 978. **Failure to deliver message — Notes protested.**— If a telegraph company delays delivery or fails to deliver a message either remitting money for the payment of a note or directing that such note be protected, and as a result of such failure or delay the note is protested, the sender may recover both for actual loss sustained as well as for damages to credit. So, where a telegraph company received from a banking-house, acting as agent for plaintiff, a message to another banking-house, directing the latter to protect the plaintiff's note, and the message was never delivered, it was held that the company was liable to the plaintiff and that the damages should not be measured by the limitation provided in case of repeated messages in the blank form on which the message was written, but would embrace all actual damages, including injury to credit, but not exemplary damages, in the absence of proof of express or implied authority or adoption by the company.[18] But in another case where it appeared that the company had failed to forward the money in time to avoid the note being protested, it was held that the company was not liable where it also appeared that the note had been taken up on the following day, that there was no evidence of any injury to plaintiff's credit, and that the fact of the protest was known only to those in the bank and to the plaintiff.[19]

§ 979. **Messages in reference to claims — Directing attachment — Negligence of telegraph company.**— A telegraph com-

[17] McPeek v. Western Un. Teleg. Co., 107 Iowa, 356, 43 L. R. A. 214, 5 Am. Neg. Rep. 314, 78 N. W. 63.

[18] Western Un. Teleg. Co. v. Brown, 58 Tex. 170, 44 Am. Rep. 610.

[19] Smith v. Western Un. Teleg. Co., 150 Pa. St. 561, 24 Atl. 1049.

pany which, by its negligence in the transmission or delivery of a message, directing the attachment of property or the taking of other immediate means for the purpose of securing a debt or claim, causes a loss of either a whole or a part of such debt, will be liable to the person so injured for the difference between the amount which might have been secured in liquidation of such debt if the company had promptly transmitted and delivered such message, and the amount actually secured.[20] So, where a message was sent by the plaintiffs in New York to their attorney in Providence, directing him to attach a house and lot of one B. in that city for a debt of $12,000, and the operator was informed of the importance of the message and that unless it was sent at once it would be of no use, and the message was not received owing to delay, until it was too late to make the attachment, which could have been made if the message had been promptly transmitted and delivered, and it appeared that the house and lot were worth over $12,000, it was held that the measure of damages in an action against the telegraph company was the amount of debt and interest, less $500, which had been received from the bankrupt estate of B.'s firm.[21] So, in another case, where a message was delivered to the telegraph company for transmission and delivery, which read "Attach property A. for seven hundred ninety dollars," and it was interpreted by the addressee as being for $190, it was held that the company was liable for the balance.[22]

§ 979a. **Message to sheriff to postpone sale of property — Failure to deliver.**— In an action against a telegraph company for damages for failure to deliver a message to a sheriff directing him to postpone the sale of property, it has been decided

[20] *United States*: Fleischner v. Pacific Postal Teleg. Cable Co., 55 Fed. 742. *California*: Parks v. Alta Cal. Teleg. Co., 13 Cal. 422, Allen's Teleg. Cas. 114. *Indiana*: Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 4 Am. Elec. Cas. 708, 34 N. E. 581. *Nebraska*: Western Un. Teleg. Co. v. Beals, 56 Neb. 415, 76 N. W. 903. *New York*: Bryant v. American Teleg. Co., 1 Daly (N. Y.), 575 Allen's Teleg. Cas. 288. *Texas* Western Un. Teleg. Co. v. Sheffield, 71 Tex. 570, 10 S. W. 752, 2 Am. Elec. Cas. 802.

[21] Bryant v. American Teleg. Co., 1 Daly (N. Y.), 575, Allen's Teleg. Cas. 288.

[22] Western Un. Teleg. Co. v. Beals, 56 Neb. 415, 76 N. W. 903.

that the sender of the message, who is also the owner, may recover damages for the loss which he sustained having reference to his entire interest in the property, without regard to the fact whether the records show the actual extent of his interest. So where a partner to whom the interest of a co-partner in partnership property had been transferred sent a telegram to a sheriff to postpone the execution sale of the land it was held in an action against the telegraph company for failure to deliver the message that there might be a recovery of damages by him to the full extent of his interest in the property, though the records showed title to the property to be in the partnership and only a half interest in the plaintiff.[23] The court said in this case: "The evidence shows that Wofford was really the owner of the whole property after the dissolution of said firm. The records, however, showed title as in Wofford and Wemken at the time of the occurrence here in question. Appellant insists that as it could not, under these circumstances, possibly have foreseen as the result of the delay in delivering the telegram that Wofford would suffer, except as to one-half of the land, it therefore cannot be held any further. We think there is nothing in the point. Such damages for breach of contract are allowed as are naturally the result of the breach. The failure to deliver the telegram in time would naturally and proximately result in a sale of the property, and this would naturally involve loss to the owner. It cannot be, and we think is not, claimed that such injury would be too remote to authorize recovery in reference to the entire property."[24]

§ 980. **Message to physician — Lawyer — Loss of fee.**— Recovery may be had from a telegraph company for failure to deliver a message to a physician or lawyer as a result of which such a person loses a fee which he would have earned but for the failure of the company to deliver the message. So, where a message to a physician, directing him to come on the day the message was sent, was not delivered until the follow-

[23] Western Un. Teleg. Co. v. Wofford (Tex. Civ. App., 1903), 74 S. W. 943.

[24] Per James, J.

ing day, and before he could leave, the call was countermanded, it was held that the company was liable and that the measure of damages would be the difference between the lost fee and what he earned during the time the visit would have required.[25] But if the message indicates no such probable injury, it is held that there can be no recovery.[26]

§ 980a. **Sending money by telegraph — Collection of draft — Tender of check by company instead of cash — Measure of damages — Mental suffering.**— Where a telegraph company receives money to be transmitted to a person it is under the obligation to transmit it promptly and for a failure to perform its contract duty it will be liable for such damages as are the direct, necessary and probable result of the breach but not for those which are speculative and remote. So, in a case in Kentucky where a person who was a stranger in a city, sent a draft by telegraph, which was paid and upon his calling for the money was tendered a check after the close of banking hours, which he declined to accept on the ground that he was unknown in the city and that the check was useless to him because he could not be identified and that he wanted the money, it was held that the company was bound to deliver the money and not a check, that there was a breach of contract and that the measure of damages therefor was the amount of the draft which was collected, with interest from the time it was paid until it was tendered in court, the cost of sending the message and any additional expense incurred by him necessarily because of the breach of contract. It was, however, decided that there could be no recovery for mental anguish or annoyance in censequence thereof.[27] Upon the question of the right to recover for mental suffering the court said: "Telegraphic messages of a business nature should be, and are, subject to the law applicable to other business transactions. The measure of recovery is then regulated by the nature

[25] Western Un. Teleg. Co. v. Longwill, 5 N. Mex. 308, 21 Pac. 339, 2 Am. Elec. Cas. 638.

[26] Western Un. Teleg. Co. v. Clifton, 68 Miss. 307, 8 So. 746.

[27] Robinson v. Western Un. Teleg. Co., 24 Ky. Law Rep. 452, 68 S. W. 656, 57 L. R. A. 611. See also as to recovery for mental suffering in such cases, Western Un. Teleg. Co. v. Burgess (Tex. Civ. App., 1901), 60 S. W. 1023.

of the transactions involved, but in every case subject to those cardinal principles applicable to the defining of the measure of damages, to wit, that the damages must be proximate, certain and the necessary result of the breach. They must not be conjectural nor speculative. In the case at bar the message was solely concerning a business transaction — in fact was the hiring of appellee to collect a sum of money at a distant city for, and immediately transmit it to the hirer. The telegraph company undertook to render the service for him. It failed to discharge its undertaking. In other words, it broke its contract. Although it collected the draft it did not transmit the money promptly to the person to whom it had engaged to deliver it. The contract sued on is not different in any material degree from one where a bank accepts for collection for its customer a draft on a remote locality, and after collecting it fails to turn over the money to the person entitled. This person may, and under similar circumstances would, suffer the same degree of anxiety, worry, mental pain and mortification that appellant did. Yet the only difference between the contracts, the one sued on and the one imagined, is in the time required to perform them. It is probably true that every breach of contract occasions some mental disturbance, varying perhaps more in proportion to difference of temperament of the persons than to the circumstances of the case. * * * We are of opinion, upon precedent and principle that appellant was not entitled to recover anything for his mental anguish or annoyance suffered because of appellee's breach of the contract." [28]

§ 980b. **Telegrams in reference to railroad tickets — Measure of damages for failure to transmit — Mental suffering.** — Where a telegraph company fails to transmit or deliver a telegram in reference to the sending of a railroad ticket it will be liable for such damages as were reasonably within the contemplation of the parties at the time of making the contract. So where, on delivering to a telegraph company a message requesting the sendee's brother to send him a ticket by telegram, the sender informed the agent that he had no means to lay

[28] Per O'Rear, J.

over, it was decided that his suffering from cold and hunger in sleeping out of doors at nights, and in attempting to reach his home four hundred miles distant as a result of the failure to deliver the telegram, were damages reasonably within the contemplation of the parties in making the contract to send the message, and hence were not too remote to entitle the sendee to recover therefor. The court said the elements of damages would be: (1) Price of telegram; (2) wages or compensation for time lost in reaching his home; (3) price of meals and lodging during the time he would be en route; and (4) "mental worry and distress accompanying the physical fatigue and cold while on the journey, of course including the physical suffering itself.[29]

§ 981. **Forged message — Payment of money in pursuance of.**— Where, through the negligence of a telegraph company, a forged message is transmitted to a third party, as a result of which such third party, in reliance thereon, pays money to another, the company will be liable for the actual loss sustained. So, where by the negligence of the telegraph operator in one town a message, purporting to be signed by the cashier of a bank in such town, was sent to bankers in another town, vouching for the credit of the person named in the message, to the extent of $20,000, and, in reliance upon the despatch, such bankers paid a check for $10,000, it was held that the telegraph company was liable for that amount.[30] And the company will likewise be liable for money which has been paid by an addressee in reliance upon a telegram which has been forged by one of its operators.[31] But a code provision allowing a recovery in an

[29] Barnes v. Western Un. Teleg. Co., 27 Nev. 438, 76 Pac. 931, 65 L. R. A. 666.

[30] Elwood v. Western Un. Teleg. Co., 45 N. Y. 549, Allen's Teleg. Cas. 594.

[31] Pacific Postal Teleg. Cable Co. v. Bank of Palo Alta, 109 Fed. 369, 48 C. C. A. 413. The court said: "If there be no decided cases which march up to the standard of authority, binding upon this court, then sound reason, which is the soul of the law, must assert the rule which should govern and control cases of this character. The business of telegraph companies is in some respects different in its relations with the public from that of other corporations. It is important because of its instantaneous means of communication, and because it is intended to influence the action of the party to whom the telegram is di-

action for conversion of "a fair compensation for the time and money expended in the pursuit of property" does not apply in such a case and there can be no recovery for money expended in pursuing the man who obtained the money on the faith of the telegram.[32]

§ 981a. **Forged message — Wires tapped by third person — Use of information from operator.**— Where an operator of a telegraph company imparts to a third person, information, of such a character in reference to the sending of messages in the usual course of the company's business as enables such third person to tap the wires and send a message which has all the appearance of genuineness and in reliance upon which money is paid, it has been decided that the company will be liable for the money so paid. So where a person was informed by an operator as to the "call" of another place and the signature used by him in the transmission of messages, and the former tapped the telegraph wires and sent messages to a confederate in reliance upon which a draft was cashed by a bank it was held that a finding of negligence on the part of the company was justified and that the bank could recover the amount paid by it.[33]

rected. Such party is, in most cases, compelled to act upon the telegram which he receives, and has a right to trust to its correctness, and rely upon the representation made upon its face that the sender, whose name is signed to the message, has sent that particular telegram to the party named in the message. In these particulars, at least, it may be said that a telegraph company, in the eye of the law stands in a position of its own. * * * If the agent or servant while so employed by the corporation, by his wrongful and malicious act occasions a violation of that duty, or any injury or loss to the person interested in its faithful performance by or on behalf of the corporation, the principal is held liable for the breach of it. * * * This general principle * * * seems to be deeply rooted in the groundwork of the law, and ought not to be frittered away by ingenious argument or splitting of hairs upon nicely drawn distinctions of facts which do not create any substantial distinction in the principle of law involved," per Hawley, J.

[32] Pacific Postal Teleg. Cable Co. v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413.

[33] Western Un. Teleg. Co. v. Uvalde Nat. Bank (Tex. Civ. App.), 72 S. W. 232, affd. 97 Tex. 219, 77 S. W. 603. The Supreme Court said in affirming the decision of the Court of Civil Appeals: "If the

§ 981b. **Telegram — Unauthorized message sent by telephone — Loss of lien.** — Where mortgagees of property lose their lien thereon by reason of an unauthorized telegram which was sent under such circumstances as to put the company or its acting operator upon inquiry as to the authority of the sender, the company will be liable in damages for the loss so sustained. So in an action by mortgagees against a telegraph company for the loss of their lien on cattle worth $3,500, caused by the receipt over the telephone, from one whose voice was not known to the operator and who had no authority to send it, and the transmission to the plaintiffs to whom it was addressed, of this telegram: "We will pay Barnes' draft for thirty-five hundred. Bank of Denison," it was declared that the loss of the lien upon the cattle was not an unnatural or improbable effect of the delivery of the

defendant had made any regulation or adopted any code or signals or made any provision against this known danger, the evidence fails to disclose the fact, unless the signals stated at the outset constituted one. If these were designed for this purpose, which is not shown, then the servant of the company was in fault in defeating that purpose by disclosing the call for Uvalde, and it would be difficult to answer the view of the Court of Civil Appeals that this was, of itself, sufficient evidence of negligence." The court then proceeded to consider the question of the liability of the company in view of the fact that the agents did not consider these matters as having any such signification, and said: "The case then stands in this attitude: the defendant is engaged in the business of conveying from place to place intelligence, often of vast importance in business and other affairs: it invites the confidence of the public that its service is as reliable as the exercise of care and foresight commensurate with the importance of the interests involved can make it; at the same time it is, to its knowledge, exposed to a constant danger of being made, through the use by swindlers of its own appliances and servants, the instrument of fraudulent deception upon its patrons; and when such a deception has been accomplished upon one, it does not show that it had taken any precaution against it, or that none was practicable. We are unwilling to establish the first precedent that a defense going no further than this is sufficient, and to hold that the jury were not warranted in this state of the evidence in finding that the defendant was guilty of negligence. If it be urged that the burden was on plaintiff to show negligence, the answer is that it did show that the company was apparently in the wrong in delivering a false telegram. The defendant charged with the duty which, as we have seen, rested upon it, should have shown, not only that it was ignorant of the falsity

telegram, and the damages resulting from this loss were not too remote to warrant a recovery.[34]

§ 982. **Libelous message by agent of telegraph company.**—A telegraph company is liable for the acts of its agents acting within the scope of their authority. So, where the station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the wires of said company to another of its station agents, addressed for delivery to a third person, and which is so delivered, the company is liable in punitive damages.[35] In this case the court said: "Is the company itself liable for exemplary damages, by reason of the act of the agent McHale, although it did not know, direct or authorize it? * * * He alone saw the libelous message, and sending it was a matter incident to his business and pertaining to the particular duty of his employment. He was acting in the capacity for which he was em-

of the message, but that it was justifiably ignorant. It could not establish this without showing that the imposition upon it occurred notwithstanding the use of proper care on its part," per Williams, J.

[34] Bank of Havelock v. Western Un. Teleg. Co. (C. C. A.), 141 Fed. 522. The court said: "The gravamen of this suit is false representation and resulting damage, and the acceptance of the apparent offer which the bank of Denison never made neither conditioned nor limited it. The fact that the telegraph company, in violation of its duty of reasonable care, falsely represented to the plaintiff that the Bank of Denison had promised to pay the draft of Barnes for $3,500, and that the plaintiff in reliance upon the truth of that representation, surrendered its lien upon cattle of the value of $3,500, constituted a perfect cause of action, and entitled the plaintiff to a judgment. One who wrongfully deceives or misleads another, to whom he owes the duty of truthful statement, to his damage, is liable for the natural and probable consequences of his act. The natural and probable effect of the false telegram was the expenditure or the loss by the addressee of $3,500 upon the faith of it, and this loss by the surrender of the cattle, or of a lien upon them, was not so remote as to be either an unnatural or improbable effect of it," per Sanborn, J. The court, however, in this case affirmed a judgment for the defendant on the ground that there was not sufficient evidence of the negligence of the defendant to warrant a verdict against it.

See § 773 herein, wherein this case is further considered.

[35] Peterson v. Western Un. Teleg. Co., 72 Minn. 41, 40 L. R. A. 661, 74 N. W. 1022, 5 Am. Neg. Rep. 376, 8 Am. & Eng. Corp. Cas. (N. S.) 517. See §§ 1019, 1020, herein.

ployed, and having this power, he was acting within the scope of his authority. * * * That he abused the authority is no defense in such case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse, without his fault. One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law, and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if, for their malicious acts done within the scope of their employment, the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence the public are greatly interested in such a question, and the liability for such wrongs should rest upon that body which, by its act, creates the power and the opportunity for committing them. It would be a lamentable condition of the rights of the citizen if, under the guise of exercising lawful corporate powers, the corporation should permit the citizen to be defamed by the false and malicious publication of its agent, while acting as its duly appointed representative." [36] And where a telegraph operator sent a forged telegram purporting to be from an unmarried woman to an unmarried man, with whom she had only a casual acquaintance, requesting him to meet her at a certain town and the operator exhibited the telegram and boasted of having sent it, it was held that he was acting in the line of his business in the sending of the telegram and that the woman could recover from the company damages for mental suffering caused by the injury to her reputation.[37] But a telegraph company will not be liable for punitive damages for the transmission and delivery of a libelous message where the evidence shows no evil motive nor malice on the part of the company beyond that which the law infers from the wrongful act nor that the wrongful act was conceived by

[36] Per Buck, J.

[37] Magouirk v. Western Un. Teleg. Co., 79 Miss. 632, 31 So. 206.

the telegraph company or its agents in the spirit of mischief or criminal indifference to civil obligations.[38]

§ 983. **Contract between telegraph company and individual — Maintenance of office — Damages for breach of.**— Where a telegraph company enters into a contract with an individual in reference to the maintenance of an office by him in a certain place, or for a certain number of years, no other office to be opened or maintained by the company during the term specified, and the individual to be allowed a certain part of the receipts for maintaining the office, if subsequently there is a breach of the contract by the telegraph company, it will be liable to such individual for damages which are to be computed on the basis of the average yearly receipts from the office.[39]

§ 983a. **Disconnection of telephone — Refusal of service — Breach of contract — Punitive damages.**— In case of a breach of contract by a telephone company to furnish a subscriber with telephone service where such service has been paid for, the measure of damages is, in the absence of any evidence showing special damage the amount paid for the service for the time during which it is refused. And in an action to recover damages for such a breach it is held proper to instruct the jury to find for the plaintiff the amount paid by him for the service for the time his telephone was discontinued, taking for the basis the amount paid by the month, and allowing for the time lost such part thereof as they deem right. The court said in this case: "The plaintiff had by contract acquired the right to a certain service, and this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass, as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract but an actual tort. The proper measure of damages to compensate for the breach is a matter of some difficulty, and we have been referred to no authorities directly in point. Where the contract is to deliver a specific message,

[38] Western Un. Teleg. Co. v. Cashman, 132 Fed. 805, 65 C. C. A. 607.

[39] Tufts v. Atlantic Teleg. Co., 151 Mass. 269, 23 N. E. 844, 2 Am. Elec. Cas. 878.

and is broken, the measure of damage has been often adjudicated, and we see no reason why the same principle should not apply to the case before us for the contract here was in substance an undertaking to convey all messages the subscriber might wish to send, or others might wish to send to him, over appellant's line, within the time paid for by him. In the absence of proof of special damage for the failure to carry a message, the recovery would be limited to the amount paid for the service which was not furnished. Here inconvenience and annoyance cannot be recovered for except in peculiar cases.[40] Where there is a contract, not for specific message but for the carriage of all messages within a certain time the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages, in the absence of any proof of specific loss, is the amount paid for the service for the time during which it is refused. In case of special damage, this, in addition, may be recovered under proper averments." [41] And where a subscriber who claimed that his

[40] Citing 25 Am. & Eng. Enc. Law 855–863; Chapman v. Teleg. Co., 90 Ky. 265, 13 S. W. 880, 3 Am. Elec. Cas. 670.

[41] Cumberland Teleph. & Teleg. Co., v. Hendon, 24 Ky. Law Rep. 1271, 71 S. W. 435, 8 Am. Elec. Cas. 860, per Hobson, J. The plaintiff in this case was a physician whose telephone had been disconnected for non-payment of rent when in fact the rent had been paid for several months in advance. It appeared that during the time the telephone was disconnected, several persons attempted to communicate with the physician over the telephone and that some of them were informed that service had been discontinued for non-payment of rent. It did not appear that any pecuniary loss had been sustained by the plaintiff by the suspension of service, although it seemed that he was considerably annoyed. It was held that the trial court properly refused to instruct the jury that there might be a recovery of punitive damages but that it erred in instructing that if they believed from the evidence that the plaintiff suffered inconvenience by reason of the telephone service being discontinued, then they should find for him such sum as would fairly and reasonably compensate him for the inconvenience so sustained. The case does not show that the plaintiff sustained any injury by reason of the statement that service had been discontinued for non-payment of rent. Such a statement might, however, result in injury to a subscriber, as where he is a business man, in which case it might injure his credit. Under such cir-

house telephone was defective and refused to pay the full rental, was refused connection with the long distance telephone unless he came to the exchange and paid the required tolls in advance it was held that the act of the local manager of the company in giving instructions to this effect and in also discontinuing the house telephone and in removing it prior to the time when the rules of the company authorized him to was not of such a wanton or wilful character as would authorize a recovery of punitive damages.[42] So in another case it is held that a subscriber is not entitled to recover such damages by the fact that the company refused to make a long distance connection, it not appearing that there were any aggravating circumstances. And it was also decided in this case that the plaintiff, who averred that in consequence of the refusal of the company to make a long distance connection so that he could communicate with his counsel, he, the subscriber, paid unnecessarily and unjustly a certain sum of money to a delinquent employee to get rid of him and to recover from him certain property intrusted to him, could not recover such payment as actual or special damages, it not appearing that such absent counsel could have controlled the delinquent employee.[43] But where a telephone company that entered into a contract with one who was engaged in the messenger business by which it agreed to furnish him with the use of a telephone for a period of three years, removed the telephone at the end of four months, it was held that prospective profits were recoverable for such breach of contract and that a verdict would not be set aside as excessive which was based on the rate of reasonable increase in the business where the evidence of the actual receipts showed that the business was growing.[44]

§ 984. **Error in message — Settlement by agent with third party for less than face value of claim.—** If, by reason of errors

cumstances it would seem that evidence of such an injury might properly be given and a recovery therefor allowed.

[42] Cumberland Teleg. & Teleph. Co. v. Baker, 85 Miss. 486, 37 So. 1012.

[43] Haber, Blum, Block Hat Co. v. Southern Bell Teleph. & Teleg. Co., 118 Ga. 874, 45 S. E. 796, 8 Am. Elec. Cas. 847.

[44] Owensboro Harrison Tel. Co. v. Wisdom, 23 Ky. Law. Rep. 97, 62 S. W. 529.

in the transmission of messages between a principal and his agent, in reference to the settlement of a claim with a third party, the agent has, under apparent authority, settled such claim for less than its face value, the principal may recover from the telegraph company for the loss resulting therefrom.[45]

§ 984a. **Refusal of street car conductor to give change — Abusive language by conductor.**— In an action by a passenger to recover damages against a street railway company for the act of its conductor in retaining change to which the passenger was entitled and also in using insulting and abusive language in connection with his refusal to return such change the damages which may be recovered should not be limited to the amount of the change which was retained but there may also be a recovery of compensatory damages for humiliation and injury to the feelings which the passenger suffered in consequence of the language used. This question is considered in a case in New York on an appeal from a decision of the Appellate Division affirming the action of the trial court in directing a verdict for the amount of the change. The court of appeals declared the proper rule to be as above stated saying, after a review of authorities: "The foregoing authorities render it manifest that the defendant was not only liable to the plaintiff for the money wrongfully retained by its conductor, but also for any injury she suffered from the insulting and abusive language received at his hands. This brings us to the consideration of the elements of damages in such a case, and what may be considered in determining their amount. Among the elements of compensatory damages for such an injury are the humiliation and injury to her feelings which the plaintiff suffered by reason of the insulting and abusive language and treatment she received, not, however, including any injury to her character resulting therefrom. She was entitled to recover only such compensatory damages as she sustained by reason of the humiliation and injury to her feelings, not including punitive or exemplary damages." And after further reviewing the authorities the court said in conclusion: "After this somewhat ex-

[45] Hasbrouck v. Western Un. Teleg. Co., 107 Iowa, 160, 77 N. W. 1034.

tended review of the authorities bearing upon the subject, we are led irresistably to the conclusion that the defendant is liable for the insulting and abusive treatment the plaintiff received at the hands of its servant, that she is entitled to recover compensatory damages for the humiliation and injury to her feelings occasioned thereby, and that the trial court erred in directing a verdict for the plaintiff for twenty cents only, and in refusing to submit the case to the jury.[46]

§ 984b. **Physical injury — Collision with telegraph pole — Right under statute — Massachusetts case.**— In Massachusetts it has been decided that, under a statute of that State providing that any telegraph company authorized to use the streets for telegraph lines shall be liable for damages to all persons injured in person or property by the erection of the poles, where a person is thrown from his wagon and injured by a collision with a telegraph pole, he can recover therefor without showing any negligence on the part of the defendant in the construction and maintenance of the pole, where the person injured is not guilty of contributory negligence.[47]

§ 985. **Death — Physical injuries — Measure of damages — Generally.**— For the purpose of determining the measure of damages in an action to recover for negligent killing, or for injuries to a person, caused by the negligence of an electrical company, various facts may be shown to, and various elements may be taken into consideration by, the jury to whose reasonable discretion the question of damages is to a great extent left.[48] So the age of the plaintiff, his physical condition prior to the injury, and his ability to work, may be considered in ascertaining the measure of damages,[49] as may also physical pain which

[46] Gillespie v. Brooklyn Heights R. Co., 178 N. Y. 347, 70 N. E. 857, 16 Am. Neg. Rep. 181, per Martin, J., reversing 82 App. Div. 645, 81 N. Y. Supp. 1127. Gray, J., with whom two other judges concurred, said in dissent: "I dissent, because I think it is extending unduly the doctrine of a common carrier's liability in making it answerable in damages for the slanderous words spoken by one of its agents."

[47] Riley v. New England Teleg. & Teleph. Co., 184 Mass. 150, 14 Am. Neg. 566, 68 N. E. 17, decided under Rev. Laws, c. 122, § 15.

[48] Economy Light & P. Co. v. Sheridan, 103 Ill. App. 145.

[49] Williams v. Louisiana E. L. & P. Co., 43 La. Ann. 295, 8 So. 938,

he suffered as a result of the injury.[50] And in an action to recover for negligent killing, the measure of damages has been held to be such a sum as the deceased would, probably, have earned in his business during life, and which would have gone to his next of kin, taking into consideration his age, ability, disposition to labor, and habits of living and expenditure.[51] But the mere fact that a person's wages are not cut off or diminished by an injury, and that he has not been subjected to any pecuniary loss or outlay, will not prevent recovery of substantial damages where there have been severe and permanent injuries.[52] In this case it was said by the court: "The right to compensation for a personal injury is not dependent upon the fact that the wages of the injured person were cut off or diminished by reason of the injury, nor is the amount of compensation for such injury to be measured by the amount of his income or wages. In cases of this character there can be no direct evidence of the amount of damage sustained, or the amount of money which will be a compensation for the injury; but it is sufficient to show to the jury the extent of the injury, and the amount of their verdict thereon is to be determined in the exercise of an intelligent discretion, and unless the amount of the verdict is such as to indicate that it was given under passion or prejudice, it will be sustained.[53] But to justify a verdict against the defendant in an action for personal injuries from negligence, there must be evidence that the injury resulted from the negligence charged and the causation cannot be left to the mere conjecture of the jury.[54] Pain and suffering are also elements to be considered

3 Am. Elec. Cas. 479; Fisher v. St. Louis Transit Co. (Mo. 1906), 95 S. W. 917.

[50] Fisher v. St. Louis Transit Co. (Mo. 1906), 95 S. W. 917.

[51] Maxwell v. Wilmington City Ry. Co., 1 Marv. (Del.) 199, 40 Atl. 945.

Full statutory damages have been held to be properly awarded where it was shown that the deceased was a man thirty-seven years of age, of average size, in good condition physically and mentally, and that he lived for some minutes after the accident and suffered some pain; Hesse v. Meriden S. & C. Tramway Co., 75 Com. 571, 54 Atl. 299, 13 Am. Neg. Rep. 482.

[52] Clare v. Sacramento E. P. & L. Co., 122 Cal. 504, 55 Pac. 326, 5 Am. Neg. Rep. 115.

[53] Per Harrison, J.

