CURRAN

v.

RANKIN AND OTHERS

[SUPREME COURT, 1964 (Mills-Owens C.J.), 5th-8th September, 1st October]

Civil Jurisdiction

Sale of Land—draft agreement for sale and purchase agreed—not as instrument intended to have efficacy as binding agreement—efficacy of bargain intended to rest on execution of formal contract—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) s.59(d)—Statute of Frauds (1677) (Imperial) (29 Car.2, c.3).

Contract—sale of land—agreed draft—whether subject to contract—memorandum — authority of solicitor to provide—Indemnity, Guarantee and Bailment Ordinance (Cap. 199) s.59(d)—Statute of Frauds (1677) (Imperial) (29 Car.2, c.3).

A draft agreement for sale and purchase was agreed between the plaintiff as prospective purchaser, and the second defendant (on his own behalf and as agent for the other prospective vendors) in the presence of their respective solicitors in Suva. It was then agreed that the solicitor for the vendors would have the draft agreement engrossed early on the following day and send it to the solicitor for the purchaser; when signed by the purchaser the engrossment was to be returned to the vendors' solicitor who would obtain the signature of the second defendant thereto. When that had been done the vendors' solicitor would so advise the purchaser's solicitor by telephone and the latter would then forward a cheque for the deposit.

On the following day the solicitor for the vendors forwarded the engrossment to the solicitor for the purchaser with a covering letter in terms of the arrangement, though at the same time, he advised the purchaser's solicitor that he had been told that the second defendant had left Suva. The second defendant refused to proceed with the transaction and the plaintiff brought action for specific performance.

Held: 1. On the evidence, it was not the intention of the parties to be bound, except on the execution of a formal contract.

2. The defendants were not bound, either because a condition precedent was unfulfilled or because the law does not recognise a contract to enter into a contract.

3. In view of the above findings it was unnecessary to decide whether the forwarding of the engrossment to the solicitor for the purchaser brought into existence a sufficient memorandum for the purposes of section 59(d) of the Indemnity, Guarantee and Bailment Ordinance.

Cases referred to: *Rossdale v. Denny* [1921] 1 Ch. 57; 124 L.T. 294: *Coope v. Ridout* [1921] 1 Ch. 291; 124 L.T. 402: *Chillingworth v. Esche* [1924] 1 Ch. 97; 129 L.T. 808: *Raingold v. Bromley* [1931] 2

Ch. 307; 145 L.T. 611: *Eccles v. Bryant* [1948] Ch. 93; [1947] 2 All E.R. 865: *Thirkell v. Cambi* [1919] 2 K.B. 590; 121 L.T. 532: *Ridgeway v. Wharton* (1857) 6 H.L.C. 238; 10 E.R. 1287: *Forster v. Rowland* (1861) 7 H. & N. 103; 158 E.R. 410: *Smith v. Webster* (1876) 3 Ch. D. 49; 35 L.T. 44: *Bowen v. Duc D'Orleans* (1900) 16 T.L.R. 226: *Lockett v. Norman-Wright* [1925] Ch. 56; 132 L.T. 532: *New Lynn Borough v. Auckland Bus Co. Ltd.* [1964] N.Z.L.R. 511: *Masters v. Cameron* (1954) 91 C.L.R. 353: *Rossiter v. Miller* (1878) 3 App. Cas. 1124; 48 L.J.Ch. 10: *Evans v. Hoare* [1892] 1 Q.B. 593; 66 L.T. 345: *Leeman v. Stocks* [1951] Ch. 941; [1951] 1 All E.R. 1043: *Horner v. Walker* [1923] 2 Ch. 218; 129 L.T. 782: *Griffiths Cycle Corporation Ltd. v. Humber and Co. Ltd.* [1899] 2 Q.B. 414; 81 L.T. 310; on appeal (1901) 85 L.T. 141: *Daniels v. Trefusis* [1914] 1 Ch. 788; 109 L.T. 922: *North v. Loomes* [1919] 1 Ch. 378; 120 L.T. 533: *Von Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284; 105 L.T. 434.

