The present seems a fit time to challenge, "To the law and to the testimony" in bonds as well as in other things. And if the court has justified its boast that it would "never immolate truth and justice," it may well be doubted whether it has not "immolated the law" in the application of its principles to these cases.

JAMES F. MISTER.

KANSAS CITY, Missouri.

RECENT ENGLISH DECISIONS.

High Court of Justice of England. Court of Appeal.

DICKSON ET AL. v. REUTER'S TELEGRAPH COMPANY.

The defendants, a telegraph company, through the negligence of their servants, delivered to the plaintiffs a message which was not intended for them. The plaintiffs, who reasonably supposed that the message came from their agents and was intended for them, acted upon it and thereby incurred a loss: *Held*, affirming the decision of the Common Pleas Division, that the plaintiffs could not maintain any action against the defendants upon the ground of their negligence, or of an implied representation by them that the message was sent by the plaintiffs' agents.

APPEAL from the judgment of the Common Pleas Division in favor of the defendants on demurrer to the statement of claim, which alleged that the plaintiffs were merchants at Valparaiso, and were a branch house of the firm of Dickson, Robinson & Co., of Liverpool; the defendants were a telegraph company having their chief offices in London, and agencies in Liverpool and in various parts of the world, including South America. The defendants had a system of forwarding in one "packed" telegram the messages of several senders, each message being distinguished and headed by a registered cipher known to the defendants and their agents and also to the senders, which messages, on receipt of the packed telegrams by the defendants' agents, were transmitted to the proper recipients. Previous to December 1874, Dickson, Robinson & Co. were in the habit of sending messages to the plaintiffs through the defendants' company, and were instructed by the defendants to head the messages by a registered cipher word indicating that the messages were intended for the plaintiffs. On the 26th of December 1874 the plaintiffs received at Valparaiso a telegraphic message, which they understood and reasonably understood, to be a direction from Dickson, Robinson & Co. to ship barley to England; but the message was not in fact intended for the plaintiffs. The mis-deli-

very was caused by the negligence of the defendants or their agents. On receiving the telegram the plaintiffs proceeded to execute the supposed order and shipped large quantities of barley to England. Owing to a fall in the market for barley, the plaintiffs, by reason of the shipments, sustained a serious loss, and they now claimed that the defendants' company should reimburse them for that loss.

The facts are fully stated in 2 C. P. D. 62, where the proceedings in the Common Pleas Division are reported.

Herschell, Q. C. (*Benjamin*, Q. C. and *W. H. Butler* with him), for the plaintiffs.

Watkin Williams, Q. C. (*H. D. Greene* with him), for the defendants.

BRAMWELL, L. J.—I am of opinion that this judgment must be affirmed. The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. This general rule is admitted by the plaintiffs' counsel, and prima facie includes the present case. But then it is urged that the decision in *Collen* v. *Wright*, 7 E. & B. 301; in Ex. Ch. 8 E. & B. 647; has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that *Collen* v. *Wright*, properly understood, shows that there is an exception to that general rule. *Collen* v. *Wright* established a separate and independent rule, which, without using language rigorously accurate, may be thus stated: if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in *Collen* v. *Wright*. If so, it appears to me that it does not apply to the facts before us, because in the present case I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plain-

tiffs. It appears to me, therefore, that there is a distinction between this case and *Collen* v. *Wright*, and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred.

But then it is argued that this is a case of misfeasance, that is, a case of negligence. Now the defendants' counsel made a remark which seemed to me very just, namely, that before any person can complain of negligence he must make out a duty to take care; and that that duty to take care can only arise in one of two ways, namely, either by contract or by the law imposing it. That it does not arise by contract in this case is shown by the observations which I have already made for the purpose of pointing out that there is no contract between the plaintiffs and the defendants. Does that duty arise by law? If it did arise by law, the consequence would be that the general rule which has been admitted to exist is inaccurate, and that it ought to be laid down in these terms, that no action will lie against a man for misrepresentation of facts whereby damage has been occasioned to another person, unless that misrepresentation is fraudulent or careless. But it is never laid down that the exemption from liability for an innocent misrepresentation is taken away by carelessness. It seems to me, therefore, that that point also fails the plaintiffs.

Further, the defendants did not guarantee that the message was authentic, and so far as they were concerned it might not be true. The action is not maintainable upon the ground of an implied warranty that the message was correct.

