

FOLL. at 12-80 W.N. 149

~~3 F.L.A. 452~~

FOLL. 1960 QSR. 26

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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

NEILL AND ANOTHER APPELLANTS ;
PLAINTIFFS,

AND

HEWENS AND ANOTHER RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Contract—Statute of Frauds—Note or memorandum—Signature—Sale of land H. C. OF A.
—Executors as vendors—Contract signed by one only—Names of both typed 1953.
at commencement—Sufficiency of signature—Conveyancing Acts 1919-1943
(N.S.W.) (No. 6 of 1919—No. 29 of 1943), ss. 54A, 153.

Executors and administrators—Rights, powers and duties—Power to sell land—
Contract signed by one of two executors—Direction in will to convert—Whether
binding on estate—Enforceability of contract.
SYDNEY,
Dec. 7, 8, 15.
Dixon C.J.,
Williams,
Webb, Fullagar
and
Taylor JJ.

H. and B. were executors of a will disposing of certain land. A document in the form of a contract for the sale of the land to E. and A. was prepared by a solicitor then acting for H. The document was signed by E. and A. in the space provided following the printed words "Signature of purchaser". B. had also signed in a space following the words "Signature of vendor". H. refused to sign the document, alleging that his consent to the sale was conditional upon the purchasers contracting to resell part of the land to his brother. No such condition appeared in the document prepared by H.'s then solicitor nor was it proved at the hearing of the suit. The document commenced: "Conditions and Terms of Sale for the undermentioned Property. Sold by private treaty on the . . . day of . . . 1947 by Elizabeth Catherine Bradford and James Richard Hewens". In a suit by E. and A. for specific performance of the terms and conditions contained in the document,

Held, that as the evidence showed that all the parties were intended to sign the document before a completed contract was made the document did not come into being as a perfect instrument so as to permit of the vendors' names

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in typewriting at the commencement of the conditions of sale being regarded as a signature for the purpose of satisfying s. 54A of the *Conveyancing Acts* 1919-1943 (N.S.W.).

H. was appointed executor and trustee of a will which contained a direction to the executor to convert the estate into money. By a codicil B. was appointed "an additional executor". A form of contract had been prepared for the sale of certain real estate, part of the assets of the estate, to E. and A. It had been signed by E. and A. as purchasers, and B. as vendor, but H. refused to sign it. In a suit for specific performance brought by E. and A.,

Held, that the direction to convert could not be carried out by B. alone; consequently, B. alone could not bind the estate to a contract to sell the land and there was no enforceable contract.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.): *Neill v. Hewens* (1952) 53 S.R. (N.S.W.) 113; 70 W.N. 11, affirmed.

APPEAL from the Supreme Court of New South Wales.

In a suit brought by way of statement of claim, as amended, in the equitable jurisdiction of the Supreme Court of New South Wales against Richard James Hewens and Elizabeth Catherine Bradford, the plaintiffs, Asen Stanley Ernest Neill and Eric Andrew Neill, alleged, so far as material, that:—

1. At the time of his death the testator, James Gurney, of Brombin, New South Wales, was seized and possessed of certain land for an estate in fee simple.

2. By his will dated 7th July 1939 the testator duly made and executed his last will and testament whereby he appointed the defendant Hewens to be the executor and trustee of his said will and directed that the whole of his estate be converted into money and distributed in the manner set out therein.

3. On 21st February 1941 the testator made and executed a codicil to his said will and testament whereby he appointed the defendant Elizabeth Catherine Bradford "as an additional executor to my will".

4. The testator died on 15th June 1942 and probate of his will and codicil was duly granted to both the defendants.

5. "By an agreement in writing made by and between the defendants of the one part and the plaintiffs of the other part the defendants as the executors of the aforesaid will and codicil of the said testator agreed to sell to the plaintiffs and the plaintiffs agreed to buy from the defendants the "said land" for the sum of seven hundred and seventy-five pounds payable as to one hundred pounds thereof on the signing of the said agreement and as to the balance thereof by cash on completion of the said agreement".