[54] Omaha St. R. Co. v. Leigh, 49 Neb. 782, 69 N. W. 111.

in estimating damages in such cases, and it is held that recovery may be had for pain and suffering which it is reasonably probable will ensue in the future.[55] But additional pain and suffering, due to the improper treatment of wounds or injuries, must, it is held, be excluded by the jury in its consideration of the measure of damages.[56] And it has been decided, in an action by a husband and wife to recover for an injury to the husband while a passenger on a street car, that, there being no evidence of the value of the wife's services in nursing him, it was error to permit the jury to speculate as to the value thereof, and a judgment was reduced the amount awarded therefor.[57] Various other elements may be considered by the jury in ascertaining the measure of damages, such as mental suffering, expenses incurred, diminution in earning capacity, and injuries due to fright. These elements we shall consider in the following sections..

§ 986. **Physical injury — Expenses incurred.**— Expenses necessarily incurred as a direct result of a physical injury due to the negligence of an electrical company, are proper elements of damages in an action to recover for such injury. So, where a person was prevented by an injury from attending to his business, it was held that the expense necessarily incurred by him in procuring competent help to do the work which he would have performed but for the injury, was a proper element of

[55] Springfield Consol. Ry. Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442, 13 Am. Neg. Rep. 25; Hamilton v. Great Falls St. R. Co., 17 Mont. 351, 43 Pac. 713, denying rehearing, 17 Mont. 334, 42 Pac. 860; Cameron v. Union Trunk Line, 10 Wash. 507, 5 Am. Elec. Cas. 388, 39 Pac. 128.

[56] Grotsch v. Steinway R. Co., 19 App. Div. (N. Y.) 130, 45 N. Y. Supp. 1075.

[57] Lawson v. Seattle & Renton R. Co., 34 Wash. 500, 76 Pac. 71, 16 Am. Neg. Rep. 253. The court said: "There was no evidence that any expense was incurred or paid out to procure other help to assist the wife by reason of her engagement in waiting upon her husband. There was therefore no financial loss to the community on account of said services, unless it was entitled to recover the value of these necessarily increased duties of the wife. There was, however, no evidence as to their value; and, even if it were a recoverable item, the jury should not have been left to speculate as to its value, per Hadley, J.

damages.[58] And, where one is compelled, by reason of an injury, to employ a servant to do household work, such additional expenses may be recovered as an item of damages.[59] But where there is no allegation in the pleading of the plaintiff as to the amount which has been expended it is decided the pleading is subject to demurrer.[60]

§ 987. **Physical injury — Mental suffering — Fright.**— Mental suffering, in connection with a physical injury, is a proper element of damages.[61] But such suffering must grow out of and be the result of the injuries received.[62]

§ 988. **Fright — Injuries produced by.**— As a general rule, probably, recovery may be had for injuries produced by fright, where the fright is an accompaniment of a physical injury, due to the negligence of another. In some cases it is also held that recovery may be had for injuries resulting from fright, although there may be no physical injury other than that caused by the fright.[63] Upon this latter proposition, however, the courts are not in harmony, since there are numerous cases where the contrary view is taken.[64] In a case in New York, where a person was injured by an electric shock, communicated from a broken trolley wire, which fell upon her, it was held that for injuries produced by fright alone there could be no recovery, but that they formed a basis of recovery when accompanied by the harm occasioned by the fall.[65] In another case in New Jersey where an electric car struck a vehicle in which a person was riding and carried it along for some distance, it was held that this constituted a physical injury, which would allow him to

[58] North Chicago St. R. Co. v. Zeiger, 182 Ill. 9, 54 N. E. 1006, affg. 78 Ill. App. 463.

[59] Willis v. Second Ave. Traction Co., 189 Pa. St. 430, 42 Atl. 1, 5 Am. Neg. Rep. 245.

[60] Western Union Teleg. Co. v. Griffith, 111 Ga. 551, 36 S. E. 859, 8 Am. Neg. Rep. 200.

[61] Terre Haute Elec. Ry. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 587; Fisher v. St. Louis Transit Co. (Mo. 1906), 95 S. W. 917.

[62] Terre Haute Elec. Ry. Co. v. Lauer, 21 Ind. App. 466, 52 N. E. 703, 5 Am. Neg. Rep. 587.

[63] See § 825, herein.

[64] See § 826, herein.

[65] O'Flaherty v. Nassau Elec. R. Co., 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, 58 Alb. L. Jour. 347, affirmed 165 N. Y. 624, 59 N. E. 1128.

recover damages resulting from incidental fright.[66] In Ohio, however, it has been decided that where no physical injury ensues from a collision there can be no recovery for mental distress resulting from fright.[67] In a case in Massachusetts, which was an action to recover for injuries received by a passenger while the conductor was in the act of ejecting a drunken passenger from the car, it was held that there could be no recovery for fright, resulting from the drunken man's presence in the car, or the attempt of the conductor to remove him, and that the recovery was limited to the consequences of the injury, and the pain and fright caused by contact with her person.[68] And in a later case in this State it is decided that there can be no recovery for sickness resulting purely from fright, though the fright be caused by what may be termed as a grossly negligent act.[69]

§ 989. **Physical injury — Diminution in earning capacity.**— Diminution in earning capacity is also an element to be considered in the estimation of damages in an action to recover for physical injuries caused by the negligence of another.[70] As to the computing of damages for such injury, it has been said: "In cases wherein the evidence shows that the injury received will affect the ability of the party in the future to earn money, compensation must be made therefor; but the rule is not that the jury must determine the number of years that the disability will continue to exist, and then multiply this number by the yearly compensation the party has earned in the past.

[66] Consolidated Traction Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100, affd., 60 N. J. L. 452, 457, 38 Atl. 683, 684.

[67] Ohliger v. Toledo Traction Co., 23 Obio Cir. Ct. R. 265.

[68] Spade v. Lynn & Boston R. Co., 172 Mass. 488, 52 N. E. 747, 5 Am. Neg. Rep. 367.

[69] Smith v. Postal Teleg. Cable Co., 174 Mass. 576, 55 N. E. 380.

[70] City of Denver v. Sherrett, 60 U. S. App. 104, 31 C. C. A. 499, 88 Fed. 226, 5 Am. Neg. Rep. 521; Atlanta Consol. St. R. Co. v. Owings, 97 Ga. 663, 33 L. R. A. 798, 25 S. E. 377, 5 Am. & Eng. R. Cas. (N. S.) 1; Hamilton v. Great Falls St. R. Co., 17 Mont. 351, 43 Pac. 713; denying rehearing in 17 Mont. 334, 42 Pac. 860; Wynne v. Atlantic Ave. R. Co., 14 Misc. (N. Y.) 414, 35 N. Y. Supp. 1034, 70 N. Y. St. R. 737.

As to sufficiency of pleading of loss of earnings, see Wellmeyer v. St. Louis Transit Co. (Mo. 1906), 95 S. W. 925.

Damages for future losses in cases of this kind are not susceptible of computation by a strictly mathematical calculation. Evidence may be given of the age of the party injured, the probable duration of life, the effect the injury has had upon the ability of the person to earn money, of the probability that the injurious effect on the ability to earn money will continue in the future, either during life or for a lesser period, and of the business or occupation in which the person was engaged, and the compensation, whether by wages, fees, by a fixed salary or profits, that resulted therefrom; and, from the facts thus proven in evidence it is for the jury to award such fair sum as will, in their judgment, compensate the party for the decreased or destroyed ability to earn money in the future, due allowance being made for the contingencies and uncertainties that inhere in such matters." [71] In this connection it has been decided that evidence that the plaintiff is suffering from his injuries at the time of the trial, and testimony by experts that the injury will probably be permanent, is sufficient, to base an allowance for future disability.[72]

§ 990. **Injuries causing death — Funeral charges not recoverable as part of damages — Statute.**— Under the New Jersey statute which authorizes an action to be brought by the personal representatives of a person killed by the negligent act of another, for the exclusive benefit of the widow and next of kin, the damages to be assessed at such an amount as the jury shall deem fair and just, with reference to the pecuniary injury resulting from such death, funeral charges may not be recovered as a part of the damages.[73]

§ 991. **Death of child — Injuries to — Measure of damages for.**— In case of the death of a minor, the law implies a pecu-

[71] City of Denver v. Sherrett, 60 U. S. App. 104, 31 C. C. A. 499, 88 Fed. 226, 5 Am. Neg. Rep. 520, per Shiras, Dist. J.

[72] Cotant v. Boone Suburban R. Co., 125 Iowa, 46, 99 N. W. 115, 16 Am. Neg. Rep. 26.

[73] Consolidated Tract. Co. v. Hone, 60 N. J. L. 244, 38 Atl. 759, 9 Am. & Eng. R. Cas. (N. S.) 249, revg. 59 N. J. L. 275, 35 Atl. 899, 5 Am. & Eng. R. Cas. (N. S.) 679. See also Ferguson v. Delaware & Atlantic Teleg. & Teleph. Co., 71 N. J. L. 59, 58 Atl. 74, 16 Am. Neg. Rep. 502.

niary loss to the parent, based upon the ground of the loss of service of such child. The extent of this pecuniary loss would be impossible of precise ascertainment in any case, but must depend upon the exercise of discretion by the jury, and where apparently a verdict is not influenced by passion, prejudice, corruption, ignorance or partiality, it will not be disturbed.[74] The true measure of damages in such a case is a compensation for the loss sustained by the parent from the death.[75] The general method of computing such damages is based upon the estimated value of the child's services, to such time as he would have obtained his majority, together with the expenses attending the injury and death, deducting therefrom the probable cost of support and maintenance.[76] And it is held that damages will not be restricted to a merely nominal sum for the negligent killing of a child five years of age, though the only evidence furnishing a basis for a determination as to the amount of damages is as to the age, sex and general intelligence of the child.[77] In a case in Georgia, however, it is held that the court will take judicial notice, that a child three years of age is incapable of rendering services, for which a parent can recover, in an action to recover damages for the death of such child.[78] But in another case in Louisiana, where a child three and a half years old was killed by a trolley car, $12,500 was held excessive damages in favor of the parents, and the verdict reduced to $4,000.[79] While again in a case in New Jersey, where it appeared that a child between four and five years of age had been run over and killed by a trolley car, a verdict of $5,000 was declared by the court to be so excessive as to make it clear that it was not the result of the dispassionate, unprejudiced ac-

[74] San Antonio Traction Co. v. White, 94 Tex. 468, 61 S. W. 706, reversing 60 S. W. 323. See § 949, Excessive Damages, in this chapter.

[75] San Antonio Traction Co. v. White, 94 Tex. 468, 61 S. W. 706, reversing 60 S. W. 323. See also Wales v. Pacific Electric Motor Co., 130 Cal. 521, 62 Pac. 932.

[76] Penn. R. Co. v. Lilly, 73 Ind. 252. See also St. Louis, etc., R. Co. v. Freeman, 36 Ark. 41; Walters v. Chicago, etc., R. Co., 36 Iowa, 458; Rains v. St. Louis, etc., R. Co., 71 Mo. 164.

[77] Howell v. Rochester R. Co., 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17.

[78] Atlanta Consol. St. R. Co. v. Arnold, 100 Ga. 566, 28 S. E. 224.

[79] Rice v. Crescent City R. Co., 51 La. Ann. 108, 24 So. 791.

tion of the jury.[80] And in a later case in New Jersey it is held that a declaration in a suit by a father for injuries resulting in the death of his son which fails to show any loss of services during the son's lifetime, and claims only for the burial expenses and loss of services after the son's death, fails to state a cause of action.[81] In another case, where a young man nineteen years of age, who contributed to his parent's support, was injured, by being negligently knocked off a car, and subsequently died, it was held that the parent might recover $2,500 damages.[82]

§ 992. **Injury to child — Action by parent.**— In an action by a parent to recover for loss occasioned by an injury to his child, the measure of damages is the pecuniary loss to the parent. This is generally determined on the basis of the loss of

[80] Graham v. Consolidated Traction Co., 62 N. J. L. 90, 40 Atl. 773, 4 Am. Neg. Rep. 660.

See also Rowe v. New York & N. J. Teleph. Co., 66 N. J. L. 19, 48 Atl. 523, 9 Am. Neg. R. 528, holding in an action to recover damages for the death of a boy twelve years of age, who was killed by striking his foot against a wire charged with electricity while walking along the sidewalk, that a verdict for $5,126 for the pecuniary loss resulting to his next of kin from such death, was excessive and that the verdict would be set aside unless the plaintiff would reduce the damages to $2,000.

An award of full statutory damages of $5,000 has been held, in Connecticut, to be sufficiently supported by evidence that the intestate was a bright, active, intelligent boy of sixteen, five feet two inches high, who for nearly three years had been a general clerk in a village grocery and driver of the delivery wagon. Nelson v. Branford Lighting & Water Co., 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490.

[81] Ferguson v. Delaware & Atlantic Teleg. & Teleph. Co., 71 N. J. L. 59, 58 Atl. 74, 16 Am. Neg. Rep. 502. The court said: "We have recently held in a similar case that there can be no recovery for burial expenses. Callaghan v. Lake Hopatcong Ice Company, 69 N. J. L. 100, 54 Atl. 223. In the same case we held that the damages recovered by the father must be confined to the period of the son's life. * * * The difficulty in the present case is that the declaration fails to show any loss of the child's services prior to his death. The claim is for loss of services from date of death. The Callaghan case, cited above, holds that damages are not recoverable by the father for the loss of services caused by the death of his son. For such damages the action must be brought under the statute in the name of the personal representative," per Swayze, J.

[82] Erslew v. New Orleans & N. E. R. Co., 49 La. Ann. 86, 21 So. 153.

the child's services from the time of the injury to the time of his majority, together with such expenses as have been actually paid, or such as, in the judgment of the jury, are reasonably necessary to be incurred. But future possible expenses are not to be considered, nor are the increased inconvenience and trouble caused other members of the family, unless by such inconvenience or trouble the parent is put to further pecuniary loss.[83] In such a case in Louisiana, where a child was run over by an electric car and lost both legs, $20,000 was awarded, it being held that the measure of damages should be proportioned to his sufferings, and to that helplessness or dependence to which he was reduced.[84]

§ 992a. **Injury to wife — Measure of damages where husband assigns claim to her.**— Where a husband makes an assignment to his wife of a claim against a street railway company for damages as a result of injuries to her while a passenger on one of the company's cars, the wife may, under the assignment, recover the value of the services of which the husband has been deprived or may be deprived in the future by reason of the injury complained of and it is decided that there should be no allowance in mitigation of such damages for future possible earnings of the wife. So in a case where this question arose the court said: "We cannot see what bearing the question as to the future possible money earnings of the wife could have on the right of the husband's recovery for injuries to the wife, which right was assigned to the plaintiff. If she should be able in the future to earn money in an independent business, such earnings would not belong to the husband, and would be no offset to the damages the husband might have recovered, or which the wife may recover under the assignment from the husband." [85]

§ 993. **Death of husband — Parent.**— In an action to recover for the death of a husband and father, the measure of damages

[83] Woeckner v. Erie Elec. Motor Co., 187 Pa. St. 206, 41 Atl. 28, 43 Week. N. of Cas. 50, 3 Am. Neg. Rep. 601.

[84] Nelson v. Crescent City R. Co., 49 La. Ann. 491, 21 So. 635, 2 Am. Neg. Rep. 162, 164.

[85] Hutcheis v. Cedar Rapids & M. C. R. Co., 128 Iowa, 279, 103 N. W. 779, 18 Am. Neg. Rep. 400, per McClain, J.

is the pecuniary loss to the plaintiffs, such loss being what would probably have been earned by deceased during his life, which would have gone to plaintiffs, the age of deceased, his ability and disposition to labor, and his habits of living and expenditure to be considered.[86] There can be no recovery in such cases for any injury to or distress of feelings, for loss of society or for any other fact which has not a pecuniary value.[87] So, in actions to recover for the death of a wife, the general rule is that the measure of damages is the pecuniary loss, with no allowance for distress of mind, sorrow, or mental anguish. Such damages may, however, include the value of services which she customarily rendered in caring for and training their children.[88] Under the California Code,[89] which gives a cause of action to "heirs" for the negligent killing of a person, and which permits the recovery of such damages as may be just, allowance may be made to children, in an action to recover damages for the death of their mother, for the probable loss of any pecuniary benefits which they might have received from the mother after attaining their majority.[90]

§ 994. **Injuries to trees.**— We have already considered the question of the right of electrical companies to cut or trim trees for the purpose of the construction or maintenance of their lines.[91] While such companies may trim trees, so far as is reasonably necessary for the proper construction and operation of

[86] Pennsylvania Teleg. Co. v. Varnau (Penn.), 15 Atl. 624; San Antonio St. Ry. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

Where there is no evidence relating to services of the deceased in the care of his family or in the education of his children, or of his fitness by nature or disposition, to superintend or give attention to the education of his children or to provide for their moral or intellectual training it has been held error to instruct the jury that if they find the defendant guilty they may take into consideration, in estimating the damages, the value of his services and the superintendence and attention to the care of his family and the education of his children, of which they have been deprived by his death. North Chicago Street R. Co. v. Irwin, 202 Ill. 345, 66 N. E. 1077, 14 Am. Neg. Rep. 19.

[87] Pennsylvania Teleg. Co. v. Varnau (Penn.), 15 Atl. 624; San Antonio St. Ry. Co. v. Renken, 15 Tex. Civ. App. 229, 38 S. W. 829.

[88] Redfield v. Oakland Consol. St. R. Co., 112 Cal. 220, 43 Pac. 1117.

[89] Cal. Code Civ Proc., §§ 377.

[90] Redfield v. Oakland Consol. St. R. Co., 110 Cal. 277, 42 Pac. 822.

[91] See chap. XVII, herein.

their lines, yet, if in so doing, shade or ornamental trees are injured or destroyed, and the value of property diminished, the company will be liable in damages for such injuries, and the measure of damages in such cases would be, as a general rule, the diminution in the value of the property caused by such cutting or trimming.[92] So, where ornamental shade trees were cut in a street, and it was proven that an adjacent lot was injured to the extent of $150, by the cutting of a tree in front thereof, it was held that damages to that amount were properly allowed.[93] And, if it appears that the cutting was done fraudulently, oppressively, or with gross negligence, punitive damages may be allowed.[94] But in an action by the owner of property to recover damages in such a case evidence is admissible, to mitigate or defeat the recovery of exemplary damages but not

[92] Hoyt v. Southern New England Teleph. Co., 60 Conn. 385, 3 Am. Elec. Cas. 857; Gorhan v. Eastchester Elec. Co., 80 Hun (N. Y.), 290, 5 Am. Elec. Cas. 201, 30 N. Y. Supp. 125. See Meyer v. Standard Teleph. Co., 122 Iowa, 514, 98 N. W. 300, holding that where an action is brought to recover damages for the unreasonable cutting of trees the plaintiff, if entitled to recover, should be allowed the difference between the value of the land if the cutting had been reasonable and its value after the cutting was done.

Pleading. Where the complaint in an action against a telegraph company to recover damages for injury to trees by the servants and employees of the company does not show that the trees were cut in the business of constructing, maintaining or operating the line or that the abutting owner has any rights in the land upon which the highway is located other than those belonging to the general public, the complaint will be demurrable for want of sufficient facts. And it was also declared that though the presumption were to be indulged in that the abutting proprietor owns to the center of the highway the complaint would still be insufficient in failing to show that the trees were located upon the part owned by such proprietor. Western Union Teleg. Co. v. Krueger, 30 Ind. App. 28, 64 N. E. 635, 8 Am. Elec. Cas. 214.

[93] Hoyt v. Southern New Eng. Teleph. Co., 60 Conn. 385, 3 Am. Elec. Cas. 857. See also the following cases: Western Un. Teleg. Co. v. Satterfield, 34 Ill. App. 386, 2 Am. Elec. Cas. 296, allowing $100 damages; Tissot v. Great Southern Teleph. & Teleg. Co., 39 La. Ann. 996, 2 Am. Elec. Cas. 286, 3 So. 261, allowing $400 damages; Memphis Bell Teleph. Co. v. Hunt, 16 Lea (Tenn.), 456, 2 Am. Elec. Cas. 282, allowing $250 damages; Cumberland Teleph. & Teleg. Co. v. Poston, 94 Tenn. 696, 30 S. W. 1040, 5 Am. Elec. Cas. 203, allowing $300 damages.

[94] Cumberland Teleph. & Teleg. Co. v. Poston, 94 Tenn. 696, 30 S. W. 1040, 5 Am. Elec. Cas. 203.

to defeat the recovery of compensatory damages, of an oral license from the tenant of the property and of instructions which were given by the company to its employees as to the manner in which the trees were to be trimmed.[95]

§ 995. **Electric light plant — Injury to adjoining property.**— Where, by the operation of an electric light plant, adjoining property is depreciated in value, both present and future damages may be allowed in an action to recover for such loss.[96] But damages for depreciated market value of property due to a nuisance, arising from the operation of an electric light plant, are prospective, and can, it is held, only be allowed in actions which, in their nature, are for permanent injury.[97]

§ 995a. **Erection of poles on private property — Measure of damages for.**— Where a telegraph, telephone or electric lighting company commits a trespass by entering upon the land of an individual and erecting its poles thereon it will be liable for the actual damages sustained and where the act is done in violation of the protest of the owner and under such circumstances as to show a wanton and malicious disregard of his rights a recovery of exemplary damages may be allowed.[98] But where the company did not know that the land on which it erected its poles was private property it was decided that exemplary damages could not be recovered, and it was also held in this case that, where the company removed the pole after the action was brought and filled the hole so that there was only a slight depression left which was the result of the

[95] Western Union. Teleg. Co. v. Smith, 64 Ohio St. 186, 59 N. E. 890.

[96] Hyde Park Thomson-Houston L. Co. v. Porter, 167 Ill. 276, 47 N. E. 206, affg. 64 Ill. App. 152. See also Chicago North Shore Street Ry. Co. v. Payne, 192 Ill. 239, 61 N. E. 467, affg. 94 Ill. App. 466.

Recovery by tenant. Where by the operation of an electric light plant a nuisance is created causing an injury to adjoining property, a tenant who is in possession may, in an action for damages, recover the depreciation in the rental value of the premises. Bly v. Edison Electric Illum. Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500, reversing 54 App. Div. 427, 66 N. Y. Supp. 737.

[97] Wolf v. Cincinnati Edison Elec. Co. (C. P.), 6 Ohio Dec. 159.

[98] Johns v. Cumberland Teleph. & Teleg. Co., 25 Ky. Law. Rep. 2074, 80 S. W. 165.

earth settling, there could only be recovery of what it would cost to fill the depression and cause the grass to grow where there had been a disturbance of the sod and also of a nominal sum for the period that the pole was so maintained.[99]

[99] Southwestern Teleph. & Teleg. Co. v. Whiteman, 36 Tex. Civ. App. 163, 81 S. W. 76.

TITLE IX.

PARTIES, REMEDY AND EVIDENCE.

CHAPTER XXXVI.

PARTIES AND REMEDIES.

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§ 996. **Parties — Owners of personal property may maintain action to restrain collection of taxes.**— In California the owner of personal property, fraudulently assessed, may maintain an action to restrain the assessor from collecting taxes.[1]

§ 997. **Citizens may complain of nuisances.**— In Louisiana a citizen has a right to complain of nuisances, where the injury is not common to every person, but invades some vested right or causes particular damage to such citizen, as distinguished from the rest of the public.[2] So, also, where persons seek to wholly appropriate a street, without authority, private individuals may maintain an action to enjoin the appropriation.[3] And, in Illinois, if it appears that such obstruction will work a special injury to a private individual, and that he will suffer irreparable damage, equity will interpose, at his instance, to prevent such obstruction, but it will not interfere merely on the ground that the obstruction is a public nuisance.[4]

§ 998. **Municipality as party — Mandamus.**— A municipality is a proper relator in a mandamus proceeding to compel a railway company, located in its streets, under an ordinance of the city, to perform its duty to the public and operate its road.[5]

§ 999. **Taxpayers as parties — Injunction.**— City taxpayers will not be denied an injunction, restraining an unauthorized guaranty of bonds by a city, merely because innocent holders of such bonds cannot then recover from the city.[6] So in Oregon, a taxpayer may sue in his own name, to restrain the illegal creation of debts by a city, when the burden of taxation would be increased thereby.[7] And where a trolley company is illegally constructing its road, a taxpayer may take action against

[1] Pacific Postal Teleg. Cable Co. v. Dalton, 119 Cal. 604, 51 Pac. 1072.

[2] Irwin v. Great So. Teleph. Co., 37 La. Ann. 63, 1 Am. Elec. Cas. 709, 710, 711.

[3] Louisville & N. R. Co. v. Sonne, 21 Ky. Law. Rep. 848, 53 S. W. 274.

[4] Chicago Gen. Ry. Co. v. Chicago, B. & Q. R. Co., 181 Ill. 605, 54 N. E. 1026. See § 1004, herein.

[5] Bridgeton v. Bridgeton & M. Traction Co., 62 N. J. L. 592, 43 Atl. 715.

[6] Lynchburg & R. St. R. Co. v. Dameron, 95 Va. 545, 28 S. E. 951.

[7] Brownfield v. Houser, 30 Or. 534, 49 Pac. 843.

the company, to restrain it, and need not wait therefor, until the assessment is laid.[8] So a corporation may, as a taxpaper, sue to enjoin the breaking up of a street pavement, done without legal authority.[9] And a taxpayer may contest the legality of the use of public money for the construction of a subway under the streets of a city, where the city's vote to accept a statute for said construction amounts virtually to a vote to raise or pay money.[10] But it has been decided that a suit cannot be maintained by a taxpayer to restrain the granting of a franchise by a municipality to a street railway company where it does not appear that the granting of the franchise will operate as such a wrongful surrender of the property of the city as will increase taxation.[11]

§ 1000. **Parties — Injunction to restrain construction or extension of parallel railway.**— Where it is proposed to construct or extend a street railway from one town to another, which would parallel a steam railroad, the latter has not a sufficient interest to entitle it to an injunction to restrain such construction or extension, merely upon the ground that the line deviates from the route authorized by the charter of the companies proposing to build such street railway lines, but if the finding of public convenience and necessity, required by the statute in such cases, has not been made, then the railway company, whose line would be paralleled, has sufficient interest to maintain an action to enjoin such construction or extension.[12]

§ 1001. **Telegraph company as intervenor.**— Where an action is brought to foreclose a mortgage, by a railroad company, which is a military and post road, and a receiver has been appointed, pendente lite to enforce its right to erect its line on the company's right of way, a telegraph company may properly intervene.[13]

[8] State, Lewis v. Board of Freeholders, of Cumberland, 56 N. J. L. 416, Am. Elec. Cas. 52, 28 Atl. 553.

[9] Potomac Elec. Power Co. v. United States Elec. L. Co., 26 Wash. L. Repr. (Dist. Col.) 19.

[10] Prince v. Crocker, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; Mass. Pub. Stat., c. 27, § 129.

[11] Linden Land Co. v. Milwaukee Electric Ry. & L. Co., 107 Wis. 493, 83 N. W. 851.

[12] New England R. Co. v. Central R. & E. Co., 69 Conn. 47, 36 Atl. 1061.

[13] Union Trust Co. v. Atchison, T. & S. F. R. Co., 8 N. Mex. 327, 43 Pac. 701. The fact that the United

§ 1002. **Action in name of State to recover taxes — Injunction.—** Where a statute provides that an action, in addition to other remedies, may be brought in the name of the State, to recover taxes assessed against a telegraph company, when it has failed or refused to pay the same, such action may be brought in behalf of the State, even though an injunction has issued restraining the county auditor and county treasurer from maintaining an action against said company to recover taxes.[14]

§ 1003. **Parties — Stockholders — Conduits for electric lighting.—**Even though the visible tangible property of a corporation, consisting of conduits in streets for electric lighting, is within the State, still the court will not interfere with the internal management of a foreign corporation at the suit of a resident stockholder, by setting aside unwise and useless contracts, which depreciate and destroy the value of the stock.[15] And an injunction will not lie, pendente lite, at the instance of a stockholder, to restrain an electric light company which has agreed with the stockholders of a rival company to purchase their stock in the event of the deposit by them of a majority of their holdings with a trustee, where said company denies an alleged intention to acquire control of the other company, for the purpose of destroying its business, and asserts its intention to continue the same for the purpose of realizing greater profits from said combination.[16] But the rule that the existence of a corporation may be questioned only by the State is no bar

States Government might have intervened in a mandamus proceeding, relative to certain agreements between a telegraph company and a subsidized railroad, does not prevent it from bringing an independent actiton against both companies to obtain its rights and so obtain an enforcement of the same by a competent decree. United States v. Union Pac. Ry. Co. & Western Un. Teleg. Co., 160 U. S. 1, 16 Sup. Ct. 190, 40 L. Ed. 319, 6 Am. Elec. Cas. 697, 753, per Mr. Justice Harlan. This case is fully considered in chap. III, herein.

[14] Western Un. Teleg. Co. v. State, 146 Ind. 54, 44 N. E. 793; Ind. Rev. Stat. of 1894, § 8488.

[15] Madden v. Penn. Elec. L. Co., 181 Penn. St. 617, 37 Atl. 817, 40 Week. N. of Cas. 432.

[16] Phelan v. Edison Elec. Illum. Co., 24 Misc. (N. Y.) 109, 53 N. Y. Supp. 305, 16 Nat. Corp. Repr. 837. As to parties in actions by stockholders and to actions by and against corporations, see Thompson on Corp. (ed. 1895), §§ 4564 et seq., 7566 et seq.

and has no application to a suit by a minority stockholder to avoid for fraud or breach of trust a contract and act of consolidation and to restore to the corporation injured and to its stockholders, the previous franchises and property transferred by these means to the consolidated company.[17]

§ 1004. **Parties — Abutting owners — Injunction.**— An abutting owner cannot maintain an action to restrain an electric street railway, or telegraph or other electric company from constructing its line on the ground that it has not complied with certain conditions or requirements imposed by statute or ordinance or that it is a public nuisance, but he must, in order to obtain such relief, show some special or particular injury to his individual rights. This is the general rule since, in case of a public injury, the action must be in the name of the State.[18]

[17] Jones v. Missouri-Edison Electric Co., 144 Fed. 765.

