1949 *Present :* **Dias and Windham JJ.**

PUBLIC TRUSTEE, Appellant, *and* UDURUWANA, Respondent

S. C. 359—D. C. Kandy, 2,968

Donation—Donatio inter vivos—Donatio mortis causa—Chose in action—*Bill of sale—Registration of Documents Ordinance (Cap. 101), Sections 17 and 18.*

A, when he was at the point of death, stated, in the presence of witnesses including B, that he desired to give a gift of Rs. 10,000 to B who had been his faithful servant. B, by words and signs, accepted the donation.

Held, (i) that there was a valid donation.

(ii) that the donation was one *inter vivos* and not a *donatio mortis causa* needing execution in the presence of five witnesses or by means of a notarial document.

(iii) that the right of B under the donation was a *chose in action* and, therefore, was valid and effectual without the writing or registration mentioned in sections 17 and 18 of the Registration of Documents Ordinance.

APPEAL from a judgment of the District Judge, Kandy.

E. B. Wikramanayake, K.C., with *H. W. Jayewardene*, for defendant appellant.—There is no evidence of an offer or a definite acceptance by the plaintiff. Plaintiff cannot accept an offer made to a third party and make it a binding promise. Even if there was a valid offer and acceptance, the gift fails as the promise failed to be implemented. It is in evidence that the deceased on finding that he could not implement the promise gave orders that the terms should be embodied in a codicil ; and he died before it was executed. Even if a cheque had been given it would have been revoked by his death, and now he cannot be in a better position because the cheque was not given to him. In any event this is a *donatio mortis causa* and not a *donatio inter vivos*. The evidence discloses that the promissor was conscious of death. *Parampalam v. Arunachalam* [1]. A *donatio mortis causa* requires the formalities necessary for a will—*Parampalam v. Arunachalam (supra)* ; *Voet XXXIX, 6, 4 ; Meyer and others v. Rudolph's Executors* [2]. Finally, the gift is void for not complying with provisions of §§ 17, 18 of Ordinance No. 23 of 1927.

H. V. Perera, K.C., with *B. H. Aluwihare* and *R. S. Wanasundera*, for plaintiff respondent.—There is clear evidence of offer to plaintiff and acceptance by him. There is evidence of such offer and acceptance on two occasions. Acceptance may be by conduct. There is a difference between a promise which would be binding on acceptance, giving rise to legal rights and obligations, and the implementation of such promise. In this case the implementation of the promise was frustrated. The point that this is a *donatio mortis causa* was not raised in the lower Court. Reference to death is essential in a *donatio mortis causa*. There must also be evidence to indicate restoration of possession in case of survival. *Voet XXIX. 6. 1 ; Censura Forensis* (Barber's Translation) p. 94, article 25. Relies on *Parampalam v. Arunachalam*. Dalton J. held on the facts that it was *donatio mortis causa*. This is clearly a *donatio inter vivos*.

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

[2] *(1918) A. D. 70 at 85.*

1——J. N. A 95168—1,040 (2/50)

Even if it is a *donatio mortis causa* no notarial execution is necessary. Ordinance No. 7 of 1840 does not apply to donations.

Being a *donatio inter vivos*, and there being no implementation of the promise, only the promise to pay money exists. The Registration of Documents Ordinance does not apply to a promise to pay money. Choses in action are specially excluded. The Registration of Documents Ordinance deals only with title to movable property. The Ordinance is not intended to cover instances like this—*Charlesworth v. Mills* [1]; Encyclopaedia of Laws of England, 2nd Ed., Vol. II., p. 242.

Mohamed Bhoy v. Maria Dias [2]. Assignment of money deposited in Court did not require to be registered. *Appuhamy v. Appuhamy* [3]. *Gunatileke v. Ramasamypillai* [4].

Cur. adv. vult.

