

1881 THE DOMINION TELEGRAPH CO.... APPELLANTS ;
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 \*Nov. 3, 4. AND  
 1882  
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 *Mar. 24. JOHN SILVER AND ABRAHAM } RESPONDENTS.
 MARTIN PAYNE..... }

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

*Libel—Telegraph message—Liability of Telegraph Company—
 Special damages—Inadmissibility of evidence as to, when not
 alleged—Excessive damages.*

S. et al. (respondents) partners in trade, sued the *D. T. Co.* (appellants) for defamation of the respondents in their trade. In the declaration it was alleged:—1. That they were wholesale and retail merchants at *Halifax*. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at *Halifax* to their office in *St. John*, and there caused to be printed, copied, circulated and published the false and defamatory message following:—“*John Silver & Co.*, wholesale clothiers, of *Greenville* street, have failed; liabilities heavy.” 2nd. That same message was caused also to be published in other parts of the Dominion. 3rd. That the appellants promised and agreed with the proprietor or publisher of the *St. John Daily Telegraph* newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously and by means of said telegraph, transmitted, sent and published from their office in *Halifax* to their office in *St. John*, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business, standing and reputation were thereby greatly damaged.

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

The *D. T. Co.* denied the several publications charged, and also the entering into the agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one *Snyder*, an officer of the company, to furnish him news at so much for every hundred words, but that he only paid for such as he used. The original despatch was not produced. The only evidence as to damage was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit which was refused and the case was submitted to the jury who, upon the evidence, rendered a verdict for the plaintiffs with \$7,000 damages. On appeal to the Supreme Court of *Canada*, it was

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*Held*,—1. (*Taschereau*, and *Gwynne* JJ., dissenting,) That the appellants, the *D. T. Co.*, were responsible for the publication of the libel in question.

*Per Taschereau* and *Gwynne*, JJ., dissenting: assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that *Snyder* had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded.

2. (Sir *W. Ritchie*, C.J., doubting, and *Henry*, J., dissenting) that the damages were excessive, and therefore a new trial ought to be granted.

*Held* also *per Strong*, *Taschereau* and *Gwynne*, JJ. No special damages having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible, and therefore a new trial should be granted.

**A**PPPEAL from a judgment of the Supreme Court of *Nova Scotia* (1).

This action was brought by the plaintiffs as partners

(1) 2 *Russ. & Geldert* 17.

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in trade against the defendant company for defamation of the plaintiffs in the way of their trade.

The first count of the declaration, consisting of three counts, alleges that the plaintiffs before and at the time of the committing the grievance hereinafter alleged, were merchants carrying on business by wholesale and retail at *Halifax*, under the name of *John Silver & Co.*, and the defendants were at the said time proprietors of, and by their servants and agents managed and conducted a certain system of electric telegraph upon, along and over certain lines of, and owned by, the defendants; and the plaintiffs say that whilst the plaintiffs were such merchants and carrying on business as aforesaid, the defendants, wrongfully, falsely and maliciously, by means of the said telegraph so owned and used by them, transmitted, sent and published from the office of the said defendants in the said city of *Halifax* to their office in the city of *St. John*, in the Province of *New Brunswick*, and there falsely and maliciously caused to be written, printed, copied, circulated and published, the false, malicious and defamatory message following of and concerning the plaintiffs, that is to say: "*John Silver & Company*" (meaning the plaintiffs), "wholesale clothiers of *Granville* street, have failed, liabilities heavy," meaning thereby that the plaintiffs had failed and become bankrupt and unable to pay their debts in full, and were unable to continue their business, whereby and by reason and means whereof the plaintiffs' credit was impaired, and their business and reputation seriously injured.

The second count alleged—that the defendants on or about the 6th day of January, 1879, by means of said telegraphic lines owned and used by them, and by means of the facilities possessed by them for the transmission of intelligence by telegraph, wrongfully, falsely and maliciously transmitted, sent and published from their office in

the city of *Halifax* to their office in the city of *St. John*, in the Province of *New Brunswick* and to their office in the city of *Montreal*, in the province of *Quebec*, and to other cities in the Dominion of *Canada* and in the *United States of America*, and there falsely and maliciously caused to be written, printed, copied, circulated and published in divers ways, amongst others, by copying, publishing, or causing to be copied and published, in the *St. John Daily Telegraph* newspaper and other newspapers and circulating sheets in said city of *St. John* and elsewhere, the false, malicious and defamatory message following of and concerning the plaintiffs; that is to say—(as in first count,) whereby, and by reason and means whereof, the plaintiff's credit was impaired, and their business and reputation seriously injured, and they otherwise suffered great loss and damage by reason of the premises.

The third count was as follows:—And also for that the plaintiffs were both before and at the time of the committing of the grievances herein-after alleged, dry goods merchants, carrying on business in *Halifax*, under the name and style of *John Silver & Co.*, and the defendants were, when, &c., the proprietors of, and by their servants and agents managed and conducted a certain system or line of electric telegraph upon and along certain lines of telegraph owned or used by them, and upon and along and over certain other lines of telegraph connecting with the defendants said lines for the purpose of enabling defendants to transmit messages from place to place in the Dominion of *Canada* and in the *United States of America*, and plaintiffs say, that the defendants promised and agreed to and with the proprietor or publisher of the *St. John Daily Telegraph* newspaper, and entered into an arrangement with such proprietor or publisher, whereby the defendants agreed to collect and to transmit by

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means of their said line or system of electric telegraph, news despatches to the said newspaper from time to time, and it was also further agreed, arranged or understood by and between the said parties last named, that the said proprietor or publisher would pay the defendants for all such messages as said defendants would transmit to them, and such proprietor or publisher should publish in said newspaper; and plaintiffs say that in pursuance of said arrangement and agreement the defendants wrongfully, maliciously, and by means of the said telegraph so owned and used by them transmitted, sent and published from the defendants' office in *Halifax* to their office in *St. John*, and there falsely and maliciously caused to be written, printed, copied, circulated and published, the false, malicious and defamatory message following, of and concerning the plaintiffs, that is to say,—(as in first count), whereby and by reason and means whereof, many customers who had theretofore dealt with plaintiffs ceased to do so, and plaintiffs credit and business standing and reputation were thereby greatly damaged.

To this declaration the defendants pleaded, denying the several publications charged in the respective counts, and denying the entering into the agreement mentioned in the third and the forwarding the message therein stated in pursuance of any such agreement.

Issues being joined on these pleas, the case went over for trial before a jury. At the trial, the depositions of the proprietor and publisher of the *St. John Daily Telegraph* Mr. *Elder* taken upon an examination *de bene esse* before a commissioner were read, subject to objections taken at the examination to the admissibility of the evidence and its sufficiency. The substance of his evidence was—that he had never seen any telegram containing the matter complained of as libellous; that telegrams are received by officials at the office of the

paper and are not generally seen by him, and are destroyed the morning after their receipt; that his attention was first drawn to the telegram in question by a telegram received from the *Dominion Telegraph Co.*, saying that "the prior telegram was not correct," whereupon he wrote an article which was published in his paper. By the copy of depositions printed in the case it appears, however, that he produced at his examination a copy of the *St. John Daily Telegraph* of the 7th January, 1879, from which an extract was taken and annexed to the depositions and marked Exhibit B, which is as follows:—

*The Daily Telegraph,*

*St. John, N.B., Tuesday, January 7, 1879.*

*Halifax, January 6.*

*John Silver & Co.*, wholesale clothiers of *Granville street*, failed to-day; liabilities heavy.

*Howard C. Evans & Co.*, commission merchants and lobster packers, failed; liabilities about \$20,000.

