[HIGH COURT OF AUSTRALIA.]

WELLS . . . . . APPELLANT;
PLAINTIFF,

AND

MATTHEWS AND OTHERS . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 22, 23, 24.

Griffith C.J., Isaacs, Gavan Duffy, Powers and Rich JJ.

Contract—Evidence—Promise to make gift by will.

In an action brought by the plaintiff against the executors of her father's estate, alleging a contract by which her father had, for valuable consideration, promised that he would by his last will leave her a share in his estate equal to the shares he left to certain others of his children, and claiming damages for breach of such contract, the plaintiff relied on oral conversations. The *Statute of Frauds* was not pleaded.

Held, that the question for decision was whether the oral conversations amounted to a contract for valuable consideration, or to a mere representation of intention which the plaintiff was content to accept.

The Judge of the Supreme Court having found on the evidence that the plaintiff had failed to establish her case,

Held, that there was no ground for disturbing that finding.

Decision of the Supreme Court of Victoria (*Hodges* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Charlotte Elizabeth Wells against Mary Ann Matthews, Frances Chambers, Mary Ann Matthews the younger and Sarah Ann Matthews, personally and as executrices of the will of George Cole Matthews,

deceased, the father of the plaintiff, and also against Avis Gamble, Frake Richard Matthews and Elizabeth Cox. By her statement of claim the plaintiff alleged that her father had made a contract with her by which he promised to leave her by his will a certain specified share of his estate, and she claimed damages for the breach of that contract. The material facts are stated in the judgments hereunder.

The action was heard before *Hodges* J., who gave judgment for the defendants.

From that decision the plaintiff now appealed to the High Court.

A. H. Davis, for the appellant, referred to *Leake on Contracts*, 6th ed., p. 457; *Laver* v. *Fielder* (1); *Fraser* v. *Pape* (2); *In re Parkin*; *Hill* v. *Schwarz* (3); *Jones* v. *How* (4); *Barkworth* v. *Young* (5); *Chaplin* v. *Hicks* (6); *Ex parte Wilmot*; *In re Thompson* (7).

[ISAACS J. referred to *Logan* v. *Wienholt* (8).

RICH J. referred to *Fry on Specific Performance*, 4th ed., p. 100; *Goilmere* v. *Battison* (9).]

Bryant and *Latham*, for the respondents, were not called on.

GRIFFITH C.J. I think Mr. *Davis* has said all that can be said for his client, but he has failed to satisfy me that the conclusion of *Hodges* J., who had the advantage of seeing and hearing the numerous witnesses, is erroneous. The action is a singular one. The plaintiff claims that her father made a contract with her for valuable consideration that he would leave her a share in his estate equal to the share or shares that he might leave to three of his younger children. The contract is stated in three different ways, to which I will refer afterwards. The father, who was a farmer in the country and had a large family, owned some freehold land. Several members of the family took up selections of adjoining lands under the Land Acts of Victoria, under which it

(1) 32 Beav., 1.
(2) 20 T.L.R., 798.
(3) (1892) 3 Ch., 510, at p. 518.
(4) 7 Ha., 267.
(5) 4 Drew., 1, at p. 23.
(6) (1911) 2 K.B., 786, at p. 792.
(7) L.R. 2 Ch., 795.
(8) 1 Cl. & F., 611.
(9) 1 Vern., 48.

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was necessary that each selector should solemnly declare that the land was taken up solely for his own benefit to the exclusion of every other person. It was not unusual in Victoria, or in other States where similar Acts were in force, for what has been called "family selections" to be made. Each selector was bound to reside on his selection, but did not do so, the whole of the selections being treated as a family estate. It appears that that is what was done in this instance. None of the selections were treated otherwise than as part of a single estate, or managed apart from the rest. The father paid the rent, not the children. Later, the father desired to sell the property as a whole, and consulted with his children as to what was to be done with their selections. The plaintiff, at any rate, agreed that her father might sell her land with his. Various versions were given of what is alleged to be the contract made when she gave that consent. There was, of course, from the first no definite agreement between the father and daughter as to what should be their legal relationship in respect of the land. What that relationship was in point of law is to be inferred from the facts. The whole matter depended upon tacit mutual understanding, which was, indeed, the only possible basis for such a transaction, having regard to the stringency of the law as to personal residence and beneficial ownership. These being the relations between the father and daughter when the proposal was made to sell the whole estate, consent was given by the plaintiff to the sale of her land with the rest. The agreement alleged in the statement of claim is that in consideration that the plaintiff would transfer her land to the proposed purchaser the father would "by his last will leave to the plaintiff a full or equal share of his estate passing under such will, that is to say, a share equal to the share to be given by the will to such of his children as had no land or as should transfer the lands held by them respectively to a purchaser in accordance with the wishes of" the father. That is the form in which the plaintiff's advisers after consideration determined to allege the promise. The actual evidence with regard to the promise is given by the plaintiff. She said: "My father on 3rd March told me what his arrangements were, what he intended to do with those who allowed their land