Action for specific performance of agreement for sale and purchase of land.

P. A. Liddell for the plaintiff.

R. I. Barker for the defendants.

The facts appear from the judgment of the Chief Justice.

MILLS-OWENS C.J.: [1st October, 1964]—

The Plaintiff seeks specific performance of an alleged contract for the sale to him by the Defendants at the price of £25,000 of a freehold copra plantation comprising 2,000 acres, known as "Valavala" and situate at Natewa Bay in the island of Vanua Levu. The Defendants deny that the negotiations between the parties resulted in a binding agreement, and, in the alternative, rely upon section 59(d) of the Indemnity, Guarantee and Bailment Ordinance (Cap. 199) which is in terms corresponding to section 4 of the Statute of Frauds.

The facts are substantially undisputed and are briefly as follows: Mr. J. B. Rankin, the 2nd Defendant, owned the property jointly with his brother and sister, the 1st and 3rd Defendants, and was authorised to effect a sale on their behalf. There had been previous negotiations for the sale of the property to Mr. Curran, the Plaintiff, but these had proved abortive owing to Mr. Rankin withdrawing at a late stage. On Friday the 30th August, 1963, Mr. J. B. Rankin and Mr. Curran had again got together, and having agreed on the price and down-payment they went to a Solicitor, Mr. Johnson of Messrs. Cromptons, for the purpose of having the transaction dealt with. It is not suggested that there was a binding contract at that stage. Both parties were aware that it was necessary to make special provision regarding certain buildings and livestock to which a third party was making a claim. It then appeared that it was desirable that Mr Rankin should be represented by Mr. Leys, Solicitor of Messrs. Munro, Warren, Leys and Kermode. Mr. Rankin duly instructed Mr. Leys to act for him; Mr. Curran remained represented by Mr Johnson. By arrangement between Mr. Johnson and Mr. Leys it was agreed that Mr. Leys should draft a contract which he duly did in consultation with Mr.

Rankin. The draft was sent by Mr. Leys to Mr. Johnson who discussed it with his client, and then, in accordance with a previous arrangement, all four persons, Mr. Rankin, Mr. Curran, Mr. Leys and Mr. Johnson, met at Mr. Leys' office late in the afternoon of the same day for the purpose of going through the draft. Although there is no dispute of any substance as to what precisely occurred on that occasion the parties are completely at variance as to the resulting consequences in law. The draft agreement was considered by all present, with particular reference to the clauses as to the buildings and livestock, and there is no doubt that it was finally agreed. Some minor additions or amendment only were found to be necessary and these were duly inserted. It was now too late in the afternoon for the draft to be engrossed and it was arranged that this should be done the next day. Mr. Leys outlined the procedure which he proposed should be adopted, without any apparent dissent. He said he would get the draft engrossed in the usual two parts early the next day. He would send both to Mr. Johnson for him to obtain Mr. Curran's signature. Mr. Johnson would then return both to Mr. Leys who would obtain Mr. Rankin's signature. When Mr. Rankin had signed Mr. Leys would telephone Mr. Johnson and Mr. Johnson would then let Mr. Leys have cheques for the deposit and certain costs. Although it does not appear so from the evidence in so many words, no doubt Mr. Leys would then have handed one part to Mr. Johnson to hold on behalf of his client in accordance with the usual conveyancing practice.

Accordingly on the following day Mr. Leys had the engrossments prepared, and he made ready a letter to accompany them to Mr. Johnson. Before he could despatch these papers to Mr. Johnson, however, he was informed that Mr. Rankin had left Suva by 'plane for Savusavu, in Vanua Levu, and that it was not known when he would return. Mr Leys was in a quandary but felt it his duty at least to send on the engrossed parts to Mr. Johnson as arranged. He therefore despatched them with the letter he had already prepared and with another letter informing Mr. Johnson of developments. The two letters were as follows :

"MUNRO WARREN LEYS & KERMODE 23 Cumming Street
SUVA FIJI
31st August, 1963.