*John S. McLean & Co.*, of this city, are large creditors of *Carvill Brothers, Charlottetown, P. E. I.*, who failed on Saturday, with liabilities of \$100,000.

The steamer *Carroll* arrived from *Boston* and the *Cortes* from *Newfoundland* this morning.

That telegram was corrected he said in the evening edition of his paper of the same day, for he got the telegram saying that the prior telegram was incorrect on the same day in time for the evening edition: whereupon he had a conversation with *Mr. Snyder*, a person in the employ of the defendant's at *St. John*, and who, as witness said, appeared to be at the head of defendant's office there. Witness complained to him of the telegram which witness had to correct, whereupon *Mr. Snyder* expressed his regret that it had occurred. Witness's complaint was that the telegram he had received from *Snyder* was not correct, and that it was a serious matter for witness that it should not be correct. His reply was that they were very sorry for it, and would caution

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the party who had transmitted it to be more careful in future, or words to that effect. *Snyder*, as witness said, informed him that he had received the news in the telegram from the party in *Halifax* who compiled the news for him. Witness also said that he took a good deal of news from the defendant company from the Upper Provinces and from the Maritime Provinces including *Halifax*. The terms upon which he received these telegrams were arranged with *Mr. Snyder*, and were so much for every hundred words, but that he only paid for such as he used, unless they came from a special correspondent of his own. That he had at the time a friend in *Halifax* who was authorized to send him news, but that the telegram in question was not from him. He also said that he was in the habit of paying *Snyder* for tolls for the compiling and transmission of news by telegram on bills presented to witness in the name of the company, and he added that his transactions were entirely with *Snyder*, and that he did not think that in them the name of the company was used at all, but witness took it that *Snyder* was agent and manager of the defendants' company from seeing him in the office and paying him the tolls for the telegrams on the bills of the company. A reporter, *Mr. Thompson*, employed in the office of the *Daily Telegraph* newspaper, was also called, who testified to the news under the head of "*Halifax*," in exhibit B, published in the *Daily Telegraph* having been taken from a telegraphic despatch delivered to him at the *Daily Telegraph* office by a boy who he understood to be a messenger of the defendants, and he also said that this despatch so received by him was not now forthcoming because telegrams after they were used were either thrown into the waste paper basket or on the floor. That after proof reading they are not preserved.

The evidence offered as to damage was the evi-

dence of one *George McKeen*, partner in a firm of *Carvell, McKeen & Co.*, *St. John*, and an agent of theirs named *Mathers* residing at *Halifax*, who were called for the purpose of showing that by reason of the publication complained of Mr. *McKeen's* firm ceased to do business with the plaintiffs as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was nevertheless received, and was in substance as follows :

Mr. *McKeen* stated that his firm, through Mr. *Mathers* as their agent, had done business in *Halifax* for many years. That he, Mr. *McKeen*, took the *St. John Daily Telegraph*, and that in it he saw a telegraphic report of the plaintiffs failure, but he could not state the date; that in consequence of seeing that report, he communicated with Mr. *Mathers*, his agent at *Halifax*, once in writing and once verbally ; that the verbal communication was to the effect that the publication of the telegram would affect the credit of the plaintiffs, and that he did not wish to have any further dealings with them ; that his dealings consisted in selling them exchange, for which he had been in the habit of receiving plaintiffs promissory notes, and sometimes he discounted their notes ; but after that he had no dealings with them ; that it was in February or the latter end of January that he had the conversation with *Mathers*.

*Mathers* evidence was to the effect that the plaintiffs of their own accord, without any solicitation, were in the habit of purchasing exchange from him as agent of *Carvell, McKeen & Co.* ; that his principals wrote to him, as he thinks, upon the 9th January, asking " what about *Silver* ? " to which he says he replied, after making enquiries himself, that he thinks the saw *Hedley* about it ; who *Hedley* is did not appear, nor does the witness say what the result of his inquiries was or what he replied to the inquiry made of him by



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by his principals. The second communication which he had with his principals upon the subject, that is to say, the verbal one, was a week or ten days afterwards, and, he says, he received instructions from his principals, in the verbal communication not to deal with the plaintiffs. The witness never had any dealings with the plaintiffs in the way of their trade as dealers in dry goods, nor otherwise than as selling them exchange as above stated when they applied for it, and, he adds, that the firm had since failed.

The learned counsel for the defendants moved for a non-suit, which was refused, and the case was submitted to the jury who, upon the above evidence, rendered a verdict for the plaintiffs with \$7,000 damages.

In the following term a rule *nisi* was obtained to shew cause why this verdict should not be set aside and a new trial granted upon the following grounds :

1. Because said verdict is against law and evidence.
2. For the improper reception of evidence.
3. Because the damages found by the jury are excessive.

Upon argument, this rule was discharged, *Weatherbe, J.*, dissenting, and it is against the rule discharging this rule *nisi* that this appeal was taken.

Mr. *Dalton McCarthy* and Mr. *Rigby, Q. C.*, for appellants :

The action is for libel, in a press despatch sent by the Company from *Halifax* to *St. John*, and the jury gave a verdict for the plaintiffs with \$7000 damages. The action was brought by two partners, and could only be brought by them as co-partners and with respect to damages resulting to them as co-partners, and the verdict must be limited to such damage.

The publication, inuendo and damage alleged in the declaration are denied by the pleas, and also the al-

leged agreement with the *St. John Daily Telegraph*, and the transmission and publication in pursuance thereof of the alleged libel. In the first place, if there was publication by the company, it was at a much earlier period than when it reached *St. John*, and plaintiffs have given no evidence of publication in *Halifax*. If, however, they contend that we were guilty because the alleged libel was published in *St. John*, we say the only evidence on which they can rely is the newspaper containing the alleged libel. Now, that is not sufficient evidence of publication of the libel by defendants.

The original message sent from *Halifax* to *St. John* was not produced, and no sufficient basis laid for secondary evidence of it.

Elder never saw it and never looked for it. The original document which should have been produced or accounted for was the manuscript in the defendants' office in *Halifax* from which the message was sent over the wires to *St. John*, and no evidence of any kind of or concerning it was given by the plaintiffs.

There was no evidence that the words published in the newspaper were the same as the despatch sent over the defendants' line, even if the newspaper was admissible in evidence.

Moreover the copy of the newspaper produced by *Elder* was not admissible as evidence against the defendants, and was no proof of publication by them of the alleged libel. It might have been evidence against *Elder* himself, but not against the defendants.

The court below sought to connect this evidence with *Snyder's* statements or admissions, but they could not be admissible against the defendants.

There was no evidence that *Snyder* had any authority from or agency for defendants for the publication of the alleged libel, or the delivery of the message to the newspaper, and his general agency as manager of the defen-

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dants' business in *St. John* would not extend to such acts, which are not within the scope or functions of a telegraph company. *Harding v. Greening* (1); *Parkes v. Prescott* (2).

There was no evidence either that the company ever recognised or ratified what *Snyder* did, and without evidence of this kind there can be no liability attached to defendants.

Then, again, the collection of news paragraphs and their transmission from place to place by telegraph, and the selling of them to the newspapers, is not within the business or corporate powers of the defendants, and it would also appear from the evidence of *Elder* that this business was done by *Snyder* personally, in connection with some person in *Halifax*, and that the wires of the defendants were only used by these persons for conveying such messages. *Cooley on Torts* (3); *Poulton v. The L. & S. W. Ry. Co.* (4); *Edwards v. The L. & N. W. Ry. Co.* (5); *Erb v. Gt. W. Ry. Co.* (6).

