[HIGH COURT OF AUSTRALIA.]

HOWARD SMITH AND COMPANY LIMITED . . . . . PLAINTIFFS, } . APPELLANTS;

AND

VARAWA . . . . . DEFENDANT, . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 27, 28, 29, 30.

Griffith C.J., O'Connor and Isaacs JJ.

Contract—Statute of Frauds—Negotiations in code cablegrams—Offer and acceptance—Ambiguity—Extrinsic evidence—Subsequent correspondence. Principal and agent—Undisclosed principal—Ratification.

Where the documents relied upon to prove a contract consisted of translations and expansions of a number of cablegrams in code which passed between the parties :

Held, that the Court, in considering whether there was a concluded agreement at a certain date should look at all the surrounding circumstances for the purpose of ascertaining the sense in which abbreviated communications, capable of more than one meaning, were likely to have been understood by the recipients, and that, although the documents of that date were capable of being read so as to constitute a complete contract, evidence was admissible of communications between the parties before and subsequent to that date which tended to negative that conclusion.

Hussey v. *Horne-Payne*, 4 App. Cas., 311, applied.

Although as a general rule it is not necessary, in order to satisfy the requirements of the *Statute of Frauds*, that the acceptance of an offer in writing should also be in writing, yet if the facts show that the party making the offer did not intend to be bound unless the other party accepted it in writing, there is no contract without such acceptance.

So, where the parties were in places far apart and all the negotiations were necessarily conducted by cable :

Held, that the inference was irresistible that a party making a cabled offer did not intend to be bound by it until he was informed in like manner that the offer was accepted.

Moore v. *Campbell*, 10 Ex., 323, applied.

Where in an action upon a contract of sale, involving a number of special terms and conditions, subsidiary to the main transaction, the owners, as plaintiffs, rely upon ratification of a contract made by their agent, they must establish that the agent professed to be acting as an authorized agent for the owners with respect to the whole bargain.

Keighley, Maxsted & Co. v. *Durant*, (1901) A.C., 240, applied.

Decision of the Supreme Court, 15th February 1907, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the proceedings in the case is taken from the judgment of *Griffith* C.J.:—

"This was an action brought by the appellants (plaintiffs) against the respondent (defendant) for damages for breach of an alleged contract for the sale of the s.s. *Peregrine* by the plaintiffs to the defendant for the sum of £28,000. The defendant denied the making of the alleged contract, and also set up the *Statute of Frauds*. The documents relied upon to prove the contract were cablegrams which passed between one Moller, who was the defendant's agent, and who was a ship broker at Shanghai in China, and one Miles, who was alleged to be the plaintiffs' agent, and who was at Manila in the Philippine Islands. The contract set up by the plaintiffs at the trial was alleged to have been made on 1st December 1904. A nonsuit moved for on the ground that this contract was not proved was refused, and the defendant entered upon his case and put in evidence several cablegrams of later date, on which the plaintiffs then relied as proving a completed contract. The learned Judge who tried the case directed the jury that there was a concluded contract between the parties on 3rd December 1904, and, as the refusal to accept was not in dispute, the jury had only to assess damages, which they fixed at £10,000. It appeared that the defendant acted in the transactions in question as an agent for the Russian Government, the Russo-Japanese war

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being then in progress. On an application by the defendant to the Full Court for judgment or a new trial on the ground of the wrongful rejection of evidence, the Court directed a verdict to be entered for him, and from that decision this appeal is brought."

The correspondence, so far as is material to this report, is fully set out in the judgment of *Griffith* C.J.

Knox K.C. (*J. L. Campbell* with him), for the appellants. The cablegram of 1st December was an unconditional acceptance of the offer by the defendant's agent. It does not matter when it was received. Sending an acceptance in the channel indicated by the offeror concludes the contract: *Household Fire and Carriage Accident Insurance Company* v. *Grant* (1); *Pollock on Contracts*, 6th ed., p. 31. Any subsequent revocation or qualification of that was inoperative: *Henthorn* v. *Fraser* (2); *Harris' Case*; *In re Imperial Land Co. of Marseilles* (3); *Byrne* v. *Van Tienhoven* (4).

[ISAACS J. referred to *Bruner* v. *Moore* (5).]

When there has been an unconditional acceptance, subsequent correspondence cannot be looked at in order to qualify it or cut it down. On the correspondence up to 1st December there was clear evidence of an offer and acceptance. The fact that the acceptance leaves the details to be arranged does not impair its efficacy. The subsequent correspondence was merely negotiation as to particular terms and conditions. *Hussey* v. *Horne-Payne* (6), on which the Supreme Court relied, is merely a decision that on the particular facts of that case there was no concluded contract at a certain point; it does not decide that a definitely concluded contract can be re-opened by subsequent correspondence.

[He referred to *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (7); *Bellamy* v. *Debenham* (8).

ISAACS J. referred to *Brauer* v. *Shaw* (9).]

