right. Otherwise, the formal provisions of civil law would be eroded [reference omitted]. Admittedly the conduct of a party can be contrary to good faith if he ha drawn benefits from an important contract over a lengthy period, and now wants t withdraw from his obligations by appealing to the lack of form. In relation to a guar antor, this needs in particular to be considered when he has drawn indirect benefits as a shareholder in the principal debtor from the granting of credit over a period o years, and has by his actions caused the creditor to place justified trust in the effec tiveness of the contract, and the creditor has performed his obligations with this in mind [references omitted].

(b) Such prerequisites are lacking in this case. (. . .)

2. The alteration made by this judgment to case law of the highest courts which has existed for decades not only has implications for the future. It likewise affects legal relationships which have been entered into but not yet concluded. There are no constitutional grounds which militate against this.

(a) Judgments of the highest courts are not to be equated with statutes and do not achieve comparable binding legal effect. By deviating from a previously held legal opinion, the judge is not in principle violating Article 20, para 3 of the Basic Law. In particular, he does not need proof that factual relationships or general views have changed in a certain respect [references omitted]. A court decision which concerns the effectiveness of a legal transaction is a finding evaluating an act, and has effect simply by its nature, on a set of facts existing in the past and not yet concluded. This so-called false retrospective effect is, in the same way as for statutory provisions, in principle unobjectionable from a legal point of view [references omitted]. The rules developed in the constitutional court case law about limiting retrospective alteration of statutes [references omitted] cannot simply be carried over to the case law of the highest courts. This is because the courts are not as a rule bound to an established case law which in the light of better knowledge is shown to be no longer tenable [references omitted]. It follows from this that limitations of false retrospective effect are more seldom required for judicial decisions than for statutes.

(b) The Federal Constitutional Court has not so far established any generally valid rules in this respect [references omitted] and has contented itself with decisions in individual cases. Accordingly, limits on retrospective effect can arise from the constitutional state principle of legal certainty. For the citizen this means primarily protection of trust. (. . .) In the balancing exercise which must accordingly be carried out, it should in particular be borne in mind that substantive justice embodies a component of the constitutional state principle which is at least equal in importance to the principle of legal certainty [references omitted].

(c) Besides this, in private law the general clause of § 242 BGB guarantees that the judge can never limit himself to looking at the matter in a formal way, if this is inconsistent with the principle of good faith. In this connection, a party's trust in the continued existence of a right must be given appropriate consideration if it is worthy of protection. The case law of the highest courts has worked out a string of legal concepts for this purpose (eg, impermissible exercise of a right, absence or disappearance of the basis of a transaction, forfeiture) which in general facilitate sufficient consideration of the justified interests of both parties. (. . .)

False retrospective effect as a result of a change in the case law of the highest courts has therefore for good reason been so far limited in the realm of private law only in

cases of the continued existence of a long-term obligation relationship, frequently of a care or maintenance nature, and the retrospective effect had consequences for the persons affected by it which possibly threatened their existence (. . .).

(d) Protection of trust of a kind comparable with those cases should not be granted to the claimant in this case. At the point in time of the legal transaction, the decisions of the highest courts which were significant for a correct understanding of § 766 sentence 1 BGB and of §§ 126 and 167 BGB had been issued a long time before [references omitted]. The case law had merely delayed in expressing the legal consequences suggesting themselves here in the case of guarantees in blank. (. . .) The effect is limited in this case to one of three guarantees given for the same loan contract. The decision has no 'knock-on effect' for the claimant, because it has itself stated that in its business there is in principle no signing in blank.

Case 21
REICHSGERICHT (FIFTH CIVIL DIVISION) 21 MAY 1927
RGZ 117, 121

Facts

In February 1920 the plaintiff was engaged as a manager by the defendant company, the managing director of which was the second defendant. In June 1922 the plaintiff left the service of the first defendant as a result of a disagreement.

By a contract of employment dated 13 August 1920, which was to run for three years, the plaintiff was allotted the house, 6 K. Street in O. as his official residence rent-free. The defendant company had bought it shortly before for M120,000. When a new contract of employment was drawn up on 20 February 1922, to run until 30 September 1924, the second defendant signed a document on behalf of the first defendant, the company, whereby the plaintiff was granted a right of pre-emption in respect of the official residence at the price of M120,000.

The plaintiff sued both defendants demanding that the house be conveyed to him; alternatively he claimed damages resulting from the failure to convey the house.

The defendants pleaded that the promises had not been made notarial form or before a court as required by para 313 [311b I] BGB and were not binding. Alternatively they denied that any such promises had been made.

The Court of Appeal found that in 1920 the second defendant had congratulated the plaintiff on his performance and had stated that the house was to be his in lieu of Christmas bonuses in cash in 1920 and 1921. Shortly afterwards the second defendant had repeated the statement, adding that the plaintiff had requested the second defendant to convey the house to him, but the second defendant had assured him on his word as a nobleman that the notarial conveyance could take place at any time, but was unnecessary between the parties. The Court of Appeal also found that no fraudulent intention of the defendants existed not to perform the contract and to rely on its formal invalidity. Instead the defendants originally had the intention to fulfil their obligations and had only changed their minds subsequently. The second defendant, in giving the assurances set out above, had caused the agreement not to be made in official form; it was contrary to good faith if the defendants now refused to convey the house.

