Present: Garvin and Dalton JJ.

1927.

PARAMPALAM *v.* ARUNACHALAM.

166—D. C. Colombo, 20,181.

Donation—Husband and wife—Gift of promissory note—Consideration—Donatio mortis causa—Due execution—Ordinance No. 5 of 1852.

Where a person gave his wife, with the intention of providing for her after his death, a document in the following terms:—

On demand I, the undersigned Parampalam Arunachalam of . . . . ., do hereby promise to pay to my wife Rosamma Annam Arunachalam or order the sum of Rs. 10,000 towards her affection.

(Signed) P. ARUNACHALAM

Held, that the wife was not entitled to claim the money from the estate of her husband—

Per GARVIN J., on the ground that the document, being a promissory note, was not enforceable for want of consideration:

Per DALTON J., on the ground that the document, being a *donatio mortis causa*, was inoperative for want of due execution.

APPEAL from an order of the District Judge of Colombo.

The defendant is the widow of Parampalam Arunachalam and administratrix of his intestate estate. In an account filed by her as administratrix the defendant showed as a liability of the estate a sum of Rs. 10,000 payable upon a promissory note made by her husband in her favour. The exact terms in which the document was drawn are set out in the head-note. The plaintiff instituted the present action for a declaration that the defendant was not entitled to recover any money from the estate upon the promissory note in question.

The learned District Judge held that the defendant was entitled to recover on the footing of a promise to pay made to her by her husband.

Haylcy, K.C. (with *Canakaratne*), for appellant.—On the question of consideration English law applies (Ordinance No. 5 of 1852, s. 2). The test is whether the defendant's rights and liabilities are in any way affected by the note (*Palaniappa Chetty v. de Mel* [1]).

[GARVIN J.—The note was subsidiary to the main object, which was to make provision for her after his death.]

[1] *16 N. L. R. 242.*

1927.

Parampalam v. Arunachalam

Subsidiary in one way, but the note contained the whole contract.

[GARVIN J.—The statement on the document, that it is given "for affection," negatives consideration. In the face of that statement is this a promissory note?]

The document is within the definition of a promissory note, but it may not be enforceable for want of consideration. Supposing there was consideration in fact, a statement in the note that there was no consideration will not render it invalid.

English law must be resorted to both to determine whether there is a promissory note and to determine whether it is enforceable.

The whole contract is contained in the note. Therefore the only action that lies is an action on the note.

[GARVIN J.—Suppose this document is merely put in as evidence of a promise?]

Here there is no contract at all outside this note. There is no evidence of a loan or sale or other contract as evidence of which the document may be produced. It is produced as the whole contract, and not as corroborative evidence of a contract. The whole action must turn on the note, and the question as to its validity must be determined by English law.

If the transaction be looked upon as a gift with immediate possession, all that the donee gets is a piece of paper; if without possession, there is a *donatio mortis causa*, but the document is obnoxious to Ordinance No. 7 of 1840. A *donatio mortis causa* resembles a legacy (*Voet XXXIX. 6, 4*) and requires the formalities necessary for a will (*Van der Keesel, ss. 492, 493: Oliphant v. Grootboom* [1]*; Nathan, vol. II., pp. 166-167*). Instead of a will the deceased has executed a note.

H. V. Perera (with *Croos Da Brera*), for respondent.—English law does not apply. The action is not on the note. Where the rights involved in the action do not depend on the rights and obligations arising on the note the English law does not apply. The connection referred to in section 2 of Ordinance No. 5 of 1852 is a connection in matter of legal principle, not a merely historical or physical connection.

The capacity of a party to bind himself by a promissory note is determined by Roman-Dutch law (*S. C. 236/D. C. Galle, 23,146 (S. C. Minutes of November 21, 1927)*). In *Patheriya v. Katchohamy* [2] it was held that where money is lent on a note an action can be brought for money lent though the note is bad. The question whether in this case a married woman could sue alone was determined by Roman-Dutch law.

[1] *3 E. D. C. 11.*

[2] *5 C. L. Rec. 83.*

It is a question whether the test in *Palaniappa Chetty v. de Mel* (*supra*) has been rightly applied in that case. In any event the application of that test in this case does not bring it under the Ordinance of 1852.

The mere form of the words not make the document a promissory note. There must be the intention to make a promissory note (*Doe v. Chamberlaine* [1]). The statement that the note is given "towards affection" negatives the intention to make a promissory note. The document is given purely for the purpose of evidence of a promise to give money.