Although it is always a question of the intention of the parties, and that is a question of fact, the written statements of the

(1) 4 Ex. D., 216.
(2) (1892) 2 Ch., 27.
(3) L.R. 7 Ch., 587.
(4) 5 C.P.D., 344.
(5) (1904) 1 Ch., 305.
(6) 4 App. Cas., 311.
(7) 44 Ch. D., 616.
(8) 45 Ch. D., 481.
(9) 168 Mass., 198.

parties are the best evidence of intention, and where their meaning is clear, the writer cannot afterwards say that he meant something else. Even if there was no completed contract on 1st December there was on 3rd December, and the jury found that the defendant by his conduct had assented to the new terms: *Brogden* v. *Metropolitan Railway Company* (1). If the subsequent conduct of the parties is evidence of their intention at that date, it shows clearly that they were acting on the basis of a concluded contract.

Though the agent did not disclose his principals' name at the time of making the contract, he showed that he was acting for the owners whoever they might be, and the owners were therefore entitled to ratify: *Keighley, Maxsted & Co.* v. *Durant* (2).

Cullen K.C. (*Mitchell* with him), for the respondent. There can be no ratification unless the alleged agent represented to the other party that he was acting for some principal, though he had no authority in fact: *Keighley, Maxsted & Co.* v. *Durant* (2); and the ratification must extend to the whole of the matters in negotiation. The whole transaction was never really communicated to the appellants, and therefore they could not ratify. It was not sufficient for them to merely ratify the sale. All through, Miles was in fact acting to a certain extent on his own behalf. Part of the transaction was incompatible with agency for the appellants. The contract, if there was one, concluded on 1st December, was never ratified, and, if it was concluded on 3rd December, the appellants were never ready and willing to perform it. [He referred to *Managers of Metropolitan Asylums Board* v. *Kingham & Sons* (3); *Bolton Partners* v. *Lambert* (4); *In re Portuguese Consolidated Copper Mines Limited*; *Ex parte Badman*; *Ex parte Bosanquet* (5); *In re Tiedemann and Ledermann Frères* (6); *Fleming* v. *Bank of New Zealand* (7).]

There was no evidence to support the finding that the respondent authorized the cablegram of 1st December from Moller to Miles. Even if there was such evidence, it is clear that the

(1) 2 App. Cas., 666.
(2) (1901) A.C., 240.
(3) 6 T.L.R., 217.
(4) 41 Ch. D., 295.
(5) 45 Ch. D., 16.
(6) (1899) 2 Q.B., 66, at p. 71.
(7) (1900) A.C., 577, at p. 587.

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parties regarded the longer cablegram of that date as a step in the negotiations. That is inconsistent with the completion of a contract on that date. The contract was either not concluded or it was re-opened by the parties. [He referred to *Bellamy* v. *Debenham* (1).] If on the evidence it is impossible to say which cablegram was first received by Miles, the plaintiffs failed to establish their case. If there was no concluded contract on 1st December, it was never completed afterwards. New terms were discussed, but were never finally settled. Where parties negotiate by code telegrams, the plaintiff must show clearly that an agreement was concluded. If the cables are capable of more than one meaning, one of which is inconsistent with a concluded contract, the defendant must succeed : *Falck* v. *Williams* (2).

Even if the respondent is not entitled to a verdict, there should be a new trial. Fresh evidence is available since the first trial, relevant to the question whether the appellants were ready and willing to deliver. That is ground for a new trial, even though the evidence is not conclusive on the point : *Broadhead* v. *Marshall* (3). Moreover, evidence of cablegrams was wrongly rejected, and the special findings were against evidence. The jury were wrongly directed as to what it was that the appellants were bound to deliver. The damages were assessed on a wrong basis. The proper measure was, not the difference between the contract price and what the ship would have brought in Australasia where there was no market, but in the Pacific. [He referred to *Dunkirk Colliery Company* v. *Lever* (4).]

Knox K.C., in reply, referred to *Sutton & Co.* v. *Ciceri & Co.* (5); *Hagedorn* v. *Oliverson* (6); *In re Tiedemann and Ledermann Frères* (7).

Cur. adv. vult.

The following judgments were read.

GRIFFITH C.J., [after referring to the proceedings, as already reported, continued :] Several points are made for the respondent.

(1) 45 Ch. D., 481 ; (1891) 1 Ch., 412.
(2) (1900) A.C., 176.
(3) 2 W. Bl., 955.
(4) 9 Ch. D., 20, at p. 25.
(5) 15 App. Cas., 144, at p. 153.
(6) 2 M. & S., 485.
(7) (1899) 2 Q.B., 66.