November 22, 1949. DIAS J.—

The late Mr. N. D. A. Silva Wijeysinghe, the " Padikara Mudaliyar ", on his death-bed in the presence of witnesses expressed the intention to give the plaintiff, his old and faithful servant, who was then present by the bedside, a donation of Rs. 10,000. Mr. S. J. C. Kadirgamar, Proctor, who had been summoned by the dying man from Colombo to Kandy, testified to that fact. The learned District Judge accepted the evidence of Mr. Kadirgamar. Mr. Kadirgamar is a professional man who has no motive for stating what is untrue. Furthermore, his evidence does not stand alone. The evidence of Mr. Kadirgamar and that of the other witnesses, including two medical men, may be summarised as follows. The dying man stated not once, but several times, that he wanted to write cheques for Rs. 10,000 in favour of the plaintiff, Rs. 10,000 in favour of the Bishop of Kandy, Rs. 1,000 in favour of his motor car driver, and he also expressed his desire to make better provision for his wife, who was not present. The plaintiff, when he heard his master express this intention to donate Rs. 10,000 to him, placed the palms of his hands together in oriental fashion and bowed low to his master saying something which Mr. Kadirgamar did not hear. The plaintiff says that he bowed to his master saying that he thankfully accepted the donation. That is precisely how a Sinhalese man of lowly status would signify his acceptance and thanks to his master for largess promised. The cheque books, however, were not available in the nursing home. The plaintiff was, therefore, sent to the Queen's Hotel where the Padikara Mudaliyar had been residing. The plaintiff returned with the cheque books, but the doctors forbade the dying man to write or sign any documents, as they believed any exertion on the part of the patient might prove instantly fatal. The Mudaliyar then instructed Mr. Kadirgamar to execute a codicil to his will giving effect to his intentions. Mr. Kadirgamar, however, had no licence to practise as a notary at Kandy. Proctor Mr. Guruswamy was fetched, and the two notaries busied themselves in drafting the codicil. The plaintiff swore that the dying man repeated his intention to donate Rs. 10,000 to him a second time, and that on each occasion he signified his acceptance and thanked his master. Before the codicil could be signed, the mudaliyar expired.

[1] *(1892) A. C. 231 at 235.*
[2] *(1903) 11 N. L. R. 325.*
[3] *(1932) 35 N. L. R. 319 at 330.*
[4] *(1919) 21 N. L. R. 204.*

The plaintiff sued the Public Trustee, the executor of the deceased man, to recover this sum of Rs. 10,000. The District Judge gave him judgment, and the Public Trustee appeals.

The law applicable is the Roman Dutch Law. Under that system of jurisprudence a "donation" is an agreement whereby one person called the "donor", without being under any legal obligation so to do and without receiving or stipulating for anything in return gives *or promises* to give something to another, who is called the "donee" [1]. A donation is perfected in one of two ways: (*a*) either by the donor expressing his intention to make the donation, followed by the actual delivery (*traditio*) of the thing donated to the donee; or (*b*) by the donor expressing his intention to make the donation coupled with the acceptance of the donation by the donee. Donations are perfected by tradition, or even without tradition, when the donor's intention to give and the donee's intention to receive have been clearly expressed. In that case, the donee can compel tradition—*Parasatty Ammah v. Setupillai* [2], *Tillekeratne v. Tennekoon* [3], *D. C. Matara 20,862* [4], *Wickremasinghe v. Wijetunge* [5], *Fernando v. Weerakoon* [6]. A donation is a bilateral agreement to which there must be two consenting parties—*Welappu v. Mudalihamy* [7]. Under the Roman Dutch Law no particular form is required for the acceptance of a donation *inter vivos*. In every case, it is a question of fact whether or not there are sufficient indications of the acceptance by the donee—*Hendrick v. Suditaratne* [8], *de Silva v. Ondaatjee* [9]. Acceptance of a donation can be established by circumstantial evidence—*Lokuhamy v. John* [10], *Binduwa v. Untty* [11]. In some cases acceptance may even be presumed from the facts—*Wickremesinghe v. Wijetunge* (*supra*), *Fernando v. Alwis* [12], *Fernando v. Fernando* [13]. A donation which has not been accepted is void. The right to challenge a donation as being void for non-acceptance is not restricted to the donor—*Kanapathipillai v. Kasinather* [14].