Affection and the necessity for making provision for the wife form the motive for the promise to give Rs. 10,000. The right to claim that sum arises immediately the promise is made. The Roman-Dutch law applies as to *causa*.

The presumption is that this is not a *donatio mortis causa*. A *donatio mortis causa* requires a clear expression that the gift is in expectation of death (*Walter Pereira, p. 602*).

[DALTON J.—If you look at the whole transaction—the document and the surrounding circumstances—there is a *donatio mortis causa;* if at the document alone, there is a promissory note.]

There is no expression by the donor that there is a gift in contemplation of death. In the absence of such an expression there is no *donatio mortis causa,* although the surrounding circumstances show an intention to make a *donatio mortis causa.* The presumption is in favour of a gift *inter vivos* (*Voet XXXIX. 6, ss. 1, 2*).

The writing is evidence of a promise. If may amount to more—a promissory note; but it is none the less evidence of a promise.

Where the action is on the promise, the document is merely evidence, and non-essential evidence. It may be the only evidence.

If *donatio* includes a promise, this is a *donatio inter vivos.* A *donatio mortis causa* requires some express mention of death and an expression of intention to revoke. These elements cannot be imported from the circumstances. Where there is no indication of revocability, even though the benefit is to be enjoyed after death, there is a *donatio inter vivos* (*2 Nathan, s. 1083*).

This is not a legacy, because it is expressed to be payable on demand and because it has been accepted.

Our law does not require a *donatio mortis causa* to be executed in the same way as a will. The Common law requirement is a rule of evidence, and Roman-Dutch law rules of evidence are not part of our law. A transaction giving rise to rights can be proved in any way unless statutory provisions require a particular form. Ordinance No. 7 of 1840 is a consolidating Ordinance. It does not mention *donationes mortis causa.*

[1] *15 M. & W. 15.*

1927.

Parampalam v. Arunachalam

Hayley, K.C., in reply, cited *Balfour v. Balfour* [1]; *Grot. 3, 2, 32; Menika v. Appuhamy* [2]; *41 Scotch L. R. 93; 2 Nathan 167, s. 1093.*

December 10, 1927. GARVIN J.—

The defendant is the widow of Parampalam Arunachalam and the administratrix of his intestate estate. It is admitted that in accordance with the rules of intestate succession of the Thesawalamai she is entitled to no share of her husband's estate, which devolves upon the plaintiff and certain others. In a certain account filed by her as administratrix the defendant showed as a liability of the estate a sum of Rs. 10,000 payable upon a " Promissory note dated August 28, 1925, in favour of Rosamma Annam Arunachalam (*i.e.*, the defendant) presently of Colombo." The plaintiff denies the right of the defendant to pay herself this amount out of the estate of the deceased, and he accordingly instituted the present action praying for a declaration " that the defendant in her personal capacity is not entitled to recover any money from the estate upon the promissory note in question " and " that the said item be expunged from the inventory filed in the testamentary case. "

Among other objections to the right of the defendant to payment of this sum of Rs. 10,000 the plaintiff pleaded that the document referred to was a forgery. His counsel, however, stated at the trial that he would lead no evidence to establish that allegation, and the District Judge held against the plaintiff on the issue of forgery. There is and never was the slightest reason to doubt the authenticity of the document.

The learned District Judge held that the defendant was entitled to recover on the footing of a promise to pay made to her by her husband based on " causa " though the " causa " did not amount to consideration under the English law.

From this judgment the plaintiff appeals. The only evidence adduced in the case consists of that of the defendant, and her evidence is not challenged. It is established by her evidence that for some time before his death the deceased was the Government Apothecary stationed at Rangalla. On August 19, 1925, he went to Teldeniya, where there is a hospital, to consult the doctor in charge. He returned and told his wife that he had been asked to enter hospital as he was seriously ill. He was a malarial subject and had been suffering from an affection of the heart for some years previously.

On August 28, at Rangalla, he executed the document D1, which is the foundation of the defendant's claim. Before he did so he sent for a notary, but no notary could be found. It is evident that he sent for a notary so that he might make his last will. As this was rendered impossible he made and granted the document D1 to his wife, as she says, " to provide for her after his death." On the

[1] *(1919) 2 K. B. 571.*

[2] *1 Br. 252.*

same day he made and executed the document D3 in favour of his elder brother Elanthairayagam, to whom he was attached. Parampalam was brought down to Colombo. He entered the General Hospital on September 1 and died on September 8. He neither made nor sought to make a last will presumably because he believed that by the documents D1 and D3 he had made provision for the only two persons—his wife and his elder brother—for whom he wished to provide.