He contends that there was no concluded contract, either on 1st December or on 3rd December, or at any later date, and that, if there was, the contract was not between the plaintiffs and the defendant, but between Miles and the defendant, and that Miles, who, it is admitted, had no actual authority from the plaintiffs to make it, did not at the time of making it profess to be acting on behalf of a principal, so that it could not, under the doctrine of *Keighley, Maxsted & Co.* v. *Durant* (1), be ratified by the plaintiffs. The evidence rejected was said to have an important bearing on this last question.

The case depends entirely upon the construction to be put upon the cablegrams, which were in code, and of which translations or expansions only were in evidence. These documents are often ambiguous, or at least difficult of interpretation. The onus is upon the plaintiffs to establish their case. In my opinion the case is not one in which the Court is called upon merely to interpret the meaning of a written contract of which the words are certain and unambiguous, but involves a consideration of all the surrounding circumstances for the purpose of ascertaining the sense in which abbreviated communications, capable of more than one meaning, were likely to be understood by the recipients.

I will first deal with the question whether any contract was proved to have been made on 1st December. This question is presented in three different aspects: (1) whether the documents relied upon disclose a contract upon their face; (2) whether the relation between Miles and Moller was that of intending vendor and purchaser at all; and (3) whether, if the relation was that of intending vendor and purchaser, and if the documents purport to show on their face a completed contract, they were intended to have the effect of a present contract. I will deal with these questions separately.

Before referring to the terms of the cablegrams it is necessary to say a few words as to the relation of Miles and Moller as shown by extrinsic evidence. Their acquaintance appears to have been of a very slight character. Miles was not called as a witness. Moller who was examined on commission as a witness for the plaintiffs deposed as follows:—

(1) (1901) A.C., 240.

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"Q. Did you know Captain Miles? A. Yes.

"Q. Had he any business relations with you? A. He tried to have, but he did not have any before that.

"Q. What did you know him as? A. I knew him as a wealthy man from Tasmania. He told me he was.

"Q. What did he tell you at Manila? A. He came to Shanghai, and told me he was one of the wealthiest men in Tasmania.

"Q. Did you know him as a shipbroker, that is what I mean?

"A. He told me he was travelling around with a certain number of ships for sale. He said he had them for the owners, and he was doing it for a pastime."

There was no more evidence on the subject, and it is difficult to draw any definite conclusion from that which I have read.

The *Peregrine*, the subject of the alleged contract, was a steamship then employed in the passenger and goods trade on the Australian coast.

The first cablegram, which was sent by Moller to Miles on 22nd November, was as follows: "Telegraph whether you can purchase two steamers not less than seventeen knots 2000 tons dead weight delivery Hongkong as soon as possible." Miles replied on the same day in these words: "*Mararoa Peregrine Moura.*" On 23rd November Moller wired as follows; "*Mararoa Peregrine Moura* if you guarantee 17 knots we can buy: telegraph lowest possible price delivery Sydney also Singapore: what deposit is required: telegraph immediately: there is every prospect of business." On the following day, 24th November, Miles replied: "*Peregrine* £28,000 Sydney: *Mararoa* £45,000 New Zealand: Singapore will be extra £2,000: Highest speed 17 knots 10 p.c. deposit." On the same day, apparently in reply to this message, Moller wired as follows: "*Peregrine Mararoa*: Telegraph the lowest firm offer Singapore delivery minus 5 p.c.: If vessels not suitable £2,000 stg. each will be paid to pay expenses: Deposit arranged: When will you be ready for delivery: How many hours can steamer maintain seventeen: Also name speed for ordinary fast voyage: Name lowest price." On 25th November Miles replied:—"Has been given the lowest price and no reduction can be made: Cannot give the option of pur-

chase: Must be accepted Australia: Speed can be tested." On 28th November Miles again wired as follows:—"*Mararoa* has been withdrawn: *Peregrine* very cheap: Everything has been arranged trial trip Government inspection 2nd December Sydney: As soon as surveying has been finished if satisfactory payment against inspector's certificate on final delivery: Speed will be guaranteed: Can only give refusal until Thursday." Thursday was the 1st of December. On the same day Moller telegraphed: —"*Mararoa*: We are authorized will accept £45,000 delivery Australia: £12,000 in our hands: In whose name shall we deposit Chartered Bank: Will you send vessel Singapore at our expense: Balance of purchase money paid when ready to leave Australia: Telegraph expected delivery Singapore: Make as soon as possible: Do your utmost: Do not disappoint." This cablegram related only to the *Mararoa*. On 29th November Miles telegraphed:— "Afraid cannot sell for immediate delivery: Have telegraphed: Will communicate with you as soon as we have a reply: Will send either or both Singapore." Although this message was no doubt an answer to Moller's of the 28th, there is nothing on the face of it to connect it with any previous document. I am, however, disposed to think that it might be shown by evidence that the words "either or both" mean the *Mararoa* and *Peregrine*.

On the same day Moller telegraphed:—"*Mararoa*: Confirm the sale as soon as possible: If everything in order there is every prospect of buying *Peregrine*: Keep offer open as long as possible," and again on the 30th:—"Please answer as soon as possible."

