

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of Hutton  
v. Lippert from the Supreme Court of the  
Colony of the Cape of Good Hope; delivered  
March 14th, 1883.*

Present :

LORD BLACKBURN.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

THIS is a suit brought by Mr. Hutton, in his capacity as Treasurer General of the Colony of the Cape of Good Hope, to recover from the Defendant a sum of 360*l.*, together with interest, which he declares to be due from the Defendant under the provisions of Act 11 of 1863, of which provisions the following only are material:—  
Sec. 2.—“For and in respect of every sale,  
“ whether private or public, made after this  
“ Act shall come into effect, of any freehold  
“ property or property held of Government  
“ upon quitrent or other leasehold tenure, or  
“ of any opstal of a loan place, there shall be  
“ chargeable upon and payable by the pur-  
“ chaser a duty of four per cent. upon the  
“ price or purchase money paid or to be paid  
“ for the said property.” Sec. 3.—“A duty  
“ as aforesaid shall be payable upon the value  
“ of any such property as aforesaid by every  
“ person becoming entitled to the same by way  
“ of exchange, donation, legacy, testamentary or  
“ other inheritance, or generally in any manner  
“ otherwise than through the medium or by the  
“ means of purchase and sale.”

R 6183. 100.—4/83. Wt. 3701. E. & S.

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The declaration in the action contained two counts respectively relying upon these two clauses of the Act; but with respect to the second count no question now arises. The question arises solely upon the first count, which relies upon the second section of the Act; and the question is whether there was or was not a sale of a certain property from Ekstein to Lippert. The law of the Cape with respect to the contract of sale is thus stated by the Chief Justice: "Under our law, as under the Roman law, a sale may be defined as a contract in which one person promises to deliver a thing to another, who on his part promises to pay a certain price." In Van Leeuwen, cap. 17, section 1, is this passage:—"The purchase is understood to be accomplished as soon as the price and the mutual condition has been fixed, although the money had not been paid, nor the delivery of the article made, unless a real misunderstanding had taken place in the articles sold." Mr. Justice Blackburn, in his treatise on the contract of sale, at page 177 quotes Pothier thus:—"In general a contract of sale is considered to have become perfect so soon as the parties are agreed upon the price for which the thing is to be sold. This rule has its operation when the sale is of an ascertained thing, and is pure and simple: *Si id quod venierit appareat quid quale quantum sit et pretium et pure venit perfecta est emptio.*" It may be observed that, even if our law governed the case, which it does not, the definition given by Mr. Justice Blackburn in his treatise on the contract of sale, which is quoted by the Chief Justice, would apply.

Such being the law applicable, it remains to be seen what the real transaction between Ekstein and Lippert was. The Chief Justice quotes a passage from the Digest,—"*In emptis*

“ *et venditis potius id quod actum quam id quod dictum sequendum est,*” a passage enunciating a principle which is probably common to the laws of all civilised countries.

We have, therefore, to look to what was the real transaction between the parties, and not to what they have called it. That transaction is contained in three documents, and it appears to their Lordships enough for the determination of this case to deal with those documents apart from any oral evidence which has been given. The first is an agreement of the 21st September 1880, which runs thus:—“ For the consideration “ after mentioned, Wilhelm August Lippert “ hereby guarantees to the said Dirk Gysbert “ Ekstein the sale, in whole or by lots,” of an estate, describing it, “ for the sum of 9,000*l.*, by “ or before the 31st day of December 1881; “ Wilhelm August Lippert to have the sole “ control and management of the aforesaid “ property and of the said sale or sales, and for “ that purpose the said Dirk Gysbert Ekstein “ shall grant unto him an irrevocable power of “ attorney, granting him the fullest power over “ the said property, so as to enable him to deal “ with it as he thinks fit, and Dirk Gysbert “ Ekstein shall be bound and obliged to pass the “ necessary transfer or transfers at the expense “ of the purchaser or purchasers. Wilhelm “ August Lippert also guarantees the payment “ of the interest at the rate of six per centum per “ annum, to commence from the 1st January 1881, “ on the said sum of 9,000*l.*, or so much thereof “ as shall remain from time to time due and “ owing; and he further guarantees, agrees, and “ undertakes that if the said ground is not sold “ in lots entirely or by lots, or if any part thereof “ shall remain unsold by the said 31st day of “ December 1881, that he shall be bound himself “ to take over the said ground for the said sum