Messrs. Cromptons,
Solicitors,
SUVA.

Dear Sirs,

re: Rankin — Curran

We now enclose, in duplicate, Sale and Purchase Agreement herein engrossed in accordance with the draft settled between us yesterday of which you have a copy. The clauses in the Schedule have been renumbered.

We understand that you will obtain Mr. Curran's execution and return the documents to us for signature by Mr. Rankin, who we expect to call at our office at 11 a.m. this morning. When he has

signed we will phone you so that settlement can then be completed by payment of the £1500 deposit.

Our bill of costs for the Agreement is also enclosed. The toll's included in the bill are for calls made at Mr. Curran's request and for which he agreed to be responsible.

Yours faithfully,
MUNRO WARREN LEYS & KERMODE
A. D. Leys.

"MUNRO WARREN LEYS & KERMODE 23 Cumming Street
SUVA FIJI
31st August, 1963.

Messrs. Cromptons,
Solicitors,
SUVA.
Dear Sirs,

re: Rankin — Curran

Our attached letter of this date was typed pursuant to arrangements made yesterday. We were therefore surprised, when we attempted to telephone Mr. Rankin a few minutes ago, to be told that he left for Savu Savu by 'plane and that it was not known when he would return. After considering the position we have decided that, as we have received no cancellation of insructions from Mr. Rankin, the proper course is for us still to send to you our earlier letter and the Agreement.

Yours faithfully,
MUNRO WARREN LEYS & KERMODE
A. D. Leys.'

Mr. Leys was then under the impression that Mr. Rankin had departed without notification to him but it later became known that Mr. Rankin had in fact left a message to inform Mr. Leys of his departure and that he did not know when he would be returning. This was explaining by Mr. Leys in a letter written by him on the following Monday the 2nd September to Mr. Johnson. Continuing the narrative of events, Mr. Johnson duly obtained Mr. Curran's signature on the Saturday morning, the 31st August, and returned both parts to Mr. Leys. At the same time he tendered two cheques to Mr. Leys, one for the deposit and the other for the costs. Mr. Leys told Mr. Johnson he could not accept the cheques as it was not in accordance with the procedure outlined on the previous day, but he was prepared to note his file to the effect that they had been tendered, and he did so. On Monday the 2nd September Mr. Rankin telephoned Mr. Leys from Savusavu and said he had expected Mr. Curran to be at Savusavu. Mr. Leys told Mr. Rankin what had occurred about the engrossments and cheques and that he (Mr. Rankin) had left them wondering what to do; he further told him that Mr. Curran was anxious to return to the United States. Mr Rankin suggested that there was no need for Mr. Curran to wait—he (Mr. Rankin) would sign the documents on

his return to Suva, which he proposed to do on the next Friday's 'plane. Mr. Leys duly conveyed this information to Messrs. Cromptons. On the next day, the 3rd September, Mr. Rankin despatched a telegram from Savusavu to Mr. Leys saying he was unable to obtain a booking on the Friday and asking that the documents be posted to him at the property Valavala. Mr. Leys conveyed this further development to Messrs. Cromptons and arranged that he (Mr. Leys) should receive the cheques to hold pending the signature of the documents by Mr. Rankin. The cheques were duly handed to Mr. Leys who then despatched a letter to Mr. Rankin enclosing the documents, giving Mr. Rankin directions for signature and attestation and assuring Mr. Rankin that he held the cheques. Within an hour of this letter being despatched Mr. Rankin phoned Mr. Leys' office, speaking to a member of his staff, countermanding his request for the documents to be sent to him and, on being told that the documents had already been despatched, said that Mr. Curran was to be informed that there was 'very little hope of concluding that sale'. On the following day, the 4th September, Mr. Rankin informed Mr. Leys over the telephone from Savusavu that he did not propose to proceed with the sale as he could now obtain finance for the development of the plantation from a source he had hitherto been unaware of (by which he meant, I find, a subsidy payable under a scheme then recently adopted by the Government). Mr. Leys conveyed Mr. Rankin's decision to Messrs. Cromptons and at the same time returned the uncashed cheques.