[18] *Illinois:* Chicago Teleph. Co. v. Northwestern Tel. Co., 100 Ill. App. 57, affirmed 199 Ill. 324, 65 N. E. 329. *Maine:* Taylor v. Portsmouth, K. & Y. St. Ry. Co., 91 Me. 193, 39 Atl. 560. *New Jersey:* Halsey v. Rapid Transit St. Ry. Co., 47 N. J. Eq. 380, 20 Atl. 859, 3 Am. Elec. Cas. 283; Borden v. Atlantic Highlands, R. B. & L. B. E. R. Co. (N. J. Ch.), 33 Atl. 276, 28 Chic. L. News, 69, 5 Am. Elec. Cas. 179. See Stockton v. Atlantic Highlands, R. B. & L. B. E. R. Co., 53 N. J. Eq. (8 Dick.) 418, 32 Atl. 680, holding that abutting owners and attorney-general are entitled to injunction to restrain construction of street railway where it does not comply with conditions precedent imposed by statute; N. J. P. L. 1894, p. 374. *New York:* Black v. Brooklyn H. R. Co., 32 App. Div. 468, 53 N. Y. Supp. 312. *Ohio:* Dietz v. Cincinnati & M. V. Tract. Co. (C. P.), 6 Ohio Dec. 513, 4 Ohio N. P. 399; Sells v. Columbus St. Ry. Co. (Ohio), 28 Week. L. Bull. 172, 4 Am. Elec. Cas. 163. *Pennsylvania:* Philadelphia & T. R. Co. v. Philadelpia & B. Pass. R. Co. (C. P., Penn.), 6 Penn. Dist. Rep. 269. *Rhode Island:* Taggart v. Newport St. Ry. Co., 16 R. I. 668, 19 Atl. 326, 3 Am. Elec. Cas. 306. *Wisconsin:* Linden Land Co. v. Milwaukee Electric Ry. & L. Co., 107 Wis. 493, 83 N. W. 851.

But see *United States:* Beeson v. Chicago (U. S. C. C., N. D. Ill.), 75 Fed. 880, 12 Nat. Corp. Repr. 608, 28 Chic. L. News, 367. *Connecticut:* Canastota Knife Co. v. Newington Tramway Co., 69 Conn. 146, 36 Atl. 1107, holding that the owner of the fee in the highway may, by action, enjoin a street railway from laying its tracks where the location is not part of the route authorized by the company's charter. *Ohio:* McMaken v. Cincinnati & H. Elec. St. R. Co. (C.

§ 1005. **Parties — Vestry — Injunction — Removal of underground pipes and wires — English decision.**— In a case in England it appeared that an electric lighting company had laid its pipes and wires about two feet below the surface of the street. The soil of the street was vested in the vestry, under the English Metropolis Management Act,[19] but only so far as was nessary for the control, protection and maintenance of the street as a highway for public use, and it was declared that notwithstanding that the said electric company's act of occupation was unlawful, yet there was no continuous trespass upon or interference with the soil of the street, so far as concerned its use as a highway and it was held that a mandatory injunction would not issue, at the instance of vestry, under these circumstances.[20]

§ 1006. **Parties — Postmaster-General — English decision.**— This case was an action to recover compensation for injuries alleged to have been sustained by the plaintiff, in consequence of the negligent and careless manner in which the flags on one of the footpaths had been opened for the purpose of erecting telegraph posts. The suit was brought against the Postmaster-General, in his private capacity, it being contended that he was

P.), 5 Ohio N. P. 367; Denver v. United States Tel. Co., 10 Ohio S. & C. P. Dec. 273. *Pennsylvania:* Thomas v. Inter-County St. Ry. Co., 167 Penn. St. 120, 31 Atl. 476, 5 Am. Elec. Cas. 175, abutting owner may have street railway enjoined where local authorities have not consented to construction, Pennsylvania R. Co. v. Montgomery Pass. Ry. Co., 167 Penn. St. 62, 46 Am. St. Rep. 659, 31 Atl. 468, injunction to prevent construction of electric railway until compensation made, but operation will not be enjoined if constructed without opposition; Russ v. Pennsylvania Telph. Co. (Penn.), 15 Penn. Co. Ct. Rep. 26, 3 Dist. Rep. 654, case of injunction allowed to stand to restrain planting pole in front of door or window of plaintiff. *West Virginia:* Maxwell v. Central District & Printing Teleg. Co., 51 W. Va. 121, 41 S. E. 125, 8 Am. Elec. Cas. 209.

See also as to estoppel against abutting owner in such cases, Western Un. Teleg. Co. v. Bullard, 67 Vt. 272, 31 Atl. 286, 5 Am. Elec. Cas. 102. In Dailey v. State, 51 Ohio St. 348, 46 Am. St. Rep. 578, 5 Am. Elec. Cas. 186, N. E. 710, it is held that an abutting owner is not estopped by not objecting to construction of a telegraph line to assert property interest in shade trees. See § 997, herein.

[19] Of 1855, § 96.

[20] Vestry of St. Mary v. London Co. (C. A., 1899), 1 Ch. 474, 68 L. Jour. Ch. (N. S.) 238.

personally responsible for the injuries inflicted, and it was held that the action could not be maintained. By virtue of certain statutes, the Postmaster-General was brought into privity with the telegraph company, being the head of that department, and he might purchase the undertakings of such companies, which became vested in him in his corporate capacity. It was declared, however, that if the action were maintainable at all, it could only be sustained against him in his corporate or official capacity, although this was left undetermined.[21]

§ 1006a. **Parties — Joint tort feasors as joint defendants.**— Joint tort feasors may be properly joined as parties defendant. So where a person is injured as a result of the contact of the wires of a telegraph company with those of a street railway company and both companies are guilty of negligence it is proper to join them as defendants.[22] And it has been decided that where an electric light wire in a city breaks and falls down and remains in the street for an unreasonable length of time, constituting thereby a dangerous obstruction to travel, and causing injury to a passer-by, both the city and the electric light company are presumed from the lapse of time to have knowledge of its condition and dangerous character, and both may be joined in an action for damages for injuries resulting from their negligent omission to cause the wire to be repaired.[23]

§ 1007. **Addressee of telegram cannot recover — England.**— Under the English decisions, no action can be maintained by the sendee of a telegram, to recover damages against a telegraph company for its negligence in the transmission of a message, unless the sender acted as his agent in sending the mes-

[21] Jones v. Monsell, Irish Rep., 6 Com. Law Ser. 155, Allen's Teleg. Cas. 702; English Teleg. Act. of 1868 (31 and 32 Vict., chap. 110), which incorporates The Teleg. Act of 1863 (26 and 27 Vict., chap. 112, § 42), enacts, section 2, that the term "the company" in The Telegraph Act of 1863 shall, in addition to the meaning assigned to it in that act, mean the Postmaster-General.

[22] Western Union Teleg. Co. v. Griffith, 111 Ga. 551, 36 S. E. 859, 7 Am. Elec. Cas. 602.

[23] City of Kansas City v. File, 60 Kan. 157, 55 Pac. 877, 7 Am. Elec. Cas. 539.

sage, and no duty is owing by the company in such matter, either by contract or by law.[24]

§ 1008. **Whether addressee can recover — American decisions.**— In a Federal case it is held that if the addressee did not contract with the telegraph company for transmission of the telegram, or if the company had no knowledge that the contract was for his benefit, he cannot recover.[25] In Alabama the receiver of a message must, in order to recover, aver and prove that he was either directly or per alium, a party or privy to the contract with the telegraph company, where his action is based on contract.[26] But it is also held that the question of contractual relations of sender and addressee is immaterial upon the point of the liability of the company.[27] The addressee may recover in Arkansas,[28] California,[29] Colorado.[30] In the District of Columbia the addressee may bring an action on the

[24] Playford v. United Kingdom Elec. Teleg. Co., 17 Law Times (N. S.), 243, 4 Q. B. 706, Allen's Teleg. Cas. 437; Dixon v. Reuter's Teleg. Co., 47 L. Jour. Rep. C. P. 1; L. R., 3 C. P. D. 1, affg. 46 L. Jour. Rep. C. P. 197, L. R., 2 C. P. D. 62. (This case is cited also as Dickson v. Reuters, etc.)

[25] Western Un. Teleg. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432.

[26] Postal Teleg. Cable Co. v. Ford, 117 Ala. 672, 23 So. 684. In this case a civil engineer had agreed with a city's representative that he should receive a telegram in case the city should require his services, and the telegram was sent for the city's benefit as well as for his own. Western Un. Teleg. Co. v. Adair, 115 Ala. 441, 22 So. 73; Western Un. Teleg. Co. v. Wilson, 93 Ala. 32, 3 Am. Elec. Cas. 586, 30 Am. St. Rep. 24, 9 So. 414, holding also that if the sender was the addressee's agent, such agency must have been disclosed.

[27] American Un. Teleg. Co. v. Daughtery, 89 Ala. 191, 3 Am. Elec. Cas. 579, 7 So. 660.

[28] Western Un. Teleg. Co. v. Short, 53 Ark. 434, 3 Am. Elec. Cas. 592, 14 S. W. 649, but also held that damages arising from special circumstances could not be recovered when such facts were not indicated by the telegram, or where the company did not otherwise have notice thereof.

[29] Bank of California v. Western Un. Teleg. Co., 52 Cal. 280, 1 Am. Elec. Cas. 239, and this was so held whether the company's agent sent the message which caused the loss or negligently permitted another to send it.

[30] Western Un. Teleg. Co. v. Cornwell, 2 Colo. App. 491, 4 Am. Elec. Cas. 664, 31 Pac. 393, but only in the cost of sending the message and incidental expenses, where the despatch is in cipher, the importance of prompt delivery and possible loss from delay not being apparent from the message or known to the company.

case as for a tort, whenever, without his own fault, he has sustained actual damages, by reason of the negligence of the telegraph company in the transmission of a message.[31] So in Florida, where the message shows that he is interested in it, or that it is for his benefit, or that damage may result from the company's negligence.[32] The addressee cannot recover in Georgia, where the sender gives the telegram to the company's messenger, who fails to give it to the company for transmission, and by a rule of the latter the former is made the sender's agent in such case.[33] In Illinois, where there is no contractual relation between the sendee and the company, the former's remedy is in tort,[34] but it is also held that the addressee may recover, if he is the party injured.[35] In Indiana the person suffering the injury has a right of action under the statute, independently of any contractual relation, and the same is intimated as the rule in the absence of a statute.[36] So the addressee may recover in Iowa,[37] and in Kansas, where the message is left by the sender as his agent.[38] But it is also held in this State,

[31] Fererro v. Western Un. Teleg. Co., 9 App. Div. (D. C.) 455, 24 Wash. L. Repr. 790, 35 L. R. A. 548.

[32] International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 4 Am. Elec. Cas. 674. Qualification to this extent is not made in an earlier case, which holds that the sendee or the one indicated as the person to whom the message was to be sent, can recover. Western Un. Teleg. Co. v. Hyers' Bros., 22 Fla. 637, 1 So. 129, 2 Am. Elec. Cas. 484.

[33] Stamey v. Western Un. Teleg. Co., 92 Ga. 613, 18 S. E. 1008, 4 Am. Elec. Cas. 699. See Brooke v. Western Union Teleg. Co., 119 Ga. 694, 46 S. E. 826, holding the company the agent of the sender and that the addressee must look to the latter for damages in case of an error in transmission. Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299, 1 Am. Elec. Cas. 404, 45 Am. Rep. 480, and note 486. See § 1009, herein.

[34] Webbe v. Western Un. Teleg. Co., 169 Ill. 610, 48 N. E. 670, 61 Am. St. Rep. 207, revg. 64 Ill. App. 331; Western Un. Teleg. Co. v. Dubois, 128 Ill. 248, 21 N. E. 4, 2 Am. Elec. Cas. 499.

[35] Western Un. Teleg. Co. v. Hope, 11 Ill. App. 289, 1 Am. Elec. Cas. 435.

[36] Western Un. Teleg. Co. v. Fenton, 52 Ind. 1, 1 Am. Elec. Cas. 198. See Western Un. Teleg. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515, 39 N. E. 874. See § 1009, herein.

[37] Mentzer v. Western Un. Teleg. Co., 93 Iowa, 752, 62 N. W. 1, 5 Am. Elec. Cas. 709; Herron v. Western Un. Teleg. Co., 90 Iowa, 129, 57 N. W. 696, 4 Am. Elec. Cas. 731.

[38] Dresser v. Wood, 15 Kan. 344;

that the right of the sendee to recover must be determined by the contract made between the sender and the telegraph company.[39] In Kentucky the sender may recover, where the message on its face is for his benefit;[40] but not in Louisiana, where there is no privity of contract and no agency.[41] But the addressee may recover in Minnesota for damages sustained, by reason of a message forged by the company's agent.[42] So in Mississippi the addressee may sue either on contract or in tort.[43] And he may recover damages in Missouri.[44] So in Nebraska, where he is the party injured;[45] and in New York, where the message is sent for his benefit or by his agent, as well also as on the immediate contract with him to deliver the message.[46] But it is also said that there is no contractual relation between the addressee and the telegraph company. This case was, how-

Burton v. Larkin, 36 Kan. 246, 13 Pac. 398; West v. Western Un. Teleg. Co., 39 Kan. 93, 17 Pac. 807. See Western Un. Teleg. Co. v. Howell, 38 Kan. 685, 17 Pac. 313, 2 Am. Elec. Cas. 87.

[39] Russell v. Western Un. Teleg. Co., 57 Kan. 230, 45 Pac. 598.

[40] Chapman v. Western Un. Teleg. Co., 90 Ky. 265, 3 Am. Elec. Cas. 670–672, 13 S. W. 880; Western Un. Teleg. Co. v. Jump (Ky., 1886), 8 Ky. L. Repr. 831.

[41] Deslottes v. Baltimore & Ohio Teleg. Co., 40 La. Ann. 183, 3 So. 566, 2 Am. Elec. Cas. 596. And the stipulation as to repeating messages binds the sender and not the addressee. Grange v. Southwestern Teleg. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

[42] McCord v. Western Un. Teleg. Co., 39 Minn. 181, 2 Am. Elec. Cas. 620, 39 N. W. 315.

[43] Shingleur v. Western Un. Teleg. Co., 72 Miss. 1030, 6 Am. Elec. Cas. 783, 18 So. 425, but the sender is not liable to the addressee; Western Un. Teleg. Co. v. Allen, 66 Miss. 549, 3 Am. Elec. Cas. 676, 2 Am. Elec. Cas. 625, holding also that addressee may recover the penalty.

[44] Bliss v. Baltimore & Ohio Teleg. Co., 30 Mo. App. 103, 2 Am. Elec. Cas. 631; Lee v. Western Un. Teleg. Co., 51 Mo. App. 375.

[45] Kemp v. Western Un. Teleg. Co., 28 Neb. 661, 44 N. W. 1064.

[46] Milliken v. Western Un. Teleg. Co., 110 N. Y. 403, 18 N. E. 251, 18 N. Y. St. R. 328, revg. 53 Super. Ct. 111; De Rutte v. N. Y., Alb. & B. Elec. M. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. (N. Y.) 403, Allen's Teleg. Cas. 273, per Daly, F. J.; Rose v. United States Teleg. Co., 3 Abb. Pr. (N. S.) 408, Allen's Teleg. Cas. 337; Leonard v. N. Y., Albany & B. Elec. M. Teleg. Co., 41 N. Y. 544, Allen's Teleg. Cas. 500, 503; Wolfskehl v. Western Un. Teleg. Co., 46 Hun (N. Y.), 542, 2 Am. Elec. Cas. 647. See also Elwood v. Western Un. Teleg. Co., 45 N. Y. 549, Allen's Teleg Cas. 594, and note, 612. Action in this case was by addressee. His right, was, however, not questioned.

ever, purely one of the right to recover damages for mental distress.[47] The addressee may recover in New Mexico.[48] In North Carolina the sendee or the person for whose benefit the message is sent may recover whether or not the sender was his agent.[49] But the addressee cannot recover in Oklahoma unless it is shown that the telegram was sent by his agent, or for his benefit, and that the company had actual or constructive notice that it was so sent.[50] In Pennsylvania the sendee may recover.[51] So also in South Carolina, where he is held a privy to the contract;[52] and he may recover as the "party aggrieved" under the Tennessee statute, even though the message was sent at the instance of a third party,[53] or is addressed to another, where it appears on the face of the telegram that the plaintiff was the beneficiary.[54] So the sendee, or the person for whose benefit the message was sent, may recover in Texas;[55] and in

[47] Curtin v. Western Un. Teleg. Co., 13 App. Div. (N. Y.) 253, 55 Alb. L. Jour. 264, 42 N. Y. Supp. 1109, 1 Am. Neg. Rep. 127, 6 Am. Elec. Cas. 812.

[48] Western Un. Teleg. Co. v. Longwill, 5 N. Mex. 308, 21 Pac. 339, 2 Am. Elec. Cas. 638.

[49] Sherrill v. Western Un. Teleg. Co., 109 N. C. 527, 3 Am. Elec. Cas. 759, 14 S. E. 94, S. C. 116, N. C. 655, 5 Am. Elec. Cas. 754, 21 S. E. 429; Pegram v. Western Un. Teleg. Co., 100 N. C. 28, 2 Am. Elec. Cas. 690, 697, 6 S. E. 770.

[50] Butner v. Western Un. Teleg. Co., 2 Okla. 234, 37 Pac. 1087, 5 Am. Elec. Cas. 758.

[51] New York & Wash. P. L. Co. v. Dryburg, 35 Penn. St. 298, Allen's Teleg. Cas. 157, holding also that he is not bound by the company's stipulations as to unrepeated messages. See on this point Western Un. Teleg. Co. v. Landis (Penn.), 12 Atl. 467; Harri v. Western Un. Teleg. Co., 9 Phila. (Penn.) 88, 1 Am. Elec. Cas. 37; Western Un. Teleg. Co. v. Richman (Penn., 1887), 19 Week. N. of Cas. 569, 2 Am. Elec. Cas. 710.

[52] Aikin v. Western Un. Teleg. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121.

[53] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695, 8 S. W. 574, 2 Am. Elec. Cas. 736; Mill & V. Code of Tenn., § 1541.

[54] Western Un. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725, Mill & V. Code of Tenn., § 1542.

[55] Western Un. Teleg. Co. v. Beringer, 84 Tex. 38, 4 Am. Elec. Cas. 806, 19 S. W. 336, even though the sender paid the sending charges and they were returned to him by the company; Western Un. Teleg. Co. v. Morrison (Tex. Civ. App.), 33 S. W. 1025; Western Un. Teleg. Co. v. Lyman, 3 Tex. Civ. App. 460, 22 S. W. 656, holding that he may recover from a connecting line. See Gulf, Col. & S. F. R. Co. v. Levy, 59 Tex. 563, 1 Am. Elec. Cas. 536, 542; Western Un. Teleg. Co. v. Adams, 75 Tex. 531, 12 S. W. 857,

Virginia the addressee may recover the statutory penalty.[56]

The distinction as to a contract with receiver and sender cannot hold under the Virginia law, "which gives a right of action to the receiver as well as to the sender, and directs, under penalty, the same promptitude and due care as to the receiver in the delivery of the message as to the sender in the transmission of the message." [57]

§ 1009. **Parties — Sender and addressee — Penalty statutes.** — Either sender or addressee may recover the penalty imposed by the Georgia statute for a want of impartial good faith or due diligence on the part of a telegraph company.[58] Under section 4177 of the Indiana statute, which provides for special damages for injury or loss occasioned by the negligence or failure of telegraph companies or their agents in receiving or transmitting telegrams, an addressee may recover, even though no relation of contract exists between him and the company, and also without regard to the contract stipulations between the sender and the company. But by the Acts of 1885, section 2, and under the statute of 1881, section 4176, only the sender can recover the penalty imposed.[59] In Mississippi the ad-

holding such recovery is not based on principle of agency, but because sendee is the person for whose benefit message is sent; Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589, but holds receiver bound by stipulation in bank as to amount of damages, where he suspects inaccuracy in message and does not have it repeated.

[56] Western Un. Teleg. Co. v. Bright, 90 Va. 778, 6 Am. Elec. Cas. 797, 20 S. E. 146, Code Va., § 1292.

[57] Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 1 Am. Elec. Cas. 487, 502, per Lacy, J.

[58] Western Un. Teleg. Co. v. Taylor, 84 Ga. 408, 3 Am. Elec. Cas. 604, 11 S. E. 396.

[59] Western Un. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894, 2 Am. Elec. Cas. 525; Ind. Rev. Stat. of 1881, § 4177, in effect May 6, 1853; Hadley v. Western Un. Teleg. Co., 115 Ind. 191, 15 N. E. 845, 2 Am. Elec. Cas. 542, 21 Am. & Eng. Corp. Cas. 72; Ind. Acts of 1885, p. 151, § 2, repealing Ind. Act of 1852, § 4176, Rev. Stat. of 1881, but § 4177 is undisturbed; Western Un. Teleg. Co. v. Brown, 108 Ind. 538, 2 Am. Elec. Cas. 508, 8 N. E. 171; Western Un. Teleg. Co. v. Kinney, 106 Ind. 468, 2 Am. Elec. Cas. 504, 7 N. E. 191; Western Un. Teleg. Co. v. Scircle, 103 Ind. 227, 1 Am. Elec. Cas. 787, 788, 2 N. E. 604; Western Un. Teleg. Co. v. Reed, 96 Ind. 195, 1 Am. Elec. Cas. 657; Western Un. Teleg. Co. v. Pendleton, 95 Ind. 12, 1 Am. Elec. Cas. 632, 639, 641.

dressee can recover the penalty even though the message had no pecuniary value to him and the sender paid the price of transmission.[60] So also in Tennessee the addressee may recover where he suffers injury by the company's failure or negligence.[61]

§ 1009a. **Parties — Message by agent for undisclosed principal.**— An undisclosed principal may maintain an action in his own name against a telegraph company for damages resulting from the negligence of the company in the transmission or delivery of a telegram sent by his agent, it being declared that there is no question about the right of such a principal to sue.[62]

§ 1010. **Jurisdiction — Federal Courts.**— If a municipal corporation attempts to forfeit the rights of a railway company in its streets, without due process of law, the United States Circuit Court has jurisdiction to enjoin said municipality from so proceeding under an ordinance which undertakes to declare such forfeiture. Such court may also enjoin the prosecution of suits subsequently begun in State courts to enforce such forfeiture.[63] Such court also has jurisdiction in an action to recover damages caused by the falling of an electric light pole where there is diverse citizenship, the plaintiff being a resident of Kansas and defendant corporations being residents of Colorado.[64] So a suit for injunction will lie in a Federal

[60] Western Un. Teleg. Co. v. Allen, 66 Miss. 549, 3 Am. Elec. Cas. 676, 6 So. 461, 2 Am. Elec. Cas. 625.

[61] Wadsworth v. Western Un. Teleg. Co., 86 Tenn. 695, 2 Am. Elec. Cas. 736, 8 S. W. 574.

[62] Western Union Teleg. Co. v. Manker (Ala. 1906), 41 So. 851; Propeller Towboat Co. v. Western Union Teleg. Co., 124 Ga. 478, 52 S. E. 766, 19 Am. Neg. Rep. 135; Dodd Grocery Co. v. Postal Teleg. Cable Co., 112 Ga. 685, 37 S. E. 981.

[63] Iron Mountain R. Co. of Memphis v. Memphis (U. S. C. C. App., 6th Cir.), 96 Fed. 113, 37 C. C. A. 410.

[64] City of Denver v. Sherrett (U. S. C. C. App., 8th Cir., 1898), 60 U. S. App. 104, 31 U. S. C. C. App. 499, 88 Fed. 226, 5 Am. Neg. Rep. 520. Corporations are citizens, within the meaning of the clause of the Constitution of the United States, which extends the judicial power of the courts of the United States to controversies between the citizens of different States; and they are citizens only of the State

court to restrain the completion of an appraisement and levy of taxes without legal authority.[65] And although the judgment of the state court rests partly on grounds of local or general law, and although the opinion may not expressly refer to the Constitution of the United States, if by its necessary operation the judgment rejects a claim, based on a constitutional right specially set up in the answer, that the relief prayed cannot, in any view of the case, be granted consistently with the contract or due process clauses of the constitution the Supreme court of the United States has jurisdiction to review under the revised statutes.[66] It is also held that, in the absence of a statute, a State court decision as to the liability of telegraph companies for default in the duty does not bind Federal courts.[67]

or sovereignty that created them. The Western Un. Teleg. Co. v. Dickinson, 40 Ind. 444, 13 Am. Rep. 295.

[65] Western Un. Teleg. Co. v. Norman (U. S. C. C., D. Ky.), 77 Fed. 13.

[66] West Chicago St. Rd. Co. v. People ex rel. City of Chicago, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed., affg. 214 Ill. 9, 73 N. E. 393, four justices dissenting; Rev. Stat., § 709. The specific relief asked for in this case was by mandamus directing the railroad company to lower its tunnel under navigable waters without cost to the city or to wholly remove it. The court, per Harlan, J., said: "The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the State court rests partly upon grounds of local or general law. But, by its necessary operation — although the opinion of the State court does not expressly refer to the Constitution of the United States — the judgment rejects the claim of the company, specially set up in its answer, that the relief asked for by the city cannot, in any view of the case, be granted consistently, either with the contract clause of the Constitution or with the clause prohibiting the State from depriving any one of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not finally be determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States. This court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views of this question are fully stated in Chicago, Burlington & Quincy R. R. Co. v. Drainage Commissioners, 200 U. S. 561."

[67] Western Un. Teleg. Co. v.

§ 1011. **Jurisdiction — State courts.**— In Massachusetts the Supreme Judicial Court has full equity powers to compel the observance of all laws governing street railways, and under its general equity powers, conferred by another statute, when a street railway corporation is constructing its road, in accordance with the powers conferred upon it by its charter, over a location granted to it by the selectmen of a town, and is using or intending to use the safeguards pointed out by the statutes, said court has no power to say that it shall use other and different safeguards. The whole subject-matter is regulated by the legislature. The duty of the court is merely to see that the law is complied with, and not to interfere unless the Constitution or the law requires it to do so.[68] If justices of the peace have jurisdiction only in actions ex contractu, the legislature cannot invest them with jurisdiction of an action by the sender or sendee of a telegram to recover under a penalty statute against a telegraph company, and its judgment does not, therefore, bar an action by the addressee in the proper court.[69] And in Arkansas it is decided that a justice of the peace has no jurisdiction of an action to recover the statutory penalty against a telegraph company for failure to deliver a message.[70] An action may be brought in the district where the despatch was received, when it is sought to recover damages, because of an injurious telegraphic despatch sent from one district to another.[71] Again the rights of a foreign licensor of a telephone patent cannot be taken away, in an action to which he is not a party, in a court to whose jurisdiction it has not submitted, nor can such rights be jeopardized by the acts of the licence.[72] In Iowa telegraph and telephone companies, the latter, by implied inclusion, may, by statute, be sued in any county through which

Wood, 57 Fed. 471, 6 C. C. A. 432. See State, Postal Teleg. Cable Co. v. Delaware & A. Teleg. & Teleph. Co., 47 Fed. 632, 3 Am. Elec. Cas. 533, affd., 50 Fed. 677, a case of removal from the State to the Federal court.

[68] Old Colony R. Co. v. Rockland &. A. St. Ry. Co., 161 Mass. 416, 5 Am. Elec. Cas. 233, 37 N. E. 370.

[69] Western Un. Teleg. Co. v. Taylor, 84 Ga. 408, 3 Am. Elec. Cas. 604, 11 S. E. 396.

[70] Baltimore & Ohio Teleg. Co. v. Lovejoy, 48 Ark. 301, 2 Am. Elec. Cas. 477, 3 S. W. 183.

[71] Leduc v. Theoret, Rapport's Judic. Quebec, 11 Cour. Sup. 395.

[72] American Rap Teleg. Co. v. The Connecticut Teleph. Co., 49 Conn. 352, 1 Am. Elec. Cas. 390. See § 524, herein.

their line or lines pass.[73] Again, if it is sought to enjoin the construction and operation of an electric street railway in front of plaintiff's premises, as authorized by a city ordinance, a constitutional question conferring jurisdiction on the Supreme Court is involved, if the threatened injury would have the effect to deprive plaintiff of his right of access to the street, or if it would subject his property to a new servitude without compensation.[74] So a case may be certified to the Supreme Court from a lower court, which has no jurisdiction, where said action involves the construction of the interstate commerce provision of the Federal Constitution and the Post Roads Act.[75] And where a corporation doing business in a State fails to deliver a telegram therein, jurisdiction of an action therefor will be upheld where, although the plaintiff resides in another State, yet the telegram was sent between points in the former State, and jurisdiction was submitted to and the point of want of jurisdiction is raised for the first time in the Appellate Court without assigning it as error.[76] Although the amount involved is less than the jurisdictional limit, nevertheless, if the Supreme Court has lawfully assumed jurisdiction; it assumes it for all purposes.[77]

§ 1012. **Actions — Generally.**— It is said that cases against telegraph companies will be found to range themselves under three different heads. First. Such as are brought to recover damages for the breach of contract, express or implied, relating to the sending and delivery of messages. Second. Such as are brought to recover a penalty or enforce a liability to pay damages imposed by the statute; and Third. Such as are brought to subject the company or its agents to criminal responsibility for acts done or omitted in violation of some statute.[78] And it

[73] Franklin v. Northwestern Teleph. Co., 69 Iowa, 97, 2 Am. Elec. Cas. 439, 28 N. W. 461.

