

THE
AMERICAN LAW REGISTER.

JULY 1875.

THE LAW APPLICABLE TO THE NEGOTIATION
OF CONTRACTS BY TELEGRAPH.

I. 1. The sender of a message for the purpose of initiating a contract, it would seem should be held responsible for the correctness of the agency employed in its transmission.

2. Those cases which dissent from this rule, sometimes adopt the same principle, in holding the sender responsible when he employs a special operator.

3. The English courts adopt a different rule, not holding the sender bound by the errors in transmission.

4. The telegraph is the agent for the party in interest, whoever employs it.

5. Grounds of the English decisions discussed.

6. The reasons for the rule first stated seem to preponderate.

II. At what time contracts negotiated by telegraph become complete.

1. A difference has been claimed between this and the mails, but without reason.

2. The delivery to the post-office of the acceptance of a definite offer closes the contract.

3. The same rule has, with reason, been applied to negotiations by telegraph. Suggestions as to the mode of proof.

4. The reason of the thing and the decisions concur in there being no difference in negotiating contracts by mail and by telegraph.

III. Discussion of the difference between the English and American decisions on this topic.

1. Statement of the English rule.

2. Reasons for dissenting from it. This mode of negotiating contracts between merchants, their agents and factors, has become so almost universal, both at home and abroad, that it becomes more and more important, to have precise and definite notions in regard to the law applicable to such transactions.

IV. The right to countermand by telegraph offers and acceptances sent by mail.

I. The first and perhaps the most difficult question will be to determine which party is responsible, as between the contracting

parties, for any errors which may occur in the transmission of the correspondence.

1. The early doctrine maintained in this country was, that the party initiating the negotiation was responsible for the correct transmission of his message, whether an offer or inquiry, and that he was bound by it, in the terms in which it was delivered to the party addressed: *Durkee v. Vermont Central Ry.*, 29 Vt. Rep. 127. But the doctrine of this case has not been universally followed, either in this country or in England.

2. But some of the cases seem to have adopted the same principle in another form. Thus in *Dunning v. Roberts*, 35 Barb. 463, it was held, that if one employ a special agent to transmit the message across the wires, and who was not the regular operator, he will be responsible for the correctness of the transmission. We cannot comprehend how this case differs, in its essential principle, from one where the message is sent by the regular operator. It will not indeed render the telegraph company responsible for the default, where a special operator is employed by the sender. But it would seem that the sender by the ordinary mode would assume the same responsibility to the party addressed, as to the correctness of the dispatch, upon its arrival at the point of destination. The only ground upon which the sender will be bound, in either case, is that it was transmitted by his own agent, and that he should be held responsible for the defects, either of capacity or conduct of the agent, while in his employ. This is certainly the general rule in regard to agency. The rule would be the same, as it seems to us, whether the party had sent the message by telegraph or by private messenger, or by an express agent, so long as it was capable of being erroneously delivered, as it would be, in either case supposed, if not to be delivered in the same writing made by the sender, as it is, when sent by mail, where there is no chance for any mistake in transmitting, the very same message first made being sent, provided it is delivered at all. But in the case of messages sent by telegraph, or by private or public express, when not reduced, in the two latter cases, to writing by the sender, mistakes may occur, and if they do, through the fault of the agencies employed by the sender, is he responsible to the other party for such mistake? For if so, he should be bound by the message in the form of its actual delivery.

3. But the English and some of the American courts perhaps,

have actually decided, that such is not the fact, in regard to messages sent by telegraph. In *Henkel v. Pape*, L. R. 6 Exch. 7, the defendant wrote a message for the telegraph company to transmit to the plaintiff, for *three* rifles. There had been some former negotiation between the parties for the purchase of *fifty* rifles. The message being sent for *the* rifles, the plaintiff naturally understood it had reference to the former negotiation, and sent fifty rifles, which the defendant refused to accept. The plaintiff brought suit for the fifty, but the court held he could only recover for the three, as directed in the defendant's written message. And it has also been held by the English courts, that the plaintiff in such case would have no redress against the telegraph company, on the ground of want of privity, not having employed them himself: *Playford v. United Kingdom Electric Tel. Co.*, L. R. 4 Q. B. 706.¹