6. "The said agreement was on or about" 5th May 1947 "duly signed by the defendant Richard James Hewens as such executor as aforesaid and by the plaintiffs".

7. "The said agreement was on or about" 16th June 1947 "duly signed by the defendant Elizabeth Catherine Bradford as such executrix as aforesaid and with the knowledge and consent and at the request of the defendant" Hewens.

8. "The plaintiffs duly paid to the defendants upon" 5th May 1947 "in accordance with the terms of the said agreement the sum of one hundred pounds".

9. "On or about" 19th January 1948 "the defendant" Bradford "duly executed as such executrix as aforesaid transfers of the aforesaid property to the plaintiffs".

10. "On or about" 17th February 1948 "the plaintiffs tendered to the defendant" Hewens "for execution by him transfers of the aforesaid property duly executed by the defendant" Bradford.

11. "Since" 16th June 1947 "the plaintiffs have repeatedly requested the defendant" Hewens "as such executor as aforesaid to carry out the said agreement but the defendant has refused and neglected and still refuses and neglects to do so".

The plaintiffs claimed, *inter alia*: (a) a declaration that the said agreement ought to be specifically performed and carried into execution; (b) alternatively, (i) a declaration that the defendant Bradford was and is alone competent to perform the agreement and to transfer the property to the plaintiffs, and (ii) that she be decreed specifically to perform the agreement on her part and to transfer the property to the plaintiffs.

The defendant Bradford entered a submitting appearance.

In his statement of defence the defendant Hewens, in general answer to the statement of claim did not admit that the documents therein mentioned or any of them or the effect thereof was sufficiently or correctly set forth in the statement of claim; he denied the allegations in par. 5; and in answer (i) to par. 6 of the statement of claim, denied that the alleged agreement was duly or at all signed by him as such executor or in any other capacity, and did not admit the signing of the alleged agreement on any date by either of the plaintiffs; (ii) to par. 7, did not admit the allegations and, if the alleged agreement was signed by the defendant Bradford he, Hewens, denied that it was signed with his knowledge or consent or at his request; (iii) to par. 8, denied the allegation that the sum of £100 or any other sum was paid to him and did not admit that any such sum was duly or at all paid by the plaintiffs to the defendant Bradford in accordance with the terms of the alleged agreement,

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and he said further, that the fact was that if any moneys were paid to the defendant Bradford purporting to be in respect of any alleged agreement for the sale of any assets belonging to the testator's estate, such moneys were paid to her without his knowledge, consent or approval; (iv) to par. 9, said that he did not know and therefore could not admit the allegations there made; (v) to par. 10, denied the due execution by the defendant Bradford of the transfers mentioned therein; (vi) to par. 11, denied that any agreement was made between the plaintiffs and himself. In general answer to the statement of claim he craved the benefit of s. 54A of the *Conveyancing Acts* 1919-1943 (N.S.W.) as a defence to the suit in the same manner as if he had pleaded or demurred to the statement of claim.

The plaintiffs joined issue with the defendant Hewens.

The contract upon which the plaintiffs relied was set out in a formal document, partly printed, partly typewritten and partly handwritten, in the form of a contract incorporating the conditions of sale approved by the Real Estate Institute of New South Wales. It was prepared on 5th May 1947, by a solicitor then acting for the defendant Hewens. The document was divided textually into three parts not physically separated, containing (i) the conditions of sale; (ii) the terms of sale; and (iii) the contract for sale, set out in that order. The contract for sale, which was expressed to be "subject to and upon the preceding conditions and terms of sale", was subscribed by each of the plaintiffs in the space which the document provided following the printed words "Signature of purchaser". The plaintiffs so subscribed their names on 5th May 1947, immediately after the document was prepared. It was also subscribed by the defendant, Mrs. Bradford, who, some time after 5th May, wrote her name in the space provided in the document following the printed words "Signature of vendor". It was not so subscribed by the defendant Hewens, nor did his name appear in that part of the document.

