Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hamburg v. *Pickard, from the Supreme Court of the Transvaal; delivered the 17th July* 1906.

Present at the Hearing:

THE EARL OF HALSBURY.
LORD DAVEY.
SIR ARTHUR WILSON.
SIR ALFRED WILLS.

[*Delivered by Sir Alfred Wills.*]

The Respondent in this case was the Plaintiff in the Court below. He brought his action on the 17th August 1904, alleging that "on or "about 20th February 1904 the Defendant," the present Appellant, "verbally bought from "the Plaintiff and the Plaintiff sold to the "Defendant the buildings known as the "Imperial Hotel situated at the corner of "High Street and John Street at Oudtshoorn "aforesaid," *i.e.*, in Cape Colony, "together "with the furniture therein for the sum of "20,000*l.* payable in a month's time," alleging further that the Defendant had paid no part of the purchase money but repudiated the sale, and claiming "an order compelling the Defendant "to pay the sum of 20,000*l.* against transfer "and delivery to him of the said 'Imperial "'Hotel' or in the alternative payment of "5,000*l.* as damages."

The Defendant by his plea admitted that there were negotiations for the purchase and sale of the hotel, including the land, the buildings then in course of enlargement and re-construction, the appurtenances, furniture, stock-in-

trade, and as a going concern, but alleged that there never was any concluded agreement.

He also pleaded as an alternative defence that on or about the 20th February 1904 the hotel was in course of enlargement and re-construction, according to certain plans shown to him, but that the work was temporarily suspended, that the Standard Bank of Pretoria held a mortgage bond on the hotel for 8,000*l.*, and that it was then verbally agreed between the Plaintiff and the Defendant that the Plaintiff should complete the said buildings in terms of the plans and specifications, and that the Defendant should buy the buildings as completed in terms of the said plans and specifications, with the land and appurtenances, and including furniture, stock-in-trade, and as a going concern, for the sum of 20,000*l.*, of which 5,000*l.* was to be paid in cash; but it was distinctly agreed that this agreement should only take effect if the Standard Bank were willing to allow the Defendant to take over the said bond of 8,000*l.*, and to allow the said bond to remain on the property on its transfer to the Defendant; that the Standard Bank refused to allow the Defendant to take over the said bond of 8,000*l.*, and refused to consent to the said bond remaining on the said property in the event of the transfer thereof to the Defendant, whereby the said agreement lapsed and became of no effect.

The case was heard before the Supreme Court of the Transvaal on several days between the 4th and 11th November 1904, and on the last-mentioned day the Court found that the agreement alleged in the Plaintiff's declaration had been proved and gave judgment for the Plaintiff with costs "for the sum of 20,000*l.* on "tender by the Plaintiff to the Defendant within "two months of transfer of the said Imperial "Hotel . . together with the furniture therein"

or in the alternative "ordering the Defendant "to pay the Plaintiff the sum of 3,000*l.* as "damages."

As the question is one of fact it becomes necessary to state with some precision the material portions of the evidence.

It seems that the Plaintiff had a friend of the name of Berman, a feather buyer, residing at Oudtshoorn, through whom he thought he might find a purchaser for his hotel. Accordingly he wrote to him the following letter (Exhibit A):—

"3rd February 1904.

"I hereby agree to sell the Imperial Hotel (illegible " . . . .) dining-room furniture to seat sixty, capable of "holding eighty people, 1 sitting room, 4 bedrooms on ground "floors furnished, 1 ground floor and kitchen.

"First floor in A building, 10 bedrooms, drawing room, "and gentlemen's sitting room.

"B building, first floor 2 bedrooms and 3 bath-rooms; "second floor 4 bedrooms, 11 new sets of furniture all new. "Also hall furniture and six new chairs for smoking room. "Also large quantities of blankets and linen. About 30 "rooms in duplicate. Bar and billiard room complete and "(canteen?) in old building, also brandy stores. The building "of the hotel, corner of High Street and John Street is three "stories, a portion of which is complete. A large part of the "additional walls are two stories high. There are large "stables, 24 horses, with forage loft to hold about eighty "thousand bundles. A quantity of loose furniture, a quantity "of cutlery and crockery and glassware, the whole as a going "concern. Stock to be taken at cost price, liquors and cigars, "price for all of the above mentioned for the sum of 24,000*l.* "(twenty-four thousand pounds) sterling.

"(Sgd.) W. H. PICKARD."

Their Lordships are satisfied that "stabling, 24 horses" should be read as "stabling (24 horses)," a description of the capacity of the stables.

