[HIGH COURT OF AUSTRALIA.]

HORTON . . . . . APPELLANT;
PLAINTIFF,

AND

JONES AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1934-1935.

SYDNEY, 1934, *Nov.* 28, 29.

MELBOURNE, 1935, *March* 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Contract—Agreement to make a will in person's favour—Promise to leave "my fortune" —Interest in land—No note or memorandum in writing—Statute of Frauds—Severability of contract—Uncertainty—Conveyancing Act 1919-1930 (*N.S.W.*) (No. 6 *of* 1919—No. 44 *of* 1930), *sec.* 54A*.

The plaintiff sued the defendants, the personal representatives of J., for damages for breach of an oral agreement whereby J. had promised to make a will in the plaintiff's favour leaving her his "fortune," consisting of a four-sevenths interest under his deceased father's will and his insurance policy. The plaintiff promised to look after J. and make a home for him for the rest of his life, and, according to her evidence at the trial, the plaintiff performed that promise. At the time the agreement was made the estate of J.'s father included investments on mortgage of real estate. J. had become entitled to four one-seventh shares in this estate as next of kin of certain of his children who had died.

Held that the agreement was unenforceable:—

By *Rich*, *Starke* and *Dixon* JJ., on the grounds that it fell within the provisions of the *Statute of Frauds*, in that at the time it was made the

* Sec. 54A of the *Conveyancing Act* 1919-1930 (N.S.W.) provides:—"(1) No action or suit 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 or suit 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 authorized. (2) This section applies to contracts whether made before or after the commencement of the *Conveyancing (Amendment) Act* 1930, and does not affect the law relating to part performance, or sales by the court."

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estate of deceased's father comprised interests in land, i.e., investments upon mortgage of real estate and that the promise to leave insurance moneys by will was not severable from the rest of the contract and fell with it.

By *Starke*, *Evatt* and *McTiernan* JJ., on the ground that it was indefinite and void for uncertainty.

Decision of the Supreme Court of New South Wales (Full Court): *Horton* v. *Jones*, (1934) 34 S.R. (N.S.W.) 359; 51 W.N. (N.S.W.) 126, affirmed.

APPEAL from the Supreme Court of New South Wales.

The appellant, Nonie Ethel Horton, brought an action in the Supreme Court of New South Wales against Elsie Marriott Jones, William James Harding and Cecil Purser, the executrix and executors of the estate of Gordon Philip Jones, deceased. By the first count the appellant alleged that in or about June 1928 the said Gordon Philip Jones agreed for a certain consideration, which was duly supplied, to make a will containing certain dispositions in her favour. The appellant also sued in other counts for £423 12s. for work done and services rendered by the appellant to Jones at his request; for £37 7s. 6d. for use and occupation by Jones of a flat belonging to the appellant at Potts Point; and for £37 7s. 6d. for rent of the flat under an alleged letting on a weekly tenancy. The substantial pleas to the count alleging an agreement to make a will were *non assumpsit*; the *Statute of Frauds* (*Conveyancing Act* 1919-1930 (N.S.W.), sec. 54A); and a contention that such an agreement was against the policy of the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (N.S.W.). To the remaining counts the plea was "never indebted." The respondents pleaded a set-off with respect to a sum of £32 8s. alleged to have been paid by them at the appellant's request in respect of a guarantee of the appellant's account given by Jones to the Commercial Bank of Australia Ltd. The respondents also pleaded *plene administravit praeter* £19,335 19s. 8d. The appellant admitted the set-off and otherwise joined issue.

The contract alleged was that in or about June 1928 Jones said to the appellant: "If you will promise to make a home for me and look after me for the rest of my life, I will leave you my fortune." He added that by his fortune he meant his four-seventh's interest under his deceased father's will. He said he would also leave her his insurance policy for £12,000. The appellant asked for time to

consider the matter. Two days afterwards, there having been a further discussion in the meantime, Jones asked her whether she had decided to accept his offer, and she said: "Yes." The appellant gave evidence that she did, to some extent, make a home for Jones and look after him until his death, which occurred on 6th March 1931. Jones, however, did not make a will in her favour, but left a will dated 3rd December 1923, making no disposition in favour of the appellant, which was admitted to probate.

The action was heard by *James* J. and a jury. The plaintiff was nonsuited. It was not disputed on behalf of the respondents that there was evidence of an intention to enter into a binding contract, but it was urged that the terms of the contract, as alleged in the parol evidence given on behalf of the appellant were so vague that upon any finding by the jury as to those terms, the alleged contract was necessarily, as a matter of law, void for uncertainty.

