1997 CarswellNS 10
Supreme Court of Canada

Hill v. Nova Scotia (Attorney General)

1997 CarswellNS 10, 1997 CarswellNS 11, [1997] 1 S.C.R. 69, [1997] S.C.J. No. 7, 142 D.L.R. (4th) 230, 157 N.S.R. (2d) 81, 206 N.R. 299, 462 A.P.R. 81, 60 L.C.R. 161, 68 A.C.W.S. (3d) 666, J.E. 97-295

Arthur Hill and Angus Hill (Appellants) v. The Attorney General of Nova Scotia (Respondent)

L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 27, 1996
Judgment: January 30, 1997
Docket: 24782

Proceedings: Reversing (1995), 45 R.P.R. (2d) 169, 140 N.S.R. (2d) 116, 399 A.P.R. 116, 56 L.C.R. 252 (C.A.)

Counsel: *Douglas A. Caldwell, Q.C.*, and *Lloyd I. Berliner*, for appellants.
Alexander M. Cameron and *Margaret MacInnis*, for respondent.

Subject: Property

Headnote

Easements --- Creation of easements — Creation in equity

Easements — Creation of easements — Creation in equity — Province expropriating land which bisected farm of owners' father — Province representing that father would receive interest in highway lands to permit him to move cattle across highway — Province constructing gates and ramps and maintaining those for 27 years — Province subsequently removing ramps — Owners obtaining declaration that they had equitable interest in land affected by removal of ramps — Province successfully appealing — Owners subsequently appealing — Province's words and actions creating equitable interest in land in form of right of way over highway — Appeal allowed and trial judge's order restored — Expropriation Act, R.S.N.S. 1954, c. 91, s. 1(c).

In order to build a controlled access highway, the province expropriated land which bisected a farm. Discussions were held with the father of the current owners with respect to the expropriation of his land and the compensation to be paid. The province's actions and words, both oral and written, clearly demonstrated that a representation was made to the father that, as part of the compensation, he would receive an interest in the highway lands which would permit the moving of people, equipment, and cattle back and forth across the highway. The province constructed fences, gates, and ramps which would permit and facilitate the movement of people, equipment, and cattle between the two segments of the farm, and continued to maintain the ramps for 27 years. Subsequently, the province removed the ramps as part of an expansion of the highway. The owners, who had since inherited the land from their father, obtained a declaration that they had an equitable interest in the land affected by the removal of the ramps, and that they were therefore entitled to compensation. The province appealed, and the appeal was allowed. The owners appealed.

Held:

The appeal was allowed.

The words and actions of the province created an equitable interest in the land in the form of a right of way over the highway. It would be unjust not to recognize the representations and actions of the province which created the equitable interest in the

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

land when they were relied upon by the father. An equitable permission is a compensable interest in land under s. 1(c) of the *Expropriation Act* (N.S.), and, accordingly, as a general rule, compensation should be paid for the expropriation of such an interest. The judgment of the Court of Appeal should be set aside, and the order of the trial judge should be restored.

Table of Authorities

Cases considered:

Crabb v. Arun District Council, [1976] 1 Ch. 179, [1975] 3 All E.R. 865 (C.A.) — *considered*

Daigle c. Clair (Village) (1986), 70 N.B.R. (2d) 129 (Eng.), 179 A.P.R. 129 (N.B. Q.B.) — *considered*

Howell v. Falmouth Boat Construction Co., [1951] A.C. 837, [1951] 2 All E.R. 278 (H.L.) — *not followed*

Steadman v. Steadman, [1976] A.C. 536, [1974] 2 All E.R. 977 (H.L.) — *applied*

White v. Central Trust Co. (1984), 54 N.B.R. (2d) 293, 140 A.P.R. 293, 7 D.L.R. (4th) 236, 17 E.T.R. 78 (C.A.) — *considered*

Statutes considered:

Expropriation Act, R.S.N.S. 1954, c. 91

generally*considered*

s. 1(c)*considered*

s. 21(1)*considered*

s. 25*considered*

Public Highways Act, R.S.N.S. 1954, c. 235

s. 21*considered*

s. 21(1)(a)*considered*

Statute of Frauds, 1677 (U.K.), 29 Car. 2, c. 3

preamble*referred to*

Statute of Frauds, R.S.N.S. 1989, c. 442

generally*considered*

APPEAL from judgment reported at (1995), 45 R.P.R. (2d) 169, 140 N.S.R. (2d) 116, 399 A.P.R. 116, 56 L.C.R. 252 (C.A.), reversing order reported at (1994), 132 N.S.R. (2d) 265, 376 A.P.R. 265, 54 L.C.R. 96 (S.C.), declaring that province had granted equitable easement during expropriation.

The judgment of the court was delivered by *Cory J.*:

1 In order to build a controlled access highway, the province of Nova Scotia expropriated land which bisected the Hill farm. The issue to be resolved is whether, as part of the consideration for the expropriated lands, the province granted Hill an

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

equitable interest in those lands permitting him to move cattle and equipment back and forth across the highway.

2 On an application brought before him, Scanlan J. (1994), 132 N.S.R. (2d) 265, found that during the expropriation of the Hill property in 1966, the Province had granted an equitable easement across the highway to Ross Hill. The majority of the Court of Appeal, (1995), 140 N.S.R. (2d) 116, Freeman J.A. dissenting, found that no compensable interest in land existed and set aside the order of Scanlan J. For reasons which differ somewhat from those of Freeman J.A., I would allow the appeal and restore the order of Scanlan J.

3 The appellants are the sons of Ross Hill and the successors in title to his farm lands. In 1966 and 1967 the respondent was acquiring land for the construction of the Trans-Canada Highway in Nova Scotia. During that time, discussions were held with Ross Hill relating to the expropriation of his land and the compensation to be paid. The proposed highway bisected the Hill farm dividing the northern portion from the southern.

4 The actions and words both oral and written of those representing the Department of Transport clearly demonstrate that a representation was made that Hill, as part of the compensation, would receive an interest in the Highway lands which would permit the moving of people, equipment and cattle back and forth across the highway.

5 In compliance with their representations the Department of Transport constructed fences, gates and ramps which would permit and facilitate the movement of people, equipment and cattle between the two segments of the Hill farm. For over 27 years the Department of Transport maintained and on occasion improved the ramps. During this period they were used by Hill and his sons in the course of their farming operations. These actions serve to confirm and entrench the representation that Hill was to have an interest in land which would permit him to move equipment and cattle across the highway between the bisected portions of his farm. The actions of the province speak louder than any written document.

6 The representation that he had an interest in land, which closely resembles an easement, was relied upon by Ross Hill. It can and should be inferred that the interest in land formed a part of the consideration ultimately accepted by Ross Hill for the expropriation of his property. Thus it is apparent that he relied to his detriment upon the representation made to him by the Department of Transport. Without the representation the consideration for the taking would have been higher to compensate Hill for the injurious affection suffered as a result of the highway's dividing his property. The Department of Transport by its actions in constructing fences, gates and ramps and maintaining them over 27 years and recognized confirmed its representation that Hill had an interest in land that enabled him to move cattle and equipment across the highway.

7 The representation as to the interest in land formed an integral and essential part of the overall agreement between the parties most particularly as to the consideration to be paid for the expropriated land. The Department of Transport through the actions of its authorized agents confirmed their representation to Hill that he would have a permanent right of way over the highway.

8 The province promised Mr. Hill access to the highway. It complied with and carried out that promise by building and maintaining for 27 years ramps giving access to the highway from Mr. Hill's land. Accordingly, Mr. Hill acquired what could be called an "equitable permission" (or interest) to enter upon and cross the highway. It is true that s. 21(1)(a) of the *Public Highways Act*, R.S.N.S. 1954, c. 235, requires that such permission be in writing and it may well be that this requirement was satisfied in this case. However assuming it was not, the writing requirement is merely a reflection of the *Statute of Frauds*, whose purpose is to prevent "many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury". See *Steadman v. Steadman*, [1976] A.C. 536 (H.L.), at p. 558, quoting the preamble to the *Statute of Frauds*, 1677 (Eng.).

9 Where the terms of an agreement have already been carried out, the danger of fraud is averted or at least greatly reduced. To borrow a phrase from the law of tort, the thing speaks for itself. In the present case, for example, it does not matter so much what was said. What is critical is what was done; and what was done was the construction and maintenance of access ramps. There is no mistaking the purpose for which those ramps were constructed: it was to allow Mr. Hill a way of reaching and crossing the highway. Accordingly, in this instance strict adherence to the literal terms of the writing requirement would not serve the purpose for which it was devised. Fraud would not be prevented; rather, the appellants would be defrauded.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

10 It is for this reason that equity evolved the doctrine of part performance:

> [This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of part performance — the "part" performance being that of the party who had, to the knowledge of the other party, acted to his own detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract. [*Steadman v. Steadman*, *supra*, at p. 558.]

11 Quite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced. See *Daigle c. Claire (Village)* (1986), 70 N.B.R. (2d) 129 (Q.B.), and *Crabb v. Arun District Council*, [1975] 3 All E.R. 865 (C.A.), *per* Lord Denning, at p. 872. That should be the result in this case.

12 This doctrine of part performance operates in this case to prevent the Crown from relying on the writing requirement in s. 21(1)(a) of the *Public Highways Act*. That section provides:

> *21* (1) Where a highway or portion thereof has been designated as a controlled access highway, no person shall, without a written permit from the Minister,
>
> > (a) construct, use, or allow the use of, any private road, entrance way or gate which or part of which is connected with or opens upon the controlled access highway; ...