We also contend that the parties in the suit are not identified with the parties mentioned in the alleged libel.—

Our next point is that the damages are grossly excessive, and there was no evidence of any damage whatever having been sustained by the plaintiffs from the alleged publication by the defendants of the libel, nor in fact of any damage whatever to the plaintiffs.

The plaintiffs gave no evidence themselves, or by any witness, of the nature and extent of their business, of their solvency or position at the time the alleged libel was published, or that their subsequent failure was in any way attributable to the alleged libel. The contradiction of the statement of the firm referred to in the

(1) 1 Moore 479.

(2) L. R. 4 Ex., 169.

(3) P. 119.

(4) L. R. 2 Q. B. 534.

(5) L. R. 5 C. P. 445.

(6) 5 Can. S. C. R. 179.

alleged libel appeared in the evening edition of the paper on the same day, and again in the next morning's edition, and no damage was shown to have resulted, or could have resulted. There was no malice shown or suggested. In the absence of any evidence of any substantial damage on which the jury could rationally found such a large verdict, it is evident that they must have acted on some prejudice, or from some motive or opinion not justified by the evidence, which is a sufficient reason for granting a new trial for excessive damages. *Folkard* on slander and libel (1); *Smith v. Frampton* (2); *Kelly v. Sherlock* (3).

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Mr. *Thompson*, Q. C., for respondents :--

The point that plaintiffs were not identified was not taken at the trial. If raised at the trial such objection would have been instantly disposed of by evidence available to the plaintiffs at the time. *Robertson v. Dumaresq* (4); *Burgess v. Boetfeur* (5); *Donnelly v. Bawden* (6).

It has been argued that there is no evidence of special damage. My answer is that by the pleadings it was admitted that plaintiffs were doing business, and the jury had the right to find that the libel complained of referred to plaintiffs. See *Nova Scotia* Rev. Stats. 4 series, ch. 94, sec 152 and 144. *Marsden v. Henderson* (7); *Hamber v. Roberts* (8).

As to the reception of the telegram contained in the newspaper in proof, the appellees contend that it was out of their power to give better evidence as to the loss of the original. Its loss was sufficiently accounted for to let in the evidence offered, and such evidence was

(1) P. 565.

(2) 2 Salk. 644.

(3) L. R. 1 Q. B. 686.

(4) 2 Moo. P. C. N. S. 87.

(5) 7 M. & G. 481.

(6) 40 U. C. Q. B. 611.

(7) 22 U. C. Q. B. 585.

(8) 7 C. B. 861.

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properly received. *R. v. Johnson* (1); *Kensington v. Inglis* (2); *Roscoe's Nisi Prius* (3); *Stowe v. Querner* (4).  
*Snyder's* admission was sufficient, and his agency was clearly proved.

The evidence of *Elder* and *Thompson* established, to say the least, that the loss or destruction of the telegram was probable, and therefore very slight evidence was required. See *Freeman v. Arkell* (5).

The evidence given satisfied both judge and jury that the telegram was lost or destroyed, and there being no degrees in secondary evidence, the newspaper was therefore admissible. If no such message was sent, or if it never existed, the onus lay on defendants of interposing before the newspaper was offered and giving evidence to establish that there never was such a message and none such was sent.

I will now take up the question of *ultra vires*.

It was open to appellants to prove what *Snyder's* duties and powers were, and in the absence of such proof on their part, it must be assumed he was their agent, especially as the evidence shows that *Snyder* was in charge of defendants' office, transacted their business and received the tolls on telegraphic messages. The act in question, viz., transmitting and delivering for publication the message in question, was a matter within the duty of *Snyder* and defendants' operators, and it must therefore be assumed that the transmission, copying and delivery to the *Telegraph* newspaper was the act of defendants. Assuming, however, that *Snyder* was not defendants' agent and the message was procured, sent and delivered at his instance, yet inasmuch as defendants' wires and servants, within the scope of their duties, were used in

(1) 7 East 66.

(2) 8 East 273.

(3) 13th Ed., page 6.

(4) L. R. 5 Ex. 155.

(5) 2 B. & C. 496.

transmitting, copying and circulating the libel, they are liable, especially as they received pay for what they did. A corporation is liable for a tort even when *ultra vires*. *Brice on Ultra vires* (1); *Tench v. The G. W. Ry. Co.* (2); *Angell and Ames on Corporations*. (3).

The amount of damages was a question purely for the jury, and the direction of the judge is not complained of. Nor was it contended that the verdict was perverse. *Riding v. Smith* (4); *Kelly v. Sherlock* (5); *Blanchard v. The Windsor and Annapolis Ry.* (6).

RITCHIE, C.J. :

This was an action for an alleged libel. The declaration contained three counts. [The learned Chief Justice then stated the pleadings.]

I think the evidence in this case fully justified the jury in finding all the issues raised by the pleadings in this cause in favor of the plaintiffs, the evidence satisfactorily establishing—1st. That defendants were owners and proprietors of certain telegraphic lines, and by their servants and agents transmitted over such lines, as a part of their business, for pay and reward, telegraphic news to be published in the public newspapers, the proprietors of which may have agreed to receive and pay for such news; and as to the paper *Daily Telegraph*, published in *St. John*, in which it was alleged the libel in question was published, the proprietor, Mr. *Elder*, says with reference to his paper and his dealings with the defendants:—

It is an important part of the business of my paper to publish telegraphic news. I take a good deal of news from the defendants' company from the Upper Provinces and Maritime Provinces, including *Halifax*. That practice has existed from soon after the defendant's company was established—prior to 7th January, in the year

(1) P. 474.

(2) 32 U. C. Q. B. 452.

(3) Sec. 387 (Edn. of 1871).

(4) 1 Ex. Div. 91.

(5) L. R. 1 Q. B. 686.

(6) 1 Russ. and Ches. 8.

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1879. The terms were so much per hundred words, according to the quantity. I cannot specify the exact price we paid for those telegrams. We only pay for such telegrams as we are able to use. We get a large quantity which we often do not use from want of space or having other more interesting matter, and then we only pay for what we use unless they are from our own correspondent. In the case of telegrams supplied to us by the *Dominion Telegraph Company* we only pay for such as we use. The *Dominion Telegraph Company* has an office at *Saint John, N. B.* Mr. *Snyder* is the head man there. He has been there from the first establishment of the company, before the 7th of January, 1879. I do not know his Christian name. The paper now produced and shown me is a copy of my paper. The "*Daily Telegraph*" of seventh January, 1879, published at *Saint John*. It is marked by me *Bc. M. T.* That paper has a large circulation for the Maritime Provinces. It circulates outside of the Province of *New Brunswick*, in *Nova Scotia, P. E. Island, Quebec, Ontario, and United States*, with a small circulation in *England*. I take it that *Snyder* was acting as agent of the company. The tolls for our telegrams are paid to Mr. *Snyder*. They are settled weekly or monthly when the bills are sent in. There is not any other telegram published in my paper of January 7th, 1879, under the head of "*Halifax*," except that already referred to. The evening edition of my paper does not circulate so largely as that of the morning. It circulates outside of *New Brunswick* in the Upper Provinces by night mail but not so largely as that of the morning. The paper marked by the Commissioner is one of the morning edition of my paper.

On his cross-examination he says :

I only know that *Snyder* is the manager of the defendants' company from seeing him in their office and paying him the bills of the telegraph company. I only know that they are bills of the *Dominion Telegraph Company* from the fact that they are rendered in their name by *Snyder*. (Objected to by *Thompson, W. T.*) I paid *Snyder* a certain sum for tolls for the compiling and transmission of the news by telegram. *Snyder's* telegram (for, say one hundred words,) might cost less than the same number from my own correspondent, because of the large quantity we get from *Snyder*. I also get telegrams from the *Western Union Telegraph Company*, which are published in both editions of my paper. *Snyder* appears to me to be the head of the office of defendants in *St. John*, and there are other operators there also.

