Richard M. Mann, for appellant.

1. The appellee is liable on the first cause of action for its negligence. It introduced no testimony whatever, nor did it introduce any provision limiting its liability, nor any testimony that it had filed with the Interstate Commerce Commission any rules or regulations limiting its liability. This was an essential showing as a defense. 223 U. S. 573; 191 S. W. 817. If a provision limiting liability had been shown it was not valid nor binding. 38 U. S. Stat. L. 1196, Fed. Stat. Ann. Suppl. 1916, p. 124; 196 S. W. 516; 191 *Id.* 817.

2. It was liable for negligently and falsely assuring appellant that the message was correctly delivered, on which assurance appellant relied to its damage. 103 Ark. 79; 25 *Id.* 219; 37 *Id.* 47; 29 *Id.* 512; 16 Cyc. 1003; 25 *Id.* 425, note 526; 111 N. W. 1; 8 L. R. A. (N. S.) 485; 50 L. R. A. 160; 75 Ark. 596; 17 Fed. 495; 117 Iowa 180; 90 N. W. 616; 62 L. R. A. 617.

3. The telegraph company was the agent of the sender and bound to correctly transmit the message. 9 Cyc. 294. See also 153 N. W. 375; 84 Ark. 457; 92 *Id.* 133; 73 *Id.* 205; 89 *Id.* 368.

Albert T. Benedict and *Rose, Hemingway, Cantrell, Loughborough & Miles,* for appellee.

1. The instruction is sustained by the conditions of the telegram. 154 U. S. 1.

2. The conditions limiting liability are authorized by the Interstate Commerce Act. 36 Stat. L. 539; 231 Fed. 405; 165 Pac. 1175; 89 S. E. 106; L. R. A. 1915 B. 685; 203 Fed. 140.

3. If plaintiff sustained a loss, it alone was to blame. 1 Sedgwick on Dam., § 201 *et seq.;* 57 Ark. 257; 264; 73 *Id.* 205; 118 *Id.* 113; 62 S. W. 119; 86 S. E. 631; 141 Pac. 585; 160 S. W. 991; 141 Pac. 586.

4. There was no later contract between the parties. 154 W. S. 128. The conditions were part of the contract and put plaintiff on notice. Plaintiff could have sold without loss. The undertaking of the agents of defend-

ant was wholly without consideration. The company is a public servant and required to conduct its business under the rules of the Interstate Commerce Commission and no discrimination nor guarantee could be allowed.

McCULLOCH, C. J. This is an action instituted by appellant against appellee telegraph company to recover damages for alleged negligence of appellee's servants in failing to correctly transmit and deliver a telegraphic message. Appellee did not introduce any testimony concerning the transaction and appellant's testimony is undisputed. The trial court decided that no liability on the part of the telegraph company was shown and gave a peremptory instruction to the jury to return a verdict in appellee's favor.

Appellant operated an oil mill in Arkansas and maintained an office in the city of Little Rock. On October 27, 1916, appellant held an option from another mill concern at Searcy, Arkansas, for the purchase of 1,000 tons of cotton seed, and on that day sent a code message by telegraph to the East St. Louis Cotton Oil Company of East St. Louis, Illinois, offering to sell 850 tons of seed at the price of $64.00 per ton, the word "completingly" being used in the code to indicate those figures. In the transmission of the message the word "completely" was used by the operator, which, according to the interpretation of the code, indicated the price of $63.00 per ton for the seed, and the message was delivered to the sendee in that form. Immediately upon the receipt of the message the manager of the East St. Louis mill called up appellant's agents at Little Rock by telephone and accepted the offer without either of the parties restating the price, appellant's agent understanding at the time that his message had been correctly transmitted indicating the price of $64.00 per ton, and the manager of the other concern supposing at the time that he received the message correctly and that the price was $63.00 per ton as indicated by the code word used in the message. There was a custom among dealers in the commodity mentioned to confirm

violation of the public duty, which it owes as a carrier to the sendee as well as to the sender.

