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Liability of a Telegraph Company to an Addressee for Non-Delivery of Failure to Deliver

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least, both defendants and plaintiffs might very justly be required to show cause why one month is not sufficient time within which to plead. The fact that an attorney is busy or indolent, or the fact that a party plans unwarranted delay, may lead to more pleading in court than do the legitimate demands of litigation. A remedy, if desirable, must be sought in legislative enactment.

—I. C.

LIABILITY OF A TELEGRAPH COMPANY TO AN ADDRESS FOR NON-DELIVERY OR FAILURE TO DELIVER.—There is, perhaps, no legal problem in which the true basis of recovery is more controverted than that of the liability of a telegraph company to an addressee. Where there has been an error in transmission recovery may be supported as grounded in tort. For non-delivery or delay in delivery, however, no principle has been agreed upon. In England, although no case on this latter point has been found, relief has been denied in cases of negligent transmission on grounds that would preclude recovery in cases of delay or non-delivery. In America, however, almost universally the addressee is allowed recovery on some theory or other.

One class of cases suggests that the sender makes the contract with the telegraph company as agent for a disclosed principal, the addressee. Such a theory may be resorted to where the sender acts primarily in the interests of the addressee. In the ordinary case, however, where he acts for himself or for a third party, such an agency cannot be implied except as a legal fiction unwarranted by the facts.

Another group of cases treats the addressee as the beneficiary of a contract between the sender and the telegraph company, and, on the doctrine that a third party beneficiary to a contract may sue on it, is allowed to recover in an action ex contractu. But this is

1 See FOUNT, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW, 47. See also 14 HARV. L. REV. 193, n. 1.
2 Playford v. United Kingdom Electric Tel. Co., L. R. 4 Q. B. 706 (1869); Dickson v. Reuter’s Tel. Co., 3 C. P. D. 1 (1877).
3 For a collection of cases see 30 L. R. A. (N. S.)1121. See also JONES, TELEGRAPH AND TELEPHONE COMPANIES, 2 ed., 604.
4 De Rutte v. New York etc. Tel. Co., 1 Daly 547 (N. Y. 1866); Western Union Tel. Co. v. Fenton, 52 Ind. 1 (1875); Western Union Tel. Co. v. Heathcoat, 47 St. 139 (Ala. 1908); Ford v. Postal Tel. Cable Co., 124 Ala. 400, 27 So. 409 (1900).
5 See WYMAN, PUBLIC SERVICE CORPORATIONS, § 349.
6 Ford v. Postal Tel. Cable Co., supra.
7 Frazier v. Western Union Tel. Co., 45 Ore. 414, 78 Pac. 330 (1904); Western Union Tel. Co. v. Adams, 75 Tex. 531, 12 S. W. 887 (1889). See 18 HARV. L. REV. 234.
necessarily of restricted application since an addressee is often injured where the contract was not really made for his benefit. The decisions of Texas, the most persistent expositor of this doctrine, show the difficulties of working out justice consistently on this basis. They seem to justify the criticism that the courts of that jurisdiction hold the contract to be for the party who first brings suit, whether he be sender or addressee. Further, it is clear that in a contract action no recovery may be had for mental anguish, yet the Texas cases do allow such damages. They reach this result on the very dubious ground that the Texas code abolishes the distinction between actions in tort and contract. Moreover, this theory is not available, of course, in those jurisdictions where the right of a third person to sue upon a promise with which he is not in legal privity is denied. It would seem, therefore, that this doctrine, which is itself anomalous, is repudiated in several jurisdictions, and which has no clearly defined boundaries even where it is accepted affords no satisfactory principle of recovery.

Another view is that the telegraph company is in the category of bailees for hire. It is argued that the addressee has a property in the message and should recover for its wrongful detention like a consignee of goods. This theory has not met with approval. The message is not, in this connection at least, treated as a chattel. It is not subject to embezzlement, the identical message is not to be carried but only its contents are to be communicated; nor does the measure of damages for failure to transmit and deliver have any relation to any value of the message itself, except as such value may be disclosed by the message or agreed on between the sender and the company.

Another possible ground for recovery is tort. No cases where a
tort action for non-delivery or failure to deliver was allowed have been found.\textsuperscript{17} The suggestion that tort liability furnishes the solution,\textsuperscript{18} moreover, is negatized by cases holding that the addressee is bound by the stipulations agreed upon by the sender and the telegraph company.\textsuperscript{19} Further, in cases of erroneous transmission where recovery is allowed on sound tort principles the addressee has been held not to be bound by such stipulations.\textsuperscript{20} It would seem clear that this is correct. An agreement between A and B cannot affect a duty arising out of tort which B owes to C.