The document D1 runs as follows:—

Rangalla,

Rs. 10,000. August 28, 1925.

On demand I, the undersigned Parampalam Arunachalam of Sandiruppay, now at Rangalla, do hereby promise to pay to my wife Rosamma Annam Arunachalam of the same place or order the sum of Rs. 10,000 (Rupees ten thousand) towards her affection.

(Signed) P. ARUNACHALAM.

The document bears a 6-cent stamp, which is the amount of duty payable by law on a promissory note. The document D3 in favour of Elanthairayagam is in the same form and is similarly stamped.

To use the defendant's own words, "he made a note to provide for me (her) after his death." Since circumstances frustrated his intention to make provision for her by last will he took the alternative course of seeking to create a liability against himself by giving his wife a promissory note for Rs. 10,000. The document is in form a promissory note. It is stamped as a promissory note and is expressed to be payable on demand. Every undertaking in writing to pay a sum of money is not necessarily a promissory note, but where the intention of the maker of the document is manifestly that it should be and take effect as a promissory note the document is a promissory note. Apart entirely from the form of the document there is in the words "or order" employed by the maker of the promise an indication that he contemplated the negotiation of the note. It is not easy to determine the exact meaning of the concluding words "towards her affection." But assuming that they imply that "affection" was the motive for the making of the promise, the document still remains a promissory note though they might possibly be regarded as some evidence of notice to an indorsee that the giving of the note was influenced by affection.

This is an instance of a gift of a promissory note; and it appears to be well-settled law in England that the donee of a promissory note made by the donor in his favour may not enforce the note against the donor (*Holliday v. Atkinson* [1]). See also *In re Leaper.*[2] Under the English law affection is not a sufficient consideration to support a simple promise, and it is admitted that this promise was voluntarily and proceeded purely from the munificence of the

[1] *(1826) 5 B & C. 502.* [2] *(1916) 1 Ch. 579.*

1927.

GARVIN J.

Parampalam v. Arunachalam

maker of the promise. By section 2 of Ordinance No. 5 of 1852 it is provided that " the law to be administered in this Colony in respect of all contracts and questions arising . . . . upon or relating to bills of exchange, promissory notes and cheques, and in respect of all matters connected with any such instrument shall be the same in respect of the said matter as would be administered in England in the like case at the corresponding period if the contract had been entered into or if the act in respect of which any such question shall have arisen had been done in England . . . . Inasmuch as the only contract between the parties is that which is embodied in the document D1, and that is a promissory note, the question which has arisen in respect of it must be determined in accordance with the law of England. If authority be needed for this proposition there is the local case of *Latchimi v. Jamieson*,[1] where the payee of a promissory note made and granted voluntarily and without consideration failed in an action against the maker though, as observed by Lascelles C.J., " different considerations would have arisen if the defendant's liability had been determinable by the Roman-Dutch law." Under that system a promise to give unaccompanied by delivery is none the less a donation and *causa* not amounting to consideration under the English law is sufficient to support a promise. I am not unmindful of the anomaly that that which would have been a good *donatio* had it been differently manifested or had it related to specific movables other than money should be unenforceable because it is manifested in the form of a promissory note within the meaning of the English act and relates to a sum certain in money. In a country where two systems of law in some respects fundamentally different have to be administered side by side anomalies must arise. But the writing is the only evidence of the contract and the intention of the maker must be gathered from its language. Where as in this instance it is in form and in substance a promissory note whether it is enforceable must be determined with reference to the English law. The appellant is, I think, entitled to the declaration he claims.

The second point taken by the appellant is that if the document can be regarded as a promise in writing which does not amount to a promissory note it is a *donatio mortis causa* and inoperative as such for want of due execution. The conclusion I have arrived at on the first point is decisive of the matter and it is unnecessary therefore to consider this submission. I find great difficulty in treating this as a *donatio mortis causa*. If regard be paid to the surrounding circumstances it would seem that it was the absence of a notary and the inability to procure the due execution which is essential to the validity of a disposition by a person to take effect after his death that induced Arunachalam to attempt to create an

[1] *(1913) 16 N. L. R. 287.*

immediate liability binding on him and on his estate if it remained undischarged at his death. His object was to make provision for his wife, and since the inability to procure the presence of a notary frustrated his intention to achieve this object by a valid disposition to take effect at his death, he took the alternative course of making a promissory note payable on demand and delivering it to his wife.