As to the telegram in question, Mr. *Elder* says :

My attention to this telegram was first called about January 6, 1879, by a telegram from the *Dominion Telegraph Company*, saying "That the prior telegram was not correct." I have no direct knowledge of the second telegram coming from the defendant company, except that it was brought to me, and I had to write a paragraph on it. Neither of those telegrams was preserved.

And again :

My attention was called to the telegram under the head of "*Halifax*" on first page of seventh of January, 1879, on the same day. It was corrected in the evening edition. I got the telegram from the defendants stating the prior telegram was incorrect on the same day in time for the evening edition. I had a conversation with Mr. *Snyder* afterwards about the first telegram. I complained to him of that telegram which we had to correct. He expressed his regret that it had occurred. I complained that the matter we had received from him by telegram was not correct, and that it was a serious matter for us that it should not be correct. His reply was "that they were very sorry about it and would caution the party who had transmitted it to be more careful in future," or words to that effect. I had at that time in *Halifax* a friend who was authorized to send me news. The telegram in question of the 7th January, 1879, was not transmitted by him. *Snyder* informed me that he had received the news in the telegram from the party in *Halifax* who compiled the news from him. I do not think the name of the company was used at all. My transactions were entirely with Mr. *Snyder*.

On cross examination :

Both of the telegrams already referred to, came from the same sources as far as I know. (This paper also put in, subject to objection by Attorney General marked "C" W. T.) I do not know where these telegrams came from, except from conversation with members of my staff and with Mr. *Snyder*. I never saw the originals of these telegrams. The first telegram received and published in the *Daily Telegraph* was as follows :—

The *Daily Telegraph*,

St. John, N. B., Tuesday, January 7th 1879.

Halifax, Jan. 6.

John Silver & Co., Wholesale Clothiers, of *Granville Street*, failed to-day, liabilities heavy. *Howard C. Evans & Co.*, Commission Merchants and Lobster Packers failed: liabilities about \$20,000.

John S. MacLean & Co., of this City, are large creditors of *Carvell Bros.*, *Charlottetown, P. E. I.*, who failed on Saturday with liabilities of \$100,000.

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The Steamer *Carroll* arrived from *Boston* and the *Cortes* from *Newfoundland* this morning.

Mr. Thompson says as to this telegram :—

I am employed in the office of the *Daily Telegraph* newspaper. Have been in that office since some time in 1875. I was there on the 6th and 7th of January last. I was a reporter and attended to the despatches that came to the two evening editions. I saw the despatch headed "*Halifax*" which was published in the evening editions of the *Telegraph* of 7th January, 1879, (already put in evidence, *W. T.*), I received it from the *Dominion Telegraph* carrier. I suppose I may call him the boy who brings the despatches from the *Dominion Telegraph Company's* office. (Objected to by Mr. *Rigby.*) I opened it. I think that telegram appeared in the first evening edition of the paper of the 6th. It appeared in the second evening edition, I read the proof of it with copy. The print in the paper is a true copy of that telegram, except that the word "of" before *Granville* street may have been inserted. That telegram was written on manifold paper. That is the kind of paper which the telegrams furnished by the *Dominion Company* (without being from any correspondent) are on. I do not think it had any signature (Objected to by Mr. *Rigby, W. T.*) The telegrams after they are printed or used are either thrown in the waste paper basket or on the floor. That is after proof reading. They are not preserved. The first evening edition of the *Telegraph* is published at three o'clock, p.m.; the next one at five p.m.

Cross-examined by Mr. *Rigby* :

I was in the office when the first telegram was received. It was a paper with a despatch on it; not in an envelope. We get despatches from the *Western Union Telegraph Company* on manifold paper, but on a different kind of paper from that which we get from the *Dominion Telegraph Company*. I only know that the boy who delivered the messages was in the employ of the *Dominion Telegraph Company*, from the fact that he brought their messages and that the other boys told me so. Also received the second telegram correcting the first one. Knew that the matter of the evening edition is transferred to the morning edition. The corrected telegram was on the same kind of paper as the first. I do not know the boy's name, or his appearance, who delivered those telegrams. The defendants company have two or three messengers I knew it was a *Dominion Telegraph* message from the fact that it was brought by one of the same messengers, and on the same kind of paper on which their messages were usually written, as we usually get messages from them.

Re-examined by Attorney General :

There are only two telegraph companies doing business in *St. John*. The *Western Union Telegraph Company* and the *Dominion Telegraph Company*. I know that the paper on which these telegrams were written was the *Dominion Company's* paper, from the fact that I have been in their office and received messages on similar paper.

A notice to defendants to produce the original telegram was proved and its production called for, but it was not forthcoming and no excuse or explanation appears to be offered for its non-production. This is the whole evidence in the case in reference to the transmission and publication of this telegram. A motion for a non-suit appears to have been made on two grounds only: no evidence of publication by the defendants; no evidence of malice. The defendants called no witnesses. I am at a loss to conceive how a plaintiff could give stronger *primâ facie* evidence of the company themselves having collected and transmitted this news for publication. Surely, if what Mr. *Elder* and Mr. *Thompson* say is not correct, who had the means within themselves of correcting or contradicting it but the defendants? The cause was tried at *Halifax*. If that telegram was not transmitted by defendants from *Halifax*, who could so well have shewn that but they themselves? If it could have availed them to have shown that the material forming this telegram was transmitted by a third party, with whom they had nothing to do, which I do not think, except, possibly, as affecting the question of damages, who could have shown that fact and the circumstances connected with the sending of that message but themselves? Defendants' office at *Halifax* contained all the information that could be had on this point, why did they not produce the original telegram? Why was the telegram without a name subscribed to it? In the absence of such evidence, is it possible that any jury could come to any other conclusion than that the tele-

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graph company, with a view to its business, caused this information to be procured, and that the person referred to by Mr. *Snyder*, when he said "he would caution the party who had transmitted it to be more careful in the future," was a servant of the company. If he was not, who knew who he was but the company, and therefore who could show this fact but the company? If they have not chosen to do so, can they complain of an inference which appears to be irresistible being drawn against them? So with reference to what took place at *St. John* the same observations apply. The company have an office in *St. John* doing business there. Mr. *Elder* deals with them through a man who is their manager or head man in that city, and who has been there from the first establishment of the company. He receives bills rendered by *Snyder* in the name of the company for his tolls; they are settled weekly or monthly. The tolls are paid to *Snyder* for the compiling and transmitting of the news by telegraph by the company. He receives these telegrams from the company. He has an arrangement by which the terms on which he receives them are fixed; he receives these telegrams written on defendants' paper, delivered by defendants' messenger, and when the incorrectness of this telegram is discovered, it is communicated to him by a message from the company. He complains to *Snyder* as manager of the company, who expresses regret, for this is the effect of Mr. *Elder's* testimony, and all this is allowed to go to the jury uncontradicted and unchallenged; and as in the doings at *Halifax* so here as to those in *St. John*; who but the defendants had the means of showing that this telegram never was sent from defendants' office to the "*Daily Telegraph*" office for publication? who but the defendants could have shown that *Snyder* was not the head man or manager and had nothing to do with the com-

pany, or that they were in no way responsible for his acts, or that no messenger of the company ever delivered the message, in other words, that the company had nothing to do with the transmission, delivery or publication of the message, but the company themselves through their officers, agents and servants in *St. John*? If Mr. *Elder's* view was incorrect, all this information being solely within the possession of the company's agent's and servants, they have not offered a tittle of evidence to contradict, alter, or explain this evidence. What jury, I ask again, could honestly come to any other conclusion than that this message, compiled and transmitted by the company at *Halifax*, was in due course of the business of the company received at the defendant's office at *St. John* and was, under the defendants' agreement with Mr. *Elder*, sent by the servants of the company to the *Dominion Telegraph* office for publication, and that all Mr. *Elder's* dealings with this company were through Mr. *Snyder*, the head man and accredited agent at *St. John*, and for all whose acts and doings in the course of such dealings they were responsible. If this be so, I am at a loss to understand how they are to escape liability for the publication of this clearly libellous matter any more than the proprietor of the paper could be, had he been sued. What better scheme could be devised that would ensure the circulation of a libel, than thus putting it in the shape of a telegram and sending it to a newspaper to be published as a piece of news in which the public were interested? It has been suggested that the transmission of news for publication in newspapers is not within the legitimate business for which telegraph companies are incorporated. I fail to appreciate the force of this objection; as newspapers are now a necessity, so at this day is telegraphic news for publication in newspapers. No newspaper published in a city such as *St. John* could

