and profit of the party entitled to the services under the agreement. The only adequate remedy is to prevent the wrong, and that can be no otherwise administered than by an injunction. The defendant is shown to be a person of superior abilities and acquirements in his pursuit of a tenor singer, and his addition to an operatic troupe as one of its members would not fail to be an attraction to the public, and a source of profit to the manager in whose employment he should render his services. The case accordingly does present the right to an injunction under the rules which have been made applicable to the issuing of that order."

In conclusion, the cases upon this subject show that the English courts at first refused to grant such injunctions under any circumstances. Gradually they came to grant relief in cases where an express negative covenant formed part of the agreement. Finally, the modern doctrine has become established in England, that where a contract for personal services is of such a nature that adequate compensation could not be secured by seeking damages in an action at law, its breach may be enjoined by a court of equity, even in the absence of an express negative covenant.

The courts of this country have reached, substantially, the same conclusion after passing through similar preliminary stages, and although there are still to be found, even among modern adjudications, decisions which deny this equitable remedy, the prevailing current of authority sanctions the jurisdiction of equity in such cases.

H. B. SCHERMERHORN.

DEPARTMENT OF COMMERCIAL LAW.

TOBIN *v.* THE WESTERN UNION TELEGRAPH COMPANY.[1]
SUPREME COURT OF PENNSYLVANIA.

Telegraph Companies—Limitation of Liability.

The stipulation in the message blank of a telegraph company which provides that the company shall not be liable for any mistakes or delays in the transmission of an unrepeated message, beyond the amount received for sending the same, does not apply to the sendee.

[1] 146 Pa., 375. Decided January 4, 1892.

THE LIMITATION OF THE LIABILITY OF A TELEGRAPH COMPANY.

The subject will be discussed under two heads: (1) How may a telegraph company limit its liability? (2) To what extent may the liability be limited?

In discussing the first question the writer assumes that the liability may be limited, and where the phrase, "the company is entitled to the benefit of these conditions" occurs, of course only that benefit which the law allows is meant.

In discussing the second question, the writer assumes that which leading writers declare to be the law in this respect, viz., that telegraph companies are not insurers, and are liable for want of due care only.

(1) *How May a Telegraph Company Limit its Liability?*—It is well settled that a telegraph company may limit its liability by an express contract: Passmore *v.* Tel. Co., 78 Pa., 238. So when a message is delivered to the company, written on one of the regularly prepared message blanks, which contains certain stipulations and conditions, the company is entitled to the benefit of those conditions in an action brought by the sender: Passmore *v.* Tel. Co., 78 Pa., 238; Wann *v.* Tel. Co., 37 Mo., 472; Lassiter *v.* Tel. Co., 89 N. C., 334; Tel. Co. *v.* Henderson, 89 Ala., 510; Wolf *v.* Tel. Co., 62 Pa., 83; Tel. Co., *v.* Dunfield, 11 Colo., 335; Aiken *v.* Tel. Co, 5 S. C., 358. This rule is followed even though the sender is not aware of the conditions contained in the message blank: Hill *v.* Tel. Co., 85 Ga., 425.

The question has arisen whether a telegraph company may limit its liability by a mere notice, and it has been held that a copy of certain rules and regulations posted in a conspicuous place in the company's office is sufficient to entitle the company to their benefit; and in the same case there is a dictum to the effect that a man will be bound by the regulations of a telegraph company whether he knows of them or not: Birney *v.* Tel. Co., 18 Md., 341, followed in Tel. Co. *v.* Gildersleeve, 29 Md., 232.

On the other hand it has been held that the stipulations in the message blank are of no avail when the message is delivered to the company, written on a plain sheet of paper and not on the blank containing the stipulations. Pearsall *v.* Tel. Co., 44 Hun., 532. In this case, however, it was intimated in the opinion that the plaintiff might have been non-suited had there not been evidence that he had no knowledge of the regulations or stipulations. It will thus be seen that this case lays down a rule contrary to the dictum in Birney *v.* Tel. Co., though it is, perhaps, in accord with the actual decision of that case.

From these cases it appears that a telegraph company may limit its liability by notice, if the notice is brought to the knowledge of the sender. See also Tel. Co. *v.* Buchanan, 35 Ind., 429.

