WESTERN UNION TELEGRAPH COMPANY *v.* CHAPPELLE.

Opinion delivered November 18, 1929.

1. TELEGRAPH AND TELEPHONES—ERROR IN TRANSMISSION—60-DAY LIMIT.—The sender of an interstate telegram, having no knowledge that the message had been incorrectly transmitted, resulting in damage, until after the 60-day period for making claims therefor had expired, and no knowledge of any circumstances that might lead a reasonable person to believe that a mistake was made, *held* not bound by a provision in the telegram that the company will not be liable for damages where the claim is not presented in writing within 60 days after the message is filed for transmission.

2. TELEGRAPHS AND TELEPHONES—PRESENTATION OF CLAIM—REASONABLE TIME.—A provision in a contract, under which a telegram was received for transmission, that the company would not be liable for damages in any case where the claim was not presented within 60 days after the message was filed for transmission, *held* to allow reasonable time for presentation of the claim for damages after the fact of error in transmission became known.
3. TELEGRAPHS AND TELEPHONES—TIME FOR PRESENTING CLAIM.—Where a claim for damages for a mistake in transmission of a telegram was presented in writing immediately after the sender learned of the mistake, and suit was brought shortly thereafter, the claim was presented within a reasonable time, and was not barred by the sender's failure to present the claim within 60 days after the message was filed for transmission.
4. TELEGRAPHS AND TELEPHONES—MISTAKE IN TELEGRAM—LIABILITY OF SENDER.—Where a landlord sent a telegram to his tenant agreeing to reduce the rent to $550, the telegraph company was agent of the landlord, and the landlord was bound by a mistake made in its transmission in which the rent was named at $450, and, when accepted by the tenant, the landlord could not compel the payment of the greater sum as rent.
5. TELEGRAPHS AND TELEPHONES—MISTAKE IN TELEGRAM—EVIDENCE.—In an action for damages for failure correctly to transmit and deliver a telegram from a landlord to his tenant regarding the amount of reduced rent to be charged, testimony of the tenant that he would have accepted the offered rental as correctly stated in the telegram filed, *held* not incompetent, since he was already bound to pay a higher rent, and there was nothing unreasonable in his saying that he would have paid the amount designated.

Appeal from Little River Circuit Court; *B. E. Isbell*, Judge; affirmed.

STATEMENT OF FACTS

This appeal is prosecuted from a judgment for damages resulting from the negligence of the appellant company in failing to correctly transmit and deliver a telegram, an unrepeated interstate message.

Appellee, who lived at Ashdown, Arkansas, received a message on May 7, 1927, from L. E. Rae, a tenant at a rental of over $500 a year, on his farm near Forrest City, Arkansas, stating that he had planted most of his crop, which had been lost in the overflow, and that he could not get backing to work it unless the rent was reduced. He immediately filed a message in reply:

"Will waive rent to four hundred rent place five fifty. Answer."

The message as transmitted and delivered by appellant read: "Will waive rent to four hundred rent place four fifty. Answer."

Rae replied by wire on the same day: "Bank agreed to help under agreement of your wire. Thanks."

It was alleged that appellee had no knowledge or information of the erroneous transmission of the message until he went to collect the yearly rent due from his tenant for the farm, when he was presented by him with the copy of the message received, which had been erroneously transmitted, showing the rent of the place to be $450 instead of $550, as had been named in the copy filed for transmission by the appellee. The tenant refused to pay more than the $450, which was accepted, although he stated he would have paid $550, had he understood from the message that that amount was required.

Immediately upon the settlement, when the information of the erroneous message had been received, appellee filed his claim on November 9, 1927, for damages in the sum of $100, upon which the appellant company denied liability in writing, because the said claim was not made or presented within 60 days after the message was filed with the company for transmission.

The answer admitted receiving the three messages for transmission; denied any error in transmitting the message as alleged, and any damage to plaintiff by reason of its negligence; denied that the tenant would have paid $550 rent if he had received the message transmitted as filed, and that appellee had no knowledge of the mistake made in the transmission of the message until he went to collect the rent; alleged that the message was accepted for transmission subject to the terms of its standard message contract, exhibiting a copy of it. This contract had been adopted, established, promulgated and filed with the Interstate Commerce Commission as effective July 13, 1929, and had been, prior thereto, authorized

and approved by the Interstate Commerce Commission by order of May 3, 1921. That it was the term and condition of the contract that it should not be liable for damages in any case where the claim for damages was not presented in writing within 60 days after the message was filed for transmission, and this claim was not presented within that time. It alleged further that, if plaintiff did not know of the error made in the transmission of the message within 60 days from the date of its filing, the fact was not due to any negligence on its part, but to the negligence of the appellee, the sender of the message, whose duty it was to follow up said message, and to exercise reasonable care and diligence to ascertain that the same had been delivered to Rae as filed by appellee; denied that the loss of the $100 was caused by the negligence in sending the message incorrectly, but by appellee, sender, accepting a lesser amount for rent than he agreed to take in the telegram as written by him.