There is no evidence that the deceased expressly stated that the promissory note was not to be enforced if he did not die or that he said anything making it contingent upon his death. Nor am I satisfied that had such evidence been available it would have been admissible to rebut the intention clearly expressed in the writing that the note was to be paid on demand. (See section 92 of the Evidence Ordinance, 1895.) In *Woodbridge v. Spooner*,[1] which was an action against the executrix on a promissory note made by the testatrix, it was held that where the note on the face of it was expressed to be payable on demand parol evidence is not available to show that at the time of making it the intention was that it should not be payable till after the death of the maker.

But as I have observed earlier, the opinion I have formed on the first of the two points urged by the appellant is decisive of the case and it is unnecessary to pursue the consideration of this aspect of the case further.

The plaintiff is entitled to the declaration he has prayed for. He is also entitled to his costs of action and of this appeal. But I think that all the costs of this action should be borne by the estate. The whole of this litigation has resulted from the action of the deceased, who there is not the slightest doubt intended that this promissory note should be paid as a personal liability which he had incurred. In showing it as a debt the administratrix was acting perfectly *bona fide* in the belief that it was a liability of the estate. Accordingly it is ordered that all the costs of both parties to this action be paid out of the estate of the deceased Parampalam Arunachalam.

DALTON J.—

Parampalam Arunachalam, an apothecary of Jaffna, on August 28, 1925, signed a document (marked D1 in the record) which was in the following form and handed it to his wife:—

6 cent stamp cancelled.

Rangalla,
August 28, 1925.

Rs. 10,000.

On demand I, the undersigned Parampalam Arunachalam of Sandirupay, now at Rangalla, do hereby promise to pay to my wife Rosamma Annam Arunachalam of the same place or order the sum of Rupees ten thousand (Rs. 10,000) towards her affection.

(Signed) P. ARUNACHALAM.

[1] *(1819) 3 B. & Ald. 233.*

1927.

DALTON J.

Parampalam v. Arunachalam

He was very ill at the time, and on September 8 he died intestate. His widow obtained a grant of letters of administration of his estate and set out in the inventory of assets and liabilities the following item as a liability:—

3. Promissory note dated August 28, 1925, in favour of Rosamma Annam Arunachalam of Rangalla, presently of Colombo, Rs. 10,000.

The plaintiff in this action, who is a nephew and an heir of the deceased, brought this action for a declaration that the defendant in her personal capacity is not entitled to recover any money from the estate upon the promissory note in question and that this item of liability be expunged from the inventory. It is agreed that the parties are governed by the Thesawalamai, and that the widow would not be entitled to anything from the estate of her husband on an intestacy as the property of the deceased was property that had been inherited by him or acquired before his marriage. The marriage had taken place in 1919, and so far as can be gathered from the record, there are no children of the marriage surviving.

The widow, both in her personal and representative capacity, was defendant in the action. The material part of her defence was set out in the following paragraphs of her answer:—

(3) . . . . the defendant states that on or about August 28, 1925, the said P. Arúnachalam, who was the husband of this defendant, settled a sum of Rs. 10,000 on the defendant personally, as a gift or grant, as he lawfully might under the Thesawalamai, to which he was subject, and he accordingly made and delivered to the defendant the said writing promising to pay to the defendant on demand the said sum of Rs. 10,000.

(4) (*e*) The said document tantamounts to a gift or settlement as aforesaid, or at least as evidence of such gift or settlement or security thereof.

There was a question raised as to the document being a forgery, but this was not pursued by the plaintiff. The issues relative to the questions argued on the appeal were the following:—

(2) Is the document D1 invalid for want of consideration?

(3) Can defendant claim any money on the document?

(4) In any event is defendant entitled to the sum of Rs. 10,000 by way of gift or settlement or promise of gift or settlement?

(5) Is D1 a gift or settlement or promise of a gift or settlement?

It is not quite clear what was meant to be included in the last two issues, but at any rate it is clear, from the argument which took place in the lower court upon the issues, that it was urged for the defendant, *inter alia*, that the document D1 was a *donatio mortis causa*, and as such must be evidenced as in the case of a testamentary disposition.

The only witness called was the defendant herself, the documentary evidence put in being the document D1, another document (D3) in exactly the same form executed by the deceased at the same time in favour of his brother for Rs. 3,000, and the inventory of the estate of the deceased (D2) in the testamentary proceedings.