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1882 exist as a leading influential journal without telegraphic  
 news. To say that the transmission of such news by  
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 Ritchie, C.J. eyes every day, when we take up a morning or evening  
 paper. To say that we can suppose that all such news  
 is transmitted by such company gratuitously for the  
 pleasure of operating, or for any love the company bear  
 either the publishers who print or the public who read  
 newspapers, or from any philanthropic desire to spread  
 intelligence, and to say that they can transmit, not  
 correct statements, but whatever so called news or  
 rumours they may collect, or what may be collected for  
 them by others of a sensational character, without  
 regard to its truth or falsity or libellous character, and  
 so derive a large revenue and not be responsible to  
 those who may be injured, or possibly ruined by such  
 participation in the publication of gross libels, and  
 which libels would not and could not be published but  
 through their instrumentality, would be simply to stul-  
 tify ourselves. Can it be possible that the character  
 and business of innocent persons can be destroyed be-  
 cause the libellers, with a view to gain and the extension  
 of their business, choose to transmit over their lines state-  
 ments and rumors unfounded in fact in relation to the  
 private character or business standing of individuals  
 with whom they have no connection, and with whose  
 character or business they have no right to meddle, and  
 when no duty, legal, moral or social is cast upon them  
 to promulgate the statements or rumours, and the  
 aggrieved parties shall have no remedy against them?  
 The law has not, and I am full well assured never  
 will, sanction such an idea. The legislature never  
 meant, as said by *Brett, J.*, in *Williamson v. Freer* (1),

(1) L. R. 9 C. P. 395.

“that the facilities for telegraphic communication should be used for the purpose of disseminating libels.” To exempt telegraph companies from liability as now claimed would be to clothe them with an irresponsible power for the perpetration of injustice and wrong wholly opposed to every principle of law or right.

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I am at a loss to understand how a newspaper proprietor can be liable for the publication of a libel and the party who prepares the libel and delivers it at the office of the newspaper for publication, and without whose acts no publication of the libellous matter could take place, can escape an equal liability with the printer or publisher of the paper: they are all engaged in one and the same transaction, viz: collecting, transmitting and publishing matter collected, the aid and participation of all being necessary to the publication.

That a libel may be published by transmission through the Electric Telegraph is a proposition for which I should think no authority was required, but the case of *Whitfield v. S. E. Ry. Co.* (1) is clear on this point, though not so strong a case in its circumstances as this. Plaintiffs were bankers carrying on business as such and issuing notes under the firm of the *The Lewes Old Bank*; the defendants were proprietors of, and by their servants and agents, managed a certain system of electric telegraph upon and over their line of railway for the purpose of enabling, and so as to enable, the defendants to transmit messages from one to another of their stations, and the defendants transmitted messages thereby and had the care and custody of all messages transmitted, yet defendants while plaintiffs were such bankers, &c, by means of said telegraph transmitted, sent and published from, to wit:

(1) E. B. & E. 115. (See also *The Phil. &c. R.R. Co. v. Quigley* 21 Howard, U.S., 202 pp. 212 and 213.

1882 *Ticehurst Road Station* to wit to *Hastings Station* and there falsely and maliciously caused to be written, printed, copied, circulated and published the false, &c., words and message following that is to say:—"The *Lewes Bank*," thereby meaning and intending the old *Lewes Bank*, "has stopped payment."

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On demurrer, judgment was delivered by Lord *Campbell* in favor of plaintiffs.

In *Edwards v. Midland Railway Co.* (1), *Fry, J.*, said:—

Those who deny that the company can be made liable (the question being whether a railway company can be made liable in an action for malicious prosecution), rely principally on Baron *Alderson's* judgment in *Stevens v. Midland Counties Ry. Co.* (2), where he held that in order to support such an action it must be shewn that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons *Platt* and *Martin*, did not agree with Baron *Alderson's* reasons, but decided in the company's favor on other grounds.

Has Baron *Alderson's* opinion, which in that case stands alone, been followed by other judges? In *Rex v. City of London*, which is cited in a note to *Whitfield v. South Eastern Ry. Co.* (3) it was held on demurrer that an action would lie against the corporation of the city of *London* for maliciously publishing a libel, and though that decision is not of the greatest weight, being affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice *Saunders*, an able and experienced judge. In *Yarborough v. Bank of England* (4), Lord *Ellenborough* referred to an earlier case of *Argent v. Dean and Chapter of St. Paul's* (5), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again in *Whitfield v. South Eastern Ry. Co.* (6) Lord *Campbell* says that "the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails," and "considering that an action of tort and trespass will lie against a corporation aggregate and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances,

(1) 6 Q. B. Div. 288.

(2) 10 Ex. 352.

(3) E. B. & E. 122.

(4) 16 East 6.

(5) 16 East, 7 note (a).

(6) E. B. & E. 122.

express malice may not be imputed to and proved against a corporation." In *Green v. London General Omnibus Co.* (1), it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice *Erle* says: "The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie." In the case before me it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice *Erle* continues: "The doctrine relied on that a corporation having no soul cannot be actuated by a malicious intention is more quaint than substantial." In other words, the *ratio decidendi* of Baron *Alderson* was in this case disregarded, and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case.

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In *Scott & Janrigan's* law of Telegraphs (2), it is said:

A side from the statutory and common law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for *mala fides* and malicious use of its functions. A libel is any false, malicious, and personal imputation effected by any writings, pictures, or signs tending to alter the party's situation in society or business for the worse, and a corporation may become responsible for its publication even in punitive damages. Citing many cases.—

In the transmission of messages for publication, especially letters and news for the public newspapers, it would seem that telegraph companies assume a responsibility similar to that of the publishers. By this agency libellous matter would be necessarily brought to the knowledge of operators who otherwise would not have cognizance of it. By their immediate and indispensable agency, "press despatches" and the like are brought before the public. In communications specially designed for the press, we see no reason why they should not stand on the same footing with publishers. But in strictly private messages the reason for so stringent a

(1) 7 C. B. (N. S.) at p. 301.

(2) P. 167, sec. 138a.

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rule does not obtain, perhaps should not be applied at all. See *White v. Nicholls* (1).

I assent to a new trial, on the ground of the damages being excessive, with great doubt and some reluctance. The evidence may not be as full and precise as it might have been, but the extent of plaintiff's business as a wholesale importing house in *Halifax*, where the cause was tried, was doubtless well known to the jury, and they were, I should think, competent to estimate the injury to such a business by the promulgation of such a report, and to give, as I think they have done, general damages.