Another point raised was that the mistake was committed in the ordinary business of the defendants. I hardly know how that was made a separate ground of argument. Inaccuracy in a telegram is more likely to mislead than inaccuracy in a verbal statement: and the delivery of a telegraphic message is a more formal matter than the communication of a message by word of mouth. I cannot however see any distinction in principle between them.

It has been argued that if this action be not maintainable the consequences will be mischievous. I am not of that opinion. If it were held that a person is liable for a negligent misrepresentation, however bona fide made, a great check would be put upon many very useful and honest communications, owing to a fear of being charged, and perhaps untruly charged, with negligence. I do not think the rule upon which we are acting unreasonable either

in itself or in its application to a telegraph company. It is to be recollected that a telegraph company are generally under some liability to the sender of the message, and if they are careless in delivering it and thereby occasion damage to him, he may maintain an action against them; and (apart from the natural desire to carry on their business properly so as to gain customers) the existence of this liability is a kind of security for the proper delivery of the messages intrusted to the telegraph company.

I wish further to say that I do not see any analogy between the liability of a common carrier and that of a telegraph company. A carrier is liable both to the person who employs him and also to the owner of the goods: but the plaintiffs did not employ the defendants, and they are not the owners of the message. Possibly some analogy may exist between the present facts and a case where a carrier has delivered goods to a person, for whom they were not intended, and who has in consequence suffered some loss or inconvenience; but I do not think that under such circumstances an action would be maintainable against the carrier; for the person to whom the goods were delivered might have refused to receive them, and when he took them in he accepted the risk flowing from a possible mistake of the carrier.

In no point of view is the present action maintainable.

BRETT, L. J.—Upon consideration of the nature of the business of a telegraph company, it seems to me plain that all that they undertake to do is to deliver a message from the person who employs them, and that they perform the part of mere messengers; prima facie, therefore, their only contract is with the person who employs them to send and deliver a message. In the present case the plaintiffs did not send the message, and therefore the defendants have made no contract with them. The defendants have in effect made a representation which is false in fact, but which they did not know to be false at the time of making it. If the case for the plaintiffs be simply that there was a misrepresentation upon which they have reasonably acted to their detriment, it must fail, owing to the general rule that no erroneous statement is actionable unless it be intentionally false. This seems to be admitted by the plaintiffs' counsel; it is urged, however, that *Collen* v. *Wright* has introduced an exception to that rule; but after the argument of the defendants' counsel I have come to the conclusion that the de-

cision in that case was founded upon a different and independent rule which may be stated to be, that where a person either expressly or by his conduct invites another to negotiate with him upon the assertion that he is filling a certain character, and a contract is entered into upon that footing, he is liable to an action if he does not fill that character; but the liability arises not from the misrepresentation alone, but from the invitation to act and from the acting in consequence of that invitation. Therefore the decision in *Collen* v. *Wright* does not establish an exception to the rule that an innocent misrepresentation does not form the ground of an action. Now the telegraph company, being mere messengers, did not either expressly or impliedly invite the plaintiffs to act with them in any character, and the present facts do not fall within the principle of that case.

It was further suggested that the defendants are liable by reason of negligence; but when the argument for the plaintiffs as to negligence is examined, it is found to be based upon the doctrine, that where a person has been led by the negligence of another to act under the belief of a certain state of facts and in consequence has suffered detriment, the person guilty of negligence is liable to make good that loss; but this doctrine properly applies to cases of estoppel; and the facts before us do not allow the plaintiffs to rely upon the defendants' negligence as a ground of estoppel: *Swan* v. *North British Australasian Company*, 2 H. & C. 175.

I cannot see that any liability rests upon the defendants, and therefore I think that the judgment of the Common Pleas Division should be affirmed.

COTTON, L. J.—I also am of opinion that the judgment of the Common Pleas Division should be affirmed. The authority most relied on by the plaintiffs' counsel was *Collen* v. *Wright*. Now it is quite clear that the decision in that case went upon the ground that the testator of the defendants by his conduct impliedly warranted that he had the authority which he professed to have; and this is plain from the language of WILLES, J., in delivering the judgment of the Exchequer Chamber, 8 E. & B. 647, 657, 658. Now the principle of that case cannot apply here. The defendants did not enter into a contract with the plaintiffs, nor did they represent that they had any authority to act as agents for the plaintiffs' Liverpool house: they simply deli-

vered the message and left the plaintiffs to act or not act upon it, as they pleased; therefore it cannot be said that in consequence of a request by the defendants the plaintiffs undertook any liability or were induced in any way to act upon the message. There being no contract between the parties to the present suit, *Collen* v. *Wright* is distinguishable.