4. The case of *New York & Washington Printing Tel. Co. v. Dryburg*, 35 Penn. St. 298, recognises the right of the party to whom the message is sent, to maintain an action against the company sending it, for any damage he may have sustained by an error in the transmission, notwithstanding he had, personally, no communication with the company until the message reached him. This case may be said, incidentally, to recognise the rule, that the party sending the message on his own account, is not responsible for the conduct of the telegraph in the transmission; but the

¹ If both these cases are sound, the result will be, that the only party injured will have no redress. But the old rule in England certainly was, and the present rule here unquestionably is, that in contracts made with public companies, serving all who bring work for them, like carriers and telegraph companies, the undertaking on their part is presumed to be in favor of the party interested, by whose agency it was negotiated. Thus if the consignor is responsible for the transportation and delivery of the goods, he alone can maintain an action for loss or damage during the transit: *Hooper v. Chicago & N. W. Ry.*, 27 Wisc. 81. But if the goods vest in the consignee, upon delivery to the carrier, he must sue: *Dutton v. Solomonson*, 3 B. & P. 582; *Jacobs v. Nelson*, 3 Taunt. 423. The party, in fact negotiating the contract, acts on his own behalf, so far as he is interested, and on behalf of others, who may become interested beyond the extent of his own interest. And there is no rule of law better settled than that, when a contract, resting in parol, is made by an agent, even where the principal is not disclosed, the action for breach may be brought, either in the name of the principal or the agent, the right of set-off, on the part of the debtor, being preserved, the same against the principal as if the action were brought in the name of the agent: 1 Chitt. Pl. 134; Story on Agency, § 403, p. 479, ed. 7; *Sadler v. Leigh*, 4 Camp. 195; *Laphum v. Green*, 9 Vt. 407; *Paterson v. Gandasequi*, 15 East 62. Lord DENMAN, C. J., in *Sims v. Bond*, 5 B. & Ad. 389; *N. Y. & W. Pr. Tel. Co. v. Dryburg*, 35 Penn. St. 298, citing *Lane v. Cotton*, 1 Ld. Raym. 646.

case assumes no such ground, but rather the contrary, that the party may seek his remedy, either against the sender, or the company guilty of default in transmitting it. For as the order was for two hand-bouquets, upon a florist, and was sent for two *hundred* bouquets, the operator reading "hand" *hund*, and supposing it an abbreviation for "hundred," the defendant would have been benefited by the error, if he chose to hold the sender upon the message, as it reached him, thus obtaining a larger order. But he elected to pursue the real defaulter.

5. We need not, perhaps, further discuss the ground upon which, probably, the preponderance of authority seems to hold the sender of the message not responsible for the errors in transmission. We can conceive no plausible ground upon which that view is maintainable, unless it be that the telegraph company being, at most, a *special* agent, employed and authorized only to act on behalf of the sender of the message, to the extent of sending the very message delivered to their operator, he is not bound by any act of the agent, beyond his authority or employment. That rule is most unquestionable, within proper limits; but it does not seem to us entirely satisfactory, when applied strictly and literally to this subject. For in the employment of a special agent of any kind, for the transmission of an order upon a mercantile house or upon any one, there can be no fair question, the principal is bound to take all reasonable precautions to employ a competent agent and to have him properly instructed. And in regard to the transmission of telegraphic messages, there is nothing clearer than that the sender, by taking proper precautions, may insure the entire accuracy of the transmission. This will be done (1) by securing a proper operator, and either reading the message to him, or else writing it so plainly that he cannot fail to send it correctly, by which correct transmission will be rendered almost certain; or (2) if absolute certainty is desired, it may be secured by having the message repeated back, while the sender remains in the office to test its accuracy, or, if that be too dilatory, by having the message repeated back to the operator, having first secured the correct reading of the original message by the operator.¹ All the cases, so far as we know, where

¹ It is sometimes said that absolute exemption from error will be secured by having the message repeated back to the operator. But this will be true only to the extent that the operator understands the message rightly himself. In the case just cited, if the operator understood "hand" to mean *hundred*, repeating the message would not correct the error.