13 I do not believe either s. 21(1) or s. 25 of the *Expropriation Act*, R.S.N.S. 1954, c. 91 (later R.S.N.S. 1967, c. 96, ss. 22(1), 26), are applicable to the facts of this case. They provide:

> *21* (1) Where at any time before the compensation has been actually ascertained or determined, land taken or expropriated under the provisions of this Act, or any part of such land, is found to be unnecessary for the purpose for which the same was taken or expropriated, or if it is found that a more limited estate or interest therein only is required, *the Minister may by writing* under his hand, registered in the proper registry office, declare that the land or such part thereof is not required and is abandoned by the Crown, or that it is intended to retain only such limited estate or interest as is mentioned in such writing, ... [Emphasis added.]
>
> [ellipsis]
>
> *25* If the injury to any land or property alleged to be injuriously affected by the exercise of any of the powers conferred by this Act may be removed wholly or in part by any alteration in, or addition to, any public work, or by the construction of any additional work, or by the abandonment of any part of the land taken from the claimant, or by the grant to him of any land or easement, and if the Crown, before an award is made, undertakes to make such alteration or addition, or to construct such additional work, or to abandon such portion of the land taken or to grant such land or easement, the damages shall be determined in view of such undertaking and the judge shall declare that, in addition to any damages awarded, the claimant is entitled to have such alteration or addition made, or such additional work constructed or such part of land abandoned or such grant made to him.

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

14 Even if they were applicable, the doctrine of part performance would prevent the Crown from relying upon them. Quite simply the written and spoken words of the Crown and its actions demonstrate that Hill was to have an equitable interest in the expropriated lands as an integral and essential part of the compensation paid for those lands.

15 The result is that Mr. Hill acquired in 1967 an equitable permission or right to enter upon and cross the highway — a permission that differs from the kind that s. 21(1)(a) contemplates only to the extent that it is not in writing. An equitable permission is a compensable interest in land within the broad meaning of that term found in s. 1(c) of the *Expropriation Act*. That section provides that "'land' includes any estate, term, easement, right or interest to, over, or affecting land". It follows that as a general rule compensation should be paid for the expropriation of such an interest.

16 To the extent that the decision of the House of Lords in *Howell v. Falmouth Boat Construction Co.*, [1951] A.C. 837, is to the contrary, I would not follow it. It is true that an estoppel cannot be raised against the Crown in the face of a contrary statutory requirement. Yet, a writing requirement cannot circumvent the application of the doctrine of part performance. As the decision of the House of Lords in *Steadman v. Steadman, supra* makes clear, the very purpose of the doctrine of part performance is to avoid the inequitable operation of the *Statute of Frauds*. Nor does it matter that in this case one of the parties is the Crown. The requirement of writing is not more pressing with respect to the Crown than it is with respect to private persons. However, it must be said that this reasoning cannot be extended to permit estoppel in the face of statutes other than the Statute of Frauds (and its equivalents). The writing requirement is specifically required to give way in the face of part performance or estoppel by conduct, because the part performance or conduct fulfils the very purpose of a written document. Yet other statutory provisions may so differ in their aim and purpose that their requirements for the execution of written forms or document will generally be mandatory.

17 How very unfair it would be to permit the Crown, 27 years after obtaining the benefit of a lower price for the land expropriated to allege that the very arrangement it made and carried out was prohibited by the provisions of s. 21 of the *Public Highways Act*. For the reasons set out earlier that position is untenable. Indeed, to accept it would make a mockery of equitable fairness and to permit, indeed encourage, governmental misrepresentation.

18 In summary, there was then a representation made by authorized representatives of the Crown that Hill would have an interest orally and by letters in land permitting him to cross the highway with cattle and equipment. There was the compliance by the Crown with its representations by means of both construction and maintenance. It was contemplated that Hill would, as he did, rely upon them. He did so to his detriment. The words and actions of the Crown created an equitable interest in the land in the form of a right of way over the highway. The Crown intended it to be used and it was for over 27 years. It would be unjust not to recognize the representations and actions of the Crown which created the equitable interest in land when they were relied upon by Hill. That equitable interest in the land comes within the definition of land in the *Expropriation Act* and damages arising from its taking should as a general rule be compensable. It remains only to determine if the release signed by Ross Hill stands as a bar to recovery.

19 In my opinion the release can not and should not constitute a bar. The release specifically indicates that the parties have reached an agreement regarding compensation under the *Expropriation Act* and that the release is executed pursuant to this agreement. It goes on to provide that the consideration was $1.00 and "other good and valuable consideration".

20 In *White v. Central Trust Co.* (1984), 54 N.B.R. (2d) 293 (C.A.), La Forest J.A., as he then was, sagely observed at pp. 310-11:

> ... As Lord Westbury stated in the House of Lord's case of *London and South Western Railway Co. v. Blackmore* (1870), L.R. 4 H.L. 610, at p. 263: "the general words in a release are limited always to that thing or those things which were specifically in the contemplation of the parties at the time when the release was given".
>
> [ellipsis]
>
> *What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.* [Emphasis added.]

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

21 Considering this release in the context of the expropriations proceedings it becomes clear that an essential and integral element of the consideration was the equitable interest in land which provided the right of way over the highway. The release did not contemplate or affect the equitable interest in land. It follows that the release cannot constitute a bar to payment to the appellants of compensation for the taking of their equitable interest in the land.

22 In the result I would allow the appeal, set aside the order of the Court of Appeal and restore the order of Scanlan J. The appellants should have their costs of these proceedings throughout. If the parties are not in agreement as to the appropriate scale of costs the issue can be raised with this Court.

Appeal allowed.

End of Document Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB 9

A either party, there being nothing to show that notice was required. By his letter in April, 1953, and his subsequent conversations the husband made it clear that he was putting an end to the agreement. It is true that he continued to pay under the maintenance agreement which was based on the separation agreement; but I am satisfied from the evidence that he regarded it as his moral duty to provide as generously for his wife as he could, and it would be unreasonable to
B hold that his failure to stop payments of maintenance was inconsistent with his termination of the separation agreement. Had there been any benefits under the maintenance agreement which he continued to take the position might have been different. The separation agreement being out of the way the wife had no legal right to refuse her husband's genuine offer of reconciliation, and from the date of her refusal has been in desertion. There must therefore be a decree nisi on the
C petition and the prayer of the answer for dissolution rejected.

Decree nisi.

Solicitors: *Lionel Altman*, Leeds (for the husband); *Morrish & Co.*, Leeds (for the wife).

[*Reported by* G. M. SMAILES, ESQ., *Barrister-at-Law.*]

D

PARKER AND ANOTHER v. CLARK AND ANOTHER.

E [EXETER ASSIZES (Devlin, J.), November 10, 11, 26, 1959.]

Contract—Intention to create legal relationship—Sharing home—Agreement by plaintiffs, a married couple, to give up their own home and share home of defendants, an elderly couple—Agreement by defendants to make will leaving their house to female plaintiff and her relatives—Whether intention to make an agreement binding in law—Duration of contract to share home.

F *Contract—Writing—Memorandum—Offer—Letter containing all terms of agreement and offer to contract—Sufficiency—Law of Property Act, 1925* (15 & 16 *Geo.* 5 *c.* 20), *s.* 40 (1).

The defendants, Mr. and Mrs. C., were an elderly couple (seventy-seven and seventy-eight years old) who lived alone in a commodious house of their own at Torquay. They were on very friendly terms with the plaintiffs,
G Cmdr. and Mrs. P., who were some twenty years younger, and who lived in their own cottage in Sussex. Mrs. P. was a niece of Mrs. C. On Sept. 18, 1955, after the plaintiffs had been visiting the defendants in Torquay, C. proposed to P. that the plaintiffs should come to live with the defendants. P. said that he would consider the matter, and a few days later he wrote to C. saying that, if the plaintiffs came to live with the defendants, they
H would have to get rid of their own cottage. On Sept. 25, 1955, C. wrote to P. saying: "The major difficulty re what is to happen to [the plaintiffs' cottage] can be solved by our leaving [the defendants' house] and its major contents . . . to [Mrs. P., her sister and her daughter] when we both pass away and if you cannot maintain it they can sell out". The letter went on to give details of (a) the cost of maintaining the defendants' house
I (which amounted to £203 4s. 8d. annually), and (b) the defendants' income and assets, and continued: "If we go fifty-fifty on maintenance of house it would cost you half of the £200 odd as set out and half the running expense of food, drinks, etc. but I think it would be fair if your share of the £200 was the same as you now pay at the [plaintiffs' cottage] if it is less than £200. I would pay for a daily woman four mornings a week, have a T.V. and a new car. You could sell out and pay off your mortgage and invest proceeds to increase your income. I hope your family vote for or against this will be unanimous". On Sept. 30 P. wrote accepting C.'s offer and said that he

would dispose of his own cottage. The plaintiffs then proceeded to act on the arrangement. On selling their cottage, they used part of the proceeds to pay off a secured advance and lent part to their daughter to buy a flat; and P. told C. what they had done. On Mar. 1, 1956, the plaintiffs moved to the defendants' house, taking some of their furniture with them. C. had in the meanwhile engaged a daily woman and bought a television set, as promised in the letter of Sept. 25, 1955, and he bought a car some time later. He also made a will leaving the house to the beneficiaries named in the letter. All the household expenses, except the rates, were shared. Mrs. P. did the greater part of the household work; P. did most of the gardening; and both the plaintiffs did the shopping. By the autumn of 1957, C. apparently began to regret the arrangement and told the plaintiffs that they would have to find some other place to live in. P. protested to C. Eventually, on Dec. 9, 1957, after continued unpleasantness on the part of C., the plaintiffs left the defendants' house, as an alternative, in their view, to being evicted. In an action against the defendants for damages for breach of contract,

Held: (i) there was a legal contract between the parties because in the circumstances it was shown that an arrangement binding in law was intended on both sides (principle in *Hammersley* v. *De Biel* (1845), 12 Cl. & Fin. at p. 78 applied), the letter of Sept. 25, 1955, was an offer and it indicated sufficiently that the duration of the agreement that the plaintiffs should live with the defendants should be the duration of the defendants' lives.