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The evidence for the Plaintiff is uncontradicted. Mr. Leys and Mr. Johnson both gave evidence and were in substantial agreement. The Plaintiff was vague but, I have no doubt, reliable. His evidence amounted to little more than a less precise version of the evidence given by Mr. Leys and Mr. Johnson, with the addition that he, at least, considered himself bound to purchase. The Defendant Mr. Rankin was not called to give evidence and this was the subject of comment by counsel for Mr. Curran. The only effect, in my view, is that Mr. Curran's assertion that in his intention at least there was a binding agreement when the parties left Mr. Leys' office, having settled the draft, is to be accepted—for what that is worth to his case. I see no point of significance in Mr. Rankin's failure to give evidence; it merely means that counsel for the Plaintiff was deprived of an opportunity of getting him to agree that he also considered himself bound and that Mr. Leys had authority to create a memorandum sufficient to enforce the alleged agreement, to neither of which points is Mr. Rankin likely to have assented. Counsel for the Defendants relied on two points: that there was a condition precedent, express or implied, to the parties becoming contractually bound, namely the execution of a formal contract; alternatively that there was no sufficient memorandum for the purposes of section 59(d) of Chapter 199. The first point rests, in so far as it concerns the alleged express condition, on the fact that Mr. Leys had laid down the procedure to be followed, which procedure was assented to by the parties and clearly contemplated that a formal contract was to be executed and that the money was not to change hands until Mr. Rankin had signed. In effect, therefore, Mr. Leys was expressing a condition precedent in the terms: "Subject to contract", so that each party had,

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as it were, a *locus poenitentiae,* the interval between the final settling of the draft and the time when the engrossment came to be presented to him for execution. Alternatively such a condition precedent was to be implied as a matter of inference from the circumstances. Counsel referred to the authorities (1) on the "Subject of contract" aspect, but I need not deal with this in detail, as the effect of the authorities in precluding a binding contract was not challenged. As to the defence that there was no sufficient memorandum, it was conceded that the letters written by Mr. Leys on the 31st August could be read together with the engrossments. The point here was that Mr. Leys had no authority to bind his clients; it was for the Plaintiff to prove affirmatively that Mr. Leys had such authority and he had failed to do so. The decided cases, (2) in particular *Smith v. Webster,* showed that a solicitor engaged in the ordinary way to act for a vendor or purchaser has no authority either to contract on his behalf or to bring into existence such a memorandum. It was argued by counsel for the Plaintiff that on the conclusion of the meeting held in the late afternoon of Friday the 31st August a binding agreement came into existence, either in the form of the settled draft, which being assented to by the parties thus became an agreement in itself, or in the form of an oral agreement incorporating the terms and conditions of the draft. It was to be noted that there was no express provision in the draft that it should not become effective until it was signed or parts were exchanged, or any other condition precedent. No authority had been cited where the words "Subject to contract" had been implied. It was not permissible to imply such a term in a written contract; to do so would be to contradict the document itself. The procedure laid down by Mr. Leys was merely machinery to protect the interests of the parties. In counsel's submission the present case fell into the second category or class of case referred to in *Masters v. Cameron,* (3) where the judgment of the High Court of Australia proceeded—

> " Where parties who have been in negotiation reach agreement upon terms of a contractual nature and also agree that the matter of their negotiation shall be dealt with by a formal contract, the case may belong to any of three classes. It may be one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time propose to have

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(1) Rossdale v. Denny [1921] 1 Ch. 57 C.A.
Coope v. Ridout (ibid) 291 C.A.
Chillingworth v. Esche [1924] 1 Ch. 97 C.A.
Raingold v. Bromley [1931] 2 Ch. 307.
Eccles v. Bryant [1948] 1 Ch. 93 C.A.