Berman knew the Defendant, who was a hotel proprietor at Pretoria, but who had lost his licence. He knew before he got the letter of the 3rd February that the Plaintiff was desirous of selling his hotel, and he wrote to the Defendant a letter which reached him on the 29th January, and was acknowledged on the

5th February by the Defendant in a letter which shows that he had not then received a letter which Berman wrote to him, enclosing Exhibit A, and which has no further bearing on the case than as indicating that Berman had spoken to the Plaintiff about disposing of his hotel, that no price had been mentioned, and that the Defendant was glad to hear of the hotel being possibly for sale. Berman wrote on the 5th February to the Defendant, enclosing the Plaintiff's letter to him of the 3rd February (Exhibit A), and in consequence the Defendant went to Oudtshoorn, arriving there on Wednesday, 17th February. He went with Berman to see the Plaintiff on Thursday the 18th, when the Plaintiff and he went round the hotel and saw the whole of the premises and their contents. The following is the Plaintiff's account of what took place: "He said 'what "'about the price?' I said 'you have got the "'price and the particulars in the document "'sent you by Berman.' . . He said 'yes, "'but that price is too much.' He said 'I will "'give you 20,000*l*. for the place.' I said 'no.'" There was further bargaining on Friday the 19th, but nothing was arrived at. On the same 19th the Plaintiff drafted another document (Exhibit G) which was as follows :—

"Masonic Hotel, Oudtshoorn,
"19th February 1904.

"I, the undersigned, undertake to purchase the Imperial "Hotel, Oudtshoorn, from W. H. Pickard, situated on the "corner of High Street and John Street, the sale to include "the buildings as they now stand and the furniture, blankets, "linen, crockery ware, toilet ware and glass ware now in use "for the sum of all other stock to "be taken at cost price, that is to say wines, spirits, cigars, "cigarettes, Cape brandy, Cape wines, fustages, forage, mules, "compressed fodder, and whatever else may be in stock, "grocery and oilman stores necessary for the conduct of a "first-class hotel, all horses, carts and coaches to remain the "property of W. H. Pickard, also a quantity of building "material, cement and corrugated iron."

The price was then a blank, and the document was not then shown or mentioned to the Defendant.

On Saturday, the 20th, they met again, and after much haggling about the price, it was, according to the Plaintiff, fixed at 20,000*l.* "for "the place," on condition that 5,000*l.* should be paid on the Monday following. The balance was to be paid in a month. The sale, he says, was then definitely concluded, and "on the terms "as to the stock mentioned in my memorandum "of 3rd February." "It was then arranged," he adds, "that we should go to the attorney's on "the Monday morning to sign the declarations "of sale." After this the Plaintiff filled in the blank in Exhibit G by inserting the price of 20,000*l.*

On the Monday the Defendant saw the manager of the Standard Bank, and learned from him that he could not make the advance without knowing his position, which was, under the circumstances, a civil way of declining, inasmuch as he had already wired to the head office at Pretoria, and had the reply. As the manager at the head office shortly afterwards saw the Defendant and declined to make the arrangement, it is not too much to conclude that the reply was unfavourable. It is true that the manager at Pretoria had the impression that 11,000*l.* was asked for, but as he said that it may have been 8,000*l.*, the sum sworn to by the Defendant and the only sum he had asked for at Oudtshoorn, there can be little doubt that this was the real figure asked for by the Defendant and refused at Pretoria.

The Defendant did not go with the Plaintiff to the attorney's; but in the afternoon he saw the Plaintiff again, when Plaintiff produced Exhibit G and asked him to sign it. He says that he read it over to him, but this is denied by the Defendant, and as Berman says that the Plaintiff

only "started" reading it to him, when Berman interfered and stopped him, saying that they had already discussed the conditions and it was unnecessary, there can be little doubt that the contents of the document never came to the Defendant's knowledge. The Plaintiff, however, directed his wife to make on the memorandum the following indorsement, which she accordingly did :—

"Mr. Hamburg accepted these conditions and informed me "in the presence of Mr. Berman that he had bought the place "for 20,000*l.*

"(Sgd.) H. PICKARD"

Berman's account is that after some haggling about price, it was agreed at 20,000*l.*, and adds: "It was agreed that the Defendant should take "the hotel as it stood, but he had to pay cost "price for the stock"; that the Defendant promised to pay 5,000*l.* at once and the balance in a month, and that they were to sign the papers on the Monday at the attorney's.