errors have occurred in the transmission of messages, on behalf of the sender, and for which he was not held responsible, turned upon mistakes which would probably not have occurred if the sender had taken the proper precautions, even short of having the messages repeated, and clearly not with that. We cannot therefore say, that we feel prepared to abandon the ground maintained by us in *Durkee v. Railway*, *supra*. The case seems to us different, where a public agency is employed, from that where one sends a special messenger. It has been so held, in regard to the employment of known factors or brokers, where it is held that such known public agents are, as to the persons with whom they do business, for any principal, clothed with the authority of general agents, although only employed for a single time, and under special instructions, limiting their powers as between them and the employer: Story on Agency, § 131; *Fenn v. Harrison*, 3 Term R. 757, 762; s. c. 4 Id. 177; *Whitehead v. Tuckett*, 15 East 408; *Pickering v. Busk*, Id. 38, 43; *Daniel v. Adams*, Ambler 495, 498; *Johnson v. Jones*, 4 Barb. 369. So also where there is no other mode of communicating except by some public instrumentality, like the post-office or telegraph companies, whatever risks or uncertainties exist, in such agencies, must fall upon the party employing them, and who is responsible, in a general way, for the transmission of the message, whatever it may be. Thus where money is sent by mail by a debtor to meet his obligation, without any special or reasonably implied direction on the part of the creditor, the sender assumes the risk of the transmission. But if the creditor direct the transmission in this mode, he must assume the risk, and in either case the servants employed in the post-office, or in the transportation of the mail, through whose culpable neglect any loss occurs, will be responsible to the party at whose risk the message or parcel is sent, although the post-master general, as general superintendent of the office, cannot be held responsible for the default of any such his public agents: *Lane v. Cotton*, *supra*; *Whitfield v. Le Despencer*, 2 Cowp. 754. So, too, upon the same principle, the deputy post-masters are responsible only for letters lost through their own want of ordinary care, and not for the misconduct of their servants, but the servants are responsible for their own misconduct to the party injured thereby: *Rowning v. Goodchild*, 3 Wilson 443; *Stock v. Harris*, 5 Burrow 2709; *Danforth v. Grant*, 14 Vt. 283; Story on Agency, § 319 a.

6. And it seems to us, that the same rules will apply to communication by telegraph, with the exception that the company is responsible for the default of its servants. But as to the responsibility, in the first instance, and as between contracting parties, the party for whose benefit the message is sent will assume the risk of correct transmission, having his remedy over against the company when in default. This view seems to us so just and reasonable, and the arguments against it of so comparatively little weight, that we cannot, at present, believe it will not ultimately prevail everywhere.

II. We are now briefly to consider at what point a contract negotiated by telegraph is consummated.

1. There have been some intimations from judges, in the way of *obiter dicta*, that there may exist some difference in this respect, between the negotiation of contracts by correspondence through the post-office and by telegraph: WILLES, J., in *Godwin v. Francis*, L. R. 5 C. P. 295. But we have not been able to comprehend why it should be so, if the courts put the proper construction upon telegraphic communications.

2. It is now entirely well settled, we believe, that in negotiating contracts by correspondence through the mail, the final acceptance on one side of a definite proposition on the other, consummates the negotiation, at the time of the delivery of such acceptance, at the post-office. This rule is firmly and learnedly maintained by Mr. Justice MARCY, in delivering the opinion of the Court of Errors in New York, in *Mactier v. Frith*, 6 Wend. 103,¹ and has since been followed in that state: *Brisban v. Boyd*, 4 Paige 17.

3. And *Trevor v. Wood*, 36 N. Y. 307,² applies the same rule to contracts negotiated by telegraph. And it is here declared that such acceptance by telegraph is at the risk of the party whose proposition is thus accepted, whether it arrives in due course of the telegraph, correctly or incorrectly, or not at all. Thus it would seem to follow that, in proving such proposition and acceptance, the telegram of the party making the proposition, as delivered to the other party, will be the original, and if that cannot be produced, the next best evidence will be the copy recorded in the books of the company where it was received, which in strictness should be

¹ The acceptance must be in reasonable time and before the receipt of any countermand: *Abbott v. Shepard*, 48 N. H. 14; *Stockham v. Stockham*, 32 Md. 196.

² See also *Brown v. Railway*, 44 N. Y. 79.

verified by the clerk enrolling it. And the original of the acceptance will be the written telegram delivered at the office of the company, where it will naturally be preserved, or if not, its enrolment will be preserved. These propositions are also maintained in *Durkee v. The Railway*, *supra*. This is in accordance with the more recent English decisions, in regard to the negotiation of contracts by the mail: *Dunlop v. Higgins*, 1 Ho. Lds. Cas. 381.