The plaintiffs contended that when that document was prepared and signed by them the defendant Hewens agreed to sell the land upon the terms contained in it, but required that they should first have it signed by the defendant, Mrs. Bradford, and said that he would sign it after she had done so. The defendant Hewens said that his assent to the sale was conditional upon the document being signed by the defendant, Mrs. Bradford, and himself and also upon the plaintiffs entering into a contract to sell to the defendant Hewens' brother portion of the land the subject of the transaction.

Roper C.J. in Eq., held that the defendant, Mrs. Bradford, acting alone could not bind the estate to a contract to sell real estate, and that the contract was not enforceable against the defendant Hewens, and consequently not enforceable at all. His Honour dismissed the suit (*Neill v. Hewens* (1)).

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Further facts appear in the judgment hereunder.

P. M. Woodward (with him *B. K. W. Cowie*) for the appellants. Although the respondent Hewens was appointed executor and trustee, the appointment of the respondent, Mrs. Bradford, as "an additional executor" does not mean that she is only an executor and is not a trustee also (*Williams on the Law of Executors and Administrators*, 13th ed. (1953), vol. 2, p. 887, *White v. Evans* (2)). She is a trustee by virtue of being an executor, and is as much a trustee as is Hewens. Either one of the executors may exercise the power of sale because s. 153 of the *Conveyancing Acts* 1919-1943 (N.S.W.) does not apply. The respondent Bradford's power of sale under the will is not affected by that section: see *Stuckey and Needham on The Conveyancing Acts*, p. 312. Both trustees can be sued independently of the Statute of Frauds. In the circumstances of this case there is a sufficient signature to satisfy that statute. The respondent Bradford signed the application for the Minister's consent with the authority of Hewens. In view of the fact that there are duties to be performed the respondent Bradford must of necessity be a trustee of the will as well as an executor. The word "trustee" as used in the will means "my trustees for the time being", and is not a power of sale given to Hewens only. If one executor is a trustee all the executors are trustees. A sale by one executor is a sale by both. It is a sale by the estate. The respondent, Mrs. Bradford, disposed of the whole estate or interest in the subject land. The contract had been made, the document was only a record. Hewens was a party to the contract. He agreed to it. At common law one executor of several has power to dispose of the estate of the testator concerned (*Simpson v. Gutteridge* (3); *Sneesby v. Thorne* (4); *In re Ingham*; *Jones v. Ingham* (5); *Union Bank of Australia v. Harrison, Jones & Devlin Ltd.* (6)).

Power was conferred under the will enabling the respondents to sell as executors, therefore they are not bound by those provisions

(1) (1952) 53 S.R. (N.S.W.) 113; 70 W.N. 11.

(2) (1798) 4 Ves. 21 [31 E.R. 11].

(3) (1816) 1 Madd. 609 [56 E.R. 224].

(4) (1855) 7 De G. M. & G. 399, at pp. 402, 403 [44 E.R. 156, at p. 157].

(5) (1893) 1 Ch. 352, at p. 360.

(6) (1910) 11 C.L.R. 492.

