1952 *Present :* **Gratiaen J. and Gunasekara J.**

PUBLIC TRUSTEE, Appellant, *and* MRS. N. SENEVIRATNE, Respondent

S. C. 459—D. C. Colombo, 1,942

Donation—Cheque given by donor—Refusal of Bank to honour the cheque—Death of donor—Right of donee to sue legal representative.

Under Roman Dutch law a donation may be made not only by giving and delivering but also by promising. Both the giving *causa donationis* and the promising *causa donationis* are equally donations.

R. offered to donate to plaintiff a sum of Rs. 5,000 and plaintiff accepted the offer. Contemporaneously with the acceptance of R.'s offer to donate Rs. 5,000, plaintiff received a cheque for that amount from R. The Bank, however, refused to honour the cheque on the ground that R.'s signature was doubtful. Before R. could satisfy the Bank in regard to the authenticity of his signature, he died. In an action instituted by the donee to recover the amount involved from the administrator of R.'s estate—

Held, that the mere drawing of the cheque did not serve automatically to appropriate to the donee's benefit an equivalent sum of money lying to the donor's credit at the Bank. Nevertheless, under Roman Dutch Law, the plaintiff was entitled to sue on R.'s promise *simpliciter*.

APPEAL from a judgment of the District Court, Colombo.

N. E. Weerasooria, Q.C., with *E. R. S. R. Coomaraswamy*, for the defendant appellant.—The District Judge has taken the view that the cheque was an assignment of the money in the hands of the banker. This view was based on an English case, *Bromley v. Brunton*[1], which, it is submitted, is not good law. See the judgment of Romer J. in *re Owen, Owen v. Inland Revenue Commissioners*[2]. See also *re Swinburne*[3], and *Re Beaumont*[4].

H. W. Jayewardene, with *S. J. Kadirgamar*, for the plaintiff respondent.—*Bromley v. Brunton* (*supra*) was not followed in later cases because in English law there must be delivery. Roman Dutch law is different. A promise to pay money is implied in the transaction and must be given effect to. No delivery of the gift is necessary. The cheque was only a direction to the bank to pay the money. See *Morice : English and Roman Dutch Law, 2nd ed., p. 108 ; Parampalam v. Arunachalam*[5] *; Public Trustee v. Uduruwana*[6].

N. E. Weerasooria, Q.C., in reply.—There is no evidence that the deceased promised to give money. That was not the case of the plaintiff. He relied solely on the cheque. The District Judge was wrong in law as to the effect of the cheque.

Cur. adv. vult.

[1] *(1868) L. R. 6 Eq. 275.*
[2] *(1949) 1 A. E. R. 901.*
[3] *(1926) Ch. 38.*
[4] *(1902) 1 Ch. 889.*
[5] *(1927) 29 N. L. R. 289.*
[6] *(1949) 51 N. L. R. 193.*

2——J. N. B 20708-1,590 (10/52)

June 9, 1952. GRATIAEN J.—

This is an appeal by the Public Trustee, who is the administrator of the estate of a deceased gentleman named P. D. R. W. Siriwardene (but better known during his lifetime as "Peter Rodrigo"), against a judgment and decree of the District Court of Colombo ordering him to pay to the plaintiff a sum of Rs. 5,000 out of the deceased's estate. The action relates to a transaction which had taken place a few days before Rodrigo died in November, 1947, leaving a last will whereby he bequeathed the entirety of his estate to charitable causes.

The Public Trustee admittedly had no personal knowledge of the circumstances upon which the plaintiff's action was based, and he therefore put her to strict proof of her claim. In addition, acting apparently on information received from some disgruntled relatives of Rodrigo, he repudiated the transaction by challenging Rodrigo's mental capacity at the relevant date ; he also raised certain special defences such as were set out in his plea of undue influence. It is but fair to the plaintiff to record the fact that all these allegations were conclusively proved to be without substance. Mr. Weerasooria very properly did not contest any of the findings of the learned District Judge on these issues, and he confined his argument to the question whether, upon the plaintiff's version of the facts, she could maintain her action for relief against Rodrigo's estate.