The agreed statement of facts upon which the case was tried without a jury shows also that the messages were regularly sent between these two points in due course of business through Little Rock, Ark., thence relayed to Shreveport, La., and from there relayed to Ashdown, Ark., there being no direct line between Ashdown and Forrest City. The message in transmission was changed by appellant company to read "four fifty" instead of "five fifty." The contract under which the message was received for transmission was printed on the back of the message, the material condition being:

"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."

It was agreed that Rae would testify that, if he had received the message from the appellee as correctly filed, he would have accepted the proposition to rent the farm for $550, and would have paid that amount of rent. This evidence was objected to as incompetent and speculative.

Appellee did not know that the message to his tenant Rae had been incorrectly transmitted reading "four fifty" instead of "five fifty" until November 1, 1927, when he went to Forrest City to collect the rent in the sum of $550, and immediately thereafter, on or about November 9, he wrote appellant company making a claim for $100 damages, the letter being received by appellant within 60 days after appellee learned of the error in the transmission of the message, but not within 60 days after the message was filed for transmission. It was agreed that the appellant company's tariffs had been duly filed with the Interstate Commerce Commission, the one in effect when the message was filed providing the condition of non-liability unless claim be presented within 60 days in writing, as already set out. The appellee accepted $450 in payment of the rent, upon his tenant, Rae, refusing to pay more than that under the terms of the message as delivered to him.

From the judgment rendered against it for damages appellant prosecutes this appeal.

Elmer L. Lincoln and *Rose, Hemingway, Cantrell & Loughborough,* for appellant.

DuLaney & Steel, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that, since the telegram erroneously transmitted was an interstate message, there is no liability on its part, since no claim for damages for its erroneous transmission was made in writing within 60 days after it was filed for transmission. It is true that no claim for the damages suffered because of the negligent transmission of the message was presented the appellant company in writing within 60 days after the message was filed for transmission, but it is also true that the appellee had no knowledge or information that the message had not been correctly transmitted, as it was the duty of the appellant company to do, until he went to collect the reduced rent, when due from his tenant, as fixed by him in the message filed and agreed to be paid by the reply thereto, and there was no

intimation of any mistake made in the transmission of the message in the reply thereto received, nor any cause for appellee's making an investigation to ascertain whether appellant company had transmitted correctly the message filed with it, as was its duty to do. Although it is not claimed that appellant company did anything to mislead the appellee, or that it was through its fault that appellee had no information or did not know of the incorrect transmission of the message until the 60 days had passed, but only that appellee is held to a literal application of the 60-day rule of filing his claim for damages, regardless of the fact that he had no intimation that his message had been incorrectly transmitted, resulting in his damage, until after the 60 days for making claim therefor had expired. Having duly received a reply to his message accepting its terms, without any indication therefrom of any mistake made in its transmission, and having no information of any circumstances that might lead a reasonable person to believe that such was the case and make investigation to determine it, he was not bound by the rule to present his claim in writing within 60 days after the filing of the telegram with the company for transmission.

We think a proper interpretation of this rule would allow a reasonable time for presentation of the claim for damages after the fact became known, nor do we understand that it has been held otherwise in *Western Union Telegraph Co.* v. *Czizek,* 264 U. S. 281, 44 S. Ct. 328, or in any other of the Supreme Court's decisions relied upon by appellant, as contended. The claim was presented in writing immediately upon ascertainment of the fact of the incorrect transmission of the message and the suit brought shortly thereafter, and, under the circumstances, we hold that it was presented within a reasonable time, and that appellee's claim is not barred by his failure to comply with the literal terms of the 60-day rule.

The appellant company was the agent of the appellee in transmitting his message making the reduction

in the rent, and he was bound by the mistake made in its transmission or by the terms in which it was delivered to the sendee, and he could not compel the payment of a greater sum than he had agreed in such message to accept for the rent. *Des Arc Oil Mill Co.* v. *Western Union Tel. Co.*, 132 Ark. 335, 201 S. W. 273, 6 A. L. R. 1081.

The testimony of Rae, the tenant, that he would have accepted the reduction and paid the amount of rental as correctly designated in the telegram filed, was not incompetent. He had already agreed and was bound to the payment of a greater amount for rent, and there was nothing unreasonable in his saying that he would have paid the amount designated, and his refusal to pay more than the amount he agreed to pay by accepting the terms of the telegram as erroneously delivered is in no wise contradictory thereof or inconsistent therewith.

We find no error in the record, and the judgment is affirmed.