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In the circumstances of this case the insertion of Hewens' name into the document by Hewens' solicitor amounted to a signature by Hewens for the purposes of s. 54A of the *Conveyancing Acts* 1919-1943, therefore the document is a sufficient memorandum within the provisions of that section (*Knight v. Crockford* (2); *Saunderson v. Jackson* (3); *Schneider v. Norris* (4); *Johnson v. Dodgson* (5); *Hubert v. Treherne* (6); *Durrell v. Evans* (7); *Jones v. Victoria Graving Dock Co.* (8); *Evans v. Hoare* (9); *John Griffiths Cycle Corporation Ltd. v. Humber & Co. Ltd.* (10); *Halley v. O'Brien* (11); *Gibbins v. North-Eastern Metropolitan Asylum District* (12); *Cohen v. Roche* (13); *Dyas v. Stafford* (14); *Leeman v. Stocks* (15)). In *Hubert v. Treherne* (16) there was not any evidence outside the language of the document; there was not any evidence to spell out the agreement. That case was distinguished in *Cohen v. Roche* (17). *Roper* C.J. in Eq. found that there was an agreement in terms of the contract. Once the contract was drawn up that was an agreement, the agreement of the parties. In his then frame of mind Hewens felt and said that that written document was the record of the transaction between the parties and when the respondent Bradford had signed it he would sign it. On the evidence she made an agreement with Hewens to sell the subject land to the appellants. An agent may fill in a name on a document (*Sims v. Landray* (18)). It was not necessary that Hewens' solicitor should have specific authority therefor, having regard to the fact that Hewens stood by and allowed the document to be handed to the other party. When the several documents for the consent of the Minister and of the Federal Treasurer were prepared and handed by Hewens to the appellants to obtain the signature thereon of the respondent Bradford she thereby became authorized by Hewens to sign the note of the contract made between the parties, signed

(1) (1910) 11 C.L.R., at p. 507.

(2) (1794) 1 Esp. 190 [170 E.R. 324].

(3) (1800) 2 Bos. & Pul. 238 [126 E.R. 1257].

(4) (1814) 2 M. & S. 286, at pp. 288, 290 [105 E.R. 388, at pp. 388, 389].

(5) (1837) 2 M. & W. 653, at pp. 659, 660 [150 E.R. 918, at pp. 921, 922].

(6) (1842) 3 Man. & G. 743, at p. 753 [133 E.R. 1338, at p. 1342].

(7) (1862) 1 H. & C. 174, at pp. 186-188 [158 E.R. 848, at pp. 853-854].

(8) (1877) 2 Q.B.D. 314, at p. 322.

(9) (1892) 1 Q.B. 593, at pp. 596, 597.

(10) (1899) 2 Q.B. 414, at pp. 417, 418.

(11) (1920) 1 I.R. 330, at pp. 339, 340.

(12) (1847) 11 Beav. 1, at pp. 4, 5 [50 E.R. 716, at pp. 717, 718].

(13) (1927) 1 K.B. 169, at pp. 175, 176.

(14) (1882) 9 L.R. Ir. 520, at p. 524.

(15) (1951) Ch. 941, at pp. 945, 947-951.

(16) (1842) 3 Man. & G. 743 [133 E.R. 1338].

(17) (1927) 1 K.B. 169.

(18) (1894) 2 Ch. 318.

by her on behalf of Hewens and sufficient to satisfy the Statute of Frauds. The fact that Hewens was in the respondents' solicitor's office when the documents were drawn up makes inescapable the inference that he was aware of them.

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B. B. Riley for the respondent Hewens. The respondent Bradford did not purport to sell alone, nor as executor. On its face the contract is by her and Hewens. There is not any reference to executors or trustees. Mrs. Bradford did not have power to contract alone. She was appointed in the codicil as an additional executor—not trustee—therefore she was not within the direction to sell contained in the will and was not given by the will any power of sale. The only power of sale exercisable by her was that given to her and the respondent Hewens by s. 153 of the *Conveyancing Acts* 1919-1943 (N.S.W.). That power was not exercisable by Mrs. Bradford alone without the leave of the court under sub-s. (4) of that section. Alternatively, if she had a power outside the statute it was exercisable only by both executors: *Holdsworth's History of English Law*, 2nd ed. (1937), vol. vii, pp. 153, 154. Powers should not be exercised by one only of several executors. The *Land Transfer Act* 1897 (Imp.) (60 & 61 Vict. c. 65), from which the relevant provisions in the *Conveyancing Acts* 1919-1943 were taken, was referred to in *Harrison, Jones & Devlin Ltd. v. Union Bank of Australia Ltd.* (1) and there was nothing in *Union Bank of Australia v. Harrison, Jones & Devlin Ltd.* (2) that took away any force from the remarks of *A. H. Simpson J.* in the court below. One executor cannot bind the others by his own several contract. He is not their agent for that purpose: *Leake on Contracts*, 8th ed. (1931), p. 976. When Mrs. Bradford signed the contract she acted on the assumption that Hewens had agreed to the sale and would continue to agree to it, therefore specific performance will not be decreed. There is not any evidence in this case of a contract of which any written document is a record. There was not to be any contract until the printed form had been signed by all parties. The parties did not intend the contract to operate there and then subject only to Mrs. Bradford's signature. The appellants' contention that the Statute of Frauds is satisfied by the contract itself containing the typed name of Hewens, depends on the "authenticated signature fiction" which requires (a) that the writing shall contain the name of the party to be charged (fulfilled here), and (b) that the party to be charged shall show, by himself or his duly