It was further contended for the plaintiffs that the defendants were liable by reason of their negligence. It was admitted that misrepresentation alone would not have supported an action; but it was contended that, owing to the nature of the business carried on by the defendants, they were bound to warrant the accuracy of the message, or at least to guarantee that every precaution had been taken by their agents to avoid mistake, and that the message was sent by the persons by whom it purported to be sent. I cannot concur in this argument. A person comes into a telegraph office and writes out a message to be forwarded by the company; how can the company ascertain whether the person in whose name the message is sent has really authorized its transmission? It is impossible to suppose that the company in the ordinary course of their business warrant that the message comes from a particular person; for they would thereby make a representation, the truth of which in many cases they cannot ascertain.

Judgment affirmed.

Notwithstanding the rule in *Playford's case* was followed by the Court of Common Pleas in Upper Canada, in *Feaver* v. *The Montreal Telegraph Co.*, 23 Upper Canada C. P. Rep. 150 (1873), the tendency of the American decisions is clearly contrary to the principle acted upon in this case. The English rule seems to be that where a tort arises through a breach of contract, a person injured by such tort can not maintain an action therefor against the wrongdoer, unless he was a party to the contract. It was for this reason held that if a servant is injured on a railway, when he himself has made the contract for the passage, his master has no right of action against the company for the loss of the servant's service: *Alton* v. *Midland Railway Co.*, 19 C. B. N. S. 213 (1865). The duty of carrying safely in such cases was said to arise wholly out of the contract. The servant alone by his contract buys the duty, and the duty is therefore wholly and only due to him. It was thought to be quite different from a case of pure and simple tort to a servant, which has no connection with a contract; there all agree the master may sue for the loss of service caused by the injury. And the same rule has been applied in America, where a widowed mother provided medical attendance and support for her minor son, who had been injured on a railway when he travelled on his own contract. She was not allowed to recover in an action on the case against the company: *Fairmount, &c., Railway Co.* v. *Stutler*, 54 Penna. St. 375 (1867).

There is room to doubt whether the

principle was properly applied in these cases; for in *Ames* v. *Union Railway Co.*, 117 Mass. 541 (1875), it was held, notwithstanding the foregoing decisions, that a master could have an action of tort against a carrier for negligent injury to his apprentice while in *transitu*, by which he lost his service, although the apprentice, in his master's absence, made the contract and paid his own fare.

On the same principle as *Alton's case*, if A. delivers his horse to B., to be kept and re-delivered on demand, and A. subsequently requests B. to deliver the horse to C., but the latter refuses so to do, C. cannot maintain any action against B. for such refusal; not in trover, for he does not own the horse; not in contract, for C. was not a party to it: *Tollit* v. *Sherstone*, 5 M. & W. 283 (1839); MAULE, B., using this language: "It is clear that an action of contract cannot be maintained by a person who is not a party to the contract; and the same principle extends to an action of tort arising out of a contract."

For a similar reason, if A., by contract, is under a duty with B. to provide a safe carriage, and C., riding therein by permission of B., is injured by a defect therein, he has no remedy against A.: *Winterbottom* v. *Wright*, 10 M. & W. 109 (1842). And if A. employs S. to hang up a chandelier in his house, S. may owe a duty to A. to do his work in a careful and proper manner; but if, through breach of that duty, the chandelier falls and injures C., the latter has no cause of action against S., who did not know of the defect, although the house was a public house, and C. lawfully therein: *Collis* v. *Selden*, Law Rep., 3 C. P. 495 (1868).

A., in good faith, sells to B. an article for a particular purpose, which, through some defect therein, injures a third person using it by consent of B. Now, if there is a contract of warranty between A. and B. by which A. would be liable to B. for the same injury, this liability does not extend to the third person and give him a cause of action against A., in the absence of any fraud or knowledge of the defect: *Longmeid* v. *Holliday*, 6 Exch. 761 (1851); see also *Davidson* v. *Nichols*, 12 Allen 514 (1866); *Loop* v. *Litchfield*, 42 N. Y. 351 (1870); *Losee* v. *Clute*, 51 Id. 494 (1873).