[74] Placke v. Union Depot R. Co., 140 Mo. 634, 41 S. W. 915.

[75] Reed v. Western Un. Teleg. Co., 56 Mo. App. 168.

[76] Western Un. Teleg. Co. v. Russell, 12 Tex. Civ. App. 82, 33 S. W. 708. See Western Un. Teleg. Co. v. Phillips, 2 Tex. Civ. App. 608, 21 S. W. 638, as to jurisdiction where telegram presented in Texas for transmission into Indian Territory.

[77] Western Un. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828.

[78] Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 1 Am. Elec. Cas. 1, 6, per Downey, Ch. J.

may also be added that such companies, as well also as other electric corporations, owe certain duties to the public, and also to employees or others sustaining contract relations to them; and for breach of their contract obligations, or for negligence in the exercise of their duties, whereby injury results, they may become liable to an action, either in contract or tort, either under statutes or the common law; and such corporations themselves may avail themselves of the aid of the courts, either to enforce their charter or other rights, or to prevent an infringement thereof. This is illustrated by numerous decisions throughout this work. In the case of negligence, however, if the injury occasioned thereby could not have been foreseen or reasonably anticipated as the probable result thereof, and would not have resulted therefrom but for the interposition of a new and independent cause, it is held that an action therefor will not lie.[79]

§ 1013. **Character or form of action for failure to transmit telegram, etc.— Ex delicto or ex contractu.—** In Alabama it is held that an action lies for breach of contract, where the telegraph company fails to transmit or deliver a message.[80] In Arkansas the action to recover a statutory penalty is in form ex contractu, but is in reality founded on tort, arising under the statute, and debt for the penalty.[81] In Dakota it is said that where a complaint alleges a contract, or a breach thereof, as the gist of the action, it cannot be converted into a tort so as to permit recovery in damages for mental suffering for neglect of a telegraph company to perform its duty; if recoverable at all, they are recoverable in tort, especially so where the statute provides for recovery of a penalty in addition to actual damages, as such statute is exclusive of all other modes of procedure.[82] In Georgia the action for a statutory penalty is held ex delicto.[83] In Florida, while the action for damages is

[79] Miles v. Postal Teleg. Cable Co., 55 S. C. 403, 33 S. E. 493.

[80] Western Un. Teleg. Co. v. Cunningham, 99 Ala. 314, 4 Am. Elec. Cas. 658, 14 So. 579.

[81] Baltimore & Ohio Teleg. Co. v. Lovejoy, 48 Ark. 301, 2 Am. Elec. Cas. 478, 3 S. W. 183.

[82] Russell v. Western Un. Teleg. Co., 3 Dak. 315, 1 Am. Elec. Cas. 653, 656, 19 N. W. 408.

[83] Western Un. Teleg. Co. v. Tay-

in form ex delicto, it is ex contractu for breach of contract.[84] In Indiana the message is not the foundation of the action for a statutory penalty.[85] In Iowa it is decided that the mere fact that the plaintiff pleads by way of inducement the making of a contract to transmit a telegram, does not make an action to recover damages for its negligent transmission sound in contract.[86] In Louisiana the action for damages arises ex contractu, and not ex delicto.[87] In Minnesota an action for damages is not one of tort, but on contract.[88] In Nebraska such a suit is not based on contract, but is founded on tort.[89] In Pennsylvania an action brought by the addressee of a telegram, to recover such damages, sounds wholly in tort.[90] And it is said in a Virginia decision that in case of penalty statutes courts have to do chiefly with the contract between the sender of a message and the telegraph company and breaches of this contract, and that the obligation of the company does not grow entirely out of contract with the sender, but rests upon a statutory duty.[91] It will be seen, therefore, that the decisions are clearly not in harmony. If a statute provides, as we have seen elsewhere that it does in some States, for special damages, the action would be for the breach of contract; and again, whether it rests on tort or on contract would depend somewhat upon whether the sender or the sendee sought to recover for the injury occasioned by the telegraph company's default or negligence. The sender may sue for breach of contract when he has a right of action, but as to the addressee, even though there is no contractual relation, yet, as we have seen, he can

lor, 84 Ga. 408, 11 S. E. 396, 3 Am. Elec. Cas. 604, 607, 612.

[84] International Ocean Teleg. Co. v. Saunders, 32 Fla. 434, 14 So. 148, 4 Am. Elec. Cas. 682, 689.

[85] Western Un. Teleg. Co. v. Meredith, 95 Ind. 93, 1 Am. Elec. Cas. 643. But see § 1009, herein.

[86] Cowan v. Western Union Teleg. Co., 122 Iowa, 379, 98 N. W. 281.

[87] Olympe de La Grange v. Southwestern Teleg. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

[88] Francis v. Western Un. Teleg. Co., 58 Minn. 252, 59 N. W. 1078, 5 Am. Elec. Cas. 739.

[89] Pacific Teleg. Co. v. Underwood, 37 Neb. 315, 55 N. W. 1057, 4 Am. Elec. Cas. 764.

[90] Western Un. Teleg. Co. v. Richman (Penn. Supreme Ct., 1887), 19 Week. N. of Cas. 569, 2 Am. Elec. Cas. 710.

[91] Western Un. Teleg. Co. v. Reynolds, 77 Va. 173, 1 Am. Elec. Cas. 487, 493, 496, 497. See Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 1 Am. Elec. Cas. 352, 359, 360.

recover in most of the States. Again, Code provisions of the several States will necessarily affect, if not determine, the question, and the same would be true as to the wording of the various penalty statutes. The question, therefore, must rest upon the rule as settled in each jurisdiction, based upon such distinct factors as appertain exclusively thereto.[92]

§ 1014. Attachment — Electric railway — Telegraph line — Information by telephone to support attachment — Decisions.—

[92] As to sufficiency of complaint under penalty statute or for damages, see *Georgia:* Greenburg v. Western Un. Teleg. Co., 89 Ga. 754, 15 S. E. 651. *Indiana:* Reese v. Western Un. Teleg. Co., 123 Ind. 294, 24 N. E. 163, 3 Am. Elec. Cas. 640, 645, per Berkshire, J.; Western Un. Teleg. Co. v. Buskirk, 107 Ind. 549, 8 N. E. 557, 5 West. Repr. 871, 2 Am. Elec. Cas. 515; Western Un. Teleg. Co. v. Scircle, 103 Ind. 227, 2 N. E. 604, 1 Am. Elec. Cas. 787, 789; Western Un. Teleg. Co. v. Walker, 102 Ind. 599, 2 N. E. 137, 1 Am. Elec. Cas. 780; Western Un. Teleg. Co. v. Huff, 102 Ind. 535, 26 N. E. 85; Western Un. Teleg. Co. v. Young, 93 Ind. 118, 1 Am. Elec. Cas. 612; Western Un. Teleg. Co. v. Roberts, 87 Ind. 377, 1 Am. Elec. Cas. 439, 440; Western Un. Teleg. Co. v. Gougar, 84 Ind. 176, 1 Am. Elec. Cas. 412, 413; Western Un. Teleg. Co. v. Axtell, 69 Ind. 199, 1 Am. Elec. Cas. 295; Western Un. Teleg. Co. v. Ferguson, 57 Ind. 495, 1 Am. Elec. Cas. 266; Western Un. Teleg. Co. v. Trumbull, 1 Ind. App. 121, 27 N. E. 513, 3 Am. Elec. Cas. 650, 654. *Mississippi:* Alexander v. Western Un. Teleg. Co., 67 Miss. 386, 7 So. 280. *New Jersey:* American Un. Teleg. Co. v. Harrison, 31 N. J. Eq. 627, 1 Am. Elec. Cas. 291, 298. *Vermont:* Harwick v. Vermont Teleph & Teleg. Co., 70 Vt. 180, 40 Atl. 169. *Virginia:* Western Un. Teleg. Co. v. Powell, 94 Va. 268, 26 S. E. 828.

As to complaint in actions for damages for nondelivery or error in transmission of telegrams see also, *Alabama:* Western Union Teleg. Co. v. Bowman, 141 Ala. 175, 37 So. 493; Western Union Teleg. Co. v. Kirchbaum, 132 Ala. 535, 31 So. 607; Western Un. Teleg. Co. v. Wilson, 93 Ala. 32, 9 So. 414, 3 Am. Elec. Cas. 586, 590, 591. *Georgia:* Western Union Teleg. Co. v. Bailey, 115 Ga. 725, 42 S. E. 89; Dodd Grocery Co. v. Postal Teleg. Cable Co., 112 Ga. 865, 37 S. E. 981. *Illinois:* Logan v. Western Un. Teleg. Co., 84 Ill. 468, 1 Am. Elec. Cas. 235. *Indiana:* Western Un. Teleg. Co. v. Henley, 157 Ind. 90, 60 N. E. 682; Western Un. Teleg. Co. v. Henley, 23 Ind. App. 14, 54 N. E. 775. *Iowa:* Cowan v. Western Un. Teleg. Co., 122 Iowa, 379, 98 N. W. 281; Albers v. Western Un. Teleg. Co., 98 Iowa, 51, 66 N. W. 1040, 4 Am. & Eng. Corp. Cas. (N. S.) 388. *Kentucky:* Graddy v. Western Un. Teleg. Co., 19 Ky. L. Repr. 1455, 43 S. W. 468. *Minnesota:* Abbott v. Western Union Teleg. Co., 86 Minn. 411, 90 N. W. 1. *New York:* Macpherson v. Western Un. Teleg. Co., 52 N. Y. Super. Ct. 232, 1 Am. Elec.

An electric railway company's cars, tracks, electric goods, supplies and safes are not exempt from attachment because of the nature of the company's business as a carrier of passengers.[93] If a receiver has been appointed in the State in which an attachment creditor is a citizen, and the latter has been served with a copy of an injunction against interfering with said receivership, and he thereafter causes the lines and property of a telegraph company situate in another State to be attached, such act violates the injunction and can give no lien to such creditor which is capable of being enforced under an equitable administration of the company's assets in the State wherein the receiver was appointed.[94] Again in New York, the information to support an attachment may be made by telephone, where the material averments are sufficient when made on information and belief; but there must be some satisfactory means of identification by the affiant in sush case, of the person to whom he was speaking, either from the fact that the voice was recognized, or that he was otherwise known.[95]

Cas. 755. *North Carolina:* Havener v. Western Un. Teleg. Co., 117 N. C. 540, 23 S. E. 457. *Pennsylvania:* Ferguson v. Anglo-American Teleg. Co., 151 Penn. St. 211, 25 Atl. 40. *South Carolina:* Young v. Western Union Teleg. Co., 65 S. C. 93, 43 S. E. 448; Simmons v. Western Union Teleg. Co., 63 S. C. 425, 41 S. E. 521, 57 L. R. A. 607; Butler v. Western Union Teleg. Co., 62 S. C. 222, 40 S. E. 162; Gist v. Western Un. Teleg. Co., 45 S. C. 344, 23 S. E. 143, 55 Am. St. Rep. 763; Mood v. Western Un. Teleg. Co., 40 S. C. 524, 19 S. E. 67. *Texas:* Western Un. Teleg. Co. v. Mitchell, 91 Tex. 454, 44 S. W. 274, 40 L. R. A. 209; Western Union Teleg. Co. v. Noland (Civ. App. 1904), 79 S. W. 632; Western Un. Teleg. Co. v. Norris, 25 Tex. Civ. App. 43, 60 S. W. 982; Western Un. Teleg. Co. v. Bell, 24 Tex. Civ. App. 572, 59 S. W. 918; McCarthy v. Western Un. Teleg. Co. (Civ. App., 1900), 56 S. W. 568; Western Un. Teleg. Co. v. Cocke (Tex. Civ. App., 1892), 22 S. W. 1005; Western Un. Teleg. Co. v. Warren (Tex. Civ. App.), 36 S. W. 314.

[93] Risdon Iron & L. Works v. Citizens' Tract. Co., 122 Cal. 94, 54 Pac. 529.

[94] Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co., 148 N. Y. 315, 42 N. E. 707, 31 L. R. A. 403, affg. 83 Hun (N. Y.), 560, 65 N. Y. St. R. 35, 31 N. Y. Supp. 1096.

[95] Murphy v. Jack, 142 N. Y. 215, 31 Abb. N. C. (N. Y.) 201, 58 N. Y. St. R. 458, 36 N. E. 882, revg. 76 Hun (N. Y.), 356, 58 N. Y. St. R. 481, 27 N. Y. Supp. 802.

§ 1015. **Liens.**— An electric light company having a franchise to occupy the streets of a city for the purpose of furnishing light to the inhabitants thereof, is not of such a public nature, though for the convenience and benefit of the public, as will exempt its property from the application of the Mechanics' Lien Law.[96] But, though under the laws of a State, sub-contractors may not be entitled to a lien, yet, in a proceeding in equity, for the purpose of disposing of the proceeds of the property to satisfy liens, if all the parties are before the court, they will be entitled to the satisfaction of their claims as against the original contractors, out of money coming to the latter.[97] Again, poles and wires erected by an electric light company have been decided to be an "appurtenance" to the premises, and subject to a lien for poles furnished.[98] So, also, they have been held to be a "structure" and subject to a lien for labor.[99] And wires and insulators have been declared to be "fixtures," subject to a lien for labor.[1] So coal used by an electric light company for the purpose of operating its plant, has been determined to be "material" furnished.[2] But a dynamo is held not to be "material."[3] Where wires for the construction of a telegraph line are furnished by the company, the custody of a contractor for building such line will not amount to possession preventing an order for the insurance of receivers' certificates constituting a lien, among other property, upon these wires erected by such contractor.[4] Again, where a trial court has made a conclusion of law that the plaintiff is entitled to a judgment for a certain sum, and to have his lien upon certain

[96] Badger Lumber Co. v. Marion Water Supply, E. L. & Power Co. 48 Kan. 182, 29 Pac. 476, 4 Am. Elec. Cas. 551.

[97] Brush Elec. Co. v. Warwick Elec. Mfg. Co. (C. P.), 4 Ohio N. P. 279, 6 Ohio Dec. 475.

[98] Badger Lumber Co. v. Marion Water Supply, E. L. & Power Co. 48 Kan. 182, 29 Pac. 476, 4 Am. Elec. Cas. 551.

[99] Forbes v. Willamette Falls Elec. Co., 19 Or. 61, 3 Am. Elec. Cas. 527, 23 Pac. 670.

[1] Hughes v. Lambertville E. L., Heat & Power Co. (N. J. Ct. Ch., 1895), 5 Am. Elec. Cas. 626. See Penn. Laws of 1897, p. 155.

[2] Pocahontas Coal Co. v. Henderson E. L. & P. Co., 118 N. C. 232, 24 S. E. 22.

[3] General Elec. Co. v. Morganton E. L. & P. Co., 122 N. C. 599, 30 S. E. 314.

[4] Postal Teleg. Cable Co. v. Vane, 80 Fed. 961, 53 U. S. App. 319, 26 C. C. A. 342.

designated property foreclosed, and to have such property sold to satisfy the judgment, it is held that this is sufficient to support the judgment.[5]

§ 1016. **Liens continued.**— Where wires strung upon poles along city streets, extend into an electric light plant building, and are attached to the dynamo, the plant and land to which the building is affixed are subject to a mechanic's lien for an unpaid balance for the labor in stringing said wires.[6] And where a statute gives a lien for engines necessary to the operation of any railway or transportation company, stationary engines constitute supplies necessary to the operation of a railway, when furnished for supplying motive power for an electric railroad. But the limitation begins to run on each item, and not on the last charge of an account for labor and materials furnished under separate and distinct orders, and not as a single contract.[7] If money is loaned an electric light company to supply power under a renewal of a former contract to light a city, but which requires additional lights, and the same power would have been required to fulfill the old contract, it will not be held that there is such a new contract as to prevent the lender of said money from having a claim prior to that of mortgagees against the company.[8] In Ohio a street railway is not a railroad within the mechanics' lien statute.[9] Although money is loaned an electric light corporation on mortgage properly recorded, nevertheless, debts due by said corporation for labor performed and materials furnished to enable it to continue operations, have a priority over such mortgages;[10] but it is also held that whether such a lien has priority over a mortgage must be determined by what appeared to be prudent at the time, and not by subsequent events.[11] Again, supplies and labor in

[5] El Reno Elec. L. & P. Co. v. Jennison, 5 Okla. 759, 50 Pac. 144.

[6] Southern Elec. Supp. Co. v. Rolla Elec. L. & P. Co., 75 Mo. App. 622, 1 Mo. App. Rep. 446.

[7] Frick Co. v. Norfolk Bank for S. & T., 57 U. S. App. 286, 86 Fed. 725, 32 C. C. A. 31.

[8] Illinois Trust & S. Bank v. Ottumwa Elec. R. Co., 89 Fed. 235.

[9] Massillon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179, 52 N. E. 192, 41 Ohio L. Jour. 5; Ohio Act of March 20, 1889.

[10] Pocahontas Coal Co. v. Henderson Elec. L. & P. Co., 118 N. C. 232, 24 S. E. 22.

[11] Illinois Trust & Sav. Bank v. Ottumwa Elec. R. Co., 89 Fed. 235.

constructing permanent buildings as part of an electric railway plant are not within a lien statute as necessary to the operation of a railway. And this same rule applies to the amount of a contract for rebuilding a hotel at a seaside resort for accommodation of the passengers of such electric railway company.[12]

§ 1016a. **Liens — Contract to deliver bonds not a lien.**— The laws of Massachusetts require the approval of the board of railway commissioners as a condition to the issuance of bonds by a street railway company. And where a note issued by such a company is conditioned that in case of nonpayment at maturity and as security therefor certain specified mortgage bonds shall be issued and the contract so evidenced constitutes merely an agreement to deliver the bonds when authorized by the commissioners, the contract does not create a lien of any kind upon the property of the railroad company, nor place the notes on an equality with previously issued bonds, and until the condition is fulfilled, the holder of the notes acquires no rights legal or equitable in the bonds nor any privilege to come in under a mortgage with actual holders of bonds duly authorized under the State law.[13]

§ 1017. **Liens — Parties.**— The owner of property may defend a suit prematurely brought, to enforce a lien against property on the same, if filed, but if he proceeds to trial on the merits, without objection, he waives his privilege to thereafter object on appeal.[14] A bank has not a lien on the assets of a telegraph company superior to a first mortgage on the company's property, where it has loaned the latter money, when in an embarrassed condition, to relieve its pressing needs, but the money is used in paying debts of a character for which

[12] Frick Co. v. Norfolk Bank for S. & T., 57 U. S. App. 286, 86 Fed. 725, 32 C. C. A. 31.

[13] Augusta Trust Co. v. Federal Trust Co. (C. C.), 140 Fed. 930. Property and assets of company sold by order of court subject to lien of actual bond-holders and petitioner sought to come in under agreement in notes the same as if it were the actual holder of the first mortgage bonds, and so share in the benefits conferred by the mortgage security equally with the actual bond-holders.

[14] El Reno Elec. L. & P. Co. v. Jennison, 5 Okla. 759, 50 Pac. 144.

receivers' certificates were authorized to be issued, and neither the bank nor the persons paid out of such loan obtained receivers' certificates.[15] But a stockholder, who loans money in good faith to an electric railway company, to keep it running, has a lien on the assets superior to mortgage bondholders, who knew of said lien and did not object, and there is an express agreement by the company to repay the loan out of its current earnings, and the company has a contract with the city for electric lighting; especially where money is loaned to erect a power plant. But a third person, who loans money to pay interest on mortgage bonds, is not entitled to such a superior lien on the assets.[16] Again, a party who agrees to lay the track and construct the overhead line of an electric railway company at a specified price per foot for the track, and per mile for the wires, is a contractor and not a laborer, under the Virginia lien statute.[17] But a purchaser for value of negotiable bonds is not within the doctrine of lis pendens as to amounts thereof which are not due.[18]

§ 1018. **Quantum meruit where contract ultra vires.**— Where a contract entered into with a city for furnishing electric lights is ultra vires and void because made for a longer period than the law authorized, the party furnishing such lights may recover therefor as on a quantum meruit.[19]

§ 1019. **Libelous telegram — Canadian decision.**— Where a telegraph company, under contract with a newspaper to collect and transmit by means of their telegraph lines, news despatches to said newspaper, sent the following message: "John Silver & Co., wholesale clothiers, of Greenville St., have failed; liabilities heavy;" which telegram was published, and later a sec-

[15] Farmers' Loan & T. Co. v. Bankers & M. Teleg. Co., 148 N. Y. 315, 42 N. E. 707, 31 L. R. A. 403, affg. 83 Hun, (N. Y.), 560, 65 N. Y. St. R. 35, 31 N. Y. Supp. 1096.

[16] Illinois T. & Sav. Bank v. Ottumwa Elec. R. Co., 89 Fed. 235.

[17] Frick Co. v. Norfolk Bank for Sav. & T., 57 U. S. App. 286, 86 Fed. 725, 32 C. C. A. 31.

[18] Farmers & M. Nat. Bank v. Waco Elec. Ry. & L. Co. (Tex. Civ. App.), 36 S. W. 131.

[19] Wellston v. Morgan, 59 Ohio St. 147, 52 N. E. 127, 40 Ohio L. Jour. 392. As to evidence as to extra lights and compensation therefor, see Brush Elec. Light & P. Co. v. Montgomery, 114 Ala. 433, 21 So. 960.

ond telegram was sent, correcting this, and was also published it was held that the appellants, the telegraph company, were responsible for the publication of the libel in question. It was declared, however, in a dissenting opinion that, assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.[20]

§ 1020. **Action — Libelous telegram continued.**— If a telegram, which there is no reason to believe is a cipher message, purporting to be signed by many persons, but not signed by anyone who is responsible, is forwarded under circumstances showing negligence or want of good faith of the telegraph operator and it is a libelous despatch, its transmission by the telegraph company may constitute a malicious and actionable publication, and it is libelous to falsely publish of a man that he is slippery, as this tends to render him odious and contemptible. It is also a publication of the libel to transmit over telegraph wires, by sound, a libelous message to be transcribed and delivered in writing to the person referred to therein. If, in such case, the act of the company's operator was wrongful, the question of negligence is immaterial upon the point of liability, but if said act was lawful, there would be no liability, however negligent the company may have been in employing the operator or in not adopting proper rules.[21] In an action on a written communication, it is no defense where one is "black-listed" as a "delinquent" debtor of the writer, that the latter did not understand the full import of the term "delinquent," where it did not appear that the person addressed un-

[20] Dominion Teleg. Co. v. Silver, 10 Can. S. C. 238, Taschereau and Gwynne, dissenting.

[21] Peterson v. Western Un. Teleg. Co., 72 Minn. 41, 74 N. W. 1022, 40 L. R. A. 661, 8 Am. & Eng. Corp. Cas. (N. S.) 517, S. C. 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302, 1 Chic. L. Week. 375. But see Weil v. Schwartz (Kan. City Ct. App., 1886), 4 West. Repr. 772.

derstood the word in any restricted sense, or that the writer so intended.[22]

§ 1020a. **Action on public lighting contract — Nonperformance of conditions in franchise no defense.**— Where a franchise granted by a city to an electric lighting company to use the streets imposes certain obligations or conditions upon the company which relate only to the franchise and also contains provisions as to the furnishing of light to the city at a stipulated price, the latter provisions are in the nature of a commercial contract by which the company is obligated to furnish, and the city to pay for, the lights and it will be no defense to an action to recover the price agreed upon for lights which have been furnished that certain conditions which relate purely to the matter of the franchise have not been complied with. So under such circumstances it has been held no defense to an action to recover for the light furnished, that the wires were not placed under ground, or the poles painted or the bond given to the city conditioned to indemnify and save it harmless from damages which might grow out of the exercise of the franchise and also for faithful compliance with the terms of the ordinance by which such conditions were imposed.[23]

[22] Western Un. Teleg. Co. v. Prichett, 108 Ga. 411, 34 S. E. 216. See further as to Libelous Messages, § 982, herein.

[23] Kaukauna Electric Light Co. v. City of Kaukauna, 114 Wis. 327, 89 N. W. 542, 8 Am. Elec. Cas. 348. The following words from the court are of value in this connection: "The ordinance of contract serving as the basis of the rights of the respective parties in this case is one of a character now become very common in this State, where the city acts in a twofold capacity: First, as a governmental body exercising delegated power of the State, it confers, and limits with conditions, the privilege or franchise to use the public streets. * * * In addition to this function as an agent of the State, however, the city, in the same instrument or ordinance, exercises its function as business corporation, with power to purchase, contract for and pay for electric lights for public purposes, and to specify the condition of such contracting,— a power arising under its own charter. * * * In the formulation of such a document, reciprocal duties are usually imposed upon both the grantee of the franchise and upon the city. Some of these duties or conditions clearly relate exclusively to the subject of the franchise. Others with equal clearness may apply only to the contractual and commercial duty of supplying

In case, however, of a breach of any of those conditions or terms which relate purely to the commercial contract, the company cannot recover for lights furnished where the city declines to accept the service as a performance of the contract.[24]

lights to the city, to be paid for when so supplied. Other provisions, conditions, and covenants may be of a mixed character, possibly applicable to both phases, so that their disobedience would at once constitute a breach of the plaintiff's contractual duty, which forms the basis of the city's promise to pay, and also a breach of the conditions upon which it holds its franchise from the State to occupy the public streets. The plaintiff's action is predicated wholly upon the commercial contract embodied in the original ordinance and in the supplemental contract with reference to arc lights. The city's defense thereto is breach by the plaintiff of several of the obligations which it assumed. In dealing with this street-lighting contract, the parties stand simply and purely as contractors, governed by the same rules of law which govern private contractors, except so far as the known situation of each may control the interpretation of their mutual promises. The company is to do certain things as a consideration of the city's promise to pay, and, as in the case of any other contract, the city's duty to pay arises only on performance of such of the undertakings of the company as can be fairly said to constitute essential consideration therefor." The court then refers to the conditions as to the burying of the wires and the painting of the poles and says: "They do not in any wise affect the interests of the city as a buyer of public lighting. They may affect its municipal government and policy as to the care and protection of the streets, but in that respect they are relevant only to the propriety of the continuance of the plaintiff's franchise to use the streets. Hence we conclude their performance or breach is in no wise material to the lighting contract, that if any penalty results to the plaintiff therefrom, it is a forfeiture of its franchise, which can be enforced only at suit of the State," per Dodge, J. Similar language was also used in reference to the condition as to giving a bond.

[24] Kaukauna Electric Light Co. v. City of Kaukauna, 114 Wis. 327, 89 N. W. 542, 8 Am. Elec. Cas. 348, holding that where by the terms of an ordinance the company was obligated to furnish lights when and where needed, it could not recover for lights furnished where it failed to supply the additional lights after a reasonable time and was notified by the city that it would no longer accept or pay for lights furnished by the company. The court said: "The city waited a reasonable time (some three months) after demanding the additional lights, until plaintiff's purpose not to furnish them became clear, paid for the lights actually furnished meanwhile, and then notified plaintiff that it would no longer accept or pay for lights furnished by it. It did not accept any further service. True, street lights continued to burn, but not with the city's con-

§ 1020b. **Action — To recover money entrusted to messenger boy — Liability of company.**— The question as to the liability of a messenger company for the acts of its boys while in the performance of their duties is considered in a recent case in Massachusetts. It appeared in this case that the plaintiff had signalled the company for a messenger boy to whom he gave a receipt for rent of a tenant and sent him to collect the money, which the boy did but failed to return it. An action was brought to recover the amount of money delivered to the messenger but the court held that the company was not liable therefor it being declared that the messenger in performing this service was the servant of the plaintiff and not of the company, though he was in the general service of the latter. It was, however, further declared that if the company was guilty of negligence in the selection of its servants it might be liable for their misconduct. The court said: "What is the implied contract or duty of the defendant growing out of this kind of business? Does the defendant become a common carrier and insurer of everything intrusted to its messengers? It seems quite plain that it does not. It impliedly contracts that the messengers whom it furnishes are suitable and proper persons for the performance of the ordinary duties of messengers, so far as the exercise of ordinary care in the selection and employment of them will enable it to procure such persons. Its duty is not very unlike that of a stable keeper, who furnishes a horse and carriage for the use of a hirer. Because, for the proper performance of their duties, these messengers should be worthy of confidence, ordinary care in the selection of them requires that investigation should be made and precautions be taken to insure the exclusion of all unfit persons from this employment, and to secure persons for such mental and moral qualifications as render them trust-

sent, and without any power on its part to prevent them. Clearly, therefore, the plaintiff has not performed the lighting contract on its part during the period covered by the bills sued on, and the city has not accepted or voluntarily received any of the benefits thereunder, upon which its promise to pay depends; and a complete defense was set up and proved against the plaintiff's cause of action at law, so that it was not entitled to recover, and judgment dismissing the complaint would have been proper," per Dodge, J.

worthy. For a failure to take due precautions in these particulars, the defendant may be held liable, either for negligence or upon an implied contract, to any person who suffers loss from the misconduct of a messenger whom it has furnished." [25]

§ 1020c. **Action — Right to recover — Stamp not affixed to telegram as required by act of Congress.**— In a case in Alabama it has been decided that while the Act of Congress entitled "An Act to provide ways and means to meet war expenditures and for other purposes," was in operation by which a telegraph company was prohibited in express words from transmitting a telegraph message which did not have upon it a revenue stamp as required by that act, an action could not be maintained against a telegraph company for failure to transmit a message which was not so stamped, and that a plea which set up the failure on the part of the plaintiff to so stamp a message given by him to the company for transmission, presented a good defense and was not subject to demurrer.[26]

§ 1021. **Ejectment — Abutting owner — Telegraph line on highway — Trespass on the case.**— We have considered, exhaustively, elsewhere, the question whether the erection and maintenance of telegraph poles and wires in streets and highways constitutes an additional servitude; [27] and where such servitude is created, it is held that the owner of the fee to the center of a rural highway, subject to the public easement, is entitled to compensation, and that he may, in default thereof, maintain ejectment against the company.[28] It is held, however, in Pennsylvania, that trespass in the case for the damage sustained is a proper proceeding by property-owners, damaged

[25] Haskell v. Boston District Messenger Co., 190 Mass. 189, 76 N. E. 215, 19 Am. Neg. Rep. 289, per Knowlton, J.