(2) Thirkell v. Cambi [1919] 2 K.B. 590, 598-9 C.A.
Ridgeway v. Wharton 10 E.R. 1287 H.L.
Forster v. Rowland 158 E.R. 410
Smith v. Webster (1876) 3 Ch.D. 49 C.A.
Bowen v. Duc D'Orleans (1900) 16 T.L.R. 226 C.A.
Lockett v. Norman-Wright [1925] 1 Ch. 56
New Lynn Borough Council v. Auckland Bus Co. [1964] N.Z.I.R. 511.

(3) (1954) 91 C.L.R. 353, 360.

the terms restated in a form which will be fuller or more precise but not different in effect. Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document. Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

In each of the first two cases there is a binding contract: in the first case a contract binding the parties at once to perform the agreed terms whether the contemplated formal document comes into existence or not, and to join (if they have so agreed) in settling and executing the formal document; and in the second case a contract binding the parties to join in bringing the formal contract into existence and then to carry it into execution. Of these two cases the first is the more common. Throughout the decisions on this branch of the law the proposition is insisted upon which Lord Blackburn expressed in *Rossiter v. Miller* (4) when he said that the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. His Lordship proceeded:
'. . . as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed'."

As to the question of Mr. Leys' authority to create a memorandum, counsel relied upon Mr. Leys having been authorised by Mr. Rankin to prepare and forward the engrossments to the Plaintiff's solicitors. There was no question here of Mr. Leys being authorised to bind his clients in contract; the contract was formed by the parties themselves and was already in existence when Mr. Leys was authorised to submit a record of its terms to Mr. Johnson. It was not necessary that Mr. Rankin should have signed; on the authorities (5) the appearance of his name in the engrossment, inserted by his agent Mr. Leys, was a "signature". *Smith v. Webster* (supra) had no application in the present case because there the judgments proceeded on the basis that there was no concluded contract. The present case, counsel contended, fell precisely within the authority of *Horner v. Walker;* (6) see also *Griffiths Cycle Co. v. Humber.* (7) It mattered not that a solicitor might not intend to bring a memoradum into existence or might be unaware that he was doing so (vide *Daniels v. Trefusis*). (8) The present case was comparable with that of *North v. Loomes.* (9) Mr. Rankin's actions subsequent to Mr. Curran signing the formal contract were consistent with his regarding himself as bound.

(4) (1878) 3 App. Cas. 1124, 1151 H.L.
(5) Evans v. Hoare [1892] 1 Q.B. 593 C.A. Leeman v. Stocks [1951] 1 Ch. 941.
(6) [1923] 2 Ch. 218
(7) [1899] 2 Q.B. 414 C.A.
(8) [1914] 1 Ch. 788
(9) [1919] 1 Ch. 378, 383.

I am indebted to counsel for their able arguments. If it is to be held that there was a binding contract it must, as it appears to me, be on the basis of an inference of fact from the conduct of the parties establishing, on the balance of probabilities, their intention to become bound at the critical time, namely on the conclusion of the meeting at Mr. Leys' office on the 31st August. It would be a novel and unsupportable proposition, as a matter either of law or of necessary inference, that a draft agreement as to which no further amendment is contemplated but which is intended to be engrossed for execution by the parties becomes *ipso facto* a binding contract immediately it is settled. No authority was cited to establish such a proposition and I doubt if counsel for the Plaintiff is to be understood as going so far. Were that the position it would long since have become the general practice to insert in draft agreements a clause expressly providing that the document remain a draft and not form, or represent the terms of, a binding contract, or some such safeguard.

