company. There was a mistake in transmitting the same. The court held that the regulation which required that such a message should be repeated was a reasonable one. But there was no holding in that case that the company, by any regulation, could exempt itself from liability for gross negligence or a fraud. The conclusion I have reached, therefore, is that, if the stipulation has the force claimed for it in this case by plaintiff in error, it is void.

I have considered this question as though the stipulations set forth upon the printed blank do apply to the facts presented in this case, but I am of the opinion that neither in letter nor spirit do they apply to a case like the one at bar. This was a case where the company contracted to transmit a message for defendants in error, and did not have the means then of complying with the contract, and when it concealed this important fact, and without which, undoubtedly, it would not have been intrusted with the transmission of the same. The stipulations in the blank, I think, refer to cases where the telegraph company is able to comply with its contract, but, through the negligence of its employés, fails to transmit the telegram intrusted to it, or delays it, or is negligent in the manner of transmitting it, or is not able to send the telegram through defective appliances, but does not conceal this fact. It appears that there were other means for transmitting the message from Portland to Seattle. Hence the message could have been transmitted. Although it does not appear that the contract for its transmission was made with reference to the fact that plaintiff in error was accustomed to send telegrams intrusted to it for transmission by the Western Union Telegraph Company lines, still it could have done so, and protected defendants from the damage it incurred. It seems, however, that the plaintiff in error chose to stand by the contract it had made to transmit the message over its own lines, when at the time it knew it was unable to do so.

Under the rule heretofore expressed for assessing damages, I find that the court was right in assessing defendants in error's damages at $3,704.37. The court found that, in addition to this, the defendants in error were entitled to interest on the same from September 7, 1891, at the legal rate, which appears in Oregon to be 8 per cent. This finding is claimed as error so far as the interest is concerned. I think there was no warrant for finding that the amount of damages defendants in error sustained should bear interest from the day the suit was commenced. In the complaint the allegation of the amount of damages is $3,704.37. The demand for judgment is for the same amount. The claim in this case was for unliquidated damages. Such demands do not bear interest. 1 Suth. Dam. p. 609; Hawley v. Dawson, 16 Or. 344, 18 Pac. 592.

In the case of Green v. Van Buskirk, 7 Wall. 139, the supreme court, speaking by Justice Field, said:

"Interest is not allowable as a matter of law, except in cases of contract or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

When interest is taken into consideration in assessing damages, it forms a part of the damages found, and is included in the general amount, and is not assessed on the amount of damages found. The only claim for damages was, as I have stated, $3,704.37. It would have been improper to give a judgment for more damages than were claimed in the complaint. Palmer v. Reynolds, 3 Cal. 396; Pierce v. Payne, 14 Cal. 420.

As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto, and sending the cause back for a new trial. In such cases the court may direct the circuit court to enter such judgment as should have been entered under the pleadings and findings. Ft. Scott v. Hickman, 112 U. S. 150, 5 Sup. Ct. 56.

The judgment as entered by the circuit court is reversed, and the cause remanded to that court, with direction to enter a judgment for the plaintiffs in that court, against the defendant therein, for the sum of $3,704.37, and costs of suit, taxed at ———.

HAWLEY, District Judge (concurring). I concur in the conclusions reached by my Brother KNOWLES on all the points discussed in his opinion and in the judgment therein announced. But I base my concurrence, with reference to the merits of the case, upon the general principles clearly enunciated in the quotation from Gray on Telegraphic Communications (section 18), which seem to me to be sound, equitable, and just. It was the duty of the telegraph company, after having been informed of the importance of the message and of the necessity of its prompt transmission, to have then and there informed the sender of the message of the fact that its wires were not at that time in working order. It could not avoid any liability by concealing the truth as to the condition of its line. It was its duty to deal with its customer in good faith and upon equal terms; to notify him of the true state of the facts, so as to leave it optional with him to try the other line, or take his chances on the line in question being speedily repaired. By failing to perform this duty, it deprived itself of the right, which it otherwise might have had, of availing itself of the terms and conditions of the stipulation and rules which were printed upon its blank form of messages.

McKENNA, Circuit Judge. I concur in the judgment, for the reasons stated by Judge HAWLEY.

McGOWAN et al. v. LARSEN.

(Circuit Court of Appeals, Ninth Circuit. February 25, 1895.)

No. 175.

1. NEGLIGENCE—MAINTAINING LIGHT ON FISH TRAP—EVIDENCE.
In an action for the death by drowning of plaintiff's intestate, caused by defendants' failure to maintain a light on their fish traps, as required