The offer contained in the telegram was accepted by the purchaser in a telephone message and later was confirmed in a telgraph message sent in accordance with the custom of that trade. The message was strictly one in confirmation of the acceptance of the price contained in appellant's offer and was not a counter-proposition for purchase at a different price.

It is next contended that there was no liability because the printed telegraph blank contained stipulations exempting the company from liability. Those stipulations read as follows:

"To guard against mistakes or delays, the sender of a telegram should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, this is an unrepeated telegram and paid for as such, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery of any repeated telegram, beyond fifty times the sum received for sending same, unless specially valued; nor in any case for delays arising from unavoidable interruptions in the working of its lines; nor for errors in cipher or obscure telegrams.

2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the nondelivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, at an additional

sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof."

(4) The stipulation in question constitutes an attempt on the part of the telegraph company to exempt itself from liability for damages resulting from the negligence of its own servants. According to the very great weight of authority such a provision in the contract of a public carrier is void, and this is true as to the particular stipulation before us concerning repeated and unrepeated messages. Jones on Telegraph & Telephone Companies, § 377. It was so held in the case of *Western Union Telegraph Co.* v. *Short,* 53 Ark. 434, and the same rule was announced in the case of *Western Union Telegraph Co.* v. *Compton,* 114 Ark. 193, except that the stipulation dealt with in that case was not the one concerning unrepeated messages. The syllabus in that case erroneously states the contrary rule, but the opinion shows clearly the holding of the court following the rule announced in the Short case, *supra,* that such stipulation is void. We granted a rehearing in the Compton case on the ground that the Supreme Court of the United States had decided that the imposition by the State statute of liability for mental anguish was an interference with interstate commerce. *Western Union Tel. Co.* v. *Brown,* 234 U. S. 542. The effect of the original opinion that the contract for exemption from liability for negligence is void was not modified in the opinion on rehearing. We allowed the judgment to stand for the sum of $50, the sum named in the stipulation merely for the reason that that was the extent of defendant's defense as it had offered in the pleadings to pay damages in that sum. The opinion on rehearing did not deal with the question of exemption from negligence, but was based entirely upon the decision of the Supreme Court of the United States that the State statute was inapplicable to an interstate message. The effect of the Compton case has been misinterpreted in other quarters. *Gardner* v. *West. Union Tel. Co.,* 231 Fed. 405; *West. Union Tel. Co.* v. *Bailey,* 184 S. W. 519; *West. Union Tel. Co.* v. *Bailey,* 196 S. W. 516; *West. Union Tel. Co.* v. *Bank*

which did not include exemption against the negligence of the carrier or his servants. The inherent right to receive a compensation commensurate with the risk involved the right to protect himself from fraud and imposition by reasonable rules and regulations, and the right to agree upon a rate proportionate to the value of the property transported."

Similar language was used by the same court in the later case of *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, which was a case which went up on a writ of error from this court. 91 Ark. 97. In that case the court said: "Is the contract here involved one for exemption from liability for negligence and therefore forbidden? An agreement to release such a carrier for part of a loss due to negligence is no more valid than one whereby there is complete exemption. Neither is such a contract any more valid because it rests upon a consideration than if it was without consideration." In each of those cases, however, the court upheld the stipulation as a special contract as to the value of the commodity shipped. The stipulation with respect to the telegraph message can not be sustained as a stipulation for value because in the very nature of the case a telegram or the damages which may flow from its breach can not be estimated in advance. *Western Union Tel. Co.* v. *Compton, supra.* Nor can adherence to the common law principle which invalidated such a stipulation be viewed as a burden upon or interference with interstate commerce, or as being in conflict with the authority of the Interstate Commerce Commission over that subject, for, as before stated, the exemption does not come within the scope of the regulation of rates or of classification of messages, but is purely an attempt to contract against the general law of the land with respect to liability for negligence.