In *Russell et al v. Webster* (2), *Bramwell*, B., says :

When it is left to the jury to say whether a statement is defamatory, and they find it to be so, then they may give general damages, that is, I suppose, damages, according to their discretion, under all the circumstances of the case.

*Pigott*, B., says :

As it is a libel on the conductors of the newspaper, there is no need to prove either malice or special damage and the jury are justified in finding general damages : *Ingram v. Ingram* (3).

But this is immaterial, as the rest of the court think there should be a new trial on the ground of excessive damages.

STRONG, J. :—

This being an action for libel, or written slander, actual damage is not an element of the cause of action, and consequently no allegation or proof of any was requisite to entitle the plaintiff to maintain the action. Even words spoken imputing insolvency to traders are actionable *per se* (4), and in such cases the plaintiff can recover substantial damages without alleging or proving any special damage (5).

(1) 3 How. U. S. 286.

(2) 23 W. R. 60.

(3) 8 Scott, 471.

(4) *Brown v. Smith* 13 C.B. 596 ;

Odgers on Slander and Libel, p.

78, and cases there cited.

(5) *Tripp v. Thomas*, 3 B. & C.

427 ; *Ingram v. Lawson*, 6 Bing.

N. C. 212 ; *Higmore v. Harrington*,

3 C. B. N. S. 142 ; Odgers on

Slander and Libel, 543.

If, however, the plaintiff, either in libel, or in actions for defamatory words actionable *per se*, seeks to prove any special damage, this must be alleged in the declaration, and in the absence of such an allegation evidence of it is not admissible (1).

In *William's* notes to *Saunders's* (2) it is said :

But if the plaintiff has sustained any special damage he must state it, for it is an established rule that no evidence shall be received of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it be specially stated in the declaration. In 1 St. 666, *Browning v. Newman*, Lord *Raymond* took a distinction between the case when the special damage is the gist of the action and when the words are in themselves actionable; that in the former evidence of special damage is allowed, though the particular instances of such damages are not specified in the declaration, but in the latter case particular instances of special damage shall not be given in evidence unless particularised in the declaration. \* \* \* However, modern practice does not warrant this distinction, for it seems now fully established that in each case the special damage must be alike particularly specified in the declaration.

And this principle applies where the damage relied on is the act of a third party to the prejudice of the plaintiff, induced by the slander or libel complained of. In such a case evidence of the prejudicial act of the third person ought to be rejected if it is not pleaded in the declaration.

The declaration in the present case contains no averment of special damage caused to the plaintiffs by reason of the refusal of *Carvell, McKean & Co.*, to sell them exchange in consequence of the publication of the alleged libel. The evidence of Mr. *Mather* and Mr. *McKean* was, however, notwithstanding the silence of the declaration in respect of the damage which they were called to prove, admitted against the objection of the defendant's counsel to its reception. It appears to me, therefore, that there was an improper reception of

(1) Wms. notes to Saunders, vol. 1, p. 322 and cases cited; Odgers 543.

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evidence which was sufficiently objected to at the trial, and that the rule *nisi* which was granted on these, as well as on other grounds, ought for this reason, if for no other, to have been made absolute; and consequently that this appeal should be allowed with costs

FOURNIER, J.:—

As we have power now, by the last amendments to the Supreme Court Act, to order a new trial, we ought to exercise that discretion in this case. I may say that I have seldom seen any case in which there was so little evidence as in this. Certainly there is none to justify the verdict that has been given for \$7,000. I take the view that it is excessive, and that a new trial ought to be ordered.

HENRY, J.:—

I agree with brother *Strong* and the learned *Chief Justice*, and, I presume, with a majority of this Court, that the evidence of publication by the defendant company was fully established. I think the party was entitled to recover damages and I do not feel that I should set aside this verdict on the ground stated by my brother *Strong*—that is, on the improper reception of evidence. I cannot recollect now exactly whether that was objected to or not, but whether it was or not I consider that it was legitimate evidence that might be given in the case. I am of opinion that the statute does not alter, nor was it intended to alter, the principles on which this court could set aside the verdict of a jury where the whole duty of finding damages is, as in cases of libel and slander, with the jury. There is nothing to shock one as to the extent of these damages. There is evidence here that the plaintiffs were extensive importing wholesale merchants in the city of *Halifax*, and it is in evidence that shortly after the publication of

this libel they failed. Now the jury, taken from the city of *Halifax* where the plaintiffs reside, would have a much better opportunity of knowing what damages they should receive than strangers a thousand miles away, sitting in this court. I do not think it was the intention of Parliament, in that amendment to the statute, to alter the law with respect to the prerogative right of a jury to assess damages in a case like this. I think we have no right to interfere with the damages on that ground, and I think we have no evidence upon which we can arrive at the conclusion that these damages were improperly given by the jury. I think, therefore, that the appeal should be dismissed.

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TASCHEREAU, J.:—

I concur in Judge *Gwynne's* observations, and have come to the same conclusion upon the same grounds.

GWYNNE, J.:—

In my opinion this appeal should be allowed, the verdict should be set aside and the Rule *Nisi* for a new trial be ordered to be made absolute in the Court below.

I do not see how this verdict can be sustained, nor how the defendants can be held responsible for the publication in the *St. John Daily Telegraph*, which is the publication complained of, unless they are responsible in all cases for the use which the receivers of telegraphic messages transmitted over the defendants' line may make of such messages when received, and so to hold would, as it appears to me, be subversive of the telegraphic system and destructive of the benefits conferred upon the public by an invention without which it would be impossible that the affairs of the world could in the present age be conducted. The company by their charter are bound to transmit all despatches received by them for transmission in the order in which

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they are received, (subject to certain specific exceptions,) under heavy pecuniary penalties. It would be impossible for them to comply with this provision of the statute if they should be compelled, or it was a duty imposed upon them by law in order to their own protection, to enquire into the truth of matter stated in the despatches delivered to them for transmission at the peril, in case of neglect to do so, of being responsible in damages if such matter should be libellous.

The Legislature, alive to the fact that improper use might be made by the company's servants of the information received by them through the medium of telegraphic messages, affecting the private affairs of individuals, have made a provision which appeared to them to be adequate to prevent the injury by enacting that any operator or person employed by the telegraph company divulging the contents of a private despatch should be guilty of a misdemeanor and on conviction should be liable to a fine not exceeding \$100, or to imprisonment not exceeding 3 months, or both, in the discretion of the court before whom the conviction should be had.

The third count of the declaration seems to be framed with the view of meeting the objection which I have suggested as to the company being made responsible for the use made by the receivers of telegraphic despatches of the information therein contained, for it is there alleged that the defendants themselves, that is that the corporate body, entered into an agreement with the proprietor of the *St. John Daily Telegraph* to become in effect his agents to collect, compile, and to transmit to him over the defendants' line of telegraph, news items, which, in case such proprietor should make use of them by publishing in his paper, he would pay the defendants an agreed upon sum for every hundred words used. The defendants file a plea denying that

they made any such agreement, and they are entitled to have that issue disposed of by being found either in their favor or against them, and if the making of that agreement by the defendants be necessary to entitle the plaintiffs to recover under their third count, it is incumbent upon them to prove that such agreement was entered into in such a manner as to be binding upon a corporate body; a point which involves the necessity of proof that the collecting and compiling news items for the proprietor of a newspaper constituted part of the corporate purposes for which the defendants were incorporated.

The gist of this count seems to be that the plaintiffs contend that the telegraphic message containing the matter complained of was not delivered to the defendants by any individual, to be transmitted over their line by the defendants in the ordinary course of business, as transmitters merely of telegraphic messages delivered to them for transmission, but that the defendants themselves, as the agents of the proprietor of the *Daily Telegraph*, originated the message and delivered it, as it were to themselves for transmission, and so that it was not a message which it was incumbent upon them to transmit under the provisions of their Act of incorporation, as to the transmission of despatches in the order of their receipt by the defendants.