The evidence of the plaintiff with regard to the circumstances of the transaction was materially corroborated by independent witnesses and was accepted as true by the learned District Judge. For the purposes of this appeal, therefore, I shall regard her version of the facts as setting out substantially the real nature of the transaction upon which her claim is based. The question for our decision is whether those facts give rise to an enforceable cause of action (in one or other of the alternative forms pleaded in the plaint).

The relevant facts may now be shortly narrated. The plaintiff, who is a married lady living with her husband on an estate in Urapola, had known Rodrigo since she was a little child, and their families had been on terms of close friendship. She called him "Peter uncle". In or about the year 1942, at the time of the threatened Japanese invasion, Mr. and Mrs. Rodrigo evacuated to the district in which the plaintiff and her husband resided. Mrs. Rodrigo was very seriously ill at the time, and the plaintiff not only helped to nurse her but also treated the elderly couple with much consideration. Shortly afterwards, Mrs. Rodrigo died, and Rodrigo, who was now a lonely widower, took up residence at the plaintiff's house for some years, making some nominal contribution towards the cost of his board. There is not the slightest doubt that he was very grateful for the many kindnesses which he had received at the hands of the plaintiff without any thought on her part of obtaining corresponding advantage for herself. In or about the year 1946 Rodrigo went away to his own house in Galle. He was then about 67 years of age and in feeble health. The plaintiff and her husband corresponded with him and visited him there from time to time. In November, 1947, he

became seriously ill and was removed to a non-paying section at the General Hospital in Colombo. From there he wrote to the plaintiff who visited him and arranged for him to be transferred to a paying ward, making the necessary deposit out of her own funds. On 17th November, at his request, she arranged for his transfer to a private hospital in Colombo where he died seven days later.

The rules of the private hospital required that Rodrigo should on admission make a deposit against the cost of his medical and other expenses but, owing to the state of his health, he was unable to subscribe his normal signature on a cheque for Rs. 750 which he attempted to draw on his bankers in Galle. Accordingly, the plaintiff saw Rodrigo's legal adviser the next morning and this gentleman, in the doctor's presence, attested on a cheque for Rs. 750 Rodrigo's thumb impression in lieu of his normal signature. At the same time, the lawyer attested, also on Rodrigo's instructions and in the doctor's presence but without the plaintiff's prior knowledge, Rodrigo's thumb impression on another cheque for Rs. 5,000 drawn on the same bankers in favour of the plaintiff. It is to this latter transaction that the present action relates.

Shortly stated, the plaintiff's version, which the learned Judge has accepted as true and which the Public Trustee no longer disputes, is that after Rodrigo's lawyer had left and after the cheque for Rs. 750 had been handed over to the doctor in charge of the hospital, Rodrigo offered the cheque for Rs. 5,000, drawn in her favour, to the plaintiff. Up to this time he had given her no idea of his intentions in regard to this cheque. He told her in so many words that he wished her to accept the sum of Rs. 5,000 represented by the cheque as a present for herself and on behalf of her two children, expressing at the same time his gratitude for all that she had done for him. The plaintiff replied, " not so much Peter Uncle ", and Rodrigo " said that (she) might do something with it and suggested Rs. 2,000 (each) for the two children ". The plaintiff eventually accepted the cheque, and Rodrigo told her to go to Galle without delay and have it cashed. She went to Galle for this purpose, but, for reasons which I shall later explain, she was unable to realise the cheque.

I pause here to reduce into simple legal terms the substance of this conversation as it was narrated by a truthful witness who could not have understood the intricacies of the law governing the transaction, namely, the English law relating to cheques and negotiable instruments on the one hand, and the Roman Dutch law relating to donations on the other :—

" (1) Rodrigo offered to donate to the plaintiff a sum of Rs. 5,000, the motive underlying his offer being gratitude, generosity and benevolence all of which elements constitute a *justa causa debendi* to sustain a promise under the Roman Dutch Law. *Jayewickreme v. Amarasuriya* [1]. The plaintiff accepted this offer, and in consequence there was immediately formed by mutual consent of the parties a