Learned counsel for appellee press upon our attention the recent case of *Gardner* v. *Western Union Tel. Co.,* 231 Fed. 405, decided by the United States Circuit Court of Appeals for the Eighth Circuit, as sustaining their contention that, such a stipulation is rendered valid by the

act of Congress assuming jurisdiction over the regulation of telegraph companies. We do not think that the decision in that case has any such bearing on the present case. That decision dealt entirely with the stipulation providing that there should be no liability unless notice should be given within sixty days—a provision the validity of which has been frequently upheld by this court, and is valid according to the weight of authority. A clause in the Oklahoma constitution attempted to render void such a provision in any contract or agreement, and the question before the court in that case was whether or not the provision of the Oklahoma constitution in its application to an interstate carrier was an attempted interference with interstate commerce, and the Court of Appeals held that it was. We fail to see the application of that decision to the question now before us. Many other cases cited on the brief of counsel held, as we did, that the right to recover mental anguish under local statutes and decisions has been abrogated by the assumption of power by Congress over the subject of interstate carriers of messages. The only decision by a court of last resort brought to our attention holding that the Interstate Commerce Commission has, under the Federal statute, the power to approve and legalize a regulation exempting a telegraph company from its own negligence is the case of *Haskell Implement & Seed Co.* v. *Postal Telegraph Co.*, 114 Me. 277, 96 Atl. 219. Some of the decisions cited seem to confuse this question with the right to recover mental anguish under local statutes, but the two questions are different, as we have attempted to show. At any rate, we are convinced that it is no interference with interstate commerce for the courts of this State to adhere to its former decisions in declaring the general law on the subject that a stipulation of a public carrier attempting to exempt itself from liability for negligence is void. That conclusion is in entire accord with the views expressed in our former decisions, and we now adhere to them.

It follows, therefore, that the circuit court erred in holding the stipulation to be valid and in giving a per-

as it is in the power of the commission to do, and concludes with the following statement:

"Our conclusion upon the record is that the Congress, by the language used in the amendatory act of 1910, has manifested a definite intention to place under the jurisdiction and control of this commission the rates and practices of interstate telegraph companies, as well as the rules, regulations, conditions and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached, as a fundamental feature of it, the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy, but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions and restrictions affecting those rates have been shown in this proceeding to be unreasonable or otherwise unlawful. The complaint must therefore be dismissed, and it will be so ordered."

The facts of the instant case may be summarized as follows: Appellant was offered the choice of three classifications under which to send its message, and the choice made governed both the rate to be charged for the service and the liability of the telegraph company for mistakes or delays in the transmission or delivery of the message. Both the charge to the sender and the liability of the company depended upon the classification selected by the sender for this message, and it was the sender's right and privilege to select the classification to which its message should be assigned. The message could have been sent as a repeated one, or as an unrepeated message, or it could have been sent as a valued message by paying one-tenth of one per cent. of the value assigned.

In the opinion of the Interstate Commerce Commission cited it is stated that the basis of any charge made by the telegraph company is that of an unrepeated message.

and it is pointed out that the right to classify messages and to base the charge upon the classification made is wholly nullified, if the rate charged and collected for an unrepeated message carries with it the same protection to the sender, or recipient, and imposes upon the telegraph company the same liability and degree of care as a repeated or a valued message. No one would pay the higher rate, if he were entitled to the same service at the lower rate.

So that, whatever we may think of the merit of the classifications, or of the possible results from their approval, by the Interstate Commerce Commission, it is our duty to give effect to the ruling of that commission, and it is likewise our duty to give effect to the numerous recent decisions of the Supreme Court of the United States, which hold that carriers may graduate their charges according to the value of the service performed. The doctrine of those cases is applicable here.

In my view, therefore, the appellant should have judgment for the sum tendered by the telegraph company, which sum is based upon liability for the negligent transmission of an unrepeated message.

I am authorized to say that Mr. Justice WOOD concurs in the views here expressed.