If, however, a telegraph company may limit its liability by a notice brought to the knowledge of the *sender*, why should it not be able to limit its liability also by a notice brought to the knowledge of the *sendee?* It may be said to be well settled in those States where the question has arisen that, so far as the *sendee* is concerned, the liability of a telegraph company may not be limited by a notice even though brought to the sendee's knowledge: Tel. Co. *v.* Richman, 19 W. N. C., 569; Tobin *v.* Tel. Co., 146 Pa., 375.

The reason for this distinction is not pointed out in the decided cases, the point being passed over with the mere mention of the fact that the stipulations in the message blanks do not apply to the sendee. A reason for this distinction which suggests itself to the mind of the writer is the analogy which exists between telegraph companies and common carriers. A common carrier may not limit its liability by a mere notice, but only by an express contract. Redman's Law of Railway Companies as Carriers. Ed. 1970, p. 32. Therefore, stipulations contained in bills of lading or freight recipts do not apply to the consignee or sendee because there is no contract between him and the carrier. When the rule in regard to limiting liability was applied to telegraph companies, though it was extended so as to be effective where knowledge of the regulations is brought home to the sender, the idea of a contract still remained. The one employing the company was considered to contract with it subject to any reasonable regulations of which he had knowledge, and therefore as the sendee made no contract with the company, the regulations were said not to apply to him even though he knew of them.

It would seem, therefore, that where a contract is made between the telegraph company and the receiver of a message, the stipulations ought to apply to the receiver if he had knowledge of them, and in accordance with this view, in Tel. Co. *v.* Stevenson, 128 Pa., 442, where the action was brought by the receiver of a message, who had entered into a contract with the telegraph company to furnish him with stock quotations, it was held that it was a question for the jury whether, owing to certain peculiar circumstances, the company had waived the benefit of its regulations, and not that the regulations did not apply to the sendee.

The following, therefore, are our conclusions as to *how* a telegraph may limit its liability: (1) The liability may be limited by an express contract; (2) the liability to persons who employ the company may be limited by a notice brought to the knowledge of the employer.

(1) *To what Extent May a Telegraph Company Limit its Liability?* In considering this phase of the question of the limitation of the liability of a telegraph company, it is most important to keep well in mind the fact that telegraph companies are not insurers, and are liable only for want of due care: Gray's Communications by Telegraph, p. 19; Thompson's Law of Electricity, § 139.

The view adopted generally by the American courts, is that a telegraph company may not limit the liability which it incurs by reason of its "gross negligence," but may stipulate against liability for "ordinary negligence." See opinion of Mr. Justice DAVIS in Pegram *v.* Tel. Co., 97 N. C., 57; also Redpath *v.* Tel. Co., 112 Mass., 71; Carew *v.* Tel. Co., 15 Mich., 525; Wann *v.* Tel. Co., 37 Mo., 472; Becker *v.* Tel. Co., 11 Neb., 87; Breese *v.* Tel. Co., 48 N. Y., 132; Lassiter *v.* Tel. Co., 89 N. C., 334; Passmore *v.* Tel. Co., 78 Pa., 238; Womack *v.* Tel. Co., 58 Texas, 176.

The following are examples of what the courts define to be "gross negligence" of telegraph companies: (1) unskillfulness of operator; Pegram *v.* Tel. Co., 97 N. C., 57; (2) knowingly using a defective instrument, Sweatland *v.* Tel. Co., 27 Ia., 433; (3) the mere transposition of two letters by an opera-

tor in transcribing for delivery to a connecting line, Leonard *v.* Tel. Co., 41 N. Y., 544; (4) transmitting a forged message, Ellwood *v.* Tel. Co., 45 N. Y., 549; (5) any delay or failure to transmit or deliver, due to causes within the control of the company, Parks *v.* Tel. Co., 13 Cal., 422; Manville *v.* Tel. Co., 37 Ia., 214; Barrett *v.* Tel. Co., 42 Mo. App., 542; True *v.* Tel. Co., 60 Me., 9.

These examples indicate that "gross negligence" is the absence of any precaution relating to the business of telegraphy which will tend to insure the safe and speedy transmission of messages. It is to be noticed, however, that there is one precaution which relates essentially to the business of telegraphy and which would tend greatly to secure the accurate transmission of messages, which telegraph companies are not required to take, viz., that of repeating the message back to the transmitting office for comparison with the original: Wann *v.* Tel. Co., 37 Mo., 472; Passmore *v.* Tel. Co., 78 Pa., 238; Lassiter *v.* Tel. Co., 89 N. C., 334.