Therefore, if A *with the intention* of making a donation of Rs. 100 to B says "I will donate to you the sum of Rs. 100" and B signifies his *acceptance* of the gift, provided B can persuade the Court that the facts are as he states, he will be entitled to obtain a decree against A, or his legal representative, for that sum of Rs. 100 if the donation is not paid. In the present case the evidence which the learned District Judge accepted shows conclusively that the deceased man unequivocally intended to donate a sum of Rs. 10,000 to the plaintiff and unequivocally intimated that fact to the plaintiff who accepted the donation both by words and signs. The plaintiff would, therefore, be entitled to sue the executor of the deceased donor to recover that money, unless some other legal fetter exists which prevents him from so doing.

[1] Voet XXXIX 5. 1., *3 Maasdorp (4th ed.) p. 104, 2 Nathan (2nd ed.) p. 1155.*
[2] *(1872) 3 N. L. R. 271.*
[3] *Ram. (43–45) 155.*
[4] *Vand. (1871) 168.*
[5] *(1913) 16 N. L. R. 413, 3 C. A. C. 52.*
[6] *(1903) 6 N. L. R. 212.*
[7] *(1903) 6 N. L. R. 233.*
[8] *(1912) 3 C. A. C. 80.*
[9] *(1890) 1 S. C. R. 19.*
[10] *Ram. (72, 75, 76) 215.*
[11] *(1910) 13 N. L. R. 259.*
[12] *(1935) 37 N. L. R. 201.*
[13] *(1944) 46 N. L. R. 44.*
[14] *(1937) 39 N. L. R. 545.*

It was argued that if a donation had been created, it was a *donatio mortis causa*, and was therefore invalid for want of proper execution. The question, however, is whether this is a *donatio mortis causa* ?

The requisites of a *donatio mortis causa* are—(1) It must be revocable, otherwise it would be a *donatio inter vivos* ; (2) It must be conditional on the death of the donor ; (3) Some mention must be made in the donation itself of the death of the donor ; and (4) It must be executed before five witnesses, or a notary and two witnesses. Donations *mortis causa* may be created in one or other of three ways ; (*a*) By the donor giving something in mere general contemplation of death, but without any fear of an early death or any imminent danger *upon the understanding* that the property donated is not to become the property of the donee until the donor's death ; (*b*) When the gift is made in fear of death from a present illness, or from a particular imminent danger, *with the understanding* that it is not to become the property of the donee until the death of the donor from the particular illness or danger ; or (*c*) where the donation is made in such special fear of death, but *on the understanding* that the *dominium* is to pass to the donee at once, but that the property is to be returned if the donor recovers or escapes from the particular illness or danger. The first two of these may be made *either with or without delivery*, but in the third there must be delivery, as ownership cannot pass without it. In case of doubt, a donation must be presumed to be one *inter vivos*, rather than *mortis causa* even though at the time of the gift the donor may have been in actual fear of death [1].

In the case we are considering, not only was there no mention at all made by the donor of his death, or that the donation to the plaintiff was to be *conditional on his death*, but the facts and circumstances also indicate that the donor did not expect to die and he desired to create an unconditional donation. I am clearly of opinion that this was a *donatio inter vivos*, and did not require any special mode of execution.

The case of *Parampalam v. Arunachalam* [2] was cited in this connection. I can find nothing in that case which is inconsistent with the view I have formed. It is to be observed that while Garvin J. based his judgment on the ground that the document sued on was a promissory note, and therefore governed by the English law regarding valuable consideration, Dalton J. based his decision on the ground that the document being a *donatio mortis causa* was inoperative *for want of due execution*. Dalton J. also held that although the intention of the donor was to create a *donatio mortis causa*, that intention was frustrated by the failure to create it in the presence of at least five witnesses, or the formality of notarial execution—see also *Fernando v. Cader* [3]. If the transaction we are considering in this case is a *donatio mortis causa*, which I think it was not, it would be inoperative for want of due execution.