A few courts, apparently in despair at the welter of principles and authority, declare that if the addressee is to have a right to sue it should come from the legislature.\textsuperscript{21}

There are some cases, however, which rest recovery on the ground that a telegraph company is a public utility owing a duty to all whom it serves, independent of the contractual one, if any, into which it enters when it receives the message.\textsuperscript{22} This, it is submitted, is the correct solution. There is a parallel in the history of the development of theories as to public utilities in general which bears out this conclusion. Beginning with an attempt to thrust all liabilities of public service corporations into the categories of contract or bailment the courts are recognizing finally that the duties and rights involved arise out of the relation between the public service company and the persons whom it serves.\textsuperscript{23} It is an obligation \textit{sui generis}, sounding strictly neither in tort nor in contract though both forms of action are allowed.\textsuperscript{24}

\textsuperscript{17} "If the duty of the telegraph company faithfully to transmit messages extends to the addressee, it would result in a liability which would be unique in the law of torts." 15 HARV. L. REV. 143. There is authority expressly denying a tort liability in such cases. Russell v. Western Union Tel. Co., 57 Kan. 230, 45 Pac. 598 (1896). In Dunham v. Western Union Tel. Co., 102 S. E. 113 (W. Va. 1920), and some other cases, though the form of action was tort, the ground for liability was not.

\textsuperscript{18} See 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 439.


\textsuperscript{20} Webbe v. Western Union Tel. Co., 169 Ill. 610, 48 N. E. 670 (1897); Western Union Tel. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894 (1887).

\textsuperscript{21} Herron v. Western Union Tel. Co., 96 Ill. 123, 57 N. W. 696 (1884). See Wadsworth v. Western Union Tel. Co., 36 Tenn. 695, 707, 8 S. W. 574 (1888). See also 24 HARV. L. REV. 411.


\textsuperscript{23} See Pound, "The End of Law as Developed in Justice Thought," 30 HARV. L. REV. 219, "one may point to the law of public service companies . . . . . . . In each case, and these are relatively recent judicial developments in our law, the common law idea of relation and of the rights, duties and liabilities involved therein has prevailed at the expense of the idea of contract." See also WYMAN, PUBLIC SERVICE CORPORATIONS, §§ 331-343.

\textsuperscript{24} "The truth of the matter is that the obligation resting upon one who has undertaken the performance of a public duty is \textit{sui generis}. It cannot be forced into the typical forms of action without artificiality, as experience has shown." WYMAN, PUBLIC SERVICE CORPORATIONS, § 333.
A recent West Virginia decision\(^2\) has recognized, apparently, the soundness of this view. The addressee in that case sued in tort for failure to deliver a telegram to him. The company argued that its liability should be limited by certain stipulations agreed to by the sender of the telegram. The court said, "Although this is an action of tort brought by the addressee, and not a suit on the contract, nevertheless, these conditions, being reasonable regulations are binding on the addressee as well as the sender . . . . such provisions, when reasonable, are determinative of the company’s duty to the public, regardless of any contractual relation."\(^2\)

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**JUDICIAL CONTROL OF ADMINISTRATIVE JUDGMENT AS TO VALIDITY OF BONDS.**—In 1917, the West Virginia Legislature passed an act\(^1\) providing that before any "county . . . or other municipality" might issue bonds, payable by taxation, the validity of the proposed indebtedness should first be approved by the Attorney General. This officer was to have before him, the bonds, and "a duly certified copy of all the orders, proclamations, notices, advertisements, affidavits and records and of all . . . proceedings connected with . . . said bond issue."\(^2\) This data was to be sent to him by the municipality within two weeks after the popular vote authorizing the bond issue. The Attorney General’s approval was to render the validity of the bonds forever incontestible in any court, unless, within ten days, some taxpayer or other person in interest filed a petition in the Supreme Court of Appeals, asking that the action of the Attorney General be "reversed or modified." The matter thus submitted was to be proceeded with by the Court as in cases of original jurisdiction. All data before the Attorney General, as well as a statement by that officer of the reasons underlying his decision, were to be presented to the Court, which was then "to decide the matter in controversy and enter such order thereon as to it may seem to be just."\(^3\)

The recent West Virginia case of *State ex. rel. Allen v. England*,\(^4\) raises the interesting question as to whether the type of judicial control of the Attorney General’s action contemplated by this

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\(^{25}\) Dunham v. Western Union Tel. Co., supra.
\(^2\) Ibid., 116.
\(^1\) Acts of W. Va. 1917, c. 57.
\(^2\) Ibid., § 1.
\(^3\) Ibid., § 2.
\(^4\) 103 S. E. 400 (W. Va. 1920). Mr. Justice Miller delivered the opinion of the Court. Mr. Justice Ritz dissented from the reasoning.