Judgment of the Lords of the Judicial Committee of the Privy Council, on the Appeal of Falck v. Williams, from the Supreme Court of New South Wales; delivered 9th December 1899.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Macnaghten.*]

Mr. Falck, who was Plaintiff in the action and is now the Appellant, was a shipowner, residing in Norway; Williams, the Respondent, was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams.

Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the "Semiramis" that the difficulty arose which led to the present litigation.

Falck sued Williams for breach of a contract of affreightment to load the "Semiramis" with a cargo of copra in Fiji for delivery in the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith,

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and that the mistake was unintentional, whoever might be to blame for the misunderstanding.

The case came on for trial before Owen, J., and a jury. A verdict was taken by consent for the Defendant. The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the Full Court. The Full Court dismissed the action with costs.

The first question is—Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say that he misunderstood it? If that question be answered in the negative, all other questions become immaterial.

The negotiation in reference to the "Semiramis" began apparently on the 7th of February 1895, by a telegram from Williams to Buch. Williams offered to load the "Semiramis" with shale at Sydney Wharf for Barcelona "at freight per ton dead weight 27*s*." Buch replied by telegram dated the 9th of February, asking 2,250*l*. as a lump sum for freight. On the 12th of February, Williams offered 27*s*. 6*d*. "per ton dead weight." On the 13th, Buch offered to accept that sum on the ship's dead weight "capacity." By telegram on the 14th, Williams explained that the rate offered was "per ton dead weight discharged." On the 15th, Buch replied that the freight was to be payable "on guaranteed dead weight capacity" or to be a lump sum of 2,100*l*., adding a word interpreted to mean "Do your best to obtain our figures, vessel will not accept less." Then on the 16th, Williams asked what was the guaranteed dead weight capacity of the ship. The answer on the 17th was "1,550" tons. On the 18th, Williams telegraphed, "Shippers will not pay more than they have already offered at per ton dead weight

discharged." He also offered in the same telegram to engage a vessel to load shale at Sydney for Liverpool, at freight per ton dead weight 23*s*.

Having had no reply to his telegram of the 18th, Williams, on the 21st, telegraphed to Buch, "Why do you not reply to our last telegraph? It is very important that we have immediate reply." And he went on to offer to engage a vessel to load copra at two ports in the Fiji Islands, deliverable in the United Kingdom, or some port on the Continent, at 47*s*. 6*d*. per ton cargo delivered.

Then we come to the disputed message. On the 22nd of February, Buch telegraphed as follows:—"Shale Copyright Semiramis Begloom Estcorte Sultana Brilliant Argentina Bronchil." That message with the code words interpreted runs thus:—Shale. Your rate is too low, impossible to work business at your figures. Semiramis. Have closed in accordance with your order.—Confirm. Two ports Fiji Islands. Sultana. Brilliant. Argentina. Keep a good look out for business for this vessel, and wire us when anything good offers."

On the following day, Williams telegraphed, "Semiramis, we confirm charter." And in accordance with his reading of the telegram of the 22nd of February, he at once proceeded in the name and on behalf of Falck to charter the "Semiramis" to carry a cargo of shale from Sydney to Barcelona. So the controversy arose. And after mutual explanations or mutual recrimination the action was brought.

Now it is impossible to contend that there was a contract in fact. Obviously the parties were not at one. Obviously the acceptance by Williams as he meant it to be understood had no connection with or reference to the proposal which Buch intended to make and thought he was making.

But then, said the learned Counsel for the Appellant, the message of the 22nd of February was too plain to be misread. An intelligent child would have understood it. Business cannot go on if men of business are allowed to shelter themselves under such a plea. Their Lordships are unable to take that view of the disputed message. When the message was sent there were three matters under consideration. There was the Barcelona Charter for the "Semiramis," there was the offer for a Liverpool Charter and there was the Fiji proposal. Of these the most important and the most pressing was the Barcelona Charter. True the negotiation was at a deadlock for the moment, but the parties were so nearly at one that it was only reasonable to expect that they would come to terms, and it is to be observed that during the negotiation, which seems to have been unusually protracted, the "Semiramis" was never once mentioned in connection with any other voyage. Whether the Appellant's view or the Respondent's view be correct, the telegram of the 22nd of February seems to deal with all three points. The Appellant says that the first two words of the code message deal compendiously with both the Barcelona Charter and the Liverpool proposal, and that the next three words deal with the "Semiramis," the last word of the three indicating clearly that she was to be sent to Fiji. The Respondent says that the first two words refer to the Liverpool proposal, the second two to the Barcelona Charter and that the fifth word "estcorte" is to be read with what follows. Indeed the whole controversy when the matter is threshed out seems to be narrowed down to this question—Is the word "estcorte" to be read with what has gone before or with what follows? In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the Appellant's agent. If he had spent a

few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word "estcorte" before the word "begloom" instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the Appellant as Plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the Respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this Appeal must be dismissed. The Appellant will pay the costs of the Appeal.