The Plaintiff alleged that neither the 24,000*l.* mentioned in Exhibit A nor the 20,000*l.* to which it was reduced was to include the stock, and as Berman says that the Defendant beat the Plaintiff down to 20,000*l.* and agreed to pay cost price for the stock, he must be taken to confirm the view that the 24,000*l.* did not include the stock.

This is the whole of the direct evidence of the bargain. There was evidence of statements by the Defendant which was treated by the Court below as strongly confirmatory of the Plaintiff's case, the discussion of which is postponed for the moment.

Now it appears to their Lordships that it is not possible to gather from this evidence what the real subject-matter of the alleged agreement was. There was, no doubt, an agreement that 20,000*l.* should be the basis of the bargain; but what was the subject-matter of the bargain,

whether actual or contemplated, their Lordships have in vain endeavoured to ascertain.

The Plaintiff says that after he and the Defendant had gone over the hotel with its appurtenances and contents, he referred to Exhibit A and told the Defendant it contained the particulars of the proposed transaction. The grammatical construction of this document would be that the 24,000*l.* included the stock, the materiality of the term as to cost price for stock being that it would enable the Defendant to know what he was giving for that which was not stock. As, however, the Plaintiff alleges that the parol bargain was 20,000*l.* "for the "place," on the terms of Exhibit A as to stock, and as Berman says the Defendant agreed to give 20,000*l.* for the hotel as it stood, there is evidence that the stock was to be paid for beyond the 20,000*l.* There is no evidence that the important stipulation that the hotel was to be sold as a going concern was departed from or that anything was said to modify it. Nor is it possible to split the alleged contract into two and say that there was a separate agreement to take either the hotel with the furniture and other things (not stock) described in Exhibit A, or the furniture and other things which had been shown to Defendant—without the term that the stock should be taken at cost price—a very important part of any such bargain. Now which of the articles which Defendant had seen were comprised in "stock"? There is no evidence at all that there was any agreement or understanding on this point. If Exhibit A be looked at, it would seem to mean "liquors and cigars," for, as it is impossible to suppose that on the sale of an hotel "stock" was meant to exclude liquors and cigars, it is very difficult to read the document in any other way than as defining the meaning of stock as equivalent to liquors

and cigars. When, however, Exhibit G, prepared the day before the alleged sale, but by the Plaintiff's indorsement alleged to contain the terms agreed upon on the Saturday is examined, it appears to be quite different from Exhibit A. "Stock" is now used, not, as Mr. Pollock said, as meaning everything consumable, but a great deal else—after "furniture, blankets, "linen, crockery ware, toilet ware and glass ware "now in use" comes "all *other* stock" to be taken at cost price, and then we have specifically mentioned not only the liquors and cigars of Exhibit A, but "fustages, forage, mules, com- "pressed fodder, and whatever else may be in "stock—grocery and oilman stores necessary "for the conduct of a first-class hotel." Their Lordships inquired what was meant by fustages, and were told that it meant ullaged wine, which by a judicious blend might possibly be made consumable, and if so would be a valuable asset; but the word is to be found in Murray's Dictionary, and it is there defined as "the "vats and tubs and all the wooden utensils "used in making wine," and a quotation is given from a South African newspaper, the "Cape and Natal News," of 7th December 1868, which shows clearly that there at least it is a known word bearing that signification. The quotation is:—"a large vintage "in prospect and no fustage in which to "store it." It was suggested that "mules" meant some kind of machinery. Murray's Dictionary has not yet reached the word, but from the Imperial Dictionary, which is a work of authority, it would appear that there are only three senses in which the word is used—in reference to animals, as the word is commonly understood, in reference to plants as the equivalent to hybrids, and in reference to machinery, as the name for a specific machine used in

spinning, so that their Lordships are driven to the conclusion that the animals usually so designated were now included under stock, and that a considerable number of things, some of which might be of very considerable value, were now to be paid for outside the 20,000*l.*, whilst horses, carts, and coaches which, or some of which, might be essential for carrying on a hotel as a going concern were to be excluded altogether. The only allusion to any exclusion of anything of the sort in the oral evidence is Plaintiff's statement that the van and the 'bus were not included in the sale, which is very different from the parallel passage in Exhibit G.