(ii) the letter of Sept. 25, 1955, was a sufficient memorandum or note of the contract for the purposes of s. 40 (1)* of the Law of Property Act, 1925, because a written offer was capable of being a good memorandum, within the meaning of s. 40 (1), although the agreement could not come into existence until after the offer had been accepted.

Smith v. *Neale* ((1857), 2 C.B.N.S. 67) and *Reuss* v. *Picksley* ((1866), L.R. 1 Exch. 342) applied.

Dictum of FRY, J., in *Munday* v. *Asprey* ((1880), 13 Ch.D. at p. 857) not followed.

(iii) the plaintiffs were, therefore, entitled to damages against the defendants for breach of contract; these damages were of two categories, viz., (a) damages in favour of the plaintiffs' jointly in respect of the value to them of living, rent-free, in part of the defendants' house, with the use of a car and a television set, and (b) damages in favour of Mrs. P. separately in respect of the value to her of her prospects of inheriting the defendants' house at their death (i.e., a third of the present value of the house, less certain deductions).

[As to the requirement that, in order to constitute a contract, the agreement was intended to be enforceable at law, see 8 HALSBURY'S LAWS (3rd Edn.) 54, para. 90, and note (a); and for cases on the subject, see 12 DIGEST (Repl.) 21, 22, *2-6*.

As to what constitutes a memorandum of a contract, see 8 HALSBURY'S LAWS (3rd Edn.) 94, para. 166; and for cases on the subject, see 12 DIGEST (Repl.) 148, *931-942*.

For the Law of Property Act, 1925, s. 40 (1), see 20 HALSBURY'S STATUTES (2nd Edn.) 500.]

Cases referred to:

Balfour v. *Balfour*, [1919] 2 K.B. 571; 88 L.J.K.B. 1054; 121 L.T. 346; 12 Digest (Repl.) 21, *3*.

*Section 40 (1) reads: " No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

A *Hammersley* v. *De Biel*, (1845), 12 Cl. & Fin. 45; 8 E.R. 1312; 12 Digest (Repl.) 146, *918*.

Munday v. *Asprey*, (1880), 13 Ch.D. 855; 49 L.J.Ch. 216; 42 L.T. 143; 12 Digest (Repl.) 146, *922*.

Reuss v. *Picksley*, (1866), L.R. 1 Exch. 342; 4 H. & C. 588; 35 L.J.Ex. 218; 15 L.T. 25; 12 Digest (Repl.) 173, *1129*.

B *Smith* v. *Neale*, (1857), 2 C.B.N.S. 67; 26 L.J.C.P. 143; 29 L.T.O.S. 93; 140 E.R. 337; 12 Digest (Repl.) 137, *851*.

Synge v. *Synge*, [1894] 1 Q.B. 466; 63 L.J.Q.B. 202; 70 L.T. 221; 58 J.P. 396; 12 Digest (Repl.) 388, *3017*.

Action.

In this action the plaintiffs, Dudley Alfred Parker and his wife Madeline
C Kate Parker, claimed damages against the defendants, Herbert Thomas Clark and his wife Jane Edith Constance Clark, for breach of a contract made between the parties in or about September, 1955.

By their statement of claim the plaintiffs alleged:

"1. In or about the month of September, 1955, it was agreed between
D the parties: (1) that the plaintiffs . . . should cease to occupy and should dispose of their interest in a dwelling-house known as 'The Thimble', Mayfield, in the county of Sussex; (2) that the plaintiffs . . . should occupy jointly with the defendants and reside at a dwelling-house owned by the defendants, known as 'Cramond' Torquay in the county of Devon (hereinafter called 'the premises') for the period of the lifetime of the survivor of
E the defendants; (3) that the parties should share between them the running costs of the said premises; (4) that the defendants should purchase a television set and a new car for the joint use of the parties; (5) that the defendants should make a valid and binding testamentary disposition giving the said premises and the contents thereof jointly to the female plaintiff, her daughter and sister.

F "2. Acting in pursuance of the said agreement and not otherwise the plaintiffs did in fact cease to occupy 'The Thimble' aforesaid and disposed of their interest therein for the sum of £3,900 and performed the obligations referred to in para. 1 (2) and (3) hereof and the defendants performed the obligations set out in para. 1 (4) hereof.

"3. In or about the month of October, 1957, the defendants . . . repudi-
G ated the said agreement by wrongfully and in breach of the said agreement giving the plaintiffs . . . notice to quit the said premises and determining the same and by failing and refusing to comply with the terms of para. 1 (5) hereof.

"4. The said repudiation was accepted by the plaintiffs on or about Dec. 9, 1957, by removing from the said premises; alternatively by a letter
H from the plaintiffs' solicitors to the defendants dated Aug. 20, 1958.

"5. By reason of the matters complained of, the plaintiffs . . . have suffered loss damage and expense and in particular have lost the value of the said premises 'Cramond' and the contents thereof."

By their amended defence, the defendants denied that they had made the alleged agreement, or any agreement with the plaintiffs, and, except for admitting
I that the plaintiffs resided at "Cramond" between March, 1956, and December, 1957, they denied all the plaintiffs' allegations and pleaded that the alleged damage was too remote to be recoverable at law. Further or in the alternative, they pleaded, in para. 4, that the alleged agreement was not in writing nor was there any or any sufficient note or memorandum in writing of the alleged agreement, as required by s. 40 (1) of the Law of Property Act, 1925. By para. 5 of the amended defence, they alleged that if, which was denied, they made the alleged agreement, the same was determined either by the plaintiffs, or, alternatively, pursuant to an express or implied agreement (to be implied from all the

circumstances) made in or about October, 1957, at "Cramond" between the first plaintiff and the first defendant.

The action came on for trial before DEVLIN, J., at Exeter Assizes, on Nov. 10 and 11, 1959, and HIS LORDSHIP delivered his reserved judgment at Bristol Assizes on Nov. 26, 1959. The facts are stated in the judgment.

C. L. Hawser, Q.C., and *Peter Lewis* for the plaintiffs.

H. E. Park for the defendants.

Cur. adv. vult.

Nov. 26. **DEVLIN, J.**, read the following judgment: The plaintiffs in this case are suing on an unusual sort of contract. They are a married couple and they are suing another married couple on an allegation that the defendants repudiated a contract whereunder the two couples were to share the running costs of the defendants' house and whereunder the defendants' house was to be left by will in a manner that benefited the plaintiffs and their relatives. Such contracts are not easily proved in fact, and, when proved, are likely to run into legal difficulties such as those that are created by s. 40 of the Law of Property Act, 1925. This is the case here. Fortunately the facts are clear. There is not much conflict of evidence and, where there is, I have no hesitation in preferring that of the plaintiffs and their witnesses. The defendants are very old and are not very reliable. The plaintiffs gave their evidence very satisfactorily. In all relevant matters they told the truth carefully, not only when they were narrating facts but also when they were giving evidence about their own states of mind.

Mr. Clark, the male defendant, is a retired civil servant who owns a house called "Cramond" in Torquay where he lives with his wife. In 1955 he was aged seventy-seven and his wife was seventy-eight years old. They have no children and live there alone. Mrs. Parker, the female plaintiff, is Mrs. Clark's niece. The Clarks have known her since she was a child and they have known Commander Parker, the male plaintiff, since the plaintiffs' marriage in 1925. Commander Parker has retired from the Navy and in 1955 the Parkers were living in a cottage called "The Thimble" at Mayfield in Sussex. They were on very friendly terms with the Clarks and visited them from time to time. Sometimes the invitations to visit the Clarks were in the nature of an S.O.S., for they were not in very good health and they had little or no domestic service. Cramond is a commodious house for a married couple. There is a hall, a large lounge, about thirty-five feet by twenty feet, a dining room, a very large kitchen, four bedrooms, a bathroom and a lavatory and a garage for two cars.

On Sept. 18, 1955, the Parkers were leaving Cramond after a visit which had lasted for two or three weeks. As they were departing, Mr. Clark made a sudden proposal to Commander Parker. He proposed that the Parkers should join forces and live with them. Commander Parker said that it was a big thing and required much study. Mr. Clark told him to think it over and he agreed that he would. Commander Parker assumed, although the word "permanent" was not used, that that was what was meant; the words used were: "Come and live with us". The Parkers thought it over and clearly liked the idea. Commander Parker was satisfied that it meant selling his cottage, The Thimble, which he owned; he was not prepared to let it and try to run the tenancy from Torquay. Accordingly, a very few days after the Parkers' return, Commander Parker wrote to Mr. Clark, in a letter which has not been preserved, pointing out the difficulty and saying that, if they came to live in Torquay, they would have to get rid of The Thimble. In reply, he received from Mr. Clark a letter, dated Sept. 25, which is of sufficient importance to set out in full:

"My dear Dudley,

Many thanks for your letter. The major difficulty re what is to happen to the 'Thimble' can be solved by our leaving 'Cramond' and its major

A contents (insured for £3,000 & £3,000) to Madeline, Mavis and Pamela when we both pass away and if you cannot maintain it they can sell out. Its present value is £9,000 to £12,000 without contents. Maintenance at present costs

B

Elect.	50	£203—4—8
Tele.	10	
Coal	21	
Rates	113–13–4	
Water	8–11–4	

My pension is £700 per annum and Connie has an annuity of £300 p.a. If I pass away Connie gets £300 widow's pension. This all disappears as
C we pass away. But I have some war loan out of which I pay income tax and eventually death duties.