In dealing with the second issue the trial Judge comes to the conclusion, in view of South African decisions, that under the Common law the promise of the deceased is enforceable, and that the defendant was not precluded by the provisions of section 2 of Ordinance No. 5 of 1852, from suing for the recovery of the sum as on a simple contract debt since she did not rely upon D1 as a promissory note at all but used it as evidence of the contract. He then concludes by stating that he " accordingly " answers issue (2) in the negative and issue (3) in the affirmative and dismisses plaintiff's action. He unfortunately has stopped there and not decided the further questions raised, and the plaintiff has appealed from his decision.

After hearing the argument addressed to this Court on behalf of the parties, it seems to me that the case is conclusively settled on the question as to whether this promise or gift was a *donatio mortis causa*. Although it is often not an easy matter to distinguish between donations *mortis causa* and *inter vivos*, taking the very clear and precise evidence of the defendant herself, and having regard to all the circumstances to which she deposes surrounding the completion and delivery of this document to her, there is not the least doubt in my mind as to what the intention of the parties, *i.e.*, the husband and wife, was when the document D1 was made and handed to the defendant. The husband in August was seriously ill with malaria and heart trouble and it was clear to him that it was advisable for him to make a will. He knew his case was serious, for he told his wife so. He actually sent for a notary, whose presence was necessary, but one could not be obtained at the time. In this difficulty he, on August 28, signed the document D1 and gave it to his wife. He clearly thought that in the event of his death it would do all that a will could do for his wife. She says " he told me that he was writing D1 to provide for me. He executed this document so that I may get this money after his death. If not for this document I would not have got anything from the estate, because his property was inherited property and property acquired before his marriage. He sent for a notary at Rangalla, but he could not get one, and he made a note to provide for me after his death."

She also adds that from September 1 to the date of his death he was daily getting worse, and that he did not think of writing a will then as he was very ill.

1927.

DALTON J.

Parampalam v. Arunachalam

It is clear that the desire of the deceased, in view of his serious illness, was to make a will and provide for his wife in the event of his death. The necessity of the presence of a notary at the time prevented that being done, so he gave her this note. Although there is no direct evidence on the point, from the writing there is good reason to think that he even wrote it out himself. It might be argued that from these circumstances, the deceased being presumed to know the requirements of the law, that here was proof of an intention to make an immediate gift, a *donatio inter vivos*. From all the attendant circumstances, however, I am quite satisfied that there was no such intention. I do not think there is anything in the words " on demand " used in the document under the circumstances here which in any way is contrary to that conclusion.

With regard to the law on the subject, it has been suggested that, inasmuch as here there is only a promissory note, a promise to give on demand, there is no donation, but a donation is not only the free and lawful giving of a thing, but also the promising of a thing,

> " Just as we donate by giving or delivering, so also we donate by promising, and therefore both the giving *causa donationis* and the promising *causa donationis* are equally donations." (*Voet XXXIX. 5, 2.*)

Any difficulty also that may have arisen from the provisions of the Common law prohibiting gifts between husband and wife is now done away with by the provision of section 13 of the Matrimonial Rights and Inheritance Ordinance, 1876. It would therefore seem that in Ceylon there is no difficulty to-day in applying the law governing donations, whether *inter vivos* or *mortis causa*, to donations between spouses (see *Voet XXIX, 6, 5*). No case arises here of a gift, ineffectual *ab initio*, being confirmed by or taking effect upon the death of the donor without taking any steps to revoke the donation (see *Voet XXIX, 5, 6*). The parties here happened to be governed by the Thesawalamai, which also permits of donations between husband and wife, but no suggestion has been put forward that if such donations are made they are not governed by the ordinary law of the land in respect of donations.

A *donatio mortis causa* is stated to be—

> " That which is made in contemplation of death without any legal compulsion, the intention of the donor being to prefer himself to the donee, and the donee to his own heir, and it is requisite that in making the donation some mention should be made of death and of restoration." (*Voet XXXIX. 6, 1.*)

He goes on to point out that the mere existence of imminent danger of death does not of itself make the donation one *mortis causa*, but contemplation of death must be expressed in words and not merely entertained in the mind.

The question of revocability or restoration is often a difficult one to decide, and again it seems to me regard must be had to all the surrounding circumstances. A donation may be made with definite mention of death and, as Voet says, *mortis causa*, but with a provision that it shall not be revocable. Such must then be taken to be a *donatio inter vivos*. The case of *D. C. Matara, No. 26,320*,[1] is one in which all the requisites of a gift *mortis causa* would appear to be present, except this one, the language of the deed being inconsistent with any intention that the gift should be revocable or should not operate in the event of the donor's recovery.