This document contains a reference to an offer, and it may, I think, be shown by extrinsic evidence what that offer was. That appears by Miles's messages of 24th and 28th. It was an offer to sell the *Peregrine* for £28,000 delivered at Sydney, which offer was to be open until 1st December. The words "will send either or both to Singapore" in Miles's message of the 29th appear to relate to an intended subsidiary arrangement as to the expenses of the voyage from Sydney to Singapore. It is at least doubtful whether they should be regarded as referring to a term of the bargain which Moller desired to make with the owners of the ship, or to a private understanding between Miles and Moller. The latter

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view is favoured by the first message of the series, in which Miles is asked if he can "purchase," not whether he can "sell." On 30th November Miles telegraphed: "*Mararoa*: Cannot give a definite answer until Friday (i.e., 2nd December) what is the matter with *Peregrine*: Fastest: a much better purchase: if there is nothing definite to-morrow (i.e., 1st December) cannot guarantee delivery before (some date which is unintelligible): Subject to immediate acceptance will arrive on 16th Singapore." This message to some extent answered the two queries contained in Moller's telegram of the 29th, and may, I think, be expanded to mean:—"If acceptance is immediate the ship will be despatched so as to arrive at Singapore on 16th December." Many details would, however, be still left uncertain, such as the financial arrangements to be made for the expenses of the voyage, and the manner in which the purchase money was to be paid.

On 1st December Moller sent an urgent cablegram as follows: "*Peregrine* accepted."

At this point the plaintiffs closed their case, contending that they had proved a complete contract in writing. If there was such a contract, it was to buy the *Peregrine*, *simpliciter*, for £28,000 to be delivered at Sydney. No doubt a contract for the purchase of a named ship for a lump sum without more may be a good and complete contract. But it is highly improbable that it would be made unless both parties were familiar with the subject matter, and were *ad idem* as to what was intended to be included by the name of the ship, and it seems to me still more improbable when one of the parties had no acquaintance with the subject matter which was at a distance of several thousand miles. Was it intended to include the apparel and furniture of the ship, which was a passenger ship, or not? Was the delivery to be immediate or deferred, and to whom and where was it to be made? On the whole, I am of opinion that, if the correspondence between the parties had ended at this point, it would have been incomplete, inasmuch as the writing did not express all the terms of it. The mere name of the ship is itself ambiguous. Upon the sale of a ship certain matters must be provided for, either expressly or by implication. In this case there is no express provision, and the circumstances do not afford grounds for any definite implication.

I proceed to consider the further correspondence on which the plaintiffs rely alternatively. The cablegram "*Peregrine* accepted" was sent as an urgent message from Shanghai at 4 p.m. on 1st December. At 3.40 Moller had sent to Miles a message as follows:— "*Peregrine*: Have accepted: Confirm the purchase: A complete inventory must be taken: Must be held responsible until we take charge Singapore: Subject to survey by Lloyds Sydney on condition that passes first class with 17 knots in light cargo: Apply for payment to Chartered Bank here to-morrow: *Mararoa* reply." The meaning of the word "to-morrow" is not explained, but it is quite clear that, if this message is to be taken as part of the correspondence, there was not on 1st December an acceptance by Moller of Miles's offer, but a counter offer on terms materially different. The telegram of 3.40 appears to have arrived at Manila at 5.30 p.m. There was no evidence to show when that of 4 p.m. arrived there. An interesting argument was addressed to us to the effect that the telegram of 3.40 operated from the time of its despatch, and had the effect of a refusal which could not be followed by an acceptance of the original offer, even if an acceptance of that offer were in fact received before it, and *à fortiori* if the acceptance were received after the refusal. It is not necessary to decide the point, for, if the plaintiffs' case rests upon the receipt of the message of 4 p.m. before that of 3.40, they have failed to discharge the onus of showing that it was so received. If the messages were received together, or that of 3.40 was received first, the question at once arises whether the message of 4 p.m. was sent as part of the negotiations, and as intended to supersede the message of 3.40, or as a mere notification that the bargaining as to the *Peregrine* was to continue. Having regard to the subsequent conduct of the parties, to which I will directly call attention, I have no doubt that the message of 4 p.m. was not intended to have a contractual operation at all, but was merely a notification to Miles of the intention of Moller's principals.

The case of *Hussey* v. *Horne-Payne* (1) was referred to and relied upon by the learned Judges of the Full Court. In that case it was held that, although two letters of a correspondence

(1) 4 App. Cas., 311.

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seemed on their face to constitute a complete contract, it was open to show by other documents and oral evidence that no complete and concluded contract had in fact been made. In the present case we have nothing but written documents, to which I will now refer. It is plain that, the question being whether the parties had in fact concluded an agreement on 1st December, any statements or conduct on their part after that date inconsistent with the existence of a concluded contract are relevant for this purpose.