The war loan goes to my surviving brother and sisters. If we go fifty-fifty on maintenance of house it would cost you half of the £200 odd as set out and half the running expense of food, drinks, etc. but I think it would be fair if your share of the £200 was the same as you now pay at the 'Thimble' if it is less than £200. I would pay for a daily woman four
D mornings a week, have a T.V. and a new car.

You could sell out and pay off your mortgage and invest proceeds to increase your income.

I hope your family vote for or against this will be unanimous.

B. & C."

E The Madeline who is referred to in this letter is the female plaintiff, Mavis is her sister and therefore also a niece of Mrs. Clark, and Pamela is the plaintiffs' daughter. Connie is Mrs. Clark.

On Sept. 30, 1955, Commander Parker replied in a letter which again has not been preserved; he wrote that he accepted Mr. Clark's generous offer. Adopting the words of Mr. Clark's final sentence, he said that the family vote was unani-
F mously in favour; and he said that he would dispose of The Thimble. The Parkers then proceeded to act on the arrangement. They put The Thimble up for sale and on Feb. 10, 1956, entered into a contract whereunder they sold the property for the sum of £3,900. £945 of this was used to pay off a secured advance to the bank, and out of the balance £2,000 was lent to their daughter Pamela in order to enable her to buy a flat at Amersham. Commander Parker
G told Mr. Clark what he had done. As he put it, he could not call in the loan without dispossessing his daughter. So it was or should have been apparent to Mr. Clark that by these transactions the Parkers had burnt their boats.

On Mar. 1, 1956, the Parkers moved to Cramond. They took with them enough furniture for the bedroom which they were to occupy and also a few other pieces; the rest was stored. They found when they got there that Mr. Clark
H had engaged a daily woman as he had promised and also had bought a television set. Shortly after their arrival, Mrs. Clark told Mrs. Parker that they had decided not to charge the Parkers with their share of the rates. Apart from this, all the household expenses were shared. Mrs. Clark, when she was able to do so, and Mrs. Parker ordered the food, and Commander Parker kept the household accounts, which he has produced. The daily maid came four or five times a
I week for four or five hours daily; otherwise the household work was done by Mrs. Clark and Mrs. Parker, I should imagine principally by Mrs. Parker. Although nothing had been said, the Parkers had assumed from the first, because they knew that the Clarks were not strong, that they would be expected to help them out; and I think it likely that they shouldered most of the work that had to be done. Every morning they served Mr. and Mrs. Clark with their breakfast. They did the shopping and paid the bills. Inside the house, Commander Parker was the handyman; he did interior painting, mended drains, painted the outside windows. Mrs. Parker did the sewing for some new curtains that were made up.

There was a garden of about half an acre and the Clarks had a man one day a week. Most of the rest of the gardening was done by Commander Parker, though Mr. Clark did a little.

By the time the Parkers arrived, Mr. Clark had not, as promised in the letter of Sept. 25, 1955, bought a new car. Within a week of their arrival he was taken ill. But when he was better he bought a new Hillman Minx. Neither of the Clarks drove, so that all the driving was done by Commander Parker. There were many journeys to the hospital when one or other of the Clarks was ill. Mr. Clark paid all the running expenses of the car except that when the Parkers used it for their own purposes they paid for the petrol.

About the time when he bought the car, Mr. Clark told Commander Parker that he would give the Parkers each £400 in order to save death duties on £800, but nothing came of this. Between June and August, 1956, Mr. Clark was ill again, and after his illness he told Commander Parker that the Hillman Minx was a luxury and that he proposed to lay it up and then sell it. Commander Parker said that this was unreasonable and reminded him of what he had said in the letter of Sept. 25.

At Christmas, 1956, a Miss Bainbridge, a distant relative of the Clarks, came to stay and her visit lasted for about three months until Easter. About this time Mr. Clark made a will. He did not go to a solicitor but made it out on a form which he bought. He says that he had never made a will before, though his intention had been to leave Cramond, after his wife died, to relatives on his own side of the family. But he made the will, he says, in accordance with his letter of Sept. 25, 1955, and left Cramond to the three beneficiaries there named, including Mrs. Parker. For some reason he destroyed this will but shortly after made another similar will. Commander Parker heard about this from Miss Bainbridge and told Mr. Clark that he thought that it was unsatisfactory that the will was made on a purchased form and without legal guidance and was not kept in a place of safety. Mr. Clark, in accordance with what appears to be his usual habit when remonstrances are addressed to him, said nothing; he is a man who does not like being involved in argument that might lead to unpleasantness.

In July, 1957, Mr. Clark told Commander Parker that he was considering selling Cramond. Commander Parker said that that would mean that they, the Parkers, would be without a home. Mr. Clark said nothing. It is clear that, at the latest, by the autumn of 1957, Mr. Clark had begun to regret the arrangement whereunder he had taken the Parkers into his home. He never gave any specific reason for this; but some time later, when Mrs. Parker questioned Mrs. Clark, she said that her husband felt that the house did not belong to him. I have no doubt that it was some general feeling of this sort, rather than any specific ground for complaint, that caused the attitude of the Clarks to change. When Mrs. Parker put the same question to Mr. Clark, he replied: "You have been enjoying yourselves and living rent free".

Matters first came to a head on Oct. 24, 1957, when, after another discussion about the car, Mr. Clark told Commander Parker that he thought that the partnership was not working and that the Parkers would have to find some other place to live in. I have no doubt at all that this came as a terrible shock to the Parkers and caused them great distress. Commander Parker protested strongly. What about the letter, he said; and what had they done to deserve such treatment? How could they leave Cramond; they had no home. To all of this Mr. Clark said nothing. Commander Parker was sufficiently disturbed to consult a solicitor. He did this on Nov. 1, 1957, and, as the result of the advice which he received, he asked Mr. Clark to put on paper that he had told them to leave Cramond. Mr. Clark replied that Cramond was not a common lodging house.

As the result of Mr. Clark's remark that the Parkers were enjoying themselves and living rent free, Commander Parker decided that he would make his contribution to the rates. He worked out that, if he paid the full half share, it would

A bring his total contribution up to more than he had been paying at The Thimble, which Mr. Clark had said in his letter of Sept. 25, 1955, was to be the limit of their contribution. Commander Parker calculated that the sum of £41 5s. 4d. would bring their contribution up to the limit and on Nov. 4, 1957, he tendered a cheque for that amount to Mr. Clark which Mr. Clark refused.

About the middle of November, 1957, Mr. Clark asked Commander Parker
B when they intended to leave. Commander Parker replied that they had no intention of leaving and that he would have to have them evicted. Mr. Clark said: " There are other ways of getting you out ". About this time, Mr. Clark offered to pay the Parkers their expenses incurred in leaving Cramond and finding another place to live in and said that for this purpose he would set aside £150. Commander Parker told Mr. Clark that he did not trust him and would not accept
C his offer. A little later Mr. Clark offered that, in addition to the £150, he would pay for the expenses which the Parkers had incurred in moving their furniture to Cramond as well as the expenses for taking it away, and Commander Parker refused that.

Commander Parker had spoken too rashly when he said that the Clarks would have to evict them. By the beginning of December, 1957, the Parkers found
D the atmosphere unbearable and they decided that they would have to leave. Commander Parker told Mrs. Clark that they would accept Mr. Clark's last offer. She gave them a cheque, apparently out of her own money, for £150, and he handed to her the bill which he had received for the furniture removal from Mayfield to Torquay and said that he would send the other bill when it arrived. On Dec. 9, 1957, the Parkers left Cramond. Although the atmosphere had been
E very strained at the end, they left in a friendly way. On Jan. 7, 1958, Commander Parker wrote a friendly letter to Mrs. Clark in which he sent the further bill for the furniture. There was no talk of any legal action, though Commander Parker described their situation as " anything but pleasant " and said that they felt very bitter over the loss of their cottage. The bills for the furniture removals were not discharged by the Clarks.

F No further action was taken by the plaintiffs until Aug. 20, 1958, when a solicitor's letter was sent to the defendants putting forward a claim substantially in the terms of the statement of claim in this action. No reply was received to it and on Nov. 13, 1958, the writ was issued. The plaintiffs were naturally questioned about this delay. They said that for some time after they left Cramond they felt too sick about the whole business to take any action. I believe this,
G and I gained the impression that they were genuinely distressed about these proceedings.

The relief claimed by the plaintiffs falls into two categories. It is accepted by both sides that, if there has been a breach of contract, the measure of damage is the value of that which the plaintiffs have lost by reason of the breach. The particulars of special damage set out in the statement of claim do not assist
H much in the assessment, for they specify chiefly costs incurred by the plaintiffs as the result of entering into the contract and as the result of its breach. The two categories are, first, the value to the plaintiffs of such benefits as are attributable to living at Cramond, and secondly, the value to the female plaintiff of the prospects of inheriting Cramond when the two defendants are dead. In the first category, the plaintiffs do not allege and have not proved that their
I share of the joint living expenses at Cramond was any less than their living expenses independently would have been. They do not rely on Mr. Clark's statement that he would not charge them rates as being contractually binding; and accordingly, as I have already said, the cost of their living at The Thimble was the ceiling over their contribution to the Cramond expenses. What they have lost consists, therefore, of the benefit of living at Cramond rent free and the value to them of the use of a car and a television set specially provided by Mr. Clark. The appropriate sum to cover these items is claimed by them as joint contractors.