The plaintiffs offer no evidence to prove, nor does the witness called by them, viz., the proprietor of the *Daily Telegraph* allege, that the defendants entered into the agreement of which he spoke in his evidence under their corporate seal, or that it was entered into in pursuance of any resolution of the board of directors, nor even with any officer of the company at their head office. He says that his transactions were entirely with Mr. *Snyder*, and that he does not think the name of the company was ever mentioned. Neither was

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there any evidence offered to show what the duties attached to the office which Mr. *Snyder* filled in the service of the company were, so as to enable the court or jury to say whether they were such as to enable him to bind the company to the extent which is claimed. It might well be within the limits of his ordinary duty in the employment in which he was engaged as a servant of the defendants to agree with the proprietor of the *Daily Telegraph* for the amount which he should pay for all telegraphic despatches coming over the defendants' line without his having any authority to enter into a contract such as that alleged whereby the defendants should become the agents of, and the compilers of news items for, the proprietor of the *Daily Telegraph* and chargeable therefore with all the consequences attaching by law to the assumption of such agency. It might even well be that, while Mr. *Snyder* should himself assume the agency and all the responsibilities attaching thereto, the defendants should permit him to contract upon their behalf as to the tolls which they should receive for the transmission of the messages brought to their office by *Snyder* or persons employed by him, without the defendants assuming any responsibility as to the collecting or compiling the news. The evidence of the proprietor of the *Daily Telegraph* is in my judgment quite consistent with this having been the nature of the arrangement. I can see nothing in the evidence from which it can, I think, be said as matter of law or of fact that the collection of news items by the defendants for the proprietors of newspapers and as their agents, is clearly part of the business for conducting which the defendants were incorporated, or which can make the act of *Snyder*, in entering into the agreement spoken of, the act of the defendants, or which would make the act of *Snyder*, or of any person employed by

him, in collecting and compiling the news and bringing it to the defendants' office for transmission, the act of the defendants themselves. The plaintiffs should at least have offered evidence to show who it was that brought the message to the defendants' office at *Halifax* for transmission. *Snyder* (as the witness called, said) informed him it was a person employed by him to collect the news—however the *onus probandi* lay upon the plaintiffs, and they and not the defendants must bear the consequences, whatever they may be, of the want of such evidence.

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But assuming the agreement for the collecting and compiling the news items for the proprietor of the *Daily Telegraph* to be one within the scope of the purposes for which the defendants were incorporated, and that *Snyder* had sufficient authority to enter into it on behalf of the defendants, and that the latter assumed the agency, a question still remains which appears to be equally applicable to all the counts.

If the defendants collected, compiled, and transmitted news items for the proprietor of the *Daily Telegraph*, they did so as his confidential agents and at his request, just as if any individual and not the defendants had become agent of the proprietor of the paper for the like purpose. The agency of the defendants then was at an end when they delivered the despatch in question to the proprietor and publisher of the *Daily Telegraph* at *St. John*. The publication complained of, and for which the damages have been awarded against the defendants, is not the delivery of the despatch, but the publication of it in the paper. The defendants are charged with having published and caused to be published the matter complained of in the *St. John Daily Telegraph*, and the grievance is the circulation which it thereby obtained. Now, with that publication the defendants had, in fact, nothing to do. They did not request or procure the

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proprietor of the paper to publish it in his paper, nor was it inserted therein to gratify any purpose of the defendants. The proprietor admits that he, himself, exercised sole power to deal with these news despatches, as seemed fit to him in the sole and uncontrolled exercise of his own discretion. He, alone and for his own purposes, inserted the intelligence in his paper. He alone can be made responsible to third persons for acts done by him in the uncontrolled exercise of his own discretion. The case is wholly different from that of a person paying for, or for his own purposes requesting and procuring a publisher of a newspaper to give the benefit of the circulation of his paper to some matter which may prove to be libellous. There the publisher is the agent of the person so procuring the matter to be published and the maxim *respondeat superior* may well apply; but here the publisher, without any request or procurement of the defendants, and in the sole and uncontrolled exercise of his own discretion, for his own purposes, namely, the credit and profit obtained by his showing himself to be an industrious collector of news items, inserts the matter in his own paper—that is his act for which he alone is responsible (1); and such, his act cannot, as it appears to me, be said to be the act of the defendants, nor for such publication can the defendants be held responsible, unless as I have at the outset suggested, they are to be held responsible to all persons for whatever use the receivers of telegraphic despatches passing over their line may, for their own purposes and in the pursuit of their business, make of such despatches—a responsibility for subjecting the defendants to which I think there is no warrant. These points, do not seem to me, to have received that consideration in the court below which the gravity of

(1) *Ward v. Weeks*, 7 Bing. 211.

the liability sought to be imposed upon the defendants seems to demand.

However, assuming the action upon the evidence given to lie against the defendants, this verdict upon the point as to damages alone cannot, in my opinion, be permitted to stand. The damages have not only been awarded in error upon evidence which was not admissible, but the enormous sum of \$7,000 has been arbitrarily awarded to compensate injury alleged to be done to the plaintiff's trade, in the absence of any evidence whatever, that such trade was as matter of fact in any respect injured or diminished by the alleged slander, which was proved to have been corrected in the same paper the same day that it was published, and such correction repeated again in the issue of the same paper on the following day. The verdict is, in my judgment, irreconcilable with the idea that the jury proceeded upon any principle which should govern them in the discharge of their duty of estimating the damages, so as to make them bear some rational proportion to the evidence laid before them of the amount of injury done to the plaintiff's trade for recompensing which the action was brought.

It is said that the words complained of, having reference to the plaintiffs trade, are actionable *per se* without proof of any special damage, but though true it is that to impute insolvency to persons in trade is actionable *per se*, yet that does not relieve a plaintiff who seeks substantial damages for an alleged injury from the obligation of giving to the jury some evidence of the extent of that injury, so as to enable them to discharge the duty devolving upon them of apportioning the damages to the injury as shown to them to have been sustained. Where the injury complained of is injury to a trade of which the jury can know nothing without evidence, it is impossible for them intelligently to discharge their

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duty unless some general evidence be given of what the business was before, and that it became diminished after the publication, from which the jury can form some rational opinion of the extent of the injury for which they are called upon to give compensation. To hold that upon the mere allegation by the plaintiffs in their declaration that their trade has sustained an injury, to establish which allegation they offer no evidence, a jury may arbitrarily give as damages any sum however large, as for example \$7,000, merely because words imputing insolvency to persons in trade, are actionable *per se*, would, as it appears to me, be a mockery of justice; and is a proposition in support of which I have not been able to find any reported decision.

In 3 B. & C. 427 is reported a case of *Tripp v. Thomas* where the words for which the action was brought imputed to the plaintiff a very grave indictable offence, namely, subornation of perjury, and the defendant allowed judgment to go by default. The jury assessed the damages at £40. Upon a motion to set aside the assessment of damages, the rule was refused because the words being actionable *per se* and the charge was admitted by the judgment by default, and there was nothing in the small amount of damages given from which it could be presumed that the damages were estimated upon erroneous grounds. There, it is to be observed, from the nature of the charge itself which was admitted on the record by the judgment by default, a jury could form some estimate of the damages proper to be awarded, and they gave a moderate sum, which could not be said to be disproportionate to the injury naturally flowing from the words complained of and admitted; but in an action which (although for words which are actionable *per se*) is nevertheless brought to recover compensation for an injury alleged to have been sustained in the plaintiffs trade, how can a jury say what

damage a trade has sustained if they are given no evidence of what the extent of the trade was before and what after the publication of the libel, which is said to have injured it? In actions of this nature it is always customary to give some general evidence of loss of trade following upon the publication, and I think it will be found that the contention has most frequently arisen upon attempts by plaintiffs to give evidence of what the defendant has insisted was particular damage not alleged and therefore inadmissible.