[26] Western Un. Teleg. Co. v. Waters, 139 Ala. 652, 36 So. 773.

[27] See §§ 295–316, herein.

[28] French v. Robb, 67 N. J. L. 260, 51 Atl. 509, 7 Am. Elec. Cas. 238; Eels v. American Teleph. & Teleg. Co., 143 N. Y. 133, 62 N. Y. St. R. 138, 38 N. E. 202, 5 Am. Elec. Cas. 92, affg. 65 Hun (N. Y.), 516, 48 N. Y. St. R. 303, 20 N. Y. Supp. 600.

by the erection of electric light poles upon the highway, the statute failing to provide a method for assessing damages.[29] And where the poles of an electrical company are erected on private property without the consent of the owner he may have them removed in an action at law.[30]

§ 1022. **Injunction — Abutting owners.—** The question of the right of the abutting owner to an injunction restraining the construction of an electrical line must depend either upon whether such a line constitutes an additional servitude, entitling him to compensation, and which he has not received, or whether his rights of ingress or egress have been impaired, or whether in some way, he has been injured in his property rights.[31] If any of the above facts appear, the construction of the line may be enjoined, but a mere apprehension that injury will result in the future to an abutting owner, by reason of the use of electricity on a street railway, will not warrant the court in perpetually enjoining its use.[32] Nor will an injunction be granted where the injuries are merely consequential, since a court of law is the proper tribunal in such case.[33] Nor is the fact that other structures of a similar nature may be erected, a ground for an injunction.[34] But if it appear that a pole or other structure is placed in front of a person's property, for the purpose of annoying him, and to injure and depreciate the value of such property, a mandatory injunction may be granted to compel the removal of such pole or structure.[35] And an injunction may be granted to restrain an abutting

[29] Zanziger v. Wayne Elec. L. Co. (Penn. C. P.), 7 Del. Co. Rep. 10, 6 Penn. Dist. Rep. 577; Penn. Act of May 8, 1889, giving electric light companies the right of eminent domain, but failing to provide a method of assessing damages.

[30] Purdam v. Cumberland Teleph. & Teleg. Co., 27 Ky. Law Rep. 1166, 87 S. W. 1071.

[31] See §§ 16, 17, herein.

[32] Potter v. Saginaw Street Ry., 83 Mich. 285, 3 Am. Elec. Cas. 299, 47 N. W. 217.

[33] People, Maloney v. General Elec. Co., 172 Ill. 129, 50 N. E. 158. See Bronson v. Albion Teleph. Co., 67 Neb. 111, 93 N. W. 201, 60 L. R. A. 426.

[34] Mt. Adams & E. P. I. P. R. v. Winslow, 3 Ohio C. C. 425, 2 Am. Elec. Cas. 268.

[35] Snyder v. Fort Madison S. R. Co., 105 Iowa, 284, 41 L. R. A. 345, 11 Am. & Eng. R. Cas. (N. S.) 53, 75 N. W. 179.

owner for cutting down or injuring the poles or wires of an electrical company, which has been duly authorized to construct its line.[36] The question of the rights of abutting owners, where electrical lines are being constructed along the streets and highways in front of their property, has been fully considered in prior chapters of this work, as well as the rights of such companies, and we refer to those chapters for a further discussion of this subject.[37]

§ 1023. **Injunction — Telegraph line along railroad right of way.**— The mere fact that a railroad company has granted to a telegraph company the right to construct its line along the railroad right of way, and agreed to confer no such right upon any other company, will not be a sufficient ground for the granting of an injunction in behalf of such company restraining another telegraph company from constructing a line of telegraph along the same railroad right of way,[38] although it has been held that a telegraph company which has erected poles in pursuance to such a contract has an exclusive right to the use of the poles erected by it, and that another company may be enjoined from using the same poles for its line of wires.[39] If a telegraph company has no authority to construct its line along a railroad right of way, it may be enjoined from so doing, in an action by the railroad company.[40]

§ 1024. **Injunction — Furnishing stock quotations — Market quotations — Stock ticker.**[41]— **Where a telegraph company**

[36] Williams v. Citizens' Ry. Co., 130 Ind. 71, 29 S. E. 408.

[37] See c. XVI, XVII, herein.

[38] Pacific Postal Teleg. Cable Co. v. Western Un. Teleg. Co., 50 Fed. 493, 4 Am. Elec. Cas. 232; Western Un. Teleg. Co. v. Baltimore & Ohio T. Co., 23 Fed. 12, 1 Am. Elec. Cas. 722; Western Un. Teleg. Co. v. Baltimore & Ohio Teleg. Co., 22 Fed. 133, 1 Am. Elec. Cas. 601; Western Un. Teleg. Co. v. American Un. Teleg. Co., 9 Biss. (U. S. C. C.) 72, 1 Am. Elec. Cas. 288; Western Un. Teleg. Co. v. American Un. Teleg. Co., 65 Ga. 160, 1 Am. Elec. Cas. 306. But see Western Un. Teleg. Co. v. New Brunswick R. Co., N. B. Eq. Cas. 338.

[39] Western Un. Teleg. Co. v. Chicago & Paducah R. Co., 86 Ill. 246, 1 Am. Elec. Cas. 246.

[40] New York City & Northern R. Co. v. Central Un. Teleg. Co., 21 Hun (N. Y.), 261, 1 Am. Elec. Cas. 315.

[41] See § 1035, herein.

has entered into a contract to furnish market reports, by means of a ticker, placed in the customer's office, for that purpose, if there have been no violations of conditions imposed by the company, and the use of the instrument furnished has been for a lawful purpose, its removal, in breach of the contract, may be restrained by injunction. But the company may impose reasonable conditions as to its use, and where there has been a violation of such conditions, the court will not interfere, by injunction, to restrain the removal of the instrument. Thus a stipulation that the customer shall only use the reports furnished him in his own business is reasonable, and, upon the violation of such stipulation, the company may remove the instrument, and an injunction will not be granted restraining such removal.[42] Or an injunction may be granted at the suit of the company, restraining such customer from communicating such information. So a subscriber to a news agency, who is furnished information upon condition that he shall not communicate it to a third person, will be enjoined from a breach of such condition, and a third person will be enjoined from inducing him to break his contract, by supplying such third person with information with a view to publication.[43] A condition, however, that the company may remove the instrument, whenever, in its judgment, there has been a breach of the conditions of the agreement, has been held to be unreasonable and no defense to an action brought to restrain the discontinuance of the service contracted for.[44] In a case in Ohio, it is held that where the telegraph company acts as agent for a board of trade, or stock exchange, in furnishing quotations to customers, it cannot be restrained from removing its ticker from the office of a person to whom its principal has forbidden it to furnish quotations.[45] And where the telegraph com-

[42] Shepard v. Gold & Stock Teleg. Co., 38 Hun (N. Y.), 338, 1 Am. Elec. Cas. 854; Cochrane v. Exchange Teleg. Co., 65 L. Jour. Ch. (N. S.) 334; Cain v. Western Un. Teleg. Co. (Ohio C. P.), 18 Cin. Week. Bull. 267, 2 Am. Elec. Cas. 381.

[43] Exchange Teleg. Co. v. Central News, 2 Ch. 48, 76 Law T. Rep. 591, 66 L. Jour. Ch. (N. S.) 672. See also Exchange Teleg. Co. v. Gregory, 1 Q. B. 147, 65 L. Jour. Q. B. (N. S.) 262, affg. 73 Law T. Rep. 120.

[44] Smith v. Gold & Stock Teleg. Co., 42 Hun (N. Y.), 454, 2 Am. Elec. Cas. 373.

[45] Cain v. Western Un. Teleg. Co., 18 Cin. Week. Bull. 267.

pany was forbidden by its contract with the board of trade from furnishing stock quotations to bucket-shops, it was held that the proprietor of a bucket-shop had no standing to prevent the telegraph company from removing its ticker.[46] And in another case, it was held that the keeping of a bucket-shop, being gambling, and, therefore, illegal, that the telegraph company was not bound to furnish market reports, even though it had contracted so to do, and that an injunction forbidding the removal of a ticker was improperly granted.[47] In an action, however, to restrain the removal of a ticker, the fact that the plaintiff has an action at law for damages is no defense thereto. If a right is clear, the fact that the company is able and willing to pay for the liberty of infringing upon it, is not a ground for refusing the injunction.[48]

§ 1025. **Code book — Infringement of copyright of — Injunction — English decision.—** The plaintiff published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmission of messages, and it was accompanied by figure ciphers for reference or private interpretation. The book was registered upder the Copyright Act, 5 and 6 Vict., chapter 45. The defendants bought a copy of the book, and compiled for their own use, with its aid, a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation. It was held that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted.[49]

§ 1026. **Injunction — Action by local authorities to restrain stringing wires across a street — English decision.—** The plain-

[46] Griffin & Co. v. Western Un. Teleg. Co. (Ohio C. P.), 9 Week. L. Bull. 22; Bradley v. Western Un. Teleg. Co. (Ohio C. P.), 9 Week. Cin. Law Bull. 223; Sterrett v. Philadelphia Local Teleg. Co. (Penn. C. P.), 18 Week. N. of Cas. 77, 2 Am. Elec. Cas. 376.

[47] Smith v. Western Un. Teleg. Co., 84 Ky. 664, 2 Am. Elec. Cas. 389, 2 S. W. 483.

[48] Smith v. Gold Stock Teleg. Co., 42 Hun (N. Y.), 454, 2 Am. Elec. Cas. 374.

[49] Ayer v. Peninsular & Oriental Steam Navigation Co., 26 Law Rep. Ch. Div. 637.

tiffs, a local authority in whom a street was vested, and under whose control and management it was placed by 18 and 19 Vict., chapter 120, section 96, sought for an injunction to restrain the defendants from carrying telephone wires diagonally across the street at the level of the chimneys, the owners of the houses not objecting, and the wires causing neither nuisance nor appreciable danger. It was held that the plaintiffs were not entitled to the injunction sought for; for they had, on the principle laid down in Coverdale v. Charlton,[50] only such a limited statutory property in the street, both with regard to depth below and height above the surface of the street, as was necessary for their control of, and for the safe and convenient uses of the street, and that as the wires caused neither nuisance nor appreciable danger, there had been no infringement of their rights.[51]

§ 1027. **Contract — Rental of telephone — Landlord and tenant — Injunction to restrain removal of — English decision.**— Under an agreement in 1889, the defendants, a telephone company, supplied to the plaintiff the use of a telephone wire and apparatus for three years, at a rent payable quarterly. Upon the expiration of the term, the parties continued the agreement, by mutual consent. On the 30th of December, 1893, being the last day of a quarter, the defendants gave the plaintiffs a notice determining the agreement forthwith, and stating their intention to disconnect the wire and remove the apparatus, and, at the same time, they demanded rent "up to the 31st of December," being one day beyond the quarter. This rent was duly paid to and accepted by the defendants. Upon a motion by the plaintiffs, for an injunction to restrain the defendants from interfering with the wire and apparatus, it was held that the agreement created the relation of landlord and tenant, and, therefore, that the acceptance, by the defendants, of rent for a day beyond that on which the notice determining the contract was given, operated as a waiver of the notice. Accord-

[50] 48 Law. Jour. Rep. Q. B. 128.

[51] Boards of Works for Wandsworth District v. United Teleph. Co., 53 Law Jour. Rep. Q. B. 449, L. R., 13 Q. B. D. 904.

ingly an injunction was granted, restraining the defendants from acting on their notice.[52]

§ 1028. **Cable address — Injunction to restrain use of — English decision.**— In a case which arose in England, an action was brought by a firm which had used a certain cable address for several years, to restrain a bank from using the same address for its despatches. It appeared that the short address "Street London," had been used for many years by Street & Company of Cornhill, as the cable address for their telegraphic despatches from abroad. This address was subsequently adopted by a bank, by arrangement with the post-office, as the cipher address for its despatches from abroad. It was held that the court had no jurisdiction to restrain the bank from using such cipher address.[53]

§ 1029. **Injunction — Electric street railway crossing steam railroad tracks.**— The intersection of railroad tracks, where the same cross a public highway, by electric street railway tracks, does not entitle the railroad company to an injunction, in the absence of some peculiar or special damage to its property.[54] And it is held that, in the absence of some such damage, equity will not enjoin an unauthorized obstruction in a public highway, at the instance of a private person, corporate or natural, but that in such cases an injunction will be granted only upon the application of the public authorities, the Attorney-General or a municipality having charge of the highways.[55] And where the State forbids such a crossing, the construction thereof may be restrained by an injunction.[56] So also a street railway com-

[52] Keith, Prouse & Co. v. National Teleph. Co., L. R., Ch. Div. (vol. 2 [1894]) 147.

[53] Street v. Union Bank of Spain & England, 30 Law. Rep. Ch. Div. 156.

[54] New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co., 70 Conn. 610, 40 Atl. 607, 41 Atl. 169; New York, N. H. & H. R. Co. v. Bridgeport Tract. Co., 65 Conn. 410, 5 Am. Elec. Cas. 246, 32 Atl. 953; Chicago & Calumet T. R. Co. v. Whiting, Hammond & E. C. S. R. Co., 139 Ind. 297, 5 Am. Elec. Cas. 236, 38 N. E. 604. See chap. XIX, herein.

[55] Morris & Essex R. Co. v. Newark Pass. R. Co., 51 N. J. Eq. 379, 5 Am. Elec. Cas. 229, 29 Atl. 184; West Jersey R. Co. v. Camden, Glouchester & W. R. Co., 52 N. J. Eq. 31, 5 Am. Elec. Cas. 137, 29 Atl. 423.

[56] Stewart v. Wisconsin Cent. Co., 89 Fed. 617.

pany may be restrained from constructing its tracks across steam railroad tracks at a place other than the crossing of a highway;[57] or from crossing such tracks on a highway at grade, where such crossing appears to be personally dangerous or to interfere with the railroad company's signal system.[58]

§ 1030. **Injunction — Action by electric lighting company to restrain construction of plant by municipality.**— Although a private electric lighting company, in reliance upon a contract with a municipality, has been to large expense in the construction and equipment of its plant, yet the city is not thereby estopped from entering the field as a competitor upon the expiration of such contract; and, although it may be true that, by the city's erection and maintenance of its own plant, the private lighting company will be practically driven out of the field, yet the court cannot interfere, by injunction, to restrain the city from erectng such plant.[59]

§ 1030a. **Injunction — Action to restrain interference by company alleging exclusive franchise to furnish light.**— The fact that a contract between a city and a gas and electric light company confers upon the latter the exclusive right to the use of the streets or the purpose of supplying "gas or other illuminating light" has been held not to confer an exclusive right to supply electricity where the company is only bound by the contract to furnish gas, to improve its gas plant, and to extend its mains and is not obligated by the contract to erect an electric light plant or to furnish electricity for lighting purposes. And where under such circumstances the city, has after due advertisement and the receipt of bids subsequently granted by ordinance the right to another company to use the streets to supply electric lights for the city and its inhabitants, injunction has been held to be the proper remedy to restrain the

[57] Trenton Cut Off R. Co. v. Newtown Elec. St. R. Co., 8 Penn. Dist. Rep. 549.

[58] Penn. R. Co. v. Braddock E. Ry. Co., 152 Pa. St. 116, 25 Atl. 780, 4 Am. Elec. Cas. 249.

[59] Thomson-Houston E. L. Co. v. City of Newton, 42 Fed. 723, 3 Am. Elec. Cas. 507.

earlier company from exercising its franchise to the detriment of the rights of the later company.[60]

§ 1031. **Contract — Specific performance — English decision.** — If sufficient appears upon the face of correspondence and telegrams taken together to constitute a binding contract, specific performance thereof may be decreed.[61]

§ 1032. **Contract — Specific performance — Mandamus — Injunction — Ontario decision.**— The plaintiffs wished to force the defendants to keep their cars running over the whole of their line of railway, during the whole of each year, in accordance with the terms of an agreement between them, set out in the schedule to 56 Vict., chapter 91(o). It was held (1) that the agreement was one of which the courts could not decree specific performance, because such a decree would necessarily direct and enforce the working of the defendant's railway under the agreement in question in all its minutiæ for all time to come. (2) Nor would it be expedient to grant a judgment of mandamus for the performance of a long series of continual acts, involving personal service, and extending over an indefinite period. (3) To grant an injunction restraining the defendants from ceasing to operate the part of their line in question would be to grant a judgment for specific performance in an indirect form.[62]

§ 1033. **Contract — Specific performance — Injunction continued.**— A court of equity will not, by injunction or otherwise, enforce the specific performance of a contract, between a railroad and telegraph company, so as to restrain one telegraph company from placing a telegraph wire on a line of poles on a railroad on the ground of interference with another telegraph

[60] People's Elec. Light & Power Co. v. Capital Gas & Elec. L. Co., 116 Ky. 76, 75 S. W. 280, 8 Am. Elec. Cas. 71.

[61] Coupland v. Arrowsmith, 18 Law Times (N. S.), 755, Allen's Teleg. Cas. 412.

[62] City of Kingston v. Kingston, Portsmouth & Cataraqui Elec. Ry. Co., 28 Ont. Rep. 399; Bickford v. Town of Chatham, 16 Sup. Ct. (Can.) 285; followed, Fortesque v. Lostwethiel & F. R. W. Co. (1894), 3 Ch. 621, not followed.

company.[63] Again, a contract at the time of filing the bill had an unexpired term of five years, imposing on the complainant the rendition of continuous mechanical services, demanding the highest degree of skill, and necessitating the expenditure of considerable sums of money on the defendant, imposing the duty of maintaining costly machinery, keeping it in repair, and the daily use of cars moved by electricity on the line of its railway. It was held that a court of equity would not enjoin threatened breaches of the contract, or decree its specific performance, nor in such case, if there was an adequate remedy at law, would the injunction or decree for specific performance be decreed.[64] Nor will a contract be specifically enforced, even though parts of the consideration are lawful, where it is void as having been made by a street railway, in consideration in part of the other parties signing a petition for the grant of a right to construct and operate said railway in front of their premises.[65]

§ 1034. **Mandamus — Generally.**— Mandamus lies to compel the Secretary of State to file an amended certificate of a gas company, whereby it proposes to extend its operations to the production of electric light, heat and power.[66] It also lies to compel such a secretary to file and record articles of incorporation, showing compliance with the laws, upon a tender of the proper fees, and even though his discretion may be exercised as to matters of form, yet it does not extend to a question of merits in an application of this character.[67] Again, mandamus is a proper proceeding to compel obedience to a city's orders, made in the legal exercise of its police powers, as in case it is sought to compel the removal of poles in the course of street improvements.[68] But it does not lie to compel a board

[63] Railroad Co. v. Teleg. Co., 38 Ohio St. 24, 1 Am. Elec. Cas. 395, 401, 402.

[64] Elec. Lighting Co. v. Mobile & Spring Hill Ry. Co., 109 Ala. 190, 19 So. 721.

[65] Brieske v. North Chicago St. R. Co., 82 Ill. App. 256.

[66] People, Municipal Gas Co. v. Rice, 138 N. Y. 151, 33 N. E. 846, 51 N. Y. St. R. 853.

[67] State, Steubenville Gas & Elec. Co. v. Taylor, 55 Ohio St. 61, 35 Ohio L. Jour. 384, 44 N. E. 513, 4 Am. & Eng. Corp. Cas. (N. S.) 470.

[68] Monongahela City v. Monongahela Elec. L. Co. (Penn. C. P.), 12

of aldermen to designate locations for electric light fixtures in streets where such board has in such matters discretionary powers under the statute.[69] Nor is it the proper remedy to compel the issuance of warrants to pay for lighting a city's streets, since an action at law should be brought to recover the same, when the city claims an offset or counterclaim for breach of contract.[70] Nor is a prerogative writ of mandamus obtainable by action, but by motion.[71] Nor will mandamus be sustained against a street commissioner of the city of St. Louis, to compel him to issue a permit to excavate the city streets for a subway, where the relator corporation has no vested right so to place its wires.[72] But in another case where a franchise was granted to a telephone company to extend its lines upon condition that the location of the poles should be designated by the commissioner of public works, it was decided that though the commissioner refused and his refusal was purely arbitrary and unjustified, the company was not justified in taking matters into its own hands, even though conforming to the recognized method of erecting such poles but that the legal course was open to the appellant to compel the commissioner's action and that mandamus would lie to compel the commissioner to act.[73]

§ 1035. **Mandamus — Discrimination — Telegraph company.**[74]— Mandamus does not lie to compel a telegraph company to permit a telephone to be placed in its office for receiving and transmitting messages, as the former company cannot be compelled to receive oral messages, even though it has waived its rights in this respect, and has permitted another telephone company to place its instrument in said office.[75] It is held

Penn. Co. Ct. Rep. 529, 4 Am. Elec. Cas. 53.

[69] Suburban Light & P. Co. v. Board of Aldermen, of Boston, 153 Mass. 200, 3 Am. Elec. Cas. 80, 81, 26 N. E. 447.

[70] Kensington Elec. Co. v. Philadelphia, 187 Pa. St. 446, 43 Week. N. of Cas. 186, 41 Atl. 509.

[71] So held in Kingston v. Kinston P. & C. Elec. R. Co., 28 Ont. Rep. 399.

[72] State, Laclede Gas L. Co. v. Murphy, 130 Mo. 10, 31 S. W. 594, 5 Am. Elec. Cas. 71, appealed to 170 U. S. 78, 18 Sup. Ct. 505. See State Nat. Subway Co. v. St. Louis, 145 Mo. 551, 46 S. W. 981, 42 L. R. A. 113.

[73] City of St. Paul v. Freedy, 86 Minn. 350, 90 N. W. 781, 8 Am. Elec. Cas. 29.

[74] See § 1024, herein.

[75] People, Cairo Teleph. Co. v.

in a New York Supreme Court decision that the New York Stock Exchange is not bound to furnish information concerning its business to any person or persons, except those whom it chooses to designate. This case was as follows: The New York Laws[76] prohibited disclosing or divulging the contents of any telegram to any person other than the one to whom it was directed, making a violation of the act a misdemeanor. Another statute, however, requires telegraph companies to receive and transmit despatches with impartiality and good faith from other telegraph lines, associations and individuals, the usual charges being paid.[77] A telegraph company had contracted with the above mentioned exchange, a voluntary association, to transmit market quotations to such persons only as it might designate, and to refuse information to those whom it should designate, the telegraph company paying the exchange for the news and charging the person so furnished therefor. It was also held that said telegraph company could not be compelled to furnish such news to one whom the exchange had ordered should be refused further service, even though the telegraph company had served him in that capacity prior to the contract, and had been paid in advance therefor, and payment had been tendered in advance for further service.[78] But it is decided in another case that a stock telegraph company, one of whose corporate purposes is to furnish market quotations, may be compelled by mandamus to replace a "ticker" removed from a customer's office and furnish service therefor.[79]

§ 1036. **Mandamus — Discrimination — Telephone company.** — Mandamus lies to compel a telephone company to place a telephone in a telegraph company's office, within the territory of the former, notwithstanding a contract with, or license from, the parent company owning the patent, which forbids the licensee to furnish telephonic facilities to any telegraph companies, except those designated by the licensor. This rule is

Western Un. Teleg. Co., 166 Ill. 15, 46 N. E. 731, 36 L. R. A. 637.

[76] 1850, c. 340.

[77] N. Y. Laws of 1848, c. 265, amd. by Laws of 1855, c. 569, and Laws of 1890, c. 566, § 103.

[78] In re Renville, 46 App. Div. (N. Y.) 37, 61 N. Y. Supp. 549.

[79] Davis v. Elec. Rep. Co. (C. P., Penn., 1887), 19 Week. N. of Cas. 567, 2 Am. Elec. Cas. 375. See § 1024, herein.

well settled.[80] And mandamus also lies to compel a telephone company to furnish telephonic facilities within its territory, where it refuses so to do, for other than the reasons above stated, as such companies cannot discriminate,[81] especially so where the persons desiring service are willing to abide by the company's reasonable regulations.[82] And it also lies to compel the restoration of a telephone and the giving of service to a customer.[83] And the right to telephone services, at the rates fixed by law, may be enforced by mandamus.[84] Nor is such remedy taken away by the fact that a penalty is provided for

[80] *United States*: State, Postal Teleg. Cable Co. v. Delaware & Atl. Teleg. & Teleph. Co., 47 Fed. 632, 3 Am. Elec. Cas. 533, 534, 545, affd., 50 Fed. 677; State, Baltimore & Ohio Teleg. Co. v. Bell Teleph. Co. (U. S. C. C., E. D. Mo., 1885), 23 Fed. 539, court equally divided, however. *Indiana*: State, Amer. Un. Teleg. Co. v. Bell Teleph. Co., 36 Ohio St. 296, 1 Am. Elec. Cas. 299, 303; S. C. (St. Louis Cir. Ct.), 22 Alb. L. Jour. 363, 24 Alb. L. Jour. 283, 1 Am. Elec. Cas. 304; Central Un. Teleph. Co. v. State, Hopper, 123 Ind. 113, 3 Am. Elec. Cas. 531, 533, 24 N. E. 215, S. C. 124 Ind. 600, 24 N. E. 1091; Central Un. Tel. Co. v. State, ex rel Falley, 118 Ind. 194, 19 N. E. 604. *Maryland*: Chesapeake & Pot. Teleph. Co. v. Baltimore & Ohio Teleg. Co. 66 Md. 399, 7 Atl. 809, 2 Am. Elec. Cas. 426. *New York*: People, Postal Teleg. Cable Co. v. Hudson River Teleph. Co., 19 Abb. N. C. (N. Y.) 466, 10 N. Y. St. R. 282, 2 Am. Elec. Cas. 394. *Vermont*: Commercial Un. Teleg Co. v. New Eng. Teleph. & Teleg. Co., 61 Vt. 241, 2 Am. Elec. Cas. 426, 17 Atl. 1071, 15 Am. St. Rep. 893.

[81] Chesapeake & Pot. Teleph. Co. v. Baltimore & Ohio Teleg. Co., 66 Md. 399, 2 Am. Elec. Cas. 426, 7 Atl. 809.

[82] State, Webster v. Nebraska Teleph. Co., 17 Neb. 126, 1 Am. Elec. Cas. 700, 52 Am. Rep. 104, 8 Am. & Eng. Corp. Cas. 1, 44, 22 N. W. 237.

"A mandamus lies to compel a telephone company to place telephones and furnish telephonic facilities without discrimination for those who will pay for the same and abide the reasonable regulations of the company. This is well settled." Godwin v. Carolina Teleph. & Teleg. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, per Clark, J., citing Joyce on Electric Law, § 1036.

[83] State ex rel. Payne v. Kimloch, 93 Mo. App. 349, 67 S. W. 684.

A breach by the customer of a previous contract under which he agreed to use the service of the respondent exclusively will not of itself defeat a proceeding to compel the telephone company to furnish the petitioner with telephone facilities, as in such a case it is decided that the remedy of the company is in an action for the breach of the contract. State v. Citizens' Teleph. Co., 61 S. C. 83, 39 S. E. 257.

[84] Central Un. Teleg. Co. v. Bradbury, 106 Ind. 1, 2 Am. Elec. Cas.

noncompliance with a statute compelling service without discrimination.[85] But a telephone company will not be compelled to instal an instrument in a rival company's office, under a statute requiring such corporations to transmit the messages of other companies, since the remedy by way of penalty, provided by the statute, affords an adequate remedy at law and is exclusive.[86]

§ 1036a. **Mandamus — Discrimination — Telephone company — House used for unlawful purpose.**— Mandamus will not issue to compel the placing of a telephone in a house which is used for an unlawful purpose. Thus it was so held where an application was made for mandamus to compel the defendant to put a telephone with necessary fixtures and appliances in the dwelling house of the plaintiff who was admitted to be a prostitute and keeper of that house as a bawdy house. And in this case it was said: "But while it is true there can be no discrimination where the business is lawful, no one can be compelled, or is justified, to aid in unlawful undertakings. * * * A mandamus will never issue to compel a respondent to aid in acts which are unlawful. * * * It is argued that a common carrier would not be authorized to refuse to convey the plaintiff because she keeps a bawdy house. Nor is the defendant refusing her a telephone on that ground, but because she wishes to place the telephone in a bawdy house. A common carrier could not be compelled to haul a car used for such pur-

14, 5 N. E. 721. See Mahan v. Michigan Teleph. Co., 132 Mich. 242, 93 N. W. 629, 8 Am. Elec. Cas. 38.

A public service corporation such as a telephone company must perform its service as required by the municipal regulations under which the corporation is granted its privileges and cannot escape by a violation of such regulations under the guise of a contract that is in part illegal in that it charges a rate in excess of that which it is authorized to charge by those regulations. Chicago Telephone Co. v. Illinois Manufacturers' Ass'n, 106 Ill. App. 54.