In the second category the claim is for the estimated value of Cramond and its contents which is put in the statement of claim at £12,000. In fact, for the purposes of this action the value has been agreed as £13,000. But the whole of this amount cannot properly be claimed in the present action. By the terms of the letter of Sept. 25, 1955, the house and contents were to be left jointly to Mrs. Parker, her sister and her daughter (1). It may be that, if the plaintiffs were claiming as trustees and if they could establish that Mr. Clark's promised bequest was intended for the benefit of the sister and the daughter as well as an inducement to the Parkers, they could obtain judgment for the full value. But counsel for the plaintiffs eventually abandoned the argument that, on the pleadings as they stood, he could recover sums for the benefit of the sister and daughter. It follows, therefore, that the damages in this category cannot exceed one-third of the value of the house and contents. This is the figure which, less certain deductions which I shall consider later, is claimed by Mrs. Parker in her own right.

The contract relied on by the plaintiffs is said to be contained in the defendants' letter of Sept. 25 and Commander Parker's acceptance thereof. In this part of the case, since Mr. Clark and Commander Parker were the contractual protagonists, it is convenient to refer to them simply as plaintiff and defendant. The defendant's first submission in answer to the claim is that the letters, construed in the light of the surrounding circumstances, show no intention to enter into a legal relationship or to make a binding contract. No doubt a proposal between relatives to share a house and a promise to make a bequest of it may very well amount to no more than a family arrangement of the type considered in *Balfour* v. *Balfour* (2) which the courts will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in a will, can be the subject of a binding contract. The letter proposal has been considered chiefly in relation to marriage contracts. In *Synge* v. *Synge* (3) it was held that the defendant, who promised in writing, as part of the terms of the marriage, to leave a house and land to the plaintiff, had thereby entered into a binding contract. KAY, L.J., delivering the judgment of the Court of Appeal, quoted (4) the dictum of LORD LYNDHURST, L.C., in *Hammersley* v. *De Biel* (5), which is as follows:

> "... the principle of law, at least of equity, is this—that if a party holds out inducements to another to celebrate a marriage, and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a court of equity will take care that he is not disappointed, and will give effect to the proposal."

That is the principle which I apply here; and, indeed, a contract of marriage is not dissimilar to an agreement by two families to live together for the rest of their joint lives.

The question must, of course, depend on the intention of the parties to be inferred from the language which they use and from the circumstances in which they use it. On the plaintiff's side, I accept his evidence that he considered that he was making a binding contract. An important factor in this was that he disposed of his own residence. It does not matter for this purpose whether it was or was not a term of the contract that he should sell The Thimble; the important thing is that the contract required him to give up his occupation of The Thimble and that he was always quite clear, and made it quite clear, that he would not give up occupation unless he also gave up the ownership and parted with the property. He would not have done that, he says (and I believe it), unless he thought that he was securing another permanent home. There is

(1) See pp. 96, 97, ante. (2) [1919] 2 K.B. 571. (3) [1894] 1 Q.B. 466.
(4) [1894] 1 Q.B. at p. 469. (5) (1845), 12 Cl. & Fin. at p. 78.

A undoubtedly, in the arrangement a lack of formality on which counsel for the
defendants greatly relies. This, I think, is largely explained by the relationship
between the parties; it is easier to demand formal documents from a stranger
than it is from a relative and friend. It is clear that the plaintiff constantly
relied on the letter of Sept. 25, 1955, as a sort of title to his rights; he kept it and
referred to it whenever his rights were called in question. When, on Oct. 24,
B 1957, they were seriously threatened, he went forthwith and consulted a solicitor
(6). He is not, in my judgment, the sort of man who would " think up " a legal
action as an afterthought when he found that he was not getting what he wanted.

The plaintiff is not a moneyed man. On the strength of the defendant's
promise he, so to speak, put down £672 10s. That is the figure which is agreed
as the expense which he incurred in giving up The Thimble, on the assumption
C that he could re-purchase The Thimble or a cottage like it. In addition to
that, he tied up £2,000, so that he has never since been in a position to buy
another property like The Thimble and has never in fact bought one. The
defendant knew this and had plenty of time to reflect on it between Sept. 25,
1955, when he wrote his letter, and Mar. 1, 1956, when the plaintiffs arrived.
If he had thought that all that his letter involved was an amicable arrangement
D terminable at will, I cannot believe that he would not have enlightened the
plaintiff and, as a cautious man himself, have warned him against the folly of
what he was doing. I cannot believe either that the defendant really thought
that the law would leave him at liberty, if he so chose, to tell the plaintiffs when
they arrived that he had changed his mind, that they could take their furniture
away and that he was indifferent whether they found anywhere else to live or not.
E Yet this is what the defence means. The defendant gave several answers which
show that this was not really his state of mind. He said that the object of the
letter was to induce the plaintiffs to come to Cramond; and he agreed also that
he made the will in fulfilment of the promise. I am satisfied that an arrange-
ment binding in law was intended by both sides.

The defendants' second submission is that the agreement is not sufficiently
F clear in its terms to be capable of constituting a legal contract. No doubt, if
the letter had been drafted by a lawyer, he would have gone into much more
detail and would, for example, have specified how the running expenses were to
be determined and matters of that sort. An agreement of this kind, made in
general terms, requires good will and co-operation from both sides if it is to be
successfully worked. But it was, in fact, made to work for more than a year and
G a half, and the defendants fulfilled all its terms even to the point of the making
of a will to the required effect. Counsel for the defendants has not argued that
the contract was too imprecise in detail to be enforceable; but he contended that
two of the terms pleaded in the statement of claim were not sufficiently clearly
set out in the letter of Sept. 25, 1955. The former of these is the first pleaded
term which alleges that the plaintiffs should cease to occupy and should dispose of
H their interest in The Thimble (7). Counsel for the defendants argues that there
is nothing express or to be implied in the letter which requires the plaintiffs to
sell The Thimble. Counsel for the plaintiffs accepts this and agrees that the
only term to be implied from the letter about The Thimble is that the plaintiffs
should cease to occupy it. But the elimination of part of the term pleaded does
not affect the relief for which the plaintiffs are asking. The main consideration
I for the defendants' promise was that the plaintiffs should come and live at
Cramond. This they have done. It may be that the request was also dependent
on The Thimble being sold; but, if it was, they have done that also.

The second point raised by counsel for the defendants is on the second term
pleaded (8), and he submits that there is nothing in the letter specifying the period
for which Cramond was to be shared and, therefore, nothing which justifies the

(6) See p. 98, letter I, ante.
(7) See para. 1 (1) of the statement of claim at p. 95, letter D, ante.
(8) See para. 1 (2) of the statement of claim at p. 95, letter D, ante.

contention in the statement of claim that it was " the period of the lifetime of the survivor of the defendants ". On this view, no time being mentioned, the duration of the agreement would be subject to reasonable notice on either side. It is clear, I think, that it was intended as a long-term arrangement. But an agreement to last for life must be exceptional and would certainly be improbable in the case of two young couples. Here, however, the circumstances are unusual. The defendants were both nearly eighty years old, and, describing their condition in September, 1955, Mr. Clark said:

> " Both of us were in very bad health and neither of us thought we had much chance to live long."

Because the terms of the defendants' offer were generous, one must not overlook the benefits which they were receiving from the arrangement. It is not easy nowadays to secure domestic assistance, especially in times of illness; and for the defendants to have living with them permanently a couple twenty years younger, whom they believed to be congenial and who were obviously willing to help, was a great advantage and one for which at market rates they might have had to pay a great deal. I have already instanced the sort of things which the plaintiffs did. While there was no bargain about it, I am sure that the defendants expected this sort of help and that the plaintiffs thought it natural and right to give it. The defendants obviously wanted comfort and security for the rest of their lives which they believed to be short. It would not have been much of a bargain to them if it had left the plaintiffs free to give notice before the end; it might be then that the need for their help would be most great. In these circumstances there is, I think, sufficient in the language of the letter to indicate that the agreement was to be for the duration of the defendants' lives. In offering the bequest of Cramond to the three women the letter says (9): ". . . if you cannot maintain it they can sell out ". This shows, I think, that the defendants expected that at the time of their deaths the plaintiffs would still be in residence.

The third submission of counsel for the defendants is that s. 40 (1) of the Law of Property Act, 1925, has not been complied with, since the agreement was not in writing, nor was there any sufficient note or memorandum of it in writing. In fact, the whole agreement, which consists of the letter of Sept. 25, 1955, and of Commander Parker's reply to it, was originally in writing. Counsel for the plaintiffs submitted that oral evidence of a written acceptance would be sufficient to satisfy the requirements of the statute. But he did not pursue this argument, preferring to rely on a contention that a written offer which contained all the terms of the contract was a sufficient note or memorandum of it for the purposes of the statute and that the acceptance of the offer could be proved orally. Counsel for the defendants submitted that the memorandum was not a good one unless the agreement was in existence before it was signed. For this proposition he relied on *Munday* v. *Asprey* (10). In that case the purchaser's solicitors sent the engrossment of a conveyance to the vendor's solicitors together with a letter in which they sought an appointment for completion. Those documents were held not to be a sufficient memorandum, since they were only a statement of an expectation of a future contract. Counsel particularly relied on the following dictum of FRY, J. (11):

> " The statute requires that a concluded agreement existing at the time when the memorandum is signed should be proved by the plaintiff, whereas the document, as I have said, shows no actual existing agreement."

I think with great respect that, whether the case was rightly or wrongly decided, this dictum cannot be supported. It is contrary to a number of

(9) See p. 97, letter A, ante.
(10) (1880), 13 Ch.D. 855.
(11) (1880), 13 Ch.D. at p. 857.

A authorities—two of which, *Smith* v. *Neale* (12) and *Reuss* v. *Picksley* (13) were cited by counsel for the plaintiffs—which show that a written offer is capable of being a good memorandum although the agreement cannot come into existence until after the offer has been accepted. I agree that a document which contains no more than a statement of all the terms of a proposed agreement would not be enough; and it may be that that is the way in which an engrossment of a
B contract ought to be regarded. The memorandum must not only contain a statement of all the terms but its language must be such as to show an intention to contract. Counsel for the defendants submitted that the letter of Sept. 25, 1955, was not an offer but merely a statement of terms proposed for consideration. But I think that the letter was an offer and expressed as such; the concluding sentence of the letter satisfies me of that.