(1) (1909) 10 S.R. (N.S.W.) 266, at pp. 272-275; 27 W.N. 39. (2) (1910) 11 C.L.R. 492, at p. 503.†

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authorized agent, that he recognizes the writing (though not subscribed with his personal signature) as being the final or complete record, as it stands, of the contract; but has not any application where it is the intention of all parties that the party charged shall subsequently subscribe the document with his personal signature. It is important to note that it is not necessary to intend that it shall be a signature (or it must not be intended that it shall not be a signature). Hewens did not intend that his typed name on the document should operate as his signature. There was not any intention whatever in any of the cases referred to on this point on behalf of the appellants that the defendant concerned should sign. In every case there was a clear indication of the defendant's approval of the document: see *Schneider v. Norris* (1); *Johnson v. Dodgson* (2); *Durrell v. Evans* (3); and *Cohen v. Roche* (4). If handing over is to be relied upon to charge a party, the authority to hand over must be affirmatively proved (*Leeman v. Stocks* (5)). In *Durrell v. Evans* (3) and *Evans v. Hoare* (6) it was clearly not intended that the defendant himself should sign the document. All pretence of regular signature is dropped. *Jones v. Victoria Graving Dock Co.* (7) was only a case of connected documents so as to satisfy the Statute of Frauds. The actual memorandum in *Halley v. O'Brien* (8) was not intended to be signed by the vendor. The memorandum preceded the solicitor's note. In *Leeman v. Stocks* (9) there was an express finding to that effect. That case shows that an auctioneer, but not a solicitor, is presumed to have the necessary authority, and that a solicitor's authority must be proved. Here Hewens did not authorize anybody to sign on his behalf but expressly reserved to himself the right to sign. Whether the agent intended the document to be binding on the purchasers is immaterial. It was not intended that the document in that state should be the final memorandum. *Roper C.J.* in *Eq.* was correct in regarding the absence of that intention as distinguishing this case from *Leeman v. Stocks* (5) and bringing it within *Hubert v. Treherne* (10). It was clearly intended by all that Hewens should sign, and therefore his typed name cannot be equal to the signature required by the statute. When she executed the agreement Mrs. Bradford did not act as Hewens' lawfully authorized agent. An

(1) (1814) 2 M. & S., at p. 289 [105 E.R., at p. 389].

(2) (1837) 2 M. & W. 653 [150 E.R. 918].

(3) (1862) 1 H. & C. 174 [158 E.R. 848].

(4) (1927) 1 K.B. 169. [

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(6) (1892) 1 Q.B. 593, at p. 596.]

(7) (1877) 2 Q.B.D. 314. [

(8) (1920) 1 I.R. 330.

(9) (1951) Ch., at p. 949.]