In the case of a *donatio inetr vivos*, however, no special mode of execution is necessary. The mere intention to donate when clearly expressed by the donor in writing or verbally when coupled with a clear acceptance

[1] *1 Maasdorp (6th ed.) p. 252* et seq.
2 Nathan (2nd ed.) p. 1167, Voet XXXIX 6, 3.
[2] *(1927) 29 N. L. R. 289.*
[3] *(1931) 9 T. L. R. at p. 9.*

by the donee by nods, words or signs, is sufficient to create a valid *donatio inter vivos* which the Courts will enforce, provided the plaintiff can persuade the Court to believe his case.

In passing I may be permitted to point out that under the Roman Dutch Law, a promise made by an employer to an employee, *e.g.*, to pay the latter a pension or a gratuity in consideration of his past faithful services, is called a *donatio remuneratoria*, and was enforceable in the Courts. Since the decision of the Privy Council in *Jayawickreme v. Amarasuriya* [1] it is settled law that a lawful promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence, can be enforced under the Roman Dutch Law—the *justa causa debendi* to sustain a promise being something far wider than what the English Law treats as good " consideration " for a promise. In *Fichardt, Ltd. v. Faustman* [2] a promise made by an employer to an employee to pay him a pension in view of the servant's past faithful services was held to be enforceable, though not registered.

It was next contended that this donation was a " bill of sale " within the meaning of sections 17 and 18 of the Registration of Documents Ordinance, 1927 (Chapter 101) (as amended by Ordinance No. 13 of 1947, sections 3 and 4), and that, therefore, there having been no handing over of the money which was donated to the donee, the donation was not valid or effectual, as it was not created by a writing and registered as required by section 18 (*b*).

This raises the question as to what precisely is the legal relationship or obligation which is created by a *donatio inter vivos* when the property donated is not handed over to the donee ? Van Leeuwen's *Censura Forensis* [3] has the following passage : " A gift is perfected as soon as the donor has expressed his intention, whether in writing or verbally—even by bare agreement ; and, for this reason a gift at the present day *gives rise to an action* (*i.e.*, a cause of action) with this limitation, however—that it is not considered perfected before acceptance on the part of the donee has followed . . . . And this is understood to take place not only by words, but also by nods, and other signs between persons who are present and consenting ". It is, therefore, clear that, whereas in the case of a *donatio inter vivos* where the gift is perfected by the intention to give coupled with the actual handing over of the thing donated to the donee, the latter obtains a *chose in possession*, on the other hand, in the case of a *donatio inter vivos* where the gift is perfected by the intention to give coupled with acceptance by the donee, and there is no transfer of property, the latter obtains a *chose in action*, namely a cause of action, or the right to sue either the donor or his legal representative for the payment of the money or handing over the thing donated. In this case we are dealing with a donation which falls within the second category. The plaintiff's right under this donation was a *chose in action* and nothing more.

Section 17 (1) of Chapter 101 (as amended by Ordinance No. 13 of 1947, section 3) enacts that " In this Ordinance, unless the context

[1] *(1918) 20 N. L. R. 289.*
[2] *S. A. L. R. (1910) Appellate Division 168.*
[3] *(1896 edition) by Barber & Macfadyen p. 90.*

otherwise requires, the expression " bill of sale " shall include (*inter alia*) a transfer, declaration of trust without transfer " and any other assurance of movable property whether absolute, or by way of mortgage or otherwise ". The word " assurance " was defined in *Gunetilleke v. Ramasamypillai* [1] to include " a conveyance ". Assuming for purposes of argument that a donation without a transfer of property can be called a conveyance, the appellant is met by the provisions of section 17 (2) which provides that " Nothing in this Chapter shall apply . . . . to *choses in action* ". In my opinion this is fatal to the appellant and demolishes his argument on this point.