The English courts do not hold, notwithstanding the case of *Couch* v. *Steel*, 3 El. & Bl. 402, that *wherever* a person is injured by the defendant's negligent breach of a public statutory duty, an action lies in favor of the party so injured. Such a result must depend upon the object and language of the particular statute imposing the duty: *Atkinson* v. *New Castle, &c., Waterworks Co.*, 2 Ex. Div. 441 (1877).

There may be a difference in the liability of a telegraph company to the receiver, whether the injury to him arises from an act of commission or of omission. If the company delivers him a wrong message, whereby he is damaged, his remedy seems far more clear (notwithstanding the English cases) than if it arise from mere non-delivery. Such a distinction is clearly recognised in *Southcote* v. *Stanley*, 1 H. & N. 247 (1856), where the plaintiff, in entering the defendant's hotel, was injured by the falling of a piece of glass from the door he was opening, and he was held to have no right of action; BRAMWELL, B., saying: "My difficulty is to see that the declaration charges any act of commission. If a person asked another to walk in his garden, in which he had placed spring guns or man traps, and the guest, not being aware of it, was thereby injured, that would be an act of commission. But if a person asked another to sleep at his house, and omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of commission, but simply of omission." The law of carriers

illustrates this distinction. A consignee of goods, to whom they are sent without his order, as for a gift, or consigned for sale, has no action against the carrier for *neglecting or refusing* to receive and transport them at the request of the consignor, although the latter tenders full payment for the carriage: *Lafarge* v. *Harris*, 12 La. Ann. 553 (1858); but there can be no doubt, that if the carrier destroy or wilfully injure the goods, the consignee has a right of action for such misfeasance. Whether, in case of sending a gift by the carrier, the action *must* be brought in the name of the donee, as stated in Angell on Carriers, § 491, is immaterial to our present purpose. It is quite sufficient for our argument that he can do so.

The same distinction between nonfeasance and misfeasance underlies that class of cases where a servant is injured by a common carrier on the journey; he has an action in his own name, although the contract was wholly made with his master, and the fare paid by him. The servant could have no action if the carrier neglected to transport him at all, or did not transport him at the stipulated time, but the master only; but for positive wrongful injury to the servant while carrying him he has his remedy. For damages to the master's business the carrier may be liable to the master on the contract: for damages to the servant's body or health, he is liable to him as for a tort: *Marshall* v. *York, &c., Railway Co.*, 11 C. B. 655; *Austin* v. *Great Western Railway Co.*, Law Rep. 2 Q. B. 442. See also *Dalyell* v. *Tyrer*, 1 El., Bl. & El. 899.

The difference between nonfeasance and misfeasance is clearly illustrated by the case of *Martin* v. *The Great Indian Peninsular Railway Co.*, Law Rep. 3 Ex. 9 (1867). The plaintiff's goods were being transported by the defendants under a contract with the Indian government, to which the plaintiff was not a party. It was held, that although the plaintiff could not sue on the contract for *non-performance* of their duty as carriers, he could sue for a positive injury done to his property while in their custody under their contract to carry safely; and although the contract was no concern of the plaintiff's, yet the act was no less a wrong to him. See also *Blakemore* v. *The Bristol & Exeter Railway Co.*, 8 El. & Bl. 1034 (1858). Likewise in *Langridge* v. *Levy*, 2 M. & W. 519; 4 M. & W. 338; and *George* v. *Skivington*, Law Rep. 5 Ex. 1, there was a positive tort or fraud in the contract, which was thought to enable a third person injured by it to sue, although no party to the contract itself.

So, if an apothecary administer improper medicines to his patient, or a surgeon unskilfully treat him, and thereby injure his health, he is liable to the patient, although the father, master, or friend of the latter may have been the contracting party with the apothecary or surgeon, and was to pay him his fees; for even if no such contract had been made, the apothecary, if he gave improper medicines, or the surgeon, if he took him as a patient and unskilfully treated him, would be liable to an action for the misfeasance: PARKE, B., in *Longmeid* v. *Holliday*, 6 Exch. 767 (1851). Yet, in such cases the patient has no remedy (but only the contractor) in case the apothecary or surgeon neglects altogether to prescribe, where he has agreed to do so upon a sufficient consideration. For a breach of his contract by nonfeasance the employer only can sue; for misfeasance in performing it, the person injured.