[1] *(1918) 20 N. L. R. 289.*

valid contract of donation *inter vivos* which, in the circumstances of this case, may be classified as a *donatio remuneratio*. Upon her acceptance of the offer by the donee, she became vested with a right of action to compel the donor to specific performance of his obligation. *Voet 39—5.19, 20;* and *Public Trustee v. Uduruwana* [1]. For, whereas under the English Law a bare executory contract of donation *inter vivos*, unless embodied in a formal deed *or* implemented by delivery (actual or constructive) creates no legally enforceable rights, *Morice's English and Roman Dutch Law* [2], the Roman Dutch Law principles recognise a donation as a species of "contract" entitling a donee, upon acceptance of a promise solemnly made and proceeding from proper motives, to enforce that promise. As *Voet* explains (*39—5—2*), "Just as we donate by giving and delivering, so also we donate by promising, and therefore both the giving *causa donationis* and the promising *causa donationis* are equally donations."

(2) Contemporaneously with the acceptance of Rodrigo's offer to donate Rs. 5,000 to the plaintiff, she accepted the cheque for that amount which he had offered in implementation of his earlier promise. Both the English Law and the Roman Dutch Law presume that a cheque is accepted only as a conditional discharge of the principal obligation and it follows that, if it be dishonoured, the creditor can sue upon the original cause of action. *Wessells on Contract* [3]. That presumption has not been rebutted by any facts which were proved or admitted at the trial. In the result, the legal consequences of the transaction up to the point of time when the plaintiff arrived in Galle the next morning in order to realise the cheque were that (*a*) if the cheque were duly met on presentation, Rodrigo's obligation under the promise *causa donationis* would have been discharged by performance, but (*b*) if it were dishonoured, the principal obligation would immediately become enforceable against Rodrigo in his lifetime or against his legal representative upon his death."

I now return to the facts which occurred after the plaintiff arrived in Galle. The Bank refused to honour the cheque because Rodrigo's "signature" was irregular, and the plaintiff was advised, apparently, to have the authenticity of Rodrigo's thumb impression certified by a Justice of the Peace. She accordingly returned to Colombo and consulted Mudaliyar Eric Perera, J.P., who visited his friend Rodrigo in hospital to discuss the matter with him. Rodrigo confirmed the genuineness of the cheque, and asked Perera to take the necessary steps to have the matter regularised. (This attitude strongly supports the view that, although the cheque was dishonoured, he regarded his principal obligation as still subsisting.) Perera consulted the officials of the Head Office of the Bank in Colombo and was advised by them to obtain a properly authenticated letter from Rodrigo requesting the Bank to meet the cheque in spite of the irregularity in his signature. There is no evidence, however, that the Bank had unequivocally undertaken to meet the

[1] *(1949) 51 N. L. R. 193.*
[2] *(2nd ed.) pages 108–9.*
[3] *Volume 1 page 676 paragraphs 2228 and 2229.*

cheque if the suggested procedure were complied with. A letter on the lines indicated was in fact prepared by the proctor who had previously attested Rodrigo's thumb impression on 18th November, but when he arrived at the hospital, some of Rodrigo's relatives whom he met there were, to use his own words, so hostile and " nasty " that he was unable to contact the invalid. Rodrigo died on 24th November before the cheque could be honoured. In the result, Rodrigo's principal obligation under his binding promise to donate Rs. 5,000 to the plaintiff remained undischarged at the date of his death.

Upon these facts the plaintiff sued the Public Trustee for the recovery of the amount involved—

(*a*) upon a cause of action based on Rodrigo's liability *on the cheque itself ;* and, alternatively,

(*b*) on the footing that Rodrigo " gave and donated to and/or promised or offered the sum of Rs. 5,000 and the plaintiff accepted the same ".

The learned District Judge rightly rejected the cause of action on the cheque, because admittedly the English Law governs that aspect of the plaintiff's claim and a promise to donate a sum of money to the payee does not constitute " valuable consideration " which is a condition precedent to liability.