On the question of the *Statute of Frauds*, the stamp affidavit of the estate of Jones was in evidence, and it showed as included in that estate an item of £21,276 19s. 9d. interest in a deceased person's estate as per schedule. It appeared from this schedule that Jones had a life interest in the estate of his father, A. T. Jones, with remainder to G. P. Jones' children, of whom he had seven, four of whom predeceased him in infancy, so that he as their next of kin, had become derivatively entitled to four one-seventh shares in the estate of A. T. Jones. It also appeared that at the death of G. P. Jones his deceased father's estate consisted of mortgages of land totalling £36,725, accrued interest thereon to the death of G. P. Jones amounting to £516 12s. 2d., and two blocks of vacant land valued at £40.

On appeal, the Full Court of the Supreme Court of New South Wales (*Jordan* C.J., *Halse Rogers* J. and *Markell* A.J.) held that the *Statute of Frauds* applied and that the first count failed, but that there should be a retrial on the remaining counts: *Horton* v. *Jones* (1).

From this decision, so far as it related to the first count, the plaintiff now appealed to the High Court.

(1) (1934) 34 S.R. (N.S.W.) 359; 51 W.N. (N.S.W.) 126.

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Sugerman and *Mack*, for the appellant. The promise was to leave the appellant by the deceased's will his interest in his father's estate and also his insurance policy and his other personal property. This was not a promise relating to an interest in land, and if it was, it was severable from the rest of the promise as to the insurance moneys and the other personal estate. This was not a disposition of land or of any interest in land within sec. 54A and sec. 7 of the *Conveyancing Act* 1919-1930. The contract is severable: there were two promises and two considerations, one relating to the deceased's interest in his father's estate, and the other to the insurance policy (*De Lassalle* v. *Guildford* (1); *Angell* v. *Duke* (2); *Mayfield* v. *Wadsley* (3); *Wood* v. *Benson* (4); *Pickering* v. *Ilfracombe Railway Co.* (5)). The modern rule is that where for one consideration there are two promises which can be severed, one good and one bad, the good promise can be enforced and the bad one cannot (*Halsbury, Laws of England*, 2nd ed., vol. 7, p. 135). There is no distinction between severability in relation to a void promise and severability in relation to an unenforceable promise (*Anson's Law of Contract*, 17th ed. (1929), p. 248). This was not a promise to demise an interest in land under sec. 54A of the *Conveyancing Act* 1919-1930. Even if the estate of A. T. Jones had been fully administered there is nothing to show that the assets of the children through whom G. P. Jones claimed had been fully administered, or that the estate of the children had been the subject of a grant of letters of administration. So far as appears from the evidence the only interest which the promisor had in the estate of his father was a right to approach the Court in its probate jurisdiction and obtain administration of the deceased's assets, and, having administered the estate, the right to whatever then remained. The right of G. P. Jones in the profits was not a right *in rem* or an interest in specific assets forming part of the estate of A. T. Jones unless it is shown that the estates of the children had been fully administered. The deceased's rights in the unadministered estate of his father were rights *in personam*, not rights *in rem*. It is only when the

(1) (1901) 2 K.B. 215.
(2) (1875) L.R. 10 Q.B. 174.
(3) (1824) 3 B. & C. 357; 107 E.R. 766.
(4) (1831) 2 C. & J. 94; 149 E.R. 40.
(5) (1868) L.R. 3 C.P. 235, at p. 250.

estate is fully administered that the right transmutes itself into a right in land.

[DIXON J. referred to *In re Rowe* (1) and *Glenn* v. *Federal Commissioner of Land Tax* (2).]

A contract is not within the statute if at the time of its making it cannot be determined whether it includes land or not. There is nothing to show what the gift may cover at the time of the promise or at the time of death. In order to come within the statute it must refer to land or deal with some specific land that is affected by it. There is nothing here to show what the state of the assets in this estate were at the time the promise was made. There is no evidence that at the death of G. P. Jones his interest in his father's estate was an interest in land (*Baker* v. *Archer-Shee* (3); *Lord Sudeley* v. *Attorney-General* (4)). In order to bring the contract within the statute there must be something on the face of it to indicate that it relates to an interest in land. Here the interest of the promisor was a mere right. It may have been nothing more than a right to go to the Probate Court to obtain administration of his children's estate either at that moment or at the time of the death. Assuming that the children had an interest in their grandfather's estate which was an interest in land, when they died and their assets came to be administered it does not follow that that land may not be personalty. There is no evidence to show that the estates of the children had been fully administered or that administration had been applied for at all (*Hoysted* v. *Federal Commissioner of Taxation* (5); *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (6); *In re Morris*; *Mayhew* v. *Halton* (7); *Bradley* v. *Holdsworth* (8); *Humble* v. *Mitchell* (9); *Bligh* v. *Brent* (10)). Sec. 54A refers to the operation of an instrument and not to the instrument itself. [Counsel also referred to *Maddison* v. *Alderson* (11); *In re Duke of Marlborough*; *Davis* v. *Whitehead* (12).]