[85] Central Un. Teleph. Co. v. State, ex rel. Falley, 118 Ind. 144, 194, 206, 19 N. E. 604, 2 Am. Elec. Cas. 27.

[86] People, ex rel. Oneida Teleph. Co. v. Central N. Y. Teleph. & Teleg. Co., 41 App. Div. (N. Y.) 17, 58 N. Y. Supp. 221. See also Re Baldwinsville Teleph. Co., 24 Misc. (N. Y.) 221, 53 N. Y. Supp. 574, 31 Chic. L. News, 51. Examine generally notes 38 Am. St. Rep. 587, 589, 44 Am. Rep. 241–243.

pose. If the plaintiff wished to have the phone placed in some other house used by her, or even in a house where she resided but not kept as a bawdy house, she would not be debarred because she kept another house for such unlawful and disreputable purpose. It is not her character but the character of the business at the house where it is sought to have the telephone placed which required the court to refuse the mandamus. In like manner, if a common carrier knew that passage was sought by persons who are traveling for the execution of an indictable offense, or a telegraph company that a message was tendered for a like purpose, both would be justified in refusing, and certainly when the plaintiff admits that she is carrying on a criminal business in the house where she seeks to have the telephone placed, the court will not by its mandamus require that facilities of a public nature be furnished to a house used for that business." [87]

§ 1036b. **Mandamus — Discrimination — Electric light company.**— A company organized to furnish electric light to consumers conducts a business which is affected with a public interest and while it is not obligated to furnish service to all of its patrons upon an absolute equality, in the absence of any statutory enactment to that effect, yet it should not unjustly discriminate between customers and is under the obligation to furnish light at a reasonable rate and without unjust discrimination. So where it appeared that such a company furnished transformers free to all of its patrons it was held that a refusal to furnish light to a certain person unless he would pay the cost of a transformer was unjust discrimination and that mandamus would issue to compel the furnishing by the company of electricity for lighting purposes. And it was also decided that the rights of the parties were not affected by the fact that the company wired the houses of its other patrons on which work it made a large profit, while the house of the proposed patron was wired by other parties.[88]

[87] Godwin v. Carolina Teleph. & Teleg. Co., 136 N. C. 258, 48 S. E. 636, 67 L. R. A. 251, per Clark, J.

[88] Snell v. Clinton Elec. Light Co., 196 Ill. 626, 63 N. E. 1082, rev'g 95 Ill. App. 552.

§ 1037. **Mandamus — Street railways.**— Mandamus is the proper remedy to compel a street railway company to perform its duty to maintain and operate its road in conformity with the provisions of its grant.[89] But it will not be granted to compel such company to keep its cars running over the whole of each line during the entire year.[90] Again, mandamus is not justified in behalf of a street railway, where an appeal is pending, and questions important to the public and the parties are presented thereby, and said railway is protected by a sufficient undertaking given by the appellants, and the necessity for exercising the claimed right before determination of the appeal is not apparent. This was held in a case where a street passenger railway sought to condemn a way for a trolley line across a railroad's right of way, and to compel the joint construction of the crossing. An appeal had been taken to the Supreme Court, by the railroad company, from a judgment of the Circuit Court, dismissing an appeal, through which court the proceedings had been carried and the amount awarded deposited. On the last appeal the railroad contested the validity of the proceedings, but claimed that if they could be held valid then they were merely an attempt of one railroad to condemn the lands of another; that the right to cross a steam railway, at grade, should be finally settled before a crossing should be forced; and that the question of a necessity for taking the land was open to a retrial in the Circuit Court, under the statute. The Circuit Court had refused to dissolve an injunction restraining the building of the crossing by the street railway pending said appeal. But the railway insisted upon an absolute right to a writ of assistance, and that the court's refusal to issue the same, pending the appeal, was a refusal to perform a clear duty, for which mandamus ought to lie. Said railway also asserted that the proceeding was really one to force a crossing, to which the right was absolute. It did not appear, however, that there was a necessity for putting in said crossing

[89] City of Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; State, Bridgeton v. Bridgeton & M. Tract. Co., 62 N. J. L. 592, 43 Atl. 715.

[90] Kingston v. Kingston P. & C. Elec. R. Co., 28 Ont. Rep. 399. See § 1032, herein.

before the litigation and the right to the crossing were finally determined.[91]

§ 1037a. **Excuses — Atmospheric, etc., disturbances.**— Atmospheric or electrical disturbances causing delay in the transmission of a message, or preventing its being accurately transmitted constitutes a valid defense for such delay or error on the part of the telegraph company. And if from any uncontrollable cause, not to be provided against by reasonable foresight or the use of approved scientific appliances, or by the exercise of that degree of care, skill and diligence which the law exacts, delay or error is occasioned, then the company may avail itself of such facts in avoidance of liability for claimed acts of negligence in transmission of telegrams.[92]

[91] State ex rel. Oskosh, A. & B. W. R. Co. v. Burnell, 104 Wis. 246, 80 N. W. 460; Wis. Rev. Stat., § 1854; Rev. Stat., § 1850, and § 1828, subd. 6.

[92] Brown v. Postal Teleg. Co., 111 N. C. 187, 16 S. E. 179, per MacRae, J.; Western Un. Teleg. Co. v. Davis, 95 Ga. 522, 22 S. E. 642; Kirby v. Western Un. Teleg. Co., 4 So. Dak. 105, 55 N. W. 759, Leonard v. New York, Alb. & B. E. M. Teleg. Co., 41 N. Y. 544; Allen's Teleg. Cas. 500, 510, 511, per Woodruff, J.; Western Un. Teleg. Co. v. Cohen, 73 Ga. 522; Bierhaus v. Western Un. Teleg. Co., 8 Ind. App. 246, 34 N. E. 581; Redington v. Pacific Postal Teleg. Cable Co., 107 Cal. 317, 40 Pac. 432, 5 Am. Elec. Cas. 693; Pacific Postal Teleg. Co. v. Fleischner, 66 Fed. 899, 14 C. C. A. 166, 5 Am. Elec. Cas. 840, 843.

CHAPTER XXXVII.

EVIDENCE.

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§ 1038. **Telegraphic message — What is original.** — The question whether the message presented to a telegraph company for transmission and delivery, or the message as delivered to the addressee, is to be considered as the original for the purposes of evidence, as between sender and addressee, must, we believe, be determined upon the question of agency, that is, whether the telegraph company is to be considered as the agent of the sender or addressee in the particular case. If the addressee has made the telegraph company his agent and assumed the risk of transmission, then the original will be the message delivered to the telegraph company for transmission. If, however, the sender has made it his agent, then as between the sender and addressee, the written message, which is delivered to the receiver, must be considered the original and primary evidence.[1] Where, however, one of the parties to an action seeks to introduce a message, sent by the other to a third person, the message delivered to the operator will be considered as the original.[2] And in an action for failure to promptly deliver a message it has been decided in a recent case in Alabama that, though the plaintiff did not produce or account for the absence of the written message lodged with the defendant's

[1] Anhauser-Busch Brewing Co. v. Hutmacher, 127 Ill. 652, 21 N. E. 626, 2 Am. Elec. Cas. 881; Hawley v. Whipple, 48 N. H. 487; Durkee v. Vermont Central R. Co., 29 Vt. 127, Allen's Teleg. Cas. 59; Saveland v. Green, 40 Wis. 431; Allen's Teleg. Cas. 457. See Whilden v. Merchants & Planters' Nat. Bank, 64 Ala. 1. But see §§ 903–907, herein, upon the point whether operator is agent of sender.

[2] Mattison v. Noyes, 25 Ill. 591, Allen's Teleg. Cas. 169, 170.

agent for transmission nor give notice to the defendant to pro duce that message, to refuse to admit the message actually received into evidence was error, where there was no claim that any mistake had intervened in the transmission of the message, nor that the message delivered was not the very message received by the defendant from the sender. The court said: "Under these circumstances the presumption is that the message delivered is a correct reproduction of that received and it was admissible in support of the complaint." [3]

[3] Collins v. Western Un. Teleg. Co. (Ala., 1906), 41 So. 160, per Weakley, J. The court further said in this case: "We do not find that the cases relied on by appellee to support the ruling of the city court conflict with what we now hold. American Un. Teleg. Co. v. Daughtery, 89 Ala. 191, 7 So. 660 (S. C. sub. nom. Daughtery v. Teleg. Co., 75 Ala. 168, 51 Am. Rep. 435), was a suit for the non-delivery of a message, and there the whole effort was to introduce secondary evidence of the message lodged with the defendant at the point whence it was to be transmitted. The exact and only point there decided, so far as it is necessary for us now to inquire, was that incompetent evidence had been admitted to prove the destruction of the message delivered to the company for transmission. In Whilden v. National Bank, 64 Ala. 1, 38 Am. Rep. 1, it was said: 'There is some difficulty determining whether the message delivered to a telegraphic office, or that which is delivered to the person to whom it may be addressed at the point of destination, is to be regarded as the original. Perhaps, under some circumstances the one or the other may be considered the original. It is not now necessary to enter on that inquiry.' And the court proceeds to hold that the message received by the sendee was admissible upon two distinct grounds; First, because the message as written by the sender was without the jurisdiction of the court; and second, because the appellants had voluntarily admitted to the witness the genuineness of the dispatch offered in evidence. So far from there being any holding that the message delivered to the sendee was secondary, not the original, there is obviously in the opinion a studied and cautious purpose to avoid such a holding. The case, however, supports rather than conflicts with the view we have taken. The delivery of the message to the plaintiff was the equivalent of an assertion by the defendant that it was the message it had received for transmission, and was equivalent of an admission of its genuineness and correctness. If there were any valid terms or conditions upon the form employed by the sender which the message as prepared at Albertville would have disclosed, and which would have defeated the action, they could and should have been brought forward by plea. No such plea was interposed," per Weakley, J.

§ 1039. **Parol evidence — Contents of telegraphic despatch — When admissible.**— The rule that a party to an action can only introduce the best evidence which it is in his power to produce, applies in cases of proof of the contents of a telegraphic despatch. In such cases the original message, whether it be the message delivered to the company for transmission or that received by the addressee, must be produced as being the best evidence, and secondary or parol evidence of its contents will not be received by the court until a failure to produce such original has been accounted for. Unless it appears that the original cannot be obtained or produced, parol evidence of its contents will not be received, but where such facts are shown it may be admitted.[4] Where a message is without the jurisdiction of the court, and it appears that an effort has been made to obtain it, parol evidence thereof is admissible.[5] And if a message is in the possession of the adverse party, notice to produce is a condition precedent to the introduction of parol evidence of its contents.[6] So where the plaintiffs offered in evidence a copy of the telegram sent by them to the defendants who were in court and upon whom no demand was made for the production of the telegram it was held that an objection to its admission on the ground that it was secondary evidence was properly sustained.[7] Where it is shown that a telegraph com-

[4] *Alabama*: Western Un. Teleg. Co. v. Way, 80 Ala. 542, 2 Am. Elec. Cas. 455, 4 So. 844; McCormick v. Joseph, 83 Ala. 401, 3 So. 796, 2 Am. Elec. Cas. 881. *California*: Eppinger v. Scott, 112 Cal. 373, 42 Pac. 301. *Connecticut*: Lewis v. Havens, 40 Conn. 363. *Illinois*: Mattison v. Noyes, 25 Ill. 591, Allen's Teleg. Cas. 169. *Indiana*: Western Un. Teleg. Co. v. Hopkins, 49 Ind. 223, 1 Am. Elec. Cas. 135. *Maryland*: Smith v. Easton, 54 Md. 138. *Minnesota*: Magie v. Herman, 50 Minn. 424, 52 N. W. 909, 36 Am. St. Rep. 660. *New Hampshire*: Hawley v. Whipple, 48 N. H. 487, Allen's Teleg. Cas. 457. *New York*: Dunning v. Roberts, 35 Barb. (N. Y.) 463, Allen's Teleg. Cas. 188; Thorpe v. Philbin, 15 Daly (N. Y.), 155. *Texas*: Reliance Lumber Co. v. Western Un. Teleg. Co., 58 Tex. 394, 1 Am. Elec. Cas. 466, 469; Chester v. State (Tex. Civ. App., 1887), 2 Am. Elec. Cas. 882, 5 S. W. 125. *Vermont*: Durkee v. Vermont Cent. R. Co., 29 Vt. 127, Allen's Teleg. Cas. 59.

[5] People v. Seaman, 107 Mich. 348, 65 N. W. 203, 2 Det. L. News, 671.

[6] Brown v. St. Louis & S. F. R. Co., 69 Mo. App. 418; Cairo & St. Louis R. Co. v. Mahoney, 82 Ill. 73.

[7] Brownlee v. Reiner (Cal. Sup., 1905), 82 Pac. 324.

pany customarily destroys original messages after a certain period of time, and that prior to the commencement of such period the message in question was delivered to the company for transmission, and cannot be found, there is sufficient foundation for the introduction of secondary evidence.[8]

§ 1040. **Telegraph company may be compelled to produce messages — Subpoena duces tecum.**— Telegraph messages are not privileged communications, and telegraph companies, when called upon by courts of justice to produce them, must do so,[9] and they may be compelled to do so by subpœna duces tecum.[10] The subpœna should describe and designate what is desired, with such certainty, as to inform the operator what he

[8] Flint v. Kennedy, 33 Fed. 820, 2 Am. Elec. Cas. 881; American Un. Teleg. Co. v. Daughtery, 75 Ala. 168, 3 Am. Elec. Cas. 579; Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107, 2 Am. Elec. Cas. 881; Western Un. Teleg. Co. v. Collins, 45 Kan. 88, 3 Am. Elec. Cas. 664, 25 Pac. 187; Western Un. Teleg. Co. v. Collins, 7 Kan. App. 97, 53 Pac. 74; Barons v. Brown, 25 Kan. 410.

[9] *United States*: United States v. Babcock, 3 Dill. (U. S. C. C., 1876) 566; United States v. Hunter, 15 Fed. 712. *California*: Ex parte Jaynes, 70 Cal. 638, 2 Am. Elec. Cas. 454, 12 Pac. 117. *Iowa*: Woods v. Miller, 55 Iowa, 168, 1 Am. Elec. Cas. 324. *Maine*: State v. Litchfield, 58 Me. 267, Allen's Teleg. Cas. 494. *Missouri*: Ex parte Brown, 72 Mo. 83, 32 Am. Rep. 426, 1 Am. Elec. Cas. 316. *Pennsylvania*: Heinsler v. Freedman (Ct. Com. Pl., Phila., 1851), 2 Parsons' Select Cas. 274, Allen's Teleg. Cas. 1. *West Virginia*: First Nat. Bank v. Merchants' Nat. Bank, 7 W. Va. 544, 1 Am. Elec. Cas. 109. *England*: Ince's Case, 20 Law Times (N. S.), 421, Allen's Teleg. Cas. 497; Tomline v. Tyler, 44 Law Times (1881), 187. *Canada*: Re Dwight, 15 Ont. Rep. 148.

Judge Cooley, in his work on Constitutional Limitations (6th ed.), p. 371, note, criticises and attacks the principle supported by the foregoing cases. He says: "We should suppose, were it not for the opinions to the contrary by tribunals so eminent, that the public could not be entitled to a man's private correspondence, whether obtainable by seizing it in the mails or by compelling the operator of the telegraph to testify to it, or by requiring his servants to take from his desk his private letters and journals and bring them into court on subpœna duces tecum. Any such compulsory process to obtain it seems a most arbitrary and unjustifiable seizure of private papers; such an 'unreasonable seizure' as is directly condemned by the Constitution."

[10] Woods v. Miller, 55 Iowa, 168, 1 Am. Elec. Cas. 324, 7 N. W. 484; Tomline v. Tyler, 44 Law Times, 187 (1881).

is required to produce;[11] and so far as possible, it should identify the particular message or messages required.[12] And an officer or agent of a telegraph company is punishable for contempt in refusing to produce, on proper process, a message in the possession of the company.[13] So, where an agent, after a subpœna was served upon him to produce certain messages, destroyed them upon the order of the manager, it was held that the manager was in contempt, but the operator was discharged, on the ground of the blame resting on his superior officer.[14] But where the subpœna directed an employee of the telegraph company to produce all messages from a number of persons to many other persons between certain specified dates, it was held that the employee was not in contempt for refusing to obey such subpœna.[15] And the fact that the rules of the company forbid an employee from delivering telegrams or copies affords no legal excuse for his refusal to obey a subpœna.[16]

§ 1041. **Statute forbidding disclosure of contents of message — Does not apply to their production in evidence.** — A statute forbidding telegraph companies to disclose the contents of any message, except to the person to whom it is addressed, does not prohibit the production and introduction of messages as evidence, under an order of the court for that purpose.[17]

§ 1042. **Telegraphic messages in criminal cases — Fraud.** — On the trial of an indictment a telegraph operator may be required to testify to the contents of a message, addressed or delivered to the accused.[18] And a despatch, written or signed by a person, is competent in evidence against him as an ad-

[11] United States v. Babcock, 3 Dill. (U. S. C. C., 1876) 566.

[12] Ex parte Jaynes, 70 Cal. 638, 2 Am. Elec. Cas. 454, 12 Pac. 117.

[13] Ex parte Brown, 72 Mo. 83, 37 Am. Rep. 426, 1 Am. Elec. Cas. 316.

[14] Re Dwight, 15 Ont. Rep. 148.

[15] Ex parte Jaynes, 70 Cal. 638, 12 Pac. 117, 2 Am. Elec. Cas. 454; Ex parte Brown, 72 Mo. 83, 32 Am. Rep. 426, 1 Am. Elec. Cas. 316.

[16] Ex parte Brown, 72 Mo. 83, 32 Am. Rep. 426, 1 Am. Elec. Cas. 316. See State v. Sawtelle, 66 N. H. 488, 32 Atl. 831.

[17] Woods v. Miller, 55 Iowa, 168, 7 N. W. 484, 1 Am. Elec. Cas. 324; Re Dwight, 15 Ont. Rep. 148; Heinsler v. Freedman (Ct. Com. Pl., Phila., 1851), 2 Parsons' Select Cas. 274, Allen's Teleg. Cas. 1.

[18] State v. Litchfield, 58 Me. 267, Allen's Teleg. Cas. 494.

mission.[19] So, upon a trial for larceny of a horse, a message sent by the defendant, soon after he left the place of the larceny, in which he offered horses for sale, is admissible as showing a desire to dispose of the stolen property.[20] And messages as to stopping railroad trains, if identified and brought home to the defendants, are admissible in evidence, on a prosecution for conspiracy to obstruct the mails.[21] And again a message which threatened legal proceedings unless a note was paid at once was held admissible to show that a sale of chattels was made for the purpose of defrauding creditors, where the debtor, immediately upon receipt of such message, sold such property and secretly and hastily, with his own men, removed the same.[22]

§ 1043. **Proof in actions to recover statutory penalty.**— In an action to recover the statutory penalty imposed for negligence in the transmission or delivery of telegraphic messages, the plaintiff must show that the defendant is engaged in the business of telegraphing for the public, since this is a prerequisite to recovery.[23] It is also incumbent upon the plaintiff to establish a negligent omission of duty,[24] but he is not required to prove want of partiality and good faith,[25] or that he has suffered any damage.[26] In an action to recover the statutory penalty, the message delivered from the terminal office may be introduced in evidence, without producing that presented for transmission or proving its loss.[27]

[19] Commonwealth v. Jeffries, 7 Allen (Mass.), 548, Allen's Teleg. Cas. 226; Commonwealth v. Gentry (O. & T.), 5 Penn. Dist. Rep. 703; United States v. Hunter, 15 Fed. 712, 1 Am. Elec. Cas. 444.

[20] State of Nevada v. Espinoze, 20 Nev. 209, 19 Pac. 677, 2 Am. Elec. Cas. 881.

[21] Clune v. United States, 159 U. S. 590, 4 L. Ed. 269, 16 Sup. Ct. 125.

[22] Eppinger v. Scott, 112 Cal. 369, 44 Pac. 723, affg. in banc. 112 Cal. 373, 42 Pac. 301.

[23] Western Un. Teleg. Co. v. Trissal, 98 Ind. 566, 1 Am. Elec. Cas. 682.

[24] Western Un. Teleg. Co. v. McDaniel, 103 Ind. 294, 1 Am. Elec. Cas. 795, 2 N. E. 709.

[25] Burnett v. Western Un. Teleg. Co., 39 Mo. App. 599, 3 Am. Elec. Cas. 687; Western Un. Teleg. Co. v. Ward, 23 Ind. 377, Allen's Teleg. Cas. 250.

[26] Western Un. Teleg. Co. v. Buchanan, 35 Ind. 429, 1 Am. Elec. Cas. 13.

[27] Western Un. Teleg. Co. v. Bates, 93 Ga. 352, 20 S. E. 639, 4 Am. Elec. Cas. 707.

§ 1043a. **Action to recover license tax from telephone company — Burden of proof as to exemption.**— Where it is provided by statute or code that each party must prove his own affirmative allegations and that evidence need not be given in support of a negative allegation, except when such negative allegation is an essential part of the statement of the right or title on which the cause of action is founded,[28] it is decided that, in an action brought to recover a license tax for conducting the business of a telephone company, if the defendant seeks to avoid payment of part of the amount claimed on the ground that certain of its instruments are exempt from the operation of the law by reason of the fact that they are used in interstate commerce, the burden rests upon it to establish the fact of such exemption.[29]

§ 1044. **Notice of importance of message — Evidence showing.**— In an action to recover damages for error in the transmission of a message or failure to deliver the same, extrinsic evidence is admissible to show that the telegraph company had notice of the importance of the message.[30]

§ 1045. **Receipt of despatch — Presumption as to — Evidence of.**— As in the case of letters deposited in a post-office and duly directed, a presumption arises that they reached their destination, and were received by the persons to whom they were addressed, so in the case of messages given to a telegraph company for transmission and delivery, a similar presumption arises as to their receipt by the addressee.[31] A message or letter, which answers questions asked the sender by a previous despatch addressed to him, is sufficient evidence of his receipt of such previous telegram, for the purpose of its admission in evidence against him.[32]

[28] See Mont. Code of Civ. Proc. § 3145.

[29] State v. Rocky Mountain Bell Teleph. Co., 27 Mont. 394, 71 Pac. 311.

[30] McPeek v. Western Un. Teleg. Co, 107 Iowa, 356, 78 N. W. 63, 5 Am. Neg. Rep. 319.

[31] Oregon Steamship Co. v. Otis, 100 N. Y. 446, 3 N. E. 485; Commonwealth v. Jeffries, 7 Allen (Mass.), 548, Allen's Teleg. Cas. 226.

[32] State v. Sawtell, 66 N. H. 488, 32 Atl. 831.

§ 1046. **Error in transmission — Failure to deliver — Burden of proof.—** While a telegraph company is not an insurer in all cases of the accurate transmission and prompt delivery of messages, yet, as a general rule, if a message is erroneously transmitted or the delivery thereof is unreasonably delayed, such fact or facts will establish prima facie a case of negligence on the part of the company, and casts upon it the burden of excusing itself, and of showing that the error was caused by some agency, for which it is not liable.[33] So a charge to the jury

[33] *United States*: Western Un. Teleg. Co. v. Cook, 61 Fed. 624, 9 C. C. A., 680, 5 Am. Elec. Cas. 799. *Arkansas*: Western Un. Teleg. Co. v. Short, 53 Ark. 434, 14 S. W. 649, 3 Am. Elec. Cas. 592; Little Rock & Fort Smith Teleg. Co. v. Davis, 41 Ark. 79, 1 Am. Elec. Cas. 526. *Georgia*: Western Un. Teleg. Co. v. Blanchard, 68 Ga. 299, 1 Am. Elec. Cas. 404. *Illinois*: Western Un. Teleg. Co. v. Du Bois, 128 Ill. 248, 21 N. E. 4, 2 Am. Elec. Cas. 502; Western Un. Teleg. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Western Un. Teleg. Co. v. Harris, 19 Ill. App. 347, 1 Am. Elec. Cas. 839; Pope v. Western Un. Teleg. Co., 9 Ill. App. 283, 1 Am. Elec. Cas. 367. *Indiana*: Western Un. Teleg. Co. v. Scircle, 103 Ind. 227, 3 N. E. 604, 1 Am. Elec. Cas. 787; Western Un. Teleg. Co. v. Meek, 49 Ind. 53, 1 Am. Elec. Cas. 138; Julian v. Western Un. Teleg. Co., 98 Ind. 327, 1 Am. Elec. Cas. 678. *Iowa*: Turner v Hawkeye Teleg. Co., 41 Iowa, 458, 1 Am. Elec. Cas. 208, 20 Am. Rep. 605. See Acts of Iowa, 1896, c. 108. *Kansas*: Western Un. Teleg. Co. v. Crall, 38 Kan. 679, 17 Pac. 309, 2 Am. Elec. Cas. 575. *Kentucky*: Western Un. Teleg. Co. v. Parsons, 24 Ky. Law Rep. 2008, 72 S. W. 800. *Maine*: Fowler v. Western Un. Teleg Co., 80 Me. 381, 15 Atl. 29, 2 Am. Elec. Cas. 607; Ayer v. Western Un. Teleg. Co., 79 Me. 493, 10 Atl. 495, 2 Am. Elec. Cas. 601; Bartlett v. Western Un. Teleg. Co., 62 Me. 209, 16 Am. Rep. 437, 1 Am. Elec. Cas. 45. *Michigan*: Western Un. Teleg. Co. v. Carew, 15 Mich. 525, Allen's Teleg. Cas. 345. *Missouri*: Reed v. Western Un. Teleg. Co., 135 Mo. 661, 34 L. R. A. 492, 37 S. W. 904; Smith v. Western Un. Teleg. Co., 57 Mo. App. 259, 4 Am. Elec. Cas. 761; Barrett v. Western Un. Teleg. Co., 42 Mo. App. 542. *New York*: Pearsall v. Western Un. Teleg. Co., 124 N. Y. 256, 26 N. E. 534, 3 Am. Elec. Cas. 724; Baldwin v. U. S. Teleg. Co., 45 N. Y. 744, Allen's Teleg. Cas. 613, 651; Rittenhouse v. Independent Line of Teleg., 1 Daly (N. Y.), 474, 44 N. Y. 263, Allen's Teleg. Cas. 570; De Rutte v. New York, Alb. & B. Elec. M. Teleg. Co., 1 Daly (N. Y.), 547, 30 How. Pr. 403, Allen's Teleg. Cas. 273. *North Carolina*: Cogdel. v. Western Un. Teleg. Co., 135 N. C. 431, 47 S. E. 490; Hunter v. Western Un. Teleg. Co., 130 N. C. 602, 41 S. E. 796; Rosser v. Western Un. Teleg. Co., 130 N. C. 251, 41 S. E. 378; Sherrill v. Western Un. Teleg. Co., 117 N. C. 352. 23 S. E. 277. *Ohio*: Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, 1 Am.

that if, the company failed "to deliver the message with reasonable diligence, that is, with such care and diligence as a prudent man would exercise in a matter of equal importance to himself — if that fact has been shown, makes a prima facie case of negligence, which would cast on the defendant the burden of proof, to justify, excuse or mitigate such an apparent breach of duty," was held correct.[34] A delay of twelve hours in the transmission and delivery of a message, which should have been delivered in forty-five minutes, has been held to raise a presumption of negligence.[35] As has also the substitution of the word "ten" for the word "one."[36] And the forwarding

Elec. Cas. 329. *Pennsylvania*: Western Un. Teleg. Co. v. Richman (Penn., 1887), 19 Week. N. of Cas. 569, 2 Am. Elec. Cas. 710. *South Carolina*: Young v. Western Un. Teleg. Co., 65 S. C. 93, 43 S. E. 448; Pinckney v. Western Un. Teleg. Co., 19 S. C. 71, 1 Am. Elec. Cas. 516. *Tennessee*: Marr v. Western Un. Teleg. Co., 85 Tenn. 529, 3 S. W. 496, 2 Am. Elec. Cas. 720. *Texas*: Western Un. Teleg. Co. v. Hearne, 77 Tex. 83, 21 S. W. 699, 3 Am. Elec. Cas. 775; Western Un. Teleg. Co. v. Edsall, 63 Tex. 668, 1 Am. Elec. Cas. 715; Western Un. Teleg. Co. v. Bouchell, 28 Tex. Civ. App. 23, 67 S. W. 159; Western Un. Teleg. Co. v. Hines, 22 Tex. Civ. App. 315, 54 S. W. 627; Western Un. Teleg. Co. v. Harper, 15 Tex. Civ. App. 37, 13 S. W. 970, 39 S. W. 599; Western Un. Teleg. Co. v. Boots, 10 Tex. Civ. App. 540, 31 S. W. 825; Western Un. Teleg. Co. v. Harper, 1 Tex. Civ. App. 558, 4 Am. Elec. Cas. 808.

But see following cases, where it is held that, under certain conditions, the burden of proof is upon the plaintiff in an action against the company to recover damages for delay in delivery or error in transmission. *United States*: Jones v. Western Un. Teleg. Co. 18 Fed. 717, 1 Am. Elec. Cas. 561. *California*: Redington v. Pacific Postal Teleg. Cable Co., 107 Cal. 317, 40 Pac. 432, 5 Am. Elec. Cas. 697; Hart v. Western Un. Teleg. Co., 66 Cal. 579, 6 Pac. 637, 1 Am. Elec. Cas. 734. *Iowa*: Akin v. Western Un. Teleg. Co., 69 Iowa, 31, 2 Am. Elec. Cas. 566, 28 N. W. 419; Sweetland v. Illinois, etc., Teleg. Co., 27 Iowa, 433, 1 Am. Rep. 285. *Maryland*: United States Teleg. Co. v. Gildersleeve, 29 Md. 232, Allen's Teleg. Cas. 390. *Massachsuetts*: Ellis v. American Teleg. Co., 13 Allen (Mass), 226, Allen's Cas. 306. *New York*: Kiley v. Western Un. Teleg. Co., 109 N. Y. 231, 16 N. E. 75, 2 Am. Elec. Cas. 650. *South Carolina*: Aiken v. Western Un. Teleg. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121. *Texas:* Western Un. Teleg. Co. v. Neill, 57 Tex. 283, 1 Am. Elec. Cas. 352.