The 20,000*l.* is said by the Plaintiff to have been offered and accepted "for the place." Berman says, "for the hotel as it stood." Such evidence is extremely vague to identify the subject-matter of a contract. But there does not seem on the evidence to be any reason for supposing that Exhibit A was not still to be the basis of the contract, and yet the Plaintiff indorsed Exhibit G with a statement that the terms therein contained were the terms agreed upon. Neither Exhibit A nor Exhibit G contains any suggestion of a contract to buy the hotel and furniture apart from a right to the stock (whatever that might mean) at cost price, and yet the Plaintiff has, in his declaration, treated them as separable, has dropped the terms as to stock and alleged simply a contract to buy the hotel (not even as a going concern) with the furniture at 20,000*l.*, and the Court has adopted this view and given judgment accordingly. It is intelligible that the Plaintiff and his advisers may have seen that it was impossible to say what was to pass under stock, and therefore impossible to prove a contract if stock was retained in the statement of the contract, and preferred to take their chance of

proving a verbal contract in which it should be dropped. But Plaintiff's own evidence that "the sale was to be on the terms as to the "stock mentioned in my memorandum of the "3rd February" makes the attempt impossible. The Plaintiff had to prove his case, and it was not enough to give evidence that there was *a* concluded agreement. He was bound to go further and show what it was. This, in their Lordships' opinion, he has failed to do, and at the end of nearly two days' discussion their Lordships remained unable to elicit from the learned Counsel for the Plaintiff any definite statement of what the subject-matter of the alleged contract really was. Of the particular contract alleged in the declaration, viz., for a sale of the hotel and furniture for 20,000*l.* without anything else, there is, in the opinion of their Lordships, no evidence at all. The formal Judgment of the Court would be satisfied by a tender of the hotel with the furniture, not as it was at the time of the contract, but at the time of the Judgment; and that this was intended is clear from the oral Judgment delivered on behalf of the Court by Mr. Justice Smith, in which it is said in terms that "the Judgment of the "Court will be that the Plaintiff is entitled to "recover from the Defendant the sum of "20,000*l.* on tendering the hotel, the furniture, "the glass, the crockery, as existing to-day." That cannot possibly be correct, but the error is not of vital consequence, as such a mistake might be corrected if there were the materials for establishing any definite contract.

There is evidence, to which their Lordships think undue importance has been attached, to show that the Defendant used expressions from which the conclusion might be drawn that a contract had been definitely arrived at on the Saturday. For instance, he is said to have

agreed to go on Monday to the lawyers to sign the necessary documents; that he had bought the hotel for 20,000*l.*, that he was to be congratulated, and that he had treated the Plaintiff and his wife and Berman to champagne on the Saturday after the negotiations, for which he had paid a sovereign. If this were a legitimate inference, it would not remove the difficulty that the Plaintiff has failed to show what it was that had been agreed upon. In their Lordships' opinion, if the Plaintiff and Defendant had gone to the lawyers to sign documents, it would in all probability have appeared that the parties were not really agreed, and the expressions used by the Defendant as to his having bought the hotel, and its being a subject of congratulation are consistent with either of two views, in neither of which will they help the Plaintiff's case. He might have thought, as he says, that they had agreed to something different from that which the Plaintiff alleges was the agreement, or (what seems to their Lordships the more probable explanation) when he had got the Plaintiff down to 20,000*l.*, he may have looked upon the matter as practically though not definitely concluded.

The Plaintiff, if his attempt to get Exhibit G signed by the Defendant were honest, did not know what had been agreed upon, as he says that the verbal agreement was that the stock was to be on the terms of Exhibit A, which cannot be reconciled with Exhibit G. If he were not honest in doing so, very little credit ought to be attached to his evidence generally. Berman's act in stopping the reading of a document which would have defined the situation and made it clear whether or not they were *ad idem*, was not that of an honest man. Berman had been promised 500*l.* by the Plaintiff if the matter went through, and his conduct is only explicable on the theory that he was afraid of

matters being made too definite. In other words, he was aware that it was at least by no means certain that they did understand one another.

So far, their Lordships have dealt with the case only on the evidence given for the Plaintiff, and as if no answer had been attempted; and it would be sufficient to say that to their minds that evidence is too vague, contradictory and unsatisfactory to establish any contract, still less to establish the only contract sued upon. But they think they ought to notice briefly the case set up by the Defendant.

He says that an agreement was come to—but quite different from that alleged by the Plaintiff—and that it was coupled with the condition that the Bank would allow him instead of the Plaintiff to become their debtor, on the security of the hotel, for the 8,000*l.* for which they held the mortgage of the hotel by the Plaintiff, together with other securities. The Defendant's evidence as to what was the agreement was disbelieved by the Supreme Court, and their Lordships see no reason for disagreeing with their view in this respect. Neither the Plaintiff, nor Berman, nor the Defendant were, in their Lordships' opinion, witnesses upon whose evidence they would be disposed to act simply because the witness said so and so. They are therefore the more at large to regard the probability of the statement as to the 8,000*l.* bond.