4. The attempt to qualify this rule to the extent that the acceptance must ultimately be received by the party making the offer, in order to perfect the contract, in *British and American Tel. Co. v. Colson*, L. R. 6 Exch. 108, is severely condemned by the Lords Justices, in *Harris's Case*, L. R. 7 Ch. App. 587, and must, we think, fail to be recognised in the final court of appeal. For if the acceptance is at the risk of the party making the first offer, after its delivery either to the post-office or the telegraph, as to its transmission correctly, it must equally be so, as to the time of its reaching its destination, whether in proper time, or not at all. It seems very obvious that, upon principle, no such qualification can be maintained as that attempted in *B. & A. Tel. Co. v. Colson*, *supra*. The foregoing propositions seem to us most unquestionably established by the latest and most approved authorities, and they certainly afford no ground for any distinction between negotiating contracts by mail and by telegraph.¹

¹ There are many cases in the English reports, referred to by the Lords Justices, in their opinions in *Harris's Case*, *supra*, which have an important bearing upon the question how far an acceptance of a proposition, made by the other negotiating party, and delivered at the post-office or the telegraph, will fail of consummating the contract, where it finally fails ever to reach the party for whom it is intended. The cases prior to *British & Am. Tel. Co. v. Colson*, *supra*, all hold, that the delivery of the acceptance to the mail or the telegraph, by whichever the proposition was received, will consummate the contract, without regard to the question of its ultimately reaching the party for whom it was intended. That is the doctrine of *Hebbs's Case*, Law Rep. 4 Eq. 9; *Adams v. Lindsell*, 1 B. & Ald. 681. It is true this case also contained the point that the offer was posted to a wrong address, by which it failed to reach the other party until two days later than it otherwise would have done, whereby the acceptance, which was mailed immediately the offer was received, failed to reach the party offering the goods, until he had otherwise disposed of them. But as this was through the fault of the party making the offer it was held he could not complain of the delay, thus favoring the rule before stated, that the party making the first offer is responsible for its reaching the other party in due time and correct form. Lord COTTENHAM, in the House of Lords, in *Dunlop v. Higgins*, *supra*, likened the acceptance of an offer through the mail to sending notice of the dishonor of a bill or note, where it had

III. We have thus presented the important discrepancy between the English doctrine and what we regard as the prevailing doctrine in this country, both (1) as to the responsibility of the parties to a contract negotiated by telegraph for the errors of the latter; and also (2) the allowable remedies against the telegraph owners. We desire, by some further illustrations of our meaning, to render ourselves, if possible, more clearly understood, and thus present, in a clearer light, what we regard as a departure, both from principle and analogy, in the English decisions.

1. There can be nothing, in our apprehension, more unreasonable or unjust, and, at the same time, a more entire departure from, both principle and analogy, than the point understood to be declared in *Playford v. United Kingdom Electric Tel. Co.*, L. R. 4 Q. B. 706. In that case the plaintiff, having a cargo of ice, invited an offer from a dealer in the article by telegraph, he being, by the custom of the trade, bound to pay the expense of the return message in the event of it being accepted. The offer being twenty-three shillings, was, by an error in reading, transmitted as twenty-seven shillings, whereupon the plaintiff sent his cargo of ice, and the party making the offer, refused to accept it except at twenty-three shillings, his real offer, as delivered to the telegraph. The plaintiff thereby lost 39*l.* 1*s.* 6*d.*, and brought his action against the telegraph company to recover the same. The American cases were cited, showing that here the courts recognise the analogy between the public duties of common carriers and telegraph companies, and allow the party really injured by the default of the

been held sufficient to deliver the notice at the post-office, whether it ever reached the endorser or not, as held in *Stocken v. Collin*, 7 M. & W. 515, and other cases. And *Duncan v. Topham*, 8 C. B. 225, seems to favor the doctrine, that if the acceptance of a proposition is lost by the post-office it will not render the acceptance any the less effective, as a consummation of the contract. If the acceptance is clearly conditional it will not become effective as a consummation of the contract until the assent of the other party to the condition is properly signified to the party making the condition, which must be done in the same mode in which the original acceptance should be made, *i. e.* by delivering it to the post-office, or the telegraph, by whichever mode the parties are negotiating the contract. It has been held that the acceptance of an offer will be construed as absolute and complete in effecting the consummation of the contract, unless it contained some clearly expressed and peremptory condition or qualification: *English and Foreign Credit Co. v. Arduin*, Law Rep. 5 H. of L. 64. *Potter v. Saunders*, 6 Hare 1, seems also to be opposed to the rule first broached in *British & American Tel. Co. v. Colson*, Law Rep. 6 Exch. 108.