[34] Gulf, Colo. & S. F. Ry. Co. v. Wilson, 69 Tex. 739, 2 Am. Elec. Cas. 782, 7 S. W. 653.

[35] Kendall v. Western Un. Teleg. Co., 56 Mo. App. 192. 1 Am. Elec. Cas. 761.

[36] Berube v. Great N. W. Teleg.

of a message to "Sanderson" instead of "Henderson," as directed.[37] And though the name of the sendee was misspelled it has been decided that the company has the burden of proving that the message could not in the exercise of reasonable diligence have been delivered.[38] If a telegraph company claims that an error in transmission is the fault of a connecting company, the burden of proof is upon it to establish such fact.[39] But where one in sending a telegram acts as agent of the addressee and the contract between the sender and the company calls for the delivery of the message within certain established free delivery limits it is decided that in an action by the addressee for failure to deliver he has the burden of proving either that his residence or his place of business was within such limits.[40] And likewise one seeking to recover damages for failure to deliver a telegram must prove affirmatively that damage resulted from such failure.[41] And in an action by an attorney for a plaintiff in certiorari proceedings for delay in the delivery of a message containing a notice of such proceedings where it appeared that the certiorari was dismissed for want of notice and the amount involved was paid by the attorney to his client, it was held that the attorney must show in order to recover, that he would have been successful in the certiorari proceeding and had been damaged by its dismissal.[42]

§ 1047. **Rules of street railway company — Admission of, in evidence.**— In some cases rules of an electric railway company, though intended only for the guidance of its employees, may be admissible in evidence in actions to recover for injuries sustained. So a rule of the defendant company, requiring its motormen to keep their cars under full control on approaching all street crossings, and when there is a car standing at a

Co., Rapport's Judic. Quebec, 14 C. S. 178.

[37] Western Un. Teleg. Co. v. Nagle, 11 Tex. Civ. App. 539, 32 S. W. 707.

[38] Cogdell v. Western Union Teleg. Co., 135 N. C. 431, 47 S. E. 490.

[39] La Grange v. Southwestern Teleg. Co., 25 La. Ann. 383, 1 Am. Elec. Cas. 59.

[40] Western Union Teleg. Co. v. Whitson (Ala. 1906), 41 So. 405.

[41] Clark v. Western Union Teleg. Co., 112 Ga. 633, 37 S. E. 870.

[42] Western Union Teleg. Co. v. Bailey, 115 Ga. 725, 42 S. E. 89.

crossing, taking on or letting off passengers, or if they see that they are about to meet a car on a street crossing, to slow up and see that the track is clear before attempting to pass, was held admissible in evidence, as tending to show that the company regarded such a point on its line, when being approached by one of its cars, as more or less dangerous to passengers and others.[43] And in another case the admission of such a rule in evidence was held to be harmless error, where defendant's witnesses, without objection, testified to practically the same things set forth by the rule.[44] And again, in an action by the motorman of a car to recover for injuries received in a collision between his car and a railroad train, a rule of the company as to the conduct of its motormen in approaching such crossing was held admissible, on the question of contributory negligence.[45] But in another case, where the plaintiff sued for personal injuries, received while on defendant's track in a public street, and, against defendant's objection, introduced in evidence a special rule of the defendant street railway company, intended for the guidance of its motorman, which provided that "he must keep a sharp lookout to avoid running into pedestrians and vehicles, especially at cross streets, while the car is in motion, the responsibility for safe running rests with him. * * * He will be held responsible for any damage arising from negligence," and plaintiff did not know of the existence of this rule, nor was there any evidence showing how long it had existed, it was held error,— that the rule imposed a higher degree of care on the motorman than the law required; that the jury might have understood that this rule imposed upon him and the defendant an extraordinary degree of care as to travelers on defendant's tracks, whereas the law imposes a reasonable degree of care and vigilance in such cases.[46]

§ 1048. **Burden of proof — Actions to recover for personal injuries.**— In an action to recover damages for personal inju-

[43] Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128. But see Fonda v. St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166.

[44] Hart v. Cedar Rapids & M. C. R. Co., 109 Iowa, 631, 80 N. W. 662.

[45] Threlkeld v. Wabash R. Co., 68 Mo. App. 127.

[46] Isaackson v. Duluth St. Ry. Co., 75 Minn. 27, 5 Am. Neg. Rep. 178, 77 N. W. 433.

ries the plaintiff must produce proof of the want of care on the part of the defendant. In such cases the presumption of negligence against the defendant, arising from the happening of an accident, does not relieve the plaintiff of the burden of establishing, affirmatively, the negligence of the defendant, although such presumption calls upon the defendant for an explanation. And the plaintiff must also show that the negligence was the cause of or contributed to the injury.[47] Where the existence, however, of certain facts are shown, a prima facie case of negligence, on the part of the company, may be established, thus placing upon it the burden of proving due care on its part. So proof of the fact that an electric wire had become disconnected or detached from its fastening and hung down in a public street in such a manner as to endanger travel is, of itself, prima facie evidence of negligence upon the part of the company maintaining the wire.[48] And it is a general rule that

[47] *United States:* Newark E. L. & P. Co. v. Garden, 39 U. S. App. 416, 23 C. C. A. 649, 78 Fed. 74, 37 L. R. A. 725. *Delaware:* Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Mills v. Wilmington City R. Co., 1 Marv. (Del.) 259, 40 Atl. 1114. *Georgia:* Brush E. L. & P. Co. v. Wells, 103 Ga. 512, 30 S. E. 533, 4 Am. Neg. Rep. 255. *Iowa:* Hart v. Cedar Rapids & M. C. Ry. Co., 109 Iowa, 631, 80 N. W. 662. *Louisiana:* Rombach v. Crescent City R. Co., 50 La. Ann. 473, 23 So. 604, 4 Am. Neg. Rep. 158; Clements v. Louisiana E. L. Co., 44 La. Ann. 692, 11 So. 51, 4 Am. Elec. Cas. 384. *Missouri:* Western Un. Teleg. Co. v. Guernsey & Scudder, 46 Mo. App. 120, 3 Am. Elec. Cas. 433; Barrie v. St. Louis Transfer Co. (Mo. App. 1906), 96 S. W. 233. *Montana:* Hamilton v. Great Falls St. R. Co., 17 Mont. 334, 42 Pac. 860, rehearing denied in 17 Mont. 351, 43 Pac. 713. *Nebraska:* Lincoln Traction Co. v. Shepherd (Neb. 1906), 107 N. W. 765. *New Jersey:* McGilvery v. Newark Elec. L. & P. Co., 63 N. J. L. 591, 44 Atl. 637, affg. 62 N. J. L. 451, 41 Atl. 955; Whalen v. Consolidated Tract. Co., 61 N. J. L. 604, 40 Atl. 645, 4 Am. Neg. Rep. 423. *New York:* Ludwig v. Metropolitan Street Ry. Co., 71 App. Div. 210, 75 N. Y. Supp. 667; Jones v. Union R. Co., 18 App. Div. 267, 46 N. Y. Supp. 321; Ogier v. Albany Ry., 88 Hun, 486, 5 Am. Elec. Cas. 545, 34 N. Y. Supp. 867. *Pennsylvania:* Kepner v. Harrisburgh Trac. Co., 183 Penn. St. 24, 38 Atl. 416, 5 Am. Neg. Rep. 76; Pletcher v. Scranton Tract. Co., 185 Pa. St. 147, 39 Atl. 837. *Utah:* Fritz v. Salt Lake & Ogden Gas & E. L. Co., 18 Utah, 493, 56 Pac. 90, 5 Am. Neg. Rep. 727.

[48] Denver Consol. E. Co. v. Simpson, 21 Colo. 435, 42 Pac. 42, 5 Am. Elec. Cas. 278. See also Gannon v. Laclede Gas L. Co., 145 Mo. 502,

a presumption of negligence on the part of an electrical company arises, where a person is injured by contact with a broken or fallen wire while upon the street or highway, which casts upon the company the burden of proof to show a freedom from negligence.[49] And in an action for damages for injuries caused by the servants of a telephone company letting a wire fall in a street, thus causing the plaintiff's horse to jump, and throwing plaintiff from the wagon, it was held that the above facts were prima facie proof of negligence.[50] So where the only evidence adduced touching the negligence of an electrical company in allowing and permitting its wire to become broken and remain suspended upon a public street was the simple fact that it was found so broken and suspended and that an injury to a horse resulted, it was held that a prima facie case was established which imposed upon the defendant the burden of

47 S. W. 907, 46 S. W. 968; Haynes v. Raleigh Gas Co., 114 N. C. 203, 5 Am. Elec. Cas. 264, 19 S. E. 344.

In Chattanooga Electric Ry. Co. v. Mingle, 103 Tenn. 667, 56 S. W. 23, 7 Am. Elec. Cas. 594, it is said in this connection: "In view of the extreme peril consequent on the displacement and fall of the wires in an electric railway system, it is essential that a high degree of care be exercised, not only in their construction, but in their continued maintenance in a good and safe condition. . . . If this be not done, then, with the growing network of wires suspended over the streets of our towns and cities, those who use the streets in the exercise of a common right will do so in constant peril. Under these circumstances we think no hardship is imposed upon the defendant, who is using this dangerous agency of electricity along overhead wires, when an accident occurs from a wire which has fallen to the street or dangerously near it, in requiring him to repel a presumption of negligence. Unless the rule of res ipsa loquitur is applied, it is evident that in a large number of cases liability for the resulting injury will be escaped. It is within the power of the defendant at all times to show whether he has exercised due care in the selection of material and in their erection and subsequent supervision, while to prove an actionable lack in these things would be, in most cases, practically beyond the reach of the party injured," per Beard, J.

[49] Jacks v. Reeves (Ark. 1906), 95 S. W. 782; Cleary v. St. Louis Transit Co., 108 Mo. App. 433, 83 S. W. 1029; Norfolk Ry. & Light Co. v. Spratley, 103 Va. 379, 49 S. E. 502. See Boyd v. Portland Electric Co., 40 Oreg. 126, 66 Pac. 576, 7 Am. Elec. Cas. 661.

[50] Arkansas Teleg. Co. v. Ratteree, 57 Ark. 429, 21 S. E. 1059, 4 Am. Elec. Cas. 401.

making it appear that the unsafe and insecure condition of the wire was not due to any negligence upon its part.[51] And where it is provided by ordinance that electric light wires must be insulated a prima facie case of negligence on the part of a company maintaining such a wire is held to be established by evidence showing the absence of insulation.[52] And likewise where, owing to the breaking of an electrical transformer, an excessive current is carried into a building causing the death of a person, there is prima facie proof of the negligence which casts upon the company maintaining the apparatus the burden of rebutting it.[53] Proof, however, of mere injury to a passenger on a street car does not raise the presumption of negligence, sufficient to impose upon the company the burden of proving due care on its part, and it is incumbent upon plaintiff to show an accident from which the injury resulted, or circumstances of such character as to impute negligence.[54] But proof

[51] Chaperone v. Portland General Electric Co., 41 Oreg. 39, 67 Pac. 928, 8 Am. Elec. Cas. 468. The court said in this connection: "When plaintiff made a prima facie case, this imposed upon the defendant the burden of showing, as we have seen, that the fracture of the wire was a condition not due to its fault, or that it used due care in the construction and maintenance of its system, and that the accident was one that could not have been provided against by reasonable foresight and precaution. This burden should not be confused with the burden of making the better case as between the plaintiff and the defendant. The plaintiff must have made the better case in the end by the preponderance of evidence. When the defendant produced its evidence the case rested; and it became a matter for the jury to determine whether it had succeeded, or whether, notwithstanding its attempt at exoneration, plaintiff's prima facie case was even yet the stronger and more satisfactory," per Wolverton, J.

[52] Mitchell v. Raleigh Electric Co., 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398; compare Winkelman v. Kansas City Electric L. Co., 110 Mo. App. 184, 85 S. W. 99, holding that negligence on the part of the owner of an electric light is conclusively presumed where, owing to the imperfect insulation of such wire, an injury results to one coming in contact therewith.

[53] Reynolds v. Narragansett Electric L. Co., 26 R. I. 457, 59 Atl. 393. The court said: "The transformer was an apparatus wholly under the control of the defendant, and its breaking down or functional derangement is inferentially evidence of negligence on the part of the defendant, thus making out a prima facie case for the plaintiff, and casts upon the defendant the burden of rebutting the same to the satisfaction of the jury."

[54] McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317.

of an accident, by which a passenger on a street railway, in the exercise of ordinary care, was injured, makes out a prima facie case for him, and places on defendant the burden of re-

Erroneous instruction in action by passenger. In an action by a passenger to recover for an injury sustained the following instruction was complained of: "The burden of proof is on the plaintiff to prove by a preponderance of the evidence that she received the injuries complained of while being transported by the defendant company at about the time and place alleged, and that by reason thereof the plaintiff has sustained damages. On the other hand, when the plaintiff has shown that she met with an injury, then the burden of proof is upon the defendant to prove by a preponderance of the evidence that it was not guilty of the negligent act complained of in the plaintiff's petion; said act being the proximate cause of the plaintiff's injuries. The burden of proof is also upon the defendant to show that some negligence of the plaintiff contributed to her injuries, as the proximate cause thereof, unless the plaintiff, in making her own case, has shown that some act of hers contributed to said injury." The court said: "It will be observed that this instruction placed the burden on the defendant company, after the injury was shown, to prove by a preponderance of the evidence, that it was not guilty of the negligent act set forth in the plaintiff's petition. Its effect was to shift the burden of proof on the question of negligence from the plaintiff, who held the affirmative of that issue, to the defendant, as soon as it was shown that she had been injured. At this point it may be said that it is the settled law of this State that street railways are common carriers of passengers for hire, and are liable, as other common carriers, upon common law principles. They are bound to exercise extraordinary care, and the utmost skill, diligence, and human foresight for the protection of their passengers, and are liable for the slightest negligence, but they are not held to the strict liability of insurers. * * * Before the plaintiff could recover in this case, it was necessary for her to allege and prove some negligent act of the defendant company which was the proximate cause of the injury complained of. The rule seems to be well settled that the burden of proof never shifts, but remains with the party holding the affirmative. When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon him to establish it by proof. * * * We therefore hold that, in actions against common carriers on their common law liability for personal injuries, the burden is on the plaintiff to prove that he was a passenger, and was injured by the negligence of the defendant, and the extent of such injuries; that where the nature of the accident, when proven or conceded, is such as to fairly raise the presumption of negligence, proof of such accident, which is the proximate cause of the injury complained of is sufficient. But where, from the nature of the accident,

butting all the specific negligence charged in the declaration.[55] So, where a passenger is thrown from her seat in the car by a collision with another car, following on the same track, there arises a presumption of negligence on the part of the street railway company.[56]

§ 1049. **Burden of proof — Contributory negligence.**— In an action to recover for personal injuries the plaintiff need not produce direct proof of a lack of contributory negligence on his part, but the burden is upon the defendant of establishing contributory negligence on the part of the plaintiff,[57] although it is declared that it is necessary for the plaintiff in such an action to show facts and circumstances from which it may reasonably be inferred that he was exercising proper care.[58] So it was held that a request to charge "that the plaintiff, in order to recover, must establish, affirmatively, that she was guilty of no negligence that contributed to the injury," was properly denied.[59] And where one who was a passenger on a car and was occupying one of the seats provided for passengers was in-

the presumption of negligence does not arise, as a matter of law, the plaintiff must make proof of the negligent acts of the defendant on which he bases his cause of action," per Barnes, J., in Lincoln Traction Co. v. Webb (Neb. 1905), 102 N. W. 258, 17 Am. Neg. Rep. 617, approved and followed in Lincoln Traction Co. v. Keller (Neb. 1905), 102 N. W. 262, 17 Am. Neg. Rep. 627.

[55] Calumet Elec. St. Ry. Co. v. Jennings, 83 Ill. App. 612.

[56] Anderson v. Brooklyn H. R. Co., 32 App. Div. (N. Y.) 266, 52 N. Y. Supp. 984. See also North Chicago St. R. Co. v. Schwartz, 82 Ill. App. 493.

[57] *United States:* Hayes v. Northern P. R. Co., 46 U. S. App. 41, 20 C. C. A. 52, 74 Fed. 279. *Alabama:* McDonald v. Montgomery St. R. Co., 110 Ala. 161, 20 So. 317. *Missouri:* Stevens v. Missouri P. R. Co., 67 Mo. App. 356. *Nebraska:* Omaha St. R. Co. v. Martin, 48 Neb. 65, 66 N. W. 1007, 4 Am. & Eng. R. Cas. (N. S.) 1. *New York:* Lorickio v. Brooklyn H. R. Co., 40 App. Div. 628, 60 N. Y. Supp. 247.

After default by an electrical company in an action against it for the wrongful death of plaintiff's intestate from contact with uninsulated wires the burden of proving contributory negligence is on the defendant, Nelson v. Branford Lighting & Water Co., 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490.

[58] Lorickio v. Brooklyn H. R. Co., 44 App. Div. (N. Y.) 628, 60 N. Y. Supp. 247.

[59] Consolidated Tract. Co. v. Behr, 59 N. J. L. 477, 37 Atl. 142, 2 Am. Neg. Rep. 189.

jured by a projecting marble slab on a passing wagon striking him on his arm, which although resting upon the brass rail at his side, did not project beyond the car, it was declared that under these circumstances the occurrence of the accident by which he was injured raised the presumption of negligence on the part of the street railway company and that the onus was cast upon the latter to show that the injury did not result from its negligence or that the plaintiff was himself guilty of negligence directly contributing to its occurrence.[60]

§ 1050. **Burden of proof — Aggravation of injuries.—** If it is claimed that injuries, which have been proved to have been caused by defendant's negligence, were aggravated by the failure of the plaintiff to use ordinary care, judgment and diligence in having the injury properly treated, the burden of proof to establish such fact is upon the defendant.[61]

§ 1051. **Burden of proof — Failure to give notice of personal injuries — Statute.—** Under the Massachusetts statutes it is provided that a person injured must give notice of the time, place and cause of the accident, within thirty days of the date of such accident,[62] and that if, from physical or mental incapacity, the notice cannot be given within thirty days, the person injured may give the same within ten days after the incapacity is removed.[63] Under these statutes, if there has been a failure to give the prescribed notice within thirty days, the burden of proof is upon the plaintiff, in an action to recover for personal injuries or for death, to show that from physical or mental incapacity it was impossible to give such notice.[64]

§ 1052. **Rate of speed of electric car — Evidence as to.—** In an action to recover for personal injuries, evidence as to the rate of speed of a car is admissible, where that is complained of as one of the acts of negligence.[65] So evidence of the usual

[60] Jones v. United Railways & Electric Co., 99 Md. 64, 57 Atl. 620, 16 Am. Neg. Rep. 79.

[61] Citizens' St. R. Co. v. Hobbs, 15 Ind. App. 610, 43 N. E. 479, rehearing denied, 44 N. E. 377.

[62] Mass. Stat. of 1887, c. 270, § 3.

[63] Mass. Stat. of 1888, c. 155.

[64] Ledwidge v. Hathaway, 170 Mass. 348, 49 N. E. 656.

[65] Little Rock Ry. & Electric Co. v. Green (Ark. 1906), 93 S. W.

rate at which an electric car moves is admissible, where there is testimony that at the time of the accident the car was going at the usual rate of speed.[66] And where it was claimed that a car was behind schedule time and was trying to make up time, evidence showing that the car was moving very rapidly on the same trip, at other places, was held admissible to support such claim.[67] So evidence that the iron axle of a wagon was bent and twisted and that planks were torn up and furrows made in them and the ground, and of the distance which the marks extended, is admissible, upon the question as to the speed at which a car which struck the wagon was running.[68] Where an ordinance fixes the maximum speed at which electric cars may be run, such ordinance may be admissible in evidence, on the question of negligence;[69] but an ordinance fixing the rate of speed of steam cars, vehicles drawn by horses, and horses ridden by persons, is not admissible for the purpose of enabling the jury to determine what would be a reasonable rate of speed for an electric car.[70]

§ 1052a. **Incompetency of conductor — Evidence as to.**— In an action to recover for the death of a passenger who jumped from a moving car upon the appearance in the car of flashes of fire accompanied by smoke and a hissing noise evidence that the conductor jumped from the car before the passenger did has been held admissible for the purpose of showing negligence in operating the car with an incompetent conductor. "The degree of care demanded by the law in cases of this kind requires the employment of men of experience and competency, and a failure in this respect is negligence. Electricity is a dangerous agent, and its use must be attended with the highest degree

752; Owensboro City Ry. Co. v. Lyddane, 19 Ky. L. Repr. 698, 41 S. W. 578, 3 Am. Neg. Rep. 170; Portsmouth Street R. Co. v. Peed's Adm'r, 102 Va. 662, 47 S. E. 850.

[66] Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334.

[67] Laufer v. Bridgeport Tract. Co., 68 Conn. 475, 37 L. R. A. 533, 2 Chic. L. Jour. Week. 287, 37 Atl. 379, 2 Am. Neg. Rep. 312.

[68] Strauss v. Newburgh Elec. R. Co., 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998.

[69] Washington, A. & Mt. V. Elec. R. Co. v. Quayle, 95 Va. 741, 30 S. E. 391.

[70] Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945.

of care and skill. But, notwithstanding this, there may be an appearance of great danger, when in fact there is no danger at all. It may be negligence, therefore, to place in charge of a car a person whose experience and competency are so limited that he does not know whether the danger is real or only apparent.[71] If an experienced and competent conductor would have understood the real condition when the fire appeared, and, exercising the care required by law, would have remained in the car, and so far as possible would have prevented the departure therefrom of the deceased, the evidence complained of was competent on the question of the appellant's negligence in operating the car with that conductor in charge of it." [72]

§ 1053. **Incompetency of motorman — Evidence as to.**— In an action to recover for injuries sustained by being struck by an electric car, evidence as to the general incompetency of the motorman in charge thereof, based on the observations of witnesses who had seen him operate the car on prior occasions, is inadmissible.[73]

§ 1053a. **Evidence to rebut presumption of ratification by retention of employee.**— An electrical company is entitled to introduce evidence to rebut a presumption, arising from its retention of an employee, that it has ratified a wanton act of such employee. So in an action against a street railway company to recover damages for an alleged wanton and malicious assault by a conductor upon a passenger, it was held that it was error to exclude evidence showing that the plaintiff had lodged a criminal complaint against the conductor and that he had been indicted and acquitted, it being declared that such evidence was admissible to rebut the presumption arising from the retention by the company of the conductor in its employ that it had ratified or approved the alleged malicious and wanton assault.[74]

[71] Scott v. Telephone Co., 126 Iowa, 524, 102 N. W. 432; Baldwin v. Railway Co., 68 Conn. 567, 37 Atl. 418; Crisman v. Railway Co., 110 La. 640, 34 So. 718, 62 L. R. A. 747.

[72] Blumenthal v. Union Electric Co. (Iowa 1906), 105 N. W. 588, 19 Am. Neg. Rep. 235, per Sherwin, J.

[73] Fonda v. St. Paul City R. Co., 71 Minn. 438, 74 N. W. 166.

[74] Peterson v. Middlesex & Som-

§ 1054. **Res Gestae — Declarations — Admissions.**— The question of the admissibility of facts as part of the res gestæ must be determined by the court in each particular case. No general rule can be stated which will cover all cases.[75] So testimony of plaintiff, in an action for wrongful ejectment from a street car, that he was accompanied by his two children, "that at the time of his ejectment there was some confusion on the car; that his little girl and little boy were both crying, and that he thought the little girl would go into spasms," was held to be admissible as part of the res gestæ, as evidence tending to show the degree of violence used by the conductor.[76] And words spoken by the driver in the effort to control a runaway horse are admissible in evidence, as part of the res gestæ, on the trial of an action for damages for injuries resulting from the frightening of the horse.[77] Again where the plaintiff, a passenger on defendant's street car, fell, as she was alighting, because the running board at the side of the car had not been let down it was decided that evidence was admissible, as part of the res gestæ, of an exclamation made by her immediately after she fell, "Yes, let down the step after I fall."[78] And in another case where it was sought to recover damages for the death of a motorman it was held that evidence was admissible of a declaration by such motorman, made while he was in the ambulance and in response to a leading question by the conductor, that he had received orders to proceed as he did.[79] But where, in an action to recover damages by a passenger who was ejected from a street car, on the ground that the time limit indicated on his transfer ticket had expired, evidence that a fellow passenger had stated to the conductor that he saw the plaintiff get off one car and take the next passing one, was held

erset Traction Co., 71 N. J. L. 296, 59 Atl. 456, 17 Am. Neg. Rep. 683.

[75] See Greenleaf on Evidence (14th ed.), § 108.

[76] O'Rourke v. Citizens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872.

[77] Trenton Pass. Ry. Co. Consol. v. Cooper, 60 N. J. L. 219, 38 L. R. A. 637, 38 Atl. 730, 3 Am. Neg. Rep. 55.

[78] Hutcheis v. Cedar Rapids & M. C. R. Co., 128 Iowa, 279, 103 N. W. 779, 18 Am. Neg. Rep. 400. The court said in admitting evidence of such declaration: "It was made immediately after the accident, with reference to the cause of the fall, without opportunity for premeditation," per McClain, J.

[79] Nagle v. Boston & Northern Street R. Co., 188 Mass. 38, 73 N. E. 1019, 18 Am. Neg. Rep. 133.

not to be so connected with the transaction as to form part of the res gestæ, and was incompetent as hearsay.[80] And where plaintiff was allowed to prove that, subsequent to the accident, defendant posted notices at its works, warning all employees at work on its lines and circuits to quit such work at 4 o'clock, and not to continue the same without notifying the officers of the works, it was held that the admission of this evidence was reversible error.[81] So in an action to recover for the death of a child, killed by an electric car, a declaration by the mother that she did not blame the motorman, was held to be inadmissible, as being an irrelevant fact.[82] And where testimony as to sayings of an employee of defendant, made at a time when they could not have been considered as part of the res gestæ, was admissible only for the purpose of impeaching such employee as a witness, it was held that the court, upon request of defendant's counsel, should have cautioned the jury that they should not consider such sayings as admissions binding the defendant.[83]

§ 1055. **Declarations of employees as affecting company.**— In an action to recover for personal injuries, statements and declarations made to plaintiff by the motorman, just preceding the accident, as to the condition of the track, to his not having sand, and the car being late and overcrowded, and the rapidity of the speed, are admissible as part of the res gestæ.[84] And in another case a declaration by the motorman, made two minutes after the accident, as to his ability to stop the car, and while he with other employees were in charge of the body of the injured man, were held admissible as part of the res gestæ.[85] But a statement by the motorman that the accident was due to his (the motorman's) own carelessness,

[80] Woods v. Buffalo Ry. Co., 35 App. Div. (N. Y.) 203, 54 N. Y. Supp. 735, 5 Am. Neg. Rep. 224.

[81] Colorado Elec. Co. v. Lubbers, 11 Colo. 505, 2 Am. Elec. Cas. 361, 19 Pac. 479.

[82] Budd v. Meriden Elec. R. Co., 69 Conn. 272, 37 Atl. 683, 3 Am. Neg. Rep. 335.

[83] Brush E. L. & Power Co. v. Wells, 103 Ga. 512, 30 S. E. 533, 4 Am. Neg. Rep. 255.

[84] Witsell v. West Asheville & Sulphur Springs R. Co., 120 N. C. 557, 27 S. E. 125, 2 Am. Neg. Rep. 640.

[85] Coll v. Easton Transit Co., 180 Penn. St. 618, 2 Am. Neg. Rep. 63, 37 Atl. 89.

where made after the happening of the accident, and after plaintiff had been removed from where he had fallen and was sitting in the car, and with the obvious purpose of showing that the motorman was guilty of no intentional wrong, was held inadmissible as part of the res gestæ.[86] And again, where the plaintiff had been injured by the derailing of a car, declarations made by an employee of the company, while investigating the cause of the accident, were held to be hearsay and inadmissible in favor of the company.[87] But in another case it was held that statements of a lineman, who was on an electric car with the motorman at the time of the injury alleged to have been due to the motorman's negligence, were not rendered inadmissible as a part of the res gestæ, by the fact that the operation of the car was not within the line of such lineman's duty.[88] And declarations of an agent, charged with the duty of removing defendant's poles, made within the scope and during the progress of his employment, as to the claim of the defendant company, that the poles of the plaintiff were partly upon the former's right of way, were held admissible."[89] And in an action by one to recover for an injury caused by contact with an electric wire it was held that statements made shortly after the accident by the defendant's agent who had been sent to examine the wires and apparatus, and whose duty it was to inspect them and keep them in repair, that the transformer was an old style one and as to the condition generally of the transformer and apparatus were admissible.[90] So, also, declarations by the messenger of a telegraph company, as to his inability to find the addressee, were held admissible against the company.[91]

[86] Little Rock Tract. & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7.

[87] Electric R. Co. v. Carson, 98 Ga., 652, 27 S. E. 156.