In reply to Moller's message of 3.40 p.m. of 1st December, Miles wired as follows:—"Agree to all conditions except owners will accept no responsibility whatever after delivering Sydney: If they approve will arrange Dalgety's accept delivery for account of: Provide everything that is needed coal provisions insurance crew: Will not guarantee payment purchasers on final delivery Singapore." The last sentence is not intelligible. It may mean that payment by the purchasers is to be made on final delivery Singapore, and in view of a later telegram of 10th December, by which Miles informed Moller that delivery could not be made until a credit was opened in favour of the owners for £2,000 for the expenses to Singapore, this would appear to be the meaning. It is important to bear in mind that Miles had in fact no authority from the owners to sell the ship, so that this concession by him would not be so surprising as it might seem at first sight. On the same day (2nd December) Moller replied as follows:—"Purchasers require condition of vessel on arrival Singapore to be same as surveyor's report Sydney: therefore to ensure good delivery as guaranteed keep present crew on board: expenses insurance wages to be paid by us guaranteed by Comptoir Nationale: Reply before noon to-morrow: If accepted meet Moller Hong Kong further business." This communication again imports a new term into the conditions of the bargain. On the same day Miles telegraphed to Moller as follows:—"You must distinctly understand owners cannot accept any responsibility during the voyage Singapore: In case of accident collisions it is impossible guarantee delivery in the same condition." This may or may not have been sent in reply to Moller's message of the same day. Whether it was or no, it is clear that on 2nd Decem-

ber Miles and Moller were still negotiating the terms of the sale of the *Peregrine*, and that the parties were not *ad idem*. Under these circumstances it is, in my opinion, equally clear that Moller's telegram of 4 p.m. of 1st December was not intended to have a contractual operation.

The next question is whether a concluded contract was completed on 3rd December. On the 2nd the position was that Moller had asked for terms which Miles had refused. On 3rd December Moller wired as follows: "Purchasers fully understand owners cannot accept any responsibility force majeur collisions: but you must take immediate steps to protect us if there is anything wrong with carelessness machinery boilers inventory &c.: . . . Cover insurance Australia Singapore against all risks £32,000 at our expense."

The plaintiffs contend that this communication operated as a withdrawal of all the terms on which Moller had insisted in his telegrams of the 1st and 2nd. They say that the words "force majeur collisions" are equivalent to "accident collisions" in Miles's second telegram of the 2nd. Assuming that this is so, there still remains a difficulty. If the message of 3rd December is regarded as a single message addressed to Miles as the agent of the owners, and as expressing terms to be included in the contract of sale, there would be no contract until the new terms as to protecting the purchasers were accepted by the vendors. It is said that the acceptance need not be in writing. In one sense that is no doubt true: *Reuss* v. *Picksley* (1). But, if the facts show that the party making the offer in writing did not intend to be bound unless the other party accepted it in writing, there is no contract without such acceptance: *Moore* v. *Campbell* (2). This is a question of fact. But when the parties are in different places far apart, and all the correspondence is conducted by cable, I think the inference is irresistible that the purchasers did not intend to be bound until they were informed in like manner that the terms offered were accepted. There was no evidence of the acceptance of the new terms by Miles, unless it is to be found in a message sent by him to Moller on 8th December, which is as follows:—"Owners require vessel registered in the name of

(1) L.R. 1 Ex., 342. (2) 10 Ex., 323.

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purchasers before delivery: to whom will transfer be made?" If the telegram of 3rd December is regarded as addressed to Miles as agent for the owners, I do not think that any assent by the owners to the new terms expressed in it can be inferred from the telegram of the 8th. If, on the other hand, it is suggested that the telegram of the 3rd should be treated as divisible, the first sentence being read as an acceptance of the owners' final terms, and the rest of it being regarded as addressed to Miles in the capacity of agent for Moller, other questions arise. It is true that the first sentence uses the words "owners" while the second says "You must" &c. Nevertheless the treatment of the message as two distinct messages addressed to Moller in two distinct capacities seems to be based on pure conjecture. *Primâ facie*, the whole of the communications from Moller to Miles were addressed to the latter in the same capacity, whether that was as agent for the owners of the *Peregrine* or as an independent adventurer.

The plaintiffs do not set up any document of later date than 3rd December as a sufficient note or memorandum of the contract, although Miles and Moller seem to have regarded the purchase as then practically settled. On the whole I am unable to dissent from the conclusion of the Full Court that no complete contract in writing had been shown to have existed on 3rd December.

This conclusion is to some extent confirmed by the terms of a message sent by Moller to Miles on 7th December, in which he said: "*Peregrine*: when is arrival expected Singapore: any small difficulties can easily be overcome: buyer's representative will pass rather than lose the business: telegraph definite information as soon as possible." This seems to indicate that at that date Moller did not regard the bargain as finally concluded with the owners. On 26th December Moller telegraphed for the first time to the plaintiffs. His message was as follows: "Are buyers of *Peregrine*: are ready to take delivery: you are running no risk by sending Singapore according to terms of telegrams and guarantee Comptoir Nationale D'Escompte: forward an immediate answer by telegraph date of sailing." This message incorporates by reference the terms of previous telegrams,

but does not supply the want of any acceptance by plaintiffs or their agent of the stipulations of the telegram of 3rd December. The telegram was not answered by plaintiffs.