(1) (1926) V.L.R. 452; 48 A.L.T. 68.
(2) (1915) 20 C.L.R. 490.
(3) (1927) A.C. 844.
(4) (1897) A.C. 11.
(5) (1925) 37 C.L.R. 290.
(6) (1926) 38 C.L.R. 12.
(7) (1921) 1 Ch. 172, at p. 178.
(8) (1838) 3 M. & W. 322; 150 E.R. 1210.
(9) (1839) 11 A. & E. 205; 113 E.R. 392.
(10) (1836) 2 Y. & C. (Ex.) 268; 160 E.R. 397
(11) (1883) 8 App. Cas. 467.
(12) (1894) 2 Ch. 133.

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Spender (with him *Snelling*), for the respondent. The agreement sued upon is a contract for a disposition of an interest in land within the meaning of sec. 54A of the *Conveyancing Act*. Where you have an entire contract that covers both realty and personalty, if it is bad as to the realty it is bad as to the personalty also. If a contract is entire, as this one is, you cannot sever the personalty from the realty so as to make it one thing *qua* realty and another thing *qua* personalty. It is the one contract and no other upon which the plaintiff is suing. The contract is one in respect of both realty and personalty. If it fails as to realty, it fails altogether. In *Mayfield* v. *Wadsley* (1) the evidence showed that there were two contracts. Here there is one contract. *Wood* v. *Benson* (2) shows only that there may be two contracts, and has no application here. That case also related to a guarantee. In *Williams* v. *Burgess* (3) there were two contracts. It is clear upon the evidence that there is only one enforceable contract, and it cannot be spelt out of the evidence that there are two contracts. *Pickering* v. *Ilfracombe Railway Co.* (4) deals with an entirely different aspect. The true test of severability is whether there is an independent contract (*Cooke* v. *Tombs* (5); *Lea* v. *Barber* (6); *Hodgson* v. *Johnson* (7); *Hawkesworth* v. *Turner* (8)). Here there is an entire contract, and whether it contains two promises or not, it is one contract only and it comes within sec. 54A. For the contract to be divisible the consideration must be divisible. If there is one entire consideration the promise cannot be severable (*Bentham* v. *Hardy* (9); *Halsbury, Laws of England*, 2nd ed., vol. 7, p. 134; *Winstone* v. *Mehaffy* (10)). The onus is on the plaintiff to establish that no part of the contract relates to land, or if it does, to prove an instrument in writing containing all the terms. The statute applies if there is some interest in land involved. It need not be any specific or ascertainable interest (*Toppin* v. *Lomas* (11); *Driver* v. *Broad* (12); *Miller* v. *Collins* (13); *In re Watts*;

(1) (1824) 3 B. & C. 357; 107 E.R. 766.
(2) (1831) 2 C. & J. 94; 149 E.R. 40.
(3) (1839) 10 A. & E. 499; 113 E.R. 189.
(4) (1868) L.R. 3 C.P. 235.
(5) (1794) 2 Anst. 420, at p. 424; 145 E.R. 922, at p. 924.
(6) (1794) 2 Anst. 425; 145 E.R. 924.
(7) (1858) E.B. & E. 685, at p. 689; 120 E.R. 666, at p. 668.
(8) (1930) 46 T.L.R. 389.
(9) (1843) 6 I.L.R. 179.
(10) (1917) N.Z.L.R. 956.
(11) (1855) 16 C.B. 145, at p. 160; 139 E.R. 711, at p. 717.
(12) (1893) 1 Q.B. 744, at p. 746.
(13) (1896) 1 Ch. 573, at pp. 585, 586.