[88] Coll v. Eastern Transit Co., 180 Penn. St. 618, 37 Atl. 89, 2 Am. Neg. Rep. 62.

[89] International & Great Northern R. Co. v. Teleph. & Teleg. Co. (Tex.). 21 Am. & Eng. Corp. Cas. 62. But see Postal Teleg. Co. v. Le Noir, 107 Ala. 640, 18 So. 266; Postal Teleg. Co. v. Brantley, 107 Ala. 683, 18 So. 321.

[90] City of Austin v. Nichols (Tex. Civ. App., 1906), 94 S. W. 336.

[91] Western Un. Teleg. Co. v. Bennett, 1 Tex. Civ. App. 558, 4 Am. Elec. Cas. 808, 21 S. W. 699.

§ 1056. **Transmission and delivery of message — Negligence — Declarations concerning — Telegraph operator — Agent.** — As a general rule, an agent has no power to bind his principal by admissions, unless they are made within the scope of his authority, and may be considered as a part of the res gestæ, serving to explain the nature and character of the main transaction.[92] So statements of an agent of a telegraph company are not competent, as against the company, to prove that a message was not transmitted, when not made in the performance of any duty relating to transmission.[93] And in an action to recover for injuries sustained by reason of error in transmission, or delay in delivery, statements of a telegraph operator, made several days after the act of negligence complained of, are not admissible against the company.[94] But a statement by a telegraph operator to the sender of a message, that the message had not been transmitted, together with an offer to return the price paid for transmission, was held to be admissible, it being such a statement as the agent was, by his employment, authorized to make.[95] And where a telegraph company refused to transmit a message it was held, in an action to recover damages for such refusal, that evidence was admissible of the language used by the agent of the company at the time he refused to receive it as tending to show the motive by which he was actuated.[96]

[92] Western Un. Teleg. Co. v. Way, 80 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455; Western Un. Teleg. Co. v. Mullins, 44 Neb. 732, 62 N. W. 880.

[93] Western Un. Teleg. Co. v. Way, 80 Ala. 542, 4 So. 844, 2 Am. Elec. Cas. 455.

[94] Sweatland v. Illinois & Miss. Teleg. Co., 27 Iowa, 432, Allen's Teleg. Cas. 471; Carland v. Western Un. Teleg. Co., 118 Mich. 369, 76 N. W. 762; Aikin v. Western Un. Teleg. Co., 5 S. C. 358, 1 Am. Elec. Cas. 121; Southwestern Teleg. & Teleph. Co. v. Gotcher (Tex., 1899), 53 S. W. 868; Western Un. Teleg. Co. v. Wofford (Tex. Civ. App.), 42 S. W. 119.

Declarations contained in a letter sent by a telephone operator to the sender of a message are not admissible in an action against a telephone company to recover damages for the alleged negligent act of the operator in omitting words from a telegram in telephoning it to the addressee, Wiskelman v. Western Union Teleg. Co., 30 Misc. R. (N. Y.) 450, 62 N. Y. Supp. 491.

[95] Evans v. Western Un. Teleg. Co., 102 Iowa, 219, 71 N. W. 219, 3 Am. Neg. Rep. 160.

[96] Western Union Teleg. Co. v.

§ 1057. **Expert and opinion evidence.**— In those cases where facts cannot be adequately presented to the jury, so as to impress their minds as they impress the minds of a competent, skilled observer, expert evidence may be allowed.[97] But in a matter which requires no special knowledge, and in reference to which the jury would be equally able and competent to form an opinion without such evidence, expert evidence is not admissible.[98] So in a recent case it is stated that the general rule is that opinion evidence may be received where it is the best that can be had, or where the situation, facts, and events cannot be adequately reproduced or described to the jury, but that such evidence can never be given on the ultimate facts which it is the duty of the jury to determine.[99] But the mere fact that the opinion of an expert may be upon a question which the jury is to decide, is not sufficient to exclude the testimony, unless the question is such that the jury would be competent to decide it after having become acquainted with the facts as they existed at the time of the transaction, and in the history of the subject to which the question relates.[1] It is for the trial court to determine whether a witness is sufficiently qualified to testify as an expert, and its decision upon this point will not be disturbed on appeal, unless error clearly appears.[2]

§ 1058. **Expert and opinion evidence — Physicians — Cases.**— A physician, who has qualified as an expert, may give his opinion whether a child would have been born alive if he had received medical assistance in time.[3] But it is not competent for a physician to give his opinion as to the cause of the physical condition of a witness, based merely on the examination of such witness, and the facts stated and testified to on

Simmons (Tex. Civ. App. 1906), 93 S. W. 686.

[97] New York Electric Equip. Co. v. Blair, 79 Fed. 896, 25 C. C. A. 216, 51 U. S. App. 81.

[98] North Kankakee St. R. Co. v. Blatchford, 81 Ill. App. 609.

[99] Missouri & K. Teleph. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771, 14 Am. Neg. Rep. 291, per Johnston, J.

[1] New York Elec. Equip. Co. v. Blair, 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896.

[2] Howland v. Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

[3] Western Un. Teleg. Co. v. Cooper, 71 Tex. 507; 9 S. W. 598, 2 Am. Elec. Cas. 795.

the trial.[4] Again a physician may give his opinion as to the cause of a miscarriage,[5] and whether a condition, the result of injuries, will be permanent,[6] or if not, its probable duration;[7] and also whether a wound is liable to reopen.[8] And he may testify as to exclamations of pain made by plaintiff suing for personal injuries, on an occasion when he was examining her with a view to treating her,[9] and whether pain would be produced by conditions, the existence of which has been established by the evidence.[10] But where he has given no testimony as to exclamations of pain, or of any other character, he cannot be required to testify whether he knew, at the time he was attending plaintiff, that the latter contemplated a lawsuit.[11] Again where physicians called at the trial stated that they were unable, from the appearance of the deceased, to form an opinion as to the cause of death, it was held proper to permit them to express their opinion that death resulted from a shock of electricity, in response to the following hypothetical question: "Now assuming, however, that on the morning before he died, or of his death, he received an electric shock by coming in contact with an electric light fixture and at the same time putting his hand upon a water fixture for to complete the circuit, taking that fact together with the conditions that you found there at the autopsy, what is your opinion as to the cause of death?"[12] If a physician has testified in a trial that the result of the injuries was a permanent disability, he may be asked if he did not testify, in a former action between the same parties,

[4] McGuire v. Brooklyn Heights R. Co., 30 N. Y. App. Div. 227, 51 N. Y. Supp. 1075.

[5] Howland v. Oakland Consol. St. R. Co., 110 Cal. 513, 42 Pac. 983.

[6] O'Flaherty v. Nassau Elec. Co., 34 App. Div. (N. Y.) 74, 54 N. Y. Supp. 96, 58 Alb. L. Jour. 347, affirmed 165 N. Y. 624, 59 N. E. 1128.

[7] Consolidated Tract. Co. v. Lambertson, 59 N. J. L. 297, 36 Atl. 100, affd., 38 Atl. 683.

[8] Penny v. Rochester R. Co., 7 App. Div. (N. Y.) 595, 40 N. Y. Supp. 172, 74 N. Y. St. R. 732, affd., 154 N. Y. 770.

[9] Heddle v. City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096, 4 Det. L. News, 104.

[10] Western Union Teleg. Co. v. Stubbs (Tex. Civ. App. 1906), 94 S. W. 1083.

[11] Heddle v. City Elec. R. Co., 112 Mich. 547, 70 N. W. 1096, 4 Det. L. News, 104.

[12] Gilbert v. Duluth General Electric Co., 93 Minn. 99, 100 N. W. 653, 16 Am. Neg. Rep. 446.

to recover damages for a prior injury, that such prior injury was permanent, and whether he is still of that opinion, as tending to show that plaintiff's disability was the result of the first injury, and also as possibly tending to impeach the witness.[13]

§ 1059. **Expert and opinion evidence — Cases generally — What is admissible.**— The evidence of experts is admissible as to the management of an electric car;[14] and also whether, with proper care and attention, it could have been stopped in time to avoid a collision,[15] or the space within which it could have been stopped;[16] as to the speed at which a car is running,[17] and as to the effect of sand upon the track in the stopping of a car.[18] So, also, whether electricity could be transmitted to a trail car in sufficient quantities to injure a person.[19] And an expert motorman may testify as to what he would do with reference to stopping a car, if he saw children upon the track in front of the car.[20] And again, the master mechanic of a

[13] Brooks v. Rochester R. Co., 156 N. Y. 244, 50 N. E. 945, revg. 88 Hun (N. Y.), 614.

[14] Laufer v. Bridgeport Tract. Co., 68 Conn. 475, 37 L. R. A. 533, 37 Atl. 379, 2 Chic. L. Jour. Week. 287.

[15] Howland v. Oakland Consol. St. Ry. Co., 110 Cal. 513, 42 Pac. 983.

[16] Weitzman v. Nassau Elec. R. Co., 33 App. Div. (N. Y.) 585, 53 N. Y. Supp. 905; Watson v. Minneapolis St. R. Co., 53 Minn. 551, 4 Am. Elec. Cas. 510, 55 N. W. 742.

[17] Strauss v. Newburgh Elec. R. Co., 6 App. Div. (N. Y.) 264, 39 N. Y. Supp. 998. See Little Rock Traction & Electric Co. v. Hicks, (Ark. 1906), 96 S. W. 385, holding there was no error in permitting a witness to testify as follows: "I have no means of telling how fast the car was running, but judging from the ordinary speed of cars, being 6 to 8 miles per hour, this car was running at a speed of about twenty miles per hour." The court said: "This testimony was obviously introduced for the purpose of showing that the car was running at an unusual rate of speed. It did not require an expert to ascertain that fact, especially when the difference between the usual rate and the speed it was traveling at the time of the accident was very great. It was admissible to show that the car was running rapidly and at unusual rate of speed," per Battle, J.

[18] Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199, 40 Atl. 945; Atlantic Ave. R. Co. v. Van Dyke, 38 U. S. App. 334, 18 C. C. A. 632, 72 Fed. 458.

[19] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 4 Am. Elec. Cas. 332, 35 Pac. 269.

[20] Howell v. Rochester R. Co., 24 App. Div. (N. Y.) 502, 49 N. Y. Supp. 17.

street railway company may also express his opinion whether a boy could steal a ride in a certain position on a car.[21] It has also been decided that a witness whose qualification as an expert has been shown, may testify as to how many linemen there should be in stringing wires over feed wires and where the men should be stationed.[22] And evidence of an expert has been held admissible to show that the stringing of wires across a bridge was done in a proper manner.[23] And it has been held proper to permit an electrical engineer to testify as to the volt-

[21] Baltimore City P. R. Co. v. Cooney, 87 Md. 261, 11 Am. & Eng. R. Cas. (N. S.) 759, 39 Atl. 859.

[22] Fritz v. Western Union Teleg. Co., 25 Utah, 263, 71 Pac. 209, 8 Am. Elec. Cas. 730. The court said: "Counsel for appellants insist that the subject matter of inquiry was of such a character as to lie within the common experience of men moving in the ordinary walks of life, and therefore invoke the rule that under such circumstances the opinions of experts are inadmissible, as the jury is supposed to be amply competent to draw all necessary inferences from such common facts testified to by the witnesses. While this rule is well established, yet we think counsel are in error in assuming that the subject matter testified to in this instance necessarily lies within the common experience of men. The inquiry did not simply relate to the mere handling of copper wire between elevated positions, but it involved the question of the effect, method and skill in handling such wire in close proximity to other wires heavily charged with electricity. We do not think it is true that the average man is acquainted with the effects of electricity, except as they produce almost unexplainable results to the senses. Ordinary men know nothing at all about the methods by which these results are produced. And therefore it may be entirely probable that the ordinary number of men and methods used for handling overhead wires in unobstructed places, or places simply obstructed by materials other than electrical, would be no guide whatever as to the number of men and methods that should be employed in handling the same wires when crossing other heavily charged wires. * * * It is true evidence could have been introduced as to the number of men usually employed in handling such wires, and where they would be usually stationed; but such testimony would simply be either corroborative or contradictory of the opinion expressed, and unless such witness testifying to such facts possessed peculiar skill or judgment in the manner of handling such wires under such circumstances, the testimony would, after all, be of little value in aiding the jury in determining the necessity as to the number of men to be occupied in the stations designated," per Rolapp, J.

[23] Nelson v. Branford Lighting & Water Co., 75 Conn. 548, 54 Atl. 303, 13 Am. Neg. Rep. 490.

age carried by electrical wires, and as to the effect of contact between wires.[24] And where it is alleged that certain insulators are defective it has been decided that the opinions of persons, who are experienced in the use of such insulators, as to their effectiveness is properly admissible.[25] So in an action to recover damages for negligence in the delivery of a telegraphic despatch, directing an agent to purchase all the cattle he could get at specified prices, evidence by the agent that if he had received the message he could and would have secured a specified number of cattle is not objectionable as a mere conclusion of the witness.[26] And a nonexpert witness may, where he has had opportunity to observe, testify also whether a certain person seemed to be suffering severe mental anguish.[27] So, also, he may state that a car was running fast, though his experience is not sufficient to enable him to determine the rate of speed.[28]

§ 1060. **Expert and opinion evidence — Cases generally — What is not admissible.—** Opinions as to the rate of speed of an electric car are not admissible, except when given by persons peculiarly skilled on the question.[29] And a lineman, when not sufficiently qualified, cannot testify as to the duty of a telephone company to use guard-wires.[30] Nor can a witness, not shown to be an expert, testify whether an employee was doing his work in a proper manner.[31] So a person who has had no practical knowledge as to the operation of electric railways, but has obtained his information from others, is not competent to testify as an expert, as to the use of fenders on street cars.[32] And the

[24] Nagle v. Hake, 123 Wis. 256, 101 N. W. 409, 17 Am. Neg. Rep. 393.

[25] Warren v. City Electric Ry. Co., 141 Mich, 298, 104 N. W. 613, 12 Det. Leg. N. 415.

[26] Western Un. Teleg. Co. v. Carver, 15 Tex. Civ. App. 547, 39 S. W. 1021.

[27] Sherrill v. Western Un. Teleg. Co., 117 N. C. 352, 23 S. E. 277.

[28] Ehrman v. Nassau Elec. R. Co., 23 App. Div. (N. Y.) 21, 48 N. Y. Supp. 379.

[29] Francisco v. Troy & L. R. Co., 78 Hun (N. Y.), 13, 5 Am. Elec. Cas. 374, 29 N. Y. Supp. 247.

[30] Hand v. Central Penn. Teleph. & S. Co. (C. P.), 1 Lack. L. News, 351.

[31] Brush E. L. & P. Co. v. Wells, 103 Ga. 512, 4 Am. Neg. Rep. 255, 30 S. E. 533.

[32] North Kankakee St. R. Co. v. Blatchford, 81 Ill. App. 609.

mere opinion of an attorney that if a specified witness had been present, the case would have been won, is not admissible.[33] Nor can a witness, after giving the facts attending an accident, also express an opinion whether the motorman might have avoided the accident by the exercise of good judgment.[34] And, as a general rule, a witness may not express an opinion upon a question which is for the jury to determine.[35] So the opinion of an expert as to whether certain telephone poles were calculated to frighten horses has been held to be inadmissible.[36]

§ 1061. **Measure of damages — Evidence as to.**— Where it is claimed, in an action to recover for personal injuries, that there has been a diminution of earning capacity, as a result of the injury, evidence is admissible as to the value of plaintiff's services, before the injury in the particular occupation he was then following.[37] So it has been decided that in an action to recover damages for a personal injury evidence is admissible,

[33] Martin v. Sunset Teleph. & Teleg. Co., 18 Wash. 260, 51 Pac. 376.

[34] Woeckner v. Erie Elec. M. Co., 187 Penn. St. 206, 41 Atl. 28, 43 Week. N. of Cas. 50.

[35] Little Rock Traction & E. Co. v. Nelson, 66 Ark. 494, 52 S. W. 7; Bergen Co. Tract. Co. v. Bliss, 62 N. J. L. 410, 41 Atl. 837; Flynn v. Boston E. L. Co., 171 Mass. 395, 8 Am. & Eng. Corp. Cas. (N. S.) 489, 50 N. E. 937, 4 Am. Neg. Rep. 399.

[36] Missouri & K. Teleph. Co. v. Vandevort, 67 Kan. 269, 72 Pac. 771, 14 Am. Neg. Rep. 291, wherein it was said: "The question submitted to the witness — whether the poles were calculated to frighten horses — was the principal question which was submitted to the jury, and the jury was just as competent to give an opinion upon the ultimate fact as any of the experts. It was easy to describe the poles, their position and surroundings. They were ordinary poles, from which the bark had been peeled, being about twenty feet long and about sixteen inches in diameter at the larger end and six inches at the smaller end. The location, condition, color and appearance of the poles, and all the circumstances surrounding or in any way connected with them, could have been described by the witnesses, and thus leave to the jury the determination of this ultimate fact which practically determined the case. It was not necessary, therefore, to resort to opinion evidence and the objections of counsel for the company should have been sustained," per Johnston, J.

[37] Atlanta Consol. St. R. Co. v. Bates, 103 Ga. 333, 30 S. E. 41, 4 Am. Neg. Rep. 128; Christie v. Galveston City R. Co. (Tex. Civ. App.), 2 Am. Neg. Rep. 260, 39 S. W. 638.

as bearing upon the measure of damages, of the amount of wages which the plaintiff had earned for a period of time, covering several years, in a former employment though he was not working at such employment when the accident occurred and was earning much less.[38] And evidence of the earnings of plaintiff, in an action to recover for personal injuries, is admissible, where the occupation in which he was engaged in partnership with others, simply employed the services of the parties.[39] But evidence by a partner of deceased, as to the capital invested by them, the number of men employed, and the net income of the firm arising from speculative contracts of short duration, was held to be incompetent for the purpose of showing the earning capacity of the deceased.[40] Again where it appeared that plaintiff was a medical student and attending school before the injury, evidence that he was unable to read after its occurrence was held admissible as tending to show the seriousness of the injury.[41] So evidence that the plaintiff was induced by a message incorrectly transmitted to instruct his agent to settle a claim for less than its value is admissible.[42] And in an action to recover damages for failure to deliver a message, evidence is admissible, for the purpose of showing the degree of negligence on the part of the company, that after the sending of such message, another one was sent to the operator in the town where plaintiff resided in which it was requested that the first message be promptly delivered.[43] Again where vindictive damages are claimed against a telephone company for its refusal to put in a telephone for the plaintiff, it may be shown, not as a defense, but in mitigation of damages, that the capacity of the switchboard and lines were so taxed at the time that it was impossible to put in an additional wire

[38] West Chicago Street R. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586, affirming 110 Ill. App. 204. See also West Chicago Street R. R. Co. v. Maday, 188 Ill. 308.

[39] Thomas v. Union R. Co., 18 App. Div. (N. Y.) 185, 45 N. Y. Supp. 920. See Mt. Adams & E. P. I. P. R. Co. v. Isaacs, 18 Ohio C. C. 177.

[40] Read v. Brooklyn H. R. Co., 53 N. Y. Supp. 209, 32 App. Div. (N. Y.) 503.

[41] Bruce v. Beal, 99 Tenn. 303, 41 S. W. 445, 9 Am. & Eng. Cas. (N. S.) 841, 2 Chic. L. Jour. Week. 464.

[42] Hasbrouck v. Western Un. Teleg. Co., 107 Iowa, 160, 77 N. W. 1034.

[43] Western Union Teleg. Co. v. Frith, 105 Tenn. 167, 58 S. W. 118.

and that similar service was refused to other applicants for the same reason.[44] But where a message purported that the sender would procure cotton in this country to be shipped to Bremen, evidence of the price of cotton in Liverpool was held to be irrelevant, in the absence of proof of an influencing or regulating relation between the markets or of mutual dependence.[45] And evidence tending to show the embarrassed financial condition of the sender of a telegram is not admissible in an action to recover damages, since it raises a collateral issue on which neither the liability of the company nor the proper ascertainment of damages depends.[46] In an action by a passenger, who had been assaulted by an employee of a street railway company, to recover damages, evidence that such employee was arrested and paid a fine and costs is not admissible in evidence in mitigation of damages.[47] But evidence of the fact that a passenger was arrested by order of the conductor and was subsequently discharged, is admissible as bearing upon the question of damages.[48]

§ 1062. **X-ray photograph — Admissibility of.**— In an action to recover for personal injuries, an x-ray photograph, showing the condition of the bones injured, is admissible in evidence, where taken by one familiar with the process of, and accustomed to taking such photographs, and who testifies that it accurately represents the condititon of such bones.[49]

§ 1063. **Evidence as to condition of other poles, where one has fallen.**— In an action to recover damages for injuries caused by the falling of a telegraph pole, evidence is not admissible as to the condititon of other poles of the same line of telegraph, in the absence of some connecting evidence, such as

[44] Gwynn v. Citizens Teleph. Co., 69 S. C. 434, 48 S. E. 460.

[45] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 2 Am. Elec. Cas. 467, 4 So. 844.

[46] Western Un. Teleg. Co. v. Way, 83 Ala. 542, 2 Am. Elec. Cas. 464, 4 So. 844.

[47] Hanson v. Urbana & C. Elec. St. R. Co., 75 Ill. App. 474.

[48] Jenkins v. Brooklyn H. R. Co., 29 App. Div. (N. Y.) 8, 51 N. Y. Supp. 216, 4 Am. Neg. Rep. 555, rehearing denied, 30 App. Div. (N. Y.) 622, 51 N. Y. Supp. 868.

[49] Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445, 9 Am. & Eng. R. Cas. (N. S.) 841, 2 Chic. L. Jour. Week. 464.

the fact that they were all of one kind, erected at the same time, and equally exposed to the elements.[50]

§ 1064. **Conversations by telephone — Admissibility of, as evidence — Identification of person with whom conversation is held.**— Conversations carried on by means of a telephone are admissible in evidence.[51] But some of the decisions seem to hold that there must be some identification of a person in order to render statements, apparently made by him through the telephone, admissible in evidence against him.[52] So it is held in one case that it is competent for a witness to testify to a conversation over a telephone, and to statements made by the other party thereto, where the witness called said party to the instrument and recognized his voice in response.[53] And again, where a person, after conversing with another through the telephone, went to the office of such person, who admitted that he had held the conversation, and the former person recognized his voice as the one he had heard through the telephone, it was held that the identity of the secoond person was sufficiently established to render the conversation admissible.[54] And in another case, where a witness testified that he called up the central telephone office, requested to be connected with the defendant's place of business, asked the person who responded if he was the defendant, was answered in the affirmative, and a conversation ensued, but witness did not know the defendant, nor his voice, it was held that the witness was properly permitted to testify to the conversation.[55] And in another case in this same State, it was held that the fact that the voice was not

[50] Western Un. Teleg. Co. v. Levi, 47 Ind. 522, 1 Am. Elec. Cas 133.

[51] Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 2 Am. Elec. Cas. 880, 11 S. W. 49; Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 27 Am. St. Rep. 861, 17 S. W. 608; Southern Nat. Bank v. Smith (C. P.), 7 Penn. Dist. Rep. 182.

[52] Obermann Brewing Co. v. Adams, 35 Ill. App. 54, 3 Am. Elec. Cas. 856; Murphy v. Jack, 142 N. Y. 215, 58 N. Y. St. R. 458, 36 N. E. 882, 31 Abb. N. C. 201; People v. Ward, 3 N. Y. Crim. Rep. 483, 1 Am. Elec. Cas. 860; Deering v. Shumpik, 67 Minn. 348, 69 N. W. 1088.

[53] People v. Ward, 3 N. Y. Crim. Rep. 483, 1 Am. Elec. Cas. 860.

[54] Deering v. Shumpik, 67 Minn. 348, 69 N. W. 1088.

[55] Globe Printing Co. v. Stahl, 23 Mo. App. 451.

identified did not render the conversation inadmissible.[56] The court in this case based its decision on the ground that the nature, operation and uses of the telephone were facts of general scientific knowledge, of which the court would take judicial notice, and that when a person adopted the telephone as a means of communication, for business purposes, having the proper instruments placed in his office, he thereby invited business communications through that channel, and that conversations so held were admissible. It was also held that the ruling was merely to determine the admissibility in evidence of such conversation and not its effect after admission, and that its weight in each instance might be much or little in the estimation of the triers of fact according to their views of its credibility and of other testimony in support or contradiction of it. And again, in this State, in a later case, it was held that where one is connected by telephone with the place of business of another, with whom he desires to converse, and is answered by some one assuming to be such person, he will be presumed to have received his answer from such person, but that the latter may show that he neither made the answer attributed to him nor authorized it to be made.[57]

§ 1065. **Conversation by telephone — Telephone operator acting as agent of both parties.—** It frequently happens that a telephone operator is called upon to conduct a conversation between two parties, and where he so acts he is considered as the agent of both, and what he repeats to one as being said by the other is admissible in evidence against the latter, because it is the declaration of an agent.[58]

§ 1066. **Conversations by telephone — Cases generally.—** Persons who are present when one orders an article, by means of the telephone, may testify as to the statements made by him in making the contract.[59] But the fact that an agent went to a telephone, and supposedly conferred with his principal, and

[56] Wolfe v. Missouri Pac. Ry. Co., 97 Mo. 473, 11 S. W. 49.

[57] Guest v. Hannibal & St. J. R. Co., 77 Mo. App. 258, 2 Mo. App. Rep. 7.

[58] Oskamp v. Gadsden, 35 Neb. 7, 37 Am. St. Rep. 428; Sullivan v. Kuykendall, 82 Ky. 483.

[59] Snively v. Colburn, 78 Ill. App. 93.

then said "That will be all right," and agreed to a modification of the principal's contract, was held not to be sufficient to warrant the other party to the contract in relying upon the agent's assumption of authority.[60] And it has been decided that a telephone conversation is inadmissible to establish admissions of one of the parties to a suit where it appears that the witness was not acquainted with the party's voice, and could not identify it.[61] And evidence as to what one, with whom a conversation was held by telephone, repeated to a third person, as being the statements made by the other party to the conversation, is inadmissible against the latter.[62] So also evidence as to a conversation between the prosecuting witness in a criminal trial and his agent, in the absence and without the knowledge of the defendant, is held to be incompetent.[63]

§ 1066a. **Oaths cannot be administered by telephone.**— Where it is provided by statute that an oath shall be administered in the mode most binding upon the conscience of the person taking the same and that it shall be taken before the officer authorized to administer the same, it has been decided that the personal presence of the affiant is required and that an oath cannot be administered over the telephone though the officer administering it is familiar with the voice of the affiant.[64]

[60] Joseph v. Struller (App. Term, Sup. Ct.), 25 Misc. (N. Y.) 173, 54 N. Y. Supp. 162.

[61] Swing v. Walker, 27 Pa. Super. St. 366, wherein it was said by the court: "The offer to prove a conversation over the telephone was clearly inadmissible. The object of the evidence was to show admissions of Walker, one of the defendants. It appeared from the testimony of the witness that he was not acquainted with Walker's voice and could not identify it. No discussion is necessary to show that a declaration or admission is not admissible unless the party making it is identified as the person sought to be charged. The introduction of the telephone has not changed the rule of evidence on that subject. If the witness had been in the presence of the person at the other end of the line, the declaration of that person would not have been admissible without evidence that he was one of the defendants," per Henderson, J.

[62] German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 70 N. W. 769.

[63] Limerick v. State, 14 Ohio C. C. 207, 7 Ohio Dec. 664.

[64] Sullivan v. First National Bank (Tex. Civ. App. 1904), 83 S. W. 421, wherein it was said in this connection: "But it is answered the statute does not expressly re-

But in a case in California it is held that an acknowledgment of a deed may be taken by telephone.[65]

quire the actual presence of the affiant, and it is enough that the clerk and the attorney recognized his voice. This brings us to a further consideration of the question with relation to a possible prosecution for perjury. In such a prosecution there must be established beyond a reasonable doubt the fact that an oath had been legally made, that the matter sworn to was false in fact, and that the defendant in the prosecution was the one who made the oath. Now, it may be true that one can be certainly identified by the sound of his voice, but that is not enough for the purposes of the rule in such a case. It may be true that the officer, when he takes the affidavit of one well known to him, might recognize his voice over the telephone and therefore be able to testify that he took the oath and made the affidavit in issue. But it must be borne in mind that the law does not require the clerk or notary to be acquainted with one who becomes an affiant before them. A stranger may appear, sign an affidavit, and demand that the officer swear him and affix his jurat. In that case the officer certifies and can swear to no more than that the man who affixed the name to the affidavit swear to its truth. The name he signed may have been fictitious, but the individual swore to it as the clerk or notary certified, and he would be subject under that name or his true one to a prosecution for perjury. Now, if the contention of the appellant is sound, the rule must be laid down broadly, and whoever might demand the official jurat by his personal presence presence might also demand it over the telephone. Had it not so happened in this case that the clerk was acquainted with Sullivan, and identified him by his voice, he could have done no more than certify that a man whom he did not know, but who represented himself to be Sullivan authorized the name of Sullivan to be signed to the affidavit, and swore its contents were true. The clerk could not possibly identify him as the one making the affidavit if the question should afterwards arise. In a prosecution for perjury such testimony on the part of the clerk would not even raise an issue against the unknown affiant. So we hold that not only is the personal presence of the affiant required, to the end that by appropriate form and ceremony his conscience may be bound, but that it is required also to the end that the officer may see and know that the man who signs also swears. No modern business necessity requires the broadening of these rules," per Gill, J.

[65] Banning v. Banning, 80 Cal. 271, 22 Pac. 210.

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