Assuming, however, that there was a completed contract on 3rd December, the question still remains—Who were the parties to it? Up to this time the plaintiffs had given Miles no authority to sell the ship for them.

It will be convenient to consider this question together with the question whether Miles professed to be making the contract on behalf of the owners. It is now necessary to refer to the evidence which was rejected by *Pring* J., which consisted of two cablegrams from Moller to Miles. The first, dated 23rd November, was as follows:—"Add 10 p.c. for outside commissions clear beside our 2½: cannot be helped: keep confidential." The second, dated the following day, was as follows:—"Keep us fully protected: Commission and brokerage as per our telegram of 23rd: Will hold us responsible: Will probably lead to business." This telegram, read in conjunction with Moller's first inquiry, "Can you purchase" &c. suggests that Miles was asked to obtain an option of purchase of ships, and that he was to add to the price at which he might obtain the option an additional 10 per cent. for purposes which it is easy to read between the lines. They also show that, if Miles was expected to act as agent for the owners, the price at which he was to agree to sell the ships to Moller's principals was not to be the price which the owners were to receive, but a larger sum. In my opinion these messages were relevant both to the question whether the supposed contract was in fact made with Miles as an individual or with him as a person purporting to act as the authorized agent of the owners of the ship, and also to the question of the proper meaning to be attributed to Moller's message of 3rd December. There would therefore, in any event, have to be a new trial, if the defendant is not entitled to a nonsuit or verdict. But, apart from these telegrams, I think that the documents relied upon do not show upon their face that in making any contract which could be deduced from them Miles professed to be acting on behalf of the owners of the ship. If the contract had been for the sale of the ship *simpliciter* for a fixed sum it might perhaps be inferred that he did so pro-

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fess. But the question is whether in making the whole of the bargain between himself and Moller he professed to be acting for the owners. I think that, if there were no more in the case, the message of 3rd December must be read as a stipulation insisted upon by the purchasers, but as one intended to be performed by Miles personally under some understanding between him and Moller. The bargain was, however, a single bargain.

Some additional light is thrown upon this part of this case by messages which passed between Miles and the plaintiffs. On 1st December he telegraphed to them that he had a firm offer of £26,000 for the *Peregrine*. On the 6th he telegraphed that he would do his utmost to "keep the offer open." This is difficult to reconcile with the notion that there was a concluded contract on the 3rd. On 7th December plaintiffs telegraphed to him that they would accept "£26,000 nett free of commission, cash on delivery, napery crockery plateware excluded: vessel to be transferred in the name of new owners before delivery."

It may be that Miles was playing a double part as representing himself to Moller as agent for the owners and to them as agent for the purchasers. But, on the whole, I do not think that the plaintiffs have established that with respect to the whole of the bargain, which, as I have said, was a single bargain, Miles professed to be acting as an authorized agent for the owners. And, in my opinion, this is a necessary condition of the existence of any right of ratification in the plaintiffs within the rule laid down in *Keighley, Maxsted & Co.* v. *Durant* (1). The onus of proof that he did so profess is on the plaintiffs, and they have failed to discharge it. Moreover, the contract now sought to be ratified is a contract under which the vendors were to receive £26,000, while that made, if any, was one under which the purchasers were to pay £28,000. If there were no more in the case, this discrepancy would be fatal. For these reasons I think that the appeal must be dismissed.

O'CONNOR J. I have had the opportunity of reading the judgment of my learned brother the Chief Justice, and I entirely concur in the conclusion at which he has arrived and in the

(1) (1901) A.C., 240.

reasoning by which it is supported. Having regard to the pleadings the plaintiffs cannot succeed without proving a contract in writing. The contract, if any there is, must, therefore, be made out from the cablegrams which passed between Miles and Moller. From those cables it is necessary to establish: first, that the parties were *ad idem*, that they arrived at a concluded contract; secondly, that the contract was made between Miles, acting as the plaintiffs' agent, and Moller, acting as the defendant's agent. The Court is entitled, in reading the cables, to any assistance which evidence of the subject matter and surrounding circumstances may afford. But the facts and circumstances of which there is evidence do not afford much assistance. The cables themselves are, as is to be expected in that species of communication, in some instances obscure and confused. However, a Court must do the best it can to arrive at the meaning of the communications by which the parties have chosen to negotiate their contract. To my mind it is quite clear that on the 1st December 1904 there was no concluded agreement. I was at first disposed to think that the parties were in agreement on the 3rd December 1904. But further consideration of the cables of that and subsequent dates satisfies me that there was one matter at least as to which the parties were never *ad idem*, that is, which party was to bear the responsibility of any difference between the condition of the *Peregrine* as she arrived at Singapore and as she was passed for delivery in Sydney. Proposals and counter proposals were made, but that question was never settled by the cables. Indeed, the evidence appears to show that it was because of the difficulty of coming to any agreement on that matter that Moller and Varawa came on to Sydney. I am also of opinion that there was no evidence in the cables or letters to show that Miles contracted or purported to contract as the plaintiffs' agent. The cables not admitted in evidence furnish strong evidence that he was not acting as their agent. Leaving those out of consideration and taking only the cables and letters in evidence, a strong light is thrown on Miles's position by the cables which were passing between him and the plaintiffs at the time he was negotiating the alleged contract with Moller. The latter set of cables appears to be entirely inconsistent with the position that he made the