The object underlying sections 17 and 18 of the Registration of Documents Ordinance is to prevent false credit being given to people who are allowed to remain in possession of movable property which apparently is theirs, but the ownership of or title to which they have parted with. Therefore, the law provides that, in certain cases where there is no transfer of the movables, the transaction must be evidenced by a writing which must be registered. If this is not done the transaction is not valid or effectual—see s. 18. The law strikes at the document and not at the transaction itself—*Appuhamy v. Appuhamy* [2]. In that case the deed of gift donated the stock-in-trade, goodwill, *book-debts* and *other debts* of a business without any delivery of possession to the donee. It was held that while the transaction was not valid and effectual in the absence of registration in so far as the stock-in-trade was concerned, it was a valid donation so far as the book-debts and other debts (*choses in action*) were concerned. There are several cases in the law reports which illustrate this principle. In *The Chartered Bank v. Rodrigo* [3] it was held that a debt is a *chose in action*, and, therefore, exempted by section 17 (2). In *Julis v. John* [4] it was held that the right to recover under a judgment is a *chose in action*, and its assignment need not be registered. The facts of the case of *Mohamed Bhoy v. Maria Dias* [5] are instructive. The plaintiffs and the defendants owned undivided shares in a land which was the subject of a partition action. The defendants by a notarial document duly registered in the *Land* Registry agreed to convey to the plaintiffs the divided portions which would be allotted to them in the final decree, or, if the Court ordered the land to be sold, they *assigned* to the plaintiff all sums of money which they may become entitled to in lieu of their shares in the land. The Court ordered the land to be sold. When the plaintiffs applied to draw out the money from Court, the defendants objected. It was held that the deed did not deal with movable property, and was, therefore, not a " bill of sale " needing registration under the Registration of Documents Ordinance.

If the appellant's argument is sound, then every donation in which the money donated is not handed over to the donee forthwith would be liable to be impeached for want of registration. I am clearly of opinion that sections 17 and 18 have no application to the facts of this case.

[1] *(1919) 21 N. L. R. 203.*
[2] *(1932) 35 N. L. R. at p. 330*, and see *Charlesworth v. Miles (1892) App. Cas at p. 235* (H of L).
[3] *(1940) 41 N. L. R. at p. 451.*
[4] *(1925) 6 C. L. Rec. 98.*
[5] *(1908) 11 N. L. R. 325.*

What Chapter 101 aims at doing is to prevent the creation of real rights in movable property when there is no delivery of possession, except by a writing and registration.

The appeal is dismissed with costs.

WINDHAM J.—I agree.

Appeal dismissed.

1949 *Present :* **Wijeyewardene C.J. and Canekeratne J.**

ASSOCIATED CEMENT COMPANIES, LTD., BOMBAY, Appellant, *and* COMMISSIONER OF INCOME TAX, Respondent

S. C. 300—D. C. Colombo 16,757

Income tax—Claim for refund of tax paid in excess—Relief in respect of Empire tax—Prescription—Income Tax Ordinance (Cap. 188), Sections 46 and 84.

Section 84 (1) of the Income Tax Ordinance is applicable to a claim for relief arising under section 46 (1) of the same Ordinance.

APPEAL from a judgment of the District Court, Colombo.

In this action the plaintiff company sued the Commissioner of Income Tax for a refund of Rs. 13,175·91 under section 46 (1) of the Income Tax Ordinance. The question for consideration was whether the claim was prescribed under section 84 (1) of the Income Tax Ordinance.

H. V. Perera, K.C., with *S. J. Kadirgamer*, for the plaintiff appellant.

M. F. S. Pulle, K.C., Acting Attorney-General, with *H. W. R. Weerasuriya, Crown Counsel*, for the Crown.

Cur. adv. vult.

September 13, 1949. WIJEYEWARDENE C.J.—

The plaintiff company was registered in Bombay under the Indian Companies Act on August 1, 1936, as the result of the amalgamation of several cement companies which were previously operating separately. The company, which owns factories in different parts of India, opened a Branch in Colombo on May 1, 1940. The Company's accounting year ends on July 31, and thus the company's accounts are made up from August 1 to July 31 of the following year. The Income Tax Assessment Year in British India covers the same period as the assessment year in Ceylon.

The plaintiff company filed this action stating

(i) that it has paid Income Tax in Ceylon amounting to Rs. 12,457·08 for the year of assessment 1940/41 on an income of Rs. 69,206 derived from Ceylon and that it has also paid Rs. 22,514 and 8 annas as Income Tax and Super Tax in India in respect of that income, and