

THE ELECTRIC DESPATCH COM- PANY OF TORONTO (PLAINTIFFS).	} APPELLANTS;	1891
		*Mar. 19.
AND		*Nov. 17.
THE BELL TELEPHONE COM- PANY OF CANADA (DEFEND- ANTS)	} RESPONDENTS.	

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Construction of—Telephone service—Transmission of message—
Use of wire.*

The Bell Telephone Co. carried on the business of executing orders by telephone for messenger boys, cabs, etc., which it sold to the Elec. Desp. Co., agreeing, among other things, not to transmit or give, in any manner, directly or indirectly, any orders for messengers, cabs, etc., to any person or persons, company or corporation, except to the Elec. Desp. Co. The G. N. W. Tel. Co. afterwards established a messenger service for the purposes of which the wires of the Telephone Co. were used. In an action for breach of the agreement with the Elec. Desp. Co. and for an injunction to restrain the Telephone Co. from allowing their wires to be used for giving orders for messengers, etc. :

Held, Ritchie C.J. doubting, that the Telephone Co., being ignorant of the nature of communications sent over their wires by subscribers, did not "transmit" such orders within the meaning of the agreement; that the use of the wires by subscribers could not be restricted; and that the Telephone Co. was under no obligation, even if it were possible to do so, to take measures to ascertain the nature of all communications with a view to preventing such orders being given.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Divisional Court (2) in favour of the defendants.

The action is brought by the plaintiffs for breach of

*PRESENT.—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

(1) 17 Ont. App. R. 292.
6½

(2) 17 O. R. 495.

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an agreement entered into with them by the defendants and asks for damages and for an injunction.

Before the date of the said agreement the defendants in connection with their regular telephone business had been and on that date were carrying on a messenger business at their said central office, where they kept messengers for the delivery of messages, letters and parcels throughout the city of Toronto and its suburbs and had been in the habit of receiving at said central office, by means of their telephones and wires, orders from the lessees of said telephones and others for the services of messengers.

At this time the plaintiffs were carrying on in the city of Toronto the business of the district telegraph and telephone exchange system including telegraph signalling and despatching and delivering messages, goods and parcels by messengers or vehicles, and they possessed and used in such business several lines of telephonic communication in the said city of Toronto, and they had in their employ a number of messengers for the delivery of messages, letters and parcels throughout the said city of Toronto and its suburbs, and an action had been brought by the Canadian Telephone Company (whose interests were subsequently acquired by the Bell Company) against the plaintiffs, and for the purpose and with the view of settling the disputes, as well between the parties to that action as between the defendants and the plaintiffs, an agreement was entered into between the said parties.

By the first clause of the agreement, the defendants covenant and agree :—"That they will and hereby do bargain, sell, assign, and set over to the said Electric Despatch Company, their successors and assigns, for the period of ten years from the 1st day of October, in the year of Our Lord 1882, all the messenger, cab, city express, cartage and livery call business,

now carried on in the city of Toronto by the said Bell Telephone Company, and such other and further business rights and privileges as are hereinafter mentioned, together with the good-will of the said business.

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By the 8th clause the defendants covenant and agree:—"That they will place in direct communication with the Electric Company's office all subscribers to their telephone exchange system who desire to order messenger, cab, city express or livery service, and give the Electric Company free communication with the subscribers to the Bell Company telephone system in the same manner as telephone exchange subscribers are now furnished communication with one another.

In the sixteenth clause the defendants expressly agree "that they will in no manner and at no time during the term of this agreement, transmit or give directly or indirectly free or for remuneration any messenger orders to any person or persons, company or corporation, except the Electric Despatch Company as herein set forth, and that from and after the first day of October next, being the month of October, 1882, they will cease to do any such business as herein agreed to be done by the Electric Despatch Company."

The substance of the plaintiffs' complaint is that in or about the early part of the month of July, 1887, the defendants entered into an agreement with the Great North-West Telegraph Company, in which they agreed to render to the latter company the same services, and to grant to them the same privileges, that they had already agreed to grant to the plaintiffs.

At the trial judgment was given in favour of the defendants, the trial judge holding that the messages sent by persons using the wires were not transmitted

1891 by the company. On appeal to the Court of Appeal
 THE the judges were equally divided and the appeal was
 ELECTRIC dismissed. The plaintiffs appealed to the Supreme
 DESPATCH Court of Canada.
 COMPANY
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 v. Robinson Q.C. and Moss Q.C. for the appellants. As
 THE BELL to messages being "transmitted" by telephone see
 TELEPHONE
 COMPANY
 OF CANADA. *The Attorney General v. The Edison Telephone Co.* (1).

The plaintiffs' claim is not against public policy.
Printing and Numerical Registering Co. v. Sampson (2);
Ontario Salt Co. v. Merchants Salt Co. (3).