The District court and the Court of Appeal of Dusseldorf gave judgment for the plaintiff. The judgment was quashed for the following reasons.

Reasons

The courts below . . . held that the defendants in their negotiations had the serious intention to perform the contract which was invalid in form and that they only decided subsequently not to do so. The courts below held as a matter of law that it is contrary to good faith and against the sentiments of decency entertained by all fair and just people if the defendants now refuse to execute the conveyance contrary to their previous promises 'made in such a solemn form.'

In view of the statutory requirement of form laid down by para 313 section 1 [311b I] BGB neither the plea that a present violation of good faith (of present malice [references] had been shown nor any other violation of bonus mores can be said to have been made out.

As regards the first plea, the practice of the *Reichsgericht* [references] requires that a party who opposes a plea of lack of form must have been mistaken concerning the legal requirement of form and that this mistake was caused wilfully or negligently (para 276 BGB) by the other party to the transaction. The facts as found do not disclose the existence of these two prerequisites. Instead, the pleadings show that both parties were aware of the need to observe the formalities; no deception or even an attempt to this effect has occurred. Nor can the defendants be said to have acted culpably at the time when the disputed promises were made, seeing that the Court of Appeal has found that the defendants had the serious intention at that time to honour their promises and made the promises with this intention in mind. If it is correct that both parties knew of the need to observe the formalities, it is also due to the consent of the plaintiff that the formal recording of their agreement was postponed, and he must bear the consequences of this postponement without being able to shift the burden on the other party. The mistake concerning the legal need to observe the formalities which is necessary to support the plaintiff's complaint cannot be replaced by a factual mistake as to whether in the circumstances the promise, even though informal, would be kept. The complaint raised here, as developed by the practice of the *Reichsgericht* and as featuring in the broader context of blameworthiness at the conclusion of the contract (*culpa in contrahendo*) does not support the claim . . . [references].

A violation of good morals has not occurred either which might bind the defendant in virtue of para 826 BGB in conjunction with para 249 BGB to execute a conveyance (reference). If the promises 'upon the word of a nobleman' were inspired by the honest intention to perform them when they were made, the 'solemn declaration' alone cannot by itself be regarded as a violation of good morals; it can only be said to exist if the fact of these promises were denied in the course of the proceedings and their performance was refused. Since however the defence of lack of form in accordance with para 313 section 1 [311b I] BGB constitutes, in principle, an admissible plea of an existing legal remedy a violation of good morals which obliges the defendant to pay damages held to have occurred in the special circumstances of the case, can only be found in the present situation, if the previous attitude can be said to have created a legal obligation. This must be denied in the present case, having regard to the basic

facts found by the Court of Appeal. It is the essence of a legal provision requiring form that if the form is not observed, a declaration of an intention to conclude a legal transaction is not binding. It does not bind, even if the intention is manifested by especially emphatic words in solemn form. The statutory requirement of form cannot be replaced by some other solemn expression chosen by the parties. The form required by the statute cannot be rendered superfluous by these means, and it is not possible by way of awarding damages to accord legal effects to an informal declaration, if the statute denies it any effect.

Accordingly the claim for the performance raised by this action, which cannot be supported on the ground of blameworthiness at the conclusion of the contract (*culpa in contrahendo*) cannot be justified either on the ground that good morals have been violated. The claim must therefore be rejected.

Case 22
BUNDESGERICHTSHOF (FIFTH CIVIL DIVISION) 27 OCTOBER 1967
BGHZ 48, 396

Facts

The defendant sold to the plaintiff a parcel of land by a contract in writing, but not before a notary or court, as required by para 313 [311b I] BGB. The plaintiff's claim that the defendant be condemned to convey the premises was allowed by the *Landgericht* Bielefeld and the *Oberlandesgericht* Hamm. A second appeal by the defendant was rejected for the following reasons.

Reasons

The plaintiff contends, first of all, that since both parties were aware of the need for the written contract of 20 June 1958 to be in proper form, and therefore had both knowingly failed to observe the statutory provisions on form, neither of them could assert that it was contrary to good faith to claim that the contract was void for lack of form. With this argument the plaintiff relies on the practice of the *Reichsgericht*, affirmed by this Division, that no party may raise the defence of malice, if the facts show only that knowingly or unknowingly the parties acted contrary to para 313 [311b I] BGB [references]. As the Court of Appeal has found, these prerequisites are not present in this case. It is true that the plaintiff, too, knew that the contract had to be in proper form, because he suggested that it should be drawn up by a notary. On the other hand, the defendant did not act knowingly in contravention of para 313 [311b I] BGB.

He attempted, and attempted successfully, to persuade the plaintiff not to insist on notarial form for inasmuch as by referring to his signature and thereby to his commercial reputation he declared that the written contract was equivalent to a notarial contract. In these circumstances and also because the managing partner of the defendant who had been his chief in the past, was in his eyes endowed with special authority, it was practically impossible for the plaintiff to insist on compliance with the statutory formalities.