The term "ordinary negligence" as applied to telegraph companies is very difficult of definition. According to all the dicta it is the only negligence for which a telegraph company may limit its liability. The term itself, however, has not yet been defined, although in Pegram *v.* Tel. Co., 97 N. C., 57, it was intimated that ordinary negligence is "an omission . . . incident to the service . . . where there is slight attaching culpability." An examination of the cases, however, will show that the only mistakes or delays for which a telegraph company is not liable, even though the message is sent subject to the regulations, are those due to causes entirely beyond the control of the company, or those which could have been guarded against only by repeating the message: Parks *v.* Tel. Co., 13 Cal., 422; Manville *v.* Tel. Co., 37 Ia., 214; Barrett *v.* Tel. Co., 42 Mo. App., 542; True *v.* Tel. Co., 60 Me., 9; Fowler *v.* Tel. Co., 80 Me., 381; Wann *v.* Tel. Co., 37 Mo., 472; Lassiter *v.* Tel. Co., 89 N. C., 334; Passmore *v.* Tel. Co., 78 Pa., 238. These companies, however, are not liable for mistakes due to causes over which they have no control, even though the message was not sent subject to any stipulation by them: Shields *v.* Tel. Co., 9 Western Law Journal, 283; Bowen *v.* Tel. Co., 1 Am. Law Reg., 685. Therefore the term "ordinary negligence" does not apply to cases where the mistake or delay was due to causes not within the control of the company. The only remaining cases to which the term can possibly apply are those in which the mistake could have been avoided only by the use of the device of repeating. Perhaps, therefore, the term "ordinary negligence" means the absence of the precaution of repeating the message. That this is the meaning of the term is not clear, however, for it is not certain that, even before these companies made use of the stipulations in their message blanks, that they were bound to repeat messages for comparison.

Whatever the meaning of the terms "gross" and "ordinary" negligence may be, it is nevertheless well settled that telegraph companies are not liable for mistakes due to causes over which they have no control, and that when the message is sent subject to a stipulation in regard to repeating, the company is not liable for

a mistake which could have been avoided only by repeating.

Though according to the authorities a telegraph company may not limit its liability for "gross negligence," it may frequently evade liability consequent on acts which are grossly negligent by reason of the construction placed upon the stipulation in regard to unrepeated messages. In New York, Pennsylvania, Massachusetts, California, Iowa, North Carolina, Missouri, Kentucky and Texas it is held that when a message is sent subject to the stipulation in regard to repeating, the plaintiff, who has suffered by reason of a mistake in the transmission, must prove that the mistake was one which it was not only in the power of the company to avoid, but one which the company could have avoided by some precaution other than that of repeating: Kiley *v.* Tel. Co., 109 N. Y., 231; Passmore *v.* Tel. Co., 78 Pa., 238; Ellis *v.* Tel. Co., 13 Allen, 226; Hart *v.* Tel. Co., 66 Cal., 579, 584; Aiken *v.* Tel. Co., 69 Ia., 31, 36; Lassiter *v.* Tel. Co., 89 N. C., 334; Wann *v.* Tel. Co., 37 Mo., 472; Camp *v.* Tel. Co., 1 Met. (Ky.), 164; Womack *v.* Tel. Co., 58 Tex., 176. It may very frequently happen that the mistake is due to the gross carelessness of the telegraph company, and yet the plaintiff be unable to obtain evidence to that effect. In this way, therefore, a telegraph company may frequently escape the liability which it should justly incur by reason of its "gross negligence." Thompson's Law of Electricity, p. 232. This rule applies generally only where the loss suffered has been occasioned by a mistake in the transmission: Manville *v.* Tel. Co., 37 Ia., 214; Tel. Co. *v.* Adams, 75 Tex., 531; Bliss *v.* Tel. Co., 30 Mo. App., 103; True *v.* Tel. Co., 60 Me., 9: Graham *v.* Tel. Co., 1 Col., 230; Fowler *v.* Tel. Co., 80 Me., 381; Tel. Co. *v.* Fontaine, 58 Ga., 433; Smith *v.* Tel. Co., 83 Ky., 104: Tel. Co. *v.* Wenger, 55 Pa., 262; Tel. Co. *v.* Hyer, 22 Fla., 637; Clay *v.* Tel. Co., 81 Ga., 285; Hadley *v.* Tel. Co., 115 Ind., 191; Tel. Co. *v.* Collins, 45 Kan., 88. In New York, however, the rule applies where the loss suffered was due to a delay in the delivery: Kiley *v.* Tel. Co., 109 N. Y., 231.