The learned counsel also cited *Pugh v. The City and Suburban Telephone Co.* (4); *Tipping v. Eckersley* (5); *Mogul S.S. Co. v. McGregor* (6).

Lash Q.C. and *Wood* for the respondents referred to
Smith v. The Gold and Stock Telegraph Co. (7); *Commercial Union Telegraph Co. v. New England Telephone Co.* (8).

Sir W. J. RITCHIE C.J.—I have entertained some doubts as to the questions involved in this case which are not entirely removed, but as the other members of the court are unanimous I will not delay the decision.

STRONG J.—I have had some doubt in this case on the question of public policy but my general impressions, as I stated some years ago in *The Ontario Salt Co. v. The Merchants Salt Co.* (3), are strongly against avoiding contracts on that ground in cases which have not been the subjects of previous decision. I think, therefore, that I ought not to give effect to these doubts. I concur in the judgment of my brother Gwynne.

- (1) 6 Q. B. D. 244.
- (2) L. R. 19 Eq. 462.
- (3) 18 Gr. 540.
- (4) 27 Al. L. J. 163.

- (5) 2 K. & J. 264.
- (6) 23 Q. B. D. 598.
- (7) 49 N. Y. (S. C.) 454.
- (8) 61 Verm. 241.

FOURNIER J.—I agree that this appeal should be dismissed.

GWYNNE J.—The question raised by this appeal is simply one as to the construction of an agreement entered into between the appellants and the respondents under the seals of the respective companies and bearing date the 12th day of September, 1882. By that agreement, after reciting among other things that the respondents were then carrying on in the city of Toronto a general district messenger, cab, city express, cartage and livery call business, which they had agreed to sell and the appellants had agreed to purchase upon the terms thereafter contained, it was witnessed that the respondents did thereby bargain, sell, assign and set over unto the appellants for the period of ten years from the 1st day of October then next, all the messenger, cab, city express, cartage and livery call business then carried on by the respondents in the city of Toronto, and such other and further business, rights and privileges thereafter mentioned together with the good-will of the business. Now the messenger business so then carried on by the respondents, and so sold to the appellants, was carried on in this manner. The respondents kept a large staff of messenger boys, and when requested by any of the lessees of their telephone instruments to send a messenger boy to such lessee, or to deliver a message for such lessee, they did so by one of their messenger boys, making a charge to the person so served; so likewise when requested by any such lessee to send to such lessee or to any place for such lessee at his request a cab, city express, cart or livery vehicle, or horse, or the like, they did so, in like manner making a charge for such service to the person for whom it was rendered. This being the nature of the business which the respondents

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ents were carrying on under the name of a "General District messenger, cab, city express, cartage and livery call business," which they had agreed to sell and had sold to the appellants, the agreement proceeds to provide the means for giving effect to the sale so that it should commence to take effect upon the 1st day of October then next, from and after which day the respondents covenanted to cease to do any such business. The means so provided are as follows:

Paragraph 2 of the agreement provides that the respondents will, on or before the 1st day of October then next, transfer the telephone line wires of all cabmen, carters, city expressmen and liverymen who are subscribers to the telephone exchange system from the central office of the said respondents to and through a twenty-five wire magnets telephone switch placed in the central office of the appellants by and at the expense of the respondents for the free use of, and to be operated by, the appellants during the term of the agreement, in such manner and so that all telephone communications over the said telephone line wires of such cabmen, carters, city express and livery men, must pass through said switch in the central office of the appellants. By paragraph 2a the respondents agree to transfer to the appellants all existing contracts for cab, livery, express or cartage service, but that if any parties to such contracts should insist on the respondents carrying out the said contracts the appellants should place such parties in direct communication with the respondents as requested during the existence of such contracts, and that the respondents should collect the rates collectable for any services rendered and account to the appellants therefor.

By paragraph 3 the respondents covenanted that the telephone lines of all cabmen, carters, city express and livery men who should thereafter become subscribers

to the respondents' exchange system should be connected only through the appellants' central office as above stated.

By paragraph 4 that the respondents will erect and connect such wires as are necessary for the transmission of communications between the twenty-five wire switch placed in the central office of the appellants as before mentioned and the respondents' central office free of expense to the appellants, and that the appellants should have the free and continuous use of said switch and lines during the continuance of the agreement.

By paragraph 5 that they will maintain and keep in repair the said lines and switch free of expense to the appellants.

By paragraph 6 that they will immediately upon the said lines being transferred as above agreed notify the said cabmen, carters, city express and livery men of the transfer of said lines, constituting the office of the appellants a branch or switch station of the respondents, and that in future the fares payable for each cab, express waggon or livery vehicle ordered through the respondents' telephones will be due and payable to the appellants.