The requisites have also been concisely set out in the case of *Oliphant v. Grootboom* [2] cited in the course of the argument. They are revocability, the death of the donor as a condition of the donation, mention of the death of the donor in the donation, and possession to be given to the donee. It is equally clear, however, from the authorities, that in applying these requisites to the facts of each case, when it has to be decided whether, for instance, there is any donation at all, or whether it is a case of *donatio mortis causa* or *inter vivos*, the question of intention is the governing factor. To ascertain the intention of the parties however, as pointed out by De Villiers C.J. in *Van Wyk v. Van Wyk's Executors*,[3] the terms of every gift must be looked at. It has been urged here for the defendant that inasmuch as here the note purports to be payable on demand, there is not only no element of revocability about the gift, but that it shows the intention was that the gift was to take effect immediately. Do the circumstances, attendant upon the donation support this argument? The evidence of the defendant to my mind puts it beyond doubt that the deceased sought to do what he thought a will would do and no more, and that the note was intended to provide for her after his death in the event of his death from the illness from which he was then suffering. It was to all intents and purposes a testamentary disposition of part of his property (as also was the note D3 handed to his brother), and I have come to the conclusion that it was given for that purpose alone and for no other purpose. It was conditional on the death of the donor and it was revocable, inasmuch as it was intended to take effect only in the event of his death. Having regard to her evidence, it seems to me that it was not intended to take effect in the event of his recovery, in other words, that, if he recovered, it was fully open to him to recall it. Had deceased recovered from his illness I do not see how under the circumstances here (even if section 2 of Ordinance No. 5 of 1852 was not on the statute book) it could seriously be argued that the defendant could seek to put the note in suit to recover the Rs. 10,000 in a Court of law.

[1] *(1873) Grenier's Reports 143.*

[2] *3 E. D. C. 11.*

[3] *5 S. C. (Juta) 1.*

1927.

DALTON J.

Parampalam v. Arunachalam

It was further urged, however, that in the document D1 there is no mention of the death of the donor, neither is there any explicit reference to his death. That, however, the donor contemplated death is clear from the facts deposed to by the defendant, and it was this which moved him in the words of his wife, in this way to enable her to " get the money after his death," in order " to provide for me after his death." Having regard to her evidence, can it be doubted that he definitely expressed his contemplation of death ? There is, it is true, no mention of illness or death in the document, but having regard to all the circumstances attendant upon its execution and delivery to her, it is impossible in my opinion to come to any other conclusion that he definitely gave expression to what he contemplated might come to pass as a result of his illness. All the other elements being present, it seems to me that this evidence supplies all that is requisite on this question to bring the donation within the class of gifts contended for by the appellant. I am unable to bring it within the category of gifts *inter vivos*, made on the point of death. It is undoubtedly a very hard case, but I am unable, for the reasons set out above, to say that this is not a *donatio mortis causa*. There is no doubt in my mind upon the point. Under those circumstances such donations in the words of Voet (*XXXIX. 6, 4*) require the presence of at least five witnesses or the formality of a notary and two witnesses. In other words they require to be executed as a testamentary disposition. These are also the requirements to-day in Ceylon under section 3 of Ordinance No. 7 of 1840 in the case of wills. It is true that there is no mention in that Ordinance of donations *mortis causa*, but I am not able to gather from that absence any intention of the Legislature to abrogate the requirements of the Common law in respect of donations to which I have referred. Solomon J.A. in *Meyer et al. v. Rudolph's Executors* [1] deals with a somewhat similar point, arising from legislation in Cape Colony and Natal.

For these reasons, with respect to issues (4) and (5), I come to the conclusion that the Rs. 10,000 was a *donatio mortis causa*, and in the absence of any legal proof of such donation, the defendant is not entitled to the sum. This is conclusive of the matter in dispute, and it is not necessary, therefore, to consider the further questions raised upon the appeal or the other issues with which the trial Judge has dealt.

The appeal must be allowed with costs, the order of the trial Judge being set aside, and the plaintiff being declared entitled to the declaration he seeks with costs of suit, the item of Rs. 10,000 being expunged from the inventory. Having regard to the fact that the plaintiff made a serious charge of forgery against the

[1] *(1918) A. D. 70, at p. 85.*

defendant, which he had to withdraw when the case came on for trial, having regard also to the fact that the litigation arises out of the act of the deceased, and having regard also to all the other circumstances, I think the costs of the trial and of this appeal should come out of the estate. I would so order.

Appeal allowed.