Cornford v. *Elliott* (1); *Re Pritchard's Settlement*; *Playne* v. *Twisden* (2); *Dalgety & Co. Ltd.* v. *Gray* (3)). On the assumption that the whole estates are not administered, it is not necessary to point to a definite and ascertainable interest, and here there was an interest in trust. In *Lord Sudeley* v. *Attorney-General* (4) the estate was not wholly administered, and a beneficiary was not entitled to say that specific property was his. In the present case the estates of the children had been administered at the date of the contract. There was an equitable interest in land disposed of by the contract (*Cooper* v. *Cooper* (5); *Blake* v. *Bayne* (6); *Glenn* v. *Federal Commissioner of Land Tax* (7); *Gray* v. *Smith* (8)). The arrangement made between the plaintiff and the deceased was too uncertain to be enforced (*Maddison* v. *Alderson* (9); *In re Hamilton*; *Hamilton* v. *Hamilton* (10)).

[DIXON J. referred to *O'Sullivan* v. *National Trustees, Executors and Agency Co. of Australasia Ltd.* (11).]

Sugerman, in reply. The facts in *Maddison* v. *Alderson* (12) differed materially from the facts in this case. The promises in this case were not too vague to constitute a contract (*Richardson* v. *Garnett* (13)). For a case to be struck by the *Statute of Frauds* it is necessary that all the facts which go to show that the case falls within the statute should appear on the face of the plaintiff's own case.

Cur. adv. vult.

1935, March 11.

The following written judgments were delivered :—

RICH AND DIXON JJ. The Supreme Court set aside the nonsuit entered at the trial and ordered a new trial upon the second, third and fourth counts of the plaintiff's declaration, but upon the first count entered a verdict for the defendants. The defendants are sued as executors, and, by her first count, the plaintiff declared

(1) (1885) 29 Ch. D. 947.
(2) (1903) 88 L.T. 197, at p. 198.
(3) (1919) 26 C.L.R. 249.
(4) (1897) A.C. 11.
(5) (1874) L.R. 7 H.L. 53.
(6) (1908) A.C. 371.
(7) (1915) 20 C.L.R. 490, at p. 503.
(8) (1889) 43 Ch. D. 208.
(9) (1883) 8 App. Cas. at p. 472.
(10) (1906) 25 N.Z.L.R. 218.
(11) (1913) V.L.R. 173; 34 A.L.T. 190.
(12) (1883) 8 App. Cas. 467.
(13) (1895) 12 T.L.R. 127.

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upon a contract by their testator that he would make a will in her favour leaving her so much of his father's estate as he had power to dispose of and the proceeds of the policies of insurance upon his life. The consideration on her part for this contract she alleged to be a promise by her to enter his service and to act as secretary, housekeeper and nurse to him without wages for the remainder of his life and, so entering into his service and if and when requested by him, to cease carrying on the business in which she was then engaged. She alleged performance of her promise. The estate of the deceased's father to which the count refers included investments upon first mortgage of real property. The contract set up by the plaintiff was not evidenced by writing, and the judgment of the Supreme Court proceeded upon the ground that, in the absence of writing, she could not recover upon the count because the deceased's disposable interest in his father's estate having regard to its state of investment included an interest in land. The correctness of this view was contested upon this appeal by the plaintiff who is the appellant. To take the case out of the operation of sec. 54A of the *Conveyancing Act* 1919-1930, in which the relevant portion of the *Statute of Frauds* is embodied, the plaintiff relies upon various grounds. The first reason given is that even if the estate of the deceased's father included at the time of the making of the contract investments upon mortgage, yet the interest of the deceased himself in that estate was not an interest in land. Next, it was said that it did not appear upon the evidence that the estate did then include investments upon mortgage. It was contended further that, inasmuch as when the alleged contract might come to be performed the estate might not be so invested, the contract was not hit by the enactment. If the contract so far as it related to the deceased's interest in his father's estate was held to affect an interest in land, it was said that nevertheless so much of it as related to the insurance policies need not be evidenced by writing because it was separable. Finally, it was claimed that the contract in relation to the policies was a collateral agreement made in consideration of the plaintiff's entering into the main agreement.

On behalf of the defendants it was contended in answer that, in

any event, the evidence disclosed no contract; because the consideration relied upon by the plaintiff was too uncertain or vague.