Now it is admitted that every thing so undertaken to be done by the respondents has been done, and that the appellants by the switch placed in their central office have been put into direct communication with all cabmen, carters, city express and liverymen who are subscribers to the respondents' telephone exchange system, and lessees of their telephone instruments who can communicate with each other without the intervention of the respondents or of their servants in their central office. It is contended, however, on the part of the appellants, that if any lessee of a telephone instrument of the respondents should make use of such instru-

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ment for the purpose of requesting any other lessee of such an instrument to send to the former a messenger boy, cab, express cart, or livery carriage, &c., that inasmuch as such request would pass through the central office of the respondents such use by any lessee of the respondents of the telephone instrument leased to him would constitute a breach by the respondents of their covenant contained in the agreement, which is as follows, namely :

That they will in no manner and at no time during the continuance of this agreement transmit or give, directly or indirectly, free or for remuneration, any messenger, cab, city express or livery orders to any person or persons, company or corporation, except the Electric Company as herein set forth, and that from and after the first day of October next they will cease to do any such business as herein agreed to be done by the Electric Company.

The argument in support of this construction of the above covenant is that when one lessee of a telephone instrument of the respondents holds communication with another lessee of such an instrument the communication, whatever it may be, is transmitted over the wires which are the property of the respondents from the one lessee to the other, and that therefore the respondents are the persons who "transmit" that communication, although their sole act and part in the matter is causing the wire extending from the telephone instrument of the one lessee, at the request of such lessee, to be connected with the telephone instrument of the other lessee in utter ignorance of the nature of the communication intended to be passed from one to the other, and that in case such communication should prove to be a request made upon the person receiving the communication to send a messenger to the person sending it that becomes a breach by the respondents of their covenant. The whole question is, therefore, reduced to this: Is this the true sense in which the word "transmit" is used in the covenant?

Doubtless the word "transmit" is an accurate expression to make use of in relation to every message which is sent from one subscriber to the respondents' telephone exchange system to another. Every message is transmitted from one person to another along the respondents' wires, but in such case the person who transmits the message is no other than the sender of it. The wires constitute the mode of transmission by which the one lessee transmits the message along the wires to the other. It is the person who breathes into the instrument the message which is transmitted along the wires who alone can be said to be the person who "transmits" the message. The owners of the telephone wires, who are utterly ignorant of the nature of the message intended to be sent, cannot be said within the meaning of the covenant to transmit a message of the purport of which they are ignorant. The contention of the appellants in effect operates to construe the respondents' covenant as if it was thus expressed:

That they will not transmit or give directly or indirectly, or suffer or permit any lessee of any of their telephone instruments to make use of any of such instruments for the purpose of transmitting or giving any messenger, cab, city express or livery order to any person or corporation except the appellants.

The respondents' covenant is, in my judgment, open to no such construction. The business which the respondents made over to the appellants was simply that which the respondents had been carrying on. As to all cabmen, carters, city express, or liverymen, which were or should become subscribers to the respondents' telephone exchange system, they have been placed in direct communication with the appellants by the switch placed in the appellants' central office as had been agreed upon, and no complaint is made of any breach by the respondents of their covenant as regards any of such persons; any lessee, however, of a telephone instrument might through his instrument ask any other lessee to

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1891. send him a cab or an express cart, equally as a messenger boy, and if the non-interference by the respondents to prevent one of the subscribers to their telephone exchange system from asking another subscriber to send him a messenger would constitute a breach by the respondents of their covenant, so also would the respondents' non-interference to prevent any subscriber from asking another to send a cab or express cart. Now the messenger boy business which the respondents formerly carried on, and which they made over to the appellants, was conducted in this manner. When a lessee of one of their telephone instruments called upon the respondents and requested them through the telephone to send a messenger to him, or to any place for him, they executed the order making a charge for so doing to the person from whom they received the order. The object of the respondents' covenant seems to be to provide that if, after the first of October then next, when the respondents covenanted to cease carrying on the messenger boy, cab, city express and livery order business which they had previously carried on, they should receive any order to send to or for any person a messenger boy, cab, city express, cart, &c., &c., they would transmit the order to the appellants to be executed instead of executing it themselves as they had previously done. This seems to me to be the natural construction of the language used in the covenant. To be in a position enabling the respondents to "transmit" an order to the appellants it must have been given to them and received by them. It is a strained and unnatural construction of the language used to say that an order given through the telephone and sent by one lessee of the respondents' telephone instruments to another is an order given to and received by the respondents. It is assumed by the appellants that while the respondents themselves