A person to whom a gratuitous promise has been made by a common carrier for his transportation, has no remedy if the carrier declines to carry him, and revokes his free pass, or neglects to run the train as advertised; but if he does carry him, and injures him by his negligence, he is liable for such misfeas-

ance; for by assuming the relation he assumes the duty: *Philadelphia, &c., Railroad Co.* v. *Derby*, 14 How. 468; *Steamboat New World* v. *King*, 16 How. 469; *Todd* v. *Old Colony Railroad Co.*, 3 Allen 18; *Wilton* v. *Middlesex Railroad Co.*, 107 Mass. 108; *Gillenwater* v. *Madison Railroad Co.*, 5 Ind. 340. So, if one gratuitously promises to do any work, or render any service for another, but subsequently wholly neglects to commence his undertaking, he is not liable for such nonfeasance; but if he commences upon the work, and by his gross negligence injures the person or property of the other, he then becomes liable for such misfeasance: *Elsee* v. *Gatward*, 5 Term Rep. 143; *Thorne* v. *Deas*, 5 Johns. 84; *Balfe* v. *West*, 13 C. B. 466.

This distinction between nonfeasance and misfeasance is not especially relied upon in the American telegraph cases, but upon inspection they all appear to have been cases of misfeasance where the company delivered a wrong message—a message not sent; and in such cases there is no reason why they should not be liable *as if no message at all had been sent*. And of course, if a telegraph company deliver an order to a person to send goods, or perform labor, and the person incurs expense in reliance upon such order, the company giving the order ought to indemnify the sufferers, either because they are the principal in the affair, or if they are agents, on the ground of an implied warranty that they have authority from the sender to deliver the exact message they do deliver, as was argued in the principal case, and of which proposition *Collen* v. *Wright* is the main authority.

In *Bowen* v. *Lake Erie Telegraph Co.*, Allen's Tel. Cas. 7, in the Court of Common Pleas of Ohio (1833), B. & Co., in Michigan, sent to the plaintiffs in New York, merchants, this message: "Send one *handsome* eight-dollar blue and orange." The message was delivered by the defendants to the plaintiff: "Send one *hundred* eight-dollar blue and orange"—a clear misfeasance; and the plaintiff sent one hundred shawls of that description, which B. & Co. returned, and the shawl season having closed, they were depreciated in value. The plaintiff was allowed to recover, no question being made as to the right of action. And in *Aiken* v. *Western Union Telegraph Co.*, 5 South Car. Rep. 358 (1874), it seems to be assumed rather than decided. So in *Lowery* v. *Western Union Telegraph Co.*, 60 N. Y. 198 (1875), it was not denied. The same may be said of *Elwood* v. *Western Union Telegraph Co.*, 45 N. Y. 549; Allen's Tel. Cas. 594 (1871), and *Rose* v. *U. S. Telegraph Co.*, 3 Abb. P. Rep. (N. S.) 408; Allen's Tel. Cas. 327 (1867).

N. Y. & Wash. Printing Tel. Co. v. *Dryburg*, 35 Penna. St. 157 (1860), is the most important case in support of an action by the receiver. R., in New York, sent a message to D. in Philadelphia, "Send me two *hand* bouquets, very handsome, one of $5 and one of $10." The word "hand" was delivered to D. *hundred*, and D. procured a large quantity of expensive flowers to complete the order. He was allowed to recover of the company, though the point of non-privity was expressly made—a positive misfeasance. *De Rutte* v. *New York, &c., Telegraph Co.*, 5 Am. Law Reg. N. S. 407, was also a case of misfeasance, but there was some ground to hold that the sender of the message in that case was acting as agent of the receiver (see Allen's Telegraph Cas., at p. 281), and if so, even by the English cases the receiver has a right of action.

If, as was held in *Henkel* v. *Pape*, Law Rep. 6 Ex. 7 (1870), a telegraph company is not the agent of the sender, so as to bind him to the receiver by the telegram as delivered, the receiver has, according to the English law, no redress,