C The amended defence raises the plea that the plaintiffs themselves determined the agreement. This was not pursued by counsel for the defendants in argument and is contrary to the evidence which I have accepted. The plaintiffs did agree to leave the house—presumably, in their view, as an alternative to being evicted —in exchange for £150 and the promise of further payments for furniture removal. They maintain that by so doing they did not intend to prejudice their
D rights, and it has not been alleged that they did. In any event the further payments were never made.

Accordingly I am satisfied that there has been a breach of contract and that the plaintiffs are entitled to damages under the two heads which I have already particularised (14). Cramond is obviously a desirable and well-appointed house, since with its contents it is valued at £13,000, and I assess the benefit of
E living in part of it rent free together with the use of a car and a television set at £300 a year. I shall take a multiplier of four as representing the value as in December, 1957, of that sum. This multiplier is based on what cannot be much more than a guess about the expectation of life of the two defendants. But it need not be more than approximate since a discounting figure, also based on the same expectation of life, must be applied in order to value Mrs. Parker's
F prospects under the will. The value of those prospects must also be discounted by the fact that Mrs. Parker might have had to find a sum to pay death duties, and I must also allow for contingencies, such as that the house might be destroyed before the will took effect. Mr. Clark apparently contemplated finding the death duties from some other source and the house was in fact insured. But counsel for the plaintiffs admits that there was no legal obligation on Mr. Clark
G to do either of these things and that his doing them cannot be put higher than an expectation. Taking these matters into account, I value Mrs. Parker's prospects under the will as at today at £3,400. There will therefore be judgment for both plaintiffs jointly for £1,200 and costs, and for Mrs. Parker separately for £3,400.

Judgment for the plaintiffs.

Solicitors: *Shelton, Cobb & Co.* (for the plaintiffs); *Pennington & Son*, agents for *Hooper & Wollen*, Torquay (for the defendants).

[*Reported by* DEIRDRE MCKINNEY, *Barrister-at-Law.*]

---

(12) (1857), 2 C.B.N.S. 67.
(13) (1866), L.R. 1 Exch. 342.
(14) See p. 99, letter H, ante.

TAB 10

Elpis Maritime Co Ltd v Marti Chartering Co Inc
The Maria D

HOUSE OF LORDS

LORD KEITH OF KINKEL, LORD BRANDON OF OAKBROOK, LORD ACKNER, LORD OLIVER OF AYLMERTON AND LORD LOWRY

19, 20 JUNE, 24 JULY 1991

Guarantee – Note or memorandum of agreement in writing – Effect of guarantor's signature – Guarantor's intention or capacity – Charterparty – Charterers' brokers orally agreeing to provide guarantee of charterers' liabilities – Charterparty incorporating terms of prior oral agreement – Brokers signing first page of charterparty as agents of charterers and signing page containing guarantee without qualification – Whether charterparty providing sufficient note or memorandum of guarantee – Whether brokers' intention or capacity in signing charterparty relevant to enforceability of guarantee – Whether owners entitled to claim against brokers on guarantee – Statute of Frauds (1677), s 4.

The appellant owners chartered their ship to the charterers for the carriage of a cargo of wheat from Turkey to Algeria. The charterparty was negotiated through brokers on either side and negotiations were carried out partly by telephone and partly by telex. During the course of the negotiations the charterers' agents (the respondents) agreed by telephone to guarantee certain of the charterers' liabilities for demurrage and freight under the charterparty. Their agreement to do so was recorded in an exchange of telexes between the agents. The written charterparty as finally concluded was on the Gencon standard form but expressly incorporated six pages of additional clauses, one of which, cl 24, provided that the respondents guaranteed payment of outstanding demurrage, if any, and the balance of freight owing by the charterers. The front sheet containing the basic terms of the charter and the incorporation of the additional clauses was signed by the appellants as principals and by the respondents 'for and on behalf of Charterers as Brokers only'. The pages containing the additional clauses were signed or initialled for the appellants and signed for the respondents without any indication that they were signing as brokers for the charterers only. At the end of the last page there appeared a stamp and signature of the appellants with the word 'owners' typed above and a stamp and signature for the respondents with the word 'charterers' typed above. After the ship had completed her voyage and discharged her cargo the appellants presented a final freight statement to the charterers who failed to pay. The appellants brought an action against the respondents as guarantors of the charterers' obligation to pay demurrage and balance of freight and sought summary judgment under RSC Ord 14. The respondents contended that the guarantee was not sufficiently evidenced to satisfy the requirements of s 4[a] of the Statute of Frauds (1677). The judge held that cl 24 provided a sufficient note or memorandum on which the appellants could sue and he gave summary judgment for part of the sum claimed while giving unconditional leave to defend in respect of a disputed amount of demurrage. On appeal by the respondents against the order for summary judgment the Court of Appeal held that since there was a

a Section 4 is set out at p 762 *b c*, post doubt whether the respondents had signed the charterparty as a contracting party or only in an agency capacity summary judgment could not be justified. The court accordingly gave unconditional leave to defend. The appellants appealed to the House of Lords.

Held – A contract of guarantee could be made enforceable under s 4 of the Statute of Frauds either by having a written agreement signed by the guarantor or his agent or by having a note or memorandum of the agreement, which could be oral, signed by the guarantor or his agent. In the latter case the intention or capacity of the person signing the memorandum was irrelevant since all that was necessary under s 4 was the existence of a note or memorandum of a promise to answer for the debt, default or miscarriages of another person signed by the party to be charged. On the assumption that the respondents had signed the page of the charterparty containing cl 24 as a contracting party the prior oral agreement of guarantee was subsumed into the written agreement containing cl 24 which had been signed by the respondents on their own account and the appellants could enforce that agreement directly under the Statute of Frauds. Alternatively, on the assumption that the respondents had signed the charterparty, including the page containing cl 24, solely as agents for the charterers, nevertheless the page containing cl 24 was a sufficient note or memorandum of the prior oral agreement of guarantee signed by the party to be charged, since cl 24 contained all the terms of the prior oral agreement of guarantee and the respondents' signature was affixed to the page containing that clause, and it was therefore enforceable against the respondents regardless of their intention or capacity in affixing their signature to the charterparty. It followed that in either case the respondents were liable under the guarantee and had no arguable defence to the appellants' claim. The appellants were accordingly entitled to summary judgment for the amount claimed. The appeal would therefore be allowed (see p 760 *c*, p 762 *d* and p 765 *h* to p 766 *c g* to p 767 *e*, post).

Re Hoyle, Hoyle v Hoyle [1893] 1 Ch 84 applied.

Young v Schuler (1883) 11 QBD 651 distinguished.

Notes

For the necessity for written evidence of a guarantee, see 20 *Halsbury's Laws* (4th edn) para 119, and for cases on the subject, see 12 *Digest* (Repl) 163–202, *948–1284*.

For the Statute of Frauds (1677), s 4, see 11 *Halsbury's Statutes* (4th edn) 205.

Cases referred to in opinions

Hoyle, Re, Hoyle v Hoyle [1893] 1 Ch 84, CA.

Young v Schuler (1883) 11 QBD 651, DC and CA.

Appeal

Elpis Maritime Co Ltd, the owners of the vessel The Maria D, appealed with leave of the Appeal Committee of the House of Lords given on 19 February 1991 from the decision of the Court of Appeal (Parker and Bingham LJJ) ([1990] CA Transcript 891) on 31 October 1990 allowing the appeal of the respondents, Marti Chartering Co Inc (Marti), from so much of the decision of Saville J given on 12 March 1990 as gave summary judgment for the owners against Marti for a substantial part of the owners' claim under a guarantee entered into between the owners and Marti of certain obligations arising in connection with a charterparty dated 27 October 1988 between the owners and Okan Dis Ticaret AS (the charterers), for whom Marti acted as brokers. The facts are set out in the opinion of Lord Brandon. *a*

Bernard Rix QC and *Duncan Matthews* (instructed by *Richards Butler*) for the owners.
Gabriel Moss QC and *David G M Marks* (instructed by *Stephenson Harwood*) for Marti. *b*

Their Lordships took time for consideration.

24 July 1991. The following opinions were delivered.

LORD KEITH OF KINKEL. My Lords, I have had the opportunity of *c* considering in draft the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives would allow this appeal.

LORD BRANDON OF OAKBROOK. My Lords, this appeal is concerned with the enforceability by the appellants (the owners) against the respondents *d* (Marti) of a contract of guarantee associated with a charterparty dated 27 October 1988 made between the owners and Okan Dis Ticaret AS (the charterers). The matter came first before Saville J in an action brought by the owners against Marti in the Commercial Court. The owners applied for summary judgment for $US175,533·10 under the contract of guarantee concerned. Marti, while admitting the contract of guarantee, contended that it was unenforceable by reason of s 4 of *e* the Statute of Frauds (1677). They further contended that, even if the contract of guarantee was enforceable, the amount due under it was no more than $US144,820·59. Saville J held that the requirements of s 4 of the 1677 Act were satisfied, so that the contract of guarantee was enforceable, and by order dated 21 March 1990 gave summary judgment for the owners against Marti for *f* $US144,820·59 with interest, and leave to Marti to defend as to the balance of the claim. Marti appealed to the Court of Appeal (Parker and Bingham LJJ) against so much of Saville J's order as gave the owners summary judgment for $US144,820·59. That court held that it was not clear that the requirements of s 4 were satisfied, so that the contract of guarantee might be unenforceable, and accordingly by order dated 31 October 1990 allowed the appeal and set aside the *g* relevant part of Saville J's order. The owners now bring a further appeal to your Lordships' House by leave of the House, seeking to have the order of the Court of Appeal set aside and the relevant part of Saville J's order restored.