The evidence given in support of the alleged contract may be briefly stated. The plaintiff was the lessee of some flats, one of which she occupied. The deceased, a man aged fifty-three, made her acquaintance. She deposed that, shortly after meeting her, he came to see her at her flats and that the following conversation took place:—"He said 'I came to see you. I came to put a certain proposition to you.' Then he told me that he was a very lonely man. He said, 'I am a very lonely man; my wife and children have left me, and I suffer with heart trouble, and it is not safe for me to be alone.' He said 'I came to put a proposition to you. I liked you when I first met you.' He said 'I came to ask you if you would make a home for me, and look after me for the rest of my life.' He said 'If you will, I will promise to leave you my fortune.'" He then described what he meant by his fortune. She said it would need thinking over, and took time to consider the proposal. He came to see her next evening when, according to her evidence, she replied as follows: "Well, you promised to leave me your fortune if I gave up everything and made a home for you, but I am used to having money of my own to spend. What would I do about money for expenses, money for clothes and so on? Certainly, I have plenty of clothes, but shoes and stockings wear out. Would you give me an allowance, because I will have to have some money? I am used to spending a fair amount of money. I am used to running a car, and I am also used to dressing well." He said:—"Oh well, you leave it to me and I will treat you properly and see that you do not want for anything. . . . You leave it to me; I will treat you properly. You will not have to work, and you will find that I will give you whatever money is necessary. You will be able to drive your car, and in fact you really will not know how to put in your time. I will provide for you, and give you everything you want for out-of-pocket expenses." She went on to say:—"But still he would not give me a definite promise that he would give me a dress allowance, but I did not press the point then. No definite arrangement was made that night. The next night he came to see me again. . . . He came again the following

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night and I accepted his offer. He asked me had I thought it over, and I said ' Yes, that I had thought it over,' and he said ' Well have you decided to accept my offer ? ' and I said ' Yes, I will accept your offer, providing that you will carry out your part of the contract, I am prepared to carry out my part '."

For some months after this, he regularly visited her and then came to live at the flats, where he remained for eighteen months. Then her landlord levied a distress, after which she and the deceased went to other flats which he appears to have taken. About seven months later he died. Her evidence as to the services she performed is as follows :—" During the time he was living at my flats I cooked his meals for him. I always took him up early morning tea and toast. Then I cooked his breakfast for him, and cooked a hot luncheon for him, and during most of the time cooked him a three-course dinner, but sometimes he went to " a restaurant. " We then moved to " other flats, " and when I got there I acted as his housekeeper. I cooked all his meals, looked after his clothes, washed his socks, did any correspondence he wanted me to, and generally looked after him." She also said that after leaving her flats she remained in constant attendance upon him and that he had many illnesses. The plaintiff's evidence was corroborated by relatives of the deceased and others whom he and she had visited. They gave evidence to the effect that he said she had promised to look after him and he had agreed to leave his fortune to her.

We are prepared to assume that, upon this evidence, it was open to a jury to find that her promise was to act as his housekeeper and attendant under his reasonable and lawful directions. If this was its meaning, it was not too vague or uncertain to afford a consideration for his promise to leave what he called his " fortune " to her. Even so, we think his promise would not be actionable without a writing. When he described what he meant by his fortune after offering to leave it to her if she would accept his proposal, he said, according to her evidence, that he meant four-sevenths of his father's estate which he could dispose of by will, because it had, so his solicitor said, reverted to him under the provisions of his father's will on the death of certain of his own children. He further said that his life was insured for £12,000 and he would leave her that

also. Other evidence was given in reference to the promise to leave the plaintiff the life insurance moneys, but, in our opinion, it did not enable the jury to interpret the transaction as two separate contracts of which one, namely, that relating to the insurance moneys, was collateral to the other and made in consideration of the plaintiff's assenting to the obligation of that other contract. Such cases as *Angell* v. *Duke* (1) and *Morgan* v. *Griffith* (2), which were relied upon, have no application.

In the present case the inclusion of the policies of insurance was no more than part of the reward that the deceased promised she should have under his will. It may be treated, perhaps, as an addition to the share in his father's estate, but his promise was to make a will containing dispositions of these two pieces of property in consideration of her promise to look after him. Further, we think the contention that the promise in reference to the insurance moneys might be considered separable must also fail. If a contract, which is not evidenced by writing, contains more than one promise and, although one of the promises is of a description to which the *Statute of Frauds* applies, another or others are not, the whole contract is unenforceable except when the promises are not only themselves severable but may be referred to and supported by independent or divisible considerations or divisible parts of a consideration capable of distribution (cf. *Hodgson* v. *Johnson* (3)). There is nothing to support an interpretation of the contract sued upon which would bring it within the exception.

The question whether the alleged contract, so far as it related to the deceased's interest in his father's estate, fell within sec. 54A of the *Conveyancing Act* 1919-1930, depends upon an ascertainment of the nature of his rights in that estate and upon its condition or possible condition of investment. It appears that, under his father's will, he took a life interest with vested remainders to his seven children as tenants in common. Four of these children died in infancy, and he, of course, was their sole next of kin. He thus was entitled to take in due course of administration four separate intestate estates each of which consisted of a right to a seventh

(1) (1875) L.R. 10 Q.B. 174.
(2) (1871) L.R. 6 Ex. 70.
(3) (1858) E.B. & E. 685; 120 E.R. 666.