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contract with Miller as their agent. The Supreme Court, in my opinion, therefore came to a right conclusion in the matter submitted for their consideration and rightly directed the verdict to be entered for the defendant. I agree that the appeal must be dismissed.

Isaacs J.

ISAACS J. The plaintiffs cannot succeed unless they establish a ratification of a concluded contract entered into between Moller acting for the defendant and Miles professing to act for the plaintiffs.

The telegram of 1st December cannot be relied on as closing the bargain. It was despatched twenty minutes later than the other telegram of the same date and, in the absence of any evidence to the contrary, the earlier cable may be assumed to have reached its destination earlier than the second cable sent. But it is unnecessary to decide whether in view of this assumption the bargain was closed when the later cable came to hand, because the matter did not rest there. The subsequent correspondence shows conclusively that, even if a contractual obligation had been technically created, the parties mutually abandoned it, re-opened the transaction, and continued negotiations. Then as to the telegram of 3rd December, did this of itself close the bargaining? Clearly not. It contains a new requirement, viz.:—"You must protect us," &c. If Miles is to be considered as acting for the plaintiffs this is a stipulation demanded of him as agent, and unless assented to by or on behalf of the plaintiffs, prevents a conclusion of the contract. If it had been expressly refused, no question could have arisen; there would obviously have been a failure to agree.

Then silence is relied on as assent to this new stipulation. That depends on the circumstances. Here the known circumstances of the two negotiating parties, the distance of Miles from the owners, and the nature of the intervening cables, entirely preclude any such assumption in this case. There is no indication that Miles ever agreed to this stipulation; he was certainly hovering a good deal, neither he nor Moller wanted the affair to slip out of their hands. Moller knew that Miles would do all that was possible to secure the owners' acquiescence to assure the

good condition of the vessel at Singapore—which was the view point of the purchasers—but there is nothing to show that Moller ever believed or had reason to believe that Miles, as representing the owners, did accede to that requirement.

There appears to have been no recession from the unequivocal statement on 2nd December that the "Owners will accept no responsibility whatever after delivery Sydney."

In my opinion there was not a concluded bargain between Moller and Miles in whatever character we may regard the latter as acting.

But, on the supposition of a binding contract, in what capacity did Miles profess to enter into it? I pass by any question of the *Statute of Frauds* for this purpose, and consider the question purely as one of fact.

I shall state the general result of the evidence as it appears to me to be the undeniable story told by the documents and admitted circumstances of the case. Particular references to the cables will be few.

Captain Miles, a Tasmanian gentleman, went to the East in 1904 during the Russo-Japanese war. He went with the design of trafficking in ships, then owned by other persons, that is to say shipping companies in Australia and New Zealand. He took up his temporary abode in Manila, and got into communication with the firm of Moller Bros., shipbrokers of Shanghai, from whom he ascertained that some fast sailing steamers were required for their principal. The defendant Varawa was their immediate principal, and legally the only one that could be looked to, though he was in fact purchasing for the Russian Government. Miles went to Shanghai and had an interview with Moller of which some account is given by Moller. Miles gave no evidence at the trial. It is evident from the documentary evidence that the oral testimony of the conversation between Miles and Moller is far from complete. When he returned to Manila a series of telegrams passed between him and Moller, which alone or with conduct constitute the alleged contract relied on.

They prove beyond doubt that the inquiry made by Moller of Miles was whether Miles could *purchase* two steamers for him, and that Miles was told to add, that is to the price he would

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otherwise ask, ten per cent. for outside commissions, and 2½ per cent for Moller & Co. So that Miles was not to receive net the price he nominally asked but only that sum less 12½ per cent. of the net price.

Moller of course knew Miles had to get the ships from others; that is why "purchase" was used; and so on the basis of this knowledge and of the telegraphic arrangements already adverted to, two sets of cable negotiations took place. The first was between Miles and Moller, and the second between Miles and the plaintiffs.

These sets of negotiations were perfectly distinct and separate; and as might be expected from a person in Miles's position, a buyer in one aspect and a seller in the other, they are often irreconcilable and apparently contradictory.