The material facts, which are not in dispute, are as follows. By the charterparty dated 27 October 1988 referred to earlier the owners chartered their mv Maria D (the ship) to the charterers for a voyage from one safe berth Izmir, Turkey, to one *h* safe port in Algeria for the carriage of a cargo of wheat. The charterparty was negotiated through brokers on either side, Tramp Maritime Co Ltd (Tramp) on behalf of the owners and Marti on behalf of the charterers.

Negotiations for the charterparty were carried out partly by telephone and partly by telex. The terms agreed upon included provisions relating to demurrage and freight, the latter to be payable as to 95% within four banking days after the *j* signing of bills of lading but in any case before breaking bulk, and as to the balance upon final settlement of demurrage and despatch at the loading and discharging ports.

During the course of negotiations Tramp insisted that Marti should themselves provide a guarantee, initially only in respect of the charterers' liability for demurrage. Mr Mufit Atala, the general manager of Marti, agreed to this on behalf of Marti in a telephone conversation with Mr Dimitris Zafeiriou on behalf of Tramp. The agreement was confirmed in a telex from Tramp to Marti sent at 1213 hrs on 26 October 1988, in which there appears the provision 'demm guaranteed and payable by chrtrs to owner at bends however Marti to guarantee abt outstanding demm if any directly to owners'. No objection was taken to this provision in Marti's telex in reply sent at 1457 hrs on the same day. The scope of the guarantee was subsequently extended to include the 5% balance of freight. That extension was agreed in the course of a further telephone conversation between Mr Zafeiriou for Tramp and Mr Atala for Marti. Mr Atala agreed to this extension of the guarantee because he had the impression that unless he did so there would be no deal.

The written charterparty, as finally concluded, was on the Gencon standard form. It consisted of a front sheet, described as Part I, containing on its face 21 boxes with printed headings, in which there were typed the basic terms of the charter. That sheet was followed by a second sheet, described as Part II, containing partly on its face and partly on its reverse side printed clauses numbered 1 to 17, many of which were struck out in whole or in part. There then followed a further three sheets containing six pages of additional clauses numbered 18 to 55. These clauses were expressly incorporated into the charter by words typed in box 21 on the face of the front sheet.

The front sheet was stamped and signed for the owners as principals. It was also stamped and signed for Marti with the following words typed above the stamp and signature: 'For and on behalf of Charterers as Brokers only'. On all the succeeding pages except the last there appeared either a signature of initials for the owners but without any stamp, and a stamp and signature for Marti but without any words indicating that they were put there by Marti as brokers for charterers only. At the end of the last page there appeared a stamp and signature for owners with the word 'Owners' typed above them, and a stamp and signature for Marti with the word 'Charterers' typed above them.

Clause 24 of the charterparty, which was on the second page of the additional typed clauses, provided:

> 'Owners to pay charterers dispatch at half demurrage rate working time saved at both ends. Dispatch may be deducted from balance freight. Demurrage guaranteed and payable directly by charterers to owners. *However Marti guarantees about outstanding demurrage, if any, and for balance freight.*' (My emphasis).

Clause 40 provided for payment of freight in two stages of 95% and 5% as indicated earlier and cl 53 provided:

> 'Charterers guarantee that demurrage at disch port will be paid within latest 30 days after presentation of time sheets and statement of facts for discharging port by owners. Load port despatch to be settled together with balance freight.'

The ship berthed and loaded at Izmir in November 1988. She then proceeded to Algeria, berthed at Oran and completed her discharge on 16 January 1989. On 20 January 1989 time sheets and statements of facts concerning the discharging port were presented by the owners to the charterers through the brokers, together with a final freight statement, showing $US175,533·10 as due to the owners in respect of demurrage and final freight. No part of this sum was paid by the charterers in due time or at all, in consequence of which the owners brought arbitration proceedings against the charterers. By an award dated 26 June 1990 the arbitration tribunal awarded the owners the full amount of their claim, namely $US175,533·10, with interest and costs. No part of that award having been paid by the charterers to the owners, the later brought the action against Marti in the Commercial Court out of which this appeal arises.

Section 4 of the Statute of Frauds provides so far as material:

> 'noe action shall be brought whereby to charge the defendant upon any speciall promise to answere for the debt, default or miscarriages of another person unlesse the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.'

It is to be observed that s 4 prescribes two separate ways in which a contract of guarantee may be made enforceable. The first way is by having a written agreement signed by the party to be charged or his agent. The second way is by having a note or memorandum of the agreement similarly signed. In the latter case the agreement itself may be oral. The distinction between these two ways of achieving enforceability is of great importance in the present case.

According to a note of the judgment of Saville J approved by him he dealt with the question of the enforceability of the contract of guarantee as follows:

> 'It seems to me there is a note or memorandum of the guarantee on which the plaintiffs sue in the form of clause 24. The opening page of the charter is indeed signed by Marti "for and on behalf of charterers as broker only" but the typed page including clause 24 is signed without qualification so that when one looks at the charterparty as a whole and their signature on that page they were also signing unconditionally on their own behalf as well as on behalf of their principals, the charterers.'

The Court of Appeal, in reversing the decision of Saville J on the question of enforceability, founded itself mainly on an earlier decision of that court, *Young v Schuler* (1883) 11 QBD 651. Counsel for the owners invited your Lordships to hold that the Court of Appeal misunderstood that earlier decision, and that, on a proper interpretation of it, the present case was plainly distinguishable from it. It therefore becomes necessary to examine *Young v Schuler* in order to see what were the nature and basis of the decision in it.

The facts of that case were these. By articles of agreement under seal Henry Young & Co agreed to do certain work for which John Abrahams & Co were to make certain payments to them. The agreement also contained this clause:

> 'It is further understood between the parties to this contract that the aforesaid J. Otto Schuler guarantees payment to the said H. Young & Co. of all moneys due to them under this contract.'

Schuler executed the articles of agreement in the name and on behalf of John Abrahams & Co under a power of attorney which he had from them. The relevant words of execution were 'Signed and delivered by the said John Abrahams & Co.' with this signature opposite to them 'P.P.A. John Abrahams & Co., J. Otto Schuler'.

John Abrahams & Co having failed to pay Henry Young & Co the moneys due under the contract, the latter sued Schuler for them as guarantor. Schuler, by his statement of defence, denied having guaranteed the payment of any sum to the plaintiffs. At the trial evidence was given of statements made by Schuler at the time of execution of the agreement clearly showing that he intended to sign on his own behalf as well as on that of John Abrahams & Co. The jury found for Henry Young & Co and gave a verdict for £994.

Counsel for Schuler applied to a Divisional Court of the Queen's Bench Division for a new trial on the ground that on the face of the agreement Schuler had not signed on his own behalf, and that evidence was not admissible to show that he had. The application was refused by the Divisional Court. Grove J said that, even without the evidence of the statements made by Schuler at the time of execution, the right conclusion was that Schuler signed in a dual capacity, first, as agent for John Abrahams & Co and, secondly, as guarantor (see 11 QBD 651 at 653–654). He further said that the evidence of the statements made by Schuler at the time of execution was admissible to resolve any ambiguity which there might otherwise be as to the capacities in which he signed. Grove J made no reference to s 4 of the Statute of Frauds. The second member of the court, Manisty J, did refer to s 4, saying that he agreed that there was a sufficient note or memorandum signed by Schuler to satisfy its requirements (see 11 QBD 651 at 654). Then, having quoted s 4, he said that the question was, first, was there a contract, and, secondly, was there a note in writing sufficient to satisfy the statute. Finally he said that assuming the evidence of Schuler's statements to be admissible, which he thought that it was, it clearly showed that Schuler intended to bind himself, and he must be taken to have signed with that intention.

The decision of the Divisional Court was affirmed by the Court of Appeal. Brett MR said (11 QBD 651 at 654–655):

> 'If there is here a signature by Schuler as a contracting party, then an effectual guarantee has been given by him. The question then simply is, did he sign as a contracting party? Looking at the document alone this is doubtful, and if there were no evidence on the subject I should say that Schuler signed for Abrahams & Co. But the questions whether a person has signed his name at the foot of a document, and if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible. Here is a signature by Schuler, which may, as it seems to me, without contradicting the document, be taken as a double signature; a signature on his own behalf and also as agent for Abrahams & Co. Evidence then is given of such admissions made by him at the time as plainly show that he intended it to be a double signature. This evidence does not contradict anything on the face of the document, and is, in my opinion, clearly admissible. The application, therefore, must be refused.'

Cotton LJ said (at 655):

> 'I am of the same opinion. A verdict has been found against the appellant as having signed a guarantee. The contract is between the plaintiffs and Abrahams & Co.; but it contains what purports to be a guarantee by Schuler. Schuler signs the contract "P.P.A. John Abrahams & Co., J. O. Schuler," and there is evidence that he signed with the intention of binding himself. Primâ facie he would be taken to have signed only for Abrahams & Co.; but evidence that he intended to sign in both capacities, in his own right and as attorney for Abrahams & Co., does not contradict the document, and is admissible. I am of opinion, therefore, that he must be taken to have signed in both capacities.'

Bowen LJ said that he was of the same opinion (at 655).

In view of the contention of counsel for the owners that the Court of Appeal in the present case misunderstood *Young v Schuler*, it is necessary to examine the way in which that court first interpreted and then applied that decision. So far as interpretation of the decision is concerned Bingham LJ, with whom Parker LJ agreed, said ([1990] (A Transcript 891):

> 'The question which arose in the action was: had Mr Schuler's signature satisfied the Statute of Frauds so as to make him personally chargeable as a guarantor.'