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share in the main estate, presumably of residue. It appeared, however, that the main estate had discharged debts and liabilities. The evidence proved also the state of its investment at the deceased's death. It was invested to a great extent upon mortgage. Whether it sufficiently appeared by admissible evidence that it was so invested at the time of the making of the contract alleged was disputed. We think that the question must be answered against the plaintiff. References to mortgages were made by the deceased in the course of discussing with the plaintiff the arrangement proposed between them, and we think that these references amount to more than a narrative statement. They form part of the materials admissible for identifying the subject matter of the alleged contract.

Upon these facts the first question is whether, although the estate of the deceased's father be regarded as including interests in land, the interest in that estate taken by the deceased himself as sole next of kin of his sons can be so regarded. It was suggested that because the deceased had no more than a right to have the estates of his deceased children administered in due course and to receive the net surplus, and that these estates in turn comprised no more than an analogous right in the residue of his father's estate, no right in any specific asset in the estate of the deceased's father subsisted in the deceased. This may at once be conceded (cf. *Lord Sudeley* v. *Attorney-General* (1); *Vanneck* v. *Benham* (2); *Barnardo's Homes* v. *Special Income Tax Commissioners* (3); *Baker* v. *Archer-Shee* (4); and *In re Rowe* (5)). But it is not the consequence that no right of property subsisted in the deceased, nor that no right of property subsisted involving an interest in land. The deceased possessed equitable rights enforceable in respect of the assets considered as a whole. It is true that he had no immediate right to possession or enjoyment and that his precise rights involved, at any rate prima facie, administration, and possibly necessitated conversion and calling in of investments. But, none the less, he had more than a mere equity. He had an equitable interest and it related to assets which included interests in lands. (See *Cooper* v. *Cooper* (6);

(1) (1897) A.C. 11.
(2) (1917) 1 Ch. 60.
(3) (1921) 2 A.C. 1.
(4) (1927) A.C. 844.
(5) (1926) V.L.R. 452; 48 A.L.T. 68.
(6) (1874) L.R. 7 H.L. 53.

Blake v. *Bayne* (1); *Brook* v. *Bradley* (2); *Ashworth* v. *Munn* (3); *In re Dawson*; *Pattisson* v. *Bathurst* (4)). But this does not completely dispose of the question whether the alleged contract falls within sec. 54A and amounts to a contract for the sale or other disposition of land. For, although the deceased's interest in his father's estate might or did at the time of the making of the alleged agreement amount to or include an interest in land, this arose only from its state of investment, which from the point of view of the contracting parties was a mere accident. When the deceased came to fulfil his promise it might no longer be so invested. The contract was to leave that interest whatever form it might take or happen to be in. Indeed, it may be said that the substance of the contract was to leave to the plaintiff whatever the deceased might have at his death representing that interest, and his life insurance policies. We think that these considerations do not take the contract set up out of the *Statute of Frauds*. The contract is to leave property by will whatever form it may be in. At the time of contracting, it involved an interest in land. It is therefore a contract to leave that interest or the proceeds thereof if thereafter called in and invested in some other form of security or distributed. It appears to us that this is a contract which relates to an identifiable asset or assets which have the character of an interest in land, although consistently with the contract and before its performance is complete, they may have lost that character. Such a contract at its inception relates to an interest in land and promises a disposition of that interest or its proceeds. The alternative expressed in the words "or its proceeds" does not make the contract fail to answer the description of sec. 54A. That provision has, we think, substantially the same effect as the *Statute of Frauds* so far as it related to interests in land. We cannot agree in the construction of the curiously drawn definition of "disposition" in sec. 7 of the *Conveyancing Act* 1919-1930 which excludes disposition by will.

The final suggestion on the part of the plaintiff was that the matters with which we have dealt involved inferences or other

(1) (1908) A.C., at pp. 383, 384.
(2) (1868) L.R. 3 Ch. 672, at pp. 674, 675.
(3) (1878) 15 Ch. D. 363, at pp. 368, 370.
(4) (1915) 1 Ch. 626, at p. 639.

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matters of fact which must be submitted to the jury. We think the evidence supports no inference which in point of law would take the case outside the statute.

For these reasons we are of opinion that the appeal should be dismissed.

STARKE J. In my judgment, this appeal should be dismissed.