latter companies to maintain an action to recover damages: *De Rutte v. N. Y., Albany & Buff. Tel. Co.*, 1 Daly 547; *N. Y. & W. P. Tel. Co. v. Dryburg*, 35 Penn. St. 298. The learned judge said in giving judgment: "We cannot agree with the judgments given in the American courts, cited in argument, that there is any analogy between a consignment of goods through a carrier and the transmission of a telegram." The learned judge also denies, that "the person, to whom a telegraphic message is sent, can be said to have a property in the message." * * * "The only question therefore is, with whom was the contract made?" Here he concludes it was solely with the party sending the reply, and he alone can sue, since he alone employed the telegraph company.

2. It scarcely expresses what we feel in regard to such a rule of law, to say that it is incomprehensible to us. We think we do comprehend enough of it to understand, that it is not only a departure from all just analogies, as well in the law of agency, as in that of carriers; and that, in practice, it must prove, not only inconvenient and embarrassing, but that it will, in many cases, produce serious injustice. We feel more keenly, an error in the English decision, because of its greater influence upon our own law, and also because of its far more rare occurrence, than among our own multiplied courts, many of which have by no means the same opportunity to know the just and salutary application of the principles of the common law, as are possessed by the English courts. We do not suppose the English courts would adhere to the form of the contract so implicitly, as to require a known agent, transmitting a message on behalf of his principal, as in the case of a commercial traveller directing his principal to fill an order for goods bargained by himself, to sue for any default in the transmission, in his own name, merely because the agent gave the order. But it seems to us, that this simple rule of the law of agency, *qui facit per alium facit per se*, reaches all the difficulty which ever arises, in regard to the party entitled to sue for the defaults of telegraph companies in transmitting messages. The party directing the message acts on behalf of the party really interested in the correct transmission of the same, and that party may always sue for any breach of duty. We cannot bring ourselves to believe that the English courts will, ultimately, adhere, so strenuously to what we cannot but regard as the mere shadow of the con-

tract, as to exclude the only party in interest from all redress, and thus exempt the real defaulting party from all responsibility.

IV. There are, of course, very many other points where the use of the telegraph will modify, to some extent, the established rules of law affecting the negotiation of contracts through the mail. One of these is the extent to which the action of the parties, through the mail, will be subject to countermand before the message through the mail reaches the other party. Upon principle, it would seem, that an offer through the mail would be countermandable, during its transit, by any mode of communication which reached the party before the offer. It was so held in *Bank of the Republic v. Baxter*, 31 Vermont 101. But, upon the same principle, *i. e.* that action through the mail is countermandable, so long as it remains merely inchoate, and has not become finally binding upon the party taking such action, it must follow, that an acceptance through the mail, as it becomes operative from the time of delivery to the post-office, is not countermandable by telegraph. This is so stated by Lord Justice MELLISH in *Harris' Case*, L. R. 7 Ch. App. 587, 595. His lordship said, that he had always so understood the law until the case of *British and American Tel. Co. v. Colson*, L. R. 6 Exch. 108, "which had raised some doubt on the subject." But we can scarcely suppose that that case will effect any change in the law upon the question.¹

I. F. R.

¹ We have not deemed it essential to cite all the cases in the books upon points where there is no controversy, and we have not alluded to a class of cases, like *Dutton v. Poole*, 1 Ld. Raym. 301; *Mellen v. Whipple*, 1 Gray 317, as modified by *Price v. Eaton*, 4 B. & Ad. 433; *Tweddle v. Atkinson*, 1 B. & S. 393, and many others, where it has been held, that one not a party to the contract, and from whom the consideration did not proceed, cannot sue upon it, to enforce a duty created for his benefit, save in exceptional cases, which were stated by Mr. Justice MERCALF, in *Mellen v. Whipple*, *supra*, and in his *Law of Contracts*, n. 209, because we do not regard these cases as having any bearing upon the question of allowing the party interested in the correct transmission of a telegram to sue for damage sustained by the default in its transmission. That is a question of privity, where there is serious conflict in the cases, and room for doubt how far the later decisions have improved upon the earlier ones, which gave a more liberal construction to the right of action, but the question we have discussed is one of agency merely, whether a party can claim the benefit of a contract made for his benefit by an agent not declaring his agency at the time.