The whole of the circumstances are to be considered. Prior to the meeting at Mr. Leys' office Mr. Curran and Mr. Rankin had agreed the price and down-payment, but other matters, notably those of the buildings and livestock, remained to be settled. The meeting resulted in a settled draft, and this was the aim and purpose of the meeting. Such being the nature or course of the transaction at that stage, it appears to me to be a crucial matter. In my view the draft was settled, in the intention of the parties, as a draft, not as an instrument intended to have efficacy as a binding agreement. Nor do I think that, in the intention of the parties, they had reached the stage where they were bound, whether by oral agreement or by conduct, in the terms of the draft. If, for example, the 'officious bystander' test were to be applied, what would then have been the parties' reply to a question whether they now considered themselves contractually bound? Could it be said that undoubtedly each would have said 'Yes—we are bound by (or in) the terms and conditions of the draft —execution of the engrossments is a mere formality'? I think not. In so far as they had formulated a precise mutual intention at that stage, as it appears to me, it was to be guided by their solicitors' advice in achieving their object of bringing into existence a legally binding agreement. That advice took the not unusual form of settling a draft agreement in the presence of the parties, and it was made very clear that a formal contract was still to be executed by them personally. All the *indica* point to the execution of a formal contract as the final act required of the parties, and this was a process which would be well understood by laymen. The previous experience of the parties was such that on this occasion they were very likely to have particularly adverted to the desirability of acting on legal advice. Their subsequent actions, and those of their solicitors, do not advance the case of either of them. Mr Leys, very wisely, was concerned to prevent complications arising. Mr Johnson, understandably, hoped to force the issue, in his client's interest. So far as Mr. Rankin is concerned there is nothing in his actions following the meeting in Mr. Leys' office to indicate that he at any time waived execution of a formal contract or regarded the matter of his own signature as one of no importance.

In my view the second class of case envisaged in *Masters v. Cameron* is a somewhat special one, in effect the case where by a condition subsequent a term of a binding contract is not to have immediate effect—nevertheless a term and a condition which can be enforced by the Court. If the present case were to be held to be one where a binding contract came into existence it would have to be, in my view, on the ground that it fell within the first class of case dealt with in *Masters v. Cameron*, that referred to in the passage cited from *Rossiter v. Miller;* but, as I have indicated, in my judgment it falls within the third category, namely that where there is no intention to be bound except upon the execution of a formal contract. The Defendants in the case before me were not bound, as Parker J. said in *Von Hatzfeldt-Wildenburg v. Alexander*, (10) and as I hold, either because a condition precedent was unfulfilled or because the law does not recognise a contract to enter into a contract. In the particular circumstances of this case, the latter ground seems more apposite. The efficacy of the parties' bargain, in my judgment, was intended by them to rest not upon the settlement of its terms but upon the execution of the contemplated formal contract.

Having reached this view it is not necessary for me to express a decided opinion on the question whether there was a sufficient memorandum for the purposes of Chapter 199, but it may be desirable to state the tentative views which I have formed. As it appears to me, the extent of a solicitor's authority to render his client liable by bringing into existence a sufficient memorandum may vary according as there is already a binding contract or not. In the former event the solicitor might well have authority to render his client liable and may do so either deliberately or inadvertently. He need not be expressly authorised to sign a memorandum; if the bringing into existence of a signed memorandum is or is fairly incidental to what he is employed to do it is within the scope of his authority. Thus if, being employed to complete a sale dependent on a binding oral agreement, he sets forth the terms in writing in the course of the conveyancing steps taken to bring about completion he may well provide the required memorandum. But if not authorised to contract, in a case where there is not already a binding contract, it would not be within the scope of his authority to provide a memorandum as to do so would be to do the very thing he is not employed to do. In this latter type of case the question whether there is a binding contract and that whether there is a sufficient memorandum are really one; *ex hypothesi*, the memorandum is effective only if there is a binding contract and that equally depends on the scope of the solicitor's authority, whereas in the former type of case the solicitor may be employed to do some act in relation to the contract the doing of which would not necessarily, or incidentally, involve recognition of its existence. The foregoing appears to me to follow from the decisions in *Smith v. Webster, Daniels v. Trefusis* and *North v. Loomes* (supra).

(10) [1912] 1 Ch. 284, 289.

On the basis that there was in fact no binding contract between the parties I give judgment for the Defendants dismissing the action with costs.

Action dismissed.