The plaintiff—the appellant—sued the executors of G. P. Jones and alleged that in the year 1928 Jones, in consideration of the plaintiff promising to enter into his service and act as secretary, housekeeper and nurse to him without wages for the remainder of his life, and so entering into his service, and if and when requested by him to cease carrying on the business in which the plaintiff was then engaged, promised the plaintiff that he would make a will in her favour, leaving to her so much of his father's estate, namely four-sevenths thereof, as was within his power of disposition, and the proceeds of any policy or policies of assurance upon his life and any other personal property of which he might die possessed, and that the plaintiff did so promise to and did in fact enter into his service, and did act as secretary, housekeeper and nurse to him without wages until his death, and was requested by him and did when so requested cease carrying on the aforementioned business, and that all things happened and all times elapsed necessary to entitle the plaintiff to have such a will as aforesaid made by G. P. Jones. Yet Jones neglected to make, and died without making, such a will or any will in favour of the plaintiff. Evidence was led of a conversation between Jones and the plaintiff to this effect:— "I came to ask you if you would make a home for me, and look after me for the rest of my life. If you will, I will promise to leave you my fortune." "He went on to tell me that by his 'fortune' he meant four-sevenths—that his solicitor had told him that by his father's will any of his children who had died before he did, their share would revert to him, and he could will it away to whomsoever he liked and he would leave that to me. He also went on to say that he was insured for £12,000, and he would leave me that amount too. He said he would leave me his insurance policy, which amounted to £12,000." Ultimately, the plaintiff says, she accepted this

proposal, entered Jones' service, and did to some extent make a home for him until his death, which occurred in March of 1931.

Such statements and acts do not, in my judgment, establish the contract alleged, nor do they constitute any evidence of such a contract. It is quite true that definite proposals to leave property by will for valuable consideration have been recognized and enforced as contracts (*Synge* v. *Synge* (1); *Richardson* v. *Garnett* (2)). But it appears to me that the proposal to "leave you my fortune" was quite indefinite: until Jones' death, it was uncertain what his fortune would be; he was free, in my opinion, to deal with his property in his lifetime. Again, the plaintiff was free to serve or not to serve Jones, as she thought fit. All that the evidence warrants, in my opinion, is an expectation on the part of the plaintiff that she would benefit under Jones' will, if she looked after him. But it does not appear to me that the words used are the language of obligation or contract, or any evidence of it. (See *Maddison* v. *Alderson* (3).)

However this may be, the contract alleged is, in my opinion, a contract within the provisions of the *Statute of Frauds* (*Conveyancing Act* 1919-1930 of New South Wales, sec. 54A). A contract to leave by will "all my real and personal property" would, I think, be clearly within the statute, for it expressly stipulates for the disposition of any land belonging to or coming to the contracting party, or an interest therein. And the cases are not distinguishable, to my mind, where the contract is for "all my property," or for "all my fortune," for they too extend to and cover the disposition of any land belonging or coming to the contracting party, or any interest therein. The *Statute of Frauds* is directed to agreements concerning, covering or extending to lands or interests therein, whether the contracting party has title to them or not. The present case is even stronger. The agreement of the parties stipulated, according to the pleadings, for so much of the estate of Jones' father, namely four-sevenths thereof, as was within Jones' power of disposition, and it was proved that part of the father's

(1) (1894) 1 Q.B. 466, at pp. 470, 471.
(2) (1895) 12 T.L.R. 127.
(3) (1883) 8 App. Cas., at pp. 472, 487.

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estate was at the time of the agreement invested upon mortgages of land; and, as the learned Chief Justice of the Supreme Court of New South Wales observed in his judgment, a mortgage of land constitutes an interest in land. It was contended, however, that Jones had no interest in these mortgages, but only a right to the administration of his father's estate. The learned Chief Justice satisfactorily disposed of the argument in the following passage of his judgment: "But the fact that the interest is not identifiably attached to any specific asset does not . . . prevent it from being in fact and in law a beneficial interest in all the assets for the time being existing in their actual condition, for the purposes of the *Statute of Frauds*" (1). The form in which these assets were invested might, indeed, as was contended, change from time to time, but nevertheless the assets about which the parties stipulated, and to which they attached their agreement, was the interest as it then existed, and was an interest in land, whatever form it afterwards assumed, or was converted into.

Lastly, it was contended that the promise by Jones to leave his insurance moneys to the appellant was severable from the other stipulations of contract, and consequently not obnoxious to the *Statute of Frauds*. Again I agree with the learned Chief Justice that there is no substance in the argument; neither the form of the pleadings nor the evidence suggests any independent or severable promise.