With regard to the other cause of action (which is itself split up into two distinct alternative sub-divisions) the learned District Judge took the view that the plaintiff could succeed on the basis that, in the circumstances of the case, the issuing of the cheque amounted in law to a " constructive delivery " of a sum of Rs. 5,000 lying to Rodrigo's credit at the Bank. In arriving at this conclusion, the learned Judge purported to follow a ruling of the Court of Equity in England in *Bromley v. Brunton* [1]. With respect, the learned Judge went wrong at this point. In *Bromley's case* the Court of Equity was no doubt concerned with a set of circumstances very similar to the present case. The English Law, *unlike the Roman Dutch Law*, insists on actual or at least constructive delivery in order to confer validity on a gift *inter vivos*, and Vice Chancellor Stuart took the view that the drawing of the cheque served automatically to appropriate to the donee's benefit an equivalent sum of money lying to the donor's credit at the Bank. But in truth *Bromley's case* enjoyed only a brief and most precarious career as a precedent in the English Courts. Its *ratio decidendi* " puzzled " Buckley J. in *re Beaumont ; Beaumont v. Ewbank* [2] and was politely distinguished. It was strongly disapproved by the Court of Appeal in *re Swinburne* [3], and its epitaph has been recorded in a recent judgment of Romer J. in *Owen v. Inland Revenue Commissioners* [4]. For the true principle is that the mere issuing of a cheque granted to a person by way of gift, *unless accompanied by an irrevocable undertaking by the Bank to hold an equivalent sum of money exclusively available to answer the cheque*, cannot be regarded as " an

[1] (*1868*) *L. R. 6 Eq. 275.*
[2] (*1902*) *1 Ch. 889.*
[3] (*1926*) *Ch. 38.*
[4] (*1949*) *118 L. J. R. 1128.*

appropriation or dedication of the money in the Bank or a constructive payment of the cheque ". In the result, Rodrigo's intention to discharge his obligation was frustrated during his lifetime, and the plaintiff's action must stand or fall on the enforceability of Rodrigo's unfulfilled promise to donate Rs. 5,000 to her. The answer to that question is regulated by the Roman Dutch Law, and, for the reasons which I have previously given, I hold that the acceptance of the offer by the plaintiff and the subsequent dishonouring of the cheque which had been granted as a conditional (and not an absolute) discharge of the resulting obligation, clearly entitled the plaintiff to sue on the promise *simpliciter*. In that view of the matter, there was really no need to enquire whether the gift had been perfected in some way " by the assistance of equity ".

In my opinion the judgment under appeal must be affirmed, but not for the reasons which weighed with the learned District Judge. The plaintiff's action succeeds because the following issues must, upon the facts, be answered *in the affirmative* :—

" 3 (*b*) Did the late Mr. P. D. Rodrigo on or about 18.11.47 promise or offer the plaintiff a donation in the sum of Rs. 5,000 ?

4. Did the plaintiff accept the said promise or offer ? "

In arriving at this conclusion I do not lose sight of the fact that the plaintiff had admitted under the stress of cross-examination that " apart from the cheque Rodrigo gave me, he made me no other present of Rs. 5,000. He did not promise the Rs. 5,000 at any time other than handing me the cheque. The promise to give Rs. 5,000 which I have pleaded in the plaint is the cheque that he gave me ". These somewhat ambiguous answers were no doubt elicited in an attempt to bring the facts of the present case into line with the ruling of Garvin J. (with whose conclusions Dalton J. agreed on entirely different grounds) in *Parampalam v. Arunachalam*[1]. But the *ratio decidendi* of Garvin J.'s judgment is manifestly distinguishable. For there, as he pointed out, " the only contract between the parties was embodied in a document " which Garvin J. construed as a *promissory note*, and on that assumption " the writing was the only evidence of the contract ". No such analogy is permissible in the present case where the offer and acceptance of a cheque necessarily indicate the formation of an earlier concluded agreement. The plaintiff's evidence which I have quoted is, if sensibly construed in the light of the real transaction between herself and Rodrigo, perfectly innocuous. If, on the other hand, it must be assessed as the expression of a layman's opinion on a complicated question of law, it is of no value whatsoever.

For the reasons which I have given, I would dismiss the Public Trustee's appeal with costs.

GUNASEKARA J.—I agree.

Appeal dismissed.

[1] *(1927) 29 N. L. R. 289.*