(10) (1842) 3 Man. & G. 743 [133 E.R. 1338].

authority from Hewens to her will not be held from the particular circumstances of the case. There is not any evidence to support such an implication. The form of application for permission to transfer the land is not in any different position from the contract itself. It was not contemplated that Mrs. Bradford would herself submit it, unsigned by Hewens for the Minister's consent. On submission to the Minister it had to be accompanied by a certified copy of the original contract for sale. The application for transfer did not go to the Department of Lands. The answer "Yes herewith" to question No. 7 in the application for consent to purchase the land referred to a contract with Hewens and not to the signing by Mrs. Bradford. The original contract for sale did not accompany the application as required notwithstanding a special note to that effect on the form: see *Dawson v. The Commonwealth* (1). There was not any sufficient connection between the receipt and any document signed by Hewens, nor can there be obtained a sufficient identification either way out of the receipt: it is too vague and does not give any information as to what it is for.

[WILLIAMS J. referred to *Norton v. Angus* (2).]

By no application of the principles of authentication or of agency is any document not signed by Hewens available against him. The appellants do not rely upon the only document signed by Hewens.

P. M. Woodward in reply. Whether the signature be typed, or by hand, or in the margin, is immaterial. It must be taken that Hewens in effect signed the document itself. The circumstances show an acceptance of the document by Hewens. When the contract was reduced to writing in the presence of the parties in the solicitor's office there was then a completed contract between the parties upon which any party could sue. It cannot be said that at any time Hewens refused to sign the document or that the others were unwilling to sign it. Hewens, by his conduct, accepted the contract. *Hubert v. Treherne* (3) is distinguishable.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

This is an appeal from a decree of *Roper* C.J. in Eq. dismissing a purchaser's suit for specific performance. The defendants-respondents are the executors of the will and codicil of James Gurney deceased, who died on 15th June 1942. The defendant Hewens was appointed by the testator's will made on 7th July 1939 to be

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(1) (1946) 73 C.L.R. 157, at p. 160.

(2) (1926) 38 C.L.R. 523.

(3) (1842) 3 Man. & G. 743 [133 E.R. 1338].

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his executor and trustee. The will included a direction to him, described as trustee, to convert the whole of the estate into money and to divide the same among beneficiaries. The codicil appointed the defendant Elizabeth Catherine Bradford to be an additional executor (*sic*) to the will. The contract alleged by the plaintiffs-appellants is for the sale to them by the executors of a piece of land forming part of the estate called the Stony Creek block for the sum of £800, including an amount of £25 for stock. The defendant Hewens alone defended the suit. He denied the contract and set up the Statute of Frauds. The defendant Mrs. Bradford entered a submitting appearance only and gave evidence in support of the plaintiffs' case.

The material facts may be briefly stated. The Stony Creek block is situate about nine miles from Wauchope in New South Wales. It appears to have been known in the district that the executors would be likely to sell the land, although in fact there had been some dissension between them on the subject. The plaintiffs were desirous of buying the block and in April 1947 applied to the defendant Hewens. He expressed the view that Mrs. Bradford would not agree to sell but the plaintiffs decided to interview her. They appear to have informed her that Hewens had given his consent to a private sale to them. After some discussion she at length gave her concurrence and next day, namely 14th April 1947, she wrote to the solicitors who seem to have acted for the executors informing them that she would consent to a sale to the plaintiffs. Hewens and the plaintiffs then met at Wauchope but Hewens refused to agree to a sale. His solicitors wrote to the plaintiffs on 21st April 1947 saying that he was not agreeable to sell at the price offered and that the property must go up for auction. Shortly after this, however, the respondent Hewens departed from this decision. On 5th May 1947 he appears to have taken the plaintiffs as intending purchasers to see his solicitors. A contract was drawn up on that occasion and it is that document which is put in suit by the plaintiffs. After it had been explained to the plaintiffs in the presence of Hewens the latter said, according to one of the plaintiffs, that that would be all right. The plaintiffs signed the document and handed over a cheque for £100 deposit. Hewens, however, refused to sign the document.