EVATT AND MCTIERNAN JJ. The plaintiff by her declaration alleges that in consideration of her promise "to enter into the service" of the deceased "and to act as secretary, housekeeper and nurse to him without wages for the remainder of his life" and "if and when required by him to cease carrying on the business in which the plaintiff was then engaged," the deceased would make a will in her favour leaving her certain assets, particulars of which are then set forth.

In our opinion the evidence given by the plaintiff as to the arrangement which was entered into between her and the deceased

(1) (1934) 34 S.R. (N.S.W.), at p. 366; 51 W.N. (N.S.W.), at p. 128.

is not reasonably capable of proving a contract substantially the same as that alleged. Her evidence is as follows :—

"As I opened the front door he pushed it shut again and said 'To be quite honest, I did not come about the flat. I came to see you. I came to put a certain proposition to you.' Then he told me that he was a very lonely man. He said 'I am a very lonely man ; my wife and children have left me, and I suffer with heart trouble, and it is not safe for me to be alone.' He said 'I came to put a proposition to you. I liked you when I first met you.' He said 'I came to ask you if you would make a home for me, and look after me for the rest of my life.' He said 'If you will, I will promise to leave you my fortune.' "

After describing what he said he meant by his fortune, the plaintiff's evidence continues :—

"He said 'Will you promise to think it over ; will you come out with me to-morrow night,' I said 'No, I cannot promise you that' and then I said 'Really, I must go now, as the telephone is ringing.' He said 'Well, anyway, I will bring the car round to-morrow night, and you can let me know then.' The next night he brought his car round ; and I had promised to go out with someone else, but they had not rung me up, so I went out with him in the car and we discussed it more fully. I then said to him, 'Oh well, you promised to leave me your fortune if I gave up everything and made a home for you, but I am used to having money of my own to spend. What would I do about money for expenses, money for clothes and so on. Certainly I have plenty of clothes, but shoes and stockings wear out. Would you give me an allowance, because I will have to have some money. I am used to spending a fair amount of money. I am used to running a car, and I am used to dressing well.' He said 'Oh well, you leave it to me and I will treat you properly and see that you do not want for anything.' He said 'Before I met you I met a doctor's widow, and I put the proposition to her.' He said 'She said she would think it over,' but she asked me to pay £500 for a residential for her, and suggested that I should go and live there. He said 'I thought it looked a bit too much like blackmail, so I made an appointment to go and see her the next night and talk it over, but I never went.' He said 'You leave it to me ; I will treat you properly. You will not have to work, and you will find that I will give you whatever money is necessary. You will be able to drive your car, and in fact you will really not know how to put in your time. I will provide for you, and give you everything you want for out-of-pocket expenses,' but still he would not give me a definite promise that he would give me a dress allowance, but I did not press the point then. No definite arrangement was made that night. The next night he came to see me again and asked for my answer. In the mean-time I had discussed it with my mother and my brother, and I went to see my married sister at Lavender Bay (objected to). I had a talk to my mother, brother and somebody else. He came again the following night and I accepted his offer. He asked me had I thought it over and I said 'Yes,' that I had thought it over, and he said 'Well, have you decided to accept

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my offer ?' I said 'Yes, I will accept your offer, providing you will carry out your part of the contract, I am prepared to carry out my part.'"

It appears therefore that the offer, which was accepted by her and which measures the content of the obligations which she assumed, was in these terms "I came to ask you if you would make a home for me and look after me for the rest of my life." This offer was restated by her in the following terms "Oh well, you promised to leave me your fortune if I gave up everything and made a home for you but I am used to having money to spend."

The plaintiff's evidence continues with an account of the services which she performed for the deceased, namely, correspondence, housekeeping, cooking, nursing and "constant attendance upon him." But this is not an exhaustive statement of what is reasonably capable of being implied by the proved terms of the arrangement into which she entered. The words "to make a home" and "to give up everything" extend beyond the relationship of master and servant: they point to the conclusion that sacrifice of her own interests and prospects as well as service was part of the obligation. It is not suggested that her part was not honourable, but it cannot be measured by any legal standards. In our opinion it is impossible for a jury to gather from the evidence adduced as to the conversations and acts of the parties and the circumstances of the case, that a contract was made imposing obligations upon the plaintiff, the "nature and content" of which was not uncertain. The precise arrangement alleged is not supported by the evidence, and the terms of the arrangement proved are too uncertain to constitute a contract.

This view of the matter was accepted by *Halse Rogers* J.

The appeal should in our opinion be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Lionel Dare & B. P. Purcell.*

Solicitor for the respondents, *A. N. Harding.*

H. D. W.