

been served with process, and therefore is not a party to the suit, disposes of this question. He may never be brought in. If he should be, it would seem that there is a controversy which is divisible, and can be litigated by the other parties without his presence. It matters not that there is another controversy involved in the issues to which he may be an indispensable party. *Barney v. Latham*, 103 U. S. 205. Motion denied.

HURLBURT v. VAN WORMER.

(Circuit Court, N. D. New York. January 5, 1883.)

1. LETTERS TESTAMENTARY—CONCLUSIVE EVIDENCE UNTIL REVOKED.

By section 2591 of the New York Code of Civil Procedure, letters testamentary are declared conclusive evidence of the authority of the persons to whom they are granted, until revoked or the decree granting them is reversed upon appeal.

2. SAME—JURISDICTION—RECITALS OF FACTS NECESSARY TO CONFER.

The recitals of the jurisdictional facts necessary to confer jurisdiction, in the decrees of courts of exclusive though limited jurisdiction, are *prima facie* evidence of the facts recited. On this principle it has been repeatedly declared that the granting of letters testamentary is in general *prima facie* evidence of the death of the testator.

In Equity.

Neri Pine, for complainant.

M. F. Brown, for respondent.

WALLACE, C. J. The only ground upon which a decree for the complainant is opposed is that the complainant has failed to establish affirmatively the death of Rockwell, the testator of the complainant's assignor, the complainant having acquired title to the letters patent in suit by assignment from one Arnold. Letters testamentary were granted to Arnold by the surrogate of Broome county, in this state, reciting the death of Rockwell; that he was an inhabitant of Broome county at or immediately previous to his death; and that his will was duly admitted to probate by said surrogate. Such letters, by the Code of Civil Procedure of this state, § 2591, are conclusive evidence of the authority of the persons to whom they are granted until the letters are revoked, or the decree granting them is reversed upon appeal.

Irrespective of this statute, the recitals of the jurisdictional facts necessary to confer jurisdiction, in the decrees and judgments of courts of exclusive though of limited jurisdiction, are *prima facie* evi-

dence of the facts recited. Upon this principle, it has been repeatedly declared that the grant of letters testamentary is in general *prima facie* evidence of the death of the testator or intestate. *Comstock v. Crawford*, 3 Wall. 396; *Belden v. Meeker*, 47 N. Y. 307; *Welch v. N. Y. C. R. Co.* 53 N. Y. 610; *Thompson v. Donaldson*, 3 Esp. 63; *Jeffers v. Radcliff*, 10 N. H. 242. The facts elicited by the proof relative to Rockwell's disappearance are not sufficient to countervail the presumption thus established.

A decree pursuant to the prayer of the bill is directed.

WHITE, WASHER & KING v. WESTERN UNION TELEGRAPH CO.

(Circuit Court, D. Kansas. June Term, 1882.)

1. TELEGRAPH MESSAGES—NEGLIGENT TRANSMISSION—LIABILITY.

In an action for damages for negligence in the transmission of a message by a telegraph company, whereby the sender of the message suffered pecuniary loss, the burden of proof rests upon the plaintiff to show that the error or mistake occurred through the culpable carelessness and gross negligence of the operators or employes of the company; a simple mistake in transmitting a dispatch is not sufficient to render the company liable.

2. SAME—NATURAL CAUSES.

Where the errors or mistakes in the transmission of the dispatch occurred through climatic influences, such as storms, lightning, rain, or other natural causes, temporarily affecting the insulation of the wires, or the working of the instruments, the company is not responsible: as the mere fact that a mistake was made in the message transmitted would not itself authorize any recovery for more than nominal damages.

3. SAME—CONTRACT RESTRICTING LIABILITY.

A contract written at the head of a telegraph dispatch restricting the liability of the company for loss from mistake or negligence in the transmission or delivery of the dispatch, will not exonerate the company from loss or damage caused by the wanton carelessness or gross negligence of its servants, agents, or operators.

4. SAME—NEGLIGENCE.

The highest degree of care is not required of telegraph companies in the transmission of messages over its lines; if ordinary care is exercised by its agents, employes, or operators, it is sufficient to exonerate them from liability for loss or damage.

5. SAME—GROSS NEGLIGENCE.

Gross negligence is that want of care which a person habitually careless and negligent would exercise in business transactions.

This was an action to recover damages by reason of an alleged mistake in transmitting a dispatch over the lines of defendant's company. The dispatch was sent pursuant to certain regulations and conditions