“ of 9,000*l.*, or any portion thereof remaining  
 “ unsold at a proportionate value, so that the  
 “ said Dirk Gysbert Ekstein shall receive the  
 “ said sum of 9,000*l.* in full, with interest due.  
 “ In consideration whereof it is hereby agreed  
 “ that the said Dirk Gysbert Ekstein shall pay,  
 “ and the said Wilhelm August Lippert shall  
 “ receive or be entitled to account for the  
 “ moneys coming into his hands, whatever surplus  
 “ and balance shall remain after payment to the  
 “ said Dirk Gysbert Ekstein of the said sum of  
 “ 9,000*l.* and interest, as his commission on and  
 “ recompense for said guarantee.” On the 28th  
 of the same month “it was further agreed that  
 “ the proceeds of the sale shall be handed over  
 “ to Ekstein on passing transfer until the whole  
 “ amount of 9,000*l.* shall be paid.” Then comes  
 a power of attorney by which Ekstein nominates  
 and appoints Lippert his lawful attorney to  
 transfer all and singular the aforesaid estate,  
 and so on, unto the various purchasers from  
 time to time, and to give good and valid and  
 effectual receipts, &c.

It thus appears that the price which Ekstein  
 was to receive was ascertained, viz., 9,000*l.*, and  
 it was to be paid on the 31st December 1881,  
 unless (and this appears to their Lordships to  
 make no real difference in the transaction)  
 some portions of it had been paid before, which  
 portions were, if Lippert sold, as he might  
 have done, but was not bound to do, to be  
 paid over to Ekstein. As far as Ekstein was  
 concerned, it appears to their Lordships that  
 he sold the property. Now did Lippert buy  
 it? Lippert obtained the complete control of  
 it, not only such control as would have been  
 necessary for him if he acted as agent, or  
 guarantor (as it is here called), to sell portions  
 of the property to other people, but the full  
 possession and control of it. There could not

be wider words than these: "deal with it as he thinks fit." Lippert might sell or let any portion of it, or he might retain the whole in his own hands; he might cultivate it or let it run to waste; he might sell any portions of the woods and copse; in fact, he was, to all intents and purposes, the owner of it, and this in consideration of a fixed price to be paid on or before a fixed day.

Under these circumstances it appears to their Lordships that the Chief Justice was justified in saying that the effect of the transaction was to give Ekstein every right which a vendor could legally claim, and to confer upon the Defendant every right which a purchaser could legally demand. Does it make any difference that the parties have called this transaction by the name of a guarantee? It appears to their Lordships that because the parties have used this term "guarantee" in a sense which is unusual and not applicable to this case,—for Lippert really guaranteed nothing,—the nature of the transaction is not thereby changed; and because they have said that Lippert was to be entitled to whatever surplus or balance shall remain on the resale of portions of the property, if any were resold, "as commission and recompense for the said guarantee," this expression does not convert him from a purchaser into an agent. The object of the parties seems to have been to obtain all the benefits of a sale, without subjecting themselves to the duty on it, by giving a contract of sale the colour of a contract of Guarranty or agency. Their Lordships agree with the Chief Justice that, notwithstanding these devices, the true character of the transaction sufficiently appears. They will humbly advise Her Majesty that the judgment of the Supreme Court of the Colony be reversed, and that the Plaintiff do receive judgment for the amount which he claims. The Plaintiff will have the costs in the Court below and the costs of this Appeal.