This rule, which places the burden of proof on the plaintiff, is not followed in Maine, Ohio, Illinois, Tennessee or Arkansas. In these States the mere fact of a mistake in the transmission raises a presumption of gross negligence on the part of the company, which must be rebutted by evidence sufficient to satisfy a jury: Bartlett *v.* Tel. Co., 62 Me., 209; Tel. Co. *v.* Griswold, 37 Ohio, 301; Tel. Co. *v.* Tyler, 74 Ill., 168; Marr *v.* Tel. Co., 85 Tenn., 529; Tel. Co. *v.* Short, 53 Ark., 434.

Another way in which a telegraph company may frequently evade liability consequent upon negligent acts is by the requirement that notice of a claim against the company shall be presented within a certain time: Wolf *v.* Tel. Co., 62 Pa., 83.

The time in the stipulations to this effect varies with the message blanks of different companies. The usual period of limitation is sixty days, but periods as short as thirty and even twenty days have been held valid: Tel. Co. *v.* Dunfield, 11 Col., 335; Aiken *v.* Tel. Co., 5 S. C., 358. The question is always what is reasonable, and where the purpose of the stipulation, as appears from the period of

limitation, seems to be rather to preclude the employer from his remedy than to enable the company to procure evidence in defense of the action, the tendency is to hold the condition unreasonable and void: Southern Express Co. *v.* Capperton, 44 Ala., 101.

The scope of the company's liability may be limited by a condition which defines the limits within which a personal delivery shall be free of charge: Tel. Co. *v.* Henderson, 89 Ala., 510. This holds, also, that the sender of a message is bound to know whether the sendee lives within the free-delivery limits, and that if he does not offer to pay the extra charge for delivery beyond the free limits, the company is under no obligation to deliver the message except within the free limits. This part of the decision is unsatisfactory, because, as delivery is an essential part of communication by telegraph, it would seem that when a message is handed in for transmission, the price demanded for transmission ought to include any extra charge which the company are entitled to make for delivery.

A telegraph company is not liable for the negligence of a connecting line when a message is sent subject to a stipulation to that effect: Tel. Co. *v.* Mumford, 87 Tenn., 190. The liability of telegraph companies can scarcely be said to be limited in this respect, because it would seem that by reason of their analogy to common carriers, they would not be liable for errors occurring on connecting lines in the absence of a special agreement to that effect: Am. & Eng. Ency. of Law, Vol. 2, p. 859. In the case of carriers, however, such a special agreement may be implied from the facts and attending circumstances of the case, as where the freight for the entire route is reckoned in one sum: Redf. on Carriers, § 189. By analogy, therefore, it would seem that a telegraph company, in the absence of a stipulation to the contrary, might be held liable for errors occurring on connecting lines. Therefore, though in strictness a telegraph company cannot be said to limit its liability in respect to connecting lines, it certainly may affect its liability by a stipulation which practically serves to rebut the presumption of a contract which might be implied from circumstances attending the sending of the message.

Our conclusions from the discussion of the above question are as follows: (1) Telegraph companies may not limit their liability for "gross negligence;" gross negligence meaning the absence of any reasonable precaution relating to and tending toward the safe transmission of messages by telegraph, save the precaution of repeating the message. (2) In several States, by reason of the peculiar construction placed upon the stipulation in regard to repeating messages, telegraph companies may frequently escape liability for "gross negligence." (3) Telegraph companies may also evade liability for "gross negligence," by stipulating that notice of claims against them be presented within a certain time. (4) The scope of the liability of telegraph companies may be limited by a stipulation defining the limits of free delivery. (5) Telegraph companies may evade the liability, which in many cases they might incur, by reason of the negligence of connecting lines.

EDWARD BROOKS, JR.