Bingham LJ also said:

> 'The upshot of the Court of Appeal decision therefore was that the beneficiary of the guarantee succeeded because there was extrinsic evidence of Mr Schuler's intention when he affixed his signature, and would not otherwise have succeeded.'

So far as the application of the decision is concerned Bingham LJ said:

> 'So, in the light of that authority, one turns to the facts here. On the front page of the charterparty it seems plain that Marti were acting as pure agents and qualifying their signature in such a way as to make that clear. In respect of the succeeding pages, it is necessary to ask the question which [Brett MR] posed in *Young v Schuler* (1883) 11 QBD 651 at 645—did they sign as a contracting party? The correct answer to that question might be that so far as the page is concerned on which cl 24 appeared Marti were verifying as brokers that the terms set out on the page were the terms that they had agreed, and for that purpose their signature was not a purely agency signature. I remind myself, however, that this is an application for summary judgment under RSC Ord 14 and one can only sustain the order which the judge made if it is clear beyond serious argument that that is the correct view. I do not for my part think that that conclusion is sufficiently clear for Ord 14 purposes, since on the last page of the charterparty under the heading "Charterers" Marti's unqualified signature would appear to be affixed in an agency capacity and it is difficult to suppose that their signing on the preceding pages was in any other capacity. Accordingly, as at present advised, it would appear to me that there is an arguable question and one on which it may be that evidence would be relevant.'

Bingham LJ concluded, in view of his doubt with regard to the capacity in which Marti signed the page of the charterparty which included cl 24, that the case was not one in which summary judgment under RSC Ord 14 could be justified.

I agree with what Bingham LJ described as the upshot of the Court of Appeal's decision in *Young v Schuler*. With great respect, however, I am unable to agree with his prior statement that the question which arose was whether Schuler's signature satisfied the Statute of Frauds so as to make him personally chargeable as a guarantor. On the contrary, I am of opinion that the case did not turn on any question relating to the Statute of Frauds at all.

The question which arose in *Young v Schuler*, as appears from the passage in the judgment of Brett MR quoted earlier, was whether Schuler was a party to the articles of agreement concerned, and in that connection whether extrinsic evidence of his intention when signing was admissible to show that he signed not only as agent of John Abrahams & Co but also for himself. There were two possibilities. If Schuler signed only as agent for John Abrahams & Co and not also for himself, there was no contract of any kind between Schuler and Henry Young & Co upon which the latter could sue, and no question of enforceability under s 4 of the Statute of Frauds could possibly arise. On the other hand, if Schuler signed both as agent for John Abrahams & Co and also for himself, the articles of agreement, in so far as they contained a guarantee by Schuler of the liabilities of John Abrahams & Co, constituted an agreement in writing signed by him. Such an agreement plainly came within the first way of achieving enforceability under s 4 of the Statute of Frauds, and no arguable question whether it did so or not could arise. The decision of the Court of Appeal was that extrinsic evidence of Schuler's intention when signing the articles of agreement was admissible, and that, having regard to that evidence, Schuler had signed as a contracting party.

Of the five judges who dealt with the case, Grove and Manisty JJ in the Divisional Court, and Brett MR, Cotton and Bowen LJJ in the Court of Appeal, four made no reference whatever in their judgments to s 4 of the Statute of Frauds or any question arising in relation to it. The only judge who made such a reference in his judgment was Manisty J and I find it extremely difficult to understand why he did so. In the result, however, it is clear beyond doubt that the Court of Appeal did not regard enforceability under s 4 as posing any question for its decision.

The present case differs fundamentally from *Young v Schuler*, in that it is not in dispute that there was an oral contract by which Marti guaranteed the liabilities of the charterers in respect of demurrage and balance of freight, such contract having been made in the course of conversations on the telephone between Mr Zafeiriou of Tramp and Mr Atala of Marti before the charterparty was signed. The evidence from Marti further showed that, without Marti's agreement to the giving of that guarantee, it is likely that no charterparty would have come into being.

My Lords, it is standard practice, when two brokers, acting on behalf of their respective principals, negotiate by telephone or telex or both, the terms on which a ship is to be chartered, and terms are fully agreed, for those terms to be embodied in a written charterparty in which they are subsumed. It seems to me to be clear that Tramp and Marti intended to follow this standard practice in the present case, not only in respect of the terms of the main contract between the owner and the charterers, but also in respect of the terms of the collateral contract of guarantee between the owners and Marti. The question is, however, whether, so far as the collateral contract of guarantee between the owners and Marti is concerned, the two brokers achieved the result intended. That question arises because Marti have raised what the Court of Appeal regarded, rightly in my view, as an arguable case, that all the signatures affixed by Marti to the pages of the charterparty, including the page containing cl 24, were affixed by them solely as agents of the charterers and not also for themselves as a contracting party.

In these circumstances it is necessary, in order to decide whether the owners can enforce the agreement of guarantee against Marti, to consider that question on two alternative assumptions. The first assumption is that Marti affixed their signature to the page of the charterparty containing cl 24 as a contracting party. The second and alternative assumption is that every signature affixed by Marti to the charterparty, including the signature on the page containing cl 24, was affixed by them solely as agents for the charterers.

I consider the case, first, on the assumption that Marti signed the page of the charterparty containing cl 24 as a contracting party. On that assumption, the prior oral agreement of guarantee was subsumed in the written agreement contained in cl 24. The latter agreement, moreover, was signed by Marti on their own account. In the result there was, on the first assumption, a written agreement of guarantee signed by the party to be charged therewith, so as to render that agreement enforceable by the owners against Marti in the first of the two ways of achieving enforceability prescribed by s 4 of the Statute of Frauds.

I consider the case, secondly, on the alternative assumption that every signature affixed to the charterparty by Marti, including that on the page containing cl 24, was affixed by them solely as agents for the charterers. On that assumption, Marti were not parties to the charterparty at all, and the prior oral agreement of guarantee between the owners and Marti was never subsumed in cl 24 of the charterparty but remained intact as when it was first made. The question then arises whether cl 24 of the charterparty constituted a memorandum or note of that prior oral agreement signed by Marti, so as to make that agreement enforceable by the owners against Marti in the second of the two ways of achieving enforceability prescribed by s 4.

My Lords, there were cited to your Lordships in the course of argument a considerable number of cases in which the courts have had to consider and decide what does or does not constitute a sufficient memorandum or note of an agreement of guarantee signed by the party to be charged for the purposes of s 4. I do not propose, however, to refer to more than one of those cases, *Re Hoyle, Hoyle v Hoyle* [1893] 1 Ch 84, in which it seems to me that the basic principle relevant to the present case was shortly and in my view correctly explained by A L Smith LJ. He said (at 100):

> 'The statute enacts that no action shall be brought upon a promise of a certain description unless there is a note or memorandum thereof signed by the party to be charged. A letter to a third party has been held enough; an affidavit made in a different matter has been held to suffice; and I should say that an entry in a man's diary, if it were signed by him and the contents were sufficient, would do. The question is not what is the intention of the person signing the memorandum, but is one of fact, viz., is there a note or memorandum of the promise signed by the party to be charged? Here the testator by his will, which he signs, recites the guarantee sued on. The contents of the statement are sufficient, and why is this not a memorandum in writing signed by a party to be charged? I say that it is.'

I would refer also to similar statements of principle made by Lindley LJ (see [1893] 1 Ch 84 at 98).

Applying the statements of principle made in *Re Hoyle* above to the present case, it seems to me to be wholly irrelevant, in relation to the question which I am now considering, with what intention, or in what capacity, Marti signed the page in the charterparty containing cl 24, whether as agents for the charterers only or for themselves as well. Clause 24 contained all the terms of the prior oral agreement of guarantee and Marti's signature was affixed to the page containing that clause. On those facts the page of the charterparty concerned contained, in my opinion, a sufficient memorandum or note of the prior oral agreement of guarantee signed by the party to be charged, so as to satisfy the second requirement for achieving enforceability prescribed by s 4. It follows from what I have said that I consider, with great respect to the Court of Appeal, that they were in error in treating the issue of the intention with which, or the capacity in which, Marti signed the page of the charterparty concerned, as relevant to, let alone decisive of, the question whether that page contained a sufficient memorandum or note of the prior oral agreement signed by Marti, so as to make that agreement enforceable in the second of the two ways prescribed by s 4.

As will be apparent, the conclusion which I have reached is that it makes no difference to the question of enforceability under s 4 whether one makes the first or the second of the two assumptions referred to and discussed above. On either of the two assumptions the result is that there was an agreement of guarantee between the owners and Marti which satisfied the requirements for enforceability prescribed by s 4. On the first assumption there was an agreement in writing signed by Marti. On the second assumption there was an oral agreement of which there was a sufficient memorandum or note signed by Marti.

Since the owners were bound to succeed on the question of enforceability either on the one assumption or on the other, Marti had no arguable defence to the owners' claim for $US144,820·59. It follows that the owners were entitled to summary judgment for that sum with interest under RSC Ord 14.

My Lords, for the reasons which I have given I would allow the appeal, set aside the order of the Court of Appeal dated 31 October 1990 and restore the relevant part of the order of Saville J dated 21 March 1990.

LORD ACKNER. My Lords, I have had the opportunity of considering in draft the speech prepared by my noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives I, too, would allow this appeal.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brandon of Oakbrook, I agree with it, and for the reasons he gives I would allow the appeal.

LORD LOWRY. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Brandon of Oakbrook, and for the reasons he gives I would allow the appeal and concur in the order which he proposes.

Appeal allowed.

Mary Rose Plummer Barrister.