In the cables between Miles and Moller there is to be found in Ex. 10 (8th December) and afterwards some mention of the owners, not however expressly as contractors with Moller, but only as persons whose objection to a desired course was an insuperable obstacle to Miles agreeing to it, or whose insistence on a guarantee was a condition to the delivery of the ship to the purchaser. If those references stood alone and were capable of no other construction they might greatly assist the plaintiffs in this branch of the case, but they are altogether counterbalanced by the other written evidence. The opening cables of the Miles-Moller negotiations are decisive that Miles at all events did not enter upon his work as owner's agent, and was not intended to. He was first of all asked if he could *purchase* two steamers, which is quite inconsistent with the plaintiffs' theory to start with; then this is followed by a cable to which I have already referred to and which should be quoted verbatim. It was part of the negotiations between Miles and Moller and clearly admissible. It runs thus: "Add ten per cent. for outside commissions clear besides our two half cannot be helped keep confidential."

Apart from the moral aspect of the scheme, upon which Moller and Miles were embarking, it is clear that this telegram is destructive of the suggestion that Miles was professedly bargaining for Howard Smith & Co. That would suppose that Howard Smith & Co. were to add the 12½ per cent. commission, that they

were to receive their price plus the padding, and were to delude the purchaser by giving a receipt to him for the whole gross sum as if for purchase money only, and then hand over the 12½ per cent. to the purchaser's agents for distribution to the intended recipients of the commission. This is a material circumstance when the question of ratification is considered. In succeeding telegrams expressions are used which taken literally point to Miles as the vendor to Moller, no mention being made to the owners till 8th December. Reference is also several times made to the *Mararoa* as well as the *Peregrine* in the same telegrams, and it fits in better with the view that Miles dealt with Moller in respect of both, than that he was acting in one line of a cable as agent for the owners of the *Mararoa* and in the next as agent for Howard Smith & Co. as owners of the *Peregrine*. On the whole I feel no doubt on the construction of this first set of telegrams that Miles professed and purported to act for himself and not for Howard Smith & Co. He, of course, depended for his ability to do this on his success with the second set of negotiations, namely with the plaintiffs, to which I shall now refer. I may state *in limine* that nowhere in these negotiations is there a direction or arrangement to sell for £28,000. The price asked is £26,000. On 23rd November he tells the plaintiffs that he is offered £25,000 for the *Peregrine* if he will guarantee 17 knots, and is informed in reply that plaintiffs will accept £27,500, and they add significantly "must have a guarantee from a responsible party." In other words, in response to his virtual question how much less than £25,000 they can take, they tell him they want more, and in addition cannot accept merely his responsibility. On 7th December plaintiffs cable that they will accept £26,000 nett free of commission, cash on delivery. Next day Miles cables the plaintiffs that on certain conditions the "National Bank will pay £28,000, £26,000 purchase money, £2,000 commission and brokerage, which they will receive. Fully expect £100 from you to pay expenses" &c. The plaintiffs reply the same day is "If you accept delivery" &c. Now the telegram sent by Miles does not say the £28,000 is to be paid to Howard Smith & Co., nor could they with any honesty receive it. They were plainly told the bank was to pay £28,000 evidently to Miles in the first place, and

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of that only £26,000 was purchase money, that is for Howard Smith & Co., being the sum they asked. The remaining £2,000 was stated to be commission and brokerage, which according to the telegram the National Bank was to receive, it may be to receive back from Miles for the ultimate recipients whoever they might be. In other words, as far as the cable discloses Howard Smith & Co. were not to touch a penny of this £2,000. Under no possible interpretation of either set of cables could the plaintiffs claim to be entitled to £28,000. Under their own cables with Miles £26,000 was distinctly fixed as the price. If they ratified Miles's contract with Moller, they ratified the whole of his acts, including the arrangement by which the 12½ commission was to be secretly added to the real price. Naturally the plaintiffs would disclaim any such indefensible transaction. But without it how do they arrive at £28,000? That amount was fixed because of the confidential telegram of 23rd November, and Howard Smith & Co. were informed on 8th December that £26,000 was the purchase money, and that £2,000 was an addition. Their case, however, as pleaded and pressed is on a contract for the price of £28,000. If they succeeded they would have established their right to have had the whole of the £28,000 supposing the contract carried out; and damages must be based on that supposition. But by what right would they receive the full £28,000? For them to retain the £2,000 commission would be quite contrary to either set of cables; but, if not, how would they distribute it?

To my mind the plaintiffs' claim, when the facts are carefully examined, breaks down at every point.

Some interesting questions of law raised relative to ratification were argued, but in the view I have taken their determination is not necessary.

Appeal dismissed with costs.

Solicitors, for the appellants, *Sly & Russell.*

Solicitors, for the respondents, *Minter, Simpson & Co.*

C. A. W.