In *Ingram v. Lawson* (1), which was the case of a libel charging that a ship of, which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not seaworthy, the plaintiff gave proof at the trial of what was the average profit of the Captain of a ship on an East Indian voyage and that upon his first voyage after the publication of the libel his profits were nearly £1,500 below the average and the jury awarded £900. In that case upon a motion for a new trial, it having been objected that the evidence should not have been received, *Coltman, J.*, said :--

With respect to damages the jury must have some mode of estimating them and they could not be in a condition to do so unless they knew something of the nature of the plaintiff's business and of the general return from his voyages.

And *Erskine, J.*, said :--

In order to enable the jury to form some judgment as to the effect the libel was calculated to produce I think it was reasonable to let them know the nature of the plaintiff's business and the amount realized by him in his various voyages.

The established rule in all cases, whether of actions for words actionable *per se* or actionable only when accompanied by special damage, is, that no evidence of particular damage can be given unless it is alleged in the declaration, and the general allegation of loss of

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customers is not sufficient to enable a plaintiff to shew a particular injury or the loss of a particular customer. This also is the law as laid down by the Supreme Court of the State of *New York* in *Tobias v Horland* (1). In *Rose v. Groves* (2), *Cresswell, J.*, says:—

In actions for slandering a man in his trade, where the declaration alleges that he thereby lost his trade, he may shew a general damage done to his trade, though he cannot give evidence of particular instances.

In *Evans v. Harries* (3), which was an action for slander of plaintiff in his business of an inn-keeper, the plaintiff was permitted to prove that his business was less and that many customers, not particularizing any, had ceased to come to his house since the utterance of the slander. The jury gave a verdict for £20. Upon a motion to set aside this verdict upon the ground that the evidence was, as was contended, special damages not averred, *Martin, B.*, said:

How is a public house keeper, whose only customers are persons passing by, to show damage resulting from the slander unless he is allowed to give general evidence of loss of custom.

In *Dixon v. Smith* (4), which was an action by a surgeon for slander, by reason of which *D.* would not employ him as an accoucheur, and that the plaintiff was otherwise injured in the way of his business—it was proved that the words were spoken by the defendant in conversation with *D.* The plaintiff's fee for attendance on *D.* would have been a guinea or two guineas, and the plaintiff also proved that since the utterance of the slander his business, particularly in midwifery cases, had fallen off to the extent of one-third. The learned judge, who tried the case, directing the jury as to their duty, told them that:

They might take into consideration how much the plaintiff's business fell off in consequence of what the defendant said, but that

(1) 4 Wendell 540.

(3) 1 H. &amp; N. 252.

(2) 5 M. &amp; Gr. 618.

(4) 5 H. &amp; N. 450.

they must be cautious not to give damages for any injury not arising from the words of the defendant, and that he was not answerable for damage arising from repetitions of the slander.

The jury having found a verdict for the plaintiff with £50 damages, a rule *nisi* was obtained to set it aside on the ground of the improper reception of evidence of general loss of patients and diminution of business; 2nd, for misdirection in telling the jury that they might take into consideration such loss in assessing the damages; and, 3rd, on the ground that the damages were excessive.

All the judges constituting the court were of opinion that the jury were not at liberty to give such general damages as they had given; that the evidence was admissible and the charge unobjectionable, but they were of opinion that the decline of plaintiff's business as spoken of in evidence could not have arisen from the speaking of the slanderous words by the defendant to *D.*, and that for repetitions of the slander the defendant was not responsible, and therefore the damages were pronounced to be excessive. This case has a most important bearing upon the present case as establishing the duty of the jury to be to apportion the damages to the extent of the injury proved before them to be attributable to the act of the defendant, and as showing that the defendants here are not responsible for the act of the proprietor and publisher of the *Daily Telegraph* in publishing the information the defendants had given him, that being the uncontrolled and independent act of the publisher of the paper himself for which he alone was responsible. In *Riding v Smith* (1) the authority of *Evans v. Harries*, that general evidence of loss of business in an action of slander for words spoken of a plaintiff in reference to his trade is proper and admissible is recognised, and indeed such evidence to enable a jury intelligently to discharge their duty

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seems to me to be necessary to this extent that, although without any such evidence some moderate damages might be given as recoverable in law by reason of the words being actionable in themselves, yet if the jury should give damages of a large amount, such as the damages of \$7,000 given here, their verdict cannot be supported but must be set aside as evidencing either ignorance or disregard of their duty on the part of the jury. This verdict therefore must be set aside as given in error upon the evidence of *McKeen* and *Mathers* which was inadmissible as pointing to a particular or special damage not complained of in the declaration. But the verdict should be equally set aside even if that evidence had been admissible, for that evidence, properly considered, does not warrant the attributing *McKeen's* direction to his agent *Mathers* to cease dealing with the plaintiffs to the publication in the *Daily Telegraph* of the 7th January, 1879, which is complained of, for granting the paper of that date to be the one which *McKeen* saw, all that it induced him to do was to write to his agent to make enquiries as to its correctness—he asks him in his letter written upon seeing the publication—“ what about *Silver* ?” and what Mr. *Mathers* did upon the receipt of this was to make private enquiries himself about the plaintiffs, and although he does not tell us what was the result of his enquiries, he, no doubt, did inform his principal, *McKeen*, who, as I gathered from the evidence, thereupon, and nine or ten days after the item now complained of had been corrected in the same paper in which the first and objectionable publication had appeared, forbids him to deal any more with the plaintiffs.

Now, *McKeen & Co.* were never customers of the plaintiffs in the sense of being purchasers from them of any of the articles of their trade. Their sole business connection consisted in *McKeen & Co.* selling

exchange to the plaintiffs, when the latter applied for it, taking the plaintiffs' promissory notes therefor. That the plaintiffs had any occasion for or wanted to purchase exchange, or applied to *McKeen & Co.* for that purpose after the 7th January, 1879, was not suggested. That they, in fact, failed shortly afterwards is admitted from causes, it may be presumed, which existed prior to the 7th January, for it has not been suggested that the publication of that date in the *Daily Telegraph* contributed in the slightest degree to that event. The effect of *McKeen & Co.*'s instructions to their agent *Mathers* was not to sell any more exchange to the plaintiffs, if they should apply for it, and it is obvious that if they should not want to purchase exchange, or should not apply for that purpose to *McKeen & Co.*, the latter's instructions to their agent *Mathers* could do no injury to the plaintiff's trade, and these instructions, not having been given until after the expiration of several days after the publication complained of had been corrected in the same public manner in which the libel had been published, and after *Mathers* had made his own private enquiries into the affairs of the plaintiffs, and after, as we may presume, he had communicated the result to his principals, a strong presumption is raised that *McKeen's* prohibition to *Mathers* to deal any more with the plaintiffs is attributable to the result of *Mathers* enquiries being unfavorable to the plaintiffs, rather than to the publication in the *Daily Telegraph*, which had been corrected, so that, as it seems to me, it is impossible to regard the \$7,000 given by the jury, even though the defendants should be liable for that publication, otherwise than as exorbitant in the extreme and unwarranted by any evidence.

Appeal allowed with costs.

Solicitors for appellants: *Rigby & Tupper.*

Solicitors for respondents: *Meagher, Chisholm & Ritchie.*

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