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carried on the business no lessee of any of their telephone instruments could have transmitted through his telephone a request to another lessee to send to the former, a messenger, or a cab, city express, or the like, but there is no foundation for any such assumption. The respondents could not have deprived any lessee of the right to use his instrument for the purpose of transmitting to another lessee a request to execute any such order, nor could the respondents have deprived the party receiving such an order of his right to execute it. The appellants' contention, however, is that it is now incumbent upon the respondents, by reason of their covenant, to intercept in their central office, as it is contended they can, an order not addressed to them—but to intercept all orders passing along the wires from one lessee to another which asks for a messenger or a cab, city express or the like, and that unless the respondents so intercept such orders and send them to the appellants the covenant of the respondents is broken. Now in point of fact the respondents have no means whatever of knowing the nature of any communication passed along the telephone wires from one lessee of a telephone instrument to another until the communication has passed through and has already been received by the party to whom it is addressed, and then only by the adoption of a practice by no means commendable, and which, though it may be within their power, certainly constitutes no part of any duty the respondents are called upon to discharge, namely, of employing persons for the special purpose of spying and prying into every communication which passes along the wires from one lessee to another in order to discover whether any of such communications contains a request for a messenger, cab, city express or the like to be sent anywhere. Such an interpretation of the respondents' covenant

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1891 would, moreover, involve a violation of every lease of
THE an instrument which was in existence in September,
ELECTRIC 1832, when the agreement was entered into, and the
DESPATCH substitution of new leases restraining the lessees from
COMPANY ever transmitting through their instruments an order
OF TORONTO for a messenger boy, cab, or city express or any livery
v. order to any other lessee than to the appellants, and
THE BELL restraining any lessees other than the appellants re-
TELEPHONE ceiving any such order from another lessee from exe-
COMPANY cuting it under penalties sufficient to protect the
OF CANADA. respondents from the breach of their covenant which,
Gwynne J. as is contended, would be involved in such transmis-
sion of such a message.

It is impossible, in my opinion, to conceive that the parties to the agreement ever contemplated that a request sent by one lessee of the respondents' telephone instrument to another for a messenger boy or a cab or city express to be sent anywhere could constitute a breach by the respondents of their covenant. What the parties did contemplate I have no doubt was, that the respondents should cease to carry on the messenger boy, cab and express order business which they had previously carried on, and that if they should be asked as they formerly had been by any of their lessees for a messenger boy they would transmit the order to the appellants to execute and would not execute it themselves, and as it is admitted that the respondents never have committed any breach of the covenant by neglecting to send to the appellants any such order addressed to and received by them, nor any breach unless it can be held that an order spoken into his telephone instrument by one lessee and so addressed and sent to another and not intercepted by the respondents, and diverted from its original destination and given instead to the appellants, should constitute a breach of their covenant; and as I am of opinion that

the respondents' covenant is not open to any such construction the appeal must, in my opinion, be dismissed with costs.

PATTERSON J.—I cannot say that I have any doubt about this case. I entirely concur in the construction of the contract presented in the divisional court by the Chancellor and Mr. Justice Ferguson, and in the Court of Appeal by Mr. Justice Osler and Mr. Justice Maclellan.

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The messenger business, though it may require telephone communication to enable it, in these days of telephones, to be successfully carried on, is no more a branch of the business of a telephone company than any other enterprise in which the company may choose to engage, such for example as a grocery, as was suggested during the argument by one of my learned brothers. The contention of the appellants involves the assertion of the right of the company to refuse the use of its lines,—those lines in respect of which a servitude is imposed on the public highways, street, bridges, watercourses and other such places (1); for sending an order for a messenger, or for groceries, to any other shop but its own. It may be, though I doubt it, that if brought to the test of strict law the abstract right to establish such a monopoly could be maintained, but it would be a rash thing to make the experiment, and I have no idea that clause 16 of the contract with the appellants was framed with any such purpose or understanding. The language of the clause creates no difficulty in my mind. The agreement on the part of the Bell Company is contained in paragraphs numbered from 1 to 16, and one numbered 2a. Number one is the general assignment of the business and good-will, and the others are mainly oc-

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cupied with details of what is in a general way covered by number one. No details specially referable to the good-will of the business are given till we come to the last paragraph. It was to be expected that orders would, for a while at all events, continue to come to the Bell Company for cabs or messengers. What was to be done with them? Those are the orders which I understand paragraph 16 to refer to. It is more general than paragraph 8 which refers to orders of the same kind, number 16 not being confined to orders coming over the wires. As well expressed by the learned chancellor "both stipulations are *in pari materiâ*, and are such as are usual in the case of a sale of a business and good-will to prevent the seller from taking an active part, whether directly or indirectly, in derogating from the value of the property and good-will sold and transferred."

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants : *McMichael, Mills & McMichael.*

Solicitors for respondents : *Kingstone, Wood & Symons.*