to go with his. . . . . He said that those who allowed the land to go with his were to get an equal share with the three youngest of the family, and of course Elizabeth" (who was a daughter who had agreed). "I said I would not agree to anything till my husband came home. . . . . I remember the conversation taking place on 4th, when my father returned. I and my husband and my father were present. My father, when we were all sitting at tea, said: 'Bob, did Charlotte'" (the plaintiff) "'tell you about the arrangement I had made with her or wanted to make?' My husband said, 'Yes'; and then father went over it again to him, saying what he had promised. Father said I was to get an equal share with the younger ones. He said: 'There will be no money now passed over, but Charlotte will get an equal share with the three younger ones and Elizabeth,' that is the one that allowed him to sell her selections. To that my husband said: 'You have always trusted one another in the past in business matters and I suppose you can trust one another now, and Charlotte can please herself.' I said I was agreeable under those conditions." That is the plaintiff's version of the conversation which is said to amount to a contract. Nothing was said about a will or a promise to make a will. But in supposed corroboration of that evidence Mr. Wynne, the father's solicitor, was called to prove an admission made by the father as to the nature of the arrangement or contract, if there was one. He said that, in a conversation between himself, the father and the plaintiff, the father said: "I have arranged with her. I have arranged that when I die my daughter and her sisters shall have an equal share in my estate with the younger ones who have no land." . . . "It was 'the sisters who are transferring the land.' What he said was: 'My daughter and her sisters who are transferring their land will have an equal share with the younger ones who have no land.'" That is substantially the same as the plaintiff's version. But shortly after the testator's death Mr. Wynne, after an interview with the plaintiff, wrote on her behalf a letter to the defendants' solicitors, in which he said: "As her" (the plaintiff's) "father on many occasions promised her that she was to share in his estate equally with the others . . . . and there was

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no reason for his changing his intention, our client is satisfied that he was not in a fit condition at the time he made the will to properly consider the claims of all his children." That represents the alleged promise as one to divide his estate equally between all his children, which is quite inconsistent with the contract suggested by the plaintiff in her pleadings and alleged by her in her evidence. When the father died he left her £250, and to each of the three younger children he left a share of residue. The plaintiff now claims that she is entitled to have an equal share with those three children in the residue, that is to say, that she is entitled to get as much out of the estate as any of those three. The learned Judge heard the evidence I have mentioned and a great deal of other evidence, some of which was quite inconsistent with the plaintiff's version.

The question really is: Was there a contract made *inter partes* for valuable consideration, to the effect that the plaintiff promised to give up the land to which she was nominally entitled, and the father promised that in consideration of that land being so given up he would give her a definite share of his estate, or was the transaction merely a continuation in another form of the previous position of mutual confidence and trust? The father himself used that term to express the relation between himself and his children. The learned Judge came to the conclusion that there was not a definite contract at all, but only a mutual understanding which amounted to no more than a representation by the father of his intention, upon which the plaintiff was content to act. Upon the whole of the evidence, which is very conflicting, I certainly cannot see my way to differ from the conclusion to which the learned Judge came. The *Statute of Frauds* was not pleaded. In the face of the conflict of evidence and the conclusion of the learned Judge, I think it is impossible to disturb his decision. Personally I should, from the written record of the evidence, arrive at the same conclusion.

ISAACS J. I agree with the conclusion of the Chief Justice. My position is this: The issue on the main question is whether what the testator said was a declaration of intention which he was competent to change, or whether it was a promise irrevocably

made for valuable consideration. I think the evidence on behalf of the plaintiff is capable of either construction. There is a considerable body of evidence which tells in favour of the defendants, but whatever conclusion I might come to on reading the mere printed evidence before me, this much is clear, that a great deal would depend on the demeanour of the witnesses—more than usually is the case. The learned Judge who heard and saw the witnesses had that advantage which we have not, and, to my mind, it is impossible to say that his decision was wrong in view of that important feature.

I therefore agree that the appeal should be dismissed.

GAVAN DUFFY J. I agree that the appeal should be dismissed.

POWERS J. I concur.

RICH J. I concur.

Appeal dismissed.

Solicitors, for the appellant, *Hamilton, Wynne & Riddell.*
Solicitors, for the respondents, *Harwood & Pincott.*

B. L.