What occurred is not very clearly stated by the plaintiffs, whose evidence seems to have been accepted by *Roper* C.J. in Eq. Both plaintiffs, E. A. Neill and A. S. E. Neill, gave evidence that the respondent Hewens said that he would let the lady sign first and have the lady's privilege. According to E. A. Neill, Hewens said

that if he Hewens signed first she might not sign. The solicitor said he would give the plaintiffs the documents to take away for the purpose of obtaining Mrs. Bradford's signature. She was away from home at the time and it was arranged that Hewens should inform the plaintiffs when she returned. A form of application to the controller under the *National Security (Economic Organization) Regulations* was filled up at the interview and signed by the plaintiffs. This document they also took away for the purpose of obtaining Mrs. Bradford's signature to it. On 25th May Hewens wrote to the plaintiff E. A. Neill saying that he had not heard from him and wished to know "when we would be likely to be fixing up about Stony Creek. Mrs. Bradford has been home a fortnight . . . I would be pleased if you let me know what is doing". The plaintiffs then interviewed Mrs. Bradford again and obtained her signature to the documents. Hewens, however, then refused to sign them. The reasons he is said to have given were that the beneficiaries disapproved and that there were other offers. He persisted in refusing to go on with the transaction and eventually the plaintiffs brought the suit from which this appeal arises.

The document signed by the plaintiffs and Mrs. Bradford as a contract consists of conditions and terms of sale followed by a part entitled "Contract for Sale". The conditions begin with the particulars of the land. These particulars are followed by printed clauses to which are appended some special conditions in typewriting. Then follow what are called "terms of sale". These provide only that upon the signing of the contract the purchaser shall pay into the hands of the agent a cheque for a deposit of £100 and that the balance of purchase money shall be paid to the vendor on completion. At the end of the document under the heading "Contract for Sale" there is a statement that subject to and upon the preceding conditions and terms of sale the plaintiffs purchase the property as thereinbefore described for the sum of £775 and the vendors sell the same. Next follows a date line which has not been filled in except as to the year. Then comes a note of the purchase money, the deposit and the balance. The document ends with "Signature of purchaser", followed by the signatures "E. A. Neill" and "A. Neill" and their occupation and address, and "Signature of vendor", followed by the signature "E. Bradford". The name of the vendor's solicitor is added. The only place in the document where the defendant Hewens' name is mentioned is at the commencement. It occurs in type in the heading of the document, which is as follows—"Conditions and Terms of Sale for the under-mentioned Property. Sold by Private Treaty. By Elizabeth Catherine Bradford and James Richard Hewens".

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Besides denying that this amounted to a concluded contract and relying upon the Statute of Frauds, the defendant Hewens set up a condition which he alleged had not been fulfilled. The condition was that the plaintiff should enter into a contract to sell part of the property the subject of sale to his brother. On the issue whether this condition had been made *Roper C.J.* in Eq. found against him. But his Honour held that the Statute of Frauds was not satisfied (s. 54A of the *Conveyancing Acts* 1919-1943 (N.S.W.)). For the plaintiffs it has been contended that the typed name of the defendant Hewens amounted to a sufficient signature by him. *Roper C.J.* in Eq. declined to accept this contention. His Honour said :—" The principles relied on are those which were applied in *Schneider v. Norris* (1), *Evans v. Hoare* (2), and *Leeman v. Stocks* (3) and other cases. But I do not think that they apply to the facts in this case. Here the document, as written and printed on its face, provides for signature by both parties by the subscription of their names as signatures (Cf. *Hubert v. Treherne* (4)) and the evidence shows that all parties were intended to complete the document by signing in that way. The document did not come into being as a perfect instrument so as to permit of the insertion of the vendors' names in typewriting at the commencement of the conditions of sale being regarded as a signature for the purposes of satisfying s. 54A. This case, because of the evidence, is stronger than was *Hubert v. Treherne* (4) against holding that the document is signed by the vendor who has not subscribed it " (5).

Another contention made for the plaintiffs which the learned judge overruled was that the contract bound the estate, notwithstanding that it had not been executed by both of the executors or trustees. Section 153 (4) of the *Conveyancing Acts* 1919-1943 makes it necessary that the statutory power of sale conferred upon executors in the case of realty should be exercised by both of them. It was sought, however, on behalf of the plaintiffs to treat the power of sale given in the will as overcoming this necessity. But clearly whatever power of sale is conferred upon them by the will must be exercised by both of them jointly. The view his Honour took on this point seems indisputably to be right. There is no room for the view that because at one stage both appeared to be content with the proposed sale, one of them alone could carry it into effect by a contract executed only by that one.