Now it is quite plain that the Defendant could not, in fact, carry out the purchase without such accommodation. The Plaintiff says he represented himself as a rich man not needing such assistance—very possibly this may have been so—but in fact his position did not render him independent of the loan. He was undoubtedly anxious to purchase. He had lost his licence at Pretoria, and was stranded there. He got a

month's time, during which, after his failure to get the money from the Standard Bank, he was trying to raise it elsewhere, but he was no more successful in other quarters than he had been with the Bank. It is very unlikely, under those circumstances, that he should have bound himself definitely to pay 20,000*l.* before ascertaining that he could have the accommodation. It is common ground that one of his first inquiries from the Plaintiff was whether there was a sum out on mortgage, and how much it was, and that he expressed a wish to have it allowed to him as it had been to the Plaintiff. Whether what he was told by the bank manager at Oudtshoorn was equivalent to a definite refusal or not, he certainly got no promise from him, and his conduct afterwards on the Monday is entirely consistent with his allegation that it was a condition of the contract that he should be able to obtain this assistance. He was glad to get time, and not to be obliged definitely to abandon the possibility of purchasing as long as he hoped to be able to get financial help. When he found he could not get it, he dropped the negotiation. It is exceedingly probable that if he had been able to get it, with a willing seller and a willing purchaser, all the difficulties which have been pointed out in the way of supposing a definite contract to have been arrived at on the 20th February would have been got rid of, and the purchase would have gone through. But the probabilities seem to be all in favour of his story that he made it a condition of any purchase that he should get the accommodation.

Their Lordships fully appreciate the importance to be attached to the opinion of the tribunal which has heard and seen the witnesses, as to all matters connected with their conduct and demeanour in Court. They have therefore in this their Judgment not even stated or discussed

the evidence of the Defendant, except in this one particular, in which, in their opinion, all the probabilities are in favour of his account. They do not understand the Court below to have pronounced any opinion in favour of the Plaintiff's case founded upon their observation of his or of Berman's demeanour. Indeed it was hardly possible for them to do so in face of the Plaintiff's allegation that he believed the sovereign paid for the champagne after the bargaining on Saturday the 20th February to have been a payment on account of the purchase money—not made any better by the attempt to foist upon the Defendant a receipt for 1*l.* on account of purchase money, followed by a lawyer's letter asking for the balance of 19,999*l.*—"puerile" as the Court styles it; mendacious, as it might with equal propriety have been called—and in face of Berman's conduct in preventing the Plaintiff from reading Exhibit G to the Defendant. But their Lordships' view that their evidence, taken as it stands and assuming its truth, wholly fails to show any definite and ascertainable contract renders discussion as to their credibility unnecessary.

An important question was raised and discussed at considerable length as to the effect of a clause in the Transvaal Proclamation, No. 8 of 1902, by which it is provided "that no "contract of sale of fixed property shall be of "any force or effect unless it be in writing, "and signed by the parties thereto or by their "agents duly authorized in writing." The alleged contract was made in Cape Colony. The trial took place in the Transvaal. Is the proclamation to be construed like the English Statute of Frauds as merely regulating the mode of proof of such contracts? In which case the *lex fori* would be applicable, and the Plaintiff's case must fail, because the only proof he could offer of the contract was by evidence inadmissible

by the law of the Transvaal; or does the enactment strike at the verbal contract itself, and make it for all purposes no contract? In which case, as such legislation in the Transvaal would have no operation upon a contract made in Cape Colony, it must simply be disregarded. The *lex loci contractus* would prevail and the contract could be proved by oral evidence.

Their Lordships being satisfied that no oral contract has been established by the evidence, it becomes unnecessary for them to express any opinion upon the subject, and the only observation they would make upon it is that this proclamation is a fiscal enactment, a consideration which must not be lost sight of should it ever become necessary to decide the point. They are the better pleased to be spared the necessity of dealing with it on the present occasion, that the point was not taken in the Court below, and consequently their Lordships are without the assistance which they would have derived from the consideration of the question by the learned Judges of the Supreme Court of the Transvaal.

Their Lordships will humbly advise His Majesty that the Appeal should be allowed and judgment entered in the Supreme Court of the Transvaal for the Appellant with costs. The Respondent must pay the costs of this Appeal.