(1) (1814) 2 M. & S. 286 [105 E.R. 388].

(2) (1892) 1 Q.B. 593.]

(3) (1951) 1 Ch. 941.]

(4) (1842) 3 Man. & G. 743 [133 E.R. 1338].

(5) (1952) 53 S.R. (N.S.W.) 113, at p. 117 ; 70 W.N. 11, at pp. 12-13.

At the threshold of this case lies the question whether any contract was in fact made. From the facts that have been already stated it seems to be perfectly clear that neither party entered into any anterior contract containing the terms and conditions expressed in the written contract. There was certainly no contract of which that document was intended only to be a subsequent note or memorandum. Neither side intended to contract otherwise than by means of the very instrument. It is equally clear that when the written contract was drawn up by the solicitors and explained to the parties it was intended as an instrument to be converted into a contract by the execution by all parties thereto.

When the defendant Hewens expressed his unwillingness to sign before Mrs. Bradford it was for the purpose of withholding or deferring his assent to the instrument as a contract and ensuring that he was not bound until she had first executed the document. When the plaintiffs-appellants carried the instrument away from the solicitor's office, although all parties may have supposed that there was no doubt about the transaction going through, unless indeed it was because Mrs. Bradford's agreeing remained in doubt, yet none of them could have supposed that then and there a contract had been concluded binding the defendant Hewens. When Mrs. Bradford executed the contract the presumption is that she did not intend to bind herself unless her co-executor and co-trustee also executed the instrument, his signature being regarded by all parties as essential.

On the facts, therefore, the plaintiffs must fail on the simple ground that they are unable to establish the actual making by the defendants of the contract on which they sue. This view of the case answers the argument, if any further answer was needed, based upon the supposition that one of the two executors might sell. As it denies the making of the contract, it leaves no room for the question whether the Statute of Frauds has been satisfied. But incidentally it provides an answer to the argument that the typescript name of the respondent Hewens amounted to his signature within the meaning ascribed to the Statute of Frauds. For it is clear that when in the course of the preparation of the document Hewens' name was typed in by the solicitor's clerk it could not at that point of time have operated as an equivalent of his signature. If in the circumstances it could ever become his "signature" it could only be by his subsequent recognition and to put it at its lowest it would be necessary for Hewens to recognize the instrument containing his name as the final and complete expression of a contract he then or there entered into as a party. It would

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H. C. OF A. be impossible to push further than this the doctrine of such cases
 1953. as *Knight v. Crockford* (1); *Saunderson v. Jackson* (2); *Schneider*
 NEILL v. *Norris* (3); *Johnson v. Dodgson* (4); *Durrell v. Evans* (5);
 v. *Evans v. Hoare* (6); *Cohen v. Roche* (7) and *Leeman v. Stocks* (8).
 HEWENS. Cf. *Hubert v. Treherne* (9).

For these reasons the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *W. H. Woodward & Son*.

Solicitors for the respondents, *L. O. Martin & Sons*, Taree, by
C. M. Marsh & Harvey.

J. B.

- (1) (1794) 1 Esp. 190 [170 E.R. 324].
- (2) (1800) 2 Bos. & Pul. 238 [126 E.R. 1257].
- (3) (1814) 2 M. & S. 286 [105 E.R. 388].
- (4) (1837) 2 M. & W. 653 [150 E.R. 918].

- (5) (1862) 1 H. & C. 174 [158 E.R. 848].
- (6) (1892) 1 Q.B. 593.
- (7) (1927) 1 K.B. 169.
- (8) (1951) Ch. 941.
- (9) (1842) 3 Man. & G. 743 [133 E.R. 1338].